Matter of Kohn v New York City Dept. of Hous. Preserv. & Dev.
2020 NY Slip Op 32409(U)
July 10, 2020
Supreme Court, New York County
Docket Number: 100217/20
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

YEHUDA KOHN,

Petitioner, Index No.: 100217/20

DECISION/ORDER

For a Judgment Pursuant to Article 78

of the Civil Practice Law and Rules

-against-

THE NEW YORK CITY DEPARTMENT OF

HOUSING PRESERVATION & DEVELOPMENT,

Respondent.

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HON. CAROL R. EDMEAD, J. S.C.:

In this Article 78 proceeding, petitioner Yehuda Kohn (Kohn) seeks a judgment to overturn an order of the respondent New York City Department of Housing Preservation & Development (HPD) as arbitrary and capricious (motion sequence number 001). For the following reasons, this petition is denied.

FACTS

Kohn is the owner of a building (the building) located at 189 Johnson Avenue in the County of Kings, City and State of New York, Block # 3062, # Lot 35. *See* verified petition, ¶ 1. In 2017, Kohn began an extensive renovation of the building. *See* verified answer, ¶ 23; exhibit A. After the work was completed in 2019, Kohn submitted an application to enroll the building in the "J-51" real estate tax abatement program to HPD, the City agency which oversees properties' eligibility and compliance with that program. *Id.*, ¶ 22; exhibit A. On October 8, 2019, after reviewing all of the documents that Kohn had submitted and after conducting a physical examination of the building, HPD issued an order that denied that application (the HPD order). *Id.*, ¶¶ 25-29; exhibit D. The HPD order specifically found as follows:

> "We carefully reviewed the Application and the supporting documentation submitted regarding eligibility for the requested tax benefits. We have determined, based upon the information you provided, that the Application is denied because it fails to meet the J-51 Program's criteria for eligible projects.
>
> "HPD's review of the Application found that the Site does not meet the requirements of Section 5-04 (a) (6) of the Rules because both (a) less than seventy-five percent (75%) of the total area of the original perimeter walls and/or less than fifty percent (50%) of the total area of the original non-party perimeter walls remains in place as perimeter walls in the building for which benefits are claimed and (b) less than eighty percent (80%) of the original structural floor area of the building remains in place as structural floor in the building for which benefits are claimed.
>
> "Since failure to meet the above-described eligible project criteria conclusively precludes the granting of any tax benefits under the J-51 Program, we have not analyzed the Project further. Therefore, we have not reached any conclusions concerning any of the other criteria that might also make the Project ineligible for these tax benefits.
>
> "This constitutes HPD's final determination regarding the Application."

Id., exhibit D. Aggrieved, Kohn thereafter commenced this article 78 proceeding on February 5, 2020. *See* verified petition. HPD filed an answer on May 22, 2020. *See* verified answer. At that point, the Covid-19 national pandemic forced the court to suspend its operations indefinitely.

Now, however, sufficient restrictions have been lifted so that this fully submitted matter may be resolved (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983); *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

Kohn's petition raises only one argument to support its assertion that the HPD order was an arbitrary and capricious decision; specifically, that "HPD's calculations [concerning wall area and floor area] are misguided and thus in error," that "the correct calculations are set forth in paragraphs 9-20 [of the petition]," and that "the October 8, 2019 decision was rendered in error for [HPD]'s failure to consider all evidence and all supporting documentation submitted." *See* verified petition, ¶¶ 25-26. This argument is not persuasive.

The "J-51 program" is one of several programs that HPD oversees to administer certain real estate tax abatements that have been enacted by the New York State Legislature. Its enabling statutes are Real Property Tax Law § 489 and New York City Administrative Code § 11-243. The specific J-51 program rules that HPD promulgated to assess renovated buildings' acceptable perimeter wall area and structural floor area are found at §§ 5-03 and 5-04 of Chapter 5 of Title 28 of the Rules of the City of New York (RCNY).

In the HPD order, the agency's tax incentive program director found that Kohn's renovation of the building had resulted in unacceptably low percentages of post-renovation perimeter wall area and structural floor area. *See* verified answer, exhibit D. The director noted that the agency's review included examination of Kohn's application materials and other documentary submissions. *Id.* HPD has presented a copy of the internal agency report that the director reviewed when he considered Kohn's application. *Id.*, exhibit E (Iuonas affidavit). That report shows that the HPD architect who prepared it examined "other documentary submissions" which included: 1) Kohn's submissions; 2) the building's certificate of occupancy; 3) publicly filed construction/renovation plans; 4) public GPS maps and photographs that permitted estimated measurements of the building before, during and after its renovation; and 5) the results of a physical inspection of the building by HPD inspectors. *Id.*, ¶ 4. The report also explains how the architect calculated the building's post-renovation perimeter wall area and structural floor from the measurements that she arrived at from the foregoing examination. *Id.*, ¶¶ 5-12. The ensuing HPD order states that the director relied on the report's conclusions when he denied Kohn's J-51 application. *Id.*; exhibit D. From this, the court finds that the contents of the administrative record plainly provided a "rational basis" for the director to rely on while

reaching his final decision. Therefore, the court concludes that that decision (i.e., the HPD order) was not an arbitrary and capricious ruling, as defined by the law.

As previously mentioned, Kohn argues that the HPD order was arbitrary and capricious because HPD relied on the measurements and calculations in its own report rather than the ones set forth in ¶¶ 9-20 of the petition, which Kohn asserts are accurate. *See* verified petition, ¶¶ 25-26. However, Kohn nowhere explains why his figures are accurate and HPD's are not. It is well settled that "[t]he interpretations of a respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational." *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). Here, the administrative record detailed how HPD arrived at its conclusions by applying the rules set forth in 28 RCNY §§ 5-03 and 5-04. In the absence of anything other than Kohn's unsupported and self-serving allegation that HPD was somehow "misguided," the court finds that HPD's calculations are entitled to deference. Therefore, the court rejects Kohn's argument.

The court also notes the Court of Appeals' admonition that an administrative agency's determination is presumed to be arbitrary and capricious "when it 'neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts.'" *Matter of 20 Fifth Ave., LLC v DHCR*, 109 AD3d 159, 163 (1st Dept 2013), *quoting Matter of Lantry v State of New York*, 6 NY3d 49, 58 (2005). However, to succeed on such an argument, a proponent must show how a challenged decision "fails to adhere to prior agency precedent," and Kohn's petition does not offer examples of other HPD decisions that approved J-51 applications, or argue that its denial of the instant application improperly differed from such decisions. Therefore, the court finds that Kohn cannot prevail on this argument either.

Accordingly, the court finds that Kohn's Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Yehuda Kohn (motion sequence number 001) is denied and the petition is dismissed with prejudice.

Dated: New York, New York

July 10, 2020

ENTER:

HON. CAROL R. EDMEAD J.S.C.