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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. OMANSKY PART 47
Justice

Sarah Wilkins

- v -

Satish K. Babbar

INDEX NO. 110116/01

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion decided in accordance with accompanying memorandum

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/20/01

PAULA J. OMANSKY J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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In the Matter of the Application of

Index No. 110116/01

SARAH WILKINS, as President of the 9th STREET A-1 BLOCK ASSOCIATION, RON PLOTKIN, as treasurer of the ST. MARK'S PLACE A-1 BLOCK ASSOCIATION, Marcia Lemon as President of the LUDLOW STREET BLOCK ASSOCIATION, STATE SENATOR THOMAS K. DUANE, DENNIS RICCIO, LAUREN BARNES, NANCY COHN, LIZ DIAMOND, SAKI DREMELLAS, LAURIE GORDON, *GAHAN* HASKINS, KIM HONE, MARY ELLEN HOSTAK, SARAH JOHNSON, WILLIAM KLAYER, KATE KUBERT, KEITH LUBELL, JEFF LOHN, 9TH STREET ESTATES, INC. MICHAEL O'NEILL, SUSAN PILLAY, MAY ROUND, SARAH SCHULMAN, DAVID TABOR, JERRY ORTER, STEVE DiPERO, ROB SIMPSON, JACKSON KRALL, TAMI HAUSMAN, LISA KRAMER, DAVID MORROW, SALLY BOON, MICHAEL ROSENTHAL, MARLENE PARACIOS, KATHERINE WOLPE, GEORGE STEGMEIR, SUSAN ALLEE, GAIL LARROCA, SUSAN CHAN, EMANUEL DELALAIN, WENDY WOOD, PAUL KORINSKI, JORDAN MAMONE, and ROY NATHANSON

Petitioners,

ORDER AND JUDGMENT

For a Judgment under Article 78 of the Civil Practice Law & Rules,

- against -

SATISH K. BABAR, R.A., as Acting Commissioner of the NEW YORK CITY DEPARTMENT OF BUILDINGS, MANHER SHAH, Acting Borough Commissioner of the CITY OF NEW YORK DEPARTMENT OF BUILDINGS, and the NEW YORK CITY DEPARTMENT OF BUILDINGS

Respondents.

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PAULA J. OMANSKY, J.:

In this Article 78 proceeding, petitioners seek to rescind the revocation letter issued by respondents dated May 8, 2001, and May 9, 2001, (the May 2001 Revocation Letters") to the extent that they permit any further submission of evidence to the respondent New

York City Department of Buildings ("DOB") by any party interested in the construction of a commercial premises at East Store Apartment, 412-414 East 9th Street New Ycrk, New York.

Petitioners also seek to reinstate the Final Revocation Letter issued by DOB, dated June 18, 1999, ordering the cessation of all further work at the premises (the "June 1999 Final Revocation Letter"). In addition, petitioners request that this court direct respondents to fully enforce the zoning laws and to prohibit any further operations of commercial business on the premises. Petitioners, also seek an award of costs, disbursements and attorneys fees upon the grounds that the respondents acted with wanton and deliberate disregard of the law, gross negligence and that it knowingly refused to implement the New York City Zoning Resolution ("Zoning Resolution") (General City Law §§ 81-c[2] and E2[2]).

Respondents cross-move, pursuant to CPLR 3211(a)(2), CPLR(a)(7), CPLR 7801(1) and CPLR 7803, on the grounds that the court lacks subject matter jurisdiction over this proceeding and petitioners have failed to state a cause of action upon which relief may be granted.

FACTS

Petitioners include property owners on 9th Street between First Avenue and Avenue A, New York, New York, taxpayers and residents of 9th Street between First Avenue and Avenue A, taxpayers and residents of St. Mark's Place between First Avenue and Avenue A, and residents of nearby neighborhoods. Three

cnincorporated associations appear through their presidents or treasurers (General Association Law § 12). Petitioners maintain, that except for the last category of petitioners, they are all directly affected by the conduct of the respondent DOB because a predominately residential block will be transformed by this large alcohol-dispensing restaurant. This change in use, according to petitioners, will add to the vermin in the neighborhood as well as increase the noise, traffic, garbage removal, and congestion in an already crowded neighborhood.

Petitioners allege that respondents "surreptitiously" permitted Ilan Zinner, president of 412 East 9th Street Realty Corp. and the owner of subject building, a non-party,[1] Thomas Hamada *of* the Ebisu Corporation, a non-party, and Robert Strong, R.A. a non-party and architect under the employ of Ebisu Corp. and others to construct or install a commercial establishment. According to petitioners, respondents' determination will actually reward the three applicants for what petitioners' term a "deliberate forgery of the lease" which was allegedly submitted by Mr. Zinner and the Ebisu Corp. for the sole purpose *of* misleading the respondent Department of Buildings" (petition, ¶ 3).

The history of this dispute is long and complicated. In 1977, the basement space located in the subject premises, was home to a bar known as the "Frog Pond." From 1978 through 1979, the space was utilized as a residential apartment by an individual named

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[1] The landlord has not been made a party to this action and neither side argues to add the landlord as a necessary party.

"John Jonas." In an order dated December 8, 1985, the New York State Division of Housing and Community Renewal ("DHCR") held that

> the inspection made by this Agency in the subject apartment shows that the apartment is used for residential purposes. Therefore, the tenant is entitled to the [sic.] Rent Stabilization lease.

Mr. Jonas voluntary vacated the subject premises in 1997 and the premises remained vacant. On February 25, 1999, respondents issued a work permit in connection with the landlord's first application

In March 1999, it came to the attention *of* petitioner 9th Street A-A Block Association ("Block Association") that construction work was being done on the premises. Work permits which were issued by the DOB were displayed in front of the building. On March 11, 1999[2], counsel for the Block Association wrote to the DOB, objecting to the issuance of work premits. The Block Association claimed that a permit for a commercial use at the subject premises should not be granted because there had not been a continuous non-conforming commercial use at the subject premises since December 15, 1961. The Block Association also submitted documentation which demonstrated that the portion of the subject premise in question had been occupied as a residential use for approximately 20 years. Hence, the Block association concluded that any non-conforming use that had existed at the subject premise had been discontinued for more than two years, and required the

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Petitioners have also filed objections to Ebisu Corp.'s application for a restaurant wine license with the New York State Liquor Authority.

space to remain as residential.

On April 22, 1999, the DOB issued a 10-day letter of revocation for the subject premises but permitted the applicant to present evidence of conformity with all laws. Later on May 6, 1999, the DOB granted a five-day extension of the revocation for the purpose of allowing the landlord and restaurant owner to submit evidence of conforming use.

However, petitioners maintain that the construction work continued and that petitioner Sarah Wilkins notified the DOB about the alleged violation on May 10, 1999.

On May 11, 1999, the DOB rescinded its letter of revocation based upon the submissions of landlord and the architect. Petitioners' attorney wrote DOB and requested that the revocation be reinstate'd and that his clients have an opportunity tc review the submissions and to respond.

DOB sent copies of the submissions to petitioners on May 16, 1999. Petitioners contend that the landlord and the architect submitted a forged commercial lease to DOB Borough Commissioner Ronny Livian. The lease stated that it was an agreement for the East Store premises and listed the name of the lessee as "Gisella's Secrets."

On May 17, 1992, petitioners contested the validity of the lease pointing out that the lease, which was supposedly executed in 1987, was made using a preprinted form that was only created in 1994. In further support of their position, petitioners presented a copy of the affidavit of the former tenant of the bakery known as

"Gisella's Secrets" dated May 16, 1999. The tenant stated that the signature was not her own but a forgery, and that she was the tenant in the West Store and not the East Store (see, petition Ex. L).

On May 26, 1999, DOB reissued a letter of revocation to Mr. Strong. Mr. Zinner, and Eli Koike. Soon after, on June 18, 1999, the respondent DOB issued the June 1999 Final Revocation Letter, which stated that "evidence of a continued on-conforming use of the was store was found to be unsatisfactory." The letter also directed that "[a]ll further construction shall cease as of this date."

Petitioners maintain that there was no construction on the site from June 18, 1999 until April 17, 2001, when work resumed. Petitioners Contacted DOB, regarding the reactivated construction and learned that the landlord had filed a new work permit application on December 28, 2000 (Application No. 102934238). On January 12, 2001, DOB issued a permit to the landlord in connection with the second application.

The Block Association again objected to the application and DOB advised the landlord in a latter, dated May 8, 2001 that the permit would be revoked "on the basis that a non-conforming store on the First (1st) floor in an R7-2 district had been discontinued for more than two years ... and is contrary to Section 52-61 of the Zoning Resolution." In a revised letter, dated May 9, 2001, DOB advised that the permit would be revoked "on the basis that a non-conforming store never existed on the first (1st) floor in an R7-2 district ... [t]herefore, changing the space to a commercial use is

not allowed in a Residential District."

In response to DOB's May 2001 letters, the landlord provided documentation to the agency, in the form of records from the New York City Department of Housing Preservation and Development and listings from the Yellow Pages phone directory for *1959,* 1960, and 1962, which the landlord maintains, demonstrates that a commercial use existed during the relevant time period, in the basement portion of the subject premises.

On May 25, 2001, petitioners learned that DOB rescinded all revocation letters. Petitioners then commenced this Article 78 proceeding.

DISCUSSION

Subject Matter Jurisdiction

Respondents argue that this action is premature because petitioners have failed to exhaust administrative remedies. Respondents note that section 26-250 of the Administrative Code of the City of New York ("Administrative Code"), which governs the review procedures of DOB decisions, permits parties to appeal determination made by DOB to the Board *of* Standards and Appeals ("BSA")[3]. Section 666(6)(9) of the Charter of the City of New York (the "Charter") specifically grants lessees and tenants the right to appear in front of the BSA.

In New York, the right of litigants to immediate judicial

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[3]Section 25-204 *of* the Administrative Code excludes for the appeals process, those orders of the DOB which concern dangerous buildings, places and things or which direct owners to correct unsafe conditions.

review depends upon whether the parties are seeking to compel an administrative agency to perform a ministerial act or to review an administrative action (Capers v Giuliani, 253 AD2d 630, 633 [1st Dept 19981, appeal dismissed in part, denied in part 93 NY2d 868 [1999]). Decisions by local municipal officials on whether to affirmatively enforce zoning codes are discretionary and are not, generally, subject to judicial oversight in a civil suit or by way cf mandamus (Manuli v Hildenbrandt, 144 AD2d 789, 790 [3d Dept 19881). However, DOB has no discretion to issue a building permit which fails to conform with applicable law or to issue a permit for a structure which is not in compliance with the relevant zoning ordinances (Parkview Assoc. v City of New York, 71 NY2d 279, 281, rearg denied 71 NY2d 995, appeal dismissed, cert denied 488 US 801 [1988]; Perrotta v City of New York, Dept *of* Bldg., 107 AD2d 320, 325 [1st Dept], affd 66 NY2d 859 [1985]). Furthermore, exhaustion of administrative remedies is not required where an agency's action is challenged as being beyond its grant of power (Lehigh Portland Cement Co. v New York State Dept *of* Environmental Conservation, 87 NY2d 136, 140 [1995]; Johnson v Office of Health Sys. Mat. of the New York State Dept. of Health, 251 AD2d 20 [1st Dept 19981).

Therefore, respondents' cross motion to dismiss this proceeding for lack of subject matter jurisdiction is denied. This Court has subject matter jurisdiction over the instant proceeding but shall limit is analysis to determining whether DOB violated the Zoning Law and whether the governing law limits DOB's authority to rescind the revocation letters (cf., Koultukis v Phillips, ____

AD2d ___, 728 NYS2d 440 [1st Dept 2001]).

Zoning Resolution

A review of the governing statutory framework indicates that Chapter 26 of the Charter empowers DOB to enforce provisions of the New York City Building Code, the Zoning Resolution and other laws, rules and regulations governing the construction, alteration, maintenance, use and occupancy, and safety of buildings or structures in the City of New York (Charter § 643). Therefore, the DOB is the proper administrative agency to consider whether to grant the landlord the right to make structural changes to the basement area necessary for a commercial establishment.

This court also rejects petitioners' argument that the DOB violated either the explicit provisions or the underlying public purpose of the municipal zoning regulations.

Chapter 2 of Article II of the Zoning Resolution, adopted on December 15, 1961, divides the City into three zoning use districts, residential (R1-R10), commercial (C1-C8) and manufacturing (M1-M3). These three categories are further divided into low, moderate, and high density districts; the higher the number after the letter, the greater density of use allowed. In addition, the Zoning Resolution set forth 18 different use groups. The uses listed in each use group have common functional or nuisance characteristics. Business conforming to use groups 1-4 have a relatively low nuisance impact and are permitted in residential districts. Here, the subject premises is located in an R7-2 residential zoning district.

The Zoning Resolution only permits residential and certain community facility uses in structures located in areas designated residential zoning districts (Matter of Toys "R" Us v Silva, 89 NY2d 411, 418 [1996], quoting Zoning Resolution § 52-61). Although New York law generally views nonconforming uses as detrimental to a zoning scheme and the overriding public policy of this State is aimed at the reasonable restriction and eventual elimination of nonconforming uses, the Zoning Resolution takes into account the fact that a building may have been used in a manner different from what was initially permitted (ibid.). In particular, section 52-11 of the Zoning Resolution states that a "non-conforming use[1]" may be continued, subject to various exceptions set forth in Chapter 2 of Article V of the Zoning Resolution.

One of these exceptions, which is outlined in section 52-61 of the Zoning Resolution, provides that a building reverts to its original use if the non-conforming use is discontinued for a period of two years'. However, the fact that commercial use of the

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[1]A non-conforming use is defined as "any lawful use, whether of a building or other structure or of a tract of land, which does not conform to any one or more of the applicable use regulations of the district in which it is located, either on December 15, 1961 or as a result of any subsequent amendment thereto" (The Zoning Resolution § 12-10).

Section 52-61 of the Zoning Resolution provides in pertinent part:

> [i]f, for a continuous period of two years, ... the active operation of substantially all the non-conforming uses in any building or other structure is discontinued, such land or building or other structure shall thereafter be used only for a conforming use. Intent to resume active operations shall not affect the

subject premises was interrupted is not dispositive in this case since the remaining portion of section 52-62 protects businesses located in residential areas by exempting basement stores from the two-year rule[6].

Since the present record shows that subject premises clearly falls within the exemption, the Zoning Resolution does not prohibit the landlord from renting the subject premises to a commercial tenant. Furthermore, petitioners have failed to present any evidence that DHCR specifically declared that subject premises could not revert to prior commercial use. The administrative determination submitted by petitioners only requires the landlord, who chose to rent to a residential tenant, to comply with the rent regulatory laws and issue a Rent Stabilization lease. This determination is silent as to the future status of the space once

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foregoing.

[6]This exemption provides that

> [e]xcept in "Historic Districts" as designated by the Landmarks Preservation Commission and the Board of Estimate, the provisions of this Section shall not apply to vacant ground floor or basement stores in buildings designed for residential use located in R5, R6, or R7 Districts where the changed or reactivated use is listed in Use Group 6A, 6B, 6C, or 6F excluding post offices, veterinary medicine for small animals, automobile supply stores, electrolysis studios, and drive-in banks. In addition, the changed or reactivated use shall be subject to the proviso of Section 52-54 (Commercial Uses in Residence Districts).

(Zoning Resolution § 52-62). Use Group 6A allows eating or drinking establishments including those which provide outdoor table service or have music for which there *is* no cover charge or specified showtime (Zoning Resolution § 32-15).

the named tenant departs. The question of whether the present space is required to remain permanently as residential housing stock, pursuant to the rent-regulatory laws, is not properly before this court. All such matters must first be addressed to the appropriate agency which has primary jurisdiction over this issue (Davis v Waterside Housing Co., Inc., 274 AD2d 318 [1st Dept], lv denied 95 NY2d 770 [2000]).

Penalty

As to the question of appropriate penalty, the Administrative Code permits the Commissioner of DOB to close, as a public nuisance, a building or a part of a structure which is improperly cccupied for commercial ,or manufacturing use in a residential district (Administrative Code §26-127.2[a] and [b]). However, since section 52-61 of the Zoning Resolution creates an exemption for business located in basement of buildings in residential areas, respondents have no authority to close down the subject premises solely on the basis that the landlord seeks to convert the space to permissible commercial use

This court also denies petitioners' request to expand the scope of civil penalties provided by the Administrative Code, to include the requested relief (Raritan Dev. Corp. v Silva, 91 NY2d 98, 107 [1997]). Section 26-115 of the Administrative Code grants the Commissioner of the DOB the power

> to issue notices and order for the enforcing compliance with any law, rule or regulation in respect to any matters under the jurisdiction of the department, and for remedying any condition found to exist in, on or about any building, enclosure or premises in violation of any

law, rule or regulation in respect to any such matters. Section 27-197 of the Administrative Code specifically gives the Commissioner of DOB the authority to revoke a permit that was issued in error or was based on false information. Respondents correctly rescinded prior permits and issued stop-work orders based on the belief that the landlord was acting in contravention of the zoning laws (Parkview Assoc. v City of New York, supra, 71 NY2d, at 282).

Here, petitioners have failed to cite any authority which requires respondents to issue an additional prospective civil penalty against the landlord and/or architect who allegedly filed a fraudulent lease[7]. Although the permanent withholding of all future work permits, which seek permission to use the space commercially, would help to deter impropriety, the present statutory scheme does not extend such prospective punitive powers

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In comparison, the Administrative Code provides for criminal proceedings against owners, architects, builders, contractors and any other persons, who violate the provisions of any laws, rules or regulations enforceable by the DOB (Administrative Code §26-125) or who violated the strictures of applicable zoning resolutions (Administrative Code § 26-126). Penalties include criminal fines and in some cases imprisonment (Administrative Code §§ 25-125 [a] and [b]; 26-126[k]). In particular, section 26-124 of the Administrative Code criminalizes the knowing issuance of false statements in certificates, forms, written statements, applications, reports or certificates of correction. Convictions are considered misdemeanors which are "punishable by a fine of not less than one thousand dollars nor more than five thousand dollars, or by imprisonment not to exceed six months, or both" (Administrative Code 26-124 [a]).

However, since there has been no criminal proceeding, judicial review in this proceeding is limited to the scope of civil penalties permissible under the Administrative Procedure Code.

to DOE. The specific relief requested by petitioners requires legislative action and cannot be implemented by judicial fiat (Raritan Dev. Corp. v Silva, supra, 91 NY2d, at 107).

Petitioners have also not supported their position that the landlord is prevented from reapplying for a new permit and supplementing the record with accurate and appropriate documentation to support. Respondents cannot bar owners from correcting violations or from submitting additional evidence in support of their position because due process requires that the DOB must give the applicant an opportunity to be heard after the revocation of a permit (Tafnet Realty Corp. v New York City, Dept. of Bldss., 118 Misc2d 498, 499, n 1 [Sup Ct, NY County 1983]).

Since petitioners have failed to show that respondents acted in a manner which was inconsistent with governing statutes, the court is unable to reinstate the June 1999 Final Revocation Letter or grant any *of* the requested alternative relief (Parkway Village Equities Corp. v Board of Standards and Appeals of the City of New York, 279 AD2d 299 [1st Dept] lv denied 96 NY2d 711 [2001]). The petition is denied in its entirety and respondents' cross motion to dismiss the petition for failure to state a cause of action is granted. All requests for attorney fees, costs and disbursements are denied.

Accordingly, it is

ORDERED that respondents' cross motion to dismiss the petition for failure to state a cause of action is granted and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed. All requests for attorney fees, costs and disbursements are denied.

This constitutes the order and judgment of the court

DATED: September 001

ENTER:

PAULA J. OMANSKY
J.S.C.