Westlaw

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

New York Law Journal
Volume 236
Copyright 2006 ALM Properties, Inc. All rights reserved.
Wednesday, November 29, 2006
Decision of Interest

HPD USES PROPER DISCRETION TO DENY MITCHELL-LAMA BUYOUT BY HOUSING COMPANY

New York County Supreme Court

Justice Lippmann

A LIMITED-PROFIT housing company was developed under Article II of the Private Housing Finance Law (Mitchell-Lama Law) to provide housing for low- and moderate-income persons and families. Petitioners are now seeking to 'buy out' of the Mitchell-Lama program which would result in an increase of the rent at the housing company to market value. Respondent, New York City Department of Housing Preservation and Development ('HPD') denied approval. The court noted that the issue before it was whether HPD's denial was arbitrary and capricious. Looking to the underlying restrictive covenant, the court found that it would be unfair and inappropriate to permit high rents for what was always planned and intended as a project for middle-income housing, especially in view of the beneficial financing and tax exemptions obtained by petitioners. The court concluded that it was a rational and proper exercise of discretion for HPD to deny approval.

MATTER OF TIVOLI STOCK LLC v. NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, 108052/06 --Counsel for Petitioner Tivoli Stock LLC and Tivoli BI LP:

Stacey M. Ashby

Meister Seelig & Fein, LLP

Counsel for Defendant New York City Department

of Housing Preservation and Development:

Mark Muscheinheim, Esq.

Corp. Counsel

Copyright © 2009 The New York Law Pub. Co.

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

Counsel for Tivoli Towers Tenants Association

Seth A. Miller, Esq.

Collins, Dobkin & Miller, LLP

Counsel for Bklyn Borough President (Amici Curiae);

Frederick C. Arriaga, Esq.

In this CPLR Article 78 proceeding, petitioners, Tivoli Stock LLC and Tivoli BI LP (collectively, Tivoli), seek a mandatory injunction directing respondent, New York City Department of Housing Preservation and Development (HPD) to issue: a Letter of No Objection in response to petitioner's April 27, 20005 written request (exhibit E to the verified petition) to dissolve Tivoli Towers Housing Co., Inc. (Tivoli Housing) or reconstitute Tivoli Housing pursuant to Private Housing Finance Law (PHFL) §35; an order, pursuant to CPLR 408 and 3120 (4), authorizing petitioners to serve on respondent a subpoena duces tecum for documents necessary to the prosecution of this action; and an order awarding petitioners costs and disbursements of this proceeding.

Tivoli is the contract vendee under a contract to purchase the stock of a limited-profit housing company which owns nominal title to the land and apartment building located at 49-57 Crown Street, Brooklyn, New York, commonly known as Tivoli Towers, as well as the beneficial ownership of the building (verified petition, §2). Tivoli Towers was developed under article II of the PHFL (Mitchell-Lama Law) to provide housing for low- and moderate-income persons and families. The Mitchell-Lama Law is a government program for encouraging the private development of low- and middle-income housing. The program encourages such housing by offering state and municipal assistance to developers in the form of long-term, low-interest government mortgage loans and real estate tax exemptions. In return for these financial benefits, developers agree to regulations concerning rent, profit, disposition of property and tenant selection (see PHFL §§20-23, 28, 31, 33, see generally 9 NYCRR 1700.1 et seq.). Absent some specific restrictive covenant, a limited-profit housing company, aided by a loan made after May 1, 1959, may 'voluntarily dissolve,' e.g., become deregulated. Under PHFL §35 (2), the only conditions imposed on a housing company for dissolution without the consent of the supervising agency, are that it pay the remaining mortgage loan principal and interest, as well as all expenses incurred in the dissolution, and that at least 20 years have elapsed since the occupancy date.

In 1969, the Board of Estimate of the City of New York approved the application of Tivoli Housing for a proposed limited-profit rental housing project under the PHFL. The Plan and Project upon which the Board of Estimate based its approval stated that the development would be for 'middle income families...it is intended

Copyright © 2009 The New York Law Pub. Co.

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

that the improvements to be constructed on the development site will be financed by a mortgage issued by the City of New York under Limited-Profit Housing Companies Law (Article II of the PHFL) ' (answer, exhibit A). The 1972 deed from the City conveying the parcels upon which Tivoli Towers was to be built, contains a restrictive covenant 'to devote the land to the uses specified in the plan for the area approved by the Board of Estimate for a period of 50 years' and requires that any change in this use be approved by the City (Restrictive Covenant) (answer, exhibit E).

Tivoli Housing, the limited-profit housing company organized under the Mitchell-Lama Law, and petitioners Tivoli Stock LLC and Tivoli BI LP, now seek to accomplish a 'buy out' of the Mitchell-Lama Program, relying on the provisions in the Mitchell-Lama Law that allow a buy out after 20 years. The buy out would result in the rent at Tivoli Towers increasing to market value.

HPD argues that the issue before the court is not whether Tivoli Housing has an absolute right to dissolve and effect a buy out of the Mitchell-Lama Program after 20 years, but whether or not the proposed buy out from the Mitchell-Lama Program is precluded by the housing company's independent obligation under the Restrictive Covenant, since the buy out would result in a change in use from the affordable housing contemplated by the Mitchell-Lama program, and the Plan and Project upon which the Board of Estimate based its approval. A change in use under the Restrictive Covenant requires HPD'S approval, which was denied. Ultimately, however, the issue before the court is whether HPD'S denial of what HPD characterizes as a change in use, is arbitrary or capricious.

Pursuant to PHFL §2 (15), the 'supervising agency' of housing companies in the City of New York is HPD. PHFL §2 (20) defines a 'plan' under this statute as follows: 'A plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a substandard and insanitary area or areas and for recreational and other facilities incidental or appurtenant thereto to effectuate the purposes of article eighteen of the constitution.'

Section 35 (2) of the PHFL provides for the voluntary dissolution of a limited-profit housing company as follows:

2. A company aided by a loan made after May first, nineteen hundred fifty-nine, may voluntarily be dissolved, without the consent of the commissioner or of the supervising agency, as the case may be, not less than twenty years after the occupancy date upon the payment in full of the remaining balance of principal and interest due and unpaid upon the mortgage or mortgages and of any and all expenses incurred in effecting such voluntary dissolution.

3....After such dissolution and conveyance, or such reconstitution, the provisions of this article shall become and be inapplicable to any such project and its

Copyright © 2009 The New York Law Pub. Co.

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

owner or owners and any tax exemption granted with respect to such project pursuant to section thirty-three hereof shall cease and terminate.

Pursuant to the New York City Charter §1802 (6) (d), the commissioner of HPD represents the City in carrying out the provisions of, inter alia, the Mitchell-Lama Law, and acts as and exercises the powers, rights and duties that the Mitchell-Lama Law vests in the 'supervising agency.' The rules promulgated by HPD in carrying out its duties and obligations as the 'supervising agency' under the Mitchell-Lama Law are set forth in Chapter 3 of Title 28 of the Rules of the City of New York (RCNY). Section 3-14 (i) of Title 28 of the RCNY is entitled 'Voluntary Dissolution,' and includes language quoted from PHFL §35.

The facts are as follows: On or about July 14, 1969, the Commissioner of HPD forwarded to the Chair of the City Planning Commission the Plan and Project entitled 'Tivoli Towers A Limited Profit Housing Project Supervised by Housing and Development Administration of the City of New York' (Plan and Project). The sponsor of the project was Irving Lentnek, who arranged to have Tivoli Towers Co. Inc. organized pursuant to the provisions of the Limited-Profit Housing Companies Law (answer, exhibit C). The Development Plan Summary section describes the proposed limited-profit rental housing project as one 'planned for the Crown Heights Community, an area formerly considered one of the finest in the City of New York and now suffering the throes of typical urban blight in its transitory state.' One of the purposes of the project was to 'help dam the blight which has consumed this area of our City by enabling young families, the backbone of any community to find moderately priced modern well equipped housing in an area most suited for such purposes' (answer, exhibit A).

The Plan and Project acknowledges that the project would be for 'middle income families' and that in order for the project to be within the 'financial means of middle class families...it is intended that the improvements to be constructed on the development site will be financed by a mortgage issued by the City of New York under the Limited-Profit Housing Companies Law (Article II of the Private Housing Financing Law).' The Plan and Project describes the 'Project Site,' in relevant part, as follows: 'The development site will be devoted entirely to residential use (except, of course, the required parking facilities), consisting generally of the aforesaid residential apartment building, appropriate parking, swimming pool, recreational areas, and landscaped park areas. There will be no commercial space' (answer, exhibit A).

On or about August 10, 1972, the City of New York deeded two of the three lots underlying the apartment building to Tivoli Housing, a New York limited-profit housing company. By acceptance of this deed, Tivoli Housing, for itself, its successors and assigns, covenanted as follows:

Copyright © 2009 The New York Law Pub. Co.

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

A. That the grantee, its successors and assigns will and shall devote the land to the uses specified in the plan for the area approved by the Board of Estimate, for the Tivoli Towers Housing Project. Said covenant is to run for a period of 50 years from the completion of the clearance, replanning and reconstruction and neighborhood rehabilitation of the area.

B. That for a period of 50 years from the completion of the clearance, replanning, reconstruction and neighborhood rehabilitation of the area, no change shall be made in the use of the land as specified in the plan without the consent of the State Commissioner of Housing and Community Renewal [i.e., the DHCR] and the Administrator of the New York City Housing and Development Administration

(order to show cause ¶20).

Thereafter, the Tivoli Towers project was constructed and a Certificate of Occupancy for the building was issued on October 18, 1974 (answer, exhibit F).

By letter dated April 20, 2005, Tivoli Housing applied to HPD for approval to transfer the stock of that limited-profit housing company to Tivoli Stock LLC, as well as approval to transfer the beneficial ownership of the Tivoli Towers housing project to Tivoli BI LP (answer, exhibit G). By letter dated July 26, 2005, HPD consented to this stock transfer (answer, exhibit H). On or about April 27, 2005, Tivoli Housing, Tivoli Stock LLC and Tivoli BI LP notified HPD of their intention, once the above described stock transfers and beneficial ownership interest transfers were effected, to prepay its mortgages and dissolve Tivoli Housing or reconstitute Tivoli Housing, pursuant to PHFL §35 (answer, exhibit I). Tivoli's April 27, 2005 notice explained that upon the dissolution or reconstitution of Tivoli Housing, Tivoli Towers would no longer by subject to the PHFL or HPD's jurisdiction.

