

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

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In the Matter of the Application of
Emergency Coalition Organization To Save
Washington Square Park; Jessie McNab;
Ray Brizzi; Susan Furman; Daniel Weinberg;
Nina Reznick; Jerry Sitner; and
Robert Levine,

Petitioners,

For a Judgment pursuant to CPLR Article 78

-against-

The City of New York; Michael Bloomberg, in
his capacity as Mayor of the City of New York;
the New York City Department of Parks and
Recreation; Adrian Benepe, in his capacity as
Commissioner of the Department of Parks and
Recreation; and William Castro, in his capacity
as Manhattan Borough Commissioner of the
Department of Parks and Recreation,

Respondents.

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**AMENDED
VERIFIED PETITION**

INDEX NO. **07102194**

Assigned to:
Hon. Judge _____

Petitioners, by their attorney, Joel R. Kupferman, upon knowledge as to certain matters
and upon information and belief as to all others, respectfully allege as follows:

NATURE OF THE PROCEEDING

1. This action arises from the New York City Department of Parks and Recreation's
("DPR") Plan to redesign and reconstruct Washington Square Park (the "Park") and its
adjoining sidewalks and the environmental review process for the proposed Plan
undertaken pursuant to the New York State Environmental Quality Review Act

("SEQRA"), N.Y. Environmental Conservation Law §§ 8-0101–8-0117 (1997), and the New York City Rules of Procedure for Environmental Quality Review ("CEQR"), 62 R.C.N.Y. §§ 5-01 et seq.

2. Pursuant to CPLR Article 78 and § 3001, Petitioners seek an order: (a) nullifying the Negative Declaration -- the Notice of Determination of Non-significance for the Washington Square Park Reconstruction Project CEQR#06DPR001M (hereinafter referred to as the "Neg Dec") – which found that the proposed redesign and reconstruction of the Park will not have any significant environmental impact within the meaning of SEQRA and CEQR; (b) compelling Respondents to prepare an Environmental Impact Statement ("EIS"); and (c) enjoining Respondents from contracting for or commencing work on the planned project until they have fully complied with the mandates of state and city law. The Negative Declaration and the underlying Environmental Assessment Statement ("EAS"), both dated November 8, 2006, are attached hereto as Exhibit A and Exhibit B, respectively.

3. Petitioners seek a judgment, order, and declaration, pursuant to C.P.L.R. Article 78, finding that Respondent City of New York's ("City") determination to issue a Negative Declaration for the Washington Square Park Project was a violation of law, arbitrary and capricious, and an abuse of discretion.

4. This action is ripe and has been commenced in a timely fashion in as much as the Negative Declaration issued on November 8, 2006 constitutes DPR's final determination regarding the environmental assessment of the Park Project. See C.P.L.R. § 217(1).

THE PARTIES

5. Petitioner Emergency Coalition Organization to Save Washington Square Park (“ECO”), a non-profit organization dedicated to protecting the historic and natural character of Washington Square Park, was incorporated on September 20, 2006. ECO participated as a Petitioner in the case Emergency Coalition Organization to Save Washington Square Park v. The City of New York, Sup Ct, NY County, Index No.: 05/110200, (settled by Stipulation of Discontinuance dated August 15, 2005) and in Podolsky v. Bloomberg, et al.; Index No. 1009981/06, New York Supreme Court. ECO’s members, including Jessie McNab and Susan Furman, frequent the Park on a regular basis to avail themselves of the myriad political, cultural, and associational activities there and to enjoy the natural surroundings.

6. Petitioner Jessie McNab has lived in the West Village since 1957. She currently resides at 55 Bethune Street with two of her children and a granddaughter. She visits the Park to enjoy the trees and other plants, and to listen to musical and other cultural performances at the fountain circle. She appreciates the layout of the park, as an aesthetic, artistic, and natural wonder. Jessie serves as an officer of ECO.

7. Petitioner Ray Brizzi resides at 424 East 75th Street, New York, New York. Every weekend, and on many weekdays, from the beginning of spring through late fall for the past seven years he has visited the Park that the Project for Public Spaces describes as “one of the twelve great public spaces in the United States and Canada” and as having “a unique and very special ‘vibe’ that is tied closely to its spontaneous music scene and

longstanding use as a performance and protest space.”¹ He has been a Manhattan resident for eleven years, a commuter for another twenty years, and has spent many afternoons in Washington Square Park. He has been playing guitar for the last five years, inspired by the performances he saw and performers he met in the Park. He has also created and maintained an informational website dedicated to the protection and preservation of Washington Square Park. (<http://home.earthlink.net/~preservewsp/id17.html>)

8. Petitioner Susan Furman is a New York City resident living at 216 East 28th St, New York, New York. She has visited Washington Square Park nearly every day since the beginning of 1999. As a musician, she comes to the park to sing, listen to other performances, and socialize with other musicians and artists.

9. Petitioner Daniel Weinberg is in his third year as an undergraduate at New York University (“NYU”), and is currently enrolled in the Gallatin School of Individualized Study, studying advocacy. Throughout his academic years at NYU, he has used the Park’s facilities – its benches, the raised ledges around the fountain, and the steps of the fountain itself – for reading, eating, and socializing with fellow classmates and friends. He also has taken advantage of these areas to enjoy the musicians and performers in the Park. Though Daniel has moved to 252 56th Street in Brooklyn, he still frequents the Park several days a week.

10. Petitioner Nina Reznick resides four blocks away from Washington Square Park, at 28 East 10 Street New York, New York. She takes a walk through the park at least several times a week, and sometimes, even daily. She enjoys the company of the

¹ Project for Public Spaces, Making Places Newsletter, December 2005. (See Exhibit #RB2).
http://www.pps.org/info/newsletter/december2005/us_canada_squares?referrer=newsletter_contents

musicians, performers, and other park goers, and watches the neighborhood dogs and bird life. She has been involved since the early 1980's in many rallies and political demonstrations in the Park. She has also been a licensed "citizen tree-pruner" for many years and has consistently and actively participated in the maintenance of the health of New York City's street trees.

11. Petitioner Jerry Sitner is 84 years old and has lived in Greenwich Village for over 45 years. He currently resides at 14 Washington Place East, one block from the Park. Jerry walks through the Park many times a day for exercise. He and his friends congregate there regularly and enjoy local events that take place in the Park.

12. Petitioner Robert Levine resides at 2 Fifth Avenue, New York, New York. He frequents Washington Square Park to read, socialize and especially to enjoy the various activities in the fountain area. He has a disability that requires him to utilize a wheelchair for daily living. He is a member of Disabled in Action ("DIA"), a 35 year old New York City-wide organization dedicated to making the physical environment more accommodating for, and public policy more inclusive of, the needs of all persons with disabilities ("PWD").

13. Respondent City of New York is a municipal corporation.

14. Respondent Michael Bloomberg is the Mayor of New York City.

15. Respondent New York City Department of Parks and Recreation is a mayoral agency of the City of New York and is responsible for establishing and improving the City's Park system, including promulgating regulations for the parks under its jurisdiction.

16. Respondent Adrian Benepe is the Commissioner of the New York City Department

of Parks and Recreation and was appointed by Mayor Michael Bloomberg. The Commissioner's duties are, *inter alia*, to "manage and care for all parks, square, and public spaces... to prepare plans for the establishment and improvement of a park system for the city ..., to plant and maintain trees and to construct, establish seats fountains, statues and works of art in any place within his or her jurisdiction." NYC Charter §533 (a) (1),(2),(4)

17. Respondent William Castro is the Manhattan Borough Commissioner for the New York City Department of Parks and Recreation. He is responsible for the management of more than 270 parks, playgrounds and malls including primary responsibility for the management of Manhattan's green infrastructure. In addition, he shares responsibility for the allocation and management of capital funds used to rebuild parks and upgrade recreational facilities.

See http://www.nycgovparks.org/sub_ask_commissioner/ask_the_commissioner.html

JURISDICTION AND VENUE

18. N.Y. C.P.L.R. § 7801 confers jurisdiction on this Court.

19. Venue is properly in New York County pursuant to N.Y. C.P.L.R. § 506(b), because Washington Square Park, the subject matter of this action, is located in that County.

FACTUAL BACKGROUND

Related Cases

20. In Emergency Coalition Organization to Save Washington Square Park v. The City of New York, the City conceded its responsibility to prepare an environmental assessment statement for the proposed Plan and make an appropriate determination of significance pursuant to CEQR and SEQRA.

21. On May 1, 2006, an Article 78 proceeding was filed by Petitioners Jonathan Greenberg, Luther Harris and others, Greenberg v. City of New York, Index No. 105857/06, in Part 17 of this Court. By decision dated July 26, 2006, the Honorable Emily Jane Goodman ruled that the DPR failed to properly inform Community Board 2, the City Landmarks Preservation Commission, and the City Art Commission about material aspects of the renovation plans for Washington Square Park², namely the reduction of the fountain plaza area by as much as 33% and installation of a 45-foot spray. (Goodman decision is attached as Exhibit C).

22. The Court then enjoined all renovation of the fountain and fountain plaza pending further review by Community Board 2 and the Landmarks Preservation Commission and the Arts Commission. The City appealed the decision to the Appellate Division, First Department, and argument was heard on October__ 2006. No decision has yet been issued.

23. The Court also ruled that Petitioner Greenberg's CEQR and SEQRA claims were premature, as DPR was still in the process of conducting an environmental review. The

2. Also heard by this Court in Part 17 was an Article 78 Petition, Podolsky v. Bloomberg et al; Index No. 100998/06, brought by Petitioner Ronald Podolsky against, inter alia, the City of New York, seeking to annul the determination of the Art Commission approving the DPR's plans on the basis that said Respondents had either ignored or failed to comply with the Petitioner's Freedom of Information Law request for the DPR's written submission to the Art Commission and that, as a consequence, the Art Commission approval was the result of arbitrary, capricious and unreasonable withholding of material information. The Court denied the petition but the case has been appealed.

DPR completed its Environmental Assessment Statement (“EAS”) for the Park Renovation Project on November 8, 2006, and issued a Negative Declaration on the same day.

24. Upon information and belief, the Petitioners in *Greenberg, et al.* have filed another Article 78 proceeding against the City and DPR alleging violations of SEQRA and CEQR and seeking to annul Respondent DPR’s Negative Declaration, Greenberg and Harris v. City of New York, Index No. **100760/2007**. The matter is being heard by Justice Joan Madden.

25. It is respectfully requested that this proceeding be assigned to Justice Madden as a related case as the instant petition and the Greenberg and Harris proceeding arise out of the same factual background and seek essentially the same relief: the annulment of Respondent DPR’s Negative Declaration, and an order requiring DPR to prepare an Environmental Impact Statement in compliance with the requirements of CEQR and SEQRA.

Description of Washington Square Park

26. The City of New York maintains Washington Square Park, which is located in the Borough of Manhattan, City of New York, at the terminus of Fifth Avenue. The Park is bordered by Washington Square North, Washington Square East, Washington Square South (West 4th Street east and west of the Park), and Washington Square West.

27. Upon information and belief, the Park is denoted a City of New York landmark as integral part of the Greenwich Village Historic District. (Exhibit A, 5). The Park is

surrounded by residences and many New York University facilities.

28. Populated and frequented by a diverse mix of students, residents, and artists, the Park has a long, rich history of fostering community gatherings. In particular, the “fountain circle” area, comprised of the center fountain and surrounding sunken plaza, planters, circular pathway and benches, acts as a “direct catalyst for neighborhood personality” by serving as unique informal gathering spaces for the public to hear music, to join with others in making music, to view art and to engage in and listen to political expression. (Exhibit B, pp. 27-28). The sunken central plaza has nooks for sitting and the depressed fountain acts as a sort of "theater in the round" in which generations of musicians and political activists have gathered for performance and peaceful assembly. (Id.). (See also McNab, Brizzi Aff.s).

29. The fountain circle area and the surrounding areas are populated by a diverse collection of full-grown trees, many of which are between 80 to 100 years old. (Exhibit B, 29). In the northwest corner of the park, one particularly notable tree is the historic English Elm with a sign on it that says "The Hanging Elm." Upon information and belief, the New York City Department of Parks and Recreation, in 1988, determined the English Elm was 310 years old, making it historically significant as the oldest known tree in Manhattan. (<http://www.pbase.com/hjsteed/image/36787723>). These trees offer scenic value and natural shade in the summer for the much-needed protection from the sun for people who come to enjoy the park.

30. The widespread canopies of these same trees provide habitat for resident birds and animals as well as a stopover place for migratory birds, including possibly threatened

and/or endangered species (Exhibit B, 29) under federal and/or New York State law. In fact, recent sightings of a red-tailed hawk in the Washington Square Park that have been well documented in the local papers are but one example of the significant value of the mature trees of Washington Square Park. Upon information and belief, the same hawk makes the Washington Square Park its permanent home by nesting in the canopies of the northwest quadrant of the park. (Reznick Aff.).

The Procedural History of Redesign/Renovation Plan for the Park

31. The NYC Department of Parks and Recreation is responsible for establishing and improving the City's Park system. From NYC Charter Chapter 21, § 533(a), paragraphs 1-4 – the powers and duties of the Department of Park and Recreation commissioner are:

“1. to manage and care for all parks, squares and public places, the sidewalks immediately adjoining the same and all playgrounds, playground fixtures and other recreation properties . . .”

“ 2. *to prepare plans for the establishment and improvement of a park system for the city with due regard to proper connections with the systems of federal, state and county parks and recreation areas in the city and the counties adjacent to the city, and execute the same when authorized in accordance with the provisions of this charter;*

3. *to maintain the beauty and utility of all parks, squares, public places, playgrounds and other recreational properties, except those within the jurisdiction of the board of education and to institute and execute all measures for the improvement thereof for ornamental purposes and for the beneficial uses of the people of the city;*

4. *to plant and maintain trees and to construct, erect and establish seats, drinking fountains, statues and works of art in any place within his or her*

jurisdiction, and to determine when and where lamps or lighting appliances shall be placed and lighted therein and the design thereof.”

The aforementioned “beneficial uses” include use of the City’s parks as traditional public forums for the exercise of First Amendment rights of speech and assembly.

32. The plan to redesign WSP was first publicized at a public hearing before the Community Board 2 Parks Committee on February 2, 2005.

33. Despite the series of subsequent public hearings before the Community Board 2, the New York City Landmarks Preservation Commission and the Art Commission, DPR failed to inform these involved agencies of “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.” (Exhibit C, Goodman Decision at 18). In particular, DPR failed to reveal that the new fountain design would include a 45-foot spray which would preclude people from performing in it and that the fountain circle would be reduced by as much as 33% of its current size. Such changes in the fountain plaza would eliminate the historical function of the fountain circle as a gathering area for performances and First Amendment activities.

34. On or about February 17th, 2006, Ray Brizzi wrote a letter to the DPR Commissioner Adrian Benepe. (Exhibit #RB1, Brizzi Aff.). The letter identified a series of environmentally adverse effects of the proposed reconstruction of WSP and requested a response from DPR. In particular, the letter asked DPR to justify the necessity for such a major alteration to the Park’s form and function. The letter also pointed out that no bird survey or tree survey had been done in the area.

35. DPR issued a request for proposal, published March 21, 2006, soliciting bids by

contractors for “the reconstruction of the fountain, plaza and northwest quadrant in Washington Square Park.” (Bid document-excerpted at Exhibit D). The Petitioners only learned of the bid document from one of the contractors in the construction industry and subsequently paid for a copy of the bid document at the DPR office. The bid scope of work includes “restoration of the central fountain, reconstruction of pavements, benches, fences and lights as well as new landscaping.” (Exhibit D, 201). The bid revealed information contradictory to DPR’s public assurances and presentations, - including the aforementioned reduction of the fountain and removal and transplanting of trees in the northwest quadrant. (Exhibit D, Item #16 & #17, 267, 268). The Bid documents raise serious questions about the environmental impact of the reconstruction and necessitates an environmental review characterizing, discussing and mitigating of the potential environmental impact of the proposed plan.

36. After being sued in Emergency Coalition Organization to-Save Washington Square Park v. The City of New York the City conceded its responsibility to prepare an environmental assessment statement and make an appropriate determination of significance pursuant to CEQR and SEQRA in a signed a Stipulation of Discontinuance dated August 15, 2005. In that CEQR process DPR designated itself the Lead Agency and completed its environmental assessment and issued its negative declaration on November 8th, 2006. DPR concluded that the proposed action will have no significant adverse environmental impact. The Negative Declaration and EAS identify the project actions in three phases: Phase I, relocation of the Fountain and Fountain Plaza and major alteration to the Fountain Plaza and the northwest section of the Park, as reflected in the

Bid document; Phase II, as yet unspecified alterations to the dog runs, games area, and playground areas; and Phase III, replacing utility buildings (Exhibit A, 3 and Exhibit B, 8-9). The EAS provided inadequate information about the second and third phases of the Plan and their potential impacts. In particular, none of the 314 pages of the Environmental Assessment refers to the bid document or the details within that would affect the consideration of environmental impact.

37. On December 5th, 2006, Jessie McNab wrote to the NYC Office of Environmental Coordination requesting that the agency assist DPR in conducting the CEQR environmental review for the proposed Plan. (Exhibit #JM1, McNab Aff.). The letter requested, *inter alia*, DPR and OEC to: 1) rectify the apparent lack of information on the Phase II and III of the reconstruction project; 2) inadequate explanation of how access for the disabled will be improved; and 3) missing analysis of the environmental impacts of removing trees to provide a larger lawn. No reply or corrective action came from either the NYC Office of Environmental Coordination or DPR.

38. On December 4th, 2006, Robert Levine, as a representative of Disabled in Action of Metropolitan New York, wrote a letter to the NYC Office of Environmental Coordination detailing DPR's continuing violations of the Americans with Disabilities Act throughout the proposed Plan and the failure of the Environmental Assessment Statement to address the issues. (Exhibit #RL1, Levine Aff., para 6). No reply or corrective action came from either the Office of Environmental Coordination or DPR.

The Fatally Flawed Environmental Assessment

39. DPR failed to meet the SEQRA and CEQR requirements in that they failed to fully identify and evaluate potential environmental impacts arising from the extensive reconstruction of the Park. See Doremus v. Town of Oyster Bay, 274 A.D.2d 390, 393 (N.Y. App. Div. 2000). The EAS fails to adequately discuss the proposed Plan's Purpose and Need, fails to identify and evaluate the myriad environmental adverse effects both to the park and to the community, does not consider any alternatives to the proposed Park Project, and recommends no mitigation actions for the reasonably foreseeable impacts—both long and short term--on the Park's natural resources (both flora and fauna), the neighborhood character, socioeconomic impacts, local aesthetic, historical, and cultural resources and public health.

Information Missing from the EAS

40. Respondent DPR, in its EAS and the Neg Dec, omitted and/or misrepresented information critical to assessing potential impacts from the reconstruction project. In particular, DPR failed to include in the EAS the Phase I project specifications as set forth in the bid contract document (prepared prior to the environmental review), and failed to present sufficiently detailed information regarding Phases II and III of the WSP Project to properly evaluate whether the Plan as a whole would result in significant impacts necessitating the preparation of an EIS. As a result, DPR failed to take a "hard look" at the areas of environmental concern and failed to make a "reasoned elaboration" of the basis of its determination of Negative Declaration. See *Merson v. McNally*, 90 N.Y.2d 742, 751-752 (N.Y. 1997).

Purpose and Need for Reconstruction of Washington Square Park

41. Upon information and belief, the DPR's initial emphasis as to the purpose of the Washington Square Park reconstruction project was merely to renovate the park in order to comply with the ADA requirements. However, over time, DPR's stated purpose for the renovation has evolved, ultimately developing into an ambiguous list of objectives in the DPR's current Environmental Assessment which states: "provide the park with a cohesive design, improved circulation and physical condition, contemporary design standards for pedestrian use, enhanced access and rehabilitation of important historic features." (Exhibit B, 8).

42. While DPR still claims that "an important part of the reconstruction project is to ensure enhanced and equal access to park features, in compliance with the [ADA]" (Id. 20), the Plan is wholly inadequate and lacking in specific information regarding ADA compliance – DPR's EAS and Neg Dec content themselves with generalities. Only after being sued did DPR provide some details regarding ADA compliance in the Affidavit of Amy Freitag, DPR Deputy Commissioner for Capital Projects, as part of the City's Answer to the Greenberg Article 78 Petition. (Exhibit H, Freitag Affidavit, p.12).

43. The Freitag Affidavit introduces the notion of "curb cuts in lawn areas for wheelchairs" and "spacing between some benches that allows room for wheelchair companion seating" for the first time as ADA compliance measures that support the purpose and need for the reconstruction of Washington Square Park. (Id.). A seeming non-sequitur in the final sentence on ADA compliance is the statement that the Plan

“restores the fountain to its historic, pre-1970s relationship to its adjacent plaza.” (Id.).

44. DPR simply posits that significantly altering the fountain is necessary for ADA compliance even though they acknowledge that Disability advocates are on record as preferring the existing ramps (Exhibit H, Freitag Affidavit, p.12) and without having done an ADA self-assessment for Washington Square Park.

45. U.S. Department of Justice Regulation 28 CFR: Part 35 (“Regulation”) implementing Title II of the ADA requires public entities with fifty employees or more, such as DPR, to perform Self-Evaluations of accessibility for disabled persons. 28 C.F.R. 35.105. It also requires such entities to have a transition plan that includes the steps necessary to make their facilities accessible. 28 C.F.R. 35.150(d).

46. In her decision dated July 25, 2006, Judge Goodman noted that DPR’s stated reasons for altering the fountain and fountain plaza were based on “good public policy” considerations rather than for ADA compliance. (Exhibit C, 10-11 and Exhibit H, Affidavit of Jared Knowles, p. 4 –[an attachment to NYC’s Verified Answer]).

47. DPR has not phased implementation of the Plan to prioritize providing ADA compliant restrooms, drinking fountains and other purported access enhancements.

Natural Resource Impacts

48. The Project will impact flora in Washington Square Park by removing up to 32 trees in the Northwest quadrant of the Park and by endangering the remaining trees through construction activities. Specifically, significant changes in the Park’s drainage system, the replacement and widening of paved pathways, the installation of curbing within the

Park boundaries, the underground demolition and installation of water and electrical lines, and other construction activities will collectively endanger virtually all of the Park's trees.

49. The impact of this extensive damage to the Park's trees will likely affect the behavior of the migratory birds that annually stop at the Park by eliminating their stopovers in the Park – an important part of the remaining limited green space in Manhattan south of Central Park. The Park's habitat is necessary for the successful migration of innumerable species of birds that use NYC Parks as part of the Atlantic Flyway³ (the major flight path of migratory birds in the eastern U.S.).

50. Indirect impacts to the use of the park by humans includes the loss of shade and a reduction of air quality in the area as a result of the elimination of mature trees whose superior function cannot be adequately compensated or mitigated by planting more grass or even younger trees.

51. DPR's objectivity in conducting its environmental review is suspect for a number of reasons that indicate DPR's Neg Dec was a foregone conclusion. DPR representatives have made numerous statements that progress on the Plan was time critical and any delay could jeopardize funding for all or part of the project funding. (Exhibit H - Freitag Affidavit, pp.13-14; Exhibit C - Greenberg Decision, 5 [Vellonakis e-mail to most of Community Board 2]). As early as January 2005 Parks Commissioner Benepe and the Mayor's Fund to Advance New York City agreed to place two plaques bearing the Tisch

³ "The Atlantic Flyway (the major flight path of migratory birds in the eastern U.S.) overlaps with one of the most urbanized regions of North America. From Boston to Atlanta, numerous cities dot the coastline. **Urban parks are often the only stopover habitat available to migrating birds as they fly through these areas.**" <http://www.wcs.org/international/northamerica/birdmonitoring> (Website for the New York Bird Monitoring Program, run by Wildlife Conservation Society in conjunction with the Audobon Society and NYC Department of Parks and Recreation, for the purpose of evaluating "New York City's parks as migratory bird stopover sites." Id.)

family name on opposite sides of the reconstructed fountain and in exchange DPR would receive \$2,500,000 from the Tisch Foundation, Inc. to pay for the Plan to reconstruct and alter the fountain and surrounding plaza at the Park. (Exhibit E, Sheet 23)

52. The fact that DPR has proceeded with the RFP bid (and did not award a contract only because the bids were too high), agreed to the put the Tisch plaque on the fountain in exchange for \$2.5 million, and has made numerous statements that the Plan must proceed as quickly as possible or DPR will lose its funding for the project indicate that DPR was determined to issue a Negative Declaration even before the EAS began.

53. The fact that DPR took significant steps towards expediting the commencement of the project by issuing an RFP and making such a binding commitment to private donors prior to any environmental review and without public disclosure indicates that DPR was planning to approve the project even before any environmental review was undertaken.

AS AND FOR A FIRST CAUSE OF ACTION

54. Petitioners repeat and reallege each of the allegations made in paragraphs 1-53 with the same force and effect as if fully set forth herein.

55. Respondent DPR did not fulfill the requirements of SEQRA and CEQR to identify significant environmental impacts, take a "hard look" at the impacts, and make a "reasoned elaboration" of the basis for DPR's determination that the Plan would not have significant environmental impacts and that preparation of an Environmental Impact Statement was not required. The Environmental Assessment Statement and the resulting Negative Declaration as prepared by DPR was incomplete and its conclusions

unsupported by appropriate documentation and the issuance of the Negative Declaration is therefore arbitrary, capricious and an abuse of discretion.

56. The proposed Plan for the reconstruction of the WSP encompasses and pervasively affects ten (10) acres and as such it is properly determined to be a Type I action as defined by SEQRA. See 6 N.Y.C.R.R. §617.4(b)(6)(i).

57. For Type I actions SEQRA and CEQR require the preparation of an Environmental Assessment Form (EAS under CEQR) to make a threshold determination of the significance of such actions and whether a full Environmental Impact Statement will be required. See 6 N.Y.C.R.R. § 617.6(a)(2). A Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an Environmental Impact Statement.” 6 N.Y.C.R.R. §617.4(a)(1). The NYC CEQR Technical Manual Chapter 1, Section B, 121. *Type I Actions*, states that “[b]efore taking a Type I action, an agency is required to prepare an EAS. Although it is possible to conclude on the basis of an EAS that a Type I action would have no significant impact on the environment, such a determination is less likely than it is for an unlisted action.” (Excerpts of CEQR Manual attached as Exhibit G).

58. In Balsam Lake Anglers Club v. Department of Env'tl. Conservation, 153 Misc. 2d 606 (N.Y. Misc. 1991) the Court held that “[s]ubstantively, an administrative body must identify all significant environmental issues, take a "hard look" at such issues, and make a "reasoned elaboration" of the basis for the determination. The threshold for requiring the preparation of an environmental impact statement rather than issuing a negative declaration is very low. Any indication that the action may have a significant effect on the

environment requires preparation of an environmental impact statement.” Id. at 611.

59. SEQRA requires agencies to determine whether the actions it takes may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare an EIS. See 6 N.Y.C.R.R. §617.1(c). CEQR implements SEQRA in New York City, See e.g. Akpan v. Koch, 75 N.Y.2d 561, 567, 555 N.Y.S. 2d 16, 18 (1990), and also requires agencies to assess whether an action will have a significant adverse impact on the environment. 43 R.C.N.Y. §6-01 et seq. The environmental impact defined under the statute includes not only effects on natural resources but also socioeconomic impacts, impacts on neighborhood character, open space and public health.

60. In the Greenberg case, supra, the Court found that the Parks Department’s plans for altering the fountain and fountain plaza “. . . could have a substantial impact on the historic role of the Washington Square Park, [and] 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 Community Board in reaching their decisions, and the Art Commission was additionally deprived of the views of the Landmarks Commission.” (Exhibit C, 18, 19). (emphasis added).

61. Contrary to such requirements, DPR did not thoroughly analyze all relevant areas of concern in its review of a determination with regard to Park Reconstruction Project and gave at best cursory attention to adverse effects upon natural resources, neighborhood

character, socioeconomic conditions, and open space, among others.

DPR failed to identify and evaluate the environmental
impact of the project on Natural Resources

62. Under SEQRA and CEQR, the impacts that may be “reasonably expected to result” from the proposed Type I (or Unlisted) action must be compared against a series of environmental criteria, considered as indicators of significant adverse impacts on the environment. One such criteria is the impact on natural resources, defined by the following:

The removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources. NYCRR 617.7 (c) (1) (ii) (SEQRA), *see also* 43 RCNY §6-06 (a)(2) (CEQR provision providing almost identical language)

63. In the instant project, DPR admits that a large collection of mature trees - over 350 - fall under Natural Resources as defined by SEQRA and CEQR (Exhibit B, 29). DPR also admits that the majority of the trees are historic. Reading the EAS alone, one would be led to believe that DPR expects at best a small possibility of tree removal as the EAS merely states that “[a]t the professional discretion of a certified arborist, trees which are below accepted health standards will be removed and appropriately replaced.” Id. In stark contrast to the EAS, the Bid document indicates that thirty-two (32) trees measuring between 6 and 12 inches in diameter at breast height (DBH) will be removed and two (2) trees measuring more than 20 inches DBH will be relocated (Exhibit D), and further explicitly identifies the target trees to be removed on Sheet No. 4 of the Bid Contract

Drawings entitled the “Staging and Tree Protection Plan”. (Exhibit E).

64. It is alarming that the DPR Manhattan Borough Office of Forestry signed **none** of the 68 Contract Drawings⁴ issued in conjunction with Phase I. Most importantly no DPR Forestry staff signed Sheets #3 (“REMOVAL”) and # 4 (“STAGING AND TREE PROTECTION PLAN”) (Exhibit E). As the tax-supported division within the DPR, the Manhattan Borough Office of Forestry should have been consulted first, as the office carries the special expertise to review any tree-disturbing aspect in the landscape designer’s plan for the Park.

65. The plans to remove and replace trees, as presented in the Bid Contract and Contract Drawings, raises several areas of environmental concern that should have required a “hard look” and consultation from the appropriate field of expertise in the earliest stages.

Effects of Construction on Existing Trees

66. CEQR Manual (Page 3I-18, Item 324 Tree survey) mandates a tree survey to be “conducted when trees are present on site and would be cleared or otherwise impacted (for example, by soil compaction, which can adversely affect the root system) due to project-related activities.”⁵ Without having done a tree survey, the Bid document (Item # 16) and the EAS already show a clear intent to remove trees prior to an analysis of potential effects. (Exhibit D, bid item #16 – “removal of 32 trees with DBH of over 6” to

4 - (THE RECONSTRUCTION OF THE FOUNTAIN, PLAZA AND NORTH WEST QUADRANT IN WASHINGTON SQUARE PARK)

5 CEQR Manual. 3I-17 Tree Survey -.... The minimum diameter of trees to be surveyed and the methodology to conduct the survey should be determined in consultation with the appropriate Borough

18”). The EAS merely states that “DPR is completing a detailed arbor survey, using guidance from the National Society of Arboriculture, to assess existing tree and root system health.” This is a classical glaring example of not taking a “hard look.” Without completing a proper tree survey, DPR cannot identify and fully measure the current health of the trees assessed in the EAS and possibly subject to removal.

67. This omission “sabotages the EAS conclusions such that “[t]he proposed project will not result in any adverse impacts on natural resources.” (McInnes Aff., para. 14). DPR also failed to explain how it determined that any of the trees at Washington Square Park needed to be removed or explain why the diseased or damaged trees, if they exist, cannot be rehabilitated rather than replaced.

68. The NYC Department of Parks and Recreation Tree Removal Protocol, dated 12/16/03 in a memo from Commissioner Benepe, cited in Crotona Park Urban Forest Management Plan reads as follows:

“Tree Removal

Trees can be in decline and still provide significant benefits, as long as risks are adequately addressed through pruning, cabling, or other arboricultural measures. Tree removal should be the last tool a manager uses, especially when the tree is historically important or a specimen. Parks has developed specific guidelines for when and under what conditions trees may be removed. The four situations in which tree removal is appropriate are (1) if the tree is dead, (2) if the tree is irreversibly diseased or in significant decline, (3) if the tree presents a hazard, or (4) if there is an unavoidable conflict between a tree and a construction project and the Commissioner approves the healthy tree’s removal.”

http://www.nycgovparks.org/sub_your_park/trees_greenstreets/croton_park_forest_plan/crotonurbanplan.pdf.

69. As such, the EAS fails to contain any analysis of the impact of tree removal. A reasoned elaboration of the impact would have at a minimum included the loss of

environmental, historical and aesthetic benefits provided by these trees .

70. Although the EAS identifies that the “proposed action includes soil removal and replacement”, it summarily dismisses the disturbance and impact of Project construction on existing trees: “these direct effects are temporary as they are construction-related” (Exhibit A, 29). However, according to certified Arborist Bruce McInnes, “excavation, no matter how carefully accomplished, within the root zones of trees is injurious” and the “damage is never ... unnoticed by the tree.” (McInnes Aff., para. 17). Such damage will have short-term and long-term adverse effects on the tree often lasting up to 8 to 10 years. (Id. at para. 18).

71. The DPR issued a Negative Declaration without taking a hard look at the significant environmental impacts to the existing trees that would take place by many of its actions. These actions include but are not limited to: “pruning to compensate for root damage” (not beneficial to tree) (McInnes Aff. para. 20)., “fertilizing trees under stress” (each tree should tested for precise fertilization needed) (Id. para. 21) addition of curbs cutting into tree roots (Id. para.44,47,52), the change of walkways (impinging upon sensitive and complex root systems and even more damage through heavy concrete walkways), the placement of new deep-based perimeter fences (damages roots) and the use of structural soil (inadequate for root activity)⁶ .

72. The EAS admits that the urban trees with most of their roots under pavement grow poorly and die prematurely. “The major impediment to establishing trees in paved urban

Environmental Protection, and any other applicable resource agencies

6 - CEQR Soils. One of the most important and often overlooked ecological support systems is soils. Soils are an integral component of any habitat type, as they play a significant role in determining the composition, amount, and nutritive value of vegetation at a site, CEQR Manual 3i-29

areas is the lack of adequate volume of soil for tree root growth” (Exhibit B, EAS at 29). Even though such environmental conditions must necessarily require more care and precaution, DPR fails to take a hard look and acknowledge the great potential for adverse effects the Project will have upon these conditions. With this understanding of the soil conditions in the Park, preservation of each tree mandates consideration and analysis of the needed conditions and potential disturbances per tree.

73. CEQR Manual advocates precautionary assessment in analyzing the impact of site-specific actions. (CEQR Manual Section **211. Site-Specific Actions**). The Manual requires that, “[f]rom the range of possible scenarios that are reasonable and likely on the site, the one with the **worst environmental consequences** should be chosen for analysis. CEQR Manual 2-2 (emphasis added). It is critical that these factors all be considered in the design of a project, not during its implementation. Failure to properly assess, IN ADVANCE, the degree of impacts and their consequences in a construction project may doom the trees (especially the larger trees) to decline and death. (McInnes para.27).

Replacement and Transplant

74. The direct and indirect adverse effects on the environment of Washington Square Park due to the removal of trees and other construction activities cannot be adequately mitigated by replacement of smaller trees. Not only to mention the historic and aesthetic values the veteran trees provide, they also “typically contribute significantly more environmental benefits and value to society than smaller trees” per tree. (McInnes Aff.,

para 9)

75. Specifically, these benefits are air temperature cooling and UV radiation reduction, carbon storage and sequestration and air pollution removal. Veteran trees store between 600 to 1,000 times more carbon within their biomass than trees less than 7.6 cm DBH. In addition, veteran trees continue to store additional carbon and annually sequester between 30 to 80 times more carbon than small trees less than 7.6 cm DBH. (McInnes Aff. Exhibit #BLM1). A significant factor affecting the influence of trees on air pollution is the amount of functional leaf surface area. Veteran trees remove 30 to 65 times more air pollution annually than small trees less than 7.6 cm in diameter in selected cities (Id.).

76. DPR claims that, by “addition of new (and compatible) vegetation,” (referring to younger trees and lawn) “the proposed action will create approximately 20% more greenery within the park.” (Exhibit B, EAS at 30). Lawns, however, are not equivalent to trees, and it is arbitrary and capricious to assume that the supposed increase in “green space” represents positive environmental benefit.

77. As much as small trees cannot replace the larger trees, even more so, lawn cannot replace mature trees. Specifically, lawns require high maintenance including the use of lawnmowers⁷ and pesticides. Lawns do not reduce air pollution - mown turf grass has very limited vascular surface areas and shallow root systems which limit their ability to both intercept air born particulates and to make effective carbon sinks. (Exhibit G, “When Cities Grow Wild – Natural Landscaping from an Urban Planning Perspective”)

7 - Gasoline powered lawn and garden equipment, on average, produce 5% of ozone-forming VOCs in areas with smog problems (EPA, 1998).

78. The “20% more greenery” claim misleads and deceives the public reviewers. Not only is the focus of this claim on quantity as opposed to quality, but it is also on the wrong quantity, and disregards total benefits and on-going environmental costs of maintaining cultivated lawns to benefits and environmental costs of trees. The short-coming of this claim is multi-layered.

79. The Parks Department does not even guarantee that the lawn portion of the “20%” increase will remain natural, thus the 20% is even more a misnomer. Artificial grass has been placed by the Department in over 79 parks in the city system and is beginning to replace some portion of the Washington Park, posing serious adverse effects, including but not limited to the creation of a “heat sink” (the lawns reach a temperature of over 160 degrees Celsius in the summer and can produce toxic polycyclic aromatic hydrocarbons (PAHs) (Exhibit #JM 2 “A Turf War” – Synthetic Turf in New York City Parks” published by NYers for Parks, a major New York City parks advocacy organization.).

