

22-101
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of

Index No. /2022

NYC FREEDOM TRAIL FOUNDATION INC.,

Petitioner(s),

VERIFIED PETITION

-against-

PUBLIC DESIGN COMMISSION OF THE
CITY OF NEW YORK,

Respondent(s).

For a Judgment under Article 78 of the CPLR.

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Petitioner, NYC FREEDOM TRAIL FOUNDATION INC. (“Petitioner”) by its attorneys, HIRSCHLAW FIRM, P.C., as and for its Verified Petition herein allege as follows:

PRELIMINARY STATEMENT

1. This proceeding is brought pursuant to New York Civil Practice Law and Rules (“CPLR”) Article 78 to set aside the determination of the Respondent dated September 20, 2021, with respect to Agenda 27861, wherein the Respondent determined to move Agenda Item 27861 from the “Public Hearing Agenda” to the “Consent Agenda”. See September 20, 2021 determination annexed hereto as **Exhibit “1”**.

2. Petitioner does not seek any financial remuneration from this proceeding, but rather seeks to have the determination of the Respondent reversed and have Agenda Item 27861 remanded back to the Public Hearing Agenda.

3. On September 20, 2021, the Public Design Commission violated its own rules and customs in approving the conceptual design for Item 27861, an artwork for Abolitionist Place (Park), which did not meet its requirements given to agencies for the required content of conceptual proposals or align with the legally required description of its procedures defined in its annual report, mandated by the City Charter due to reform legislation in 2017. See Annual Report for 2019 annexed hereto as **Exhibit “2”** and Annual Report for 2020 annexed hereto as **Exhibit “3”**.

4. The agency violated its own rules and acted arbitrarily and capriciously by refusing to place Item 27861 on the public agenda of its meeting on September 20, 2021 or at a later date – denying the public the opportunity to testify on the approval of the final conceptual design proposal, or even learn about changes made to the proposal since January 2021.

5. Members of the public followed lawful procedures by asking for the item to be moved from the "consent agenda" to the "public agenda." This decision took place within a consistent pattern of the New York City Economic Development Corporation (NYCEDC) excluding public attendance from all meetings related to the artist selection process; including bypassing the community board with jurisdiction and the requirements of the relevant community council legislation requiring a community review and opportunity for input.

6. The agency acted arbitrarily and capriciously by approving the project even though the NYCEDC had not met the Commission's earlier justification for tabling the proposal, which was that more public engagement was required before the item would be considered again. See Respondent's prior determination dated January 19, 2021 annexed hereto as **Exhibit “4”**. No public engagement of any kind took place in the intervening period, despite an official

announcement in a June 2021 press release that it would occur over the summer. See Press Release annexed hereto as **Exhibit “5”**.

7. Subsequent to the date of the determination, through a Freedom of Information Act request to the Department of Cultural Affairs¹, Petitioner, together with others from the community, viewed the actual conceptual design proposal submitted which NYCEDC and the Respondent had declined to provide (see **Exhibit “6”**), and it was substantively different than the proposal reviewed in January 2021 (see **Exhibit “7”**). While it did include a new map of locations for the proposed textual artwork, including a new location for an undetermined sculpture, it did not include any actual "drawings" of the proposed artwork, both the textual artwork and the completely content-free sculpture. These revelations contradicted direct communications from the Department of Cultural Affairs, and also the Respondent itself, that the proposal had not changed significantly since January 2021. See **Exhibit “8”**.

8. This further supports the Article 78 claim that the Public Design Commission violated its rules and acted arbitrarily and capriciously by not allowing public testimony. It also further shows that the Commission acted arbitrarily and capriciously because these changes were not influenced by public engagement, which was already determined to be necessary by the Respondent pursuant to its prior determination of January 19, 2021.

9. The official responses put the agency in a double-bind. If there were substantive changes to the proposal, the agency acted arbitrarily by denying public testimony given that public response was its reasoning in January for tabling the proposal. If there were no substantive

¹ Petitioner and/or its principal initial submitted a FOIL request to the Respondent, which Respondent never responded to.

changes to the proposal, it acted arbitrarily by not addressing the serious concerns established when the proposal was tabled.

10. The Respondent's determination on September 20, 2021, should be set aside as the decision is arbitrary and capricious since Respondent failed to follow their own procedures and prior determinations in approving the conceptual design for Item 27861 by moving Item 27861 from the Public Hearing Agenda to the Consent Agenda.

PARTIES

11. At all times herein mentioned, Petitioner was and is a not-for-profit entity incorporated within the State of New York and has a principal place of business within the County of New York.

12. Jacob Morris, who is a long-time public historian of Abolitionism and New York City's critical role as a nexus to Abolitionist history and the Underground Railroad (and responsible for the co-naming of Abolitionist Place), is the President of the Petitioner.

13. Upon information and belief, at all times herein mentioned, Respondent PUBLIC DESIGN COMMISSION OF THE CITY OF NEW YORK is and was a public benefit corporation and/or agency created by the City of New York. According to its website, "[a]s New York City's design review agency, the Public Design Commission (PDC) has jurisdiction over permanent structures, landscape architecture, and art proposed on or over City-owned property. The mission of the PDC is to advocate for innovative, sustainable, and equitable design of public spaces and civic structures, with a goal of improving the public realm and therefore related services for all New Yorkers throughout the five boroughs.

14. Petitioner is adversely affected from the Respondent's determination as Petitioner is a not-for-profit entity whose stated objective is to bring cultural awareness and historical

accuracy to the major role of the City of New York with respect to the Underground Railroad and Abolitionist history.

VENUE

15. Venue is proper in New York County because that is the county where the Petitioner maintains its principal place of business and where each of the Respondents are located.

FACTUAL BACKGROUND

16. Downtown Brooklyn was historically a critically important area in the history of Abolitionism. As part of the rezoning of Downtown Brooklyn in the early 2000s, the New York City Economic Development Corporation (NYCEDC) proposed seizing a large section of land and property through eminent domain. Advocates protested, arguing that the property at 227 Duffield Street had been an Underground Railroad stop and should not be demolished.

17. After that controversy, including a study evaluating the Underground Railroad claims and the eventual exemption of condemnation of the building, the Mayor's Office announced that a park would be built to honor the Abolitionist history of the area. The City of New York, through NYCED, organized a Request for Proposals (RFP) for the development of an educational programming and a major memorial dedicated to the Abolitionist history of Brooklyn in a new park ("Willoughby Square," later "Abolitionist Place") that would be built in the area. See **Exhibit "9"**. It was stated that it was to be a major memorial dedicated to the great role of Brooklyn in the Abolitionist movement within the United States. The total budget under the RFP was \$2,000,000.00; with \$1,000,000.00 earmarked for programming and \$1,000,000.00 earmarked for the art/memorial. The RFP was won by the Brooklyn Historical Society.

18. The development of the park itself and the memorial was delayed for many years because of financial issues related to the development of an underground parking garage at the park site. A design for the park, including the parking garage, was approved by the Public Design Commission on March 7, 2016. See **Exhibit "10"**.

19. In 2019, the NYCEDC announced that they would renew efforts to build the park, now without any underground parking garage at all.

20. On August 26, 2019, landscape architectural firm Hargreaves Jones presented a proposed design of the park at an executive board meeting of Community Board 2, which, notably unlike its committee meetings, did not allow public comment or the ability of members of the public to speak during the meeting. The art component was not considered within the new design in any respect at all. The design included arbitrary, isolated locations for the "art component."²

21. Ricky Da Costa of NYCEDC explicitly stated that the City sought to expedite approval of the park design to complete it before the end of the administration of Mayor Bill de Blasio. The Department of Cultural Affairs said that they would undertake the selection of an artist through the Percent for Art program.

22. In media coverage, respondents publicly criticized the failure to integrate the memorial artwork into the park design.³

² [Community Board 2 (Brooklyn) Presentation on Willoughby Square Park and Abolitionist Memorial - YouTube]

³ Willoughby Park delayed after historians say design leaves out abolitionist history (brooklyneagle.com)

23. On September 26, 2019, the Department of Cultural Affairs held a meeting to select five artist finalists for the artwork. No public notice was made, and none of the community advocates involved with Abolitionist history or 227 Duffield were invited to the selection. See **Exhibit “11”**.

24. On or about February 6, 2020, artist Kameelah Janan Rasheed was selected as the winner at a meeting. No public notice was made, and none of the community advocates involved with Abolitionist history or 227 Duffield were invited to the selection.

25. The selection decision was not made public until a year later in January 2021 when the City and Kameelah Janan Rasheed went before a committee of Community Board 2.⁴ No public notice was made, and none of the community advocates involved with Abolitionist history or 227 Duffield were invited or notified that a selection had been made a year prior. At the Community Board committee meeting, there was criticism of the lack of coordination with the advocates for the preservation of the history of Abolitionism in Brooklyn.

26. With a conceptual proposal placed on the agenda of the Public Design Commission, the agency responsible for approving public art, in January 2021, respondents alerted academics and community members, who organized to attend and testify at the Public Design Commission presentation via Zoom on January 19, 2021.⁵ Academics and civil society organizations signed a group letter criticizing the proposal. See **Exhibit “12”**. Despite the park design itself also being substantially updated, with a formal presentation provided to the Public Design Commission, it was not separately placed on the public agenda and the original park approval from 2016 was merely extended in January 2021. See **Exhibit “13”**.

⁴ [Artist chosen for abolitionist installation at Willoughby Square Park \(brooklynpaper.com\)](#)

⁵ <https://www.youtube.com/watch?v=f5GE2k6Cx2M>

27. Testimony and criticism at the public hearing on January 19, 2021, included arguments that the proposal was incomplete, did not communicate the relevant history, and distorted the relevant history.⁶ In fact, even the artist at the hearing made the statement that “this project is not designed to represent all of Abolitionist history; that is impossible.”⁷

28. Several commissioners, in their comments in response, requested that the park design itself be reconsidered to make the artwork more prominent.

29. In this hearing, the Chair Signe Nielsen conceded that the proposal was incomplete. She said that the artist had affirmed that “the reason you don’t have a proposal before you is that I have yet to develop it with your voices.” That characterization confirms that this proposal was not at a proper conceptual stage. She said the artist came with “an intentional lack of specificity.” Referring to public outreach and the development of the design, she then said, “We are not going to give approval until this process has moved further along.”

30. Implicitly acknowledging the NYCEDC’s lack of public outreach, she said that she would like to table the conceptual design proposal “so that there is greater opportunity for the artist to hear some of the voices that have not been heard, for whatever reason we won’t dwell on.”

31. The *New York Times* wrote a story about the issue on January 25, 2021, demonstrating public interest in the matter.⁸

⁶ Id.

⁷ Public Design Commission Public Meeting, Tuesday, January 19, 2021 - YouTube, approximately at 19:00 minute mark.

⁸ A Monument Honoring Brooklyn Abolitionists Stalls Under Scrutiny - The New York Times (nytimes.com)

32. Since January 2021 until the date of this petition, no public outreach has been held and none of the individuals who brought their voices to the hearing have been engaged in any way. In a press release announcing the renaming of the park to "Abolitionist Place" on June 17, 2021, the NYCEDC stated that a public engagement regarding the memorial would begin that summer. See **Exhibit "5"**. No public engagement took place during the summer.

33. On Wednesday, September 15, 2021, the Public Design Commission posted its agenda for the September 20, 2021 meeting on its website. See **Exhibit "14"**. The item was now placed on the "Consent Agenda" rather than the "Public Hearing Agenda", meaning that no new information would be made available and that the proposal would be approved by consent.

34. On Thursday, September 16, 2021, Petitioner and other members of the public wrote messages to Executive Director Keri Butler and the Commission asking to testify. Eventually, the director responded saying that they would not allow this. See **Exhibit "15"**.

35. Prior to the hearing on September 20, 2021, Petitioner and others requested a copy of the new application from both the Department of Cultural Affairs and the Economic Development Corporation. Both agencies did not provide the petition in advance of the hearing where the proposal was approved by consent.

36. In response to a message by Jacob Morris, Public Design Commission Executive Director Keri Butler replied that the reason that the proposal would be approved without any public engagement taking place in the previous eight months was that the artist's contract required conceptual approval for additional payment. The language of this contract has not been provided despite several Freedom of Information Law requests.

37. On September 17, 2021, Department of Cultural Affairs Director of External Ryan Max wrote an email to Todd Fine stating that "aside from [a newly-seen public

engagement outline], the proposal is largely unchanged from what the artist presented in January. The artist is set to begin community engagement in the weeks ahead; to offer feedback to the artist and/or receive updates on community engagement, you can send an email to percentinfo@culture.nyc.gov.” See **Exhibit “16”**. This was later determined to be factually inaccurate, as there were substantial changes made to the design of the memorial; based on documents that were later produced in response to the Freedom of Information request.

38. The public engagement outline was incoherent and included dates that had already passed. See **Exhibit “17”**. No public engagement took place through the end of the mayoral administration and into January.

THE STANDARD OF REVIEW

39. An Article 78 proceeding is a special proceeding. It may be summarily determined upon the pleadings, papers, and admission to the extent that no triable issues of fact are raised. C.P.L.R §409(b); C.P.L.R §7801; C.P.L.R §7804(h).

40. The applicable standard for review is whether the administrative decision was (1) made in violation of lawful procedure, (2) affected by an error of law, or (3) arbitrary or capricious or an abuse of discretion. C.P.L.R §7803(3).

41. The standard of judicial review in a CPLR Article 78 proceeding is whether the administrative determination was made in “violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion”. CPLR § 7803[3]. See also, *Figueroa v New York City Housing Authority*, 141 A.D.3d 468,469 (1st Dept., 2016); *Metropolitan Movers Ass'n, Inc. v Liu*, 95 A.D.3d 596, 598 (1st Dept., 2012).

42. In an Article 78 proceeding, the Court’s function is to determine whether the action of an administrative agency had a rational basis or was arbitrary and capricious. See e.g.

Pell v. Bd. of Educ., 34 N.Y.2d 222, 230–231 (1974). “Arbitrary action is without sound basis in reason and is generally taken without regard to the fact”. *Pell*, 34 N.Y.2d at 231.

43. A rational basis exists only where the determination is “[supported] by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination”. *Ador Realty, LLC v. DHCR*, 25 A.D.3d 128 (2d Dept. 2005) quoting *Pell*, 34 N.Y.2d 231. A determination made “without sound basis in reason and without regard to the facts” is arbitrary and capricious. *Scherbyn v. Wayne-Finger Lakes Bd. Of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991).

44. An administrative determination by an agency is arbitrary and capricious when it is made “without sound basis in reason and is generally taken without regard to the facts”. *Persico v. New York City Dept. of Bldgs.*, 2011 N.Y. Slip Op. 52424[U], 34 Misc.3d 1204[A] (Sup.Ct., NY County, Dec. 22, 2011), quoting *Pell v Board of Education*, 34 NY2d 222, 231 (1974).

45. An agency's failure to follow its own procedures or rules in rendering a decision is arbitrary and capricious. *D.F. v Carrion*, 2014 N.Y. Slip Op. 24078 (Sup.Ct., NY County, Mar. 21, 2014); *Gilman v New York State Div. of Housing and Community Renewal*, 99 NY2d 144 (2002).

THE ANALYSIS OF THE FACTS TO THE LAW

46. The Public Design Commission has written instructions and procedures for the public to request to testify at a public hearing. Until September 2019, these rules definitively stated that if the public wished to testify on a consent agenda item, it would be rescheduled according to “standard procedure”. See **Exhibit “18”**. After that, the instructions were changed

to state that the public should contact the commission if they desired to testify. See **Exhibit “19”**. However, there has been no announcement that “standard procedure” has changed.

47. Given that the Commission had said that the proposal was incomplete and that the NYCEDC needed to do additional public outreach, and given that the proposal was changed significantly from the January proposal (including an undefined sculpture and new locations for the artwork), it was unreasonable to assume that the January hearing was sufficient for a public response.

48. The Public Design Commission both violated its rules and acted arbitrarily and capriciously in denying public testimony.

49. Furthermore, within reform legislation passed because of the vagueness of Public Design Commission procedures, Local Law 17 of 2017 the City Council mandated that the Commission publish its procedures in its annual report.⁹ These procedures state that conceptual designs should include "drawings" of the proposal.¹⁰ Most conceptual proposals at this stage clearly allow the public to understand the content and look of the proposal.

