

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

Stop the Chop NYNJ, Inc.,

Index No. 159582/2016

Petitioner,

**VERIFIED PETITION
AND COMPLAINT**

-against-

Franchise and Concession Review Committee
of the City of New York, the City of New York
acting by and through the New York City
Department of Small Business, the New York
City Economic Development Corporation, and
FirstFlight Heliports, LLC d/b/a Saker Aviation
Services,

Respondents.

**TO: SUPREME COURT OF THE STATE OF NEW YORK FOR THE
COUNTY OF NEW YORK**

Petitioner Stop the Chop NYNJ, Inc. (“STC”), for its Verified Petition and Complaint for judgment pursuant to Article 78 of the New York Civil Practice Law and Rules and New York common law, by its attorneys, respectfully alleges and states as follows:

INTRODUCTION

1. This is a hybrid Article 78 proceeding and civil action which seeks (without limitation) injunctive and monetary judgment against respondents, pursuant to the State Environmental Quality Review Act, the regulations promulgated thereunder, and common law doctrines of nuisance, taking/inverse condemnation, and trespass, in connection with the July 13, 2016 approval by the Franchise and Concession Review Committee of the City of New York of the 2016 Agreement (the “2016 Agreement”) between, *inter alia*, the New York City Economic Development Corporation and helicopter operators to extend the July 23, 2008 Concession Agreement to conduct operations at Downtown Manhattan Heliport (the “DMH”).

PARTIES

2. Petitioner STC is a New York non-profit corporation consisting of, *inter alia*, thousands of New York City residents who live along the flight paths of, and therefore adversely affected by, the tourist helicopter flights emanating from Downtown Manhattan Heliport.

3. Upon information and belief, Respondents Franchise and Concession Review Committee of the City of New York (the “FCRC”), the New York City Department of Small Business (the “DSBS”), and the New York City Economic Development Corporation (the “NYCEDC”) are all agencies of the City of New York (collectively, the “City”).

4. Upon information and belief, FirstFlight Heliports, LLC d/b/a Saker Aviation Services (“FirstFlight”) is a foreign corporation doing business with the City as set forth herein.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this matter pursuant to, *inter alia*, CPLR 7803 and 7804, which authorize a special proceeding to be brought against a body or officer whose determination was “made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.”

6. The Court has personal jurisdiction over this matter pursuant to CPLR 302(a).

7. Venue for this proceeding is proper in New York County because the complained of conduct took place in New York County.

FACTUAL BACKGROUND

8. On November 5, 2007, the NYCEDC issued a Request for Proposals for the “fixed base” operation of the DMH, which is located at Pier 6 (Block 2, Lot 23 on Manhattan’s tax map). Under the proposal, the City sought to modify the DMH operations and facilities to accommodate diverted flights from the West 30th Street Heliport due to the reduced operations there.

9. In 2007 and 2008, the DSBS carried out a review under New York's State Environmental Quality Review Act ("SEQRA") (City Environmental Quality Review No. 08SBS008M), and retained an environmental consultant, AKRF, to "determine whether increased aircraft operations at the [DMH], due to transferring of operations from the West 30th Street Heliport in Manhattan, would result in significant increase in noise levels."

10. The scope of AKRF's review was quite limited in that it only considered onsite increases in noise levels at the DMH and did not consider increases in noise along flight paths. The study selected three receptor sites "adjacent" to the DMH to measure existing noise levels (i.e., baseline noise from the FDR Highway and adjacent streets, and existing aircraft operations at the DMH).

11. AKRF used flight data from the West 30th Street Heliport to evaluate how diverting flights from that location to the DMH would affect noise levels in the vicinity of the DMH. To capture the "worst case scenario" AKRF used hourly flight data from the busiest days at the West 30th Street Heliport – summertime Fridays and Sundays.

12. AKRF found that on most days the diversion of the West 30th flights to the DMH would not exceed the applicable noise impact threshold set forth in the City Environmental Quality AKRF, Technical Memorandum, Downton Manhattan Heliport Noise Screening Analysis (Oct. 8, 2007).

13. AKRF did find that there would be exceedances on Fridays between 8 a.m. and 10 a.m., and Sundays between 11 a.m. and 6 p.m., unless steps were taken to reduce flight volume during these times. The AKRF study considered no other impacts.

14. On March 19, 2008, DSBS issued a Negative Declaration stating that the new concession would result in no significant environmental impacts.

15. In a two sentence section of the Negative Declaration titled “Air Quality and Noise,” the DSBS found: “No significant CO concentrations are projected. Operation guidelines to be specified in the concession agreement to minimize noise include limits on the hours of operation and when tourist flights may use the facility.”

16. On February 19, 2008, NYCEDC selected FirstFlight as the fixed base operator for the DMH. The FCRC held a public hearing on the concession on June 2, 2008, and on July 23, 2008, the City, acting through the DSBS entered into a concession agreement with FirstFlight for a 10-year term (the “2008 Agreement”). In exchange for annual retention payments the City granted FirstFlight the exclusive right to operate the DMH] as a public used heliport. The 2008 Agreement limited hours of operation during the work week to: Monday through Friday, 7 a.m. to 10:00 p.m.; and no tourist flights between the 7 p.m. and 10 p.m. seven days a week. The 2008 Agreement limited weekend hours to 7 a.m. to 5 p.m., with no tourist flights between 7 a.m. and 9 p.m.

17. In Section 8.04 of the 2008 Agreement FirstFlight agreed to comply with section 24.01 et seq. of the City Administrative Code (i.e., the “Noise Control Code”), and to avoid operating the DMH in a manner that causes a private or public nuisance.

18. After 2008, there was a surge in tourist flights at the DMH, as the volume of non-tourist flights remained fairly steady:

<u>Year</u>	<u>DMH Tourist Flights</u>
2009	23,415
2010	41,540
2011	44,008
2012	43,519

2013 48,493

2014 56,085

2015 59,301

19. Due to the rapid increase in tour volume from the DMH and an onslaught of complaints from affected citizens focusing on overflight noise impacts, the NYCEDC convened FirstFlight, the Federal Aviation Administration, and other concerned stakeholders to discuss ways of reducing impacts.

20. The discussion culminated on April 30, 2010 with the New York City Helicopter Sightseeing Plan (“NYCHSP”). The NYCHSP purported to reduce sightseeing flights by eliminating “short tour” flights (i.e., those lasting four to eight minutes), which apparently represent 15-20% of sightseeing flights at DMH; eliminating sightseeing tours over the Empire State Building and Central Park; and adopting various improved tour routes to mitigate noise impacts.

21. The NYCHSP predicted that installation of a fuel tank at the DMH would reduce operations by 10% because 35 flights a day were for short fueling trips only.

22. Despite the NYCHSP, tourist flights from the DMH continued unabated through 2015, as did the complaints and protest from those affected by the overbearing noise caused by these flights.

23. After negotiations between the Helicopter Tourism and Jobs Council and the City, on February 2, 2016, the DSBS, the NYCEDC, and FirstFlight agreed to an amendment to the 2008 Agreement. The 2016 Agreement has several key provisions:

- A reduction in tourist flights by 50 percent, according to the following implementation schedule: 20% by June 1, 2016; 20% by October 1, 2016; and 10% by January 1, 2017;
- Cessation of tourist flights on Sunday, to take effect April 1, 2016, and a

requirement that Saturday tourist flights not exceed 300, to take effect on June 2, 2016;

- Cessation of flights over Governor's Island and Staten Island, and operation in continued compliance with the 2010 NYCHSP;
- Monthly reporting on tourist flights volume, to take effect July 1, 2016;
- The City reserves the right to reduce the number of tourist flights by an additional 50 percent if, after June 1, 2016, the number of tourist flights exceed the peak monthly operational levels specified, or fly over restriction are violated on more than five occasions; and
- Mandatory air quality monitoring in the vicinity of the DMH, in accordance with a plan to be negotiated by the parties and established by April 1, 2016.

24. The 2016 Agreement also extends the expiration date of the 2008 Agreement through April 30, 2021, allows for two one-year renewal options exercisable at the sole discretion of the City, and reduces the minimum annual guarantee payment the City may receive during the extension years.

25. Finally, provided FirstFlight complied with the terms of the 2008 Agreement and the Amendment, the City agreed to seek approval from the FCRC for the extensions of the 2008 Agreement, and adjustments to the minimum annual guarantee.

26. In the days surrounding the signing of the 2016 Agreement, NYCEDC issued a press release, and the City's papers widely reported on the deal, including the N.Y. Times which published a statement from STC.

27. On June 24, 2016, notice of a joint public hearing of the FCRC and DSBS concerning the 2016 Agreement was posted in the City Record. Similar notice was made in the Daily News and El Diario on July 7 and 8, 2016.

28. On July 11, 2016, the FCRC held a public hearing to vote on a resolution allowing NYCEDC, on behalf of the DSBS, "to utilize a different procedure, pursuant to Section 1-16 of the Concession Rules of the City of New York, for DSBS to amend the concession

agreement.” John Dellaportas, president of STC, spoke on behalf of the organization. The FCRC approved the resolution on July 13, 2016.

29. On November 14, 2016, STC filed a summons with notice in New York County Supreme Court against the FCRC, DSBS, the NYCEDC, and FirstFlight Heliports, noticing the defendants of an intent to bring an Article 78 proceeding and civil action for violations of SEQRA, nuisance, taking/inverse condemnation, and trespass.

FIRST CAUSE OF ACTION (SEQRA)

30. STC repeats and realleges each of the foregoing paragraphs.

31. As set forth above, the City violated SEQRA by failing to conduct any environmental review of its decision to execute the 2016 Agreement, extending the term of the 2008 Agreement for as many as five additional years, while approving a level of tourist flights in substantial excess of the level subject to SEQRA review in 2008.

32. Under SEQRA, no agency may undertake, fund, or approve an action, and no project sponsor may commence any physical alteration related to an action, until the agency has complied with the provisions of SEQRA. 6 NYCRR § 617.3(a).

33. For any non-exempt action, a reviewing agency must determine in writing (using an Environmental Assessment Form (“EAF”)) whether the proposed action may have a significant adverse impact on the environment. 6 NYCRR §617.7(a), (b).

34. The Agency must issue publicly either a positive or negative declaration of impact on the environment. 6 NYCRR § 617.2.

35. If a significant adverse impact is likely to occur, an Environmental Impact Statement (“EIS”) must be prepared to investigate how to avoid or reduce adverse environmental impacts or to consider potentially less damaging alternatives.

36. The City has not prepared an EAF or an EIS, or issued a declaration with respect

to the 2016 Agreement, as it was required to do.

37. The 2016 Agreement marks a non-trivial increase in the size and scale, and an obvious change in the fundamental character, of a project, and thus is a major reordering of priorities, and a material change of the 2008 Agreement, not routine agency administration. Although the 2016 Agreement purports only to improve conditions, this is true only as compared to the immediately preceding period, not as compared to when the 2008 Agreement underwent SEQRA review. Even though the 2016 Agreement purports to decrease the volume of tourist flights from the DMH by 50 percent – from the 2015 baseline of 59,301 to 29,651 – that reduced number is still 26 percent larger than the number of tourist flights in 2009, and likely still larger than the number of flights AKRF analyzed in its 2008 EAS, before the surge in tourist flights. Thus, the Amendment extends the concession agreement for as long as five additional years, while allowing a nontrivial increase in the acceptable volume of tourist flights beyond what has been subject to environmental review.

38. Based on the foregoing, the 2016 Agreement was *ultra vires*, made in violation of lawful procedure, beyond the City’s jurisdiction, affected by an error of law, arbitrary and capricious, and an abuse of discretion.

SECOND CAUSE OF ACTION
(NUISANCE)

39. STC repeats and realleges each of the foregoing paragraphs.

40. For the reasons set forth above, the 2016 Agreement, and the helicopter flights authorized thereby, constitute (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with the property rights of the STC and its members to use and enjoy their homes, (5) caused by Respondents’ conduct in acting and/or failing to act.

41. STC and its members have been harmed as a result thereof.

THIRD CAUSE OF ACTION
(TAKING/INVERSE CONDEMNATION)

42. STC repeats and realleges each of the foregoing paragraphs.

43. For the reasons set forth above, the 2016 Agreement, and the helicopter flights authorized thereby, constitute a taking of private property (*i.e.*, the homes of STC’s members) for public use without just compensation, and/or an inverse condemnation.

44. STC and its members have been harmed thereby.

FOURTH CAUSE OF ACTION
(CIVIL TRESPASS)

45. STC repeats and realleges each of the foregoing paragraphs.

46. For the reasons set forth above, the 2016 Agreement, and the tourist helicopter flights authorized thereby, constitute an entry by Respondents upon the homes of the STC and its members without justification or permission.

47. STC and its members have been harmed as a result thereof.

RELIEF SOUGHT

WHEREFORE, Petitioner respectfully demands a judgment against Respondents and in favor of Petitioner: (a) enjoining, voiding and nullifying the 2016 Agreement; and (b) awarding monetary damages in excess of \$25,000.

Dated: New City, New York
February 6, 2017

LAW OFFICES OF
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s/ Judith Lisa Bachman

By: _____

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