At an IAS Term, Part 75 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of January, 2023.

P R E S E N T:

HON. ROBIN S. GARSON,
Justice.

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In the Matter of the Application of
FLUSHING & LITTLE NASSAU LLC,

Petitioner,

For a Judgment Pursuant to Article 78 of the CPLR, and for a Declaratory Judgment Pursuant to Section 3001 of the CPLR

-against-

Index No. 500702/22

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT; and LOUISE CARROLL, in her official capacity as Commissioner of HPD,

Respondents.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	9, 1
Opposing Affidavits (Affirmations)	
Affidavits/ Affirmations in Reply	
Other Papers:	

Upon the foregoing papers, petitioner Flushing & Little Nassau LLC seeks an order: (a) declaring the imposition by respondent New York City Department of Housing Preservation and Development (HPD) of a Special Reserve Fund on New York City Mandatory Inclusionary Housing (MIH) projects violates the Separation of Powers

doctrine of the New York State Constitution; (b) declaring the imposition of a Special Reserve Fund on MIH projects violates the New York City Administrative Procedure Act (CAPA) in that HPD failed to comply with the rule-making procedure set forth in the New York City Charter; (c) declaring the Special Reserve Fund does not apply to a mixed-income building such as the building that is the subject of this proceeding; (d) directing HPD to approve a permanent amendment to the Restrictive Declaration (RD) applicable to the subject MIH project that eliminates the Special Reserve Fund by striking entirely Sections 8 (h) and 22 of the RD; and (e) awarding petitioner damages, attorney's fees and costs.

Background

Petitioner is the owner of two parcels of real property, located at 378 Flushing Avenue and 33 Little Nassau Street in Brooklyn, which are within an MIH zone designated for the development and construction of affordable housing. The two parcels were developed with residential buildings pursuant to New York City's MIH program, with the Flushing Avenue parcel improved with market rate units and the Little Nassau Street property improved with a building wherein 90% of the units were designated as affordable housing. Pursuant to the New York City Zoning Resolution (ZR), petitioner executed an RD, dated October 26, 2020 which provided, among other things, that petitioner will establish a Special Reserve Fund in the amount of $1,156,933, to be administered by HPD, which shall be used solely for the benefit of the MIH units to pay for unanticipated increases in the cost of operating and maintaining the MIH units (including, but not limited to, escalating real estate taxes), or for capital repairs or

improvements, the cost of which cannot be covered by the building's capital reserve fund.

Petitioner subsequently challenged the inclusion of the Special Reserve Fund in the RD on the grounds that such fund is only required for buildings with 100% affordable units as indicated by HPD's "Checklist" for MIH projects. Petitioner contends that during negotiations which followed, HPD acknowledged that the Special Reserve Fund applied only to buildings comprised entirely of MIH units, but that it considered the project "effectively 100% MIH" because of the "overwhelming number" of MIH units in the Little Nassau building. In an amended RD, HPD offered a reduction of the amount to be deposited in the Special Reserve Fund to $308,000. The amended RD was signed by petitioner's representative on January 3, 2022. According to correspondence between petitioner's counsel and the New York City Law Department, the reduction of the fund was in consideration of petitioner refraining from filing a proposed order to show cause challenging the Special Reserve Fund, but without petitioner waiving any right to contest the inclusion of the Special Reserve Fund or providing HPD with any defense to any such challenge (Verified Petition, Exhibit 3, NYSCEF Doc No 4).

On January 7, 2022, petitioner filed the instant petition seeking declaratory relief, an order directing HPD to approve and issue a permanent amendment to the Little Nassau RD that eliminates the Special Reserve Fund and an award of damages and attorneys' fees. The petition is grounded upon contentions that HPD's application of a Special Reserve Fund in the Little Nassau RD violates the Separation of Powers Doctrine,

constitutes a new "rule" that HPD instituted without compliance with CAPA and is otherwise arbitrary and capricious.

Discussion

At the outset, while petitioner sets forth the aforesaid contentions in the verified petition, it has not filed a memorandum of law or supporting affidavit/affirmation providing legal arguments, caselaw and/or other authority demonstrating the merits of its claims based on the particular facts of this matter. Thus, the court is guided solely by the arguments and authority set forth in HPD's submissions (which include a comprehensive memorandum of law) in assessing the legal merits of this proceeding.

