

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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**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT
OF RESPONDENT'S CROSS-MOTION TO DISMISS**

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September 9, 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 reply memorandum of law in further support of its motion to dismiss the Verified Petition (“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.

ARGUMENT

**RESPONDENT'S CROSS-MOTION TO
DISMISS SHOULD BE GRANTED BECAUSE
PETITIONER'S OPPOSITION FAILS TO
IDENTIFY ANY COGNIZABLE CLAIM FOR
RELIEF.**

The Petition must be dismissed because the PDC's Conceptual Approval is not a final determination subject to judicial review and any challenge the artwork installation project entitled *Questions Worth Having Answers To* by Kameelah Janan Rasheed (the "Artist") is unripe. The Opposition fails to demonstrate that the PDC made a final determination regarding *Questions Worth Having Answers To*. To the extent Petitioner attempts to challenge the choice of the Artist, such challenge would be barred by the statute of limitations and because the PDC did not choose the Artist. Further, contrary to Petitioner's assertions in the Opposition, the PDC followed all applicable rules and regulations in granting Conceptual Approval, was not required to hold public hearings prior to granting Conceptual Approval, and, in any event, did hold a public hearing regarding Conceptual Approval and has indicated a willingness to hold another hearing in the future.

A. PDC's Conceptual Approval is not a Final Determination, and Petitioner's Challenges are not Ripe for Review

Petitioner argues that the PDC's September 20, 2021 resolution granting Conceptual Approval for *Questions Worth Having Answers* is a "de facto" final determination, rather than the initial step in a multi-stage review process. However, Petitioner appears to base its position on a misunderstanding of the PDC's design review process, as well as unfounded speculation by the Petitioner's president as to the PDC's deliberations and motives. The PDC's Conceptual Approval allowed the Artist to move forward with her community engagement process, further develop the design of her artwork, and prepare for submission of the project to the

PDC for Preliminary Approval (the second stage of the PDC's design review process). As the artwork cannot be fabricated or installed until the PDC grants Preliminary Approval, the September 20, 2021 resolution granting Conceptual Approval does not constitute a final determination.

The PDC serves as the City's design review agency, and reviews proposals submitted by other city agencies for permanent structures, landscape architecture, and art proposed on or over City-owned property.¹ The PDC's Conceptual Approval of a proposal, as the first step of the review process, is neither final nor definitive and cannot amount to a final determination. See Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 522 (1986). As Petitioner concedes, the September 20, 2021 resolution itself states that "Conceptual approval is conditioned upon submission of this project for preliminary review and approval before September 20, 2023." Petitioner's Mem. of Law in Opposition to Cross-Motion (NYSCEF Doc. No. 43) at 4. Because a PDC Conceptual Approval only allows an artwork submission to proceed to the next step of the PDC's approval process, it cannot be considered "a definitive position on the issue that inflicts an actual, concrete injury." See Church of St. Paul & St. Andrew, 67 N.Y.2d at 519.

The September 20, 2021 Conceptual Approval constitutes 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." See Best Payphones, Inc. v. Dep't of Info. Tech. & Telecomms., 5 N.Y.3d 30, 34 (2005). Therefore, Petitioner's claim is unripe. The Court should dismiss Petitioner's challenge

¹ *Design Review*, Public Design Comm'n, <https://www1.nyc.gov/site/designcommission/review/design-review.page> (last accessed Aug. 30, 2022).

as unripe in order “to preclude the initiation of litigation that may thereafter become academic.”

See Comm. to Save the Beacon Theater v. City of N.Y., 146 A.D.2d 397, 404 (1st Dep’t 1989).

B. The Selection of the Artist for this Project was a Separate Determination through the Percent for Art Program

In this case, the Artist was initially selected to create an artwork for Abolitionist Place in 2020 through the Percent for Art Program, which is managed by the City’s Department of Cultural Affairs (“DCLA”), not the PDC. Affidavit of Keri Butler, Respondent’s Exhibit “A”² (NYSCEF Doc. No. 29) (“Butler Aff.”) ¶ 8–9. While the PDC has an advisory role in this process, the PDC did not vote on, or in any way authorize, the selection of the Artist. Id. ¶ 9. The PDC reviews proposals submitted by other City agencies for projects on City-owned property³, and in this case, reviewed a proposal submitted by the New York City Economic Development Corporation (“EDC”) and DCLA on behalf of the Artist after she was selected through the Percent for Art Program. Id. ¶ 10. Thus, Petitioner’s claim that “Respondent has essentially committed to the artist” makes no sense in this context—the artist was selected in 2020 through a process outside of the PDC’s control, and the PDC’s current role is to review and approve the Artist’s proposed artwork before it is fabricated and installed at the selected site. Petitioner cannot use this proceeding as an attempt to belatedly challenge the selection of the Artist through the Percent for Art Program.

Indeed, the PDC is not a party to nor a beneficiary of the Percent for Art Design/Build Contract for the artwork, annexed to Petitioner’s Aff. in Opposition to Cross-Motion as Exhibit “1” (NYSCEF Doc. No. 47). Instead, the PDC’s Conceptual, Preliminary, and Final

² The Exhibits referred to herein are annexed to the Affirmation of Gati Dalal in Support of Respondent’s Cross-Motion to Dismiss (“Dalal Aff.”).

³ *Design Review*, Public Design Comm’n, <https://www1.nyc.gov/site/designcommission/review/design-review.page> (last accessed Aug. 30, 2022).

Approvals of the project constitute milestones in the contract's fee schedule, along with other milestones such as submission of an initial proposal for the project, partial and full fabrication, and installation of the artwork at the site.⁴ See NYSCEF Doc. No. 47 at 27. The contract was fully executed by EDC's Construction Manager and the Artist following the selection of the Artist through the Percent for Art Program on or about June 17, 2021. See id. at 22.

Petitioner argues that because the PDC's Conceptual Approval serves as a milestone for the project's Percent for Art Design/Build Contract, it functions as a final determination for the purposes of an Article 78 proceeding. Petitioner's Mem. of Law in Opposition to Cross-Motion (NYSCEF Doc. No. 43) at 3–4. However, as noted above, this contract directly resulted from the selection of the Artist for the Abolitionist Place site through the Percent for Art Program, not the PDC's design review process. In this case, the PDC's role is to review the proposals submitted by the EDC and DCLA for an artwork installation at the Abolitionist Place site. Petitioner attempts to conflate the PDC's design review process with the EDC and DCLA's selection of an Artist to create an installation for Abolitionist Place, but this proceeding only challenges the PDC's actions. The Court must dismiss any claims made with regard to the actions of other agencies, over which PDC has no authority, pursuant to CPLR § 3211(a)(7) for failure to state a cause of action upon which relief may be granted.

C. Construction at the Site Does Not Indicate a Final Determination

Petitioner also points to recent construction work at Abolitionist Place to support its position that the September 20, 2021 resolution was a final determination. See Petitioner's

⁴ Petitioner incorrectly claims that the September 20, 2021 resolution entitled the Artist to 30% of the contract payment because it served as the Preliminary Design approval. This is not true—the project has not yet been submitted for Preliminary Approval to the PDC, and has only received Conceptual Approval (milestone “B” in the contract). See Respondent's Exhibit “H” (NYSCEF Doc. No. 36).

Mem. of Law in Opposition to Cross-Motion (NYSCEF Doc. No. 43) at 4; Affidavit of Jacob Morris (NYSCEF Doc. No. 46) ¶ 26; Petitioner’s Exhibits “2a” and “2b” (NYSCEF Doc. Nos. 48, 49). However, as Petitioner surely realizes, *Questions Worth Having Answers To* is only one element of the planned public open space at Abolitionist Place—the 1.15 acre site will also include a new play area, lawn space, dog park, ornamental plantings, and multiple seating areas.⁵ Petitioner claims that “heavy construction equipment at the site is already undertaking activity to carry out the design concept,” but cannot cite anything to demonstrate that the construction is related to the *Questions Worth Having Answers To* installation. Affidavit of Jacob Morris (NYSCEF Doc. No. 46) ¶ 26. The presence of construction at the site does not in itself indicate that the PDC has authorized the fabrication and installation of *Questions Worth Having Answers To*. Indeed, it has not, and the EDC and DCLA have until September 20, 2023 to submit a proposal to the PDC for Preliminary Approval, a necessary prerequisite to beginning installation.

