SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

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WEST 58TH STREET COALITION, INC.,152 W. 58 ST. OWNERS CORP., SUZANNE SILVERSTEIN, CARROLL THOMPSON, XIANGHONG DI STELLA LEE, DORU ILIESIU, ELIZABETH EVANS-ILIESIU,

Plaintiff,

- v -

CITY OF NEW YORK, BILL DE BLASIO, SCOTT STRINGER, NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, NEW YORK CITY DEPARTMENT OF BUILDINGS, STEVEN BANKS, JACQUELINE BRAY, WESTHAB, INC.,NEW HAMPTON, LLC,JOHN PAPPAS, PAUL PAPPAS, B GENCO CONTRACTING CORP., TMS PLUMBING & HEATING CORPORATION, BASS ELECTRICAL CORPORATION

Defendant.

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INDEX NO. 156196/2018

MOTION DATE 10/04/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136, 137, 138, 139, 140, 141, 142, 143, 146, 147

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Petitioners commenced the instant Article 78 proceeding challenging the determination of respondents City of New York, New York City Department of Homeless Services (DHS), and New York City Human Resources Administration (HRA) (with other City-related respondents, collectively City) to open a homeless shelter in the building located at 158 West 58th Street in the County, City and State of New York (the building). Petitioners argue that the decision is arbitrary, capricious, and irrational because the building is unsafe and not in compliance with current building and fire safety codes. Petitioners also claim that the City failed to perform a proper fair share and environmental

review, did not give the public an opportunity to be heard, and that the shelter would give rise to a public nuisance.[1]

"In reviewing an administrative agency determination, [the Court] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious" (Matter of Gilman v New York State Div. of Hous. and Community Renewal, 99 NY2d 144, 149 [2002]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (Peckham v Calogero, 12 NY3d 424, 431 [2009], citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]). "If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (Peckham, 12 NY3d at 431; see Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363-64 [1987]).

The Court finds that the decision to open a homeless shelter at the premises has a rational basis and is therefore not arbitrary and capricious.

With respect to safety, petitioners claim that the building must be brought up to current building and fire safety code requirements because there is a change in occupancy. Any alternations in compliance with the 1968 building code would only be permissible "provided the general safety and public welfare are not thereby endangered" (NYC Admin Code § 27-118 [c]); and that certain alteration work must be brought up to code, irrespective of grandfathering. The City contends that the building is grandfathered and that compliance with current codes is not required.

The applicable codes depend, in part, on the classification. The Court finds that there is a rational basis to find that the building is a Class A Multiple Dwelling with an R-2 classification under the applicable laws because DHS claims that the residents of this shelter would stay for 30 days or more

[1] By interim order dated December 12, 2018, this Court denied the branches of the petition seeking a preliminary injunction and discovery (NYSCEF Doc. No. 132).

(see NYSCEF Doc. No. 118 [hereinafter Gittens affidavit] at 3, ¶¶ 6-7; NYSCEF Doc. No. 117 [hereinafter Bray affidavit] at 30-31, ¶ 57).

Consequently, because the building has an R-2 classification, the petitioners' claim that the building changed occupancy is without merit. As the City contends, when the Building Code was updated in 2008, the J-2 group was omitted and [single room occupancy hotels, like the building's prior use,] were classified as R-2 'apartment hotels (nontransient)'" (NYSCEF Doc. No. 119 at 30, n 55, citing NYSCEF Doc. No. 118 [Gittens affidavit] at 3).

Accordingly, under the rules applicable to this type of occupancy and classification, a partial Temporary Certificate of Occupancy (TCO) was issued,[2] which demonstrates to the Court that the building is presumably safe and in compliance with applicable laws.

The Court rejects petitioners' contention that the owner elected to conform to current code as the application concerned the work being done on the first floor and not the entire building (Tr at 64).

Petitioners point to the absence of evidence from the respondents, expert or otherwise, to sufficiently oppose their expert affidavits regarding the building's safety. While the respondents did not submit any affirmative evidence from a City representative specifically stating that the building and proposed plans would not "endanger" "the general safety and public welfare," it is not required to do so. The Court reads the plain words of the applicable statutes to infer that such considerations were already taken into account when issuing the TCO (see NYC Admin Code § 28-118.15 ["the commissioner is authorized to issue a temporary certificate of occupancy before the completion of the entire work covered by the permit, provided that the subject portion or portions of the building may be occupied and maintained in a manner that will not endanger public safety, health, or welfare"]; NYC Charter § 645 [b] [3] [f] ["the commissioner may, on request of the owner of a building or structure or his authorized representative, issue a temporary certificate of occupancy for any part of such building or structure

[2] The TCO was issued with respect to the cellar and first through fourth floors.

provided that such temporary occupancy or use would not in any way jeopardize life or property"]). Further, if this Court were to examine whether the exception to grandfathering based on "the general safety and public welfare" should be scrutinized, it necessarily calls for a substitution of judgment with respect to the safety conditions of the building. "[W]here, as here, the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference" (Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363 [1987]).

To find otherwise, based upon petitioners' allegations and affidavits (which take issue with nearly every aspect of the entire building and project), it would be asking the Court to substitute respondents' judgment for its own and make an independent review of the facts in support of its decision, which is something that the Court cannot do, even if it were inclined to reach a different result (see Peckham v Calogero, 12 NY3d 424, 431 [2009]). For example, while the Court could be concerned with the single means of egress, which only leads to the lobby, and that the width of the stairwell may very well inhibit residents from exiting while simultaneously permitting first responders in — these are all aspects for which the City and its agencies are supposed to be given deference (see Peckham v Calogero, 12 NY3d 424, 431 [2009] ["courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise"]).

Other violations independent of the grandfathering provisions are also entitled to agency deference in the manner in which the City interprets them. Thus, the rationalizations for permitting one means of egress and having such egress through the lobby, are not arbitrary and capricious (see Gittens affidavit at 4-5). Further, according to the City, the Fire Protection Plan, which elaborates on the infrastructure in place to prevent fires, was examined by the Fire Department of New York, which had no objections to the plan; and the respondents have a certified permit to continue the work on the sprinklers to have the fire protection systems in place according to the plan (Tr at 70, 77-79, 81-82).

The failure to submit a façade inspection report does not, when considered in context of this petition, warrant the finding that the decision to open the homeless shelter is arbitrary and capricious. The Court further finds the issue raised concerning the asbestos report unavailing, as the risk of exposure to asbestos was only due to the work done on the first floor.

Petitioners arguments in support of its challenge to the City's determination regarding the fair share analysis is without merit. The Fair Share Criteria permit DHS to focus on a 400-foot radius from a proposed site. Focusing on this region has a rational basis, as the report states it presumed that this is the area to be most affected by the shelter. Thus, the Court does not find that DHS ignored any material facts (e.g., the number of shelters already present in Community District 5 overall) in a flagrant disregard of the criteria in order to render its decision as arbitrary and capricious (see Community Planning Bd. No. 4 (Manhattan) v Homes For the Homeless, 158 Misc 2d 184, 191-92 [Sup Ct, NY County 1993]). The beds to population ratio is not dispositive — rather, the Fair Share analysis is specifically designed to balance a number of factors in guiding the City's determination (Community Planning Bd. No. 4, 158 Misc 2d at 191-92). In sum, the Court finds that the City performed a meaningful analysis under the Fair Share Criteria (see NYSCEF Doc. No. 89; see e.g., Matter of Bloomberg v Liu, 133 AD3d 414, 415 [1st Dept 2015]; Matter of Turtle Bay Assn v Dinkins, 207 AD2d 670, 670 [1st Dept 1994]).

Similarly, petitioners' allegations that the City failed to provide a "reasoned elaboration" for its conclusion in the environmental assessment statement that there would be no negative impact on the neighborhood's character are also without merit. The City performed a full review in compliance with the CEQR Technical Manual and gave a reasoned elaboration on this aspect (see NYSCEF Doc. No. 97 at 27-28 [supplemental studies]; see, e.g., Finn v City of New York, 141 AD3d 436 [1st Dept 2016]). Further, the other aspects of the environmental review are also adequately supported (see id.).

Accordingly, the environmental review process and no negative impact statement were not arbitrary and capricious.

Finally, petitioners have no standing to challenge the open-ended request for proposals process (see, e.g., Matter of City Club of N.Y., Inc. v Hudson Riv. Park Trust, Inc., 142 AD3d 803, 804 [1st Dept 2016]). Additionally, that part of the proceeding asserting a claim for a public nuisance must also be dismissed, as petitioners have no standing to make such claim (see Saks v Petosa, 184 AD2d 512, 513 [2d Dept 1992] ["A claim for damages arising from a public nuisance which interferes with or causes damage to the public in the exercise of rights common to all, cannot be maintained by a private individual absent special damages"]).

Accordingly, it is hereby ADJUDGED that the application is denied and the petition is dismissed. This constitutes the decision, order and judgment of the Court.

HON. ALEXANDER M. TISCH

4/25/2019
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE