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

DISTRICT 4 PRESIDENT'S COUNCIL; THE CITYWIDE COUNCIL ON HIGH SCHOOLS; DISTRICT 4 COMMUNITY DISTRICT EDUCATION COUNCIL; EAST HARLEM PRESERVATION, INC.; NOS QUEDAMOS COMMITTEE, INC.; NEW YORK CITY PARK ADVOCATES, INC.; MARINA ORTIZ; and HECTOR NAZARIO, Petitioners, -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 and for Declaratory Relief Pursuant to CPLR 3001	Index No. 107463/09 IAS Justice Shafer

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION PRESERVING THE STATUS QUO BY ENJOINING PERFORMANCE OF THE 2009 CONCESSION PENDING THIS COURT'S FINAL DECISION ON THE AMENDED VERIFIED PETITION

NORMAN SIEGEL, ESQ.
260 Madison Avenue, 18th Floor
New York, NY 10016
(212) 532-7586

-and-

NEW YORK LAWYERS FOR THE
PUBLIC INTEREST, INC.
151 W. 30th Street, 11th Floor
New York, NY 10001
(212) 244-4664

-and-

STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038
(212) 806-5400

Co-Counsel for Petitioners

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PRELIMINARY STATEMENT

Petitioners respectfully submit this Memorandum of Law in Support of their Motion for a Preliminary Injunction Preserving the Status Quo by Enjoining Performance of the 2009 Concession Pending This Court's Decision on the Amended Verified Petition. Petitioners move, pursuant to CPLR 6311, for preliminary injunctive relief preserving the status quo and enjoining Respondents from implementing the Randall's Island Sports Fields Concession Agreement by and between the City of New York, acting by and through its Department of Parks and Recreation, and Randall's Island Sports Foundation and Randall's Island Fields Group LLC, dated as of June 19, 2009 (the "2009 Concession"), until this Court has rendered a final decision on Petitioners' Amended Verified Petition (the "Petition"), dated July 10, 2009. The Petition, *inter alia*, requests that the Court vacate and annul the 2009 Concession. Petitioners have not previously asked the Court for injunctive relief in this matter.

This motion arises from a long-running dispute between Petitioners (and their predecessors), a group of residents and non-profit organizations that advocate on behalf of parks, public schools and the public from the communities surrounding Randall's Island, and Respondents, who are various instrumentalities of the City of New York. The dispute concerns the Randall's Island Sports Field Redevelopment Project ("RISFDP"), which would redevelop Randall's Island Park by, *inter alia*, significantly increasing the amount of parkland dedicated to athletic fields and effectuating the 2009 Concession, a "major concession" (as defined under 62 RCNY § 7-02) that would grant exclusive use of at least half of these fields to the Randall's Island Sports Fields Group, LLC (the "Private Schools Group"). As described in the Petition, Petitioners seek relief on two distinct grounds: (1) Respondents' failure to comply with the State Environmental Quality Review Act ("SEQRA") (ECL §§ 8-101, *et seq.*) with respect to the RISFDP; and (2) Respondents' repeated attempts to award a major concession (*i.e.*, the 2009

Concession and its predecessor) to the Private Schools Group without following the mandatory public review and comment procedure of the New York City Uniform Land Use Review Procedures ("ULURP") (NYC Charter § 197-c and RCNY, Title 62, Chapter 2).

In January 2008, Justice Kornreich of this Court ordered Respondents to subject a previous version of the 2009 Concession to ULURP. Rather than do so (a process that would almost certainly have been completed well before now), Respondents attempted to circumvent Justice Kornreich's order and avoid ULURP review by altering some of the terms of the concession. That attempt led to the current Petition, which has now been fully submitted and briefed. Rather than reiterate Petitioners' proofs in this Motion, Petitioners respectfully direct the Court to the prior submissions, copies of which are attached to the accompanying Affirmation of E. Gail Suchman, Esq., in Support of Motion for Preliminary Injunction, dated August 27, 2009 ("Suchman Aff.").