D. The PDC Followed All Relevant Rules and Procedures Relating to *Questions Worth Having Answers To*

Petitioner cites to Section 224 of the New York City Charter (“City Charter”) and claims that “[i]t is clear the City Council Charter affords the public the right to be heard before a course of conduct or action is taken.” Petitioner’s Mem. of Law in Opposition to Cross-Motion (NYSCEF Doc. No. 43) at 5. To be clear, the full text of the cited subsection reads:

- (1) The department of cultural affairs shall engage in outreach and education efforts regarding the opportunity to submit works of art for consideration for inclusion in capital projects as provided for by this section. Such outreach and education efforts shall include but not be limited to information sessions in each borough that shall be open to the public and the development of

⁵ “The City, Elected Officials, and Community Officials Rename Willoughby Square as Abolitionist Place,” Econ. Dev. Corp. (June 17, 2021), <https://edc.nyc/press-release/city-renames-willoughby-square-abolitionist-place>.

written materials that describe the submission and selection process for works of art. The department shall make such written materials available in a manner deemed appropriate by the department, including but not limited to making such materials available to arts and cultural organizations, community-based organizations, and colleges and universities. Such written materials shall be made available in English and in the six languages most commonly spoken by limited English proficient individuals in the city as determined by the department of city planning.

- (2) 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. Reasonable advance notification of the intention to include works of art in a project shall also be posted on the website of the department of cultural affairs. Following notification of the intention to include works of art in any project, the department of cultural affairs shall hold or present at a public meeting, such as a meeting of the community board of the community district in which the project is located, on such works of art prior to such inclusion. A notice of such public meeting shall be posted on the website of the department of cultural affairs not less than fourteen days prior to any such meeting. All such works of art shall be subject to the approval of the art commission pursuant to section eight hundred fifty-four of this charter.

City Charter § 224(d) (emphasis added). As is obvious from the plain text, this subsection refers to the initial selection of an artist for inclusion in a capital project (a procedure organized by the DCLA), not the PDC design review process. Indeed, the only reference to the PDC is the last

sentence of the subsection, which states that all works of art shall also be approved by the PDC.⁶ Accordingly, Petitioner’s reliance on the requirement for a public hearing in this Charter section is unavailing because it does not apply to the PDC’s review of *Questions Worth Having Answers To* prior to the Conceptual Approval.

Further, the PDC is not required to hold a public hearing prior to approving an artwork submission. While the Rules of the City of New York (“RCNY”) require that “[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,” the relevant laws and regulations do not require a public hearing as a part of the PDC’s review of an artwork submission.⁷ See 57 RCNY § 1-01. Nevertheless, the PDC held a public hearing for this artwork submission on January 19, 2021—and 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, to the extent that Petitioner alleges injury from a lack of public testimony on the project, this allegation is incorrect because a public hearing was held (even though not required) and because further administrative action (i.e. an anticipated future public hearing) by the PDC may ameliorate this alleged grievance. Accordingly, as the Petition fails to identify any final determination by the

⁶ 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>.

⁷ 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; see also 2021 N.Y.C. Public Design Comm’n Annual Report, accessible at <https://www1.nyc.gov/site/designcommission/resources/annual-report.page> (describing the agency’s Design Review process) . .

PDC that is ripe for judicial review, and because the PDC's actions were at all times in accordance with the applicable law, the Verified Petition must be dismissed.

Therefore, Respondent respectfully requests that the Court grant Respondent's cross-motion and dismiss the instant proceeding in its entirety.

Dated: New York, New York
September 9, 2022

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CERTIFICATION UNDER UNIFORM CIVIL RULE 202.8-b

Pursuant to rule 202.8-b(c) of the Uniform Civil Rules for the Supreme Court and the County Court, I hereby certify as follows: (i) according to Microsoft Word, the portions of this Reply Memorandum of Law that must be included in a word count contain 2,441 words; and (ii) this Reply Memorandum of Law complies with the word count limit set forth in rule 202.8-b(a).

Dated: New York, NY
September 9, 2022

Respectfully submitted,

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