STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

DANIEL R. SACK,

Petioner,

Index # I-2019-000073

vs. DECISION

CITY OF BUFFALO COMMON COUNCIL,
TM MONTANTE DEVELOPMENT LLC,

Respondents.

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Mark A. Montour, J.S.C.

Petitioner Daniel R. Sack (hereinafter referred to as "Petitioner") filed a notice of petitioner/summons and a verified petition/complaint and seeks an order from this Court: (1) declaring that the Linwood Lafayette Urban Development Action Area (hereinafter referred to as the "LLUDAA") designated by the Common Council of the City of Buffalo on April 16, 2019, is inconsistent with the policy and purposes stated in Article 16, Section 691 of the New York State General Municipal Law; (2) annulling and setting aside respondent City of Buffalo Common Council's (hereinafter referred to as "Common Council" or the "City") resolution designating the LLUDAA; and (3) permanently enjoining respondent Common Council from approving, granting, or otherwise authorizing tax incentives, loans, or other forms of financial aid pursuant to General Municipal Law Article 16 to respondent TM Montante Development LLC (hereinafter referred to as "TM Montante") or any other parties relating to the LLUDAA.

Background

On April 16, 2019, respondent Common Council resolved that the "present status of the area encompassed within the proposed Linwood Lafayette Urban Development Action Area" impairs the "sound growth and development" of Buffalo. Therefore, "consistent with the policies and purposes" of Section 691 of Article 16 the area was designated as an Urban Development Action Area. Respondent Common Council asserted that the area was at "significant risk of deterioration and blight and will continue to be substandard, unsanitary, deteriorated or deteriorating." TM Montante is an owner and developer of real property located in the LLUDAA.

Petitioner is a citizen who lives near the LLUDAA. His neighborhood is located immediately west of the LLUDAA. Petitioner paid taxes in excess of $1,000 on certain property

and he claims that respondent Common Council's determination will negatively affect him by increasing the amount of noise and traffic near his property. Petitioner brings one claim based upon General Municipal Law Article 16 ("GML Article 16" or the "UDAAA") and another claim based upon General Municipal Law §51 ("taxpayer suit").

Petitioner's GML Article 16 claim alleges that respondent Common Council was incorrect in their determination that the LLUDAA was beyond their jurisdiction. Petitioner further alleges that the Common Council was without or in excess of their jurisdiction when they included Gates Circle and rights-of-way on Delaware, Lafayette, and Linwood Avenues. Petitioner alleged that the Common Council only included these areas to reach its sixty percent of City owned land necessary for the LLUDAA to meet the necessary qualifications to become an Urban Development Action Area. Petitioner contends that the Common Council's interpretation, if upheld, would violate the rules of statutory construction that all parts of an act are to be read and construed together in order to determine the legislative intent.

Respondent Common Council asserted that petitioner lacks standing to bring this suit because petitioner does not articulate any actual harm by the Common Council's action and is unlikely to experience specific harm differing from the general public. Respondent Common Council further contended that petitioner's injuries are merely perceived and, even the injuries he perceives, are outside of the protections under GML Article 16. Respondent Common Council asserted that petitioner has also failed to meet his burden under GML §51 because petitioner has not named a Common Council official involved in the Urban Development Action Area's designation and does not accuse such individual of fraud, collusion or personal gain. Finally, respondent Common Council opined that the designation of the Urban Development Action Area

was not an official decision and, therefore, such designation or decision cannot be arbitrary, capricious, or an abuse of discretion.

Discussion

Intent of GML Article 16

The legislative intent or purpose of a statute is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense. *See, Frank v Meadowlakes Dev. Corp.*, 6 NY3d 687 (2006). When a statute is clear and unambiguous a court must give effect to the legislative will and intent as expressed, and it should not speculate upon the supposed intent for the purpose of giving the statue a different meaning. Rules of construction are invoked only when the language used leaves its purpose and intent uncertain or questionable. *See, Roballo v Smith*, 99 AD2d 5 (4th Dept 1984).

Under the UDAAA and, more specifically, under GML §691, the "policy and purpose" provision opens with an expression of the State's concerns regarding city-owned areas "which are slum or blighted, or which are becoming slum or blighted areas" and advances to provide a tool to assist in correcting such conditions with tax incentives to encourage the participation of private enterprise to correct the perceived blight. At the same time the UDAAA embraces a public policy that provides opportunity for minority-owned enterprises to participate in projects to be undertaken in a Urban Development Action Area ("UDAA").

> "In order to protect and promote the safety, health, morals and welfare of the people of the state and to promote the sound growth and developments of our municipalities, it is necessary to provide incentives for the correction of such substandard, insanitary, blighted, deteriorated of deteriorating conditions, factors and characteristics by the clearance, replanning, reconstruction, redevelopment, rehabilitation, restoration or conservation of such areas, the undertaking of public and private improvement programs related thereto and the encouragement and participation in these programs by private enterprise."

GML §691.

Clearly, it is within the ambit of the municipality to rectify "substandard, insanitary, blighted" conditions within its boundaries and at the same time offer tax incentives to private enterprise to alleviate such environments. Since it is purported that this legislation has only been utilized once by respondent Common Council since its passage in 1979, the question is whether GML Article 16 is the proper means to address the supposed deficiencies.

Eligible Property

The fundamental purpose of the UDAAA tax incentives is to foster "the development and redevelopment of blighted and deteriorated buildings and land in areas *which have previously been acquired by such municipalities through urban renewal powers, tax foreclosure proceedings or any similar process by which a municipality assumes ownership of abandoned land or buildings"* (emphasis added). Governor's 1979 Approval Memorandum. The ways in which the municipality assumes ownership of the property is also referred to as "enumerated measures" or "means".

This provision of the stature is clear, unambiguous and not subject to interpretation. The property that is subject to the UDAAA must have been acquired by respondent City through one of the enumerated measures. It is undisputed that respondent City acquired the parking ramp through an enumerated measure. It is also without dispute that prior to the LLUDAA designation respondent TM Montante offered to purchase the parking ramp from respondent Common Council. Further, the property contained in the LLUDDA consists of the former Millard Fillmore Gates Hospital campus that is owned by respondent TM Montante and land owned by respondent City including the designated rights-of-way beneath the asphalt of portions of Delaware Avenue, Linwood Avenue, and Lafayette Avenue, the decommissioned parking ramp or the grassy areas, water fountain and monuments in Gates Circle.

GML Article 16 requires that a least sixty percent (60%) of the land in the UDAA be owned by respondent City and the property must be "appropriate for urban development". Respondent Common Council contends that the inclusion of the rights-of-way, parking ramp and Gates Circle, consisting of 8.45 acres, is necessary to meet the 60% threshold. As previously mentioned, respondent City assumed ownership of the parking ramp by tax foreclosure proceedings. However, there is no evidence in the record demonstrating respondent City's ownership of the rights-of-way and/or Gates Circle was achieved by one of the enumerated measures. As a matter of fact, respondent City could only identify the decommissioned parking ramp as qualifying property for purposes of complying with the UDAAA. *See*, Pope affidavit at ¶14. As such, it is difficult, and at the same time curious, to understand the justification for including the rights-of-way and Gates Circle to meet the statutory sixty percent (60%) threshold. At oral argument respondents were struggling to convince the Court otherwise and instead claimed that the Common Council's actions were merely a designation and, as such, the tax incentives are not guaranteed unless and until the projects are in conformance with the purpose of the statute, which is to correct or address areas of the City "which are slum or blighted, or which are becoming slum or blighted areas". The statute does not define "slum" or "blight" so in such instances the Court is free to explore definitions as put forth in recognized publications.

Dictionary.com. defines "slum as a thickly populated, run-down, part of a city, inhabited by poor people or any, run-down place to live". While Wikipedia references a slum as "a highly populated urban residential area consisting mostly of closely packed, decrepit housing units in a situation of deteriorated or incomplete infrastructure, inhabited primarily by impoverished persons". And Encyclopedia Britannica describes a slum as "a densely populated area of substandard housing, usually in a city, characterized by unsanitary conditions and social

disorganization". While "blight" describes a wide array of urban problems, which can range from physical deterioration of buildings and the environment, to health, social and economic problems in a particular area.

