# 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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STF 390 WADSWORTH HOLDING LLC

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF

Defendant.

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**INDEX NO.** 158766/2019

**MOTION DATE** N/A

**MOTION SEQ. NO.** 001 (cross motion only)

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

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

Upon the foregoing documents, it is

"In 2016, HPD created the Building Distress Index ('BDI') as a means of identifying physically-distressed buildings for potential assistance or intervention by future HPD programs" (NYSCEF Doc. No. 22 [Capperis Aff], ¶ 3). Two years later, the City of New York enacted Local Law 1 of 2018 because of its "concern[] with the association between various characteristics of building distress, and the likelihood of suspected or reported harassment against tenants," and its "interest in finding ways to protect tenants at risk of displacement due to landlord harassment" (Local Law 1, § 1, Legislative Findings). Under the Local Law, respondent New York City Department of Housing Preservation and Development (HPD) was responsible for evaluating such buildings and protect these vulnerable tenants. As is relevant here, HPD has

designed a Building Qualification Index (BQI), which essentially replaces the BDI (NYSCEF Doc. No. 22, ¶ 3).[1] The BQI looks at

> (1) The number of open and closed hazardous and immediately hazardous violations of the housing maintenance code per adjusted dwelling unit that were issued by the Department within the five-year period prior to July 24, 2018, rated on a range of values from zero to ten. . . .
>
> (2) The total amount of paid or unpaid emergency repair charges per adjusted dwelling unit levied against the building within the five-year period prior to July 24, 2018, rated on a range of values from zero to ten.
>
> (3) The ratings in this section are based on the number of standard deviations above the average at the time of evaluation. Buildings above such average score 2.5 points, and an additional 2.5 points for each of up to 3 standard deviations above the average. The following scores will result in placement of a building on the Pilot Program List:
>
> (a) Buildings with no ownership changes within a five-year period prior to July 24, 2018, and a combined score of 15 or more for criteria in subdivisions (1) and (2) of this section;
>
> (b) Buildings with one ownership change within a five-year period prior to July 24, 2018 and a combined score of ten or more for criteria in subdivisions (1) and (2) of this section; and
>
> (c) Buildings with two or more ownership changes within a five-year period prior to July 24, 2018, and a combined score of five or more for criteria in subdivisions (1) and (2) of this section (28 Rules of the City of NY [RCNY] § 53-03 [Criteria for the Building Qualification Index]).

As stated, when the BQI is too high, the building in question is placed on the Pilot Program List. The buildings on the Pilot Program List must apply for and obtain a Certification of No Harassment (CONH) from the Department of Buildings before they undertake any work

[1] According to respondent, the two differ in that "(a) the BQI uses a five-year time period from a fixed reference date, where the BDI used a three-year time period from a variable reference date; (b) the BQI considers only dwellings with six or more units where the BDI considered buildings with three or more units; and (c) the BQI takes into consideration the number of ownership changes of a property within the applicable five-year time period, where BDI did not consider ownership changes" (NYSCEF Doc. No. 22, ¶ 7).

covered under 28 RCNY § 53-01. A building's application to the Department of Buildings triggers "an investigation into whether harassment has occurred during a prescribed time period . . . . If a building is placed on the CONH Pilot Program list, all such permits will be denied until the building applies for and receives a Certificate of No Harassment" (NYSCEF Doc. No. 22, ¶ 4).

Around October 12, 2018, respondent promulgated the Pilot Program List that included petitioner. Respondent alleges that it placed petitioner STF 390 Wadsworth Holding, Inc. on the list because of its BQI. On November 1 and November 5, 2018, petitioner filed Freedom of Information Law requests with the Department of Buildings in which it sought the building's BQI score, the system HPD uses to calculate the score, and a complete list of "the information, data, documentation or any other record utilized to calculate the 'score'" (NYSCEF Doc. No. 2 [Nov 1 and 5, 2018 letters]). The November 5 letter refers to the November 1 letter and the requests petitioner's law firm made with respect to petitioner and several other buildings on the list that were managed by Barberry Rose Management.

On May 7, 2019, respondent sent petitioner several emails and links to documents in response to the FOIL request (*see* NYSCEF Doc. Nos. 3-9). According to petitioner, these productions "did not furnish the information sought nor provide a written explanation for HPD's refusal to furnish the information sought" (NYSCEF Doc. No. 1 [Petition], ¶ 9). Instead, respondent provided the guidelines used to calculate the BDI (NYSCEF Doc. Nos. 6, 8) and apparently used a spreadsheet that referred to the BDI as well (*see* NYSCEF Doc. No. 22, ¶ 20 [relating to another building that challenged a FOIL production for the same reason]). On May 16, 2019, petitioner appealed the FOIL response and asked for all information relating to its BQI score and the scoring method for BQI. HPD did not reply to its appeal.

Therefore, around September 9, 2019, petitioner filed this Article 78 proceeding as a challenge to respondent's failure to comply with its FOIL request. The proceeding sought all documents from respondent related to respondent's Pilot Program List determination (*id.*). It further asked that "[i]n the event that no such documents exist that are responsive to Owner's FOIL Application," the court declare, under CPLR §3001, that respondent "unlawfully added [petitioner] to the Pilot Program List" (*id.*, ¶ 4 [b]). Finally, petitioner sought attorney's fees under Public Officers Law (POL) §89(4)(c).

On November 15, 2019 respondent cross-moved to dismiss on the ground of mootness (NYSCEF Doc. No. 18).[2] It submitted the affidavit of Sean Capperis, who was director of strategic planning in the Division of Strategic Planning at the respondent agency during the period in question (NYSCEF Doc. No. 22). The affidavit is from an Article 78 proceeding that challenges the placement of BSF Inwood Holding LLC on the Pilot Program List (*Matter of BSF Inwood Holding LLC v New York City Department of Housing Preservation and Development*, Index No 157569/2019 [Sup Ct, NY County] [Rakower, J.] [*Inwood Holdings*]). Apparently, respondent alleges that the FOIL production *Inwood Holdings* suffered from the same error as the production at issue here – specifically, that it inadvertently used the acronym "BDI" when it meant to use "BQI" (*see also* NYSCEF Doc. No. 20 [Aff of Records Access Officer Dina Saffan]). Respondent therefore argued that its production was complete, and the matter was moot.

On March 13, 2020, in response to the cross-motion, petitioner amended the petition (NYSCEF Doc. No. 33). As amended, the petition seeks an order annulling and setting aside

[2] Respondent also argued that petitioner's request for declaratory relief was untimely and that attorney's fees were not warranted.

respondent's decision to place it on the Pilot Program List. Petitioner stated that, due to the mislabeling of the BQI in respondent's original production, it did not have information about its BQI score and the relevant methodology until respondent explained the error in the November 15 filing. At that point, petitioner retained a statistician, who examined the building's BQI score and determined that respondent's computation was in error and inconsistent with the governing law. Therefore, it amended the petition to conform to the newly discovered facts (*id.*, ¶¶ 13-15). Because of the prior problems, petitioner states, the court should consider the amendment.

In lieu of an answer to the amended verified petition, respondent again cross-moved for dismissal of the proceeding (NYSCEF Doc. No. 57). According to respondent, the amended petition is untimely because the challenged decision became final and binding on October 12, 2018, when respondent published the Pilot Program List. Although respondent did not notify petitioner that it was on the list, petitioner claims that this is irrelevant because direct notice is not required. Even if the court were to reject its position, respondent states that the amendment is still untimely because petitioner undoubtedly knew of the listing on November 1, 2018, when it first sent its FOIL request to respondent. Respondent states that petitioner did not have to wait for a reason for its placement on the list before it instituted a challenge, and it asserts that petitioners regularly commence Article 78 proceedings before they know the basis for a challenged ruling. According to respondent, petitioner essentially asks this court to toll the four-month limitations period until it, or any petitioner, gathers its evidence.

In opposition, petitioner emphasizes that the burden is on respondent to establish when the limitations period commenced. It claims that respondent did not publish the Pilot Program List in the City Record, and the online posting by itself was insufficient notice (citing 28 RCNY § 53-02 [1]). In addition, petitioner argues that the list did not enable petitioner to "calculate the

impact of [respondent's] actions against its property interests" and therefore did not constitute a final determination under CPLR § 217 (1) (NYSCEF Doc. No. 63, ¶ 6). More specifically, petitioner argues that absent an explanation for the determination, it was unable to articulate a basis for its petition. It notes that, in addition to the BQI score, it could have been involved in the Alternative Enforcement Program, the subject of a building-wide vacate order, or found guilty of harassment by a city agency. Petitioner states that, therefore, it needed the FOIL documents first. As a result, petitioner reiterates that the statute of limitations began to run on November 15, 2019, and its amended petition is timely.

In reply, respondent reiterated that a determination is final when the aggrieved party receives notification (citing, *e.g.*, *Matter of Adventist Home v Board of Assessors*, 83 NY2d 878, 879-880 [1994] [*Adventist Home*]). Respondent notes that where the impact of a list is not quasi-legislative – that is, where it does not affect the public at large – actual notice is required, and, seemingly, acknowledges that the court may decide that this was not a quasi-legislative action of wide-reaching effect. Regardless, respondent states, petitioner received actual knowledge of its inclusion on the Pilot Program List long before it amended its petition. Further, it rejects petitioner's statement that it could not understand the impact of respondent's action before it learned why it was on the list. Among other things, respondent points to 28 RCNY § 53-01, which outlines the impact of a building's inclusion on the list and the accompanying CONH requirement.

On December 10, 2020, at oral argument, the court solely considered respondent's new pre-answer cross-motion to dismiss (NYSCEF Doc. No. 68). Among other things, the court expressed concern that respondent would require a petitioner to initiate a proceeding without knowing the basis of the government action, thus putting it "between a rock and a hard place (*id.*,

p 9, line 1). Respondent stated that "it is pretty [commonplace] for Petitioners in Article 78 Proceedings to commence them without having the full knowledge of why the agency took a particular action" (*id.*, lines 10-13). After oral argument, the court took the matter on submission.

Now, after careful consideration, the court denies the cross-motion. The court rejects respondent's position that publication of the list, without more, was sufficient to comprise notice (*see Adventist Home*, 83 NY2d at 880), but agrees that petitioner had actual notice of its placement on the Pilot Project List by at least November 1, 2018, when it submitted its FOIL claim to respondent. However, petitioner promptly filed a FOIL request that sought information to confirm its placement on the list and find out why it was placed there (*see* NYSCEF Doc. No. 36), so that petitioner could determine whether it could raise a rational objection to the decision.

Further, the original petition was timely as a response to the FOIL request. A petitioner cannot appeal the denial of until there is a final determination (CPLR § 217 [1]). Because the documents that respondent produced were mislabeled, petitioner believed it did not receive the correct documents and it appealed the decision. Petitioner properly deemed respondent's non-response to its appeal as a denial and commenced the proceeding in a timely fashion (*see Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 72 [2017]).

Significantly, the original petition made it clear that petitioner intended to challenge its placement on the Pilot Program List if there was a viable claim, and that petitioner sought the documents in question for that purpose (NYSCEF Doc. No. 1, ¶¶ 5-8, 13). Even more, as alternative relief, the original petition sought an order that set aside the determination and removed petitioner from the list (*id.*, ¶¶ 43-44). Therefore, the court "discern[s] no prejudice to respondent[] from the proposed amendment" (*Matter of New York Mills Redevelopment Co., LLC v Town of Whitestown*, 88 AD3d 1281, 1284 [4th Dept 2011]).

The court also rejects respondent's position that petitioner could have challenged the rationality of its placement on the list without any basis. "Where a challenge is to the methodologies in general, as here, the challenger must make a compelling showing of unreasonableness" (*Matter of Samaritan Hosp. v Axelrod*, 107 AD2d 911, 913 [3d Dept 1985]; *see Matter of Society of N.Y. Hosp. v Axelrod*, 116 AD2d 426, 430 [3d Dept 1985], *mod on other grounds* 70 NY2d 476 [1987] [affirming appellate court's decision but concluding instructions to respondent on remittal overreached court's authority]). Petitioner could not have alleged unreasonableness without knowing the basis of the determination. The critical word in respondent's statement that petitioners regularly commence Article 78 proceedings "without having the *full* knowledge of why the agency took a particular action" (NYSCEF Doc. No. 68, p 9., lines 10-13 [emphasis supplied]) is "full." For example, a government employee who is terminated from employment may not have a complete record of her or his file, but the employer has given the employee a reason for the firing. When a license is revoked or an application is denied, the petitioner knows the general basis for the determination (*see, e.g., Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 216 [2017] [driver's license]; *Matter of Tate v O'Neill*, 187 AD3d 684, 685 [1st Dept 2020] [handgun license]).[3] Here, petitioner had no information concerning its inclusion on the list until respondent provided clarification in November.

Additionally, at oral argument, respondent argued that petitioner has sustained no prejudice because it can appeal the denial of a CONH (*e.g.*, NYSCEF Doc. No. 68, p 9 line 22 – p 10 line 3). This argument lacks merit because, according to petitioner, it could take up to a year

[3] *See Matter of Tate v O'Neill*, Index No. 151123/2019, NYSCEF Doc. No. 1 [Petition], ¶ 33 [respondent provided petitioner with reason for denial]).

for respondent to conduct the necessary review and determine whether to issue a CONH (NYSCEF Doc. No. 1, ¶¶ 24-25). Then, if respondent denies the certification, the aggrieved party must commence an Article 78 proceeding to challenge the decision. The cumulative delay comprises serious prejudice to a building that was placed on the list improperly.

Finally, the court exercises its discretion and declines to award attorney's fees to petitioner (*see Matter of Mineo v New York State Police*, 119 AD3d 1140, 1141 [3d Dept 2014]). Under POL § 89 (4) (c), "a court may award reasonable attorney's fees and litigation costs incurred where a party has substantially prevailed and when the agency failed to respond to a request or appeal within the statutory time; and the agency had no reasonable basis for denial (*BSF Inwood Holdings, LLC v New York City Dept. of Housing Preservation and Development*, 2020 NY Slip Op 30473(U), *3 [Sup Ct NY County 2020] [internal quotation marks and citation omitted]). Even if the statutory requirements are satisfied, the court retains the sound discretion to grant or deny an award (*Matter of LTTR Home Care, LLC v City of Mount Vernon*, 179 AD3d 798, 800 [2d Dept 2020]). Here, the court finds that respondent attempted to comply within a reasonable time and, although its efforts were flawed, its conduct does not warrant the imposition of fees. As respondent clarified its disclosure in response to the petition, rendering the proceeding as originally framed moot, petitioner did not "substantially prevail" in the proceeding. Even if this were not the case, the court would use its discretion and deny the award under the circumstances at hand.

Accordingly it is

ORDERED that the pre-answer cross motion to dismiss is denied; and it is further

ORDERED that respondent has 30 days from the date of the filing of this order to serve and file its answer and to provide any documents in the record it has not already produced; and it is further

ORDERED that petitioner shall serve and file its reply within 20 days of the filing of respondent's answer.

The parties shall attend a conference with the court on June 9, 2021 at 2:45 via Microsoft teams.

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4/23/2021
DATE

MELISSA ANNE CRANE, J.S.C.

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