

Kalodop II Park Corp. v City of New York

2022 NY Slip Op 34270(U)

December 16, 2022

Supreme Court, New York County

Docket Number: Index No. 150675/2019

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

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INDEX NO. 150675/2019

KALODOP II PARK CORPORATION,

MOTION DATE 06/08/2021

Petitioner,

MOTION SEQ. NO. 001, 002

- v -

CITY OF NEW YORK, CITY COUNCIL FOR THE CITY OF NEW YORK, CARLINA RIVERA, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, THE HISTORIC HOUSE TRUST OF NEW YORK CITY, THE OLD MERCHANTS HOUSE OF NEW YORK, INC., NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, DEPARTMENT OF CITY PLANNING OF THE CITY OF NEW YORK, and CITY PLANNING COMMISSION OF THE CITY OF NEW YORK,

DECISION + ORDER ON MOTION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 56, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 137, 138, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 170, 179, 181, 183, 189

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

ORDER

Upon the foregoing documents, it is

ORDERED that the cross-motion of Respondent The Old Merchants House of New York, Inc., to dismiss the proceeding for lack of personal jurisdiction is DENIED; and it is further

ORDERED that the Order to Show Cause of Petitioner to extend the time for service upon Respondent The Old Merchants House of New York, Inc., pursuant to CPLR 306-b (Motion Seq No. 2) is GRANTED; and it is further

ADJUDGED that the cross-motion of the City Respondents to DISMISS the petition is GRANTED and the proceeding is DISMISSED, without costs and disbursements to respondents.

DECISION

The case before this court is at one turn complicated, involving issues of historic preservation, private property rights, and zoning regulation. At the other turn, the issues are fundamentally simple involving the separation of powers between different branches of our local government.

Petitioner is the owner of a parcel in the NoHo Historic District Extension (the "property"). The parcel is "improved" with a one-story parking garage and is adjacent to the Merchant's House Museum, a New York City designated landmark built in 1832.

As stated in the Petition, "Since 2011, Petitioner has been seeking the approvals necessary to convert the existing one-story parking garage into a taller commercial structure (likely a hotel) that would contribute to the design and character of the historic district and local community." As the property is in an historic district, in order to develop the parcel in the manner Petitioner desires, Petitioner was required to obtain a Certificate of Appropriateness from Landmarks Preservation Commission (LPC), which must evaluate and determine that the design of the proposed development is appropriate within the

historic district and to ensure that the petitioner/owner adopts proper measures to protect historic and environmental resources including the adjacent Museum.

By letter dated April 8, 2014, the LPC approved a proposal by Petitioner to demolish the existing one-story parking structure on its parcel and construct an 8-story hotel on the property that would have commercial uses on the ground floor. However, the proposed development was not authorized, as-of-right, under the applicable Zoning Resolution.

The Petitioner therefore filed a Uniform Land Use Review Procedure (ULURP) application with the Department of City Planning (DCP) dated April 6, 2015. The application sought to obtain the issuance of Special Permits for waivers of certain of the setback and ground floor use restrictions of the historic district zoning applicable to the property. However, the Zoning Resolution governing the property, Section 74-712, did not permit the issuance of Special Permits under these circumstances where the property was currently improved. Therefore, the Petitioner also applied for an amendment to Section 74-712 to allow the issuance of the Special Permits in this instance.

As part of the ULURP process, the Community Board and the Borough President recommended denial of Petitioner's application. However, by resolutions dated August 22, 2018, the DCP approved Petitioner's application for the zoning amendment

and special permits. Subsequently, and challenged by the Petitioner here, the New York City Council disapproved DCP's approval of the zoning text amendment and special permits by resolutions adopted September 26, 2018.

Petitioner commenced this proceeding pursuant to CPLR Article 78 seeking an order of this court vacating and reversing the action of the City Council. Respondent City opposes the application and cross-moves to dismiss. Respondent The Old Merchants House of New York, Inc., cross-moves to dismiss arguing lack of personal jurisdiction. Respondent The Historic House Trust of New York City also appears and opposes the petition. Petitioner also brings an Order to Show Cause seeking an extension of time to effect service upon The Old Merchants House of New York.

The court shall deny the cross-motion to dismiss the Petition against Respondent The Old Merchant House on jurisdictional grounds, and grant the order to show cause of Petitioner for an extension of the time to effectuate service upon such Respondent, nunc pro tunc. Cross moving Respondent has not demonstrated that it suffered any prejudice as the result of the late service, and Petitioner's claims are plausible (Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 106 [2001]). Moreover, the court finds that the cross-movant was not a necessary party, as the City Respondent owns the parcel on

which the Museum rests (JP Morgan Chase Bank v Salvage, (171 AD3d 438) [1st Dept 2019]).

While the parties have made extensive submissions and argument on the underlying fact of the ULURP application and the ultimate denial thereof by Respondent City Council, the court cannot reach those issues, which are presumably tendered by the parties to demonstrate a rational basis for Respondents' denial or alternatively the lack thereof, without confronting the threshold issue. That is, does this court have the power to grant the relief sought by the Petitioner which would involve not merely vacating a legislative enactment, but compelling, apparently in the form of a mandamus, the City Council to pass legislation because it would be irrational not to do so, according to Petitioner's theory?

The court agrees with Respondents' arguments that the court lacks the power to grant the relief sought by the Petitioner.

Section 197-d of the New York City Charter reads in pertinent part (emphasis added) that

- a. The city planning commission shall file with the council and with the affected borough president a copy of its decisions to approve or approve with modifications (1) all matters described in subdivision a of section one hundred ninety-seven-c, (2) plans pursuant to section one hundred ninety-seven-a, and (3) changes in the text of the zoning resolution pursuant to sections two hundred and two hundred one. . . .
- b.***(1) any decision of the city planning commission to approve or approve with modifications . . . a plan pursuant to section one hundred ninety-seven-a, **or a**

change in the text of the zoning resolution pursuant to sections two hundred or two hundred one.

e. All actions of the council pursuant to this section shall be filed by the council with the mayor prior to the expiration of the time period for council action under subdivisions c and, if applicable, d of this section. Actions of the council pursuant to this section shall be final unless the mayor within five days of receiving a filing with respect to such an action of the council files with the council a written disapproval of the action. Any mayoral disapproval under this subdivision shall be subject to override by a two-thirds vote of all the council members within ten days of such filing by the mayor.

Petitioner argues that the procedure outlined in Section 197-d is in the nature of an administrative determination and that decisions by legislative bodies governing special use permits are subject to review in Article 78 proceedings relying upon Western New York Dist., Inc. of the Wesleyan Church v Village of Lancaster, (17 Misc3d 798, 810-11 [Sup Ct, Erie County, Aug 28, 2007] "special permit decisions, even when made by a legislative body, are considered administrative decisions for purposes of judicial review under CPLR article 78"). However, such reliance is misplaced. This proceeding concerns not only Petitioner's application for a permit but also an amendment to the Zoning Resolution, because in this proceeding the applicable Zoning Resolution by its terms bars the issuance of the Special Permits sought by the Petitioner. While the determination of a special permit may have an administrative dimension, the amendment of a statute is clearly a power

uniquely reserved to the legislative domain. Further, the Western New York Dist., Inc. opinion explicitly relies upon the Court of Appeals decision in Lemir Realty Corp. v Larkin, (11 NY2d 20, 25 [1962]) wherein it was stated that

The mere fact that consents were granted to owners of premises somewhat similarly situated does not in itself show that consent was arbitrarily refused to this applicant. The question is not whether someone else has been favored. The question is whether the petitioner has been illegally oppressed. Exercise of discretion in favor of one confers no right upon another to demand the same decision. Unlimited discretion vested in an administrative board by ordinance is not narrowed through its exercise. Calculated failure to lay down general standards in the ordinance should not be nullified by interpretation that each case passed upon creates a standard that must be generally followed thereafter. The council may refuse to duplicate previous error; it may change its views as to what is for the best interests of the city; it may give weight to slight differences which are not easily discernible.

In this proceeding, the current Zoning Resolution explicitly excludes the issuance of a Special Permit. As to such exclusion, this court is without the power to compel the City Council to exercise its discretionary authority as an independent law-making branch of government, where there is no allegation of unconstitutionality or illegality associated with the government action. As was persuasively stated by a court on similar facts:

A reading of the petition, however, leaves one in doubt whether the proceeding is one in the nature of a proceeding to review the action of the town board, or whether it is one to secure an order in the nature of a mandamus order directing the town board to issue a permit

claimed by the petitioner as a matter of right. In any event, it is clear that the petition is insufficient on the face thereof to entitle the petitioner to any relief. In the first place, it is clear that an article 78 proceeding will not lie either to review legislative action or to compel a legislative body to act in a particular manner. The decisions are consistently to the effect that a proceeding in the nature of a certiorari proceeding does not lie to review the action of a legislative body. And also, it is settled that mandamus will not lie to compel a legislative body to take legislative action in a particular way. Legislative discretion may not be interfered with by the courts.

Leichter v Barrett, 208 Misc 577, 579 (Sup Ct, Westchester Cty, Jul 18, 1955) (citations omitted); see also Weers v Whiton, 3 AD2d 924, 924 (2d Dept 1957) ("article 78 proceeding is not available to review a legislative function").

The court shall grant the cross-motion of the municipal Respondents to dismiss this proceeding on the grounds that the Petition fails to set forth a claim that can be considered within a CPLR Article 78 proceeding.

Debra A. James

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12/16/2022

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE