

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

ROGER MANNING,

Petitioner-Appellant,

- against -

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

Respondents-Respondents.

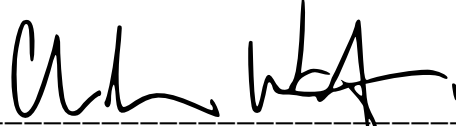
Appellate Division
Case No. 2023-03112

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the affirmation of Charles Weinstock, sworn to October 19, 2023, and the proposed *amicus curiae* brief attached to it, Christopher Marte, the City Club of New York, the Metro Area Governors Island Coalition, East River Park Action, New York City Friends of Clearwater Inc., the South Street Seaport Coalition, Friends & Residents of Greater Gowanus, the Bowery Alliance of Neighbors, the Western Queens Community Land Trust, Kent Barwick, and Tom Fox (collectively, the “Proposed Amici”) will move this Court at 27 Madison Avenue, New York, New

York, at 10:00 a.m. on Monday, October 30, 2023 for an order granting them leave to file an *amicus curiae* brief in support of the Petitioner-Appellant.

New York, New York
October 19, 2023



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NEW YORK STATE SUPREME COURT
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AFFIRMATION

CHARLES WEINSTOCK, an attorney admitted to practice
before the courts of the State of New York, affirms under penalty of
perjury:

1. I am an attorney for Christopher Marte, the City Club of
New York, the Metro Area Governors Island Coalition, East River Park
Action, New York City Friends of Clearwater, the South Street Seaport
Coalition, Friends & Residents of Greater Gowanus, the Bowery
Alliance of Neighbors, the Western Queens Community Land Trust,
Kent Barwick, and Tom Fox (collectively, the “Proposed Amici”). I

submit this affirmation in support of their motion for leave to file an *amicus curiae* brief in support of the Petitioner-Appellant.

2. The Proposed Amici believe that their experience and expertise in urban land use policy issues can contribute a unique perspective on the 2020 upzoning of Governors Island (the “Upzoning”), which they believe constitutes an arbitrary and capricious application of the City’s zoning powers, in violation of (1) the legal commitments it made to the federal government when it took over Governors Island and (2) the Public Trust Doctrine, which prohibits municipalities from using parkland for nonpark purposes without the express approval of the State Legislature.

3. The proposed brief is attached here as Exhibit A. The lower court’s December 8, 2022 decision and order is attached as Exhibit B, and the Petitioner-Appellant’s January 5, 2023 notice of appeal is attached as Exhibit C.

PARTIES

4. CHRISTOPHER MARTE is a member of the New York City Council representing the 1st District, which includes Governors Island. He is a member of the Council’s Committee on Parks and

Recreation and has been a leading voice in opposition to the Upzoning.

5. THE CITY CLUB OF NEW YORK, founded in 1892, seeks to promote thoughtful urban land use responding to the needs of all New Yorkers. It has addressed major issues in zoning and historic preservation, including the protection of natural areas and parkland. It was a plaintiff and the animating force behind *Avella v. City of New York*, 29 N.Y.3d 425 (2017), in which the Court of Appeals held that the Public Trust Doctrine prohibited the construction of a shopping mall and movie theater in Flushing Meadows Corona Park.

6. THE METRO AREA GOVERNORS ISLAND COALITION (M.A.G.I.C.) was co-founded in November 2020 by Roger Manning and Allie Ryan, lower Manhattan residents and long-time devotees of Governors Island. It is dedicated to promoting increased public awareness and involvement in determining the future of the Island, and in particular, the preservation of its open spaces. Manning is the Petitioner-Appellant in this proceeding.

7. EAST RIVER PARK ACTION is a grassroots community group formed in 2019 to oppose the demolition of the 47-acre East

River Park, regularly used by low- and middle-income residents of the East Village and Lower East Side. Many of those who took advantage of its open space, recreational and fitness resources, and urban farm, educational, cultural ,and historic offerings look to Governors Island to replace it.

8. NEW YORK CITY FRIENDS OF CLEARWATER, INC. is a chartered sloop club of the Hudson River Sloop Clearwater, Inc. It supports the protection of the Hudson River and related waterways and shores, including New York Harbor, through education, advocacy, and celebration. Members use the Island regularly.

9. THE SOUTH STREET SEAPORT COALITION is an all-volunteer community-based non-profit organization whose mission is to craft a plan for the future of the South Street Seaport Historic District. The majority of its members lives in the densely developed Seaport district, in short supply of natural open space and in immediate proximity to the Governors Island ferries. Members use the Island regularly.

10. FRIENDS & RESIDENTS OF GREATER GOWANUS works to help create an ecologically safe Gowanus Canal corridor and

watershed, including restoration of the natural environment. It seeks to protect the corridor's industrial heritage while supporting an innovative and creative future. Members use the Island regularly.

