Matter of Bronx Council for Envtl. Quality v City of New York
2018 NY Slip Op 31513(U)
July 5, 2018
Supreme Court, New York County
Docket Number: 100240/18
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

BRONX COUNCIL FOR ENVIRONMENTAL QUALITY and CHAUNCY YOUNG,

Petitioners,

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

Index No.: 100240/18
DECISION/ORDER

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY COUNCIL, THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, THE NEW YORK CITY DEPARTMENT OF SMALL BUSINESS SERVICES, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, and MITCHELL J. SILVER, as Commissioner of The New York City Department of Parks and Recreation,

Respondents.

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HON. CAROL R. EDMEAD, JSC:

In this Article 78 proceeding, the petitioners Bronx Council for Environmental Quality (BCEQ) and Chauncy Young (Young; together, petitioners) seek a judgment to declare invalid and enjoin certain official actions undertaken by the respondents (motion sequence number 001). For the following reasons, this petition is denied.

FACTS

The dispute underlying this proceeding centers on a 4.4 acre parcel of waterfront property that is located in the County of the Bronx, City and State of New York, and is known as Harlem River "Pier 5" (Pier 5). *See* verified answer, Alderson aff, ¶ 4. Pier 5 is bounded on the North by Mill Pond Park, on the east by the Major Deegan Expressway, on the south by the 149th Street

Bridge (between Manhattan and the Bronx), and on the west by the Harlem River. *Id.*

BCEQ is a Bronx-based not-for-profit organization composed of volunteer residents and environmentalists who are dedicated to improving the borough's air, land and water quality. *See* amended verified petition, ¶ 4. Young is a Bronx resident, and a member of the non-party Harlem River Working Group (HRWG), an environmental consortium that was organized by BCEQ to work with City government to develop plans for the use of Harlem River waterfront property that include rights of public access. *Id.*, ¶¶ 4-5. In their petition, BCEQ and Young allege that the Pier 5 parcel is actually part of Mill Pond Park, and should thus be deemed to constitute City-owned parkland. *Id.*, ¶¶ 35-45. BCEQ and Young further allege that the respondents have illicitly transferred the Pier 5 parcel to a private real estate developer who intends to commence a construction project on the parcel that severely restricts public access to the waterfront (the Bronx Point Project). *Id.*

The named respondents in this proceeding are as follows: 1) the City of New York (the City); 2) the New York City Council (the City Council), the City's legislative body; 3) the New York City Economic Development Corporation (EDC), a not-for-profit corporation that represents the City in economic development transactions; 4) the New York City Department of Small Business Services (DSBS), the City agency charged with providing assistance to those small business owners that wish to do business with the City; 5) the New York City Department of Parks and Recreation (DPR), the City agency charged with ownership and maintenance of all parkland located inside the City; 6) and Mitchell J. Silver (Silver), the DPR's Commissioner. *See* verified answer, ¶¶ 6-11. In support of their answer, respondents have submitted affidavits from: 1) Colleen Alderson (Alderson), the DPR's Chief of Parklands and Real Estate, who avers

that Pier 5 is not and never was City parkland; and 2) the EDC's vice president, Kate Van Tassel (Van Tassel), who denies that Pier 5 had been illicitly transferred to developers. *Id.*, Alderson aff; Van Tassel aff.

Petitioners originally commenced this Article 78 proceeding on February 15, 2018, but served an amended verified petition and notice of petition one day later on February 16, 2018. *See* petition; amended verified petition. The petition sets forth causes of action for: 1) violation of the public trust doctrine; 2) violation of General Municipal Law § 51; and 3) violation of Section 6 (f) of the federal Land and Water Conservation Fund Act (LWCFA). *Id.* Respondents served a verified answer with affirmative defenses on April 27, 2018. *See* verified answer. Both petitioners and respondents have submitted a quantity of documentary evidence, which the court will review in the following decision that disposes of petitioners' Article 78 application (motion sequence number 001).

DISCUSSION

Normally, the court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether the agency's disputed determination had a rational basis in the record or was instead arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). "The interpretations of [a] respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational." *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791

(1988). Here, however, petitioners are not challenging a specific administrative order or determination issued by any of the respondent agencies. As a result, normal Article 78 analysis does not apply in this case.

Instead, petitioners object to respondents' purported sale of the Pier 5 parcel to a private real estate developer. See amended verified petition, ¶ 3. Petitioners specifically contend that this alleged "sale"[1] was an illicit act pursuant to: 1) the public trust doctrine; 2) General Municipal Law § 51; and/or 3) the LWCFA (54 USC § 200305 [f] [3]). *See* petitioners' mem of law at 7-13. Petitioner's argument hinges on a prerequisite finding that the Pier 5 parcel constitutes "parkland," which is subject to the restrictions contained in these foregoing laws and statutes. Respondents assert that the Pier 5 parcel is not "parkland," however, and request that the instant petition be dismissed as groundless. After reviewing all of the parties' submissions, the court agrees with respondents that the Pier 5 parcel is not "parkland."

In *Friends of Van Cortlandt Park v City of New York* (95 NY2d 623 [2001]), the Court of Appeals reiterated the controlling law in this state that "[i]n the 80 years since [*Williams v Gallatin*, 229 NY 248 (1920)], our 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." 95 NY2d at 630. In case law that followed *Friends of Van Cortlandt Park*, the Appellate Division, Second Department, has

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[1] For their part, respondents deny that any sale of the Pier 5 parcel has taken place. *See* answer, Van Tassel aff, ¶ 21. Respondents instead assert that the Bronx Point Project is a joint venture between two private real estate development companies to whom the City will extend a long term lease for the majority of the Pier 5 parcel. *Id*, ¶¶ 17, 21. Respondents also assert that "the waterfront public open space component of the project will *not* be included in the lease, but the developer will build the open space and fund its maintenance." *Id.*, ¶ 21.

recognized that:

> "To establish that property has been dedicated for public use, there generally must be an unequivocal express or implied offer by the owner and, where required, an express or implied acceptance by the public. Thus, 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."

Matter of Angiolillo v Town of Greenburgh, 290 AD2d 1, 10-11 (2d Dept 2001) (internal citations omitted); *distinguished* 21 AD3d 1101 (2d Dept 2005).

Here, petitioners initially contended that "the Pier 5 site is parkland because the City has expressly dedicated it as parkland." *See* amended verified petition, ¶ 54. Respondents replied that "petitioners point to no legislation that dedicates Pier 5 as parkland, and the relevant portion of the City Map indeed shows that Pier 5 is not mapped parkland." *See* respondents' mem of law at 19. Respondents' contentions both appear to be correct. The submissions that petitioners annexed in support of their petition plainly do not include a copy of any official act by the City that dedicates the Pier 5 parcel as public parkland. *See* amended verified petition, exhibits A-V. Further, the currently effective 2005 Bronx Borough Presidents' Map that respondents annexed to their answer, and the 2006 amendments to that map, all clearly show that the Pier 5 parcel is not marked as parkland, while the Pier 2 & 3 parcels, and the rest of Mill Pond Park, are so marked. *See* verified answer, exhibits A, B, C. Respondents also correctly note that the New York City Administrative Code (NYC Admin Code) requires that all parks "shall be located and laid out on the city map." NYC Admin Code § 25-102. Petitioners reply papers assert that "while a park marking on a Borough President's map could be used to establish the City's dedication of parkland, the opposite is not true." *See* petitioners' reply mem of law at 8. However, the case that petitioners cited in support of their reply argument, *Village of*

Croton-On-Hudson v County of Westchester (38 AD2d 979 [2d Dept 1972]), does not support that argument. That decision did not refer to NYC Admin Code § 25-102 or the City map at all, and it involved a finding of an *implied* parkland dedication, rather than an *express* parkland dedication. 38 AD2d at 979. It is therefore inapposite. Accordingly, in the absence of any official act that expressly dedicated the Pier 5 parcel as parkland, and in view of the fact that the City map does not show the Pier 5 parcel to constitute parkland, the court concludes that petitioners have failed to support their contention that "the City has expressly dedicated [the Pier 5 parcel] as parkland," and rejects that contention.

Petitioners also contend that "the Pier 5 site is parkland because the City has implicitly dedicated it as parkland." *See* amended verified petition, ¶ 55. With respect to this argument, the Appellate Division, First Department, has observed that:

> "Where . . . there is no formal dedication of land for public use, an implied dedication may exist when the municipality's acts and declarations manifest a present, fixed, and unequivocal intent to dedicate. In determining whether a parcel has become a park by implication, a court should consider the owner's acts and declarations and the circumstances surrounding the use of the land. The burden of proof rests on the party asserting that the land has been dedicated for public use."

Matter of Glick v Harvey, 121 AD3d 498, 499 (1st Dept 2014) (internal citations omitted), *affd* 25 NY3d 1175 (2015). However, in the *Glick* decision, the First Department has also held that the petitioner's failed to meet their burden of proof on the issue of implied dedication, for the following specified reasons:

> "While the City has allowed for the long-term continuous use of parts of the parcels for park-like purposes, such use was not exclusive, as some of the parcels . . . have also been used as pedestrian thoroughfares. Further, any management of the parcels by the [DPR] was understood to be temporary and provisional, pursuant to revocable permits or licenses. Moreover, the parcels have been

> mapped as streets since they were acquired by the City, and the City has refused various requests to have the streets de-mapped and re-dedicated as parkland."

121 AD3d at 499 (internal citations omitted). Here, petitioners assert that the available evidence indicates that the City intended to dedicate the Pier 5 parcel as parkland, while the respondents claim the opposite. After careful consideration of that evidence, the court finds for the respondents on the issue of implied dedication.

In their moving papers, the petitioners identify the following as evidence of the City's "present, fixed, and unequivocal intent to dedicate" the Pier 5 parcel as parkland: 1) that in 2005-2006, the City permitted the alienation of certain other parkland located close to the Pier 5 parcel for the construction of (a) a new Yankee Stadium (specifically, Macombs Dam Park and Mullaly Park), and (b) the Bronx Terminal Market (specifically, land across the street from the Pier 5 parcel), and was thereafter obliged by federal law to designate other land - including the Pier 5 parcel - as replacement parkland; 2) that the DPR controlled both Mill Pond Park and the Pier 5 parcel for a period of 10 years, during which it kept the Pier 5 parcel enclosed in a gated fence emblazoned with the DPR's official signage; 3) that the City and the Bronx Borough President both issued (separate) reports that identified the Pier 5 parcel as a potential waterfront public-use development site; and 4) that the respondents permitted BCEQ and the HRWG to use the Pier 5 parcel for two separate environmental projects, specifically, (a) the Brownfield Opportunity Area study and (b) the Pop-Up Wetland project. *See* amended verified petition, ¶¶ 20-34; Argenti aff, ¶¶ 7-29; exhibits A-V. As was previously mentioned, the respondents respond that none of this evidence indicates a "present, fixed, and unequivocal intent to dedicate" the Pier 5 parcel as parkland. *See* respondents' reply mem of law at 2-11, 20-27. The court will review each item in

turn.

As regards petitioners' "replacement parkland" allegations, it is clear that the LWCFA applied to the Yankee Stadium project, since it received partial federal funding.[2] It is further clear that Section 6 (f) of the LWCFA requires that an equal amount of replacement parkland be designated whenever existing parkland is commercially developed as part of a federally funded project. 54 USC § 200305 (f) (3). However, respondents have demonstrated that the Pier 5 parcel was *not* part of the designated replacement parkland. Specifically, respondents have presented copies of the 2006 Bronx Borough President's Map and of the 2006 Yankee Stadium Redevelopment Project Final Environmental Impact Statement, both of which depict all of the land that was designated as replacement parkland. *See* answer, McCamphill affirmation, exhibits C, G. This land consists of several adjoining parcels, totaling 5.11 acres, and includes Piers 2 and 3, but does *not* include the Pier 5 parcel. *Id.* Respondents have also presented a copy of the 2009 Gateway Center at the Bronx Terminal Market Final Environmental Impact Statement, which depicts all of the land that the developer and the City agreed to co-develop as "waterfront public open space" in that project. *Id.*, exhibit J. This land consists of a 2 acre parcel that covers Pier 4, but similarly does *not* encompass the Pier 5 parcel. *Id.* Because this documentary evidence clearly shows all of the nearby land that was designated as "replacement parkland" in the Yankee Stadium and Bronx Terminal market projects, and the Pier 5 parcel is plainly *not* depicted as part of that land, the court finds that the petitioners' contention that the Pier 5 parcel is "replacement parkland" is not supported by any evidence. Therefore, the court rejects

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[2] Petitioners do not contend that the Bronx Terminal Market project was subject to the LWFCA.

petitioners' "replacement parkland" contention.

As evidence to support their "DPR ownership and control" argument, petitioners assert that, while it was under the DPR's management, the Pier 5 parcel was labeled as a "Mill Pond Park Extension" on a "New York City Zoning and Land Use Application," and this should be interpreted to mean that the City viewed the Pier 5 parcel as part of Mill Pond Park. *See* amended verified petition, ¶ 26. However, the petitioners have not presented a copy of this alleged document. For their part, respondents have presented a copy of a joint application that the DPR and EDC submitted to the New York City Arts Commission in 2008 in connection with a development plan for Mill Pond Park itself. *See* verified answer, McCamphill affirmation, exhibit K. This document plainly states that the Pier 5 parcel "has also been included in the concept plan for planning purposes, but is currently unfunded and will not be built as part of this project." Id. Respondents assert that this documentary evidence demonstrates that the Pier 5 parcel "was outside the scope of the application." *See* respondents' mem of law at 10. The court agrees, because the language on the application speaks for itself, and because the petitioners have failed to produce any documentary evidence that demonstrates that the DPR ever held out the Pier 5 parcel as a "Mill Pond Park Extension." Therefore, the court rejects the respondents' second contention.

To support their "official reports" allegations, the petitioners have presented copies of the NYC Mayor's 2007 "PlaNYC" and the Bronx Borough President's 2011 "Bronx Waterfront Vision" proposals, both of which endorsed a southward expansion of Mill Pond Park which would cover the Pier 5 parcel. *See* amended verified petition, Argenti aff, ¶¶ 13-15; exhibits J, L. Petitioners particularly refer to a DPR sign that was placed on the fence around the Pier 5 parcel

in 2009 that contained a map depicting the parcel as part of a newly expanded Mill Pond Park. *Id.*, exhibit K. Respondents reply by citing the decision of the Appellate Division, Third Department, in *Matter of Lazore v Board of Trustees of Vil. of Massena* (191 AD2d 764 [3d Dept 1993]), which addressed similar facts and disposed of a similar argument as follows:

> "The Park and Recreation Facility Development Plan . . . relied upon by petitioner merely lists possible development and was never meant to be binding even though it includes a map of the parcel which describes its use as a park. A memorandum to respondent by the [respondent] states that the plan was not 'set in concrete' and would be 'flexible enough to add or delete priorities.' Additionally, although the parcel was designated part of a Greenbelt–Preservation district, this is not dispositive because the permitted purposes of land within this district include other uses as well as outdoor recreation. Although evidence of adoption of a zoning map listing the parcel as a park would finally decide the issue in petitioner's favor, respondent contends that such a map was not adopted by the Village and petitioner offers no proof establishing otherwise. Consequently, given all of the facts and circumstances, including the evidence establishing that the parcel was used for public works storage and snow dumping for some time, we decline to disturb Supreme Court's determination that the parcel was not a park."

191 AD2d at 766 (internal citations omitted). Respondents urge that petitioners documents herein only show that "the City merely considered the possibility of future park use" of the Pier 5 parcel, and urge that "the mere consideration of future park use [should not] constitute an implicit dedication of parkland." *See* respondents' mem of law at 25. Respondents urge both that evidence of "mere consideration" does not rise to the level of "present, fixed, and unequivocal intent to dedicate," and that a judicial finding that such "mere consideration" is sufficient evidence of such intent would have the chilling effect of preventing municipalities across the state from ever engaging the general public or public advocacy groups (such as petitioners) in the City-planning process for fear of being ambushed by a "gotcha" argument. *Id.* at 25-26. The court agrees, at least with the first point. Petitioners' submissions from the Mayor

and Bronx Borough President are not official acts, but merely informational releases to the public that tout the possibility of expanding Mill Pond Park to cover the Pier 5 parcel. When judged objectively, these documents, at best, demonstrate the "mere consideration of future park use" of the parcel, and do not demonstrate a "present, fixed, and unequivocal intent to dedicate" the parcel as parkland. Therefore, the court rejects petitioners' third contention.

Petitioners finally aver that the DPR authorized them to conduct two environmental projects on the Pier 5 parcel: 1) the 2012 Pop-Up Wetland Project and ; 2) the two-phase 2007 and 2014 Brownfield Opportunity Area Project. *See* amended verified petition, Argenti aff, ¶¶ 22-29. Petitioners urge that the fact that they had to apply to the DPR for permits to conduct these projects shows that the DPR considered the Pier 5 parcel to constitute "parkland" over which it had jurisdiction. *See* petitioners' mem of law at 8-9. Respondents reply that, while the DPR had jurisdiction over the Pier 5 parcel, it was always kept fenced off and closed to the public, except for some occasions on which the DPR issued short-term, limited-use, revocable-at-will permits for the temporary entry and use of the parcel. *See* respondents' mem of law at 22-23. Respondents note that the DPR issued permits for several circuses and carnivals to use the Pier 5 parcel in addition to the petitioners' two projects. *Id.* Respondents deny that the DPR's issuance of such temporary permits evinced any intent on their part to permanently dedicate the Pier 5 parcel as parkland. *Id.* The court believes that the Court of Appeals' holding in *Matter of Glick v Harvey*, which upheld the above-quoted decision of the Appellate Division, First Department, is dispositive of this issue. Therein, the Court found as follows:

