

**Robbins v New York City Landmarks Preserv.
Commn.**

2021 NY Slip Op 31501(U)

May 4, 2021

Supreme Court, New York County

Docket Number: 100230/2020

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

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INDEX NO. 100230/2020

RICHARD ROBBINS,

MOTION DATE 2/25/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, 315 WEST 103 ENTERPRISES LLC, 315 W 103 ST. DEVELOPMENT LLC

DECISION + ORDER ON MOTION

Defendant.

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Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Richard Robbins (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York City Landmarks Preservation Commission shall serve a copy of this order along with notice of entry on all parties within ten (10) days.

In this Article 78 proceeding, petitioner Richard Robbins (Robbins) seeks a judgment to vacate an order of the respondent New York City Landmarks Preservation Commission (LPC) and ancillary related relief (motion sequence number 001). For the following reasons, his petition is denied and this proceeding is dismissed.

FACTS

This proceeding is the latest round of litigation between Robbins, who resides in an apartment next door to the subject property, a building located at 315 West 103rd Street in the County, City and State of New York (the building), and the building's owner, respondent 315 West 103 Enterprises, LLC (315 Enterprises). *See* verified petition, ¶¶ 11, 14. The facts of this matter have been discussed extensively in prior decisions by this court (Bluth, J., Index No. 100647/18) and the Appellate Division, First Department (*Matter of Robbins v New York City Landmarks Preserv. Commn.*, 176 AD3d 440 [1st Dept 2019]), so there is no need to recount them at length here. For the purposes of this decision, however, the following is relevant.

315 Enterprises purchased the building in November 2014, and has been renovating it since then through its corporate affiliate, co-respondent 315 W 103 St. Development, LLC (315 Development; together, owner). *See* verified answer (owner), ¶¶ 2, 4; verified answer (City), ¶ 135. On June 23, 2015, the LPC designated the portion of the neighborhood where the building is located as a "Historic District." *See* verified answer (City), ¶ 137. However, in 2009, the co-respondent New York City Department of Buildings (DOB; together, the City respondents) had issued the building's prior owner a permit to carry out renovation work there pursuant to an approved construction plan. *Id.*, ¶ 130. The DOB later reinstated the permit in 2013 with approval for an amended construction/renovation plan. *Id.*, ¶ 133. The DOB again reinstated the permit in 2016 (after the landmark designation), and concurrently rescinded several stop work

orders (SWOs) so that owner could complete certain urgent weatherproofing and enclosure work on the rear wall. *Id.*, ¶¶ 138-140. The City respondents note that Robbins did not commence Article 78 proceedings to challenge any of the DOB's actions. *Id.*, ¶¶ 131, 134, 138, 141.

In 2017, after completing the aforementioned weatherproofing work, owner applied to the LPC for the approval of plans to make further modifications to the building's rear wall, interior, and roof. *See* verified answer (owner), ¶ 142. On January 19, 2018, the LPC issued owner a "certificate of no effect" permit (the CNE permit), which authorized owner's proposed work. *Id.*, ¶ 143; exhibit C. Robbins filed an Article 78 petition to challenge the CNE permit, however this court (Bluth, J.) denied his petition in a decision dated July 27, 2018 (Index No 100647/18; motion sequence no 001), and the First Department upheld that denial in a decision dated October 3, 2019. *Matter of Robbins v New York City Landmarks Preserv. Commn.*, 176 AD3d 440. In pertinent part, the First Department found that:

"A writ of mandamus compelling LPC to conduct certificate of appropriateness review does not lie. LPC is granted discretion to decide whether a certificate of no effect is appropriate, after considering 'whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement . . . in an historic district' . . . and whether a 'new improvement . . . would affect or not be in harmony with the external appearance of other, neighboring improvements . . . in such district.' As such, LPC did not violate lawful procedure when it determined that the modifications proposed by intervenors in 2017 could be approved with a certificate of no effect by LPC staff. Similarly, the decision to grant a certificate of no effect was not arbitrary and capricious, based on the application submitted to LPC for modifications at the rear of the building and for replacement of the rooftop bulkhead.

"Contrary to petitioner's contention, LPC was precluded from considering the propriety of improvements to the real property for which the DOB had issued a permit prior to the historic district designation. The permit was not revoked, and its expiration prior to designation did not render it invalid." 176 AD3d at 441-442 (internal citations omitted). Some time later, owner applied to the LPC for the approval of modified plans for the work at the building, and the LPC issued owner a modified CNE permit on October 18, 2019 (the modified CNE permit). *See* verified answer

(owner), ¶ 148; exhibit D. Robbins filed this Article 78 petition partly to challenge the modified CNE permit.

Also at issue in this proceeding are certain information requests that Robbins had previously served on the respondents pursuant to Public Officers Law § 87, a/k/a the Freedom of Information Law (FOIL). Specifically, Robbins submitted one FOIL request to the LPC in December 2017 (the LPC FOIL), and later submitted five successive FOIL requests to the DOB on, respectively: 1) January 1, 2017 (DOB FOIL 1); 2) February 25, 2019 (DOB FOIL 2); 3) March 15, 2019, (DOB FOIL 3); 4) July 25, 2019 (DOB FOIL 4); and 5) December 17, 2019 (DOB FOIL 5). *See* verified answer (City), ¶¶ 149-162; exhibits G, H, I. The First Department addressed, but did not dispose of, the LPC FOIL request in its October 3, 2019 decision, which found as follows:

“As to petitioner's FOIL request, the issue was not ripe for judicial review at the time petitioner commenced this proceeding (CPLR 7801 [1]). LPC responded within the appropriate time frame and petitioner agreed to a rolling production of documents, which was ongoing, as evidenced by the record (see Public Officers Law § 89 [3] [a]). Thus, petitioner is not entitled to litigation costs as a prevailing party (Public Officers Law § 89 [4] [c] [i]). Alternatively, Supreme Court providently exercised its discretion in declining to award costs (*id.*)”

Matter of Robbins v New York City Landmarks Preserv. Commn., 176 AD3d at 442. Robbins alleges that neither the LPC nor the DOB has complied with his FOIL requests.

Robbins commenced this Article 78 proceeding on February 10, 2020, by serving and filing a verified petition that seeks review of: 1) the LPC's amended CNE; and 2) the LPC's and DOB's alleged denials of his FOIL requests. *See* verified petition. 315 Enterprises and 315 Development filed an answer with affirmative defenses on October 30, 2020. *See* verified answer (owner). The LPC and DOB filed a joint answer with affirmative defenses on February 5, 2021. *See* verified answer (City). Robbins thereafter filed reply papers, and this matter is now fully submitted (motion sequence number 001).

DISCUSSION

As indicated, the first portion of this decision disposes of Robbins' Article 78 challenge to the LPC's modified CNE permit. A trial court's role in an Article 78 proceeding is to determine whether, upon the facts before an administrative agency, a challenged agency 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. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination is arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Matter of 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 a rational basis for the agency's determination can be found in the administrative record, there will 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. Further, 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, Robbins argues that the LPC's decision "granting approval of modifications to a temporary wall, and declaring this wall to be 'existing' after repeatedly claiming that it was 'temporary' . . . is by definition arbitrary and capricious." *See* verified petition, ¶ 93. The City respondents assert that Robbins' argument is barred by the doctrine of collateral estoppel, since

the First Department's decision in the prior Article 78 proceeding resolved the issue of the scope of review that the LPC was bound by. *See* respondent's mem of law at 5-8. After careful consideration, the court agrees with respondents.

“Under the doctrine of collateral estoppel, a party is precluded from ‘relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same.’ ‘The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action.’”
Reynoso v Ahava 750, LLC, 185 AD3d 1074, 1076 (2d Dept 2020) (internal citations omitted);
see also One Bryant Park v Permasteelisa Cladding Tech., Ltd, 189 AD3d 584 584-585 (1st Dept 2020), quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 (1999). In upholding the denial of Robbins' earlier Article 78 petition, the First Department clearly held that:

“Contrary to petitioner's contention, *LPC was precluded from considering the propriety of improvements to the real property for which the DOB had issued a permit prior to the historic district designation*. The permit was not revoked, and its expiration prior to designation did not render it invalid.”
Matter of Robbins v New York City Landmarks Preserv. Commn., 76 AD3d at 441-442 (internal citations omitted) (emphasis added). In his current petition, Robbins is plainly contesting “the propriety of improvements to the real property” by asserting that the LPC had mislabeled the building's rear wall as “existing” rather than “temporary,” and applied the wrong regulation when it agreed to the wall's renovation. However, the First Department's decision made it clear that the LPC was “precluded” from making such considerations because the DOB's permit to renovate the wall preexisted the building's landmark status, and superseded LPC regulations that apply to renovating landmarked properties. Because the First Department determined this issue in the prior Article 78 proceeding, the doctrine of collateral estoppel prevents Robbins from relitigating it in this one. Therefore, the court rejects Robbins' argument. Because that was the sole argument that Robbins raised to challenge the modified CNE permit as arbitrary and

capricious, the court also finds that so much of Robbins' petition as seeks to vacate that permit pursuant to CPLR Article 78 should be denied.¹

The balance of Robbins' petition asserts that the City respondents have "constructively denied" his various FOIL requests, and seeks an order to compel them to comply with those requests. *See* verified petition, ¶¶ 96-105. Robbins' petition asserts that "even after responding, DOB produced no new documents that petitioner sought." *See* verified petition, ¶ 99. However, his reply papers admit that "LPC and DOB have now provided all the documents I requested, although a large number of documents produced were redacted, including at least some documents that contained non-exempt correspondence that was improperly withheld." *See* Robbins reply aff, ¶ 8. It is well settled that a respondent's production of responsive documents, even when it is done beyond the statutory 10-day limit and subsequent to the commencement of an Article 78 proceeding, renders the respondent's challenge to the purported denial of a FOIL request moot, and requires dismissal of the respondent's petition. *See e.g., Matter of Corbett v City of New York*, 160 AD3d 415, 416 (1st Dept 2018), quoting *Matter of Alvarez v Vance*, 139 AD3d 459, 460 (1st Dept 2016).

Here, the City respondents assert that they have made final responses to the LPC FOIL and DOB FOILs 1, 2, and 4 after having conducted diligent searches for responsive records. *See* verified answer, ¶¶ 188-189; exhibits H, I. Pursuant to the above-cited authority, the City respondents' production of this material in response to Robbins' FOIL requests renders his Article 78 petition to enforce those requests moot as regards the LPC FOIL and DOB FOILs 1,

¹ In any case, it is clear that the LPC demonstrated a rational basis for issuing the modified CNE permit, since the administrative record included the DOB permits which were issued before the building acquired landmark status. The First Department's decision held that those permits remained viable, and precluded the LPC from conducting the sorts of review that Robbins requested.

2, and 4. Robbins nevertheless argues that the responses were improperly redacted and omitted non-exempt correspondence. *See* Robbins reply aff, ¶ 8. The City respondents reply that they performed the challenged redactions pursuant to the “intra-agency materials” exemption set forth in Public Officers Law § 87 (2) (g). *See* respondents’ mem of law at 19-22. The statute specifically exempts from disclosure requests for “inter-agency” or “intra-agency” materials which are not:

- “i. statistical or factual tabulations or data;
- “ii. instructions to staff that affect the public;
- “iii. final agency policy or determinations; [or]
- “iv. external audits, including but not limited to audits performed by the comptroller and the federal government; . . .”

Public Officers Law § 87 (2) (g). The First Department defines “nonfinal intra-agency materials” as those which “are entirely advisory in nature and rendered only to aid the actual decision-maker[s].” *Matter of Correction Officers' Benevolent Assn. v New York City Dept. of Corr.*, 157 AD3d 643, 644 (1st Dept 2018), quoting *Rothenberg v City Univ. of N.Y.*, 191 AD2d 195, 196 (1st Dept 1993). The First Department also recognizes that the “intra-agency materials exemption” applies to “opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making.” *See Matter of Jewish Press, Inc. v New York City Department of Investigation*, _AD3d_, 2021 NY Slip Op 02108, *1 (1st Dept 2021). Since the City respondents met their statutory burden of “articulating a particularized and specific justification for denying access’ to the requested documents” (i.e., Public Officers Law § 87 (2) (g)), the burden shifted to Robbins to demonstrate that the “intra-agency materials” exemption does not apply herein. *Matter of Correction Officers' Benevolent Assn. v New York City Dept. of Corr.*, 157 AD3d at 644, quoting *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462–463 (2007). However, Robbins’ reply papers merely speculate that it does not, and demand that the court conduct an in-camera inspection in order to resolve the issue. *See* Robbins

reply aff, ¶¶ 8-10. After reviewing the City respondents' submissions, the court notes that the DOB only performed redactions on the material responsive to DOB FOIL 2, which sought "all internal and external DOB correspondence ... all statistical or factual tabulations or data ... or determinations including the decision to reinstate the [building's DOB] permit . . . over two years after it expired." See verified answer, exhibits H, I. Thus, Robbins' reply argument is inapposite to the LPC FOIL and to DOB FOILs 1 and 4. Further, it appears that there was a basis for the DOB's redactions to DOB FOIL 2, because "correspondence" concerning the DOB's "determinations including the decision to reinstate the [building's DOB] permit," would plainly constitute material that memorializes the DOB's "consultative or deliberative process," which Public Officers Law § 87 (2) (g) exempts from disclosure. Finally, the court notes that the First Department has already ruled that the LPC was precluded from considering the propriety of the DOB's deliberations. *Matter of Robbins v New York City Landmarks Preserv. Commn.*, 176 AD3d at 442. Thus, under the facts of this case, the court finds that in-camera review of the material that the DOB redacted from DOB FOIL 2 would be unnecessary. See e.g., *Matter of Taylor v New York City Police Dept. FOIL Unit*, 25 AD3d 347 (1st Dept 2006); *Matter of Robles v Borakove*, 6 AD3d 216 (1st Dept 2004); *Matter of Alicea v New York City Police Dept.*, 287 AD2d 286 (1st Dept 2001); *Matter of Davidson v Police Dept. of City of N.Y.*, 197 AD2d 466 (1st Dept 1993). Therefore, the court rejects Robbins' argument and finds that so much of his petition as seeks Article 78 review of the LPC FOIL and DOB FOILs 1, 2, and 4 should be denied.

The City respondents argue that Robbins' Article 78 petition is premature with respect to DOB FOILs 3 and 5, for the same reason discussed in the First Department's earlier decision; i.e., that they "agreed to a rolling production of documents, which was ongoing, as evidenced by

the record.” *Matter of Robbins v New York City Landmarks Preserv. Commn.*, 176 AD3d at 442. Their assertion that the DOB’s response to those FOIL requests is still ongoing is borne out by the parties correspondence, which clearly shows that the DOB’s response is not yet final. *See* verified answer, exhibits H-M. Indeed, Robbins’ reply papers admit that the “DOB . . . reopen[ed] the matter and produc[ed] documents after my commencing this proceeding.” *See* Robbins reply aff, ¶ 11. As a result, the court finds that so much of Robbins’ petition as seeks Article 78 review of DOB FOILs 3 and 5 should be denied (again) as premature.

The court notes in closing that the First Department’s determination that Robbins’ petition was not ripe with respect to the subject FOIL requests also furnished a rationale for denying his request for litigation costs, since he is not the “prevailing party” within the definition of Public Officers Law § 89 (4) (c) (i). *Matter of Robbins v New York City Landmarks Preserv. Commn.*, 176 AD3d at 442. Therefore, the court finds that he is not entitled to an award of costs in this proceeding either.

Accordingly, the court concludes that Robbins’ Article 78 petition should be denied in full, 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 Richard Robbins (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York City Landmarks Preservation Commission shall serve a copy of this order along with notice of entry on all parties within ten (10) days.

5/4/2021
DATE


HON. CAROL R. EDMED, J.S.C.
J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
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