Petitioners now seek a preliminary injunction to preserve the status quo pending this Court's final decision on the Petition. The 2009 Concession provides that it will become effective on September 19, 2009. While Respondents refused Petitioners' request at the outset of this litigation to delay voluntarily the 2009 Concession's implementation pending this Court's final decision, Respondents and Petitioners agreed to attempt to complete this litigation by September 19. However, because of Respondents' actions and inactions, compounded by Corporation Counsel's recent error in filing its opposition papers on the Petition, (which caused the return date to be delayed by more than two weeks), it is now clear that this litigation cannot be completed by September 19. Nevertheless, Respondents again have refused to stay implementation of the 2009 Concession voluntarily while this case proceeds. There is no basis for this refusal, given that the Private Schools Group has (on information and belief) already

received athletic fields permits for the upcoming school year through the Department of Parks & Recreation's ("DPR") usual permitting process, and a preliminary injunction temporarily halting implementation of the 2009 Concession pending meritorious challenges to its validity will not prevent Respondents from issuing, and the Private Schools Group from receiving, athletic fields permits for the upcoming school year.

Absent a preliminary injunction pending disposition of this case, Respondents will implement the 2009 Concession, thereby depriving Petitioners of their statutorily-guaranteed right to review and comment on the concession *before* it is implemented, and causing them irreparable harm. On the other hand, Respondents will suffer no irreparable harm if a preliminary injunction issues, because they may continue to award permits to the Private Schools Group for the upcoming school year under the normal permitting system, as they have always done. As a result, a preliminary injunction is warranted here.

STATEMENT OF FACTS

In January 2008, Justice Kornreich of this Court ordered Respondents to comply with ULURP with respect to the 2009 Concession's predecessor concession, which, like the 2009 Concession, awarded a major concession to the Private Schools Group for the use of certain athletic fields on Randall's Island for twenty years. In January 2009, Respondents issued a "Negative Declaration for the Randall's Island Sports Fields Development Project" and an Environmental Assessment Statement, indicating that Respondents did not subject the RISFDP to full environmental review under SEQRA and that they intended to enter into a new concession agreement with the Private Schools Group without subjecting it to ULURP review. Although no written final concession agreement was publicly available at that time, Petitioners filed their original petition on May 26, 2009, with a return date of June 22, 2009. The Petition challenged Respondents' failure to comply with Justice Kornreich's January 2008 order, as well as their

failure under SEQRA to take the requisite "hard look" at the various environmental impacts that would be caused by the RISFDP. Suchman Aff. ¶¶ 11-15.

On May 29, 2009; Respondents announced that DPR, the Randall's Island Sports Foundation ("RISF," a public-private partnership that administers Randall's Island Park), and the Private Schools Group had negotiated a new concession agreement (*i.e.*, the 2009 Concession) regarding the allocation of sports fields on Randall's Island. On June 8, 2009, Respondent Franchise & Concession Review Committee ("FCRC") held a public hearing on the 2009 Concession, and, on June 10, 2009, the FCRC unanimously voted to approve it. On or about June 19, 2009, DPR, RISF, and the Private Schools Group executed the 2009 Concession. Suchman Aff. ¶¶ 16-18. Respondents' approval of a new concession with the Private Schools Group, without subjecting it to ULURP Review, required Petitioners to amend their Petition shortly after filing their original petition.

On or about June 8, 2009, Petitioners' counsel spoke by telephone with Respondents' counsel, the New York City Department of Law ("Corporation Counsel"). Corporation Counsel asked for additional time to respond to the Petition, but would not agree to Petitioners' request to delay the June 10 vote on the 2009 Concession by the FCRC or otherwise delay the implementation of the concession pending the outcome of this litigation. However, Corporation Counsel indicated its desire to have a judge hear the matter in time for a decision before September 19, 2009, and that, accordingly, there was "no reason to run into court" for preliminary relief. Corporation Counsel suggested that the Respondents' opposition papers should be due by July 3, 2009, and Petitioners' reply papers on July 17, 2009, with a new return date of July 20, 2009 or shortly thereafter. Suchman Aff. ¶¶ 21.

On or about June 16, 2009, Petitioners' counsel telephoned Corporation Counsel to

request copies of the final 2009 Concession approved by the FCRC on June 10, and other supporting papers, which were necessary for Petitioners to amend their Petition. Corporation Counsel indicated that she would send an executed copy of the final concession agreement, along with copies of certain related documents requested by Petitioners, to Petitioners' counsel by week's end. Because Petitioners did not yet have the final concession documents, the parties agreed to a new briefing schedule: July 2 for Petitioners' amended Petition; July 24 for Respondents' opposition; and August 7 for Petitioners' reply. The parties agreed to a return date of August 18, 2009 to accommodate Corporation Counsel's trial schedule.[1] Suchman Aff. ¶ 22.

On or about June 19, 2009, Petitioners' counsel telephoned and emailed Corporation Counsel regarding the final 2009 Concession documents, which had not yet arrived. Suchman Aff. ¶ 23. By June 26, 2009, Petitioners had still not received the promised documents, and Petitioners' Counsel once again telephoned Corporation Counsel to request them. Because the Fourth of July holiday was quickly approaching, the parties agreed to a yet another extension of the briefing schedule: July 10 for Petitioners' amended Petition; July 31 for Respondents' opposition; and August 14, 2009 for Petitioners' reply. The parties agreed not to alter the August 18, 2009 return date. Suchman Aff. ¶ 26.

On the evening of June 29, 2009, Corporation Counsel finally emailed the final 2009 Concession agreement and certain (but not all) of the requested supporting documents to Petitioners' counsel, permitting Petitioners to amend the Petition. Suchman Aff. ¶ 27. The parties then served the Amended Petition, opposition, and reply according to the agreed

[1] On the same call, Petitioners' counsel requested several documents cited in the draft concession agreement (*e.g.*, the Sports Fields Plans and Specifications and the Sports Fields Schematic Drawings). Corporation Counsel stated that Respondents would not produce these documents voluntarily and that they were a matter for discovery. Suchman Aff. ¶ 22.

schedule. *Id.* ¶ 28.

On August 18, 2009, the agreed return date, Petitioners properly filed their papers in this Court's motion part. Respondents, however, mistakenly filed their opposition papers in Part 8 (Justice Shafer's Part), leading the court clerk to adjourn the return date until September 2, 2009. Petitioners' counsel requested that Corporation Counsel re-file its papers properly in the motion part and restore the August 18 return date. Corporation Counsel later re-filed Respondents' papers in the motion part on August 19, 2009, but they were apparently unable to restore the return date to August 18. The clerk has listed the matter as fully submitted, but as of September 2, 2009. Because, as represented by the clerk, this Part usually schedules oral argument for approximately three weeks after the return date, it became clear that the Court would not even hear argument before September 19, let alone resolve the case by that time. Suchman Aff. ¶ 29.

Given that their rights would be irreparably compromised if the 2009 Concession were implemented before a final decision on the Petition, on August 21, 2009, Petitioners again requested that Respondents voluntarily hold the 2009 Concession in abeyance pending a final decision in this matter. Petitioners specifically pointed out that such a voluntary stay would not prevent Respondents from continuing to issue athletic fields permits to the member schools of the Private Schools Group through the DPR's usual permitting process, which the DPR has done until now with respect to those schools. Suchman Aff. ¶ 30 & Ex. 7.

On August 25, 2009, Corporation Counsel rejected Petitioners' request for a voluntary stay of implementation of the 2009 Concession pending this Court's decision. Suchman Aff. ¶ 31 & Ex. 8. As a result, Petitioners are compelled to move this Court for interim injunctive relief preserving the status quo pending this Court's decision on the Petition.

STANDARD OF REVIEW

The purpose of a preliminary injunction is to preserve the status quo pending trial.

Council of the City of N.Y. v. Giuliani, 183 Misc.2d 799, 822 (Sup. Ct. Queens Co. 1999). To obtain preliminary injunctive relief, the movant must demonstrate: (1) irreparable injury absent a preliminary injunction; (2) a likelihood of success on the merits; and (3) a balance of the equities in the movant's favor. *See, e.g., McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*, 114 A.D.2d 165, 173 (2d Dep't 1986). Where, as here, "denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced." *Council of the City of N.Y.*, 183 Misc.2d at 822.

ARGUMENT

Petitioners seek to preserve the status quo pending this Court's decision on their Petition. By its terms, the 2009 Concession is set to commence on September 19, 2009. Suchman Aff. Ex. 1, Ex. Q thereto § 2.02(a). If the status quo is not maintained, and Respondents are permitted to implement the 2009 Concession on September 19 without complying with ULURP and SEQRA, then Petitioners will be without a remedy, and thereby irreparably harmed. Furthermore, as the attached petition and supporting papers demonstrate, Petitioners are likely to succeed on the merits of their claims under ULURP and SEQRA. Finally, the balance of equities favors Petitioners here. Although Respondents' planned actions will deprive Petitioners of their statutorily-guaranteed rights, Respondents have refused voluntarily to stay performance of the 2009 Concession pending this Court's decision, even though Respondents would suffer no harm from doing so, because they would still be able to assign Randall's Island athletic fields permits for the upcoming school year to the member schools of the Private Schools Group under the DPR's usual permitting system, as they have done heretofore.[2]

[2] The 2009 Concession provides that the City is scheduled to receive its first annual payment of $2,200,000 on September 19, 2009. Suchman Aff. Ex. 1, Ex. Q thereto, § 4.02. Assuming that Respondents are even entitled to receive this payment, delay in receiving it will not cause them irreparable harm, as they have already waited nearly

I. ABSENT A PRELIMINARY INJUNCTION STAYING IMPLEMENTATION OF THE 2009 CONCESSION, PETITIONERS WILL BE IRREPARABLY HARMED

Respondents' violations of ULURP and SEQRA amount to irreparable harm to Petitioners *per se*. The purpose of ULURP is to provide the public with "meaningful formal community review" of public projects affecting the use of land *before* implementation. *Connor v. Cuomo*, 161 Misc.2d 889, 897 (Sup. Ct. Kings Co. 1994). "Where the community's role is limited to recommendation" with respect to such public projects, "it is essential that it be empowered to make its recommendations at the very beginning of the land use review process before an action is implemented." *Id.* Or, as another New York City court recently put it, ULURP review is "an integral part of the decision-making process in the land use context[,] ... designed to protect the community and to allow them input and participation on important land use decisions by the City." *Stop BHOD v. City of N.Y.*, 22 Misc.3d 1136(A), 2009 WL 692080, at *13, (Sup. Ct. Kings. Co., Mar. 13, 2009). "Where, as here, a regulatory regime is implemented to ensure community involvement in government decision-making or to protect the public from potential harm, the government's failure to follow the law, in itself, constitutes irreparable harm to the community." *Id.*

In *Connor*, the Court held that the petitioners would be "irreparably harmed if the preliminary injunction is not granted," because absent an injunction, a challenged real estate purchase would go forward without ULURP review, thereby depriving the petitioners of their only meaningful remedy – the right to "make recommendations . . . before an action is implemented." 161 Misc.2d at 897. In *Stop BHOD*, the Court held that, absent a preliminary

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two-years to receive payments from the Private Schools Group, resulting from Justice Kornreich's invalidation of the original concession in January 2008 and Respondents' decision not to follow her order to comply with ULURP at that time.

injunction, "petitioners will be irreparably harmed by the commencement of expansion of the BHOD without the City respondents conducting the legally mandated reviews which are designed to protect the community and allow community participation and review in significant land use actions." 2009 WL 692080, at *14 (citation omitted).

These cases are directly on point here. Like the public agencies in *Connor* and *Stop BHOD*, Respondents have attempted to "thwart the very purposes of the legally mandated reviews" by ignoring their obligations under ULURP altogether and giving only lip service to SEQRA. *Id.* Moreover, now they seek to implement the 2009 Concession before this Court can resolve the matters in dispute. Absent a preliminary injunction preserving the status quo, Petitioners will be deprived of their right to participation in, review of, and comment on the 2009 Concession *before* its implementation, thereby causing them irreparable harm *per se*. *See Stop BHOD*, 2009 WL 692080, at *13.

II. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR ULURP AND SEQRA CLAIMS

As the foregoing shows, implementation of the 2009 Concession before this Court decides this case would render Petitioners' relief ineffectual. In such cases, courts have stated that "the degree of proof required to establish the element of likelihood of success on the merits should be reduced." *Council of the City of N.Y.*, 183 Misc.2d at 823. Indeed, in these cases, even a Court harboring "grave doubts regarding the likelihood of plaintiff's success on the merits" may grant injunctive relief preserving the status quo to avoid rendering the plaintiff's relief "ineffectual." *Schlosser v. United Presby. Home at Syosset, Inc.*, 56 A.D.2d 615, 615 (2d Dep't 1977).

The attached submissions make clear that Petitioners are likely to succeed on the merits of their claims, whether the Court applies the deferential standard appropriate to this case or the

more stringent standard generally applicable to requests for injunctive relief. Below, Petitioners offer a very brief synopsis of their arguments and direct the Court's attention to Petitioners' briefs for greater detail.

Petitioners have demonstrated that the 2009 Concession is a "major concession" under 62 RCNY § 7-02(g), and therefore subject to the requirements of ULURP, because it involves at least three different new land uses, each of which constitutes "an open use which occupies more than 30,000 square feet of a separate parcel of parkland." 62 RCNY § 7-02(g). Those uses are: (1) newly constructed parking areas; (2) previously open space reconfigured into sports fields within the so-called "Concession Location"; and (3) newly constructed sports fields within the so-called "Premises," as defined by the 2009 Concession. *See* Suchman Aff. Ex. 2 at 12-15; 16-17. Because the 2009 Concession encompasses these areas, Respondents' failure to conduct public review of the concession violated Petitioners' rights under ULURP.

The Petition also demonstrates that Respondents violated SEQRA by issuing a Negative Declaration, rather than undertaking a full environmental review including the preparation of an Environmental Impact Statement ("EIS"). In doing so, Respondents failed to take the requisite "hard look" at the environmental impacts of numerous aspects of the Randall's Island Sports Fields Development Project, including: (1) the impact of thousands of anticipated additional park users on traffic and parking, production of solid waste, and energy demand; (2) impacts on water and natural resources, including impacts related to wetlands, storm water runoff, increased wastewater, and climate change; and (3) impacts on the surrounding communities and public health, including impacts on open space and impacts from the increased usage of artificial turf. Suchman Aff. Ex. 2 at 6-8, 22-33. Additionally, the Negative Declaration improperly analyzed the RISFDP in isolation from, and therefore improperly "segmented" out, the other aspects of the

Randall's Island Sports Foundation's overall "Management, Restoration, and Development Plan," of which the RISFDP was just one part. *Id.* at 33-36. As these facts show, the RISFDP required an EIS, and this requirement also makes the 2009 Concession a "major concession" that is automatically subject to ULURP review. 62 RCNY § 7-01(a).

III. THE BALANCE OF THE EQUITIES CLEARLY FAVORS PETITIONERS

Finally, the balance of the equities clearly favors Petitioners. Petitioners seek to vindicate their statutorily guaranteed right under ULURP to review and comment on the implications of the 2009 Concession before its implementation and their rights under SEQRA to have public officials give appropriate consideration to the environmental impacts of public projects. Absent a preliminary injunction preserving the status quo until the Court decides this case, Respondents will implement the 2009 Concession on September 19, 2009 – before Petitioners even have their day in court – violating their rights of pre-implementation "recommendation," and causing them irreparable harm. *Connor*, 161 Misc.2d at 897 (equities balanced in favor of petitioners where City attempted to avoid ULURP review).

In contrast, the equities weigh against Respondents. A preliminary injunction would not cause irreparable harm to Respondents. It would not require them to undertake any affirmative act. It would not affect their ability to issue permits for Randall's Island athletic fields, which Respondent DPR currently does through its normal permitting process, to the members of the Private Schools Group for the upcoming school year. Only Respondents' ability to collect payments from the Private Schools Group under the 2009 Concession (assuming its validity) could possibly be affected, and Respondents' own delay – their failure to subject the original concession to the ULURP process, as ordered in January 2008 – has already caused them to wait for such payments for nearly two years. A short additional delay while the Court resolves Respondents' legal right to accept such payments in the first place will not cause them

irreparable or even significant harm.[3] Finally, it was Respondents' obdurate refusal to comply with Justice Kornreich's order in the first place that required Petitioners to sue Respondents a second time to enforce their rights. Had Respondents merely followed Justice Kornreich's order to submit the original concession to ULURP review last year, that process would almost certainly have been completed long ago, and this issue would not likely be before the Court now.

Nor would a preliminary injunction harm the member schools of the Private Schools Group. On information and belief, those schools have already received permits for athletic fields on Randall's Island for the upcoming Fall sports season through the DPR's normal permitting process. They can continue to receive permits through that process until the Petition is decided.[4]

In sum, the equities clearly favor Petitioners. The non-party Private Schools Group would be unaffected by a preliminary injunction because its members have already obtained their fall permits and could continue to obtain permits through DPR's normal permitting process. Respondents would, at most, be somewhat inconvenienced by a short additional delay in receiving money over and above the long delay they caused themselves by not submitting to ULURP back in January 2008. In contrast, failure to grant a preliminary injunction pending a final decision would deprive Petitioners and the community at large of their legal rights to full community review and input ***before*** implementation through the ULURP process and appropriate environmental impact review under SEQRA.

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[3] Respondents do not usually collect payments for sports fields permits issued to public, private or parochial schools. 56 RCNY § 2-09. Furthermore, the only conceivable harm to Respondents from a preliminary injunction temporarily halting their receipt of such an unprecedented payment would be the loss of interest on the payment during whatever period of time the preliminary injunction endures, assuming Respondents are entitled to such payment in the first place.

[4] Respondent DPR does not require payments from public, private or parochial schools for athletic field permits, *see* 56 RCNY § 2-09, and, as Respondents have represented, the member schools have priority for athletic field permits on Randall's Island under DPR's informal "grandfathering" policy. The private schools will thus be able to obtain permits with or without the 2009 Concession. Suchman Aff. Ex. 3 at 4-5.

CONCLUSION

For the reasons presented herein Petitioners respectfully request that the Court grant a preliminary injunction preventing the implementation of the 2009 Concession pending this Court's final decision on the Petition.

Dated: New York, New York
August 27, 2009

NORMAN SIEGEL, ESQ.

260 Madison Avenue, 18th Floor
New York, NY 10016
(212) 532-7586

- and -

NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INC.

By: _____
Gavin Kearney

151 W. 30th Street, 11th Floor
New York, NY 10001
(212) 244-4664

- and –

STROOCK & STROOCK & LAVAN LLP

By: _____
Alan M. Klinger
Jonathan D. Twombly

180 Maiden Lane
New York, NY 10038
(212) 806-5400

Co-Counsel for Petitioners