To Be Argued By:
JOHN R. LOW-BEER
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

ROGER MANNING,

Petitioner-Appellant,

—against—

CITY COUNCIL OF THE CITY OF NEW YORK, BILL DE BLASIO, as Mayor of the City of New York; NEW YORK CITY PLANNING COMMISSION; and THE GOVERNORS ISLAND CORPORATION, d/b/a THE TRUST FOR GOVERNORS ISLAND,

Respondents-Respondents.

CASE NO. 2023-03112

BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

When the federal government transferred all but 22 of the 172 acres of Governors Island to the City and the State, it imposed deed restrictions that, *inter alia*, required that at least 40 acres be dedicated as parkland in perpetuity, prohibited all industrial and manufacturing uses on the Island, and required the issuance of a Master Plan. The primary goal of the deed is "to ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island." R92.[1] The permitted and required uses are said to be in furtherance of the Island's service "as an educational and civic resource of special historic character and as a recreational and open space resource for the people of the City, the State and the United States." R93

Respondents, who now own that portion of Governors Island (the "Island"), concede that they are bound by the restrictions and indeed claim to be abiding by them. They have nevertheless enacted zoning that is radically inconsistent with them. Petitioner now challenges the enactment of that zoning as arbitrary and capricious.

[1] References to "R__" are references to pages in the Record filed herewith. References to "SR__" are to pages in the Supplemental Record filed herewith.

In 2010, the original grantee, a subsidiary of the Empire State Development Corporation called Governors Island Preservation and Education Corporation ("GIPEC"), issued the Park and Public Space Master Plan ("Master Plan"). R2722-2895. The Master Plan, faithful to the letter and the spirit of the Deed, repeatedly called attention to the uniqueness of the Island as a "world apart." R2744, R2758, a place where one can "leave the city without leaving," a place of "views, wind, tides, currents, horizon, e s c a p e" [sic], R2758, an Island of "vast water, big sky," R2752, where the visitor would enjoy "breathtaking 360° views of the New York Harbor," R2748, sharply different from Manhattan with its "tall buildings [that] create canyons," R2752.

In 2010, "Mayor Bloomberg and Governor Paterson agreed that the primary responsibility for the long-term development, funding, and governance of the Island should reside with New York City." SR109. Accordingly, GIPEC transferred ownership to a City entity called the Governors Island Corporation, d/b/a the Trust for Governors Island (the "Trust"). The Trust is an instrumentality of the City. Its By-Laws state that its three Members are the Mayor, the First Deputy Mayor, and the Deputy Mayor for Economic Development. The three Members in turn appoint the 17 Directors. *See infra* at 9.

In 2011, prior to beginning Phase 1 of the Master Plan, the City issued a Final Generic Environmental Impact Statement ("FGEIS") which echoed the tone

and the substance of the Master Plan. It described Governors Island as "An Island Like No Other," "Carefree Island," that "allows visitors to leave the big city behind." R291-292. It delineated two Development Zones in the southern portion of the Island (the "South Island" or "Southern Subdistrict") and an open space area, later named the "Open Space Subarea," comprising the remainder of the South Island, parts of which were to be developed in Phase 1. It noted that "Phase 1 . . . would be consistent with the deed restrictions that regulate development on the Island." R320. A Final Supplemental Generic Environmental Impact Statement ("FSGEIS"), issued in 2013, dealt with the allowable uses in the northern 92-acre portion of the Island ("North Island" or "Northern Subdistrict") which is the historic portion.

In 2020, the Trust and the New York City Department of Small Business Services initiated a Uniform Land Use Review Procedure ("ULURP") to massively upzone the southern 80 acres of the Island, called the "South Island" or "Southern Subdistrict." Specifically, the Trust proposed to increase the allowable density of the South Island from the 1.65 million square feet envisioned by the 2011 FGEIS to 4.25 million square feet (reduced to 3.75 million in the adopted zoning) and to allow industrial, manufacturing and commercial uses on all 80 acres. In connection with their rezoning proposal, in March 2021 the City issued a Final Second Supplemental Generic Environment Impact Statement ("FSSGEIS"). On

May 27, 2021, the New York City Council adopted the Trust's proposal with modest ameliorative modifications. R1647-1695.

Petitioner alleges that Respondents acted arbitrarily and capriciously in approving an upzoning of Governors Island that (1) instead of dedicating 40 acres as parkland, which is unzoned, rezoned the entire southern portion of the Island as a C4-1 mid-density commercial zone, (2) enabled and invited construction of buildings up to 25 feet high on up to 20 percent of the Open Space Subarea, (3) enabled and invited the creation of "private parks" in the Open Space Subarea, (4) enabled and invited the construction of cellars that could be used for industrial and manufacturing purposes underneath the entirety of the Open Space Subarea, and (5) enabled and invited industrial and manufacturing uses throughout the South Island.

Respondents, in their opposition below, did not dispute that the deed restrictions applied and were binding on them. Indeed, they went so far as to argue that they had already dedicated 43 acres of parkland in perpetuity—three more than required by the deed. However, they argued that the rezoning was not arbitrary and capricious because zoning is independent of deed restrictions, which they said were "self-enforcing." R2975-2976. Therefore, they argued, the deed restrictions are not violated even if the zoning allows and encourages uses and construction that the deed prohibits. Second, they argued that the zoning is fully consistent with the deed restrictions.

The court below agreed with respondents' first argument, holding that "Changes to zoning do not alter deed restrictions, such as those in place here, and any applicable deed restrictions remain in effect notwithstanding whatever the zoning is. ... The zoning and deed restrictions operate together as parallel regulations of the land. Thus, the court cannot say that the City Council's actions were arbitrary and capricious simply because the zoning does not mirror the Deed." R7.

While as a general matter it is true that zoning and deed covenants are independent of one another, the court below erred in failing to realize that this case is different. In this case the City is the covenantor, the party concededly burdened by the covenants. It is legally obligated to comply with the restrictions. Therefore, for it to propose and enact zoning that invites and encourages violations of them is arbitrary and capricious.

Obviously, too, the deed restrictions are not "self-enforcing" as the City claims. To enforce a deed restriction, one has to go to court. It is irrational for the City to encourage violations of deed restrictions that it will then have to go to court to prevent. In contrast, zoning <u>is</u> self-enforcing. The Department of Buildings does not issue permits for construction that does not comply with zoning, nor does it issue certificates of occupancy for uses that violate zoning. Although, as the court below said, zoning need not "mirror" the deed restrictions, it is arbitrary and capricious for the City to invite violations of deed restrictions that it is obligated to enforce.

Respondents' arguments as to how the zoning is consistent with the deed restrictions are far-fetched. For example, they argue that because "industrial or manufacturing uses" are not defined terms in the deed, it is not inconsistent with the deed to allow industry and manufacturing everywhere on the South Island, including in the area that should be designated as parkland in perpetuity.

As a Hail Mary pass, the City argues that it has in fact dedicated 43 acres as parkland through the Master Plan. However, the Master Plan, which was not even issued by a City entity (GIPEC was a State/City entity) describes parkland, but nowhere so much as mentions dedication of parkland. In fact, the City has studiously avoided dedicating any land on Governors Island as parkland, or even referring to any land on Governors Island as dedicated parkland.

If, however, this Court were to hold that the City, having asserted in a sworn statement by the Trust's General Counsel that it has dedicated 43 acres as parkland in perpetuity, is judicially estopped from contending otherwise, then the rezoning is a violation of the public trust doctrine that is ripe for adjudication now for the reasons stated below.[2]

[2] Petitioner does not appeal from the lower court's denial of his motion to amend to add a SEQRA claim. Petitioner also notes that due to the error of prior counsel, the Notice of Appeal erroneously listed him as the sole appellant and did not include the Proposed Petitioners. This should not be interpreted to mean that the Proposed Petitioners did not intend to appeal.

QUESTIONS PRESENTED

1. Did the City Respondents act arbitrarily and capriciously in proposing and enacting zoning that enables and encourages violations of deed restrictions that concededly bind?

The Court below answered: No.

2. Assuming that 43 acres of land on Governors Island are dedicated parkland as the City Respondents now contend, did they violate the public trust doctrine by enacting zoning that allows industrial and manufacturing and other prohibited uses on that land?

The Court below held that this question was not ripe for decision.

STATEMENT OF FACTS

A. History and Description of Governors Island and Recent Conveyances

Governors Island (or the "Island") is a 172-acre island in New York harbor, 800 yards south of the tip of Manhattan and 400 yards west of Brooklyn. "Steeped in history and located in a magnificent setting," R287, it was used for military purposes from the Revolutionary War until 1966 and by the Coast Guard from 1966 to 1996.[3]

[3] For an outline of Governors Island's history, see https://www.govisland.com/history.

The Island is divided in two by the eponymous Division Road. The 92-acre "North Island" or "Northern Subdistrict" is the site of numerous historic buildings, including Fort Jay and Castle Williams. It was dedicated as a National Historic District in 1985, and a local Historic District in 1996, and is listed on the State and National Registers of Historic Places. A 22-acre portion of North Island on the northwest of the Island including the two forts and adjacent buildings was designated a National Monument in 2001 and is referred to as the "Monument Property." The remaining 150 acres of the Island are referred to as the "Island Property."

The 80-acres south of Division Road, referred to as "South Island" or "Southern Subdistrict," were created between 1901 and 1912 with landfill from the excavation for the Lexington Avenue subway line. Most of the buildings on South Island were built between the 1960s and the 1980s to serve the Coast Guard. Many of them were demolished in accordance with the 2010 Park and Public Space Master Plan for the Island ("Master Plan").

On January 31, 2003, pursuant to the Balanced Budget Act of 1997, the federal government conveyed the Island Property to GIPEC, a City/State partnership and subsidiary of the Empire State Development Corporation created for the planning, redevelopment, and ongoing operations of the Island Property. At the same time, the federal government transferred the National Monument from the

federal General Services Administration to the National Park Service. In conjunction with these transfers, the federal government, as transferor and covenantee, imposed on the Island a number of covenants that run with the land, including the "Real Estate Use Restrictions" that are at issue here. R92-100.

At the closing, the conveyancing was done in three steps. First, the federal GSA conveyed the Monument Property to the National Trust for Historic Preservation ("National Trust"). R__. The deed from the federal government to the National Trust (the "National Trust Deed" or the "Deed"), contained the above-mentioned covenants that run with the land. Second, the National Trust then conveyed the same Monument Property to the National Park Service, which now owns and manages it.[4] Third, the GSA deeded the Island Property, *i.e.*, the remainder of Governors Island, to GIPEC, by a deed that, in paragraph 1, incorporated by reference all the covenants of the National Trust Deed.

In 2010, GIPEC transferred its ownership interest to the Trust, "an instrumentality of the City of New York." R285. As described in Article II of the Trust's By-Laws, it is a corporation with three members:

> [T]he individual holding the office of Mayor ("Mayor") of the City of New York (the "City"), the individual holding the office of First Deputy Mayor of the City (or its successor office), and the individual holding the office of Deputy Mayor of Housing and Economic

[4] Presumably, this two-step transfer was done to ensure the horizontal privity required for covenants to run with the land.

> Development of the City (or its successor office), or each such individual's authorized delegate.

Article II of the By-Laws further provides that the Members "serve . . . in furtherance of the interests of the City." The Members, in turn, "appoint [the] seventeen (17) Directors of the Corporation." [5]

The end result of these transactions is that the Island Property is owned by the Governors Island Trust and the Monument Property is owned by the National Park Service. Both the Governors Island Trust and the National Park Service are subject to the deed restrictions in the National Trust Deed, which apply to the Island as a whole.

B. The Real Estate Use Covenants

Section 2 of the Deed contains the "Real Estate Use Covenants" (hereinafter "Covenants," "Restrictions," or "Deed Restrictions"), which "shall be binding upon and enforceable against the Island Property, the Island Property Owner [*i.e.*, the Trust] and the Governors Island Operator [also the Trust], in favor of and enforceable by the Monument Operator [*i.e.*, the National Park Service] and the Governors Island Operator [the Trust]." R92.

[5] By-Laws, Art. II. The Trust By-Laws are available at https://gov-island-site.s3.amazonaws.com/pages/TGI-By-Laws-Amended-12.14.2022.pdf, which can be accessed directly via this link or through the Trust's website at https://www.govisland.com/about/para-documents.

Section 2.1 of the Deed, titled "General," recites in subsection (a) the intent of the Covenants. The first stated intent is "to ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island":

> The restrictions, conditions and covenants contained herein are intended to ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island, guarantee public access to this magnificent island, promote the quality of public education, and enhance the ability of the public to enjoy Governors Island and the surrounding waterways, thereby increasing the quality of life in the surrounding community, the City, the State and the United States.

R92.

Section 2.1(b) mandates that "the Governors Island Operator, the State and the City shall develop and adopt or cause to be developed and adopted a master plan for the preservation and re-development and use of Governors Island (the 'Master Plan'), which Master Plan shall incorporate the terms and conditions of this Deed." R92 (bold in original).

Section 2.2, "Public Accessibility," requires that the Island be "publicly accessible at all times in perpetuity," subject to various conditions including "reasonable hours of operation of public parks, esplanades, walkways and other public areas and facilities," and "use of parts of the Island Property for the Permitted Uses." R93.

Section 2.3, "Permitted Uses," states the purposes of those Permitted Uses: "The Island Property shall serve as an educational and civic resource of

special historic character and as a recreational and open space resource for the people of the City, the State and the United States." *Id.*

Section 2.3(a), titled "Public Benefit Uses," requires that "not less than ninety (90) acres . . . including the Monument Property shall be used for" the "Public Benefit Uses." First among those uses is "Parkland":

> Exclusive of the Monument Property, public parkland of at least forty (40) acres (no less than twenty (20) acres of which shall be contiguous), located primarily south of Division Road, which shall be dedicated and used as such in perpetuity (the "Parkland Restriction Term").

R93 (emphasis added).

Section 2.4, "Prohibited Uses," states that "no portion of the Island Property shall be used for any of the following purposes (collectively, the 'Prohibited Uses'): . . . (b) Industrial or manufacturing uses; . . . " R95.

C. The Master Plan and the 2011 and 2013 Environmental Reviews

In 2010, GIPEC fulfilled in part the Deed's requirement of publication of a Master Plan that "incorporate[s] the terms and conditions of this Deed." R2722-2895.

The Master Plan was faithful to the spirit and the letter of the Deed's vision and its specific restrictions. It emphasized the uniqueness of the Island (20 mentions) as a "world apart." R2744, R2758, a place where one can "leave the city without leaving," a place of "views, wind, tides, currents, horizon, e s c a p e" [sic],

R2758, an Island of "vast water, big sky," R2752, sharply different from Manhattan with its "tall buildings [that] create canyons," *id*.

No fewer than 15 times the Master Plan trumpeted the 360º view of New York Harbor that visitors would enjoy from the 82-foot-high hill in the southern park area:

> Your visit to Governors Island culminates at the top of the Hills where you take in breathtaking 360° views of the New York Harbor. … In Manhattan, tall buildings create canyons with their own shadows. There is little sense that Manhattan is an island surrounded by water. … The Hills offer a more dramatic 360º panorama of the Harbor. As you make your way up one of four hills, the Island's open spaces and buildings fall away, and the Harbor and skyline reveal themselves. While just 82 feet high above grade, the tallest hill affords views previously only experienced from a plane or helicopter. The panorama of the Harbor, with the sea, sky and monuments unfolding, gives you the sensation of being at the top of the world.

Master Plan, at R2748, R2753, R2755.

The Master Plan also considered the financials, *i.e.*, how much square footage of space would be needed to make the Island financially self-sustaining. It concluded that "[a]t full development, taking into account the existing 1.4 million square feet of vacant historic structures and the building sites available in the development zones on the southern portion of the Island, the Island could accommodate between 2.8 million square feet of built structures . . . and 4 million square feet or more." R. 2888. This square footage of development, the Master Plan calculated, would generate sufficient funding "to support a very high level of

operations for the Island, including maintenance of the park and public spaces, and to fund a capital replacement reserve." *Id.*

In 2011, prior to beginning construction of Phase 1 of the Master Plan, the City, which in the interim had taken ownership of the Island Property from GIPEC, issued the FGEIS. In tone and in substance, the FGEIS followed the Deed and the Master Plan's vision of parkland and moderate development, treating Governors Island as "An Island Like No Other" that "allows visitors to leave the big city behind":

> **An Island Like No Other.** Several aspects of Governors Island make it unique—and these features are respected in the principle "An Island Like No Other." Its setting in the New York Harbor surrounds the Island with "vast water, big sky." From everywhere on the Island are views of the harbor, including the Statue of Liberty, Ellis Island, Lower Manhattan skyline, the East River bridges, Brooklyn, Staten Island, and New Jersey. Based on this, the design approach is to preserve and enhance these views, from all around the edge of the island and from its interior.
>
> * * * *
>
> **Carefree Island.** The trip to Governors Island, by boat, allows visitors to leave the big city behind. Visitors to the Island today remark that even an afternoon there feels like a vacation. This spirit is embodied in the principle, "Carefree Island."

R291-292 (underlining added).

The 2011 FGEIS delineated two South Island Development Zones extending over 33 acres and provided for 43 acres of open space through the center and perimeter of the South Island. The FGEIS projected that there were

approximately 1.35 million square feet of development space in existing historic structures on the North Island and that "up to approximately 1.65 million sf would be built" on the two South Island Development Zones for a total of 3 million square feet on the whole Island. SR76, R318.

In 2013, the Office of the Deputy Mayor for Economic Development ("ODMED") and the Trust issued the FSGEIS, which analyzed the creation of the Special Governors Island District on the North Island. The major purpose was to allow new commercial uses not allowed under the then-existing zoning. The overall floor area for the entire Island was still anticipated to be 3 million square feet. SR76.

D. The City's 2021 Upzoning

The Deed Restrictions state that they are intended "to ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island."

The City, however, sees Governors Island as "the site of a sweeping economic development project poised to turn the area into a center of culture, commerce, and innovation." SR109 (quoting Mayor Bill de Blasio's 2016 State of the City address). The City's "Vision" was a "Project to Support City's Economic Recovery," that would "create 8K jobs and an estimated $1 billion of fiscal impact for the City, all on Governors Island alone." R. 910. To this end, the City proposed zoning "amendments [that] will facilitate the development and success of a new 24/7

mixed-use campus with vibrant public spaces that will draw visitors and generate revenue for the ongoing maintenance of the Island." R.48. The City argued that the upzoning was necessary in order to attract an anchor academic institution for its proposed Center for Climate Solutions. *See*, *e.g.*, R53.

In October 2020, the Trust and the New York City Department of Small Business Services initiated a ULURP procedure to upzone the South Island from a low-density residential R3-2 zoning district to a mid-density commercial C4-1 district and to extend the Special Governors Island District use regulations to the entire Island. On May 27, 2021, the New York City Council adopted, with modifications, the proposed map and text amendments to Article XIII, Ch. 4 of the New York City Zoning Resolution (Special Governors Island District). R1647-1695.

Pursuant to the adopted upzoning, C4-1 zoning covers the entire South Island, which is divided into Eastern and Western Subareas, coterminous with the Eastern and Western Development Zones, and an Open Space Subarea, which comprises the remainder of the South Island.[6]

[6] A 43-acre portion of the Open Space Subarea in the middle of the Island, between the Eastern and Western Subareas, has been developed as public open space that Respondents refer to as "South Island Park." R48.

The zoning as adopted allows for a floor area ratio ("FAR")[7] of 2.63 FAR on the South Island. The allowable square footage of development on the South Island is 3,775,000 square feet, well over double the expected 1,625,000 in the 2011 FGEIS. *Compare* SR14 *with* R1460. Buildings can be as high as 225 feet, equivalent to 22 stories, plus a 40-foot allowance for permitted rooftop obstructions. ZR 134-24(b). This is more than three times the 70-foot height of the highest hill on Governors Island. R457.

The upzoning enables and encourages construction and uses specifically prohibited by the Deed. First, the amended zoning enables construction and uses inconsistent with, or violative of, the Deed's Parkland Restriction Term, which requires that at least 40 acres be dedicated as parkland and used as such in perpetuity. Once parkland is dedicated as such, it is subject to the common law public trust doctrine, which places stringent limits on construction and uses. Parks designated as such are typically mapped as parks, and are not zoned.[8]

[7] The floor area ratio is a multiple of the floor area of a zoning lot. For example, absent any other rules, a lot 100 x 10 feet (1,000 square feet) with an applicable FAR of 2.0 would support a 2,000 square foot building, *i.e.*, a two-story building covering the entire lot area.

[8] *See* ZR 11-13 (Public Parks) ("District designations indicated on zoning maps do not apply to public parks"); Mayor's Office of Environmental Coordination, City Environmental Quality Review Technical Manual (2021 ed.), at 4-1 ("New York City's Zoning Resolution controls the use, density, and bulk of development within the entire City, with the exception of parkland, which does not have a zoning designation.") (available at https://www.nyc.gov/assets/oec/technical-manual/04_Land_Use_Zoning_and_Public_Policy_2021.pdf).

Here, however, the approved C4-1 zoning encompasses all of the area of the South Island designated as the "Open Space Subarea." The City's mapping the entire Subarea as C4-1 and failure to designate it as parkland prevents it from enjoying the protections of the public trust doctrine. Buildings up to 25 feet high are allowed to cover 20 percent of the Open Space Subarea. R1622. All commercial, industrial, and manufacturing uses allowed elsewhere in the Southern Subdistrict are allowed in cellars within the Open Space Subarea. R250.

Second, in violation of the Deed Restriction prohibiting "industrial or manufacturing uses," the upzoning allows industrial and manufacturing uses, including but not limited to "furniture manufacture; manufacture of pharmaceutical products, chemical compounding or packaging; manufacture of non-alcoholic beverages; food product manufacture (except slaughtering of meat or preparation of fish for packing); building and repair of boats of less than 200 feet in length; [and] the manufacture of alcoholic beverages and breweries" anywhere in Southern Subdistrict, including in the Open Space Subarea. R1613.

E. ULURP History: Community Board 1 and the Manhattan Borough President Rejected the Upzoning

On December 22, 2020, Manhattan Community Board 1, which has jurisdiction over Governors Island, voted to reject the City's upzoning application by a vote of 26 to 3, with 7 abstentions and 2 recusals. R628. Among its many criticisms were the following:

- "CB1 strongly believes that the proposed development on Governors Island must meet the restrictions, conditions and covenants as contained in the Deed from 2003 and that the following mitigations and conditions are needed to: **'*ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island, guarantee public access to this magnificent island, promote the quality of public education, and enhance the ability of the public to enjoy Governors Island and the surrounding waterways, thereby increasing the quality of life in the surrounding community, the City, the State and the United States.*'**" R640 (bold and italics in original).

- "The Trust describes the Open Space Subarea as Public Open Space in contradiction to the Deed which labels this as Public Parkland. The Open Space Subarea would not have park protections that would typically be found in a park under the jurisdiction of the New York City Department of Parks and Recreation." R632.

- "[T]here are no protections in place to prevent the over-development of the Open Space Subarea. Id.

- "[Z]oning still allows uses and structures not typically found in parks. Considered as "permitted obstructions" and exempt from any floor area or coverage restrictions, buildings and other structures up to 35 feet are allowed when they house permitted uses." *Id*.

- "[I]t is the existing density and scale that gives Governors Island its identity as an island refuge in its highly urbanized context within the city . . . . [T]he drastic increase in scale of development [as compared to the 2010 Master Plan and the prior FGSEIS] is unacceptable." R633.

- "The proposed building heights in the development parcels are approximately 10 times the height of those in the Historic District and 3 times the height of the highest existing structures on or near the Island." R634.

- "[T]here is no rational basis to justify an as-of-right on-site parking capacity of up to 150 vehicles on each development parcel in an otherwise vehicle-free island. This generous allowance is contrary to the Deed's requirement." R635.

- "The applicant has stated that this vast scale of development is required in order for the Island to achieve financial sustainability. The Trust presented financial projections to the CB1 Land Use, Zoning & Economic Development Committee on November 9, 2020. CB1 requested detailed financial modeling after the meeting in order to evaluate the assumptions and to test the models' sensitivity to changes in those assumptions. However, the applicant has refused this request." R636.

On January 27, 2021, Manhattan Borough President Gale A. Brewer disapproved the City's ULURP Application. She emphasized that the allowable building heights would "irrevocably change [the Island's] character." R655-656. "To protect what makes Governors Island attractive in the first place," she wrote, the height of any future structure must be reduced." R656. She concluded:

> Any development that occurs on Governors Island must be done in a way that preserves what makes it special now. The island is one of the few places where New Yorkers can escape the city and connect with nature. While the goal of furthering climate research is laudable, and I acknowledge that revenue from the development of new facilities is necessary, I believe that these goals can be achieved without a major impact on the pastoral qualities that now make this island such a magnet for the public.

R657-658.

The upzoning as adopted by the City Council reduced a few of the most egregious excesses of the original proposal that the Community Board and the Borough President had objected to, but the reductions were slight. The allowable zoning floor area was reduced by 11.7 percent, from 4,275,000 square feet to 3,775,000 square feet. R65, R54. The maximum building height was reduced by

23.5 percent, from 340 feet (including permitted obstructions) to 265 feet. Whereas the original proposal would have allowed buildings to cover the entirety of the Open Space Subarea, they could now only cover 20 percent of that area. *Compare* R257 *with* R1466. Parking spaces were reduced from 300 to 200. Minor changes were made to the uses allowed in the Open Space Subareas.

F. Procedural History and Decision Below

On September 25, 2021, acting *pro se*, Petitioner Manning timely filed the Verified Petition herein in the Supreme Court, New York County. The Petition contained a single cause of action claiming: "The City Council's Enactment of Zoning Resolution Text and Map Amendments for Governors Island That Are in Violation of Restrictions in the National Trust Deed Was Arbitrary and Capricious." R16.

On November 19, 2021, the City filed its opposition. R23-3014. It argued that Petitioner could not get around the fact that he lacked standing to enforce the Deed Restrictions by challenging the City's approvals as arbitrary and capricious, because zoning and land use covenants were completely independent of one another, and the fact that the zoning did not "duplicate" the Deed Restrictions was irrelevant. It further argued that the zoning amendments promote the federal government's purpose for the Island and are consistent with the Deed.

On February 14, 2022, after the City had filed its papers in opposition, Petitioner and 25 Proposed Petitioners retained counsel and moved to file an Amended Verified Petition ("Amended Petition"). R3015-3082. The Proposed Petitioners included organizational petitioners Metro Area Governors Island Coalition (M.A.G.I.C.), East River Park Action, New York City Friends of Clearwater, The South Street Seaport Coalition, Friends & Residents of Greater Gowanus, Bowery Alliance of Neighbors, and The Western Queens Community Land Trust, as well as 18 individual petitioners.

The Amended Petition also sought to add claims for violations of SEQRA and of the public trust doctrine. Petitioner does not appeal from denial of leave to amend to add the SEQRA claims.

On July 24, 2022, The City Club of New York filed a motion for leave to file an *amicus* brief. R3110.

Following further briefing, by a Decision and Order dated December 8, 2022, the Supreme Court (Kotler, J.), granted the motion to file an *amicus* brief, but denied leave to add the SEQRA claim as untimely, granted leave to add the public trust claim but denied it as unripe, and dismissed the Petition on the merits. R4-9. The Supreme Court did not address Respondents' standing argument.

With respect to the claim that the rezoning was arbitrary and capricious because it violated the Deed Restrictions, the Supreme Court, paraphrasing Respondents' affiant City Planning Deputy Director Eric Botsford, stated:

> Changes to zoning do not alter deed restrictions, such as those in place here, and any applicable deed restrictions remain in effect notwithstanding whatever the zoning is (*Friends of Shawangunks, Inc. v. Knowlton* [64 NY2d 387 [1985]). The zoning and deed restrictions operate together as parallel regulations of the land. Thus, the court cannot say that the City Council's actions were arbitrary and capricious simply because the zoning does not mirror the Deed.

R7; R70 (Botsford Aff. ¶ 30).

ARGUMENT

I. PETITIONER HAS STANDING TO BRING A CLAIM PURSUANT TO CPLR 7803

Relying on the law governing private covenants and the provisions of the Deed, the City Respondents argued below that because Petitioner does not have standing to enforce the Restrictions, his purportedly "convoluted" approach of invoking Article 78, must therefore fail. R2970.

The decision below did not endorse this contention, and for good reason. "The standing inquiry is both plaintiff-specific and claim-specific." *Pagan v. Calderon*, 448 F.3d 16, 26 (1st Cir. 2006) (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984)); *see also*, *e.g.*, *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (same). There is nothing suspect or unusual in a petitioner having standing to

bring one claim (here, an Article 78) when he does not have standing to bring another (here, a plenary action to enforce the Restrictions).

The matter of *Glick v. Harvey*, 2014 N.Y. Misc. LEXIS 35 (S. Ct. N.Y. Co. Jan. 7, 2014), *rev'd*, 121 A.D.3d 498 (1st Dep't 2014), *aff'd*, 25 N.Y.3d 1175 (2015), relied on by the Respondents below, is precisely on point and actually supports Petitioner, not Respondents. That case, like this one, was an Article 78 challenging a City Council rezoning action. The court there held that petitioners lacked standing to make a claim to enforce a deed restriction, *id.* at *57, but granted judgment to petitioners on a different claim, violation of the public trust doctrine.[9] Here, as in *Glick*, the fact that Petitioner does not have standing to sue for enforcement of the Deed Restrictions is irrelevant to the question of whether he has standing to claim violations of CPLR 7803 and of the public trust doctrine.

Below, the City cited *Glick* and *Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783 (2006), to argue that plaintiffs cannot enforce a covenant where the deeds disclaimed third-party beneficiaries. Those cases are inapposite, because they did not present the unique facts that make this case different. Whereas here the City is the covenantor (the party burdened by the covenant), in those cases the City was the covenantee (the benefitted party). There, the City, as covenantee, acted jointly

[9] As discussed *infra* at 39 n.23, the *Glick* court's ruling on the public trust claim was reversed, not for lack of standing but on the merits, by this Court in a decision that was affirmed by the Court of Appeals.

with the covenantor and pursuant an explicit provision in the covenant itself (*Glick*) or pursuant to a statute (*Mendel*) to dissolve the covenant that the third party sought to enforce.[10] Therefore, there could be no claim in those cases that the City Council had acted arbitrarily and capriciously to allow itself to evade covenants that bound it.

Here, in contrast to *Glick* and *Mendel*, the City, which is the burdened party, cannot walk away from the burdens of the Covenants. Nor does it try to. To the contrary, it falsely proclaims that it has respected and complied with the Covenants.

Respondents' argument that Petitioner lacks standing to bring a claim pursuant to CPLR 7803 rings especially hollow in light of their failure to dedicate 40 acres of parkland in perpetuity as mandated by the Deed, thus depriving Petitioner, Proposed Petitioners, and other strangers to the Covenants of a cause of action they would otherwise have had to enforce them under the public trust doctrine. *See*, *e.g.*, *Avella v. City of New York*, 29 N.Y.3d 425 (2017) (affirming this Court's granting of petitioners' public trust doctrine claim against City).

[10] As *Glick* and *Mendel* illustrate, where the City is a party to a lawsuit involving covenants, it is usually as the covenantee, not the convenantor. *See also City of New York v. Delafield 246 Corp.*, 236 A.D.2d 11 (1st Dep't 1997) (City as covenantee can enforce affirmative covenant against successor in title to original covenantor). This case, where the City is the covenantor, is exceptional in a way that makes it fundamentally different from those.

Petitioner's and Proposed Petitioners' lack of standing to sue to enforce the Covenants in fact weighs in favor of, not against, granting their CPLR 7803 claim. The Covenants are explicitly intended to "enhance the ability of the public to enjoy Governors Island and the surrounding waterways" and "increase[ ] the quality of life in the surrounding community, the City, the State and the United States." R92. This lawsuit is the sole avenue for anyone to seek redress for Respondents' arbitrary and capricious actions.[11]

II. RESPONDENTS' UPZONING THAT ENABLES VIOLATIONS OF RESTRICTIONS THAT BIND THEM IS ARBITRARY AND CAPRICIOUS

It is a bedrock principle of administrative law that an agency is bound to follow its own rules, and that a failure to do so makes the agency's decision arbitrary and capricious. *See*, *e.g.*, *Vukel v NY Water & Sewer Mains, Inc.*, 94 N.Y.2d 494, 496 (2000); *Partman v. N.Y.S. Div. of Hous. & Community Renewal*, 179 A.D.3d 466, 467 (1st Dep't 2020); *Dobbins v. State of N.Y.—Unified Court System*, 189 A.D.3d 1397 (2d Dep't 2020).

