

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

BRONX COUNCIL FOR ENVIRONMENTAL )  
QUALITY and CHAUNCY YOUNG )

Petitioners, )

-against- )

Index No.: 100240 / 2018

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 )

Assigned:  
Carol Edmead, J.S.C.

Respondents. )

**REPLY MEMORANDUM OF LAW  
IN SUPPORT OF AMENDED VERIFIED ARTICLE 78 PETITION**

BRONX LEGAL SERVICES  
Anne Nacinovich  
Roland Nimis  
349 E 149<sup>th</sup> Street, 10<sup>th</sup> Floor  
Bronx NY 10451  
Tel./Fax (718) 928-3739  
*Attorneys for the Petitioners*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
ARGUMENT	4
I.    THE CITY’S FAILURE TO FUND THE PARK EXPANSION AT PIER 5 DOES NOT RELEASE IT FROM ITS OBLIGATION TO ALIENATE THE LAND UNDER THE PUBLIC TRUST DOCTRINE	5
II.   THE BOROUGH PRESIDENT MAPS DO NOT INCLUDE ALL THE LAND THAT ALL PARTIES AGREE CURRENTLY COMPRISES MILL POND PARK	7
III.  APPLICATION OF THE PUBLIC TRUST DOCTRINE	8
CONCLUSION	10

TABLE OF AUTHORITIES

**Cases**

*Glick v. Harvey*, 25 N.Y.3d 1175 (N.Y. 2015) ..... 8

*Merritt Cook v. Harris*, 61 N.Y. 448 (N.Y. 1875)..... 5

*Riverview Partners LP v. City of Peekskill*, 273 A.D.2d 455 (2d Dep’t 2000) ..... 7

*Village of Croton-on Hudson, v. County of Westchester*, 38 A.D.2d 979 (2d Dep’t 1972)  
*aff’d* 30 N.Y.2d 959 (N.Y. 1972)..... 8

**Other Authorities**

Charles V. Bagli, Robin Shulman, *Transforming Bronx Terminal Market, but at a Steep Price*,  
N.Y.Times, Oct. 24, 2005 ..... 6

Plaintiffs Bronx Council for Environmental Quality (“BCEQ”) and Chauncy Young respectfully submit this memorandum and supporting affidavits in further support of their Article 78 Petition.

#### ARGUMENT

The City Respondents concede that on August 1, 2006, the City granted the Commissioner of the Parks Department’s request for:

permanent management and jurisdiction of the waterfront property at the Bronx Terminal Market Waterfront located at East 150<sup>th</sup> Street and Exterior Street in the Bronx. Parks will be constructing new parkland on this site as part of the Yankee Stadium Redevelopment Project. We are therefore requesting that your agency surrender the above listed blocks and lots [Block 2356, part of Lot 2, Block 2539 part of Lot 2] as outline in the attached map to Department of Citywide Administrative Services for reassignment to the Department of Parks’ jurisdiction. The parcels requested include only land eastward of the Oak Point Rail Link Trestle.

*See*, Respondents’ Exhibit (“R. Ex.”) D, letter dated August 1, 2006 from Adrian Benepe to Andrew Schwartz and attached image and R. Ex. E dated August 11, 2006, and attached image; Alderson Aff. at ¶ 27.

While Respondents suggest otherwise, the request makes no distinction between Pier 5 and the rest of Mill Pond Park. *Cf.* Alderson Aff. at ¶ 29. The block and lot numbers and images of the land that the documents permanently place under the control of the Parks Department to construct new parkland include the full area of Mill Pond Park and its promised expansion, including the Pier 5 land, as described in the Petitioner’s Papers. *See*, Argenti Aff. at ¶ 3 and Amended Petition at ¶ 18, R. Exs. D and E.

In the remainder of the Respondents’ papers, they attempt to backtrack on this commitment. They argue that the Petitioners are wrong to rely on the City’s and its representatives’ repeated reaffirmations of this commitment in their dealings with Petitioners and

others in the community over the next decade. Petitioners are simply asking this Court to hold the City to its promises to create a park on Pier 5, or to require the City to follow the longstanding public trust doctrine requirement to obtain State legislative approval before repurposing the parkland to another use.

I. THE CITY'S FAILURE TO FUND THE PARK EXPANSION AT PIER 5 DOES NOT RELEASE IT FROM ITS OBLIGATION TO ALIENATE THE LAND UNDER THE PUBLIC TRUST DOCTRINE

When the City created the Mill Pond waterfront park, Pier 5 was not developed at the same time as the section to the north because of funding constraints. This lack of funding, and the condition of the land, should not preclude the Court from finding that Pier 5 is dedicated parkland. While Respondents are correct in arguing that the continued active park use of land is relevant to the determination of whether the park has been dedicated by implication, they are wrong in arguing such a use is necessary. The circumstances of each case of public dedication must be considered. For example, in determining the public dedication of land to the public for use as a public road, "the dedication and acceptance may be proved by long public use, *or* by the acts of the proper public officers recognizing [the use]." *Merritt Cook v. Harris*, 61 N.Y. 448, 453-454 (N.Y. 1875) (emphasis added).

In the case of Pier 5, community members were told that the City did not have the funds for the expansion; for example, they were told Pier 5's development was delayed and difficult to fund in park because the soil contamination was expensive to remediate. *See*, Affidavit of Chauncy Young dated May 23, 2018 ("Young Aff.") at ¶ 12. These justifications for the delayed expansion should not impact the park status of the land. Indeed, the lack of funding led to some of the active collaborations between the Parks Department and the community, such as the HRWG visioning sessions, the participation of Partnership for Parks, the Parks Department's

introduction of a university group from MIT to the HRWG - all efforts to keep the park development process moving forward while keeping the community engaged. *See generally*, Young Aff. at ¶¶ 4-13.

Although the City lacked sufficient funding to complete the park, the Respondents are incorrect to argue that the City did not invest in the Pier 5 land. Pier 5 was treated similarly to the other areas of Mill Pond that were constructed over the former Bronx Terminal Market parcel; and the City prepared the site by paying for the demolition of the dilapidated Bronx Terminal Market buildings. *See*, Charles V. Bagli, Robin Shulman, *Transforming Bronx Terminal Market, but at a Steep Price*, N.Y. Times, Oct. 24, 2005, at <https://www.nytimes.com/2005/10/24/nyregion/transforming-bronx-terminal-market-but-at-a-steep-price.html> (last accessed on May 18, 2018). (The City spent \$7.2 million in total for demolition of the terminal market buildings and arranged to build a park on the waterfront portion of the parcel.) A search of the public land use records on ACRIS shows that on June 30, 2006, the City of New York executed a partial surrender of a lease that included the Pier 5 parcel. *See*, Young Affidavit at Ex. U. This is consistent with the land trade described in the news report, in which the City arranged for a Harlem Waterfront park in exchange for private development on public land. This agreement also took place just one month before the Parks Department requested permanent jurisdiction over the parcel to construct new parkland. *Ibid*. It supports the Petitioners' experience that the Respondents drew a line after varied commercial and industrial uses of the land, and committed to a park.

As the Parks Department struggled to find funding, other agencies of the City looked to the land to develop it, and in the Bronx Point Project, eventually gained favor. (*See generally*, Respondents' Memorandum at pages 24-25). But the Respondents' change of heart does not

change their obligations. Once there is a dedication of parkland, express or implied, it is not revocable. *Riverview Partners LP v. City of Peekskill*, 273 A.D.2d 455 (2d Dep't 2000). The Petitioners' position is not that the City is prohibited from changing the land use of parkland, but that the City must comply with the public trust doctrine procedures, with the provisions against municipal waste, and with the federally-imposed transfer requirements for the land, if does so.

