SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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THE CITYWIDE COUNCIL ON HIGH SCHOOLS; DISTRICT 4 COMMUNITY DISTRICT EDUCATION COUNCIL; EAST HARLEM PRESERVATION, INC.; NOS QUEDAMOS COMMITTEE, INC.; NEW YORK CITY PARK ADVOCATES, INC.; MARINA ORTIZ; and HECTOR NAZARIO,

Petitioners,

-against-

Index No. 107463/09

THE FRANCHISE AND CONCESSION REVIEW COMMITTEE OF THE CITY OF NEW YORK; MICHAEL R. BLOOMBERG, Mayor of the City of New York; ANTHONY CROWELL, Special Counsel to Mayor Michael R. Bloomberg; WILLIAM C. THOMPSON, JR., Comptroller of the City of New York; MICHAEL A. CARDOZO, Corporation Counsel for the City of New York; MARK PAGE, Director of the New York City Office of Management and Budget; SCOTT STRINGER, President, Borough of Manhattan; each in his official capacity as member of The Franchise and Concession Review Committee of the City of New York; THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION; and THE CITY OF NEW YORK,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001

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MARILYN SHAFER, J.:

This matter arises in connection with an on-going Randall's Island Sports Field Development Project, in New York City, New York (the Project). Randall's Island is in the East River beneath the Robert F. Kennedy (Triborough) Bridge, south of the South Bronx, east of East Harlem, Manhattan, and west of Astoria, Queens. Among other improvements to the park on Randall's Island, the Project seeks to reconstruct or create 63 sports fields and pursue a concession agreement with a group of private schools for use of the fields during the academic year.

On February 14, 2007, Respondent the Franchise and Concession Review Committee

(FCRC) of the City of New York (the City) approved a concession agreement, entitled the "Randall's Island Sports Fields Improvement Project Agreement" (herein, the 2007 Concession). The 2007 Concession resulted from a three-way agreement between the City, operating through the New York City Department of Parks and Recreation (DPR), the Randall's Island Sports Foundation (RISF), and the Randall's Island Fields Group, LLC, a consortium of 20 private schools in New York City (hereinafter, the Private Schools Group). *See District 4 Presidents' Council v Franchise & Concession Review Comm. of City of N.Y.*, 18 Misc 3d 1123(A), NY Slip Op 50173 (U) (Sup Ct, NY County, Jan 30, 2008, Kornreich, J., Index No. 108327/07) (the Prior Order).

The Prior Order vacated and annulled the FCRC's approval of the 2007 Concession because it was designed to allow "the City to avoid ULURP [Uniform Land Use Review Procedure] review by drafting terms to redefine when a concession has been granted [and] undermine ULURP's purpose of requiring community input on significant land use decisions regarding public land." *Id.* at *3.

On Tuesday, May 26, 2009, Petitioners filed their original petition in this matter. On Friday, May 29, 2009, Respondents announced that, as indicated in an Environmental Assessment Statement for the Project of January 26, 2009 (hereinafter, the 2009 EAS), DPR, RISF, and the Private Schools Group had negotiated a new concession agreement regarding the allocation of sports fields on Randall's Island. *See* Randall's Island Sports Fields Concession Agreement, by and between The City of New York, acting by and through its Department of Parks and Recreation, and Randall's Island Sports Foundation and Randall's Island Fields Group LLC, dated as of June 19, 2009 (hereinafter, the 2009 Concession). Apparently, on June 8, 2009, the FCRC held a public hearing on the 2009 Concession, and, on June 10, 2009, the FCRC unanimously voted to approve it. On or

about June 19, 2009, DPR, RISF, and the Private Schools Group executed the 2009 Concession.

According to the 2009 EAS, the Project would "reconstruct or create 63 sports fields on Randall's Island Park and pursue a concession agreement for the use of a portion of the 66 sports fields on Randall's Island Park by [the Private School Group]." 2009 EAS, § 3b. The stated purpose of the Project is to "reconfigure and restore the worn and non-regulation size fields, as well as add landscaping, drainage improvement, park amenities, and key infrastructure improvements throughout Randall's Island Park. The new fields will enable increased soccer, baseball, and softball programming, as well as additional field days for local public schools in communities in need of active recreation facilities...." *Id.*, § 3c. Finally, the Project, which states that some 9,123,206 sq. ft. are generally to be developed (*id.* at § 13b), indicates that ULURP review is not required (*id.*, § 5).

As of the same date of the 2009 EAS (January 26, 2009), DPR, the lead agency for environmental review of the Project, issued a negative declaration under SEQRA (State Environmental Quality Review Act)[1] and CEQR (City Environmental Quality Review), indicating that the Project will have no significant environmental impact (hereinafter, the Negative Declaration).

Petitioners[2] seek an order, pursuant to CPLR 3001 and 7803, declaring that: (i) Respondents

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[1]A negative declaration is a Notice of Determination of Nonsignificance, which ends the SEQRA review process (6 NYCRR 617.6 [b] [3] [ii] and [iii], 617.7 [a] [2]) as to the environmental aspects of the project, so that preparation of an Environmental Impact Statement is not required. *See Matter of 27th St. Block Assn. v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 158 (1st Dept 2002).

[2]By Joint Stipulation and Order of November 25, 2009, District 4 President's Council was dropped as a party petitioner, and the affidavit of Hunter Manuel, as President of District 4 President's Council was withdrawn, with references to the affidavit in the pleadings deemed

must comply with ULURP, as directed in the Prior Order; (ii) the Negative Declaration based upon the 2009 EAS is invalid; (iii) DPR must issue a positive declaration and prepare an EIS (Environmental Impact Statement) under SEQRA; and (iv) Petitioners are entitled to costs, including reasonable attorneys' fees.

ULURP REVIEW

The City's ULURP requirements are contained in New York City Charter (NYC Charter) §§ 197-c, 197-d, and 62 RCNY § 7-01 (Chapter 7 of Title 62 of the Rules of the City of New York). Pursuant to Charter § 197-c (a) (6), ULURP is applicable to "major concessions as defined pursuant [to NYC Charter § 374]."

As a preliminary matter, "concession," according to NYC Charter § 362 (a), means "a grant made by an agency for the private use of city-owned property for which the city receives compensation other than in the form of a fee to cover administrative costs, except that concessions shall not include franchises, revocable consents and leases."

In turn, a "major concession" means "a concession that has significant land use impacts and implications, as determined by the commission, or for which the preparation of an environmental impact statement is required by law. All major concessions shall be subject to review and approval pursuant to [NYC Charter §§ 197-c, and 197-d]." NYC Charter § 374 (b).

Finally, NYC Charter § 374 (b), also requires that the "city planning commission [CPC] shall adopt rules that either list major concessions or establish a procedure for determining whether a concession is a major concession." CPC's procedure is given in 62 RCNY § 7-01, which provides

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stricken.

that "[a] concession shall be considered a major concession [if it] will cause one or more of the thresholds set forth in § 7-02 to be exceeded."

The main 62 RCNY § 7-02 thresholds implicated by the 2009 EAS and the 2009 Concession are the ones that define a major concession as:

> (g) an open use which occupies over 30,000 square feet of a separate parcel of parkland; (h) a use which in total occupies more than 2,500 square feet of floor area[; or] (i) a concession comprised of two or more components, no one of which exceeds thresholds set forth in paragraphs (a) through (h) above, where at least two of such elements each exceed 85 percent of any applicable threshold set forth in such paragraphs.

62 RCNY § 7-02.

An exception to this rule obtains for

> issuance of a new concession which continues a currently existing use or which permits a use which existed lawfully on the property at any point in the preceding two years ... provided that ... the cumulative effect of any amendments or extensions made over any five year period does not include modifications which when added to the existing concession, cause any threshold of § 7-02 to be exceeded and increase the size of an existing concession by ten percent or more.

62 RCNY § 7-03 (d).

Petitioners argue that the 2009 Concession is a major concession, requiring ULURP, because it includes more than 30,000 sq. ft. of parkland being converted to new uses. *See* 62 RCNY § 7-02 (g). Respondents maintain that the 2009 Concession falls within the applicable exception because it largely continues an existing use, or mere reconfiguration, of the parkland.

The court finds no interpretation of the 2009 Concession that brings the proposed improvements within the 30,000 sq. ft. limitation for exemption from ULURP. The new fields themselves, the accompanying parking, and the necessary roads, each, and collectively, appear to exceed that limit.

With regard to the construction of new fields, the 2009 EAS offers that "a total of 51 fields will be available for use during the fall season and a total of 57 fields will be available for use during the spring and summer seasons." This projection is compared therein to "a minimum of 33 existing fields that are available for use during the fall season and a maximum of 40 existing fields that are available for use during the spring and summer seasons. Because far fewer of the new fields will be overlapping compared to the existing fields, available playing time year-round will be substantially increased." 2009 EAS, at 3.

This statement indicates that there will be more, new, athletic fields in the Project, but also indicates that there is to be less overlapping, which, by definition, means there must be a reconfiguration of the total space and a diminution of passive space[3], for other sports, or non-sports, activity in the park. Elsewhere, the EAS indicates that the Project will double the number of fields in the park generally from 28 existing now, to 56. *See* EAS, Table 2.15-4. Yet elsewhere, the EAS confirms that at a minimum "[n]ine ... new soccer fields will overlap with the new ball fields (6 in Sunken Meadow, 2 at the Central Fields, and 1 at the Hell Gate Fields). These new fields will serve in addition to the one existing 120-yard soccer field (near Icahn Stadium ...) and two existing 100-yard soccer/lacrosse fields at Hell Gate Fields."

The Respondents reject Petitioners' argument that passive recreational space will be adversely affected by the creation of the new fields as incorrect. Respondents cite to the CEQR Technical Manual to establish that the space to which Petitioners refer (for instance, open meadows

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[3]*See* Boden Affidavit in Opposition (¶ 7) that identifies one of the existing uses of the park as "passive recreation." *See also* Laird Affidavit in Opposition (¶¶ 28, 40) identifying the change of the parkland from "informal field areas around the island" to "dedicated use of field spaces for athletic purposes."

for picnicking, sunbathing, frisbee, or kite-flying) is in actuality "active recreational space." *See* CEQR Technical Manual, 3D-1 (active open space includes "multipurpose play area [open lawns and paved areas for active recreation, such as running games, informal ball-playing ...]"). Respondents fail to point out that the very next paragraph defines "passive open space." *See id.*, 3D-1 (passive open space is "used for relaxation, such as sitting or strolling ... sunbathing ... picnicking ... and publicly accessible natural areas used, for example, for strolling, dog walking, and bird watching"). It is beyond cavil that "passive use" of a park is, indeed, a recognized use, and the CEQR Technical Manual appears to confirm as much.

Respondents also rely on the CEQR Technical Manual to show that they are authorized to make specifically the kinds of changes contemplated by the Project. Specifically, Respondents cite to the CEQR Technical Manual assessment of open space provisions, which state that:

> [d]irect effects may not always result in adverse effects to open space. Alterations and changes to parks may be beneficial or may result in beneficial changes to some resources while having an adverse effect on others. In determining whether or not to prepare an open space assessment, consider whether the changes are likely to adversely affect utilization of existing resources or specific user groups of these resources.

Respondents once again fail to note that on the very same page, the CEQR Technical Manual notes that "[i]ndirect effects may occur when the *population generated by the proposed action overtaxes the capacity of existing open spaces* so their service to the existing or future population of the affected area would be substantially or noticeably diminished." Emphasis added.

Thus, the CEQR Technical Manual, in keeping with, for instance, 6 NYCRR 617.7 (c) (1) (viii), is cognizant that " a substantial change in the ... intensity of use [of] open space or recreational

resources" may have significant adverse impact on the environment.[4]

As for the scale of the Project, Respondents do not, for instance, contest that a regulation soccer field is 54,000 sq. ft., and there will be 22 new ones, as opposed to the *one* currently existing *elsewhere in the park*. This substantial change in intensity of use of Randall's Island's recreational resources, far from being exempted from ULURP as argued by Respondents, is, as noted above, a statutory criterion for determining potentially adverse environmental significance of an action. *See* 6 NYCRR 617.7 (c) (1) (viii).

The Respondents confirm, repeatedly, that there will be an increase in use of the parkland due to the Project. *See* 2009 EAS, at 3*n* ("[b]ecause far fewer of the new fields will be overlapping compared to the existing fields, *available playing time year-round will be substantially increased*"), at 8 ("the new fields will enable *increased [sports] programming*, as well as *additional field days* [and] *add many thousands of hours of additional playing time* ... due not only to the overall increase in fields but also to the reduction of overlapping fields, to the synthetic surface treatment, and to field lighting allowing for *extended hours of playing time*"), and at 20 ("[t]he proposed project would *greatly enhance existing recreational uses* within Randall's Island Park"). Respondents' assurances of increased intensity of use of the fields, coupled with the displacement of passive uses, due to the Project, are statutorily indicated as potentially having significant adverse impact on the environment. ULURP review is required. *See* 6 NYCRR 617.7 (c) (1) (viii) (change in "intensity of use" of land,

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[4]The Court is persuaded that "intensity of use" categories should "represent a 'continuum' of activity levels on a given piece of land. At the low end of the continuum would be 'uses not requiring substantial building or infrastructure improvements (*e.g.*, open space, parks, conservation districts, etc.).' At the high end would be 'uses requiring substantial infrastructure (heavy manufacturing and industrial facilities, etc.).'" *Lemon v McHugh*, – F Supp 2d –, 2009 WL 3747218, *1 (Dist Ct, DC 2009). Thus, for purposes of environmental assessment, there is room for changes in "intensity of use" within the traditional, conventional, categories.

open space, or recreational resources is indicator of significant environmental impact); *accord* 17 NYCRR 15.11 (a) (8) (for Department of Transportation); *Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d 62, 69 (1989).

Moreover, the 2009 EAS provides that "[i]n Randall's Island south, the existing roadway system will be expanded and resurfaced to support the new layout of fields in this area. The new roadway will have 12-foot wide lanes at the field entrances and two 16-foot wide travel lanes around the field areas." 2009 EAS, at 87. It strains reason that the creation of these new fields and new roadways to access them, in areas where there are far fewer fields at present, and only limited roadways, could amount to less than 30,000 sq. ft., and, thus, be exempt as a non-major concession under 62 RCNY § 7-03 (d).

The EAS also identifies quite clearly, that "one asphalt parking lot will be converted to fields, and the parking spaces dispersed to smaller, more appropriate 'pocket parking' areas." 2009 EAS, at 4. Although not directly applicable to parks, Respondents do not contest Petitioners' suggestion that in a typical New York City parking lot "an area of less than 300 square feet, but in no event less than 200 square feet, may be considered as one space." New York City Zoning Resolution 25-62. Although the "one asphalt parking lot" is not absolutely identified in the EAS, even if the parking spaces are of minimal size, and the asphalt parking lot allows for as few as 150 cars, the RCNY § 7-02 threshold will arguably be exceeded by moving the parking spaces to "pocket parking."[5] To be sure, the court notes that at least 10 of the approximately 26 proposed "pocket parking"

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[5]150 cars, at 200 sq. ft. per car, is 30,000 sq. ft. in the asphalt lot. And that 30,000 sq. ft. of parking would be "dispersed," while the lot itself is converted to a field. The resulting change in use and configuration or the parkland would exceed 30,000 total sq. ft. for both the action of converting the parking lot to a field, as well as for the action of constructing "pocket parking" in the existing recreation areas.

installations are in Sunken Meadow Fields, which currently has no such designated parking areas, and is the primary site of the 2009 Concession.

In any event, the "one asphalt parking lot" that is to be converted is likely to be much larger, and, indeed, probably the one "located ... to the east of the bridge structure in the vicinity of the Bronx Toll Plaza" which, according to the 2009 EAS, will no longer be necessary because there "will no longer be large-scale events which depend upon parking at Randall's Island Park." 2009 EAS, at 96-97. In reality then, it is far more than 150 cars that will likely be accommodated by the construction of new parking lots on the parkland:

> [n]ear the Bronx Shore Fields, there are plans for two designated parking areas for a total of 200 parking spaces. There are also two open areas which may be used for picnicking or special event parking with a total of approximately 300-400 spaces. Around Sunken Meadow Fields, the loop road will have approximately 124 perpendicular parking spaces for visitors. There will also be roughly 75 parking spaces available in front of the new tennis center and along the access road to this field area. On the southwestern portion of the island, about 84 parking spaces will be included in the roadway design for the loop road accessing the East River Fields and 24 spaces around Sunken Garden Fields. In the southeast, nine spaces will also be included in the loop roads circling Wards Meadow Fields, Hell Gate Fields, and Central Fields. There will also be a larger designated parking lot for Wards Meadow Fields with about 230 spaces.

2009 EAS, at 6.

This latter description accounts for more than 1000 parking spaces moved from a largely central location, to locations distributed throughout the parkland. At the expected minimum of 200 sq. ft. per parking spot, this would amount to at least 200,000 sq. ft. of new construction in, and new use of, the parkland, from parking accommodation alone. As such, the 2009 EAS and Concession parking arrangements exceed the thresholds given by 62 RCNY § 7-02 (g), and, accordingly, require ULURP review.

The 2009 EAS also provides for the construction of six comfort stations on the parkland. The comfort stations would be staffed, and, in addition to restrooms, would comprise storage for maintenance equipment, central locations for general information, and electronic information systems on Park and field usage. It appears that fully five of these stations will be new, because the 2009 EAS (at 5) offers that "[t]he six stations will be located at: Bronx Shore, Sunken Meadow (2 stations), Central, Hell Gate (*rehabilitated station*), and between East River and Wards Meadow." Emphasis added. As only one of the stations is designated a rehabilitation effort, the others must be new construction. *See also* Laird Affidaivt. ¶ 5. Given the multiplicity of function for these comfort stations, although the 2009 EAS does not provide actual square footage information, 62 RCNY § 7-02 (h), which limits new construction to 2500 sq. ft. of floor space, is likely implicated by the construction of at least the two planned stations in Sunken Meadow, an area definitively designated for the 2009 Concession.

In an argument demonstrating more daring than logic, the Respondents maintain that all of these new field, new roadway, new comfort station, and parking renovations and constructions were, or are to be, accomplished by the City in a separate procurement process, and the renovations and new construction were or are not a function of the 2009 Concession. As such, they argue, Petitioners' claim that the 2009 Concession itself caused the thresholds to be exceeded is incorrect.

The 2009 Concession, by its own terms, involves "Sports Fields" at the "Concession Location" set forth in the Exhibits to the agreement. However, "Sports Fields," again, by the 2009 Concession's own terms, means not only the fields, but "all related facilities including, without limitation, parking, curb work, and restrooms." 2009 Concession, at 3, 4, Exh. A & B.

Respondents maintain that the permits of the 2009 Concession do not restrict the use of the

new fields, the new roadway, the new comfort stations, and the new "pocket parking." However, the 2009 Concession states clearly that the RISF may use the Concession Location "as long as any such usage does not materially impair the ability of the [Private Schools Group]" to use the Location. *See* § 3.01 (a). Further, any modification of the plans and specifications for the Sports Fields must be approved by the Private Schools Group, and the Schools Group Representative, and the City has agreed to "keep the Schools Group Representative fully informed of their progress in the performance of all Construction Work. *See* §§ 5.02-5.03.

At the very least, a plain-language reading of the 2009 Concession includes priority over use and construction of new fields, new roadways, new comfort stations, and new "pocket parking" at Bronx Shore, Sunken Meadow, Hell Gate, and Wards Meadow Fields. It is inherently incredible that the 2009 Concession is not governed by the limits of 62 RCNY § 7-02.

Respondents' argument is reminiscent of the arguments offered in support of the 2007 Concession. With reference to the 2007 Concession, the Honorable Shirley Kornreich noted, in the Prior Order, that the concessions seem designed to allow "the City to avoid ULURP review by drafting terms to redefine *when* a concession has been granted [and] undermine ULURP's purpose of requiring community input on significant land use decisions regarding public land." *District 4 Presidents' Council*, 18 Misc 3d 1123(A) at *4 (emphasis added).

Here, the Respondents' arguments again seem designed to avoid ULURP review. This time the Respondents have redrafted the terms of the 2009 Concession to parse the activities of the Project, essentially using segmentation to redefine *how* the concession has been granted. However, segmenting the Project and simply claiming that the declared change in intensity of use is not significant is unacceptable. *See Matter of New York City Coalition for the Preserv. of Gardens v*

Giuliani, 175 Misc 2d 644, 655 (Sup Ct, NY County 1997) (an agency "cannot ignore the combined impact of a development with closely related and multiple phases, nor can it countenance the deliberate division of such developments into smaller parts in an attempt to circumvent the rules of SEQR"), *affd* 246 AD2d 399 (1st Dept 1998).

The simple and unavoidable facts of the matter indicate that the Respondents intend to undertake a major concession in partnership with the Private Schools Group involving a change in use, or change in intensity of use, of several hundred thousand total square feet (*see* 62 RCNY § 7-02 [i]) of parkland. The structure of the 2009 Concession reveals that, once again, the Respondents seek to flout and undermine the purpose of ULURP review by segmenting activities to artificially remain beneath the threshold of 62 RCNY § 7-02, and improperly asserting that the proposed changes in existing use and intensity of use are exempt under 62 RCNY § 7-03 (d). *See Matter of Save Pine Bush v City of Albany*, 70 NY2d 193, 205-206 (1987) (where aspects of a project are, in actuality, not separate, but related, environmental study is mandatory); *see also* 6 NYCRR § 617.7 (c) (1) (viii) (a change in "intensity of use" of land, open space, or recreational resources is indicator of significant environmental impact).

As noted in the Prior Order, "allowing the City to avoid ULURP review by drafting terms to redefine when a concession has been granted would undermine ULURP's purpose of requiring community input on significant land use decisions regarding public land." *District 4 Presidents' Council*, 18 Misc 3d 1123(A) at *3. Despite the adroit drafting of the Respondents, the scale and type of development under the Project and the 2009 Concession require ULURP review, and it is hereby so ordered.

NEGATIVE DECLARATION BY DEPARTMENT OF PARKS AND RECREATION (DPR)

Petitioners seek an order, pursuant to CPLR 3001 and 7803, declaring that the Negative Declaration made by DPR based upon the 2009 EAS is invalid, and that DPR must issue a positive declaration and prepare an EIS under SEQRA.

The court is required to: (i) sustain DPR's Negative Declaration unless the court concludes that it "was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 363 [1986], citing CPLR 7803 [3]); and (ii) determine only whether DPR identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration for its determination" (*Matter of Merson v McNally*, 90 NY2d 742, 751-752 [1997]; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416-417 [1986]).

The purpose of SEQRA "is to incorporate the consideration of environmental factors into the existing planning, review, and decision-making processes of state, regional, and local government agencies at the earliest possible time" (6 NYCRR § 617.1 [c]), and "to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources" (Environmental Conservation Law § 8-0101).

Under SEQRA, there are two basic types of action. Type II Actions are "routine or continuing agency administration and management, not including new programs or major reordering of priorities that may affect the environment." 6 NYCRR § 617.5 (c) (20). Type II Actions do not require an Environmental Impact Statement (EIS), because they "have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8." 6 NYCRR § 617.5 (a).

Type I Actions are ones that are more likely to require the preparation of an EIS than unlisted actions (*i.e.* actions not specifically listed in 6 NYCRR 617.12 [b]) or Type II Actions. Type I Actions require the preparation of a full Environmental Assessment Form for use in determining the significance of the action in question. *See* 6 NYCRR 617.5 (b). If the lead agency determines that the action may include the potential for at least one significant environmental effect, such a finding is deemed a "positive declaration," which would then require the preparation of an EIS. *See* 6 NYCRR 617.2 (ac), 617.7, & 617.12. If, on the other hand, the lead agency determines either that there will be no environmental effect or that the identified environmental effects will not be significant, such a finding is deemed a "negative declaration." *See* 6 NYCRR 617.7 (a) (2) & 617.2 (y).

Here, Respondents note that as the Project was originally classified as a Type II Action, and Petitioners' application for judicial review of that classification was rejected as time-barred in May of 2008. Only after that matter was closed did Respondents undertake further environmental review by issuing the 2009 EAS (which indicates that the Project is a "Type I Action" because it involves physical alteration of more than 10 acres of of parkland – *see* 6 NYCRR 617.4 [b] [6] [i]; 2009 EAS, p.2). Respondents maintain that "[w]hile there have been changes to the structure of the Concession since 2008 in order to conform with the [Prior Order], there has been no significant change to the [Project.]"

Respondents audaciously argue that because they originally classified the Project as a "Type II Action," and only voluntarily elected to treat the Project as a "Type I Action," the Negative Declaration is not judicially reviewable. The very idea that a final determination by an agency, based on a new EAS/EAF – regardless of how similar a previous EAS/EAF may be – would be exempt

from judicial review because of a determination with regard to a separate, prior, EAS/EAF, is preposterous on its face.

CPLR 7803 (3) offers no separate treatment for final determinations that were preceded by other determinations or classifications. In all events, a final determination under SEQRA is deemed made, for instance, when it has an impact on the aggrieved petitioners (*Matter of Wing v Coyne*, 129 AD2d 213, 217 [3rd Dept 1987]), or when the agency commits itself to a definite course of future action (*Matter of Price v County of Westchester*, 225 AD2d 217, 220 [3rd Dept 1996]). As the Respondents herein changed the "structure" of the Project, clearly they did not have a "definite course of future action" at the time they were making changes. Any determination prior to the issuance of the 2009 EAS was clearly abandoned, and the new Negative Declaration was a separate, and judicially reviewable, determination.

What is more, Respondents' argument that their Declaration based on the 2009 EAS is not reviewable, is misplaced, counter to public policy, and without gravitas. First, the unreported case upon which the Respondents rely is inapposite. In *East Fifties Neighborhood Coalition v Lloyd*, 13 Misc 3d 1243 (A), NY Slip Op 52301 (U) (Sup Ct, NY County 2006), the court discussed whether the City could be forced to reopen the EIS for a grandfathered project (which pre-dated, and was not subject to SEQRA) to build a water supply tunnel, for which the City had issued a voluntary EIS due to the concomitant surface construction work. The court found that, as there had been no "substantial modification" of the pre-SEQRA plan, and the EIS was, in essence, the City's own study, it could not be used to defeat the rights of the City to complete the project. Here, the Respondents themselves state that there were "changes to the structure" of the Project. Indeed, a change in "structure" that goes from requiring ULURP review under the Prior Order, to one where

no ULURP review is required, is logically a "substantial modification." Moreover, the Project was not grandfathered by operation of a simple dismissal of the prior petition as time-barred. Finally, here the Respondents issued no EIS. The case is inapplicable, and reliance thereon is misplaced.

Second, New York public policy is that the court is authorized to review projects for which "a substantial question remains on which an effective disposition can be made, *i.e.*, whether the proposed project should be designated a Type I or Type II action under [SEQRA]." *Matter of Wood v Zoning Bd. of Appeals of Town of E. Hampton*, 51 AD3d 680, 681 (2nd Dept 2008). "In view of the fact that SEQRA entrusts some initial classifications of Type II actions to agencies, it is imperative this trust not be taken lightly and that the reason for the classification be documented." *Town of Bedford v White*, 155 Misc 2d 68, 72 (Sup Ct, Westchester County 1992), *affd* 204 AD2d 557 (2nd Dept 1994); *see also Matter of Hazan v Howe*, 214 AD2d 797, 799-800 (3rd Dept 1994) (even where an agency indicates that an action is Type II, and, thus not subject to SEQRA, "[t]here may be a need to document the rationale for this initial determination, in order to facilitate judicial review, when it is not manifestly clear that the activity involved meets the criteria defining a particular class of Type II actions").

Finally, in assessing the potential adverse environmental impact of the Project, DPR is normally required to consider cumulative and synergistic effects of related simultaneous and pending actions. SEQRA requires consideration of "two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria [for determining significance] in this subdivision." 6 NYCRR § 617.7 (c) (1) (xii). Here, there is no question that the Project involves, at the very least, a "substantial change in the ... intensity of use, of land ... or

in its capacity to support existing uses." 6 NYCRR 617.7 (c) (1) (viii); 17 NYCRR 15.11 (a) (8). Arguments that essentially espouse segmentation of the Project in order to avoid judicial review are without gravitas. The Negative Declaration based upon the 2009 EAS is judicially reviewable.

Turning to the validity of the Negative Declaration, the Respondents assert, repeatedly, that the 2009 Concession is separate and apart from the renovation of the fields on Randall's Island. However, as it is also the fundamental position of Respondents that the 2009 Concession involves adjustment of the intensity of use of the land, and not a change in use, the provisions of 6 NYCRR 617.7 apply to the Project. *Matter of Farrington Close Condominium Bd. of Mgrs. v Incorporated Vil. of Southampton*, 205 AD2d 623, 625 (2nd Dept 1994) (substantial change in intensity of use requires EIS).

Moreover, Respondents' assurances that the Project involves improvements to Randall's Island that are not part of the 2009 Concession indicate that DPR, in issuing its Negative Declaration, failed to "consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are: (i) included in any long-range plan of which the action under consideration is a part ... ." 6 NYCRR § 617.7 (c) (2); *see also Matter of Save the Pine Bush*, 70 NY2d at 205-206; *Farrington Close Condominium Bd. of Mgrs.*, 205 AD2d at 626 (considering only a part, initial phase, or segment of an action is contrary to the intent of SEQRA).

As the Negative Declaration is counterpoised with the pure, codified, legal obligations of DPR, partially given by 6 NYCRR 617 *et. seq.*, the customary judicial deference is not warranted. Here, the obligation of DPR to address the cumulative impacts of what they themselves consider to be a change in the intensity of use and long-range plans for the Project is "clear and unambiguous"

(*Matter of Bockis v Kayser*, 112 AD2d 222, 223 [2nd Dept 1985]), does not contain "special or technical[, but only] common words of clear import" (*Matter of New York State Assn. of Life Underwriters v New York State Banking Dept.*, 83 NY2d 353, 360 [1994]), and does not suffer from some "fundamental ambiguity" (*Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 667 [1998]). *See generally Matter of Beekman Hill Assn. v Chin*, 274 AD2d 161, 166-167 (1st Dept 2000).

The Negative Declaration, issued disregarding applicable statutes, was thus, by definition, affected by an error of law. *Chinese Staff & Workers Assn.*, 68 NY2d at 363; *Matter of Sanford v Rockefeller*, 35 NY2d 547, 574 (1974); CPLR 7803 [3]. As such, it is not relevant whether the DPR took a "hard look" at the part of the Project under the 2009 Concession. Whatever "look" the DPR took, by its own admissions, did not properly consider intensity of use, and was segmented. It is ordered that the Negative Declaration is vacated.

The request that the court direct DPR to issue a positive declaration is denied. The court is not in the position, nor have Petitioners demonstrated that it has the power, to substitute its own assessment of the environmental impacts of the Project for that of DPR. *See Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 (1979); *Nelson v Roberts*, 304 AD2d 20, 23 (1st Dept 2003).

COSTS AND ATTORNEYS' FEES

CPLR Article 86 provides in pertinent part that:

> "a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust. Whether the position of the state was substantially justified shall be determined solely on the basis of the record before the

agency or official whose act, acts, or failure to act gave rise to the civil action." CPLR 8601 (a).

Here, the DPR was aware of the admonition of the Prior Order that the concessions seem designed to allow "the City to avoid ULURP review by drafting terms to redefine *when* a concession has been granted [and] undermine ULURP's purpose of requiring community input on significant land use decisions regarding public land." *District 4 Presidents' Council*, 18 Misc 3d 1123(A) at *4 (emphasis added).

Having had the benefit of the Court's Prior Order in the matter, the Respondents again attempted to avoid the required ULURP review by segmenting or parsing the 2009 Concession. In addition, as 6 NYCRR 617.7 (c) (1) (viii) directly indicates that a change in "intensity of use" of land, open space, or recreational resources is indicator of significant environmental impact, Respondents' arguments that doubling the number of fields on Randall's Island is exempt from SEQRA cannot be justified by any reasonable legal theory or extension of the law. The court finds that the positions taken by Respondents were, thus, not "substantially justified." CPLR 8601 (a). It is ordered that the Petitioners are entitled to their reasonable fees and other expenses.

Settle order and judgment on three days' notice directly to chambers.

Dated: 12/21/09

ENTER: MARILYN SHAFER J.S.C.

J.S.C.