[11] Respondents also argued below that Petitioner's claims were not ripe, implying that he might get his bite at the apple later. They are wrong on the law, because a facial challenge to a zoning action is ripe upon enactment of that action. They are also wrong in suggesting that Petitioner will be able to sue when a particular building or use permit is approved. Approval of a building permit is not discretionary and cannot be challenged pursuant to Article 78. And because, as discussed below, Respondents have not dedicated any parkland, Petitioner will also not have a public trust claim.

When the City Respondents took ownership and control of Governors Island, they bound themselves to the Deed Restrictions. They agree that they are thus bound, and indeed the record is replete with their insistences that the Restrictions are still in effect—and the Supreme Court so stated. *See* R7 and, e.g., R52, R62, R234, and R313. Therefore, their enactment of zoning that allows and encourages as-of-right construction and uses in blatant violation of those Restrictions—accepting the Restrictions with one hand while negating them with the other—is arbitrary and capricious.

Citing *Friends of Shawangunks, Inc. v. Knowlton*, 64 N.Y.2d 387 (1985), the Supreme Court held that "[c]hanges to zoning do not alter deed restrictions, such as those in place here, and any applicable deed restrictions remain in effect notwithstanding whatever the zoning is . . . . Thus, the court cannot say that the City Council's actions were arbitrary and capricious simply because the zoning does not mirror the Deed." R7.

The Court's statement that as a general matter covenants and zoning are independent of one another is correct, as are the City's many statements in their papers below to the same effect. But the conclusion that the Court draws is not correct, because this case is different. If we were talking about a covenant between two private parties, the City could rezone the Island unhindered. But here, the City

itself is the covenantor, the party burdened.[12] As the covenantor, the City has an obligation to abide by, and indeed to enforce, these Deed Restrictions. The City agrees. By enacting zoning that opens the door wide to things that the Deed Restrictions prohibit, the City is irrationally making its task of ensuring that the Deed Restrictions will be followed impossible, or at least much more difficult. It is arbitrary and capricious of the City to approve zoning that will impede or frustrate it from fulfilling its legal obligations.

The City, however, argued below that *because* the Deed Restrictions remain in effect, the zoning is irrelevant. According to the City, Petitioner "fundamentally misunderstands this point, [which] underlies the entire Petition":

> [B]ecause the Deed restrictions remain in place, and are self-enforcing, they are entirely irrelevant to the question of whether the zoning change . . . must . . . be upheld. . . . [T]o the extent that the 2021 rezoning authorizes any uses that do not conform to the deed restrictions, the deed restrictions remain in force, and those uses remain prohibited. Thus, no zoning change, including those at issue here, can authorize a violation of the Deed.

R2975-2976 (emphasis added).

[12] Although legally separate from the City, the Trust is a City instrumentality entirely controlled by the Mayor. Its three Members are the Mayor, the First Deputy Mayor, and the Deputy Mayor for Economic Development. They appoint all the Directors. *See supra* at 9. For the purpose of assessing whether the City Council's rezoning was arbitrary and capricious, the fig leaf of the legal separateness of the Trust is irrelevant. Indeed, the City does not deny that it is bound to respect the Deed Restrictions.

To the contrary, it is Respondents who fundamentally misunderstand how the law applies to the particular facts of this case. As Respondents themselves pointed out only five pages before the passage just quoted, deed restrictions, far from being "self-enforcing," are a dead letter unless enforced by a party with standing to do so. R2954. That party, usually the covenantee, must initiate a lawsuit, an expensive and lengthy process whose outcome, as that of any litigation, is not ensured.[13]

The entire thrust of the City's argument below, which was adopted by the Supreme Court, is that it intends to abide by the Deed Restrictions, and the zoning is irrelevant to those Restrictions. But if the City intends to abide by the Restrictions, and indeed to enforce them, it makes no sense—and it is arbitrary and capricious—to enact zoning that will enable, and indeed invite, violations of those same Restrictions. It makes no sense and is arbitrary and capricious for the Trust to sponsor and urge upon the Community Board, the City Planning Commission, and the City Council a rezoning that allows as-of-right uses and construction that would violate those Deed Restrictions. And it makes no sense, and is arbitrary and

[13] Generally only the covenantee or someone in privity with the covenantee can enforce a covenant at law. However, in certain circumstances, equity will enforce covenants despite the absence of privity between the parties. The most common such circumstance is where "restrictive covenants are created with the design to carry out a general scheme applicable to an entire tract[. In such circumstances] the covenant is enforceable by any grantee as against any other . . . ." *Malley v. Hanna*, 101 A.D.2d 1019, 1020 (4th Dep't 1984), *aff'd on other grounds*, 65 N.Y.2d 289 (1985).

capricious, for the City Council to knowingly, deliberately, enact zoning that enables, with no further discretionary review, construction and uses that would then have to be fought in a lawsuit initiated by the City's own alter ego, the Trust.

By the same token, zoning that is at least as restrictive as the Restrictions would prevent violations. Unlike the Restrictions that Respondents claim are "self-enforcing," zoning is self-enforcing: the Department of Buildings does not issue permits for construction in violation of zoning, and there is no need to resort to litigation; similarly, one cannot get a certificate of occupancy for a use that violates zoning, and violations can be enforced by the Department of Buildings, again, without litigation.

The City argued below that Petitioner's lawsuit "rests entirely on the mistaken premise that local zoning provisions are arbitrary unless they mirror the broad use requirement and restrictions included in the deed." R2973. The City is mistaken. Petitioner does not contend that, as a general matter or even in this case, zoning must "mirror" deed restrictions. Petitioner's contention is more limited: that under the perhaps unique facts of this case, where the City itself is bound by the Restrictions, the City may not enact zoning that allows and encourages their violation.

III. RESPONDENTS' UPZONING ENABLES AND ENCOURAGES VIOLATION OF SPECIFIC GOALS AND RESTRICTIONS IN THE DEED

Below, the City argued that the approved zoning is consistent with the Deed Restrictions. To the contrary, the approved zoning is inconsistent with both the letter and the intent of the Deed Restrictions.

A. The Rezoning Enables and Encourages Construction and Uses That Negate the Primary Goal of the Deed: "Protection and Preservation of the Natural, Cultural and Historic Qualities of Governors Island."

The primary goal of the Deed is "to ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island." The other goals are, in order, to "guarantee public access to this magnificent island, promote the quality of public education, and enhance the ability of the public to enjoy Governors Island and the surrounding waterways, thereby increasing the quality of life in the surrounding community, the City, the State and the United States." R92.

With respect to the Island Property specifically, *i.e.*, the South Island and the portion of the North Island other than the Monument Property, the deed states that all the "Permitted Uses" are in furtherance of the Island Property's service "as an <u>educational and civic resource of special historic character and as a recreational and open space resource</u> for the people of the City, the State and the United States." R93 (emphasis added). No other purposes are given.

These federal government priorities flatly contradict the City's assertion below that "while preservation was important to the U.S. federal government when it conveyed the Island to GIPEC in 2003, its primary goal was to ensure the Island is redeveloped in a way that maximizes public enjoyment and access and makes the Island an educational and cultural hub. Thus, any limitations in the Deed should be read in connection with that overarching goal." R2978 (emphases added). Nor is there any evidence whatsoever that the federal government shared the City's goals of "economic development and job creation" and creating a "24/7 mixed-use campus with vibrant public spaces that will . . . generate revenue." SR198, R2978, R48.

To the contrary, the City goals, which are built in to its zoning amendments, are at odds with the vision of a unique island where one can "leave the city without leaving," a place of "views, wind, tides, currents, horizon, escape," "vast water, big sky," sharply different from Manhattan, described in the Master Plan. R2744, R2758, R2752. With its out-of-scale tall buildings and density, the adopted zoning negates the Deed's goal of "preserv[ing] and enhance[ing] these views [of the harbor], from all around the edge of the island and from its interior." 2011 FGEIS at S-5 (R292). Instead we have "24-hour/7-day-a-week activity." R58. The "breathtaking 360° views of the New York Harbor" described in the Master Plan

as the "culmination" of your visit to Governors Island, R2748, are no more.[14] The blocking of this view by buildings is shown in the image prepared by the Environmental Simulation Center and George M. Janes & Associates, consultants to Community Board 1. R3126. Other images from the FSSGEIS's comparison of the "No Action" vs. "With Action" alternatives illustrate how dramatically the upzoning will affect the open vistas and low scale of the Island today. SR178, SR181-185.

The Decision below quoted the City Planning Commission Report that analogized Governors Island to "Central Park, where thrilling skyline views are part and parcel of the pastoral experience, or the High Line, where a verdant park literally threads its way under and between buildings." R6. Those parks are indeed great, but the experience of Governors Island, intended as a wide-open space apart from the City, should be different from those parks. In its presentations to the Community Board and the City Planning Commission, the Trust compared the proposed development scale and density to Hudson Yards, Battery Park City, and Cornell Tech, among others. R532, R705, R708-713, R755. As the Master Plan says more than 20 times, Governors Island is "unique" and these comparisons are not instructive.

But not only is the City's massive upzoning in conflict with the Deed Restrictions. The City has never produced even a smidgen of evidence to show that

[14] The Master Plan mentioned the "360º views" more than 15 times.

the goals of making Governors Island financially self-sufficient and establishing a world-class academic and scientific Climate Solutions Center require this much density, this much height, open spaces that are not protected as dedicated parkland, and industry and manufacturing everywhere. When the Community Board sought evidence to support the City's suggestion that the proposed amount of development space was necessary to achieve their goals, Respondents refused to provide it. R636.

In fact, the Master Plan stated that with between 2.8 and 4 million square feet of development space for the whole Island (*i.e.*, between 1.4 and 2.6 million square feet for the South Island, as compared to the 3.75 million allowed by the rezoning), the Island would generate revenue sufficient "to support a very high level of operations for the Island, including maintenance of the park and public spaces, and to fund a capital replacement reserve." R2888.[15] But even if this analysis is mistaken, and even if Governors Island does not become self-financing by 2050 (sic!) as the Trust says it will under its upzoning, *see* R541, Governors Island will create indirect economic benefits in the form of job creation and improvements to the City's overall attractiveness that will more than make up for any City funding.

[15] The FSSGEIS, comparing the upzoning to "the 2013 Alternative" of 1.6 million square feet of South Island development space versus the then-proposed 4.5 million square feet, conceded that "it is possible that the Trust could attract a large academic or commercial anchor tenant to occupy the majority of the approximately 1.6 million gsf development envelope permitted under the 2013 Alternative."

In reality, it appears that the City is primarily interested in facilitating development to help the City's economy, regardless of what the Deed Restrictions require. In 2020, the Office of the Mayor "announced that the [Governors Island] Center for Climate Solutions would play a key role in the Mayor's economic recovery agenda, *StrongerNYC*. The Center for Climate Solutions is projected to create 8,000 direct new jobs and $1 billion in economic impact for New York City." R770.[16]

These are laudable goals, but they are extraneous to the Deed and the carefully developed Master Plan. Prioritizing those goals cannot justify the enactment of zoning that opens the door wide to violations of the Deed. What the Court of Appeals said in *Avella v. City of New York* is equally applicable here:

> We acknowledge that the remediation of Willets Point is a laudable goal. Defendants and various amici dedicate substantial portions of their briefs to the propositions that the Willets West development would immensely benefit the people of New York City, by transforming the area into a new, vibrant community, and that the present plan might be the only means to accomplish that transformation. Those contentions, however, have no place in our consideration of whether the legislature granted authorization for the development of Willets West on land held in the public trust.

Avella, 29 N.Y.3d at 440; *see also Municipal Art Society v. City of New York*, 137 Misc. 2d 832, 838 (S. Ct. N.Y. Co. 1987) ("Zoning benefits are not cash items.").

[16] *See also* SR109 ("In 2016, Mayor de Blasio announced in the State of the City address that 'Governors Island will be the site of a sweeping economic development project poised to turn the area in a center of culture, commerce, and innovation.'").

Just so here, no matter how laudable the City's goals, they do not justify the enactment of zoning that overrides the Deed Restrictions.

B. Respondents' Imposition of Zoning on the Purported "South Island Park" Was Arbitrary and Capricious

The Deed's Parkland Restriction Term requires the creation of "public parkland of at least forty (40) acres …which shall be dedicated and used as such in perpetuity." R93.

Respondents' mapping of C4-1 zoning over the entirety of what they call "South Island Park" constitutes an explicit refusal to dedicate 40 acres as public parkland, and is therefore arbitrary and capricious.

In this litigation, Respondents tepidly argue that they did dedicate South Island Park as parkland. Respondents' affiant Marni Friedlander, General Counsel of the Trust, avers that ""[t]hrough its Master Plan, . . . the Trust has dedicated 43-acres of the Island to parkland, which cannot be converted to a non-park use." R40, *see also* R51 (referring to "approximately 46 acres of dedicated parkland in South Island Park"). In its Memorandum of Law below, too, the City states that "through the operation of the Master Plan and the Deed in combination, the Trust established South Island Park as protected parkland which cannot be converted to a non-park use." R2989.

By recognizing their obligation to dedicate parkland while falsely claiming they have already done so, Respondents highlight the arbitrariness and

capriciousness of their imposition of C4-1 zoning on those 40 acres instead of formally designating them as parkland by amending the City Map.

Dedication of land to park purposes requires "an official act by the governing body of the municipality, such as the passage or adoption of a formal resolution or local law. Formal dedication is commonly indicated by phrases like 'land(s) dedicated for park purposes' and 'dedicated parkland.'"[17]

The City's CEQR Technical Manual, which guides environmental reviews within the City, states that "New York City's Zoning Resolution controls the use, density, and bulk of development within the entire City, with the exception of parkland, which does not have a zoning designation."[18] Similarly, ZR 11-13 ("Public Parks") provides that, with exceptions not relevant here, "District designations indicated on zoning maps do not apply to public parks."[19]

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[17] N.Y. State Office of Parks, Recreation and Historic Preservation, "Handbook on the Alienation and Conversion of Municipal Parkland in New York" (Sept. 1, 2017) at 4 (https://parks.ny.gov/documents/publications/AlienationHandbook2017.pdf) (citing 1996 N.Y. Op. Atty. Gen. (Inf.) 1093 (village board may dedicate parkland by resolution or by local law) (http://www.ag.ny.gov/bureaus/appeals_opinions/opinions/1996/informal/96_37.pdf).

[18] Mayor's Office of Environmental Coordination, City Environmental Quality Review Technical Manual (2021 ed.), at 4-1) (available at https://www.nyc.gov/assets/oec/technical-manual/04_Land_Use_Zoning_and_Public_Policy_2021.pdf).

[19] The Zoning Resolution further provides:

> In the event that a public park or portion thereof is sold, transferred, exchanged or in any other manner relinquished from the control of the Commissioner of Parks and Recreation, no building permit shall be issued, nor shall any use be permitted on such former public park or portion thereof, until a zoning amendment designating a zoning district therefor has been adopted by the City Planning Commission and has become effective after submission to the City Council in accordance with the provisions of Section 71-10

Parks are typically designated by a ULURP mapping action pursuant to N.Y.C. Charter § 197-c (a)(1) ("Changes in the city map ...") and § 199 ("Projects and changes in city map"). An illustrative example of this is shown on a City Planning Department web page titled "NYC Planning Street Map: Status & History of NYC's Streets."[20] The map shown there is a "portion of an alteration map" that illustrates the designation of a new park via an amendment to the City Map.[21] The newly designated parkland is shown on the illustrative City Map page as "PARK."

The Master Plan referenced by Ms. Friedlander and Respondents' Memorandum of Law as having "dedicated" 43 acres of parkland does not even mention formal dedication of parkland. In their public presentations, in the environmental review documents, and even elsewhere in their opposition to the Petition herein, Respondents have studiously avoided referring to those 43 acres as dedicated parkland, or even as parkland, uniformly describing them only as "public open space," or the "Open Space Subarea." The FSSGEIS carefully misrepresents the Deed, stating that "t]he most significant requirement[ ] of the deed [is] that at

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Id.

[20] https://streets.planning.nyc.gov/city-map?lat=40.7057&layer-groups=%5B%22amendments%22%2C%22citymap%22%2C%22pierhead-bulkhead-lines%22%2C%22street-centerlines%22%5D&lng=-73.9225

[21] Clicking on the map on that page will bring up an enlargement of it. The text in the blue box reads: "In this case, the map shows the elimination of a portion of Shakespeare Avenue in the Bronx, the addition of a different, small piece of land to Shakespeare Avenue, and the establishment of a new park."

least 40 acres of the Island be developed [not dedicated] as public open space [not parkland]." SR72 (emphasis added). It makes no mention of a "South Island Park."

Respondents' affiant Erik Botsford, Deputy Director of the City Planning Department's Manhattan Office, avers that Petitioner's claim that the Open Space Subarea "has not been 'dedicated as parkland' . . . is both inaccurate and represents a misunderstanding of both parkland protection and the role of zoning." R72. However, instead of showing that this Area has been dedicated as parkland, he goes on to argue that the rezoning provides equivalent protections.[22] As explained below, it does not.

Where there has been no formal dedication, dedication can sometimes be implied. However, case law holds that far stronger evidence is required than the passing assertion of Trust GC Friedlander, sworn though it is, to imply a dedication of parkland. Her statements do not provide the "unequivocal manifestation of an intent to dedicate the parcels as permanent parkland" that the Court of Appeals has required. *Glick v. Harvey*, 25 N.Y.3d at 1180 ("acts and declarations of the land owner [must be] unmistakable in their purpose and decisive in their character to have

[22] Mr. Botsford further testified that "South Island Park, like several other flagship parks in New York City, is not owned by the Department of Parks and Recreation. This does not prevent it from being dedicated to the public in perpetuity, even though it is not classified as #public park# in the Zoning Resolution as are city-owned, DPR-managed park properties." R73 (emphasis added). However, Mr. Botsford does not say that the Open Space has been dedicated, but only that nothing "prevent[s] it from being dedicated."

the effect of a dedication"). When weighed against all the contrary evidence, including Respondents' failure to seek a City Map amendment and their uniform use of the words "open space" while shunning the words "designated parkland," their litigation statements will not carry the day, and will not prevent the City from arguing in a future lawsuit that South Island Park is not dedicated parkland.[23]

In any event, the dispute here is not about whether Ms. Friedlander's statements constitute a dedication, but about whether the City's rezoning action was arbitrary and capricious insofar as it imposed new commercial zoning on what the Deed requires to be dedicated parkland. If the City truly intended those 43 acres to be parkland, it should have transferred them to the jurisdiction of the Department of Parks and Recreation and amended the City Map to designate them as such. Ms. Friedlander's assertions are just a Hail Mary pass in a desperate attempt to defeat Petitioner's claim.

Respondents' further argument that they need not dedicate any parkland because their rezoning provides equivalent protections is irrelevant as well as wrong. There is a reason why Respondents do not want to dedicate the 40 acres as parkland: not doing so gives them flexibility in their development plans, such as

[23] In *Glick v. Harvey*, the lower court, based on strong evidence, found an implied dedication, but the Court of Appeals held that same evidence insufficient to establish the required unequivocal intent to designate. *Compare Glick*, 2014 N.Y. Misc. LEXIS 35 (detailing evidence), *with id.* 25 N.Y.3d 1175 (finding that same evidence insufficient).

permitting them to interpret the public trust doctrine as allowing construction over the entirety of the supposed park area (as they had originally proposed before reducing the buildable area to 20 percent), and allowing uses such as industry and manufacturing. Not dedicating parkland also forecloses any public trust doctrine challenges.

Respondents' failure to dedicate parkland in conjunction with their rezoning was arbitrary and capricious.[24]

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[24] Mr. Botsford cites Brooklyn Bridge Park as a "prime example, highly relevant to Governors Island," because the underlying land is zoned for manufacturing. R74. However, his claim that "the parkland uses are protected by other binding instruments, including a May 2, 2002 Memorandum of Understanding between the City and State requiring the parkland to be preserved in perpetuity" is flat-out wrong. R74 (citing https://www.brooklynbridgepark.org/wp-content/uploads/2020/10/2002-Memorandum-of-Understanding.pdf) finds no support in that MOU.

The MOU provides that "the state-owned areas designated as open space under the General Project Plan shall be transferred to the jurisdiction of State Parks and shall be afforded the protections of state law relating to the non-alienation of State park lands." As to the City-owned areas, no such protections are promised. Instead, the MOU states, "The City-owned areas designated as open space under the General Project Plan shall be . . . designated as open space," not parkland, and no non-alienation protections are mentioned. MOU at 4. In fact, the MOU provides for "development of appropriate commercial uses within the Project Area." MOU at 3. On information and belief, several residential, commercial and retail buildings have been built totaling 9 percent of the Project Area. Such uses are obviously not permitted on dedicated parkland.

Moreover, even as to the state-owned areas, the protections are only promised, not provided. The same is true of the Deed here, which requires future owners to dedicate 40 acres of parkland, but does not delineate that land or actually dedicate it as parkland.

As *Glick v. Harvey* illustrates, not all land used for park purposes is formally designated. The City-owned portions of Brooklyn Bridge Park apparently fall into that category. However, whereas here the Deed requires that 40 acres be designated as parkland in perpetuity, nothing requires that the City-owned portions of Brooklyn Bridge Park be designated and protected. Indeed, on information and belief, since the 2002 signing of the MOU, private residential housing has been built within or adjacent to the Park in order to provide financing for its maintenance.

C. The Rezoning Enables and Encourages Construction and Uses That Are Unlawful on Dedicated Parkland

The approved zoning allows the Open Space Subarea to be built on and used in ways that violate the public trust doctrine, and consequently also the Parkland Restriction Term of the Deed.

The new zoning states outright that the "Open Space Subareas" may include not only "public parks," but also "private parks," without limitation. ZR 134-112(a). Respondents concede that allowing private parks is inconsistent with the Deed, but say that it does not matter, because "the Deed's requirement that the required parkland be open to the public must be complied with, notwithstanding the applicable zoning." R2990.

This argument highlights the flaw in Respondents' argument about the independence of zoning and deed restrictions. To say, using the passive voice, that "the Deed's requirement ... must be complied with" ignores the fact that this requirement is not self-enforcing. Given that the Trust, a City entity, must enforce the Deed Restrictions, it was irrational and arbitrary and capricious of it to propose, and the City Council to enact, zoning that would allow for and invite violations.

The rezoning also allows "buildings or other structures containing permitted uses, up to a height of … 25 feet," equivalent to 2.5 stories, occupying as much as 20 percent, or 8.6 acres, of the Open Space Subarea. ZR 134-24(b)(5). This reduces the actual parkland from 43 to 34.4 acres. The equivalent 20 percent

in Central Park would be an area greater than 30 Manhattan blocks. The only large building in Central Park, the Metropolitan Museum, occupies only 1.5 percent of Central Park's area. Respondents claim that structures serving park purposes, including "dining establishments, comfort stations, and open-air amphitheaters," are permissible amenities. R73. Yes, but allowing them to cover 20 percent of the parkland is not.

The zoning further allows cellars underneath the entirety of the Open Space Subarea, which can be used for any "use otherwise permitted in the Southern Subdistrict." ZR 134-112(a). Such uses include large-scale commercial, manufacturing and industrial uses that cannot qualify as park purposes under any definition.

The City argued below that this provision is consistent with park use because it is analogous to the "sidewalk vault under pedestrian walkways, similar to what is found under sidewalks throughout New York City." R2991. The approved zoning does not limit manufacturing and industrial cellar space to locations underneath pedestrian walkways. Rather, it allows it throughout the entirety of the Open Space Subarea. Moreover, to Petitioner's knowledge there are no vaults underneath pedestrian walkways in dedicated parkland in New York City—nor would such vaults be permitted if they served manufacturing or industrial uses.

