

<b>Matter of Cenpark Realty, LLC v New York State Div. of Hous. &amp; Community Renewal</b>
2005 NY Slip Op 30547(U)
September 7, 2005
Supreme Court, New York County
Docket Number: 104872/05
Judge: Lewis B. Stone
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50S

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In the Matter of the Application of :  
 CENPARK REALTY, LLC., :  
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 Petitioner, : DECISION AND  
 : ORDER  
 For a Judgment Pursuant to Article 78 of the :  
 Practice Law and Rules, : Index Number  
 : 104872/05  
 -against- :  
 NEW YORK STATE DIVISION OF HOUSING AND :  
 COMMUNITY RENEWAL and 360 CENTRAL PARK :  
 WEST TENANTS ASSOCIATION :  
 :  
 Respondents. :  
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Hon. Lewis Bart Stone, J

This proceeding was commenced under Article 78 of the Civil Practice Law and Rules ("CPLR") by Cenpark Realty, Inc. ("Cenpark"), the owner of the building at 360 Central Park West, New York, N Y (the "Building"), to review an Order (the "Order") of the New York State Division of Housing and Community Renewal ("DHCR") issued on February 11, 2005 denying a petition for Administrative Review ("PAR") of a decision (the "Decision") of the Rent Administrator ("RA") issued on August 27, 2002. The Decision rescinded an earlier decision of the RA issued on July 30, 1998 (the "Earlier Decision") which had allowed Cenpark a rent increase for installing new windows at the Building in 1994 and 1995. The Earlier Decision had

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Cen appealed by a Petition for Administrative Review (the "Earlier PAR") brought by 360 Central Park West Tenants Association (the "Tenants Association"), an association of Building residents on September 2, 1998. The Earlier PAR was granted by DHCR remanding the matter to the RA on August 27, 2002. Following such remand, the Decision was subsequently issued by the RA.

Under the Rent Stabilization Law ("RSL"), which is applicable to the Building, all building owners are entitled to certain rent increases for certain building wide improvements. This process was designed to induce owners to continue to invest and maintain regulated buildings by creating incentive for capital re-investments within the regulatory system. Ansonia Residents Assoc. v. DHCR, 75 NY2d 206 (1989). These increases are referred to as Major Capital Improvement ("MCI") increases. Under the law, DHCR reviews MCI applications to assure compliance with law. The replacement of single pane windows with insulation is among the types of improvements which clearly qualify for MCI treatment.

To carry out the intent of the law, DHCR considers both whether the improvements have been installed appropriately and whether they have been installed on a building wide basis before approving an MCI application.

After the windows were installed, Cenpark filed its MCI application with DHCR on October 28, 1996. On November 12, 1996, DHCR gave the Building

Cenpark's notice of the application, noting that they had thirty days to respond, and several tenants responded within such period. DHCR, in accordance with its rules, forwarded the tenants' responses to Cenpark on January 2, 1997 for comment. Cenpark responded to DHCR on January 28 that it had addressed the problems brought to its attention by tenants who responded.

On November 19, 1996, the Tenants Association wrote DHCR and requested an additional period of not less than 90 days to respond to the November 12, 1996 notice. The letter, written by the President of the Tenants Association, stated "If I don't hear from you within 10 days of receipt of this letter, I would assume the extension has been granted." DHCR responded on January 2, 1997, to the President of the Tenants Association, giving the Association twenty days to respond to Cenpark's application. On April 1, 1997, 78 days later,<sup>1</sup> the Tenants Association filed its objections to Cenpark's application on various grounds.

The ground relevant to this dispute relates to the quality of the window installation. The Tenant Association challenged the quality of the window installation<sup>2</sup> alleging that "a majority of the windows are defective. Specifically, in at least 52 of

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<sup>1</sup> The process seems replete with time lines being ignored, but neither party has raised issues on such grounds.

<sup>2</sup> The challenge also sought denial for the MCI application in whole and in part on various other grounds. The other issues raised have been resolved during the pendency of this dispute and are not before this Court.

apartments at the building, tenants have great difficulty opening the windows...Additionally, in other apartments the spring balances are defective and the windows do not close properly.” The response also stated that “a complete list of the tenants whose windows cannot be opened” were included in an affidavit of the Tenant Association’s consultant (the “Tenants Consultant Report”).