In or about February 2006, HPD advised Tivoli's counsel that the tenants' association at Tivoli Towers had claimed that the Restrictive Covenant in the City deed prevented Tivoli from voluntarily withdrawing from the Mitchell-Lama program and prohibited Tivoli from exercising its right, pursuant to the PHFL, to bring Tivoli Towers out of the Mitchell-Lama program. Thereafter, HPD advised Tivoli's attorney that the decision of the New York Court of Appeals in Matter of Columbus Park Corp. v. Department of Hous. Preserv. & Dev. of City of N.Y., 80 NY2d 19 [1992], could prohibit Tivoli from dissolving or reconstituting Tivoli Housing. On April 11, 2006, petitioners were informed, at a meeting with HPD, that HPD would not be issuing a Letter of No Objection to Tivoli. Tivoli states that as a result of the City's refusal to issue a Letter of No Objection, Tivoli cannot obtain the financing that it needs to fund the acquisition.

In bringing this Article 78 proceeding, petitioners claim that the change from affordable housing to market value rents is not a change in use, pursuant to the

Copyright © 2009 The New York Law Pub. Co.

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

terms of the Restrictive Covenant and that, therefore, HPD's consent is not required. Petitioners contend that the Restrictive Covenant only requires residential use for 50 years, but not the affordable housing contemplated by the Mitchell-Lama Law and the Plan and Project for Tivoli Towers upon which the Board of Estimate based its approval.

The Plan and Project prepared and presented to the City of New York for Tivoli Towers sets forth, among other things, the proposed use of the project. The Plan and Project acknowledges that the project would be for 'middle income families' and that in order for the project to be within the 'financial means of middle class families...it is intended that the improvements to be constructed on the development site will be financed by a mortgage issued by the City of New York pursuant to the Limited-Profit Housing Companies Law (Article II of the Private Housing Financing Law' (answer, exhibit A). The developer also applied for certain subsidies available from the federal government, to 'enable middle class families to share the benefits of modern apartments at prices which would be prohibitive under conventional construction and financing costs.' In constructing this residential apartment building for these 'middle income' and 'middle class families,' the developer 'intend[ed] to join with the Government to arrest urban blight and the flow of productive, young families from the City' (answer, exhibit A).

Petitioners hinge their argument that the HPD should be compelled to issue a Letter of No Objection on the paragraph in the Development Plan Summary that states that the development site will be devoted 'entirely to residential use.' In reliance on this paragraph, petitioners argue that the only use of Tivoli Towers that must continue for 50 years under the terms of the Restrictive Covenant is a 'residential' use, and not affordable housing. This interpretation, however, would ignore the entire Plan and Project reviewed and approved by the Board of Estimate when it approved the Tivoli Towers affordable housing project, pursuant to the Mitchell-Lama Law.

The Restrictive Covenant in the deed to Tivoli Housing, by which the City conveyed the property on which Tivoli Towers was constructed, binds the grantee, its successors and assigns to 'devote the land to the uses specified in the plan for the area approved by the Board of Estimate...for a period of 50 years' (answer, exhibit E). The 'uses specified in the plan for the area approved by the Board of Estimate' are the uses in the Plan and Project, i.e., the construction of affordable housing.

The argument about the 'residential' use of the project made by petitioners was made by the petitioners in Matter of Columbus Park Corp. v. Department of Hous. Preserv. & Dev. of City of New York (80 NY2d 19 [1992]). There, '[t]he parties' essential disagreement is over the purpose and effect of the restrictive covenants, i.e., whether they restrict the owner to a general residential use of the

Copyright © 2009 The New York Law Pub. Co.

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

land or to a particular use of the land as Mitchell-Lama housing' (Matter of Columbus Park Corp. v. Department of Hous. Preserv. & Dev. of City of N.Y., 80 NY2d at 28). The Court of Appeals rejected the petitioner's argument in Matter of Columbus Park Corp., concluding that 'by the terms of the covenants in each case the owners, in exchange for substantial financial aid, agreed to further the purpose of the Mitchell-Lama program by providing affordable housing for the additional time period specified in their contracts' (Matter of Columbus Park Corp., 80 NY2d at 23).

In Matter of Columbus Park Corp., the limited-profit housing company applied for 'approval of the housing project and the associated land acquisition, mortgage financing and tax exemption. The application contained a detailed plan for the construction, financing and maintenance of the project as Mitchell-Lama housing...' (Matter of Columbus Park Corp., 80 NY2d at 26). The Court of Appeals acknowledged that the Board of Estimate 'resolutions approving the project and the deed provide that Bronx Park East agrees to 'devote the land to the uses specified in the plan for the area, approved by the Board of Estimate for Bronx Park East ...for a period of fifty (50) years'.... The plain meaning of this language shows that Bronx Park East agreed to use the land as provided in the Project Plan, i.e., for Mitchell-Lama housing [emphasis in original]' (Matter of Columbus Park Corp., 80 NY2d at 30). The Court rejected the argument that the uses specified in the plan for the area reference the City Master Plan and thus the covenant only restricted the use to 'residential.'

Although petitioners attempt to distinguish this case by arguing that '[i]n Bronx Park East, the plan never defined the use of the real property that was being incorporated into the project,' (petition, ¶45) the Court of Appeals found that the plan did so: 'The application contained a detailed plan for the construction, financing and maintenance of the project as Mitchell-Lama housing...' (Matter of Columbus Park Corp., 80 NY2d at 26). So too, in the instant case, and in identical language in the Restrictive Covenant, Tivoli Housing agreed to 'devote the land to the uses specified in the plan for the area approved by the Board of Estimate...for a period of 50 years' (answer, exhibit E). There is no other plan for the Tivoli Towers project approved by the Board of Estimate other than the Plan and Project and the affordable housing use described in that Plan and Project. As stated by the Court of Appeals '[o]nly the plan for the project itself is such a plan' (Matter of Columbus Park Corp., 80 NY2d at 30). Petitioners' improvident reliance on one paragraph to support their argument that Tivoli Towers is only restricted to residential use for 50 years, ignores the context in which the paragraph is found, i.e., in the Plan and Project for the affordable housing Tivoli Towers Mitchell-Lama project. It is apparent that the dissolution of the project and the conversion of the property to unregulated housing units will affect the use of the parcel. Petitioners' statutory rights must be read in conjunction with the contract between the parties. The statutory privilege of voluntary dissolution

Copyright © 2009 The New York Law Pub. Co.

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

does not exist in a vacuum. Petitioner is bound by the covenants contained in the deed, which reflect the spirit of the original plan. It would be unfair and inappropriate to permit high rents for what was always planned and intended as a project for middle-income housing, especially in view of the beneficial financing and tax exemptions obtained by petitioner. In view of the foregoing, it was a rational and proper exercise of discretion for HPD to decline to issue a Letter of No Objection.

To the extent that this court may review the determination of HPD not to consent to the change in use (although petitioners do not present their claim as based in certiorari review under Article 78, but, rather, mandamus) the court must consider whether the agency's determination had a rational basis in the record or whether it was 'arbitrary and capricious' (CPLR 7803; Matter of Colton v. Berman, 21 NY2d 322 [1967]). As expounded by the Court of Appeals: 'The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified...and whether the administrative action is without foundation in fact.'...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 School Dist. #1, 34 NY2d 222, 231 [1974]). The reviewing court does not examine the facts de novo to reach an independent determination. Rather, the reviewing court must defer to the administrative fact finder's assessment of the evidence (Matter of Colton v. Berman, 21 NY2d 322, supra. [1995]). Here, the Court finds that the determination of HPD not to consent to the change in use of Tivoli Towers from affordable housing to market rental housing, which would have resulted from the project leaving the Mitchell-Lama Program, should be upheld since HPD's determination is neither arbitrary nor capricious, nor without foundation of fact.

By seeking an order of mandamus directing HPD to 'issue a letter of no objection in connection with [petitioner's] plan to dissolve a Limited Profit Housing Company pursuant to 35 (2) of the Private Housing Finance Law... ' petitioners rely only on the provisions of the PHFL, which allow for voluntary dissolution of a limited-profit housing company 'not less than twenty years after the occupancy date...' and seek to ignore the additional and independent obligation set forth in the Restrictive Covenant in the deed, which requires that the use of the land approved by the Board of Estimate continue for 50 years and that HPD consent to any change in that approved use.

In any event, even if the terms of the Restrictive Covenant did not preclude the buy out from the Mitchell-Lama Program, an order of mandamus should not be issued.

CPLR 7803 provides in relevant part as follows:

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by

Copyright © 2009 The New York Law Pub. Co.

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

law....

Mandamus to compel the performance of such a duty lies only where the right to relief is clear and the duty sought to be compelled is the performance of an act required to be performed by law that involves no exercise of discretion (Matter of Hampton Hosp. & Med. Ctr. v. Moore, 52 NY2d 88, 96 [1981]). Nor is mandamus available to compel that a discretionary duty be performed in a particular way (Matter of Eastway Constr. Corp. v. Gliedman, 86 AD2d 575 [1st Dept 1982]. Here, there is no right to this relief because the Restrictive Covenant in the deed requires it to provide affordable housing under the Mitchell-Lama Program for longer than the 20-year statutory minimum, unless HPD consents to the change in use, which it has reasonably refused to do.

Petitioners argue that the terms of the Restrictive Covenant are void because 'it can never be known when the fifty years runs...,' since the phrase 'the completion of the clearance, replanning and reconstruction and neighborhood rehabilitation of the area' is patently vague (petition, ¶¶11, 39). On the contrary, the terms used in the Restrictive Covenant are terms used in the Private Housing Finance Law and are the terms agreed to by Tivoli Housing when it acquired the parcels and financed the project with the City's 50-year mortgage and 30-year tax exemption.

