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

BRONX COUNCIL FOR ENVIRONMENTAL QUALITY and CHAUNCY YOUNG Petitioners, -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.	)	Index No.: 100240 / 2018

MEMORANDUM OF LAW
IN SUPPORT OF AMENDED VERIFIED ARTICLE 78 PETITION

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PRELIMINARY STATEMENT

This Article 78 petition seeks to enforce the public right to protected parkland by requiring the City of New York and its agencies to receive legislative approval from the State before giving away valuable waterfront parkland on Pier 5 of the Bronx's Harlem River for private development. For close to a decade, Pier 5 has been labeled an extension of Mill Pond Park, and the City and its agencies have long promised the surrounding community, including the Petitioners, that they would develop the park once funding was allocated. The City put the land under the ownership and control of the Parks Department, posted greenleaf signs, marked the land as parkland on maps, and regularly worked with community groups and members, including the Petitioners, to secure substantial State and Federal funds for environmental projects that involved public access to the parkland.

Given this history, the Respondents' plan to put a massive mixed-use development called Bronx Point on Pier 5 without first obtaining State legislative approval should not be permitted as it flouts the public trust doctrine. The City and its agencies also are required to obtain federal approval before changing the land's use, as a portion of Mill Pond Park was created with certain federal funds. Additionally, the Respondents' giveaway of parkland constitutes waste under municipal law, and therefore should be disallowed.

FACTUAL BACKGROUND

Pier 5 is a 4.4-acre tract of land lying in a floodplain just north of 149th Street and the 145th Street Bridge along the Bronx shoreline of the Harlem River, in the center of the Harlem River greenway plan. *See*, Amended Verified Petition dated February 16, 2018 ("Pet.") at ¶ 19 and Affidavit of Karen Argenti dated February 10, 2018 ("Argenti Aff.") at ¶ 12, Exs. A, C, E. The

Pier 5 tract is immediately south of the already developed Mill Pond Park, which is bound by the Harlem River to the west, a Major Deegan access road to the north, Exterior Street to the east, and forming a jagged boundary to the south along East 150th Street and Pier 4. (Those boundaries are visible in the map attached as Ex. E to the Argenti Aff.) The Pier 5 land was labeled by the City of New York (the "City") as the "Mill Pond Park Extension" and appears as green, designating parkland, on various maps. *See*, Argenti Aff. Exs. A and B. The New York City Department of Parks and Recreation (the "Parks Department") described Mill Pond Park as "located along East 149th Street and Exterior Street, across the street from the Gateway Center at Bronx Terminal Market" in naming Mill Pond Park February 2010's Park of the Month. *See* Argenti Aff. at Ex. A. This description includes Pier 5. Pier 5 appears red in the Ex. E map and is labeled "Mill Pond Park Extension" in the City's Zola planning map found at Ex C. The full contiguous park area is visible in a Parks Department map issued in 2011. Argenti Aff. Ex. A.

The Petitioners have been actively working with the City on the Mill Pond Park development since its inception. Sometime around 2006, The City committed to the creation of Mill Pond Park on underused City land in part to compensate the community for two takings of nearby City land for commercial ventures. *Id.* at ¶ 7.

The northern portion of Mill Pond Park was designated parkland as a partial replacement for parkland further inland that was taken from the community to build a new Yankee Stadium. *Id.* Because the site of the new Yankee Stadium overlay portions of Macombs Dam Park and Mullaly Park, two parks that had received federal funding under the Land and Water Conservation Fund Act of 1965 (the "LWCF Act"), the City obtained approval for the substitution from the U.S. Department of the Interior under 6(f) of that law. Argenti Aff. at ¶ 8. The City agreed to create a park on "waterfront vacant land of 6.42 acres (includes 1.37 acres of

underwater land)" for tennis courts and a pedestrian esplanade and further agreed that "Bronx Terminal Market buildings G and H will] be demolished to become parks." Argenti Aff. at ¶8 and Ex. G. The new Mill Pond Park inherited the 6(f) conversion obligations from the Macombs Dam Park and Mullaly Park land it replaced. Pet. at ¶21. The final environmental impact statement for the Yankee Stadium project described the Harlem River park portion of the replacement land as a 10-acre park including 5.82 acres of open space. Pet. at ¶ 22 and Argenti Aff. at Ex. H (The 5.82 acres consists of 5.11 acres of park and a .71 acre esplanade). This final environmental impact statement put the commitment to the new park in context, describing that "these new waterfront areas would substantially augment the open space proposed by the NYCDPR [the Parks Department] south of the project area along the Harlem River, and would provide new locations for the public to enjoy views of the Harlem River, including the bridges that cross it and the opposite Manhattan shoreline." Argenti Aff. at ¶10 and Ex. H.

