

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.,

Index No.: 150659/2022

Petitioner,

-against-

PUBLIC DESIGN COMMISSION OF THE CITY OF
NEW YORK,

Respondent.

For a Judgment Under Article 78 of the CPLR.

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RESPONDENT’S MEMORANDUM OF LAW
IN SUPPORT OF ITS CROSS-MOTION TO DISMISS THE PETITION

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April 8, 2022

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Respondent Public Design Commission of the City of New York (“PDC”), by its attorney, HON. SYLVIA O. HINDS-RADIX, Corporation Counsel of the City of New York, submits this Memorandum of Law in support in support of Respondent’s cross-motion for an order dismissing the Verified Petition (the “petition”) pursuant to Rules 3211(a)(2), 3211(a)(5), 3211(a)(7), Section 306-b, and 7804(f) of the Civil Practice Law and Rules (“CPLR”), on the grounds that the Court lacks subject matter jurisdiction because there has not been a final administrative determination and that the claims are barred by the statute of limitations because Respondent was not timely served in this proceeding.

PRELIMINARY STATEMENT

Petitioner brings this proceeding to challenge the PDC’s September 20, 2021 resolution granting Conceptual Approval for the artwork installation project entitled *Questions Worth Having Answers To* by Kameelah Janan Rasheed (the “Artist”) proposed for Abolitionist

Place in Downtown Brooklyn. After the City’s Economic Development Corporation (“EDC”), in partnership with the City’s Department of Cultural Affairs (“DCLA”), selected Ms. Rasheed to design a text-based public art installation for Abolitionist Place,¹ the EDC and DCLA submitted a proposal for the artwork to the PDC for Conceptual Approval, the initial stage of the PDC’s review process. See Dalal Aff. ¶ 17. After initially tabling the submission following a public hearing and a review of the proposal, the PDC voted on September 20, 2021 to grant Conceptual Approval for the submission after the EDC and DCLA submitted a revised proposal. Id. ¶¶ 23, 27–28. While the Conceptual Approval allows the Artist to move forward with her community engagement process for the artwork, it only constitutes the initial step in the PDC’s review process. See Butler Aff. ¶ 4. The PDC must also grant Preliminary Approval prior to any fabrication, construction, or installation of the artwork. Id. ¶ 5. Therefore, as additional actions and approval are required before construction and installation of the artwork is authorized, Petitioner seeks to challenge a non-final administrative determination and thus, a determination from which there is no certainty of specific harm. Accordingly, the challenged determination is not ripe for judicial review, and the Court must dismiss this petition pursuant to CPLR § 3211(a)(2).

Additionally, Petitioner failed to timely serve Respondent in accordance with CPLR § 306-b. Petitioner does not attempt to explain why it waited so long to serve the petition

¹ To the extent that Petitioner challenges the selection of Kameelah Janan Rasheed as the artist to design an artwork installation for Abolitionist Place, the PDC did not vote on, or in any way authorize, that decision. The PDC reviews proposals from other City agencies for projects on City-owned property, including property that is leased by the City to private entities. See *Design Review, Public Design Comm’n*, <https://www1.nyc.gov/site/designcommission/review/design-review.page> (last accessed Apr. 1, 2022). Therefore, any claims made with regard to the actions of other agencies, over which PDC has no authority, must be dismissed pursuant to CPLR § 3211(a)(7) for failure to state a cause of action upon which relief may be granted.

upon Respondent, nor has it presented any evidence or alleged any reasons for an extension of time to serve.

For these reasons, and as explained hereinafter, the Court should grant Respondent's cross-motion to dismiss the proceeding.

RELEVANT STATUTORY FRAMEWORK

Article 78 of the CPLR Requires a Final Determination.

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.

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.

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.”

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.

Pursuant to Chapter 37 of the New York City Charter (“City Charter”), the Public Design Commission (“PDC”)² 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

² 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 at <https://www1.nyc.gov/site/designcommission/resources/annual-report.page>.

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 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.

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.”

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 FACTS

Respondent respectfully refers the Court to the April 8, 2022 Affirmation of Gati Dalal (“Dalal Aff.”), and exhibits annexed thereto, for the relevant facts herein.

POINT I

A CHALLENGE TO THE PDC’S SEPTEMBER 20, 2021 CONCEPTUAL APPROVAL IS NOT RIPE FOR REVIEW BY THIS COURT AND MUST BE DISMISSED

This proceeding must be dismissed pursuant to CPLR § 3211(a)(2) on the grounds that Petitioner’s claims against Respondent PDC are not ripe for review by this Court. This Court lacks subject matter jurisdiction as there has not been a final administrative determination.

