

**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. 150659/2022

NYC FREEDOM TRAIL FOUNDATION INC.,

Petitioner(s),

-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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**MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT’S
CROSS-MOTION TO DISMISS THE PETITION**

Respectfully submitted,

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Petitioner submits the following Memorandum of Law in opposition to the motion to dismiss the Petition by Respondent, pursuant to C.P.L.R. §3211(a)(2), §3211(a)(5), §3211(a)(7), §306-b, and §7804(f). For all the reasons provided for herein, the cross-motion to dismiss should be denied in its entirety.

PRELIMINARY STATEMENT

In short, Petitioner commenced an Article 78 proceeding under a theory that Respondent 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.

Respondent now seeks to dismiss the Petition on two general theories: *First*, Petitioner is seeking to appeal a “non-final” determination, so this application is premature; *Second*, service of Petition was beyond the 15-days provided for under CPLR §306-b.

As to the threshold issue, while the Respondent characterizes the September 20, 2021 determination as provisional and non-final, it would appear that it would be “de facto” a final determination, as by the time the Respondent were to reach a final determination, the project that is the subject of the instant Petition would be nearly complete. As Petitioner believes that it would have no reasonable remedy available to it in the event it waited for the Respondent to issue a final determination, it is Petitioner’s position that the Respondent’s determination amounted to a “de facto” final determination – in that the September 20, 2021 determination commits the Respondent to a definitive course of future conduct. Therefore, it is ripe for an Article 78 proceeding. While the issue of “definitive course of future conduct” relates more to

other types of governmental action, the logic and reasoning should be applicable to the instant proceeding, and other proceedings related to the arts and humanities.

With respect to the delay in service, it was not an intentional delay in service or failure to be proactive. Counsel for Petitioner went online and saw that the Respondent's website indicated that due to Covid restrictions, it was running on limited hours and with limited staff. After phone calls were unsuccessful to contact the Respondent, counsel for Respondent contacted the Respondent via email, after the 15-day time period for service. It was then once a response was received via email that Petitioner was able to communicate with the Respondent to effectuate service. As there seemed to be Covid restrictions in place, it did not seem appropriate to have a process server just show up randomly to drop off the paperwork. Given the complications regarding Covid, it did not seem that there was any issue that was raised by the Respondent regarding late service until it submitted its instant cross-motion to dismiss. As it is now raised as an issue, as part of its application seeking "such other and further relief as this Court may deem just proper and appropriate" (Notice of Petition, Relief #5), Petitioner seeks to have the extension of time granted under CPLR §306-b based on "good cause shown" and/or the "interest of justice".

Accordingly, for all the reasons provided for herein, and the accompanying papers in opposition to the cross-motion, Petitioner requests that the cross-motion be denied in its entirety.

BACKGROUND

For the purposes of brevity, the Plaintiff refers the Court to the Verified Petition, affirmation of Daniel Hirschel, the affidavit of Jacob Morris, the affidavit of Vinnie Bagwell, and the documents annexed thereto.

ARGUMENT

POINT I: THE SEPTEMBER 20, 2021 DETERMINATION COMMITS THE RESPONDENT TO A DEFINITIVE COURSE OF FUTURE CONDUCT; SO IT IS RIPE FOR AN ARTICLE 78 PROCEEDING

For the purposes of the rule that a proceeding against a body or officer must be commenced within four months after the determination to review becomes final and binding on a petitioner, an administrative determination becomes final and binding when it definitively impacts and aggrieves the party seeking judicial review. CPLR §217(1); *Matter of Hogg-Chapman v New York State Teachers' Retirement Sys.*, 83 A.D.3d 1261, 1262 (3rd Dept., 2011), quoting *Matter of Scott v City of Albany*, 1 A.D.3d 738, 739 (3rd Dept., 2003). A final and binding determination “contemplates that the agency has reached a definitive position, there will be no further change of that position and the petitioner has no opportunity to avoid injury other than by complying with the agency’s demands”. See generally, *Matter of Delta Kappa Epsilon [DKE] Alumni Corp. v Colgate Univ.*, 38 A.D.3d 1041, 1042 (3rd Dept., 2007; see *Matter of Adams v Carrion*, 85 A.D.3d 1517, 1518-1519 (3rd Dept., 2011).

While generally such cases are read with respect to calculating when the administrative agency’s determination is final with respect to bringing an Article 78 proceeding, there is no reason the Court cannot impart the same standard when determining when a party is actually aggrieved by an agency determination that is a “de facto” final determination. As provided for in the accompanying affidavit of Jacob Morris and Vinnie Bagwell, the Respondent has essentially committed to the artist, as well as her design and concept. There will be no substantial opportunity for the public and experts to be heard on the design concept. The Respondent, and whatever related agency is involved, has, upon information and belief, distributed a substantial portion of the contract price based upon the

milestones set forth in the agreement between the artist and contractor. Additionally, Jacob Morris has observed that site work has already begun at the project, with heavy equipment already being brought in to undertake work. By the time the Respondent would actually reach a “final” determination, a substantial portion of the project would have already been completed. As such, there would be no real relief that either the Petitioner, or any other person, would be able to obtain as a result of the Respondent breaching its own policies and procedures. This would set up a scenario where in the future agencies over art and designs can effectively commit major taxpayer resources, commit to a concept that lacks support or appeal to the community at large, but avoid accountability by deeming everything provisional or non-final until there has been substantial completion of the project.

While the September 20, 2021 determination does provide “Conceptual approval is conditioned upon submission of this project for preliminary review and approval before September 20, 2023,” that is really just window-dressing for what was actually transpiring behind the scenes. As provided for the in Affidavit of Jacob Morris, he contacted Keri Butler, who at the time was the Executive Director of the Respondent, about his concerns with respect to placing the Item 27861 onto the Consent Agenda. By email dated September 16, 2021, Ms. Butler advised Mr. Morris that:

I want to clarify that the PDC did not reject this proposal, it was tabled. I have attached the certificate for reference. The artist has responded to the PDC’s comments, but the project is still at a Conceptual level, meaning the artist’s community engagement process has not begun. I tried to explain to Todd (perhaps unclearly) that the artist’s funding for the community engagement process is tied contractually to the PDC’s Conceptual approval. Therefore, after the artist receives Conceptual approval, they can begin the engagement process. If you would like to be involved in that process, please reach out to EDC and DCLA.

Artworks must receive PDC's Preliminary approval before they can be fabricated and installed. The Preliminary submission to the PDC will occur after the community engagement process and development of the project.

The Respondent can couch it however it so desires, but the fact is that the Respondent, or its related agency, was intent on moving this project forward, and releasing substantial taxpayer monies to the artist in furtherance of her concept.

Furthermore, Respondent's conduct in placing the matter on the Consent Agenda was violative of City Council Legislation which provides reasonable advance notification of its intention to include works of art in a Percent for Art project on the Department's website. Section 1(d) of Section 224 of Chapter 9 of the New York City Charter also requires that the City hold at least one public hearing on such works of art prior to inclusion. The specific language provides, in part:

d. Reasonable advance notification of the intention to include works of art in a project shall be provided to the appropriate council member, borough president and chairperson of the community board of the community district in which the project is located.

It appears that Respondent's own conduct was designed to run an end-around the City Council Charter. If the public at large were to see Respondent's argument through to its logical conclusion, then the Respondent can keep meeting contractual benchmarks for the artist without substantively coming to "final" determination until there is substantial completion of the project. It is clear the City Council Charter affords the public the right to be heard before a course of conduct or action is taken. To allow otherwise would leave the public (and taxpayers) no meaningful relief under an Article 78 proceeding as the Respondent, or any governmental

agency, can render each step, threshold or milestone provisional in nature until substantial completion.

Accordingly, it is evident that the instant application should be granted in its entirety.

POINT II: DUE TO CIRCUMSTANCES, THE COURT SHOULD DEEM SERVICE TIMELY NUNC PRO TUNC, AS PETITIONER REQUESTED “such other and further relief as this Court may deem just, proper and appropriate”

To the extent Respondent seeks to dismiss the Petition as being served untimely, Petitioner requests that in the interest of justice and for good cause shown the Petition be deemed timely *nunc pro tunc*. The Petitioner refers the Court to the affirmation of counsel, Daniel Hirschel, which is part of the opposition to the cross-motion to dismiss. Within the affirmative, it is detailed that the delays were attributable more to Covid-19 regulations and guidelines, and not the result of a lack of diligence.

The standard under “interest of justice” appears to be more flexible than good cause shown. Within the “interest of justice”, there is an accommodation for late service that might be due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant or respondent. See, *Salsbury v. Wyckoff Heights Medical Center*, 162 A.D.3d 742, 80 N.Y.S.3d 271 (2nd Dept., 2018).

In the evaluation of “the interests of justice”, this Court may consider diligence or lack thereof along with any other relevant factor in reaching its determination including the expiration of the *Statute of Limitations*, the meritorious nature of the cause of action, the length of delay in service, the promptness of Petitioners' request for the extension of time and prejudice to Respondents. See *Leader v. Maroney Ponzini & Spencer*, 97 N.Y.2d 95 (2001).

In the instant action, there is certainly no prejudice that can be claimed by the Respondent. In fact, Respondent's argument being that the matter isn't ripe for adjudication would counter any substantive argument with respect to prejudice.

To the extent it is argued that Petitioner never sought the requested relief to have the Petitioner deemed timely served *nunc pro tunc*, as part of the relief requested in the Notice of Petition, Petitioner sought "such other and further relief as this Court may deem just, proper and appropriate". In *Frankel v. Stavsky*, 40 A.D.3d 918, 838 N.Y.S.3d 90 (2nd Dept., 2007), the Second Department held that, "a court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party." Furthermore, a Court may grant the type of relief within its jurisdiction appropriate to the proof, whether or not demanded, imposing such terms as may be just. CPLR §3017(a); see generally, *Matter of Nowak v. Wereszynski*, 21 A.D.2d 427, 250 N.Y.S.2d 981 (4th Dept., 1964).

The issues presented within this Article 78 are of too great importance for the Court to dismiss based upon a procedural technicality, when there is ample support to have the Petition deemed timely served *nunc pro tunc*.

Accordingly, the Court should deny Respondent's cross-motion to dismiss the Petition.

