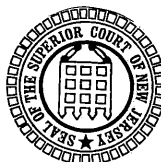


SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
BARRY P. SARKISIAN
PRESIDING JUDGE
CHANCERY-GENERAL EQUITY



Brennan Courthouse
583 Newark Avenue
Jersey City, New Jersey 07306

NOT FOR PUBLICATION WITHOUT THE
WRITTEN APPROVAL OF THE COMMITTEE ON OPINIONS

LETTER OPINION

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Re: City of Jersey City v. SMI LL, LLC c/o Suntex Ventures LLC, and NJDEP
Docket No. HUD-C-1-18
Date of Oral Argument: January 16, 2018
Date of Decision: January 19, 2018

Dear Counsel:

Introduction

Presently before the Court is Plaintiff, the City of Jersey City's application for preliminary injunctive relief enjoining Defendants SMI LL, LLC c/o Suntex Ventures LLC ("Suntex") and New Jersey Department of Environmental Protection ("DEP") from executing a Term Sheet and proposed lease amendment under which, Plaintiff contends, Defendants would be able to proceed with a development project designed to expand and create new marina uses at Liberty

State Park, a public park located in Jersey City. Plaintiff contends that Defendants have violated the existing lease agreement governing the DEP and Suntex's present relationship under which Suntex operates an existing marina on the north end of Liberty State Park. In addition to this injunctive relief, Plaintiff ultimately seeks an order that the Term Sheet and proposed lease amendment be declared invalid and unenforceable. More specifically, Plaintiff contends that Defendants violated the existing lease agreement by (i) failing to allow for competitive/public bidding for this project, and (ii) Suntex's acceptance of the Term Sheet outside of the twenty-day acceptance window set forth in the existing lease.

With respect to the "twenty day window argument" Plaintiff asserted, initially, on information and belief, that Defendants violated the Lease by Suntex's failure to accept the Term Sheet within the twenty-day window provided for in paragraph forty-six of the Lease. No party contests the fact that the Term Sheet was delivered by DEP to Suntex on November 30, 2017. Plaintiff contended that Suntex failed to accept the Term Sheet until December 27, 2017, several days after the twenty-day deadline set forth in paragraph forty-six of the Lease had expired. However, Defendant DEP, in their opposition, provided uncontroverted evidence, in the form of an e-mail chain, that Suntex actually accepted this Term Sheet and provided an executed copy of the Term Sheet to DEP within the twenty day window. At oral argument, Plaintiff conceded this point and withdrew this position.

On January 2, 2018, this Court ordered Defendants to return on January 16, 2018 and show cause why such injunctive relief should not be issued. As part of its January 2, 2018 order, the Court temporarily enjoined and restrained Defendants from accepting the terms of that certain Term Sheet proposed by DEP to Suntex, dated November 30, 2017 ("Term Sheet") and/or proceeding with the proposed terms contained therein and/or the development project proposed therein, and temporarily enjoining and restraining Defendants from executing a certain proposed lease amendment (the "proposed Lease Amendment") and/or otherwise proceeding with the matters contained therein. The Court ordered this temporary relief before having the opportunity for a full consideration of Defendant DEP's objection to the injunctive relief sought by Plaintiff that is now before the Court.

For the reasons set forth below, the Court finds that this matter is not ripe for adjudication and that this Court cannot grant the injunctive relief Plaintiff seeks, given that (1) the proposed Lease Amendment is not finalized, and (2) will be subject to additional procedural controls designed to give the DEP input from various State and Federal agencies as well as the general public that must occur prior to the initiation of this development project. Accordingly, Plaintiff's application is denied.

Facts

This matter involves a proposal for a lease amendment under which Suntex, the lessor of the existing marina located on the north end of Liberty State Park would expand its usage area in that marina and construct, maintain, and use a new marina located at the southern end of Liberty State Park. DEP, as the owner of the park, seeks to amend its pre-existing lease with Suntex in exchange for additional rents and Suntex's agreement to take responsibility for the repair of the

bulkhead section of the north end marina. Accordingly, on November 30, 2017, DEP provided Suntex with a proposed Term Sheet and proposed Lease Amendment, which set forth the procedures for which DEP and Suntex would negotiate a lease amendment and required permits and approvals upon which this lease amendment would be conditioned on.

The Term Sheet provides the parties shall enter into a negotiation period of thirty (30) days to enter into a "mutually satisfactory lease agreement." However, "[t]he Lease shall be contingent upon Tenant obtaining all necessary approvals" from the following non-exclusive list of State and Federal Agencies:

- State Bond Counsel
- The State House Commission
- The Ogden-Rooney Process
- U.S. Army Corps of Engineers (USACE)
- U.S. National Park Service (USNPS), including compliance with the existing Record of Decision for Northern Marina Expansion Section 106 of the National Historic Preservation Act of 1966
- Land Use Regulation including, but not limited to, Freshwater and Coastal Wetlands, Coastal Area Facility Review, Flood Hazard, and Threatened and Endangered Species
- Riparian/Tidelands
- Any other applicable approvals.

At oral argument, the DEP acknowledged that these are minimum procedures/hearings that will take place before the proposed Lease Agreement can be approved.

The Term Sheet also provides that there will be public hearings in which the DEP will solicit input from the general public and interested parties prior the ultimate acceptance by the DEP of this Amended Lease. More specifically, page 6 of the Term Sheet provides as follows:

Additionally, DEP is responsible for ensuring compliance with standard reporting and public hearing requirements as specified by P.L. 1993, c.38, known as the Ogden-Rooney process. This process includes submitting a report to various legislative committees identifying all advantages and disadvantages, benefits and detriments of this conveyance and two (2) public hearings to be held to solicit input from the general public and interested stakeholders. The report prepared by DEP will contain various commissioned reports supporting the terms of the Lease and DEP anticipates one hearing will be held in Liberty State Park. The Ogden-Rooney process will conclude with a vote before the State House Commission for final approval of the Lease.

By way of factual background, the City of Jersey City deeded 165 acres of land to the State in 1965, which were used to create Liberty State Park. Between 1975 and 1977, the State acquired additional land for the park, financed in part by the Green Acres Land Acquisition Act,

N.J.S.A. 13:8A-1-34. The park opened on June 14, 1976 and a Master Plan for the park was created in 1977.¹

In 1987, DEP and Liberty State Park Development Corporation ("LSPDC") entered into a lease ("prime lease"), dated June 12, 1987 as modified by first amendment dated September 21, 1988, and by second amendment dated March 4, 1996 under which LSPDC would be responsible as a sub landlord for the development, construction, maintenance and operation of a full service marina complex located on approximately 50.648 acres of land and contiguous water on the north end of Liberty State Park (the "north end marina"). On February 26, 1996 LSPDC sublet the north end marina to Dimeling, Schreiber & Park ("DS&P") pursuant to a written agreement (the "Lease").

On October 11, 1996, the tenant DS&P assigned its interest in the Lease to Liberty Landing Marina, L.L.C. Then on May 15, 2003, LSPDC assigned all of its interest in the Lease to DEP terminating the prime lease and leaving DEP as the landlord in control of the north end marina. Subsequently, on March 7, 2005, Liberty Landing Marina, as tenant assigned its interest in the Lease to New Liberty Landing Marina, LLC, and in 2010 New Liberty Landing Marina, LLC, in turn, assigned its interest to Suntex LL Marina, LLC. On October 22, 2015, Suntex LL Marina, LLC assigned its interest in the Lease to Defendant, Suntex. Thus, DEP currently leases the north end marina to Suntex pursuant to the lease agreement that was entered into between LSDPC and DS&P on February 26, 1996 referred to herein as the Lease.

Pursuant to the Lease, Suntex has a right of first refusal for any additional marina related uses in Liberty State Park. As set forth in paragraph forty-six of the Lease,

Landlord and Sublandlord each hereby agree that to the extent of its respective fee or leasehold interest in and to the following described portions of Liberty State Park, no such portion shall be used by Landlord, Sublandlord or by any third parties over whom Landlord and Sublandlord has control, whether via a sale or lease of such portion(s): (a) as to the entirety of Liberty State Park for the duration of the Primary term (buy not with respect to any Renewal Term) for a marina or marina related facilities; and/or (b) as to the Restricted Area, for a period of fifteen (15) years from the commencement of the Primary Term, for a restaurant, commercial food service or other commercial retail operation which is the same as or substantially similar to those being operated by Subtenant on the Premises pursuant hereto (the "Retail Operations" without such portion(s) first being offered to the Subtenant herein either on the same terms and conditions as shall have been offered or, if used directly by Sublandlord for such purposes, would have been offered to such third parties.

At such time as Landlord or Sublandlord intends to add a use in an area and during a time as to which the foregoing covenants apply, whether by itself or an affiliate or by a third party via a sale or lease of a parcel falling within such area, **Landlord or Sublandlord may either before, as part of or after a request for proposals and/or competitive negotiations, submit a proposal regarding such transaction to Subtenant** and upon

¹ See Jersey City v. State Dep't of Env'tl. Prot. 227 N.J. Super. 5, 11 (App. Div 1988) ("The Master Plan itself described a large marina project for the South Embankment of the Park and boat slips at the northern end of the Park.").

receipt thereof Subtenant shall have twenty (20) days within which to accept or reject such proposal by written notice to Landlord or Sublandlord (the "Notice of Acceptance"). Failure to give such Notice of Acceptance within the aforesaid time shall automatically constitute a rejection. In the event that the proposal is properly accepted in accordance herewith, the necessary documentation with respect thereto shall be prepared and executed by the parties within thirty (30) days after such acceptance. If said proposal is not so accepted by Subtenant, the Landlord and Sublandlord, as the case may be, each shall be free to operate for its own account the marina, restaurant commercial food service and/or the Retail Operations, as the case may be, or to proceed with the third party transaction provided, however, in the event of the latter, if such third party transaction is not concluded on materially the same terms as offered to Subtenant, then any subsequent third party offer failing within the scope of this paragraph will again be subject to the Subtenant's rights of first refusal hereunder (emphasis added).

The Plaintiff contends that the Term Sheet and proposed Lease Amendment be declared invalid due to the DEP's failure to offer competitive/public bidding for this project before offering it to Suntex and argue that a reasonable construction of paragraph forty-six of the Lease and, in particular, the highlighted language, above, mandates that the DEP engage in competitive bidding before offering the Term Sheet to Suntex.

Moreover, Plaintiff asserts that the citizens of Jersey City will be harmed if Defendant's proposed Lease Amendment is permitted to go forward, given that DEP has failed to conduct necessary studies to: (i) ensure that the Proposed South-End Marina includes adequate waterfront public access; (ii) ensure that the Proposed South-End Marina takes adequate care to account for conservation concerns; and (iii) ensure that the Proposed South-End Marina takes adequate care to account for environmental degradation, water pollution, air pollution, and land pollutions concerns.

In opposition to this application, Defendant DEP, joined by Defendant Suntex, contends that this matter is not justiciable as it is not ripe for adjudication given that there is no executed lease agreement which Plaintiff seeks to invalidate. They also contend that this Court does not have jurisdiction, given that challenges to final agency determinations are supposed to be heard before the Appellate Division. Furthermore, Defendants assert that Plaintiff does not have standing here as non-parties to the Lease. Apart from these justiciability concerns, Defendants also contend that any immediate and irreparable harm that might be suffered by Plaintiff is mitigated by the extensive negotiations and approval procedures outlined in the Term Sheet and proposed Lease Amendment and required under State law. More specifically, the DEP avers that there will be no acceptance of the Lease Amendment prior to further negotiations between the DEP and Suntex and that any accepted Lease Amendment would be subject to additional State and Federal agency approvals and public hearings.

Additionally, Defendants assert that the DEP is not subject to the State's public bidding laws under N.J.S.A. 52:34-6 to -20 and that the DEP's authority to lease the land in Liberty State Park is governed by the procedures set forth in N.J.S.A. 13:1D-51 et seq. (the "Ogden-Rooney Act"). Defendants contend that the Ogden-Rooney Act procedures, and the permits/acceptances Suntex is required to obtain under the Term Sheet, provide additional environmental oversight

and ensure meaningful public participation before the proposed Lease Amendment could become effective.

Discussion

As an initial matter, we must determine whether the City of Jersey City has standing in its ultimate claim for declaratory relief in which it seeks to have the Court declare the Term Sheet and proposed Lease Amendment unenforceable. Defendants contest Jersey City's standing to seek such relief as a non-party to the underlying Lease or Term Sheet.

It is true that the City of Jersey City, as a municipality, ordinarily would not ordinarily have standing to challenge the action of a State agency solely for the purpose of asserting the rights of the general public. County of Bergen v. Port of New York Authority, 32 N.J. 303, 316 (1960). However, as the Appellate Division already determined when considering Jersey City's challenge to the construction of the north end marina in 1988, "Jersey City, which initially donated 165 acres for Liberty State Park and which is located adjacent to the park, and its citizens do have a special, regional interest" and have standing to assert the rights of its constituency. See Jersey City v. State Dep't of Env'tl. Prot. 227 N.J. Super. 5, (App. Div 1988).

The concept of "standing" refers to a party's entitlement to maintain an action before the court. N.J. Citizen Action v. Riviera Motel Corp., 296 N.J. Super. 402, 409 (App. Div. 1996), certif. granted, 152 N.J. 113 (1997), appeal dismissed as moot, 152 N.J. 361 (1998) (citing N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 67 (1980)).

In order to demonstrate standing, a plaintiff must have a "sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and there must be a substantial likelihood that the plaintiff will suffer harm in the event of an unfavorable decision." Id. at 409–10 (citing N.J. State Chamber of Commerce, supra, 82 N.J. at 67). However, "New Jersey Courts take a liberal view of standing . . . the threshold to prove a part's standing is 'fairly low.'" EnviroFinance Group, LLC v. Environmental Barrier Co., LLC, 440 N.J. Super. 325, 340 (App. Div. 2015) (internal citations omitted).

Defendant, DEP contends that Plaintiff has no standing here despite the Appellate Court's decision in Jersey City, supra 227 N.J. Super at 5. In the 1988 case, there was an existing lease agreement that gave Liberty State Park Development Corporation authorization to develop the park and enter into third-party contracts, so long as it had DEP approval. Ibid. at 12. Here, there is no executed Lease Amendment, and therefore, DEP claims that Plaintiff cannot have standing as a non-party to a lease, where no such agreement even yet exists. Here, the Court disagrees. Plaintiff here is objecting to the violation of an existing lease, namely, the lease agreement entered into in 1994 by Defendant's predecessors. The fact that the proposed Lease Amendment is not yet executed only strengthens Plaintiff's interest in this controversy, given that one of its main contentions is that it is being unfairly excluded from competitive bidding for the marina expansion project.² Moreover, for the reasons already enunciated in Jersey City, supra

² While this interest gives Plaintiff standing here, the Court is not finding that DEP was required to engage in this competitive bidding process. See infra pg. 8.

227 N.J. Super at 5, the Court here finds that Plaintiff has standing to assert the rights of its constituency given the environmental and public interest concerns set forth in the Certification of Sam Pesin attached to Plaintiff's application.

Next, we must determine whether the Court has jurisdiction over this matter or whether it should be transferred to the Appellate Division for review. "The Appellate Division has been vested with exclusive jurisdiction to review any action or inaction of a state administrative agency." See Mutschler v. New Jersey Dept. of Environmental Protection, 337 N.J. Super. 1, 9 (App. Div. 2001) (citing Pascucci v. Vagott, 71 N.J. 40, 51-54 (1976)). This exclusive jurisdiction even extends to actions that are essentially declaratory in nature. Ibid. (citing Equitable Life Mortgage & Realty Investors v. New Jersey Div. of Taxation, 151, N.J. Super. 232, 237-38 (1976)). Therefore, if a challenge to an action or inaction of a state administrative agency is brought before the Court, we are obligated to transfer the matter to the Appellate Division on the motion of a party or on our own initiative. Ibid at 10; R. 1:13-4(a).

In Jersey City, supra 227 N.J. Super, the Appellate Division heard a challenge to the DEP's initial lease of the north end marina to Suntex's predecessor. At the trial court level in 1987, Judge Humphreys, then Assignment Judge of Hudson County, denied the application for injunctive relief stopping work on the marina and transferred the actions to the Appellate Division because the plaintiffs were challenging a final decision of a state agency. The Appellate Division affirmed its jurisdiction over the matter, given that the lease had been executed, public hearings had been conducted, and the DEP had reached a final determination that it was going to lease a portion of Liberty State Park to Suntex's predecessor in interest. Here, the City of Jersey City brings this application after the execution of the Term Sheet, but prior the effectuation of the proposed Lease Amendment. According to the Term Sheet, DEP and Suntex are required to "use commercially reasonable efforts to enter into a mutually satisfactory lease agreement" after the Term Sheet is accepted. This negotiation period is to last thirty (30) days and any lease resulting thereof is subject to Suntex obtaining a litany of permits/approvals, including approval from the State House Commission, the U.S. Army Corps of Engineers and the U.S. National Park Service. Moreover this proposed Lease Amendment is subject to the Ogden-Rooney process under which the DEP must receive input from various state agencies and conduct at least two public hearings to obtain input from the public and interested stakeholders. Thus, the acceptance of the Term Sheet here and the promulgation of a proposed Lease Amendment is not a final agency determination. Once there is a final agency determination, jurisdiction would vest in the Appellate Division.

Finally, the Court finds that this matter is not ripe for our consideration.

There is a 'two-part test to determine ripeness of the controversy: (1) the fitness of issues for judicial review and (2) the hardship to the parties if judicial review is withheld at this time.' In determining whether an issue is fit for judicial review, we consider whether review would require additional factual development.

K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J. Dep't of Env'tl. Prot., 379 N.J. Super. 1, 9-10 (App. Div. 2005) (quoting 966 Video v. Mayor & Twp. Comm. of Hazlet Tp., 299 N.J. Super. 501,

515-16 (Law Div. 1995)).

In Jersey City v. State Dep't of Env'tl Protec., the Appellate Court found that the case before it was ripe for appellate review where facts surrounding that controversy had been firmly established. 227 N.J. Super. at 9. There, the lease had been finalized, and "[i]nterested persons [] had the chance to present their views to the public officials who made the planning decision through the many public hearings, and other formal and informal avenues." Ibid. As set forth above, the proposed Lease Amendment here has not been finalized or executed. Prior to this proposed Lease Amendment's finalization, Suntex and DEP must engage in a period of negotiation in which the terms of the proposed Lease Amendment are subject to change. Even then, any mutually agreed upon Lease Amendment would then be contingent on Suntex obtaining permits or approvals from various agencies, including the State Bond Counsel, The State House Commission, the U.S. Army Corps of Engineers, and the U.S. National Park Service. Moreover, because the land in Liberty State Park was acquired by the DEP with Green Acres funds, N.J.S.A. 13:1D-51 et seq. (the Ogden-Rooney process), requires that a report be prepared outlining all of the advantages and disadvantages of the proposed conveyance and that two public hearing be held to obtain input from the general public and interested stakeholders.

Plaintiff's argument that certain language in paragraph 46 of the lease mandates that the DEP in engage in competitive bidding before offering the term sheet to Suntex is without merit. The language in paragraph 46 of the Lease is clear and unambiguous. This paragraph gives Suntex the right of first refusal over the expansion of any marina uses in Liberty State Park and then provides that the DEP "may either before, as part of or after a request for proposals and/or competitive negotiations, submit a proposal regarding such transaction to" Suntex. This language does not create a condition whereby DEP must request proposals and competitive negotiations, it gives DEP the option to do so.

More importantly, there is no legal requirement for DEP to engage in competitive bidding for the recreational facilities contemplated under the Suntex term sheet. When determining whether the DEP was subject to the State's public bidding laws when leasing out the original north end marina, our Appellate Division held that "the public bidding laws are not applicable to these transactions. There is no specific provision in the statutes requiring adherence to the public bidding procedures where State land is leased for recreational development purposes." Jersey City 227 N.J. Super. 5, 19 (App. Div. 1988) (finding that the development of a marina is a recreational development purpose). The DEP has broad statutory authority to develop State parks pursuant to N.J.S.A. 13:1L-8 and N.J.S.A. 52:31-1.1, and by the terms of the Lease is not obligated to conduct public bidding or competitive negotiations

Lastly, and for the reasons set forth above, the Court finds that Plaintiff's claim that the public's interest or the environment might be affected in drastic ways without this declaratory relief is untimely. Defendants are required to engage in the Ogden-Rooney process in which the public will have opportunity to voice its concern and the plan will have to pass environmental muster with the U.S. National Park Service that will include compliance with existing environmental regulations. Once the proposed Lease Amendment passes through these

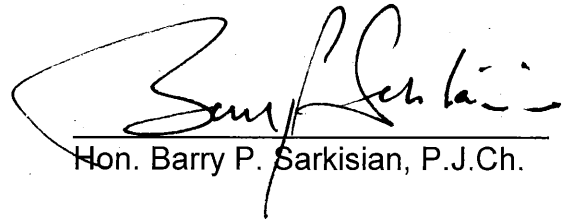
procedures, designed to protect the very interests Plaintiff is advocating, the matter may be ripe for judicial review before the Appellate Division – not this Court.

Conclusion

Given the above findings, the Court is not in a position to issue a preliminary injunction to Plaintiff under the factors set forth in Crowe v. DeGioia, 90 N.J. 126, 447 A.2d 173 (1982). Accordingly, the Court **denies** Plaintiff's application for injunctive relief and removes the temporary restraints imposed on Defendants pursuant to its January 2, 2018 Order.

Since this decision is dispositive of Plaintiff's declaratory judgment action in its entirety, the complaint is dismissed.

SO ORDERED,

A handwritten signature in black ink, appearing to read "Barry P. Sarkisian", is written over a horizontal line. The signature is fluid and cursive.

Hon. Barry P. Sarkisian, P.J.Ch.