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New York Supreme Court
Appellate Division: First Department

ROGER MANNING,

Petitioner-Appellant,

against

Case No. 2023-03112

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-Appellants,

REPLY BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

The City's opposition is firmly focused on attacking an argument that Petitioner never made—that "zoning and contractual covenants [must] be identical," City Br. at 2—while failing to address the argument that Petitioner does make: that a rezoning that breaches a municipality's contractual obligation is arbitrary and capricious. *Matter of Wa-Wa-Yanda v. Dickerson*, 18 A.D.2d 251 (2d Dep't 1963).[1]

In line one of its Brief in Opposition, the City admits that it has "assumed the obligation to preserve and redevelop [Governors Island] according to the restrictive covenants in the deed." The City's subsequent arguments in avoidance of that obligation are disingenuous. The City argues (1) that the zoning limits industry and manufacturing when it does not; (2) that it has dedicated 43 acres as public parkland in perpetuity when it has not; (3) that the zoning limits the uses of the Open Space Subareas to uses consistent with dedicated parkland when it does not; and (4) that the Governors Island Trust would block construction and uses violative of the Deed Restrictions even though it proposed the zoning that allows

[1] The City also spends pages on another undisputed point: that the zoning allows uses that the Deed also allows. *See, e.g.*, City Br. at 26 ("the permitted uses of the Eastern and Western Subareas of the South Island . . . fit naturally within the restrictive covenants' permitted uses"), *id.* at 28 (same); *id.* at 33 (same).

Most of the City's arguments in opposition were anticipated and addressed in Petitioner-Appellant's Brief ("Pet. Br.").

them and now defends them as not violative. The City's argument highlights an additional violation, too: the zoning allows all residential uses, including all kinds of permanent housing open to anyone, when the Deed Restrictions allow only narrowly specified residential uses.

The zoning itself states that the first General Purpose of the Special Governors Island District is to "to promote public use and enjoyment of the Island as a recreational destination that draws upon its location in New York Harbor with singular view and natural beauty." ZR 134-00 (a). One cannot just walk to Governors Island as one can to Central Park, or the Highline. It is a trip, albeit a short one. If it is to be recreational destination, as the zoning's first General Purpose states, it must be worth the effort. It must be different from the City. It must remain a place where, as the Master Plan said, one can "leave the city without leaving," a place of "views, wind, tides, currents, horizon, e s c a p e" (R2758) – or as the 2011 FGEIS said, "An Island Like No Other," with "vast water, big sky," that "allows visitors to leave the big city behind" (R291-292).

Instead, the zoning implements the Mayor's 2016 vision of Governors Island as "the site of a sweeping economic development project" (SR109), "a project to support [the] city's economic recovery" by "creat[ing] 8K jobs and an estimated $1 billion of fiscal impact for the City, all on Governors Island alone" (R910).

Because its provisions are contrary to the Deed Restrictions and to its own statement of General Purposes, it should be annulled.

ARGUMENT

I. IT WAS IRRATIONAL AND UNLAWFUL FOR THE CITY TO ENACT ZONING THAT BREACHES THE CITY'S OWN CONTRACTUAL OBLIGATION

In opposition to Petitioner's argument that it was arbitrary and capricious for the City to enact zoning that violates Deed Restrictions that bind it, the City argues that the conflicts between the zoning and the covenants do not matter, because "[t]hough the restrictive covenants bind the Trust's use of Governors Island, they do so as a matter of contract. Therefore, their requirements are still "separate and distinct" from the zoning provisions." City Br. at 21 (citing *Friends of Shawangunks v. Knowlton*, 64 N.Y.2d 387 392 (1985)).

The law is clear, however, that a rezoning that breaches the City's contractual obligations is arbitrary and capricious. This case is on all fours with *Matter of Wa-Wa-Yanda v. Dickerson*, 18 A.D.2d 251. The Town of Islip there had leased its property to a private party for a hotel, a yacht basin, and "for the sale of gasoline" for a term of 30 years. *Id.* at 252. A few years later, the Town amended its Zoning Ordinance to prohibit the gasoline station use. After a thorough analysis, the Second Department annulled the amendment as "unreasonable, arbitrary and

capricious," holding that the Town could not impair "a subsisting contract by a municipal ordinance." *Id*. at 254.

> [T]he [federal] constitutional safeguard against the impairment of contracts operates to bar 'a state from unilaterally abrogating contracts which it has entered into.' (*Jones v. Burns*, 138 Mont. 268, 292). This latter principle is applicable 'particularly with respect to contracts previously entered into by the state in its proprietary capacity.'. . . Accordingly, we hold that the town, by reason of the impairment of contract clause in the Federal Constitution, is barred from abrogating, through the medium of a zoning amendment which it adopted in its governmental function, a prior subsisting lease which it made in its proprietary character.

Id. at 256, 258 (emphasis added); *see also, e.g., 19th St. Assoc. v. State*, 79 N.Y.2d 234 (1992) (statute that violated contractual obligations of a consent decree was an unconstitutional impairment of contract rights).

Friends of Shawangunks, relied on by the Supreme Court and the City, is not to the contrary. The Court of Appeals there held that "the issuance of a permit for a use allowed by a zoning ordinance may not be denied because the proposed use would be in violation of a restrictive covenant." 64 N.Y.2d at 392. Petitioner does not contest this rule. But as *Wa-Wa-Yanda* shows, a different rule applies where the government is acting inconsistently with, or in breach of, its own contractual obligations. That is the case here, where the very first line of the City's Brief states: "When state and local authorities obtained Governors Island, they assumed the obligation to preserve and redevelop it according to the restrictive covenants in its deed."

II. THE CITY'S CONTENTION THAT THE UPZONING "DOES NOT CONFLICT WITH THE RESTRICTIVE COVENANTS" IS ABSURD

The City's contention that "the zoning changes do not conflict with the restrictive covenants" is absurd.

A. The Amended Zoning's Allowance of Industrial and Manufacturing Uses Throughout the Southern Subdistrict Breaches the Covenant's Absolute Prohibition of Such Uses

The City argues that although the Deed Restrictions prohibit "industrial or manufacturing uses," Deed § 2.4(b), those words are undefined in the Deed and "potentially ambiguous," and deference must be given to the Corporation Counsel's interpretation of those terms in this litigation.

None of the cases cited by the City support its argument that it is owed deference in the interpretation of a restrictive covenant that binds it. In construing the Deed, the City is in the position of the regulated, not the regulator. Moreover, there is nothing unclear about the Deed Restrictions. "When a contract is clear in and of itself, . . . interpretation of the contract is a question of law." *Bethlehem Steel Co. v Turner Constr. Co.*, 2 N.Y.2d 456, 460 (1957). "Common words are to be given their commonly understood meaning unless another meaning is obviously intended." *Steinbeck v Gerosa*, 4 N.Y.2d 302, 308 (1958) (citing McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 232). That includes the words "industrial" and "manufacturing" as used in the Deed. The fact that Penal Law § 140.00 "define[s]

certain vehicles as 'buildings,'" City Br. at 25 (citing *People v Minicone,* 66 N.Y.2d 995, 996-997 (1985)), is irrelevant.

The City's interpretation requires rewriting both the Deed and the amended zoning to add exceptions and limitations that are not found in either. First, the City would rewrite the Deed's absolute prohibition on "industrial or manufacturing uses" to add an exception for industrial or manufacturing uses when they are "in connection with an expressly permitted . . . use." City Br. at 30 (emphasis added). Second, the City would rewrite the amended zoning (ZR 34-111 and ZR 34-112) to add a provision limiting the industrial and manufacturing uses to only those "in connection with an expressly permitted . . . use" when it contains no such limit—or indeed any limitation whatsoever, *e.g.*, with respect to size. The City provides no support for such a rewriting of both documents.[2]

[2] Again mischaracterizing Petitioner's argument, the City states that Petitioner "incorrectly claims that the entire list of manufacturing or industrial activities in the Zoning Resolution's Use Groups 17 and 18 have been permitted in Governors Island." Not so. Petitioner said only that "ZR 134-111 expressly permits uses" in those Use Groups, not that it permits all uses in those Use Groups. However, ZR 134-111 does permit all of the manufacturing uses listed in Use Group 11 (ZR 32-20) in the Southern Subdistrict. The industrial and manufacturing uses allowed in the Southern Subdistrict pursuant to ZR 34-111 are:

Use Group 18, ZR 42-15—manufacture of alcoholic beverages and breweries, without limitation on size;

Use Group 17, ZR 42-14—research, experimental or testing laboratories; 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 repaid of boats of less than 200 feet in length;

Use Group 16, ZR 32-25—carpentry, custom woodworking or custom furniture making shops; warehouses;

B. The Amended Zoning's Allowance of All Residential Uses Breaches the Covenant's Prohibition of All But Specified Residential Uses

The weakness of the City's argument that exceptions should be read into the Deed's prohibition of industrial and manufacturing uses is highlighted by the fact that the Deed does make specific exceptions to another prohibition: the prohibition on residential housing. The Deed prohibits "Residential uses, except as otherwise expressly permitted herein." Deed § 2.4 (a) (emphasis added). There are four exceptions: (1) "student and faculty housing" in connection with the Educational Uses required by Deed § 2.3 (ii) (emphasis added); (2) "[h]ousing for caretakers or managers of Governors Island and police and fire personnel and facilities thereat," *id.* § 2.3 (b)(ii); (3) "[s]hort-term or extended-stay accommodations," *id.* § 2.3 (b)(iii); and (4) "[h]ospitality uses, including hotels," *id.* § 2.3 (b)(v).

The first exception demonstrates that where the Deed's drafters wanted to allow an otherwise prohibited use when it is in connection with a required or permitted use, they knew how to do so. The fact that the Deed specifies that the student and faculty housing is allowed in connection with the required Educational

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Group 11, ZR 32-20—art needlework, hand weaving or tapestries; books, bookbinding or tooling; ceramic products, custom manufacturing; clothing, custom manufacturing or altering for retail; hair products, custom manufacturing; jewelry manufacturing from precious metals; medical, dental, drafting instruments, optical goods, or similar precision instruments; musical instruments, except pianos and organs; orthopedic or medical appliances, custom manufacturing; printing, custom; watchmaking.

Uses strengthens the conclusion that the Deed did not allow industrial and manufacturing uses in connection with any permitted activities.

It should be noted, too, that the amended zoning allows any and all conceivable types of residential use, and in so doing breaches the Deed's prohibition on residential housing. Section 34-111 of the amended zoning allows all uses in Use Groups 1 through 4. Use Group 1 "consists of single-family detached residences." ZR 22-11. "Use Group 2 consists of all other types of residences." ZR 22-12.

Had the City intended to limit the allowed residential uses on Governors Island to be consistent with the Deed, it could easily have done so. Use Group 3 allows uses that are a near-perfect fit with the Deed's prohibition and its exceptions, comprising community facilities that "may appropriately be located in residential areas to serve educational needs or to provide other essential services for the residents," including "[c]ollege or student dormitories," and "[p]hilanthropic or non-profit institutions with sleeping accommodations." ZR 22-13 (1) & 22-13 A. Use Group 5 "consists of hotels used primarily for transient occupancy." ZR 32-14. The City could have specified additional residential uses consistent with the Deed. It did not.

Instead, in breach of the Deed's prohibition on all but specified residential uses, it chose to allow all residential uses, without limitation. This is yet another reason why the amended zoning must be annulled.

C. The Amended Zoning Is Blatantly in Conflict With the Deed's Requirement that 40 Acres Be Dedicated as Parkland in Perpetuity

Petitioner's Brief described the ways in which the amended zoning is in conflict with the Deed's requirement that 40 acres "shall be dedicated and used as [public parkland] in perpetuity." Deed § 2.3 (a):

- failing to dedicate any acreage as parkland and re-mapping the entirety of the South Island, including all of the supposed parkland, with C4-1 commercial zoning;
- allowing "private parks," without limitation" (ZR 134-112(a));
- allowing "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));
- allowing cellars underneath the entirety of the Open Space Subarea, to be used for <u>any</u> "use otherwise permitted in the Southern Subdistrict," including large-scale commercial, manufacturing and industrial uses (ZR 134-112(a)).

Pet. Br. at 36-44.

The City's response is disingenuous and at odds with the facts. Neither in Ms. Friedlander's Affirmation nor anywhere else does the City support its suggestion that some part of the Open Space Subarea has been expressly dedicated as parkland by a mapping action or impliedly dedicated so as to meet the high bar of *Glick v. Harvey*, 25 N.Y.3d 1175, 1180 (2015) (requiring that "[t]he acts and declarations of the land owner indicating the intent to dedicate his land to the public use [be] unmistakable in their purpose and decisive in their character to have the

effect of a dedication") (citations omitted). *See* Pet. Br. at 37-38 (describing express and implied dedication).

