

MEMORANDUM

TO: REF Attorneys and Legal Assistants

DATE: 2/3/86

FROM: Mary Sabatini DiStephan/Nancy Kramer *MSD*

RE: Merger of Two or More Buildings in A Single Offering Plan

When a single offering plan involves the conversion to cooperative or condominium ownership of more than one building, an initial finding as to the appropriateness of the "merger" should be made. Frequently the sponsor's attorney will request such a determination before submitting a red herring. However, the determination should be made whether or not such a request precedes submission.

The sponsor should submit a written response to the following questions in order that such determination can be made.

1. Do the buildings share:
 - (a) a single tax lot?
 - (b) a single J-51 tax exemption or abatement?
 - (c) a single heating plant?
 - (d) a single mortgage?
 - (e) a single certificate of occupancy number?
 - (f) a single rent stabilization number?
 - (g) a common courtyard?
 - (h) a common sewer line, water line, or facility?
 - (i) any other common facilities?
2. Was the entire property acquired by a single deed?
3. Were the buildings constructed at about the same time?
4. Were the buildings constructed by the same owner?
5. Were the buildings owned and managed as one unit (i.e., one superintendent, one managing agent)? For what period of time?
6. Are the buildings similar in size? Specifically, how many units are in each building?
7. What is the nature of tenancy of each building (i.e., how many rent-controlled, rent-stabilized tenants)?
8. Is the general condition of each building and its amenities similar?
9. How many vacancies are there in each building?
10. Are the buildings subject to the same zoning requirements?

In addition to the foregoing, elicit any other data which you think is relevant.

Re: Merger of Two or More Buildings in
a Single Offering Plan

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All these factors should be weighed in making the decision. Attached to this memo please find two sample determination letters, dated August 25, 1982 and August 1, 1985 and also the Supreme Court and Appellate Division decisions in the Cheltoncort case.

Please see either of us in deciding on cases which are close calls.

attachments (4)

SUPREME COURT : NEW YORK COUNTY

SPECIAL TERM : PART I

-----X

In the Matter of the Application of
CHELTONCORT INC.,

Petitioner,

For an order Pursuant Article 78 of the
CPLR

Index No.
18338/82

-against-

ROBERT ABRAMS, ATTORNEY GENERAL OF
THE STATE OF NEW YORK,

103 9/24/82

Respondent.

-----X

LEONFORTE, J.:

The petitioner moves, pursuant to Article 78, for an order annulling the determination of the respondent in rejecting petitioner's offering plan. The respondent cross moves to dismiss the petition herein pursuant to CPLR 3211.

The petitioner is the owner of two buildings known as 356 and 360 West 21st Street, New York County. The petitioner filed a proposed offering plan for cooperative ownership of the two buildings. Petitioner contends the plan as submitted complied with all relevant statutes and regulations.

The plan was assigned to a specific assistant Attorney General for review. On February 9, 1982, the respondent requested more information from petitioner as to the offering of the two buildings under one plan. This information was forwarded to the respondent in early March, 1982. On or about July 19, 1982, the petitioner was notified that its offering of two distinctly different buildings under one plan was not acceptable.

It is the petitioner's contention that the respondent had no authority to reject the plan as submitted, that the rejection of the plan is based on minor differences between the buildings, and this is not sufficient to reject the plan as submitted.

Further, petitioner alleges that the respondent's duty is to insure there is proper disclosure as to all material facts in the offering plan. Since all material facts were disclosed in the offering plan, including the differences in the two structures, petitioner concludes respondent is doing more than it should under the General Business Law in rejecting petitioner's cooperative plan.

In its cross motion, the respondent states that the existence of documentary evidence and the fact the respondent has not made a final determination must cause the petition to be dismissed.

First, the respondent alleges the petitioner's offering plan is only at the pre-filing review stage. The submission of the plan at the pre-filing stage precedes the submission of the actual submission for filing. Thus, respondent's rejection of the petitioner's offering plan does not constitute a final administrative determination.

Also respondent contends the two structures involved are substantially different as follows: 356 West 21st Street has five (5) apartments with three (3) rent controlled while 360 West 21st Street has fifty-two (52) apartments of which forty-six (46) are rent controlled; "356" is an 86 year old structure without major renovation save a boiler replacement, while "360" has been completely renovated.

Further, respondent concluded based on these facts that tenants in the older, smaller "356" could be evicted due to a decision to purchase by the tenants of "360" even though not one tenant of "356" chose to purchase. The tenants of "360" would suffer a financial drain due to the needed upkeep of the older building. Finally, due to the share allocations the tenants of "356" would not be able to carry a vote to authorize improvements for that building.

Further, the respondent contends these findings are properly made within the powers of the Attorney General to review the offerings for conversions to cooperatives.

One who objects to the action of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (Water Gate II Apartments v Buffalo Sewer Authority, 46 NY2d 52; Young men's Christian Ass'n v Rochester Pure Waters District 37 NY2d 371).

But, assuming, arguendo, the review herein would be fruitless, petitioner herein would still be unsuccessful.

If a determination was made on a rational basis and was made in conformance with the administrative agency's statutory responsibilities and lawful procedure, it cannot be said to be arbitrary and capricious and the findings must be upheld by the courts. (Matter of East 12th Assoc., Inc. v Leventhal, 38 NY2d 833; Matter of Sullivan County Harness Racing Assn. v Glasser, 30 NY2d 169).

Further, the considerable agency expertise in arriving at a determination is judicially approved (Procaccino v Stewart, 25 NY2d 301; Matter of Greene v Goodwin, 46 A2d 69.

The respondent based its findings on a rational and reasonable basis utilizing the expertise of its office in these matters. Petitioner has not shown respondent to have exceeded its authority as to its findings.

Accordingly, the petitioner's application is denied and the petition is dismissed with leave to renew upon exhausting the available administrative remedies.

Dated: October 13, 1982

J.S.C.

461 N.Y.S.2d 1
93 A.D.2d 713

In re Application of CHELTONCORT, INC., Petitioner-Appellant,
v.

Robert Abrams, etc., Respondent-Respondent.
Supreme Court, Appellate Division, First Department

April 7, 1983

J. Gaier, New York City, for petitioner-appellant.
R.S. Greathead, Albany, for respondent-respondent.

Before MURPHY, P.J., and ROSS, ASCH, MILONAS and ALEXANDER, JJ.

MEMORANDUM DECISION.

Order, Supreme Court, New York County, entered on November 8, 1982, which denied petitioner's application to compel respondent to accept an Offering Plan for filing and granted respondent's cross-motion to dismiss the petition for failure to exhaust administrative remedies with leave to renew, is unanimously affirmed, without costs.

Petitioner Cheltoncort, Inc., (Cheltoncort) is the owner of two residential buildings, known as 356 West 21st Street ("356") and 360 West 21st Street ("360"). The buildings were constructed at the same time, have always been in common ownership, are located on a single tax lot and are covered by a single 8% percent mortgage. "356" contains 5 residential units, while "360" contains 52 residential units. "360" was "gut" rehabilitated in 1974 and with "356", enjoys a J-51 tax abatement.

In June of 1981, petitioner submitted to the Attorney General pursuant to 13 NYCRR 17.3 a draft of a proposed cooperative conversion plan for the conversion of the two buildings to a single co-op corporation. 13 NYCRR 17.3 establishes an optional "pre-filing" procedure whereby a sponsor of a cooperative offering may submit the proposed offering plan to the Real Estate Financing Bureau of the Attorney General's office for analysis and comment. This procedure was adopted by the Attorney General in response to the criticism generated by the substantial backlog in cooperative conversion filings, and the long delays encountered in the review of the submissions.

This prefiling procedure authorizes the Department of Law, after the lapse of 120 days from the date of the prefiling and after the analysis and comment provided for and after submission by the sponsor of 15 bound copies of the offering plan, together with his personal check or certified check for one half of the filing fee required by General Business Law §352-e(7)(a), to issue a letter to the sponsor or sponsor's attorney indicating that the draft offering plan is filed. At any time during the prefiling procedure, however, the sponsor may elect to make a submission for final filing in compliance with §17.1(d) and (e), which filing would be subject to the time and other requirements of §17.1(g). Additionally, if the Department of Law declines to issue the letter referred to above to the sponsor or sponsor's

attorney under the prefiling procedure, the sponsor has the option of submitting the offering plan for final filing and complying with §§ 17.1(d)(e) and 17.1.

After receiving objections by a tenant's committee to the single plan, the Attorney General notified the sponsor's counsel that the two buildings would have to be offered under separate plans because the disparate characteristics between the two buildings substantially out-weighed the common characteristics. It was the Attorney General's view that these dissimilarities would place the tenants of 356 at a substantial disadvantage, e.g. because of the greater number of tenants at 360, the voting power of the 356 tenants would be diluted; and because 356 had not been recently rehabilitated as had been 360, there reasonably may be expected to be a greater need for repairs for 356 than for 360 which need could cause a drain on the resources of 360 and which would be opposed by the tenants of 360. Other disparities involved separate and distinct heating and water systems, and the fact that there were rent stabilization registrations in respect to 360 which had a certificate of occupancy with no such certificate of occupancy or stabilization registrations at 356 because it contained less than six units. The Attorney General therefore rejected the single or merger plan proposed by the sponsor.

This Article 78 proceeding ensued. Petitioner argues that the Attorney General exceeded his statutory powers granted under General Business Law § 352-e, et seq., in that he improperly inquired into the merits or substance of the plan rather than merely determining whether there was such accurate and adequate disclosure of information as would afford potential investors an adequate basis upon which to make a judgment in regard to their investment in the cooperative plan.

Special Term dismissed the petition, holding that the filing of Article 78 proceeding prior to a final determination by the Attorney General was premature, in that administrative remedies had not been exhausted. Moreover, Special Term found that substantively, the determination by the Attorney General was not arbitrary or capricious and therefore dismissed the petition with leave to renew after administrative remedies had been exhausted.

The prefiling procedure authorized by 13 NYCRR § 17.3 et seq., is not a substitute for the formal filing procedures authorized by GBL § 352-e, et seq. As this Court has previously held, the decision to file pursuant to GBL § 352 or prefile pursuant to 13 NYCRR 17.3, belongs to the sponsor but until the Attorney General has responded to the formal filing authorized under GBL § 352-e, a petition such as the one here on review is prematurely brought (In the Matter of 44 West 96 Street Associates v. Abrams, 85 A.D.2d 563, 445 N.Y.S.2d 709 [1st Dept, 1981]).

Accordingly, Special Term properly dismissed the petition herein. However, since there has not yet been a formal filing with an opportunity to the Attorney General to respond thereto we do not reach the substantive issues presented on this appeal.



STATE OF NEW YORK
DEPARTMENT OF LAW

TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047

ROBERT ABRAMS
ATTORNEY GENERAL

R. SCOTT GREATHEAD
ASSISTANT ATTORNEY GENERAL
IN CHARGE
REAL ESTATE FINANCING BUREAU

Telephone No.: (212) 488-3367

August 25, 1982

Heller and Peck, Esqs.
230 Park Avenue
New York, New York 10017

Attention: Irwin Levy, Esq.

Re: 166 East 92nd Street
173 East 91st Street
175 East 91st Street a/k/a
1622 Third Avenue
File No: C810519

Dear Mr. Levy:

The proposed offering plan for the conversion of the above captioned three buildings to cooperative ownership was submitted by you to the Department of Law for prefiling review pursuant to 13 NYCRR Part 17 on or about August 18, 1981. Copies of said proposed offering plan were distributed to tenants at that time.

Whenever a proposed offering involves the merger of two or more buildings into a single plan, it is the practice of the Department of Law to inquire whether the merger of the buildings into one plan is appropriate and would result in a viable cooperative operation.

After the Plan was assigned to the undersigned for review, a letter dated March 16, 1982, requesting specific information in the form of an itemized questionnaire was submitted to you as attorneys for the sponsor, in order to ascertain certain facts regarding the propriety of the proposed merger. Your response was received on March 24, 1982.

The tenants' attorneys, Feinberg, Siff and Herman, by Peter S. Herman, Esq. indicated by phone calls of March 22, June 8, and July 6, 1982, that the tenants' position is that the three buildings are distinct and vastly dissimilar. Mr. Herman submitted his comments by letter dated April 14, 1982.

