

**Matter of 413 E. 187 Holdings LLC v New York City
Dept. of Hous. Preserv. & Dev.**

2023 NY Slip Op 34994(U)

November 16, 2023

Supreme Court, Bronx County

Docket Number: Index No. 812423/2022E

Judge: Alison Y. Tuitt

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 5**

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**In the Matter of the Application of: 413 EAST 187
HOLDINGS LLC**

Index No. 812423/2022E

Petitioner,

-against-

Hon. Alison Y. Tuitt

**NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION & DEVELOPMENT**

Justice Supreme Court

Respondents

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The following papers were read on this motion (Seq. No. 1) for **article 78** noticed for September 16, 2022, and submitted on January 20, 2023

Verified Petition and Exhibits	NYSCEF Doc. # 1-7
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 14
Affirmation in Reply and Exhibits	NYSCEF Doc. # 18

Upon the foregoing papers, the Verified Petition brought by 413 East 187 Holdings LLC (hereinafter referred to interchangeably as “Petitioner” or “Owner”), pursuant to CPLR article 78, seeking to reverse, annul, and set aside the final determination of the New York City Department of Housing Preservation & Development (“Respondent”), dated April 25, 2022 (the “Determination”), which denied Owner’s application for a certificate of eligibility and reasonable cost for tax benefits, as an error of law, arbitrary and capricious, and an abuse of discretion, is decided as follows:

I. Background

In this Article 78 proceeding, Petitioner and Owner of real property located at 413 East 187th Street (hereinafter, “the property”), in the Bronx, claims that Respondent erroneously denied its application for a J-51 program tax exemption. For purposes relevant here, the J-51 program tax exemption includes the culmination of certain statutes: Real Property Tax Law (“RPTL”) § 489; 28 Rules of the City of New York (“RCNY”) § 5-01, *et seq.*; and NYC Administrative Code (“NYC Admin. Code”) § 11-243. As a result, Petitioner contends that Respondent’s Determination was an error of law, arbitrary and capricious, and an abuse of discretion.

In its Determination, Respondent stated that Petitioner’s property, a multiple dwelling unit building, was occupied prior to obtaining a Certificate of Occupancy (“CO”). The earliest CO for the property was issued on March 11, 2019. However, the rent roll submitted as part of Petitioner’s application showed numerous different occupancies for the property, in many different units, beginning July 2018. In addition, a review of public records by Respondent indicated occupancy of the property prior to March 11, 2019. Respondent did provide

Article 78 motion as submitted (*see Matter of Kosciuszko Plaza LLC v New York City Dept. of Hous. Preserv. & Dev.*, 150 A.D.3d 520, 521 [1st Dept 2017] [“the agency’s rules do not expressly provide for administrative review of the denial of a petition for J-51 benefits”]).

Petitioner’s moving papers do not dispute that a CO for this property was first issued on March 11, 2019. Rather, Petitioner argues that the denial of its application dated May 14, 2019, on the grounds of undisputed occupancy violations preceding the issuance of a CO, was as an error of law, arbitrary and capricious, and an abuse of discretion. Petitioner asserts that Respondent has set a standard that a past violation relating to occupancy (even if later cured or fixed) is an automatic disqualification from obtaining future J-51 program tax exemption benefits, and that this is contrary to the statutory scheme surrounding the J-51 program.

The opposition papers essentially affirm Petitioner’s argument (*see* NYSCEF Doc No. 14, at page 9 [“The later issuance of the CO does not undo petitioner’s violation of the prohibition against occupancy prior to DOB certifying the work for which J-51 Program benefits are sought”]; *id.* at page 10 [“It is irrelevant to the issue of eligibility for J-51 Program benefits that a CO was issued later”]; *id.* at page 11 [“because the subject project was not certified prior to occupancy of the subject building, HPD correctly, and in accordance with applicable state and local laws and rules, denied petitioner’s application”]). Curiously, Respondent also states that “[b]uildings which, at the start of the rehabilitation process, are not code compliant may be brought up to code and then once in compliance, the owner may apply for the tax exemption” (*id.* at page 13).

The Court finds that the Determination is not supported by a rational basis because Respondent has made contradicting arguments in its opposition papers. Moreover, the plain language of the J-51 program statutory scheme does not support Respondent’s strict position (*see Matter of Schiffren v Lawlor*, 101 A.D.3d 456, 457 [1st Dept 2012] [Appellate Division, First Department, interpreting “[t]he plain language” of statutes relating to “J-51 benefits” to reach a conclusion]). Respondent failed to provide the Court with any pointed supporting authority or case law for its current interpretation of the relevant statutory scheme as a basis for denying Petitioner’s application. Accordingly, the Court concludes Respondent’s Determination was without a rational basis, is an error of law, arbitrary and capricious, an abuse of discretion, and is the product of a violation of lawful procedure (*see Slesinger*, 39 A.D.3d 246; *Matter of Nehorayoff*, 95 N.Y.2d at 675; CPLR 7803).

IV. Conclusion

Accordingly, it is hereby,

ORDERED, that the Verified Petition is granted to the extent of voiding Respondent’s Determination dated April 25, 2022, and vacating, nullifying, and setting aside Respondent’s denial of Petitioner’s application

Petitioner an opportunity to address the issue of occupancy preceding the CO, but Petitioner failed to do so. Thus, Respondent issued its Determination and denied Petitioner's application. Respondent explained in its Determination that the J-51 program tax exemption laws "provide that no one may legally occupy a building until it has been issued a Certificate of Occupancy" (NYSCEF Doc No. 4, citing NYC Charter § 645 (b) (3) and NYC Admin. Code § 28-118.1).

II. Standard of Review

"In the context of an Article 78 proceeding, it is established that judicial review is limited to a determination of whether the administrative decision is arbitrary and capricious, or lacks a rational basis... and where such rational basis exists, an administrative agency's construction and interpretation of its own regulations are entitled to great deference" (*Slesinger v Department of Hous. Preserv. & Dev. of City of New York*, 39 A.D.3d 246 [1st Dept 2007]; *see also* CPLR 7803). "The test for whether an administrative agency's determination is arbitrary and capricious is whether the determination is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Muhammad v Zucker*, 137 A.D.3d 429, 430 [1st Dept 2016] [internal quotation marks and citations omitted]). Stated another way, an administrative decision may be judicially reviewed as to whether "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed" (CPLR 7803 [3]). The administrative determination will be upheld if it is supported by a rational basis (*Matter of Nehorayoff v Mills*, 95 N.Y.2d 671, 675 [2001]).

III. Applicable Law and Analysis

The Court preliminarily addresses three issues. First, the Court finds that the issues raised in this proceeding can be determined without a formal hearing (*see Nyitray v New York Athletic Club of City of New York, Inc.*, 195 A.D.2d 291 [1st Dept 1993]). Second, the Court notes that service of the Verified Petition was not effectuated pursuant to the CPLR. Nevertheless, the papers submitted with the Verified Petition state Respondent consented to the method of service herein (NYSCEF Doc No. 7). Neither Respondent's answer nor opposition papers objected to the method of service. Third, although Respondent's Determination required Petitioner to seek remedy exclusively through the utilization of Article 78, it appears this may have not been proper (*see generally Matter of 9 Orchard Partners, LLC v New York City Dept. of Fin.*, 204 A.D.3d 527 [1st Dept 2022] [parties involved in matters of tax abatement and assessment are directed to "proceed under RPTL article 7 and not CPLR article 78"]). Nevertheless, in the interest of justice, the Court will decide this pending

