

**Matter of Brewer v New York City Hous. Auth.**

2019 NY Slip Op 33576(U)

December 6, 2019

Supreme Court, New York County

Docket Number: 154063/2019

Judge: Eileen A. Rakower

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

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In the Matter of the Application of

MANHATTAN BOROUGH PRESIDENT  
GALE A. BREWER,

Index No.  
154063/2019

Petitioner,

**DECISION  
and ORDER**

For a Judgment Under Article 78 and § 3001  
and § 6301 of the Civil Practice Law and Rules,

- against -

THE NEW YORK CITY HOUSING  
AUTHORITY; KATHRYN GARCIA, Interim  
Chair and CEO; THE CITY OF NEW YORK; and  
BILL DE BLASIO, MAYOR OF THE CITY OF  
NEW YORK,

Motion Seq. 001

Respondents.  
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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Manhattan Borough President Gale A. Brewer (“Petitioner”) brings this action as a “hybrid Article 78 and plenary action”, seeking an Order:

1. Declaring that the Holmes Tower Infill Development is an “essential or significant” modification to public housing plan, and is thus subject to the New York State Public Housing Law and the city’s Uniform Land Use Review and Procedures (“ULURP”);
2. Vacating and nullifying the resolution adopted by Respondent New York City Housing Authority (“NYCHA”) and Kathryn Garcia (collectively, “NYCHA Respondents”) on December 19, 2018, which authorized NYCHA to enter into a 99-year lease with Fetner Properties (“Fetner”);

3. Declaring that the use of a Mayoral Zoning Override (“MZO”) to circumvent ULURP is an impermissible abuse of authority that usurps the role of Petitioner;
4. Vacating and nullifying the determination by NYCHA Respondents that NYCHA is empowered to seek MZO in connection with its infill projects;
5. Temporarily restraining and preliminarily enjoining any Respondent from taking any action in further of any construction related to the Holmes Towers Infill Development, including but not limited to permitting, conducting, authorizing, or continuing any construction work at the development site; and
6. Awarding Petitioner costs, fees, and disbursements incurred in connection with these proceedings.

Additionally, Petitioner moves for an Order granting Petitioner leave to serve a notice pursuant to CPLR § 3120 to obtain limited disclosures in support of the Petition. Respondents oppose.

Respondents the City of New York and Bill De Blasio, Mayor of the City of New York (collectively, “City Respondents”) oppose and cross move for an Order dismissing Petitioner’s Verified Petition pursuant to CPLR §§ 3211(a)(2) and (7). Petitioner opposes the cross-motion.

NYCHA Respondents oppose and cross move for an Order dismissing Petitioner’s Verified Petition pursuant to CPLR §§ 3211(a)(2), (7) and (5), 7804(f), and 217(1). Petitioner opposes the cross-motion.

#### Background/Factual Allegations

In May 2015, NYCHA created NextGen NYCHA as a response to a decrease in federal spending. NYCHA Respondents contend part of NextGen NYCHA would “activat[e] a limited number of underutilized sites with potential market value into mixed-income developments.” (NYCHA Respondents’ Memo. of Law at 4). In December 2018, NYCHA built upon NextGen NYCHA and launched NYCHA 2.0, to significantly increase the resources for the restoration of NYCHA’s buildings. NYCHA Respondents contend that NYCHA picked Holmes Towers to lease out the space for the construction of a mixed-income building with new community facilities. NYCHA Respondents contend that Holmes Towers would raise about \$25

million in revenue that would be used towards the rehabilitation needs of Holmes Towers.

In May 2017, Fetner was selected to construct the new building at Holmes Towers. NYCHA contends that “[a]fter considering the feedback received following numerous meetings with the residents of Holmes Towers, Community Board 8, the Resident Advisory Board, elected officials, and the general public, NYCHA and Fetner proposed construction of a 50-story building with 339 units, half of which would be designated for affordable housing, to be located adjacent to the two existing NYCHA buildings at Holmes Towers.” (NYCHA Respondents’ Memo. of Law at 5).

In May 2018, NYCHA Respondents contend that NYCHA’s Board authorized NYCHA to submit an application to HUD pursuant to Section 18 of the United States Housing Act (“section 18”), for the approval of NYCHA entering into a 99-year lease with Fetner for the construction of the proposed building located at Holmes Tower. In December 2018, NYCHA Respondents contend that NYCHA’s Board authorized the lease between NYCHA and Fetner contingent on the approval of the application submitted with HUD and Fetner’s receipt of financing commitments. NYCHA Respondents contend that HUD did not issue a determination and therefore, NYCHA did not execute a lease with Fetner.

Petitioner commenced this Verified Petition as an Article 78 proceeding on April 18, 2019. On June 7, 2019, two months after the Verified Petition was filed, NYCHA Respondents contend that NYCHA withdrew its application with HUD and HUD confirmed it has discontinued processing NYCHA’s application.

On October 29, 2019, the parties appeared for oral argument. Following oral argument, NYCHA informed the Court that NYCHA’s board rescinded the resolutions related to the Holmes Towers Infill Development.

#### Parties’ Contentions

Petitioner argues that the Court should annul NYCHA’s authorization of the lease because NYCHA acted in violation of lawful procedure, and arbitrarily and capriciously when it approved the lease on December 19, 2018 and bypassed ULURP. Additionally, Petitioner argues that NYCHA lacks statutory authority to MZO on behalf of Fetner to exempt the new skyscraper from zoning to bypass ULURP. Petitioner further argues that the documents that are sought are relevant and necessary for Petitioner to determine the status of the project. Petitioner asserts

that she needs to know the specifics of Respondents' development of Holmes Towers in order to obtain effective relief in the Article 78 proceeding.

In opposition, NYCHA Respondents assert that the proceeding should be dismissed because the Court lacks subject matter jurisdiction and Petitioner fails to state a claim of action because Petitioner's claims are not ripe. Moreover, NYCHA Respondents argue that there have been no plans to seek approval of a MZO and therefore Petitioner's application is premature.

In further opposition, City Respondents assert that there is no final agency determination and therefore Petitioner's Article 78 claim is not ripe. City Respondents assert that the requested documents have no bearing on the legal questions raised in the Article 78 proceeding.

### Legal Standards

"Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v Franco*, 95 NY2d 550, 554 [2000]. One such question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." See CPLR 7803 [3]. "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

"It is well-settled that an Article 78 proceeding may only be brought to challenge a final agency determination or action. See CPLR § 7801." *New York City Council v. New York City Hous. Auth.*, 41 Misc. 3d 1238(A) [Sup Ct, NY County 2013]. "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." *Id.* (citation omitted). See also *Gordon v. Rush*, 100 N.Y.2d 236, 242 [2003].

Discussion

In light of NYCHA's correspondence to the Court dated November 4, 2019, Petitioner's Article 78 proceeding is moot. NYCHA's Board rescinded the three resolutions related to the Holmes Towers Infill Development. In the correspondence, NYCHA's counsel states that "[a]ny future proposed development would require a new authorization from the Board that would be issued at a future Board meeting." (Doc. 3). Accordingly, there is no final agency determination for the Court to review and Respondents' cross-motions to dismiss are granted.

Moreover, Respondents have not sought approval of MZO, therefore Petitioner's claim is not ripe. Additionally, Petitioner's discovery request is neither material nor necessary and is therefore denied.

Wherefore, it is hereby,

ORDERED that the Petition is denied and Respondents' motions to dismiss are granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: DECEMBER 6, 2019



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Eileen A. Rakower, J.S.C.