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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
BARBARA WEINSTEIN, ET AL.,

INDEX NO. 103844/12

Petitioner,

-against-

MOTION DATE

MOTION SEQ. NO. 002

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....	1-6
Answering Affidavits– Exhibits	7-12
Replying Affidavits	13-14

CROSS-MOTION: _____ YES ✓ NO

FILED

APR 05 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 4/2/13

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: PART
----------X

In the Matter of the Application of

BARBARA WEINSTEIN, et al.,

Petitioners,

For a judgment under Article 78 of the Civil Practice Law and Rules and for Other Relief,

- against -

ROSE HARVEY, as Acting Commissioner of the New York State Office of Parks, Recreation and Historic Preservation, et al.,

Respondents,

-and-

NEW YORK UNIVERSITY,

As a Necessary Third-Party.
----------X

Index No. 103844/2012

DONNA MILLS, J.:

Petitioners move, pursuant to CPLR 2214 (a) and CPLR 7806, for an order requiring each of the "City Respondents" and New York University (NYU), named as a necessary third-party, to respond in full to petitioners' discovery requests directed to each of them, and then to proceed to a hearing to resolve the first cause of action of the amended petition relating to parkland alienation.

Background

Petitioners are challenging a project that they claim "threatens to overwhelm one of New York City's crown jewels, historic Greenwich Village" (amended petition, ¶ 1). The amended petition contends that the project's proponent, NYU, "seeks to cram

almost 2 million square feet of sweeping new development space onto two square blocks in the heart of the Village – much of it unrelated to any academic purpose – over the objections of neighborhood groups, preservationists, much of NYU's own faculty, and a unanimous local Community Board" (*id.*). They assert that "City officials" have "rubber-stamped NYU's plan, and even facilitated it by, among other things, illegally turning over public park land for NYU's use, illegally permitting destruction of an historic preservation site, and illegally ignoring deed restrictions" (*id.*).

The amended petition asserts further that "the City refused even to consider the adverse impacts on the most affected group here – NYU's own faculty, 40 percent of whom are housed on the site. Moreover, the City failed to give adequate consideration to less intrusive alternatives and mitigation measures, and it effectively denied the public any meaningful participation in the review process" (*id.*). Petitioners, "representing thousands of Greenwich Village residents and hundreds of NYU faculty members," commenced this Article 78 proceeding seeking declaratory and injunctive relief to prevent NYU's project from proceeding, by overturning the administrative approvals of the project, which, they allege, are irrational, arbitrary, and capricious.

Petitioners include: (1) Deborah Glick, the New York State Assembly member for the 66th Assembly District, which includes "Washington Square Village" and the surrounding area; (2) Barbara Weinstein, a professor of history at NYU and a member of the "NYU Faculty Against the Sexton Plan" (NYU Faculty); (3) Judith Chazen Walsh, a member of the "Washington Square Village Tenants' Association"; (4) Susan Taylorson, a member of "LaGuardia Corner Gardens, Inc."; (5) Mark Crispin Miller, a professor of media, culture and communication at NYU and a leader of NYU Faculty; (6) Alan Herman, a member of "Lower Manhattan Neighbors' Organization" (LMNO); (7) Anne Hearn, president of the "Washington Square Village Tenants' Association"; (8) Jeff Goodwin, a sociology professor at NYU and a member of NYU Faculty; (9) Jody

Berenblatt, a member of LMNO; (10) NYU Faculty, a Delaware 501 (c) (3) not-for-profit organization; (11) "Greenwich Village Society for Historic Preservation," a 501 (c) (3) not-for-profit organization; (12) "Historic Districts Council," a not-for-profit New York corporation; (13) "Washington Square Village Tenants' Association"; (14) "East Village Community Coalition," a 501 (c) (3) not-for-profit organization; (15) "Friends of Petrosino Square," an unincorporated association; (16) Georgette Fleischer, president of Friends of Petrosino Square; (17) "LaGuardia Corner Gardens, Inc.," a 501 (c) (3) not-for-profit organization; (18) LMNO, a 501 (c) (3) not-for-profit organization; (19) "SoHo Alliance," a New York registered not-for-profit corporation; (20) "Bowery Alliance of Neighbors," an unincorporated association; (21) "NoHo Neighborhood Association," a not-for-profit unincorporated association; and (22) "Washington Place Block Association," a not-for profit unincorporated association.

Respondents include: (1) Rose Harvey, Acting Commissioner of the New York State Office of Parks, Recreation, and Historic Preservation (OPRHP); (2) OPRHP, a public agency of the State of New York; (3) Paul T. Williams, Jr., president and chief executive officer of the Dormitory Authority of the State of New York (DASNY); (4) DASNY, a public benefit corporation; (5) Veronica M. White, Commissioner of the Department of Parks and Recreation (DPR) of the City of New York (City); (6) DPR, a public agency of the City; (7) Janette Sadik-Khan, Commissioner of the City's Department of Transportation (DOT); (8) DOT, a public agency of the City; (9) Mathew M. Wambua, Commissioner of the City's Department of Housing Preservation and Development (DHPD); (10) DHPD, a public agency of the City; (11) Amanda Burden, Director of the Department for City Planning (DCP) and the Chairperson of the City Planning Commission (CPC); (12) CPC, a public commission of the City; (13) DCP, a public agency of the City; (14) Christine Quinn, Speaker for the City Council; (15) City Council, the City's legislative body; (16) the City, a domestic municipal corporation; and

(17) third-party necessary respondent NYU, a private educational corporation and sponsor of the project.

To advance the project, NYU obtained the City's permission to rezone two Greenwich Village "super blocks" (Superblocks), 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 (amended petition, ¶ 2). These largely residential Superblocks include open space and park land – public amenities that petitioners assert are in short supply in Greenwich Village. The project will eliminate these public spaces. NYU will construct "sweeping buildings," constituting almost two million square feet, about half of which is slated for non-academic purposes, including a performing arts center, a gymnasium, housing, and retail establishments, and will require at least 20 years to complete (*id.*, ¶ 3). The Superblocks contain five apartment buildings, housing approximately 4,500 residents, many of whom are low-income renters or NYU faculty members who cannot merely leave and find another place to live (*id.*, ¶ 4).

Petitioners claim that concentrating this massive development on these two Superblocks will have profound consequences for an already-congested Greenwich Village, without mitigation (*id.*, ¶ 6). Nevertheless, CPC and the City Council never required NYU to demonstrate its need for such concentrated development space on the Superblocks. Allegedly, the City Respondents violated several legal requirements intended to protect the public and public resources, including the following:

(a) **Alienation of Public Lands**: The "Public Trust Doctrine," a common-law protection for public park land, forbids NYU's plan unless the State Legislature formally alienates the affected park land by, among other steps, enacting legislation and creating substitute parkland. The City Respondents authorized NYU's plan without any such prior state authorization, in violation of this legal requirement.

(b) **Environmental Review Deficiencies**: The City Respondents permitted NYU to proceed with the project although environmental laws preclude NYU from imposing these "profoundly adverse impacts" because

NYU has less intrusive alternatives.

(c) **Denying the Public Meaningful Input**: Open Meeting Laws, and the Uniform Law Use Review Procedure (ULURP), require that these sorts of significant decisions be made transparently, in open, public meetings. The City Respondents made many of their decisions privately, rather than based on a full, open assessment of the project, the stated need for it, the consequences to residents, and the applicable laws and regulations. In so doing, they violated ULURP, which requires the CPC to give the public a meaningful opportunity to be heard before rendering its decision.

Petitioners seek to stop the project, and to compel City officials to comply with all of their legal obligations before considering it further. They claim that the proceeding is not about the merits of NYU's project or the worthiness of its goals, but, rather, about compliance with state and local laws in alienating public lands, approving a major rezoning, lifting deed restrictions mandated by law, and allowing unmitigated environmental harm (*id.*, ¶ 13).

The amended petition contains six causes of action. This motion for discovery relates to the first cause of action which is asserted against DOT, Janette Sadik-Khan, DPR, Veronica M. White, and the City. It alleges that respondents violated the Public Trust Doctrine, because the City Respondents authorized NYU's plan without any prior state legislative authorization.

The second cause of action is against DASNY, Paul T. Williams, OPRHP, Rose Harvey, City Council, Christine Quinn, DCP, CPC, and Amanda Burden. It alleges that the court should declare that these respondents have violated New York Parks, Recreation and Historic Preservation Law § 14.09.

The third cause of action is against City Council, DHPD, Mathew M. Wambua, and the City. It alleges that the decision to approve the NYU application was a government determination made in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion.

The fourth cause of action is against Burden, DCP, CPC, the City Council, Quinn, and the City. It alleges that the decision to approve the NYU application on the basis of a deficient "Final Environmental Impact Statement" was a government determination made in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion.

The fifth cause of action is against Burden, DCP, CPC, the City Council, and Quinn. It alleges that the failure to adhere to ULURP was a government determination made in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion.

The sixth cause of action is against the City Council, Quinn, and the City for failure to comply with the requirement that the relevant meetings be open to the general public, in violation of Section 103 of the Open Meetings Law.

As stated above, this motion for discovery pertains to the first cause of action pertaining to a violation of the Public Trust Doctrine. As alleged in the amended petition, the Public Trust Doctrine, a common-law protection for public parkland, forbids NYU's plan unless the State Legislature formally alienates the affected parkland by enacting legislation and creating substitute parkland. Petitioners complain that the City Respondents authorized NYU's plan without any such prior state authorization.

According to the amended petition, the project requires the City to transfer to NYU two parcels of City-owned land currently used as public parkland. Both are located along the west side of Mercer Street, with one located between West Houston and Bleecker Streets, and the other located between West 3rd and West 4th Streets. Both parcels are maintained as publicly-accessible open spaces for public recreation (amended petition, ¶ 155; diagram 2-1). Also involved in the project is the "LaGuardia Place" parcel, a space established in the 1990s that includes trees, plants, public benches, and a statute of Fiorello LaGuardia. It is located on LaGuardia Place, between

Bleecker Street and West 3rd Street (*id.*, ¶ 160; diagram 2-1). The fourth parcel is also located between Bleecker Street and West 3rd Street, on the west side of Mercer Street. The project requires that NYU receive extensive easement rights over these park parcels (*id.*, ¶ 158; diagram 2-1).

The project would affect a fifth park parcel, LaGuardia Corner Gardens (LCG), which is located on the southeast corner of Bleecker Street and LaGuardia place (*id.*, ¶ 167). There have been multiple community initiatives to transfer LCG from DOT to DPR and remap the land from roadbed to parkland. CPC, the Manhattan Borough President, and Community Board 2 (CB2) approved the transfer as early as 1967, but the transfer was not completed. Subsequent resolutions occurred in 1979, 1995, and 2004. However, NYU refused to grant consent, which blocked the transfer (*id.*, ¶ 168). Petitioners contend that, because the State Legislature has not authorized the alienation of any of the five parks, the City may not transfer any of its property interests in this parkland for NYU's private development purposes (*id.*, ¶ 172). Petitioners argue that the City has dedicated the tracts as parkland and protected them from alienation under the Public Trust Doctrine, and that the City has made the tracts continuously available to the public for its recreational use for decades.

Petitioners contend that the motion for discovery results from the position by the City Respondents and NYU about parkland alienation, namely, that the City's failure to formally map these sites as parks is conclusive proof that it never intended them to be dedicated parkland. Petitioners argue that public lands can become dedicated parks, either expressly or by implication. The City Respondents do not dispute this assertion (*see* memorandum of law in opposition to the order to show cause at 11). Petitioners contend that the reason that formal mapping never occurred is because of NYU's "steadfast opposition over many years" (affirmation of Randy M. Mastro, Esq., dated February 21, 2013 [Mastro aff], ¶ 6). Petitioners claim that respondents possess

documents that will confirm that NYU's opposition prevented the parcels from becoming formally mapped. The "City pursued formal dedication of these several tracts as parkland but NYU was the '880-pound gorilla' that got in the way" (*id.*, ¶¶ 6-7).

> The documents that petitioners seek include:
> (1) all documents related to a February 9, 2007 "Greenstreets Memorandum of Understanding" between DOT and DPR (February 9, 2007 MOU);
>
> (2) all documents relating to NYU's position at any point in time on transferring any of these four Superblock sites to DPR on formally mapping them as parks on the "City Map";
>
> (3) copies of all communications between DPR and NYU about the February 9, 2007 MOU;
>
> (4) all executed "Greenstreets MOUs," as well as supporting documents and communications;
>
> (5) copies of all communications between DPR and NYU about the four Superblock sites and concerning NYU's position on mapping the sites as City parks;
>
> (6) relevant to the March 1995 CB2 resolution to transfer the strips to DPR, copies of all documents reflecting which property owners did not consent and which property owners consented to the transfer of the sites from DOT to DPR;
>
> (7) copies of all communications from DPR to financial donors of Mercer Playground, including, but not limited to: Kathryn Freed, Anthony Dapolito, and Scholastic Inc., for the period to and including May 15, 1999;
>
> (8) copies of all communications between DOT and DPR regarding a February 12, 2012 licensing agreement for LCG;
>
> (9) copies of all LCG "Green Thumb Licensing Agreements" executed prior to the February 12, 2012 licensing agreement;
>
> (10) all documents relating in any way to any effort within City government to transfer these four Superblock sites to DPR and formally map them as parks on the City Map;
>
> (11) all documents relating in any way to City Respondents making these

four Superblock sites available to the public for any park or recreational uses and maintaining them as such for any period of time; and

(12) all documents relating in any way to NYU's position, at any point in time, on transferring any of these four Superblock sites to DPR on formally mapping them as parks on the City Map.

Petitioners argue that expedited discovery and an expedited hearing on the first cause of action is warranted as to two questions raised by respondents' papers: (1) whether the ministerial process of "mapping" has been performed for all parks, and (2) whether NYU obstructed the mapping process for some or all of the four parks.

The City Respondents and NYU (in separate memoranda) argue that: (1) the discovery that petitioners seek is neither material nor necessary to their public trust claim, because the issue should be decided as a matter of law; (2) whether other parcels have been dedicated as parkland or have park-like indicia is not relevant to this proceeding and would be extraordinarily burdensome; (3) the discovery requests are overbroad and burdensome; and (4) petitioners have not set forth any basis for bifurcating their public trust claim and holding a separate expedited hearing on that claim alone.

Discussion

"[D]isclosure is available only by leave of the court in a CPLR article 78 proceeding" (*Stapleton Studios v City of New York*, 7 AD3d 273, 274 - 275 [1st Dept 2004], citing CPLR 408, 7804 [a]). In an Article 78 proceeding, a court should not grant leave to conduct discovery "absent a showing that the discovery sought was likely to be material and necessary to the prosecution or defense" of the proceeding (*id.*, at 275). Petitioners have not made the requisite showing.

The discovery application pertains to the Public Trust Doctrine. The Public Trust Doctrine provides 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]). "[L]egislative approval is required when there is a substantial intrusion on parkland for non-park purposes, regardless of whether there has been an outright conveyance of title and regardless of whether the parkland is ultimately to be restored" (*id.*). Moreover, "an implied dedication may exist 'when a municipality's acts and declarations manifest a present, fixed, and unequivocal intent to dedicate'" (*Powell v City of New York*, 85 AD3d 429, 431 [1st Dept], *lv denied* 17 NY3d 715 [2011], quoting *Riverview Partners v City of Peekskill*, 273 AD2d 455, 455 [2d Dept 2000]).

According to petitioners, all indicia show that an "implied dedication" occurred in that the City deemed the lots parkland, and this is sufficient, with formal mapping unnecessary. This includes the following: (1) the City has permitted the land to be used by the community for recreational purposes over an extended period of time; (2) park signs and DPR insignia have been placed at the sites; (3) City officials have made public statements identifying the sites as parks; (4) DPR (as opposed to other City agencies) has maintained the sites for a substantial period of time; and (5) City websites contain references to the sites as parks. As to this argument, petitioners have presented an array of evidence to support the assertion. Thus, it appears that discovery is unnecessary for petitioners to litigate their opposition to the NYU project on the merits.

Significantly, petitioners are obtaining the bulk of the information sought on this motion for expedited discovery through their FOIL requests. "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, art 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" (*Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 78 [1984]). Respondents represent that the FOIL requests are being handled "expeditiously" (City Respondents' memorandum of

law in opposition at 11-12). According to petitioners themselves, they will be obtaining document requests numbered one through nine, above, through their FOIL request (*see* Mastro aff at 5-7).

Petitioners assert that they "need expedited discovery to refute the Respondents' false claims that the City never intended or even attempted to treat these four sites as parks" (memorandum of law in support at 1). In support of this assertion, they submit, among other things, the affidavit of former Park Commissioner Henry J. Stern, who states that, as Commissioner, he repeatedly requested the transfer of these sites to DPR, and to officially list them as such on the City Map, but, on each occasion, NYU objected. Thus, it was only "NYU's obstructionist and steadfast opposition over many years" that prevented the sites from becoming mapped as parks. That petitioners seek to "refute" respondents' allegedly false claims that "the City never intended or even attempted to treat these four sites as parks" does not make the requested discovery necessary or material. The information that petitioners seek (information as to past governmental action as to the sites) is neither material nor necessary to assess whether the respondents' determination to permit the project to go forward violated the Public Trust Law (*see Matter of CRP/Extell Parcel I, L.P. v Cuomo*, 101 AD3d 473, 474 [1st Dept 2012] ["The court properly denied discovery in connection with the CPLR article 78 proceeding, as the material petitioner sought to be discovered is neither material nor necessary to assess whether the Attorney General's determinations were affected by an error of law or arbitrary and capricious"]).

Indeed, re-examining past governmental action or inaction in connection with a present challenge would be contrary to the policy of resolving Article 78 proceedings expeditiously (*Matter of Council of City of N.Y. v Bloomberg,* 6 NY3d 380, 389 [2006] ["Article 78 proceedings are indeed designed for the prompt resolution of largely legal issues, rather than for discovery, trials and 'credibility judgments'"] [citation omitted];

Matter of Town of Pleasant Val. v New York State Bd. of Real Prop. Servs., 253 AD2d 8, 15 [2d Dept 1999] ["Because discovery tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding, discovery is granted only where it is demonstrated that there is need for such relief"]).

Much of the argument for discovery is based on the assertion that the only reason that the sites at issue were not mapped as parks is because of "NYU's obstructionist tactics and steadfast opposition" (Randy M. Mastro, Esq. February 26, 2013 letter [Mastro Letter] at 2). That NYU previously objected to the mapping is not contested. Whatever tactics it used in the past, be it labeled "obstructionist" or otherwise, does not appear to be a decisive issue in this proceeding. It appears from the motion papers and supporting documentation that petitioners have ample evidence to submit upon which the court may render a determination as whether the sites should be deemed dedicated parkland without formal mapping. Furthermore, the response to the outstanding FOIL request may yield further relevant evidence.

Petitioners cite *Matter of Seniors for Safety v New York City Dept. of Transp.* (101 AD3d 1029 [2d Dept 2012]) for the proposition that "the Court cannot resolve petitioners' parkland alienation claim without first resolving this factual dispute through discovery and a hearing." The factual dispute is the City's intent by not mapping the sites as parkland. However, in *Matter of Seniors for Safety*, discovery was crucial to the dispositive issue of whether the statute of limitations barred the claim. The Second Department held that the "Supreme Court erred in holding that the first cause of action was barred by the statute of limitations, without first conducting a factual hearing to resolve disputed issues of fact relating to that issue" (101 AD3d at 1032). Thus, unlike here, the discovery sought was vital to adjudication of a dispositive issue.

Petitioners also cite *Matter of Angiolillo v Town of Greenburgh* (290 AD2d 1, 11 [2d Dept 2001], *lv denied* 98 NY2d 602 [2002]) for the proposition that "whether a parcel

has become a park by implication is a question of fact which must be determined by such evidence as the owner's acts and declarations and the circumstances surrounding the use of the land" (*id.*) However, the court's determination as to whether the parkland and parkway land at issue could be alienated was based on the statute that created the Sprain Brook Parkway and the Rochambeau Park, as well as other statutory provisions, and an objective consideration of whether the subject property had become a park by implication (*id.*). Discovery as to administrative records was not necessary to resolve the issue. That a factual analysis must be made to determine the legal issue of whether the sites have been dedicated as parkland does not require discovery where the relevant facts are not in the exclusive possession of the City Respondents.

Finally, petitioners argue that the discovery requested will speed, rather than slow, the proceeding, because it will enable the court to resolve this "inherently factual dispute" (Mastro Letter, at 4). In making this argument, petitioners characterize the discovery as "targeted" (*id.*).

As stated above, nine of the categories of documents requested are forthcoming through the FOIL request. The additional documents sought through expedited discovery cannot be fairly characterized as "targeted" in that it includes: (1) all documents relating in any way to any effort within City government to transfer these four Superblock sites to DPR and formally map them as parks on the City Map; (2) all documents relating in any way to City Respondents making these four Superblock sites available to the public for any park or recreational uses and maintaining them as such for any period of time; and (3) all documents relating in any way to NYU's position at any point in time on transferring any of these four Superblock sites to DPR on formally mapping them as parks on the City Map.

Accordingly, it is

ORDERED that the motion by petitioners is denied.

Dated: 4/2/13

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.

FILED

APR 05 2013

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