Iskalo 5000 Main LLC v Town of Amherst Indus. Dev. Agency
2016 NY Slip Op 32729(U)
July 27, 2016
Supreme Court, Erie County
Docket Number: I-2016-000045
Judge: John L. Michalski

[* 1]

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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ISKALO 5000 MAIN LLC and ISKALO 5010 MAIN LLC,

Petitioners,

v.

Index No. I-2016-000045

TOWN OF AMHERST INDUSTRIAL DEVELOPMENT AGENCY,

Respondent.

Sean W. Hopkins, Esq.
Attorney for Petitioner

Andrea Schillaci, Esq.
Attorney for Respondent

MEMORANDUM and ORDER

Michalski, J.

It is hereby ORDERED that:

1) Respondent's determination denying Petitioners' amended application is ***reversed***,

2) Petitioners' amended application is ***granted***, and

3) Respondent's request for attorneys fees is ***denied***.

The Court will issue a memorandum further amplifying our decision forthwith.

Dated: Buffalo, New York
June 29, 2016

Hon. John L. Michalski

GRANTED

JUN 29 2016

BY Laura Rodgers
LAURA RODGERS
COURT CLERK

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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MEMORANDUM and ORDER

Michalski, J.

Petitioners brought this Civil Practice Law and Rules (CPLR) Article 78 special proceeding seeking an Order reversing Respondent's determination to deny their amended application for financial assistance, and directing Respondent to approve said application. For the reasons set forth below, Petitioners' request is ***granted***.

PROCEDURAL HISTORY

Petitioners Iskalo 5000 Main LLC and Iskalo 5010 Main LLC are domestic liability corporations whose primary business interest is the development of commercial real estate in Erie

County. In June 2011 Petitioners purchased the parcel of real property abutting the northeast corner of Main Street and the I-290 in the town of Amherst. At that time, the sole structure on that parcel was the Lord Amherst Hotel. Petitioners purchased the property with the intent to build a much larger Hyatt hotel immediately to the north of the Lord Amherst, while concomitantly updating the original hotel. Because the Lord Amherst was situated in a town-designated "Enhancement Area", Petitioners were eligible to apply for financial assistance with the project from Respondent Town of Amherst Industrial Development Agency. Petitioners made such application on August 11, 2011 with the provision that " . . . if the hotel responds well to this initial infusion of capital and management expertise, a more comprehensive upgrade is intended (see Petitioners' initial application, pg. 5). Respondent granted the application on August 19, 2011.

In December of 2012 Petitioners made a subsequent request for financial assistance. In that application, Petitioners noted that it was their intent to pursue a more comprehensive renovation of the Lord Amherst to serve as a "like new" mid-scale hotel complementing the anticipated completion of the higher-end Hyatt. On December 12, 2011 Respondent again granted Petitioners' application. With sufficient capital in hand, Petitioners began the more comprehensive phase of the project shortly thereafter. However, upon commencing the asbestos abatement and demolition work, Petitioners quickly discovered rampant mold infestation, to the extent that all of the structure's interior walls required replacement. These difficulties resulted in Petitioners deciding to reevaluate their original plan for the Lord Amherst. They subsequently consulted a renowned hospitality consultant who advised that, considering the unexpected costs of the mold remediation, the development of the initially intended mid-scale hotel was no longer a financially viable option. Accordingly, upon the further advice of the consultant, Petitioners decided to pursue a more upscale

design for the Lord Amherst, albeit one which would require additional financing. Petitioners sought to procure a portion of that financing from Respondent by way of filing an amendment to the previously granted December 2011 application for financial assistance in February of 2016. At the time of that filing, General Municipal Law (GML) § 862 had been amended to preclude such financing from being allotted to "retail projects" unless the applicant could establish that such project qualified as a "tourism destination" under GML § 862(2)(a).

Respondent scheduled a public hearing on the application for March 4, 2016. At the hearing, Petitioners introduced, *inter alia*, 1) a legal opinion from the law firm Hodgson Russ which concluded that the project was a "tourism destination", 2) data collected from the recently completed Hyatt indicating that three quarters of its guests were from outside New York State, and 3) a memorandum from Respondent's own Executive Director of thirty plus years concluding that the project should be classified as a "tourism destination".

On March 18, 2016 Respondent denied Petitioners' application by a 4 - 3 vote. On March 30, 2016 Petitioners brought the instant action seeking an Order reversing Respondent's determination and directing them to grant the amended application for financial assistance. Specifically, Petitioners allege, *inter alia*, that: 1) Respondent acted arbitrarily and capriciously in denying the application because the hearing record is devoid of any evidence that the project does not qualify as a "tourism destination", and that it establishes conclusively that it does, in fact, so qualify, 2) Respondent erred as a matter of law in classifying the project as a "retail project", and not a "tourism destination", and 3) that one of Respondent's members should have recused herself from participating in the vote aforementioned. Respondent answered that their determination had a rational basis, and that there was no conflict of interest with the board member. They also allege

that Petitioners are contractually bound to reimburse their attorney's fees under the terms of the application.

CONCLUSIONS OF LAW

I. STANDARD OF REVIEW

Under CPLR Article 7803-3, the determination of an administrative agency is reviewable only where it "was affected by an error of law or was arbitrary and capricious". An agency makes an error of law where its interpretation of a statute or regulation is "irrational or unreasonable", *Matter of Betty Howard v. George K. Wyman, Commissioner of the N.Y. State Department of Social Services* (28 N.Y.2d 434), see also *Mountain and Fishing Co. v. McGoldrick* (294 N.Y. 104), *Colgate-Palmolive-Peet Co. v. Joseph* (308 N.Y. 333). In reviewing an "error of law" claim, the reviewing court's role is limited to determining whether the agency's construction of the relevant regulation or statute "has warrant in the record and a reasonable basis in the law," *Howard*, (*supra*). An agency acts arbitrarily and capriciously where its determination " is without sound basis in reason and is generally taken without regard to facts," *Ward v. City of Long Beach* (20 N.Y.3d 1042). "The arbitrary and 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," *Id*, quoting 1 N.Y. Jur. Administrative Law § 184, pg. 609.

II. ANALYSIS

Setting aside the recusal issue, the dispositive question presented is whether the project can be classified as a "tourism destination" under GML § 862(2)(a). That section reads:

> Except as provided in paragraph (b) of this subdivision, no financial assistance of the agency shall be provided in respect of any project where facilities or property that are primarily used in making retail

> sales to customers who personally visit such facilities constitute more than one-third of the total project cost. For the purposes of this article, retail sales shall mean: (I) sales by a registered vendor under article twenty-eight of the tax law primarily engaged in the retail sale of tangible personal property, as defined in subparagraph (I) of paragraph four of subdivision (b) of section eleven hundred one of the tax law; or (ii) sales of a service to such customers. Except, however, that tourism destination projects and projects operated by not-for-profit corporations shall not be prohibited by this subdivision. For the purpose of this paragraph, "tourism destination" shall mean a location or facility which is likely to attract a significant number of visitors from outside the economic development region as established by section two hundred thirty of the economic development law, in which the project is located.

Our inquiry begins, and is confined to, the administrative record upon which Respondent's determination was made. As noted above, Petitioners presentation to the effect that the project constitutes a "tourism destination" included a legal opinion from the Buffalo law firm of Hodgson Russ, data from the newly completed adjacent Hyatt Hotel indicating that seventy five percent of their guests reside outside of New York State, a lengthy and highly detailed submission from Respondent's then-Executive Director, Jim Allen, which found the project to be a "tourism destination", information contained within the application itself, and records showing that other Industrial Development Agencies have found hotels to be "tourism destinations" on dozens of occasions. No evidence was introduced to rebut Petitioners' presentation or conclusions.

Notwithstanding this record, Respondent declined the application. There was no written decision supporting or explaining the basis of their determination. The only evidence indicating some degree of deliberation or reflection is an audio recording of the board members' discussion just prior to the March 18, 2016 vote, and a single paragraph in the minutes from Respondent's March 4, 2016 Executive Committee Meeting:

> "After Mr. Chiazza's[1] presentation several Board Members asked questions of the project on a variety of the project's aspects, including the legal definition of a tourism destination under NYS statute, where visitors are expected to come from and their nature for staying at the hotel, the scope of improvements and why the AIDA wasn't aware sooner of the updated plan."

The "nature for staying at the hotel, the scope of improvements and why the AIDA wasn't aware sooner of the updated plan" are matters completely irrelevant to the GML § 862(2)(a) analysis. As for the "legal definition of a tourism destination" concerns, the record indicates not that Respondent's presentation was wanting or insufficient, but that Respondents concluded a hotel, quite simply, can not be so classified. We find this interpretation "irrational [and] unreasonable" (see *Matter of Betty Howard*, *supra*), and erroneous as a matter of law. Petitioners clearly established that the project "is likely to attract a significant number of visitors from outside the economic development area", GML § 862(2)(a). Their presentation to that effect was thorough, detailed, and supported by Respondent's then-Executive Director; and was not rebutted or challenged in the least. Accordingly, we further conclude that Respondent's denial was arbitrary and capricious because "it [was] taken without sound basis and reason or regard to facts", *Ward* (*supra*); see also *Barker Central School District v. Niagara County Industrial Development Agency* (62 A.D.3d 1239).

The only remaining question is whether the appropriate remedy is vacatur with a *de novo* hearing, or outright reversal. "A decision of an administrative agency which neither adheres to its own prior precedent [sic] nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious and mandates reversal, even if there may otherwise be evidence in the record sufficient to support the determination", *Hamptons, LLC v. Zoning Board of Appeals*

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[1] "Chiazza" is David Chiazza, Vice President of Iskalo Development Corporation.

of Inc. Village of East Hampton (98 A.D.3d 738). Here, there is absolutely no "evidence in the record" to support Respondent's determination. Moreover, Petitioner's project certainly constitutes "essentially the same facts" as those presented to Respondent on prior occasions because it is the very same project which had already twice been granted financial assistance. Respondent's suggestion that those determinations are distinguishable solely because the "tourist destination" exception was not extant at the time Petitioners made those applications is unpersuasive because, as noted above, they erred in their interpretation of that term. A reason that is erroneous as a matter of law can not serve as a sufficient or rational basis for "reaching a different result on essentially the same facts", *Id*.

Accordingly, we find that reversal of the denial, and granting the amended application is the appropriate remedy.

ATTORNEY'S FEES

Respondent seeks attorney's fees under the provision of the Application for Financial Assistance reading:

> "Deponent acknowledges and agrees that applicant (Petitioner) shall be and is responsible for all expenses incurred by the Town of Amherst Industrial Development Agency in connection with this application whether or not resulting in the issuance of a bond, lease, transaction, or installment sale"

Noticeably, this provision is silent with respect to attorney's fees.

The well settled and time honored New York rule holds that "attorney's fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule", *A.G. Ship Maintenance Corp. v. Lezak* (69 N.Y. 2d 1). Accordingly, a "court should not infer a party's

intention to waive the benefit of the rule unless the intention to do so is unmistakenly clear", *Hooper Associates, Ltd. v. AGS Computers, Inc.* (74 N.Y. 2d 487). Here, the agreement contains no such unmistakenable clarity on the issue of attorney's fees. Thus, Respondent's counter claim is without merit.

RECUSAL

Given our conclusions above, we find it unnecessary to address Petitioners' recusal claims.

WHEREFORE, it is hereby ORDERED that:

1) Respondent's determination denying Petitioners' application is ***reversed***,

2) Petitioners' application is ***granted***, and

3) Respondent's request for attorneys fees is ***denied***.

Dated: Buffalo, New York
July 27, 2016

Hon. John L. Michalski

GRANTED

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