

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

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In the Matter of the Application of

NYC FREEDOM TRAIL FOUNDATION INC.,

Petitioner,

**AFFIRMATION IN
SUPPORT OF CROSS-
MOTION TO DISMISS**

-against-

Index No.: 150659/2022

PUBLIC DESIGN COMMISSION OF THE CITY OF
NEW YORK,

Respondent.

For a Judgment Under Article 78 of the CPLR.

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GATI DALAL, an attorney admitted to practice law before the Courts of the State of New York, affirms under penalties of perjury, pursuant to Rule 2106 of the Civil Practice Law and Rules (“CPLR”), as follows:

1. I am Assistant Corporation Counsel in the office of HON. SYLVIA O. HINDS-RADIX, Corporation Counsel of the City of New York, attorney for Respondent Public Design Commission of the City of New York (“PDC”). I am familiar with the facts and circumstances of this matter based upon the relevant documents attached hereto, my review of the records and files maintained by the City of New York, and my conversations with employees, officers and agents of the City of New York.

2. I submit this affirmation in support of Respondent’s cross-motion for an order dismissing the Verified Petition (the “petition”) pursuant to CPLR §§ 3211(a)(2), 3211(a)(5), 3211(a)(7), 306(b), and 7804(f) on the grounds that Petitioner’s claims against the

PDC are not ripe for review by this Court because there has not been a final administrative determination, and the claims are barred by the statute of limitations because Respondent was not timely served in this proceeding.

RELEVANT STATUTORY FRAMEWORK

Article 78 of the CPLR Requires a Final Determination

3. Under the CPLR, an Article 78 proceeding cannot be used to challenge a determination which is not final. See CPLR § 7801. The CPLR states, in pertinent part:

Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed;

CPLR § 7801 (emphasis added).

Article 78 Proceeding: Statute of Limitations

4. Section 217(1) of the CPLR sets forth the applicable statute of limitations for Article 78 proceedings. This section provides, in pertinent part, as follows: “Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” CPLR § 217(1).

Article 78 Proceeding: Filing and Service Requirements

5. Pursuant to CPLR § 304(a), “[a] special proceeding is commenced by filing a petition in accordance with rule twenty-one hundred two of this chapter.”

6. Filing of the petition must be followed by timely service of the petition with notice or order to show cause, in compliance with the provisions of CPLR § 306-b.

Regarding special proceedings, that section reads in relevant part:

Service of the . . . petition with notice of petition or order to show cause . . . where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

CPLR § 306-b (emphasis added).

The Public Design Commission

7. Pursuant to Chapter 37 of the New York City Charter (“City Charter”), the Public Design Commission (“PDC”)¹ is the City agency charged with reviewing and approving permanent structures, landscape architecture, and art proposed on or over City-owned property.

See City Charter § 854. Specifically, the City Charter states:

d. No work of art shall hereafter become the property of the city by gift or otherwise, or be purchased, commissioned, contracted for, accepted, erected or placed in or upon any public building, or allowed to be placed on or extend into or over any public street, avenue, highway, square, park, dock or pier or other public place belonging to the city, unless such work of art or a design of the same, accompanied by a specification and an estimate of the cost thereof, a plan showing its proposed location, and, if the commission deems it necessary or desirable, also a model, and any other pertinent information as may be required by the commission including a plan in such detail as the commission may require for the maintenance or conservation thereof, shall first have been submitted to the commission by the agency having jurisdiction, and such work of art or the design thereof, its location, and the

¹ While the agency was established as the Municipal Art Commission in 1898, it was renamed the Public Design Commission in 2008 to better reflect its mission and purview. See 2020 N.Y.C. Public Design Comm’n Annual Report, accessible here: <https://www1.nyc.gov/site/designcommission/resources/annual-report.page>.

plan for its maintenance or conservation, shall have been approved in writing by the commission. The commission shall have authority to bar final payment for the purchase or erection of any such work of art if the president or executive director of the commission certifies that the work of art has not been completed substantially in accordance with the approval of the commission.

City Charter § 854(d). Pursuant to the City Charter, the PDC must submit an annual report detailing, *inter alia*, the total number of submissions received by the commission, the number of submissions acted or commented on by the commission, a summary of methods or procedure used to determine approval or rejection of submissions, and any other information deemed relevant by the commission. See City Charter § 859.

8. Title 57 of the Rules of the City of New York (“RCNY”) governs the PDC generally. Under 57 RCNY § 1-01, “[r]egular meetings of the [PDC] shall be held at least once each month Notice of the meetings shall be posted on the Commission’s Web site, and in accordance with the New York State Open Meetings Law, . . . and shall be made available upon request.”

