

**William 165 LLC v New York City Dept. of Hous.
Preserv. & Dev.**

2024 NY Slip Op 30238(U)

January 18, 2024

Supreme Court, New York County

Docket Number: Index No. 160131/2022

Judge: Kathleen Waterman-Marshall

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

per adjusted dwelling unit between October 31, 2016 and October 31, 2021 (the “Relevant Period”) at the time of evaluation (28 RCNY § 53-03 [1-3]). HPD then uses the number of ownership changes that occurred during the Relevant Period to determine whether the building may be placed on the CONH Pilot Program List (*Id.* at § 53-03 [3] [b-c]). As is here pertinent, buildings with one ownership change must meet or exceed a score of ten and buildings with two ownership changes must meet or exceed a score of five to qualify for placement on the CONH Pilot Program List (*Id.*). Once placed on the CONH Pilot Program List, buildings must apply for and obtain “a certification of no harassment or waiver of such certification as a condition to obtaining approval of construction documents or an initial or reinstated permit... for any covered categories of work” (Administrative Code § 27-2093.1 [c] [1]).

Here, HPD assigned the Building a score of five, given the number of relevant housing maintenance code violations and emergency repair charges levied against it during the Relevant Period. HPD determined that the Building changed ownership twice during the Relevant Period; first by deed transfer recorded on February 13, 2017 and again by “RPTT and RETT” recorded on June 4, 2020 to report a transfer of controlling interest in the entity (i.e., Petitioner) that owns the Building. Thus, HPD concluded that the Building met the required score for placement and added the Building to the CONH Pilot Program List, which is published on HPD’s website, on June 24, 2022.

HPD notified Petitioner that the Building was included on the CONH Pilot Program List by letter printed July 15, 2022. Petitioner allegedly received HPD’s letter on July 28, 2022. Exactly four months later, Petitioner commenced this Article 78 proceeding to challenge HPD’s inclusion of the Building on the CONH Pilot Program List.

Petitioner claims herein that HPD’s determination to include the Building on the CONH Pilot Program List is arbitrary and capricious or an abuse of discretion, as only one change in ownership occurred during the Relevant Period – evinced by the deed transfer recorded on February 13, 2017 – and the Building’s BQI score of five is insufficient to qualify for placement. Alternatively, Petitioner seeks a waiver from the CONH Pilot Program, although it has not yet applied for a CONH or for a waiver. Petitioner finally contends that HPD’s inclusion of the Building on the CONH Pilot Program List caused a significant decrease in its market value and, therefore, the United States and New York State Constitutions entitled Petitioner to an opportunity to be heard before HPD’s determination.

In opposition, HPD claims, *inter alia*, that Petitioner’s challenge is time-barred because it was not commenced within four months from June 24, 2022, the date on which HPD added the Building to the CONH Pilot Program List, that Petitioner’s request for a waiver from the CONH Pilot Program is unripe, and that HPD rationally and reasonably included the Building on the CONH Pilot Program List, as it interprets “change in ownership,” in the context of the CONH Pilot Program, to encompass deed transfers, RPTT assessments, and RETT assessments.

Statute of Limitations

An Article 78 proceeding “must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner” (CPLR 217 [1]). The Court of Appeals “has identified two requirements for fixing the time when the agency

action is ‘final and binding on the petitioner.’ First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative actions or steps available to the complaining party” (*Best Payphones, Inc. v Dept. of Info. Tech. & Telecomms.*, 5 NY3d 30, 34 [2005]; *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007] [same]).

Neither Administrative Code of City of NY § 27-2093.1 nor 28 RCNY § 53-03 set forth precisely when or how HPD’s decision to add a building to its CONH Pilot Program List becomes “final and binding.” Petitioner argues that receipt of written notice by mail is required to start the four-month statute of limitations. HPD argues that publication on the List triggers petitioner’s time to file an Article 78 proceeding. On this issue, the Court finds persuasive and follows the decision of Hon. Melissa A. Crane in *Stf 390 Wadsworth Holding LLC v New York City Dept. of Hous. Preserv. & Dev.* (2021 NY Slip Op 31362[U] [Sup Ct, NY County 2021]). There, after a thoughtful analysis on similar facts, the court denied HPD’s cross-motion to dismiss the amended petition as untimely and “reject[ed] [HPD’s] position that publication..., without more, was sufficient to comprise notice” to the petitioner that its building was placed on the CONH Pilot Program List (*Id.* at *7, citing *Adventist Home v Board of Assessors*, 83 NY2d 878, 880 [1994] [court found action untimely and statute of limitations began to run upon petitioner receiving actual notice of determination, not upon publication]).

Indeed, this conclusion is consistent with the requirements of due process as well as the other provisions of the rules and regulations at issue herein (*see generally Vill. of Chestnut Ridge v Howard*, 92 NY2d 718, 722 [1999] [“As a general principle of statutory construction, all sections of a law should be read together to determine its fair meaning”]), which require notice to be mailed (*see* Administrative Code §§ 27-2093.1 [d] [2] [upon receiving application for certification of no harassment, department shall, *inter alia*, mail notice to the owner]; 27-2093.1 [d] [6] [if certification of no harassment denied, notice of denial and written findings shall, *inter alia*, be mailed to applicant]; 28 RCNY § 53-06 [1-4] [if department refuses to act upon or rejects application for certification of no harassment, or determines there is not reasonable cause to believe harassment occurred, harassment occurred, or there is reasonable cause to believe harassment occurred, department shall, *inter alia*, send written notice of determination to applicant]).

Accordingly, this Court finds that the statute of limitations for Petitioner to challenge HPD’s inclusion of the Building on the CONH Pilot Program List began to run on July 28, 2022, when it received actual notice of Respondent’s determination.² Since Petitioner commenced this Article 78 proceeding exactly four months later, the action is timely.

The CONH Pilot Program

It is well-settled that, in reviewing an agency determination by way of an Article 78 proceeding, the court must ascertain whether the action in question “was made in violation of

² The Court notes that Petitioner merely asserts, without additional proof, that it received HPD’s letter on July 28, 2022. However, HPD does not vigorously contest Petitioner’s claim and will not be prejudiced by the Court accepting the alleged date of receipt as true, given the balance of this decision.

lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion” (CPLR 7803 [3]; *see Matter of Gilman v. New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 146 [2002]). A petitioner meets its heavy burden of establishing that an action is arbitrary and capricious where it proves, beyond “conclusory allegations and speculative assertions” (*Cashin v Cassano*, 129 AD3d 953, 954 [2d Dept 2015]), that the action was “taken without sound basis in reason or regard to the facts” (*Matter of Peckham v. Calogero*, 12 NY3d 424, 431 [2009]; *see Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). “If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency” (*Matter of Peckham v. Calogero*, 12 NY3d at 431).

“It also is well established that an agency is to be accorded wide deference in its interpretation of its own regulations and, to a lesser extent, in its construction of the governing statutory law. More specifically for DHCR, ‘the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable’” (*Vink v New York State Div. of Hous. & Cmty. Renewal*, 285 AD2d 203, 209-210 [1st Dept 2001], quoting *Matter of Gaines v New York State Div. of Hous. & Cmty. Renewal*, 90 NY2d 545, 548-549 [1997]).

Here, Petitioner is not entitled to an order reversing HPD’S determination to include the Building on the CONH Pilot Program List. HPD calculated the Building’s BQI score in accordance with the applicable provisions of Local Laws 1 and 140 and 28 RCNY § 53-03 and rationally interpreted “change in ownership,” in the context of the CONH Pilot Program, to encompass deed transfers, RPTT assessments, and RETT assessments (*see id.*). Thus, neither HPD’s conclusion that the Building qualified for placement on the CONH Pilot Program List nor its determination to place the Building on the CONH Pilot Program List was arbitrary and capricious, affected by an error of law, an abuse of discretion, or violative of lawful procedures or Petitioner’s due process rights under the New York or United States Constitutions (*see In the 738 E. 6th Owner de LLC v New York City Dept. of Hous. Preserv.*, 2023 NY Slip Op 34191[U] *7-8 [Sup Ct, NY County 2023] [HPD’s determination that building changed ownership twice during and qualified for CONH Pilot Program List rational, reasonable, based on applicable provisions of Local Laws 1 and 140 and 28 RCNH 53-03, and not violative of Petitioner’s due process rights under New York or United States Constitutions]; [*M*]atter of *DS Brooklyn Portfolio Owner LLC v New York City Dept. of Hous. Preserv. & Dev.*, 2023 NY Slip Op 34193[U] *7-8 [Sup Ct, NY County 2023] [same]).

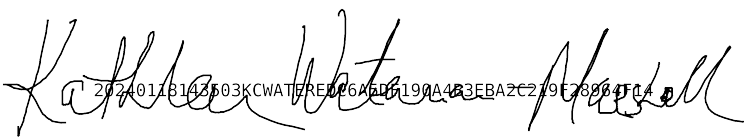
HPD’s determination to place the Building on the CONH Pilot Program List without affording Petitioner a prior hearing did not violate Petitioner’s procedural due process rights under the United States or New York State Constitutions (*see In the 738 E. 6th Owner de LLC v New York City Dept. of Hous. Preserv.*, 2023 NY Slip Op 34191[U] at *7; [*M*]atter of *DS Brooklyn Portfolio Owner LLC v New York City Dept. of Hous. Preserv. & Dev.*, 2023 NY Slip Op 34193[U] at *7). Indeed, the alleged decline in the Building’s market value that purportedly resulted from HPD placing it on the CONH Pilot Program List is not a recognized constitutionally-protected property interest (*see generally Ramapo Homeowners’ Assn. v New York State Off. of Mental Retardation and Dev. Disabilities*, 180 F Supp 2d 519, 527 [SD NY

2002] [“although the members of the Association may have a property right in the value of their homes, governmental action allegedly causing a decline in property values has never been held to deprive a person of property”] [internal quotations omitted]).

Finally, Petitioner is not entitled to a waiver from the CONH Pilot Program at this time, as it “has not applied for a CONH and there has been no finding of harassment” (*In the 738 E. 6th Owner de LLC v New York City Dept. of Hous. Preserv.*, 2023 NY Slip Op 34191[U] at *8; [*Matter of DS Brooklyn Portfolio Owner LLC v New York City Dept. of Hous. Preserv. & Dev.*, 2023 NY Slip Op 34193[U] at *8 [same]; see Administrative Code 27-2093.1 [i] [commissioner may grant waiver of CONH although commissioner determines harassment occurred at the pilot program building for which such CONH is sought during the 60 month period prior to date of submission of application for CONH]).

Accordingly, it is hereby

ORDERED that Petitioner’s Verified Petition is denied and the proceeding is dismissed.



1/18/2024
DATE

HON. KATHLEEN WATERMAN-MARSHALL

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE