SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

NEW YORK CITY COUNCIL, BARUCH HOUSES TENANTS' ASSOCIATION, ROBERTO NAPOLEON, DOUGLASS HOUSES TENANTS' ASSOCIATION and JANE WISDOM,

Index No. 101386/13

DECISION/ORDER

Petitioners,

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

-against-

NEW YORK CITY HOUSING AUTHORITY and JOHN B. RHEA, as Chairman of the Board of the New York City Housing Authority,

Respondents.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	1
Affirmation in Opposition to Petition.....	2
Replying Affidavits.....	3
Exhibits.....	5

Petitioners New York City Council, Baruch Houses Tenants' Association, Roberto Napoleon, Douglass Houses Tenants' Association and Jane Wisdom (collectively hereinafter referred to as "petitioners") commenced the instant proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge a land lease initiative proposed by respondents New York City Housing Authority and John B. Rhea (hereinafter referred to as

"NYCHA" or "respondents"). For the reasons set forth below, the petition is denied.

The relevant facts are as follows. In 2011, NYCHA unveiled "Plan NYCHA: A Roadmap for Preservation," a five-year strategic plan which identified new and sustainable sources of revenue, including development rights at NYCHA Campuses that NYCHA could use to generate a significant source of capital funding to raise money for its capital budget. Early in 2013, NYCHA publicly unveiled its proposed plan to lease land from existing public housing projects to private developers (the "Land Lease Initiative"). Pursuant to the Land Lease Initiative, fourteen parcels of land from eight NYCHA developments located in Manhattan would be leased for 99 years to private developers for the purposes of building high-rise residential buildings. Pursuant to the Land Lease Initiative, eighty percent of the units in the new high rises are to be leased out at market rates and twenty percent of the units are to be reserved for low-income individuals. NYCHA alleges that it chose the fourteen sites primarily for "their potential to generate significant revenue" for developers, and in turn, for NYCHA and its buildings. Specifically, it alleges that "[t]he income generated through land leases would be dedicated to building improvements at the eight developments, initially, and other public housing properties citywide."

After unveiling the Land Lease Initiative, NYCHA released a document entitled "Land-Lease Initiative - Pre-RFP Discussion Document" (the "Pre-RFP"), which provided significant information about the Land Lease Initiative to potential developers such as the identification of the various sites, the amount of square footage that is available under certain zoning rules and NYCHA's views on the applicable approval process. Subsequent to releasing the Pre-RFP, NYCHA held a series of meetings with residents and resident associations of the affected NYCHA developments. NYCHA alleges that it released detailed information about the

development sites, including responses to questions and concerns and created a two-step process whereby NYCHA would first issue a Request for Expressions of Interest ("RFEI"), to be followed by the issuance of a Request for Proposals ("RFP"). Pursuant to the process, only developers who responded to the RFEI would be permitted to respond to the RFP but a developer could be conditionally designated after a response to the RFEI alone. This means that a developer could be selected subject to the successful completion of all legal pre-development requirements such as local and Department of Housing and Urban Development ("HUD") reviews and approvals, as a result of an "exceptionally responsive and visionary" proposal in response to the RFEI. However, the RFEI makes clear that "NYCHA may only incur a legal obligation identified in the RFEI with regard to the Parcels described in it after NYCHA enters into a binding written agreement and such written agreement is approved by the Board."

On August 16, 2013, NYCHA issued its Request for Expressions of Interest ("RFEI") which "invites developers to submit proposals for the design, construction and operation" of the residential developments called for by the Land Lease initiative and informs prospective developers that an "internal selection committee" of NYCHA staff will review the submissions. Upon review, the NYCHA members may recommend to NYCHA's board that "a Developer be selected for a particular Development Parcel." Once NYCHA's board approves the recommendation, it will issue a Conditional Designation Letter to the developer and the "selected Applicant must begin pre-development work within thirty (30) days of the date of the conditional Designation Letter." Petitioners then commenced the instant Article 78 petition in October 2013 seeking to challenge the Land Lease Initiative.

