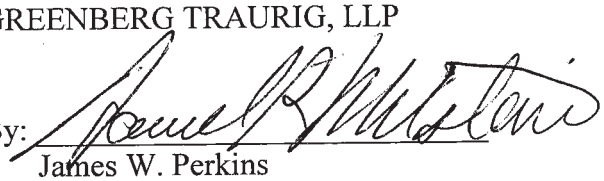
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JOSE CRUZ, MAHMOUD ELWARDANY, DEBORAH FINSTON, JOHN TOMASZEWSKI and DONALD WEST, both individually and in their capacity as stockholders of the SEWARD PARK HOUSING CORPORATION, Petitioner(s), - against - SEWARD PARK HOUSING CORPORATION and DAVID PASS, both individually and in his capacity as the purported PRESIDENT OF SEWARD PARK HOUSING CORPORATION, and CLINTON GRAND PARKING, L.L.C., a subsidiary of ICON PARKING, SYSTEMS, L.L.C., Respondent(s).	Index No. 155244/2016 (Hon. Arthur F. Engoron) **NOTICE OF ENTRY**

Please be advised that annexed hereto is a true and correct copy of the Decision and Order of the Hon. Arthur F. Engoron dated and filed with the clerk of the Court on July 19, 2017.

Dated: New York, New York
July 19, 2017

GREENBERG TRAURIG, LLP

By: 

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ENGORON **PART** 37
Justice

Index Number : 155244/2016
CRUZ, JOSE
vs.
SEWARD PARK HOUSING
SEQUENCE NUMBER : 002 + 001
DECLARATORY JUDGMENT

INDEX NO. 155244/2016
MOTION DATE 8/3/16
MOTION SEQ. NO. 001, 002

The following papers, numbered 1 to 2 **, were read on this** ~~**motion to/for**~~ article 78 petition

~~**Notice of Motion**~~**/Order to Show Cause — Affidavits — Exhibits** _____ **No(s).** 1

~~**Answering Affidavits**~~ — **Exhibits** Notice of Petition **No(s).** 2

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this ~~**motion is**~~

petition is decided in accordance with accompanying memorandum decision.

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

Dated: 7/19/17

ARTHUR F. ENGORON, **J.S.C.**

1. **CHECK ONE:** ..... ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☑ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

----------x

In the Matter of the Application of
JOSE CRUZ; MAHMOUD ELWARDANY; DEBORAH FINSTON; JOHN TOMASZEWSKI; and DONALD WEST; both individually and in their capacity as stockholders of the SEWARD PARK HOUSING CORPORATION,

Petitioners,

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

-against-

SEWARD PARK HOUSING CORPORATION and DAVID PASS, both individually and in his capacity as the purported PRESIDENT OF SEWARD PARK HOUSING CORPORATION, CLINTON GRAND PARKING, L.L.C. & a subsidiary of ICON PARKING SYSTEMS L.L.C.,

Respondents.

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Index Number: 155244/2016

Sequence Number: 001, 002, 003

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 6, were used on this Article 78 petition seeking to reverse respondents' determination to implement a valet system in their parking garage; respondents' motion, pursuant to CPLR 3211(a), to dismiss the petition; and petitioners' cross-motion for sanctions:

	Papers Numbered:
Petitioners' Article 78 Petition (Seq. 001 & 002)	
Order to Show Cause - Affirmation - Exhibits	1
Notice of Amended Petition - Affirmation - Exhibits	2
Seward and Pass's Motion to Dismiss (Seq. 003)	
Notice of Motion - Affirmation - Affidavit - Exhibits	3
Clinton's Affirmation in Support of Motion - Exhibit	4
Petitioners' Notice of Cross-Motion - Affirmation - Exhibits	5
Seward and Pass's Reply Affirmation in Support of Motion - Affidavit - Exhibit	6

Upon the foregoing papers, the petition is denied, the motion is granted, the cross-motion is denied, and the proceeding is dismissed.

Background

Named petitioners are shareholders and proprietary lessees of respondent Seward Park Housing Corporation ("Seward"), a cooperative housing corporation. They bring this special proceeding against Seward; David Pass, Seward's purported president; and Clinton Grand Parking, L.L.C. ("Clinton"), a subsidiary of Icon Parking Systems, L.L.C. ("Icon"), the company hired to operate and manage the co-op's garage ("Garage"), in order to invalidate a garage operating contract Seward awarded to Icon.

Respondents allege that from 2008 to 2015, real estate taxes on the co-op more than doubled, while maintenance charges rose by only 14%. At a Board meeting held on August 19, 2015, the Board appointed a "working group" and tasked it with evaluating the feasibility of expanding parking throughout the co-op. During its November 17, 2015 meeting, the Board voted to engage Walker Parking Consultants ("Walker") to provide recommendations on how to best use the Garage to benefit the entire co-op. Walker's report ultimately recommended an experienced garage operator to implement a valet parking system in lieu of the self-park system. Seward accepted Walker's recommendation, and the Board elected to send out a request for proposal to seven qualified garage operators.

Seward's Board of Directors ("Board") held a special meeting on January 27, 2016, which was attended by nine of the 11 board members. At that meeting, the Board unanimously voted to adopt the following resolutions ("January 27th Resolutions"): (1) the Garage was to be converted from a self-park system to a valet system, and it would "increase access to parking for shareholders and generate more income for the Coop - Effective March 1, 2016"; (2) Seward was to award its garage management contract to Icon for a 10-year term, contingent upon the final terms and contract to be negotiated, reviewed, and approved by the Board; and (3) Seward was to adopt an implementation procedure to allow for a fair and expedient transition. Respondents argue that the January 27th Resolutions became final and binding that same day. The next day, the Board sent notices by email and hand delivery ("Notice") to Seward's shareholders notifying them of the Board's final decision concerning the garage conversion.

Upon receiving the Notice, a small group of cooperators organized protests objecting to the Board's decision. On February 4, 2016, a group of shareholders gathered to express their disagreement with and upset over the January 27th Resolutions. On the same day, petitioners began circulating petitions, one of which, circulated on February 10, 2016, contends that the January 27th Resolutions have inconvenienced them, and that they prefer to keep the self-park system. Respondents allege that less than 13% of cooperators were willing to sign the petition seeking a return to the self-park system, whereas more than twice that number executed a pro-valet petition.

On March 2, 2016, the Board, by majority vote, approved the form of the garage lease that had been previously negotiated. On March 3, 2016, Seward entered into a garage management contract ("Contract") wherein Seward sold off its interests to the Garage with a 10-year lease, allowing Icon to make money off the Garage by implementing a valet system and increasing the number of garage spaces available. Respondents allege that shareholder response to the parking conversion has been overwhelmingly positive. Icon's attendants have allegedly been well-received, and many shareholders have expressed their opinion that the switch has been beneficial to them and the co-op as a whole. Respondents further allege that petitioners are shareholders and proprietary lessees of only five of Seward's 1,700 units.

The Instant Proceeding

The instant petition challenges the Contract's validity, alleging that the BOD exceeded its authority by (1) not providing prior notice of a purported change to the co-op's "house rules"; (2) destroying petitioners' property rights in their previously assigned parking spaces; and (3) entering into an illegal contract with Icon.

Respondents now move, pursuant to CPLR 404, 406, 7804, 3211(a)(1), 3211(a)(5), and 3211(a)(7), to dismiss this proceeding. Respondents argue, inter alia, that the instant petition was commenced more than four months after petitioners received notice of the January 27th Resolutions, which constituted the Board's final and unambiguous decision to convert the Garage to valet parking. Respondents argue that neither the Board's approval of the Contract's final form, nor petitioners' attempts to convince the Board to change its mind extended or tolled the limitations period. Petitioners oppose the motion, arguing that the January 27th Resolutions were "preliminary," and that no final, challengeable determination existed until March 2, 2016, when the Board approved the Contract's final form.

Pursuant to petitioners' proprietary leases, respondents additionally request this Court to find petitioners jointly and severally liable for the costs and expenses they incurred in defending against this proceeding, including reasonable attorney's fees.

Discussion

In an Article 78 proceeding, the scope of judicial review is limited to whether the administrative agency had a rational basis for its determination. See Matter of Pell v Board of Educ., 34 NY2d 222, 230-31 (1974); China v New York City

Bd. of Standards and Appeals, 97 AD3d 485, 487 (1st Dept 2012) ("the agency's interpretation is entitled to great deference, and must be upheld as long as it is reasonable"). Judicial review of an administrative determination is limited to a consideration of whether the determination is supported by substantial evidence on the record as a whole. See Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499 (2011) ("This Court has defined 'substantial evidence' as such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact").

Pursuant to CPLR 217(1), the Statute of Limitations for bringing an Article 78 special proceeding is 120 days and begins to run when the body's challenged decision becomes "final and binding upon petitioner," which is typically when an individual receives a notice of the final determination. See Village of Westbury v Department of Transp., 75 NY2d 62, 72 (1989) ("A determination generally becomes binding when the aggrieved party is notified") (internal quotations omitted). The Court finds that the Board's decision to convert the Garage became "final and binding" upon petitioners on January 28, 2016, when petitioners received the Notice. See Young v Board of Trustees of the Village of Blasdell, 89 NY2d 846, 848-49 (1996) ("the Statute of Limitations was triggered when the Board committed itself to a definite course of future decisions. That occurred when the Board of Trustees resolved to approve the lease") (internal citations omitted). The incontrovertible evidence, pursuant to the Notice, demonstrates that the Board did in fact provide petitioners notice of the January 27th Resolutions, both by written notices circulated to the cooperators and by disclosure of the Board minutes. Thus, the record irrefutably demonstrates that petitioners received notice on January 28, 2016 of the Board's final and unambiguous decision. The Contract's execution on March 3, 2016 merely implemented actions that the Board had already decided to take.

Petitioners' position that the January 27th Resolutions did not become "final and binding" until March 2016 is flatly contradicted by the minutes of the January 27th board meeting and the Notice provided to petitioners the following day. On its face, the January 27th Resolutions are the final word of the Board, unambiguously committing to a garage conversion and awarding the operating contract to Icon. And as a matter of law, neither the Board's approval of the Contract's final form, nor petitioners' attempt to convince the Board to change its mind about the Garage's conversion, extended or tolled the limitations period. See Young v Board of Trustees of Village of Blasdell, 221 AD2d 975, 977 (4th Dept 1995) ("The fact that [respondent] subsequently undertook a SEQRA review of the project ... does not commence anew the running of the Statute of Limitation"). Furthermore, the record establishes that petitioners were aware of the Board's final decision and felt harmed, as evidenced by the protests and petitions that followed the days and weeks after the Notice was disseminated.

The Court has considered all of petitioners' other arguments and finds them unavailing. In particular, the Board did not exceed its authority in converting the Garage to a valet parking system. Article 2.1 of the bylaws states that the Board "shall have entire charge of the property, interests, business and transactions of the [co-op], and may adopt such rules and regulations for the conduct of its meetings and management of the [co-op] as it may deem proper." Here, the Board acted within its authority–*i.e.*, converting the Garage for the co-op's financial benefit–even if its decision to do so was unpopular with some (*apparently* a minority of) shareholders. Thus, the Board's decision to convert the Garage for legitimate, financial purposes is protected by the business judgment rule. See 40 W. 67th St. v Pullman, 100 NY2d 147, 153 (2003) ("the business judgment rule provides that a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith"); see also Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 542 (1990) ("board action undertaken in furtherance of a legitimate corporate purpose will generally not be pronounced arbitrary and capricious or an abuse of power in article 78 proceedings"). New York courts have also consistently held that it is within a co-op board's scope of authority to determine how to use the co-op's facilities and that doing so is a legitimate corporate purpose. See Frisch v Bellmarc Mgmt., Inc., 190 AD2d 383, 387 (1st Dept 1993) ("The cooperative corporation is the sole owner of the land, structures and facilities, while the individual shareholder through the proprietary lease receives the right to occupy the space in the premises to which his or her shares are allocated"). Moreover, the Contract is not illegal *per se*, and does not appear to have been instituted, complied with, or operated illegally. Although only "signed" by one party, the document propounded by respondents as the Contract appears to be genuine. Also, contrary to petitioners' belief, they are not entitled to disclosure, although they do have the right, as cooperators, to view certain documents, which the co-op apparently has and is making available.

Additionally, the Board's decision to implement a valet system is not a change to the "house rules." Even if the January 27th Resolutions were deemed to have done so by implication, shareholders were given 30 days' prior notice before the new parking procedures became effective. Furthermore, petitioners were not deprived of any property rights because, both pursuant to the express terms of the shareholders' proprietary leases and as a matter of law, they hold no rights in the use of the Garage. Article 6.8 of the proprietary leases state that if the co-op "shall furnish to the lessee … any facility … or any other such service, the same shall be deemed to have been furnished by the [co-op] under a revocable license." Therefore, petitioners' proprietary leases provides them with no more than discretionary access to parking spaces by revocable licenses that are executed separate and apart from their shares and leases.

As a matter of public policy, the Board was under no contractual, legal, or equitable duty to involve more than 1,700 cooperators in its decision-making process. Rather, the Board was elected specifically to conduct the day-to-day affairs of the co-op and to take entire charge of the property, interests, business, and transactions of the co-op. It would be nearly impossible for co-op boards to function if every time they had to act, they had to entertain potentially endless debate involving numerous varying positions.

Pursuant to petitioners' proprietary leases, respondents are entitled to reasonable attorney's fees in connection with this proceeding. Specifically, Article 6 of the proprietary lease states that shareholders/lessees are obligated to indemnify the co-op for any costs, including reasonable legal fees, incurred in connection with any action they commence against the co-op based on the lease or the parties' obligations that arise thereunder. Inasmuch as the instant proceeding arises out of petitioners' claims that the Board breached their proprietary leases and violated the co-op's bylaws, petitioners are obligated to indemnify respondents for the costs and expenses respondents incurred in defending against this proceeding.

Finally, neither side is entitled to sanctions for frivolous litigation or for any other reason.

Accordingly, the petition is denied, the motion to dismiss is granted, the cross-motion for sanctions is denied, and the proceeding is dismissed with costs.

Conclusion
Petition denied; motion to dismiss granted; and cross-motion for sanctions denied.

Respondents' request for reasonable attorney's fees and costs is hereby severed and referred to a special referee to hear and report (CPLR 4311). In order to obtain a hearing with a special referee, plaintiff may submit to Room 119 a copy of this Decision & Order and notice of entry, together with a Special Referee Info Sheet (http://nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf), and any required fees.

Dated: July 19, 2017

Arthur F. Engoron, J.S.C.