

**Matter of Greenpoint Renaissance Enter. Corp. v
Cestero**

2011 NY Slip Op 31944(U)

June 13, 2011

Sup Ct, NY County

Docket Number: 110976/10

Judge: Barbara Jaffe

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

PRESENT: Jaffe BARBARA JAFFE
J.S.C.

PART 5

Index Number : 110976/2010
GREENPOINT RENAISSANCE

INDEX NO. 110976/10

vs
CESTERO, RAFAEL

MOTION DATE 4/5/11

Sequence Number : 001

MOTION SEQ. NO. 001

ARTICLE 78

MOTION CAL. NO. 59

CAL # 59

The following papers, numbered 1 to 5 were read on this motion to/for annulment of administrative determination pursuant to Article 78.

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

PAPERS NUMBERED

1

Answering Affidavits — Exhibits _____

2, 3, 5

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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NYS SUPREME COURT - CIVIL

Dated: 6/13/11
JUN 13 2011

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

-----X
In the Matter of the Application of:
GREENPOINT RENAISSANCE ENTERPRISE
CORPORATION, and ST. NICKS ALLIANCE,

Petitioners,

Index No. 110976/10

Motion Date: 4/5/11
Motion Seq. No.: 001
Motion Cal. No.: 59

DECISION & JUDGMENT

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

-against-

RAFAEL CESTERO AS COMMISSIONER OF
NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT AND
THE CITY OF NEW YORK,

Respondents.

-----X
BARBARA JAFFE, JSC:

For petitioners:
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For respondents:
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UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

By notice of petition dated August 17, 2010, petitioners Greenpoint Renaissance
Enterprise Corporation (GREC) and St. Nicks Alliance (St. Nicks) seek, pursuant to CPLR
Article 78, an annulment of respondent New York City Housing Preservation Department's
(HPD) determination, dated April 23, 2010, denying petitioners the right to develop the former
Greenpoint Hospital site, on the grounds that the determination violated applicable laws and
regulations and was arbitrary, capricious, and an abuse of discretion. Petitioners also seek an

order compelling HPD to accept their proposal to develop the site following its 2007 Request for Proposals (RFP).

I. FACTUAL BACKGROUND

GREC is a consortium of community and nonprofit organizations founded in 1984 for the purpose of planning and facilitating the redevelopment of the former Greenpoint Hospital Complex. St. Nicks is a community nonprofit organization in the Williamsburg section of Brooklyn that develops affordable housing and community health services for low-income and working-poor residents. (Pet.).

Respondent Rafael Cestero, as Commissioner of HPD, heads the administrative agency responsible for administering New York City's (City) housing policy and the disposal of City land for the development of housing and community facilities. (*Id.*).

In February 2007, as part of Mayor Bloomberg's New Housing Marketplace Initiative, intended to construct or rehabilitate 165,000 housing units by 2013, HPD issued an RFP for the development of affordable housing, with potential funding available through various city, state, and federal programs designed to subsidize construction and enhance overall project affordability. (Ans., Exh. 1). Developers were invited to submit proposals for residential and/or mixed-use developments on three separate City-owned sites in Greenpoint and Williamsburg, Brooklyn. (*Id.*). Each applicant was required to assemble a development team and undertake the design, financing, construction, and marketing of the proposed project. City would then convey the site to the selected developer for a nominal purchase price per tax lot of \$1. (*Id.*).

The instant action addresses a proposal submitted by St. Nicks for one of the three sites, described in the RFP as a portion of the former Greenpoint Hospital site and denominated as Site

3 (premises). (*Id.*, Exhs. 1, 2). The site includes a vacant building, a former four-storey nurses' residence at the corner of Maspeth and Debevoise Avenues, and an adjacent parcel of vacant land running along Maspeth Avenue. (*Id.*, Exh. 1).

The submission deadline, originally April 18, 2007, was extended to May 9, 2007, on which date St. Nicholas-Briarwood LLC (St. Nicks), submitted a proposal. (*Id.*, Exhs. 1, 2). Saint Nicholas Neighborhood Preservation Corporation and Briarwood Organization each owned 50 percent of St. Nicks. (*Id.*, Exh. 2). GREC is not named as a party or joint venturer in this proposal, nor did GREC submit its own proposal to develop the premises. (*Id.*). The application reflects that the proposal does not include a joint venture to develop the site. (*Id.*).

St. Nicks submitted two options to develop a portion of the premises (Brooklyn Block 2885, part of Lot 1): (1) the construction of 265 affordable apartments which would preserve the existing building on the premises and include a 90-unit senior housing facility, plus 175 units of mixed income rental housing and a new geriatric health care facility; or (2) the construction of 302 affordable apartments. (*Id.*). The proposals would rely upon both City and State financing.

TNS Development Group Ltd., Lemle & Wolff, Inc., and Beth Abraham Health Services (collectively, TNS) also submitted a proposal to develop the premises. (*Id.*, Exh. 3). It sought to construct a nine-storey building containing 170 mixed-income rental units, a street-level commercial space and the rehabilitation of an existing four-storey former hospital building into 31 senior rental units. (*Id.*). HPD subsequently invited TNS to modify the senior housing component of its proposal, and in December of 2007, TNS provided an addendum, increasing the number of senior housing units to 70 by decreasing the size of each unit but maintaining the square footage as set forth in the original proposal. (*Id.*, Exh. 5).

As a result of the collapse of several large financial institutions in 2008 and 2009, HPD was required to cut its capital budget by 30 percent in September 2008, and by another 20 percent in April 2009. (Ans.). In light of these new developments, each developer complied with HPD's request that it submit revised financial proposals by September 11, 2009. (*Id.*, Exhs. 6, 7, 8).

On April 23, 2010, HPD issued a press release announcing its selection of TNS's proposal to build 240 units of affordable housing and its willingness to enter into negotiations for the disposition and development of the premises. (*Id.*, Exh. 14). On April 28, 2010, petitioners sought a review of HPD's determination. On July 26, 2010, petitioners met with HPD and learned that St. Nicks's proposal was considered and rejected in favor of TNS's proposal, because TNS proposed to put more equity into the project, and HPD's experts determined that St. Nicks's reliance on a greater percentage of competitive funding sources constituted a comparative weakness. (*Id.*, Exh. 16). TNS, moreover, received the highest scores among the competing proposals received pursuant to the RFP's competitive selection criteria. (*Id.*, Exh. 9). Petitioners thus commenced this proceeding.

II. CONTENTIONS

Petitioners contend that HPD's determination is arbitrary and capricious because:

(1) TNS's proposal was in clear contravention of law and policy; (2) HPD failed to use a clear and consistent process for all of the proposals and applications submitted to develop the premises; (3) HPD's subsequent negotiations with TNS, after May 9, 2007, provided TNS with an unfair advantage in the process; and (4) HPD's solicitation of a modified proposal from TNS was contrary to the terms and conditions of the RFP. (Pet.).

In its answer, HPD denies that petitioners are entitled to vacatur of its determination

because: (1) GREC lacks standing to bring this proceeding; (2) the agency has not taken a final administrative action, and, thus, the petition is not ripe for judicial review; and (3) HPD's selection of TNS's proposal was rational, fair, and in compliance with the requisite laws. (Ans.; Respondents' Mem. of Law, dated Jan. 7, 2010).

In reply, petitioners maintain that HPD's decision to continue post-bid negotiations with TNS was a final, binding decision, as they were injured by not being chosen as developer of the premises, and further administrative action will not ameliorate their injury, as their only recourse will be to challenge the disposition of the site, which will not restore St. Nicks's candidacy as a potential developer. (Reply). They also assert that GREC has standing, as St. Nicks is one of its members. (*Id.*).

III. ANALYSIS

A. Standing

To establish standing, an association or organization "must show that at least one of its members would have standing to sue." (*Matter of Citizens Emergency Comm. to Preserve Preserv. v Tierney*, 70 AD3d 576, 576 [1st Dept 2010]). In land-use matters, a "petitioner must show that one or more of its members – as distinct from the general public – has suffered injury in fact, and must demonstrate that the injury falls within the zone of interests protected by the legal authority being invoked." (*Id.*; see also *Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany*, 13 NY3d 297, 304 [2009]).

GREC is neither a named party nor a joint venturer in St. Nick's May 2007 proposal, and it did not submit an independent proposal to develop the site. Thus, although it is alleged that GREC is dedicated to overseeing community interests and preserving affordable housing in the

former Greenpoint Hospital site, its interest in the site is distinct from an injury. (*See Matter of Citizens Emergency Comm.*, 70 AD3d at 576 [organization had no standing where its members only had interest in preservation, as an interest is distinct from an injury and does not confer standing]). GREC has thus failed to demonstrated that it has a “legally cognizable interest in the property.” (*See Matter of Lee v New York City Dept. of Hous. Preserv. and Dev.*, 212 AD2d 453, 454 [1st Dept 1995] [organization had no standing as it failed to show legitimate entitlement to property]).

Moreover, there is no allegation that, as a result of HPD’s rejection of St. Nicks’s proposal to develop the premises, GREC suffered an injury from the proposed transfer of the property or that HPD’s rejection impacted it differently than it did the general public. Thus, GREC has not established standing here.

St. Nicks, however, indisputably has standing to challenge HPD’s determination.

B. Ripeness

A “CPLR article 78 proceeding against a public body . . . must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” (*Matter of Rocco v Kelly*, 20 AD3d 364, 365-66 [1st Dept 2005]). An administrative determination is final and binding once it “has its impact upon the petitioner who is thereby aggrieved.” (*Matter of Edmead v McGuire*, 67 NY2d 714, 716 [1986]). The agency must have arrived at a definite position on the issue inflicting actual injury, and the injury may not be significantly ameliorated either by further administrative action, or steps taken by the complaining party. (*Matter of Comptroller of City of N.Y. v Mayor of City of N.Y.*, 7 NY3d 256, 262 [2006]; CPLR 217 [1]).

