Matter of Glick v Harvey
2014 NY Slip Op 30008(U)
January 7, 2014
Supreme Court, New York County
Docket Number: 103844/12
Judge: Donna M. Mills

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS PART 58
Justice

In the Matter of the Application of
DEBORAH GLICK, et al.,

Index No. 103844/12

Petitioner,

MOTION DATE

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

MOTION SEQ. NO.

ROSE HARVEY, et al.,

Respondents.

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-14 Vol. 1-21
Answering Affidavits– Exhibits	15-19
Replying Affidavits	

CROSS-MOTION: ✓ YES _____ NO

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ATTACHED DECISION AND ORDER.

Dated: 1/7/14

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

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In the Matter of the Application of

DEBORAH GLICK, individually and in her representative capacity as Assemblymember for the 66th Assembly District, BARBARA WEINSTEIN, JUDITH CHAZEN WALSH, SUSAN TAYLORSON, MARK CRISPIN MILLER, ALAN HERMAN, ANNE HEARN, JEFF GOODWIN, JODY BERENBLATT, NYU FACULTY AGAINST THE SEXTON PLAN, GREENWICH VILLAGE SOCIETY FOR HISTORIC PRESERVATION, HISTORIC DISTRICTS COUNCIL, WASHINGTON SQUARE VILLAGE TENANTS' ASSOCIATION, EAST VILLAGE COMMUNITY COALITION, FRIENDS OF PETROSINO SQUARE, by and in the name of its President, GEORGETTE FLEISCHER, LAGUARDIA CORNER GARDENS, INC., LOWER MANHATTAN NEIGHBORS' ORGANIZATION, SOHO ALLIANCE, BOWERY ALLIANCE OF NEIGHBORS, by and in the name of its Treasurer, JEAN STANDISH, NOHO NEIGHBORHOOD ASSOCIATION, by and in the name of its Co-Chair, JEANNE WILCKE, and WASHINGTON PLACE BLOCK ASSOCIATION, by and in the name of its president, HOWARD NEGRIN,

Petitioners,

Index No. 103844/12

For a Judgment Pursuant to CPLR Article 78

-against-

ROSE HARVEY, as Acting Commission of the New York State Office of Parks, Recreation and Historic Preservation, THE NEW YORK STATE OFFICE OF PARKS, RECREATION, AND HISTORIC PRESERVATION, PAUL T. WILLIAMS, JR., as the President and the Chief Executive Officer of Dormitory Authority of the State of New York, DORMITORY AUTHORITY OF THE STATE OF NEW YORK, VERONICA M. WHITE, as Commissioner of the New York City Department of Parks and Recreation, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, JANETTE SADIK-KHAN, as Commissioner of the New York City

Department of Transportation, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, MATHEW M. WAMBUA, as Commissioner of the New York City Department of Housing Preservation and Development, and THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, AMANDA BURDEN, as Director of the New York City Department of City Planning and Chair of the New York City Planning Commission, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, CHRISTINE QUINN, as Speaker of the New York City Council, THE NEW YORK CITY COUNCIL, THE CITY OF NEW YORK,

Respondents,

and

NEW YORK UNIVERSITY,

As a Necessary Third-Party.

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DONNA M. MILLS, J.:

This is an Article 78 proceeding challenging the approvals by the New York City Council, on July 25, 2012, of a major construction project to be carried out by New York University (NYU) (the NYU Project[1]) in two "super blocks" (Superblocks) located in Greenwich Village, in an area bounded by West 3rd Street on the north, Houston Street on the south, Mercer Street on the east and LaGuardia Place on the west.

Petitioners filed their amended verified petition on or about November 9, 2012, adding Deborah Glick, as name petitioner,

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[1] The project is variously termed "the Core Project" by NYU and "the Sexton Plan" by the petitioners. In this decision, the project will be described as the NYU Project, or the Project.

and Washington Place Block Association as an additional petitioner and amplifying certain of their allegations. The petitioners also include more than 20 other individuals and organizations who reside or are located in the vicinity of the Project.[2]

Respondents include Rose Harvey, as Acting Commissioner of the New York State Office of Parks, Recreation and Historic Preservation as name petitioner, as well as New York City, several New York City agencies and officials, the New York City Council, and New York State (State) agencies and authorities and their respective commissioners or officials.[3]

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[2] The additional petitioners include Barbara Weinstein, Mark Crispin Miller, and Jeff Goodwin, all of whom are members of the NYU faculty and members of the NYU Faculty Against the Sexton Plan (NYU Faculty); Judith Chazen Walsh, a member of the Washington Square Village Tenants' Association; Susan Taylorson, a member of LaGuardia Corner Gardens, Inc.; Alan Herman, a member of Lower Manhattan Neighbors' Organization (LMNO); Anne Hearn, president of the Washington Square Village Tenants' Association; Jody Berenblatt, a member of LMNO; NYU Faculty, a not-for-profit organization; Greenwich Village Society for Historic Preservation, a not-for-profit organization; Historic Districts Council, a not-for-profit organization; East Village Community Coalition; Friends of Petrosino Square, an unincorporated association; Georgette Fleischer, as president of Friends of Petrosino Square; LaGuardia Corner Gardens, Inc.; LMNO, a not-for-profit organization; SoHo Alliance, a not-for-profit organization; Bowery Alliance of Neighbors, an unincorporated association; NoHo Neighborhood Association, a not for profit unincorporated association; Jean Standish, as Co-Chair of NoHo Neighborhood Association; Washington Place Block Association, a not-for-profit unincorporated association; and Howard Negrin, as president of Washington Place Block Association.

[3] The additional respondents include the New York State Office of Parks, Recreation and Historic Preservation (OPRHP);

The various New York City respondents filed their answer on or about January 11, 2013. NYU filed its answer on January 11, 2013, and the Dormitory Authority of the State of New York and the New York State Office of Parks Recreation and Historic Preservation filed their cross motions to dismiss on January 11, 2013. Petitioners' pleadings were therefore amended as of right. CPLR 3025; *see also* CPLR 203 (f) and 7802 (d), and the caption in the case should be amended appropriately.

THE NYU PROJECT

According to NYU, the Project, which was planned to add academic buildings, as well as faculty and student housing to its Washington Square campus, is necessitated by the continuing expansion of its student body. NYU estimates that, from 1990 to 2005, its student body increased by 24.5%. NYU contends that its physical plant did not increase comparably over that period. Although NYU states that it plans to decrease the growth rate, it

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the Dormitory Authority of the State of New York (DASNY) and Paul T. Williams, Jr. (Williams) as the president and chief executive officer; the New York City Department of Parks and Recreation (DPR) and Veronica M. White as commissioner; the New York City Department of Transportation (DOT) and Janette Sadik-Khan (Sadik-Khan) as commissioner; the New York City Department of Housing Preservation and Development (DHPD) and Mathew M. Wambua (Wambua) as commissioner; the New York City Planning Commission; the New York City Department of City Planning and Amanda Burden as director of the Department and chair of the Commission; the New York City Council and Christine Quinn (Quinn) as Speaker; and New York University as necessary third-party. New York City, its agencies and officials, and the City Council will collectively be referred to as the City, or the City Respondents.

[* 6]

projects that its future growth will be a 0.5% annual growth rate over the next 25-year period, though there may be a fluctuation in admission rates from year to year. NYU CORE Final Environmental Impact Statement (FEIS), Amended Petition, Exhibit 14, at 1-22.[4]

The two Superblocks, on which the NYU Project is located (along with a third Superblock between West 4th and West 3rd Streets - the "Education Block"), were created as a result of an urban renewal project undertaken by the City of New York in 1955, with money obtained from the federal government under Title I of the Housing Act of 1949. The two Superblocks were initially sold to a private developer who built the two 17-story Washington Square Village buildings and the retail building on the North Superblock, and the supermarket on the South Superblock. In the early 1960's, NYU acquired title to 14 acres on the two Superblocks, for the primary purpose of faculty and student housing. NYU later decided to add the Coles Sports and Recreation Facility (Coles Gymnasium) to the South Superblock. The deed for the land purchased by NYU was subject to the following restrictions:

> "1) Only educational uses are permitted on the Education Block and on the Coles Gymnasium site;
> 2) No educational uses are permitted in other

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[4] The FEIS is also found as an exhibit to the City's Cross Motion to Dismiss as exhibit A. The FEIS will hereinafter be cited merely as FEIS, without an exhibit identifier.

areas;

3) Two areas on LaGuardia Place are to be used for retail purposes;

4) No retail uses are permitted in other areas; and

5) The remainder of the land is designated for residential uses."

FEIS, at 2-16. The deed restrictions also include specific density, coverage, height, setbacks and parking restrictions, and off-street loading requirements. FEIS, at 2-16 & 17. The deed restrictions, which run with the land, were to be in effect for 40 years following completion of the "housing project."[5] Because the Coles Gymnasium was not completed until 1981, the deed restrictions are in effect until 2021, unless that date is changed with the approval of the City Council (previously the Board of Estimate).

The North Superblock contains two 17-story residential buildings (Washington Square Village, building 1 & 2 and building 3 & 4), a 1-story retail building, a children's playground in the interior of the block, and City-owned open space which includes the Mercer Playground, on the Mercer Street side of the North Superblock, and LaGuardia Park, on the LaGuardia Street side of

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[5] Completion of the "housing project" is defined as the date on which the Department of Housing and Buildings of the City of New York issues certificates of occupancy for all of the buildings provided in the plans of the project. *See* Agreement between the City of New York and Washington Square Village Corporation, exhibits to Cross Motion to Dismiss Amended Petition of Respondent City, RRRR, ¶ 304. Exhibits to the City's Cross Motion to Dismiss which are identified by letters will hereinafter be referred to as City Exh. ____.

the Superblock. LaGuardia Park contains a statue of Mayor Fiorello LaGuardia, a new toddlers' park (Adrienne's Garden), and trees and green walkways used by the public. In addition, a raised garden (Sasaki Garden) is located between the two buildings comprising Washington Square Village, on top of an underground garage.

Two new academic buildings, the LaGuardia Building and the Mercer Building, will be constructed in the North Superblock, between the two Washington Square Village buildings as part of the NYU Project. The LaGuardia Building is to be located on the western side of the Superblock, the Mercer Building on the eastern side. Both buildings are to contain classrooms and faculty offices above ground, and academic space including auditoriums, classrooms and rehearsal spaces, a study annex, and mechanical space below ground. The plans for the North Superblock also include open space, including NYU-owned, publicly accessible open space in the interior of the block (including two new public lawns and the Philosophy Garden), and some additional City-owned parkland on the Mercer and LaGuardia sides of the block, including a Tricycle Garden and Mercer Street Entry Plaza, on the Mercer Street side, and the LaGuardia Play Garden and the LaGuardia Entry Plaza, along LaGuardia Place. The Sasaki Garden and an existing commercial building on LaGuardia Place would be eliminated. Certain presently existing public space, such as

Adrienne's Garden, would be moved. The Project, as originally planned, included a temporary gymnasium on the North Superblock, to replace the Coles Gymnasium during the construction on the South Superblock.

The South Superblock presently contains three 30-story residential towers, Silver Towers 1 and 2, which are occupied by NYU faculty, and a third tower, 505 LaGuardia Place, which was established under the Mitchell Lama program for middle income residents, which includes non-NYU residents. The South Superblock also contains the Coles Gymnasium, the Morton Williams Supermarket, city-owned public space, including the Mercer-Houston Dog Run, LaGuardia Corner Gardens, and Time-Landscape, as well as NYU-owned open space.

Under the Project, two new buildings would be built in the South Superblock, the Bleeker Building, on the northwest corner of the Superblock, where the Morton Williams Supermarket is now located, and the Zipper Building, on the Mercer Street side of the Superblock, where the Coles Gymnasium and the dog run are now located. As originally proposed, the Bleeker Building was to contain academic space, dormitories, and a potential public school, if the School Construction Authority (SCA) elects to construct one. The originally proposed Zipper Building was to contain academic uses, dormitory uses, faculty housing, a new gymnasium, a hotel and convention center, and a grocery store to

replace the Morton Williams grocery, which would be eliminated by the Bleeker building. Open space planned for the South Superblock includes the Greene Street Walk, a new toddler playground, new seating and landscaping along Bleeker Street, and a new dog run to replace the dog run that would be displaced by the Zipper Building.

The Project also involves changes in zoning requirements regarding height, bulk and setbacks on the two Superblocks, as well as remapping three of the four parcels of open space which are currently mapped as streets. In the North Superblock, the property on the Mercer Street side (Mercer Playground) and the property on the LaGuardia Street side (LaGuardia Park) would be remapped as parkland. In the South Superblock, property on the Mercer Street side between Bleeker and Houston Streets (including the Mercer-Houston Dog Run) would be demapped as a street and become the property of NYU. Property on the LaGuardia Street side of that Superblock (including LaGuardia Corner Gardens) would remain mapped as a street. *See* affirmation of Allesandro G. Olivieri, ¶¶ 34, 36 & 37; CPC Report, C120077MMM, City Exh. BBB.

Finally, the Project, as originally proposed, also included a Commercial Overlay to permit street level commercial development on the ground floor level of six NYU buildings in a six-block area, east of Washington Square Park, and the demapping

and transfer of title to NYU of a strip of land on the Mercer Street side of the Education Block between West 3rd and West 4th Streets above NYU's co-generation plant.

During the approval process, pursuant to the Uniform Land Use Review Procedure (ULURP), the NYU Project underwent two significant modifications; the first, as approved by the New York City Planning Commission (CPC), on June 6, 2002, and the second, as approved by the City Council, on July 25, 2012. The Project as originally proposed contained approximately 2.4 million gross square feet (gsf) of above and below-ground development.[6] *See* CPC Report, June 6, 2012, City Exh. CCC at 1. The modified Project, as approved by the City Council, has a total of 1.9 million gsf of above and below-ground development. *See* aff. of Edith Hsu-Chen, ¶ 17.

As a result of the two sets of modifications, the hotel portion of the Zipper building, the temporary gymnasium in the North Superblock, the commercial overlay in the area east of Washington Square Park, and the tower portion of the Bleeker building were eliminated. The remaining modifications primarily involved the decrease in height and footprint of various buildings, as well as the decrease in some below-ground development.

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[6] According to the FEIS, the Project as originally proposed contained 2.5 million gsf of development. FEIS, S-1.

In the North Superblock, by reducing the building footprint, the LaGuardia Building was reduced from 135,000 gsf, as originally proposed, to 114,000 gsf in the City Council modifications. *See* Hsu-Chen aff. ¶ 21; Technical Memorandum, July 20, 2012, at 3, City Exh. UUU.

The Mercer Building which was 250,000 gsf in the original proposal, was reduced to 190,000 gsf in the CPC, and further reduced to 69,000 gsf in the City Council modifications. The original height of 218 feet (ft.), was reduced to 162 ft. (192 ft. including the rooftop mechanical bulkhead) in the CPC modifications, and ultimately to 68 ft. (or 98 ft. including the rooftop bulkhead) in the City Council modifications. Hsu-Chen aff. ¶¶ 22 & 23; Technical Memorandum, *supra* at 4.

Plans for the South Superblock were also modified during the ULURP procedings. In the original application, the Bleeker building was to have a base and a tower with a total of 225,000 gsf (a base of 154,000 gsf and a tower of 71,000 gsf) with the tower rising to 178 ft. (or 208 ft. at the top of the mechanical bulkhead) with an additional 64,000 gsf of below-grade classroom space (*see* Hsu-Chen aff. ¶ 34). In the CPC modifications, the tower was eliminated, resulting in a reduction in height from 178 ft. to 108 ft. (exclusive of the bulkhead) and a reduction of the density from 225,000 gsf to 154,000 gsf. In the City Council, the plans for the Bleeker building were further modified with

respect to the use of the 100,000 gsf dedicated for use as a public school. In the original plan, the SCA was given until 2025 to exercise its option to build a public school. Ultimately, that time frame was shortened and the SCA is required to exercise its option to build by 2014. Furthermore, if the SCA opts not to build a school, NYU must use its best efforts to find a community group to lease 25,000 gsf, and NYU will be permitted use the remaining 75,000 gsf for academic purposes. *See* CPC Report, Cross Motion to Dismiss of the City, Exh. CCC, at 46; Hsu-Chen aff. § 35 and City Exh. UUU at 3.

The Zipper Building is composed of a base and towers. The base will contain a supermarket to replace the Morton Williams supermarket, academic uses, and a below-ground gym, replacing the Coles Gymnasium. Six towers of varying heights will contain faculty and student housing. In the original application, the Zipper building was to be 1,050,000 gsf. With the omission of the hotel, the Zipper building was reduced to 980,000 gsf. In the City Council modifications, the height of three of the northernmost towers facing Bleeker Street were reduced from 168 ft. to 85 ft. The height of two of the towers closer to West Houston Street were increased in the City Council modifications, but those increases are all within zoning maximum limits (the towers from south to north would be changed from 275, 128, 188, 208, 228, and 168 ft. in the original proposal to 257, 158, 198,

168, 198 and 85 ft. [exclusive of bulkheads]) in the City Council proposal, and a publicly accessible atrium was added on the ground floor. Hsu-Chen aff., ¶¶ 36-37; *see also* City Exh. UUU at 2-3.

According to NYU, the Project will result in the creation of approximately 4 acres of public open spaces and amenities and parkland. Petitioners contend that NYU is overstating the amount of open space that will be added.

Petitioners assert six causes of action in their amended verified petition:

1) violation of the common-law public trust doctrine, against DOT, Sadik-Khan, DPR, White and the City;

2) failure to explore all feasible and prudent alternatives and give consideration to feasible and prudent mitigation plans in violation of section 14.09 of the Parks Recreation and Historic Preservation Law, against DASNY, Williams, OPRHP, Harvey, the City Council, Quinn, DCP, CPC and Burden;

3) unlawful lifting of deed restrictions in violation of the common law, against the City Council, DHPD, Wambua and the City;

4) violation of State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Act (CEQR), against Burden, DCP, CPC, the City Council, Quinn and the City;

5) failure to adhere to ULURP in violation of section 197-c of the City Charter and title 62, chapter 2 of the Rules of the

City of New York (RCNY), against Burden, DCP, CPC, the City Council, Quinn and the City; and

6) failure to conduct business in a public meeting in violation of article 7 of the Public Officers' Law, against the City Council, Quinn and the City.

NYU opposes and seeks dismissal of the amended petition. The City and its agencies and their respective officials cross-move to dismiss the amended petition. In separate cross motions, OPRHP and DASNY and their respective officials each cross-move to dismiss the amended petition.

THE PUBLIC TRUST DOCTRINE

In their first cause of action, petitioners contend that four parcels of land,[7] which will be adversely impacted by the NYU Project, are dedicated parkland that have been made available for recreational use and enjoyment by the public for decades, and, therefore, are subject to the common-law public trust doctrine and may not be alienated without the authorization of the New York State Legislature.[8]

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[7] Throughout their papers, the parties use different words to refer to these parcels. Petitioners refer to them as parkland, or use the names of the different parcels, that appear on signs at the parcels or on the DPR website or materials, LaGuardia Park, Mercer Park, and LaGuardia Corner Gardens. Respondents refer to the parcels as "street strips" or the Mercer Street Strip and the LaGuardia Street Strip.

[8] In the amended verified petition, petitioners also include a fifth parcel of land located in the Education Block, on the west side of Mercer Street, in the block between West 3rd and 4th

As a result of the Project, as approved by the City Council, although two of the parcels in the North Superblock, the Mercer Playground and the LaGuardia Park will be remapped as parkland under the jurisdiction of DPR, during the period of construction, both parcels will be subject to an easement to NYU for use as construction staging grounds. They will, therefore, be inaccessible as parks for some or all of the approximately 20 years of the Project. Ultimately Adrienne's Garden, now within LaGuardia Park, would be placed elsewhere in the general LaGuardia side of the Superblock, and the Mercer Playground would be replaced with a Tricycle Garden and adjacent passive areas. *See* FEIS at S-12 & S-39. Under the original proposal, the below-ground property was to be owned by NYU and would contain below-ground portions of the proposed LaGuardia and Mercer Buildings. *See* FEIS at S-13.

In the South Superblock, under one of the construction staging options, the LaGuardia Corner Gardens would be inaccessible for approximately 39 months. Under another staging option, for approximately 27 months the garden would be covered by a construction shed. FEIS, S-79. Even after the completion

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Streets, described in the FEIS as the Mercer Plaza. NYU's cogeneration plant is located below-ground at that location. Under the proposal there would be no development on that parcel, but title would be transferred from the City to NYU. Petitioners' memorandum of law does not, however, discuss that parcel.

of the construction, the LaGuardia Corner Gardens would be subject to substantial shadows, making it impossible to grow some of the plants presently grown in the garden, and according to the FEIS, the overall quality of the resource would be reduced. FEIS at 5-40.

The Mercer-Houston Dog Run would be completely eliminated; however, as part of the Project, NYU would construct a new dog run, of approximately the same size, to the west of the Zipper Building along Houston Street. FEIS at 5-40.

It is uncontested by petitioners that the four parcels in question have been mapped as city streets since 1954 when the City considered developing an expressway in lower Manhattan. That plan was, however, later abandoned, due to community opposition. At various times since 1954, unsuccessful efforts were made by members of the community and by DPR officials to have the parcels remapped as parks and placed under the complete jurisdiction of DPR. It is also uncontested that land may be dedicated as parkland either expressly or by implication. What is necessary to show that land has been dedicated as parkland by implication is, however, disputed by the parties.

Petitioners submit the affidavit of Henry J. Stern, who served as Commissioner of DPR from April 1983 to February 1990 and again from February 1994 to February 2002. Stern contends that the City's intent to dedicate land as parkland can be

demonstrated by the following factors, regardless of whether the land is mapped as such:

> "•Long-time, continuous use of the land for park purposes
> •Signage at the site identifying it as parkland under the jurisdiction of the Parks Department
> •Other indicia at the site of Parks Department oversight, such as the Parks flag or Parks insignias displayed on the property
> •Public access permitted to the site at times posted by the Parks Department or under its auspices
> •Maintenance and repairs of the property by the Parks Department
> •References on the Parks Department website to the property as parkland
> •Public statements by City officials identifying the property as parkland, and
> •Capital expenditures by the City to use or improve the land for park use."

Aff of Henry J. Stern, ¶ 17.

Petitioners contend that all four parcels exhibit many of the factors listed by former Commissioner Stern.

1. Mercer Playground

According to petitioners, the Mercer Playground, located on the Mercer Street side of the North Superblock, was opened by the City in 1999, and has been used by neighborhood children as a playground since that time. Petitioners submit copies of photos of the DPR signage at the Mercer Playground including: a sign containing the name, Mercer Playground, and including the department's maple leaf symbol; the maple leaf symbol imprinted on the grounds of the park; the water drain containing the maple leaf symbol and the identification, "City of New York Parks and Recreation;" the multilingual "no smoking" sign that includes the

maple leaf symbol and identifies the DPR website, www.nyc.gov/parks; the DPR sign listing department rules for the playground, and containing the DPR name, the maple leaf symbol, the department website address, and identifying both the mayor and the commissioner of DPR by name; and the DPR flag flying over the park. Affirmation of Randy M. Mastro, dated April 2, 2013, Exhs. 7-11 & 13.[9] Petitioners also submit copies of two different programs for the "Opening Day" ceremonies on May 15, 1999, identifying DPR, Mayor Giuliani and Commissioner Stern. Mastro, Exhs. 16 & 17. The DPR program, which describes the history of the parcel of land as formerly occupied by mixed-use buildings, states:

> "In 1995 the Department of Transportation gave Parks a permit to use the site. Two years later the site was formally transferred to Parks, and plans were made for capital improvements. The playground construction was funded jointly by Council Member Kathryn Freed and LMNO(P) at a cost of $340,000. LMNO(P) raised an additional $100,000 for the construction of the fence. Supporters included New York University, the Robinson & Benham Charitable Trust, and the Archives Fund."

Id., Exh. 17. Petitioners also submit a screenshot of the DPR webpage for Mercer Playground which contained the same information until March 8, 2013, but was allegedly taken down at some time after that date and before petitioners' omnibus reply

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[9] Numbered exhibits which are annexed to the April 2, 2013, Mastro Affirmation will be referred to as Mastro Exh. ____.

memorandum was submitted to the court in April 2013.[10] Finally, petitioners submit a copy of a photograph of a truck with the DPR maple leaf symbol which appears to be at the Mercer Playground in connection with maintenance and repairs being done at the playground. *Id.*, Exh. 12.

Petitioners also submit the affidavit of Kathryn E. Freed (Freed), who was previously the New York City Council member for the 1st District, representing lower Manhattan, and is currently an elected New York City Civil Court Judge, sitting as an Acting Supreme Court Justice of the State of New York. Freed states that during her tenure as Councilmember for District 1, she allocated $250,000 in discretionary capital funds, which are available for publicly owned projects that have a public purpose, to the construction of the Mercer Playground. She states that she chose to allocate the funds to Playground

> "because I understood that it would remain a dedicated park. I would not have allocated $250,000 in capital funds if I anticipated that soon thereafter, this parkland would be taken away from the public and handed over for NYU to use for decades as staging for construction."

Aff of Kathryn E. Freed, ¶ 11.

Petitioners submit the affidavit of Vicki Papadeas, who has lived and worked in the community since 1988 and was involved in

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[10] The court notes that the DPR webpage currently contains the description of the playground's history without the sentence indicating the formal transfer of the property from the Department of Transportation to DPR.

the efforts of the LMNO to turn the stip of land which is now Mercer Playground, into a park. According to Papadeas, since the playground was dedicated it has been used by neighborhood children to ride bicycles or scooters, draw with chalk or play tic-tac-toe. Aff of Vicki Papadeas, ¶ 6. Papadeas states that as a result of the involvement, signs, and statements of the DPR and the formal dedication of the park, she and other members of the community understood the playground to be a park. *See also* aff of Hubert J. Steed, resident of Washington Square Village.

Petitioners contend that despite the fact that the Mercer Playground is still formally mapped as a street, the history of the site, including the formal dedication of the playground by DPR in 1999, indicates that the property is both expressly and impliedly dedicated as parkland.

Both the City and NYU contend that the public trust doctrine does not apply to the Mercer Playground or the other three parcels, because they are all located on property which is mapped as streets, under the jurisdiction of DOT. The City and NYU further argue that for the Mercer Playground property and the other parcels to be considered parkland would require review pursuant to ULURP, and approval by the City Council. NYC Charter, §§ 197-c & 197-d. The City and NYU further argue that there have been multiple efforts by members of the community and others to have the Mercer Playground and the other three parcels

formally transferred to DPR, but that those efforts failed and that only temporary or restricted use by DPR has been permitted. *See* affirmation of Allesandro G. Olivieri, General Counsel of DPR, ¶¶ 22-32 regarding history of rejected attempts to have parcels remapped as parkland; *see also* Letter from Elliot G. Sander (DOT) to Henry J. Stern (DPR), dated April 28, 1995, confirming permit for "temporary use and occupation" of the area which was to become Mercer Playground. City Exh. FFFFF. According to the City, "the clear and consistent intention of the City has been to maintain the property as public streets and to not dedicate them as parkland" (Memorandum of Law in Support of City of New York's Verified Answer to the Petition and Cross Motion at 13-14) and, therefore, the property cannot be considered parkland by implication.

In response to the argument that the City had a clear and consistent intention to not dedicate the respective properties as parkland, petitioners rely on the affidavits of former DPA Commissioner Stern, former City Council Member Freed, and former Commissioner of DOT, Christopher R. Lynn, who state that both DPW and DOT supported formally turning the property over to DPW and that the sole and strident objector was NYU.

According to Stern, as part of DPW's efforts to transfer all of the properties at issue here to DPW, and in an effort to comply with ULURP, DPW sent letters to all of the property owners

or lessees with building frontage on the properties asking for "(1) a written consent and (2) a 'Waiver of Damages' holding the City harmless from any claims of liability resulting from the remapping." Stern aff, ¶ 24. Stern states that NYU, the largest property holder involved, withheld consent and refused to grant the waiver. *Id.*, ¶ 25; *see also* Memorandum to file from Jane Cleaver, DPR, dated August 5, 1995, annexed to Stern aff as Exh. A, regarding the efforts by DPR regarding "demapping the wide pavements that are mapped as streets on the East side of LaGuardia Place and the West side of Mercer" stating "NYU has stated that it is unwilling to agree to or participate in this project." In fact, the City includes among its exhibits, a letter from NYU to the commissioners of DPR and DOT dated March 22, 1996 supporting the grant of a permit from DOT to DPR for the operation of the Mercer Playground but expressly opposing the demapping of the property, stating: "we believe that the creation of a viable facility does not require demapping and that demapping may limit the University's rights." Letter from Robert Goldfeld to Henry J. Stern and Eliot G. Sander, dated March 22, 1996, City Exh. VVVV.

According to former DOT Commissioner Lynn, because of NYU's opposition, he decided that remapping

> "became a fight not worth having for the following reasons: DOT had already moved these sites off its books (either through Greenstreets, permits or otherwise), and the Parks Department had already taken

> dominion over them for use and occupation as parkland. It therefore made no practical difference whether the City Map was formally changed. These sites had already become dedicated parkland."

Aff of Christopher R. Lynn, ¶ 13.

2. LaGuardia Park

LaGuardia Park, located on the LaGuardia Street side of the North Superblock, contains trees, green walkways, the statue of Mayor Fiorello LaGuardia that was dedicated in 1995, and a new toddler's park, Adrienne's Garden, for which ground was broken in September 2010.

Petitioners submit a screenshot of the DPR website regarding the Fiorello LaGuardia statue which states as follows:

> "In the early 1990s, the Friends of La Guardia Place raised funds to renovate the barren public plazas along the east side of the street. The buildings along this stretch had been razed decades earlier to make way for the never built Fifth Avenue South connector to the unrealized Lower Manhattan Expressway. As part of these landscape improvements, the Friends commissioned this sculpture of La Guardia for the neighborhood in which he was raised.
>
> ***
>
> On October 19, 1994 the LaGuardia sculpture was formally dedicated in a ceremony presided over by Al McGrath, the late president of the Friends of La Guardia Place. Participants included included L. Jay Oliva, president of New York University, and four mayors, Abraham D. Beame (served 1974-1977), Edward I. Koch (served 1978-1989), David N. Dinkins (served 1990-1993), and Mayor Giuliani (served 1994-2001)."

Mastro Exh. 23; *see also* article noting the presence of "local community members, elected officials, the city Transportation and Parks departments, business owners and New York University

representatives" gathering to celebrate the September 15, 2010 groundbreaking for Adrienne's Garden within the LaGuardia Park. "Enter the dragon: Ground is broken for a new playground," The Villager, Vol. 80, No. 7, Sept. 23-29, 2010. Mastro Exh. 19.

Petitioners submit the affidavit of Hubert J. Steed, who states that over 25 years, LaGuardia Park has been used by the community in a variety of ways, including gathering there for outdoor meetings and community events. Steed aff, ¶ 4 (a).

The City contends that even if LaGuardia Park is referred to as a park on the DPR website, in fact the statue of LaGuardia and the maintenance of the area are funded by private donations, and the improvements are coordinated jointly by DPR and DOT under the Greenstreets program, a program which began in the mid-1990's as a partnership between DPR and DOT to "change currently unused streets into green spaces to beautify neighborhoods, improve air quality, and calm traffic." Olivieri affirmation, ¶ 12; *see also* Master Greenstreet Agreement, dated January 30, 2007, which states "DPR and DOT ackowledge that the Sites are temporary and will always remain as DOT jurisdictional properties, available for DOT purposes and uses as needed. DPR and DOT further acknowledge that the Sites are not intended to be formal or implied dedicated parklands." City Exh. YYYY, Agreement at 1. The court notes, however, that assuming LaGuardia Park is part of the Greenstreet program, this Master Agreement was signed

approximately 13 years after the sculpture of LaGuardia was dedicated with the then current and former mayors in attendance.

Petitioners contend that the August 26, 2009 amendment to the Greenstreets Agreement, which adds the "East side of LaGuardia Place between Bleeker St. and West 3rd Street, Manhattan" (City Exh. CCCCC), purports to identify the whole block as part of the Greenstreets program, or at the very least, the commercial strip which is adjacent to the statue of Mayor LaGuardia, and, therefore, should be disregarded.

Petitioners also submit the affidavit of petitioner Anne Hearn, a resident of Washington Square Village since 1967, and a founding member and vice president of Friends of LaGuardia Place, the community organization involved in the creation of LaGuardia Park in 1986. According to Hearn, she was never aware that LaGuardia Park was part of Greenstreets, that it is her understanding that parcels which are part of Greenstreets have signage indicating that fact, that LaGuardia Park has never had a Greenstreets sign, and that the City has never publicly identified LaGuardia Park as being part of the Greenstreets program. Aff of Anne Hearn, dated April 1, 2013.

3. LaGuardia Corner Gardens

The LaGuardia Corner Gardens, located on the LaGuardia Street side of the South Superblock, has been managed and administered under DPR's GreenThumb Community Garden program

since the early 1980's. Petitioners submit photographs of signs identifying the garden as a GreenThumb project and indicating the hours that the garden is open to the public, both of which identify the garden as a DPR project and contain DPR symbols. Mastro Exhs. 24 & 25. The sign identifying the garden as part of the GreenThumb program states:

> "This site is a public garden which is maintained by neighborhood volunteers through GreenThumb. Founded in 1978 GreenThumb helps local residents transform vacant properties into attractive green spaces. If you want to join this garden, call (212) 788-8000."

Mastro Exh. 24.

The GreenThumb website which contains the DPR name and symbol, describes the GreenThumb program as follows:

> "GreenThumb was initiated in response to the city's financial crisis of the 1970s, which resulted in the abandonment of public and private land. The majority of GreenThumb gardens were derelict vacant lots renovated by volunteers.
> These community gardens, now managed by neighborhood residents, provide important green space, thus improving air quality, bio-diversity, and the well-being of residents. But gardens aren't just pretty spaces; they're also important community resources."

www.greenthumbnyc.org/about.html.

The current GreenThumb rules define a GreenThumb garden as: "A community garden that is registered and licensed with GreenThumb and located on a Lot." A Lot is defined as: "A parcel of City-owned land under the jurisdiction of the Department that contains a Garden at any time on or after September 17, 2010."

www.nycgovparks.org/rules/section-6. Petitioners contend that the portion of the rule which appears to limit a GreenThumb garden to parcels that are formally mapped as parkland came into effect long after the LaGuardia Corner Gardens became part of the GreenThumb program and cannot retroactively alter its status as parkland by implication.

Former DPR Commissioner Stern states that he recalls telling the former chairperson of Community Board 2 that DPR "would embrace a formal transfer of LaGuardia Corner Gardens to Parks because we are already treating it as such." Stern aff, ¶ 19 (ii). Stern further states that some DPR employees believed that the garden had been formally transferred because of DPR's long history of working with the community to maintain the garden. *Id.*

The City argues that DOT, not DPR, is the licensor under the Green Thumb program. The license for LaGuardia Corner Garden, dated January 7, 2009, notes that the property is "managed and administered by the GreenThumb Program of the New York City Department of Parks and Recreation ... [is] subject to development by [DOT], but no development is currently planned on said Premises." City Exh. AAAA at 1. The City further argues that the same parcel of land is also part of the City's Greenstreets program, and, therefore, is subject to DOT's jurisdiction and to the Memorandum of Understanding (MOU) between

DPR and DOT, which states that the listed sites are temporary, and will always remain as DOT jurisdictional properties. *See* Master Greenstreet Agreement, dated February 9, 2007, at 1, and City Exh. A, listing LaGuardia Place Bet. West Houston St. and Bleeker St., City Exh. YYYY.

Petitioners submit the affidavit of petitioner Ellen Horan, vice chair and board member of LaGuardia Corner Gardens, who states that, although the 2007 MOU between the DOT and DPR states that the entire LaGuardia Place area between West Houston and Bleeker Streets is within the Greenstreet program, the area encompasses two separate plots of land, LaGuardia Corner Gardens and Time Landscape,[11] and that only the latter is part of the Greenstreet program. She notes that, whereas the DPR website maintains a page describing Time Landscape as part of Greenstreet and there is a Greenstreet sign in Time Landscape, there is neither a reference to LaGuardia Corner Gardens as part of the Greenstreet program in DPR's website, nor a sign identifying the garden as part of Greenstreet. Again, moreover, the agreements containing the restrictive language were signed approximately 20 years after the LaGuardia Corner Gardens was created.

4. Mercer-Houston Dog Run

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[11] Quoting the DPR webpage, Horan describes Time Landscape as "a forested plot that serves as 'a living monument to the forest that once blanketed Manhattan Island.'" Aff of Ellen Horan, dated March 28, 2013, ¶ 8.

According to petitioners, the Mercer-Houston Dog Run (the Dog Run), located on the Mercer Street side of the South Superblock, was built in 1981, and was used recreationally by members of the community as a dog park for years before that. *See* Stern aff, ¶ 19 (iv); aff of Ellen Maddow, ¶¶ 2-3. According to Maddow, who describes herself as a member of the Greenwich Village community and a resident of SOHO since 1973, prior to the construction of the Coles Gymnasium, the Dog Run and the children's playground by NYU, she and other members in the community used the same open lot as an informal dog park for years. Maddow states that she became a member of the Mercer-Houston dog run when it was built in 1981 and remained a member for over 25 years.

According to the website of the Mercer Houston Dog Run Association (MHDRA), in the 1970's when NYU received approval from the City to build the Coles Gymnasium, it agreed to build and maintain the dog run, which was formally opened in 1980. *See* http://mercerhoustondogrun.org/our-history/. The dog run is operated by MHDRA, a volunteer not-for-profit corporation, with membership open to all dog owners, who must pay annual dues of $60 per dog, or $30 per dog for persons over 62.

The City contends that the Dog Run cannot be considered a public park because it is not available to the public at large, but rather, is a private-membership only space available to fee-

paying members. Olivieri affirmation, ¶ 48.

Former Commissioner of DPR Stern states, however, that many

> "public park properties condition public access on fee payments, such as public recreation centers, public golf courses, public stadiums, public athletic fields, public tennis and basketball courts, public beaches, public swimming pools, and public ice skating rinks, (including Wollmans Rink in Central Park and Citi Pond at Bryant Park)."

Stern aff, ¶ 19 (iv).

The court notes that, unlike the other three parcels, no evidence has been submitted by petitioners indicating that there are signs at the dog run identifying it as under the jurisdiction of DPR, references to the dog run on the DPR website, indication that the dog run is maintained by DPR, or any other involvement by DPR. Rather, according to the website maintained by the MHDRA, the dog run was repaired pursuant to a contract with NYU.

Law Governing the Public Trust Doctrine

"[O]ur courts have time and again reaffirmed the principle that 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." *Friends of Van* Cortlandt *Park v City of New York,* 95 NY2d 623, 630 (2001); *see also* Matter of *Angiolillo v Town of Greenburgh,* 290 AD2d 1, 10 (2d Dept 2001) ("It is well settled that parkland is inalienable, held in trust for the public, and may not be sold without the express approval of the State Legislature").

Land can become parkland "either through express provision, such as restrictions in a deed or legislative enactment, or by implied acts, such as a continued use of the parcel as a park" or other acts which suggest implied dedication. *Matter of Lazore v Board of Trustees of Vil. of Massena*, 191 AD2d 764, 765 (3d Dept 1993).

It is undisputed that the four parcels of land are all still mapped as streets. Petitioners do not contest that at least three of the four properties do not constitute express parkland. The question remains, however, whether any or all of the four parcels have been impliedly dedicated as parkland.

Citing *Riverview Partners v City of Peekskill* (273 AD2d 455, 455 [2d Dept 2000]), the City argues that in order to establish parkland by implication, petitioners must show actions by the City that "manifest a present, fixed and unequivocal intent to dedicate" the property as a park. *See also Roosevelt Is. Residents Assn. v Roosevelt Is. Operating Corp.*, 7 Misc 3d 1029(A) *12, 2005 NY Slip Op 50811(U) (Sup Ct, NY County 2005) ("Vague or contradictory evidence of parkland dedication is inadequate, as a matter of law, to establish that a particular site is parkland.") The City also cites *Powell v City of New York* (85 AD3d 429, 431 [1st Dept 2011]) for the proposition that there can be no implied dedication where the owner has expressed contrary intent.

Pointing to the history of failed efforts by the Community Board, local community organizations, and members of the community to have the various parcels remapped as parkland, as well as the reservations in the agreements between DOT and DPR regarding jurisdiction over the parcels, the City contends that petitioners cannot show the unequivocal intention of the City to dedicate the land as parkland which it contends is necessary to declare the parcels parkland by implication.

Although the law governing what is necessary to establish parkland by implication is less than crystal clear, a number of cases suggest that the long continued use of a property as a park can, itself, establish the property as parkland by implication. So, although *Powell*, quoting *Riverview Partners*, does state that implied dedication "may exist" where "'unequivocal intent'" has been demonstrated, *Powell* also states that "[a] parcel of land may constitute a park either expressly, such as by deed or legislative enactment, or by implication, such as by a continuous use of the parcel as a public park (emphasis supplied)." 83 Ad3d at 431. Similarly in *Village of Croton-on-Hudson v County of Westchester* (38 AD2d 979, 980 [2d Dept 1972], *affd* 30 NY2d 959 [1972]) the court concluded that "the long-continued use of the land for park purposes constitutes a dedication and acceptance by implication" despite the fact that the deeds for the property contained no restriction of the land to park use and there was no

such formal dedication of the property. *See also Hotel Empls. & Rest. Empls. Union, Local 100 of New York, NY & Vicinity, AFL-CIO v City of New York Dept. of Parks & Recreation*, 311 F3d 534, 548 (2d Cir 2002), *quoting Angiolillo v Town of Greenburgh*, 290 AD2d 1, *supra* ("'[A] parcel of property may become a park by express provisions in a deed or legislative enactment or by implied acts, such as the continued use of the parcel as a park'"). Although not every use of property as parkland will necessarily be sufficient to establish parkland by implication, here petitioners have shown more than clearing the land and the planting of a few trees and installation of a few benches, which was found insufficient to create a park in *Pearlman v Anderson* (35 AD2d 544 [2d Dept 1970], *aff'g on the opinion at* 62 Misc 2d 24 [Sup Ct, Nassau County 1970]).

Recently in *Matter of Friends of Petrosino Square v Sadik-Khan* (--- NYS2d ----, 2013 WL 5789234 *3, 2013 NY Misc LEXIS 4908, **7-8; 2013 NY Slip Op 23364, ***3 [Sup Ct, NY County, October 23, 2013]), applying the principle of implied dedication, the court concluded that Petrosino Square was impliedly dedicated as parkland, although it included land that had previously been used as a traffic lane in Lafayette Street. The court pointed to, among other things, that the park had been "held out" as a park by DPR and DOT, its continued use as a park to this day, the DPR "signage" and DPR logos at the park, the DPR sponsored

groundbreaking, DPR participation in the dedication ceremony and DPR participation in the dedication of the northern tip of the park as Art Installation Space. *Id.* at *2-3, **7-8, ***3. Nonetheless, the court ultimately concluded that the public share bike station was a proper park purpose; therefore, the public trust doctrine was not violated by use of the park for the bike share program. Though, as the City and NYU argue, the *Petrosino Square* case is not dispositive of the questions before this court, the court there relied on the principle that "'the long-continued use of the land for park purposes constitutes a dedication and acceptance by implication.'" *Id.* at *2, ** 6-7, ***3, quoting *Village of Croton-on-Hudson v County of Westchester,* 38 AD2d at 980.

This court concludes that the City's interpretation of the law governing the public trust doctrine would effectively superimpose the requirement of express dedication on the doctrine of implied dedication. The court further concludes that land may become parkland by implication even, for example, where the land remains mapped for another purpose, as here.

Of course, the very term "public trust doctrine" suggests that its application involves more than merely the official acts of governmental entities. It involves the actions and concerns of the public as well. *See Gewirtz v City of Long Beach,* 69 Misc 2d 763, 773 (Sup Ct, Nassau County 1972), *affd* 45 AD2d 841 [2d

Dept 1974] (three decades of public use of beach front facilities shows their acceptance as a public park, triggering the application of the public trust doctrine).

Furthermore, the interference with or alienation of property need not be permanent for the public trust doctrine to apply. *See Friends of Van Cortlandt Park v City of New York,* 95 NY2d 623 (closure of golf course for more than five years for use as a construction site requires legislative approval). Here NYU would have an easement over the property encompassing Mercer Playground and LaGuardia Park for the duration of the construction project which is slated to be a 20-year period.

It is the view of this court that long-continued use of the land for park purposes may be sufficient to establish dedication by implication, despite the fact that the property is still mapped for long-abandoned street use. To rule otherwise would effectively eliminate the distinction between express and implied dedication of parkland.

Here, petitioners have certainly shown long continuous of the four parcels as parks.[12] Such long continuous use of land as parks by the public, at least in part, triggers the notion of a

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[12] The court notes that petitioners appear to no longer focus on the fifth parcel of land, the Mercer Street side of the block between West 3rd and 4th Streets where NYU's cogeneration plant is located. Furthermore, the demapping of that parcel and the transfer of title to NYU has no impact on the construction project in the two Superblocks. This decision, therefore, does not consider that parcel of land.

"public trust." With respect to three of the four parcels, there is extensive use of signage indicating some amount of management of the properties by the DPR, and at least some intention of the City to identify the parcels as parks and encourage members of the public to consider and utilize them as parks. The Mercer Playground would appear to have virtually all of the indicia suggested by former DPR Commissioner Stern to show the City's intent to treat the property as parkland where formal mapping as a park is absent. With respect to LaGuardia Corner Gardens and the 2009 change in the GreenThumb rules suggesting that a GreenThumb garden must be "under the jurisdiction" of DPR to be considered a GreenThumb garden, the court notes that despite the City's position that the garden is formally under DOT's jurisdiction, DPR has apparently not removed LaGuardia Corner Gardens from their website listing of GreenThumb gardens, or removed the GreenThumb signage from the garden. Furthermore, there is at least some question as to whether such a change in rules after the parcel was treated as a GreenThumb garden for approximately 20 years would be effective to remove its status as parkland. *See Gewirtz v City of Long Beach* (69 Misc 2d 763) (once property has been dedicated as a public park by the city it was held in trust for the public and could not be restricted to property for residents-only by change in city rules).

Although the City has pointed to several documents

indicating the previous unwillingness of DOT to relinquish its jurisdiction over the three properties, there is little evidence that DOT had any intention to reclaim the parcels for use as streets, as originally planned in the 1950's. Rather DOT resisted remapping to accommodate NYU's opposition to any change in the status quo, that might interfere with its own use of that property in the future. Of course, the NYU proposal, as approved by the City Council, includes the re-mapping of two of the parcels as parkland subject to NYU's easement during the construction project for use as staging areas during the construction. One might, therefore, conclude that NYU's longstanding opposition to repeated efforts of the community and the DPR to have the land remapped as parkland, was primarily to maintain an advantage with respect to its own long-planned expansion project.

Nonetheless, the City argues that a ruling that any or all of the properties at issue have become parkland by implication could harm its ability to reclaim for street purposes property mapped as a street that is currently being used by the public as a park, a Greenstreet, or GreenThumb garden. The City's concern is, however, overstated. At most, where a substantial conflict arises between the City and the local community, that conflict would be treated on a case-by-case basis, as such challenges are now.

For all of these reasons, the court concludes that the public trust doctrine applies to three of the four parcels of land involved, the Mercer Playground, LaGuardia Park, and LaGuardia Corner Gardens. That does not mean, however, that NYU will ultimately be prevented from going forward with its Project, as approved by the City Council. Rather, it means that NYU must obtain the approval of the New York State Legislature if it intends to substantially interfere with the parcels of land which are now used as parks, either by using them as construction staging areas, or by altering them by incorporating them into larger areas of public spaces. Despite the assertion of petitioner Glick to the contrary, NYU may be able to obtain the approval of the State Legislature. If, however, NYU is unsuccessful in its efforts, it will, at the very least, have to develop alternative areas for construction staging that will not interfere with the use by the public of Mercer Playground, LaGuardia Park, and LaGuardia Corner Gardens. Accordingly, the cross motions of the City and NYU to dismiss petitioners' first cause of action are denied.

VIOLATION OF THE HISTORIC PRESERVATION LAW

Section 14.09 of the Parks Recreation and Historic Preservation Law (PRHPL) states as follows:

> 1. As early in the planning process as may be practicable and prior to the preparation or approval of the final design or plan of any project undertaken by a state agency, or prior to the funding of any project by

> a state agency or prior to an action of approval or entitlement of any private project by a state agency, the agency's preservation officer shall give notice, with sufficient documentation, to and consult with the commissioner concerning the impact of the project if it appears that any aspect of the project may or will cause any change, beneficial or adverse, in the quality of any historic, architectural, archeological, or cultural property that is listed on the national register of historic places or property listed on the state register or is determined to be eligible for listing on the state register by the commissioner.

PRHPL § 14.09 (1).

On March 11, 2011, Beth A. Cumming, Historic Site Restoration Coordinator of OPRHP, notified NYU that it had been determined that the Washington Square Village site was eligible for listing on the State and National Registers of Historic Places, "as an impressive example of postwar urban renewal planning and design." Letter from Beth A. Cumming to Denise Langer, Assoc. Gen. Counsel, NYU, dated March 11, 2011, Amended Petition, Exh. 80, Resource Evaluation. Presumably because of that finding of eligibility and in anticipation that it might seek DASNY funding for the Project in the future, NYU consulted with DASNY with respect to the potential impact of the Project on an historic resource. DASNY, in turn, consulted with OPRHP.

On May 22, 2012, NYU, OPRHP and DASNY signed a Letter of Resolution (LOR) stating that NYU seeks to undertake a project in the North Superblock that would add two new academic buildings, below-grade academic space, street-level publicly accessible open space and below-grade parking, that NYU had consulted with OPRHP

and DASNY concerning the Project, that the parties agreed that the Project would have an adverse impact on Washington Square Village, and that NYU agreed to take certain actions prior to the commencement of the action to mitigate that adverse impact.[13] Letter of Resolution, Amended Verified Petition, Exh. 14, App. B). The LOR specifically states that

> "This LOR shall not be effective unless and until the City Planning Commission, the lead agency for the Proposed Project under the State Environmental Quality Review Act (SEQRA)and DASNY make their findings under SEQRA consistent with the determinations described above."

Id. at 5.

In their second cause of action, petitioners seek a declaration that the LOR signed by respondents DASNY, Williams, OPRHP and Harvey violates section 14.09 of the PRHPL. Petitioners also seek to have the LOR annulled and to require DASNY and OPRHP to study "all prudent and feasible alternatives for the NYU Project.[14] More specifically, petitioners contend

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[13] The actions agreed to include, but are not limited to an archeological investigation of the area and development of mitigation measures based on the investigation if necessary; preparation of Historic American Buildings Survey Level II documentation of Washington Square Village prior to commencement of construction and a scaled landscaping plan documenting Sasaki Garden; submission of plans for new construction to OPRHP; and inclusion of plaques or historic markers providing an historical interpretation of Sasaki Garden and Washington Square Village.

[14] The amended verified petition also asserts the second cause of action against respondents City Council, Quinn, DCP, CPC and Burden, however, petitioners agree with the City respondents that they were mistakenly named as respondents in that cause of

that the State Agencies failed to consider any development of an alternative location, improperly accepting NYU's contention that location of the planned buildings within the Washington Square campus was a necessary element of the plan.

Both DASNY and OPRHP (and their respective commissioners, Williams and Harvey) move to dismiss the second cause of action on the basis that no final action has been taken by them and that, therefore, the matter is not ripe for review.

DASNY was created for the purposes of financing and constructing facilities for a variety of public and private purposes, including colleges and universities. Public Authorities Law §§ 1676, 1678. DASNY finances projects by authorizing the issuance of bonds. According to DASNY, prior to doing so, however, it must hold public hearings pursuant to the Tax Equity Fiscal Responsibility Act of 1982 (TEFRA) and the proposed project must be reviewed in accordance with section 14.9 of PRHPL and SEQRA. Aff. of Robert S. Derico, ¶¶ 8 & 9. As both DASNY and OPRHP argue, NYU has not yet sought DASNY funding for its proposed project in the North Superblock, therefore, DASNY has not yet held a public hearing pursuant to TEFRA, nor issued its written findings pursuant to SEQRA. DASNY and OPRHP further argue that under the very terms of the LOR, until DASNY issues

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action and voluntarily dismiss them from the second cause of action. Petitioners' Omnibus Memorandum at 36 n 143.

such written comments, the LOR is not in effect. They contend that only when NYU applies to DASNY for funding will DASNY issue written comments pursuant to SEQRA, and until then there will be no final agency action, and the matter is not ripe for review.

"The test for ripeness is well settled, to wit, a determination must be final before it is subject to judicial review (*see* CPLR 7801 [1])." *Matter of Green Thumb Lawn Care, Inc. v Iwanowicz*, 107 AD3d 1402, 1405 (4th Dept 2013).

> "Administrative actions as a rule are not final unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. To determine if agency action is final, therefore, consideration must be given to the completeness of the administrative action and a pragmatic evaluation [must be made] of whether the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. ... If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered definitive or the injury actual or concrete."

Matter of Essex County v Zagata, 91 NY2d 447, 453-454 (1998)(internal quotation marks and citations omitted).

Petitioners argue that the LOR signed by DASNY, OPRHP, and NYU constitutes a final action, reviewable by this court, because, they contend, the NYU Project was approved by the City Council in reliance on the LOR, and there are no further agency proceedings involving the exploration of alternatives to the NYU Project. Petitioners also point to DASNY's brief, in which the agency states that it participated in the City's environmental

review process as an involved/interested agency. DASNY memorandum of law at 3. In that same sentence, however, DASNY's brief goes on to state that DASNY has not made any findings under SEQRA.

Petitioners contend that in agreeing to the LOR, which states that "all prudent and feasible alternatives have been fully explored," DASNY made all of the findings that it would have to make pursuant to SEQRA, and that, therefore, the LOR should be considered final agency action. Petitioners further contend that in every "Finding" document available on DASNY's website, the agency certifies that the plan at issue minimizes or avoids adverse environmental impacts to the maximum extent practicable by merely incorporating the mitigation measures identified by the environmental impact statement. Petitioners specifically point to a document on DASNY's website regarding Columbia University's proposal for "Phase 1 Components of the Manhattanville in West Harlem Rezoning and Academic Mixed-Use Development Project." However, that very document begins by indicating that Columbia had requested DASNY funding for the Project, and then proceeds with a 37-page document of findings regarding the proposed project, which is far more detailed than the five-page LOR challenged by petitioners.

Here, it is undisputed that NYU has not yet sought DASNY funding for the proposed construction on the North Superblock.

Unless and until it does so, DASNY is not required to issue findings pursuant to SEQRA. This court is not prepared to presume that it knows exactly what findings DASNY will make, when and if NYU requests funding for its Project, and whether those findings will result in any changes to the LOR which could result in changes to the Project in the North Superblock. Furthermore, as OPRHP has noted, construction in the North Superblock is not slated to begin until 2021. *See* City Planning Commission, June 6, 2012, Calendar No. 11, In the matter of an application submitted by New York University pursuant to sections 197-c and 201 of the New York City Charter for the grant of a special permit pursuant to section 74-743 of the Zoning Resolution, Amended Verified Petition, Exh. 16 at 60.

For these reasons, the court concludes that the LOR does not constitute the type of final agency action that would render the matter ripe for judicial review. Accordingly, the cross motions to dismiss of DASNY and OPRHP are granted, and the court need not reach the additional arguments made by DASNY and OPRHP.

UNLAWFUL LIFTING OF DEED RESTRICTIONS

In their third cause of action against the City Council, DHPD, Mathew Wambua, Commissioner of HPD, and the City, petitioners allege that the decision to approve the NYU application violated the common law by unlawfully lifting existing deed restrictions in the deeds entered into by NYU when

it purchased the two Superblocks.

As noted above, the two Superblocks were created as a result of an urban renewal project undertaken by the City. In 1955, the City conveyed the two Superblocks to the Washington Square Village corporation, subject to deed restrictions which both limited the use of the property and set certain density, height, setback and other restrictions for the property for a period of 40 years from the completion of the housing project. *See* Agreement between the City of New York and Washington Square Village Corporation (Agreement), City Exh. RRRR, ¶ 510. In the early 1960's, NYU acquired the property subject to the restrictive covenants. *See* Deed, City Exh. QQQQ. The parties agreed that, absent action to alter that date, the restrictions would be in effect until 2021.

The City contends that petitioners have no standing to enforce the deed restrictions, because the Agreement containing the restrictions is a contract, which may be enforced only by parties to the contract and not by persons who are only incidental beneficiaries. *See Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 108 AD2d 3, 6 (2d Dept 1985), *affd* 66 NY2d 38 (1985). Therefore, according to the City, petitioners are not third-party beneficiaries to that contract, as they contend. The City further relies on section 511 of the Agreement which specifically states that the deed restrictions may not be

enforced by persons who are not parties to the Agreement:

> "nothing expressed in or to be implied from this Agreement is intended or shall be construed to give any person, firm or corporation, other than the parties hereto and the holder or holders of the first mortgage and the Federal Housing Commissioner or his successors in office, any legal or equitable right, remedy, or claim under this Agreement, or under any provisions herein contained; this Agreement and all such provisions being for the sole and exclusive benefit of the parties hereto, the holder of the mortgages and the Federal Housing Commissioner or his successors in office...."

Id., ¶ 511.

Interpreting a nearly identical provision in a land purchase agreement between the City and the owner of property located in Manhattan, the Court of Appeals rejected third-party beneficiary status for tenants of the housing complex on the property in question who were seeking to enforce deed restrictions in the agreement and dismissed the action for lack of standing. *Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783 (2006).

Nothing in the general language of General Municipal Law § 501, cited by petitioners, which empowers municipalities to undertake urban renewal projects, grants petitioners the status of third-party beneficiaries. This court concludes, therefore, that petitioners here lack standing to enforce the deed restrictions contained in the Agreement, pursuant to which the Superblocks were conveyed by the City.

Even assuming petitioners did have standing, the Agreement contains the following provision that effectively permits changes

if the parties to the Agreement agree to the changes:

> "[t]his Agreement cannot be changed or amended without the written consent of the parties to this Agreement and the holder of any mortgage, if any, upon the interest, or any portion thereof, of the Sponsor, and the insurer of the indebtedness secured by any such mortgage."

Id., ¶ 516. Moreover, the restrictive covenant in section 510 of the Agreement, which prohibits changes in the housing project for a period of 40 years from the completion of that project, specifically states that changes may not be made "without the consent of the City Planning Commission and the Board of Estimate of the City or of the respective successors of said Commission and Board." *Id.*, ¶ 510 (c). Thus, where, as here, the parties to the Agreement (or in the case of changes in the housing project, the CPC and the City Council, as successor to the Board of Estimate) consent, the Agreement, including the deed restrictions, may in fact be changed.

For these reasons, petitioners' third cause of action is dismissed.

STATE ENVIRONMENTAL QUALITY REVIEW (SEQR)

In their fourth cause of action against Burden, the DCP, the CPC, the City Council, Quinn, and the City, petitioners contend that NYU's FEIS was deficient, and that, therefore, respondents' approval of NYU's ULURP application was arbitrary and capricious.

