SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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SL GREEN REALTY CORP.,

Petitioner,

- v -

NEW YORK CITY WATER BOARD, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Respondent.

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INDEX NO. 156322/2019

MOTION DATE 03/04/2024[1]

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for Article 78.

The petition to annul a determination by respondents concerning water and sewer charges is denied.

Background

Petitioner owns a property on Third Avenue in Manhattan. It contends that respondents refused to refund petitioner for water and sewer charges that accrued in connection with two cooling tower meters during separate periods in 2017 (one meter was for May 7, 2017 to August 23, 2017 while the period for the other meter ran from January 30, 2017 to August 23, 2017).

Petitioner explains that a cooling tower is part of a recirculated water system and is used to cool water by putting air and water into direct contact so the water evaporates into the atmosphere. Petitioner argues that at least 85% of the water which enters the cooling tower does

[1] The Court recognizes that the instant proceeding was scheduled for oral argument before a different judge back in 2020 (it is unclear from the docket whether or not that oral argument took place). Although this proceeding was only assigned to this part on March 4, 2024, the Court nevertheless apologizes for this lengthy delay.

not discharge into the wastewater (aka sewer) system. It insists that respondents are well aware of this statistic and that respondents provide a "wastewater allowance" of 85% (see NYSCEF Doc. No. 3 at 15 of 46 [Water and Wastewater Rate Schedule]).

Petitioner contends that on January 8, 2018, an entity it hired to audit their water and sewer bills ("UtiliSave") sent a letter to respondents demanding that petitioner receive the appropriate credits for the cooling tower meters (NYSCEF Doc. No. 5 at 2 of 23).[2] In this letter, UtiliSave asserted that "the cooling towers were fully metered to the satisfaction of DEP. This fact is confirmed by DEP's inspection and recently granted sewer allowances for the cooling tower meters in question. We respectfully request that DEP reinstate the credits from May 7, 2017 to August 23, 2017 for meter V84005438, and reinstate the credits from January 30, 2017 to August 23, 2017 for meter 080044785. Please also note, that DEP applied an erroneous multiplier to meter 080044785 of 0.010 instead of 1,000. (High-quality image is enclosed)" (*id.*).

On April 19, 2018, respondents insisted that the multiplier of .010 for meter 080044785 was correct and denied petitioner's request for a retroactive allowance for their cooling tower (*id.* at 4 of 23). Respondents observed that "A property owner may be considered for a Cooling Tower Sewer Allowance upon receipt by DEP of a completed Application for Evaporative Cooling Tower Sewer Allowance, a determination the cooling tower meter was installed to the satisfaction of DEP and the applicant is eligible for a Cooling Tower Sewer Allowance. Also, the property owner must reapply for a renewal of the allowance by submitting an application before the expiration of the two-year period. A complete application was received on August 23, 2017 for each meter, and a Cooling Tower Sewer Allowance was granted as of August 23. 2017 (*id.*).

[2] The Court will reference page numbers for this exhibit as it appears all of the separate communications between the parties were uploaded as a single, 23-page NYSCEF Document.

UtiliSave then appealed that determination in a letter dated May 1, 2018 in which it complained that the wastewater allowance was only applied prospectively and insisted that the multiplier was incorrect (*id*. at 7 of 23). It also appears that UtiliSave sent a similar appeal dated May 31, 2018 concerning the same subject matter (*id*. at 12 of 23).

In October 2018, respondents adhered to its initial determination and noted that "your request for retroactive Cooling Tower Sewer Allowance is denied since a renewal application was not submitted prior to the application expiring. The renewal application was received on August 23, 2017 for each meter. A Cooling Tower Sewer Allowance was granted as of August 23, 2017 for meters V84005438 and 080044785" (*id*. at 19 of 23). Petitioner then appealed on October 30, 2018 and respondents once again denied that request on February 27, 2019 (*id*. at 20-23).

Petitioner contends that respondents' final determination was irrational based on the governing statutes. It argues that respondents are required to bill for the actual use of the sewer system and that petitioner should not be required to pay for charges it did not incur. Petitioner argues that respondents have created a billing practice which has no relation to the amount of sewage being discharged into the system. It emphasizes that where a property has a cooling tower, up to 99% of water consumed by the tower evaporates so that almost none of the discharged water goes back into the sewage system.

In opposition, respondents argue that the rate schedule only permits prospective application of cooling tower credits. They observe that the Water Board establishes rates and charges for the use of water supplied by the City and the discharge of water into the sewer system. Respondents argue that an allowance for wastewater is only permitted where the water use is metered and an application is submitting requesting such an allowance. They observe that

the meter number ending 438 was installed in 2001 and received cooling tower credits from October 23, 2001 to May 7, 2017. Respondents maintain that the meter number ending 785 was installed on January 30, 2017 but that respondents did not receive an application for cooling tower credits until August 23, 2017.

Respondents insist that the wastewater allowance is based upon compliance with certain obligations that includes monitoring, sampling, and other steps to ascertain the actual charges. They explain that the application process ensures that the system is properly metered, required licenses have been obtained and that there are no delinquent water charges. Respondents conclude that petitioner simply failed to submit an application and so it was charged in accordance with the rate schedule.

In reply, petitioner contends that respondents are improperly seeking to expand their authority by permitting them to collect greater revenue than is authorized under the applicable statutory scheme. It maintains that respondents are only permitted to charge for a customer's actual use of the sewer system. Petitioner argues that respondents have a contractual obligation to perform an accurate calculation of revenues.

Discussion

In an Article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*id.*). "If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*id.*). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of*

Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

"The Water and Wastewater Rate Schedule promulgated by the Water Board, and administered by respondent New York City Department of Environmental Protection (DEP), neither violates a duty enjoined on respondents by law nor was promulgated in excess of jurisdiction, and instead complies with applicable law. The Rate Schedule generally charges for use of the sewer system based on consumption of water (General Municipal Law § 451[1]; see Public Authorities Law § 1045–j[1] [charges appropriate for "services ... made available by( ) the sewer system"]; Administrative Code of City of N.Y. § 24–514[a] [same, where sewer system is "used or useful"]), and allows for credits where DEP can estimate, 'as far as practicable,' the sewage to be discharged (Administrative Code of City of N.Y. § 24–514[b][5])" (*Milford Mgt. v New York City Water Bd.*, 179 AD3d 432, 433, 118 NYS3d 70 [1st Dept 2020]).

In *Milford Mgt.*, the Appellate Division, First Department found that "Nothing in the state or city legislative provisions identified precludes respondents from requiring customers to apply for the credits or from providing credits only prospectively. The regulations are both reasonable and practical given the statutory requirement to ensure that the system is financially self-sufficient" (*id*.). The Court concluded that "the determination that petitioner was not entitled to retroactive credits. . . before it filed an application . . . was supported by a rational basis in the record" (*id*).

Similarly, here, the Court finds that respondents were permitted to deny petitioner's request for retroactive credits. Petitioner admits it did not submit a renewal application for one of the meters and did not submit an application at all for the other meter until August 23, 2017—the very same day they started receiving the wastewater allowance. Respondents rationally

determined that petitioner was not eligible for the wastewater allowance until they complied with the application process.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements.

3/5/2024
DATE

ARLENE P. BLUTH, 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