The above inquiry has revealed the following:

1. The 91st Street and 92nd Street buildings have different tax lots:

166 E. 92nd Street (hereinafter referred to as "92") - Block 1520 Lot 41

173 E. 91st Street (hereinafter referred to as "173") - Block 1520 Lot 34

175 E. 91st Street (hereinafter referred to as "175") a/k/a 1622 Third Avenue-Block 1520 Lot 34.

2. There are no tax exemptions or abatements for any of the buildings.
3. Each building has an entirely separate heating plant. 92 has a "Pacific-General Boiler Co." boiler and a "Heavy Oil Boiler" which burns no. 6 fuel oil (see sponsor's engineer's report, page 72). 173 is heated by a "Weil McLain" steam boiler and a "Marathan" burner which burns no. 2 oil (see sponsor's engineer's report, page 76j). 175 is equipped with a "Weil McLain" gas fired boiler (see sponsor's engineer's report, page 76j, 76k). None of the three heating systems appears to be of the same type. Certainly no system is shared.
4. All the buildings share a common wraparound mortgage dated March 31, 1981, when the present sponsor acquired the three buildings.
5. 92 is a new-law 6-story tenement constructed in 1927 under certificate of occupancy number 12433. 173 and 175 are old-law, 5-story tenements constructed in 1872 with certificate of occupancy number 26342 of 1940. 173 and 175 have been the subjects of a series of different building applications (see pages 75, 76). 92 has a total of 42 units (seven 2 1/2 room apartments, twenty-three 3-room apartments and twelve 4-room apartments); 173 is composed of 19 units, all of them two room studios except one apartment which is a four room garden apartment; 175 consists entirely (16 units) of three room apartments.

To: Heller and Peck, Esq.
Re: 166 E. 92nd St., 173 & 175 E. 91st St.

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6. Each building is separately registered with the Rent Stabilization Association. 92 has 20 rent stabilized tenants and 20 rent controlled tenants; all 19 of the tenants in 173 are rent stabilized; 175 has 9 rent controlled units and 7 rent stabilized units.
7. Each of the buildings has a separate interior courtyard. 173 and 175 are adjoining properties. 92 is completely non-contiguous to the other two.
8. The buildings have separate water and sewer lines. 92 has a laundry room but this facility is not available to the residents of 173 or 175, neither of which has laundry facilities.
9. The buildings were simultaneously acquired by the sponsor. At present they share common management and a common superintendent.
10. Each building has a separate multiple dwelling registration number:
92 - MDR# 106260
173- MDR# 1220071
175- MDR# 114947
11. 92 has a lobby and an elevator. Neither 173 nor 175 has a lobby or elevator.
12. The buildings are subject to different zoning requirements. 92 is zoned R-8 residential. 173 and 175 are zoned C1-9 commercial. 175 has two commercial tenants. Both 92 and 173 are entirely residential.
13. All three buildings are in disrepair. 173, however, is in a more serious sub-standard condition than the other two. 173 has 23 pending violations. 175 has 54 pending violations. 92 has 13 pending violations. The repairs which are needed are not cosmetic in nature but concern basic structure, heating, piping and electricity. Some of the violations may be immediately hazardous, particularly in 173.
14. Share allocations of the three buildings are as follows:
92 - 6,919 shares (42 units)
173 - 1,652 shares (19 units)
175 - 2,168 shares (16 units)

To: Heller and Peck, Esq.
Re: 166 E. 92nd St., 173 & 175 E. 91st St.

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Under the proposed merger, neither the shareholders residing in 173 nor those residing in 175 would be able to carry a vote to authorize the expenditure of funds for improvement of their buildings beyond the amounts budgeted in the plan. A similar problem would exist if 173 and 175 were merged. 173, which consists of nineteen units, and is in the worst condition of the three buildings, requiring considerable improvements, would never be able to carry a vote over the wishes of 175, which has 16 units but more shares allocated to it. Under these circumstances, the interests of each of the three buildings would be adverse to the other two.

The upkeep of 173 would be far out of proportion to its income and would result in a financial drain and unfair burden on the occupants of 175 and 92.

The plan itself recognizes the inherent difficulties of joining the three buildings into cooperative ownership. The plan allocates to each building a different fixed proportion for maintenance and repairs for the first year of operation (see page 13 of the proposed offering plan). It is open to question whether this allocation is equitable, a concern that will be exacerbated following the first year of operation when the tenant shareholders of the three buildings, each having inherently adverse interests, take control of the budget.

Finally, tenants of one building may face eviction because of the decision to purchase by tenants of one or two of the other buildings. To permit this result merely because the three buildings are commonly owned would subvert the protections afforded by the Rent Stabilization Law and Code and the Rent Control Law and Regulations, and would thereby contravene the provisions of GBL §352-eeee(1).

In summary, the meaning and intent of a "cooperative housing corporation" under the law would not be met. See, e.g., Black's Law Dictionary (5th Ed.) which defines a "cooperative" as "a corporation or association organized for the purpose of rendering economic services (i.e., housing), without gain to itself, to shareholders or members who own and control it." A cooperative corporation whose shareholders have inherently adverse interests and whose shareholders could not control the services to be provided in their own building does not meet this test.

To: Heller and Peck, Esq.
Re: 166 E. 92nd St., 173 & 175 E. 91st St.

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Based upon the factors enumerated, such substantial dissimilarities among the three buildings exist that the proposed merger of the three buildings into a single cooperative offering plan is unacceptable.

It is the determination of the Attorney General that 166 East 92nd Street, 173 East 91st Street and 175 East 91st Street, a/k/a 1622 Third Avenue, are wholly separate and dissimilar buildings, that they could not be successfully operated on a joint cooperative basis, and that to convert the three buildings to cooperative ownership pursuant to one cooperative plan would be improper, untenable and inequitable to tenants of all buildings and would constitute a fraudulent practice and thus the breaking of the Martin Act.

The offering plan fails to fully and fairly disclose these risks to prospective purchasers.

For the foregoing reasons your plan is rejected from prefiling review. The foregoing is not a comprehensive list of deficiencies. The Department of Law expressly reserves the right to note additional deficiencies.

The issuance of this deficiency letter shall not be construed to be a waiver of or limitation on the Attorney General's authority to take enforcement action for violations of Article 23-A of the General Business Law and other applicable provisions of law.

The documents submitted by you pursuant to Part 17.3 as a prefiling will be available for you to pick up during normal business hours from this office. Any filing fees paid will be credited toward any subsequent submission of an offering plan for any of the three buildings, if such plan is submitted pursuant to Part 18 within six (6) months of this date.

Tenants must be presented with any new offering plan if and when a new offering plan is submitted to this office.

Very truly yours,

MARY SABATINI
Assistant Attorney General

MS:jg
cc: Feinberg, Siff & Herman
Att: Peter S. Herman, Esq.



STATE OF NEW YORK
DEPARTMENT OF LAW
TWO WORLD TRADE CENTER
NEW YORK, NY 10047

ROBERT ABRAMS
Attorney General

JAMES M. MORRISSEY
Assistant Attorney General in Charge
Real Estate Financing Bureau

(212) 488-3365

August 1, 1985

Time Equities Inc.
55 Fifth Avenue
New York, New York 10003

Att'n: Cory Katz, Esq.

Re: 202-204-206 W. 85th Street
208-210-212-214 W. 85th Street

Dear Ms. Katz:

The Department of Law has reviewed your letter of July 26, 1985, regarding your clients' intention to submit two separate offering plans for the seven residential buildings captioned above. The offer to sell shares allocated to 202-204-206 W. 85th Street will be contained in one plan and 208-210-212 and 214 W. 85th Street will be offered in the second plan.

This letter will confirm the following:

1. The factors enumerated in your letter, among others, have been utilized by this office in prior cases to determine whether the filing of a single plan or multiple plans for a multi-building complex is necessary or appropriate.

2. The facts set forth in your letter indicate that it would be consistent with the policy and practice of this office, and with our interpretation of the law, to permit the two separate plans to be filed provided the plans are otherwise in compliance with all applicable provisions of the General Business Law and the regulations, promulgated thereunder.

Re: 202-204-206 W. 85th St. -2-
 208-210-212-214 W. 85th St.

August 1, 1985

In view of the fact that no proposed offering plan for the premises has been submitted to the Department of Law for review, and that the public comment period has not commenced, this letter should not be construed as a formal opinion of the Attorney General or a final administrative ruling on the question presented. Furthermore, the views expressed above are based solely upon the information supplied and representations made in your letter and supporting documentation. Any different set of facts or circumstances might result in the Department taking a different position.

Very truly yours,

MARY SABATINI DiSTEPHAN
Assistant Attorney General

MSD:bw