

At an IAS Term, Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of November, 2011.

P R E S E N T:

HON. DAVID B. VAUGHAN,

Justice.

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BROOKLYN HEIGHTS ASSOCIATION, INC., BY ITS
PRESIDENT JANE MCGROARTY, ET. ANO.,

Petitioners,

For a Judgment Pursuant to Article 78

- against -

Index No. 1120/11

THE NEW YORK STATE OFFICE OF PARKS,
RECREATION, AND HISTORIC PRESERVATION,
ET. AL,

Respondents.

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The following papers numbered 1 to 10 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 3-5 6-7 8-9
Opposing Affidavits (Affirmations) _____	10
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, (1) petitioners Brooklyn Heights Association (BHA) and Fulton Ferry Landing Association (FFLA) move, pursuant to CPLR Article 78, for an order and judgment prevent respondents The New York State Office of Parks, Recreation and Historic Preservation (NYSOP) (Andy Beers [Beers], former Acting Commissioner) and The Brooklyn Bridge Park Corporation (BBPC), doing business as Brooklyn Bridge Park (BBP),

from permitting the private development of a certain property, known as the “Tobacco Warehouse;” and (2) respondents each cross-move, pursuant to CPLR 3211(a)(1), (4) and (7), dismissing the petition on the grounds that a defense is founded upon documentary evidence, an action involving substantially the same parties is pending in federal court, and the pleading fails to state a cause of action.

BACKGROUND

The Parties

BHA is a non-profit corporation with the stated mission of maintaining and improving the community of Brooklyn Heights in Brooklyn, New York. FFLA is a non-profit volunteer community organization dedicated to preserving the historic character and architecture of the Fulton Ferry Landing Area in Brooklyn. NYSOP is a New York State government agency, of which, at the time of commencement of the instant proceeding, Beers was the Acting Commissioner. BBP is a not-for-profit corporation incorporated under the laws of the State of New York with its principal place of business at 334 Furman Street, Brooklyn, New York, and is currently identified as the “tenant” of Empire Fulton Ferry State Park (EFFSP) parkland, including the Tobacco Warehouse, after it entered into a 99-year leasehold with the Brooklyn Bridge Park Development Corporation. In its capacity as tenant, it has operational control of, financial responsibility for, and the duty to manage and care for, the Empire Fulton Ferry State Park.

Factual Background

The instant proceeding involves an historic area of Brooklyn situated near the Brooklyn Bridge and known as the Fulton Ferry Landing. The BHA, beginning in the 1960's, commenced a campaign to turn the Fulton Ferry Landing and its neighboring historic structures, the Tobacco Warehouse and the Empire Stores, then owned by Con Ed, into a

protected historic district and public park. NYSOP acquired the nine acres that comprised the property from Con Ed in 1978. Following the allocation of seed monies by the Legislature and the announcement by Governor Hugh Carey of its creation, the Fulton Ferry Park (the Park) was created in 1987. The creation of the Park gave rise to the founding of FFLA in 1988.

The Tobacco Warehouse is a structure that was built in approximately 1860 as center for tobacco storage and customs inspection. It is situated in an area immediately north of the Brooklyn Bridge. While it lacks a roof, and is in derelict condition and is deemed to be structurally unsound, its historical significance is undisputed. It was placed on the United States National Register of Historic Places in June, 1974, and was included in the Fulton Ferry Historic District by the New York City Landmarks Preservation Commission in 1977.

