

Index No. 108327/07

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

DISTRICT 4 PRESIDENTS' COUNCIL; THE
CITYWIDE COUNCIL ON HIGH SCHOOLS;
EUGENIA SIMMONS-TAYLOR; MARINA ORTIZ; and
MATTHEW WASHINGTON,

Petitioners,

- against -

THE FRANCHISE AND CONCESSION REVIEW
COMMITTEE OF THE CITY OF NEW YORK;, et al.,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR

**RESPONDENTS' MEMORANDUM OF LAW IN
OPPOSITION TO PETITIONERS' MOTION FOR
DOCUMENT DISCOVERY PURSUANT TO CPLR
SECTION 408**

MICHAEL A. CARDOZO

*Corporation Counsel of the City of New York
Attorney for Respondents
100 Church Street
New York, N.Y. 10007*

*Of Counsel: Susan M. Shapiro
Tel: (212) 788-1141
NYCLIS No.*

SUPREME COURT OF THE STATE OF NEW YORK
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CITYWIDE COUNCIL ON HIGH SCHOOLS; EUGENIA
SIMMONS-TAYLOR; MARINA ORTIZ; and
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Petitioners, (Friedman, J.)

-against-

THE FRANCHISE AND CONCESSION REVIEW
COMMITTEE OF THE CITY OF NEW YORK;
MICHAEL R. BLOOMBERG, Mayor of the City of New
York; ANTHONY CROWELL, Special Counsel to Mayor
Michael R. Bloomberg; WILLIAM C. THOMPSON, JR.,
Comptroller of the City of New York; MICHAEL A.
CARDOZO, Corporation Counsel for the City of New
York; MARK PAGE, Director of the New York City
Office of Management and Budget; SCOTT STRINGER,
President, Borough of Manhattan; each in his official
capacity as member of The Franchise and Concession
Review Committee of the City of New York; THE NEW
YORK CITY DEPARTMENT OF PARKS AND
RECREATION; and THE CITY OF NEW YORK,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR

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**RESPONDENTS' MEMORANDUM OF LAW IN
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Preliminary Statement

Respondents Franchise and Concession Review Committee of the City of New
York ("FCRC"); each of its members in his official capacity as a member of the FCRC: Michael
R. Bloomberg, Mayor of the City of New York ("Mayor"); Anthony Crowell, Special Counsel to

the Mayor; William C. Thompson, Jr., Comptroller of the City of New York; Michael A. Cardozo, Corporation Counsel of the City of New York; Mark Page, Director of the New York City Office of Management and Budget; and Scott Stringer, President, Borough of Manhattan; New York City Department of Parks and Recreation (“Parks Department”); and City of New York (“City”) submit this memorandum of law in opposition to petitioners’ motion for document discovery pursuant to section 408 of the Civil Practice Law and Rules (“CPLR”).

Petitioners, District 4 Presidents’ Council, comprised of the presidents of the Parents’ Associations/Parent Teacher Associations (“PTA”) for the schools located in East Harlem in District 4 of the City School District of the City of New York, the Citywide Council on High Schools, which represents parents of public high school students citywide, Eugenia Simmons-Taylor, a parent of a public high school student and the President of the PTA at the Young Women’s Leadership High School of East Harlem and President of the Presidents’ Council District 4, Marina Ortiz, a member of the Randall’s Island Community Council, and Matthew Washington, a community activist (Petition, ¶¶3-7), commenced this proceeding, under Article 78 of the CPLR, challenging the adoption of a Resolution by respondent FCRC concerning the development, upgrade, operation, use, maintenance and management of approximately 65 sports fields on Randall’s Island. The challenged Resolution authorizes respondent Parks Department to enter into a concession agreement with the Randall’s Island Sports Foundation (“RISF”) and authorizes RISF to enter into a subconcession agreement with the Randall’s Island Fields Group LLC (“Schools Group”), a group of 20 independent schools, with respect to usage rights and payments for ongoing fields maintenance and capital construction costs.

In their original Petition, petitioners raise one question of law. Petitioners contend that the challenged concession constitutes a “major concession” within the meaning of New York City Charter (“Charter”) §374(b) and the rules promulgated by the City Planning Commission, codified at 62 RCNY Chapter 7, and as such, was subject to land use review (see Charter §197-c(a)(6)) under the Uniform Land Use Review Procedure (“ULURP”), Charter §197-c and §197-d. In a separate motion, petitioners seek to amend their petition to assert two additional claims, purportedly “based upon newly presented” information and documentation. Affirmation of Norman Siegel in support of motion to amend petition, dated September 12, 2007 (“Siegel Aff.-a”), ¶5. Claiming that when “Respondents served their Verified Answer and supporting exhibits and memorandum of law on August 15, 2007 ... they asserted facts and provided documents which were unknown and unknowable to Petitioners prior to the commencement of this action” (Siegel Aff.-a ¶4), petitioners moved to amend to their petition to assert an environmental claim and a challenge to the award of the concession license agreement through sole source negotiations and also moved for document discovery purportedly with respect to those claims. For all the reasons set forth in the Affidavit of Aimee Boden in Opposition to Motion to Amend Petition, sworn to October 30, 2007 (“Boden Aff.”), and the exhibits attached thereto, and Respondents’ Memorandum of Law In Opposition To Petitioners’ Motion To Amend The Petition, dated October 31, 2007 (“Resp. Mem Opp. Amend”), which are incorporated herein by reference, petitioners’ proposed new claims are time-barred and patently without merit.

Respondents attached all the documents that are material and relevant to an adjudication of petitioners’ original claim to Respondents’ Verified Amended Answer. In addition, the Parks Department and the FCRC (through the Mayor’s Office of Contract Services

("MOCS")) have already provided petitioners' attorneys with hundreds of pages of documents responsive to requests seeking disclosure of documents, pursuant to the Freedom of Information Law, Public Officers Law §84, et seq. ("FOIL"), including documents concerning petitioners' proposed new claims (both of which raise only questions of law and, as a matter of law, are not actionable). Despite raising only questions of law in their pending petition, because all the documents that are material and relevant to an adjudication of petitioners' claims are attached to Respondents' Verified Amended Answer, petitioners' motion for discovery should be denied in its entirety. Petitioners have failed to show "ample need" for the requested discovery.

STATEMENT OF FACTS

For a complete statement of facts, the Court is respectfully referred to the Affirmation of Susan M. Shapiro, dated October 31, 2007, the Affidavit of Amy Kleitman, sworn to October 30, 2007 ("Kleitman Aff."), and the exhibits attached thereto, the Affidavit of Christian E. Stover, sworn to October 31, 2007 ("Stover Aff."), and the exhibits attached thereto, and to the Boden Aff., and the exhibits attached thereto, and to Resp. Mem Opp. Amend, the latter two of which are incorporated herein by reference.

In their original petition, petitioners assert one claim. They challenge the determination that the challenged concession is not a "major concession" and thus subject to land use review pursuant to ULURP. By separate motion, petitioners seek to amend their petition to assert two additional claims. The two proposed new claims, a challenge to the failure to prepare an environmental impact statement ("EIS") and to the award of the concession through sole source negotiations, are not actionable for the reasons set forth in respondents' opposition to petitioners' motion to amend the petition. Nonetheless, pointing to the failure to prepare an EIS, petitioners "seek documents reflecting the purported determination that the Concession was not a major concession and analyses, studies, data, or other evaluations of the project that supposedly

contributed to the parks Department's determination that the Concession was a Type II Action." Affirmation of Norman Siegel in support of motion for limited discovery, sworn to September 12, 2007 ("Siegel Aff-d"), ¶8. Pointing to the FCRC's approval of awarding the concession through sole source negotiations, petitioners "seek documents reflecting any request for competitive sealed bids for the concession, any explanation for not soliciting bids or any requests for approval by an alternative procedure." *Id.*, ¶9. Finally, pointing to their conclusion that "the concession will effect 158.5 acres" and respondents argument "that the concession would affect only 12.5 acres of land which is unused or used for parking," petitioners "seek documents reflecting the acreage to be used, the transformation of the existing acreage, and the use of each area at the time of the Concession." *Id.*, ¶10. Thus, petitioners seek the following documents reflecting: 1) the determination that the concession was not a major concession; 2) analyses contributing to the determination that the concession was a Type II action; 3) a request for competitive sealed bids for the concession;¹ 4) the terms and conditions of the concession; and 5) "the acreage to be used, the transformation of the existing acreage, and the use of each area at the time of the concession." *Id.*, ¶15.

¹ Petitioners confuse the provisions of Chapter 13 (Procurement) and Chapter 14 (Franchises, Revocable Consents and Concessions) of the Charter. They further seek to conflate those provisions and argue that a concession which is governed by the provisions of Chapter 14 should be awarded pursuant to the provisions of Chapter 13. *See* Resp. Mem Opp. Amend, pp. 22-24.

ARGUMENT

PETITIONERS' MOTION FOR PRETRIAL DISCOVERY SHOULD BE DENIED BECAUSE PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE DOCUMENTS AND INFORMATION THEY NOW SEEK ARE MATERIAL AND NECESSARY TO THEIR CLAIMS IN THIS PROCEEDING

Petitioners' motion for pretrial discovery should be denied in its entirety. Discovery is available in special proceedings, including those brought under Article 78, only by leave of the Court. CPLR §408. As numerous courts and commentators have recognized, this requirement is to maintain the summary nature of special proceedings. *E.g.*, Matter of Shore, 109 A.D.2d 842, 843 (2nd Dep't 1985); New York University v. Farkas, 121 Misc.2d 643, 644-45 (Civ. Ct. N.Y. Co. 1983); 1-4 Weinstein, Korn & Miller CPLR Manual, §4.03[c] (2001).

The case law, including the cases cited by petitioners, demonstrates that discovery should be granted in a special proceeding, including an Article 78 proceeding, if at all, only after the court has determined upon hearing the underlying petition that a trial of outstanding factual issues is required. As the Court stated in Arnot-Ogden Memorial Hospital v. Blue Cross of Central New York, Inc., 122 Misc.2d 639, 640-41 (Sup. Ct. Chemung Co. 1984): "The question as to the petitioner's entitlement to pretrial discovery must ... be determined on the basis of what issues of fact or law are before the court. ... [Before considering the motion for pretrial discovery, the court first must] determin[e] whether there are any factual issues requiring a trial which would warrant a grant of pretrial discovery." As the Court succinctly explained (122 Misc.2d at 641):

Normally, a proceeding under article 78 raises a question of law only. This is especially true when the claim is made that the decision subject to review is arbitrary, capricious and in violation of lawful procedure. It is at that time that the court in

considering the issues raised by the parties must determine whether further development of the facts are called for. In such a case a hearing might prove necessary and pretrial discovery could be allowed upon proper showing of special circumstances.

Because discovery tends to prolong a case, and, therefore, is inconsistent with the summary nature of a special proceeding, the courts will only permit discovery in very limited circumstances. The moving party must demonstrate “ample need” for the requested discovery. E.g., Matter of Shore, 109 A.D.2d at 843 (denying prehearing discovery); New York University v. Farkas, 121 Misc.2d at 644-48 (granting pretrial discovery).

Thus, for example, in Margolis v. New York City Transit Authority, 157 A.D.2d 238 (1st Dep’t 1990), a case cited by petitioners, the Appellate Division reinstated the Article 78 petition and remanded for a hearing on a disputed factual issue, directing at the same time that petitioner’s application for a deposition of a Transit Authority officer or employee be granted. Likewise, in People of the State of New York v. Bestline Products, Inc., 52 A.D.2d 17 (1st Dep’t 1976), rev’d, 41 N.Y.2d 887 (1977), the Appellate Division modified the trial court’s granting discovery as necessary to “prepare itself for the trial directed by Special Term.” 52 A.D.2d at 19. The Court of Appeals reversed the grant of discovery as an abuse of discretion based, in part, upon “the paucity of support for the relief sought.” 41 N.Y.2d at 888. See also Matter of General Electric Company v. Macejka, 117 A.D.2d 896, 897 (3rd Dep’t 1986) (discovery in special proceeding requires “disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity”) (emphasis added); Matter of Shore, 109 A.D.2d at 843 (considering an application for discovery made in light of the lower court’s order that a hearing be held).

As acknowledged by petitioners, the party seeking discovery must demonstrate that the information sought is both material and necessary to the claims. E.g., Matter of General

Electric Company v. Macejka, 117 A.D.2d at 897; Matter of Shore, 109 A.D.2d at 844.

