

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

In the Matter of the Application of

IVY COURT TENANTS ASSOCIATION,
 Petitioner,

INDEX NO. 102180/11
 MOTION DATE 06-15-2011
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

For a Judgment Pursuant to Article 78 of the
 Civil Practice Law and Rules,

-against -

**NEW YORK STATE DIVISION OF HOUSING
 AND COMMUNITY RENEWAL and
 NYC 107 LLC,**
 Respondents.

The following papers, numbered 1 to 5 were read on this petition to/for Art. 78

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 2</u>
Answering Affidavits — Exhibits _____ cross motion	<u>3 - 4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered and adjudged that this Article 78 petition is granted, the Deputy Commissioner's determination dated December 24, 2010, is annulled. The matter is remanded to the New York State Division of Housing and Community Renewal (DHCR) for reconsideration once all "C" violations are cured.

Petitioner is seeking to reverse and annul the December 24, 2010 decision of Deputy Commissioner Woody Pascal of the New York State Division of Housing and Community Renewal (DHCR) which denied its Petitions for Administrative Review (PAR) [Pet. Exh. A]. Petitioner claims that the determination which approved NYC 107 LLC's complex-wide Major Capital Improvement (MCI) rent increase was arbitrary and capricious, and without rational basis in law or fact, based on a remaining "C" violation for lead paint in Apartment 2C at 220 West 107th Street. Petitioner seeks to annul the determination or alternatively have it remanded to DHCR for further consideration and an adjustment of the effective date of the increase so that it coincides with the date of corrections for the "Class C" violation concerning lead paint.

DHCR opposes the petition claiming that the determination was not arbitrary and capricious, had a rational basis in law and fact, and properly relied on documentary evidence submitted by the buildings owner that the violations were corrected. The Rent Administrator's Order dated March 6, 2009, was relied upon by the Deputy Commissioner in his determination [Pet. Exh. D], and DHCR claims the remaining "Class C" violation was raised for the first time at the PAR proceeding.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

NYC 107 LLC, is the owner of three buildings known as 210, 220 and 230 West 107th Street. It sought a complex-wide Major Capital Improvement (MCI) rent increase and filed its application on September 17, 2007. The increase was sought based on the installation of new ceramic flooring throughout the public areas of the complex, and renovation or restoration of the hallway, lobby and vestibule [Return Exh. A-1]. Notices were sent and individual tenants as well as the petitioner submitted their opposition to the rent increase application [Return Exhs. A-3, A-4, A-7, A-8]. Petitioner claimed amongst other things that there were three open "C" violations concerning the complex and submitted a copy of the Housing Preservation and Development (HPD) Registration Building Summary Report, dated December 20, 2007 [Return A-8]. NYC 107 LLC, claimed that the violations were corrected prior to its filing of the MCI application. It submitted an affidavit from the director of maintenance for the complex, work orders, photographs to show the conditions were corrected [Return A-11], the affidavit of an engineer certifying the "C" violations were corrected, and a cost breakdown from the contractor [Return Exh. A-14]. On March 6, 2009, the rent administrator, Lilia Albano, issued a determination finding that NYC 107 LLC was entitled to an MCI rent increase based on the complete replacement of flooring [Pet. Exh. D].

The rent administrator denied the remainder of NYC 107 LLC's application finding the work did not constitute an MCI. The total amount approved by the rent administrator was \$764,675.00, which resulted in a rent increase of \$15.91 per room per month effective November 1, 2007 and permitted a retroactive rent increase for the rent stabilized apartments in the amount of \$270.47 per room [Pet. Exh. D].

The petitioner filed a PAR on April 10, 2009, claiming that the flooring which involved ceramic tiles was not an MCI; the cost breakdown provided by NYC 107 LLC was not a reliable record and the costs were inflated; the rent administrator erred in calculating the total cost, and there remained open "C" violations at all three buildings [Pet. Exh. E]. NYC 107 LLC's answer to the PAR stated that all of the violations had been cured prior to the date the application was filed; proof was submitted that the conditions giving rise to the violations had been cured [Return Exh. B-5]. NYC 107 LLC claimed that the conditions had been corrected but not removed from the record because HPD was denied access and was unable to conduct an inspection of an apartment.

On October 7, 2010, DHCR sent NYC 107 LLC a "Notice to Submit Additional Information" based on its review of the "C" violations alleged by the petitioner [Return Exh. B-8]. DHCR sought evidence that the "C" violation for lead paint had been removed from the HPD database for Apartment 2C at 220 West 107th Street. NYC 107 LLC submitted a response to the DHCR "Notice to Submit Additional Information" including proof of payment of a filing fee for the violation dismissal report; an affidavit from a certified lead based paint abatement contractor attesting that all the work had been performed properly; and a letter from a lead paint testing laboratory stating an investigation and swipe was done of 220 West 107th Street, Apt 2C, and all samples were found to be within acceptable limits [Return Exh. B-9]. On December 24, 2010, the Deputy Commissioner issued an "Order and Opinion Denying Administrative Review," which found no bar to granting the MCI rent increase because, "...the Owner submitted documentation that it had conducted procedure for correcting the condition and had applied to HPD to remove the violation from its database" [Pet. Exh. A].

On February 24, 2011, the petitioner filed an Article 78 petition seeking to vacate the Deputy Commissioner's December 24, 2010 determination. On March 7, 2011, an Amended Petition was served on the respondents.

An administrative decision will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious, (*Matter of Pell v. Board of Education*, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974] and *Ansonia Residents Ass'n v. New York State Div. of Housing and Community Renewal*, 75 N.Y. 2d 206, 551 N.E. 2d 72, 551 N.Y.S. 2d 871 [1989]). Judicial review of an administrative determination under Article 78 is confined to the facts and record adduced before the agency (*Featherstone v. Franco*, 95 N.Y.2d 550, 742 N.E. 2d 607, 720 N.Y.S. 2d 93 [2000], *Matter of Rizzo v. New York State Div. Of Hous. and Community Renewal*, 6 N.Y. 3d 104, 843 N.E. 2d 739, 810 N.Y.S. 2d 112 [2005]). An agency is to be accorded wide deference in the interpretation of its regulations and governing statutory law, however, it cannot engraft requirements or assume powers not found in the enabling legislation (*Vink v. New York State Div. of Hous. and Community Renewal*, 285 A.D. 2d 203, 729 N.Y.S. 2d 697 [N.Y.A.D. 1st Dept., 2001]).

The existence of violations is relevant during the administrative review process and DHCR may consider them through the date a determination is made on the application. This is consistent with the policy of the rent laws. A finding of "C" violations identified by HPD during proceeding before the rent administrator, which remained on record during the time proceedings for administrative review was commenced, may be relied upon by DHCR for purposes of determining whether the owner has met the statutory requirements for an MCI increase (*251 West 98th Street Owners, LLC v. New York State Div. of Housing and Community Renewal*, 276 A.D. 2d 265, 713 N.Y.S. 2d 729 [N.Y.A.D. 1st Dept. 2000] citing to *Matter of Rubin v. Eimicke*, 150 A.D. 2d 697, 541 N.Y.S. 2d 570 [N.Y.A.D. 1st Dept. 1989] and *370 Manhattan Ave., Co., L.L.C. v. New York State Div. of Housing and Community Renewal*, 11 A.D. 3d 370, 783 N.Y.S. 2d 38 [N.Y.A.D. 1st Dept. 2004]).

The Rent Stabilization Code § 2522.4[a][13] states,

"The DHCR shall not grant an owner's application for a rental adjustment pursuant to this subdivision, in whole or in part, if it is determined by the DHCR prior to the granting of approval to collect such adjustment that the owner is not maintaining all required services, or that there are current immediately hazardous violations of any municipal, county, State or Federal law which relate to the maintenance of such services. However, as determined by the DHCR, such application may be granted upon condition that such services will be restored within a reasonable time, and certain tenant-caused violations may be excepted."

The Rent Stabilization Code § 2522.4[a][13], applies to those circumstances where the owner is entitled to a full MCI rent increase, "but for" the fact that after improvements were made, a violation remains open. Under those circumstances, the owner must be granted the opportunity to cure the unrelated condition before the rent increase can be granted (*In re Terrace Court LLC v. New York State Div. Housing and Community Renewal*, 79 A.D. 3d 630, 914 N.Y.S. 2d 43 [N.Y.A.D. 1st Dept., 2010]).

Petitioner seeks to vacate the Deputy Commissioner's determination because the respondents were aware the remaining "C" violation had not been cured as of the date of the determination. Petitioner claims that neither the Rent Administrator's determination or the Deputy Commissioner's determination provide a "reasonable time" to cure the "C" violation, instead each states that all violations were cured [Pet. Exhs. A & D]. Petitioner claims that the remaining "C" violation was placed on the building in July of 2008, almost three years later, as of February 18, 2011, Housing Preservation and Development still listed a "C" violation against the property, and that a "defect letter" was issued [Pet. Exh. G].

DHCR claims that the Deputy Commissioner's determination properly relied on evidentiary proof provided by NYC 107 LLC of correction of the violation. DHCR claims that it contacted the Housing Preservation and Development (HPD) lead paint unit concerning the "C" violation and was advised that the violation would not be removed until the tenant of Apartment 2C provided access to the apartment.

Upon review of all the papers submitted, this Court finds that "C" violations were addressed in the rent administrator's determination. The Deputy Commissioner's determination dated December 24, 2010 addressed the remaining "C" violation which was raised by the petitioner in the PAR. DHCR, prior to the December 24, 2010 determination, sought additional proof that the "C" violation had been cured [Return Exh. B-8]. The Deputy Commissioner relied on evidentiary proof submitted by NYC 107 LLC, that the lead paint "C" violation had been cured, and decided there was no need to wait for HPD to post its inspection results [Return Exh. B-9]. DHCR acted in violation of its enabling statute by failing to suspend the increase without providing a "reasonable time" for NYC 107 LLC, to cure the "C" violation which remains outstanding in HPD records.

Accordingly, it is the decision and order of this court that the petition is granted, the Deputy Commissioner's determination dated December 24, 2010, is annulled. The matter is remanded to the New York State Division of Housing and Community Renewal for reconsideration once all "C" violations are cured.

Accordingly, it is ORDERED and ADJUDGED that the petition is granted, the Deputy Commissioner's determination which approved NYC 107 LLC's complex-wide Major Capital Improvement (MCI) rent increase is annulled and it is further

ORDERED, that the case is remanded to the New York State Division of Housing and Community Renewal for reconsideration once all "C" violations are cured.

This constitutes the decision and judgment of this court.

Dated: July 12, 2011


MANUEL J. MENDEZ

J.S.C. MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE