

Matter of Kew Gardens Dev. Corp. v Wambua

2012 NY Slip Op 31339(U)

May 15, 2012

Supreme Court, New York County

Docket Number: 100859/12

Judge: Cynthia S. Kern

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

PRESENT: _____
Justice

PART 55

Handwritten notes:
Kew Gardens Dev Corp
- v -
HED

INDEX NO. 10089-0

MOTION DATE _____

MOTION SEQ. NO. 1

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

RECEIVED
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NYS SUPREME COURT - CIVIL

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the **FILED** index decision.

FILED
MAY 21 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/15/12 _____ PK
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: Part 55

-----X
In the Matter of the Application of

KEW GARDENS DEV. CORP.,

Petitioner,

Index No. 100859/12

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

MATTHEW WAMBUA, Commissioner of the
DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT OF THE CITY OF NEW
YORK and DEPARTMENT OF FINANCE OF THE
CITY OF NEW YORK,

FILED

MAY 21 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

Respondents.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

-----X
Petitioner Kew Gardens Dev. Corp. ("Kew Gardens") brought this petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to review, modify, annul and set aside a determination made by respondent Department of Housing Preservation and Development of the City of New York ("HPD") denying Kew Gardens' application for a tax abatement pursuant to the RPTL § 421-a Program. Respondents HPD and Department of

Finance of the City of New York (“DOF”) cross-move for an order pursuant to CPLR § 3211(a)(7) dismissing the petition for failure to state a cause of action. For the reasons set forth below, the petition is denied and the cross-motion is granted.

The relevant facts are as follows. Petitioner, the owner of the real property located at 153-01/03/05/07 76th Road, Kew Gardens, Queens (“the subject property”), developed the subject property as four attached three-family homes (“the development”). The development shares common sewer and drain lines, a common backyard, a common roof system, party walls and each home is subject to a multitude of easements, covenants and restrictions as part of a “major development” covering several buildings erected under special approval of the City Planning Commission of the City of New York. Construction on the development commenced in or about June 2008.

On or about February 25, 2009, petitioner submitted an application to HPD for preliminary tax exemption benefits pursuant to RPTL § 421-a. On or about March 16, 2009, HPD issued petitioner a checklist requesting additional information about the development. On or about June 3, 2009, petitioner responded to the request and provided the requested documents and information.

In or about April, 2011, upon completion of construction of the development, petitioner submitted to HPD an application for final tax exemption benefits pursuant to RPTL § 421-a. Thereafter, HPD issued two notices requesting additional documents in support of both the preliminary application filed in March 2009 and the final application. The notices stated that the additional documents needed to be provided by April 25, 2011. Kew Gardens responded to the notices and alleged that it provided the requested documents to HPD by Federal Express

overnight delivery on April 25, 2011. HPD then issued a letter dated April 26, 2011, rejecting Kew Gardens' application based on late submission. However, it was agreed that pursuant to HPD rules, Kew Gardens would re-file its application and that it would be deemed timely submitted.

On or about September 2, 2011, Kew Gardens duly re-submitted its application. By letter dated September 12, 2011, HPD informed petitioner that the development was ineligible for RPTL § 421-a tax exemption benefits because it did not meet Admin. Code § 11-245.1-b's requirement that the Certificate of Occupancy indicate that there be at least four dwelling units per building. Further, the letter requested that Kew Gardens review Local Law 58 of 2006 and the legislative frequently asked questions posted on HPD's website and to send a written reply. Petitioner responded to HPD by letter dated September 25, 2011, explaining that an exception for garden style maisonette dwellings, as set forth in Title 28, Section 6-02(e) of the Rules of the City of New York ("RCNY"), applies to the development, and thus, it should receive § 421-a tax exemption benefits.

By letter dated October 4, 2011, HPD denied petitioner's two outstanding applications.

HPD explained that

For projects that commence construction on or after December 28, 2007, Ad Code 11-245.1-b(c) reserves 421-a tax benefits for buildings with a minimum of four dwelling units, as set forth in the certificate of occupancy, except that three-unit buildings constructed with substantial government assistance...are still eligible for §421-a benefits. The application for a Preliminary Certificate of Eligibility and affidavits submitted indicate that construction commenced without any governmental assistance on June 30, 2008. According to the Department of Buildings Records, each building was issued a Certificate of Occupancy on September 2, 2010 indicating only three dwelling units. Thus, the project is not entitled to benefits under the

421-a Program because it did not satisfy the minimum dwelling unit requirement.

By Notice of Petition and Verified Petition dated January 23, 2012, petitioner commenced this Article 78 proceeding seeking to annul and set aside HPD's determination on the ground that the development satisfies the requirements of the maisonette rule and therefore qualifies for a tax exemption.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); see *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, the court finds that the petition must be denied as there was a rational basis for the HPD's determination denying petitioner's application for a tax abatement pursuant to the RPTL § 421-a Program. Section 421-a of the Real Property Tax Law provides for an exemption from local taxation for certain new multiple dwellings. It explicitly provides

authority for a local housing agency in a city with a population of one million or more to exclude certain new multiple dwellings through the passage of a local law. RPTL § 421-a(2)(I) provides in relevant part:

Authority of city to enact local law. Except as otherwise specified in this section, a city to which this section is applicable may enact a local law to restrict, limit or condition the eligibility, scope or amount of the benefits under this section in any manner provided that such local law may not grant benefits beyond those provided in this section and provided further that in the city of New York such local law shall not take effect sooner than one year after it is enacted.

Local Law 58 of 2006 sets forth the City of New York's (the "City") local laws regarding the implementation of RPTL § 421-a. Admin. Code § 11-245 was enacted pursuant to Local Law 58 of 2006 and became effective on December 28, 2007.

Pursuant to Admin. Code § 11-245.1-b, tax exemption benefits under RPTL § 421-a for buildings in the City may only be provided to multiple dwellings with Certificates of Occupancy indicating that there are four or more dwelling units in the building. Specifically, the statute states:

(c) No benefits under section four hundred twenty one-a of the real property tax law shall be conferred for any multiple dwelling containing fewer than four dwelling units, as set forth in the certificate of occupancy, unless the construction of such multiple dwelling is carried out with substantial assistance of grants, loans or subsidies from any federal, state or local agency or instrumentality where such assistance is provided pursuant to a program for the development of affordable housing.

As set forth above, Admin. Code § 11-245.1-b(c) provides one exception to the four or more unit rule, namely, that a dwelling containing fewer than four units can receive tax exemption benefits pursuant to RPTL § 421-a if its construction was carried out with substantial governmental

assistance. Additionally, Admin. Code § 11-245.1-b(f) provides that HPD “may promulgate rules and regulations to effectuate the purposes of this section.”

28 RCNY § 6-02(e), the rule on which petitioner relies, also known as the maisonette rule, provides in relevant part:

[a multiple dwelling] shall contain at all times not less than the number of dwelling units specified in § 6-02(b)(1) [(three or more units)]. A multiple dwelling containing the requisite number of dwelling units may include: garden type maisonette dwelling projects containing a series of attached dwelling units which are provided as a group collectively with all essential services such as, but not limited to, water supply and house sewers, and which units are located on a site or plot under common ownership, including ownership as a condominium; and buildings erected at the same time with common exterior walls, provided that in each case such buildings are operated as a unit under a single ownership, notwithstanding that Certificates of Occupancy were issued by the Department of Buildings for separate portions thereof covering less than the requisite number of units.

Thus, 28 RCNY § 6-02 allows certain dwellings to receive tax exemption benefits if they have just three units. However, 28 RCNY § 6-02, which was enacted no later than 1994, is a law that previously allowed HPD to disregard the Certificate of Occupancy but which is now in direct conflict with Admin. Code § 11-245.1-b.

“It is a fundamental principle of administrative law that an agency cannot promulgate rules or regulations that contravene the will of the Legislature. If an agency regulation is ‘out of harmony’ with an applicable statute, the statute must prevail.” *Weiss v City of New York*, 95 N.Y.2d 1, 4-5 (2000) (internal citations omitted). Further, a special local law which is inconsistent with a general law “must give way to the later general law.” *Ling Ling Yung v. County of Nassau*, 77 N.Y.2d 568, 570-71 (1991). In the instant action, petitioner concedes that