It is well-settled that an Article 78 proceeding may only be brought to challenge a final agency determination or action. *See* CPLR § 7801. A court lacks subject matter jurisdiction to

issue an opinion in the absence of a genuine legal dispute and thus does not have discretion to entertain an unripe claim. *See Combustion Eng'g, Inc. v. Travelers Indem. Co.*, 75 A.D.2d 777 (1st Dept 1980). In order for an agency action to be deemed "final," two criteria must be satisfied: (1) "the action must 'impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process...[meaning] a pragmatic evaluation [must be made] of whether the' decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury"; and (2) "there must be a finding that the apparent harm inflicted by the action 'may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.'" *Gordon v. Rush*, 100 N.Y.2d 236, 242 (2003), citing *Matter of Essex County v. Zagata*, 91 N.Y.2d 447, 453 (1998). "If further agency proceedings might render the disputed issue moot or academic, then the agency position cannot be considered 'definitive' or the injury 'actual' or 'concrete.'" *Matter of Essex County*, 91 N.Y.2d at 454.

In the instant action, that portion of the petition seeking to challenge the Land Lease Initiative as arbitrary and capricious must be denied as unripe as the RFEI was not a final agency action. As an initial matter, the issuance of the RFEI was not a final agency action because it did not inflict an actual, concrete injury upon petitioners. Petitioners have not demonstrated that they have yet been affected by the issuance of the RFEI as there has been no direct or immediate impact from the issuance of the RFEI and thus, there can be no harm. *See Matter of Town of Riverhead v. Central Pine Barrens Joint Planning & Policy Commn.*, 71 A.D.3d 679, 681 (2d Dept 2010), citing *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 522 (1986)(finding no concrete injury as "[t]here has been no direct or immediate impact from any administrative action. 'Indeed, as yet, there can be no such harm for there has been no

interference.'") The "mere participation in an ongoing administrative process is not, in and of itself, an actual concrete injury." *Matter of Town of Riverhead*, 71 A.D.3d at 681. Additionally, the issuance of the RFEI was not a final agency action because any harm which may be inflicted upon petitioners in the future may be prevented or significantly ameliorated by further administrative action. As an initial matter, respondents have yet to receive expressions of interest from developers. If respondents do receive expressions of interest, they may decide not to go forward with the developers that have expressed interest which would render the instant petition moot. Moreover, respondents have affirmed that any determination to go forward with a certain developer would be subject to approval by NYCHA's board, which would constitute final agency action. It would be at that point that a petition challenging the Land Lease Initiative would be ripe for review pursuant to Article 78.

Petitioners' reliance on *Price v. County of Westchester*, 255 A.D.2d 217 (3d Dept 1996) for the proposition that the issuance of the RFEI was a final agency action is misplaced. In *Price*, petitioners, the owners of land abutting the Westchester airport, commenced an Article 78 proceeding in 1994 alleging respondents failed to comply with the State Environmental Quality Review Act ("SEQRA") in connection with a project being constructed at the airport. Respondents asserted that the petition was untimely as they made their final determination for the purposes of compliance with SEQRA in 1987. In addressing petitioners' assertion that the determination was not final because it "contains several contingencies," the court explained:

> We agree with respondents that the contingencies do not affect the finality of the [determination], which *clearly commits the County to a definite course of future action* with regard to each of the projects identified in the updated master plan.

Id. at 220 (emphasis added). However, in the instant action, the issuance of the RFEI was not a

final agency action as it does not clearly commit respondents to a definite course of future action as NYCHA's members may decide not to approve any of the developers's expressions of interest or they may not get expressions of interest from developers. Further, NYCHA's board may not even approve the developer that NYCHA's members choose, in which case the Land Lease Initiative might not go forward at all.

Petitioners' reliance on *Sierra Club, Inc. v. Power Auth. of the State of New York*, 203 A.D.2d 15 (1st Dept 1994) is also misplaced. In *Sierra Club*, petitioners brought an Article 78 proceeding in May 1990 seeking to challenge the proposed construction of hydroelectric dams in Quebec. A letter of intent to go forward with the project had been signed by the contracting parties in December 1988 and the specifics of such agreement, which was later executed, were approved by respondents' trustees in June 1989. In determining that the action was untimely, the court held that respondents' approval of the specifics of the agreement in June 1989 constituted a final agency determination as "[i]t was then that the Power Authority's commitment under the terms of the agreement became 'formulated and proposed' and the administrative process...conferred finality." *Id.* at 16. The court noted that "[e]ven if the subsequent formal contract had modified the terms of the approval, this fact would not, per se, render the initial approval less final." *Id.* Unlike in *Sierra*, in the instant action, no portion of the Land Lease Initiative has yet been approved by NYCHA's board. NYCHA has not chosen a developer and has not submitted any such choice or plans to its board for approval. Thus, it is clear that the issuance of the RFEI was not agency action that "conferred finality."

That portion of the petition challenging respondents' failure to submit the Land Lease Initiative to the Uniform Land Use Review Procedure ("ULURP") as required by Public Housing Law ("PHL") § 150 is also denied as unripe. Pursuant to PHL § 150(1), "[t]he prior approval of

the local legislative body and of the planning commission, if any,...shall be requisite to the final adoption or approval by an authority or municipality of a plan or project...." City Charter § 197-c(a) (8) specifies that ULURP applies to "[h]ousing and urban renewal plans and projects pursuant to city, state and federal housing laws." It is undisputed that respondents have not yet submitted to ULURP any portion of its Land Lease Initiative for review. However, petitioners may only challenge respondents' failure to do so once there is a "final adoption or approval" "of a plan or project." While the parties dispute whether ULURP approval is required for the Land Lease Initiative as a whole, the parties do not dispute that at a minimum "it is required for actions requiring zoning changes from the city." With regard to these zoning changes, respondents affirm that "[i]nasmuch as NYCHA now intends to include retail stores in several of its developments, it will, in fact, seek ULURP approval of the zoning changes necessary to effectuate that before it finally adopts or approves its Land Lease Initiative." As it is clear that NYCHA's board has not yet approved the Land Lease Initiative, any challenge to respondents' failure to submit the Initiative, in whole or in part, to ULURP, is premature as they may still do so.

Finally, that portion of the petition seeking an Order rescinding the RFEI on the basis that the Land Lease Initiative was not sufficiently described in NYCHA's 2013 Annual Plan in violation of 42 USC § 1437c-1(d)(8) (the "Housing Act") and 24 CFR § 903.7(h) (the "implementing regulations") is also denied. USC § 1437c-1(d)(8) and 24 CFR § 903.7(h) requires that NYCHA contain certain information in its annual plan, such as "a description of any housing for which [NYCHA] will apply for demolition or disposition" along with a "timetable for the demolition or disposition." As an initial matter, respondents have demonstrated that its 2013 Annual Plan complies with Federal Requirements. In its 2013 Annual Plan submitted to

HUD on October 18, 2012, NYCHA described a new initiative to bring hundreds of millions of dollars in revenue to NYCHA to help maintain and preserve public housing in New York City. The 2013 Annual Plan stated that the new initiative would create permanently affordable housing units, not displace any residents, and bring millions of dollars to the housing authority that would go towards providing safe, secure and well-maintained housing for NYCHA residents at the sites throughout the City. The 2013 Annual Plan also informed HUD that NYCHA would offer its sites for the development of market rate and affordable housing and, in some cases, ground floor commercial and retail establishments. Finally, the 2013 Annual Plan states that "[a]fter NYCHA has engaged residents, elected officials, and other community leaders, [NYCHA] will finalize a list of new sites and, early in 2013, release a Request for Proposals seeking development on these sites." Pursuant to the 2013 Annual Plan, there followed a year of engagement of residents, elected officials and other community leaders, which culminated in the 2014 Annual Plan, dated October 18, 2013, which lists the eight developments and fourteen parcels of land that NYCHA proposes to lease and provides further specifics about the Land Lease Initiative. Petitioners' assertion that NYCHA was not sufficiently specific about the Land Lease Initiative in the 2013 Annual Plan is unavailing. At the time NYCHA submitted the 2013 Annual Plan to HUD in October 2012, NYCHA has affirmed that it did not know the details of the sites it would propose to lease to private developers nor did it know any further details about the Initiative as a whole. Indeed, NYCHA has affirmed that "by the time the 2014 Annual Plan was drafted, more details about the initiative were known, and more were provided."

However, even if the Land Lease Initiative was not sufficiently described in NYCHA's 2013 Annual Plan, petitioners' request to rescind the RFEI on that basis is denied as petitioners have no private right of action to enforce the 2013 Annual Plan. NYCHA publishes its annual

plan pursuant to the Housing Act, which provides that a "public housing agency shall submit to the Secretary an annual public housing agency plan under this subsection for each fiscal year for which the public housing agency receives assistance..." 42 U.S.C. § 1437c-1(b)(1); *see also* 24 C.F.R. 903.4 & 903.7. HUD has established a process by which it reviews, approves or disapproves a Public Housing Authority's Annual Plan. With respect to the investigation and enforcement of these provisions, 42 U.S.C. § 1437c-1(1)(2) provides that "the [HUD] Secretary shall...provide an appropriate response to any complaint concerning noncompliance by a public housing agency with the applicable public housing agency plan." 42 U.S.C. § 1437c-1(1)(2). The Housing Act's implementing regulations provide that if HUD's Secretary determines that a public housing agency is not in compliance with the annual plan, "it shall take such actions as the Secretary determines to be appropriate to ensure such compliance." 24 C.F.R. § 903.25. It is well settled that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. Univ. of Chicago*, 441 U.S.677, 688 (1979). "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). Courts have routinely found that no private right of action exists under the Housing Act. *See Renaissance Equity Holdings LLC v. Donovan*, 2013 WL 2237547 at*5 (E.D.N.Y. May 21, 2013)("[t]here is no private right of action under the Housing Act...."); *see also Thomas v. Butzen*, 2005 WL 2387676 (N.D. Ill. 2005)(finding that "section 1437c-1...does not suggest Congressional intent to confer enforceable rights on plaintiffs. The section says nothing about a private right of action, and its focus is on public housing agencies' responsibility to report to HUD, not on their responsibilities to their tenants."); *see also Shell v. HUD*, 2009 WL 4298757 at *2 (11th Cir. Dec. 2, 2009)(affirming the

district court's holding "that neither 24 C.F.R. 903.25 nor 42 U.S.C. § 1437c-1 provide a private right of action"); *see also Copeland v. United States*, 622 F.Supp. 2d 1347 (S.D. Fla. 2008)(observing that under 42 U.S.C. §1437c-1, whether a housing authority violates its annual plan is a question for HUD to determine in its discretion).

In the instant action, this court agrees with the well-settled law that petitioners do not have a private right of action to challenge NYCHA's alleged failure to sufficiently describe the Land Lease Initiative in its 2013 Annual Plan. The Housing Act does not address enforcement of an annual plan and, by its plain terms, does not create individual rights. Although the broad purpose of the Housing Act may be directed at ensuring adequate, habitable housing for low-income families, the focus of §1437c-1 is on regulating the contents of NYCHA's annual and five-year plan submissions and thus focuses on the regulated entity rather than on the individuals protected. Therefore, that portion of the petition must be denied.

Petitioners' reliance on *Renaissance Equity Holdings LLC v. Donovan*, 2013 WL 2237547 (E.D.N.Y. May 21, 2013) for the proposition that the Housing Act may be challenged pursuant to Article 78 is also without merit. In *Renaissance*, the plaintiffs, landlords of a building which participates in the section 8 housing program, commenced an action against HUD asserting violations of the Housing Act and its implementing regulations. The court dismissed the complaint on the ground that the Housing Act does not provide a private right of action which would enable plaintiffs to maintain such a lawsuit. In a footnote, the court went on to state that "Plaintiffs are not left without remedy. They may file an Article 78 proceeding against NYCHA in state court...and may...assert breach of contract claims against NYCHA for violations of their...contracts." *Id.* at *6. However, that remedy does not apply to petitioners in the instant action as the *Renaissance* plaintiffs' right to commence an Article 78 proceeding against

NYCHA was based solely on the fact that they maintained a housing contract with NYCHA. In this case, as petitioners cannot demonstrate any contractual relationship with NYCHA whatsoever, they may not challenge the 2013 Annual Plan pursuant to Article 78.

Accordingly, that portion of the petition which seeks to rescind the RFEI due to noncompliance with the Housing Act and its implementing regulations is denied with prejudice and the remaining portions of the petition are denied without prejudice as they are not yet ripe for review. This constitutes the decision and order of the court.

Dated: 12/2/13

Enter: _____
J.S.C.

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