SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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FALBROS REALTY CORP.,

Petitioner,

- v -

THE CITY OF NEW YORK, CITY PLANNING COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF CITY PLANNING OF THE CITY OF NEW YORK, DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK

Respondent.

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INDEX NO. 158676/2021

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- 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for ARTICLE 78 .

Respondents' cross-motion to dismiss is granted.

Background

This proceeding concerns a planned development located in Brooklyn on the former site of an elevated railway. Petitioner observes that a portion of this site was rezoned to permit construction of housing in this area, which was a railroad right-of-way although the elevated structure was demolished in 1985. It observes respondent the City Planning Commission ("CPC") has, in recent years, not required developers to apply for a special permit under zoning rules where it is clear that the former transit area has been abandoned.

[1] The Court recognizes that this proceeding was scheduled for oral argument on numerous occasions in late 2021 and 2022 before the judge initially assigned to handle this proceeding, although it is unclear whether oral argument took place. This petition was assigned to this part on March 4, 2024; nevertheless, on behalf of the court system, the Court apologizes for the lengthy delay in resolving this case.

Petitioner maintains that it is clearly respondents' policy that a special permit is not required in these types of areas and points to statements made in 2018 by an attorney for the city in an action in Kings County (Index Number 508742/2018). It cites to other examples of projects where the special permit requirement was waived.

Petitioner contends that in 2019, a prospective purchaser reached out to CPC to inquire whether a special permit was required for the subject premises. It argues that over the next year, CPC scheduled various meetings and insisted it was considering the matter before eventually deciding that a special permit was required. Petitioner focuses on a letter from an attorney for the Department of City Planning (another respondent here) in which she noted that there was a previous special permit granted for this site in 1996 (NYSCEF Doc. No. 10 at 2). That permit allowed the storage of building supplies and it was still considered to be in effect (*id*.).

DPC's attorney stressed that a special permit is required under the relevant zoning regulations as the railroad right-of-way was open after the relevant date (*id*.). While acknowledging that the CPC has approved other construction in the area, the attorney concluded that "is not a factor under the zoning text for the applicability of the special permit, and I believe the special permit authorizing that construction has lapsed and could not now be modified. Absent a text amendment, ZR Section 74-681, as interpreted with the legislative history, would require a special permit for development of the Site, as was determined in connection with the prior special permits for the Site" (*id*.).

Petitioner argues that the purpose of this zoning regulation only pertains to properties that are located in active transit areas, something that is not the case here. It insists that it continued to discuss the issue with respondents and received an email from the same attorney in which she

noted that respondents had a prior position in 2018 but that they were permitted to change the policy (NYSCEF Doc. No. 12).

Respondents cross-move to dismiss on the ground that this proceeding is not ripe for an Article 78 determination. They observe that simply confirming that a special permit would be required in order to develop the subject premises is not a final determination. Respondents observe that this letter has no effect on petitioner; they insist that petitioner would have to first seek a construction permit from DOB and that DOB would have to deny that request on the ground that a special permit was required. They also argue that the instant challenge is untimely as the determination from respondents' attorney is from March 5, 2021.

Respondents insist that petitioner's request for reconsideration did not extend the limitations period especially where, as here, respondents simply adhered to their final determination.

In opposition, petitioner argues that respondents' cross-motion contains two contradictory positions: one that the proceeding is not ripe and, second, that it is untimely. It insists that the instant dispute is ripe because of petitioner's inability to develop the instant site. Petitioner also claims that this proceeding is timely as the March 5, 2021 did not address the reasons for respondents change in policy. It argues it only discovered the alleged justifications in the August 2019 follow up email, which makes this proceeding timely.

In reply, respondents emphasize that petitioner has not sought or been denied a construction permit for the subject property by DOB. They point out that petitioner seeks declaratory relief, which is not available where there would be no concrete effect. Respondents also argue that the instant petition is not timely.

Discussion

The first issue for this Court to consider is whether the instant dispute is ripe for judicial review. "An agency action is final when the decisionmaker arrives at a definitive position on the issue that inflicts an actual, concrete injury. The position taken by an agency is not definitive and the injury is not actual or concrete if the injury purportedly inflicted by the agency could be prevented, significantly ameliorated, or rendered moot by further administrative action or by steps available to the complaining party" (*Matter of Patel v Bd. of Trustees of Inc. Vil. of Muttontown*, 115 AD3d 862, 864, 982 NYS2d 142 [2d Dept 2014] [internal quotations and citations omitted]).

The Court finds that this administrative determination is not ripe for review because petitioner has not suffered any actual or concrete injury. In this Court's view, petitioner merely asked for an advisory opinion about whether a special permit would be required in order to develop the instant property. Respondents answered in the affirmative, but that decision was not issued in connection with any official steps taken by petitioner. For instance, it was not made in connection with a litigation or an agency process. As respondents point out, petitioner has not been denied any construction permits on the ground that it lacks a special permit. That is, as described above, any injury could easily be ameliorated or even changed during the permit application process. Certainly, the issue of whether a special permit would be required would be a key issue should DOB decide that one was required. But that is merely a possibility.

The Court recognizes that petitioner, understandably, wanted to find out respondents' position prior to trying to get a construction permit. But it cannot seek the instant relief before it actually applies for a construction permit.

The Court observes that the ripeness issue compels the Court to grant the cross-motion to dismiss. However, had the Court reached the timeliness issue, the Court would have found the petition to be timely. Although, the August 2021 email purports to simply adhere to the March 2021 determination, the fact is that this rationale raises new justifications for finding that a special permit is required (NYSCEF Doc. No. 12). Specifically, respondents addressed the fact that it had another position at a prior time but has now changed that position (*id*.). This issue was not addressed in the March 2021 letter.

In this way, the Court views this as analogous to a motion to reargue in that decisions adhering to a prior decision are nonetheless appealable if the merits are considered (*e.g., Jones v City of New York*, 146 AD3d 690, 690 46 NYS3d 57 [1st Dept 2017]). That is, because respondents delved into the merits, raised new issues, and did not simply state they adhered to their prior determination, the Court find that this petition was timely.

Summary

The Court observes that petitioner is rightfully frustrated that respondents seem to have changed their prior position about whether special permits are required in this type of development project. But this issue is not ripe given that petitioner has not actually applied for, or been denied, a construction permit based on their failure to obtain a special permit.

And the Court questions whether petitioner's argument that respondents are, essentially, estopped from enforcing the applicable zoning regulation is meritorious. "We have held many times that estoppel is not available against a governmental agency in the exercise of its governmental functions" (*Matter of Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33, 475 NYS2d 826 [1984]). This is understandable because over time, new people are elected and policies may change. And so even if this were ripe and petitioner challenged the special permit

requirement, it is unclear how this Court could grant petitioner declaratory relief requiring respondents to ignore the applicable zoning regulation because, years ago, they had a certain policy preference that has since changed.

Accordingly, it is hereby

ORDERED that respondents' cross-motion to dismiss the petition is granted; and it is further

ADJUDGED that the petition is denied, this proceeding is dismissed without costs or disbursements upon presentation of proper papers therefor.

3/6/2024
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE