SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA ANNE CRANE** **PART** **IAS MOTION 15EFM**

Justice

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AMICUS ASSOCIATES LP

Plaintiff,

- v -

NEW YORK CITY LOFT BOARD

Defendant.

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INDEX NO. 150485/2020

MOTION DATE 01/15/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

In this Article 78 proceeding, petitioner Amicus Associates LP ("Amicus" or "Owner"), seeks an order setting aside the New York City Loft Board's ("NYC Loft Board") September 19, 2019 ruling denying petitioner's application for a second extension to file for code compliance pursuant to Multiple Dwelling Law (MDL) 284(1)(vi)(B), as well as a judgment declaring that the NYC Loft Board's regulation 29 RCNY 2-01 (b)(3) (the "regulation"), as interpreted by Loft Board Order #4890, allowing only one extension of MDL 284 is *ultra vires*.

I. BACKGROUND

Petitioner is the owner of 83 Canal Street, New York, New York, an interim multiple dwelling ("IMD") that is subject to MDL Article 7-C (Petition ¶ 2 [NYSCEF Doc. No. 1]). Article 7-C, also referred to as the "Loft Law," regulates the occupancy of commercial space that was unlawfully converted to residential use. The Loft Law requires owners of interim multiple dwellings to comply with the MDL by obtaining residential certificates of occupancy. MDL 284 establishes a schedule that an owner must comply with to obtain a residential certificate of occupancy.

Petitioner was first granted an extension on May 17, 2017 (*id.* ¶ 23). Under the extended deadlines, Amicus was required to file an alteration application by October 18, 2017, obtain a building permit by January 18, 2018, achieve Article 7-B compliance and obtain a residential

certificate of occupancy both by June 18, 2018 (Answer ¶ 109 [NYSCEF Doc. No. 30]). Although Amicus timely filed an alteration application, it sought a second extension the day before the building permit deadline of January 18, 2018 (Petition ¶ 39). On February 28, 2019, the NYC Loft Board's Executive Director ("Executive Director") denied this request stating that pursuant to 29 RCNY § 2-0l (b) (3), the Loft Board regulations only allowed one extension per deadline in the amended code compliance table and that Amicus had already been granted extensions of each deadline on May 17, 2017 (February 28, 2019 Decision at 2 [NYSCEF Doc. No. 38]). The Executive Director further stated that, even without the extension limitations, Amicus failed to demonstrate that it met the statutory standard to obtain an extension of the code compliance deadlines (*id*. at 2-4).

On April 16, 2018, Amicus filed an appeal with the NYC Loft Board (Appeal [NYSCEF Doc. No. 4]). On September 19, 2019, the NYC Loft Board issued Order #4890, affirming the Executive Director's denial of Amicus' second extension request (NYC Loft Board Order #4890 [NYSCEF Doc. No. 3]).

II. ARGUMENTS

Petitioner argues the NYC Loft Board erroneously denied Amicus' second extension application based on its interpretation of the regulation as limiting owners to only one extension. Amicus argues that owners are entitled to a second extension of the legalization milestones based on the plain language of the statute where an owner has acted in good faith, but was delayed due to circumstances beyond its control (Petition ¶ 13). Alternatively, petitioner argues that the NYC Loft Board's interpretation of the regulation is *ultra vires.* Moreover, petitioner contends that the NYC Loft Board's finding that Amicus did not take all reasonable and necessary action to obtain issuance of a building permit was arbitrary and capricious. Lastly, petitioner avers that the NYC Loft Board violated the New York State Open Meetings Law (Public Officers Law § 100 *et seq.*) by going into Executive Session to discuss the merits of the Order and this violated its procedural due process rights.

City and tenant-respondents argue that the NYC Loft Board's determination that the owner was not entitled to a second extension of the code compliance deadlines was rational and supported by the relevant laws and, therefore, not an error of law or *ultra vires*. Respondents contend that the Loft Board upheld the Executive Director's decision because it supported the design and intent of the regulation, which is to address the significant hazards of interim

dwellings by bringing them into compliance with light, air, sanitation, safety, and fire protection standards within a time certain (NYC Loft Board's Aff., at 9 [NYSCEF Doc No. 43]).

III. DISCUSSION

In New York, "where the rules or regulations of an administrative agency are in conflict with the provisions of the statute or inconsistent with its design and purpose" they are invalid (*Matter of Association of Commercial Prop. Owners v New York City Loft Bd.*, 118 AD2d 312, 314 [1st Dept 1986] [internal quotations and citation omitted], *affd* 71 NY2d 915 [1988]). "The challenger of a regulation must establish that the regulation is so lacking in reason for its promulgation that it is essentially arbitrary" (*id.* at 315 [internal quotation marks and citation omitted]). An administrative determination is arbitrary or capricious if made "without sound basis in reason" and "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]). Courts may not substitute their judgment if a rational basis supports the determination (*Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute" (*Matter of Gruber* (*New York City Dept. of Personnel-Sweeney*), 89 NY2d 225, 231 [1996]). "The judicial function is at an end once it has been determined that an agency's conclusion has a sound basis in reason" (6 NY Jur 2d Article 78 § 15).

Pursuant to 29 RCNY 2-01 (b)(3), if the statutory requirements for an extension are met, "applications for extensions of code compliance deadlines will be limited to one extension per deadline in the amended code compliance timetable." The statute also outlines the standard by which the Executive Director decides an extension application: "only where an owner has demonstrated that it has met the statutory standards for such an extension, namely, that the necessity for the extension arises from conditions or circumstances beyond the owner's control, and that the owner has made good faith efforts to meet the code compliance timetable requirements" (29 RCNY § 2-01(b)(2)(i)).

Petitioner claims:

> it was an error of law for the Loft Board to deny the Owner's second extension application based on its interpretation of its regulations as limiting owners to only one extension. Rather, owners are entitled to a second extension of the legalization milestones based on the plain language of the statute where an owner . . . has acted in good faith but was delayed due to circumstances beyond its control.

(Petition ¶ 13). The petitioner, both here and before the NYC Loft Board argued three reasons for its delay: (1) it was unable to obtain a permit because it could not file its legalization plans until tenants provided access; (2) once it filed the legalization plans and narrative statement with the Loft Board, the Loft Board did not expeditiously schedule a narrative statement conference and; (3) the Department of Buildings ("DOB") did not issue any objections other than an initial disapproval (Appeal [NYSCEF Doc No. 4]).

For each argument the NYC Loft Board explained its reasoning for its denial of a second extension. First, the plain language of 29 RCNY 2-01(b)(2)(i), read in conjunction with MDL 284 (1)(viii), states the Executive Director may only grant one extension of the code compliance deadlines (Loft Board Order at 2-4 [NYSCEF Doc No. 3]). Next, as to point (1), the owner failed to serve a request for access on the tenants who allegedly refused access until some seven months after filing its initial registration for nine units in the building, with no reason for the delay (*id*. at 4). Then, as to points (2) and (3), because it is the owner's obligation to expedite the legalization process, the owner should have requested a narrative statement conference within the deadline and reached out to DOB (*id*.).

Further, the NYC Loft Board found that the owner failed to show good faith efforts to meet the deadline stating:

> Owner's actions do not demonstrate good faith efforts to meet the code compliance timetable requirements under 29 RCNY § 2-01 (b)(2)(i). As indicated above, Owner delayed in meeting its obligations. It did not send access notices for over seven months. Furthermore, Owner procrastinated until just one day prior to the expiration of its prior extension to file its alteration application with DOB. In addition, Owner did not reach out to the loft Board to schedule the narrative statement conference. Nor did Owner reach out to DOB to schedule a plan examination.

(*id*. at 5).

A review of the evidence reveals that the NYC Loft Board, in its correspondence with petitioner in scheduling the narrative conference, proposed multiple dates (Appeal at 121). While

it is true that two out of the three dates suggested were outside the deadline for compliance, the NYC Loft Board stated in its correspondence to petitioner, "[I]f you are not available on the proposed dates, please provide alternative dates that are amenable to you and your client(s)" (*id.*). However, there is no evidence that the petitioner attempted to reschedule the narrative conference within the deadline. Nor is there evidence that petitioner initiated contact with DOB to examine the building plan or issue its objections (*id.* at 57).

Here, the NYC Loft Board's interpretation of the regulation is not irrational or unreasonable (*see Matter of 902 Assoc. v New York City Loft Bd.,* 229 AD2d 351, 352 [1st Dept 1996] ["The Loft Law . . . is to be liberally construed"]). The Loft Law places an affirmative obligation on building owners subject to the Loft Law to meet specific deadlines (*see* Multiple Dwelling Law § 284(2)). If an owner's delay in code compliance is due to circumstances beyond the owner's control, documentary evidence must be presented in corroboration (*Matter of Mapama Corp. v New York City Loft Bd.*, 30 Misc 3d 1234[A], 2011 NY Slip Op 50355(U), *2 [Sup Ct, NY County 2011], *affd* 95 AD3d 785, 786 [1st Dept 2012]). As such, it was reasonable that the NYC Loft Board found that the owner did not demonstrate that there were circumstances outside its control or make good faith efforts with deadline compliance (*Matter of 902 Assoc.,* 229 AD2d at 352 [when the NYC Loft Board's determination has a rational basis, its interpretation of its own regulations should be upheld]). Accordingly, petitioner's request to set aside the September 19, 2019 ruling of the NYC Loft Board is denied, as is its request that the court declare 29 RCNY 2-01(b)(3) *ultra vires*.

Finally, petitioner alleges that the NYC Loft Board went into Executive Session to discuss the merits of the second extension in violation of Public Officers Law 100-111 ("Open Meetings Law") on September 19, 2019. City-Respondent denies that an Executive Session was held on the date in question and has furnished a video of the meeting (Respondent's Br. at 21 [NYSCEF Doc. No, 43]).

The Open Meetings Law requires that public body meetings conducting public business, other than executive sessions, "be open to the general public" (*see* Public Officers Law §103 (a)). "The purpose of the Open Meetings Law is to prevent municipal governments from debating and deciding in private what they are required to debate and decide in public" (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 686 [1996]). "Courts are empowered, 'in their discretion and upon good cause shown, to declare void any action taken by

a public body in violation of the mandate of this legislation'" (*id.*, citing *Matter of New York Univ. v Whalen*, 46 NY2d 734, 735 [1978]). It is the petitioner's burden to show good cause warranting judicial relief (*Matter of New York Univ.*, 46 NY2d at 735).

Here, petitioner has failed to meet its burden. While Amicus attaches meeting notes that reference executive sessions being held, none reference the date of the denial, the building, or the owner. There is no evidence that an executive session was even held on September 19, 2019. Accordingly, petitioner's request that the court find NYC Loft Board in violation of the Open Meetings Law is denied.

IV. DECISION

Based upon the foregoing, it is

ORDERED and ADJUDGED that the Petition is denied and the proceeding is dismissed.

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3/29/2021
DATE

MELISSA ANNE CRANE, 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