11. THE BOWERY ALLIANCE OF NEIGHBORS is a nonprofit grassroots organization working on behalf of the residents and small businesses in the Bowery neighborhood on the Lower East Side. It seeks to preserve the historic character of the area, and to ensure public access to open and green spaces for Bowery area residents. Members use the Island regularly.

12. THE WESTERN QUEENS COMMUNITY LAND TRUST is a non-profit organization of activists, small business owners, professors, artists, students, and others fighting for equitable land use in Western Queens, protecting communities there from encroaching gentrification and displacement. Members use the Island regularly.

13. KENT BARWICK is a civic activist who has been involved in urban planning, design, and preservation in the City for five decades. He helped generate support for the original federal transfer of Governors Island to the City. Former Mayor Giuliani appointed him to the commission that advised the City on potential uses of the

Island, and for years, he served as a director of the Governor's Island Alliance. Among Mr. Barwick's many contributions over the years was his work with Jacqueline Kennedy Onassis to save Grand Central Terminal in the 1970s. He also served as the Municipal Art Society's executive director from 1970 to 1975, and as its president from 1983 to 1995 and again from 1999 through 2009. He chaired the New York City Landmarks Preservation Commission, and he co-founded the Historic Districts Council, the Preservation League of New York State, and the New York Landmarks Conservancy.

14. TOM FOX is a civic activist at the forefront of urban park and waterfront development for 50 years. He was the first president of the Hudson River Park Conservancy, and he helped write the 1998 Hudson River Park Act. In Brooklyn, he was a founding co-chair of the Brooklyn Bridge Park Coalition. Mr. Fox created the New York Water Taxi — the model for the current NYC Ferry — and operated the Water Taxi Beach on Governors Island for five years, bringing New Yorkers to concerts and other events on the Island. He received the annual award from the Governors Island Alliance and regularly visits the Island.

CONCLUSION

15. The Proposed Amici bring a wealth of experience and expertise on the issues presented for decision by the Court. All have participated in similar court proceedings in the past, and believe that their perspectives can aid the Court in its disposition of the case. The Amici therefore ask the Court's permission to file the brief.

New York, New York
October 19, 2023

A handwritten signature in black ink, appearing to read 'Charles Weinstock', is written over a horizontal dashed line.

CHARLES WEINSTOCK

EXHIBIT A

Supreme Court, New York County, Index No. 158809/2021

New York Supreme Court
Appellate Division—First Department

ROGER MANNING,

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CITY COUNCIL OF THE CITY OF NEW
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Respondents-Respondents.

BRIEF FOR *AMICI CURIAE*

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PRELIMINARY STATEMENT

As individuals and organizations dedicated to preserving open public space in New York City, the Amici oppose the 2020 rezoning of Governors Island (the “Upzoning”) on both legal and policy grounds.

The Upzoning is the latest example of a disturbing trend in public land use in the City. Here, as with Brooklyn Bridge Park, Diller Island, and other projects over the past decade, the government has worked in tandem with private developers and public-private entities to push the envelope of permissible uses of City land.

Too often, their focus has been on the economics of parkland management. Disregarding the legal instruments and regulations that govern the use of the land, they have prioritized commercial exploitation above all else, without due consideration of the effects the commerce will have on the public’s enjoyment of the land.

Their pretext is that they are required to raise revenue sufficient to fully maintain and operate the sites. But this is often not the case; there is certainly no such mandate for Governors Island. Even where there is, the government has sought to raise revenue far in

excess of what the facilities actually need to become self-sustaining.

The goal has been to convert parks into profit centers, and the victims are the New York residents for whom the land is held in trust.

“Self-sufficiency” was certainly the pretext for rezoning Governors Island, an attempt to divert attention from the fact that the law would eviscerate the use restrictions set out in a 2010 deed to which the City was a signatory (the “Deed”)¹ and in a 2010 master plan (the “Master Plan”) that the Deed had called for to implement those restrictions.² Both required the City to set aside at least 40 acres of dedicated parkland on the Island, to impose specific limits on commercial development, and to prohibit industrial and manufacturing uses altogether. The intention was for Governors Island to become “An Island Like No Other,” “allow[ing] visitors to leave the big city behind.” R291-292. It was to be a place of “views,

¹ R206; *see* R93, 141. References to “R__” are to pages in the Record filed with the Brief for Petitioner-Appellant.

² The Park and Public Space Master Plan by the Deed’s original grantee, the Governors Island Preservation and Education Corporation (“GIPEC”), a subsidiary of the Empire State Development Corporation. R2722-2895.

wind, tides, currents, horizon, escape,” “vast water, big sky,” with “breathtaking 360° views of the New York Harbor.” R2758, 2752, 2748.

