

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

PRESENT: HON. MARILYN SHAFER, JSC

PART 8

Index Number : 103373/2008

CITIZENS EMERGENCY

vs

TIERNEY, RPBERT B.

Sequence Number : 001

ARTICLE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

103373

NOV 21 2008

103373

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

granted to attorney
FILED

NOV 21 2008

COUNTY CLERK'S OFFICE
NEW YORK

NYS SUPREME COURT
RECEIVED
NOV 17 2008
MOTION SUPPORT OFFICE

103373

Dated: 11/14/08

MARILYN SHAFER

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

In the matter of the application of

CITIZENS EMERGENCY COMMITTEE
TO PRESERVE PRESERVATION,

Petitioner,

INDEX NO. 103373/08

MOTION SEQ. NO. 001

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules,

-against-

ROBERT B. TIERNEY, Chair of the New York City
Landmarks Preservation Commission, and KATE
DALY, Executive Director of the New York City
Landmarks Preservation Commission,

Respondent.

FILED
NOV 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 7, were read on this petition:

	<u>PAPERS NUMBERED</u>
Notice of Petition, Verified Petition – Exhibits	1,2
Memorandum of Law	3
Verified Answer – Affidavit – Exhibits	4,5
Memorandum of Law	6
Reply Memorandum of Law	7 ¹

Cross-Motion: Yes No

¹ Respondent submitted an unauthorized sur-reply which has not been considered.

Upon the foregoing papers, the petition is granted.

Introduction

This is an Article 78 proceeding for prohibition and mandamus regarding the review and designation of landmarked buildings and districts by the Landmarks Preservation Commission.

Background

The "Landmarks Preservation and Historic District" law (Landmarks Law) was enacted, *inter alia*, to protect and perpetuate "the city's cultural, social, economic, political and architectural history" by designating improvements and landscape features having a special character or special historical or aesthetic interest as historic districts and landmarks. (*Admin. Code of City of NY*, § 25-301(b)) The eleven-member LPC is appointed by the Mayor for three-year terms and must include at least three architects, one historian, one realtor, one city planner or landscape architect. There must be at least one resident of each borough and ten of the eleven positions are unsalaried. (*NY City Charter*, § 3020(1))

A landmark is defined in the statute as "[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation" (*Admin. Code of the City of NY*, § 25-302(n)) If, after an investigation of the premises or area under consideration, the LPC is disposed to decree landmark status, it must conduct a public hearing. (*Id.*, § 25-303(b)) The designation of a landmark by the LPC is subject to review by the City Council, who may modify or disprove the designation. (*Id.*, § 25-303(g)(2)) LPC action taken pursuant to its authority under the Landmarks Law is considered to be administrative.

The LPC has several primary functions: designating landmarks; issuing work permits for the over 25,000 buildings within its jurisdiction; and enforcing permit violations. It employs 65 full time and three part-time staff members, including 16 professionals who *inter alia* research potential landmarks, draft detailed designation reports, and assist in the evaluation of Requests for Evaluation (RFE) submitted by “the public, property owners elected officials, advocacy groups, and other interested parties.”

New York has lost significant landmarks, including the Metropolitan Opera House and the original Pennsylvania Station. LPC jurisdiction over a building attaches only after it votes to designate that building. Any work for which the Department of Buildings has issued a permit prior to designation, including demolition, may proceed after designation.

Petitioner, Citizen’s Emergency Committee to Preserve Preservation (CEPP), is a voluntary unincorporated public education and citizens advocacy association dedicated to supporting the purposes and objectives of the LPC. It consists of residents and taxpayers of the City and State of New York, described as “committed preservationists,” including a former member of the LPC; the author of a recently published book, Preserving New York; the director of a graduate program in historic preservation; and the executive director of a leading preservation advocacy organization. The petition alleges that the LPC’s designation process has become statutorily and constitutionally flawed. In derogation of statutory specification: (1) the Chairman has usurped the power of the full LPC and acts as the sole advancer of properties²; (2) the LPC has unreasonably delayed submission of designation proposals; and (3) the LPC has

² In its website, the LPC states: “Ultimately the decision whether to bring the property forward to the full commission for review is made by the Chair.” (www.nyc.gov/html/lpc)

failed to establish and consistently apply landmark designation standards. Negative landmark designations are made in secret and without explanation by the Chairman only, an abuse of power and a violation of the statute which has prevented or delayed consideration of many potential landmark properties.

The petition seeks both general and specific relief. Generally, it seeks to make the LPC's procedures more transparent and fair by: (1) insuring that every disposition is made on the record; (2) publishing clear standards for designation; (3) presenting all properties for which an RFE is received to the full Commission; and (4) presenting negative as well as positive recommendations to the Commission.

Specifically, the petition requests this Court to direct that 6 proposed properties or districts whose RFE's have been pending for years, be presented for consideration:

1. "Fish building", 1150 Grand Concourse, Bronx. RFE pending 35 months;
2. John Street/Maiden Lane Historic District, Manhattan. RFE pending 52 months;
3. Park Slope Historic District Expansion, Brooklyn. RFE pending 79 months;
4. Fort Greene/BAM Historic District Expansion. RFE pending 77 months;
5. Pacific Street Branch Library, Brooklyn. RFE pending 51 months; and
6. St. Saviour's Church, Queens. RFE pending 69 months.

The LPC argues, in opposition, that the petitioner lacks standing to bring this proceeding, since any injury suffered by its members is the same as that suffered by any member of the public. It argues that the petition fails to state a cause of action because the statute vests the LPC with exclusive discretion to determine which building or groups of buildings should be considered for designation. Finally, the LPC argues, its procedures are fair. An RFE

Committee, consisting of the Chairman, Executive Director, Director of Research, Director of External affairs and Special Assistant to the Executive Director meets every two to four weeks to evaluate each RFE and determine which meet the threshold criteria set forth in the Landmarks Law. If the Committee determines that a property merits further consideration, a photograph, statement of significance and the Committee's recommendation is sent to each Commissioner. After considering comments from the Commissioners and determining how it fits into the agency's priorities, the Chair decides whether to recommend that the full Commission calendar a public hearing to formally consider the property. For the full commission to consider every RFE would create an unworkable burden.

With respect to the specific relief sought, the LPC concedes that 5 of the properties are meritorious:

1. "Fish building", 1150 Grand Concourse, Bronx, has been under review, since 2001, as part of a potential "Grand Concourse Historic District;"

2. John Street/Maiden Lane Historic District, Manhattan was surveyed in the 1990's and a portion of the area has the potential to be a historic district. It is not an LPC priority because the LPC's current emphasis is devoted to designation in boroughs other than Manhattan;³

3. Park Slope Historic District Expansion, Brooklyn and 4. Fort Greene/BAM Historic District Expansion was requested in 2001. It is not an LPC priority because approximately half the buildings designated as landmarks in the City are located in Brooklyn historic districts and LPC is pushing forward communities in other sections of Brooklyn;

³ The Court notes that a review of the LPC website on Nov. 6, 2008 revealed that most of the currently designated landmarks were located in Manhattan.

5. Pacific Street Branch Library, Brooklyn, was deemed to be of merit in 2004. The Commission staff has “reached out” to the agency which occupies the City-owned building to “allay concerns about how designation might impact the provision of mandated public services”; and

6. St. Saviour’s Church, Queens, was considered and rejected in 1995 and in 2006.

Discussion

The law is clear that in matters of “great public interest” a citizen may maintain a mandamus proceeding to compel a public officer to do his or her duty. (*Hebel v West*, 25 AD3d 172 [3d Dept 2005]) An article 78 proceeding in the nature of mandamus is an appropriate remedy to compel performance of a statutory duty that is ministerial in nature, but not one in respect to which an officer may exercise judgment or discretion, unless such judgment or discretion has been abused by arbitrary or illegal action. (*Id*) The preservation of New York City’s rich history, independent of political and commercial pressure, is a matter of “great public interest.”

We turn first to the petitioner’s standing. Standing involves a threshold determination by the court as to whether it is authorized to adjudicate the merits of a dispute, rather than an actual adjudication of the merits. (*New York State Assn. of Nurse Anesthetists v Novello*, 2 N.Y.3d 207 [2004] [R.S. Smith, J., dissenting] | “Standing is a complicated subject at best, and there is always the danger that it will become a black box, from which a judicial conjurer can extract the desired result at will”])

To confer standing, there must be a determination that the challenged action would cause

the petitioner direct harm. While standing principles are broadly construed in actions such as this, it remains incumbent upon the party challenging administrative action to show that it would suffer direct harm, injury that is somehow different from that of the public at large. (*Society of Plastics Indus v County of Suffolk*, 77 NY2d 761 [1991]) Under prevailing case law, an organization lacks standing unless it can demonstrate that one or more of its members would have standing to sue. (*Long Island Pine Barrens Society, Inc v Town Board of East Hampton*, 293 AD2d 616 [2d Dept 2002])

Aesthetic or quality of life type of injuries have consistently been recognized by the courts as a basis for standing. (*Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Planning Commission of the City of New York*, 259 AD2d 26 [1st Dept 1999])

The Petitioner is an advocacy group comprised of committed preservationists dedicated to supporting the objectives of LPC. Many of its members are professionals employed in the field of preservation. The involvement of advocacy groups in the preservation process is specifically acknowledged in the LPC's own description of its activities, *inter alia*, to assist in the evaluation of Requests for Evaluation (RFE) submitted by ".... advocacy groups..." This Court finds Petitioner's interest and involvement in the preservation of the City's landmarks is not the same as that suffered by the public at large. Petitioner has alleged an "injury in fact" sufficient to satisfy the test for standing articulated by the Supreme Court:

We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the are will be lessened" by the challenged activity. (*Friends of the Earth v Laidlow*, 528 US 167 [2000])

We turn next to the adequacy of the petition. Courts will not interfere with municipal

decisions which involve questions of judgment, discretion, allocation of resources and priorities inappropriate for resolution in the judicial arena. (*Matter of Abrams v New York City Transit*, 39 NY2d 990 [1976]) Where entitlement to a benefit is subject to agency discretion, a party's expectations can only rise to a protected property interest where the agency's discretion is so narrowly circumscribed as to virtually assure conferral of the benefit. (See, *Matter of Daxor Corp. v State of N. Y. Dept. of Health*, 90 NY2d 89[1997])

LPC argues that calendaring a property by the LPC is a discretionary action, citing three trial level cases, two of which are unreported. (*Matter of Sucknik v Koch*, 20281/79 [NY Cty 1980] (unreported); *Matter of Deane v City of New York Department of Buildings*, 177 Misc 2d 687 [NY Cty 1998]; and *Save the Cottages and Gardens v City of New York*, 114543/98 [NY Cty 1998] (unreported))

We do not deem these cases to be controlling and they are, at any rate, distinguished. The properties in *Deane* and *Save the Cottages* had been explicitly denied consideration by the LPC. Since a demolition permit had been issued for the property in *Save the Cottages*, the petition was moot. *Sucknik*, decided 30 years ago, does not have a perspective on the pervasive pattern of arbitrary action complained of in the petition.

Petitioner argues the relief it seeks, that final dispositions of every RFE be timely done by the full LPC, in public and on the record, is ministerial. To implement such procedures would in no way infringe upon the LPC's discretion. It would merely require the process be more transparent. This Court agrees.

The court has jurisdiction to entertain a proceeding to determine whether an agency has failed to perform a duty enjoined upon it by law. (*Matter of Fehlhaber v O'Hara*, 53 AD2d 746

[3d Dept 1976]) The Court of Appeals has repeatedly confirmed that administrative agencies owe a duty of fairness to its applicants and fairness requires a hearing be held and a determination rendered promptly. (*Matter of Utica Cheese, Inc v Barber, et al*, 49 NY2d 1028 [1980][granting an Article 78 petition to compel the Commissioner of the Department of Agriculture and Markets act on a milk dealer license application which had been pending for 16 months within 90 days])

What was complained of [in *Utica Cheese*] was the failure to take any action on a license application and the relief sought was the performance of a non-discretionary duty enjoined by law, namely, some action on the license one way or another. (*Hamptons Hosp & Med Center, Inc v Moore*, 52 NY2d 88 [1981])

To allow RFE's to languish is to defeat the very purpose of the LPC and invite the loss of irreplaceable landmarks. The LPC has utterly failed to articulate any reasonable basis for its failure to consider five referenced RFE's which, by its own admission, are meritorious. Its action is, then, arbitrary and capricious. Under similar considerations, the Court of Appeals compelled the New York City Department of Sanitation to implement a City-wide recycling program:

(G)ranting petitioners the relief they seek here would not involve the courts in resolving political questions or making broad policy choices on complex societal and governmental issues, involving the ordering of priorities. ... Petitioners are not seeking any change in legislative policy or reordering of priorities; "they ask only that the program be effected in the manner that it was legislated." (*Klostermann v Cuomo*, 61 NY2d 525 [1984]). Nor is the justiciability of this dispute affected by the fact that the implementation of these mandatory provisions entails some exercise of discretion on the part of respondents. We held in *Klostermann* that an action seeking compliance with a statutory directive is not rendered nonjusticiable "merely because the activity contemplated ... may be complex and rife with the exercise of discretion" Compliance with almost any statutory directive will involve some measure of discretion exercised by those implementing its terms, but this will not render nonjusticiable a claim which asks the courts to compel compliance with a statute that is otherwise mandatory on its face. Mandamus may "compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so" (*id.*, at 540). The judgment below conforms to this principle. (*Natural Resources Defense Council v New York City Department of Sanitation*, 83 NY2d 215 [1994])

This Court finds that, in light of all the circumstances, the LPC's failure to take any action on certain RFE's is arbitrary and capricious. This Court directs the LPC to promulgate procedures whereby: (1) all RFE's are submitted to the RFE Committee within 120 days of receipt thereof; and (2) all Committee's recommendations, whether positive or negative, be reported, on the record, to the full LPC.

We have considered the other arguments raised by the parties and find them to be without merit.

Accordingly, it is hereby

ORDERED that the petition is granted; and it is further

ORDERED that respondent submit, within ninety (90) days of the date hereof, proposed regulations consistent with this decision.

This reflects the decision and order of this Court.

Dated: 11/14/08

MARILYN SHAFER

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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NOV 21 2008
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