It should be noted, too, that the 43 acre so-called South Island Park is now completed. R48. The future construction of buildings and vaults or cellars on the scale permitted and encouraged by the approved zoning would take the open space out of use and violate the public trust doctrine. *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623, 631 (2001) (finding violation of public trust doctrine where construction of underground water treatment plant would be ongoing for years and "some future uses of the land will be inhibited by the presence of the underground structure").

All of the above uses, invited and encouraged by the adopted zoning, are prohibited in dedicated parkland, and the City's adoption of zoning inviting such uses was arbitrary and capricious.

D. The New Zoning Enables and Encourages Industrial and Manufacturing Uses That the Deed Explicitly Prohibits

The Deed lists among the "Prohibited Uses" "Industrial or manufacturing uses" anywhere on the Island. R95.

Yet ZR § 134-111 expressly permits uses in Use Groups 17 and 18. Use Group 17 "consists primarily of manufacturing uses." ZR 42-14. Use Group 18 "consists primarily of industrial uses which (1) either involve considerable danger of fire, explosion or other hazards to public health or safety, or cannot be designed without appreciable expense to conform to high performance standards

with respect to the emission of objectionable influences; and (2) normally generate a great deal of traffic, both pedestrian and freight." ZR 42-15.

Among the uses that the amended zoning permits are "furniture manufacture; manufacture of pharmaceutical products, chemical compounding or packaging; manufacture of non-alcoholic beverages; food product manufacture ...; and the manufacture of alcoholic beverages and breweries."

Below, Respondents first argue that these uses do not violate the Deed because the Deed does not define "manufacturing." They do not address "industrial." This does not merit response. Their next argument is that because the Deed's paragraph 2.4, "Prohibited Uses," begins with the words, "Without limiting the foregoing [*i.e.*, the Permitted Uses]," the Deed permits "manufacturing [and presumably industry] that is a component of specifically authorized and required uses under the Deed," and that a determination of whether the manufacturing or industrial use is a component of an authorized use "may rely on case-specific factors that would not be apparent without an actual proposal." R2984.

This argument is creative, but it is frivolous flimflam. Section 134-11 of the Zoning Resolution does not limit the permitted industrial or manufacturing uses to those that are "components" of other uses (whatever that broad term may encompass). It does not say that some of the allowed uses are "authorized," whereas others will only be permitted as "components." It simply allows these industrial and

manufacturing uses. Anyone can go to the Department of Buildings and apply for a building permit and subsequently a certificate of occupancy, and if their application complies with the Zoning Resolution and the Building Code, they are entitled to a permit as-of-right.[25]

IV. RESPONDENTS' UPZONING VIOLATES THE PUBLIC TRUST DOCTRINE

In the alternative and/or additionally, Respondents' upzoning should be invalidated as violative of the public trust doctrine. Given that Respondents have stated in sworn testimony that 43 acres of the Open Space Subarea are dedicated as parkland in perpetuity, they should be judicially estopped from taking a contrary position.

Parkland is a precious resource that requires protection from expedient decisions to convert it to other uses. By requiring that any nonpark use be specifically and explicitly approved by the State Legislature, the public trust doctrine provides this protection. *Avella v City of New York*, 29 N.Y.3d 425 (2017); *Friends of Van Cortlandt Park v City of New York*, 95 N.Y.2d 623 (2001).

[25] Respondents' suggestion that Petitioner's claim is not ripe because the issuance of a permit might depend on "case-specific factors" must be rejected. Petitioner is not challenging a specific application of the Zoning Resolution to a particular project. Rather, Petitioner asserts that enacting zoning that invites and encourages industrial and manufacturing uses on Governors Island, and even within what should be dedicated parkland, is arbitrary and capricious.

In *Friends of Van Cortlandt Park*, the Court of Appeals held that construction of a water treatment plant to be located underneath Van Cortlandt Park violated the public trust doctrine because its construction would entail closure of "an appreciable area of the park ... for more than five years," and although the park was to be restored over the treatment plant, "some future uses of the land will be inhibited by the presence of the underground structure." *Id.* at 631. The Court specifically pointed to the presence of "vents and air intake louvres … in berms [that will] extend above finished grade" as violating the public trust doctrine. *Id.* at 628.[26] Notably, the proposed water treatment plant in *Friends of Van Cortlandt Park* was to cover only 23 acres in a 1,146-acre park, or two percent of the park's area.

A fortiori, if, as Respondents assert, the Open Space Subareas are in fact designated parkland, the new zoning is invalid because it immediately enables violations of the public trust doctrine, with no further discretionary approvals. available open space. and would constitute a violation of the public trust doctrine.

Supreme Court held that Petitioner's public trust claim was premature. It is not premature because the rezoning allows construction as of right. Although a future plaintiff might seek a preliminary injunction after construction has started,

[26] The Court of Appeals also held that "to the extent it is inconsistent with our decision today," an unreported case, *Wigand v City of New York* (NYLJ, Sept. 25, 1967, at 21, col 5), that authorized use of parkland to facilitate installation of two underground water tanks "should not be followed." *Id.* at 631.

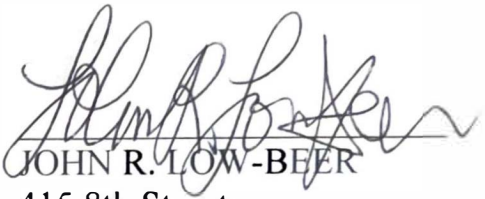
under *Dreikausen v. Zoning Board of Appeals*, 98 N.Y.2d 165 (2002), and its progeny it is literally impossible for that plaintiff to succeed. *See also*, *e.g.*, *Citineighbors Coalition v. Landmarks Preservation Commission*, 2 N.Y.3d 727 (2004); *Weeks Woodlands Assn., Inc. v. Dormitory Auth. of the State of New York*, 95 A.D.3d 747 (1st Dept. 2012), *aff'd on op. below*, 20 N.Y.3d 919 (2012). *Dreikausen* held that by challenging a building's construction at the outset and at every opportunity thereafter, a plaintiff has protected their right to obtain a demolition order should their claim be held meritorious on appeal. As a result, a plaintiff can never prove the irreparable harm necessary to obtain an injunction. However, after construction is substantially complete, that plaintiff can succeed in obtaining a demolition order only in the most extraordinary of circumstances, if at all.[27]

[27] For a fuller explanation, *see* J. Low-Beer, "Why Community Groups Can Never Win Against Developers: The '*Dreikausen* Paradox and Other Hurdles," NYLJ, Sept. 18, 2019, https://plus.lexis.com/document?crid=662e1712-db9e-4d7d-9ded-e2ad4ebf59fd&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A5X34-W8H1-DY35-F005-00000-00&pdsourcegroupingtype=&pdcontentcomponentid=8205&pdmfid=1530671&pdisurlapi=true

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the decisions and orders and the judgment of the Supreme Court, grant leave to amend the Petition, and grant the Amended Petition to the extent of voiding Respondents' rezoning pursuant to CPLR 7803 and the common law public trust doctrine.

New York, New York
September 5, 2023



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PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a computer. The body text is double-spaced and set in 14-point Times New Roman typeface, and the footnotes are single-spaced and set in 12-point Times New Roman typeface. According to the computer word-processing program, the number of words in the brief, including point headings and footnotes and excluding the table of contents, table of authorities, signature block, and printing specifications statement, is 11,898.

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

ROGER MANNING,

Petitioner-Appellant,

—against—

CITY COUNCIL OF THE CITY OF NEW YORK, BILL DE BLASIO, as Mayor of the City of New York; NEW YORK CITY PLANNING COMMISSION; and THE GOVERNORS ISLAND CORPORATION, d/b/a THE TRUST FOR GOVERNORS ISLAND,

Respondents-Respondents.

New York County Clerk's Index No. 158809/21

Appellate Division Case No. 2023-03112

1. The index number of the case is 158809/21.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on September 24, 2021 by Notice of Petition; the answer of Respondent was served on November 19, 2021.

5. The nature and object of the action is breach of contract.

6. This appeal is from a Decision and Order of the Honorable Lynn R. Kotler entered in favor of Respondents, against Petitioner on December 8, 2022, which dismissed the proceeding.

7. The appeal is on a full reproduced record.