

**Matter of 515 E. 5th St., LLC v New York City Bd. of
Std. & Appeals**

2009 NY Slip Op 31652(U)

July 17, 2009

Supreme Court, New York County

Docket Number: 117203/08

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT: _____ J.S.C.

PART 11

Index Number : 117203/2008

515 E. 5TH ST., LLC

INDEX NO. _____

vs

NYC BD. OF STANDARD & APPEALS

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion proceeding is determined in accordance with the annexed decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 17, 2009

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
HON. JOAN A. MADDEN
J.S.C.

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

-----X
In the Matter of the Applications of

515 EAST 5TH ST., LLC, 514 E. 6TH STREET,
LLC, and 516 E. 6TH STREET, LLC,

Petitioners,

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

Index No.
117203/08

-against-

NEW YORK CITY BOARD OF STANDARDS AND
APPEALS, THE CITY OF NEW YORK, MONTE
SHAPIRO, SHARON JANE SMITH, ALICE
BALDWIN, JOSEPH LUBASZKA and JEAN CHAIN

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Respondents.

-----X
JOAN A. MADDEN, J:

In this Article 78 proceeding, petitioners 515 East 5th St., LLC, 514 E. 6th Street, LLC and 516 E. 6th Street, LLC move for a judgment vacating the Resolutions of respondent the New York City Board of Standards and Appeals (BSA), issued on November 25, 2008, and affirming the final determinations of respondent the New York City Department of Building (DOB), dated February 1, 2008 and March 6, 2008.

Petitioner 515 East 5th St., LLC is the owner of 515 East 5th Street (the East 5th Street Building). Petitioners 514 E. 6th Street, LLC and 516 E. 6th Street, LLC are co-owners of 514-516 East 6th Street (the East 6th Street Building). The aforementioned buildings (collectively the Subject Buildings) are

five-story tenements built before 1901. Pursuant to New York State Multiple Dwelling Law (MDL) § 211, if a tenement is to be expanded beyond five stories, it must conform to the provisions of the MDL governing multiple dwellings built after 1929, which set forth, inter alia, minimum fire safety requirements. In or about March 2006 and October 2007, petitioners submitted alteration applications to DOB, seeking work permits to allow the expansion of the Subject Buildings to six stories plus penthouses. These application proposed alternate construction materials and methods to those required by the MDL's provisions for fire safety protection.

DOB granted work permits for the East 5th Building in March 2006, and for the East 6th Street Building in October 2007. New York City Council member Rosie Mendez voiced her concerns to DOB as to its approval of petitioners' permits, which proposed fire safety mechanisms that did not comply with the MDL (Record of Proceedings before the BSA [BSA's Records], correspondence from Council member Mendez to DOB dated 5/21/07, R-40-41). In response, DOB's Deputy Commissioner explained, inter alia, that "the fire safety upgrades in the proposed design maintain the spirit and intent of the MDL, given the practical difficulties and unnecessary hardships that would be caused in this particular case by the compliance with the strict letter of the MDL provisions" (BSA's Records, Letter from DOB's Deputy Commissioner

Fatma M. Amer to Mendez dated 2/1/08, R 60-61). DOB's Manhattan Borough Commissioner reiterated the Deputy Commissioner's findings, stating, inter alia, that petitioners' "proposed design upgrades the level of fire protection afforded the occupants that is at least equivalent to what would be required under the MDL", and further noted that his letter constituted DOB's final determination regarding the Subject Buildings (BSA's Records, Letter from Manhattan's Borough Commissioner Christopher M. Santulli dated 3/6/08, R 63) (the Determination).

Respondents Monte Shapiro, Sharon Jane Smith, Alice Baldwin, Joseph Lubaszka, and Jean Chin, tenants of the Subject Buildings, appealed the Determination, seeking revocation of the permits on the grounds that the fire-safety upgrades permitted by DOB failed to comply with the requirements of MDL § 211, and further that DOB lacked authority to grant variances to the MDL provisions (BSA's Records, Appeals regarding the East 6th Street Building & the East 5th Street Building, R 11-25 & R 72-89, respectively). The BSA consolidated the appeals for the Subject Buildings.

BSA held a public hearing held on October 7, 2008, and issued resolution on November 25, 2008 reversing the 3/6/08 Determination and revoking the permits (BSA's Records, the BSA resolutions for the East 6th Street Building and the East 5th Street Building, R 1-5 & R 6-10, respectively) (the Resolutions).

The BSA found, *inter alia*, that the proposed enlargement of the Subject Buildings did not comply with the requirements of the MDL for fireproof construction, and that DOB did not provide "any evidence of statutory or legal authority to approve alternative safety measures," thus resulting in invalidly issued permits (*id.* at R 4 & R 9). BSA also denied petitioners' request that BSA consider a hardship waiver, pursuant to New York City Charter 666 (7), or alternately, to apply its determinations prospectively (*id.*).

Petitioners then commenced the instant Article 78 proceeding seeking an order annulling the Resolutions and reinstating the permits. They argue that: (1) BSA improperly held that DOB lacked statutory or legal authority to approve alternative fire-safety measures; and (2) BSA's failure to consider petitioner's requests regarding the hardship waiver and prospective application constitute errors of law, and were arbitrary and capricious.

In opposing the petition, respondents BSA and the City of New York (collectively, the City Respondents) argue, *inter alia*, that the petition is not ripe for judicial review, and in the alternative, that BSA's resolutions were neither arbitrary and capricious, and were made in accordance with the law.

At the outset, the court will consider the ripeness issue. An agency action is final and ripe for judicial review in an

Article 78 proceeding, "when the decision maker arrives at a 'definitive position on the issue that inflicts an actual, concrete injury'" (*Stop-The-Barge v Cahill*, 1 NY3d 218, 223 [2003], quoting *Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998]). "[A] determination will not be deemed final because it stands as the agency's last word on a discrete legal issue that arises during an administrative proceeding" (*Matter of Essex County v Zagata*, *supra* at 453). There must also "be a finding that the injury purportedly inflicted by the agency may not be 'prevented or significantly ameliorated by further administrative action or by steps available to the complaining party'" (*id.* at 453, quoting *Church of St. Paul and St. Andrew v Barwick*, 67 NY2d 510, 520, *cert denied* 479 US 985 [USNY 1986]; see also *Matter of Best Payphones, Inc. v Department of Info. Tech. and Telecom. of City of N.Y.*, 5 NY3d 30, *rearg denied* 5 NY3d 824 [2005]). "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'" (*Matter of Essex County v Zagata*, *supra* at 454; see also *Stop-The-Barge v Cahill*, *supra*).

Applying the foregoing principles, the court concludes that the instant petition is not ripe for judicial review, as the alleged harm claimed by petitioners, i.e. the reversal of DOB's approval of their permits, can be significantly ameliorated by

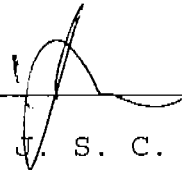
further administrative action or by steps available to the petitioners. The City Respondents submit two DOB determinations, issued after the Resolutions, wherein DOB listed its objections to the permit application as to its non-compliance with the MDL (the City Respondents' Verified Answer, Exhibit B, Correspondence to petitioners from DOB dated 1/14/09). The City Respondents contend, and petitioners do not dispute, that pursuant to MDL §310, petitioners may appeal these determinations to the BSA, and seek hardship waivers allowing them to use the fire safety mechanisms that they have installed or planned to install, and reinstating their permits.

Thus, as it is undisputed that further administrative action is available to petitioners which could change the City Respondents' position regarding petitioners' permits, and thereby result in lessening the injury to petitioners or even render the disputed issue moot or academic, the instant proceeding is not ripe for judicial review. (*See Matter of Best Payphones, Inc. v Department of Info. Tech. and Telecom. of City of N.Y., supra; Stop-The-Barge v Cahill, Stop-The-Barge v Cahill, supra; Matter of Essex County v Zagata, supra; Church of St. Paul and St. Andrew v Barwick, supra*).

In their reply papers, petitioners request that if the court determines that this proceeding is not ripe, the proceeding should be stayed so that they will not be precluded by the four-

month statute of limitations from challenging BSA's November 25, 2008 determination, in the event they do not prevail after pursuing the further administrative steps available to them. Thus, rather than denying and dismissing the petition, the court will mark this proceeding off the calendar, to be restored on 10 days notice.

Dated: July 17, 2009



J. S. C.

FILED
JUL 24 2009
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