On April 23, 2010, HPD rejected St. Nicks's proposal in favor of one submitted by TNS. On April 28, 2010, St. Nicks requested a review of HPD's determination, and sought reconsideration of its decision to move forward in negotiations with TNS. HPD met with St. Nicks on July 26, 2010 to reconsider its determination, but ultimately informed petitioner that it would indeed move forward with TNS's proposal to develop the premises. On July 26, 2010, that determination became final and binding as HPD would not reconsider St. Nicks's proposal. HPD's determination reflects a definite position on the issue which inflicted actual injury upon St. Nicks, and there is no evidence that the injury may be significantly ameliorated by further administrative action or steps taken by the complaining party. (*See Matter of Comptroller of City of N.Y.*, 7 NY3d at 262 [where comptroller objected to City contract, mayor's determination that comptroller must register contract final and binding as of date of registration, as comptroller's only recourse was to bring suit, and no further ameliorative administrative action expected]). For these reasons, St. Nicks has established its entitlement to judicial review.

C. HPD's authority

HPD is responsible for all City functions relating to the rehabilitation, maintenance, alteration, and improvement of residential buildings and privately owned housing. (NY City Charter § 1802[1]). As set forth in the City Charter, the duties of the commissioner include:

all functions of the city, and all powers, rights and duties as provided by federal, state or local law or resolution, relating to slum clearance, slum prevention and urban renewal; neighborhood conservation; prevention and rehabilitation of blighted, substandard, deteriorated or unsanitary areas, and publicly-aided and public housing, including the regulation of rents in housing built with state or local financing, except housing under the jurisdiction of the New York City housing authority.

(NY City Charter § 1802[3]). In fact, HPD is charged with securing sponsors for urban renewal projects and programs "by any method permitted by Law which it determines will best meet the

Project's objectives and the City Housing Goals, including, but not limited to, direct negotiation, RFQ, RFP, competitive bidding, public bidding, auction, selection by entities other than the Agency, and application." (28 RCNY § 33-03[a]).

1. Standard of review

Judicial review of an administrative agency's decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR 7803[3]). In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *AWL Indus., Inc. v Triborough Bridge & Tunnel Auth.*, 41 AD3d 141, 142 [1st Dept 2007]; *Matter of Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349, 349 [1st Dept 1996]). Moreover, the determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *aff'd* 11 NY3d 859 [2008]).

2. Rational basis for HPD's determination

Here, TNS's proposal not only met the threshold requirements under the RFP, but

received the highest scores under the selection criteria, and HPD's experts determined that reliance on a greater percentage of competitive funding sources contained in the St. Nicks proposal rendered that proposal relatively weaker than TNS's, a significant factor in assessing the overall financial feasibility of each proposal.

III. Noncompliance with bid specifications

"[A]n RFP is a more flexible alternative to competitive bidding," and thus permits ongoing negotiations and alterations to RFPs and any subsequent proposals. (*AWL Indus.*, 41 AD3d at 142). However, "even in the stricter context of competitive bidding, an agency has the authority to waive noncompliance with bid specifications if such noncompliance constituted a mere irregularity and it was in the agency's best interest to do so." (*Id.* at 143). And, "[w]here the judgment of an agency involves factual evaluations in the area of that agency's expertise and [it] is supported by the record, such judgment must be accorded great weight and judicial deference." (*Id.* at 142).

Here, HPD's judgment is soundly supported by the record.

IV. Fairness of process

While it is true that all who submit proposals must be treated fairly, there is no legal requirement that a final contract must conform with the original RFP. Rather, HPD is authorized to "negotiate and dispose of any Site on terms other than those set forth in the RFP" (28 RCNY § 33-03[d][7][iv]). Although TNS's proposal of underground parking spaces does not comply with the RFP, the record reflects that HPD, pursuant to 28 RCNY § 33-03(d) and section VII of the RFP, determined that TNS's proposal of 49 Parking spaces adheres closely enough to the zoning requirements, and that further adjustments may be brought into compliance without additional design or financing implications. In the end, HPD determined that TNS would only be

required to provide approximately five additional parking spaces in order to comply with applicable zoning ordinances, and even if TNS's submission deviated from the specifications of the RFP, HPD properly considered the deviation tangential and waived it in light of TNS's experience and the savings. (*AWL Industries, Inc.*, 41 AD3d at 143).

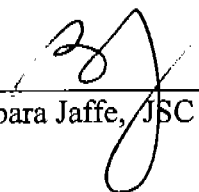
V. CONCLUSION

Accordingly, it is

ORDERED and ADJUDGED, that the petition is denied in its entirety and the proceeding is dismissed.

This constitutes the decision and judgment of this Court.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: June 13, 2011
New York, New York

JUN 13 2011

UNFILED JUDGMENT

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