

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

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In the Matter of the Application of

BRONX COUNCIL FOR ENVIRONMENTAL
QUALITY, and CHAUNCY YOUNG,

Petitioners,

Index No.: 100240/2018

-against-

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

(Edmead, J.S.C.)

Respondents.

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**RESPONDENTS' MEMORANDUM OF LAW
IN OPPOSITION TO THE PETITION**

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PRELIMINARY STATEMENT

This is a case where Petitioners seek to impose their own hopes and wishes on a City-owned property ripe for redevelopment in the southwest Bronx. Petitioners conflate their desires with the City's legal obligations. The land at issue is an undeveloped, vacant parcel of approximately 4.4 acres on the Harlem River, known as the Pier 5 site. Its past uses include freight transport, lumber operations, and coal storage. It has never been open to the general public for park use. Yet Petitioners want the Pier 5 site to be a park, and apparently believe it already is.

Petitioners' claim fails. Parkland can be dedicated either expressly or by implication; Pier 5 is neither. First, Pier 5 is not mapped parkland. Second, the City has never expressed an unequivocal intent to dedicate Pier 5 as parkland. To the contrary, the City has never allowed open public access to Pier 5, and has never budgeted funds to develop Pier 5 as a park.

Ironically, Petitioners seek to halt the Bronx Point project, which plans to create—for the first time—publicly accessible open space resources on Pier 5, including a waterfront esplanade, a lawn area and playground, and a plaza for seasonal uses. The Bronx Point project will also provide hundreds of units of permanently affordable housing, and cultural facilities, including the Universal Hip-Hop Museum. Petitioners apparently prefer their own personal vision for the Pier 5, but fail to show that the City's alternate plan is unlawful.

Accordingly, the Petition should be denied and this proceeding should be dismissed.

STATEMENT OF FACTS

A. Pier 5 is a vacant, undeveloped lot.

The Pier 5 parcel is a vacant, undeveloped lot bounded by 149th Street/145 Street Bridge to the south, the Harlem River to the west, Mill Pond Park to the north, and the Major Deegan Expressway/Exterior Street to the east.¹ Pier 5 lies to the south of the land commonly known as Piers 1 through 4 on the Harlem River Waterfront. Below is a recent picture taken from 150th Street looking into the Pier 5 site:



¹ Affidavit of Colleen Alderson, sworn to on April 27, 2018 (“Alderson Aff.”), ¶ 4.

² *See id.* ¶ 6.

In the past, Pier 5 has been used for freight transport, lumber operations, coal storage, and highway construction.³ The City acquired portions of the Pier 5 site at different times.⁴ Pier 5 has never been held out to the general public as public open space.⁵

1. *Pier 5 was sparsely used, and mostly fenced off to the public, while it was under DPR's jurisdiction.*

Pier 5 was held in the jurisdiction of the City's Department of Parks and Recreation ("DPR") from 2006 through 2017. During this time, Pier 5 remained vacant and undeveloped, and was mostly fenced off to the public, with the exception of certain occasional permitted events discussed below. Pier 5 was sparsely used during these years, and was never open for general public use.

DPR acquired jurisdiction of Pier 5 in 2006 from the City's Department of Small Business Services ("DSBS"). DPR requested that Piers 2 through 5 be transferred from DSBS to DPR, in order to effectuate the construction of replacement parkland in connection with the Yankee Stadium Redevelopment project, discussed in more detail below.⁶ Although only Piers 2 and 3 were to be used for replacement parkland for the Yankee Stadium project, DPR requested the transfer of Piers 2 through 5, so as to maintain this contiguous waterfront land together.⁷ As explained in more detail below, Piers 2 and 3, to the north of Pier 5, were subsequently dedicated as replacement parkland in connection with the Yankee Stadium Redevelopment project, and

³ *Id.* ¶ 28.

⁴ *Id.*

⁵ *See id.* ¶ 26.

⁶ *Id.* ¶¶ 27-31.

⁷ *Id.* ¶ 29.

Pier 4 was subsequently developed as a park in connection with the Gateway Center at the Bronx Terminal Market project. In contrast, Pier 5 was never mapped as parkland, and the City never budgeted or otherwise acquired funds to develop Pier 5 as parkland.

While Pier 5 was in DPR's jurisdiction, it remained undeveloped, vacant land, with only intermittent, temporary uses. For instance, the large vacant space of Pier 5 has provided an ideal location for various private entities to hold short-term circuses and carnivals. For several years, DPR granted permits for the circus companies Hermanos Vazquez and Universoul Circus to the use the site for several weeks each year.⁸ DPR also granted permits for the Bronx County Fairs & Exposition Association, Inc., and the Tetro Moderno Puertorriqueno to hold carnivals on the site.⁹ All of these short-term circus and carnival uses were by for-profit companies that charged admission to members of the public, and the permits—like all DPR land use permits—were revocable at will by DPR.¹⁰

The Pier 5 lot was also used as a work area and equipment storage area for New York State Department of Transportation for Major Deegan Expressway rehabilitation, during portions of 2014 through 2017, again via DPR permit.¹¹ The large vacant space of Pier 5, immediately adjacent to the Major Deegan Expressway, was ideal for this use.

In 2013, DPR granted a permit to Petitioner Bronx Council for Environmental Quality's ("BCEQ") contractor to use the Pier 5 site to conduct a study of ecological methods to capture and filter stormwater runoff from the Major Deegan Expressway before it enters the

⁸ Alderson Aff. ¶ 49.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* ¶ 50.

Harlem River (referred to by Petitioners as the “Pop-Up Wetland Project”).¹² The permit allowed use of the property for this ecological study from June 27, 2013 through August 1, 2014.¹³

While the Pier 5 site was in DPR’s jurisdiction, the City considered this site for a potential future extension of Mill Pond Park, among other scenarios for future development of the site. In December 2015, Petitioner BCEQ and DPR jointly submitted the *Harlem River Brownfields Opportunity Area Nomination Report* (“BOA Report”), prepared using State funding from the Brownfields Opportunities Area Program.¹⁴ The BOA Report examines the potential for the development of an approximately five mile stretch on the Harlem River waterfront, including Pier 5, for environmental restoration and community recreational access. The BOA Report clearly states that the City was considering various development options for the Pier 5 site:

Within the BOA Focus Area, development is most likely at Pier 5. According to City sources multiple scenarios will be explored for this site, including variations on the potential amount of housing, retail, office, light industrial, job-dense workspace, and other uses that could be realized, along with waterfront access and publicly accessible open space. If Pier 5 and other Lower Concourse development sites end up featuring commercial retail and/or community facilities uses on the first and second floors, these uses would create new employment in or very near the BOA.

...

As the northernmost parcel within the study area for the Mayor’s Lower Concourse infrastructure investment announced in early 2015, this site is being studied by EDC in partnership with City Hall, along with other sites outside of the Harlem River BOA Study Area, as part of the mayoral affordable housing initiative.

¹² Exhibit M (DPR stormwater study permit). All exhibits cited herein are attached to the Affirmation of Amy McCamhill, sworn to on April 27, 2018.

¹³ *Id.*

¹⁴ Exhibit N (2015 BOA Report).

EDC states that they will devise multiple development scenarios for the site that will seek to balance the goals of maximizing open space and affordable housing objectives, and will enlist stakeholder and agency input as the plan is drafted.¹⁵

Ultimately, Pier 5 became the site of the Bronx Point development project discussed below. In June 2017, DPR surrendered jurisdiction of Pier 5 to the Department of Citywide Administrative Services for re-assignment to DSBS.¹⁶

2. *Pier 5 is not part of the parkland that was developed as part of the Yankee Stadium Redevelopment project.*

The City's 2006 Yankee Stadium Redevelopment project involved the alienation of dedicated parkland at nearby Macombs Dam Park and Mullaly Park. In connection with that project, the City mapped parkland elsewhere in the Bronx to replace the alienated parkland. Piers 2 and 3, located to the north of Pier 5 on the Harlem River waterfront, were included as a component of the replacement parkland, and were mapped as dedicated parkland in July 2006.¹⁷ The Yankee Stadium Redevelopment Project Final Environmental Impact Statement ("FEIS") depicts the replacement parkland, including the replacement parkland on Piers 2 and 3, as well as replacement parkland at other locations.¹⁸ As documented in the FEIS, the replacement parkland on Piers 2 and 3 totals 5.11 acres.¹⁹

Because federal funding, through the Land and Water Conservation Fund ("LWCF") Act of 1965, had been used to fund a 10.67-acre portion of Macombs Dam Park that

¹⁵ Exhibit N (2015 BOA Report), at 13, 65.

¹⁶ Alderson Aff. ¶¶ 54-55.

¹⁷ See Exhibit C (Bronx Borough President's Map No. 13115).

¹⁸ Exhibit G (Yankee Stadium Redevelopment Project FEIS Chapter 4), at Figure 4-8.

¹⁹ *Id.* at Table 4-1.

was alienated as part of the Yankee Stadium project, the federal government needed to approve the dedication of replacement parkland as a conversion under Section 6(f) of the Act.²⁰ The federal approval required a determination that the replacement parkland had a value at least equal to that of the converted parkland.²¹ Therefore, the City hired a licensed appraiser to assess the value of the replacement parcels, including the replacement parkland at Piers 2 and 3.²²

In July 2006, the Department of Interior approved the conversion of replacement parkland, including 6.42 acres of parkland at Piers 2 and 3.²³ These 6.42 acres include 1.37 acres of underwater land that was not counted in the Yankee Stadium Redevelopment Project FEIS.²⁴ The Section 6(f) replacement parkland at Piers 2 and 3 remains subject to LWCF regulations and restrictions; namely, it cannot be converted to other than public outdoor recreation use without federal approval, which requires the development of other reasonably equivalent replacement parkland.

The Pier 1 parcel to the immediate north of Piers 2 and 3 was also developed as public open space in connection with the Yankee Stadium Redevelopment project, although it was not mapped as dedicated parkland and is not under the jurisdiction of DPR.²⁵ As documented in Yankee Stadium Redevelopment Project FEIS, Pier 1 was developed as a 0.71

²⁰ Alderson Aff. ¶ 36.

²¹ Alderson Aff. ¶ 64.

²² Exhibit H (2006 Appraisal Report).

²³ Exhibit I (2006 approval documents for LWCF conversion).

²⁴ *Id.* The underwater land accounts for the discrepancy in the acreage of replacement parkland described in the Yankee Stadium Redevelopment Project FEIS and the acreage of federally approved conversion parkland, as the FEIS does not credit land underwater as replacement parkland. Alderson Aff. ¶ 36.

²⁵ Alderson Aff. ¶ 35. The Pier 1 parcel is under the jurisdiction of DSBS. *Id.*

acre Harlem River esplanade that connects with the public waterfront path in the mapped parkland on Piers 2 and 3, thereby providing contiguous public access to the waterfront.²⁶

3. *Pier 5 was not part of the open space development on Pier 4.*

Although, as discussed above, only Piers 2 and 3 were mapped as dedicated parkland in replacement for the parkland alienated by the Yankee Stadium Redevelopment project, the City endeavored to provide contiguous open waterfront access on Piers 1 through 4. The waterfront esplanade developed on Pier 1 fulfilled part of this vision.

While the Yankee Stadium Redevelopment project was underway, the Gateway Center project at the former Bronx Terminal Market site was also in development; through this project, plans for Pier 4 also coalesced. As part of the Gateway Center project, the developer agreed to fund the development of approximately two acres of additional open space, south of Piers 2 and 3, on Pier 4.²⁷ Accordingly, the Yankee Stadium Redevelopment project FEIS explained that the City “will develop an approximately 2-acre waterfront public open space on Pier 4,” to be maintained by DPR, by 2009, to provide a total of over 7.8 acres of continuous waterfront space.²⁸ Likewise, the FEIS for the Gateway Center project also explained that “the City—with contributions from the project sponsor—would develop an approximately 2-acre waterfront public open space” on Pier 4 by 2009.²⁹

²⁶ Alderson Aff. ¶ 35; Exhibit G (Yankee Stadium Redevelopment Project FEIS Chapter 4), at Table 4-1.

²⁷ Exhibit J (Gateway Center at the Bronx Terminal Market FEIS Chapter 5), at 5-5.

²⁸ Exhibit G (Yankee Stadium Redevelopment FEIS Chapter 4), at 4-4, 4-5, 4-7.

²⁹ Exhibit J (Gateway Center at the Bronx Terminal Market FEIS Chapter 5), at 5-5.

4. *Pier 5 is not part of Mill Pond Park.*

With funding in place to develop Piers 2 through 4 as a public park maintained by DPR, and the planned waterfront esplanade connection on Pier 1, the City began to plan for what ultimately became Mill Pond Park. In March 2007, DPR and the City's Economic Development Corporation ("NYCEDC") jointly submitted applications for preliminary Art Commission approval of a proposed park design for Piers 1 through 4.³⁰ The application describes the scope of the project as follows:

Rehabilitation of the Bronx Terminal Market site into a waterfront park for the community as required by the Yankee Stadium and Gateway Center FEIS reports. The park will be approximately 9 acres and include 16 tennis courts, waterfront esplanade [sic], and a passive park on pier 4. The project is on Piers 1-4 along the Harlem River. For the purpose of an overall concept plan along the waterfront pier 5 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. We are seeking preliminary approval on Piers 1-4 only.*³¹

This project scope explicitly excludes the Pier 5 area.

In the application, certain renderings included a depiction of potential future facilities on Pier 5, which were depicted in a semi-transparent shaded mode to reflect that this area was not part of the proposed plan for Mill Pond Park. For example, in the rendering copied below, Pier 5 is depicted in semi-transparent shading in the upper right-hand corner.

³⁰ Exhibit K (2007 Art Commission application excerpt and preliminary approval).

³¹ *Id.* (emphasis added).



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The Art Commission requested that Pier 5 be included in the conceptual plan to ensure that DPR was considering the future programming and design of the undeveloped, vacant site.³³ However, DPR and NYCEDC were clear that Pier 5 was outside the scope of the application for preliminary approval.

The Art Commission issued a final approval for Mill Pond Park in July 2008.³⁴ Mill Pond Park, comprising Piers 2 through 4 with a connection to the waterfront esplanade on Pier 1, opened in 2009.³⁵ The park features sixteen Deco Turf tennis courts, a picnic and sand

³² *Id.*

³³ Alderson Aff. ¶ 44.

³⁴ Exhibit L (2008 Art Commission application excerpt and final approval).

³⁵ Alderson Aff. ¶ 47.

play area, a shaded outdoor classroom space for children, and an ADA-accessible esplanade along the Harlem River waterfront.³⁶

B. The Bronx Point Project will include affordable housing, a museum, and—for the first time ever—public open space on Pier 5.

Pier 5 is now being redeveloped as a mixed-used site, known as the Bronx Point project.

1. *The Bronx Point project components*

The Bronx Point project is a key component of a \$194 million capital investment strategy for the Lower Concourse neighborhood in the Bronx, announced by the de Blasio administration in 2015 and spearheaded by NYCEDC.³⁷ This unprecedented capital investment in South Bronx neighborhoods was developed through an NYCEDC-led two-year community process that included interactive workshops and visioning sessions to engage the local community.³⁸ The Pier 5 site is attractive for a mixed-use development project due to its relatively large size, proximity to transit, and potential for open space resources along the Harlem River waterfront.³⁹

As documented in the project's Final Generic Environmental Impact Statement, approximately three acres of publicly-accessible open space is being developed as part of the project.⁴⁰ The open space concept design that has been submitted to, and approved by, the New

³⁶ *Id.*

³⁷ Affidavit of Kate Van Tassel (“Van Tassel Aff.”), sworn to on April 27, 2018, ¶ 3.

³⁸ *Id.*

³⁹ *Id.* ¶ 4.

⁴⁰ Exhibit S (Lower Concourse North Final Generic Environmental Impact Statement (“FGEIS”) Chapter 5), at 5-12.

York City Public Design Commission (formerly known as the Art Commission) depicts the Bronx Point project's open space components.⁴¹ A waterfront pedestrian pathway will connect seamlessly with the pedestrian pathway in Mill Pond Park and on Pier 1, providing expanded public access to the Harlem River waterfront. An open space area abutting Mill Pond Park will provide a playground and open lawn area. Outdoor dining space will be provided in front of the project's mixed-used building, and other exterior areas of the building will feature a terrace, steps providing views of the Harlem River, a museum entrance plaza, and a large plaza abutting Exterior Street, suitable for seasonal markets and food trucks.