As Petitioner previously stated, designated parkland is not zoned at all. Pet. Br. at 37 (citing ZR 11-13 and the City's CEQR Technical Manual). Instead of addressing this point, the City simply repeats its misleading assertions that "other parks in the City, such as Brooklyn Bridge Park, retain zoning designations that do not impact their status as parkland." City Br. at 27-28; *see also id.* at 31. However, as Petitioner previously detailed, only the State-owned portions of Brooklyn Bridge Park are "afforded the protections of state law relating to non-alienation of State park lands." Pet. Br. at 41 n.24. The City-owned portions are not so protected. In fact, residential, commercial and retail buildings have been built in Brooklyn Bridge Park.

The City's statements regarding its dedication of parkland are equivocal. Instead of stating that 40 acres of the Island are dedicated parkland, it says "respondents to not dispute that more than 40 acres of the island is dedicated parkland." City Br. at 34. This is blatantly untrue. *See* Pet. Br. at 36- 41 (arguing that the City falsely claimed that it had dedicated parkland when it has not).

To rebut Petitioner's contention that the City has heretofore scrupulously avoided applying the term "dedicated parkland" to Governors Island, the City states that "the Trust has described [the purported park] as parkland for more than a decade, including in presentations to City Council," and "the Trust has

repeatedly said that the space is meant to be a park." City Br at 31, 34. These statements cite to R49-50,[3] the Affirmation of Trust General Counsel Marni Friedlander. Ms. Friedlander there uses the word "park" as well as the term "Open Space Subarea," but she makes no claim regarding dedication. Her only claims in that regard are those at R40 and R51, which Petitioner previously rebutted. *See* Pet. Mem. at 38.[4] Not one of the references in the City's brief leads to a statement by the Trust that the 43 acres are "dedicated parkland" or "public parkland."

The City points to "the deed's own inclusion of 'open space' alongside parkland as a permitted use." City Br. at 32. True, the Deed allows Additional Public Benefit Uses, including "Open space, in addition to a large public park." Deed § 2.3 (a)(iii)(A) (emphasis added) (R94). But this only strengthens Petitioner's point that designated public parkland is distinct from "open space."

In short, the City has not dedicated any part of the Open Space Subarea as public parkland, and it is disingenuous of it to suggest that it has. Therefore, its purportedly reassuring suggestion that any future construction or use in violation of the public trust doctrine could be enjoined by a lawsuit brought under that theory is false.

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[3] The City's Brief, at 31, also cites to R916. That page merely contains a map of Governors Island with a notation "43-acre park." It does not suggest that this is dedicated parkland.

[4] It should be noted that the Master Plan by which Ms. Friedman claims that parkland was dedicated not only says no such thing, but was published while a State entity, GIPEC, still owned the Island.

False, too, is the City's statement that approved uses in the Open Space Subarea are limited "to public or private parks, playgrounds, and supporting uses such as open-air theaters, food options, and restrooms." City Br. at 27; *id.* at 32 (same); *see also* Friedlander Aff. ¶ 43 (R52) ("a non-park use would not be permitted under the 43-acre park"). The amended zoning, at ZR 34-112 (a), plainly allows industrial and manufacturing uses in cellars in the entirety of the Open Space Subarea, including the purported parkland. That section provides: "Uses otherwise permitted in the Southern Subdistrict pursuant to Section 134-111 (Permitted uses in subdistricts) may be located in cellars within the Open Space Subarea." Section 134-111, in turn, cross-references a long list of manufacturing and industrial uses. Another use obviously inconsistent with designated public parkland is "private parks," allowed by Section 134-112. In addition, there is the very large amount of construction, inconsistent with designated parkland, allowed pursuant to ZR 134-24(b)(5).

However, the City argues, the provisions regarding construction, industrial and manufacturing uses, and private parks within the Open Space Subarea are not inconsistent with 43 acres of that Subarea being parkland because those provisions can be read as applying only to the seven acres of the Open Space Subarea that are not purported parkland.[5] If the City had meant to make those provisions

[5] The Open Space Subarea is "approximately 50 acres in total." City Br. at 33.

applicable only to those seven acres, it could have said so in the amended zoning. Indeed, that is precisely what Petitioner contends: if the 43 acres were truly parkland, they would be unzoned. Instead, the City chose to allow industrial and manufacturing uses and private parks within the entirety of the Open Space Subarea, and to allow that 20 percent of its acreage be built on. That is inconsistent with this acreage being designated parkland, and it breaches the Deed Restrictions.