The Upzoning discarded that vision, replacing it with a plan to convert much of the Island into “a sweeping economic development project poised to turn the area into a center of culture, commerce, and innovation.” Final Second Supplemental Generic Environmental Impact Statement (“FSSGEIS”) at 3-10 (quoting Mayor de Blasio’s 2016 State of the City address).

The Governors Island Corporation d/b/a the Trust for Governors Island (the “Trust”), a City instrumentality, was particularly forthright about the breadth of the City’s economic ambition. According to the Trust, the Upzoning was to create a “Project to Support City’s Economic Recovery,” to “create 8K jobs and an estimated \$1 billion of fiscal impact for the City, all on Governors Island alone.” R910. To this end, the City proposed zoning to “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.” R48. Thus, the City jettisoned the vision of “An Island Like No Other.” R291-292.

The Amici do not question the worthy goal of Island self-sufficiency. But it is hornbook law that, however worthy a government’s intentions, it does not have the authority to disregard a deed it has signed. If enforcing the Deed here makes it harder for the City to achieve the goal of self-sufficiency, then it must look elsewhere for the needed revenue.

The Deed represents a considered judgment about the proper balance of purposes, allowing a combination of "public, commercial and mixed-use" uses. But it also requires that this combination be “compatible with the Island’s historic and civic character.” The parkland, commercial, and other restrictions *define* “compatibility.” R94. The City cannot now replace the Deed’s judgment about the proper balance of uses with its own.

Even before the Upzoning, the City was in violation of the Deed, since it never actually dedicated the required 40 acres of parkland. While it now argues, preposterously, that 43 acres of existing “public open space” satisfies that requirement, plainly it does

not. The Deed requires that the land be *dedicated in perpetuity*, with the protections afforded all parks under the jurisdiction of the City's Parks Department.

The City has put itself in a double-bind. Either it failed to properly dedicate 40 acres, in which case it violated the Deed, or it did dedicate them, in which case it violated the Public Trust Doctrine. That doctrine prohibits a municipality from "alienating" parkland for nonpark use without the express approval of the State Legislature. It is undisputed that the City failed to secure that approval here. Based on this double-bind alone, the decision of the Court below must be reversed and the Article 78 petition granted.

INTEREST OF *AMICI CURIAE*

The Amici are individuals and organizations deeply concerned with the urban environment of New York City, and dedicated to the promotion of thoughtful land use policy that responds to the needs of all New Yorkers. They have participated in similar court proceedings in the past, and they come to this appeal with perspectives and experience that would assist the Court in its consideration of the case.

CHRISTOPHER MARTE is a member of the New York City Council representing the 1st District, which includes Governors Island. He is a member of the Council's Committee on Parks and Recreation and has been a leading voice in opposition to the Upzoning.

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Water Taxi — the model for the current NYC Ferry — and operated the Water Taxi Beach on Governors Island for five years, bringing New Yorkers to concerts and other events on the Island. He received the annual award from the Governors Island Alliance and regularly visits the Island.

STATEMENT OF FACTS

The Amici adopt the statement of facts presented by the Petitioner-Appellant in his brief.

ARGUMENT

I. THE CITY EITHER VIOLATED THE DEED’S PUBLIC PARKLAND REQUIREMENT OR VIOLATED THE PUBLIC TRUST DOCTRINE

A. The Upzoning Violated the Deed’s Requirement that at Least 40 Acres Be Dedicated as Public Parkland

When the federal government transferred 150 of the 172 acres of Governors Island to the City, the Deed imposed restrictions that required, *inter alia*, that at least 40 acres be dedicated as public parkland in perpetuity—a restriction intended to further the Island’s

service “as a recreational and open space resource for the people of the City, the State and the United States.” R93.³

The City has never disputed that the Deed restrictions are binding on it. Until this litigation, however, it had never claimed that it *did* dedicate the area as parkland. Instead, the City had consistently described the 43 acres as merely “public open space.” R632. Now, in a sworn affirmation, the Trust’s General Counsel states:

Through the Master Plan, which incorporated the requirements of the Deed and resulted in the development of the 43-acre park, the Trust has *dedicated* 43 acres of the Island to parkland, which cannot be converted to a non-park use.

R40 (emphasis added); *see also* R2989.

This is sophistry. The Deed and the Master Plan may have required the City to dedicate 40 acres of parkland; they did not themselves make the parkland. The City confuses the creation of a legal obligation with the fulfillment of that obligation. A law

³ As noted earlier, the Deed also prohibited all industrial and manufacturing uses on the Island. In clear violation of that restriction, the Upzoning now allows, among other uses, the manufacture of “pharmaceutical products,” “chemical compounding or packaging,” “food product manufacture,” and “the manufacture of alcoholic beverages and breweries,” even in the open space areas. R1613.

requiring drivers to observe a 60 mile per hour speed limit does not mean that all drivers will observe it.