The Petition

As contended by petitioners, the Fulton Ferry Park and the Fulton Ferry Historic District have always contained the Tobacco Warehouse, and was included in the "larger" Brooklyn Bridge Park. In 1999, BHA, in response to its efforts to prevent demolition of the Tobacco Warehouse, received written assurances from NYSOP that its "plans for redevelopment of [Fulton Ferry Park] have always incorporated the Tobacco Warehouse."¹

According to petitioners, NYSOP obtained approximately \$600,000 from three sources to renovate the Tobacco Warehouse: (a) the NYSOP Infrastructure Fund, N.Y. Code, Art VI, § 97-MM; (b) the Clean Water/Clean Air Bond Act fund; and (c) the Environmental Quality Bond Act of 1986. Also, in 2001, NYSOP applied for a federal grant under the federal Land and Water Conservation Fund (LWCFA), which was to be administered by the

¹ According to petitioners, the Tobacco Warehouse has since been restored to create a functional outdoor venue.

National Park Service (NPS). In addition to containing a narrative describing the location and condition of the "Cove" area as well as the general scope of the project, the application for said grant also included a "6(f) map to delineate the areas that were to be aided by the federal funding." Also according to petitioners, the "Pre-approval On-site Inspection Report" incorporated a map which "emphasizes," with hand drawn arrows, that the Tobacco Warehouse is included within and is part of the Park.²

As further alleged by petitioners, the grant application sought to facilitate public access to the Tobacco Warehouse and the adjacent site by creating walkways, improving irrigation, sloping the surrounding parkland, installing electrical outlets, and landscaping around the Tobacco Warehouse. NPS purportedly required NYSOP to agree never to alienate or permit private development of the Tobacco Warehouse absent written approval of the Department of the Interior. In a written certification dated June 21, 2001, NYSOP's assistant Regional Director, Richard Kearns (Kearns) agreed to said condition.

Petitioners assert that while the public was permitted access to the Tobacco Warehouse since 2003, at the end of 2009, NYSOP terminated such access, claiming that "further renovation" was required. They characterize said action as part of a "subterfuge," whereby, in 2008, NYSOP, without notifying the board members of the BBPDC, made a "secret application" to NPS, asking that the Tobacco Warehouse be removed from the 6(f). Petitioners claim that on January 6, 2011, Beers made a decision to support NYSOP's original application. They submit, as an exhibit, a letter dated January 31, 2011, sent by Beers to the NPS stating that "[NYSOP] continues to believe that inclusion of the Tobacco Warehouse in the 6f map was an administrative mistake, and that our Agency and the

²Petitioners assert that said report also included a certification from Park Engineer John Bagley, which certified that NYSOP had been "told (verbally or in writing) what a 6(f) boundary is and the implications of conversions in use."

National Park Service acted properly to correct this mistake in 2008 by removing the Warehouse from the 6f [sic] map.”

Petitioners contend that the evidence overwhelmingly establishes NYSOP’s intentional inclusion of the Tobacco Warehouse on the 6(f) map, and that such placement must continue in perpetuity unless a written application for conversion which meets all the requirements of the Land and Water Conservation Fund Act is submitted by the State of New York and reviewed and approved by the NPS. They allege that the “demapping” took place in conjunction with the issuance, by BBPC of a Request for Proposals for the “rehabilitation” of the Tobacco Warehouse, leading to an award to a private developer, who petitioners do not identify. The redeveloped premises are allegedly to be used for private enterprise as an enclosed theater.³ Petitioners further claim that BBPC made this award “despite the knowledge of its Executive Director about the secret and illegal manner in which the Tobacco Warehouse was removed from the federally protected portion of Fulton Ferry Park,” and that (1) NYSOP’s agency action in making a false and materially misleading submission to the federal government on January 6, 2011, and (2) BBPC’s decision to award an RFP for private development, violate Article 78 of the CPLR.

The Petition alleges four causes of action: (1) for a determination under CPLR Article 78 against NYSOP based upon the removal of the Tobacco Warehouse from the 6(f) map; (2) for a determination under CPLR Article 78 against BBPC for its awarding of the of “the rights to the Tobacco Warehouse” to a private company for use as a theater; (3) for a

³Petitioners claim that the private company was awarded the RFP for its designs to (a) charge admission, and hence make the Tobacco Warehouse no longer open to the public, (b) put a roof over most of the Tobacco Warehouse and hence make it no longer “outdoors,” and (c) use the Tobacco Warehouse for purposes precisely deemed ineligible in the LWCF manual, such as professional and semi-professional performances—each of which designs, which the BBPC approved on November 19, 2010, run afoul of the restrictions that are in place to protect the structure.

determination under Article 78 against NYSOP for violation of the Public Trust Doctrine; and (4) for a determination against BBPC for violation of the Public Trust Doctrine.

NYSOP's cross motion

In cross-moving for dismissal of the petition, NYSOP denies petitioners' allegations that it engaged in a pattern of malfeasance and secret submissions designed to have the NPS revise its 6(f) map and advance the privatization of the Tobacco Warehouse. It further asserts that the present proceeding is untimely since any challenge to said transfer had to have been brought within four months of the final determination by NYSOP in November of 2009 to transfer the property, or, at the latest, within four months of its conveyance to BBPDC by Letters Patent dated July 8, 2010. Finally, it argues that NPS's decision to revise the 6(f) map does not give rise to a cause of action against NYSOP.

NYSOP alleges that on November 5, 2008, more than two years prior to the commencement of the instant proceeding, it wrote to NPS stating that the buildings depicted on the EFFSP map, one of which was the Tobacco Warehouse, had been included in the 6(f) map in error. In response, NPS, by letter dated December 12, 2008, agreed, and revised the map accordingly. Said action of the NPS is the subject of the federal lawsuit commenced by petitioners, which will be discussed, *infra*.

NYSOP further alleges that, following its designation as lead agency for State Environmental and Quality Review Act (SEQRA) purposes in March of 2009, it published, by letter dated November 9, 2009 signed by its then-Commissioner, Carol Ash, a statement declaring that the lands of EFFSP are no longer necessary or useful to its purposes. Thereafter, on February 26, 2010, NYSOP, the State Office of General Services (OGS) and BBPDC executed a resolution recognizing that OGS was conveying the EFFSP property to BBPDC by Letters Patent in two separate parcels for the purpose of advancing the Brooklyn

Bridge Park Project.⁴ On July 8, 2010, OGS issued Letters Patent transferring title of EFFSP to BBPDC.

On July 15, 2010, BHA's president wrote to NPS to object to the redrawing of the 6(f) map.

BBPC's cross motion

In cross-moving for an order dismissing the petitioner, BBPC initially challenges petitioners' argument that because the Tobacco Warehouse is dedicated municipal parkland protected by the public trust doctrine, and that State legislation was required in order for BBPC to enter into a conditional development agreement, by asserting that such State legislation existed, in that the Urban Development Corporation Act (UDCA) authorized the State of New York to transfer the Tobacco Warehouse to BBPDC for use for non-park purposes. It further submits that: (1) once such transfer, without parkland restrictions, took place, BBPDC was authorized and free to transfer the Tobacco Warehouse to BBPC for use as a performance and cultural space; and (2) the documents through which the transfers were accomplished establish that the Tobacco Warehouse is not restricted to parkland uses and it was never dedicated municipal parkland.⁵ It further asserts that the existence of petitioners' (then-pending) federal law claims mandates dismissal of the instant proceeding.

The Federal Court Proceeding

As noted above, shortly before commencing the instant proceeding, the petitioners herein, along with the New York Landmarks Conservancy, commenced an action as plaintiffs in the United States District Court, Eastern District of New York (*Brooklyn Heights*

⁴The Tobacco Warehouse, along with another structure known as the Empire Stores, was included in Parcel "B".

⁵Respondent identifies such documents as the Letters Patent from the State to BBPDC, and the virtually simultaneous ninety-nine year Master Ground Lease from BBPDC to BBPC.

Association, Inc. et al. v National Park Service, et al., 11-CV-226) wherein violations of federal regulatory law and state common law were alleged.⁶ On April 8, 2011, the Court (Vitaliano, D.J.), without ruling on any state law issues, granted plaintiffs' motion for a preliminary injunction. Plaintiffs, BBPC, and BBPDC each then moved for summary judgment, with plaintiffs seeking final judgment on both their federal and state claims.

The gravamen of the proceeding before the District Court closely resembled that which is presented here. In opposition to plaintiffs' allegation that federal and state law were violated, BBPC asserted that NYSOP made a mistake when it included the Tobacco Warehouse and Empire Stores on the 6(f) map submitted in its grant application to NPS in 2001, and submitted again in the closeout documentation in 2003.

By Order dated July 11, 2011, the District Court granted plaintiffs' motion as to the LWCFRA and APA claims, vacated the challenged NPS decision, remanded the matter for further administrative proceedings, and dissolved the preliminary injunction. After reviewing the administrative record and applicable law in a light most favorable to defendants, the Court found that the evidence which pointed to the absence of any mistake by [NYSOP] in the inclusion of the Tobacco Warehouse and Empire Stores on the 6(f) map, was "so one-sided that [plaintiffs] must prevail as a matter of law." The Court further found, factually, that "NPS's revisionist administrative review of the original grant to [NYSOP] resulted in a conclusion that was both 'counter to the evidence before the agency' and 'so

⁶Petitioners' claims in the Federal action arose under the land and Water Conservation Fund Act of 1965, 16 USC 460l-8, and its implementing regulations promulgated at 36 CFR Part 59; the National Environmental Policy Act (NEPA), 42 USC 4332 and its implementing regulations promulgated at 40 CFR Part 1502; the Administrative Procedure Act (APA), 5 USC 550-559 and 701-706; § 106 of the National Historic Preservation Act of 1966 (NHP) 16 USC 470a to 470w-6; and New York's Public Trust doctrine.

implausible that it could not be ascribed to a difference in view or the product of agency expertise.”

The District Court went on to reject NPS’s interpretation of the LWCF, under which it contended that it was allowed to excise properties from a final 6(f) map after the close of a grant if they were later deemed “unsuitable” or “not intended for” public outdoor recreation use, as “flatly impermissible and directly contrary to established law.” In thus concluding that NPS acted outside its legal authority when it amended the 6(f) map to remove federal protection from the Tobacco Warehouse more than five years after the LWCF grant had closed, the Court stated: “[c]ontrary to defendants’ arguments—and perhaps contrary to plaintiffs’ hopes—the outcome here does not forever forbid excision of the structures from the 6(f) map on some future date as a matter of federal law. It simply requires that the federal government keep its promise, as embodied in the LWCF, that parkland developed or improved with federal taxpayers’ money will remain available for public use....” The District Court granted summary judgment, vacated and declared void the NPS decisions, and remanded the matter to NPS for further administrative proceedings.

Finally, the District Court observed that all that remained was a single cause of action, namely, the New York common law public trust doctrine. Further acknowledging the pendency of the present “parallel state court proceeding,” the District Court, for stated reasons of judicial economy and in furtherance of the principles and objectives of comity, declined to exercise supplemental jurisdiction over “this orphaned claim,” finding that a dispute as to the proper application of a New York common law doctrine, including its interaction with various New York statutes and the proper interpretation and reach of New York Court of Appeals decisional law, provided compelling reasons for it to decline to exercise supplemental jurisdiction over plaintiffs’ state law claim. Accordingly, while the

District Court found that “any authority or right to act in reliance on the revised 6(f) map is annulled” by its order to vacate, it dismissed such state law claim without prejudice.

It is thus on this modified footing that the instant matter is now under consideration.

DISCUSSION

At the outset, the court finds that the determinations rendered by the United States District Court which, applying federal law, resulted in its finding that the NPS acted outside its authority in removing the Tobacco Warehouse from the 6(f) map, bars relitigation of the same issue before this court under well-settled principles of collateral estoppel (*see McGrath v Gold*, 36 NY2d 406, 411 [1975] [when an issue of fact has once been determined by a valid and final judgment, that issue cannot again be litigated by the same parties in any future lawsuit]; *see also McKinney v City of New York*, 78 AD2d 884, 886 [“ [I]t is clear that in those instances where the Federal court proceeding is predicated on the same basis as is the State court proceeding, Federal court determinations must be given res judicata effect in New York State courts”]; *Prudential Oil Corp. v Phillips Petroleum Co.*, 69 AD2d 763 [1979] [dissent] [“(s)ince the United States Court of Appeals has previously determined that the assignment to plaintiff was made for the exclusive reason of bringing suit, that fact may not be relitigated in this action”]). Consequently, the court rejects NYSOP’s argument that NPS, and not NYSOP, made the determination that it was appropriate to revise the 6(f) map. Although NYSOP was not a party in the federal action, the District Court, in its Order and Judgment, set forth, as background, BBPC’s factual assertion that NYSOP, its predecessor in interest, made a mistake when, in both 2001 and 2003, it included the Tobacco Warehouse on the 6(f) map, and, based upon the overwhelming evidence, conclusively found the absence of any mistake by NYSOP. Indeed, the only issue before the court is applicability of New

York's public trust doctrine to the instant controversy, since all other issues have been resolved by the judgment in the parallel proceeding in the Eastern District.

The public trust doctrine

Under the public trust doctrine, State legislative approval is required before parkland can be alienated or used for an extended period for non-park purposes (*Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 630 [2001]). A parcel of land may constitute a park either expressly, such as by deed or legislative enactment, or by implication, such as by a continuous use of the parcel as a public park (*Matter of Angiolillo v Town of Greenburgh*, 290 A.D.2d 1, 10–11 [2001], *lv denied* 98 NY2d 602 [2002]; *Matter of Lazore v Board of Trustees of Vil. of Massena*, 191 AD2d 764 [1993]). Such an implied dedication may exist “when a municipality's acts and declarations manifest a present, fixed, and unequivocal intent to dedicate” (*Riverview Partners v City of Peekskill*, 273 AD2d 455, 455 [2000]). Once land is dedicated to parkland use, “the dedication is irrevocable” absent specific legislative approval (*Id*; *see also Chateau Rive Corp. v Enclave Development Associates*, 22 AD3d 447, 448 [2005] [“Public parkland is impressed with a public trust and may not be alienated or diverted to private ownership or non-park use without a special act of the New York State Legislature”]).

The doctrine, and the minimal degree of alienation that is required to trigger its applicability, is well established. In *Williams v Gallatin*, 229 NY 248 [1920], a taxpayer sought to enjoin the New York City Commissioner of Parks from leasing the Central Park Arsenal Building to the Safety Institute of America, arguing the transaction was “foreign to park purposes” (*Id* at 250). The lease was for a 10-year term, cancellable if the City needed the property for park use. In prohibiting the lease, the Court of Appeals found that a park is a recreational pleasure area set aside to promote public health and welfare, and as such, “no

objects, however worthy, . . . which have no connection with park purposes, should be permitted to encroach upon [parkland] without legislative authority plainly conferred...The legislative will is that Central Park should be kept open as a public park ought to be and not be turned over by the commissioner of parks to other uses. It must be kept free from intrusion of every kind which would interfere in any degree with its complete use for this end” (*Id* at 253-254; *see also Miller v City of New York*, 15 NY2d 34, 37 [involving a 20-year lease]; *Matter of Ackerman v Steisel*, 104 AD2d 940 [1984]] [storage of sanitation vehicles and equipment], *affd* 66 NY2d 833 [1985]; *Stephenson v County of Monroe*, 43 AD2d 897 [1974]; *Aldrich v City of New York*, 208 Misc 930 [1955], *affd* 2 AD2d 760 [1956]; *but see 795 Fifth Ave. Corp. v City of New York*, 15 NY2d 221, 225 [1965] [Park Commissioner properly determined that a café and restaurant could be constructed in Central Park where the project furthered park purposes]).