NYU conducted an environmental review in connection with its proposed project which was submitted to the relevant city

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agencies as part of its ULURP application. In its FEIS, NYU examined the potential environmental impacts of the Project as originally proposed, an alternative proposal that would be built in the same area but would be approximately 18% smaller, the elimination of several individual components of the Project such as the hotel, the demapping of certain areas of land, an alternative that would not result in any unmitigated significant adverse impacts, and a no-action alternative. Finally, the FEIS considered the impacts of potential modifications to the Project considered by the CPC. FEIS, ch. 26. Among the areas examined were: socioeconomic conditions, community facilities and services, open space, shadows, historic and cultural resources, urban design and visual resources, natural resources, hazardous materials, water and sewer infrastructure, solid waste and sanitation services, energy, transportation, air quality greenhouse gas emissions, noise, public health, neighborhood character, construction impacts, and possible mitigation of adverse impacts. The FEIS concluded that even with the smaller Project, many of the adverse impacts could not be avoided, including: shadows on the LaGuardia Corner Garden eliminating sun necessary for many of the species of plants currently grown there, elimination of the elevated Sasaki Garden which is part of the historic Washington Square Village complex and some limited alterations in the facade of the ground floor level of the

buildings themselves, noise impacts of the construction, and limitation on availability of the LaGuardia Corner Garden during the construction phase.

Despite the detailed examination of these various issues, petitioners contend that the FEIS was deficient because it did not consider, as a reasonable alternative, the possibility of developing some or all of the Project in other geographic locations of New York City. Quoting from a portion of NYU's website relating to travel and transportation between NYU's various academic buildings and dorms throughout the city, petitioners contend that NYU's own marketing materials state that "NYU's 'campus' is New York City." *See* Amended Petition, Exh. 3. That document, however, goes on to state that "[i]ts heart is in Greenwich Village around Washington Square Park." *Id.* NYU states that the purpose of the Project is not merely to expand its academic facilities, dormitories, and faculty housing in order to accommodate the undergraduate and graduate expansion it projects over the next approximately 20 years, it is to accomplish that expansion in the Washington Square area, in order to facilitate the cross-discipline interaction of NYU's faculty and students. According to NYU, such cross-discipline collaboration is part of the trend in higher education. *See* ULURP Application, Amended Verifed Complaint, Exh. 20 at 6.

Although petitioners may disagree with NYU's purpose, the

court is not prepared to rule that the purpose is invalid. The City's failure to require NYU to consider the alternative of building outside of the Washington Square Area in its FEIS was, therefore, not arbitrary and capricious.

Petitioners further argue that the City failed to take an "independent hard look" at the potential environmental impacts of the NYU Project. *See* Petitioners' Omnibus Memorandum of Law at 49. Citing *Matter of County of Orange v Village of Kiryas Joel* (44 AD3d 765 [2d Dept 2007]), petitioners suggest that in taking that "hard look," the City should have conducted independent fact-finding. *Id.* The *Kiryas Joel* case did not, however, state that the City must conduct an inquiry independent of the FEIS. Rather it found that the FEIS, prepared by the Village of Kiryas Joel, in connection with its plan to construct a public water supply facility and pipeline, failed, among other things, to

> "fully identif[y] the nature and extent of all of the wetlands that would be disturbed or affected by the construction of the proposed water pipeline, how those wetlands would be disturbed, and how such disturbance, if any, would affect the salutary flood control, pollution absorption, groundwater recharge, and habitat functions of those wetlands."

Id. at 768. Therefore, according to the Court, the FEIS was inadequate and the decision of the Village Board of Trustees to proceed with the water facility was properly annulled, and the matter remitted to the Trustees of the Village for the preparation of an amended FEIS examining the various

environmental issues which the challenged FEIS had failed to examine. Here there is no indication that NYU failed to identify the nature or extent of any resources that would potentially be impacted by the Project. Rather, petitioners disagree with NYU's justification for the Project.

Petitioners also contend that the failure to require NYU to prepare a new environmental analysis when modifications were made in the Project constitutes a violation of SEQR. The court notes, however, that an additional chapter was, in fact, added to the FEIS, which examined the environmental impacts, if any, of potential modifications to the Project that were considered by the CPC as a result of NYU's discussions with the Borough President. *See* FEIS, chapter 26. Those potential modifications involved, among other things, elimination of a temporary gymnasium, proposed hotel use and commercial overlay area, and reduction in above and below-ground space in both the Mercer and Bleeker buildings, and reduction in the gsf of the Zipper Building. *Id.*, ch. 26, 3-4. A Technical Memorandum, dated June 4, 2012, examined the impact of the modifications proposed by the CPC and concluded that they would not result in any new or different environmental impacts not already examined by the FEIS. City Exh. WW at 1.

The City Council modifications to the plan resulting from NYU's discussions with Council Member Chin, consisted primarily,

though not exclusively, of further reductions in the height and bulk of certain buildings. The July 20, 2012 Technical Memorandum, presented to the City Council by the CPC, concluded that the City Counsel's additional modifications to the Project, examined in chapter 26 of the FEIS and approved by the City Council, did not result in any new or different adverse impacts other than those already evaluated in the FEIS. *See* Technical memorandum, at 1, City Exh. UUU.

"The mere fact that a project has changed does not necessarily give rise to the need for the preparation of a supplemental EIS (SEIS). An SEIS is required only if environmentally significant modifications are made after issuance of an FEIS." *Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d 1, 7 (1st Dept 2006), citing *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 429-430 (1986). "[W]hether or not a modification is 'significant' is for the agency to decide, after identifying the relevant areas of concern, again taking a 'hard look' at the potential impacts, and making a reasoned elaboration for the basis of its determination." *Id.* (internal citation omitted). Given the examination of the modifications in the two technical memoranda, the court concludes that the agency did take a hard look at whether the various downward modifications of the NYU Proposal constituted "significant" modifications which required further environmental

study.

Furthermore, petitioners have not indicated how the modifications, which primarily involve a decrease in the size of the Project, would be likely to create any environmental impacts not already studied in the FEIS. Thus, the court concludes that the City's failure to require NYU to prepare an amended FEIS to analyze the modifications to the proposal resulting from NYU's negotiations with Council Member Chin was not arbitrary and capricious.

Petitioners also contend that the FEIS mischaracterizes the open spaces which currently exist in the two Superblocks and that will result from the Project. The court notes that the FEIS states that the Project will result in a net increase of approximately 3.28 acres of open space. FEIS at 5-1. According to the FEIS, by 2031, when the Project is complete, the open space ratios will improve, both qualitatively and quantitatively, as compared with the situation if the Project were not undertaken. Therefore, the Project will not result in any significant adverse environmental impact on publicly accessible open space.

Petitioners also focus on the Sasaki Gardens, disputing the characterization of the property in the City's brief as "lack[ing] 'public accessibility'" and being "'barely visible from neighboring streets.'" Petitioners' Omnibus Memorandum at

54. In contrast, petitioners contend that photographs of the garden show that it is "clearly visible" from the sidewalk and that it is "easily accessible to the public in spite of the presence of a fence, and commonly used by people who are members of the public not residents of Washington Square Village." *Id.* at 55. The court notes, however, that the FEIS's description of the public accessibility and use of the garden and other interior open space in the Superblocks is far more nuanced than the petitioners' brief would suggest.[15] In any case, the court will not substitute its judgment regarding the dispute in the accuracy of the characterization of the garden in the FEIS, and concludes that the acceptance by the City respondents of the analysis of the facts in the FEIS was not arbitrary and capricious. *See Akpan v Koch*, 75 NY2d 561, 573 (1990).

Petitioners contend that the FEIS was flawed because it failed to disclose the negative impacts of potential construction

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[15] According to the FEIS, "[t]he garden generally is not heavily utilized and provides opportunity for tranquil respite. While there are no signs indicating that it is a private open space, the garden is not easily viewed and not easily accessible from the surrounding streets; users need to enter through one of the Washington Square Village private driveways, as all other possible points of entrance are fenced off. The Washington Square Village building forms, in combination with fencing along LaGuardia Place and Mercer Street as well as differences in elevation along West Houston Street, create a hidden enclave in that relatively few pedestrians recognize the interior recreational opportunities in the superblocks. Therefore, the open space in the interior of the site, which is on private (NYU) property, is utilized primarily by the superblock residents." FEIS at 5-19.

delays. Petitioners rely largely on the affidavit of Dr. Tom Angotti, a professor of Urban Affairs and Planning at Hunter College, who states that the adverse effects on the environment studied in the FEIS "could very well continue beyond 2021," the projected end-date of the Project. Aff of Dr. Tom Angotti, dated Sept. 21, 2012, ¶ 42. Angotti bases his conclusion on the fact that NYU had delays in another construction project, the building of the Bobst Library (*id.*, ¶ 41), and the fact that NYU has not presented evidence "that it has the funds or capacity to complete the project as planned." *Id.*, ¶ 42.

The FEIS presented a detailed time line for the Project, breaking the construction schedule into two major phases, phase 1, projected to start in the last quarter of 2013 and to be completed in 2021. Phase 2 is projected to begin in the first quarter of 2022 and to end in the third quarter of 2031. Intermediate dates are included for the construction of major portion of the Project (e.g. the Zipper building, the Bleeker building, etc.), with dates for demolition, excavation/foundation, super structure/exterior, and interiors. *See* FEIS at 20-14 and Fig. 20-1.

Petitioners offer mere speculation that the Project will experience significant delays. This speculation contrasts sharply with the situation in the case of *Develop Don't Destroy (Brooklyn), Inc. v Empire State Dev. Corp.* (33 Misc 3d 330, 333

[Sup Ct, NY County 2011], *affd* 94 AD3d 508 [1st Dept 2012]), which involved what the court described as "'the largest single-developer project in New York City history [citation omitted].'" There the court directed the preparation of a supplementary EIS to examine the potential environmental impact of delays, because new terms in the agreement governing the project extended estimated construction dates by 15 years. *Id.*

Here, where extended delays are merely speculative, the lack of an examination of the environmental impact of potential delays did not render the FEIS invalid.

Overall, the court concludes that the City did identify the relevant areas of environmental concern and took the requisite "hard look" as required by SEQR. *Matter of Jackson v New York State Urban Development Corp.*, 67 NY2d at 417.

NONCOMPLIANCE WITH ULURP

In their fifth cause of action, petitioners allege that the City failed to comply with ULURP and ask that the CPC and City Council resolutions authorizing the zoning map change, zoning text amendments, large-scale general development (LSGD) special permit, zoning change, and NYC City Map change be annulled.

Pursuant to section 197-c of the New York City Charter, "applications by any person or agency for changes, approvals, contracts, consents, permits or authorization thereof, respecting the use, development or improvement of real property subject to

city regulation" that require changes in the city map, designations of zoning districts, or changes to the text of zoning regulations shall be reviewed pursuant to a uniform review procedure.[16] NY City Charter § 197-c; 62 RCNY § 2-01.

It is uncontested that the NYU Project triggers the ULURP process. Pursuant to ULURP, within 60 days of receiving a completed application from the DCP, the local community board must hold a public hearing on the application and submit written comments to the CPC and the Borough President. 62 RCNY § 2-03. Within 30 days of receipt by the CPC of the community board's written comments, the borough president may submit a recommendation (or waive the right to submit such a recommendation) to the CPC. 62 RCNY § 2-04. Not more than 60 days from the expiration of the borough president's time to

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[16] According to Edith Hsu-Chen, director of the Manhattan Borough Office of the DCP, the NYU Project involves the following land uses which are subject to ULURP: "1) a city map change to narrow, through elimination, discontinuance, and closure, various segments of Mercer Street and LaGuardia Place to enable property disposition to NYU and to establish new public parkland; 2) a zoning map amendment to change an existing R7-2 District to a C1-7 District and to establish within an existing R7-2 District a C1-5 District; 3) a zoning text amendment to Section 74-742 (Ownership) and Section 74-743 (Special provision for bulk modifications), relating to special permit regulations for large scale general developments; and 4) a special permit pursuant to Section 74-743 of the Zoning Resolution to allow the distribution of total allowable floor area without regard for zoning lot lines [this, however was eliminated by modifications to the Project during the public review process]; and (ii) to allow the location of buildings without regard for the applicable height and setback, yards and distance between buildings." Hsu-Chen aff, ¶ 4.

submit a recommendation or waive that right, the CPC shall hold a public hearing on the application, and within the applicable 60-day period, approve, approve with modifications or disapprove the application. 62 RCNY § 2-06 (a).