III. THE CITY'S CONTENTIONS REGARDING STANDING AND ENFORCEMENT ARE IRRELEVANT AND ILLOGICAL

Petitioner's challenge is to the zoning on its face. The City does not dispute that Petitioner has standing pursuant to Article 78 to bring this challenge. That there is as yet no actual construction or use that contravenes the Deed Restrictions is irrelevant to the question of whether the City's enacting of the amended zoning was irrational, arbitrary and capricious. Future permit applications will not involve any discretionary acts that could be challenged pursuant to Article 78. Nor does the public trust doctrine provide a cause of action for those claims involving the Open Space Subarea, because none of it is dedicated parkland. This is Petitioner's only vehicle.

The City would not have written and approved this amended zoning if it did not contemplate and expect and welcome construction and uses that would fulfill what the City regards as the zoning's promise. Clearly, too, the City does not believe that the National Park Service will step in to block its violations of the Deed

Restrictions, else it would not have enacted them. Yet the City seeks to reassure this Court that if it denies the Petition, the Deed Restrictions will not be a dead letter, because they will be enforced by the Governors Island Trust as landlord, City Br. 33, or by the National Park Service, City Br. at 23.

The suggestion that the Trust can be trusted to enforce the Deed Restrictions defies logic. It is the Trust, after all, that proposed the amended zoning and shepherded it through the approval process, and that now takes the position, contrary to the plain text of the zoning and the Deed, that the two are consistent with one another. Having proposed the amended zoning, and having taken the position that the zoning is consistent with the Restrictions, the Trust will not block those same uses and construction on the ground that they violate the Deed Restrictions.

As to the National Park Service, it is not its responsibility to enforce the Deed Restrictions. Its jurisdiction is limited to the Monument Property, which is not at issue here. The Trust proposes to conscript a federal agency without jurisdiction – and the Department of Justice, which would have to bring the case – to absolve the Trust of its responsibilities. A Lexis search reveals that the National Park Service has never been a plaintiff in any lawsuit of this nature anywhere.

The City implies that the Deed's provision that only the National Park Service can enforce the Restrictions against the Trust indicates a particular intent to exclude third parties. City Br. at 7-9, 19. That is not the case. This provision only

restates the strict common law limits on who can enforce a covenant running with the land. Although the requirements for covenants to be enforceable at law differ somewhat from the requirements in equity, both law and equity limit enforcement to parties in privity with the burdened party and/or having an interest in land derived from a common grantor. *See, e.g.*, *Malley v. Hanna*, 101 A.D.2d 1019 (4th Dep't 1984) (covenant enforceable in equity); *id.*, 65 N.Y.2d 289, 291 (1985) (covenant enforceable at law); 9 POWELL ON REAL PROPERTY, Ch. 60; 11 WARREN'S WEED NEW YORK REAL PROPERTY, Ch. 212.

Under the common law of covenants, the National Park Service, which is in privity with the Trust, is the only party that could have a right to enforce the Deed Restrictions.[6] Making this right explicit in the Deed provides the basis for Deed § 2.5 (Change in Uses), the mechanism that allows the Trust to apply to the National Park Service to amend the Deed Restrictions to meet changing needs.

In short, as a practical matter, this is the only chance for judicial review of the amended zoning and uses and construction consistent with that zoning that violate the Deed Restrictions.

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[6] The federal government's concern to ensure that the covenants would run with the land is evidenced by the fact that when it transferred most of Governors Island to a State entity, GIPEC, it first transferred the portion that it would retain, *i.e.*, the Monument Property, to a private entity, the National Trust for Historic Preservation, and then back to a United States federal agency, the National Park Service. These transfers created the horizontal privity that some courts have held necessary for a covenant to be enforceable at law, in addition to the vertical privity as described in *Malley*, 65 N.Y.2d at 291. For a discussion of the different kinds of privity, *see* 11 WARREN'S WEED NEW YORK REAL PROPERTY § 121.09.

CONCLUSION

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

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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 4,447.