SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

COMMUNITY UNITED TO PROTECT THEODORE ROOSEVELT PARK et al.

- v -

CITY OF NEW YORK et al.

INDEX NO. 152354/2018

MOT. DATE

MOT. SEQ. NO. 001 and 002

The following papers were read on this motion to/for Article 78

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____
Replying Affidavits NYSCEF DOC No(s)._____

This is an Article 78 proceeding, whereby petitioners seek to challenge a determination by the New York City Department of Parks and Recreation ("Parks Department") which granted permission to the American Museum of Natural History (the "Museum") to construct an addition which will replace three existing buildings and will expand into neighboring Theodore Roosevelt Park (the "Park") by approximately a quarter acre. The proposed addition is named the Gilder Center for Science, Education and Innovation and would occupy 230,000 square feet, stand five stories tall and be located on the western side of the Museum (the "project"). Petitioners allege that the determination, which constitutes in *toto* the Parks Department's Letter of Approval dated December 4, 2017, Statement of Findings of even date and additional letter dated April 25, 2018 (collectively the "determination") violates the New York City Charter. Further, petitioners maintain that the determination will result in the loss of public parkland and cause "catastrophic environmental damage to the area..."

Petitioners are a self-styled "coalition of more than 5,000 New Yorkers [who] seek to preserve [the] Park and protect the neighborhood surrounding it from irreversible environmental damage." Respondents are the City of New York (the "City"), the Parks Department, Mitchell J. Silver, Commissioner of the Parks Department, and the Museum.

Petitioner's allege that the determination should be vacated because the Parks Department misread the Act of 1876 (the "Act"). Section 1 of the Act authorized the Parks Department to:

> enter into a contract with the [Museum] for the occupation by it of the buildings erected or to be erected on that portion of the Central Park, in the city of New York, formerly known as Manhattan square, in accordance with [the Act of 1871] and [the Act of 1875], and transferring thereto and establishing and maintaining therein its museum, library and collections, and carrying out the objects and purposes of the said society.

Dated: 12/10/18

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

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

(Emphasis added.)

It is undisputed that the park area described in the Act is the same as Theodore Roosevelt Park.

Pursuant to the Act, the Parks Department entered into a written lease with the Museum dated December 22, 1877, which provides in pertinent part as follows:

> Whereas, by [the] Act [the Parks Department] is authorized and directed to enter into a contract with the [Museum] for the occupation by it of the buildings erected, or to be erected, on that portion of the Central Park, in the City of New York, known as Manhattan Square, and for transferring thereto and establishing and maintaining therein its museum, library and collections and carrying out the objects and purposes of [the Museum];
>
> And whereas, a building contemplated by said act has now been erected and nearly completed and equipped in a manner suitable for the purposes of said Museum, as provided in the first section of the Act of May fifteenth, eighteen hundred and seventy five, known as Chapter 351 of the laws of 1875, for the purposes of establishing and maintaining therein the said Museum as provided by the said last named Act and by the Act of April fifth, eighteen hundred and seventy one, known as Chapter 290 of the laws of 1871.
>
> And whereas, it is desired as well by the [Parks Department and Museum] that immediately upon the completion and equipment of said building, the [Museum] should be established therein, and should transfer thereto its Museum, Library and Collections and carry out the objects and purposes of the [Museum].
>
> Now, therefore, it is agreed by and between the said parties as follows, viz:
>
> First, That the said party of the first part has granted and demised and let, and doth, by these presents, grant, demise and let, unto the said party of the second part, the said buildings and the appurtenances thereunto belonging, to have and to hold the same so long as the said party of the second part shall continue to carry out the objects and purposes defined in its charter, or such other objects and purposes, as by any future amendment of said charter may be authorized;

Throughout the rest of the lease, the term "building" is used in the singular form, only.

Petitioners contend that the determination should be vacated because the project is subject to Uniform Land Use Review Procedure ("ULURP") review. ULURP was enacted in 1975 and provides a multi-step review process involving public input through hearings and review by, *inter alia,* city agencies, community boards, the Borough President and/or Board, City Council and the Mayor (City Charter § 197-c). Under City Charter § 197-c(a), ULURP review is required for "[s]ite selection for capital projects" and the "[s]ale, lease ... exchange, or other disposition of the real property of the city."