9. Title 57 RCNY § 1-07 is titled “Submission of Matters for Approval,” and states:

Every matter required by Chapter 37 of the City Charter to be submitted to the Art Commission shall be presented first for approval as described in the Art Commission Submission Guidelines. The Commission in its discretion may give higher levels of approval than that which has been requested to any matter submitted. Every matter shall be submitted on the Application Form, and include such materials as described in the Submission Guidelines. The Submission Guidelines and Application Form are available on the Commission’s Website and made available upon request.

Additionally, Title 57 RCNY § 1-08 provides that, for each submission, “the Executive Director shall decide whether the materials submitted are sufficient and the Commission may subsequently require additional materials.”

STATEMENT OF MATERIAL FACTS

Artist Selection Process

10. The New York City Economic Development Corporation (“EDC”), in partnership with the NYC Department of Cultural Affairs’ (“DCLA”) Percent for Art program, selected artist Kameelah Janan Rasheed (the “Artist”) “to design a text-based public art installation” at Abolitionist Place (formerly Willoughby Square) in Downtown Brooklyn which would feature “engraved text throughout the open space, plus a free-standing structure, inspired by the area’s abolitionist history.” See <https://edc.nyc/project/abolitionist-place>; see also Affidavit of Keri Butler, Executive Director of the PDC, dated April 7, 2022 (“Butler Aff.”), annexed hereto as Exhibit A, at ¶ 8.

11. The PDC attends the artist selection panels in an advisory capacity but only became involved with the art installation project at Abolitionist Place when EDC and DCLA submitted the Artist’s conceptual proposal to the PDC in December 2020 for the January 19, 2021 PDC meeting cycle. See Butler Aff. at ¶¶ 9-10.

The PDC’s Review and Approval Process for Art Installations

12. As explained in detail in the Butler Affidavit, the PDC has a three-step review and approval process for artwork installation submissions, which includes: Conceptual Review, Preliminary Review, and Final Review. See Butler Aff. at ¶ 3; see also PDC website: <https://www1.nyc.gov/site/designcommission/review/requirements/artwork-installation.page>.

13. Conceptual Review is the initial stage of review and approval of artwork by the PDC and should occur early in the design process. At this stage, the PDC considers the artist’s previous work, their process, and general idea for the proposed project. Once the artwork has been fully developed, it can proceed to the Preliminary Review stage. At this point, the PDC

reviews the artwork submission, and if approval is granted, the artwork can be fabricated and installed at the selected location. See Butler Aff. at ¶¶ 4-5.

14. Final Review and Approval by the PDC requires submission of photographs documenting the completed work and often includes information about maintenance and upkeep of the artwork. Id. at ¶ 7.

January 19, 2021 PDC Meeting

15. On January 19, 2021 the PDC held a public hearing on the Conceptual proposal for the art installation by the Artist for Abolitionist Place entitled *Questions Worth Having Answers To*.² A copy of the PDC meeting agenda for January 19, 2021 is annexed hereto as Exhibit B.

16. While a public hearing is not required for every artwork submission,³ if the PDC, at its discretion, schedules a public hearing, it is generally held when an artwork is at the Preliminary Review stage. See Butler Aff. at ¶ 6. However, in this instance, due to the high interest in the overall project and unique nature of the art installation, specifically in that the Artist was planning community engagement in order to develop the content of the text-based artwork, the PDC decided to hold a public hearing for the art installation during the earlier Conceptual Review stage. Id. at ¶ 11.

17. In support of the Artist's Conceptual proposal, EDC and DCLA submitted to the PDC: the Artist's curriculum vitae, a statement explaining the proposed artwork installation at Abolitionist Place, a presentation which included examples of prior work and

² A recording of the January 19, 2021 public hearing can be accessed here: <https://youtu.be/orKqr5Cb9O4?t=189> (last accessed April 8, 2022).

³ Indeed, neither the City Charter, the RCNY, nor the PDC's annual disclosure require that the PDC hold a public hearing for artwork submissions.

proposed plans for the instant project, and applications to the PDC from the EDC and DCLA. Copies of all of these documents are collectively annexed hereto as Exhibit C.

18. In advance of the public hearing, twenty-seven (27) people signed-up to give public testimony and the PDC received seventeen (17) letters and written testimony. Copies of the submitted letters as well as a list of the people who signed up to testify at the hearing are collectively annexed hereto as Exhibit D. All of the letters were given to the PDC members for consideration in advance of the hearing per standard procedure.

19. Of the seventeen (17) letters submitted to the PDC in advance of the hearing, fourteen (14) were dated between October 28, 2019 and June 28, 2020 and were regarding support for a separate project entitled *Sisters in Freedom*. See Exhibit D at 1-22.⁴

20. The remaining three (3) letters were written testimony submitted by members of the public commenting on the art installation for Abolitionist Place See Exhibit D at 23-27.

21. At the PDC's public hearing on January 19, 2021, thirteen (13) people appeared virtually to testify. Testimony was heard from Todd Fine, Jacob Morris (President of Petitioner), Raul Rothblatt, Stacey Shub, Curtis Harris, Julie Finch, Mitty Owens, Shawné Lee, Beth Bugdaycay, Anthony Beckford, Diana DuCroz, Victora Combranez, and Elizabeth Adams (a representative from Council Member Steven Levin's office).⁵

22. As explained in further detail in the Butler Affidavit, most of the public testimony at the January 19, 2021 hearing focused on frustrations about processes that were not

⁴ These fourteen (14) submitted letters were originally sent to other city agencies and officials in 2019 and 2020 and copies were sent to the PDC in connection with the January 19, 2021 public hearing.

⁵ See note 2, *supra*, for the YouTube link of the recording of the January 19, 2021 public hearing. The public testimony begins at 28:50.

within the control of the PDC or the artist. See Butler Aff. at ¶ 15. For instance, the individuals who testified complained about demolition of local buildings, a perceived lack of communication and community engagement by the EDC, and support for a separate project entitled *Sisters in Freedom*. Id.; see e.g. January 19, 2021 public hearing at 34:36; 37:30; 39:24; 40:10; 53:10; 1:03:45.⁶ The limited testimony related to the Artist's proposal focused on how the submission was lacking in content and detail despite the Artist explaining that she intended to engage the community to develop the content and details for her artwork. See Butler Aff. at ¶ 16; see also e.g. January 19, 2021 public hearing at 30:55; 40:38; 43:10; 57:45, 1:20:05.

23. By certificate of resolution dated January 19, 2021, the PDC expressed support for the Artist's artwork but tabled the submission until the artist had an opportunity to address the concerns raised by the PDC. A copy of the January 19, 2021 resolution is annexed hereto as Exhibit E. The resolution stated in relevant part as follows:

CERTIFICATE 27674

RESOLVED That the Design Commission, having considered a proposal for the installation of an artwork by Kameelah Janan Rasheed, Willoughby Square Park, Willoughby Street, Abolitionist Place (Duffield Street) and Gold Street, Brooklyn, submitted by the Department of Cultural Affairs' Percent for Art Program and the Economic Development Corporation, represented by exhibits 5587-JF, JG, JH & JI of record in this matter, hereby tables the same. The Commission expresses support for the artist's work and robust community outreach plan, and notes the importance and challenge of creating a monumental memorial to the abolitionist movement in Brooklyn. The project may be resubmitted for review with the understanding that the artist will (1) work with the support of the landscape architect to identify additional artwork locations, including the site of the fountain, and to ensure the formal expressions of the artwork are prominent so the artwork becomes a focal point (or focal points) within the park; (2) consider legibility and long-term durability and maintenance of the text installations,

⁶ See note 2, *supra*, for the YouTube link of the recording of the January 19, 2021 public hearing.

in particular at locations where people will be sitting or walking; and (3) develop the content with input from community members, as proposed. Commissioner Aarons and Commissioner Armstead recused themselves.

See Exhibit E (emphasis added).

September 20, 2021 PDC Meeting

24. EDC and DCLA submitted a revised plan for the artwork installation in September 2021 responding to the PDC's comments, including revisions to the artwork locations, and a detailed plan for community engagement. A copy of this revised plan is annexed hereto as Exhibit F.

25. Given that (1) the PDC had previously expressed overall support for the Artist, her work, and her process, (2) this revised plan addressed the PDC's specific concerns and requests from January 2021, and (3) the Artist still planned to conduct community engagement to develop the content of the artwork and submitted a detailed plan and schedule to do so, the PDC placed the project on the consent agenda for Conceptual Approval. See Butler Aff. at ¶¶ 19-20. A copy of the PDC meeting agenda for September 20, 2021 is annexed hereto as Exhibit G.⁷

26. Furthermore, since the public testimony at the January 19, 2021 hearing related to the Artist's proposal focused on its lack of details and content, and the Artist had not yet initiated her community engagement plan to develop the content, the PDC did not believe another public hearing would be productive. See Butler Aff. at ¶ 21.

27. By certificate of resolution dated September, 20, 2021, the PDC granted conditional Conceptual Approval for the Artist's art installation at Abolitionist Place. A copy of the September, 20, 2021 resolution is annexed hereto as Exhibit H.