The open space components of the Bronx Point project will be thoroughly vetted by various public bodies before the project is ultimately developed. The Public Design Commission must next approve the preliminary and final design.⁴² The open space components are also subject to review by the Department of City Planning for compliance with waterfront zoning, and by the New York State Department of Environmental Conservation for tidal wetlands compliance.⁴³ The final open space design is also subject to review by DPR and the local Community Board.⁴⁴

A key component of the Bronx Point project is the development of affordable housing. Phase I of the project will include 530,000 square feet of permanently affordable rental apartments, in 571 residential units, targeting households with incomes ranging from extremely

⁴¹ Exhibit U (excerpt from the Bronx Point project's conceptual review submission to the Public Design Commission); Alderson Aff. ¶¶ 58-59.

⁴² Alderson Aff. ¶ 59.

⁴³ *Id.*

⁴⁴ *Id.*

low to moderate, in a new building featuring modern amenities.⁴⁵ Phase II of the project will contain up to 474 additional residential units, in a mix of affordable and market-rate housing, and ground floor retail space.⁴⁶

Phase I of the project is also anticipated to include a permanent home for the Universal Hip-Hop Museum, the world's first brick-and-mortar museum dedicated to the history of hip-hop.⁴⁷ The museum will feature exhibition space as well as interactive programming.⁴⁸ In addition, the Bronx Point project will include a 48,500 square foot state-of-the-art cinema, as well as retail space along Exterior Street and community facility space for educational and community-focused programming.⁴⁹ These Phase I project components, including the public open space components, are expected to be completed by 2022.⁵⁰ The Bronx Point project is expected to create over 150 permanent jobs and approximately 1,200 direct construction jobs.⁵¹

As part of the Bronx Point project, the Pier 5 site, excluding the waterfront open space component, is being leased to the developer; the City will retain ownership of the waterfront open space land, with maintenance of this land to be funded by the developer.⁵²

⁴⁵ Van Tassel Aff. ¶ 18.

⁴⁶ *Id.*

⁴⁷ *Id.* ¶ 19.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* ¶ 20.

⁵¹ *Id.*

⁵² *Id.* ¶ 5.

2. *The Bronx Point project was subject to extensive public review.*

The Bronx Point project underwent environmental review under New York City Environmental Quality Review (“CEQR”) and the New York State Environmental Quality Review Act (“SEQRA”). This review culminated in the issuance by the Office of the Deputy Mayor for Housing and Economic Development of a Final Generic Environmental Impact Statement (“FGEIS”) on August 10, 2017.⁵³ The FGEIS contains twenty-four chapters assessing the various categories of impact analysis, as set forth in the *New York City CEQR Technical Manual*, and six appendices. It comprehensively analyzed the potential for significant environmental impacts from the project.

The environmental review also directly addressed the issue of whether Pier 5 is parkland; as explained in the FGEIS, the “project site is city-owned and entirely vacant; it is not mapped as or considered to be parkland.”⁵⁴ The FGEIS also noted that the proposed open space contiguous with Mill Pond Park, while referred to as “an extension of Mill Pond Park,” would “be publicly accessible open space,” and “would not be mapped parkland.”⁵⁵

In a response to a comment stating that “[t]he EIS does not list the need to alienate parkland, or the need for a 6(f) review due to the nature of the Land and Water Conservation Fund replacement,” the FGEIS explains, “[p]arkland alienation, or the need for a 6(f) review are not listed [as required land permits] . . . because Pier 5 was never mapped or

⁵³ Chapters 1, 5, and 24 from the FGEIS are included herein as Exhibits R, S, and T, respectively. The full FGEIS and other environmental review records are available on the New York City Mayor’s Office of Environmental Coordination’s CEQR Access platform, at <https://a002-ceqraccess.nyc.gov/ceqr/>.

⁵⁴ Exhibit R (Lower Concourse North FGEIS Chapter 1), at 1-1.

⁵⁵ *Id.* at 1-2, n.1.

otherwise dedicated as parkland.”⁵⁶ In response to a series of comments expressing belief that

Pier 5 is parkland, the FGEIS explains:

Comments Noted. Pier 5 is not parkland. . . . Although some may associate Pier 5 with two major development projects in the area, Yankee Stadium and Gateway Center project, it is not associated with either.

- With the Yankee Stadium Redevelopment Project, a total of 22.42 acres was alienated. Replacement parkland (a total of 24.56 acres) was acquired and developed, and includes a portion of the former Bronx Terminal Market parcel (5.11 acres consisting of Piers 2 and 3), south of the Major Deegan Exit 6 Ramp, which was mapped as parkland. Pier 5 is in no way included in this replacement parkland.
- Pier 4 (and not Pier 5) was developed as open space in connection with the redevelopment of the former Bronx Terminal Market as Gateway Center, located to the east of the Major Deegan Expressway.

While Pier 5 was in DPR jurisdiction for a period of time, unlike Piers 2 and 3, it was never mapped or otherwise dedicated as parkland.⁵⁷

The Bronx Point project was also subject to review under the City’s Uniform Land Use Review Procedure (“ULURP”). Accordingly, pursuant to the ULURP review procedures set forth in N.Y. City Charter § 197(c), the project was referred to Bronx Community Board 4, the Bronx Borough President, the City Planning Commission, and the New York City Council. Bronx Community Board 4 held a public hearing on the project on May 23, 2017, and recommended approval of the project with conditions, by a vote of nineteen in favor, seven opposed, and five abstentions.⁵⁸ Following a public hearing and comment period convened by the Bronx Borough

⁵⁶ Exhibit T (Lower Concourse North FGEIS Chapter 24), at 24-4.

⁵⁷ *Id.* at 24-8.

⁵⁸ Exhibit V (August 23, 2017 City Planning Commission Report, with Community Board 4 recommendation attached).

President from June 1 through 20, 2017, the Bronx Borough President issued his approval of the project with recommendations on June 29, 2017.⁵⁹

One June 21, 2017, the City Planning Commission held a public hearing on the land use applications for the project.⁶⁰ Six speakers spoke in favor of the project, and three in opposition. The six speakers in favor were representatives from NYCEDC, DPR, Bronx Community Board 4, two non-profits, and a local development company. The speakers in opposition included two representatives of an environmental non-profit organization and one member of the community. The representative from DPR explained that the Pier 5 site was never mapped or otherwise dedicated as parkland. Statements in opposition included the contention that the project conflicted with plans and promises to make the parcel parkland.

The City Planning Commission approved the project's land use actions on August 23, 2017.⁶¹ The City Council's Subcommittee for Planning held a public hearing on the project on September 25, 2017, and voted to approve the project on October 10, 2017.⁶² The Land Use

⁵⁹ Exhibit V (August 23, 2017 City Planning Commission Report, with Bronx Borough President recommendation attached).

⁶⁰ Exhibit V (August 23, 2017 City Planning Commission Report), at 12.

⁶¹ *Id.* A separate City Planning Commission report documents its approval of each of the four discretionary land use actions that the Bronx Point project entails. City Planning Commission Report C 170314 (disposition of property) is attached as City Exhibit V. The other reports are available on the Department of City Planning's website, at <http://a030-cpc.nyc.gov/html/cpc/index.aspx>.

⁶² Van Tassel Aff. ¶ 16; Exhibit W (September 25, 2017 Subcommittee on Planning hearing transcript).

Committee voted to approve the project on October 11, 2017.⁶³ On October 17, 2017, the New York City Council approved the Bronx Point project, thus concluding the ULURP process.⁶⁴

ARGUMENT

POINT I

PIER 5 IS NOT PARKLAND

Petitioners seek a judgment declaring that Pier 5 is dedicated parkland that cannot be alienated without express legislative approval. As demonstrated by the record evidence, Pier 5 is neither expressly nor impliedly dedicated parkland. The Petition has no merit.

A. A high legal standard applies to claims of parkland dedication.

The public trust doctrine prohibits the use of dedicated parkland for other than park purposes without specific approval of the New York State Legislature. *See, e.g., Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 630-31 (2001). This doctrine applies only to lands actually dedicated for public park use. *See Angiolillo v. Town of Greenburgh*, 290 A.D.2d 1, 10-11 (2d Dep't 2001) (rejecting parkland alienation claim where petitioners failed to prove that affected property constituted dedicated parkland); *Cathedral Church of St. John the Divine v. Dormitory Auth.*, 224 A.D.2d 95, 103 (3rd Dep't 1996) (same).

Parkland dedication is typically achieved through formal acts, such as adopting legislation, rather than through implication. *See, e.g., Buffalo, Lockport, & Rochester Railway Co v. Hoyer*, 214 N.Y. 236, 242-43 (1915). In New York City, the City Map is the official municipal

⁶³ Van Tassel Aff. ¶ 16.

⁶⁴ Exhibit X (October 17, 2017 minutes of the City Council).

document used to record the creation and modification of public spaces, including parks. N.Y.C. Admin. Code § 25-102.

Under limited circumstances, dedication for public use can be implied. *See Riverview Partners, L.P. v. City of Peekskill*, 273 A.D.2d 455, 455 (2d Dep't 2000) (“In the absence of a formal dedication of land for public use, an implied dedication may exist when a municipality’s acts and declarations manifest a *present, fixed, and unequivocal intent* to dedicate.” (emphasis added)). The burden of demonstrating implied dedication rests with the party seeking to establish the dedication. *Angiolillo*, 290 A.D.2d at 11.

In a unanimous decision, which affirmed a unanimous First Department decision, the Court of Appeals confirmed that a party seeking to establish an implied dedication of parkland must show that the municipality’s acts constitute “an unequivocal manifestation of an intent to dedicate the parcels as permanent parkland.” *Glick v. Harvey*, 25 N.Y.3d 1175, 1180 (2015). “[I]f a landowner’s acts are ‘equivocal, or do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication.’” *Id.* (quoting *Holdan v. Trustees of Vil. of Cold Spring*, 21 N.Y. 474, 477-78 (1860)).

As long as there is “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,” a litigant cannot show that the City has manifested an “unequivocal” intent to permanently dedicate the land at issue. *Glick*, 25 N.Y.3d at 1181. In *Glick*, the Court of Appeals observed that the record documents showed that City did not manifest an unequivocal intent to dedicate the contested parcels for use as public parks: “although the City permitted and encouraged some use of these . . . parcels for recreational and park-like purposes, it had no intention of permanently giving up

control of the property.” *Id.* at 1180-81. The Court of Appeals further noted “[t]hat a portion of the public may have believed that these parcels are permanent parkland does not warrant a contrary result.” *Id.* at 1181.

Because implied dedication of parkland requires a showing of an “unequivocal” intent to dedicate, *id.* at 1180, evidence of a contrary municipal intent will defeat an attempt to establish implied dedication, and factual disputes regarding the City’s intent are not sufficient to carry Petitioners’ burden of showing the requisite intent.

B. Pier 5 is not expressly dedicated parkland.

Pier 5 is not expressly dedicated parkland. 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.

Under the Administrative Code of the City of New York, the City Map officially records “all parks, playgrounds, streets, courtyards abutting streets, bridges, tunnels and approaches to bridges and tunnels, and improvement of navigation in accordance with bulkhead and pierhead lines.” N.Y.C. Admin. Code. § 25-102. Under the New York City Charter, the Director of the Department of City Planning is entrusted with the responsibility for maintaining the City Map. City Charter § 198(b).