80. Improper tree replacement and/or selection can in fact further diminish the natural resources. A glaring example would be planting of Asian-longhorned beetle (ALB)- host trees within the ALB quarantine zone, which encompasses New York⁸. Even though DPR policy itself prohibits this practice, the Bid documents lists two species as part of replacement trees: Item # 118 ‘plant (8) *Ulmus parvifolia*’ “Allee” and Item # 124 ‘plant (3) *Aesculus parviflora*’ (Exhibit D, Bid Contract see also McInnes Aff., para 22). Planting trees in a crowded area without considering the mature size is another example of how additional planting can be in fact harmful. Planting trees which grow to be large under

8 - CEQR Manual 3I-30 341.2. *Indirect Effects* : A change that could encourage the spread of exotic species such as wooly adelgids and/or Asian longhorned beetles.

other large trees is simply the wrong thing to do. (McInnes Affidavit, para. 23, 42) eg. planting of sweetgums and dawn redwoods (Exhibit E Sheet # 5 , Bid Plans) .

81. For CEQR evaluations, an action's potential to affect that environment is the primary consideration. Of course, those plant and animal species that are known to be threatened, rare, endangered, or **otherwise sensitive or worthy of protection** are given individual consideration.” (emphasis added). CEQR Manual 3I-1. The veteran trees of Washington Square Park are sensitive and most worthy of protection; “the large trees in this park are, in fact, the only part of the park which cannot be replaced” (McInnes Aff. para.8). DPR fails, however, to accord individual consideration to these rare and valuable trees.

82. In addition, DPR failed to properly assess the cumulative impacts by dismissing the impacts of the proposed reconstruction as temporary. The long-term and short-term effects of the tree removal may not be adequately compensated by inferior substitution. As such, the Parks Department ‘s scant analysis of environmental damage in concluding that “[t]he proposed project will not result in any adverse impacts on natural resources” is erroneous and violates the standard of CEQR. (Exhibit A, Neg Dec., 6, Item 9).

Multiple functions of Washing Square Park Trees: natural shade and habitat

83. The CEQR Manual, recognizing the scarcity of natural resources in New York City, attaches extra significance to a resource serving multiple natural or recreational functions such as the benefits of the well-known and enjoyed veteran trees of the Park., See CEQR

Manual 3I-41. For instance, the large canopies provide the welcome natural shade in summer, critical to heat-sensitive individuals. (See McNab, Furman, Brizzi, Weinberg, Reznik, Levine, Sitner Affidavits).

84. The same trees serve as a “habitat for resident or migratory endangered, threatened or rare animal species or species of special concern” and any action reducing such capacity must be presumed significant. (Id.).

85. According to the DPR’s EAS, only “occasional transient” federal endangered and/or threatened species occur within or proximate to the Park (Exhibit B, 29). DPR further states that “there are no rare species or critical habitats known to occur on or adjacent to the site based on a review of the NYS DEC Natural Heritage Files.” The EAS should address not only whether federal endangered and/or threatened species use the park and would be impacted, but also whether NY State endangered species and/or species of special concern occur in the Park and would be impacted. The DPR seems to have relied on a cursory search, and in so doing, “did not uncover any survey data indicating that protected or threatened species (either listed or unlisted) exist within the park.” A search through the Cornell Ornithology Labs e-bird citizen science database indicates that within the past 5 years at least 3 species of birds (Kentucky Warbler, Peregrine Falcon, Northern Harrier) protected either federally or in NY State have occurred in NY County (Manhattan).

86. In fact, a red-tailed hawk is known to inhabit Washington Square Park. The limited areas of foliage in the Park will be greatly reduced under the Project and thus threatens the hawk’s habitat. (Reznick Aff.).

87. The DPR failed to properly examine the cumulative impacts of related projects, both in DPR's Capital Plan and by projects outside DPR's control.

Long Island Pine Barrens Soc., Inc. v. Planning Bd. of Brookhaven, 80 N.Y.2d 500, 514 (N.Y. 1992) (holding that requisite "relatedness" for mandatory cumulative impact review is the existence of a "larger plan" for development). No Park is an island. The Park is an integral part of the migratory birds flyway in New York City, and as such, other potential losses of tree canopy at other NYC stopovers must be accounted for along with the loss of trees at the Park (e.g. the loss of trees in portions of Macomb's Dam and John Mullaly Parks due to the Yankee Stadium reconstruction - planned by DPR).

88. DPR does not provide thorough documentation of the basis for its determinations. As Alexander Bickel wisely stated, "No answer is what the wrong question begets."⁹ The DPR's EAS provides no answers to critical questions regarding the environmental impacts of the proposed renovation plan because they have been left unstated in the EAS. Without answers to these critically important questions, the conclusions DPR has reached are baseless. Thus the Neg Dec is artificially propped up by analysis that arbitrarily included and excluded information as seemed to support DPR's foregone conclusion that the renovation plan must go forward. As a result, DPR failed to identify the potential for several environmental and health impacts arising from the project, and its issuance of a negative declaration was improper.

DPR failed to identify and evaluate the environmental impact of the project on Neighborhood Character, Environmental Justice, Socioeconomic Conditions.

⁹ Alexander M. Bickel, *The Least Dangerous Branch*, 55 (Indianapolis, Bobbs-Merrill, 1962)

89. SEQRA and CEQR also require consideration of impact on Neighborhood Character as defined by the following:

the impairment of the character or quality of important historical, archaeological, architectural, or aesthetic resources or of existing community or neighborhood character. NYCRR 617.7 (c) (1) (v) (SEQRA), see also 43 RCNY §6-06 (a)(5).

The environmental impacts considered herein include the social and economic impact on the quality of life and character of the neighboring community. Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y.2d 359, 365-67, 370, 509 (1986).

90. The historic value and unique neighborhood character of Washington Square Park are well-known and well-documented extensively. Project for Public Spaces, a world-renowned organization specializing in "creating and sustaining public places that build communities," named Washington Square Park one of the twelve great public spaces in the United States and Canada, stating that there is, "a unique and very special 'vibe' that is tied closely to its spontaneous music scene and longstanding use as a performance and protest space." (Brizzi Affidavit, see also Exhibit #RB2). DPR's EAS also recognizes that the Park neighborhood and user population consists of a diverse range of socioeconomic background, containing an exceptionally "dense concentration of artists, musicians and writers." (Exhibit B, 27). DPR acknowledges the "unquestioned bond between the Park and Greenwich Village's role in cultural history and contemporary urban society as a place for vibrant and spontaneous artistic, social and political invention." (Id. 28).

91. DPR, however, fails to take a hard look at how the proposed action will impact neighborhood character and merely asserts that "the proposed action is designed

specifically to reinforce the existing neighborhood personality” without addressing the well-documented and well-publicized public concern that the new design will be less accommodating to public gatherings in Washington Square Park.

92. In particular, DPR has received public comments of concern that the reduction of size in the fountain circle and the installation of water jets in the fountain would restrict performances and peaceful assembly there. The public raised these issues consistently before and during the environmental review process. (See McNab Affidavit, Brizzi Affidavit). In fact, two prior litigations against the City, Podolsky v. City of New York and Greenberg v. City of New York, asked specially for a proper and meaningful public process to address this threat to the historical role of the fountain circle area. Honorable Judge Goodman found in Greenberg that “essential aspects of the Parks Department’s Plans for the fountain and the fountain plaza... could have a substantial impact on the historic role of the Washington Square Park.” (Exhibit C, p18). Despite the obvious public concern, DPR sidestepped the issue in the EAS. DPR fails to discuss or even mention the reduction of fountain space in the neighborhood character discussion¹⁰. DPR merely mentions that the jets “reflect original design... and meets current construction codes.” (Exhibit B, 28). There is no mention that the jets would obviously prevent public gatherings, as they currently exist, when the fountains are turned on.

93. In addition, DPR failed to consider how the reduction of natural shade caused by the tree removal contemplated in the Bid Contract would impact the usability of the Park for heat-sensitive individuals. (Levine and Sitner Affidavits I). DPR also fails to consider

¹⁰ DPR does address the reduction of the fountain in a summary manner in few other sections in the EAS. In particular, DPR states under the heading Open Space: “The reduction in the size of the fountain plaza will be offset by the addition

how installation of fences may limit access and change the public character of the park.

94. By avoiding the preparation of a full EIS, DPR avoids having to assess alternatives to the Plan, including a “future without the proposed action” alternative, as required by the CEQR manual. (3H-3, sections 322, 323). The Project for Public Spaces report did contemplate the future without any change by surveying the public consensus and concluded:

People like the current park and its character. While people see the need for upgrades of certain current facilities and amenities (pavement, bathrooms, etc.), they like the park the way it is. Use of the park overall is very good—if not extraordinary. “ (Exhibit RB#2).

95. DPR also fails to consider the socioeconomic impacts of the proposed action. The proper study area for numerous aspects of a CEQR action is at a minimum a 400-foot radius around the “directly affected area” or project site.

96. The DPR EAS failed to do the required socioeconomic impact analysis under CEQR, as set forth in CEQR Tech Manual Section 3-B, 300 – 322.1 *“Indirect residential displacement.”*

97. DPR’s EAS provides no analysis of anything other than the project site, rather than the required 400-foot radius surrounding the project site, and arbitrarily omits any mention of indirect residential displacement. (Exhibit B, 19). The EAS simply asserts, without analysis, that the proposed action *“would not directly or indirectly displace residential population, businesses or employees”* and *“would not directly or indirectly encourage increased development in the surrounding neighborhood.”*

98. Contrary to DPR’s conclusory statement, the CEQR Manual states that a

of these new lawns that are expected to accommodate large demonstrations and performances.”(emphasis added) (Exhibit A, Neg Dec at 5.”. This conclusory statement is questioned infra at paragraph 88.

socioeconomic assessment is appropriate when an action “*may affect conditions in the real estate market not only on the site anticipated to be developed, but in a larger area. When this possibility cannot be ruled out, an assessment may need to be undertaken to address indirect displacement. These actions include those that would raise or lower property values in the surrounding area.*”

99. Parks in New York City collectively suffer lack of repair and inadequate ADA compliance, especially in economically disadvantaged neighborhoods. Washington Square Park, despite its problems due to lack of maintenance, is still one of the best functioning parks in the city. DPR is proposing to renovate the Park without considering the cumulative impact it creates by depriving those resources from other parks and without providing a justified purpose and need.

DPR failed to identify and evaluate the impact of the project on Open Space in connection with First Amendment Activity.

100. DPR’s plan will likely result in limitations on the use of Washington Square Park for First Amendment Activity which falls under Open Space criteria. “*Limitation of public access and changes in the type and amount of public open space may also be considered direct effects*” CEQR 3D-2. ...” “[m]ost direct effects on open space do require assessment, particularly when there is any ambiguity as to whether the action would reduce the usability of an open space.” Id .

101. With respect to Open Space considerations DPR’s Neg Dec fails to take a “hard look” at potential direct, indirect and cumulative effects of the proposed Plan. DPR merely states summary conclusions without the requisite analysis supporting those conclusions.

102. DPR claims that “[p]ark operations will not be impaired by the proposed action due to, in part, the ability of park users to spill onto three new lawns. The **reduction in the size of the fountain plaza will be offset by the addition of these new lawns that are expected to accommodate large demonstrations and performances.**”(emphasis added) (Exhibit A, 5).

103. However, recent history provides significant evidence to the contrary, the Parks Department has denied permits for large protests precisely because newly renovated grassy areas of Central Park could not accommodate demonstrators and the grass would be damaged. See UFPJ v. Bloomberg, et al. 783 NYS2d 255. In UFPJ, the protection of renovated lawns in Central park was a significant part of the basis for denying a protest permit during the Republican National convention in 2004.

104. The proposed Plan will result in a significant reduction of usable space for First Amendment activity. Judicial precedent, and DPR’s practice of denying permits on this basis, fully support considering the reduction of hard surfaces and increase in grassy areas as “[l]imitation of public access and changes in the type and amount of public open space may also be considered direct effects.” Alternatively, if not considered a direct effect of the Plan, an impact to First Amendment activity is certainly a reasonably foreseeable, indirect effect of the proposed DPR plan. DPR should prepare an EIS to evaluate alternatives to the proposed Plan, including a “no-action” alternative, and where such impacts cannot be avoided, a mitigation plan should be developed.

105. As a result, DPR’s Neg Dec does not contain a written, reasoned elaboration, but rather states DPR’s conclusions in summary fashion without any elaboration of the

reasons for those conclusions.

DPR failed to identify and evaluate the environmental impact of the project on Open Space: as to impact on people with disabilities

106. In addition, DPR also fails to adequately address Open Space needs of people with disabilities even though DPR purports to have initiated the renovation specifically to meet the ADA requirements for Washington Square Park.

107. Section 504 of the Rehabilitation Act of 1978 states that no otherwise qualified individual with disabilities should “be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency...” 29 USCS §794 (a). Title II of the Americans with Disabilities Act (“ADA”) extends this prohibition of discrimination to all activities of State and local governments covered by the Rehabilitation Act, even if they do not receive Federal funding. 42 U.S.C. §12182 et seq. The U.S. Department of Justice Regulation 28 CFR: Part 35 (“Regulation”) implements Title II of the ADA and sets standards and guidelines to which the DPR is subject.

108. In particular, the Regulation requires public entities with fifty employees or more, such as DPR, to perform **Self-Evaluations of accessibility for disabled persons**. 28 C.F.R. 35.105. It also requires such entities to have a **transition plan** that includes the steps necessary to make their facilities accessible. 28 C.F.R. 35.150(d).

109. The Office of the State Comptroller in December 2005 found that DPR’s Self–Evaluation “did not meet the requirement or the spirit of the Regulation.” (Exhibit #RL2). DPR’s Self-Evaluation failed to identify the existing barriers or describe the needed

modifications and instead “simply listed Parks facilities and provided a general statement that accessibility to non-accessible facilities would be addressed as part of an unspecified future capital plan.” (Id.). DPR also failed to provide a Transitional Plan to develop a timetable for providing such accessibility.

110. The Open Space section in the environmental assessment for the proposed reconstruction actually acknowledges that the Washington Square Park is in violation of ADA compliance. (Exhibit B, 20). The environmental assessment further stresses that an important purpose of the reconstruction is to achieve compliance by improving ADA access. (Id.). However, the one paragraph-long discussion of ADA access in the EA fails to identify the existing barriers and to provide a Transitional Plan as required by the Regulations and requested by the Office of State Comptroller. The passage merely suggests a few features that may improve access and makes a conclusory statement that ADA access will be improved.

111. In fact, the proposed alteration actually may impact ADA access negatively. The removal of veteran trees in Phase I, *inter alia*, will generate loss of natural shade provided by the tree canopy. Such loss of shade is hazardous to people with disabilities on certain medications and people with heat sensitivities. (Levine Aff., para 16, 17. Sitner Aff. para. 5). Despite numerous complaints regarding the failure to make the comfort stations ADA accessible, the proposed plan only contemplates repairing and rebuilding utility buildings in Phase III. (Exhibit B, 4). This runs counter to ADA requirements that bathrooms be made accessible at the beginning of major renovations or new facilities. (Levine Aff, para 11).

112. Furthermore, the proposed redesign of the fountain may not serve the needs of people with disabilities. The proposed destruction of the sunken area and its retaining wall of the fountain destroys the flexible seating orientation different groups can use. (Brizzi Aff., Exhibit #RB2.). In particular, persons with disabilities have used part of the wall as a back support or arm rest (Levine Aff. para 18). Furthermore, the loss of variation in height levels accompanies the loss of many lines of sight, particularly to the persons on wheelchairs who can currently enjoy many performances at eye level. (Id.).

113. The EAS also fails to consider how the new fencing and newly placed dividing barriers may prevent PWD using mobility devices such as wheelchairs from passing through the Park with ease (Id., 15).

114. Thus, DPR failed to perform the self-evaluation of ADA accessibility for the Washington Square Park as required by the Regulation 28 C.F.R. 35.105 and failed to provide a transition plan as mandated by 28. C.F.R. 150(d). The plan approved by the Neg Dec to reconstruct Washington Square Park as approved by the Neg Dec continues these violations and if put into effect will create additional significant adverse impacts to ADA accessibility.

115. Since the stated purpose of the project is to improve ADA access, a proper discussion of ADA is a necessary part of the environmental review process.

116. As such, DPR failed to identify the relevant areas of environmental concern, take a hard look at them, and make a "reasoned elaboration" of the basis for its determination" as required by SEQRA and CEQR, and failed to take a "hard look" at the relevant areas of concern. Therefore, determination to approve and issue a Negative Declaration was

affected by an error of law and was otherwise arbitrary and capricious and an abuse of discretion. Balsam Lake Anglers Club v. Department of Env'tl. Conservation, 153 Misc. 2d 606.

AS AND FOR A SECOND CAUSE OF ACTION

117. Petitioners repeat and reallege each of the allegations made in paragraphs 1-116 with the same force and effect as if fully set forth herein.

118. Respondent DPR improperly segmented the proposed project and by withholding critical information about the second and third phases of the proposed Plan and therefore could not have properly assessed the potentially significant impacts of these parts of the proposed reconstruction Plan for Washington Square Park. As a result, DPR frustrated the purpose of SEQRA, which is to alert the public and responsible officials of possible environmental changes before detrimental, irreversible changes occur. See Coalition against Lincoln West, Inc. v. New York, 94 A.D.2d 483, 486 (N.Y. App. Div. 1983). (draft sent to officials lacked material information).

119. DPR's failure to include or describe the existence of these details corrupted the public environmental review process, and both the EAS and the Neg Dec were made in violation of lawful procedure.

120. The aforementioned DPR's contract for bids states in Article 36 of Section C that "[w]ork performed under this contract cannot commence until any environmental reviews have been completed as required by law." (Exhibit D). Despite the language of the bid, DPR did solicit bids for the redesign project before any environmental review was

contemplated. After the discovery of the bid document by concerned citizens and the ensuing lawsuit forced DPR into a settlement mandating an environmental review process under SEQR and CEQR, the Environmental Assessment failed to include critical information detailed in the bid or even refer to the existence of the bid document, even though the bid was supposedly contingent upon proper completion of environmental review.

121. The bid document contains detailed plans and protocols for Phase I of the redesign project, covering only the fountain area and the northwest quadrant of the park. As Lead Agency for the environmental review under CEQR DPR should have reviewed and disclosed these details in order to properly evaluate the impact the proposed plan would create.

122. As shown above, the bid documents raise material questions regarding the environmental impacts of Phase I. In particular, the removal of 17-32 trees (Bid Item #16), transplanting two large trees (Bid Item #17), and the cumulative threat to the remaining trees represent a significant adverse environmental impact. DPR's reliance on generalities and reference to a protection plan yet to be developed in the EAS fall far short of demonstrating that the proposed plan will either have no impacts or that any impacts will be insignificant.

123. Respondents failed to properly address the cumulative impact of the three phases of the reconstruction as outlined by the Project plan and any other "reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are: (1) included in any long-range plan of

which the action under consideration is a part; (2) likely to be undertaken as a result thereof; or (iii) dependent thereon.” 6 N.Y.C.R.R. § 617.7 (2).

CONCLUSION

125. The basic purpose of SEQRA and CEQA is to “incorporate the consideration of environmental factors into the existing planning, review and decision making processes of state, regional and local government agencies at the **earliest possible time**” Herald Sq. S. Civic Assn v. Consol. Edison Co. of N.Y., Inc., 2003 NY Slip Op 51755U, 3-4 (N.Y. Misc. 2003) (emphasis added). The environmental review process aims to “provide **before damage is done**, for a "pause" during which expertise may be sought, and alternatives explored.” Marino v. Platt, 104 Misc. 2d 386, 389 (N.Y. Misc. 1980) (emphasis added.).

126. In the instant project, DPR has withheld important details and misrepresented information to involved City agencies, improperly segmented the proposed Plan by omitting details of Phases II and III of the Plan, failed to involve DPR’s own Forestry experts , and generally failed to take a “hard look” at potential significant impacts even for the first phase of the Plan. Therefore, DPR’s Neg Dec was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious and/or an abuse of discretion, and should be annulled.

127. This project is a Type I that carries with it a presumption that an EIS will be required. Respondents bear the burden to rebut the presumption that this Type I project

will have significant adverse environmental impacts and would require DPR to prepare a full Environmental Impact Statement. See 6 N.Y.C.R.R. §617.4(a)(1).

128. A Type I project can only overcome that presumption where it can be adequately demonstrated that the project will have no impacts, or that any impacts will not be significant. Respondents can only issue a Negative Declaration after they have identified all significant environmental issues, taken a "hard look" at such issues, and made a "reasoned elaboration" of the basis for the determination that the evaluation of the environmental impact of the project did not cross the very low threshold for requiring the preparation of an environmental impact statement – triggered by “any indication that the action may have a significant effect on the environment.” Balsam Lake, supra, at 611.

129. DPR issued a NEG DEC based on the improperly prepared EAS. The Environmental Assessment Statement at issue fails to identify and take a “hard look” at cumulative, short-term and long-term environmental impacts of the proposed reconstruction. Among others, impact analysis on the unique benefits the veteran trees provide, the unique neighborhood character of the fountain plaza and the great open space accommodating people of diverse socioeconomic background is seriously lacking.

130. Unless DPR’s Neg Dec is voided and Respondent is ordered to comply with SEQRA and CEQR, Petitioners and the community at large will be injured by DPR’s baseless determination to allow the proposed Plan to proceed. In the absence of a proper environmental review process, as is the case here, Petitioners sole recourse is to this Court to ensure that DPR fulfills the requirements of SEQRA and CEQR. A proper environmental review process would have addressed the numerous issues raised herein.

DPR's failure to provide a "reasoned elaboration" for its Neg Dec that addressed the issues identified in this Petition is egregious precisely because these issues have repeatedly been brought to DPR's attention by letters, Community Board meetings and prior judicial proceedings.

WHEREFORE, Petitioners respectfully request that a judgment be made and entered :

- a) issuing a declaratory judgment that Respondent New York City Department of Parks and Recreation's determination to issue a Negative Declaration of environmental impact under the SEQRA and CEQR for Washington Square Park was a violation of law, arbitrary and capricious, and an abuse of discretion;
- b) annulling and vacating the Negative Declaration
- c) compelling Respondents to prepare an Environmental Impact Statement ("EIS")
- d) enjoining Respondents from contracting for or commencing work on the planned project until they have fully complied with the mandates of city and state law.
- e) awarding reasonable costs, attorneys' fees and disbursements in this action.
- f) granting such further or other relief as the Court deems just and equitable

Dated: New York, N.Y.
February 21, 2007

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