

Matter of East 119th St. Dev. LLC v Carrion

2023 NY Slip Op 32131(U)

June 28, 2023

Supreme Court, New York County

Docket Number: Index No. 158677-2022

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

In the Matter of the Application of
East 119th Street Development LLC

INDEX NO. 158677-2022

- v -

MOT. DATE

Adolfo Carrion Jr. et al

MOT. SEQ. NO. 001

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS DOC No(s). _____

Replying Affidavits

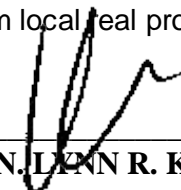
ECFS DOC No(s). _____

This is a CPLR Article 78 proceeding. Petitioner East 119th Street Development LLC is the owner of the property located at 2183 3rd Avenue, New York, New York, Block 1784, Lot 2 (the "property"). Petitioner now moves for an order annulling and setting aside respondent New York City Department of Housing Preservation and Development's ("HPD") August 23, 2022 notice of revocation of tax benefits (the "final determination") due to petitioner's failure to meet a unit mix requirement outlined in a Notice of Impending Revocation ("NOIR") dated May 11, 2022. Petitioner asserts that HPD's final determination is based upon a "draconian and non-sensical reading of the RPTL § 421-a real estate tax abatement statute which has resulted in the retroactive and prospective revocation of Petitioner's tax exemption benefits." HPD has answered the petition and opposes the relief sought. For the reasons that follow, the petition is granted to the extent that this matter is remanded back to HPD for further proceedings.

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi-judicial* hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] [emphasis removed]; see also *Matter of Colton v. Berman*, 21 NY2d 322, 329 [1967]).

The tax exemptions at issue are pursuant to RPTL § 421-a (the "421-a Tax Exemption Program"). The 421-a Tax Exemption Program provides a partial exemption from local real property taxes for

Dated: 6/28/23



HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

newly-constructed multiple dwellings and certain eligible conversions meeting the statutory and regulatory qualifications. In order to qualify for 421-a Tax Exemption Program benefits, the building must satisfy certain requirements regarding overall percentage of affordable units found at RPTL §§ 421-a(7)(c) and (d). HPD determines eligibility under the 421-a Tax Exemption Program and promulgates rules to carry out this function. See City Charter § 1802(6)(b); RPTL § 421-a(3); Administrative Code § 11-245(e). HPD's rules regarding tax exemptions pursuant to RPTL § 421-a(1-15) and Administrative Code § 11-245 et seq. are set forth in Title 28, Chapter 6 of the RCNY.

RPTL § 421(7)(c)(i) states:

Not less than twenty percent of the units in the multiple dwelling must, upon the initial rental or sale of the units and upon all subsequent rentals of the units after a vacancy, be affordable to and occupied or available for occupancy by individuals or families whose incomes at the time of initial occupancy do not exceed sixty percent of the area median incomes adjusted for family size[.]

RPTL § 421(7)(d)(i) also requires that, unless preempted by federal law,

[A]ll affordable units must have a comparable number of bedrooms as market rate units and a unit mix proportional to the market rate units, or at least fifty percent of the affordable units must have two or more bedrooms and no more than fifty percent of the remaining units can be smaller than one bedroom or in addition to the requirements of paragraph (c) of this subdivision, the floor area of affordable units is no less than twenty percent of the total floor area of all dwelling units[.]

Finally, 28 RCNY § 6-08(g)(1)(ii) mirrors these requirements and states:

[U]nless preempted by federal requirements, (A) all affordable units must have a comparable number of bedrooms and a unit mix proportional to the market rate units contained in such multiple dwelling, or (B) at least fifty percent (50%) of the affordable units must have two or more bedrooms and not more than fifty percent (50%) of the remaining affordable units can be smaller than one bedroom, or (C) the floor area of the affordable units must be no less than twenty percent of the total floor area of all dwelling units in such multiple dwelling.

In 2015, petitioner applied for a Preliminary Certificate of Eligibility ("PCE") pursuant to Title 28 RCNY § 6-05[b], which provided tax exemption benefits during construction of the subject building. Petitioner's PCE application listed twelve affordable units along with the number of bedrooms and square footage, to wit: three (3) two bedroom apartments, five (5) one bedroom apartments, and four (4) studio apartments available for income restricted occupancy with a total floor area of 7,801.5 square feet out of a total square footage of finished residential floor area of 47,800.25 square feet.

In 2016, HPD rejected the application. Petitioner filed a new PCE application shortly thereafter which listed the same number of affordable apartments for a total square footage of 7501.5 square feet out of 47,800.25 square feet. HPD required a restrictive declaration which was recorded on September 23, 2016 and states in pertinent part as follows:

WHEREAS, the Property is located in a geographic exclusion area, as such term is defined in 421-a; and

WHEREAS, eligibility for exemption from real property taxation pursuant to §421-a in a geographic exclusion area is conditioned upon not less than twenty-percent (20%) of the dwelling units situated onsite in the multiple dwelling in such Property ("Affordable Units") meeting the affordability requirements set forth in

Real Property Tax Law §421(a)(7)(c): upon initial rental of such units and upon all subsequent rentals of such units after a vacancy (“Affordability Requirement”)

By letter dated October 4, 2016, HPD notified petitioner that a PCE had been issued. The PCE stated in relevant part:

This Certificate is for construction benefits only. Upon issuance of a Final Certificate of Eligibility, this project will be entitled to: 25 Year Tax Exemption.

Based upon the information contained in the Application for Preliminary Certificate of Eligibility for Partial Tax Exemption filed 06/26/2015 and a determination by the Commissioner, the applicant, pursuant to Section 421-a of the Real Property Tax law and the 421-a Rules of the Department of Housing Preservation and Development issued pursuant thereto, is hereby granted this Preliminary Certificate of Eligibility for Partial Tax Exemption for the above premises, except as to those portions of the new building, if any, which are non-residential and which exceed the allowable 12% of Commercial, Community Facility and Accessory Use Space.

This Certificate is conditioned upon the filing and approval of a Final Application to be submitted to the Department of Housing and Preservation prior to initial occupancy (for multiple dwellings owned as a rental), and prior to the first taxable status date following the completion of construction (for multiple dwellings owned as a co-op or condo), and the submission of the temporary or permanent certificate of occupancy issued by the Department of Building[s] as evidence of the fact that the structure was completed. It entitles the property to benefits while under construction for up to three years. It is the applicant’s responsibility to complete the necessary filing in order to obtain a Final Certificate of Eligibility. This Certificate must be filed with the New York city Department of Finance immediately upon issuance.

Construction was completed and a temporary certificate of occupancy was issued by the NYC Department of Buildings (“DOB”) on or around July 27, 2018. By letter and affidavit dated August 30, 2018 (“August 30, 2018 affidavit”), Petitioner sent HPD an updated list of unit numbers for the affordable units at the subject premises and affirmed, “[T]he total square footage of the apartments [is] equal to 20% of the total building floor area.” The August 30, 2018 affidavit contained two different lists of the affordable apartments with a total square footage of 7,445.30. One only listed eleven units as affordable while neither matched the floor areas of the affordable units listed in petitioner’s 2016 PCE application. Meanwhile, the August 30, 2018 affidavit indicated that the total square footage of all units in the building was 36,737.20 square feet.

Supported by the August 30, 2018 affidavit, petitioner submitted an application for a Final Certificate of Eligibility (“FCE”) on or about November 8, 2018 in order to obtain post-construction period benefits. By letter dated June 17, 2019, HPD notified petitioner that there were inconsistencies between the PCE and FCE and requested the following:

1. Please have the current architect of record submit an affidavit explaining why the square footage of this project in total and the square footage of the affordable units have changed from the preliminary application phase to now. Please have the architect submit an updated self-certification of the plans if necessary.
2. Please have the owner submit an updated affidavit clarifying which new unit designations match the original designations listed on the OLA. All documents that require must be original.

After no response, HPD sent another letter dated July 11, 2019 again notifying petitioner that there were inconsistencies with the FCE application and stated:

According to the owner's affidavit dated 08/30/2018, the affordable units in this project have new designations and the square footages of those units have been altered. Please have the owner submit an updated affidavit clarifying which new affordable unit designations match their original designations listed on the OLA. Please also have the owner submit a new affordability calculator with this affidavit...

Petitioner sent a letter dated July 29, 2019 with two owner affidavits dated July 25, 2019 (the "July 25, 2019 affidavits") which explained the new unit designations for only four apartments and included a list of twelve affordable apartments with a total floor area of 7,445.30 square feet out of a total 36,737.20 square feet for all units. Petitioner then sent a letter dated September 5, 2019 with an August 20, 2019 affidavit that listed all twelve old unit designations with updated unit numbers.

HPD notified petitioner by letter dated May 11, 2022 (the NOIR) that the partial tax exemption for the Project granted pursuant to the PCE was being revoked because the subject property was in violation of the unit mix requirement. HPD maintains that petitioner's FCE Application contained inconsistencies between petitioner's various affidavits and petitioner had also failed to provide any updated architectural plans or an affidavit from the architect explaining the purported changes in units and square footage. In order to assess the affordable unit square footage for the FCE Application, HPD compared the floor area from the July 25, 2019 affidavits with the unit designations from the August 20, 2019 affidavit against the floor areas for the associated units from the architectural drawings in the PCE Application. The floor area for three units was at least one-hundred square feet less in the architectural plans than what petitioner stated in the owner affidavits and the total square footage for the affordable units based on the approved plans was 7,060.7 square feet whereas petitioner had stated that the total affordable units square footage was 7,445.3. Thus, HPD concluded that the affordable unit square footage did not total the required 20% of the total floor area nor meet either of the other two affordable unit mix tests stated in RPTL §§ 421-a(7)(c) and (d).

The NOIR states in pertinent part:

[T]he Property fails to meet the Unit Mix Requirement because neither the unit mix of the affordable units is proportional to the unit mix of the market units nor are there at least 50% of the affordable units with two or more bedrooms. With three (3) two-bedroom affordable units, the Property only contains 25% of the total twelve (12) affordable units with two or more bedrooms. Finally, according to the affidavit submitted by the Property on August 20, 2019 listing changes in affordable unit designations from the ones listed on the HPD online application, the square footage of the revised floor area for the new affordable units designated as 201, 205, 301, 305, 306, 405, 505, 702, 802, 902, 1101 and 1201 comprise only 18.24% of the total floor area of all the dwelling units, which [is] less than the 20% requirement.

HPD now seeks to retroactively revoke the Tax Benefit from the date upon which the Property initially began receiving such Tax Benefit for failing to comply with the Unit Mix Requirement ("Cause").

You may submit written comments and/or information to HPD regarding the potential Cause for revocation on or before the August 9, 2022 ("Documentation Deadline").

This information must include credible evidence that there are one or more factual issues which, if resolved in your favor, would require the conclusion that such Cause for revocation of the Tax Benefits does not exist ("Factual Issue(s)").

...

If HPD...determines after reviewing such written comments and/or information that there is no Factual Issue concerning the Cause for revocation of the Tax Benefits, then HPD will deliver a Determination Notice affirming that the Tax Benefit has been revoked retroactively to the date upon which the Property initially began to receive such Tax Benefit (including, if applicable, any Tax Benefit during the construction of the Property).

...

If HPD determines that Factual Issue(s) exists, HPD will deliver a notice to you informing you of your right to a hearing.

On reply, petitioner maintains that since 12 of the 58 apartments were designated as affordable, petitioner met the Section 421-a[7][c] mandate. Petitioner's counsel maintains that petitioner was not required to meet the unit mix requirement and rather, "must provide a mere 673.4 feet of additional floor area to satisfy the 20% rule." Petitioner otherwise asserts that HPD improperly disregarded petitioner's cure proposals which are warranted pursuant to 28 RCNY § 39-02 and thus a hearing is required pursuant to 28 RCNY § 39-02[f]. To the extent that HPD asserts that petitioner's cure proposals were untimely, petitioner maintains that HPD waived this argument by attending a cure meeting in September 2022.

Section 39-02, entitled "Revocation of Tax Benefits for Cause", provides in pertinent part as follows:

- (a) HPD may revoke a Tax Benefit for Cause at any time through the procedure set forth in this section.
- ...
- (e) If HPD determined that the alleged Cause for Revocation of the Tax Benefit is curable and that the Taxpayer has proposed a practicable cure, HPD may enter into a Cure Agreement with such Taxpayer. HPD may require the Taxpayer to record any such Cure Agreement against the Property receiving such Tax Benefit.
- (f) If HPD does not enter into a Cure Agreement with the Taxpayer and either receives no Comments during the Comment Period or determines after reviewing such Comments that there is not Factual Issue concerning the Cause for Revocation, HPD shall deliver a Determination Notice to the Taxpayer by the method provided herein for delivery of notices stating that the Tax Benefit has been Revoked as of the Revocation Date set forth therein.

The court agrees with petitioner that HPD improperly rejected petitioner's cure proposals without a hearing. Indeed, HPD admits that in response to the NOIR, "petitioner's representative offered to add another unit as an affordable unit, to subdivide the building into two condo tax lots, and, after the time to respond expired, offered to expand two of the units into their terraces to add additional square footage." While HPD faults petitioner for failing to "confirm if any of the market units had remained vacant since the building was completed and therefore available to use as an additional affordable unit", this merely highlights one factual issue that should be addressed at a hearing rather than summarily dismissed by HPD in violation of 28 RCNY § 39-02.

Further, the court agrees with petitioner that "it is shocking to one's conscience that HPD could impose over \$10 million in real estate charges, previously abated, without giving the Petitioner the benefit

of a hearing.” Finally, the court agrees with petitioner that to the extent HPD argues that petitioner’s cure proposals were untimely offered, this basis to reject same was waived by holding a cure meeting in September 2022.

Accordingly, the petition is granted to the extent that HPD is directed to reconsider petitioner’s cure proposals and in the event that HPD declines to accept petitioner’s proposed cures and enter into an agreement pursuant to 28 RCNY § 39-02[e], HPD must conduct a hearing to determine whether petitioner can and should be allowed to cure its violation of the 20% minimum square footage requirement of affordable to total units in the building.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the petition is granted to the extent that this matter is remanded back to HPD for further proceedings consistent with this decision/order; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 6/28/23
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.