The currently effective City Map that depicts the Pier 5 parcel is Bronx Borough President’s Map No. 13105.⁶⁵ This map was adopted on June 7, 2005, and has not changed since that time.⁶⁶ Respondents’ Exhibit B is a copy of this City Map marked up by DPR to illustrate

⁶⁵ Exhibit A (Bronx Borough President’s Map 13105).

⁶⁶ *Id.*; see also Alderson Aff. ¶ 20.

the location of Pier 5.⁶⁷ The City Map shows that Pier 5 is not mapped parkland. As discussed above, there is mapped parkland close to Pier 5—namely, at Piers 2 and 3, north of Pier 5. Thus, in contrast to Pier 5, the currently effective City Map that depicts Piers 2 and 3 shows Piers 2 and 3 as mapped parkland.⁶⁸

Along with their Petition, Petitioners provided certain maps purporting to show that Pier 5 was has been denominated as a “park” or “park extension.”⁶⁹ None of the maps that Petitioners submit are the official City Map, and indeed several of Petitioners’ maps were even created by non-City entities, namely, New Yorkers for Parks and GoogleMaps. As explained above, the official City Map, which is designated in the City Charter as the document that records official municipal land use decisions, shows that Pier 5 is not mapped parkland.

C. Pier 5 is not parkland by implication.

Petitioners’ claim that the vacant, undeveloped Pier 5 site has been impliedly dedicated as parkland also fails. Petitioners have failed to meet their heavy burden to show implied dedication.

1. *The record shows no municipal intent to dedicate.*

The history of Pier 5, as explained above and in Respondents’ supporting exhibits, conclusively shows that the City has not manifested an unequivocal intent to dedicate this parcel for park use.

⁶⁷ Exhibit B (Bronx Borough President’s Map 13105 with DPR markup to show location of Pier 5).

⁶⁸ Exhibit C (Bronx Borough President’s Map 13115).

⁶⁹ Pets.’ Exhibit B (maps from New Yorkers for Parks and GoogleMaps); Pets.’ Exhibit C (NYCPlanning map); Pets.’ Exhibit D (City digital tax map).

Unlike other properties where courts have recognized implied dedication, there is no showing here that Pier 5 was acquired by the City for park purposes. *Compare Riverview Partners L.P.*, 273 A.D.2d at 455-56 (land was acquired for park purposes and implied dedication was found); *Croton-On-Hudson v. County of Westchester*, 38 A.D.2d 979, 980 (2d Dep't 1972) (same) with *Powell v. City of New York*, 85 A.D.3d 429, 431 (1st Dep't 2011) (finding that property was not acquired for park purposes and was not impliedly dedicated); *Douglaston & Little Neck Coal. v. Sexton*, 145 A.D.2d 480, 481 (2d Dep't 1988) (same); *Pearlman v. Anderson*, 62 Misc. 2d 24, 24-26 (Sup. Ct., Nassau County 1970) (same).

Indeed, nearly all cases where implied dedication was found in New York State, there has been a clear showing that the land was acquired for park purposes. In at least one case, a failure to show acquisition for park purposes was deemed dispositive. *Pearlman*, 62 Misc. 2d at 26 (holding that "land acquired in fee for general purposes without any restriction even though used for a park may be used for other municipal purposes" and noting "[t]o hold otherwise would cause public officials to bar the use as a park of land acquired for future needs").

Petitioners cite the New York County Supreme Court decision *Friends of Petrosino Square v. Sadik-Khan*, 42 Misc. 3d. 226, 230 (Sup. Ct., N.Y. County 2013), for the proposition that "[d]edication of parkland is implied where the City holds land out as a park and the public uses the land as a park." The validity of *Petrosino Square* on this issue is at least questionable. The lower court relied on *Petrosino Square* in *Glick v. Harvey*, 2014 N.Y. Misc. LEXIS 35, at *40-41 (Sup. Ct., N.Y. County 2014), but its finding of implicit parkland dedication was unanimously overruled by both the First Department and Court of Appeals, which held that the City's temporary use of land for park purposes did not impliedly dedicate that land. 121 A.D.3d at 499 (1st Dept. 2015) (acknowledging that "the City has allowed for the

long-term continuous use of parts of the parcels for park-like purposes,” and concluding that “such use was not exclusive” and any management of the parcels by DPR was “temporary and provisional”); *aff’d*, 25 N.Y.3d 1175 (2015); *see also Pearlman*, 62 Misc. 2d at 26 (“The fact that the village cleaned up the property, put in a few shrubs and trees, walkways with four or five benches, and it was used to a small degree as a park does not . . . place this property into a trust for park purposes.”).

Nevertheless, Petitioners’ claim fails even on Petitioners’ own terms, since Pier 5 has *never* even been open to the general public for park use. Indeed, for the vast majority of DPR’s management of Pier 5, the site was vacant and fenced off to all members of the public. *Cf. Riverview Partners L.P.*, 273 A.D.2d at 455-56 (finding implied dedication where property “was purchased in 1929 for park purposes” and “was used by the public as a park since its purchase, and was maintained and improved by the defendant for park and historic purposes”); *Croton-On-Hudson*, 38 A.D.2d at 980 (finding implied dedication where a site was “acquired for public park purposes . . . and have been used as such for over 45 years”); *Gewirtz v. Long Beach*, 69 Misc. 2d 763, 772 (Sup. Ct., Nassau County 1972) (finding implied dedication where “uncontradicted evidence establishes more than three decades of continuous use of the ocean beach front facilities by the public at large after those facilities were declared to be a public park by the city itself in 1936”).

Indeed, *any* public use of Pier 5 has been extremely limited. While Pier 5 was in DPR’s jurisdiction, DPR permitted certain short-term events, namely, some circuses and carnivals, and a stormwater study conducted by Petitioner BCEQ. The circuses and carnivals were run by private, for-profit companies, who charged admission to members of the public;

these uses were authorized by DPR permits which were revocable at will by DPR.⁷⁰ The stormwater study, likewise, was short-term and authorized via a revocable-at-will DPR permit.⁷¹ *Even if* these uses could be considered “park-like,” the limited, restrictive terms of the short-term land use permits evince no unequivocal municipal intent to permanently dedicate these parcels. *See Glick v. Harvey*, 25 N.Y.3d at 1180-81 (holding that the “restrictive terms” of a “permit, memorandum of understanding, and lease/license,” shows that “although the City permitted and encouraged some use of these . . . parcels for recreational and park-like purposes, it had no intention of permanently giving up control of the property”).

In contrast to the Petitioners’ claims, the record shows that Pier 5 was not placed under DPR’s jurisdiction with the municipal intent to permanently dedicate this vacant lot as parkland. Pier 5, along with Piers 2 through 4, was transferred to DPR’s jurisdiction in 2006 in connection with the Yankee Stadium Redevelopment project. As discussed above, that project only entailed the dedication of parkland on Piers 2 and 3. Consequently, Pier 5 was not included in the 2006 mapping of parkland on Piers 2 and 3.⁷² Pier 5 was also not included in the City’s plan to develop Mill Pond Park on Piers 2 through 4. Indeed, although the City contemplated the potential future expansion of Mill Pond Park to include Pier 5, Pier 5 was explicitly carved out of the City’s design plans for Mill Pond Park—the City’s submission for design approval noted that the City had no funds to develop Pier 5 as parkland, and no current plans to do so.⁷³ Instead, the City contemplated multiple other potential uses for Pier 5, including “housing, retail, office, light

⁷⁰ Alderson Aff. ¶ 49.

⁷¹ Exhibit M (DPR stormwater study permit).

⁷² *See* Exhibit C (Bronx Borough President’s Map 13115).

⁷³ Exhibit K (2007 Art Commission application excerpt and preliminary approval).

industrial, job-dense workspace,” as well as affordable housing, as documented in the 2015 BOA report—prepared jointly by DPR and Petitioner BCEQ.⁷⁴

In sum, the record shows that the City has never manifested an unequivocal intent to permanently dedicate Pier 5 as parkland.

2. *Petitioners fail to satisfy their burden of showing unequivocal municipal intent to dedicate.*

The purported “evidence” that Petitioners have submitted in support of their parkland dedication claim fails to show such dedication.

Contrary to Petitioners’ claims, the transfer of Pier 5 to the jurisdiction of DPR, and DPR’s temporary management of the site, does not show an unequivocal municipal intent to dedicate. *Martin v. Eagle Hill Found.*, 111 A.D.2d 372, 373-74 (2d Dep’t 1975) (holding that property that had been transferred to the jurisdiction of a municipal parks department had not been impliedly dedicated as parkland). Indeed, as explained in the affidavit of DPR’s Colleen Alderson, many sites within DPR’s jurisdiction are not dedicated parkland.⁷⁵ Likewise, the presence of a DPR sign on a site—here, on a locked gate on a fenced-off property—does not indicate an unequivocal municipal intent to dedicate this site. *See Glick*, 25 N.Y.3d at 1178-81 (finding no implied dedication at a GreenThumb garden site where DPR had “erected signs there bearing the DPR insignia”).

Petitioners also point to various maps and other documents from City agencies that include the words “park” or “parkland” in reference to Pier 5. However, the use of the terms “park” and “parkland” in informal City documents and maps does not show an unequivocal

⁷⁴ Exhibit N (2015 BOA Report), at 13.

⁷⁵ Alderson Aff. ¶¶ 10-13.

intent to dedicate. As explained in Colleen Alderson's affidavit, these terms are often used informally to refer to property that DPR manages.⁷⁶ See also *Hotel Emps. & Rest. Emps. Union v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 548-49 (2d Cir. 2002) (acknowledging that Lincoln Center Plaza was designated as a "park" on DPR's website and concluding that "fact itself has little relevance with regard to park dedication" since this term was used loosely); *Lazore v. Bd. of Trs.*, 191 A.D.2d 764 (3d Dep't 1993) (finding no implied dedication because map listing parcel as a park was "never meant to be binding," in contrast to the official zoning map adopted by the Village pursuant to Village law); *Pearlman*, 62 Misc. 2d at 25-26 (finding no implied dedication although sign referred to land as park and village annual reports referred to land as "Mill River Park," because plaintiffs identified no "official act" of village trustees showing intent to dedicate).

Petitioners also argue that Pier 5 is parkland because at one time the City contemplated an expansion of Mill Pond Park on Pier 5. This argument also fails. A showing that the City merely considered the possibility of future park use is a far cry from the required showing that "the municipality's acts and declarations manifest a present, fixed, and unequivocal intent to dedicate." *Glick v. Harvey*, 121 A.D.3d at 499, *aff'd*, 25 N.Y.3d 1175. Courts have rightly rejected the claim that mere consideration of future park use constitutes an implicit dedication of parkland. See, e.g., *Lazore*, 191 A.D.2d 764 (holding that the "Park and Recreation Facility Development Plan . . . relied upon by petitioner" does not show implied dedication as it "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 park"); *Shapiro v. Town of Ramapo*, 29 Misc. 3d 1220[A] (Sup. Ct., Rockland County 2010) (finding no parkland dedication where town took

⁷⁶ Alderson Aff. ¶ 12.