In rare circumstances, the dedication of parkland can be implied, but the Court of Appeals has set a high threshold for such implication. It must be “unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon [the] property to the specific public use.” *Glick v. Harvey*, 25 N.Y.3d 1175, 1180 (2015). The assertion by a City attorney in the thick of litigation, more than a decade after the governing deed was signed, can hardly be deemed an “unequivocal and decisive” manifestation of intent.

B. If the City Did Dedicate the Parkland, the Upzoning Violated the Public Trust Doctrine

If the Court elects to credit the General Counsel’s statement that the City dedicated 43 acres as parkland, the City should be judicially estopped from contending otherwise, and therefore the Upzoning runs afoul of the Public Trust Doctrine, which was created precisely to protect parks against expedient decisions by local governments.

The Public Trust Doctrine has deep roots in English law. At common law, not even the sovereign could grant private rights to public trust property; only the parliament could. *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 77 (1877); *see also Brooklyn Park Commissioners v. Armstrong*, 45 N.Y. 234, 243 (1871); *People ex rel. Swan v. Doxsee*, 136 A.D. 400, 404 (2d Dep’t 1910), *aff’d*, 198 N.Y. 605 (1910). Since *Boston & Albany R.R. Co.*, 53 N.Y. 574 (1873), one of the earliest New York decisions, the Court of Appeals has deemed parklands held by a local government to be held “upon a special trust and for public use,” and the government “could not dispose of them or divert them from the purpose to which it were dedicated.” *Id.* at 576.

Moreover, the Legislature’s approval in alienating parkland must be “plainly conferred,” “direct and specific.” *Friends of Van Cortlandt Park*, 95 N.Y.2d 632; *see Capruso v. Village of Kings Point*, 23 N.Y.3d 631, 639 (2014); *Williams v. Gallatin*, 229 N.Y. 248, 253 (1920). “Legislative sanction must be clear and certain to permit a municipality to lease public property for private purposes.” *Lake George Steamboat Co. v. Blais*, 30 N.Y.2d 48, 52 (1972). Here, there

has been nothing approaching a plainly conferred, direct and specific legislative approval.

Although the Doctrine has most often been applied to the initial alienation of lands, the principle also applies to subsequent changes in use. In *Potter v. Collis*, 156 N.Y. 16 (1898), for example, the Court held that, although the State Legislature's General Railroad Act of 1850 had authorized municipalities to assent to the construction of railroads, that authorization was not “sufficient to authorize a city *street* railroad.” 156 N.Y. at 30 (emphasis added). Thus, the City's resolution granting a private company the right to build a railroad on public streets was invalid under the Public Trust Doctrine. *See also Matter of City of New York*, 228 N.Y. 140, 152 (1920).

Recent decisions by the Court of Appeals have consistently reaffirmed the Doctrine. *See, e.g., Avella v. City of New York*, 131 A.D.3d 77 (1st Dep’t), *aff’d*, 29 N.Y.3d 425 (2017); *Glick*, 25 N.Y.3d at 1180; *Union Square Park Community Coalition v. N.Y.C. Department of Public Parks & Recreation*, 22 N.Y.3d 648, 654 (2014); *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 623 (2001).

The City has tried to distract the public with promises of a bright new Center for Climate Solutions, which would purportedly make the Island “the site of a sweeping economic development project poised to turn the area into a center of culture, commerce, and innovation.” FSSGEIS at 3-10. But again, any scientific, cultural, or commercial benefits that the project might create are beside the point. The Public Trust Doctrine establishes, incontrovertibly, that if the City wants to capture parkland for nonparkland use, it may do so only with the express approval of the Legislature.

II. NEITHER THE DEED NOR THE MASTER PLAN PREVENTS THE CITY FROM MAKING GOVERNORS ISLAND FULLY SELF-SUFFICIENT FINANCIALLY

Nothing in either the Deed or the Master Plan requires Governors Island to be financially self-sufficient. Even if they did, however, the City has never established that it could not achieve that goal under zoning laws consistent with the Deed and Master Plan. Indeed, on multiple occasions prior to 2020, the City conceded that it could.

The Master Plan considered precisely how much square footage was necessary to make the Island self-sustaining. It stated:

At 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.

R2888. According to the Plan, this 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.*

The FGEIS, in turn, sought to achieve this self-sufficiency by defining two development zones extending over 33 acres. More modestly, it estimated that there would be approximately 1.35 million square feet of development space in existing historic structures on the north side of the Island and “up to approximately 1.65 million” in new space on the two development zones to the south—a total of three million square feet—but that this would be sufficient. R318.

The Upzoning more than doubled the allowable density on the southern side of the Island—from 1.65 million square feet to 3.75 million—and allowed industrial and manufacturing uses on all 80 acres. (The original proposal had been for 4.25 million square feet.)

Without any analysis, the City asserted that, to achieve its goal, it would “create 8K jobs and [have] an estimated \$1 billion of fiscal impact *for the City*, all on Governors Island alone.” R910 (emphasis added).

With this, the City moved its own goalpost. The purpose was no longer self-sufficiency for the Island; it was the larger ambition of undertaking “a sweeping economic development project.” FSSGEIS at 3-10. As noted above, there was nothing in the Deed or the Master Plan that required the Island even to become self-sufficient. But the new idea—Governors Island as a profit center for the City as a whole—was absurd, and altogether inconsistent with the binding instruments for the Island.

* * *

The Court of Appeal’s decision in *Avella v. City of New York* should be dispositive here. In that case, the City and the developer argued that the 1961 alienation of a portion of Flushing Meadow Park for the construction of Shea Stadium had opened the door—50 years later—to any projects that might result in “improvement of trade and commerce.” *Avella*, 29 N.Y.3d at 436; *see* N.Y.C. Admin. Code § 18–

118(b)(1). The developer sought approval to build a shopping mall and movie theater, “Willets West,” on the Shea Stadium site (now the Citi Field parking lot).

The City and the developer argued that the Public Trust Doctrine should not apply because the 1961 legislation authorized Willets West as well. The Court of Appeals rejected the argument, concluding that the legislation authorized only “the stadium and appurtenant facilities.” *Aveilla*, 29 N.Y.3d at 440. The Court stated:

[D]efendants' interpretation of the statute would permit the conversion of the parkland into a second Times Square or Wall Street, which is decidedly not evidenced in the statutory language. Moreover, had the legislature truly intended to authorize *any* use of the parkland, including private for-profit business enterprises, those portions of the statute describing the authorized uses would be rendered superfluous.

Id. at 436 (emphasis in original).

The Court acknowledged that remediating Willets Point was “a laudable goal” and that “the Willets West development would immensely benefit the people of New York City by transforming the area into a new, vibrant community.” Indeed, it noted that “the present plan might be the *only* means to accomplish that

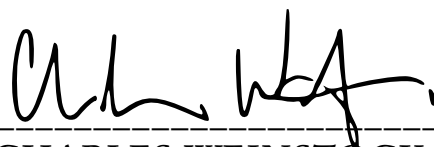
transformation.” *Id.* (emphasis added). Those considerations, however, “have no place in our consideration of whether the legislature granted authorization for the development of Willets West on land held in the public trust.” *Id.*

Laudable goals should have no greater place in the Court’s consideration of the current case. The Legislature never authorized the Upzoning, and the City’s interest in creating a self-sufficient Governors Island, however beneficial, cannot trump the restrictions imposed by the Deed and Master Plan.

CONCLUSION

For the reasons above, the Court should reverse the lower court decision and grant the Article 78 petition.

New York, New York
October 19, 2023

A handwritten signature in black ink, appearing to read 'C. Weinstock', is written over a horizontal dashed line.

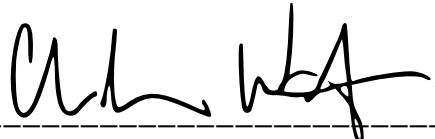
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PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a computer. The body text is double-spaced and set in 14-point Garamond typeface, and the footnotes are set in 12-point Garamond typeface. According to the computer, the total number of words, including the point headings and footnotes and excluding the case caption, table of contents, table of authorities, signature block, and these printing specifications, is 3,507, in compliance with 22 N.Y.C.R.R. § 1250.8(f)(2).

New York, New York
October 19, 2023

A handwritten signature in black ink, appearing to read 'Charles Weinstock', is written over a horizontal dashed line.

CHARLES WEINSTOCK

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Roger Manning

INDEX NO. 158809/2021

- v -

MOT. DATE

City Council Of The City Of New York et al

MOT. SEQ. NO. 1-3

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS DOC No(s). _____

Replying Affidavits

ECFS DOC No(s). _____

This Article 78 proceeding was initially commenced on September 25, 2021 while petitioner Roger Manning was self-represented. Petitioner seeks an order annulling the zoning amendments pertaining to Governors Island approved by the City Council of the City of New York ("City Council") on May 27, 2021 and granting a permanent injunction prohibiting any construction in violation of the deed covenants. Respondents are the City Council, Bill de Blasio, in his capacity as Mayor of the City of New York, the Governors Island Corporation d/b/a the Trust for Governors Island ("the Trust"), and the City Planning Commission ("CPC") (collectively "Respondents"). Respondents have answered the petition and oppose the relief sought.

In motion sequence 2, petitioner, now represented by counsel, moves pursuant to CPLR 3025[b] for leave to amend the petition. Respondents oppose the motion as well. Finally, in motion sequence 3, nonparty City Club of New York ("City Club") seeks to file a memorandum of law, submitted herewith, as amicus curiae in support of Petitioner's application. There is no opposition to the City Club's motion, which is therefore granted.

For the reasons that follow, petitioner's motion to amend is granted only to the extent that the court will consider petitioner's amplified claims in support of the original petition, the petition is denied and this proceeding is dismissed.

At the outset, the court will consider the motion to amend first. Petitioner initially claimed that the 2021 zoning amendments violated restrictive covenants in the deed transferring Governors Island from the federal government to the Trust. The original petitioner, along with new parties proposed to be joined as additional petitioners, have proposed filing an amended petition with fleshed-out allegations as well as a new claim challenging the 2021 zoning amendments' environmental review pursuant to

Dated: 12/8/22

 HON. LYNN R. KOTLER, J.S.C.

1. Check one:

☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. Check if appropriate:

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

State Environmental Quality Review Act ("SEQRA"). As respondents correctly point out, the new SEQRA claim was interposed approximately nine months after the challenged administrative action occurred, does not relate back to the original petition, and is thus untimely asserted. Moreover, petitioner's *pro se* status when this proceeding was commenced does not excuse or otherwise permit the court to overlook the four-month statute of limitations applicable to petitioner's claims (*Matter of Thorton v. New York City Hous. Auth.*, 100 AD3d 556, 557 [1st Dept 2012]). Accordingly, petitioner's motion to amend is granted only to the extent that the court will grant petitioner leave to amend his petition to the extent that petitioner challenges the Trust's compliance with the deed's restrictive covenants. The balance of the motion to amend is denied as untimely.

The court now turns to the petition as amplified by the amended petition. The relevant facts are not in dispute. In 2010, the Trust took ownership of Governors Island and agreed to follow certain covenants outlined in a deed prepared in 2003 transferring the Island from the U.S. Government to the National Trust for Historic Preservation (the "Deed"). Insofar as is relevant to this proceeding, the Deed requires 40 acres of parkland on the Island, 20 of which must be contiguous. Further, the Deed expressly provides:

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.

Also in 2010, the Trust developed a Park and Public Space Master Plan (the "Master Plan"). Before 2013, the entire Island was mapped as an R3-2 zoning district, which limited uses to residential or community facilities. In 2013, CPC approved a zoning map amendment and zoning text amendment establishing the Special Governors Island District ("SGID") on the North Island. The SGID allowed for the adaptive reuse of the North Island's historic structures and a wide range of commercial uses, such as offices, restaurants and shops, as well as some commercial uses with manufacturing components, consistent with the Deed's covenants, including art studios and the manufacture and sale of artisan goods.

In 2020, the Trust and the New York City Department of Small Business Services ("SBS") submitted two joint land use review applications to the Department of City Planning ("DCP") to amend the Island's zoning to allow for further development on the South Island. These applications, like those in 2013, underwent review through the ULURP review process. The first application sought two amendments to the zoning map: (1) to rezone the R3-2 district within the South Island to a C4-1 district and (2) to extend the SGID to the South Island. The second application sought to amend the zoning text to (1) establish the existing SGID as the North Island Subdistrict of the SGID, (2) establish a new South Island Subdistrict of the SGID; in alignment with the Master Plan, create distinct subareas for the park space (the "Open Space Subarea") and the Eastern and Western Development Zones (the "Eastern Subarea" and "Western Subarea", respectively); and further split the Development Zones into five building parcels (E-1, E-2, E-3, E-4 and W-1), and (3) establish new provisions of the SGID that modify the regulations of the new C4-1 zoning district. The Trust presented the plan to Community Board 1 ("CB1") in 2018 and 2020. CB1 held a public hearing on the application on November 2, 2020 at which the Trust and members of the public testified.

Thereafter, the Trust submitted a letter to CB1, dated December 22, 2020, which agreed to certain changes that CB1 had requested, such as the removal of certain use groups permitted in the Open Space Subarea, in particular use group 15 (amusements), and the reduction of maximum heights for open space buildings housing park amenities. Meanwhile, CB1 voted, with 26 in favor, 3 opposed, 7 abstentions, and 2 recusals, to recommend disapproval of the application unless various conditions, including those outlined in the Trust's letter, were satisfied, such as reductions in height, density and bulk,

and that the "permitted uses in the zoning text must align with the Governors Island 2003 Deed requirements. . .".

On January 20, 2021, Manhattan Borough President Gale Brewer held a public hearing where the Trust and members of the public gave testimony on the ULURP Applications. On January 27, 2021, Borough President Brewer recommended disapproval of the applications unless the Trust met a number of conditions, including height reductions and use restrictions in line with the comments of CB1.

