

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

PRESENT: GOODMAN
Justice

PART 17

JONATHAN GROENBERG
- v -
CITY OF NY

INDEX NO. 105857/06
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

| | PAPERS NUMBERED |
|---|-----------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | _____ |
| Answering Affidavits — Exhibits _____ | _____ |
| Replying Affidavits _____ | _____ |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion Article 78 proceeding
is decided in accordance with the attached

Dated: 7/25/06

EMILY JANE GOODMAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
In the Matter of the Application of
JONATHAN GREENBERG, LUTHER HARRIS,
REBECCA PARELMAN and FUSUN ATESER,

Petitioners,

For an Order and Judgment Pursuant to
Article 78 of the Civil Practice Law
and Rules,

Index No. 105857/06

-against-

THE CITY OF NEW YORK, MICHAEL BLOOMBERG,
in his capacity as Mayor of New York,
ADRIAN BENEPE, in his capacity as
Commissioner of the New York Department
of Parks and Recreation, and THE NEW
YORK CITY DEPARTMENT OF PARKS AND
RECREATION,

Respondents.

-----X
EMILY JANE GOODMAN, J.S.C.:

This proceeding involves plans of respondent New York City Department of Parks and Recreation (the Parks Department) to renovate and redesign Washington Square Park, which is located in New York City, in the heart of Greenwich Village, adjacent to the New York University campus. Petitioners Jonathan Greenberg, Luther Harris, Rebecca Parelman and Fusun Ateser, all Greenwich Village residents, seek a judgment setting aside the currently approved plans of the Parks Department, and ordering that those plans be submitted for a de novo review by Community Board 2, the New York City Landmarks Preservation Commission and the Art Commission, and requiring the Department of Parks to comply with the requirements of the State Environmental Quality Review Act

(SEQRA) and the City Environmental Quality Review (CEQR). On May 19, 2006, this court continued a temporary restraining order entered on May 1, 2006, restraining the City from undertaking any bids, entering contracts, or undertaking any work on Washington Square Park, to the extent that the work is the subject of this litigation, until a decision on this matter is rendered.

This litigation focuses on those aspects of the Parks Department's plans relating to the fountain and fountain plaza,¹ which is located in the midst of the park, slightly off-center from the park's entrance arch. The fountain, or fountain basin, is a circular sunken area, surrounded by steps which serve as a seating area. The fountain is surrounded by a wider circular plaza area which is also sunken slightly below the level of the rest of the park paths and seating areas (the fountain plaza). For many years, particularly during the 1960's and 1970's, the fountain and fountain plaza has been a gathering place for folk singers and other entertainers to perform, and for park visitors to gather to watch the entertainment. That role of the fountain and fountain plaza has been such an important part of the history of the park that the Art Commission resolution preliminarily approving the Parks Department's plans includes a request that "a

¹ The renovation project includes elements which are not the subject of this litigation, including relocation and restoration of two statues, landscape adjustments, drainage work, increase in green space, installation of a perimeter fence, and installation of a new field house and restrooms.

plaque honoring the performers, who are such an integral part of the park's rich history, be incorporated into the design of the park." Resolution of the Art Commission, adopted at a meeting on January 9, 2006.

Petitioners allege that the Parks Department began its plans to redesign Washington Square Park in 2004. According to petitioners, those plans were first revealed to the Community Board 2 Parks Committee at a public meeting of the committee on February 2, 2005. On April 21, 2005, the full Community Board 2 voted to endorse the Parks Department's plans as presented to them, concluding its resolution as follows: "[i]t is further resolved that the park must retain its character as a neighborhood park and as a place intended to encourage freedom of expression and informal performances." Resolution of Community Board 2 as adopted on April 21, 2005.

On May 10 and May 17, 2005, hearings regarding the Parks Department's plans were held before the Landmarks Preservation Commission (Landmarks Commission), which has jurisdiction over most aspects of the renovation, because Washington Square Park is within the Greenwich Village Historic District. According to Jared Knowles, Director of Public Projects in the Preservation Department of the Landmarks Commission, the decisions of the Commission are binding on every aspect of the project other than work relating to works of art such as the statues and the

restoration and relocation of the fountain, which are within the jurisdiction of the Art Commission. At the May 10, 2005 hearing, George Vellonakis, the designer of the Washington Square Park renovation, allegedly stated that the park fountain would be repaired, but that it would remain exactly the same as it was.

On May 17, 2005, following the public meeting, the Landmarks Commission voted to issue a positive report for the renovations to the park.²

Apparently City Council Members Alan Jay Gerson and Christine Quinn had concerns regarding certain aspects of the Parks Department's plans, which resulted in months of discussion between their offices and the Parks Department. On October 6, 2005, Gerson and Quinn wrote to respondent Adrian Benepe, Commissioner of the Parks Department, stating that, in consideration of the understanding reached among them "as to fundamental assurances and a framework for resolving the outstanding major issues pertaining to the renovation of Washington Square Park," Gerson and Quinn would support the release of funds currently allocated by the City Council for the funding of the renovation project. Letter from Gerson and Quinn to Benepe, dated October 6, 2005, at 1. Among the items that they specified with respect to the fountain plaza are that "[t]he

² According to Knowles, as of May 16, 2006, the Commission report had not yet been issued.

total square footage of the inner circle, from the outermost edge of the fountain wall to the innermost edge of any seating, will be no less than 90% of the current area. The design shall incorporate the same or increased amount of permanent seating between the inner and outer circles." *Id.* at 3. With respect to the fountain itself, they stated that "irrespective of the fountain's location, the interior of the fountain shall remain essentially in its current form, including the steps used for seating." *Id.*

On October 6, 2005, the parks committee of Community Board 2 met with City Council Member Gerson and discussed the agreement that he and Quinn had reached with the Parks Department. The committee passed a resolution which, inter alia, opposed the elevation of the fountain plaza to street level and opposed the reduction of the park's central plaza.

On October 18, 2005, prior to a meeting of Community Board 2, Vellonakis allegedly e-mailed most of the members of the Community Board, informing them that if they supported a revised resolution proposed by the Community Board 2 Park's Committee opposing the Parks Department's plans, the renovation of the park would be set back for at least two years.

On October 20, 2005, Community Board 2 met and adopted a resolution reaffirming its position stated in April 2005 approving the start of work on the Phase 1 plans as presented to

the Board, expressing concern that the work on Phase 1 of the plan begin as soon as possible, applauding Gerson and Quinn for their efforts at resolving issues of concern to the community regarding the Parks Department's plans, and supporting the agreement negotiated by Gerson and Quinn with the Parks Department.

According to petitioners, at some unspecified time during this process of consideration of the Parks Department plans, they learned, in response to a Freedom of Information Law (FOIL) request, that on January 24, 2005, the Tisch Foundation, which has contributed substantial funds to New York University, made a commitment of \$2,500,000 to the City for the restoration of the fountain and the surrounding plaza, on the condition that plaques be placed on opposite sides of the fountain, naming the fountain Tisch Fountain, and indicating that the restoration had been made possible by the families of Laurence A. Tisch and Preston R. Tisch. Petitioners suggest that, because of the desires of Tisch family, respondents decided to change the historic role of the fountain from a performance site and wading pool for community children, to a decorative fountain that would be named for the contributors.

Finally, on January 9, 2006, the Parks Department presented its plans for the park at a public hearing of the Art Commission, which has jurisdiction over the conservation and relocation of

two statues and the fountain, which are City-owned works of art. Petitioners allege that only at that time did the Parks Department reveal that they intended to substantially change the design of the fountain and the sunken circular area around the fountain where visitors to the park regularly gather to watch performers. According to petitioners, until the January 9, 2006 hearing of the Art Commission, the Parks Department concealed from Community Board 2, the Landmarks Preservation Commission and the public, significant aspects of the re-design of the fountain and fountain plaza that would destroy the historic role as a gathering place for cultural and political presentations. According to petitioners, only in the plans provided to the Art Commission, did the Parks Department reveal that the re-designed fountain would emit a 45-foot spray of water, which would prevent the use of the fountain proper as a performance space, seating area, and wading area for children. Additionally, according to petitioners, those plans show that the total area devoted to the fountain circle will be decreased by approximately 33%. Petitioners also contend that, earlier in the process, the Parks Department misled the Landmarks Commission into believing that it was necessary to raise the sunken plaza to street grade in order to accommodate the disabled and comply with the Americans With Disabilities Act (the ADA). 42 USC § 12101 et seq. Petitioners contend that by withholding information from both Community Board

2 and the Landmarks Commission, and providing incorrect information to the Landmarks Commission, respondents acted in violation of lawful procedure, and specifically, in violation of section 2800 of the City Charter governing the role and responsibility of the Community Boards, sections 25-301 and 25-318 (a) of the New York City Code governing the role of the Landmarks Commission, and section 856 of the City Charter governing the Art Commission.

Finally, petitioners contend that, although the City has conceded, in the context of unrelated litigation, that the Washington Square Park plans are subject to both SEQRA and CEQR,³ the City has not yet conducted the proper environmental review in compliance with those laws.

According to the City, the current fountain systems and fountain basin have many leaks, which have resulted in severe deterioration of the fountain structure and plumbing system. Pursuant to the Parks Department's plans, the fountain will be moved approximately 22 feet to bring it into alignment with the arch at the entrance of the Park at the bottom of 5th Avenue. Under the plan, when the fountain is moved and reconstructed, the

³ In *Emergency Coalition Organization to Save Washington Square Park v City of New York*, Sup Ct, NY County, Index No. 110200/05, in a stipulation discontinuing the case, the City agreed to inform petitioners' counsel within 10 business days of its final environmental determination regarding the proposed rehabilitation of the Park, and to provide counsel with a copy of the final determination.

new central jet will be capable of generating a 45-foot high plume of water, and smaller side jets will be added; however, the restored jets will have valves which will enable the size of the plume of water to be controlled. According to the City, in the 1960's and 1970's, the fountain jets were capable of creating a similarly large plume of water, and sometimes they were set at the highest possible pressure. The City submits photographs which show that before 1970, the plaza surrounding the fountain was at grade level. Post-1970 photos show a renovated fountain plaza, that was sunken below the grade of the rest of the park. The City concedes that the fountain plaza will be somewhat smaller than it is now, but contends that it will be approximately 23% smaller, rather than the 33% claimed by petitioners. The City contends that neither a relocation of the fountain, the restoration of the fountain's jets, bringing the fountain plaza to grade level, nor the reduction of the size of the fountain plaza will prevent the continued use of the area for artistic performances and other gatherings.

The City contends that no information was withheld from the Community Board, the Landmarks Commission, or members of the public in general. According to the City, the Parks Department has communicated extensively with the public and other City agencies regarding the details of the project, and all of their communications and presentations accurately reflected the

decrease in size of the fountain plaza and replacement of the fountain plumbing that would allow a 45-foot-high spray of water. The City contends that over the past two years, numerous changes have been made in the renovation plans, in response to community concerns, including, but not limited to, reduction in the height of the perimeter fence, removal of gates, and changes in size and shape of the dog run area. According to the City, however, the size and shape of the fountain area and the capacity of the fountain's jets have been consistent throughout. Amy Freitag, Deputy Commissioner for Capital Projects for the Parks Department states that, to her knowledge, the bid documents, which depict a reduction of approximately 23% in the size of the fountain plaza, are consistent with the plans as presented to the Community Board, the Landmarks Commission and the Art Commission; "[t]here were no technical changes to the layout of the fountain or fountain plaza other than the removal of certain decorative urns at the request of the Art Commission." Freitag Affidavit, ¶ 29.

The City claims that the Parks Department's presentation to Community Board 2 included pictures and diagrams which showed that the fountain jets will be able to emit a high spray of water and that it is clear from the sketches which were presented to the Community Board and the Landmarks Commission that the fountain area would be smaller than the present area.

With respect to the plan to raise the fountain plaza to

street grade level, the City contends that currently, the only access to the sunken plaza is via paved ramps that slope downwards at varying angles which exceed that permitted by the ADA, and that it was decided to raise the plaza level in order to make it more accessible to persons in wheelchairs and others who find the slopes difficult to traverse. Knowles states, however, that the decision to raise the sunken level of the plaza to make it more accessible was considered in terms of good public policy, rather than because of a belief that such a change was necessary to comply with the ADA.

According to the City, the Landmarks Commission focused its review on the preservation of historically significant design elements such as the overall pattern of pedestrian walkways and the preservation of the fountain basin; in contrast, the Parks Department's presentation to the Arts Commission in January 2006, concerned the statues of Giuseppe Garibaldi, Alexander Lyman Holley and the central fountain, because they are the only components of the Washington Square Park plans that involve artworks. The City contends that, "like the plans shown to the Landmarks Preservation Commission, those shown to the Art Commission indicated a reduction in the size of the fountain plaza as well as a realignment of the fountain." Freitag Affidavit, ¶ 23. The Art Commission's approval of the Parks Department's plans was contingent on further study of the

acoustical and other impacts from the increasing vertical capacity of the jets.

Relying upon the affidavits of petitioner Jonathan Greenberg and Arthur Schwartz, Chair of the Parks and Recreation Committee of Community Board 2, petitioners contest the City's claim that information concerning the capacity of the fountain jets had been public throughout the process. Rather, according to Greenberg and Schwartz, discussion of the plume and the side jets was publicly presented for the first time at the Art Commission hearing. With respect to the reduction of the size of the fountain plaza, petitioners contend that the public could not possibly determine if there was a reduction of size in the plaza based upon the schematic renderings of the plaza submitted by respondents. Furthermore, petitioners contend that the October 31, 2005 resolution of Community Board 2, reiterating its approval of the Parks Department's plans, was in part dependant on its support of the October 6, 2005 agreement reached between the Parks Department and City Council Members Alan Jay Gerson and Christine Quinn that the plaza area would not be less than 90% of its present area.

PETITIONERS' LEGAL CLAIMS

Community Boards are authorized by the New York City Charter to:

[e]xercise the initial review of applications and proposals of public agencies and private entities for

the use, development or improvement of land located in the community district, including the conduct of a public hearing and the preparation and submission to the city planning commission of a written recommendation....

New York City Charter § 2800 (d) (17). Petitioners contend that by failing to accurately inform the Community Board about its plans regarding the nature of the water jets and the reduction in size of the fountain plaza, the Parks Department effectively precluded the Community Board from exercising its review authority as contemplated by the City Charter. With respect to the Landmarks Commission, petitioners argue that by failing to fully disclose its plans to the Commission, the Parks Department violated Section 25-318 of the New York City Code, which provides that:

plans for construction, reconstruction, alteration or demolition of any improvement or proposed improvement which: (1) is owned by the city or is to be constructed upon property owned by the city; and (2) is or is to be located on a landmark site or in an historic district or contains an interior landmark; shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the [Landmarks Preservation] commission for a report. Such report shall be submitted to the mayor, the city council and the agency having responsibility and shall be published in the City Record within forty-five days after such referral.

New York City Code § 25-318 (a). Petitioners argue that the actions of the Parks Department were, therefore, ultra vires and in violation of law.

An action of a City agency which is ultra vires, is an action beyond the scope of its power or authority. See e.g. *Bankers Trust Corp. v New York City Dept. of Finance*, 301 AD2d 321, 325 (1st Dept 2002), *affd as mod on other grounds* 1 NY3d 315 (2003) (whether City's denial of a refund class "was an ultra vires act beyond the City's statutory power"); *Matter of Community Preservation Corp. v Miller*, 5 Misc 3d 388, 389 (Sup Ct, NY County 2004), *affd* 15 AD3d 193 (1st Dept 2005) (whether the City Counsel's enactment of Local Law 1 of 2004 was ultra vires, beyond the scope of its power). Although the Parks Department has the general authority to manage and care for the parks and to prepare plans for the improvement of the park system (see New York City Charter § 533 [a]), petitioners contend that the presentation of incomplete or inaccurate plans for the renovation of Washington Square Park to the Community Board and the Landmarks Commission was inconsistent with the New York City Charter and Administrative Code, and therefore, its actions were rendered ultra vires.

Respondents argue that the Community Board has no binding decision-making authority regarding the renovation project and, therefore, that any claim in relation to the Community Board must fail. However, under the City Charter, the Community Board is given the role of reviewing applications such as that of the Parks Department. The importance of Community Boards has been

recognized in a variety of contexts. See *Matter of Waybro Corp. v Board of Estimate of City of New York*, 67 NY2d 349 (1986) (role of Community Boards in actions pursuant to the Uniform Land Use Review Procedure [ULURP]); *Matter of Soho Alliance v New York State Liquor Authority*, 10 Misc 3d 1078(A), 814 NYS2d 892 (Sup Ct, NY County 2005) (role of Community Boards in decisions of the New York State Liquor Authority to grant liquor licenses to applicants). If the Community Board is to exercise its role, mandated by the City Charter, in a meaningful way, it must be given complete and accurate information about the significant elements of the plan it is reviewing. Certainly, respondents would not contend that providing a Community Board with plans which purposely mis-characterized a Parks Department project would satisfy the dictates of the City Charter governing the role of the Community Board. The role of a Community Board, even if advisory, is an integral part of the review process for work on public land, and provision of plans which omit or obscure significant elements vitiates that role.

The New York City Code specifically requires that plans such as those for the work in Washington Square Park must be provided to the Landmarks Commission. See NYC Code § 25-318. The purpose of the law governing landmarks preservation and historic districts is to

- (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape

features of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts....

New York City Code § 25-301. Where plans materially differ from those previously reviewed and approved by the Landmarks Commission, de novo review has been required by the full Commission. See *Matter of London v Art Commn. of City of New York*, 190 AD2d 557, 559 (1st Dept 1993). If plans have been presented to the Landmarks Commission which omit, or obscure elements which significantly impact aspects of the plan that are at the heart of the Commission's function, de novo review is similarly appropriate.

The City contends that it was apparent from the schematic designs contained in the plans that the size of the fountain plaza was to be decreased. That decrease, and certainly the amount of the decrease, is far from obvious from the diagrams submitted to the court. Furthermore, the City has failed to point to any discussion in the Parks Department's plans that specifically reveal the Department's intentions. Jared Knowles states that reduction of overall pavement and increase in greenspace was discussed at the meeting of the Landmarks Commission; however, he does not state that the decrease in the size of the fountain plaza was specifically discussed. Nor is the court convinced that a decrease of 23%, rather than 33% of

the fountain plaza area is insignificant, particularly in light of the understanding that was reached with City Council members Gerson and Quinn, that the area would not be decreased more than 10%. Similarly, the court is not satisfied that merely including drawings in the plans that depict jets of water, provides sufficient information for the Community Board to adequately evaluate the plan. The court is not convinced, however, that the Park's Department misled the Landmarks Commission concerning the reason for raising the fountain circle to grade level.

There is no question that the Washington Square Park fountain has played a significant role in the recent cultural and political history of New York City, and of the park, which, itself, is an historic district. The community and governmental entities which review the plans for renovations of, and changes to, the fountain and fountain plaza must be able to take that history in account. That obviously cannot happen if those entities do not have complete information concerning the plans, particularly those aspects of the plans that could impact the use of the fountain and fountain plaza as a gathering place for cultural and political activity.

This litigation turns on whether two major elements of the plan, the placement and capacity of the fountain jets, and the size of the fountain plaza, were clearly revealed to both the Community Board and the Landmarks Commission. I conclude, on the

basis of this record, that essential aspects of the Parks Department's plans for the fountain and the fountain plaza, which could have a substantial impact on the historic role of the Washington Square Park, were not adequately revealed to Community Board 2 or the Landmarks Commission, precluding the exercise of their roles in the oversight process as intended by the City Charter and the New York City Code. As a result, both the Landmarks Commission and the Art Commission were denied the informed views of the Community Board in reaching their decisions, and the Art Commission was additionally deprived of the views of the Landmarks Commission.

Petitioners also contend that respondents have failed to conduct the necessary environmental review concerning the renovation plans in compliance with SEQRA and CEQR, or as they agreed to do in settling *Emergency Coalition Organization to Save Washington Square Park v City of New York, supra*. Respondents agree that the plans for the renovation are subject to environmental review and state that they are in the process of conducting that review. The court agrees with respondents that until that review is completed, petitioners' environmental claim is premature.

Accordingly, it is hereby

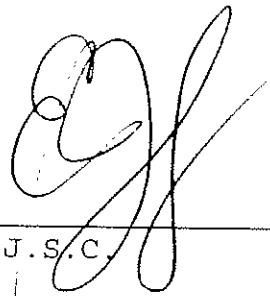
ORDERED AND ADJUDGED that the petition is granted consistent with this opinion, and the renovation of the Washington Square

Park fountain and fountain plaza is enjoined pending further review of the plans by Community Board 2 and the issuance its recommendation, further review of the plans by Landmarks Preservation Commission and the issuance of its report, and further review of the plans by the Art Commission and the issuance of its approval.

This constitutes the decision and judgment of the court.

Dated: July 25, 2006

ENTER:



J.S.C.

EMILY JANE GOODMAN