PHFL §2 (20), using almost identical language, defines a 'plan' as follows: 'A plan or undertaking for the clearance, replanning and reconstruction or rehabilitation of a substandard and insanitary area or areas and for recreational and other facilities incidental or appurtenant thereto to effectuate the purposes of article eighteen of the constitution.' Here, the 'plan' is the Plan and Project for Tivoli Towers approved by the Board of Estimate. Furthermore, almost identical language is used in the section of the PHFL which describes the approval process for state loans that apply to proposed Mitchell-Lama projects. It states in PHFL §26 (1) (d) that:

d) If the project is aided by a state loan, or a New York state housing finance agency loan, the commissioner shall also find that the project is in conformity with a plan or undertaking for providing low rent housing facilities for persons of low income and for the clearance, replanning, reconstruction or rehabilitation of a substandard and insanitary area or area, and for other facilities incidental or appurtenant thereto as may be approved by the commissioner.

Moreover, insofar as 'area' is a defined term in the PHFL, the Restrictive Covenant is not vague by virtue of the use of the word 'area,' as petitioners argue. The 'area' referenced in the Restrictive Covenant is the substandard area conveyed to Tivoli Housing by the deed.

Based on the language used in the Restrictive Covenant, which is the same language used in the PHFL, the Restrictive Covenant starts to run upon the completion

Copyright © 2009 The New York Law Pub. Co.

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

of the Tivoli Towers apartment project. In other words, when the project was fit to be occupied as affordable housing, i.e., upon the issuance of the Certificate of Occupancy for the apartment building. To now suggest that the terms of the Restrictive Covenant are vague and should be stricken, almost 30 years after the deal was struck in exchange for generous municipal financing, tax exemptions and a sale price that was a fraction of the assessed value of the property, is disingenuous.

Petitioners also argue that the Restrictive Covenant violates the Rule Against Perpetuities because it 'does not define a definite period from which the fifty (50) years starts...' (petition ¶40). The Rule Against Perpetuities, states, inter alia, that: 'No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult' (EPTL §9-1.1 [b]). Petitioners offer no legal support for their assumption that a Restrictive Covenant is an 'estate in property.' Unless the Restrictive Covenant is an 'estate in property,' the Rule Against Perpetuities is inapplicable. Thus, the Restrictive Covenant in the Deed does not violate the Rule Against Perpetuities and petitioners' challenge on these grounds fails.

Petitioners' argument that the fact that HPD has issued Letters of No Objection to some Mitchell-Lama buildings with similar restrictive covenants, but has not issued a Letter of No Objection to petitioners or to Tivoli Housing signifies that HPD is selectively enforcing its regulations, is unavailing. 'The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.... But a discriminatory purpose is not presumed...; there mu[ ]st be a showing of 'clear and intentional discrimination'' (Snowden v. Hughes, 321 US 1, 8 [1944]).

In Matter of 303 West 42nd St. Corp. v. Klein (46 NY 686, 693 [1979]), the Court of Appeals expounded:

[the right to equal protection] forbids a public authority from applying or enforcing an admittedly valid law 'with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances'...To invoke the right successfully, however, both the 'unequal hand' and the 'evil eye' requirements must be proven -- to wit, there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary classification.

Copyright © 2009 The New York Law Pub. Co.

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

Petitioners do not allege either an 'unequal hand' or an 'evil eye.' Indeed, the petition fails to articulate the suspect classification into which either petitioners or Tivoli Housing falls, which arbitrarily singles them out from other Mitchell-Lama housing companies. Even if petitioners were able to show some difference between HPD's treatment of petitioners or Tivoli Housing and those of other similarly situated limited-profit housing companies, that would not constitute a violation of equal protection without the showing of an impermissible basis for that differentiation.

As previously stated, before HPD can issue a Letter of No Objection to the buy out of Tiovli Towers from the Mitchell-Lama Program, HPD must consent to the change in use from affordable housing to the market value rents that will result. The terms of the Restrictive Covenant require this consent. Here, HPD will not consent to this change in use. Morever, even if HPD were to consent to the change in use, all of the requirements of 28 RCNY §3-14 (i) (1) (Voluntary Dissolution) would have to be met before HPD could issue a Letter of No Objection. All of these requirements have concededly not been met. Nor do petitioners allege that this 'discrimination' in failing to issue a Letter of No Objection is motivated by a constitutionally impermissible standard. For all of these reasons, petitioners' attempt to have the court issue an order of mandamus directing HPD to issue a Letter of No Objection must fail on the selective enforcement claim.

Finally, petitioners are not entitled to discovery in this Article 78 proceeding and their request for the issuance of a subpoena duces tecum in connection with their 'selective enforcement' allegations is denied. Petitioners describe this request as one for an 'order authorizing petitioners to serve on respondent a Subpoena Duces Tecum for documents necessary in the prosecution of this action...' (see affirmation of Stephen B Meister, dated June 8, 2006). The document, attached as an exhibit to the Meister Affirmation, directs the appearance by HPD 'to testify and give evidence, as a witness on examination before trial by deposition,' in addition to requiring the production of documents, i.e., certified copies of the records in HPD's custody concerning the dissolution reconstitution of any housing company of Mitchell-Lama rental or cooperative building located within the five boroughs of New York City, where any deed or other use restriction appear of record.'

Disclosure in a special proceeding, such as the instant one, is governed by CPLR 408. For a court to direct disclosure, the information sought must be found to be material and necessary to the defense (Matter of General Elec. Co. v. Macejka, 117 AD 2d 896, 897 [3d 1986]); Matter of Food Fair v. Board of Assessment Review of Town of Niskayuna, 78 AD2d 335, 337 [3d Dept 1981]). Moreover, discovery is allowed in an Article 78 proceeding only upon a showing of 'ample need' (Matter of Shore, 109 AD2d 842, 843 [2d Dept 1985]). Here, there is no demonstration of a need for the specified discovery, since the selective enforcement basis for the

Copyright © 2009 The New York Law Pub. Co.

11/29/2006 NYLJ 18, (col. 1)
11/29/2006 N.Y.L.J. 18, (col. 1)
(Publication page references are not available for this document.)

order of mandamus fails in the first instance. Thus, petitioners' request of discovery in the form of a subpoena duces tecum is denied.

Accordingly, it is hereby

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

This constitutes the decision and judgment of the Court.

11/29/2006 NYLJ 18, (col. 1)

END OF DOCUMENT

Copyright © 2009 The New York Law Pub. Co.

50 A.D.3d 572, 856 N.Y.S.2d 608, 2008 N.Y. Slip Op. 03950

Briefs and Other Related Documents
View New York Official Reports version

Supreme Court, Appellate Division, First Department, New York.
TIVOLI STOCK LLC, et al., Petitioners-Appellants,
v.
NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, et al., Respondents-Respondents.
April 29, 2008.

Background: Petitioners who sought to convert a Mitchell-Lama housing complex to non-rent-regulated housing challenged a refusal of the New York City Department of Housing Preservation and Development to issue a no-objection letter. The Supreme Court, New York County, Robert D. Lippmann, J., denied the petition and dismissed the proceeding, 2006 WL 3751468, and it later entered an amended judgment to the same effect. Petitioners appealed from both judgments.

Holding: The Supreme Court, Appellate Division, held that a conversion of the Mitchell-Lama housing complex to non-rent-regulated housing was barred by a restrictive covenant.
Amended judgment affirmed; appeal from original judgment dismissed.

West Headnotes

KeyCite Citing References for this Headnote

108 Covenants
108II Construction and Operation
108II(D) Covenants Running with the Land
108k69 Covenants as to Use of Property
108k69(1) k. In General. Most Cited Cases

268 Municipal Corporations KeyCite Citing References for this Headnote
268XIII Fiscal Matters
268XIII(B) Administration in General, Appropriations, Warrants, and Payment
268k884 k. Loaning or Investment of Funds. Most Cited Cases

Conversion of Mitchell-Lama housing complex to non-rent-regulated housing was barred by a restrictive covenant providing that, for 50 years, "no change shall be made in the use of the land as specified in the plan of the area," even though petitioners argued that the only use specified in development plan summary was that the site be devoted entirely to residential use; plan summary further required the restriction to run for 50 years after certain events, including the "neighborhood rehabilitation of the area," which the plan anticipated would be achieved through public financing and the creation of "moderately priced modern well-equipped housing."
***609** Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellants.
Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for City respondent.
Collins, Dobkin & Miller, LLP, New York (Stephen **Dobkin** of counsel), for Tivoli Towers Tenants Association, respondent.

LIPPMAN, P.J., FRIEDMAN, CATTERSON, MOSKOWITZ, JJ.

***573** Amended judgment, Supreme Court, New York County (Robert D. Lippmann, J.), entered January 12, 2007, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 challenging respondent New York City Department of Housing Preservation and Development's refusal to issue a Letter of No Objection to petitioners' request to dissolve or reconstitute Tivoli Towers Housing Co., and seeking discovery in the form of a subpoena duces tecum,

and costs and disbursements, unanimously affirmed, without costs. Appeal from judgment, same court and Justice, entered December 8, 2006, unanimously dismissed, without costs, as superseded by the appeal from the amended judgment.

Part of the realty at issue is subject to a restrictive covenant requiring that, for 50 years, "no change shall be made in the use of the land as specified in the plan of the area." Petitioners, who are seeking to convert a Mitchell-Lama housing complex to non-rent-regulated housing, argue that the only use specified in the Development Plan Summary is that the "site will be devoted entirely to residential use." They conclude, therefore, that the restriction does not mean the site must necessarily be used for affordable housing.

The Plan Summary, however, further requires the restriction to run for 50 years after certain events including the "neighborhood rehabilitation of the area" which the Plan anticipates will be achieved through public financing and the creation of "moderately priced modern well-equipped housing." Thus, the article 78 court correctly determined that petitioners had ignored the context in which the restriction is found. The court correctly held that "[p]etitioner is bound by the covenants contained in the deed, which reflect the spirit of the original plan. It would be unfair and inappropriate to permit high rents for what was always planned and intended as a project for middle-income housing" (*see* *Matter of Columbus Park Corp. v. Department of Hous. Preserv. & Dev. of City of N.Y.*, 80 N.Y.2d 19, 27-31, 586 N.Y.S.2d 554, 598 N.E.2d 702 [1992]).

Although, as petitioners rightly assert the attendant tax exemptions are only for 30 years, this has no bearing on the issue of the restrictive covenant (*see* ***610** *Matter of Columbus Park Corp.*, 80 N.Y.2d at 29, 586 N.Y.S.2d 554, 598 N.E.2d 702 [tax exemption was but one part of the bargain struck with the City for providing Mitchell-Lama housing]). Further, contrary to petitioners' contention, the deeds are ***574** not void for vagueness, as they describe the restrictive covenant with reasonable certainty (*see* *Thurlow v. Dunwell*, 100 A.D.2d 511, 512, 472 N.Y.S.2d 872 [1984]), and the record fails to support petitioners' complaint of selective enforcement (*see* *Bower Assoc. v. Town of Pleasant Val.*, 2 N.Y.3d 617, 631, 781 N.Y.S.2d 240, 814 N.E.2d 410 [2004]).

N.Y.A.D. 1 Dept.,2008.

Tivoli Stock LLC v. New York City Dept. of Housing Preservation and Development

50 A.D.3d 572, 856 N.Y.S.2d 608, 2008 N.Y. Slip Op. 03950

Briefs and Other Related Documents (Back to top)

- 2007 WL 6238798 (Appellate Brief) Reply Brief for Petitioners-appellants (Dec. 14, 2007)Original Image of this Document (PDF)
- 2007 WL 6238796 (Appellate Brief) Brief of Respondent New York City Department of Housing Preservation and Development (Dec. 5, 2007)Original Image of this Document (PDF)
- 2007 WL 6238797 (Appellate Brief) Brief for Respondent-Intervenor-Respondent Tivoli Towers Tenants Association (Dec. 5, 2007)Original Image of this Document (PDF)
- 2007 WL 6238795 (Appellate Brief) Brief for Petitioners-Appellants (Oct. 1, 2007)Original Image of this Document (PDF)

END OF DOCUMENT

Adobe Reader is required to view PDF images.

Get ADOBE® READER®

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw

881 N.Y.S.2d 89
63 A.D.3d 543, 881 N.Y.S.2d 89, 2009 N.Y. Slip Op. 04974
(Cite as: 881 N.Y.S.2d 89)

Supreme Court, Appellate Division, First Department, New York.
In re TIVOLI STOCK LLC, et al., Petitioners-Appellants,
v.
NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, Respondent-Respondent.
Tivoli Towers Tenants' Association, Respondent-Intervenor-Respondent.

June 18, 2009.

Background: Apartment building owner petitioned for writ of mandamus to compel city's department of housing preservation and development to issue "no objection" letter permitting owner to remove building from private housing finance law program, or for order setting aside department's denial of such a letter as arbitrary and capricious. Tenants' association intervened. The
Supreme Court, New York County, Marcy S. Friedman, J., granted department's and association's motion to dismiss petition. Owner appealed.

Holdings: The Supreme Court, Appellate Division, held that:
(1) res judicata barred owner's petition;
(2) owner's petition was not timely;
(3) four-month limitations period for filing petition was not tolled; and
(4) even if petition was timely, owner was not entitled to compel issuance of letter.
Affirmed.

West Headnotes

[1] Judgment ⚿552
228k552 Most Cited Cases

[1] Judgment ⚿585(2)
228k585(2) Most Cited Cases
Res judicata barred apartment building owner's petition for writ of mandamus, seeking to compel city's department of housing preservation and development to issue "no objection" letter permitting owner to remove building from private housing finance law program; claim asserted in petition was based on same facts as, and sought same relief sought in, owner's prior Article 78 petition, and therefore arose from same transaction or occurrence underlying prior petition.

[2] Limitation of Actions ⚿66(11)
241k66(11) Most Cited Cases
Apartment building owner's claim for writ of mandamus, seeking to compel city's department of housing preservation and development to issue "no objection" letter permitting owner to remove building from private housing finance law program, accrued, and four-month statute of limitations began to run, when department first notified owner that it would not issue requested letter. McKinney's CPLR 217(1).

[3] Limitation of Actions ⚿66(11)
241k66(11) Most Cited Cases
Four-month limitations period for apartment building owner's petition for writ of mandamus, seeking to compel city's department of housing preservation and development to issue "no objection" letter permitting owner to remove building from private housing finance law program, was not tolled by owner's action of seeking reconsideration of department's denial of requested letter or by owner's receipt of department's notice that it would not reconsider its denial. McKinney's CPLR 217(1).

[4] Mandamus ⚿73(1)
250k73(1) Most Cited Cases
Apartment building owner was not entitled to writ of mandamus, seeking to compel city's department of housing preservation and development to issue "no objection" letter permitting owner to remove

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

building from private housing finance law program, even if petition had been timely; owner's development included three lots it purchased from city, which were eventually merged for zoning and tax purposes, and that were encumbered by restrictive covenant by which owner promised to maintain building as affordable housing for at least 50 years.
***90** Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for New York City Department of Housing Preservation and Development, respondent.

Collins, Dobkin & Miller, LLP, New York (Seth A. **Miller** of counsel), for Tivoli Towers Tenants' Association, respondent.

ANDRIAS, J.P., CATTERSON, RENWICK, DeGRASSE, FREEDMAN, JJ.

Order and judgment (one paper), Supreme Court, New York County (Marcy S. Friedman, J.), entered July 22, 2008, ***91** granting the cross motion of respondent New York City Department of Housing Preservation and Development (HPD) and intervenor-respondent Tivoli Towers Tenants' Association to dismiss the petition seeking a writ of mandamus to compel HPD to issue a letter of no objection permitting petitioners to remove the apartment building known as Tivoli Towers from the Private Housing Finance Law program, or, in the alternative, for an order setting aside as arbitrary and capricious HPD's August 1, 2007 decision not to make a new determination with respect to petitioner's request for said letter of no objection, unanimously affirmed, with costs.

[1] The court properly dismissed the petition as barred by the doctrine of res judicata. The claim asserted in the instant petition is based on the same facts as, and seeks the same relief sought in, petitioners' prior article 78 petition, and therefore arises from the same transaction or occurrence underlying the prior petition (*see O'Brien v. City of Syracuse,* 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158 [1981]), which petition was denied and dismissed by Supreme Court (*see Matter of Tivoli Stock LLC v. New York City Dept. of Hous. Preserv. & Dev.,* 14 Misc.3d 1207(A), 2006 N.Y. Slip Op. 52439(U), 2006 WL 3751468 [2006]), and which determination was affirmed by this Court (50 A.D.3d 572, 856 N.Y.S.2d 608 [2008]). Accordingly, the claim is one that could and should have been asserted in the prior proceeding (*see O'Brien,* 54 N.Y.2d at 357-358, 445 N.Y.S.2d 687, 429 N.E.2d 1158), but petitioners failed to do so until their motion for reargument, which was denied. Having bypassed the opportunity to raise their new theory at the appropriate time, petitioners are barred from making yet another attempt to have this theory considered by raising it in the instant petition.

[2][3] Dismissal of the petition is also warranted since it is barred by the four-month statute of limitations provided for in CPLR 217(1). Although petitioners' first article 78 petition was timely, the instant petition was brought more than 19 months after HPD first notified them that it would not issue the requested letter of no objection, the point at which petitioners were aggrieved and when the limitations period commenced (*see Matter of Edmead v. McGuire,* 67 N.Y.2d 714, 716, 499 N.Y.S.2d 934, 490 N.E.2d 853 [1986]; *Tamarkin v. New York City Dept. of Educ.,* 44 A.D.3d 502, 502-503, 843 N.Y.S.2d 318 [2007]). That petitioners sought reconsideration of HPD's denial in July 2007, received notice from HPD that it would not reconsider its prior determination or issue a new determination on August 1, 2007, and filed the instant petition within four months of that date, does not toll the limitations period (*see Matter of Lubin v. Board of Educ.,* 60 N.Y.2d 974, 976, 471 N.Y.S.2d 256, 459 N.E.2d 481 [1983], *cert. denied* 469 U.S. 823, 105 S.Ct. 99, 83 L.Ed.2d 44 [1984]; *Concourse Nursing Home v. Perales,* 219 A.D.2d 451, 453,

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

631 N.Y.S.2d 156 [1995], *lv. denied* 87 N.Y.2d 812, 644 N.Y.S.2d 145, 666 N.E.2d 1059 [1996], *cert. denied* 519 U.S. 863, 117 S.Ct. 171, 136 L.Ed.2d 112 [1996]). Petitioners' characterization of its claim as entirely new and concerning the geographic scope of the restrictive covenant, as opposed to their claim in the first petition which concerned the nature of the use restriction contained in the covenant, is unavailing. It is clear that petitioners simply re-presented their earlier request for a letter of no objection permitting it to buy out of the Mitchell-Lama program and convert Tivoli Towers from a limited-profit housing project to market-rate housing, under the guise of a new legal theory.

***92** [4] Furthermore, were we to consider the claim asserted herein, we would find it lacking in merit. When all of the instruments effectuating the property conveyances, including the two deeds at issue and the Tivoli Towers Project and Plan that was approved by the City Board of Estimate, are considered as a whole, it is clear that the development included all three lots in question and that the intent was for all three lots, which were eventually merged for zoning and tax purposes, to be encumbered by the restrictive covenant contained in the City deed, regardless that the exact parcel upon which the apartment building itself was built was conveyed by a deed that contained no such covenant (*see 328 Owners Corp. v. 330 W. 86 Oaks Corp.,* 8 N.Y.3d 372, 381-83, 834 N.Y.S.2d 62, 865 N.E.2d 1228 [2007]). Indeed, the City would not have agreed to convey the two parcels conveyed by the deed containing the restrictive covenant without petitioners' commitment to abide by the terms of the covenant, and it is equally clear that Tivoli Towers would not have been built without the two City-conveyed parcels. Having benefitted substantially from the financial incentives offered through the Mitchell-Lama program for many years, petitioners should not be permitted to avoid the consequences of their reciprocal promise to maintain Tivoli Towers as affordable housing for at least 50 years by arguing that the restrictive covenant only applies to the parking garage that was actually built upon the two City lots but not to the apartment building situated on the adjacent, privately conveyed lot.

63 A.D.3d 543, 881 N.Y.S.2d 89, 2009 N.Y. Slip Op. 04974

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.