Although not explicitly labeled as such, the "verified petition" appears to be a hybrid petition/complaint which sets forth causes of action for a declaratory judgment in addition to Article 78 relief. However, the court is without jurisdiction over those causes of action seeking declaratory relief. "Under CPLR 304, an action in Supreme Court is ordinarily commenced 'by filing a summons and complaint or summons with notice' (CPLR 304 [a]). The failure to file the initial papers necessary to institute an action constitutes a nonwaivable, jurisdictional defect, rendering the action a nullity" (*O'Brien v Contreras*, 126 AD3d 958, 958 [2d Dept 2015]). Thus, to the extent petitioner seeks hybrid Article 78 and declaratory relief, as it appears from the caption of the petition, it was required to serve a summons in addition to the notice of petition, and a combined petition/complaint (*see Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 407 [1st Dept 2013]). It is further noted that because "[i]n a hybrid proceeding and action, separate procedural rules apply to those causes of action which are

asserted pursuant to CPLR article 78, on the one hand, and those which seek to recover damages and declaratory relief, on the other hand" (*Matter of East W. Bank v L & L Assoc. Holding Corp.*, 144 AD3d 1030, 1033 [2d Dept 2016]), petitioner may not use the notice of petition and petition as a vehicle for summary disposition of its declaratory judgment causes of action.

Accordingly, all causes of action for declaratory relief are dismissed as outside the jurisdiction of this court.

In an Article 78 proceeding, the court considers "only whether the determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, or was an abuse of discretion" (*Matter of Halpert v Shah*, 107 AD3d 800, 801 [2d Dept 2013]; *see* CPLR 7803 [3]; *Matter of Ward v City of Long Beach*, 20 NY3d 1042 [2013]; *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 770 [2d Dept 2005]). "Under this standard, courts examine whether the action taken by the agency has a rational basis and will overturn that action only where it is taken without sound basis in reason or regard to the facts, or where it is arbitrary and capricious" (*Matter of Halpert*, 107 AD3d at 801-802 [citations and internal quotation marks omitted]; *see Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280 [2010]; *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 [1974]; *Matter of Deerpark Farms, LLC v Agricultural & Farmland Protection Bd. of Orange County*, 70 AD3d 1037, 1038 [2d Dept 2010]). If the determination is rational, it must be upheld, even though the court, if viewing the case

in the first instance, might have reached a different conclusion (*see Matter of Mid–State Mgt. Corp. v New York City Conciliation & Appeals Bd.*, 112 AD2d 72 [1st Dept 1985], *affd* 66 NY2d 1032 [1985]). An agency's interpretation and construction of its own regulations and the legislation under which it functions are given special deference by the courts, if that construction is not irrational or unreasonable (*see Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]; *Matter of Chesterfield Assoc. v New York State Dept. of Labor*, 4 NY3d 597, 604 [2005]; *300 West 49th Street Assoc. v New York State Div. of Housing and Community Renewal, Office of Rent Admin.*, 212 AD2d 250, 255 [1st Dept 1995]).

To the extent petitioner grounds the instant Article 78 petition on claims that the HPD violated lawful procedure in that it violated the Separation of Powers doctrine or CAPA in including the Special Reserve Fund in the Little Nassau RD, the court finds otherwise.

Separation of Powers

An agency exceeds its regulatory mandate and usurps the legislative role when it "reache[s] its own conclusions about the proper" balance of conflicting "political, social and economic" interests "without any legislative guidance" (*Boreali v Axelrod*, 71 NY2d 1, 6 [1987]). Factors relevant to determining whether a regulation violates separation of powers include whether the agency "constructed a regulatory scheme laden with exceptions based solely upon economic and social concerns" (*id.* at 11-12); "did not merely fill in the details of broad legislation describing the over-all policies to be implemented" but instead "wrote on a clean slate, creating its own comprehensive set of

rules without benefit of legislative guidance" (*id.* at 13); "acted in an area in which the Legislature had repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" (*id.*); and considered "no special expertise or technical competence in the [relevant] field" (*id.* at 14).

The "central theme" of a "*Boreali*" analysis is that "an administrative agency exceeds its authority when it makes difficult choices between public policy ends, rather than find[ing] means to an end chosen by the legislature" (*Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 700 [2014]).

A "regulatory agreement" is defined as "an agreement between HPD and the owner of the affordable housing or, for MIH sites, [an RD] or other document as provided in the guidelines, that requires compliance with all applicable provisions of an affordable housing plan or MIH application, Section 23-90, inclusive, other applicable provisions of this Resolution and the guidelines" (ZR § 23-911). Under ZR § 23-96 (f), HPD has the power to require that a regulatory agreement (or RD) "contain such additional terms and conditions as HPD deems necessary" (ZR § 23-96 [f] [1], [8]).

HPD did not engage in a "uniquely legislative function" by including the Special Reserve Fund in the Little Nassau building RD. The negotiation of the Special Reserve Fund term is authorized by ZR §§ 23-96 (f) (8) which provides HPD with broad authority to ensure that MIH buildings are preserved as envisioned under the ZR. Further, HPD did not promulgate a regulatory scheme on a clean slate, but exercised its broad power

under the ZR to negotiate the Special Reserve Fund term in the RD, which "shall contain such additional terms and conditions as HPD deems necessary." Also, there is no allegation in the petition that the City Council debated whether to grant HPD its broad authority to negotiate Special Reserve Fund requirements for MIH buildings and subsequently failed to do so, or claim that the City Council stripped HPD of such authority. Finally, as it is clear that Special Reserve Fund relates to the preservation and economic feasibility of the Little Nassau project, it cannot be said that HPD did not employ its special knowledge and expertise regarding the operation and maintenance of multiple dwellings when negotiating such term.

CAPA

For a New York City agency's pronouncement to be a rule with the force and effect of law, it must be adopted in accordance with the rule-making requirements under CAPA (NY City Charter §§ 1041-1046; *1700 York Assoc. v Kaskel*, 182 Misc 2d 586, 592 [Civ Ct, NY County 1999]). CAPA requires that if the agency's statement fits the definition of a "rule" under New York City Charter § 1041 (5), then for that statement to be valid and binding, it must have been subjected to CAPA's procedures for notice, comment, public hearing, and publication (NY City Charter § 1043; *1770 York Assoc.*, 182 Misc 2d at 592).

The City Charter defines a "rule" as the "whole or part of any statement or communication of general applicability that implements or applies law or policy, or prescribes the procedural requirements of an agency" (*see Matter of the Council of the City of N.Y. v. N.Y. City Dept. of Homeless Servs.*, 22 NY3d 150, 154 [2013]). A rule

enumerates "rigid, numerical policies invariably applied across-the-board to all claimants without regard to individualized circumstances or mitigating factors" (*id.*, quoting *Matter of Schwartfigure v Hartnett*, 83 NY2d 296, 301 [1994]). "[O]nly a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers is subject to" the procedures set forth in CAPA (*Council of City of New York v Department of Homeless Serv. Of City of New York*, 22 NY3d 150, 154 [2013] [Department of Homeless Serv.] [citations and internal quotation marks omitted]). The rulemaking process is mandated when an agency establishes precepts that remove its discretion by dictating specific results in particular circumstances. "[O]nly a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers constitutes a rule or regulation" that must be formally adopted (*Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health*, 66 NY2d 948, 951 [1985]). Rules are not required for "ad hoc decision making based on individual facts and circumstances" (*Matter of Alca Indus. v Delaney*, 92 NY2d 775, 778 [1999]), or for "interpretative statements and statements of general policy that are merely explanatory and have no legal effect" (*Childs v Bane*, 194 AD2d 221, 228 [3d Dept 1993], *appeal dismissed*, 83 NY2d 846 [1994], *lv denied* 83 NY2d 760 [1994]).

Here, it is not shown that the HPD's inclusion of a Special Reserve Fund in an MIH project's RD, and the amounts required to be deposited into the fund, are mandates applied rigidly across the board rather than in a discretionary manner depending on the

facts and circumstances of each project. To the contrary, the flexibility of HPD with regard to the application of the Special Reserve Fund is demonstrated by HPD's downward negotiation of the amount to be deposited from over $1.1 million to $308,000.

Application of the Special Reserve Fund is not otherwise arbitrary or capricious as it clearly falls within the broad authority HPD has been granted by the City Council under the ZR to include any terms in an RD which HPD deems "necessary." The broad discretion granted to HPD in determining what may be necessary to include in an RD aligns with the public policy behind the affordable housing program, which is to promote "the creation ***and preservation*** of housing for residents with varied incomes in redeveloping neighborhoods and to enhance neighborhood diversity and thus to promote the general welfare" (ZR § 23-92) (emphasis added). Litigation in the Supreme Court of this county over the past two decades involving newly developed residential properties manifests the real potential of physical defects appearing in such "new construction" as the subject Little Nassau building and the resultant need for extensive maintenance and repairs over several years. Considering that preservation of affordable housing falls within HPD's area of expertise, the court cannot deem arbitrary and capricious the agency's inclusion of a Special Reserve Fund in the Little Nassau RD, to be administered by HPD, as a necessary safeguard against underfunding for any emergency or crucial maintenance and repairs to the affordable units generating below market rental income.

As the inclusion of the Special Reserve Fund in the Little Nassau RD is not contrary to law or legal procedure and may further be deemed by HPD, in its expertise, to be necessary to the preservation of the subject building, the Special Reserve Fund has a

sound basis in reason and is neither arbitrary nor capricious. Petitioner has therefore failed to establish entitlement to relief under CPLR article 78.

Accordingly, the instant petition is denied, and this proceeding is dismissed.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,

J. S. C.

13 JAN 2023

HON. ROBIN S. GARSON
A.J.S.C.