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**MEMORANDUM OF LAW IN
SUPPORT OF ARTICLE 78 PETITION TO COMPEL
COMPLIANCE WITH § 197-c OF THE NEW YORK CITY CHARTER**

Preliminary Statement

By this proceeding, Petitioners District 4 Presidents' Council, the Citywide Council on High Schools, Eugenia Simmons-Taylor, Marina Ortiz and Matthew Washington, representing concerned civic groups, public school parents and citizens, challenge the action of the City of New York (the "City") in granting the exclusive use – via a concession¹ – of a large parcel of City parkland to a consortium of largely tony private schools to the exclusion of the City's public school children (and other City denizens) during the peak after-school hours in an area where athletic fields are much needed (the "Concession"). In so acting, Respondent Franchise and Concession Review Committee ("FCRC") violated the City Charter in failing to apply the procedures set forth in the City's Uniform Land Use Review Procedures ("ULURP"), New York City Charter § 197-c; Rules of the City of New York ("RCNY") Title 62, Chapter 2.² ULURP requires that all "major concessions" are subject to its review procedures. Here, as demonstrated below, the Concession is a major concession, and thus should have been subject to ULURP review with its fundamental purpose of measuring the impact of proposed land uses.

¹ As set forth below, a "concession" is defined in the New York City Charter as:

A grant made by an agency for the private use of city-owned property for which the city receives compensation other than in the form of a fee to cover administrative costs

New York City Charter § 362(a).

² The RCNY contains the implementing rules for Section 197-c of the City Charter, and, *inter alia*, provide the definition of a "major concession."

The Concession would – in a contrived two-step process – result in vast acres of City parkland being converted to private use. In the first step, pursuant to the FCRC Resolution approving the Concession (the “Resolution”), prior actually to granting the Concession, the City would “create” a certain number of athletic fields that do not currently exist. See Ex. D to Verified Petition of June 14, 2007 (“Ver. Pet.”). In the second step, pursuant to an agreement between the Randall’s Island Sports Foundation (“RISF”)³ and a consortium of 20 private schools (the “Agreement”), the RISF would grant subconcessions to the private schools during the peak after-school hours for a 20-year period. Two-thirds of the playing fields would be available for the exclusive use of private school students during this time, and thus off-limits to the 15,000 largely minority school children in East Harlem’s District 4. These children are in desperate need of sports fields for after-school sports activities, and would be deprived of the opportunity to have access to the resources of Randall’s Island, without any of the protections of a competitive bidding process, ULURP, or review by more than a handful of City officials.⁴ Instead, their fields are being turned over to private school usage without so

³ The RISF was founded in 1992 as a public-private partnership to work on behalf of Randall’s Island Park. Its board of trustees are dominated by City representatives. See generally <http://www.risf.org>.

⁴ A recent article in The New York Times highlighted the abysmal conditions in Harlem schools, noting the only option for middle students in neighboring West Harlem to play baseball:

Here is a tattered patch of asphalt in the heart of a West Harlem housing project. It is caged in and a world apart, in the shadows of the burnt-orange high-rises. The bases are whatever the players can find: worn-out gloves, T-shirts, their imaginations. The outfield is a basketball court. . . .

* * *

It is transformed just as countless other cracked lots and hot forlorn expanses of concrete around New York City are transformed

much as a governmental second look. Moreover, not just the City's school children are denied use of these fields – for twenty years – but in fact all City citizens – community based sports clubs, professional after-work sports leagues, and among others – are excluded at these times in favor of this small group.

The City, in granting the Concession to RISF, chose to deny the public the transparency of not only an RFP process but of ULURP review. The Concession herein challenged is, as a matter of law, a “major concession,” and must go through the ULURP process. Petitioners therefore ask the Court to annul the Concession and remand this matter to the FCRC.

STATEMENT OF FACTS

The City, through the New York City Department of Parks & Recreation (“DPR”), entered into a no-bid contract with the RISF, by which the City granted the RISF the right to develop new athletic fields on 171 acres of Randall’s Island – 12.5 previously unused acres and 158.5 acres of parkland designated for some form of recreational use (the “Agreement”). Pursuant to the terms of the Agreement, the RISF would, in turn, enter into a no-bid 20-year contract with a consortium of 20 private schools for exclusive use of some two-thirds of these 171 acres during the prime after-school hours.⁵ (A list of the 20 private schools involved is annexed to the Ver. Pet. as Ex. A.)

“The Field Is Paved, the Gloves Are Borrowed, the Spirit Is Real,” New York Times, June 2, 2007. Available at: <http://select.nytimes.com/search/restricted/article?res=F0061FFE3B540C718CDDAF0894DF404482>.

⁵ Per the Agreement, the 20 private schools would receive 66.67% of field use during prime after-schools areas, and could apply for an additional 12.33% once the applications of City public schools

The Agreement between DPR and the RISF was characterized by the City as a “concession.” That being the case, the FCRC was the entity required to approve the granting of the Concession. Following a notice of a public hearing published in the City Record from January 23, 2007 to February 13, 2007, a public hearing was held by the FCRC on February 13, 2007. At this hearing a number of community representatives, groups, and activists expressed concerns regarding the Concession. Among those testifying, Council Member Melissa Mark-Viverito, who represents East Harlem and the South Bronx, expressed strong opposition to the Concession insofar as the DPR’s private partnership with RISF tolled a “heavy price” on the “surrounding working class and working poor communities.” Ex. B to Ver. Pet. at 0027-29. Council Member Mark-Viverito stated that “the greater community ha[d] not been approached and engaged in a thoughtful and respectful manner” and requested that the FCRC’s “vote be postponed and that a larger community, elected officials and the City as a whole, come up with alternative plans that do not call for the exclusivity of any one group.” Id. at 00031. Lillian Rodriguez-Lopez, President of the Hispanic Federation, similarly expressed concern regarding “the need to award a sole-source concession to the [20 private] schools in order to better the fields” when the City “has an obligation to maintain its public parks.” Id. at 00070-71 George Sarkissian, District Manager of Community Board 11, representing East Harlem, emphasized that Randall’s Island is public land that “should serve the public good” over the “needs of the more privileged.” Id. at 00081. Geoffrey Croft, President of NYC Park Advocates, characterized the Concession as allowing private schools to “buy access to public park land.” Id. at 00087. Patrick Sullivan, a

have been filled. Thus, the private schools could potentially use 80% of the primetime field hours. See Agreement at § 3.02, Ex. E to Ver. Petition at 6-7.

member of the board of directors of Class Size Matters, a parent organization, testified that “the concession [was] widely opposed by the public school community” and was the subject of a resolution in opposition passed by the District 4 Presidents Council. Id. at 00117. Thus, a wide variety of community members expressed significant concerns regarding the Concession.

Nonetheless, at the February 14, 2007 hearing before the FCRC, a representative of the City Office of the Corporation Counsel attempted to minimize the impact of the Concession by stating that 158.5 of the acres involved in the Concession were already available for general recreational use, and only the remaining 12.5 acres were subject to an alteration in usage. In reality, a review of the specific parcels to be converted from what the City representative characterized as "active recreational use" in testimony shows that much of the larger area today constitutes today woodland, general park grounds, and buildings.⁶ Given that the present state of the land does not allow for direct recreational or sports use much less the type of formal ball fields envisioned by the project, there plainly is a change of use contemplated. In approving the Concession, the FCRC failed even to address issues concerning the nature of existing versus contemplated use.

The FCRC voted to grant the Concession on February 14, 2007, with Respondent Scott Stringer, the Manhattan Borough President (and one most closely attuned to the needs of the Borough’s residents), dissenting. The Resolution provides, in part, that:

⁶ Some of the land also constitutes parking lots. It is unclear whether the parking lot section lies completely within the 12.5 acres.

The concession with RISF will commence when 75% of the sports fields are deemed substantially complete and shall end on the 20th anniversary of the concession commencement date. RISF shall grant a subconcession to the Randall's Island Fields Group LLC ("Schools Group"). The member schools of the Schools Group ("Schools") will receive guaranteed permitted use of two-thirds of the field time in the after-school time period for approximately 20 weeks a year. New York City public schools will have priority for one-third of the field time in the same time period.

Ex. D to Ver. Pet. The wording of the Resolution plainly provides that the sports fields that would be turned over to the private school group are not yet constructed, nor will they be fully completed at the time the Concession begins. Respondents clearly intend to pre-convert this land to accommodate the terms of the Concession, for without such “preliminary” step, the City’s rationale for avoiding ULURP would vanish. And while the City would realize some financial gain from the Agreement – the private schools are to contribute towards the renovation (albeit now less than half) – that fact cannot immunize the project from the meaningful review accorded by ULURP where, at the very least, an assessment could be made whether the “bargain” was sufficient. See <http://www.risf.org/sportsfield.html> (“The willingness of the Independent Schools to offer their financial support was, in fact, the stimulus for the entire expansion project.”). Moreover, the private schools have been given, essentially, veto power on any changes to the Concession and the absolute right to review any changes:

If the City, with the approval of RISF, or the RISF, with the approval of the City, desires to modify the Sports Fields Plans and Specifications after they have been approved by the Schools Group, RISF shall submit the proposed modifications to the Schools Group Representative for a determination of whether the modified Sports Field Plans and Specifications continue to conform to the Sports Fields Schematic Drawings.

The Agreement at § 5.03, Ex. E to Ver. Pet. at 10.

In all, the Concession would render over 41% of Randall’s Island’s total 273 acres (114 acres - 66.67% of the 171 acres of athletic fields contemplated in the Agreement) unavailable to the general public during the peak after-school and after-work hours. See http://www.nycgovparks.org/sub_your_park/park_info_pages/park_info.php?propID=M104. At a total size of 171 acres, or 7.4 million square feet, the Concession exceeds the 30,000 square feet requirement to trigger ULURP review.

ARGUMENT

THE CONCESSION IS, BY LAW, A “MAJOR CONCESSION” AND THUS SUBJECT TO REVIEW UNDER ULURP

The City concedes that action herein challenged is a concession, which is defined in the City Charter as:

A grant made by an agency for the private use of city-owned property for which the city receives compensation other than in the form of a fee to cover administrative costs, except that concessions shall not include franchises, revocable consents, and leases.

N.Y.C. Charter § 362(a). See Ex. D to Ver. Pet. Pursuant to ULURP, if a concession is a “major concession,” as defined therein, ULURP’s review procedures need be followed which entail, *inter alia*, involvement and review by the relevant Community Board, the City Planning Commission, and, in some cases, the City Council. Section 2-01 of ULURP’s implementing rules sets forth when an action is subject to its procedures.

Section 2-01(f) provides in relevant part that

requests for proposals and other solicitations for franchise pursuant to Charter § 363 and *major concessions as defined pursuant to Charter § 374*

are subject to ULURP. RCNY Title 62, Ch. 2, § 2-01(f) (emphasis added).

There is no claim that ULURP review was undertaken in the granting of the Concession. Where the issue lies, then, is whether the Concession is a major concession and thus subject to ULURP. ULURP defines a major concession, in relevant part, as:

A concession shall be considered a major concession if it will cause one or more of the thresholds given for the specific uses listed below to be exceeded:

(f) an open use which occupies more than 42,000 square feet of open space other than parkland;

(g) an open use which occupies over 30,000 square feet of a separate parcel of parkland.

RCNY, Title 62, Ch. 2 § 7-02.⁷

Part of the stated purpose of ULURP, which was proposed as part of a larger group of Charter amendments in 1972, is to

(i) encourage genuine citizen participation in local city government; (ii) ensure that local city government is responsive to the needs of its citizens. . . .

Orth-O-Vision, Inc. v. City of New York, 101 Misc. 2d 987, 997 (Sup. Ct. NY Co. 1979), quoting the Charter Review Commission, Legislative History, L.1972 c.634, § 1. As the court noted in Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v. Planning Com'n of City, 259 A.D.2d 26 (1st Dep't 1999), where an individual agency (in that case the Parks Department) made a determination about whether an action constituted major concession without the benefit of the CPC having promulgating the rules now in effect, such matter was:

⁷ These rules were promulgated by the City Planning Commission ("CPC") in 1998, as noted in the court's decision in Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v. Planning Com'n of City, 259 A.D.2d 26 (1st Dep't 1999). There, the court nullified an FCRC determination that an action was a "major concession" because the CPC had not yet promulgated the required rules to guide such a determination at the time it was made.

exactly the type of unfettered discretion that City Charter §374(b) was designed to eliminate. The result of an abuse of discretion would have significant consequences – ULURP review would be circumvented.

Id. at 34. The court proceeded to recognize that the concern was of even more urgency where the project was of considerable size – in that case, the construction of a recreational golf facility (as with the Aquatic Center, something that would eventually be open to all members of the public), see Ver. Pet. at ¶39, whereas here the Concession affects a sizeable area of parkland and a complete deprivation of use of the affected areas during peak hours.

In this matter, under either sections (f) or (g), and using any basis of calculation, the Concession constitutes a major concession. Specifically, the Concession, by its very terms, involves 171 acres of the 273-acre Randall's Island Park. See http://nycgovparks.org/sub_your_park/park_info_pages/park_info.php?propID=M104. Given that the total size of area involved in the Concession is 171 acres or 7.4 million square feet, the Concession vastly exceeds the 30,000 square feet threshold. While the City has attempted to obscure the total size of the Concession by arguing that only 12.5 acres would be converted to a new use (see Ex. C to Ver. Pet. at 00023), in reality, the promised 30 some new fields simply could not fit in a 12.5-acre area. A soccer field, for example, generally requires almost two acres, or more than 87,000 square feet. See, e.g., <http://www.nfhs.org/sports.aspx>. A baseball field similarly requires more than half an acre of land. Id.; see also Sample Field Usage Chart, Ex. H to Ver. Pet.. However, even the 12.5 acres – or 544,500 square feet - that would be converted from unused parkland or parking fields to athletic fields is more than eighteen times the 30,000 square feet threshold for a major concession. RCNY, Title 62, Ch. 2 § 7-02. When the additional

158.5 acres are added to it, it is plain that this acreage surpasses the requirements for the Concession to constitute a major concession.

While, as noted above, the City representative's testimony to the FCRC attempted to portray these 158.5 additional acres as already being used as athletic fields, this is, at the least, an overstatement. These acres include open wooded areas and landscaped parklands used for hiking, picnics, sunbathing, Frisbee tossing and the like, in addition to parts used as fields. The total area of the 158.5 acres in question currently used for open recreational area versus sports fields remains unclear. Moreover, any planned conversion of these now open fields, as demonstrated above, is to be done prior to the granting of the Concession and thus just another vehicle by which to avoid the dictates of ULURP. By subverting the ULURP process in these various ways, however, the thousands of District 4 students, their parents, and the community at large have been denied *any* meaningful role in the approval process.

As the court held in New York City Council v. City of New York,

3/18/2002 N.Y.L.J. 20 (col. 5) (Sup. Ct. NY Co.):

[T]he purpose of such [ULURP] review is to identify, at the earliest possible stage, those activities that will have a significant impact on the community. A ULURP review allows the community to measure the impact of the proposed land use and, where possible, identify alternatives.

Id. Clearly, the deprivation of significant amounts of playing fields to the more than 15,000 largely minority public school students of District 4 in favor of vastly smaller numbers of largely affluent private school children is the type of issue that should have

been more publicly – and formally – vetted with the various constituencies and alternatives considered.⁸

Furthermore, attempts to segregate and address separately the 158.5 and 12.5-acre portions of land run afoul of well-established precedent in the environmental and land use review areas. Specifically, the City has stated that only 12.5 acres of the 171 acres involved in the Concession are subject to conversion to new use, while the other 158.5 are already in use as recreational space. The 30 additional fields that would result from the Concession surely cannot fit in the 12.5-acre parcel of converted land; clearly, then, the entire 171 acres denominated in the Concession should be considered when assessing its impact. Specifically, given that the stated purpose of ULURP is to “identify, at the earliest possible stage, those activities that will have a significant impact on the community,” the affected acreage need be considered in the aggregate to fully comprehend the scope and impact of the Concession. See New York City Council, 3/18/2002 N.Y.L.J. 20 (col. 5). Thus, the City’s representation that only 12.5 acres are to be converted is contrary to both the spirit and the text of ULURP.

The principle of segmentation, applied in the context of assessing environmental impact of large governmental projects, is informative here, as it recognizes that unified land use proposals need be assessed for their overall impact, and any efforts by government actors to present such large projects in a piecemeal fashion is disfavored by New York state and federal courts. See In re Municipal Art Soc. Of New York, Inc., 15 Misc.3d 1138(A) (N.Y. Sup. Ct., N.Y. Cty. 2007), Slip Copy, *11, citing Stewart Park

⁸ That the private schools would pay for a portion of the renovation of course cannot immunize Respondents’ from their statutory obligations. Nowhere is it divinely ordained that some 40-50% of the project costs equals 67% of prime time use of the fields.

and Reserve Coalition, Inc. v. Slater, 352 F.3d 545, 559 (2nd Cir. 2003) (“Segmentation is to be avoided so as to insure that interrelated projects, the overall effect of which is environmentally significant, are not fractionalized into smaller, less significant actions.”). Similarly, the impact of the deprivation of 66.67% of the 171 acreage subject to the Concession during key after-school hours must be considered in the aggregate.

The evasion of ULURP review herein stands in stark contrast to a 2006 concession granted in the same park by the same agency, and serves to highlight the City’s circumvention of the New York City Charter and ULURP herein. Specifically, the FCRC recently granted a concession to the Department of Parks and Recreation to build the Randall’s Island Aquatic Center (the “Aquatic Center”) only after ULURP review. In both instances, the RISF spearheaded the development projects. Here, the RISF acts as the concession holder and has the authority to grant subconcessions to the consortium of private schools. In the case of the Aquatic Center, the RISF issued the request for proposals (“RFP”) that were evaluated by the City (of note here, the Concession was awarded on a no-bid basis and thus no RFP was issued). Both actions contemplate a change of use to currently unused parkland. In the case of the Aquatic Park, the resulting change of use will be open to the public during its operating hours. In the instant case, the concession would close a major portion of City parkland to the general public during peak hours. Looking at this side-by-side comparison, one would conclude that the current Concession is in need of the heightened scrutiny of ULURP – given its greater size, its deprivation of use to the public and the no-bid nature of the process.

In entering into the Agreement with RISF, the FCRC granted a major concession under the law and in doing so ignored and circumvented the important public

policies that underlie ULURP and the City Charter. As ULURP is clear that a major concession is subject to its review procedures, the granting of the Concession was in violation of ULURP and the City Charter.

CONCLUSION

For all of the foregoing reasons, the Court should grant the relief sought in the accompanying Verified Petition.

Dated: New York, New York
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