SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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In the Matter of the Application of

SAVE CONEY ISLAND, INC., BRUCE HANDY, RUTH MAGWOOD, JENNY McGOWAN, ANGIE PONTANI and AMOS WENGLER,

Assigned to Justice Rakower

Petitioners,

Index No. 116672/2009

For judgment pursuant to Article 78 and Section 3001 of the Civil Practice Law and Rules,

-against-

THE CITY OF NEW YORK, NEW YORK CITY COUNCIL and NEW YORK CITY PLANNING COMMISSION,

Respondents,

- x

PETITIONERS' REPLY MEMORANDUM OF LAW

Introduction

This is an unusual case. Petitioners support – indeed, petitioners applaud – the efforts of the City to revitalize the historic Coney Island amusement district. They share the City's goal to recapture the past glory of an area and a name that are synonymous around the world with great crowds and magical rides and extraordinary wonders. Petitioners were, in fact, parties to the process by which the City's plan for achieving those ends was developed – and they supported it. But then the City drew back. The area for outdoor amusements, which was to be on dedicated parkland owned or acquired by the City, was reduced from 18 acres to 12 acres, with the lost

six acres left to the private sector for its private interpretation of entertainment uses – hotels and glitzy restaurants and national retail outlets. This was done suddenly, in response to the complaints of a few private owners and with no underlying analysis of feasibility, after the original plan had been advertized publicly in a scoping notice for the environmental impact statement.

That analysis came later, and it was not undertaken by the City. It was carried out by national recognized experts in the amusement park field, and their conclusion was that the 12 acres for outdoor amusements was far less than necessary to support a viable entertainment district that would restore the excitement and create the attraction that the historic Coney Island had provided. The City, however, ignored this expert analysis, maintaining that 12 acres would do, even though there were no studies to support its position. It did so, Petitioners believe, to serve private, rather than, public interests – to placate the private owners who saw the prospect of major profits if they could develop their properties for high-rise hotels and retail uses.

It is at this point that Petitioners depart from the City. They are not trying to stop Coney Island from being redeveloped as an amusement district. Far from it, they are trying to improve the chances that the effort will be successful. In this, they are not asking the Court to substitute its judgment for that of the City agencies responsible for making the decision, but rather to hold those agencies to their statutory duty of making that decision based on an adequate record and in the public interest rather than for the benefit of a few private landowners. That is the issue at the heart of this proceeding; and while the Court cannot insist that the City take a particular course, it

can and, we respectfully submit must, ensure that when the choice is made, it is made on the basis of a complete and transparent record and with full consideration of the pertinent facts.

Point One

THE EIS FOR THE CONEY ISLAND REZONING DID NOT COMPLY WITH SEQRA, INVALIDATING THE APPROVALS GIVEN BY THE CITY PLANNING COMMISSION AND CITY COUNCIL BASED THEREON

A. Alternatives

In its answering papers, the City asserts that the Petitioners have a basic misunderstanding of SEQRA. Under the City's interpretation of the statute, all that is required of it is to develop what it calls as a "reasonable worst case scenario" for any proposed action and acknowledge the projected impacts of that scenario. As Mr. Kulikowski puts it in his affidavit, "since the purpose of SEQRA is to determine potential significant adverse impacts, there is no obligation to analyze lesser levels of development that might result in a lesser alternative." [Kulikowski Affidavit, ¶97].

But this is to cut SEQRA in half. If the only requirement of the statute were to measure maximum potential impacts, the mandate that the EIS address alternatives would have little meaning. Unfortunately, as the City has come to interpret SEQRA, that is how it proceeds – and proceeded here – in preparing the environmental impact statement. The presentation and analysis of alternatives was not geared to determining whether there were options that would improve upon the proposed action, but was rather an exercise in setting up and then knocking down straw men. For the City, the analysis of alternatives that SEQRA requires has been used here, as in

many other cases, to provide justification for the action it has decided to take, rather than to inform itself about how it might obtain a better, less damaging result.

This is to stand SEQRA on its head, defeat the Legislature's intent and wipe away almost 40 years of case law. SEQRA did not emerge out of thin air. It was intended to replicate at the State level the requirements applied to Federal projects under the National Environmental Policy Act of 1970 [42 U.S.C. § 4321 *et seq*.] ("NEPA"); and NEPA itself was the outgrowth of the landmark decision in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F. 2d 608 (2d Cir. 1965). In that case, Con Edison proposed to build a huge power plant at one of the most scenic spots on the Hudson River -- Storm King Mountain in the Hudson Highlands. The potential impacts on scenic beauty and historic sites were severe. Nonetheless, the Federal Power Commission, which had the licensing jurisdiction, approved the project. On appeal, the Court of Appeals set the license aside, noting that the project was to be built in an area of great natural beauty. But it did not annul the license because of that potential damage; it did so because the Federal Power Commission had failed to make a full investigation of alternatives that might have avoided the need to build the plant at Storm King Mountain. As the Court put it:

> Especially in a case of this type, where public interest and concern is so great, the Commission's refusal to receive the Lurkis testimony [on alternatives] . . . exhibits a disregard of the statute and of judicial mandates instructing the Commission to probe all feasible alternatives. 354 F.2d at 620.

Thus, as the Court of Appeals saw it, the search for alternative was not an afterthought in taking account of environmental impacts – it was at the heart of the process of selecting a course of action when the public interest was involved.

The Scenic Hudson decision has generally been regarded as the progenitor of the EIS required under NEPA, and particularly the section of the law that requires the evaluation of alternatives. In any case, as the law developed, the Federal courts placed the same emphasis on alternative analysis as the Court of Appeals had in the Scenic Hudson case. Thus, in Natural Resources Defense Council v. Callaway, 524 F.2d 79(2d Cir. 1975), the Second Circuit reconfirmed under NEPA the importance it had attached to the investigation of alternatives in the Scenic Hudson decision.

In the Callaway case, the Navy proposed to dump polluted dredged spoil from the Thames River in Connecticut at a site in Long Island Sound just off Fishers Island. There was great concern among lobstermen and others in the area that the polluted spoil would be washed from the dump site by the ocean currents and transported to sensitive fisheries areas. In the past, the Navy had used another site further off shore, and another deeper site had also been identified, but at the last moment, it decided to switch to Fishers Island. The EIS for the project identified all three sites, but provided little analysis of them and little reasoning for its decision. On appeal, the Second Circuit concluded that the EIS evaluation of alternatives was defective and enjoined further dumping at Fishers Island site until a proper analysis was carried out and a decision made on the basis of what it showed. In reaching its decision, the Court of Appeals explained the vital importance of NEPA's mandate to evaluate alternatives:

> Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), specifically requires the inclusion in the EIS of a "detailed statement" of "alternatives to the proposed action", including an evaluation of the

environmental consequences of the suggested alternatives, *Natural Resources Defense Council Inc. v. Morton, supra*, 458 F.2d at 834. The importance of this section of the EIS to the NEPA process has been stressed repeatedly by this and other federal courts, e.g., *Monroe County Conservation Society, Inc. v. Volpe*, 472 F.2d 693, 697-98 (2d Cir. 1972); **[**40]** *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 146 U.S. App. D.C. 33, 449 F.2d 1109, 1114 (1971); see CEQ Guidelines, 40 C.F.R. § 1500.8(a)(4). It is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as "the linchpin of the entire impact statement", *Monroe County Conservation Society, Inc. v. Volpe*, 472 F.2d at 697-98. . . .

The content and scope of the discussion of alternatives to the proposed action depends upon the nature of the proposal. Generally, however, the preparer of the statement *"must go beyond mere assertions" and provide sufficient data and reasoning to enable a reader to evaluate the analysis and conclusions and to comment on the EIS. Silva v. Lynn*, 482 F.2d 1282, 1287 (1st Cir. 1973). Although there is no need to consider alternatives of speculative feasibility or alternatives which could only be implemented after significant changes in governmental policy or legislation or which require similar alterations of existing restrictions, see *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974), *cert. denied*, 421 U.S. 994, 95 S. Ct. 2001, 44 L. Ed. 2d 484, 43 U.S.L.W. 3625 (U.S., May 27, 1975) (No. 74-1024); *Natural Resources Defense Council Inc. v. Morton, supra*, 458 F.2d at 836-38, the EIS must nevertheless consider such alternatives to the proposed action as may partially or completely meet the proposal's goal and it must evaluate their comparative merits. In addition, the discussion of alternatives should be presented in a straightforward, compact and comprehensible manner "capable of being understood by the reader without the need for undue cross reference." 524 F.2d at 92-93 (emphasis added).[1]

[1] Among other cases to the same effect, see Dubois v. United States Department of Agriculture, 102 F.3d 1273, 1286-89 (1st Cir. 1996); Friends of the Bitterroot v. United States Forest Service, 900 F. Supp. 1368, 1373-74 (D. Montana 1994); Texas Committee on Natural Resources v. Berglund, 433 F. Supp. 1235, 1251-52 (E.D. Tex. 1977); and see the regulations of the U.S. Council on Environmental Quality, where it is stated that the consideration of alternatives is "the heart of the environmental impact statement." 40 CFR §1502.14.

SEQRA was enacted into law by the State Legislature in 1975 – the same year the Callaway case was decided – and became effective in 1976. The legislative history, as well as the specific language of the statute, makes it clear that the State law was patterned after the Federal statute and intended to require the same kind of environmental review for State and local projects as NEPA required for Federal actions.[2] In requiring that an EIS address alternatives, SEQRA was undoubtedly intended to parallel the consideration of alternatives required under NEPA and the judicial interpretations of that obligation (most recently articulated in the Callaway case).

In this case, however, as in many others, the City has treated alternatives with the same sort of indifference that the Navy did in Callaway. In particular, neither the City nor the FEIS paid *any* attention to the only alternative that was backed by expert studies. This was the alternative brought forward by the Municipal Art Society and described in the RCLCo Report (Exhibit L to the Petition), which concluded that an outdoor area of at least 25 acres would be required to establish a viable, revitalized Coney Island Entertainment District. As noted in our initial brief, the only mention of this alternative in the FEIS was a two-word response to the MAS submission: Comment noted. This clearly did not constitute the "hard look" that SEQRA requires of agencies proposing major actions.

[2] Indeed, if anything SEQRA was intended to be more expansive in its coverage than NEPA since it mandated the preparation of an EIS when a project *might* have a significant effect on the environment, whereas NEPA only required an impact statement where the project *would* have such an effect.

The City contends in its answering papers that it was not required to take account of this alternative. In this regard, it argues that an FEIS need not examine every conceivable alternative – a proposition with which Petitioners agree. But this was not an alternative without substance; to the contrary, it was the *only proposal* in the record for which there was expert backing and a rigorous analysis. The City also asserts, at page 27 of its Memo of Law, that a 26 acre dedicated park area as set forth in the RCLCo Report "would not meet important objectives of the Plan." But the citations in support of that assertion (Ex. 15, at 27-11; 32-33) do not say anything like that, nor is there any support in the record for the contention in the City Memo of Law that the RCLCo proposal "is not sustainable." (Memo of Law, p. 27)

In fact, the shoe is on the other foot – and therein lies one of the principal failings of the EIS analysis of alternatives. In an effort to dismiss the 15-Acre Mapped Parkland Alternative – a dismissal that the City would presumably apply as well to the RCLCo plan – the FEIS asserts that these alternatives would be less successful in creating a year-round entertainment venue at Coney Island. But these assertions are absolutely bare – there are no data or other information presented in the EIS or found elsewhere in the record that back up such claims. They are unsupported conclusions designed to justify the City's decision to shrink the area of mapped parkland from what it originally thought to be necessary.

This is exactly what the Second Circuit said was wrong with the Navy EIS in the Callaway case. "The content and scope of the discussion of alternatives to the proposed action depends upon the nature of the proposal. Generally, however, the

preparer of the statement *"must go beyond mere assertions and provide sufficient data and reasoning to enable a reader to evaluate the analysis and conclusions and to comment on the EIS."* Here, the City provided no data or sustainable reasoning to support its bare assertions regarding the differences in year-round use. In sharp contrast, the RCLCo Report provided both, but it was ignored.

In its Memo of Law, the City also contends that there was no obligation under SEQRA to address the RCLCo Report, because it involved economic considerations, and SEQRA does not implicate economics (citing Nixbot Realty Associates v. New York State Urban Dev. Corp., 193 A.D.2d 381 (1st Dept 1993)). However, in that case, the petitioners were seeking an economic impact analysis, something that is not in issue here, where the central question is whether there was an adequate consideration of alternatives. Equally or more important, as we pointed out in our initial Memorandum of Law, where, as in this case, the EIS attempts to justify the rejection of an alternative *on economic grounds*, those grounds need to be backed up with more than generalized assertions, which is all that was offered here. In addition, the City having invoked economic factors to discount alternatives, it can hardly complain when the economics of alternatives are said to be relevant factors.

Finally, and of great importance, the issue of economic feasibility is, in many ways, at the heart of this matter and the potential environmental impacts. It is economic factors that have led to the decline of Coney Island over the years; and it the City's stated intent to use economic incentives (represented by the rezoning, among other actions) to reverse that decline and reestablish a vital and vibrant

amusement district. If, as we believe is the case here, the proposed action runs a high risk of failing in that effort and if, as we believe to be the case and the RCLCo Report evidences, an alternative has a greater chance of succeeding, that is a clearly a relevant consideration under SEQRA. This is so because if, at the end of the road, Coney Island remains derelict or the entertainment district is lost to commercial gentrification, that will be the ultimate negative environmental impact – one that will have flowed from the approval of the rezoning without taking a hard and realistic look at the alternatives. That is the environmental impact to which the RCLCo Report sought to respond. By totally ignoring that alternative and by putting down the 15-Acre Mapped Park Alternative on specious economic grounds, the City and the FEIS it prepared failed to comply with SEQRA.

We would make several other points about the City's critique of our positions on alternatives.

First, the City contends that the nine acre mapped park option it has approved is an advance over the 15-acre mapped park alternative it originally proposed and identified in the initial Scoping Notice (City Exhibit 5), because it would allow a greater diversity of entertainment uses and thus be more likely to create a year-round entertainment destination. As we have already noted, the FEIS offers no studies or data to back up this claim. Moreover, a close examination of the revised zoning reveals that *very few* additional uses are allowed compared to what would have been permitted with the 15-acre mapped park alternative; indeed, all of the major outdoor *and* indoor entertainment uses that will now be allowed would equally have been permitted under

the 15-Acre Mapped Parkland Alternative. In addition, it is worth emphasizing that it was the City that originally proposed that Alternative, as reflected the original Scoping Notice, and that one of the goals of that proposal, as explicitly stated in that Notice, was to "create year-round activity" at Coney Island [City Exhibit 5, p. 2]. Against this background, the distinction that the City used to discredit that alternative seems more clearly than ever a justification without substance.

Second, at several points in its answering papers, the City indicated that it is incongruous for the petitioners to advocate for the RCLCo Alternative, which was put forward by the Municipal Art Society ("MAS"), when, so it is asserted, that organization supported the approved project [Kapur Affidavit, ¶76; City Memo of Law, p. 27]. This is a distortion of the record. In the submission it made to City Planning, MAS did, in fact, support the rezoning concept in general (as did Save Coney Island), but it urged that the mapped park amusement district be expanded to 26 acres and that hotels be removed from the south side of Surf Avenue (see MAS Testimony to City Planning Commission, Exhibit N to the Petition). As stated in the City Planning Report that accompanied its approval of the rezoning [City Exhibit 17, p. 32]:

> The representatives of the Municipal Art Society, Coney Island USA and Save Coney Island expressed strong support for the City's goals of mapping parkland and the City's efforts to acquire land within the amusement area to ensure its long-term preservation and enhancement.
>
> *These speakers also expressed concerns about the size of the amusement area, the preservation of historic structures in the rezoning area and the location of hotels south of Surf Avenue.*

The qualifications expressed by MAS focus on precisely the issues that the

Petitioners have been raised in this lawsuit. City Planning chose to characterize the position of MAS (and, for that matter, of Save Coney Island, which is the lead Petitioner in this case) as supporting the Plan. But it is clear from the testimony itself, as inferred by City Planning's qualifications, that MAS also believed that a successful Coney Island required 26 acres of mapped parkland and getting rid of the hotels on the south side of Surf Avenue.

Third, the City is correct that we miscited Orange County v. Bd. of Trustees of Village of Kiryas Joel, 44 A.D.3d 765 (2d Dept 2007) as supporting our position on alternatives when the Second Department reversed the Supreme Court decision to that effect. We apologize to the Court for this error. At the same time, we note our view that the EIS for the Coney Island rezoning did not meet the test set out by the Second Department – i.e., that it is enough if there has been a reasonable consideration of alternatives. For the reasons described above and in our initial Memorandum of Law, we believe there was no such reasonable consideration here.

B. Alienation of Parkland

Petitioners agree that the FEIS disclosed that State Legislative approval was required to alienate the nine acres of parkland that are currently used as parking lots for Keyspan Stadium and which, if such approval is obtained, will be used for housing development. What the FEIS failed to address was the environmental impacts that would arise *in connection with the approved action* if the alienation failed. In its Memo of Law at page 19, the City contends that this is of no matter because the Petitioners "have not identified *any* environmental impacts that would occur should

the State Legislature not authorize the alienation of parkland."

This is an odd position, because it was for the City, in the EIS, to identify the resulting environmental impacts. Some of them are, however, relatively obvious. To begin with, the nine acres would remain vacant and presumably used as parking lots, continuing a deteriorated landscape that is assumed to disappear with the approved action. In addition, there would be much less housing than projected, another negative environmental impact that would, due to the failure of alienation, be a part of the approved plan. There would also be negative visual impacts.

What the City misses in its answering papers is the fact that the approved project carries with it the risk of failed alienation, resulting in a much different outcome and one that continues rather than remedies negative environmental conditions. There is no disclosure in the FEIS that these potential adverse impacts would result without State Legislative approval.

The City argues, however, that a scenario where there is no alienation (and also no mapping of new parkland) was included in the FEIS – the so-call No Demapping/No Mapping Alternative. As its name suggests, however, this was framed as an alternative, not as a potential part of the approved action. There is no way in which any decisionmaker, much less members of the general public, would have understood the impacts described under the No Demapping Alternative as having any association with the approved action. Indeed, the framing of the No Demapping option as an alternative carried with it the implication that this was an altogether different plan having nothing to do with what became the approved action. That is

completely different from addressing the impacts as potentially an incident of the approved rezoning. This failure to consider that consequences of something that might never happen is exactly what ran afoul of NEPA in Chelsea Neighborhood Associations v. U.S. Postal Service, 280 F. Supp 1171 (S.D.N.Y 1975), *aff'd* 516 F.2d 378 (2d Cir. 1975). The same error has occurred here, in violation of SEQRA.

C. Visual Resources

The heart of Petitioners' claims regarding Visual Resources is that the EIS did not fairly disclose the impacts that the hotels belatedly permitted on the south side of Surf Avenue would have on views towards the amusement district and the Atlantic Ocean. In its answering papers, the City contends that the EIS addressed these impacts at a number of different points, pointing out, among other things, that the hotels would be stepped down and that only one would be permitted on any block. However, nothing explained how four structures ranging up to 270 feet in height would not block views and create something of a wall on the south side of Surf Avenue. It was as if they were to be built of completely transparent materials.

The difficulty the City faced in denying any significant impacts on views is reflected in the inconsistent statements on the subject included in the EIS. These are set out at pages 35-37 of our initial Memorandum of Law, to which we respectfully refer the Court.

The bottom line, however, is that the FEIS could easily have included – and it should have included – renderings that accurately represented the consequences of moving four hotels to the south side of Surf Avenue. In instances like this, the truism

that a picture is worth a thousand words certainly applies; and there is ample precedent for using illustrations to show visual impacts. Thus, it is common practice under SEQRA for an EIS to include shadow studies with illustrations of the impacts when high-rise towers are proposed; and with some frequency, images of such towers, superimposed on existing views, are also included. If such an approach had been taken in this case, as it should have been, there would have been no uncertainty about the impact of the Surf Avenue hotels on views towards the amusement district and the Atlantic.

The City responds that there was no mandate to include illustrations of how the hotels would affect views and contends that the Petitioners provide no support for their claim. But in this case, *res ipsa loquitur* is appropriately invoked; unless the laws of physics have changed recently, structures extending 60 feet along a block and rising to a height of 150 or 270 feet are solid matter that cannot be seen through. Here, we submit, the burden was on the City to effectively disclose the visual impacts of that reality. Moreover, while Petitioners have not submitted visual studies, they have included as an exhibit to the Petition an illustration of the bulk of a single hotel, which illustrates their point that visual impacts were not addressed in the manner required by SEQRA.

D. Open Space

We respectfully refer the Court to the discussion of open space in our initial Memorandum of Law.