> "(1) The Commission may propose a modification of an application, including an application for a zoning text amendment pursuant to Charter § 200 or § 201, which meets the criteria of § 2-06 (g) below. Such proposed modification may be based upon a recommendation from an applicant, community board, borough board, Borough President or other source. Where a modification is proposed, the Commission shall hold a public hearing on the application as referred to a community board or boards and on the proposed modification. ... (2) The above provision shall not limit the Commission's ability to make a minor modification of an application."

62 RCNY § 2-06 (c).

The CPC shall file a copy of its decision with the City Council and within 50 days of that filing, the City Council shall hold a public hearing, for which not less than 5 days notice must be given. NYC Charter § 197-d (c). Within that 50-day period, the City Council shall approve, approve with modifications or disapprove the application. *Id.* Where the City Council approves the application with modifications, it must file that decision with the CPC which, in turn, must decide whether the modifications are of such significance that further review is required. NYC Charter § 197-d (d).

NYU submitted applications to the DCP for different aspects of the Project on September 26 and December 5, 2011. Treating

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the parts as a single application, on January 3, 2012, DCP issued a notice certifying the applications to be complete. The applications were then reviewed by Community Board 2, which held a series of public hearings in January and February. In a final public hearing on February 23, 2012, Community Board 2 voted unanimously to disapprove the Project. Community Board 2 sent its written comments to DCP on March 11, 2012. The comments expressed, among other things, opposition to the height, density and bulk of the proposed buildings, the inclusion of a hotel, the construction of a temporary gym on the North Superblock, the request for a rezoning for increased commercial uses in the Commercial Overlay Area on six blocks east of Washington Square Park, and the acquisition by NYU of property which is currently being used as parks. *See* Community Board No. 2 comments, Letter to Amanda Burden, City Exh. B.

The Borough President then reviewed the application and on April 11, 2012, recommended approval in a 24-page document, subject to certain specific modifications including, among other things, specific reductions in the gross size of the Project, an elimination of the proposed temporary gym in the North Superblock, and the exploration of the necessity of hotel use in the Zipper building.

On April 11, 2012, at a public review session, the CPC scheduled a public hearing on the application for April 25, 2012,

publishing notices of the public hearing in the City Record, the Environmental Notice Bulletin, the New York Daily News and the Villager.

On April 19, 2012, NYU submitted a letter to the CPC answering a variety of questions posed by the CPC in January. *See* City Exh. BB.

On April 19, 2012, counsel for some of the petitioners requested that CPC postpone the April 25th public hearing, contending that the Borough President's recommendations did not contain enough detail for the public to comment on, that NYU should be required to submit a new plan in response to the Borough President's recommendations, and that a new ULURP application and environmental impact statement were also necessary, because NYU had indicated that it supported the Borough President's proposed modifications.

On April 23, 2012, NYU submitted an additional letter explaining its need for new space in what it considered its "core" area and its efforts to locate some of its space needs in other areas. City Exh. HH.

Also on April 23, 2012, the DCP responded to the request of counsel for petitioners, indicating that the recommendations of the Borough President, even if supported by NYU, did not constitute a formal modification of the proposal, rejected petitioners' request for a delay, and encouraged petitioners to

participate in both the April 23 pre-hearing overview session and the April 25, 2012 public meeting. City Exh. FF.

On April 25, 2012, CPC held its public hearing on NYU's application, as scheduled. At the hearing, which lasted ten hours, from 10:15 a.m. to 8:15 p.m., 115 speakers testified, 47 of whom testified in favor of the Project and 68 of whom testified against the Project, including some of the petitioners and their counsel. *See* City Exh. II.

On May 4, 2012, NYU submitted memoranda to CPC responding to information requests made at the April 25 hearing regarding NYU's current space deficiencies, insufficient academic facilities, potential uses of new buildings, NYU's efforts to develop satellite facilities outside the "core," and financing for the Project. *See* City Exh. KK.

On May 7, 2012, CPC conducted a public post-hearing review session at which NYU's May 4, 2012 submissions were discussed. *See* City Exh. MM.

On May 11, 2012, NYU submitted additional information responding to information requests made at the May 7, 2012 session, including a reiteration of NYU's need for new space including additional faculty housing, and for the six-block commercial overlay, the hotel, the temporary gym and the potential public school in the Bleeker Building. City Exh. NN; *see also* City Exh. PP regarding the need for additional faculty

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housing.

On May 21, 2012, CPC convened a second public review session, at which DCP staff proposed potential modifications in the Project for consideration by CPC, including, among other things, a reduction in height of the Mercer Building, the elimination of the dormitory tower proposed for the Bleeker Building, and elimination of the hotel in the Zipper Building. The DCP staff recommendations rejected some of the recommendations made by the Borough President. *See* tr, City Exh. SS.

On May 25, 2012, the DCP issued its Notice of Completion of The Final Environmental Impact Statement which indicated that the FEIS included comments received by the CPC, NYU's responses to those comments, as well as additional analysis conducted subsequent to the completion of the Draft Environmental Impact Statement (DEIS). The additional analysis dealt with the modifications to the plan proposed by the CPC staff, which reduced the size of the Project and eliminated the Commercial Overlay, the temporary gymnasium and the hotel use. *See* City Exh. UU.

On June 4, 2012, a Technical Memorandum was issued which concluded that the Project with both the potential modifications proposed by the CPC staff and additional potential modifications beyond those analyzed in the new Chapter 26 of the FEIS "would

not result in any new or different significant adverse impacts not already identified in the FEIS." *See* City Exh. WW at 1.

On June 4, 2012, CPC held a third public review session to discuss the DCP staff recommendation to approve the Project with modifications. *See* tr, Exh YY.

On June 6, 2012, CPC issued its Lead Agency Report in which it considered the FEIS and the June 4, 2012 CEQR Technical Memorandum, and concluded that the requirements of SEQR had been met and that

> "1. Consistent with social, economic and other essential considerations, from among the reasonable alternatives thereto, the Proposed Action, as modified with the modifications adopted herein and as analyzed in Chapter 26, "Potential Modifications under Consideration by the CPC," of the FEIS and in the Technical Memorandum (Modified Proposed Action) is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable; and
> 2. The adverse environmental impacts of the Modified Proposed Action will be minimized or avoided to the maximum extent practicable by incorporating as conditions to the approval, pursuant to the Restrictive Declaration, dated June 6, 2012, those project components related to the environment and mitigation measures that were identified as practicable."

CPC Lead Agency Report, dated June 6, 2012, City Exh. CCC at 68.

On June 6, 2012, CPC held a public hearing to vote on NYU's application, and reviewed the modifications being recommended by the CPC report. The Project, with the proposed modifications, was approved by a majority of the members of the CPC. Among the modifications, discussed in detail above, were a reduction in the size of the Mercer and Bleeker buildings, and the elimination of

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the hotel use, temporary gym and the proposal to rezone the six block area east of Washington Square Park (the Commercial Overlay). In addition, certain use of below-ground space that could threaten the use of above-ground space for parks was eliminated, and creation of an open space oversight organization to insure protection of open space and a Restrictive Declaration, as a covenant running with the land were required. *See* CPC Lead Report, City Exh. CCC, Restrictive Declaration, City Exh. HHHHH, and tr Exh DDD.

On June 7, 2012, the CPC filed its decision with the City Council. That decision was referred to the Subcommittee on Zoning and Franchises which held a public hearing on NYU's application on June 29, 2012. At the hearing, 45 people spoke in favor of the proposal, and 78 spoke in opposition. Tr, City Exh. GGG.

On July 17, 2012, the City Council's Subcommittee on Zoning and Franchises reconvened a public meeting on NYU's application. At the meeting, the Chair explained that the Subcommittee had been conducting negotiations with NYU, in which Council Member Chin had participated, which resulted in further modifications to address concerns that had been raised regarding the Project. After hearing from representatives of NYU discussing further changes in the Project, members of the Subcommittee voted to

approve NYU's application, as further modified.[17] *See* tr Cty Exh. NNN. That same day, the City Council Committee on Land Use also voted to approve NYU's application with the specified modifications.

In conformity with section 197-d of the City Charter, on July 18, 2012, the City Council referred the proposed modifications back to the CPC for consideration of whether the further modifications required additional ULURP review.

On July 20, 2012, a further Technical Memorandum was issued, examining the further modifications to NYU's proposal, as previously modified by the CPC, which resulted from Council Member Chin's negotiations with NYU. That 18-page Technical Memorandum concluded that "the CPC Modified Proposed Actions as modified with the City Council Modifications (collectively referred to as the "Modified Proposal") would not result in any new or different significant adverse impacts not already identified in the FEIS." *See* City Exh. UUU at 1.

On July 23, 2012, counsel for two of the organizational

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[17] The modified plan as voted on by the Subcommittee on Zoning of the City Counsel further decreased the size of the Project by 212,000 gross square feet compared with the Project as approved by the CPC (and by 537,000 as compared with the original ULURP application) for an approximately 25% reduction of above-ground space or a 20% reduction of overall (above- and below-ground) space and provided for space dedicated for community use and required improvements in open space components with NYU responsible for the costs of operation and maintenance. *See* tr, City Exh. NNN at 6.

petitioners wrote to CPC urging that the plan be sent back to the drawing board for additional environmental review. Rather than demonstrating how the modified plan raised new environmental concerns, the letter and its attachments essentially detail the petitioners' continued objections to the NYU proposal, and their belief that NYU had inadequately justified its need for development of additional space in the Washington Square area rather than elsewhere in New York City, and its inability to deal with its academic needs by repurposing its existing NYU-owned buildings. City Exh. WWW.

Also on July 23, 2012, the CPC sent a letter to the City Council, attaching the Technical Memorandum No. 2, and indicating that the proposed modifications to the NYU plan did not raise any environmental issues requiring further review. City Exh. TTT.[18]

On July 25, 2012, the City Council approved four separate resolutions regarding changes in the zoning maps and permitting bulk modifications in the two Superblocks. Each of the four resolutions specifically note that the City Council had considered the relevant environmental issues and the FEIS and Technical Memoranda of June 4 and July 20, 2012. City Exh. AAAA.

According to Hsu-Chen, on July 26, 2012, the City Council filed the resolutions with the Mayor, who has five days to object

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[18] According to Hsu-Chen, the letter erroneously has a date of July 20, 2012 but it actually was sent on July 23, 2012. Hsu-Chen aff ¶ 102, n 17.

to the resolutions. NYC Charter § 197-d (e). No such objections were made. Hsu-Chen aff ¶ 103.

In arguing that the City respondents violated the letter and the spirit of ULURP, petitioners appear to make basically three arguments: 1) the CPC failed to reply to petitioners' written requests that the CPC require NYU to submit data addressing a number of issues, including, how NYU intended to finance the Project, why NYU needed to build in the Core, and a detailed plan for programmatic and non-academic use of the space; 2) the CPC refused to postpone hearing dates when a modified plan was submitted by NYU to the CPC; and 3) the City respondents failed to require a new ULURP application and hold additional hearings based upon NYU's modified plan.

With respect to the City respondents' refusal to postpone hearings regarding NYU's revised plans or to require a new ULURP application including new environmental review and additional hearings, a new application and public hearing is required only where the commission has made a "major modification." A modification is considered major which:

> "(A) increases the height, bulk, envelope or floor area of any building or buildings, decreases open space, or alters conditions or major elements of a site plan in actions (such as a zoning special permit) which require the approval or limitation of these elements;
> (B) increases the lot size or geographic area to be covered by the action;
> (C) makes necessary additional waivers, permits, approvals, authorizations or certifications under sections of the Zoning Resolution, or other laws or

> regulations not previously acted upon in the application; or
> (D) adds new regulations or deletes or reduces existing regulations or zoning restrictions that were not part of the subject matter of the earlier hearings at the community board or Commission."

Matter of Windsor Owners Corp. v City Council of City of N. Y., 23 Misc 3d 490, 501 (Sup Ct, NY County 2009), quoting 62 RCNY § 2-06 [g] [5] [ii].