Respondent Common Council concedes "the LLUDAA currently exists in the middle of a vibrant and affluent neighborhood....[and] the whole neighborhood is currently considered a prominent area in the City of Buffalo..." *See*, Gordon affidavit at ¶20. Furthermore, respondent Common Council acknowledged that other forms of tax incentives for the project, other than a UDAAA designation, were explored but ultimately deemed unattainable. The National Register of Historic Places determined "the property does not appear to meet the criteria for individual listing" therefore making the property ineligible for tax incentives. *See*, Gordon affidavit at ¶18.

So, if the LLUDDA is in the middle of a "vibrant and affluent neighborhood" considered to be a "prominent area" of the City, then it begs the question how the area can be a "slum" in danger of further deterioration. While the Court is curious, the municipality has gone through the gymnastic exercise of juxtaposing terms and language to permit this neighborhood to be branded as a "slum" to the consternation of the adjoining residents. Generally, courts are limited in reviewing a municipalities actions and decisions, so the Court will leave this uncertain determination in flux.

But the Court is laboring to merely rubber stamp the municipality's questionable inclusion of city streets and monuments in a gerrymandered fashion to achieve a threshold measurement. The standard for review of agency actions limits the Court's inquiry to whether a determination is "affected by an error of law, was arbitrary and capricious or an abuse of discretion. *See*, *Neville v Koch*, 79 NY2d 416, 424 (1992). Chief Judge Cooke eloquently expressed the need for judicial review of unbridled administrative power in *Nicholas v Kahn*, 47 NY2d 24, 33 (1979), when he

stated: "The safeguard against arbitrary administrative action lies in the promulgation of adequate standards * * * to insure meaningful judicial review * * * Protection of the individual * * * against the exercise of arbitrary administrative power demands both procedural safeguards within the agency and outside checks upon the exercise of untrammeled administrative discretion."

Respondents argue that the Common Council is only acting pursuant to accepted delegated administrative discretion and the exercise of that discretionary policy-making authority is not reviewable in this instance, which is a viewpoint unacceptable to this Court. "The exercise of a discretionary policy-making authority by an administrative officer is an administrative determination subject to judicial annulment only if found to be arbitrary and capricious". *Guile v State University of New York*, 49 AD2d 1022, 1022-1023 (4th Dept 1975). Arbitrary action cannot elude judicial reach by the plea that it was no more than the use of proper administrative discretion. The moment it is shown to be arbitrary, it ceases to be discretionary. *WNEK Vending & Amusements Co v Buffalo*, 107 Misc2d 353 (Sup Ct Erie County 1980).

Respondents failed to demonstrate that Delaware, Linwood and Lafayette Avenues and Gates Circle were acquired by respondent Common Council by one of the enumerated measures or that such pubic rights-of-way are "appropriate for Urban Development" to meet the eligibility requirements mandated by the UDAAA. Since respondents could not qualify the inclusion of public streets and monuments to satisfy the sixty percent (60%) threshold required by the statute the Court cannot find a rational basis for respondent Common Council's action. As a result, the Court finds the insertion of ineligible municipal property to satisfy the mathematical requirement to be arbitrary and capricious.

Standing

Regardless of our finding of that respondent Common Council's use of ineligible property was arbitrary and capricious, petitioner must still have standing to challenge respondent's actions. Standing is a threshold determination, which, if raised, must be considered at the outset of any litigation to determine whether a party should be allowed access to the courts to adjudicate the merits of a particular dispute. *See, Soc'y of Plastics Indus. v County of Suffolk*, 77 NY2d 761 (1991). Petitioner brings a claim based upon GML Article 16 and another claim based upon GML §51 ("taxpayer suit").

Addressing the latter first, the decisions under GML §51 make it entirely clear that redress may be had only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property of funds for entirely illegal purposes. *See, Kaskel v Impelitteri,* 306 NY 73, 79 (1953). In *Betters v Knabel*, 288 AD2d 872 (4th Dept 2001), the Appellate Division, Fourth Department indicated that a taxpayer action pursuant to GML §51 lies only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes. In order to state a cause of action under GML §51, special allegations of waste tied to corruption have been required. Allegations of illegality alone are an insufficient basis for a taxpayer's suit under GML §51. *Id.*, at 873. Here, petitioner's pleadings fail to allege with necessary specificity any fraudulent or illegal acts committed by respondents. Therefore, petitioner lacks standing to bring a GML §51 claim.

To have standing for a claim under a GML Article 16 or a common law claim, a party must show that it has suffered injury distinct from the public a large. *See, Soc'y of Plastics Indus, supra*, at 774. This is so since, under common law, a court is without power to right a wrong where civil,

property or personal rights are not affected. *See*, *Transactive Corp v New York State Dep't of Soc Servs*, 92 NY2d 579 (1987). Petitioner Sack claimed to pay in excess of $1,000 in City taxes and respondent's actions will likely lead to an increase in his tax bill. Any increase in taxes will affect all city residents. Any minimal increase in taxes suffered by petitioner as a result of the LLUDAA designation is no injury distinct from that suffered by any other taxpayer and is insufficient to meet the standing threshold. *Diederich v St. Lawrence*, 78 AD3d 1291 (3d Dept 2010). Likewise, petitioner did not submit any evidence of direct or particular harm different from any City property owner. No negative analysis of value or detrimental real estate values were placed before the Court for review. Additionally, mere unsubstantiated allegations of increased traffic, noise and related fumes or the diminution of privacy are not sufficient to establishing standing. Furthermore, the action by respondent Common Council to qualify the area as a "slum" and "blighted" and the "stigma", if any, attached to such a label is insufficient to grant petitioner the authority to initiate this action.

However, standing has been recognized and established by taxpayers who challenge the legality of any local legislative action, even though they cannot demonstrate any injury-in-fact, when lack of standing would otherwise erect an impenetrable barrier to any judicial scrutiny of legislative action. *See, Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801 (2003); *see also*, *Colella v Board of Assessors*, 95 NY2d 401 (2000); *see also*, *Matter of Davidson v Village of Penn Yan,* 107 AD3d 1423 (4th Dept 2013); *see also*, *Ricket v Mahan*, 97 AD 3d 1062 (3d Dept 2012). If the challenge to respondent Common Council's resolutions to incorporate "ineligible" property within the LLUDAA is not allowed to proceed then an impenetrable barrier to judicial review is created and, as the *Saratoga County* court stated, a court's duty is to open rather than close the door to the courthouse and the continued vitality of the constraints on power

lie at the heart of our constitutional scheme. *Saratoga County Chamber of Commerce, sura* at 814. Based upon the sound reasoning of *Saratoga County*, this Court finds that the petitioner has standing to challenge respondent Common Council's inclusion of ineligible property to muster the mandated mathematical threshold as well as the ultimate classification of the Linwood Lafayette region as an Urban Development Action Area under GML Article 16.

Respondents argue that the LLUDAA is only a "designation" and any tax abatements would not be generated until a subsequent particular project is approved by respondent Common Council. In other words, the tax abatements are not guaranteed and this action is not ripe for review. An administrative action is final and ripe for review only when a pragmatic evaluation reveals that the decision-maker has arrived at a definitive position on the issue that inflicts an actual concrete injury. Therefore, an administrative action is not ripe for review if the claimed harm may be prevented or significantly ameliorated by further administrative action. *See, Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency,* 161 AD3d 169 (3d Dept 2018).

The Appellate Division, Fourth Department recently addressed Article 78 challenges involving non-final agency determinations. *See, Matter of Witryol v CWM Chemical Services, L.L.C*, 174 AD3d 1449 (4th Dept 2019). Coincidently, in *Witryol*, the Appellate Division, Fourth Department reviewed this Court's decision that the acts of the agency respondents were not final and subject to judicial review. The Appellate Division, Fourth Department affirmed this Court's finding by holding a determination is final only where (1) the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and (2) the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. *Id.*,at 145, *citing Matter of Best Payphones, Inc. v Department of Info.*

Tech & Telecom. of City of N.Y., 5 NY3d 30, 34 (2005). Here, the City Council's decision to include ineligible property in the LLUDAA was definitive and further administrative action to rule on the availability of tax abatements will not "close the barn door" or "un-ring the bell". Therefore, petitioner's claim is ripe for judicial review.

Conclusion

Based on the forgoing reasoning the court (1) declares that the Linwood Lafayette Urban Development Action Area designated by the Common Council of the City of Buffalo on April 16, 2019 is inconsistent with the policy and purposes stated in Article 16, Section 691 of the New York State General Municipal Law; (2) annuls and sets aside respondent Common Council's resolution designating the Linwood Lafayette Urban Development Action Area.

Dated:

Hon. Mark A. Montour, JSC