⁷ A recording of the September 20, 2021 public meeting of the consent agenda approval can be accessed here: <https://youtu.be/T2O9onLwFkM?t=2001> from 33:21–35:25 (last accessed April 8, 2022).

28. The September, 20, 2021 resolution stated, in pertinent part, as follows:

CERTIFICATE 27861

RESOLVED That the Design Commission, having considered a proposal for the installation of *Questions Worth Having Answers To* by Kameelah Janan Rasheed, Abolitionist Place (formerly Willoughby Square Park), Willoughby Street, Abolitionist Place (Duffield Street) and Gold Street, Brooklyn, submitted by the Department of Cultural Affairs' Percent for Art Program and the Economic Development Corporation, represented by exhibits 5587-JF, JG, JH & JX of record in this matter, hereby gives to the same unanimous conceptual approval with the understanding that the artist will undertake a community engagement process to develop the content of the artwork and the preliminary submission will include the results of this feedback in addition to the design of the freestanding element. Commissioner Aarons and Commissioner Armstead recused themselves.

Conceptual approval is conditioned upon submission of this project for preliminary review and approval before September 20, 2023.

See Exhibit H (emphasis added).

29. As explained in the text of the resolution, this Conceptual Approval was “with the understanding that that the artist will undertake a community engagement process to develop the content of the artwork...” which would be included as part of a further submission by the artist for Preliminary Review and Approval by the PDC. Id.

30. The PDC has not foreclosed the possibility of holding another public hearing on this artwork after the artist has completed the planned community engagement and has developed the content of her artwork. See Butler Aff. at ¶ 22.

The Instant Proceeding

31. By Notice of Petition and Verified Petition, dated January 20, 2022, Petitioner commenced the instant proceeding seeking, inter alia, to annual, vacate, set aside, and reverse the PDC's September 20, 2021 resolution, which gave conditional Conceptual Approval

to the Artist's art installation and moved the artwork ("Agenda 27861") from the Public Hearing Agenda to the Consent Agenda, and to remand the matter back to the PDC to place Agenda 27861 back on the Public Hearing Agenda. See [Notice of Petition](#) (NYSCEF Doc. # 22).

ARGUMENT

POINT 1

THE PDC'S SEPTEMBER 20, 2021 CONCEPTUAL APPROVAL IS NOT RIPE FOR REVIEW BY THIS COURT

32. This proceeding must be dismissed pursuant to CPLR §§ 3211(a)(2) and (a)(7) because there is not yet a final administrative determination which is ripe for this Court's review.

33. CPLR § 7801(1) states that an Article 78 proceeding "shall not be used to challenge a determination: (1) which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the Petitioner's application."

34. In the instant proceeding, Petitioner is precluded from challenging the PDC's September 20, 2021 resolution, as well as its determination to move the Artist's submission, Agenda 27861, from the Public Hearing Agenda to the Consent Agenda because this was not a final administrative decision on the art installation. At this point, this artwork has passed the Conceptual Review stage, which is only the initial step in the PDC's review and approval process.

POINT 2**THIS PROCEEDING MUST BE DISMISSED AS
PETITIONER FAILED TO TIMELY SERVE
RESPONDENT**

35. Should this Court consider the September 20, 2021 PDC resolution to be a final determination that is eligible for Article 78 review, the proceeding should still be dismissed pursuant to CPLR §§ 3211(a)(5) and 306(b) for Petitioner's failure to timely serve Respondent.

36. CPLR § 306(b) requires service within fifteen (15) days of the expiration of the applicable four-month statute of limitations for Article 78 proceedings. Here, assuming the September 20, 2021 resolution was a final administrative determination, the four-month statute of limitations began to run on or about September 20, 2021 and expired on or about January 20, 2022. Pursuant to CPLR § 306(b), Petitioner was required to serve Respondent within fifteen (15) days of January 20, 2022, on or before February 4, 2022. However, Petitioner did not serve Respondent until February 24, 2022. See [Affidavit of Service](#) (NYSCEF Doc. #24).

37. Petitioner does not attempt to explain why it waited so long to serve the petition upon Respondent, nor has it presented any evidence or alleged any reasons for an extension of time to serve. Therefore, the petition must be dismissed in accordance with CPLR §§ 3211(a)(5) and 306-b.

WHEREFORE, for all the reasons set forth above and in the accompanying Memorandum of Law, Respondent respectfully requests that its cross-motion to dismiss the petition be granted, together with such other and further relief as this Court deems just, proper and equitable. In the event Respondent's cross-motion is denied, the undersigned respectfully requests permission to serve and file an answer within forty-five (45) days of service of notice of entry of such order.

Dated: New York, New York
April 8, 2022

_____/s/_____
Gati Dalal
Assistant Corporation Counsel