E. Historic Resources

In its answering papers, the City insists that it was appropriate to refer all questions of historic importance to the City Landmarks Preservation Commission ("LPC"), rather than consulting with the State Office of Historic Preservation ("SHPO"), which decides whether structures are eligible for listing on the State and National Registers of Historic Places. In this connection, the City suggests that review by the LPC is likely to be more comprehensive than determinations by the SHPO because the LPC also takes into account City landmarks standards. This thought is belied by the realities; there are far more structures found eligible for listing by the SHPO than are designated by the LPC. Indeed, in the last few years, the LPC has regularly refused to take up for consideration many structures that have been found eligible for listing by the SHPO. For this reason, and because SEQRA references structures on (or eligible for listing on) the State and National Registers, we continue to believe that the 28 buildings identified as possible historic properties should have been referred to the SHPO for its evaluation and that the City's failure to do so violated SEQRA.

F. Natural Resources

The position of the City with regard to flooding is that when it occurs, it will be the result of coastal flooding "controlled by the tides." But this is to miss the point. What the approved project will bring to the floodplain is thousands of new residents and many new enclosed businesses, so that when flooding occurs it will impact far more people and many more structures than it would if the area were not built up or

more of the current open space was left open (as would be the case with the 26- and 15-Acre Mapped Parkland Alternatives). The rezoning is putting many more people and many more improved parcels at risk of being flooded, an adverse environmental impact that was not considered in the EIS. Furthermore, the impacts will be made the greater as development creates additional impervious surfaces, increasing runoff and thus the exacerbating any flooding. This, too, was not addressed in the EIS.

With respect to water pollution, Petitioners were mistaken in the belief that the approved action would overburden the Coney Island Wastewater Treatment Plan in periods of heavy rain. Because there are separate stormwater and wastewater sewers in Coney Island, combined sewer outfalls are not involved and the Treatment Plant will not be overloaded even during rainstorms. Consequently, Petitioners no longer believe or claim that the rezoning would have impacts on water quality that were not disclosed in the EIS.

G. Infrastructure

We respectfully refer the Court to the discussion of infrastructure, under the heading "Wishful Thinking," at pages 42-43 of our initial Memorandum of Law.

Point Two

THE CONEY ISLAND REZONING EXCEEDED THE LEGAL AUTHORITY OF THE CITY AND WAS *ULTRA VIRES* ITS LEGITIMATE ZONING POWERS

We have set out at some length in our initial Memorandum of Law the basis for our claim that the City exceeded its legal authority and acted beyond its legitimate zoning powers when it developed and approved the Coney Island

Rezoning. As spelled out there, our basic contention is that the Rezoning was illegal because it was enacted for the private benefit of Thor Equities (and possibly one or two other landowners). However, this states the claim too broadly. Clearly, the entire Coney Island Rezoning was not passed for private benefit. Rather, it is the portion of the Rezoning that removed six acres from the land that was to be acquired by the City and mapped as parkland and instead zoned those properties for private sector uses, including hotels, restaurants, indoor entertainment, retail and other potentially profitable commercial purposes. That this was done after the City had first proposed including those six acres as a part of the dedicated entertainment district further underscores the private nature of the interests served.

In its Memorandum of Law, the City asserts that our claims that the Rezoning served private rather than public interests are founded on "baseless assumptions and innuendo." (City Memo of Law, p. 46). However, the reality of what went on was well documented in the media in articles such as those in The New York Times that are included as exhibits to the Petition. It is indisputable from those reports that the reduction of the mapped parkland and the final form of the zoning resulted from negotiations between the City and Thor Equities and served the purpose of allowing Thor to retain and develop land to its own profitable benefit. Whether that is described as spot zoning or something else, it was an illegal use of the City's zoning powers, which can only be exercised for the benefit of the general welfare and in the public interest.

In attempting to refute the irrefutable, the City returns to the contention that

the mapped parkland was reduced and the area of private development increased correspondingly as a means of promoting year-round activity in Coney Island. But as we have already noted, there are no studies in the record that support this bare assertion. Similarly, the City contends that the change from 15 acres of mapped parkland to nine acres was the result of comments by "local elected and appointed officials, civic organizations, as well as other property owners." (City Memo of Law, p. 46). Again, however, nothing in the record shows this to be so. We have no doubt that Thor Equities took this position, but there is no identification of any independent parties having done so; and as we have said, in any case there are no data or studies that support the position.

Conclusion

For the reasons set forth above, in the Petition and in Petitioners' initial Memorandum of Law, the relief requested in the Petition should be granted.

Dated: March 3, 2010

Respectfully submitted,

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