Matter of D&J Holdings, LLC v New York City Dept. of Hous. Preserv. & Dev.
2021 NY Slip Op 30163(U)
January 21, 2021
Supreme Court, New York County
Docket Number: 100216/2020
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** ***Justice*** **PART** **IAS MOTION 56EFM**

--X

In the Matter of

D&J HOLDINGS, LLC, and JOEL SCHWARTZ,

Petitioners,

- v -

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Respondent.

--X

INDEX NO. 100216/2020

MOTION DATE 12/15/2020

MOTION SEQ. NO. 001

DECISION, ORDER, and JUDGMENT

The non e-filed notice of petition, petition, and the petitioner's exhibits A, B, C, and D, along with the following e-filed documents, listed by NYSCEF document number 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 (Motion 001)

were read on this motion to/for CPLR ART 78.

In this CPLR article 78 proceeding, the petitioners seek judicial review of an October 30, 2019 New York City Department of Housing Preservation and Development (HPD) determination denying their application for a real property tax exemption pursuant to Real Property Tax Law § 421-a. HPD answers the petition and files the administrative record. The petition is denied, and the proceeding is dismissed.

RPTL 421-a(16) establishes a real property tax exemption for the owners of specified multiple dwellings that include a certain number of "affordable housing" units, as defined therein, and sets forth several affordable housing options that may be asserted by a landowner in order to claim the exemption. The petitioners own real property at 22 Melrose Street, Brooklyn, New York, an apartment building (hereinafter the building) containing eight dwelling units. On September 4, 2017, the petitioners submitted a Notice of Intent to Begin Marketing three rental units in the building as affordable housing units, along with a Workbook required by applicable regulations, that, among other things, sets forth the calculations of area median income

necessary to comply with the statute and regulations. The petitioners identified Units 2B, 3B, and 4A as the proposed affordable housing units at Pages B003, B006, and B007 of the Workbook. In their submission, the petitioners elected to pursue Affordability Option C, which

> "mean[s] that, within any eligible site excluding the geographic area south of ninety-sixth street in the borough of Manhattan, and all other geographic areas in the city of New York excluded pursuant to local law, (A) not less than thirty percent of the dwelling units are affordable housing one hundred thirty percent units, and (B) such eligible site is developed without the substantial assistance of grants, loans or subsidies provided by a federal, state or local governmental agency or instrumentality pursuant to a program for the development of affordable housing"

(RPTL 421-a[16][a][iv]). The term "one hundred thirty percent unit" is defined as

> "a dwelling unit that: (A) is situated within the eligible site for which Affordable New York Housing Program benefits are granted; and (B) upon initial rental and upon each subsequent rental following a vacancy during the restriction period or extended restriction period, as applicable, is affordable to and restricted to occupancy by individuals or families whose household income does not exceed one hundred thirty percent of the area median income, adjusted for family size, at the time that such household initially occupies such dwelling unit"

(RPTL 421-a[16][a][xiv]).

On September 12, 2017, HPD signed off and approved the Notice of Intent and Workbook.

On November 2, 2017, the petitioners filed, with HPD, a formal Application for Certification of Eligibility for Tax Exemption Pursuant to Real Property Tax Law RPTL 421-a(16), submitting, as part of its application package, copies of the approved Notice of Intent and Workbook that had been countersigned by HPD.

By letter dated March 26, 2018, the petitioners transmitted to HPD copies of the Rental Restrictive Declaration that they had recorded in the New York City Automated City Register Information System (ACRIS), along with a revised Commencement and Completion of Construction Affidavit. Inasmuch as the Rental Restrictive Declaration was dated March 21, 2017, prepared on March 27, 2018, and recorded on April 2, 2018, it is unclear as to whether the petitioners' transmittal letter, although dated March 26, 2018, was actually dispatched after

April 2, 2018. Exhibit A to the Rental Restrictive Declaration identified Units 2B, 3B, and 4A as the affordable housing units within the building to which the declaration applied. The transmittal letter also stated that the submission included copies of individual unit rent registrations for all eight units in the building that had previously been filed with the New York State Division of Housing and Community Renewal (DHCR). The petitioners, however, had neglected to include those DHCR registrations with their correspondence. On April 12, 2018, HPD informed the petitioners that it had yet to receive copies of the DHCR rent registrations. In an email response transmitted later that day to HPD, the petitioners attached the DHCR rent registrations for all eight apartments in the building.

On April 13, 2018, an HPD representative e-mailed the petitioners' agent the following message:

> "We noticed the unit discrepancy in the submitted Initial DHCR registrations. Please ask the owner to clarify why units 2B and 3B were registered as affordable *instead of 2A and 3A that were initially proposed in the 421-a(16) Units Workbook and listed in the recorded Restrictive Declaration for this project"*

(emphasis added). In fact, Units 2B, 3B, and 4A were the units identified in the Workbook and in the recorded Restrictive Declaration. In response, the petitioners' agent explained to the HPD representative that

> "[i]t seems like the Units Workbook and Restrictive Declaration list the incorrect units, as the affordable units are 2A, 3A & 4A. See the revised worksheets and restrictive declaration indicating the correct affordable apts. Please confirm that it's good now and the revised forms shall be recorded on ACRIS."

On April 16, 2018, the petitioners' agent requested HPD that that it be permitted to record an updated restrictive declaration on ACRIS. In response, the HPD representative neither authorized the petitioners' agent to submit a revised Workbook to HPD nor permitted it to record a revised Declaration on ACRIS, but instead asserted that "[t]he 421-a(16) application for this project cannot be approved at this time because of the unit discrepancies between the approved Unit Workbooks, the Restrictive Declaration and DHCR registration forms." There is no indication in the administrative record that the petitioners, or anyone on their behalf, filed an

updated or amended Rental Restrictive Declaration on ACRIS designating Units 2A, 3A, or 4A as the appropriate affordable housing units.

On April 25, 2018, a second HPD representative informed the petitioners' agent that "[w]e need to see the leases for the tenants occupying the following units: 2B, 3B and 4A. Please send these over for our review." That same date, the petitioners' agent sent an initial email response to the HPD's request, informing the HPD representative that "Unit 4A is vacant as it will be affordable at 130% A[rea] M[edian] I[ncome], 4B is rented out to free market tenant." The petitioners' agent did not reiterate its prior contention that the petitioners had intended for Units 2A and 3A, rather than Units 2B and 3B, to be designated as the affordable housing units. Later that day, the HPD representative replied that it was

> "alright [sic] if 4A is currently vacant. However, I asked for copies of the leases for 2B and 3B as well. I did not ask about 4B. See below. Note that we need to see the tenant leases and not drafts of the DHCR registration forms. Let me know if you have any questions."

On April 26, 2018, the petitioners' agent submitted copies of the leases for Units 2B and 3B, requesting the HPD to "[p]lease review and advise on the next step to get the slip-up rectified." Again, the agent made no mention of its prior assertion that Units 2A and 3A, rather than 2B and 3B, were meant to be designated as the affordable housing units. On April 27, 2018, the second HPD representative informed the petitioners' agent that she "only s[aw] the first page of each lease attached and neither is . . . signed or dated by the tenants." The HPD representative requested the petitioners' agent to "[p]lease send copies of the leases in their entirety." On April 30, 2018, the petitioners' agent emailed copies of the signed leases to HPD. On May 7, 2018, HPD informed the petitioners' agent that

> "The leases you submitted are still incomplete. Again, as I asked below, please send copies of the leases in their entirety. I would like to see copies of the entire executed leases as a whole - please do not send select pages.
>
> "In addition to the leases for the units originally deemed affordable, we'll now need to see the leases for all units in the building."

On May 10, 2018, the petitioners' agent responded to HPD, stating, "[a]s requested, see the attached signed leases for the 5 free market units along with the prepared rent stabilized leases for the 3 affordable units." In response, the HPD again informed the petitioners' agent that HPD received only select pages from the leases, and that the petitioners were required to submit signed copies of the entire lease for each of the eight units in the building. On June 12, 2018, the petitioners' agent informed HPD that it uploaded the entirety of all eight leases to the Dropbox document-sharing computer application, and provided HPD with a computer link to access those documents. When HPD could not access the documents, the petitioners' agent, on June 14, 2018, purportedly sent two emails with eight attachments, one for each lease. As of June 25, 2018, HPD asserted that it was still awaiting receipt of the leases. Despite numerous email messages sent between HPD and the petitioners' agent, as of July 13, 2018, HPD asserted that it still had yet to receive copies of the leases for Units 1B and 2B.

On December 10, 2018, a third HPD representative emailed the petitioners' agent, indicating that the requests for leases that had been sent by his two colleagues "ha[d] not been completed." He informed the agent that the "[p]rogram requires a copy of each initial lease for each apartment in the project, inclusive of all executed pages and each page of each rider that was attached to both rent stabilized and free market leases. Send everything as one submission." HPD also requested the agent to send hard copies of the leases as well. On December 17, 2018, with HPD's permission, the agent again attempted to employ the Dropbox application to submit all eight leases to HPD; the next day, the third HPD representative informed the petitioners' agent that HPD would not review the leases until it received hard copies. On December 19, 2018, the petitioners' agent mailed hard copies of all eight leases to HPD, consisting of a total of 99 pages.

In a final determination dated October 30, 2019, HPD's 421-a Program Director wrote as follows:

> “I am writing regarding the Application submitted on November 2, 2017 for a Certificate of Eligibility for tax benefits pursuant to Real Property Tax Law § 421-a(16) (“§421-a(16)”) and Chapter 51 of Title 28 of the Rules of the City of New York (the "Rules"), (collectively, "Affordable New York Housing Program").
>
> “We have carefully reviewed the Application and the supporting documentation submitted regarding eligibility for the requested tax exemption. We have determined, based upon the information you provided, that the Application is denied because it fails to meet the Affordable New York Housing Program’s criteria for eligible projects.
>
> “The Application selected Affordability Option C, which requires, inter alia, that not less than 30% of the dwelling units are Affordable Housing One Hundred Thirty Percent Units. §421-a(16)(a)(xiv) requires the Affordable Housing One Hundred Thirty Percent Units, upon initial rental and upon each subsequent rental following a vacancy, to be affordable to and restricted to occupancy by individuals or families whose household income does not exceed one hundred thirty percent of the area median income, adjusted for family size, at the time that such household initially occupies such dwelling unit. §51-04(f) of the Rules provides that no lease for an Affordable Housing Unit can be executed until the Agency verifies the eligibility of the proposed tenants. On December 20, 2018, documentation was provided to the Agency confirming that two of the dwelling units designated as Affordable Housing One Hundred Thirty Percent Units in the Application were initially leased and occupied by individuals whose eligibility was not verified by the Agency and at rents that exceeded the Permitted Rent in violation of §51-02(d)(1)(C)(ii)(a) of the Rules.
>
> “Since failure to meet the affordability criteria conclusively precludes the granting of any tax benefits under the Affordable New York Housing 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 this real property tax exemption.
>
> “This constitutes HPD's final determination regarding the Application. The only review of this determination is pursuant to Article 78 of the Civil Practice Law and Rules.”

This CPLR article 78 proceeding ensued.

Where, as here, an administrative determination is made, and there is no statutory requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (*see* CPLR 7803[3]; *Matter of Madison County Indus. Dev. Agency v State of New York Auths. Budget Off.*, 33 NY3d 131, 135 [2019]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]; *Matter of Montgomery Realty NY, LLC v New York City Dept. of Hous.*

Preserv. & Dev., 187 AD3d 443, 443 [1st Dept 2020]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept 2015]; *Matter of Batyreva v New York City Dept. of Educ.*, 50 AD3d 283 [1st Dept 2008]).

The petitioners contend that HPD's determination was arbitrary and capricious and affected by an error of law because HPD failed to take account of the fact that they amended the designated affordable housing units from Units 2B, 3B, and 4A, as identified in their Notice of Intent, Application for Exemption, and Rental Restrictive Declaration, to Units 2A, 3A, and 4A, as set forth in email correspondence. The petitioners thus argue that HPD denied the application for a tax exemption based on its review of the wrong apartment units. Hence, the petitioners assert that the exemption should not have been denied on the grounds relied upon by HPD, specifically, that the income of the tenants occupying Units 2B and 3B had not been vetted by HPD to determine their eligibility for affordable housing units, or that those units did not qualify as affordable housing within the meaning of the RPTL and the Rules of the City of New York.

HPD counters that its own rules do not permit an applicant for a tax exemption informally to amend its Notice of Intent so as to substitute one or more units for the units identified in the Notice, and that its determination, properly premised on an evaluation of Units 2B, 3B, and 4A, was not arbitrary and capricious in any event. The court agrees. Crucially, HPD has promulgated an unambiguous rule that prohibits an applicant from amending an election designating particular dwelling units as affordable housing units (*see* 28 RCNY 51-02[b]). The rule provides that "[n]o affordability election can be changed after the filing of a Notice of Intent and no unit mix or unit distribution proposed in such Notice of Intent can be changed after it has been approved by [HPD]." The purpose of the rule is to prevent landlords from undermining the rent stabilization system by switching the designation of one unit for another, in a sort of "shell game" meant solely to obtain and maintain a tax exemption, despite the rent that is actually being charged to a particular tenant or whether that tenant's income qualifies him or her for an

affordable housing unit in the first instance. Here, the petitioners and their agent, in all of their official filings with HPD, DHCR, and ACRIS, including the Notice Intent, the Application for Certification, and the Rental Restriction Declaration, consistently designated Units 2B, 3B, and 4A as the affordable housing units in the building. Over the course of almost two years of email exchanges and other correspondence with HPD, the petitioners' agent effectively confirmed that those were the affordable housing units, except on one occasion, and then only in an email response to an inquiry by an HPD representative. This one representation that the petitioners actually intended to designate Units 2A, 3A, and 4A as the affordable housing units was not corroborated by any filings, either before or after that representation was made. Despite the rule prohibiting amendment to the designation of the units, neither the petitioners nor their agent followed up that email with any attempt to make an amended paper or electronic filing changing the designation on the ground that the actual filings contained a clerical error. The petitioners did not make a formal written request for leave to amend the Notice of Intent, the Application for Certification, or the Rental Restriction Declaration on that ground, and did not attempt to confirm with HPD that Units 2A, 3A, and 4A were the designated units, despite numerous opportunities to do so. Thus, this is not a situation in which the petitioners may reasonably contend that they are being punished too harshly for making a mere clerical or typographical error.

A determination is arbitrary and capricious where it is not rationally based, or has no support in the record (*see Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624 [1st Dept 2015]), i.e., it "is without basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). A determination is also arbitrary and capricious where the decision-making agency failed to consider all of the factors that it is required by statute to consider and weigh, or considered inappropriate factors (*see Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604 [2d Dept 2008]; *Matter of Pantelidis v*

New York City Bd. of Standards & Appeals, 43 AD3d 314, 314 [1st Dept 2007]; *Matter of Fusco v Russell*, 283 AD2d 936, 936 [4th Dept 2001]).

An administrative determination is affected by an error of law where the agency incorrectly interprets or improperly applies a statute, regulation, or rule (*see generally Matter of CVS Discount Liquor v New York State Liq. Auth.*, 207 AD2d 891, 892 [2d Dept 1994]). "While agency interpretations of their own regulations are generally afforded considerable deference, courts must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case" (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 654-655 [2013] [citations and internal quotation marks omitted]; *see Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999]; *Matter of Dworman v New York State Div. of Hous. & Community Renewal*, 94 NY2d 359 [1999]; *Matter of Gaines v New York State Div. of Hous. & Community Renewal,* 90 NY2d 545, 548-549 [1997]). "While as a general rule courts will not defer to administrative agencies in matters of pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [citations and internal quotation marks omitted]; *see Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005]; *Matter of American Tel. & Tel. Co. v State Tax Comm.*, 61 NY2d 393, 400 [1984]).

As HPD correctly contends, inasmuch as the petitioners designated Units 2B, 3B, and 4A as the affordable housing units in the September 4, 2017 Notice of Intent and Workbook, and HPD duly approved that Notice of Intent and Workbook on September 12, 2017, 28 RCNY 51-02(b) prohibits the petitioners from thereafter amending the affordable housing unit designation to Units 2A, 3A, and 4A, thus altering the mix or distribution of affordable housing units. That the petitioners now claim that, at most, they sought to amend their election via an informal email communication, and nonetheless continued to submit specific documentation addressed to Units 2B and 3B to HPD during 2018 without requesting clarification, or attempting

to resolve what they now claim was HPD's misperception, only underscores the impropriety of the their contentions. The court concludes that HPD's interpretation of its own regulations is rational and entitled to deference here (*see generally Matter of Montgomery Realty NY, LLC v New York City Dept. of Hous. Preserv. & Dev.*, 187 AD3d at 443). Consequently, the agency's determination to evaluate the information concerning Units 2B, 3B, and 4A in connection with the petitioners' application, rather than Units 2A, 3A, and 4A, was not affected by an error of law, as Units 2B, 3B, and 4A were the units identified as the affordable housing units in the September 4, 2017 Notice of Intent and Workbook, and resubmitted with the November 2, 2017 Application for Certification of Eligibility.

To the extent that the petitioners assert that merits of HPD's evaluation of Units 2B, 3B, and 4A was nonetheless arbitrary and capricious, there is no basis for such a conclusion. There is factual support in the administrative record for HPD's finding that Unit 2B was leased to a tenant from November 15, 2017 to June 30, 2019 at a monthly rent of $2,800, which is above the maximum rent of $2,726, as calculated in accordance with 28 RCNY § 51-01, and that it never received any information about that tenant to verify her income to determine her eligibility for an affordable housing unit. Similarly, there is factual support in record for HPD's finding that Unit 3B was leased to two cotenants from November 15, 2017 to June 30, 2019 at a monthly rent of $2,800, which is above the maximum calculated rent of $2726, and that it never received any information on these two cotenants to verify their eligibility. Hence, HPD rationally concluded that the petitioners' application did not comport with 28 RCNY 51-02(d)(1)(C)(ii)(a), 28 RCNY 51-04(f), or RPTL 421-a(16)(a)(xiv).

Whether a challenge to a real property tax exemption determination is prosecuted as a declaratory judgment action, in an RPTL article 7 tax certiorari proceeding, or in a CPLR article 78 proceeding, "when a municipality seeks to revoke a previously granted tax exemption, it bears the burden of proving that the real property is now subject to taxation" (*Congregation Rabbinical Coll. of Tartikov, Inc. v Town of Ramapo*, 17 NY3d 763, 764 [2011]; *see Matter of*

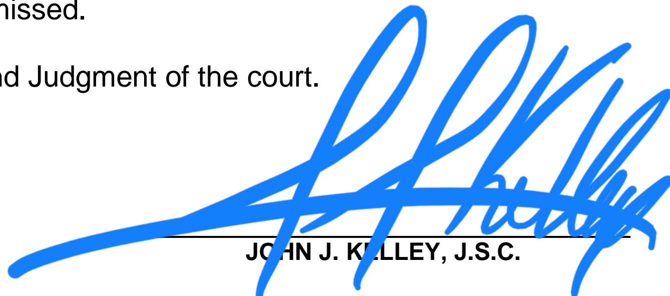
Greater Jamaica Dev. Corp. v. New York City Tax Commn., 25 NY3d 614, 623-624 [2015]; *Matter of Lackawanna Community Dev. Corp. v Krakowski*, 12 NY3d 578, 581 [2009]; *Matter of New York Botanical Garden v Assessors of Town of Washington*, 55 NY2d 328, 334 [1982]; *Matter of 471 Columbian Club of Port Jervis, N.Y., Inc. v Duryea*, 104 AD3d 944, 945 [2d Dept 2013]; *Matter of Southwinds Retirement Home, Inc. v City of Middletown*, 74 AD3d 1085, 1086 [2d Dept 2010]). Although the notice of petition asserts that HPD determined to "revoke" a previously granted affordable housing exemption, the administrative record reveals that HPD actually denied a newly filed application for such an exemption. Hence, the burden remained on the petitioners to establish that their real property should be exempt from taxation, and that the denial of their application was arbitrary and capricious or affected by an error of law. Since the petitioners failed to satisfy their burden in this regard, the petition must be denied.

Accordingly, it is

ORDERED that the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.



1/21/2021
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X] **CASE DISPOSED**		[ ] **NON-FINAL DISPOSITION**		
	[ ] **GRANTED**	[X] **DENIED**	[ ] **GRANTED IN PART**	[ ] **OTHER**	
APPLICATION:	[ ] **SETTLE ORDER**		[ ] **SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ] **INCLUDES TRANSFER/REASSIGN**		[ ] **FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**	