Liska NY, Inc. v City Council of the City of N.Y.

2014 NY Slip Op 31420(U)

May 30, 2014

Sup Ct, New York County

Docket Number: 101484/2013

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

[* 1]
SCANNED ON 6/2/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS PART 6
Justice

LISKA NY, INC., and 731 SOUTHERN BOULEVARD LLC,

Petitioners,

- v -

THE CITY COUNCIL OF THE CITY OF NEW YORK, THE BRONX BOROUGH PRESIDENT, COMMUNITY BOARD 2 OF THE BOROUGH OF THE BRONX, and THE NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondents.

INDEX NO. 101484/2013

MOTION DATE 03/14/14

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers were read on this Article 78 petition.

	PAPERS NUMBERED
Notice of Petition/ Order to Show Cause – Affidavits – Exhibits	1-3
Answering Affidavits – Exhibits	4-6
Replying Affidavits	7

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, Order + Judgment

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).

Dated: May 30, 2014

JOAN B. LOBIS, 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

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

---X

LISKA NY, INC., and 731 SOUTHERN BOULEVARD LLC,

Petitioners,

-against-

Index No. 101484/2013

Decision, Order, and Judgment

THE CITY COUNCIL OF THE CITY OF NEW YORK, THE BRONX BOROUGH PRESIDENT, COMMUNITY BOARD 2 OF THE BOROUGH OF THE BRONX, and THE NEW YORK CITY DEPARTMENT OF BUILDINGS,

Respondents.

---X

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

Liska NY, Inc., and 731 Southern Boulevard LLC (collectively "Liska") petition pursuant to Article 78 of the Civil Practice Law and Rules for an order reversing the City Council of the City of New York's denial of a special permit application pursuant to Article 7, Chapter 4 of the Zoning Resolution of the City of New York. Respondents the City Council of the City of New York ("City Council" or "Council"), the Bronx Borough President, Community Board 2 of the Borough of the Bronx ("Community Board"), and the New York City Department of Buildings ("DOB") oppose the petition. For the following reasons, the petition is denied.

In November 2003, the DOB approved Petitioners' new building application for an eight-story, 32 unit, residential building in the Bronx. The application specified the building as a Use Group 2 building, the use group designated for residential uses. In a 2007 post-approval amendment, the Petitioners filed to build "sleeping accommodations for [the] homeless." The amendment failed to indicate a change to Use Group 3, the group designated for community facility

uses. The DOB approved the amendment in October 2007. In 2009, the building received a temporary certificate of occupancy as a Use Group 2 building.

The DOB discovered that it had erroneously approved Petitioners' amended application as a Use Group 2 building, despite Petitioners' intention to use it as Use Group 3 building. Section 24-111 of the New York City Zoning Resolution permits Use Group 3 buildings to have a floor area ratio[1] (FAR) not exceeding 3.44 The Petitioners' building has a FAR of 4.9.

The Petitioners applied for a special permit, pursuant to Section 74-20 of the New York City Zoning Resolution. The purpose of the special permit is to allow for specified modifications to use or bulk regulations of the Zoning Resolution – in this matter, the FAR regulations. New York City Zoning Resolution art.7, ch.4, § 74-902. The application was submitted to the City Planning Commission for review under the Uniform Land Use Review Procedure ("Review Procedure"). After receiving an application, the City Planning Commission issues a declaration stating whether the modification will have an effect on the quality of the environment. In this case, the City Planning Commission issued a Negative Declaration, indicating that the action of reducing the FAR would have "no significant effect on the quality of the environment."

Once the application was certified by the City Planning Commission as complete, the application went to the Community Board for review. The Community Board's Housing and

[1] The floor to area ratio is the total floor area on a zoning lot divided by the lot area. New York City Zoning Resolution art.1, ch.2, § 12-10.

Land Use Committee held a public hearing. At the hearing the Petitioners were given two options. If the application were denied, Petitioners would be required to remove two extra floors and potentially lose in excess of 14 units. Alternatively, if the application were approved, Petitioners would need to decrease the area of the 7th floor of the building and remove 2 units to conform to the set back requirements for the building's height. After several hearings, the application was presented to the full Community Board on May 22, 2013. Despite the City Planning Commission's negative declaration, the Community Board recommended disapproving the application. Orlando Marin, the commissioner of the City Planning Commission, addressed the Community Board during the hearing.

Following the Community Board review, the application was reviewed by Bronx Borough President Ruben Diaz Jr. He held a public hearing on June 11, 2013. Following the hearing, the Bronx Borough President issued a recommendation to disapprove the Petitioners' special permit application. This recommendation was submitted to the City Planning Commission.

The City Planning Commission held a public hearing on July 10, 2013. The Bronx office of the Department of City Planning provided a memorandum and documentation, including reports of inspections revealing numerous violations. Notwithstanding these violations and the recommendations by the Bronx Borough President and Community Board, the City Planning Commission issued its resolution on August 21, 2013, with eight out of twelve members voting in favor of granting the special permit. The decision was then filed with the City Council for approval pursuant to Section 197-d(a) of the New York City Charter ("Charter").

On September 3, 2013, the City Council Land Use Committee's Subcommittee on Zoning and Franchises held a public hearing where Petitioners presented the special permit application. During the public hearing, Council Member Maria del Carmen Arroyo, the representative for District 17, which is where the property sits, raised concerns that the "building over the permitted zoning was intentional" and that the quality of the building was "severely lacking, posing some very serious threats." Council Member Arroyo also stated that there was an oversaturation of homeless service facilities within the quarter-mile radius of the building, and that Petitioners purposefully filed an erroneous application.

A representative from the Bronx Borough President's office, Wilhelm Ronda, read a statement in opposition to the application, which, in addition to repeating the claims from the written submission, also stated that within a quarter-mile of the facility there was an oversaturation of similar facilities. Mr. Ronda mentioned that the building had "major quality of life issues . . . including the issue of rats in the building, cracks have been noticed . . . on the outside walls as well as reported by the Community Board." He also explained that the Petitioners owned another building at 1073 Hall Place. At that site, the DOB discovered that Petitioners also attempted to adjust the application prior to the issuance of a temporary certificate of occupancy.

On September 30, 2013, the City Council Land Use Committee's Subcommittee on Zoning and Franchises voted to deny the application for a special permit. Several days later, the City Council Land Use Committee unanimously voted to disapprove the City Planning Commission's determination that the special permit application should be granted. Finally, on

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October 9, 2013, the full City Council adopted a resolution disapproving the City Planning Commission's determination to grant the special permit.

Petitioners then commenced this Article 78 proceeding. Petitioners seek an order declaring the decision of the City Council as null and void, and as arbitrary and capricious; nullifying and setting aside the determination by the Community Board as illegal, arbitrary and capricious, and an abuse of its discretion; directing the Council to approve the special permit; and directing the DOB to issue a temporary certificate of occupancy.

Petitioners assert that the Council's decision was not made with relevant evidence and, as a result, is arbitrary and capricious. Petitioners claim that the Council was required to strictly construe zoning regulations against the municipality which seeks to enforce the regulations. They argue that the Council used the more stringent standard of review for a use variance in its determination instead of the more lenient standard for special permits. Petitioners maintain that granting the special permit was a duty of the City Council, not a discretionary act.

Petitioners argue that the decisions of the Council, Community Board, and Bronx Borough President were made on impermissible bases. Petitioners claim that because City Planning Commissioner Orlando Marin deliberated in the Community Board hearings, he should have recused himself from the City Planning Commission's vote on the special permit application. Commissioner Marin voted against granting the special permit. Petitioners assert that the Council should not have relied on the deliberation and negative vote of Commissioner Marin.

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Petitioners further contend that the City Council should have granted the permit as Liska fulfilled the requirements to receive one. Petitioners assert that the only bases for a special permit are those which pertain to the "(a) distribution of bulk, (b) supporting services for the neighborhood, and (c) traffic." Petitioners state that even if Respondents' bases for denying the special permit were valid, they were not supported by substantial evidence.

Respondents argue that the City Council considered the administrative record and made a decision that was wholly rational and reasonable. They claim that the Council's decision was based, in part, on the concern that the Petitioners were acting in bad faith when filing the application. They maintain that the Council is concerned that granting the special permit would "send the message to other developers that they too can overbuild their properties, and if the violation is later discovered, simply legalize the condition by applying for a special permit after the fact."

Respondents affirm that there is no evidence on the record that suggests that Commissioner Marin's statements to the Community Board were presented to the Council or influenced the Council's vote. Respondents argue that Mr. Marin merely provided factual background to the Community Board, and that there was no need for him to recuse himself. They assert that the recommendations of the Bronx Borough President and Community Board are advisory opinions not subject to Article 78 review. They contend that there is no basis for the DOB to issue a temporary certificate of occupancy because even assuming a special permit were granted the current FAR would exceed the permissible FAR for both Use Group 2 and Use Group 3.

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In reply to the Respondents' contentions, Petitioners argue that the Council was acting in an administrative and not a legislative capacity when reviewing the special permit application. Petitioners claim that due to the administrative nature of that review, the Council should have restricted its inquiry to the factors enumerated in the text of Section 74-902 of the Zoning Resolution. Petitioners contend that community objections are insufficient to support a denial of a special permit. They assert that the Council failed to set forth the factual basis for its determination even though there were deliberations on the record.

In an Article 78 proceeding, the judiciary reviews an administrative action to determine whether that action violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). The Court is required to "defer to the agency to which the determination has been legislatively committed." Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp., 59 A.D.3d 312, 324. Where an issue is limited to "pure statutory interpretation," a court is not required to defer to an administrative agency but rather should consider the plain language of the statute. E.g., Dunne v. Kelly, 95 A.D.3d 563, 564 (1st Dep't 2012); see also Lynch v. City of N.Y., 965 N.Y.S.2d 441, 445 (1st Dep't 2013) (statute must be read and given effect as written by legislature).

For determinations that are administrative or quasi-legislative "rationality is the appropriate standard of review." Sasso v. Osgood, 86 N.Y.2d 374, 384 n.2 (1995). The Court does not consider substantial evidence within the meaning of Section 7803(4) of the Civil Practice Law and Rules. Halperin v. New Rochelle, 24 A.D.3d 768, 772 (2d Dep't 2005). Administrative

or quasi-legislative determinations are "distinguished from quasi-judicial determinations reached upon a hearing involving sworn testimony." Sasso, 86 N.Y.2d at 384 n.2 (internal citations omitted). A determination is rational "if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition." Halperin, 24 A.D.3d at 772.

The City Planning Commission issues special permits, subject to the approval of the City Council. Pursuant to Section 74-01 of the Zoning Resolution, special permits are issued "in specific districts . . . whose location or control requires special consideration or major planning factors, or for specified modifications of the #use# or #bulk# regulations" of the Zoning Resolution. A special permit is "tantamount to a legislative finding that, if the special exception conditions are met, such use is in harmony with the general zoning plan and will not adversely affect the neighborhood and surrounding areas." Framike Realty Corp. v. Hinck, 220 A.D.2d 501, 501-02 (2d Dep't 1995).

The City Council's denial of an application for a special permit may not be "impermissibly based upon generalized objections expressed by members of the community." Exxon Corp. v. Restiano, 237 A.D.2d 356, 357 (2d Dep't 1997). The Council, however, is "free to consider matters related to the public welfare in determining whether to grant or deny a special exception or permit[.]" Framike Realty Corp., 220 A.D.2d at 502. The City Council does not need to set out standards for granting a permit. Cummings v. Town Bd. of N. Castle, 62 N.Y.2d 833, 834 (1984). Even when standards are legislated by the Council, "it has not divested itself of the power of further regulation, unless the standards expressed purport to be so complete or

exclusive as to preclude" it from considering other factors. Id. at 834-35 (internal citations omitted).

Applications for special permits are reviewed by a number of entities subject to Section 197-c(a)-(m) of the New York City Charter. The City Planning Commission first reviews an application for a special permit pursuant to ULURP, which is section 197-c(a)(4) of the Charter. Once the application is certified by the City Planning Commission as complete, an affected community board has sixty days to conduct a public hearing and submit a written recommendation to the City Planning Commission and to the affected borough president, who also submits a recommendation. New York City, N.Y., Charter § 197-c(e)-(g). The City Planning Commission then reviews the application according to Zoning Resolution Section 74-902. New York City, N.Y., Charter § 197-c(h). Section 74-902 states that the City Planning Commission "may permit the allowable community facility floor area ratio . . . to apply to any development, extension, or enlargement, or change of use . . . provided" the City Planning Commission finds that the minimum requirements of Section 74-902 are met. Pursuant to Section 197-d(c) of the Charter, the Council then reviews the decision of the City Planning Commission and makes a final determination.

The final decision over the granting of a special permit has been legislatively committed to the City Council. New York City, N.Y., Charter § 197-d. In reviewing an application for a special permit, the City Council is not required to only consider Section 74-902 of the Zoning Resolution. See Cummings, 62 N.Y.2d at 834-35. Section 74-902 of the Zoning Resolution requires that the City Planning Commission make specific findings to permit the FAR to be increased, but does not state that either the City Planning Commission or New York City

Council are required to grant a permit if such findings are made. Nor is the City Council required to merely follow the recommendations of the City Planning Commission. Instead, the Charter states that after receiving recommendations from City Planning Commission, the "affirmative vote of a majority of all the council members shall be required to approve, approve with modifications or disapprove such a decision." Id. at § 197-d(c). The Charter does not elaborate as to what reasons the Council must have when approving or disapproving a special permit.

In this matter, the Council disapproved the special permit. The record shows that the City Planning Commission met the requirements for a special permit pursuant Section 74-902 of the Zoning Resolution. Upon review of the application, the New York City Council voted to deny the application. There is nothing in the record that shows that the Council used an improper standard of review for special permits. It was not required to simply grant a special permit because Petitioner met the minimal statutory standards for receiving one. See New York City, N.Y., Charter § 197-d. There is also nothing in the record that shows that the Council relied on any statements from City Planning Commissioner Orlando Marin.

Upon review of the record, the Court finds that the Council's decision was not arbitrary and capricious, and was supported by substantial evidence. In disapproving the special permit, the Council did not rely on generalized objections. Rather, the representatives of the affected community - the Community Board, the Bronx Borough President, and Council Member Arroyo – raised objections that specified the oversaturation of similar facilities in the area, the poor condition of the Petitioners' building, and concern that approval of the special permit would result in bad precedent. The Council's concern that approving the permit would result in other owners

overbuilding first and requesting permission second is not a generalized objection but a matter related to public welfare. Framike Realty Corp., 220 A.D.2d at 502. While the City Planning Commission recommended approval of the special permit, in this case the Council is not bound by its recommendation. See New York City, N.Y., Charter § 197-d. The Court cannot reverse the Community Board or the Bronx Borough President as they only issue recommendations and not determinations. See id. § 197-c(e)-(g). As a result, the Court cannot order the DOB to issue a temporary certificate of occupancy. Accordingly, it is

ADJUDGED that the Petition is denied and the proceeding is dismissed.

Dated: May 30, 2014

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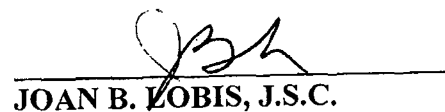

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