Matter of 124 West 23rd St., LLC v New York City Dept. of Hous. Preserv. & Dev.

2012 NY Slip Op 32919(U)
November 15, 2012
Sup Ct, New York County
Docket Number: 103036/2012
Judge: Joan B. Lobis

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[* 1] SCANNED ON 12/10/2012

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

PRESENT: LOBIS
Justice

PART 6

124 WEST 23RD STREET, LLC

INDEX NO. 103036/12

MOTION DATE

- v -

MOTION SEQ. NO. 01

N.Y.C. DEPT. OF HOUSING, PRESERVATION + DEVELOPMENT

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for annul determination.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-11
Answering Affidavits — Exhibits	12-25; 26-28; 29-33
Replying Affidavits	34-38; 39-41

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 11/15/12

JOAN B. LOBIS, J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

---X

In the Matter of the Application of
124 WEST 23rd STREET, LLC,

Petitioner,

Index No. 103036/2012

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

Decision and Order

-against-

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT ("HPD"), and MATHEW M. WAMBUA, as Commissioner of HPD,

Respondents.

---X

JOAN B. LOBIS, J.S.C.:

Petitioner 124 West 23rd Street, LLC (the "Developer") brings this proceeding under Article 78 of the C.P.L.R. against respondents New York City Department of Housing Preservation and Development and Mathew M. Wambua, as Commissioner of the New York City Department of Housing Preservation and Development (collectively "HPD"), seeking, inter alia, a judgment setting aside HPD's rejection of its application for a tax exemption under Section 421-a of the Real Property Tax Law ("R.P.T.L."), on the grounds that the rejection was a violation of lawful procedure, an error of law, and arbitrary and capricious. HPD answers and, by its affirmative defenses, asserts that the petition should be denied because its determination to deny the Developer's tax exemption application was reasonable, rational, and consistent with applicable laws and rules, and because the Developer is misinterpreting the applicable law.

This matter involves the Developer's application for a tax exemption under the 421-a Affordable Housing Program ("421-a Program") for a new, mixed-use commercial and

residential building located at 124 West 23rd Street in Manhattan. The 421-a Program is offered by New York State and authorizes exemptions or partial exemptions from local taxes for certain new or rehabilitated low- and moderate-income housing projects. In 2007, the state legislature amended section 421-a and implemented an Assessed Value ("AV") cap on tax exemptions for projects commenced after June 30, 2009. For projects commenced after June 30, 2009, only a portion of a unit's AV is eligible for a 421-a tax exemption, and any value of a unit above this threshold is not eligible for tax exemption benefits. Some projects, however, were eligible to avoid the AV cap if certain conditions were met. In order to avoid the AV cap, developers (like petitioner herein) were required to have (a) purchased negotiable certificates from an affordable housing project that entered into a 421-a written agreement prior to December 28, 2006, and (b) "commenced" construction of the project on or before June 30, 2009. R.P.T.L. § 421-a(12).

The 421-a Program is carried out by local administrative agencies. HPD administers the 421-a Program in the City of New York. New York City Charter ("City Charter") § 1802(6)(b).[1] Pursuant to the R.P.T.L., a city with more than one million people, such as the City of New York, may enact a local law to restrict, limit, or condition the eligibility, scope, or amount of the benefits under R.P.T.L. § 421-a, provided that the local law does not grant benefits beyond those provided for in R.P.T.L. § 421-a. R.P.T.L. § 421-a(2)(i). In the City of New York, New York City Administrative Code ("Admin. Code") § 11-245 contains the local definition of the word "commenced." Construction is deemed to have commenced "on the date immediately following the

[1] Pursuant to City Charter § 1802(6)(b), the Commissioner of HPD has the duty to "administer laws authorizing tax exemption or tax abatement, or both, including, but not limited to, section 11-243 of the administrative code of the city of New York and section four hundred twenty-one of the real property tax law[.]"

issuance by the department of buildings of a building or alteration permit for a multiple dwelling (based upon architectural, and structural plans approved by such department) on which the excavation and the construction of initial footings and foundations commences in good faith[.]" Admin. Code § 11-245(d). Similarly, HPD's rules regarding tax exemptions pursuant to R.P.T.L. § 421-a and Admin. Code § 11-245, et seq, set forth that commencement is

> the later to occur of (i) the date upon which a new metal or concrete structure to be incorporated into the multiple dwelling that shall perform a load bearing function for such multiple dwelling is installed; or (ii) the date upon which a building or alteration permit for the multiple dwelling (based upon architectural and structural plans approved by the Department of Buildings) was issued by such department[.]

Section 6-09(a)(1) of Title 28, Chapter 6 of the Rules of the City of New York ("R.C.N.Y."). In the R.P.T.L., construction is defined as "commenced" when excavation or alteration has begun in good faith on the basis of approved construction plans. R.P.T.L. § 421-a(2)(g).

The Department of Buildings' ("DOB") definitions of architectural and foundation plans are set forth in the New York City Building Code. Under Building Code § 106.6, architectural plans are detailed drawings of all architectural elements of the building, including doors, windows, interior finishes, fire-protection, compliance with energy and environmental requirements, accessibility, safety, and exterior finishes. Under Building Code § 1.06.7.1, foundation plans depict the foundation's footings, walls, and piles; information about adjacent structures; underpinning details; information about the soil and the bearing capacity; and details about insulation for the foundation. Under the Administrative Code, DOB may grant partial or phased approval of a new building's foundation before approving the entire building or structure and without any assurances that a permit for the entire structure will be granted. Admin. Code § 28-104.2.5.

The dispute between the Developer and HPD is whether the Developer "commenced" construction on June 30, 2009, for the purposes of avoiding the AV cap. There is no dispute that the Developer holds the requisite negotiable certificates; that DOB had issued the project a Foundation Permit on June 25, 2009, before the June 30, 2009 deadline; and that the Developer began excavating its site and installing load bearing concrete on June 30, 2009. Yet, DOB did not issue the Developer its New Building Permit until July 6, 2009, after the June 30, 2009 deadline for commencing construction in order to avoid the AV cap. HPD rejected petitioner's application for 421-a benefits on the grounds that the project did not meet the language of Admin. Code § 11-245(d) that the construction be commenced following the issuance of a DOB permit based upon approved architectural and structural plans. In this Article 78 proceeding, the Developer asks the court to reverse HPD's rejection of its application for 421-a benefits.

In an Article 78 proceeding, the court must decide whether the challenged determination has a rational basis in law. C.P.L.R. § 7803(4); In re Sullivan County Harness Racing Ass'n. Inc. v. Glasser, 30 N.Y.2d 269, 277 (1972); In re Colton v. Berman, 21 N.Y.2d 322, 329 (1967). This court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974); C.P.L.R. § 7803(3). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.'" Pell, 34 N.Y.2d at 231 (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id. Importantly, "'[i]t is not the function of judicial review in an article 78

proceeding to weigh the facts and merits *de novo* and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any reasonable basis.'" In re Clancy-Cullen Storage Co., Inc. v. Bd. of Elections of the City of N.Y., 98 A.D.2d 635, 636 (1st Dep't 1983) (emphasis in original), quoting In re Kayfield Constr. Corp. v. Morris, 15 A.D.2d 373, 378 (1st Dep't 1962). "[A]n agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable." In re Smith v. Donovan, 61 A.D.3d 505, 508 (1st Dep't) (citations omitted), leave to appeal denied, 13 N.Y.3d 712 (2009).

The Developer argues that HPD's rejection of its application for benefits under the 421-a Program was arbitrary and capricious, and an error of law, because the Foundation Permit issued by DOB on June 25, 2009, was based upon approved architectural and structural (construction) plans. It argues that its applications for the Foundation Permit and the New Building Permit were submitted simultaneously, and that both applications relied on the same architectural plans. It further argues that because DOB requires a zoning analysis for foundation permits, and architectural plans are required for a zoning analysis, then DOB's approval of its Foundation Permit was necessarily based on architectural plans approved by DOB.

The Developer also argues that the requirements for "commencement" under 28 R.C.N.Y. § 6-09(a) are legally impermissible under R.P.T.L. § 421-a(2)(i). The Developer points out that under R.P.T.L. § 421-a(2)(i), HPD can enact a local law to restrict benefits under the 421-a Program but it cannot "alter the effect" of subdivision 12. Under subdivision 12, the state legislature set forth that holders of negotiable certificates issued prior to December 28, 2006, who commenced

construction prior to June 30, 2009, are not subject to the AV cap. The Developer points out that the word "commence" is defined in 421-a(2)(g) as "when excavation . . . has begun in good faith on the basis of approved construction plans." The Developer argues that HPD is improperly altering the effect of R.P.T.L. § 421-a(12) by requiring that a building permit based on approved architectural and structural plans be issued before a project is deemed to have been commenced.

In response, HPD argues that it acted reasonably, rationally, and lawfully in denying the Developer's application for R.P.T.L. § 421-a full tax exemptions. HPD maintains that only once the Developer was issued its New Building Permit could it be deemed to have commenced construction for the purposes of R.P.T.L. § 421-a. It maintains that this determination is consistent with the applicable statutes and rules.

HPD argues that a foundation permit is based upon foundation plans and not upon architectural and structural plans. It argues that architectural plans are far more detailed than foundation plans, which do not include specific plans of each floor of a building or the locations of doors, windows, or joists, but which simply depict the foundation, basement, and cellar. HPD maintains that it reasonably and rationally concluded that the Foundation Permit issued to petitioner was not based upon DOB-approved architectural and structural plans because the application details for petitioner's Foundation Permit application—as maintained on DOB's Buildings Information System ("BIS") computer system—reflect that petitioner only submitted foundation plans in support of the application. HPD maintains that when it reviewed petitioner's application for 421-a benefits, the information on BIS was its only available information about the permits, and argues that it was reasonable for HPD to rely on the information on BIS. Regardless, HPD maintains, even when it

physically reviewed petitioner's job folders for the Foundation and New Building Permit applications, it again concluded that the Foundation Permit was based only on foundation plans. HPD argues that petitioner's contention that the plans submitted in conjunction with the Foundation Permit were architectural plans because they contained a zoning analysis is without merit, because nothing in a zoning analysis (required for all foundation permits) is tantamount to architectural and structural plans. HPD asserts that the zoning analysis consists of the use of the premises, bulk and height of the building, and other information relevant to zoning regulations; but, HPD argues, plans that depict zoning information are not the type of plans from which a construction crew can construct a building, whereas architectural plans and structural plans generally are. In support of this argument, HPD submits an affidavit from Scott Pavan, an architect and the Manhattan Deputy Borough Commissioner of DOB, who sets forth that the plans that the Developer submitted in connection with its application for the Foundation Permit do not contain complete architectural plans for a multiple dwelling, but are limited to structural plans of the basement and cellar. He further sets forth that the plans submitted with the Developer's application for the New Building Permit are architectural and structural plans within the clear meaning of those terms as defined by the Building Code, i.e. the plans show the architectural detail for the whole sixteen-story project and include details such as the location of doors and windows and details demonstrating compliance with New York City's Energy Conservation Code.

With respect to the Developer's argument that DOB had approved its architectural plans as of June 25, 2009, HPD argues that while this is true, the fact remains that the permit was still not issued by DOB until July 6, 2009 (ostensibly because, according to DOB's records, there were still outstanding issues that needed to be rectified before the building permit could be issued).

It maintains that the Developer did not complete these outstanding items until July 6, 2009. HPD argues that the plain language of Admin. Code § 11-245(d) is clear; a permit based upon architectural plans must have been issued by DOB in order to consider construction to have been commenced. To the extent that the language is ambiguous, HPD argues that the court must uphold its reasonable interpretation of the regulation.

With respect to the Developer's argument that the definitions of "commence" as set forth in the Admin. Code and the R.C.N.Y. are inconsistent with R.P.T.L. § 421-a(2), HPD argues that petitioner's argument is a nonstarter. HPD maintains that since at least 1984, commencement of a project in New York City with respect to R.P.T.L. § 421-a has required a permit based upon DOB-approved architectural and structural plans. Local Law 79 of 1984, § 1, adding Admin. Code § J51-4.1(a)(3). Additionally, HPD points out that Admin. Code § 11-245(d) was signed into law in 2006, before the legislature amended R.P.T.L. § 421-a in 2007, so had the state legislature intended the language in R.P.T.L. § 421-a to supercede New York City's local definition of "commence," it could have done so, but it did not.

In reply, the Developer reasserts its position that R.P.T.L. § 421-a(12) clearly and unambiguously sets forth that to commence a project, for the purposes of the statute, means that excavation or alteration has begun in good faith on the basis of approved construction plans; thus, the Developer argues, the local regulations or rules regarding permitting should not apply. The Developer further argues that HPD's reliance on local regulations and rules to define the word "commence" vitiates the legislature's intent when carving out the exception to the AV cap. The Developer avers that the plain language of R.P.T.L. § 421-a clearly demonstrates that the legislature

explicitly wanted to ensure that negotiable certificates issued before the end of 2006 would be honored and not devalued. The Developer maintains that HPD's local definition of "commence" effectively subjects its project to an impermissible tax exemption cap; but, if HPD followed the state legislature's definition of "commence," then the project would not be subject to the AV cap. The Developer reasserts its argument that HPD's reliance on the definitions of "commence" in the Admin. Code and the R.C.N.Y. unlawfully alters the effect of R.P.T.L. § 421-a(12) in violation of R.P.T.L. § 421-a(2)(i).

Irrespective of the above arguments in reply, the Developer also reasserts its position that, even under local rules, HPD's rejection of its application for 421-a benefits was arbitrary and capricious because it began construction under the Foundation Permit, which the Developer argues was based on DOB-approved architectural plans. The Developer argues that Mr. Pavan is incorrect in his assertion that the Foundation Permit was not based upon DOB-approved architectural and structural plans, and submits an affidavit from Joseph P. Trivisonno, an architect and the former Borough Commissioner for the Brooklyn and Staten Island Offices. Mr. Trivisonno sets forth that the Developer's Foundation Permit and New Building Permit were both based upon DOB-approved plans. He states that the applications for both permits were filed in conjunction with one another and were approved by DOB on June 25, 2009. He states that the structural plans submitted with the application for the New Building Permit are identical to those submitted with the Foundation Permit. He further states that the Foundation Permit includes a zoning analysis which incorporates the architectural plans submitted with the New Building Permit. Mr. Trivisonno takes issue with Mr. Pavan's statement that the plans submitted with the application for the Foundation Permit were not based upon "complete" architectural plans, maintaining that nothing in the applicable laws or rules

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require that a permit be based upon "complete" architectural plans. He asserts that HPD's local rules only require that the plans be approved by DOB. Mr. Trivisonno also argues that DOB should have issued a New Building Permit on June 30, 2009, because there was no reason for DOB to withhold issuing the permit at that point. He maintains that from his review of the files, the only reason the New Building Permit was not issued by DOB on June 30, 2009, was because DOB delayed in performing the ministerial task of actually entering the items that it received on June 30, 2009, into BIS (its computer system). He argues that the Developer should not have its 421-a benefits prejudiced merely because DOB delayed in entering information into its computer system.

HPD does not have authority to enact local laws which "alter the effect" of subdivision 12 of R.P.T.L. § 421-a. R.P.T.L. § 421-a(2)(i). The effect of subdivision 12 is to permit holders of negotiable certificates issued in or before 2006 to have those certificates honored, as long as the holders commence construction on or before June 30, 2009 (construction being deemed commenced once excavation has begun in good faith on the basis of approved construction plans). R.P.T.L. §§ 421-a(2)(g) and 421-a(12). The local regulations—in which a DOB-issued building permit based on DOB-approved architectural and structural plans is a precondition for commencement—do not alter the effect of subdivision 12. Nowhere in R.P.T.L. § 421-a is the phrase "approved construction plans" defined. HPD is charged with administering R.P.T.L. § 421-a in New York City. It is a proper function of HPD's administration of R.P.T.L. § 421-a to interpret the phrase "approved construction plans." It is rational for HPD rely on DOB's issuance of a building permit in determining whether DOB has approved architectural and structural plans, since the approval of such plans is a prerequisite for the issuance of the building permit. Other methods of determining whether DOB has approved architectural plans would be inefficient, unpredictable,

and subject to interpretation. There is no ambiguity in the definition of "commenced" as promulgated by HPD; commencing a project in New York City, for the purposes of R.P.T.L. § 421-a, is dependent on a building permit having been issued prior to starting work. Thus, there was a rational basis for HPD to deny the Developer's application for 421-a benefits for not having obtained its New Building Permit until after the June 30, 2009 deadline. Even had the Developer submitted architectural plans in support of its application for the Foundation Permit, so that a zoning analysis could be conducted, there is no evidence that DOB's approval of architectural plans for the purposes of conducting a zoning analysis in conjunction with a foundation permit is the equivalent of DOB's approval of the architectural plans for the purposes of issuing a building permit. Finally, whether or not DOB should have issued the New Building Permit earlier, based on its approval of the architectural plans on June 25, 2009, is not an issue properly before the court in this Article 78 proceeding against HPD. Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: November 15, 2012

ENTER:

JOAN B. LOBIS, J.S.C.