“certain preliminary steps towards creating a golf course,” but “abandon[ed] the project as simply not feasible” due to “a number of environmental, legal, financial and logistical hurdles”).

If, as Petitioners wrongly suggest, discussions of future land use possibilities alone could create an unequivocal permanent dedication, the City would be reluctant to ever engage the general public in discussions about city planning. Petitioners’ “gotcha” theory of parkland dedication would have the opposite effect that they intend—as noted by the *Pearlman* court, if the test for implied dedication were easy to meet then municipalities would be disincentivized from holding out municipal land for any temporary park-like uses—or, in this case, from even considering the future development of open space or park-like uses. *See Pearlman*, 62 Misc. 2d at 26.

Ironically, while Petitioners refer more broadly to the City’s stated interest in developing public open space on Pier 5 to oppose the Bronx Point project, they do not seem to realize that the City *is now doing exactly that* through the Bronx Point project. The City can lawfully provide public open space benefits without permanently dedicating land as parkland. For example, Pier 1 has been developed as a publicly accessible waterfront esplanade—yet as the above discussion shows, Pier 1 was not mapped as dedicated parkland when the esplanade was developed, and in fact remains in the jurisdiction of the City’s Department of Small Business Services. Similarly, the Bronx Point development project includes significant new public open space, which will provide for public recreation on Pier 5 for the first time—yet the project does not entail any mapping of parkland, and the open space components will be created and funded by a private developer. If all public open space were treated as permanently dedicated parkland, municipalities would be disinclined to provide such public open space for their constituents. *See Pearlman*, 62 Misc. 2d at 26.

Finally, Petitioners argue that Pier 5 should be considered parkland because they thought it was parkland, and allegedly so did the Bronx Borough President. Pets.' Mem. at 9. But “that a portion of the public may have believed that th[is] parcel[] [is] permanent parkland does not warrant a contrary result.” *Glick*, 15 N.Y.3d at 1181. Moreover, the Bronx Borough President has issued a recommendation approving the Bronx Point project, and in doing so noted that he “reject[s] the suggestion that by allowing development to occur on Pier 5 this means we are precluding access to open space.”⁷⁷ The Bronx Borough President’s statement recognizes that public open space can co-exist with a beneficial development project—in this case, a development with a substantial affordable housing component and community facilities—on land that is not permanently dedicated parkland.

In sum, Petitioners cannot carry their burden of demonstrating an unequivocal municipal intent to dedicate Pier 5 as parkland.

POINT II

AS PIER 5 IS NOT PARKLAND, ALL OF PETITIONERS’ CAUSES OF ACTION FAIL

A. Petitioners’ parkland alienation claim fails.

As explained above, Pier 5 is not parkland. Pier 5 has neither been expressly or impliedly dedicated as parkland. Thus, Petitioners’ first cause of action, alleging a violation of the public trust doctrine, fails.

⁷⁷ Exhibit V (August 23, 2017 City Planning Commission Report, with Bronx Borough President recommendation attached).

B. Petitioners' municipal waste claim fails.

Because Petitioners fail to show that the Bronx Point project is fraudulent or illegal, Petitioners' municipal waste claim fails. As the Court of Appeals has held, “[a] taxpayer suit under General Municipal Law § 51 ‘lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes.’” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009) (quoting *Mesivta of Forest Hills Inst. v. City of New York*, 58 N.Y.2d 1014, 1016 (1983)).

Petitioners claim that the City has taken “illegal actions in ceding control over parkland to a non-park use” is based solely on their incorrect assertion that Pier 5 is dedicated parkland. Am. Ver. Pet. ¶ 65. As shown above, Pier 5 is not parkland. Accordingly, the Bronx Point project is not illegal or fraudulent, and Petitioners have no claim of municipal waste.

C. Petitioners' claim under the Land and Water Conservation Fund Act fails.

Because Pier 5 is not parkland protected by the LWCF Act, Petitioners' claim under this federal law fails.

Petitioners concede that only a “portion of Mill Pond Park is subject to the Land and Water Conservation Fund Act of 1965’s conversion requirements since it was land substituted for parks acquired through that statute.” Am. Ver. Pet. ¶ 68. As explained above, that portion is at Piers 2 and 3. Yet Petitioners argue that the Bronx Point project on Pier 5 will somehow “diminish[] the value” of the substitution parkland on Piers 2 and 3. *Id.* ¶ 70. Petitioners cite no evidence to support this claim, nor could they. The appraisal of Piers 2 and 3, which was accepted by the federal government in approving the parkland conversion under the

LWCF Act in 2006, was in no way premised on the development of parkland on Pier 5.⁷⁸ The 2006 environmental review for the Yankee Stadium Redevelopment project does not contemplate that Pier 5 will be developed as parkland,⁷⁹ and neither does the federal government's 2006 approval of the City's conversion application.⁸⁰

In sum, Petitioners' claim that the Bronx Point Project somehow detracts from the "pledged open space" within Mill Pond Park subject to the LWCF Act, Am. Ver. Pet. ¶ 70, has no merit. Only Piers 2 and 3 were pledged as open space parkland under the LWCF, and at the time that the City applied for and received federal government approval, the City in no way represented to the government that Pier 5 would also be developed as parkland. Petitioners' LWCF claim, like their other claims, lacks any merit.

⁷⁸ Exhibit H (2006 Appraisal Report).

⁷⁹ Exhibit G (Yankee Stadium Redevelopment Project FEIS Chapter 4).

⁸⁰ Exhibit I (2006 approval documents for LWCF conversion).

CONCLUSION

For all of the foregoing reasons, the Petition should be denied and this proceeding should be dismissed.

Date: New York, New York
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