Petitioners thus must establish that there are issues of fact in the Article 78 proceeding that are material and in dispute, and that the discovery that petitioners seek is relevant to the issues that they raise in their petition. E.g., Arnot-Ogden Memorial Hospital v. Blue Cross of Central New York, Inc., 122 Misc.2d 639. Petitioners, however, have failed to, and cannot, demonstrate the requisite ample need for the requested information sought or that the requested discovery is both material and necessary to its claims.

Contrary to petitioners' contentions on this motion, there are no disputed questions of material fact relevant to this proceeding. The claim raised in the Article 78 proceeding, that the concession constitutes a "major concession" and is thus subject to land use review, raises only questions of law. Whether the concession constitutes a "major concession" as defined in Charter §§374(b) and the rules promulgated by the City Planning Commission, codified at 62 RCNY Chapter 7, or does not, depends upon the language of the provisions of the rules promulgated by the City Planning Commission that define a "major concession", including 62 RCNY §703(d), as contended by respondents, or the provisions of 62 RCNY §702(f) and (g), as argued by petitioners.

Moreover, the acreage in the various fields constituting Randall's and Wards Island Park ("Randall's Island Park" or the "Park") as currently used and when the sports fields project is complete, the information requested by petitioners, is expressly set forth in the Exhibit 6 to Respondents' Verified Answer. See also Respondents' Verified Answer, at ¶¶52, 55-56, 59-62 and 77-86 and Exhibits 2, 3 and 5. Accordingly, petitioners request for "[d]ocuments reflecting the acreage to be used, the transformation of the existing acreage, and the use of each area at the time of the Concession" (Siegel Aff-d," ¶15(e)), must be denied.

Similarly, petitioners request for “[d]ocuments reflecting the terms and conditions of the Concession” (Siegel Aff-d,” ¶15(d)), must be denied. Petitioners have already been provided with a copy of the executed challenged concession agreement which contains all of its provisions. See Exhibit 13 to Respondents’ Verified Answer.

Insofar as petitioners seek documentation “reflecting the purported determination that may have been made that the concession was not a major concession” (Siegel Aff-d,” ¶15(a)), the Parks Department has no such documentation. Kleitman Aff. ¶12. The FCRC rules do not require an agency to prepare documentation that a proposed concession is not a “major concession.” Accordingly, petitioners’ request for these documents must be denied as moot.

Petitioners requests for documents concerning their proposed environmental claim and the challenge to the award of the concession through sole source negotiations must also be denied. Petitioners’ proposed environmental claim is time-barred, was not raised before the FCRC and lacks merit. Boden Aff., ¶¶9-26 and Exhibits 1, 2 and 3 and Resp. Mem Opp. Amend, pp. 6-16. Petitioners’ proposed challenge to the sole source award of the concession is also time-barred and patently meritless. Boden Aff., ¶¶27-46 and Resp. Mem Opp. Amend, pp. 16-24. Thus, petitioners’ request for documentation concerning the Type II determination (Siegel Aff-d ¶15(b)) and with respect to the sole source award of the concession versus what petitioners mistakenly propose, a procurement utilizing competitive sealed bids (Siegel Aff-d ¶15(c)), must also be denied.

Petitioners were able to mount their challenge based upon the already disclosed documents and have failed to raise any disputed issue of fact that is material and relevant to the legal issues raised in the pending challenge. Accordingly, petitioners have not demonstrated, and cannot demonstrate, “ample need” for the information sought and that the information sought is

material and necessary to their actionable claim. Like the petitioner in Arnot-Ogden Memorial Hospital v. Blue Cross of Central New York, Inc., whose motion for discovery was denied on the merits, petitioners “seek[] pretrial discovery of facts that are either not in dispute or are irrelevant to the issues raised.” 122 Misc.2d at 641-42. Petitioners’ request for discovery too must be denied. Petitioners’ attempts to interfere with and overturn this concession should not be permitted.

CONCLUSION

For all the foregoing reasons, petitioners’ motion for discovery in this Article 78 proceeding should be denied in its entirety.

Dated: New York, New York
October 31, 2007

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Respondents
100 Church Street, Room 3-101
New York, New York 10007
(212) 788-1141

By: *Susan M. Shapiro*
Susan M. Shapiro
Senior Counsel