CPLR § 7801(1) states that “a proceeding under [Article 78] 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.”

The Court of Appeals has cautioned that “[u]ntil the agency has formalized its decision and its impact is felt in a concrete way, the courts should avoid becoming entangled in abstract or hypothetical problems.” De St. Aubin v. Flacke, 68 N.Y.2d 66, 75 (1986). An administrative action becomes final once it “impose[s] an obligation, den[ies] a right, or fix[es] some legal relationship as a consummation of the administrative process.” Essex Cty. v. Zagata, 91 N.Y.2d 447, 453 (1998) (quoting Chicago & S. Air Lines v. Waterman Corp., 333 U.S. 103, 113 [1948]). In other words, the Court’s inquiry “requires an examination of the completeness of

the administrative action and a pragmatic evaluation of whether the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.” Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 519 (1986) (internal quotation marks and citations omitted).

Additionally, the Court has warned that “if the anticipated harm is insignificant, remote or contingent the controversy is not ripe.” Id. at 520 (internal citations omitted). Accordingly, a “controversy cannot be ripe [for judicial review] if the claimed harm may be prevented or significantly ameliorated by further administrative action” Id. As the Appellate Division explained, the policy “underlying the dismissal for prematurity of Article 78 proceedings before a final and binding determination is to preclude the initiation of litigation that may thereafter become academic.” Comm. to Save the Beacon Theater v. City of N.Y., 146 A.D.2d 397, 404 (1st Dep’t 1989).

In this case, Petitioner challenges the PDC’s September 20, 2021 Resolution granting Conceptual Approval for *Questions Worth Having Answers To* by Kameelah Janan Rasheed, an artwork installation proposed for Abolitionist Place in Downtown Brooklyn. See [petition](#) generally. However, the PDC’s Conceptual Approval of an artwork submission is only the initial step in the PDC’s artwork review process. Butler Aff. ¶ 4. Conceptual Review occurs early during the artist’s design process. Id. After Conceptual Approval of the artwork submission, it may proceed to the Preliminary Review stage. Id. ¶ 5. At this point, the PDC reviews the artwork submission, and if approval is granted, only then can the artwork can be fabricated and installed at the selected location. Id. Thus, a PDC Conceptual Approval cannot be viewed as “a definitive position on the issue that inflicts an actual, concrete injury,” because it only allows an artwork submission to proceed to the next step of the PDC’s approval process. See Church of St. Paul & St. Andrew, 67 N.Y.2d at 519.

In the context of an Article 78 proceeding, the PDC’s Conceptual Approval of an artwork submission operates similarly to the design approval issued by the City’s Landmark Preservation Commission (“LPC”) when the owner of a designated historical landmark applies to the LPC to alter the property or structure. See, e.g., Comm. to Save the Beacon Theater v. City of N.Y., 146 A.D.2d at 368–69. New York Courts have conclusively held that the LPC’s approval of a design plan, which is subject to LPC review of final building plan drawings before any construction can begin, does not constitute a reviewable final determination within the meaning of CPLR § 7801. See id. at 398; see also Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d at 520. As noted by this Court, “[v]iewed holistically, and as a practical matter, the [LPC’s design approval] is not final because the developer cannot build until the LPC grants a final approval.” South Street Seaport Coal., Inc. et al. v. Landmarks Pres. Comm’n of City of N.Y., Sup Ct, N.Y. County, Oct. 4, 2021, Engoron, J., index no. 154812/2021. Like the LPC’s design approval, the PDC’s Conceptual Approval simply constitutes an initial step in the agency’s review process. Conceptual Approval allows an artwork submission to proceed to the Preliminary Review stage. An artwork cannot be fabricated or installed until the PDC grants Preliminary Approval, thus, Conceptual Approval cannot be considered “final and binding,” and Petitioner’s challenge is unripe. See Comm. to Save the Beacon Theater, 146 A.D.2d at 404.

Furthermore, Petitioner’s claim is also premature because further administrative action by the PDC can clearly address and ameliorate Petitioner’s alleged injury or harm. See Church of St. Paul & St. Andrew, 67 N.Y.2d at 520. Petitioner claims that the PDC denied the public an opportunity to testify regarding the Conceptual Review of *Questions Worth Having*

Answers To. See [petition](#) ¶ 4.³ Although the relevant laws and regulations do not require a public hearing as a part of the PDC’s review of an artwork submission—and despite the fact that the PDC already held a public hearing for this artwork submission on January 19, 2021—the PDC has stated that it is open to scheduling another public hearing after the Artist has completed the planned community engagement and has developed the content of the artwork. See *Butler Aff.* ¶ 22. Therefore, further administrative action by the PDC may ameliorate any alleged injury stemming from Petitioner’s demand for a public hearing.

As the September 20, 2021 Conceptual Approval is only the initial step in the PDC’s review process, not a final determination, and Petitioner’s alleged injury may be “prevented or significantly ameliorated by further administrative action or by steps available to the complaining party,” Petitioner’s claim is premature. See *Best Payphones, Inc. v. Dep’t of Info. Tech. & Telecomms.*, 5 N.Y.3d 30, 34 (2005). In order “to preclude the initiation of litigation that may thereafter become academic,” the Court must dismiss Petitioner’s challenge as unripe. See *Comm. to Save the Beacon Theater*, 146 A.D.2d at 404. Therefore, the instant proceeding must be dismissed pursuant to CPLR § 3211(a)(2).

POINT II

**THE INSTANT PROCEEDING MUST BE
DISMISSED BECAUSE PETITIONER FAILED
TO TIMELY SERVE
RESPONDENT.**

³ Notably, Petitioner does not set forth any legal authority for the proposition that the PDC must provide for a public hearing on every project or on demand. Indeed, the sections of the RCNY and City Charter pertaining to the PDC do not contain any public hearing requirements. See City Charter §§ 851–58; 57 RCNY §§1-01–15. The agency’s description of the Design Review process in the its annual report similarly does not mention any public hearing or testimony requirement. See 2021 N.Y.C. Public Design Comm’n Annual Report, accessible at <https://www1.nyc.gov/site/designcommission/resources/annual-report.page>.

Even assuming the September 20, 2021 PDC resolution is found to be a final administrative determination, the petition must still be dismissed under CPLR §§ 3211(a)(5) and 306-b because the petition was not timely served upon Respondent.

CPLR § 306-b provides that “[i]f 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”

The purpose of a statute of limitations is to allow parties to put stale claims to rest.

Statutes of Limitations are statutes of repose representing a legislative judgment that . . . occasional hardship . . . is outweighed by the advantage of barring stale claims. By their nature, they are somewhat harsh and seemingly unjust.

Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 404 (1993). This statement of purpose is applicable to all limitations periods, even those as short as thirty days, with an additional fifteen days to effectuate service. See Jervis v. Teachers Ins. & Annuity Ass’n, 279 A.D.2d 367, 367-68 (2001) (affirming the dismissal of an action under CPLR § 306-b); Bruno v. Zoning Bd. of Appeals, 286 A.D.2d 765, 766–67 (2d Dep’t 2001) (same).

While filing the petition with the Clerk of the Court in the county in which the special proceeding is brought “commences” the proceeding and stops the clock for statute of limitations purposes, service of the petition with notice of petition or order to show cause must still be effectuated within the statutory period—within fifteen (15) days of the expiration of the four-month statute of limitations period—for the case to go forward. See CPLR §§ 217(1), 304(a), and 306-b. Further, CPLR § 306-b provides that “[i]f 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”

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 four months later, on or about January 20, 2022. Thus, under CPLR § 306-b, service was required to be made upon Respondent by February 4, 2022, fifteen (15) days after the date on which the four-month statute of limitations expired. However, Petitioner did not serve the notice of petition and petition upon Respondent until February 24, 2022. See [Affidavit of Service](#) (NYSCEF Doc. #24). 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 § 306-b. See [Parrino v. New York City Bd. of Stds. & Appeals](#), 90 A.D.3d 931, 931 (2nd Dep’t 2011) (affirming Supreme Court’s order granting respondents’ cross-motion to dismiss the proceeding for lack of personal jurisdiction where “petitioners failed to serve the respondents with the notice of petition and petition within the 15-day period following the expiration of the applicable statute of limitations”); [Bruno v. Zoning Bd. of Appeals](#), 286 A.D.2d at 766 (affirming Supreme Court’s order granting respondent’s cross-motion to dismiss the petition where the petitioners failed to effectuate service within the mandatory time set forth in CPLR § 306-b); [Louden v. Rockefeller Ctr. North, Inc.](#), 249 A.D.2d 25, 26 (1st Dep’t 1998) (“Under the ‘commencement by filing’ system set forth in CPLR 306-b . . . after plaintiff has purchased an index number and filed the summons with the court, the action remains inchoate until the filed papers are served on defendant and proof of service is filed with the court.”) (citing [Gershel v. Porr](#), 89 N.Y.2d 327, 331 (1996)).

For the above reasons, the Court should dismiss this proceeding because there has not been a final administrative determination rendered, and because the proceeding is barred by the statute of limitations as Petitioner failed to timely serve Respondent in this matter.