The Tenants Consultant Report, dated March 11, 1997, was somewhat less apocalyptic, alleging that the results of surveys showed that “52 tenants replied with some negative comments,”<sup>3</sup> and including the result of the Consultant’s inspection of 20 of the 52 apartments, and the measurements he took which, in his opinion, showed that excessive force was needed to open the windows. DHCR sent the submission to Cenpark, which contacted its contractor who reported that it had made the adjustments to the windows in the apartment listed to which it had obtained access. Over the next few months, DHCR asked Cenpark for, and was given, additional material to supplement Cenpark’s application. DHCR eventually issued the Earlier Decision on July 30, 1998.

There is no dispute that every window in the Building was replaced by new windows. The dispute is over the quality of their installation. DHCR asserts both that

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<sup>3</sup> Even assuming a worst case scenario where any tenant “negative comment” translates to a claim that all windows in that apartment were defective, the percentage of faulty windows alleged was under 36%.

Indeed the installation is defective in a substantial portion of the apartments, it is not “building wide” under the law and that the installation of windows in a defective and unworkmanlike manner is not an improvement. The Earlier PAR did not address the merits of this dispute but set aside the original order of the RA granting the MCI instead on procedural grounds to permit an inspection.<sup>4</sup>

The DHCR subsequently, after the remand of August 2002, in November 2003, directed its representative to such an inspection of the apartments in which the Tenants Consultant Report had identified problems with the windows (the “2003 Inspection”). In that inspection, the DHCR inspector determined and reported that certain windows had problems. The RA found that “based on the aforementioned, [the findings of the 2003 Inspection] the windows at these premises are deemed installed in an unworkmanlike manner.” On the basis of this finding, the RA rescinded the MCI previously granted. Cenpark filed a PAR in response. The Decision rejected Cenpark’s PAR and upheld the RA’s rescission of the MCI award, and Cenpark responded by commencing this Article 78 proceeding.

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<sup>4</sup> The Earlier PAR was granted because DHCR failed to make available all of Cenpark’s statements and materials to the Tenants Association by failing to give them notice of Cenpark’s statements. The decision in granting the PAR specifically reserved the question of unworkmanlike installation for the remand, stating “the Commissioner notes that the number of complaints constitutes 30% of the number of apartments on the premises and may indicate that the installation was performed in an unworkmanlike manner.”

Cenpark challenges the Order on the grounds that rescinding the MCI under the facts of this case was arbitrary and capricious.

### FACTS

This case turns on facts. The facts are what problems exist with the windows and which facts were before DHCR, as well as on whether upon such facts, the decision of DHCR to deny the entire MCI was arbitrary and capricious. Here, it is undisputed that the Building, which was subject to the New York City Landmarks Law, had 1055 windows in 146 apartments. In 1994 and 1995, Cenpark replaced all 1055 single-pane windows in the building with new aluminum frame double-pane insulated windows, spending approximately \$269,000 to do so. The new windows, which were in full compliance with the Landmark Law are quite large six-pane over six-pane windows.<sup>5</sup> The Tenants Association claimed in the Tenant Consultant Report that 52 of the apartments had “window defects.”

The 2003 Inspection found window problems in 33 apartments,<sup>6</sup> and on the basis of the 2003 Inspection, the Decision rescinded the MCI.

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<sup>5</sup> See Alperin, New York Apartment Houses of Rosario Candella and James Carpenter, p. 289, Fig 298 (Acanthus Press, NY., 2001, ISBN 0-926595-80-1)

<sup>6</sup> Except for two instances where tenants sought rescheduled inspection, access was denied by the tenants in the remaining apartments, notwithstanding the clear notice of DHCR advising that the “Failure to provide access...without rescheduling...may result in a determination against your interests.” In several instances the 2003 Inspection noted that the tenant was fully satisfied with the windows.

As this is an Article 78 proceeding, this Court cannot substitute its judgment as to the finding of facts for those found by DHCR, although it may determine whether the Order's denial of the PAR on the facts found was arbitrary and capricious. Further, this Court may only inquire into the correctness of the Order made on the grounds before DHCR in the PAR and may not consider issues which could have been but were not raised in the PAR.

In its PAR, Cenpark challenged the Decision on several grounds, first that because the DHCR did not make the report of the 2003 Inspection available to Cenpark, it could not respond as to the nature of the defect for each and every window or make any necessary repair. Further, Cenpark asserted that as no tenant service complaint relating to the condition of the windows was made to DHCR since the windows were installed and as there was no violation of record relating to the windows, the Decision could not have found the windows to be faulty.

The Decision rejected these contentions finding that the identity of the defective windows were set forth in the Tenant Consultant Report, and that the 2003 Inspection was conclusive on the existence of the defects, notwithstanding the lack of complaints or violations.<sup>7</sup> It also noted that Cenpark had subsequently been given full access to

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<sup>7</sup> Cenpark's statements that there is no violation record on the Building is undisputed as is their contention that no complaints were made to DHCR for faulty service relating to the windows. While it is true, as DHCR asserts, that the lack of such violations or complaints does

the report of the 2003 Inspection, and had not amended its PAR, although it had reserved the right to do so after it had received the 2003 Inspection report.

The Decision's conclusion was that no MCI was available because under Garden Bay Manor Assoc. v. DHCR,<sup>8</sup> 150 AD2d 378 (2<sup>nd</sup> Dept. 1989) "in order for a window installation to qualify for an MCI increase, it must, *inter alia*, be performed in a workmanlike manner as to inure to the benefit of all tenants."

Cenpark in this proceeding contends that using the 2003 Inspection, which merely described the 2003 condition of the windows, to determine whether the installation of such windows, over eight years earlier were not performed in a workmanlike manner is itself arbitrary and capricious. Cenpark also argues that relying solely on problems evidenced by an inspection in 2003, more than eight years after the 1994-1995 installation cannot fairly determine whether the installation was unworkmanlike, and that problems observed in 2003 may have arisen out of wear and tear.

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not bind DHCR in its consideration of the MCI application, the fact that not one complaint involving even one of the 1055 windows was logged by a tenant in almost ten years is strong evidence at least of the installation having been accomplished in full compliance with law. As neither party addressed whether DHCR may consider for MCI purposes, the quality of an installation beyond the building code requirements, this Court does not address such issue.

<sup>8</sup> The RA incorrectly cited this case as "Garden Bay Management v. DHCR." This case did not involve windows, but involved pointing which, as supported by the record, was "done in such a poor manner that it did not qualify as a major capital improvement."

In its PAR, Cenpark contended that denying an MCI for the entire Building was arbitrary and capricious because of the instances of problem windows did not rise to the level necessary to support such a denial. This issue is therefore also preserved for review. DHCR concedes in its memorandum of law that an MCI for an entire building may only be denied where it is defective in a substantial percentage of apartments. However, neither the law nor DHCR regulations clearly establish where DHCR may or should draw this line. Thus, also to be determined is where “substantial” begins and ends and the roles of the Court and DHCR in drawing such a line.

The Tenant Consultant Report initially alleged problematic windows in 53 apartments (33% of apartments). The 2003 Inspection report identified 161 problematic windows (15.2 % of all windows) in 33 apartments (22% of apartments). The 161 windows included one with a cracked window pane, fourteen with defective or missing locks and 151 which were “hard to open” or “very hard to open.”

Whether or not the window closure problems were caused by an unworkmanlike installation, the latter two problems found by the 2003 Inspection were clearly not so caused.<sup>9</sup> The Tenant Consultant Report’s failure to list locking problems or broken

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<sup>9</sup> Although the 2003 Inspection found certain locks were found to be missing, the report neither asserted, found nor suggested that they were originally absent and not subsequently broken or removed. The 2003 Inspection report also found a single broken window. It, however, neither asserted, found nor even suggested that the break was caused by an unworkmanlike installation.

Windows can be presumed to be conclusive that they did not exist in 1997. As neither the 2003 Inspection report nor the record show any basis to infer that such problems were other than post-installation problems, unrelated to the installation and as they affect 1.2% and .01% of the windows respectively, they are not properly includable as meaningful indicia of an unworkmanlike installation. Deducting these incidents from the window problems reduces the relevant percentage of problematic windows to 14.3% of the total number of windows installed.

Owner-tenant arguments as to whether the installation of new windows may qualify for MCI treatment is not new. Each party has submitted cases to support its position.

In 95 West End Ave. V. DHCR, Index No. 10538/04 (New York County Sup. Ct., Shafer, J.), submitted by Cenpark, a DHCR inspection found that 1.1% of the windows needed repairs (3 out of 268) and that there was peeling paint and/or discolored walls in six out of 54 apartments. Although 7 out of 54 apartments<sup>10</sup> needed repairs (approximately 13%), DHCR allowed the MCI but withheld its applicability to the seven apartments until repairs were made. The Supreme Court upheld such decision as not arbitrary and capricious.

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<sup>10</sup> Apparently some apartments had both bad windows and bad walls.

In Simkowitz v. DHCR, 256 AD2d 51 (1<sup>st</sup> Dept. 1998), submitted by DHCR, the First Department upheld DHCR's denial of an MCI on the grounds that the MCI did not benefit all tenants. In that case DHCR found that "at least 18% of the apartments had substantial defects as did the entry and vestibule doors and an absence of evidence demonstrating that such defects were due to wear and tear or vandalism rather than unworkmanlike installation."

Also of note is Duell LLC v. DHCR, 269 AD2d 235 (1<sup>st</sup> Dept. 2000), which cited both Ansonia and Simkowitz and was itself cited in 925 West End as not applicable. In that case, as the Court in 925 West End noted, 60% of the apartments had defects.

While not involving windows, a decision of DHCR on a PAR relating to a new roof in Gross, DHCR Administrative Review Docket DH110323RT is quite interesting. In that case, the roof was replaced on the building, which seemed to be a six story apartment house with seven apartments per floor. The owner sought an MCI over the tenants' objections. The inspector was only able to gain access to four of the seven top floor apartments where he found evidence of water damage to paint and plaster in only two of them. DHCR granted the MCI, finding that it was not appropriate to withhold it for all apartments when only two had problems (the MCI was withheld for such apartments). What is interesting is the DHCR analysis finding

Two out of 42<sup>11</sup> apartments had problems, not that 50% of those available for inspection (2 out of 4) had problems or 28% of the “relevant” apartments (2 out of 7 immediately under the roof) had problems.

While as a matter of comparison, the 14.3% “bad” count here is closer to the 13% bad count of 95 West End than the 18% “bad” count in Simkowitz, it is also arguable that the bad count should be an apartment count which would lead to a different result. Gross, supra, illustrates how the mere use of percentages can itself be arbitrary as different results can be reached by different selections of the denominator used to calculate the percentage .

What DHCR seems to be urging here is that once it counts defects (assuming that they can be ascribed to unworkmanlike installation), determines the denominator and those defects reach a certain percentage, the MCI must be lost, regardless how serious the defects are or how arbitrary the selection of the denomination. On the other hand, according to DHCR, up to that point before the magic percentage is reached, even the most serious defects will only delay the applicability of the MCI to affected apartments.

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<sup>11</sup> This Court has assumed that with 7 apartments per floor and six floors that there were 42 apartments.

Decisions upholding denials of MCI brought to the attention of this Court all involve pervasively sloppy and unworkmanlike work and serious failures as a result. This Court concurs that such denials are proper. In other cases, the decisions support a grant of an MCI, while withholding its applicability to apartments with problems, until they are fixed. A result with which this Court also concurs.

The 2003 Inspection report contains no assertion, finding, or conclusion that the installation was made in an unworkmanlike manner. Nor is such conclusion an inherent one. The windows which are identified as being hard to open or close are almost universally noted to “need adjustment” or replacement of opening mechanisms, rather than being described as having been installed in an unworkmanlike manner.

The Tenants Consultant Report asserted that specific measurable force standards should be applied in determining whether the windows worked properly. Although Cenpark had also urged that quantitative measurements of the difficulty of opening windows should be made, none were made in the 2003 Inspection, which only reported that a window was “hard to open” or “very hard to open.”

In the Decision, the RA apparently assumed that all of the window defects were instances of initial unworkmanlike installation and denied the MCI.

In its brief, after asserting that a decision to grant or not to grant an MCI is based on a rule of substantial non-compliance, DHCR also seems to assert that where

any portion of an installation is defective by reason of poor workmanship, no MCI may be granted because under the MCI rules, “the improvement must benefit all tenants.” This is not correct. DHCR has taken a contrary position and has regularly approved MCI applications even when it found some problems to remain, and such position has been endorsed by the courts. Those cases include window replacement MCI’s where there were a small portion of the windows which were not replaced,<sup>12</sup> or where there were still a number of problem windows remaining at the time of the MCI grant.<sup>13</sup> The Courts, on the other hand, do recognize that where DHCR determines that “a substantial portion of the windows were defectively installed, and as such did not constitute an improvement to the building justifying” an MCI increase, the MCI for the entire building could be denied. See Duell, LLC v. DHCR, supra.

Further, the Order assumed that all problem windows were defective as a matter of unworkmanlike installation as distinct from merely requiring adjustment. If, however, the problem was adjustment, denying the entire MCI on such basis would be arbitrary and capricious under prior precedents. Thus, it is also crucial to this case

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<sup>12</sup> In Ansonia, supra, the Court of Appeals upheld the MCI grant by the DHCR for a building wide installation of storm windows even though no storm windows were installed on eight apartments where the landlord had found it impossible to do so due to the physical characteristics of the windows involved, and no storm windows were installed on hallway windows.

<sup>13</sup> E.g. 925 West End Avenue, supra, where 13% of the apartments needed repairs.

Whether the sticky windows are a problem of adjustment or unworkmanlike installation. The record is silent; the 2003 Inspection does not address such issue. The factual problem are further exacerbated by the over eight year delay between the window installation in 1994 and 1995 and the 2003 Inspection, as it is not improbable that after time, that windows, large enough to comply with New York City landmark requirements, may need adjustment, even if manufactured and installed with perfect workmanship.

The Decision and the Order both assumed, but did not decide, that the problems were those of unworkmanlike installation. The record, by only considering the report of the 2003 Inspection on this issue, shows no basis to establish any relationship between current problems and unworkmanlike installation. While the presence of certain types of defects (or perhaps even defects of the kinds observed in the 2003 Inspection) might, with the input of appropriate expert opinion, per se support a finding of shoddy workmanship, the record contains no such opinion. Further, the record shows significant instances of past correction of problem windows at the Building<sup>14</sup> which supports a contrary conclusion that the problems were of adjustment

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<sup>14</sup> The record shows that some tenants who complained about the windows were satisfied by adjustments subsequently made. Also, the Tenant Association Consultant Report of 52 apartments having bad windows in 1997 was reduced to 32 apartments in 2003, indicating that solution to the problem was not only feasible but was in fact accomplished at least in part.

and not of inherent poor workmanship in installation. Further, the lack of any quantification of how hard it was to open the windows gave DHCR no basis to conclude whether the problem was severe and possibly more supportive of a defect in workmanship in installation or minor and possibly more supportive of a problem in calibration or adjustment,<sup>15</sup> or even inherent in large double pane windows complying with landmarks requirements.

The over eight year delay in the resolution of this matter makes it difficult to determine whether the original installation was unworkmanlike or not. Windows do not last forever and the Rent Stabilization Code provisions relating to MCIs itself recognize that the "Useful Life" of aluminum frame windows is deemed to be twenty years. See Rent Stabilization Code §2522.4. Much of the delay in causing the inspection is attributable to DHCR which failed<sup>16</sup> to give proper notices to the complaining tenants when the matter was first before it in 1998, requiring a second full proceeding before it in 2003, five years later.

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<sup>15</sup> Both the Tenant Consultant Report and Cenpark have argued to DHCR that there were objective measurements of the force need to open windows. The 2003 Inspection made no such measurements, but reported only that certain windows were hard to open and others were very hard to open.

<sup>16</sup> The Earlier PAR was granted because of the failure of DHCR to give notice to the tenants of portions of the earlier proceeding before the RA. Giving such notices were the obligation of DHCR.

The parties, not surprisingly, respectively take differing views of the impact of the delay. Cenpark argues that the delay is too long for the 2003 Inspection to be relevant. DHCR submitted the unreported lower court decision in Simkowitz v. DHCR (New York County Index No. 105858/97) to support its position that the extended delay in inspection presents no issue. In Simkowitz, which also involved a disputed MCI for windows, the windows were installed in 1987 and the inspection took place in 1992, five years later. The Court in Simkowitz based its determination to accept an inspection made five years after the installation on the decision of the First Department in ANF Co. v. DHCR, 176 AD2d 518 (1<sup>st</sup> Dept. 1991). However, in ANF Co., the First Department approved a three year old inspection report against claims of staleness. Here the inspection occurred over eight years after the installation.

Thus, neither Simkowitz nor ANF Co. is conclusive on the staleness issue as the delay here is far longer than considered in such cases. However, this Court finds that using a proper analysis, both parties are partially correct. Although it may be difficult to reconstruct what happened many years earlier, it is not impossible, and courts and other fact finders do it all the time. However, eliding over potential difficulties caused by the extensive passage of time and instead making assumptions is, as was done in this case, is arbitrary and capricious. As a decision must be made on the question of

Whether the windows were installed in an unworkmanlike manner, there was no alternative to an inspection, no matter how late. On the other hand, considering how far removed in time the 2003 Inspection was from the installation, a report finding only that certain windows were difficult to open cannot conclusively establish the issue of unworkmanlike installation without a further causal connection and without giving Cenpark the opportunity to be heard on such issue.