Directly across Exterior Street from this new park, the City allowed a suburban-style shopping mall to be built on another portion of the Bronx Terminal Market site. As part of that deal, the developers of the mall agreed to fund an additional two acres of open-space parkland on City owned land within the Mill Pond Park area. Argenti Aff. at ¶ 11 and Ex. I.

Taking these commitments together, the City agreed to at least 7.82 acres of open space in the new park. While Mill Pond Park is ten acres, it has much less open space than this promised amount. Pet. at ¶ 24.

The City's endorsement of an expanded Mill Pond Park was reinforced by both public and private actions and statements by officials over a period of years. The community noticed that both the Pier 5 land and funded portion of Mill Pond Park were put under the control of the Parks Department and marked with Parks signage. Argenti Aff. at ¶14 and Ex. K. The Petitioners

relied on the Respondents and worked with them to improve the Bronx waterfront so that Bronx residents could access it, so that its uses would be more environmentally sound, and so the community could both enjoy and be protected by a shoreline that contained a ribbon of parks. Argenti Aff. at ¶ 12 and Pet. at ¶ 28.

In 2007, then Mayor Bloomberg issued PlaNYC, a plan for the city that included environmental, park and economic initiatives. That document cited with approval the City's work with petitioner BCEQ on obtaining funding from New York State to remediate environmental damage along five miles of the Harlem River coastline, including the Pier 5 site, stating "the BCEQ plan will expand access to the waterfront, creating new parkland curving alongside the river, a restored shoreline and natural habitat, and stronger links with the surrounding areas." Argenti Aff. at ¶ 13 and Ex. J. Soon afterwards, in 2009, the City commissioned a landscape architectural plan for Mill Pond Park that included the Pier 5 site, extending the park south to the 145th Street Bridge. *Id.* at ¶¶ 14 and 16, and Ex. M. The two portions of the park were described as Phases in the materials, with Pier 5 as part of Phase 2. *Id.* The Parks Department also initiated discussions about the plans with community members. *Id.* The community was told the park would be completed when funding was available. Pet. at ¶ 28.

In February 2011, Bronx Borough President Ruben Diaz Jr. revealed his "Bronx Waterfront Vision" which specifically identified Pier 5 as 4.4 acres of parkland that needed funding for development. Argenti Aff. at ¶ 15 and Ex. L. The Borough President's report was consistent with what community members heard from the Parks Department as they collaborated over the years. Pet. at ¶ 28.

Petitioner Chauncy Young, as a founder of the Harlem River Working Group ("HRWG") worked with other community members, groups, and public partners at the City, State and

Federal levels, to develop a vision for the Harlem River waterfront. Pet. at ¶¶ 5, 31. The HRWG work was done with the financial support and time commitments of a large number of people and institutions. *Id.* The breadth of HRWG's support is clear in the report "The Harlem River Greenway: Our River, Our Future", which ends with a long list of partners and participants. Argenti Aff. Ex. N. The report specifies a goal to "remediate and build the promised park at Pier 5." *Id.* The City reaffirmed this goal in March 2011's Vision 2020: New York City Comprehensive Waterfront Plan – Neighborhood Strategies, which restates its commitment to "Pier V (Former Velodrome Site) Develop land for public use and open space." Argenti Aff. at ¶ 21 and Ex. O.

The Petitioners relied on these shared goals with the City and its agencies in committing to several multi-year environmental projects on the Pier 5 site. First, BCEQ partnered with the Parks Department in creating a Pop-Up Wetland Project at Pier 5. Argenti Aff. at ¶¶ 22-25. Through a $235,000 grant from the Wildlife Conservation Society/National Oceanic and Atmospheric Administration (WCS-NOAA) and funds from Representative Jose Serrano, the BCEQ was able to open the Pier 5 site for community use in 2013 and 2014 for an educational program on the wetlands along the shoreline. Argenti Aff. at ¶22, Pet. ¶ 33. The Parks Department, as owner of the land, approved its use, issued a construction permit and opened the gates. *Id.* The Parks Department required BCEQ to obtain insurance as a condition of the permit, and the insurance contract identified the Parks Department as owners of the land. *Id.* at ¶ 24-25. The project also paid for a Community Coordinator, whose role included facilitating public meetings on Pier 5 to build consensus among South Bronx residents on the best park use of the land, which the grant expressly described as "new and unimproved parkland stretch[ing] from just north of the 149th Street Bridge to Mill Pond Park." *Id.* at ¶ 22.