> "Here, as the Appellate Division noted, several documents created prior to this litigation demonstrate that the City did not manifest an unequivocal intent to dedicate the contested parcels for use as public parks. The permit, memorandum

> of understanding and lease/license relating to Mercer Playground, LaGuardia Park and LaGuardia Corner Gardens, respectively, show that 'any management of the parcels by the [DPR] was understood to be temporary and provisional.' Thus, those documents' restrictive terms show that, although the City permitted and encouraged some use of these three parcels for recreational and park-like purposes, it had no intention of permanently giving up control of the property. And, as the Appellate Division observed, the City's 'refus[al] [of] various requests to have the streets de-mapped and re-dedicated as parkland' further indicates that the City has not unequivocally manifested an intent to dedicate the parcels as parkland.
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> "That a portion of the public may have believed that these parcels are permanent parkland does not warrant a contrary result. Petitioners did not establish the City's unequivocal intent to permanently dedicate this municipal property, as there was evidence that the City intended the uses to be temporary, with the parcels to remain under the City's control for possible alternative future uses."

25 NY3d 1180-1181 (internal citations omitted). Here, too, the available evidence shows that the DPR kept the Pier 5 parcel closed to the public while it was under DPR management, but occasionally issued permits for restricted, short-term use of the parcel. Under the *Glick* holding, the act of issuing such permits does not constitute evidence of DPR's "present, fixed, and unequivocal intent to dedicate" the parcel as parkland. *See also Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation*, 22 NY3d 648 (2014) (issuance of permits and licenses to restaurants operating on parkland does not violate the public trust doctrine). Therefore, the court rejects petitioners' fourth allegation as insufficient. As a result of the foregoing, the court concludes that petitioners have failed to establish that the respondents made any "implied dedication" of the Pier 5 parcel as parkland. Having made this finding, the court turns its attention to the three causes of action set forth in the instant petition.

As was previously mentioned, petitioners' first cause of action alleges violation of the public trust doctrine. *See* amended verified petition, ¶¶ 50-59. However, as was also previously

mentioned, a party which seeks to invoke the public trust doctrine must establish either an express or implied dedication of the disputed land as parkland. *Matter of Glick v Harvey*, 121 AD3d at 499, affd 25 NY3d 1175. Here, for the reasons discussed above, the court has determined that petitioners have failed to meet their burden of proof that respondents made either an express or an implied dedication of the Pier 5 parcel as parkland. As a result, petitioners first cause of action must fail, as a matter of law.

Petitioners' second cause of action alleges that respondents violated General Municipal Law § 51 by committing "waste" by illicitly alienating the Pier 5 parcel to a private developer as part of the Bronx Point project. *See* amended verified petition, ¶¶ 60-65. However, the court has already determined that: 1) the Pier 5 parcel does not constitute parkland; and 2) the documentary evidence shows that the Pier 5 parcel is neither being alienated nor leased under the Bronx point Project. As a result, petitioners have failed to establish that respondents performed any acts that constitute "waste," as the term is defined by General Municipal Law § 51. Therefore, petitioners' second cause of action, too, must fail, as a matter of law.

Petitioners' third cause of action alleges that respondents violated Section 6 (f) of the LWCFA. *See* amended verified petition, ¶¶ 66-74. However, as the court discussed in its earlier review of the documentary evidence herein, it is evident that respondents have rededicated a sufficient amount of replacement parkland to compensate for that which was taken in the Yankee Stadium and Bronx Terminal Market projects. Therefore, petitioners have again failed to meet their burden of proof, and cannot sustain their third cause of action. Accordingly, having determined that all of petitioners' causes of action are legally insufficient and/or unsupported by the relevant documentary evidence, the court finds that the instant petition should be denied, and

this Article 78 proceeding dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition of for relief, pursuant to CPLR Article 78, of the petitioners Bronx Council for Environmental Quality and Chauncy Young (motion sequence number 001) is denied in full, and the proceeding is dismissed, with costs and disbursements to respondents. And it is further

ORDERED that counsel for respondents shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for petitioners.

Dated: New York, New York
July 5, 2018, 2018

ENTER:

Hon. Carol R. Edmead, JSC

HON. CAROL R. EDMEAD J.S.C.