50. New York City legislation, Intro. 1276-B, requires the Public Design Commission to report annually on the previous year's work. Specifically, this requires that:

This bill would require the New York City Art Commission to submit to the Mayor and the Speaker a report detailing the number of submissions received by the Commission, the number of submissions acted upon, the membership of the Art Commission, a summary of the methods of procedure used to determine the approval or disapproval or rejection of submissions and the number of works of art cleaned, maintained, or repaired, in the previous year.

⁹ [The New York City Council - File #: Int 1751-2017 \(nyc.gov\)](#)

¹⁰ [Council to Vote on Legislation to Enhance Provisions for Citywide Public Art Initiatives and Establish Reporting Requirements for Economic Development Tax Expenditures - Press \(nyc.gov\)](#)

51. Pursuant to the Respondent's own guidelines, the guidelines provide clearly that the artist is required to submit drawings; which in this instance, the artist use the drawing of the layout designed by the landscape architect. The artist failed to include a drawing of her proposed memorial artwork in his submission. This means that the Respondent failed to comply with its own methods and procedures, meaning its determination was arbitrary and capricious.

52. The proposal that is the subject of this proceeding is extraordinarily incomplete compared to others approved at this stage. It does not meet the checklist standards provided to agencies for the submission of conceptual proposals. See **Exhibit "20"**.

53. The Respondent violated its own rules and procedures for conceptual approval. Upon information and belief, this was done in order to meet extraneous demands by an outside agency, NYCEDC, related to the payment of the artist, or perhaps in order to silence public voices and push the project forward.

54. The Respondent explicitly said that it had tabled the proposal because of the lack of public outreach. Because no public outreach took place in the intervening period, and because no reasonable justification of its absence was communicated, the agency acted arbitrarily and capriciously in approving the conceptual design on its consent agenda.

55. Assuming *arguendo*, the agency had received new pledges from NYCEDC of public outreach, the tabling was specific to the "conceptual approval," which results in expenditures and commitments of city time and resources. The continued lack of implementation of that plan, which is vague and incoherent, confirms that the decision was arbitrary and unreasonable.

AS AND FOR PETITIONER'S FIRST PRAYER FOR RELIEF

56. Petitioner repeats and realleges the allegations contained in the preceding paragraphs with the same force and effect as though fully set forth at length herein.

57. The Respondent failed to act in accordance with own practice and procedures.

58. The Respondent failed to allow Agenda 27861 to be heard by the public.

59. The Respondent, in moving Agenda 27861 from the "Public Hearing Agenda" to the "Consent Agenda", ignored and/or disregarded its prior determination of January 19, 2021.

60. That in violating its own procedures, the Respondent's determination of September 20, 2021 was and is arbitrary and capricious.

61. That in failing to allow public outreach, the concept upon which Respondent is moving forward with is historically inaccurate and not in the interest of the accuracy of the Abolitionist history and the community at large.

62. Furthermore, in moving Agenda 27861 to the Consent Agenda, the Respondent failed to comply with its own methods and procedures.

63. That the determination of the Respondent dated September 20, 2021 is arbitrary and capricious.

64. This Court should issue a judgment determining that the September 20, 2021 determination of the Respondent was arbitrary and capricious.

65. The Court should issue a judgment requiring that Agenda 27861 be reinstated from the "Consent Agenda" back to the "Public Hearing Agenda" in conformity to its prior determination of January 19, 2021.

66. No prior request for the relief sought herein was made by Petitioner.

67. Accordingly, for the reasons stated above, this Court should issue a judgment pursuant to Article 78 of the CPLR finding that the Respondent's September 20, 2021 determination was unlawful, irrational, arbitrary and capricious.

WHEREFORE, Petitioner respectfully requests that an Order and Judgment be entered herein annulling, vacating, setting aside and reversing the September 20, 2021 determination, that allowed the Respondent to move Agenda Item 27861 from the "Public Hearing Agenda" to the "Consent Agenda", and an Order be issued restoring Agenda 27861 back to the "Public Hearing Agenda" in conformity with the procedures of the Respondent, together with any and all additional relief the Court deems just and proper.

Date: Garden City, New York
January 20, 2022

HIRSCHEL LAW FIRM, P.C.
Attorneys for Petitioner

By: _____/s/_____
Daniel Hirschel, Esq.
1225 Franklin Avenue, Suite 325
Garden City, New York 11530
(516) 742-7070