As stated by the Court of Appeals in Ansonia Residents Assn. v. DHCR, *supra*, the purpose of the MCI system is to maintain existing regulated housing by providing an incentive to keep owners reinvesting in their properties. As these properties, which were supposedly only to be “stabilized” for a short “emergency” seem now destined to virtually perpetual regulation, providing continued incentives for capital replenishment are even more important now. Here, the record shows that almost 80% of the Building’s tenants have enjoyed new double pane windows for over eight years, without current complaints. While certain tenants complained of difficulties to their Tenant Association, the approach of DHCR has induced the tenants to battle rather than try and solve the sticky window problem.<sup>17</sup> As illustrated by this dispute, the very

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<sup>17</sup> Cenpark’s window contractor offered the tenants who had problems an adjustment of their windows. The record is unclear whether the tenants or the contractor followed through although several tenants complained that they had late notice of the date the contractor had advised them it would be available to fix windows. The record is silent on what happened next.

DHCR “solution” of full denial of MCI for faulty workmanship may well be itself arbitrary and capricious. Drawing a bright line between what is substantial and insubstantial by numbers alone, as DHCR urges can only prolong disputes as tenants and owners jockey to maneuver the result to one side or the other. While a legislature might be authorized to draw a bright line, DHCR is not a legislature, and cannot draw such a line, as the purpose of the MCI is to preserve housing, not to punish and discourage investment.

While the MCI system inherently creates tension between owners and tenants, the rule urged here by DHCR would only make things worse by creating incentives for tenants<sup>18</sup> to resist resolution of physical problems in order to reach an arbitrary threshold of defects to support a denial of an MCI, and to litigate for years. This case, having been in the administrative/litigation pipeline for almost nine years and likely to continue for several more, is illustrative of the mischief of such an approach. Creating an arbitrary numbers game without differentiating the types of defects which count, creates an incentive for tenant groups to litigate rather than to solve physical problems which a “no MCI increase for an apartment until it is fixed” rule would promote. Such is arbitrary and capricious.

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<sup>18</sup> Tenant Associations, *inter alia*, do not favor rent increases and can be expected to fight them where possible. Here such dynamic seems omnipresent.

It is not inappropriate for DHCR to blow the whistle where owners attempt to sneak through totally inadequate installations for an MCI. What DHCR may not do, however, is to expand a proper extraordinary remedy for extraordinary cases to an arbitrary and capricious rule where such an extraordinary situation does not exist.

Based on the foregoing, Cenpark's petition to vacate the Order on the grounds that such denial was arbitrary and capricious is granted on two separate and independent bases.

First, the denial is vacated on the grounds that a mechanical rule to reject an MCI application by merely counting problem windows, without considering the seriousness of any defect in the absence of a wilful default, is itself arbitrary and capricious in that it is both in derogation of the statutory purpose of the MCI provisions of the Rent Stabilization Law and necessarily arbitrary in its applicability to individual cases. This does not mean that DHCR cannot act to properly protect tenants by denying increases for those apartments where problems have not been addressed, or even by totally denying MCI benefits for a pervasively and seriously defective installation. Such rules would continue to promote the statutory purposes of the MCI scheme as articulated in Ansonia while protecting tenants who had not yet benefitted from improvements without according tenants who had fully benefitted, an unearned windfall.

Secondly, while this Court recognizes that sham or pervasively and seriously defective work must be discouraged, and that where such is the case an MCI may be denied, the denial of an MCI on the grounds of unworkmanlike installation based on an inspection over eight years later which presented no evidence of any relation of problems found to an initial unworkmanlike installation, and without any finding that the work was sham or seriously or pervasively defective, is itself arbitrary and capricious.

Accordingly, this matter is returned to DHCR to ascertain whether the window problems found were as a result of the window design mandated by the Landmarks Law, the passage of time, maintenance issues, maladjustments or other causes on the one hand or were instead caused by initial unworkmanlike installation. In doing so, if DHCR finds that there is evidence of initial unworkmanlike installation which has not been corrected, it must then consider whether such unworkmanlike installation was so serious and pervasive as to require a punitive denial of all MCI increases.


This is the Decision and Order of the Court.

DATED: SEPTEMBER 7, 2005  
NEW YORK, NEW YORK

**FILED**

SEP 15 2005

NEW YORK  
COUNTY CLERK'S OFFICE



Hon. Lewis Bart Stone  
Justice of the Supreme Court