

**This opinion is uncorrected and subject to revision in the Official Reports. This opinion is not available for publication in any official or unofficial reports, except the New York Law Journal, without approval of the State Reporter or the Committee on Opinions (22 NYCRR 7300.1)**

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable JOHN A. MILANO IA PART 3  
Justice

-----x  
HSIU YING CHIANG, Index  
Number 29440 2000  
Plaintiff, Motion  
- against - Date: February 27, 2001  
ENVIRONMENTAL CONTROL BOARD and THE Motion  
BUILDING DEPARTMENT OF CITY OF Cal. No. 7  
NEW YORK, Defendants.  
-----x

The following papers numbered 1 to 12 read on this Article 78 proceeding for a judgment vacating the fine of \$14,300 imposed by the respondents. Respondents cross-move for an order granting summary judgment dismissing the petition on the grounds that the petitioner failed to exhaust her administrative remedies and Statute of Limitations.

	<u>Papers Numbered</u>
Notice of Petition-Petition-Exhibits (A-D) ..	1 - 6
Notice of Cross Motion-Exhibits.....	7 - 10
Reply Affidavits .....	11 - 12

Upon the foregoing papers it is ordered that respondents' cross motion to dismiss the petition is denied.

Petitioner is the owner of a single-family house. On May 2, 1999, the Department of Buildings issued a Notice of Violation ("NOV") to petitioner for altering her premises in order to accommodate more than the legally approved number of families, in violation of sections 27-118.1 and 26-126.1 of the New York City Administrative Code. The inspector found that the petitioner had illegally altered the premises to permit occupancy by one family, three single room occupancies in the cellar and three single room occupancies on the first floor. Petitioner was directed to correct the illegal condition and file a certificate of correction with the Department of Buildings, and was informed that a per-day penalty could be imposed, and that a hearing would be held on June 22, 1999, due to the hazardous nature of the violation. On June 23,

1999, petitioner's certificate of correction was disapproved by the DOB, on the grounds that a certificate of correction was not submitted and a written statement explaining how the violation was corrected was not submitted. On November 9, 1999, petitioner appeared with her counsel at a hearing before an Environmental Control Board ("ECB") hearing officer, and entered a plea of "admit with explanation". Following petitioner's testimony, the hearing officer found petitioner in violation of sections 27-118.1 and 26-126.1(e) (1) of the Administrative Code and imposed a fine totaling \$14,300. The per-day penalty was imposed for a maximum of 45 days for 6 units, as petitioner had failed to file a certificate of correction with the DOB prior to the first hearing date. The hearing officer's decision and order was mailed to petitioner on January 7, 2000. The reverse side of the decision and order detailed the appeal process and clearly stated that appeals must be taken within 30 days of the mailing date of the order, that all fines must be paid in full and proof of service must be filed with the Board that a copy of the written exceptions were served on the city agency responsible for the NOV issued against the appellant. Petitioner's counsel, in a letter dated January 22, 2000, sought to appeal the hearing officer's imposition of a per diem penalty on the grounds that photographs taken prior to the hearing showed that the violations had been corrected, and requested that the prepayment of the fine be waived due to petitioner's financial condition. On February 16, 2000, the ECB issued a notice stating that petitioner's letter had been received on February 1, 2000, and that the request for an appeal was denied, as the civil penalty was not paid in full and there was no proof of financial hardship, and the petitioner had failed to file proof of service with the Board that a copy of the appeal was served on the city agency responsible for issuing the NOV. Petitioner's counsel, in a letter dated April 10, 2000 submitted to the ECB supplemental materials to the request for an appeal, including an affidavit from the petitioner and her bank statements in support of her claim of financial hardship, and proof of service that the appeal had been served on the DOB by mail on April 10, 2000. Counsel for petitioner mailed a second request for consideration of the appeal to the ECB on June 9, 2000. The ECB, in a letter dated August 15, 2000, stated that the January 22, 2000, submission had been rejected, and that the re-submission dated April 19, 2000 was served but not filed in a timely manner. The June 9, 2000 appeal seeking reconsideration of the daily penalties was denied as the hearing officer had found that while the single room occupancies in the cellar had been discontinued, there was still an illegal single room occupancy on the first floor and no evidence had been submitted to show that a certificate of correction had been filed to toll the running of the per day penalties.

Petitioner commenced the within proceeding on December 13, 2000 to review the ECB's August 15, 2000 denial of the June 9, 2000 appeal. The evidence submitted herein establishes that while petitioner failed to follow the proper procedures for filing an

administrative appeal on January 22, 2000 and April 10, 2000, the ECB accepted the June 9, 2000 appeal, thereby waiving the 30-day deadline, and issued a determination on the merits on August 15, 2000. The court, therefore, finds that petitioner exhausted her administrative remedies, and that she timely commenced the within proceeding within four months of the August 15, 2000 decision. (CPLR 217)

Respondents are directed to serve and file an answer and submit the administrative record within 20 days after the service of a copy of this order and notice of entry. Following the service of the answer, petitioner may re-notice the petition on the original papers upon 5 days notice.

Dated: May 1, 2001

.....  
John A. Milano, J.S.C.