Franklin Ave. Acquisition, LLC v City of New York
2022 NY Slip Op 31310(U)
April 21, 2022
Supreme Court, New York County
Docket Number: Index No. 158502/2021
Judge: Carol Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** **PART** **35**

Justice

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FRANKLIN AVE. ACQUISITION, LLC,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY PLANNING COMMISSION, KENNETH KNUCKLES

Defendant.

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INDEX NO. 158502/2021

MOTION DATE 09/15/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 24, 25, 26, 86 were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of Petitioner Franklin Ave Acquisition, LLC (Motion Seq. 001) is denied, and the proceeding is dismissed; and it is further

ORDERED AND ADJUDGED that the application of Respondents the City of New York, the New York City Department of Planning (DCP), the New York City Planning Commission (CPC), and Anita Laremont, in her official capacity as Director of the DPC and the Chair of the CPC, for an order denying the petition and dismissing the proceeding is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

MEMORANDUM DECISION

In motion sequence number 001, petitioner Franklin Ave. Acquisition, LLC (petitioner or applicant), brings this proceeding pursuant to Article 78 of the Civil Practice Laws and Rules, seeking to reverse the decision of the New York City Planning Commission (CPC), disapproving its applications to rezone real property located at 960 Franklin Avenue in Brooklyn (960 Franklin) (see Verified Supplemental Petition, verified October 15, 2021 [Petition] [NYSCEF Doc No 52] ¶ 1). Respondents the City of New York, the New York City Department of Planning (DCP), the New York City Planning Commission (CPC), and Anita Laremont, in her official capacity as Director of the DPC and the Chair of the CPC, oppose and request that the petition be denied and the proceeding be dismissed in its entirety.

BACKGROUND

Petitioner is the applicant of record under several applications for discretionary land use actions to facilitate its construction of two 39-story towers in the Crown Heights neighborhood of Brooklyn, bound by Franklin Avenue, Sullivan Place, Washington Avenue, and Montgomery Street (see opposition affidavit of Jonah Rogoff, sworn to December 2, 2021 [Rogoff aff][NYSCEF Doc No 55] ¶ 19).[1] Petitioner refers to these applications, designated C 200184 ZMK, N 200185 ZRK, C200186 ZSK, C200187 ZSK, and N 200188 LDK, as the "Combined Applications" (Petition ¶¶ 16, 18).

The Combined Applications contained requests for four discretionary land use approvals, affecting nine properties (Project Area), including 5 properties controlled by petitioner, which comprise the development site (Development Site) (*id.* ¶¶ 15-16). Petitioner states that its two primary rezoning applications are C 200184 ZMK, for a zoning map amendment to change the

[1] Mr. Rogoff is a Senior Borough Planner at the DCP (Rogoff aff ¶ 1).

Development Site's zoning from medium density to high density, and N 200185 ZRK, for a zoning text amendment to designate the Project Area as a "mandatory inclusionary housing area" within Brooklyn's Community District 9. Petitioner states that it has also applied for 3 special permits, including C 200186 ZSK, which would waive certain bulk requirements for large-scale development that it would otherwise have to meet under zoning regulations (¶¶ 15-18). Respondents note that this special permit, if granted, would "modify certain height, setback, and tower coverage regulations within a large-scale development plan, including waivers to increase the allowable base height and to allow taller towers closer to the street line" (Rogoff aff, ¶ 20).

The Combined Applications were preceded by a "multi-year application development process" (*id.* ¶ 23), beginning in or about 2017 (see *id.* ¶24).[2] DCP claims that, during this time, it repeatedly informed petitioner that its draft proposal was "grossly out of scale for the location" and was likely to result in harmful impacts to sensitive sections of the Brooklyn Botanical Garden,[3] which DCP could not accept (*id.* ¶ 22).

On February 21, 2021, the Combined Applications were certified into ULURP (Petition, ¶ 38). On March 2, 2021, Justice Katherine Levine of the Supreme Court, Kings County, issued a temporary restraining order in a related proceeding, *Matter of Boyd v Von Engel* (Index No. 1687/2020), temporarily restraining petitioner and respondents from taking any action

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[2] "The environmental review of applications proceeds concurrently with ULURP [the City's Uniform Land Use Review Procedure]" (Rogoff aff, ¶ 10). "Where, as here, the lead agency determines that the action may result in significant environmental impacts, the potential environmental impacts of the proposed action must be evaluated in an environmental impact statement ('EIS'), and if significant, mitigated to the maximum extent practicable" to comply with the State Environmental Quality Review Act (SEQRA) (*id.*).

[3] Mr. Rogoff states that one of DCP's greatest concerns, if petitioner were allowed to proceed, is that the "shadows from the proposed development would be cast onto the nearby Brooklyn Botanical Garden greenhouses, which contain rare desert and tropical plant species that are particularly sunlight sensitive and require full, year-round sun," (Rogoff aff ¶ 26) which led DCP to encourage petitioner to reduce the heights of the towers in its proposed development.

whatsoever in furtherance of the continuation of the ULURP to rezone 960 Franklin (*id.* 39 and exhibit G thereto [NYSCEF Doc No. 8]). The temporary restraining order was lifted on June 17, 2021 (*id.*).

Petitioner asserts that it presented a lower density alternative plan (LDA) "to the public . . . beginning in February 2021 and continuing after the expiration of the [] temporary restraining order," and that the LDA achieves a "25% reduction in density and an approximate 50% reduction in maximum building height," among other beneficial amendments (*id.* ¶¶ 41-48). Petitioner alleges that, despite its merits, CPC excluded the LDA from the Combined Applications' record and refused to review the LDA (*id.* ¶¶ 49-117).

Respondents maintain, however, that petitioner did not submit its new LDA with its request that it be included in the final environmental review statement until after the CPC's July 26, 2021 review session, and that the materials it submitted were deficient, inasmuch as they "did not include any design documents, such as site plans or massing illustrations, for DCP to analyze (Rogoff aff ¶43). That same evening, petitioner allegedly submitted its proposed presentation for an upcoming Commission hearing, but that submission only included "a high-level summary of the newly proposed alternative, area maps and just one massing illustration" which respondents deemed insufficient, "[g]iven the size and complexity of the site" (*id.*).

The CPC explained its position regarding the LDA at a post-hearing follow-up meeting on August 16, 2021, at which the Commission Chair stated that "while the applicants submitted a last minute alternative to their environmental review materials, they have not submitted an alternative [land use] proposal with even rudimentary site plans and design materials," and suggested that, if "'[a]t this late point in the process, [] the applicants want to pursue a different

proposal, they should submit a new application which will benefit from a complete and thorough review'" (*id.* ¶ 45).

Respondents published their Final Environmental Impact Study (FEIS) with respect to 960 Franklin on September 10, 2021. Therein, the CPC determined that petitioner's LDA "was determined not to be a reasonable alternative" and so had been excluded from the FEIS (*id.* ¶¶ 106-108 and exhibit A thereto at 22-1 [NYSCEF Doc No. 2]).

On September 15, 2021, petitioner commenced this Article 78 proceeding seeking an order reversing the CPC's decision to exclude the LDA from the FEIS on the ground that the CPC's decision was arbitrary and capricious and in direct contravention of the CPC's obligations under SEQRA. The same day, petitioner moved by Order to Show Cause for a preliminary injunction enjoining and restraining the CPC from proceeding with a vote scheduled for September 22, 2021 on the Combined Applications, as well as a temporary restraining order staying the CPC from proceeding with its vote pending the hearing and determination of its preliminary injunction application (collectively, the "injunctive relief") (*id.* exhibit G [NYSCEF Doc. No 8]).

Petitioner's Order to Show Cause for injunctive relief was denied in its entirety (Decision and Order dated September 22, 2021, at 5 [NYSCEF Doc No. 26]; see also September 20, 2021 "So-Ordered" Transcript., at 25: 18-19, 26: 4-7 [NYSCEF Doc. No 45]). The Court held that petitioner's application for an order compelling the CPC to consider the LDA prior to holding its vote essentially constituted an improper writ of mandamus. The Court further held that injunctive relief was unwarranted as the question of whether the CPC acted irrationally by deeming the LDA unreasonable would be determined in the Court's decision resolving the Article 78 petition,

and the interim relief sought essentially overlapped with the ultimate relief sought in the petition (*i.e.*, a determination that the CPC was obligated to consider the LDA).

On September 22, 2021, CPC issued its written report, denying petitioner's Combined Applications because "the proposed density was too high . . . given its location along narrow streets," which would have created "an unusually long street wall and high towers that are not significantly offset . . . [and that] would be inconsistent with the surrounding neighborhood character, would obstruct access to light and air for occupants of nearby buildings, and would cast shadows on nearby sunlight sensitive resources, among other concerns" (Rogoff aff, ¶ 22, citing CPC Lead Commission Report on Application, dated September 22, 2021 [CPC Report] [NYSCEF Doc No. 74], at 14, annexed as exhibit 18 to Rogoff aff).

On October 15, 2021, petitioner moved for leave to amend the caption of the proceeding and to supplement its Article 78 petition, relief that was unopposed by respondents (Motion Seq. 002). By order dated October 26, 2021, the Court granted Motion Seq. 002 and scheduled further remaining submissions on the petition (NYSCEF doc No. 46). The petition was fully submitted on December 17, 2021.

DISCUSSION

The CPLR states that a proceeding under Article 78 may only be based on certain questions, such as "whether the body or officer failed to perform a duty enjoined upon it by law; or . . . whether a determination was made in violation of lawful procedure, was affected by an error or was arbitrary and capricious or an abuse of discretion . . .." CPLR 7803 (1) and (3).

An administrative agency's decisions are entitled to considerable deference. "So long as its interpretation is neither irrational, unreasonable nor inconsistent with the governing statute, it will be upheld" (*Matter of New York Botanical Garden v Board of Stds. & Appeals of City of NY*,

91 NY2d 413, 418-19 [1998] [citation and internal quotation marks omitted]; *see also Matter of Ward v City of Long Beach,* 20 NY3d 1042, 1044 [2013] [determination which "lack[ed] the requisite rational basis [] is, therefore, arbitrary and capricious"]; *Matter of Sasso v Osgood,* 86 NY2d 374, 384 [1995] [zoning board's determination should be sustained if "rational and not arbitrary and capricious"]).

Petitioner's challenge is based on its assertion that respondents violated New York's State Environmental Quality Review Act (SEQRA) by failing to consider its "Lower Density Alternative" (LDA) proposal as a "reasonable alternative" in its rezoning application for 960 Franklin Avenue. "'Judicial review of a lead agency's SEQRA determination is limited to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was 'affected by an error of law or was arbitrary and capricious or an abuse of discretion' (CPLR 7803 [3]. . .)'" (*Matter of Coalition Against Lincoln W., Inc. v Weinshall*, 21 AD3d 215, 222 [1st Dept 2005], quoting *Akpan v Koch*, 75 NY2d 561, 570 [1990]). "In applying this standard of review, 'it is not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts or substitute its judgment for that of the agency'" (*id.*, quoting *Matter of Fisher v Giuliani*, 280 AD2d 13, 19-20 [1st Dept 2001]).

"Judicial review is limited to a determination as to whether the lead agency 'identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination'" (*id.*, quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]). The agency, however, is "not required to consider alternatives it consider[s] infeasible" (*id.*, 21 AD3d at 223, citing *Matter of South Bronx Clean*

Air Coalition v New York State Dept. of Transp., 218 AD2d 520 [1st Dept], *lv denied* 87 NY2d 803 [1995]).

Here, the CPC properly identified relevant areas of environmental concern, took a "hard look" at those areas of concern in relation to the proposed zoning map amendments and set forth a reasoned elaboration of the bases for its disapproval of petitioner's application:

> "The applicant is now seeking to have the Commission modify their proposal, a scheme that the applicant has been advised should not have been pursued in the first place. As such, while the applicant submitted an alternative environmental analysis, and additional information in a subsequent letter, the Commission is not willing to consider the applicant's proposed alternative development at this late date. The Commission notes that the applicant has had ample time and plenty of opportunities to revise the proposed project to a more appropriately scaled project, having been advised by the Department staff numerous times over a prolonged period of public review, and yet elected not to do so. The Commission further notes that such a substantial change to the proposal this late in the process, especially when only limited information provided by the applicant team, makes a mockery of the public review process and the engagement of local residents and stakeholders, the Community Board, and the Borough President to review a proposed change. At this late point in the review process, if the applicant seeks to pursue a different proposal, the Commission advises that a new application be submitted that will benefit from a complete and through public review."

(CPC Report, *supra*, at 15). As CPC has determined that the LDA did not present a feasible alternative to its prior proposal, its decision must stand (*Matter of Coalition Against Lincoln W., Inc.*, 21 AD3d at 222).

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of Petitioner Franklin Ave Acquisition, LLC (Motion Seq. 001) is denied, and the proceeding is dismissed; and it is further

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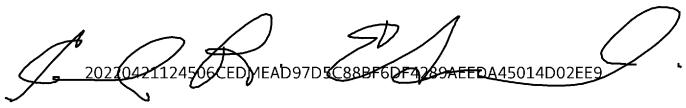

4/21/2022
DATE

CAROL EDMEAD, 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