

**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-

**AFFIRMATION IN OPPOSITION
TO CROSS-MOTION TO DISMISS**

PUBLIC DESIGN COMMISSION OF THE
CITY OF NEW YORK,

Respondent(s).

For a Judgment under Article 78 of the CPLR.

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Daniel Hirschel, an attorney licensed to practice law in the State of New York, affirms the truth of the following statements upon information and belief pursuant to C.P.L.R. §2106:

1. I am a member of the firm of HIRSCHEL LAW FIRM, P.C., attorney for Petitioner in the above entitled. As such, based upon my review of the documents and file, I am familiar with the facts and circumstances heretofore had herein.

2. I submit this Affirmation in opposition to the cross-motion of Respondent Public Design Commission of the City of New York, seeking an Order to dismiss the Petition pursuant to CPLR §§ 3211(a)(2), 3211(a)(5), 3211(a)(7), 306(b), and 7804(f).

3. Respondent’s arguments can be broken up into two broad categories: *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.

4. As provided for herein, and further demonstrated in the accompanying memorandum of law, each of these arguments is inapplicable to the instant proceeding.

5. While the September 20, 2021 was technically a “provisional” determination, possibly requiring further action on behalf of the Respondent before technically reaching 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.

6. As provided for in a little more detail in the accompanying affidavit of Jacob Morris, per the terms of the artist’s contract, she has already received a substantial portion of the contract price. Additionally, heavy construction equipment is already at the site and already undertaking activity to carry out the design concept. See Morris Aff., ¶24.

7. The 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.

8. The Petitioner has no other avenue and no other means of addressing its concerns with the design concept. To allow the September 20, 2021 determination to be deemed provisional and non-final would render any relief the Petitioner might seek effectively moot by the time the Respondent issues a “final” determination.

9. With respect to the delay in service of the Petition, CPLR §306-b provides that the Court can extend the time to for service upon good cause shown or in the interest of justice. It is Petitioner's contention it can meet this threshold based upon the facts that transpired.

10. Petitioner commenced this proceeding on January 20, 2022, which everyone agrees is a timely commencement of this action.

11. An index number was not assigned in this matter until four days later, on January 24, 2022. Upon obtaining an Index Number, Your Affirmant recalls going online to see the best manner and method to effectuate service.

12. Your Affirmant recalls seeing on the Respondent's website that due to Covid-19 and guidelines, that there would be limited hours and limited staff at the Respondent's location.

13. Your Affirmant recalls making a few calls over the next week or so, to see how to effectuate service upon the Respondent. After a few attempts over the phone, on February 15, 2022, Your Affirmant sent an email to the Respondent about possible means of alternative service.

14. It was then Your Affirmant received a response via email confirming that the Respondent had limited staff and to be in touch with them to make sure someone can be there to receive the papers.

15. Your Affirmant then advised the process server to make an attempt to reach out the Respondent, who subsequently reached out to the Respondent via email in order to effectuate service on someone who be at the office to accept the papers in the instant proceeding.

16. The delay in service was not prejudicial to the Respondent and constitutes good cause shown. Additionally, there are considerations with respect to the interest of justice that should allow this Court to consider the Petition. Accordingly, the Court should not dismiss the Petition and have it deemed timely served.

CONCLUSION

For all the foregoing reasons contained herein, the Respondent's motion for dismissal should be denied in its entirety.

Date: Garden City, New York
August 18, 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