Petitioners contend that the modifications submitted by NYU have more in common with the modifications considered major in *Windsor Owners Corp.* and, thus, required a new application and public hearing. However, in rejecting the requirement of additional review for the modifications in question, the *Windsor Owners Corp.* court noted that "they were a response and accommodation to complaints voiced by the public. The Commission's modifications reduced the project's size and scale and did not fall within any of the categories in 62 RCNY 2-06 (g) (5) (ii)." *Id.* at 502. Here as well, the modifications submitted by NYU were made in response to complaints by members of the community, reducing the number of gross square feet in the Project by 537,000 gsf, reducing the height of two of the buildings by 70 feet and 83 feet, respectively, and eliminating certain elements, which had been opposed by Community Board 2, such as the proposed hotel, the temporary gym, and the zoning changes in the six-block area north and east of the two Superblocks.

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As noted above, the letter submitted to the CPC by counsel for two of the organizational petitioners did not indicate any new environmental concerns raised by the modifications of NYU's application that had not previously been studied. Rather, their position in seeking that the NYU application be sent back to the drawing board can best be described as a continued belief that NYU had not sufficiently justified its need for any substantial development in the Washington Square area, and their continued opposition to even the reduced development.

As in *Windsor Owners Corp.*, this court concludes that additional ULURP review was not required as a result of the modifications in the application that were obtained through the ULURP process. Similarly, those modifications, which resulted in a reduction in the size and elimination of some of the elements of the proposed project which, in fact, had been opposed by members of the community, did not require a postponement of the scheduled public hearings or the submission of a new ULURP application.

Finally, in light of the submissions by NYU regarding the need for additional academic space and faculty and student housing in the Washington Square area contained in the FEIS, and additional written and oral submissions to the CPC detailed above, the court rejects petitioners' contention that the ULURP process was defective because of the CPC's alleged failure to

respond to petitioners' written requests that NYU be required to provide additional such information.

VIOLATION OF OPEN MEETINGS LAW

In their sixth cause of action, petitioners allege that the City Council, Quinn and the City violated section 103 of the Open Meetings Law which requires that "[e]very meeting of a public body shall be open to the general public." Public Officers Law § 103 (a).

The essence of the petitioners' complaints under the Open Meetings Law are that: 1) Borough President Scott Stringer and City Council Member Margaret Chin each met with NYU privately, resulting in NYU making changes to its plans and that it was the modified plan that was presented to and approved by the City Council; 2) on the morning of the City Council meeting at which the vote was taken, but prior to that vote, the City Council issued a press release stating "[t]he Council will vote to approve the NYU 2031 expansion proposal" (City Council Press Release, dated July 25, 2012, Amended Verified Petitioner, City Exh. 4); and 3) that following certain "disruptions" during the City Council meeting at which the vote on NYU's plan was taken, City Council Speaker Quinn ejected the members of the public.

1) Meetings between Borough President Stringer, City Council Member Chin and NYU

On its face, section 103 of the Open Meetings Law applies to

"public bodies" and not individual public officials, and petitioners site no case which suggests the contrary. Nor is *Matter of Oneonta Star Div. of Ottaway Newspapers v Board of Trustees of Oneonta School Dist.* (66 AD2d 51 (3d Dept 1979), which is cited by petitioners, to the contrary. There, the Court reinstated a cause of action under the Open Meetings law where a meeting of the school board at which a quorum was present and at which two areas of public concern were discussed was held in private. The Court noted that

> "It has recently been established that if any private or secret meetings or assemblages of a public entity are held when a quorum of its members is present and when the topics for discussion and eventual decision are such as would otherwise arise at a regular meeting a violation of the New York Open Meetings Law occurs."

Id, at 53-54, citing *Matter of Orange County Pub., Div. of Ottaway Newspapers v Council of City of Newburgh*, 60 AD2d 409 (2d Dept 1978), *affd* 45 NY2d 947 (1978).

Here, of course, the meetings between Stringer and Chin and NYU did not involve a quorum of the City Council. As part of the ULURP process, the Community Board's comments on NYU's application were presented to Stringer in his capacity as Borough President. He then had 30 days in which to submit his recommendation or waiver to the CPC, which he did. He was not required to hold a public hearing in connection with his recommendations. As for Chin, although as local City Council Member she had no formal role in the process pursuant to ULURP,

neither did she make a final decision on the Project, separate and apart from her vote on the Project in the City Council meeting. The fact that, in connection with the Subcommittee on Zoning and Franchises, she may have met with representatives of NYU does not constitute a violation of the Open Meetings Law.

Moreover, on July 17, 2012, the Subcommittee on Zoning and Franchises held a public meeting explaining that the Subcommittee held discussions with NYU, and at that meeting NYU presented testimony regarding the proposed downward modifications of the Project. The Zoning Subcommittee voted to approve the Project with the proposed modifications. That approval was then referred to the City Council Committee on Land Use, which, in a public meeting, also voted to approve the modified Project. *See* affirmation of Anne F. McCaughey, ¶¶ 11-3. Thus, the modified plan was made public prior to its consideration by the full City Council on July 25, 2012.

Regardless of whether petitioners were satisfied with the outcome of the meetings between Stringer and Chin and NYU, which, of course, resulted in significant reductions in the size and scope of the Project, when a project has been proposed that elicits such community concern, one would certainly hope that local public officials would become involved and enter into some form of dialogue with the sponsor of the project. That dialogue between the local officials and the project sponsor is not the

focus of, nor does it violate the Open Meetings Law.

2) The City Council press release

While the press release in question was, at best, inartfully drafted, it does not establish that the members of the City Council had already voted to approve NYU's project before the meeting was held.[19] In fact later in the discussion of the NYU Project, the press release quotes City Council Member Chin as follows:

> "The application before the Council today is 26 percent smaller than what NYU originally proposed. This is significant, and it reflects NYU's willingness to engage in the public process. I modified this proposal to directly address concerns expressed by my constituents, namely, by reducing building heights and preserving open space. ... I urge my colleagues in the Council to stand with me and vote 'yes' in support of NYU's 2031 proposal."

City Council Press Release, *supra*. Particularly in light of the quote from City Council Member Chin, urging her fellow council members to support the proposal to be voted on, it cannot be said that the press release establishes that the decision of the City Council had already been made. Petitioners fail in their effort to establish a violation of the Open Meetings law based upon the City Council press release.

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[19] The press release also discussed other issues to be voted on by the City Council the same day. Similarly inartful language is used in discussing some of those issues (e.g. "The Council will vote to file an amicus brief in the case of Windsor v. the United States, currently on appeal, to support the plaintiff's position that section 3 of DOMA is unconstitutional"). City Council Press Release, *supra*.

3) Ejection of the public from the City Council Meeting

According to petitioners' memo, City Council Speaker Quinn "wrongly ejected the entire public audience based on a few cat-calls" rather than ejecting merely the few "offending audience members." Petitioners' memo at 58. The article which petitioners cite in support of their assertion, however, depicts a rather different picture from that described by petitioners:

> "Nearly 100 opponents of NYU's controversial Greenwich Village expansion plan were tossed out of the City Council's chambers before a final vote Wednesday when they flouted Speaker Christine Quinn's repeated calls for silence.
> 'Shame on you!' the residents shouted, hissing at the councilmembers from the balcony of the chambers and waving yellow signs. After ignoring Quinn's warnings, they were escorted out of the building before the start of the vote. The heated display capped the end of months of emotional public hearings, protests and fervent opposition from residents and faculty at the school."

"NYU Expansion Critics Tossed Out of City Council Chambers Before 'Yes' Vote," DNAinfo.com, Amended Verified Petition, Exh. 63.

According to McCaughey, who was present at the City Council meeting, before Quinn ordered the Council's Sergeant-at-Arms to remove members of the public, at least four requests for order were made by the clerk, Speaker Quinn, Majority Leader Joel Rivera and the Sergeant-at-Arms. McCaughey affirmation, ¶ 22.

As the City points out even after the members of the public were ejected from the meeting, the deliberations of the City Council continued to be streamed live to the public over the City

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Council website. McCaughey affirmation, ¶ 24. Thus, the actions of the Council and its members were, in fact, available to the public.

> "A court has 'the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of [the Open Meetings Law] void in whole or in part' (Public Officers Law § 107 [1]). 'Good cause' factors include 'insufficient notice, unreasonable starting times, improper convening of executive sessions, and improper exclusion of members of the public. '[N]ot every breach of the Open Meetings Law' automatically triggers its enforcement sanctions.'"

Matter of Windsor Owners Corp. v City Council of City of New York, 23 Misc 3d at 495 (citations omitted).

Without reaching the question of whether Quinn may have overreacted to the disturbance of the meeting by some members of the public, the court concludes that under these circumstances, her action did not constitute a violation of the Open Meetings Law.

Accordingly, it is hereby

ORDERED that the proceeding shall bear the following caption

DEBORAH GLICK, individually and in her representative capacity as Assemblymember for the 66th Assembly District, BARBARA WEINSTEIN, JUDITH CHAZEN WALSH, SUSAN TAYLORSON, MARK CRISPIN MILLER, ALAN HERMAN, ANNE HEARN, JEFF GOODWIN, JODY BERENBLATT, NYU FACULTY AGAINST THE SEXTON PLAN, GREENWICH VILLAGE SOCIETY FOR HISTORIC PRESERVATION, HISTORIC DISTRICTS COUNCIL, WASHINGTON SQUARE VILLAGE TENANTS' ASSOCIATION, EAST VILLAGE COMMUNITY COALITION, FRIENDS OF PETROSINO SQUARE, by and in the name of

its President, GEORGETTE FLEISCHER, LAGUARDIA CORNER GARDENS, INC., LOWER MANHATTAN NEIGHBORS' ORGANIZATION, SOHO ALLIANCE, BOWERY ALLIANCE OF NEIGHBORS, by and in the name of its Treasurer, JEAN STANDISH, NOHO NEIGHBORHOOD ASSOCIATION, by and in the name of its Co-Chair, JEANNE WILCKE, and WASHINGTON PLACE BLOCK ASSOCIATION, by and in the name of its president, HOWARD NEGRIN,

Petitioners,

For a Judgment Pursuant to CPLR Article 78

-against-

ROSE HARVEY, as Acting Commission of the New York State Office of Parks, Recreation and Historic Preservation, THE NEW YORK STATE OFFICE OF PARKS, RECREATION, AND HISTORIC PRESERVATION, PAUL T. WILLIAMS, JR., as the President and the Chief Executive Officer of Dormitory Authority of the State of New York, DORMITORY AUTHORITY OF THE STATE OF NEW YORK, VERONICA M. WHITE, as Commissioner of the New York City Department of Parks and Recreation, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, JANETTE SADIK-KHAN, as Commissioner of the New York City Department of Transportation, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, MATHEW M. WAMBUA, as Commissioner of the New York City Department of Housing Preservation and Development, and THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, AMANDA BURDEN, as Director of the New York City Department of City Planning and Chair of the New York City Planning Commission, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, CHRISTINE QUINN, as Speaker of the New York City Council, THE NEW YORK CITY COUNCIL, THE CITY OF NEW YORK,

Respondents,

and

NEW YORK UNIVERSITY,

As a Necessary Third-Party

and it is further

ORDERED and ADJUGED that

2) the cross motions to dismiss of Rose Harvey, as Acting Commission of the New York State Office of Parks, Recreation and Historic Preservation, the New York State Office of Parks, Recreation and Historic Preservation, Paul T. Williams, Jr., as the President and Chief Executive Officer of the Dormitory Authority of the State of New York, and the Dormitory Authority of the State of New York are granted and the Amended Petition is denied and the proceeding is dismissed as against said respondents with costs and disbursements as to these respondents; and it is further

ORDERED and ADJUDGED that the cross motions to dismiss of the City Respondents and New York University to dismiss the Amended Petition as to them is granted with respect to the second through sixth causes of action, but is denied as to the first cause of action; and it is further

DECLARED and ADJUDGED that the City Respondents alienated public park land without approval by the New York State Legislature in violation of the Public Trust Doctrine, and the

petition is granted as to the first cause of action; and it is further

ORDERED that NYU is hereby enjoined from beginning any construction in connection with the project that will result in any alienation of the parcels found in this decision to be parkland, unless and until the State Legislature authorizes alienation of any parkland to be impacted by the project.

Dated:

J.S.C.

DONNA M. MILLS, J.S.C.