

Kai Ming Chen v City of New York

2024 NY Slip Op 30300(U)

January 24, 2024

Supreme Court, New York County

Docket Number: Index No. 151375/2023

Judge: Shahabuddeen Abid Ally

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHAHABUDDEN ABID ALLY PART 16TR

Justice

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INDEX NO. 151375/2023

KAI MING CHEN; TWO PIKE LLC; and UNITED FUJIANESE OF AMERICA ASSOCIATION INC.,

MOTION DATE 06/27/2023

Petitioners,

MOTION SEQ. NO. 001 + 002

- v -

THE CITY OF NEW YORK; ERIC ADAMS, in his official capacity as Mayor of the City of New York; THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES; GARY P. JENKINS, in his official capacity as commissioner of the New York City Department of Homeless Services; CARE FOR THE HOMELESS, INC.; DEVELOPMENT FUND CORP.,

DECISION + ORDER

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 68-81 were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1-15; 45-58 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

In this Article 78 proceeding, petitioners seek an order and judgment annulling the determination of respondent The New York City Department of Homeless Services ("DHS") permitting the opening of a shelter for unhoused individuals in the Manhattan neighborhood known as Chinatown. By notice of motion, petitioners also seek leave to conduct discovery in support of their petition pursuant to CPLR § 408. Respondents oppose both discovery and the petition. Petitioner's applications are consolidated herein for decision and, upon consideration of the above cited papers, are denied.

Background

New York City has enshrined the right to shelter for unhoused families and individuals in State law, court order, and consent decree (*see Callahan v Carey*, “Final Judgment by Consent,” Index No. 42582/79 [Sup Ct, New York County 1981]). Respondent DHS is the agency charged with providing shelter to all eligible families and individuals and to provide services assisting them with finding long-term housing. DHS is additionally charged with providing temporary shelter to eligible families and individuals on the same day they apply (*id.*).

In order to comply with its obligations, DHS maintains an Open-Ended Requests for Proposal (“OERFP”) process, through which interested social services providers submit proposals to open shelters in New York City (Affidavit of Vincent Pullo at ¶ 4, NYCEF No. 47). In this system, prospective providers propose new shelters for available sites, which are evaluated and scored in accordance with the rules of the Procurement Policy Board (“PPB”) (*id.* at ¶ 5). Agency experts consider factors such as the need for the proposed shelter capacity at the proposed location, the viability of the building, the scope of the proposed services, the provider’s past experience, pricing, and other relevant factors (Affidavit of Melvin Browning at ¶ 20). Also considered are the Fair Share Criteria developed by the City Planning Commission and set forth in Appendix A to Title 62 of the Rules of the City of New York (“RCNY”) (*id.* at ¶ 36).

When a proposal is selected, DHS conducts vendor responsibility checks whereby the provider’s financial resources, technical qualifications, relevant experience, history of performance and compliance with applicable rules and regulations (Pullo Aff at ¶ 6). DHS simultaneously negotiates a contract with the provider (*id.* at ¶ 7).

When DHS decides to move forward with a proposal, a public hearing is held pursuant to City Charter § 326 (*id.* at ¶¶ 7, 19). PPB Rules § 2-11 requires notice of such hearing be

published in the City Record not less than ten days prior to the hearing (*id.* at ¶ 19). At the hearing, members of the public may make comments on the proposed contract and a record of the proceeding is kept by DHS (*id.* at ¶¶ 7-8). After public hearing, the contract is finalized and submitted to the New York City Office of the Comptroller for registration along with a representation as to whether the public hearing included any testimony or comments and that if so, they were considered (*id.* at ¶ 9). DHS additionally notifies communities at least thirty days prior to the scheduled opening of a new shelter (Browning Aff at ¶ 24).

Respondent Care for the Homeless (“CTFH”) is a not-for-profit corporation based in New York State. CTFH submitted a proposal to operate a Safe Haven Shelter (“SHS”) for unhoused individuals at a former hotel located at 91 East Broadway, New York, New York (“Hotel 91”), along with providing services such as crisis intervention, independent living skills, entitlement assistance, and other related services (*id.* at ¶ 26). DHS evaluated the proposal and found that the proposed shelter location met the relevant standard under the Fair Share Criteria (*id.* at 28; Answer, exhibit C, NYSCEF No. 51).

On October 7, 2021, DHS sent notification letters to elected officials whose districts include Hotel 91 as well as Community Board (“CB”) 3, whose boundaries encompass the site (Answer, exhibit A, NYSCEF No. 49). The notification letters contained the shelter’s proposed capacity, population, the service provider and anticipated opening date of Summer 2023 (*id.*). On November 4, 2021, DHS and CB 3’s Health and Human Services Committee attended a public information session and answered community questions (Browning Affidavit at ¶ 29). On November 5, 2021, DHS published notice of a public hearing on the proposal, (Answer, exhibit B, NYSCEF No. 50) which took place on November 16, 2021 (*id.*; Pullo Aff at ¶ 14).

The final Fair Share Report was sent on January 10, 2022 to the Mayor, the Manhattan Borough President, the Department of City Planning, and CB 3 (Browning Aff at ¶ 37). On January 22, 2022, CB 3 issued a resolution of acknowledgement and support for the proposed SHS (Answer, exhibit D, NYSCEF No. 52).

On February 11, 2022, another public information session was held at the request of a local community group called Concerned Citizens of East Broadway (Browning Aff at ¶ 30). DHS answered questions at the hearing and provided written responses to issues raised (Answer, exhibit E, NYSCEF No. 53). DHS met again with the group on June 16, 2022 (Browning Aff at ¶ 30).

On September 28, 2022, CFTH entered into a Human Services Contract (“Contract”) with DHS to operate the SHS at Hotel 91 (Verified Petition, exhibit A, NYSCEF No. 2). Preparations began at the site on or about January 3, 2023 (Browning Aff at ¶ 33).

Petitioners comprise individuals and other various stakeholders located in and around the Manhattan neighborhood known as Chinatown: petitioner Kai Ming Chen is a New York City resident who has lived in the vicinity of Hotel 91 for approximately fifteen years (Verified Petition at ¶ 6). Petitioner Two Pike, LLC is the owner of real property located at 100 East Broadway, across the street from Hotel 91 (*id.* at ¶ 7). Petitioner United Fujianese Association of America, Inc. is a fraternal organization which organizes social and cultural events for seniors in the Chinatown neighborhood and has been active on East Broadway for thirty-two years (*id.* at ¶ 8). On or about September 29, 2022, petitioners requested documentation related to the Hotel 91 proposal pursuant to the Freedom of Information Law (“FOIL”) (*id.* at ¶ 26). Within the response received on December 29, 2022 were copies of the Contract and the Fair Share Report (*id.* at ¶ 27).

Petitioners commenced the instant action by order to show cause, seeking first a preliminary injunction on the renovation and opening of Hotel 91 and ultimately an order annulling the DHS determination permitting its opening. Oral argument on the application for a preliminary injunction was taken by the Court on March 6, 2023 and preliminary relief was denied in an Interim Order on March 24, 2023. Petitioners represented that they wished to move for discovery and motion practice on that issue was conducted on the schedule set forth in a stipulation executed by the parties.

Discussion

Discovery

CPLR § 408 provides that discovery is permissible in a special proceeding only by leave of the Court. Due to summary nature of special proceedings, “[d]iscovery is disfavored . . . and is permitted only on leave of court upon a showing of ‘ample need’” (*Matter of People of the State of New York v Northern Leasing Sys., Inc.*, 193 AD3d 67, 74 [1st Dept 2021]). A court determining a motion for discovery in a special proceeding has “considerable discretion” to deny or grant disclosure or define its scope (*Matter of Johnson v Annucci*, 208 AD3d 1403, 1405 [3d Dept 2022]).

Petitioners seek disclosure of the following material:

- a. All policies and procedures which the City respondents are required to follow relating to community notification prior to selecting a site for a homeless shelter, including notices prior to any hearing and required meeting procedures;
- b. All documents and communications relating to required notification to the community, including the requirement that: (1) the City notify community leaders

- prior to selecting a site; and (2) notify the public regarding the official public hearing date;
- c. Documents supporting the City respondents' position that CB 3 supported the opening of the shelter at Hotel 91 and that CB 3 followed the required public meeting procedures;
 - d. Documents and communications relating to the townhall meeting to discuss Hotel 91, which was petitioners aver was scheduled for November 16, 2021 but actually took place on February 11, 2022 after the official public hearing date;
 - e. All policies and procedures which the City respondents follow when drafting a Fair Share Report; and
 - f. All drafts and communication relating to the Fair Share Report prepared relating to Hotel 91.

(Affirmation of Laurence Lebowitz at ¶ 4, NYSCEF No. 70). Petitioner claim that the items sought are material and necessary to this proceeding because they will demonstrate that the respondents failed to follow their own contracting and notification procedures before approving Hotel 91.

Respondents oppose disclosure, contending that the material sought has largely been provided to petitioners, attached as exhibits in this proceeding, or are publicly available. Respondents further argue that petitioners have not identified factual deficiencies in the record such that the material sought would aid the Court in its determination of this petition.

The Court agrees with respondents that the material sought by petitioners are largely available in the record of this proceeding or publicly. For first and last categories of items sought, the Court observes that the policies and procedures required of the City respondents are

delineated in various provisions of the New York City Administrative Code and the RCNY and available to the public online. Documents relating to the statements made and positions taken by CB 3 have been annexed to respondents' opposition papers (*see* NYSCEF Nos. 52 and 56). Respondents additionally have annexed a copy of the notice for the November 16, 2021 public hearing and aver that no members of the public attended (*see* NYSCEF No. 50). The Court notes that notwithstanding the lack of the public participation in that hearing, it is undisputed that additional public information sessions were conducted where DHS representatives and others were present to address issues raised by the public.

As the material sought by petitioners is either publicly available or has been disclosed by respondents, and as such is already available for consideration by this Court in its determination of the merits of this petition, petitioners' motion for discovery must be denied.

The Article 78 Petition

In the context of an Article 78 proceeding, the court's function is to evaluate whether, upon the facts before an administrative agency, that agency's determination had a rational basis in the record or was arbitrary and capricious (CPLR § 7803[3]; *see, e.g. Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]; *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 [1st Dept 1996]). The administrative determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of . . . the facts" (*see Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 [1983], citing *Matter of Pell, supra* at 231). A reviewing court may not substitute its own judgment for that of the agency making the determination (*see Partnership 92 LP v New York State Div. of Hous. & Community Renewal*, 46 AD3d 425 [1st Dept 2007]). If the administrative

determination has a rational basis, there can be no judicial interference (*Matter of Pell, supra* at 231-232).

Where a court is reviewing an agency determination in which “the judgment of the agency involves factual evaluations in the area of the agency’s expertise and is supported by the record, such judgment must be accorded great weight and judicial deference” (*Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]). The reviewing court cannot evaluate anew the evidence before the agency “since the duty of the weighing the evidence, interpreting relevant statutes and making the determination rests solely in the expertise of the agency” (*P & C Giampilis Constr. Corp. v Diamond*, 210 AD2d 64, 65 [1st Dept]).

Petitioners contend that the DHS decision to open the shelter at Hotel 91 is arbitrary, capricious, and an abuse of discretion. Specifically, petitioners contend that respondents failed to follow the proper public engagement protocol by neglecting to consult all Community Boards whose boundaries include portions of the neighborhood broadly known as Chinatown. Petitioners also claim that DHS’s Fair Share Report excluded certain facilities and detention centers, which led to an inaccurate perception of the services available in the area of Hotel 91.

City respondents argue that the public engagement protocols set forth in DHS policies were satisfied, including notice requirements. City respondents further contend that the factors analyzed and incorporated into the Hotel 91 Fair Share Report were those explicitly set forth in Title 62 of the RCNY, and therefore the conclusions therein were not arbitrary and capricious and had a rational basis in fact and law.

The Court finds that petitioners have failed to establish that respondents’ decision to approve the SHS shelter at Hotel 91 was arbitrary, capricious, an abuse of discretion, or that it lacked rational basis.

First, respondents' notification and public engagement activity in this instance were not improper. New York City Administrative Code § 21-324 directs DHS to develop procedures for notifying communities of proposed new facilities, including notifications to "elected officials and the community board for the district in which the proposed shelter is to be sited" (NYC Admin Code § 21-234[a]). The Code also provides that DHS shall conduct at least one public information session in the community district in which the proposed shelter is to be sited (NYC Admin Code § 21-234[b]).

It is undisputed that DHS sent notification letters to all elected officials and CB 3 regarding the proposed shelter, that notice of a public hearing was posted in the City Record and that the hearing was held, and that additional information sessions were conducted at the request of interested parties. To the extent that petitioners contend that Community Boards other than CB 3 should have been involved in the public comment process, the Court observes that there is no requirement in the Administrative Code, the RCNY, or the PPB Rules that DHS extend the sphere of involvement to other CBs notwithstanding how other entities may define the bounds of certain neighborhoods. Indeed, what constitutes a "neighborhood" itself can vary as time passes and even longtime residents often dispute where one neighborhood ends and one begins. In this context, the Court cannot find that DHS' compliance with the letter of the Administrative Code was arbitrary, capricious, lacked rational basis or was an abuse of discretion.

Second, respondents were not improper in the preparation of the Hotel 91 Fair Share Report. The relevant factors to be considered in a Fair Share analysis are set forth in Appendix A to Title 62 of the RCNY and were developed by the City Planning Commission through the Department of City Planning pursuant to Section 203 of the City Charter. The Fair Share Criteria are not hard and fast rules, but rather "merely criteria intended to guide the siting of city

facilities” (62 RCNY Appendix A, Preface). The discretionary nature of this analysis is indicated by that stated goal that a siting determination “depend on balancing a number of factors, such as community needs for services, efficient and cost effective delivery of those services, effects on community stability and revitalization, and broad geographic distribution of facilities” (*id.*). A court reviewing an agency’s application of the Fair Share Criteria is therefore limited to ensuring that the agency substantially complied with the Criteria (*Turtle Bay Ass’n v Dinkins*, 207 AD2d 670 [1st Dept 1994]).

Here, the Court finds that the Fair Share Analysis conducted by respondents substantially complied with the Fair Share Criteria. In its Fair Share Report, respondents included the number of facilities serving the same or similar functions within a 400-foot radius, a half-mile radius, and within the same Community District as Hotel 91. The exclusion of the detention centers is appropriate, as a facility that exists for the purpose of forcibly incarcerating individuals charged with or convicted of crimes cannot be said to serve the same function as an SHS. The other facilities that petitioners claim should have been included were either outside the half-mile radius examined by respondents, not in operation at the time the analysis was conducted, or were actually included in the Fair Share Report. Notwithstanding, the omission of a handful of facilities that may provide some of the same services is in itself not sufficient to find that respondents did not substantially comply with the Fair Share Criteria. As such, the Court finds that respondents’ application of the Criteria was not arbitrary, capricious, lacking rational basis or an abuse of discretion.

The Court has considered petitioners’ remaining contentions and finds them to be without merit.

Conclusion


Based on the foregoing, the Court finds that petitioners have failed to demonstrate that there is ample need for disclosure in this special proceeding, and therefore their motion for discovery is denied. On consideration of the papers submitted, the Court further finds that petitioners have failed to demonstrate that the DHS decision to site a shelter at Hotel 91 was arbitrary and capricious or that it lacked rational basis. Accordingly, it is hereby

ORDERED that petitioner’s motion for discovery is denied; and it is further

ORDERED and ADJUDGED that the petition is denied and this proceeding is dismissed.

This constitutes the decision and order of the Court.

01/24/2023
DATE


SHAHABUDDEN ABID ALLY, A.J.S.C.

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