

**Matter of Edgewater Apts., Inc. v New York City
Planning Commn.**

2018 NY Slip Op 31835(U)

July 31, 2018

Supreme Court, New York County

Docket Number: 152211/18

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

THE EDGEWATER APARTMENTS, INC.,
Petitioner,

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

Index No.: 152211/18
DECISION/ORDER

-against-

THE NEW YORK CITY PLANNING COMMISSION
and HOSPITAL FOR SPECIAL SURGERY,
Respondents.

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HON. CAROL R. EDMEAD, JSC:

In this Article 78 proceeding, the petitioner Edgewater Apartments, Inc. (Edgewater) seeks a judgment to overturn an order of the respondent New York City Planning Commission (CPC) as arbitrary and capricious (motion sequence number 001). For the following reasons, this petition is denied.

FACTS

Edgewater is a cooperative apartment corporation that owns and manages a residential cooperative apartment building (the Edgewater building) located at 530 East 72nd Street in the County, City and State of New York. *See* petition, ¶ 25. The respondent Hospital for Special Surgery (HSS) is a New York licensed, limited liability corporation, with offices at 535 East 70th Street in the County, City and State of New York, that owns and operates a campus of hospital buildings on York Avenue between East 70th and East 72nd Streets. *Id.*, ¶ 27; exhibit A. The Edgewater building is located near the northern portion of the campus. *Id.*, exhibit A.

On August 11, 2008, the CPC granted HSS's application for a "Special Permit" to construct a new hospital building on its campus which was to be designated as the "river building." See petition, ¶ 30; exhibits A, B. Specifically, the river building was to be constructed on a raised platform over the FDR Drive between East 71st and East 72nd Streets, with pedestrian access located on East 71st Street. *Id.*, exhibit A. As part of its application for the Special Permit, HSS filed an Original Environmental Impact Statement that examined the effect that the river building would have on the area. *Id.*, petition, ¶¶ 35-40. Special Permits are normally valid for ten years, however, HSS did not construct the river building during that time frame. *Id.*, ¶ 8. Instead, on July 24, 2017, HSS filed a renewal application to extend the Special Permit for an additional three years, during which time it hopes to complete the river building. *Id.*, ¶ 33. The CPC granted that application after a hearing on November 13, 2017. *Id.*, ¶¶ 63-68; exhibits E, F, G. Edgewater disagreed with the CPC's decision to grant HSS's renewal application, however, and, commenced this Article 78 proceeding on March 12, 2018 to overturn it. *Id.*, ¶¶ 69-82. The CPC and HSS each filed separate answers to Edgewater's petition on April 18, 2018. See verified answer (CPC); verified answer (HSS). The matter is now before the court (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. See *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. and Community Renewal*, 232 AD2d 302 (1st Dept

1996). A determination is arbitrary and capricious if it is “without sound basis in reason, and in disregard of the facts.” See *Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983); citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. Thus, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232. Here, Edgewater raises two arguments as to why the CPC’s November 13, 2017 decision to grant HSS’s application to renew its Special Permit for an additional three years was an arbitrary and capricious act.

First, Edgewater asserts that “the [CPC]’s determination to renew the Special Permit is not subject to deference,” and argues that this determination violated the plain language of the Zoning Resolution (ZR). See petitioner’s mem of law at 4-10. Edgewater begins by noting the general rule that “[t]he interpretations of a respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational.” *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). However, Edgewater then also notes that questions of pure legal interpretation of statutory language do not warrant judicial deference to administrative expertise. See e.g., *Matter of Toys “R” Us v Silva*, 89 NY2d 411, 419 (1996). Edgewater finally cites the portion of the ZR that governs Special Permits, and argues that its “automatic lapse” provision renders the CPC’s grant of a three-year extension improper. See petitioner’s mem of law at 6-10. The CPC responds that, when one reads the entire text of the ZR, “the renewal of the Special Permit is fully consistent with [it].” See

Respondent's mem of law (CPC) at 7-8. After reviewing the entirety of the text, the court agrees with the CPC.

The relevant portion of the ZR provides as follows:

"11-42. (a) Except as otherwise provided in paragraphs (b), (c) or (d) of this Section, any Authorization of Special Permit granted by the [CPC] under the provisions of the 1961 Zoning Resolution shall automatically lapse if substantial construction, in accordance with the plans for which such Special Permit or Authorization was granted, has not been completed within four years from the effective date of such Permit or Authorization. Substantial construction shall mean, in the case of a new building or buildings, the substantial construction of at least one building, For the purposes of this paragraph (a), abutting buildings on a single zoning lot shall be considered to be one building.

"(b) Any Authorization or Special Permit for a site that is part of an urban renewal area or other government-sponsored or government-assisted project shall automatically lapse within four years from the date of the applicant's possession of the site, or sites, or the effective date of an Authorization or Special Permit, whichever is later; or.

"(c) Upon a showing that a longer time period for substantial construction is required for a phased construction program of a multi-building complex, the [CPC] may, at the time of granting an Authorization or Special Permit, extend the period set forth in paragraph (a) of this Section to a period not to exceed 10 years; or.

"(d) In the event judicial proceedings have been instituted to review the decision to grant any Authorization or Special Permit, the lapse period set forth in paragraph (a), (b) or (c) of this Section, whichever is applicable, shall commence upon the date of entry of the final order in such proceedings, including appeals.

"11-43. Any Authorization or Special Permit granted by the [CPC], except one granted with a 10 year lapse period, that would automatically lapse as set forth in Section 11-42 . . . may be renewed without public hearing, for two additional three-year terms, provided that the [CPC] finds that the facts upon which the Authorization or Special Permit was granted have not substantially changed. However, all Special Permits or Authorizations granted by the [CPC] shall lapse after a total of 10 years from the date of their original granting if substantial construction has not taken place at such time. An application for a renewal of Authorization or Special Permit shall be filed with the [CPC] before it lapses."

Id. In its memorandum of law, the CPC notes that ZR § 11-43 does indeed provide that “all Special Permits . . . shall lapse after a total of 10 years from the date of their original granting if substantial construction has not taken place at such time.” *See* respondent’s mem of law (CPC) at 7. However, the CPC asserts that Edgewater’s reliance on this lapse provision “completely ignores [ZR §] 11-42 (d) . . . without acknowledging that the lapse period tolls during litigation, including appeals.” *Id.* The CPC here notes that Edgewater commenced litigation to challenge its original decision to issue the Special Permit in 2008, and that the final appeal of that litigation was not completed until June 27, 2013, when the Appellate Division, First Department, issued an order affirming this Court’s (Stallman, J.) dismissal of Edgewater’s earlier challenge. *See Matter of Hand v Hospital for Special Surgery*, 107 AD3d 642 (1st Dept 2013). That Edgewater made no mention of this fact in its moving papers is disturbing, since it is an extremely significant fact, and not to be glossed over lightly. Pursuant to ZR § 11-42 (d), when “judicial proceedings have been instituted to review the decision to grant any . . . Special Permit, the lapse period . . . shall commence upon the date of entry of the final order in such proceedings, including appeals.” Here, because Edgewater did commence “judicial proceedings” to challenge HSS’s Special Permit, and because those proceedings were not concluded until June 27, 2013, when the last appeal order was entered, the ten year lapse period did not “commence” until that date, and it will not expire until June 27, 2023. As a result, it is no importance that HSS had not yet performed “substantial construction” of the river building project when it applied to renew the Special Permit on July 24, 2017. In fact, it is also conceivable that HSS could apply for a second three-year extension in 2020, should it need to, since the 10-year lapse period will not expire until June 27, 2023. It is, of course, to be hoped that further extensions will not be necessary. More

importantly, however, it was wrong and perhaps disingenuous of Edgewater to omit any discussion of either its own prior litigation against respondents or of the effect of ZR § 11-42 (d). In any case, the court rejects Edgewater's "lapse period" argument pursuant to that provision of the ZR.¹

Next, Edgewater argues that "the [CPC]'s renewal was contrary to the requirements of the [ZR]." See petitioner's mem of law at 10-19. Edgewater particularly focuses on the portion of ZR § 11-43 that permits the CPC to grant extensions of Special Permits without hearings "provided that the [CPC] finds that the facts upon which the . . . Special Permit was granted have not substantially changed." *Id.* Edgewater then argues that the CPC's November 13, 2017 order was improper, since there has been a "substantial change" in the "facts upon which the Special Permit was granted." *Id.* The CPC denies this, and responds that "the renewal of the Special Permit complied with the [ZR's] requirements." See respondent's mem of law (CPC) at 8-10. After reviewing those requirements, the court agrees.

The full text of ZR § 74-682, pursuant to which the instant Special Permit was granted, states that the CPC must make the following prerequisite determinations:

¹ The court further notes that the considerations that underlie the inclusion of "tolling provisions" such as the one set forth in ZR § 11-42 (d) were explained by the Court of Appeals in *Matter of Faymor Dev. Co. v Board of Stds. & Appeals of City of N.Y.* (45 NY2d 560 [1978]), a decision that was rendered before the ZR was amended to include such provisions. In *Faymor*, the Court noted that the "petitioner's efforts to proceed with construction were delayed, obstructed and ultimately frustrated because of violent opposition from area residents . . . [who] commenced dubious, if not frivolous lawsuits and obtained a stay on the condition that they post a bond . . . [which] was never posted." *Id.*, at 566. The Court found that, even though the ZR as it was then written did not provide for the tolling of lapse periods, the Court's inherent equitable powers both permitted and required such tolling to counteract the aforementioned "dubious, if not frivolous lawsuits." *Id.* Later, the ZR would be amended to specifically include tolling provisions to counteract the effects of vexatious, attenuated litigation over the issuance of Special Permits and Authorizations.

“(a) for development or enlargements in such demapped air space and for modification of bulk regulations, that the location and distribution of new bulk shall result in a good site plan in relation to the existing buildings on site-and in the area; and

“(b) for modification of off-street loading requirements, when such non-profit institution includes more than one building on two or more zoning lots, the City Planning Commission may determine the required number of loading berths as if such non-profit institution were located on a single zoning lot, and may permit such loading berths to be located anywhere within such institution without regard for zoning lot lines, provided that such loading berths shall be:

“(1) adequate to serve the requirements of the institution;

“(2) accessible to all the uses in such institution without the need to cross any street at grade; and

“(3) located so as not to adversely affect the movement of pedestrians or vehicles on the streets within or surrounding such institution.”

See Hand v Hospital for Special Surgery, 34 Misc 3d 1212(A), *4-5, 2012 NY Slip Op 50060(U) (Sup Ct, NY County 2012), *affd* 107 AD3d 642 (1st Dept 2013). The CPC notes that it made these findings with respect to the instant Special Permit in 2008, and that its decision to grant the Special Permit was reviewed and upheld by both this court and the Appellate Division, First Department. *Id.*; 107 AD3d 642, *supra*. The CPC further notes that, at the renewal application hearing on November 13, 2017, HSS stated that “there have been no changes to the building that would impact environmental review.” *See* respondent’s mem of law (CPC) at 9; verified answer (CPC), exhibit 12 at 15. Edgewater nevertheless argues that the CPC acted improperly in granting the renewal application because it failed to “consider any substantial change of the facts upon which the Special Permit was granted.” *See* petitioner’s mem of law at 14-19.

Edgewater bases its argument on the text of ZR § 11-43 that authorizes the renewal of

Special Permits “without public hearing . . . provided that the [CPC] finds that the facts upon which the . . . Special Permit was granted have not substantially changed.” Edgewater then asserts that there have been “substantial changes” as regards both the “good site plan” and the “loading berth location” requirements that are set forth in ZR § 74-682. *Id.* With respect to the former, Edgewater argues that the CPC failed to consider “the relationship between the [river] building and its environs;” specifically, by “failing to assess the current state of the neighborhood.” *See* petitioner’s mem of law at 16. In this regard, Edgewater notes that “it is undisputed that the neighborhood around the [river] building substantially changed,” because “eight new medical facilities were (or are being) built.” The court notes that Edgewater’s papers are devoid of either legal arguments or factual assertions concerning any alleged “substantial change” to the “location and placement of loading berths” that was set forth in the river building construction plan, however.² Therefore, the court deems that Edgewater has abandoned this prong of its argument, and focuses, instead, on the alleged “substantial changes” to the “good site plan” that were brought about by neighborhood development. In this regard, the CPC responds that “the presence of a few new buildings in the general neighborhood does not substantially change the CPC’s 2008 analysis regarding the river building’s site plan.” *See* respondent’s mem of law (CPC) at 10. The CPC also asserts that Edgewater’s argument is based on an untenable premise, because if it “were to consider every new development in a neighborhood to be a ‘substantial change,’ the permit renewal process would grind to a halt.” *Id.* It is true that, in

² Edgewater’s papers merely make passing reference to the ZR’s requirement that a building’s loading berths must be “located so as not to adversely affect the movement of pedestrians or vehicles on the streets within or surrounding such institution,” but do not specify any “substantial changes” to the river building’s construction plan that would cause its proposed loading berths to fail to meet this requirement. *See* petitioner’s mem of law at 12.

Matter of Jackson v New York State Urban Dev. Corp. (67 NY2d 400, 425[1986]), the Court of Appeals observed that “[a] requirement of constant updating, followed by further review and comment periods, would render the administrative process perpetual and subvert its legitimate objectives.” It is also true that, in this court’s review of the initial Special Permit grant, Justice Stallman noted that the Final Environmental Impact Statement (FEIS) that accompanied the Special Permit application contained an analysis of “stability of residential development” which specifically took into account “growth to the west” of the proposed river building. *See Hand v Hospital for Special Surgery*, 34 Misc 3d 1212(A), *10, *supra*. The court notes that the “eight medical facilities” that Edgewater referred to in its moving papers all appear to be located near either York or First Avenues, both of which are well west of the river building site. Therefore, the court agrees that the construction of these facilities does not constitute a “substantial change” to the river building’s “good site plan” that was outside the scope of consideration of the aforementioned FEIS. As a result, the court rejects Edgewater’s argument, and finds that Edgewater has failed to establish the existence of any “substantial changes” that would render the CPC’s November 13, 2017 decision to renew the instant Special Permit for three years an improper act, in violation of ZR § 11-43. That decision was proper, complied with the statute, and did not involve any abuse of discretion. Accordingly, the court also finds that Edgewater’s Article 78 petition should be denied, and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition of Edgewater Apartments, Inc. for relief pursuant to CPLR Article 78 (motion sequence number 001) is in all respects denied; and it is further

ADJUDGED that respondent Hospital for Special Surgery, having an address at 535 East 70th Street New York, NY, do recover from petitioner Edgewater Apartments, Inc., having an address at 530 East 72nd Street, New York, NY, costs and disbursements in the amount of \$ _____, as taxed by the Clerk, and that respondent have execution therefor; and it is further

ORDERED that counsel for respondents shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for petitioner.

Dated: New York, New York
July 31, 2018

ENTER:



Hon. Carol R. Edmead, JSC

HON. CAROL R. EDMED
J.S.C.