The BCEQ and the Parks Department also worked on a second collaboration involving Pier 5 between 2007 and 2014. Id. at ¶¶ 26-29. BCEQ received two grants, in amounts of $99,000 and $345,230, from the New York State Brownfield Opportunity Areas Program (BOA) in order to examine the environmental impact of development along the Harlem River shoreline. *Id.* at 26-27. The Pier 5 site was essential to that project, as a 'central focus area' where samples were collected. *Id.* at Ex. V. In this project, the City was directly involved in administering the BOA funds, and represented both to the BCEQ and the state that the land involved was under Parks jurisdiction. *Id.* at ¶ 28. The BOA report revealed that the City had mixed zoning maps for both Pier 5 and the already developed portion of Mill Pond Park to the north, and within some maps distinguished between the developed and undeveloped park area. Argenti Aff. at Ex. T. The BOA report also had a section dedicated to parks - and for that the Parks Department released a map of the area within the scope of the study identifying the land it considered parkland. See, Argenti Aff. at Ex. A and Ex. T. That Parks Department map, dated 2011, shows Pier 5 and Mill Pond Park as contiguous parkland and released the map for submission to the State in soliciting funding. *Id.* at Ex. A. Likewise, the Parks Department released the map again in a request for proposal for work to fulfill the terms of the grant. *Id.* at Ex. V.

Despite close to a decade of collaborative actions and representations to the Bronx community that when funding became available, the Parks Department would expand Mill Pond Park to include the Pier 5 site, the Respondents have now broken that promise by instead committing to an enormous private mixed-use development on Pier 5. Argenti Aff. at ¶ 30. The Respondents have not been transparent about their decision-making process, but instead acted to restrict public participation in the review process by, for example, closing meetings that they were legally obligated to open to the public. *Id.* at ¶ 31. Respondents' decision to give away this

valuable riverfront parkland to a private developer is directly in conflict with the City's treatment of the land as undeveloped parkland for close to a decade. *Id.* at ¶32.

ARGUMENT

I. THE PUBLIC TRUST DOCTRINE REQUIRES NEW YORK CITY TO RECEIVE STATE LEGISLATIVE APPROVAL TO CHANGE THE USE OF THE PIER 5 PARK SITE

The common law public trust doctrine has long compelled municipalities in New York State to obtain "the direct and specific approval of the State Legislature, plainly conferred" before taking parkland for non-park use. *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 631-632 (N.Y. 2001), *citing Ackerman v. Steisel*, 104 AD.2d 940 (2nd Dept 1984). The designation of parkland can be express or implied. *Id.* For well over a hundred years, the public trust doctrine has been applied to vindicate the right of the people of New York to preserve parkland for community use. *Williams v. Gallatin*, 229 N.Y.248, 253-54 (N.Y. 1920) (Finding the Parks Commissioner in violation of the public trust doctrine when he attempted to lease space in the Arsenal Building in Central Park to the Safety Institute of America for a ten-year period), *Brooklyn Park Commissioners v. Armstrong*, 45 N.Y. 234 (N.Y. 1871) (Land acquired as parkland is held in the public trust and cannot be alienated without specific State legislative approval); *Avella v. City of New York*, 29 N.Y.3d 425, 431 (N.Y. 2017) ("the public trust doctrine is ancient and firmly established in our precedent . . . 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") (internal citations omitted).

The misappropriation of public parkland for a private purpose is a continuing violation of the public trust doctrine, *Capruso v. Village of Kings Point*, 23 N.Y.3d 631 (N.Y. 2014).

An express dedication of parkland can be accomplished through a deed conveying land to a municipality and the municipality accepting the land; or by the municipality directly dedicating land as a park. *Gewirtz v. City of Long Beach*, 69 Misc. 2d 763, 770 (Sup. Ct. Nassau Co. 1972). For a formal dedication, courts will look for "actions by the city [which manifest] unequivocally an intention to dedicate the municipally-owned property to public use as a public park." *Id.*

More informal actions taken by the government can also give rise to a finding of an implied dedication of parkland. "A party seeking to establish such an implied dedication . . . must show that (1) "[t]he acts and declarations of the land owner indicating the intent to dedicate his land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication" and (2) that the public has accepted the land as dedicated to a public use." *Glick v. Harvey ("Glick")*, 25 N.Y.3d 1175, 1180 (N.Y. 2015) *citing Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N.Y. 261, 269 (1876). (The *Glick* court questioned whether the second prong of the implied dedication doctrine applies to a municipal land owner, but based its decision on other grounds. *Glick* at 1180.)

In the *Glick* decision, the Court of Appeals found that the City of New York and its agencies had not dedicated the parcels in dispute, because the City had consistently and expressly limited the Parks Department control over the Department of Transportation-owned land as a 'temporary and provisional' when they made short term commitments for public use of the land. *Glick* at 1180-1181. For example, the City put such limitations directly in their contracts with a local gardening group. *Id.* at 1178-1179. In contrast, "[d]edication of parkland is implied where the City holds land out as park and the public uses the land as park." *Friends of Petrosino Square v. Sadik-Khan*, 977 N.Y.S.2d 580, 584 (N.Y. Sup. Ct. 2013) citing *Village of Croton-on Hudson v.*

Cnty. of Westchester ("Croton"), 38 A.D.2d 979 (2nd Dept. 1972). The *Croton* case enforced the public trust doctrine's legislative approval requirement when the town of Croton-on-Hudson attempted to skip the process for the land, even though the land was never deeded as parkland. *Croton*, 38 A.D.2d at 979. The court found that the public trust doctrine nonetheless applied because the land at issue was acquired to use as a park and in fact used as a park for many years. *Id.*

A. PIER 5 IS PARKLAND

The Respondents, by treating Pier 5 as parkland for close to a decade, and by allowing the community to rely on their repeated promises to further develop the land for park use once funds become available, have established parkland on the Pier 5 site. The City gave the Parks Department ownership and control of Pier 5, along with the rest of Mill Pond Park, at the conception of Mill Pond Park about a dozen years ago. In their many dealings with the community, including both of the Petitioners, the Parks Department and the City were active participants in envisioning the best park use of the Pier 5 site. The City and Parks Department accepted money towards those goals from both the Federal and State governments. They endorsed park use projects on Pier 5 over a period of close to ten years, and allowed the public to use the land in 2013 and 2014 during the shoreline wetlands education program. The City and its agencies clearly labeled the land as parkland using the greenleaf signs, and voluntarily identified the land as parkland and shared their plans for the land with community members, other public officials, and the public at large. Their actions convinced not only the Petitioners that the land was park, but also the Borough President, who identified the park development as a priority. The Respondents' representations that it was funding restrictions that kept the parkland unimproved

for so long was understandably convincing to the Petitioners and other community members in the South Bronx.

Taken together, these official acts and representations of the City and its Parks Department provide the unequivocal, unmistakable intention to create a dedicated park the public trust doctrine requires.

Both the Petitioners' and the Respondents' acceptance of that dedication is clear in the collaborative work they accomplished on Pier 5 over the years. Likewise, the Federal and State and private funders' reliance on the representation is clear in their support for and funding of the projects led by the BCEQ, the HRWG and community members like Chauncy Young.

B. THE BRONX POINT PROJECT IS A NON-PARK USE

The Bronx Point project is a massive mixed-use development that plans to place over a thousand units of new housing on the Pier 5 floodplain site. *See, City Announces Bronx Point, a Waterfront Development That Will Create Open Space and Hundreds of Units of Affordable Housing in the South Bronx* dated September 22, 2017, found at https://www.nycedc.com/press-release/city-announces-bronx-point-waterfront-development-will-create-open-space-and-hundreds (last accessed March 7, 2018). The Bronx Point Project is indisputably not a park use. *See, Williams v. Gallatin*, 229 N.Y. 248 (N.Y. 1920).

C. PIER 5 MUST BE ALIENATED ACCORDING TO LAW BEFORE ANY NON-PARK USE

Because Pier 5 has been treated as dedicated parkland, and the new development is a non-park use, the Public Trust doctrine requires that the city seek specific approval from the State Legislature before proceeding. While the proposed Bronx Point project brings housing to the community, "it is simply not in [a Court's] power to set the [public trust] doctrine aside, no matter how worthy a proposed use of parkland may be." *Avella v. City of New York*, 131 A.D.3d

77, 86 (1st Dept. 2015) (enjoining further work on a shopping mall built on parkland that had received legislative approval only for another possible use, the building of a sports stadium).

D. BECAUSE ALIENATION MUST PRECEDE THE ULURP PROCESS, THE CITY CANNOT RELY ON THEIR PREMATURE ULURP APPROVALS TO DEVELOP PIER 5

The Respondents were premature in shepherding their Bronx Point project through the ULURP process without having received State Legislative approval to alienate the Pier 5 parkland. *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 628 (N.Y. 2001) (Enforcing the public trust doctrine by requiring the City to first obtain specific legislation permitting the placement of a water treatment facility in a park, and describing the State Attorney General's objection to the City's granting of ULURP approvals before obtaining such approval). *Avella v. City of New York*, 131 A.D.3d 77 (1st Dept. 2015) (Enjoining further work on a shopping stadium that had not obtained ULURP approval or alienation, and requiring the alienation legislation first).