To establish that property has been dedicated for public use, there generally must be an unequivocal express or implied offer by the owner and, where required, an express or implied acceptance by the public (*see Angiolillo*, 290 AD2d at 10 [citations omitted]). The burden of proof rests on the party asserting that the land has been dedicated for public use (*Id*, citing *Winston v Village of Scarsdale*, 170 AD2d 672, 673 [1991]). Petitioners have met this burden, since, as discussed, the undisputed evidence before the court demonstrates that the Tobacco Warehouse was dedicated parkland, as it was used as outdoor recreational parkland as part of EFFSP.

Moreover, respondents’ original intent to designate the Tobacco Warehouse for public use is manifestly unambiguous and thus irrevocable absent specific legislative approval (*see Powell v City of New York*, 85 AD3d 429, 431 [2011]). Indeed, the District Court’s judgment disposes of BPPC’s conclusory argument to the opposite effect. Here, BPPC contends that

the Tobacco Warehouse lost its parkland status when it was transferred without parkland restrictions pursuant to state legislative authorization—specifically, as based upon the revised 6(f) map of December 12, 2008, by the Letters Patent from the State Commissioner of the New York State Office of General Services (OGS) dated July 8, 2010 and approved by the Attorney General on July 20, 2010, and the State Comptroller on July 26, 2010. Purporting to act under the authority of Section 6263-a of the New York State Urban Development Corporation Act, OGS, by issuing such Letters Patent, transferred title to the land comprising the former EFFSP in two parcels, A and B, with Parcel B including the land where the Tobacco Warehouse is situated, and whose provisions contained no requirement that the Tobacco Warehouse be used only for park purposes.⁷ However, respondents offer no support for their implied assertion that OGS’s actions constituted full legislative approval (*see Chateau Rive Corp.*, 22 AD3d at 447). Moreover, as was made clear by findings of the District Court, the inclusion of the Tobacco Warehouse as parkland on the 6(f) maps submitted by NYSOP in 2001 and 2003 was intentional, and the District Court’s order vacating and annulling any actions taken in reliance on the revised 6(f) map, conclusively invalidates any argument advanced by respondents to the effect that the Tobacco Warehouse was not alienated in violation of the public trust doctrine.

Finally, the court finds the State Respondents’ contention that the present action is time-barred to be devoid of merit. “A municipality’s current and ongoing use of dedicated parkland for nonpark purposes without the approval of the State Legislature in violation of the public trust doctrine is a continuing wrong that the municipality has the ability to control

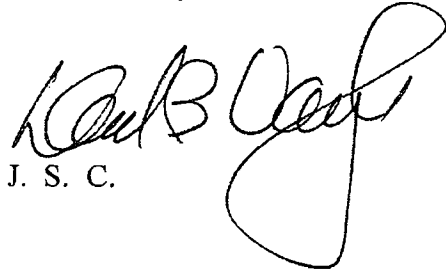
⁷Indeed, the Letters Patent stated that the Tobacco Warehouse can be demolished, reconstructed, or otherwise altered, subject only to compliance with certain historical preservation guidelines.

and abate” (*Capruso v Village of Kings Point*, 78 AD3d 877 [2010]). Accordingly, the four-month statute of limitations under CPLR 217(1) is inapplicable to the present petition.

In view of the foregoing, the court (1) denies respondents’ cross motions, and (2) grants petitioners’ motion to extent of determining that respondents’ alienation of the Tobacco Warehouse was a nullity because it violated New York’s public trust doctrine, and remanding the instant matter in accordance with Judgment of the District Court for the Eastern District dated July 11, 2011.

This constitutes the decision, order and judgment of the court.

E N T E R,


J. S. C.