Petitioners further argue that pursuant to the lease, the Museum may only occupy its current footprint, which is confirmed by use of the term "appurtenances". Petitioners argue that the Museum would not have been granted appurtenances if the Museum had been granted the right to "occupy, or construct buildings over, the entirety of [the] Park." Petitioners therefore maintain that the project constitutes an unauthorized disposition of city parkland without compliance with ULURP.

Interrelatedly, petitioners contend that the project should be subject to ULURP review because it "constitutes a site selection for capital projects". Petitioners base this argument on the nature of the project, the Museum's alleged concession the project is a "city capital project" and will be funded "by the

local financing law, with the approval of the comptroller and the mayor, with funding appropriated by the City and State of New York."

Petitioners last claim is that the determination should be vacated because it is irrational, arbitrary and capricious. Petitioners argue that the Parks Department failed to identify the project's significant adverse impacts and rubber-stamped inadequate and incomplete mitigation measures proposed in a Final Environmental Impact Statement ("FEIS") prepared in accordance with the State Environmental Quality Review Act ("SEQRA") and City Environmental Quality Review ("CEQR").

Meanwhile, respondents jointly contend that the petition should be denied based upon controlling case law and because they have correctly interpreted the Act and the lease. Respondents argue that "[w]hile the [l]ease acknowledges that 'a building contemplated by [the Act] has now been erected and nearly completed,' and certain lease provisions dictate the operation and management of that original building (e.g., requiring the Museum to promptly transfer its library and collections into the building then-erected), those provisions relate explicitly to the Museum's operations and do not and are not intended to confine the Museum to that original building or limit the authorization for multiple 'buildings' that was expressly granted in the [Act] and the [l]ease."

Further, respondents maintain that they have complied with the requirements of SEQRA and that petitioners have raised claims for which they failed to exhaust their administrative remedies.

Discussion

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[Tlhe proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi*-judicial hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck. Westchester Countv*, 34 NY2d 222, 231 [1974] [emphasis removed]; *see also Matter of Colton v. Berman*, 21 NY2d 322, 329 [1967]).

The petition first turns on the court's interpretation of the Act. "It is a well-settled principle that [] the correct interpretation of a statute is ordinarily an issue of law for the courts..." (*Roberts v. Tishman Speyer Properties, L.P.*, 62 AD3d 71 [1st Dept 2009] [internal quotations omitted] quoting *Matter of Rosen v. Public Empl. Relations Bd.*, 72 NY2d 42 [1988]). The Act expressly authorizes the Parks Department to enter into a lease with the Museum for the then-existing and as-of-yet constructed buildings within the Park. While Petitioners argue that subsequent legislation sheds light on the legislature's intent when it signed the Act into law, the court disagrees. Only when the meaning of a statute cannot be discerned from its plain language can the court look to legislative intent (see *Vink v. New York State Div. of Housing and Community Renewal,* 285 AD2d 203 [1st Dept 2001]). Moreover, the subsequent legislative actions referred to by petitioners is not evidence of legislative intent at the time the Act was passed.

The court next turns to the lease. Petitioners urge this court to find that the project involves either a new site for a capital project or the disposition of city-owned land. Meanwhile, respondents maintain that the lease grants the Museum the right to construct an appropriate building anywhere within the Park. The court agrees with respondents for the reasons that follow.

The recital provisions of the lease set forth the authority for the Parks Department's grant thereunder, and describe the then-existing building. The first provision of the lease then grants to the Museum the "buildings and the appurtenances thereunto belonging". While petitioners argue that if the Parks Department had intended to lease to the Museum as-of-yet constructed buildings, it would have contained an express provision providing so, this argument is unavailing. The express language of the

lease, when read in its entirety, clearly expresses an intent to grant to the Museum all buildings in the Park. While petitioners' counsel seeks to trivialize the import of the recital provisions referring to the Act in reply, such an argument is fails as a matter of law. The recitals here clearly express the parties' intent when they entered into the lease and are not otherwise contradicted by the lease (*cf. Hutchison v. Ross*, 262 NY 381 [1933]). Moreover, petitioner's argument fails in light of *Tuck v. Heckscher*, (29 NY2d 288 [1971]).

Tuck involved a challenge to the Metropolitan Museum of Art's construction of the Lehman Wing and deals with the same Act and a similarly worded lease. The Court rejected the administrative challenge to the construction of the Lehman Wing and its alleged encroachment into Central Park in light of the express language of the lease which set aside the subject land "for museum purposes in the 1870s." The *Tuck* Court concluded "that there is no substance to petitioner's argument either that the city did not intend the museum to occupy any park land other than that upon which the original building was constructed or that acceptance of the Foundation's offer entailed a 'disposition' of city-owned property requiring Board of Estimate approval."

The court rejects petitioners' argument that *Tuck* is distinguishable. While *Tuck* predates ULURP, there was a similar review process in place under a predecessor statute. Moreover, the *Tuck* Court expressly rejected the argument that the Lehman Wing "constitute[d] a disposition of city property." In considering a similar challenge in connection with the construction of the Hayden Planetarium, Judge Bruce Allen noted that "petitioners do not show any reason why the word 'disposition' should be interpreted differently under ULURP" (*Community Alliance for Responsible Development, Inc. v. American Museum of Natural History Planetarium Authority*, 1997 WL 34848975 [Sup Ct, NY Co 1997]). Nor is *Tuck* distinguishable because the *Tuck* lease expressly defined the area upon which buildings could be granted by metes and bounds as opposed to simply naming the park. As respondents' counsel pointed out at oral argument, the Park is clearly bounded by particular streets and the area of park which was granted to the Metropolitan Museum of Art is situated within Central Park, making its delineation more complicated and therefore requiring specificity.

It is of no moment that the lease uses the singular form of the term building in the provisions following the Parks Department's express grant of "said buildings and the appurtenances thereunto." Assuming *arguendo* that the repeated use of the singular term gives rise to ambiguity, the express language of the lease and the recitals which specifically quote the Act verbatim resolves any question (*Musman v. Modern Deb, Inc.*, 56 AD2d 752 [1st Dept 1977] ["where a recital clause and operative clause are inconsistent and recital clause is clear but the operative clause is ambiguous, the recital clause should prevail..."]).

Finally, the court rejects petitioners' argument that such a reading of the lease renders the term "appurtenances" superfluous. To the extent that the Museum does not reach any portion of otherwise-city-owned land, appurtenances throughout the Park remain necessary. Therefore, the Parks Department's grant of appurtenances in the lease cannot reasonably be read as superfluous.

Petitioners' remaining claim also fails. SEQRA challenges are reviewed under the deferential "arbitrary and capricious" standard in Section 7803(3) of the CPLR. (*Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 NY3d 219 [2007]). "Judicial review of an agency determination under SEQRA is limited to whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination." (*Id.* at 231-232 [internal quotations omitted]). "It is not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency" (*Fisher v. Giuliani*, 280 AD2d 13, 19-20 [1st Dept 2001]).

Here, there can be no dispute that the FEIS met the Park Department's obligation under SEQRA, and the court cannot "second-guess" the agency's determination (*Friends of P.S. 163 v. Jewish Home Lifecare, Manhattan*, 30 NY3d 416 [2017]). Assuming *arguendo* that all of petitioners' arguments on this point are properly before the court, the Parks Department appropriately weighed the issues regarding

hazardous materials at the project site. Indeed, the project site, like many construction projects in New York City, contains metals, volatile organic compounds ("VOCs"), and other hazardous materials. The FEIS sufficiently outlines various mitigation protocols, and petitioners have failed to come forward with sufficient proof that would warrant a finding that such measures lack any rationale. Indeed, this is not a case where the Museum will simply begin digging into the ground. Rather, as respondents' counsel points out, the FEIS outlines "how contaminated soil will be sampled, managed and disposed; how dewatering will be conducted; how the new building will protect against soil vapor intrusion; how air monitoring will be conducted during the construction process; what particular measures will be undertaken in the event that air monitoring results exceed action levels; and requirements for the pre-demolition survey, abatement and disposal of any asbestos, lead-based paint, or polychlorinated biphenyls ("PCBs") encountered in accordance with federal, state and local regulations."

Similarly, issues regarding noise and construction activity were considered by the Parks Department and the proposed measures to deal with these issues, akin to measures used in typical city construction sites, are rational and otherwise sufficient.

In light of the foregoing, the petition must be denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the petition is denied and this proceeding is dismissed; and it is further

ORDERED that in light of the court's decision, the temporary restraint previously imposed by court order dated October 26, 2018 is vacated and motion sequence number 002 is denied as moot and oral argument scheduled for December 11, 2018 is cancelled.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 12/10/18
New York, New York

So Ordered:

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