Matter of 326 Bedford Ventures LLC v New York City Dept. of Hous. Preserv. & Dev.
2023 NY Slip Op 34195(U)
December 4, 2023
Supreme Court, New York County
Docket Number: Index No. 158941/2022
Judge: Erika M. Edwards

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ERIKA M. EDWARDS** **PART 10M**

Justice

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In the Matter of the Application of
326 BEDFORD VENTURES LLC AND CUR 326 BEDFORD LLC, as Tenants in Common,

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Respondent.

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INDEX NO. 158941/2022

MOTION DATE 09/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

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

Upon the foregoing documents, the court denies Petitioner 326 Bedford Ventures LLC and CUR 326 Bedford LLC, as tenants in common's ("Petitioner") Verified Petition and dismisses it as against Respondent New York City Department of Housing Preservation and Development ("Respondent"), without costs to any party.

Petitioner brought this Article 78 Verified Petition against Respondent. Petitioner is the owner of a multiple dwelling building with thirty-two (32) apartments located at 326 Bedford Avenue, Brooklyn, New York. Petitioner purchased the building on or about September 6, 2018. Petitioner alleges that the building has been transferred once since November 29, 2017, when Petitioner purchased the building.

Respondent is the New York City agency responsible for administering the Certificates of No Harassment ("CONH") Pilot Program Building List ("List") and said certificates. Respondent added Petitioner to the List as of June 24, 2022.

Petitioner seeks a judgment reversing, annulling and setting aside Respondent's inclusion of Petitioner's building on the List and an order directing Respondent to remove Petitioner's building from the List, as arbitrary and capricious, an abuse of discretion, because it was affected by an error of law, and/or made in violation of lawful procedure. Alternatively, Petitioner seeks an order determining that the building is entitled to a waiver of CONH.

Petitioner also seeks an order reversing, annulling and setting aside Respondent's inclusion of Petitioner's building on the List and declaring and ordering it to be removed from the List as violative of Petitioner's constitutional rights under the United States Constitution, 14th Amendment, and the New York Constitution, art. I, § 6. Petitioner argues in substance that the program fails to afford, prior to being added to the List, building owners procedural due process in providing them notice of access to a full and fair hearing, the right to call and cross-examine witnesses, and to adduce and rebut evidence. Petitioner argues in substance that the building should not be on the List, that it was not served with the notice that it was included on the List and that it was merely published on Respondent's website. Furthermore, Petitioner argues that the statute fails to require Respondent to provide a building owner with notice of the intent to add it to the List, nor does it provide a procedure for challenging the addition to the List or for removal from the List. Petitioner argues in substance that Respondent failed to notify Petitioner that its building was added to the List and that Petitioner and several other owners who are clients of Petitioner's counsel only found out about being added to the List when the owners attempted to sell their buildings or they applied for a permit to conduct work on the property.

Alternatively, Petitioner argues in substance that it is entitled to a waiver of CONH since it was the owner of record of the building prior to November 29, 2017, and/or the building was added to the List on or after October 31, 2021, eligibility for inclusion on the List resulted from

the amendment of paragraph (1) of subdivision b of the New York City Code § 27-2093.1 made by the Local Law 140 of 2021 and Petitioner was the owner of record prior to the date of enactment of the Local Law 140 of 2021.

Petitioner further argues that it is unreasonable for a property owner to have to complete the application for a CONH, pay the $160.00 per existing unit fee for the application if it was submitted after July 1, 2018, and then wait an excessive amount of time for Respondent's determination as to whether there was any tenant harassment within the applicable 60-month period. Such process unnecessarily delays the owner's ability to make necessary repairs or improvements to the building and often prevents or delays the sale of the building. Additionally, Petitioner argues that Respondent failed to promulgate any application or procedure to apply for or to receive an authorized exemption. Also, Petitioner argues that a building's addition to the List encumbers the building tremendously, the Building Qualification Index ("BQI") calculation is unnecessarily complex and the process is mired in secrecy. Additionally, Petitioner argues that at the time Respondent included Petitioner on the List, it had not created or promulgated in rules the BQI for buildings where eligibility for inclusion was as a result of Local Law 140.

Petitioner also argues in substance that Petitioner was unable to get any information from Respondent regarding why it was included on the List and Respondent failed to timely respond to Petitioner's FOIL request submitted on October 18, 2022.

Therefore, Petitioner urges the court to grant its Petition.

Respondent opposes Petitioner's Petition and explains the background of the creation of the Pilot Program and the List. Respondent states in substance that the City enacted Local Law No. 1 of 2018 ("Local Law 1") on December 31, 2017, as a pilot program, which was extended by Local Law 140 of 2021 ("Local Law 140"). It mandated Respondent to compile and publish a

list, to promulgate in rules the criteria used to select buildings to be included on the List, as specified in Administrative Code § 27-2093.1(b). The section relevant to this proceedings states that the List includes buildings with six or more dwelling units that have scores on the BQI indicating significant distress as determined by Respondent (AC § 27-2093.1[b]). Such buildings are required to remain on the List for 60 months after the date that they were first included on the List, or until expiration of the local law that added the applicable section, whichever is later (AC § 27-2093.1[a]). If an eligible building is placed on the List, then such building must obtain a CONH or waiver of such CONH as a condition to obtaining approval of permits or construction documents from the Department of Buildings for certain covered types of work (AC § 27-2093.1[c]).

Respondent further explains that on September 7, 2018, Respondent promulgated 28 RCNY § 53-03 to set forth the criteria used to evaluate prospective CONH Pilot Program buildings for distress through calculations using a formula to get a building's BQI score. The BQI is based on several factors, including the number of open and closed hazardous and immediately hazardous violations of the housing maintenance code and the total amount of paid or unpaid emergency repair charges per adjusted dwelling unit issued by Respondent within the five-year period prior to October 31, 2021, on a scale of 0 to 10. It is based on the number of standard deviations above the average at the time of the evaluation which is calculated by adding 2.5 points if the building is above average, plus an additional 2.5 points for each of up to three standard deviations above the averages. Additionally, calculations are made depending on the number of building ownership changes within the applicable five year period.

Respondent further states in substance that if an applicant applies for a CONH and Respondent finds that tenant harassment occurred within the five year period, then under certain

circumstances the applicant can apply for a waiver from the CONH requirement. Such circumstances include when the owner of record was the owner of record prior to November 29, 2017, or when the building was added to the List after October 31, 2021, because of an amendment to paragraph (1) or the addition of section (b)(4), and the owner of record was the owner of record prior to November 11, 2021, which was the date of enactment of Local Law 140. A waiver could also be granted if the owner was not the owner of the building during any period of time when the harassment occurred and did not otherwise participate in the harassment; or with the intent to harass, did not agree to harass, or cause such harassment; or did not intend for another to engage in such conduct. Additionally, the owner must have acquired the title pursuant to a bona fide transaction that was not intended to evade the applicable provisions (AC § 27-2093.1[i][1]).

Respondent included printouts from its software program to support its calculation of the violations and emergency repair charges components, as well as the thirteen considerations included in the BQI calculation for the buildings on the List. Respondent further argues that if a building owner believes the building was improperly added to the List, then the owner could send a letter to Respondent stating the reasons why the owner believes the building should not have been placed on the List. Respondent stated that as of December 19, 2022, there were 1,163 buildings on the List.

Respondent argues in substance that Respondent's determination to add Petitioner's building to the List was based on its BQI score of 12.5 and that such decision was rational, reasonable, in accordance with the law and not arbitrary and capricious. Respondent argues that it correctly calculated the building's score of 10 for the violation component and 2.5 for the emergency repair charges component, for a combined score of 12.5. Respondent further argues

that since the building changed ownership once between October 31, 2016 and October 31, 2021, the threshold score for inclusion on the List was 10 or more. Therefore, since 12.5 exceeded the threshold score for inclusion on the List as required by Local Laws 1 and 140 and 28 RCNY § 53-03, Respondent argues that it correctly placed Petitioner's building on the List.

Respondent further argues in substance that Petitioner cannot receive a preemptive waiver from the program because it did not apply for a CONH and Respondent has not determined the existence of tenant harassment. Additionally, Respondent argues that there have been no due process constitutional violations and that adequate notice and opportunity to be heard was provided to Petitioner. Petitioner also provided copies of the letter that was sent to Petitioner advising Petitioner that its property was selected for the CONH Pilot Program. Petitioner also provided instructions on how a member of the public could access open and closed violations and emergency repair charges, so the public can be informed about whether a building is at risk of being on the List. Finally, Petitioner provided copies of its Responses to Petitioner's FOIL requests. Petitioner objected to Respondent's submission of this additional material.

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (*see* CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; and *Scherbyn v BOCES*, 77 N.Y.2d 753, 757-758 [1991]). In reviewing an administrative agency's determination, courts must ascertain whether there is a rational basis for the agency's action or whether it is arbitrary and capricious in that it was without sound basis in reason or regard to the facts (*Matter of Stahl York Ave. Co., LLC v City of New York*, 162 AD3d 103, 109 [1st Dept 2018]; *Matter of Pell*, 34 NY2d

at 231). Where the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (*Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010]). When a court reviews an agency's determination it may not substitute its judgment for that of the agency and the court must confine itself to deciding whether the agency's determination was rationally based (*Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N.Y.*, 72 NY2d 753, 763 [1st Dept 1988]).

Furthermore, an agency is to be afforded wide deference in the interpretation of its regulations and, to a lesser extent, in its construction of the governing statutory law, however an agency cannot engraft additional requirements or assume additional powers not contained in the enabling legislation (*see Vink v New York State Div. of Hous. and Community Renewal*, 285 AD2d 203, 210 [1st Dept 2001]).

Here, the court denies Petitioner's Verified Petition and finds that Petitioner failed to demonstrate its entitlement to the relief requested. The court finds that Petitioner failed to prove that Respondent's determination to include Petitioner's building on the List was made in violation of lawful procedures, was arbitrary or capricious, was affected by an error of law, was an abuse of discretion or was a violation of Petitioner's due process rights under the New York or United States Constitutions. The court agrees with Respondent and finds that Respondent's procedures for calculating a building's BQI in general, the manner in which it administers the program and its calculation of Petitioner's building's BQI was rational, reasonable and based on the applicable provisions of Local Laws 1 and 140 and 28 RCNY § 53-03. Although the court would like Respondent to be more transparent in its administration of the program, to provide more information and understandable explanations as to how and when a building is added to the

List and for it to implement a more user-friendly process, such considerations do not warrant a reversal of the determination in this case, nor any of the relief requested in the Petition.

Additionally, the court finds that pursuant to lawful procedure, Petitioner is not entitled to a waiver from the program as Petitioner has not applied for a CONH and there has been no finding of harassment. Therefore, Petitioner is ineligible for such waiver at this time.

Therefore, the court denies Petitioner's Petition and dismisses it without costs to any party.

The court has considered any additional argument raised by the parties which was not expressly discussed herein and the court denies any additional request for relief which was not expressly granted herein.

As such, it is hereby

ORDERED and ADJUDGED that the court denies Petitioner 326 Bedford Ventures LLC and CUR 326 Bedford LLC, as tenants in common's Verified Petition and dismisses it as against Respondent New York City Department of Housing Preservation and Development, without costs to any party.

This constitutes the decision and order of the court.

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12/4/2023
DATE

ERIKA M. EDWARDS, 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