II. THE BOROUGH PRESIDENT MAPS DO NOT LABEL AS PARK AREAS THAT ALL PARTIES AGREE CURRENTLY ARE WITHIN MILL POND PARK

Respondents argue that the Court should disregard all the maps the Respondents shared with the public showing Pier 5 as parkland, and that only the Borough President's land maps can show a definitive express dedication of parkland. But the Borough President maps are not accurate in this instance. The maps exclude both Pier 5 and the portion of Mill Pond Park created as part of the Gateway Mall development from the park. As described in more detail previously, through the Gateway Mall project, the City procured funding from the developers and committed to two acres of open space on the waterfront, land that all parties to this proceeding agree is park. *See*, Respondents Exhibits A, C, Bronx Borough President Maps Numbers 13105 and 13115 respectively; *cf.* Petitioner's Ex. I at p. 9-6. The most recent Borough President map, No. 13115, shows only the northernmost portion of Mill Pond Park marked as park (the portion of the park that federal law required be dedicated as park in exchange for allowing the City to place the new Yankee Stadium development on other parkland that had received federal funding). R. Ex. C. Because a large portion of the existing Mill Pond Park, an area where its park status is not in dispute, is not included as park in the maps, those maps are demonstrably unreliable in this instance.

The New York Administrative Code, which Respondents cite to in support of their reliance on the Borough President map as binding, likewise is not as clear as they claim. The code only establishes the City's obligation to mark the map. N.Y. Admin. Code § 25-101 and § 25-102 (2006). It does not address instances where the City has failed to update its records.

In any case, while a park marking on the Borough President's map could be used to establish the City's dedication of parkland, the opposite is not true. *See, Village of Croton-on-Hudson, v. County of Westchester*, 38 A.D.2d 979, 979 (2d Dep't 1972) *aff'd* 30 N.Y.2d 959 (N.Y. 1972) (finding that there was an informal, or implied, dedication of parkland even absent evidence in the county deeds).

### III. APPLICATION OF THE PUBLIC TRUST DOCTRINE

The Court of Appeals determined that an implied dedication of parkland is found when a "City's acts [demonstrate] an unequivocal manifestation of an intent to dedicate the parcels as permanent parkland." *Glick v. Harvey*, 25 N.Y.3d 1175, 1180 (N.Y. 2015).

In addition to the evidence Petitioners presented in their earlier papers, it is now clear that in turning over the Pier 5 land to the Parks Department control, the City described their intention in exactly those terms – calling the change in control "permanent" and specifying it was done because the Parks Department "will be constructing new parkland on this site". R. Ex. D.

The Respondents make much of the fact that the Pier 5 land had multiple other non-park uses before Mill Pond Park's construction, and that the land had not been acquired for park use (Respondents' memorandum at pages 21-22). However, in this case, Petitioner has been clear that the City's commitment to the park use for an Expanded Mill Pond Park came out of the City's decisions to create a waterfront park on land it owned. That decision was repeatedly



ratified and accepted by the community over a ten-year period. The transfer documents cited above, as well as the City's decision to release their lease, indicate clear intentions and consistent actions to establish a park on Pier 5.

While the Respondents downplay the significance of the public's and the Parks Department's "informal and loose" use of the term "park", the Petitioners' record indicate a shared and uncomplicated understanding of what it means. *See*, Alderson Aff. at ¶ 12. The Petitioners actively collaborated with the Parks Department, and relied on its consistent position that the Mill Pond Park expansion on Pier 5 would happen when funding was found. The Petitioners expended significant resources in time, and helped procure hundreds of thousands of dollars from State and Federal agencies, in furtherance of two shared goals - to implement interim park uses for the parkland over a ten-year period and to create a better and permanent park use in the future. Underdeveloped parkland is still parkland. The Respondents must comply with the public trust doctrine process before changing its use.

CONCLUSION

For these reasons, and the reasons laid out in our earlier submissions, Petitioners respectfully request the Court to find in favor of the Petitioners and order the City Respondents to stop development on the Pier 5 site until the land has been alienated by the New York State legislature and to award Petitioners its costs and other fees as the Court finds just and proper.

Respectfully Submitted,

BRONX LEGAL SERVICES

---

By Anne Nacinovich  
[anacinovich@lsnyc.org](mailto:anacinovich@lsnyc.org)  
Roland Nimis  
[rnimis@lsnyc.org](mailto:rnimis@lsnyc.org)  
349 E 149<sup>th</sup> Street, 10<sup>th</sup> Floor  
Bronx NY 10451  
Tel./Fax (718) 928-3739  
*Attorneys for the Petitioners*

Dated: Bronx, NY  
May 23, 2018