II. THE RESPONDENTS' GIVEAWAY OF PIER 5 ALSO VIOLATES THE GENERAL MUNICIPAL LAW'S PROHIBITION AGAINST WASTE OF PUBLIC ASSETS AND LAND

The General Municipal Law grants taxpayers the right to challenge illegal official acts that waste the property or funds of a municipal corporation. N.Y. Gen. Mun. Law § 51. ("[A]n action may be maintained against [an official actor] to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation."). Any official act made without authority is an illegal official act under Section 51. *Aldrich v. City of New York*, 208 Misc. 930, 936 (Sup. Ct. Queens Co. 1955), *aff'd*, 2 A.D.2d 760 (2nd Dept. 1956).

Waste in the strict sense is not required to enjoin an illegal act, so long as the act would harm the public interest. *Altschul v. Ludwig*, 216 N.Y. 459, 467, (N.Y. 1916). Thus, the public injury need not be measurable in financial terms. *Brill v. Miller*, 140 A.D. 602, 607 (1st Dept. 1910). The unlawful sale of a park, for example, inherently harms the public interest without regard to the financial impact of the sale. *Aldrich*, 208 Misc. at 936. In *Aldrich*, the Comptroller of the City of New York recommended the sale of land dedicated to park and hospital use to private developers for the purpose of building a beach club and hotel. *Id.* at 934. A non-profit corporation sued the City and its officers under Section 51, alleging that the sale of the land to private developers for a non-park or hospital use would constitute an illegal official act that would harm the public interest. *Id.* The court held that the plaintiff taxpayers had the right to enjoin the City from selling the land without approval from the state legislature. *Id.*

The Respondents actions that violate the public trust doctrine are the same actions that constitute unlawful waste of a shared public asset, and harm the public interest. As in *Aldrich*, Respondents are attempting to devote parkland to a non-park use without seeking legislative approval. Thus, Petitioners have the right pursuant to Section 51 to enjoin Respondents from proceeding with the non-park use.

III. THE USE OF RESTRICTED FEDERAL FUNDS FOR THE NORTHERN PORTION OF MILL POND PARK MUST TRIGGER A REVIEW WHEN THE OVERALL SIZE AND USE OF THE PARK CHANGES

In 2006, when the northern portion of Mill Pond Park was approved as partial replacement for the parks originally funded by the LWCF Act, but lost to the new Yankee Stadium development, it was designated as parkland benefiting from LWCF Act funds. Under the terms of LWCF Act and its regulations, any substantial change made in the use of a part of a park that carries with it the LWCF Acts funding restrictions, or changes made to the amount of

outdoor space in such a park, both are subject to prior federal approval. 54 U.S.C. § 200305(f)(3)[1] and 36 C.F.R. § 59.3. The City's commitment to Pier 5 as parkland was repeatedly presented in their own materials and to the public as an extension of or the next phase of Mill Pond Park. In the initial application, the 6(f) conversion portion of Mill Pond Park was presented to the Federal government as a part of a larger planned park area along the Harlem River, with a significant amount of open space that never came to fruition. The park was then expanded to the south. If the City wants to shrink the park and reduce the outdoor space within it, the City is obligated to comply with the conversion requirements as laid out in 36 C.F.R. § 59.3 and allow the federal government to review and approve of those plans.

If, in fact, the City has failed to obtain federal approval for eliminating the extension of the park and reducing the amount of open outdoor space, that failure to perform an act required by law would need to be remedied, as with the alienation legislation, before the development of Pier 5. *See*, Handbook on the Alienation and Conversion of Municipal Parkland, available at https://parks.ny.gov/publications/documents/AlienationHandbook2017.pdf (last accessed March 7, 2018) (Revised September 1, 2017).

[1] Please note that this is the current citation of the law. 16 U.S.C. § 460L-8(f)(3) was repealed and moved to 54 U.S.C. § 200305(f)(3). The provision is also referred to as a "6(f) conversion."

CONCLUSION

For these reasons, Petitioners respectfully request that the Court find in favor of the Petitioners and order the City Respondents to stop development on the Pier 5 parkland site until the land has been alienated by the New York State legislature and received the necessary federal approvals, to nullify the premature U.L.U.R.P. approvals, and to award Petitioners their costs and other fees as the Court finds just and proper.

Respectfully Submitted,

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