On February 3, 2021, CPC held a public hearing on the applications. Several groups testified in favor of the proposed development, while petitioner and others, including CB1, the Manhattan Borough President, and representatives of other community groups, expressed opposition to the application, objecting largely to the scale of potential development.

On February 26, 2021, in response to comments raised during the public review process, the Trust revised its ULURP applications. The Trust submitted amendments further limiting certain uses within the South Island's designated open spaces and expanded the width of the Eastern Esplanade. It also lowered the permitted maximum building height and maximum number of parking spaces permitted within the Development Zones and reduced the permitted heights of any buildings or portions of buildings near the Governors Island Historic District or public open space.

On March 17, 2021, the CPC approved the applications. In its report, the CPC reasoned:

The Commission supports the goals outlined in the 2010 Master Plan that envisioned a substantial public open area on the South Island flanked by two development areas. New York City is full of examples of successful and exciting interplays between the urban and natural environments, development and recreation areas, and active and passive activities. One need only look as far as 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. The Commission notes that Governors Island today contains this very juxtaposition on the North Island, where public green spaces are threaded around historic structures, creating the very character that so many find special about the island. The actions sought by the Trust will continue this pattern, replacing abandoned Coast Guard buildings and fenced off open lots with new developments that will be enlivened by researchers, educators, and students, side by side with major open spaces, public plazas, and intimate circulation pathways. Together, the proposed actions will allow the Trust to find parties interested in developing a significant new series of institutional, educational, and commercial buildings that will further its vision of creating a global center for climate and resiliency research, study, and education. This concept of a Center for Climate Solutions will center New York City in the global effort to address the causes and effects of climate change, perhaps the greatest crisis and challenge of our time and for generations to come. Further, the zoning actions sought by the Trust, after working in collaboration with DCP staff over several years, contain thoughtful zoning and urban design controls that will ensure that new buildings within the development areas of the South Island will complement the existing public open spaces and Governors Island Historic District, while creating exciting new areas of the island that will bring year-round life and activity to areas that are now underutilized and largely closed off to public access.

On April 5, 2021, the City Council Subcommittee on Zoning and Franchises held a public hearing on the applications. Following the Committee's hearing, the Trust, in consultation with the Council Committee on Land Use, again submitted proposed modifications to the rezoning to address issues raised.

On May 27, 2021, the New York City Council adopted two resolutions. The first resolution approved with the Committee and Trust's modifications, CPC's approval of the Zoning Text amendment, with 45 in favor, 2 opposed, 1 abstentions, and 1 absent. The second resolution approved the decision of the CPC to approve the Zoning Map amendment, with 44 in favor, 3 opposed, 1 abstentions, and 1 absent.

Thus the challenged zoning amendments, in their final form, create a new resource called the "Open Space Subarea". Respondents assert that this new resource was created to limit the permitted uses in the Open Space Subarea to be more in line with those found in other parks in the region. Respondents further assert that the zoning amendments will also allow the Trust "to create a vibrant, mixed-use, 24-hour regional destination anchored by a cross-disciplinary academic Center for Climate Solutions [] focused on urban climate change mitigation and to create financial sustainability for the Island that will support its public programs, the park, and other public open spaces well into the future." The Trust plans to continue phased redevelopment of the Island and expand the existing South Island Park from 43-acres to approximately 46-acres and widen the existing esplanade by over 2-acres. It will also add additional public space across the Development Zones by creating a public circulation network containing primary and secondary pedestrian walkways that connect the perimeter esplanade to the South Island Park.

Petitioner Roger Manning is a musician, a part time web developer, and a cofounder of a community group called Metro Area Governors Island Coalition which he claims "advocates preserving the unique green open space quality of Governors Island for the benefit of everyday New Yorkers." Petitioner claims that the 2021 zoning amendments violate restrictive covenants in Governors Island's deed because the zoning amendments permit development that goes beyond the permitted uses of the Island outlined in the Deed and fail to create and protect the Deed's required 40-acres of parkland. The actual issue animating Petitioner's claim is his opposition to the Governors Island phased redevelopment plan, but since Petitioner is not a party to the Deed and therefore lacks standing to challenge compliance with the Deed, he has instead brought a claim challenging the zoning amendments affecting Governors Island.

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. Nor does the court find the rezoning irrational in light of the Deed and the Governors Island Master Plan. While respondents and amicus lament changes to the natural qualities of the island, respondents have weighed those considerations and opted to prioritize enhancing public enjoyment and access. Nor does the court find that the proposed rezoning necessarily conflicts with the Deed's requirement to ensure the protection and preservation of the natural, cultural and historic qualities of Governors Island. The Deed does not require Governor's Island to remain static. It is not for the court or petitioners to supplant respondents' determinations simply because a 360-degree panorama view of the harbor will no longer be available from the 82-foot high hill in the southern park area.

Finally, petitioners have failed to show that the rezoning violates the public trust doctrine. "Parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes" (*Avella v. City of New York*, 29 NY3d 426 [2017] citing *Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623 [2001]). The rezoning will allow "buildings or other structures containing permitted uses, up to a height of ... 25 feet," occupying as much as 20 percent of the Open Space Subarea. These buildings will also be permitted to use cellars for any use otherwise permitted in the southern subdistrict. While these uses are not insignificant, the court cannot say they violate the public trust doctrine at this juncture. Compared to cases where public trust claims have succeeded, there is no actual project to which petitioners have raised an objection. Simply permitting buildings to be constructed on parkland with cellar space does not necessarily constitute a public trust violation (see *i.e. Union Square Park Community Coalition v. City of New York*, 22 NY3d 648 [2014]). Thus, respondents are correct that this claim is not ripe for adjudication at this time.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence 3 is granted without opposition; and it is further

ORDERED that motion sequence 2 is granted to the extent that the court will grant petitioner leave to amend his petition to the extent that petitioner challenges the Trust's compliance with the deed's restrictive covenants. The balance of the motion to amend is denied as untimely; and it is further

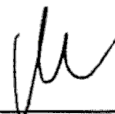
ORDERED that the petition is denied on the merits, this proceeding is dismissed, and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

12/8/22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.

EXHIBIT C

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

ROGER MANNING;

Petitioner,

-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.

Index No. 158809/2021

NOTICE OF APPEAL

PLEASE TAKE NOTICE, that the Petitioner Roger Manning hereby
appeals to the Appellate Division, First Judicial Department, from the Decision and
Order of the Supreme Court of the State of New York, New York County (Hon.
Lynn R. Kotler), dated December 8, 2022, and entered in the Office of the New
York County Clerk on December 9, 2022 (the “Order”), as to which Notice of
Entry was served December 9, 2022. This appeal is taken from each and every
part of said Order, as well as from the whole thereof.

DATED: Buffalo, New York
January 5, 2023

Respectfully submitted,



By:

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Attorneys for Petitioners
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New York Law Department
100 Church Street, Room 6-141
New York, New York 10007
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Attorneys for City Respondents



NYSCEF Confirmation Notice

New York County Supreme Court



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158809/2021

Roger Manning v. City Council Of The City Of New York et al
Assigned Judge: Lynn R. Kotler

Documents Received on 01/06/2023 01:32 PM

Doc #	Document Type
89	NOTICE OF APPEAL

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1109 Delaware Ave, Buffalo, NY 14209

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An email regarding this filing has been sent to the following on 01/06/2023 01:32 PM:

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Hon. Milton A. Tingling, New York County Clerk and Clerk of the Supreme Court

Phone: 646-386-5956 Website: http://www.nycourts.gov/courts/1jd/supctmanh/county_clerk_operations.shtml

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NEW YORK STATE SUPREME COURT
APPELLATE DIVISION: FIRST DEPARTMENT

ROGER MANNING,

Petitioner-Appellant,

- against -

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

Respondents-Respondents.

Appellate Division
Case No. 2023-03112

**AFFIRMATION OF
SERVICE**

CHARLES WEINSTOCK, an attorney admitted to practice
law in the State of New York, affirms under penalty of perjury:

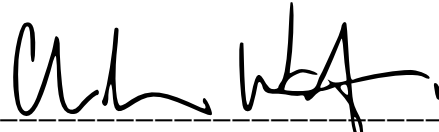
I represent Christopher Marte, the City Club of New York,
the Metro Area Governors Island Coalition, East River Park Action,
New York City Friends of Clearwater, the South Street Seaport
Coalition, Friends & Residents of Greater Gowanus, the Bowery
Alliance of Neighbors, the Western Queens Community Land Trust,
Kent Barwick, and Tom Fox (collectively, the “Proposed Amici”).
On October 3, 2023, John Low-Beer, attorney for the Petitioner-

Appellant, gave his consent for me to serve by email the papers for the Proposed Amici's motion to file an *amicus curiae* brief in this case. On October 4, 2023, Jesse A. Townsend, attorney for the Respondents-Respondents, gave me his consent as well.

On October 19, 2023, I emailed the following papers to Mr. Low-Beer at jlowbeer@yahoo and to Mr. Townsend at jtownsen@law.nyc.gov:

1. Notice of Motion, dated October 19, 2023
2. Charles Weinstock Affirmation, sworn to October 19, 2023
3. Proposed *Amicus Curiae* Brief, dated October 19, 2023
4. Decision and Order, dated December 8, 2023
5. Notice of Appeal, dated January 5, 2023.

New York, New York
October 19, 2023



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