[* 1]

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

PRESENT: HON. PAUL G. FEINMAN PART 52

Index Number : 113788/2006

PECKHAM, DANIEL

VS

CALOGERO, JUDITH A.

Sequence Number : 001

ARTICLE 78

INDEX NO. 113788/2006

MOTION DATE 2/28/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits _____	
Replying Affidavits _____	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

PETITION
~~MOTION~~ IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION/ORDER/JUDGMENT

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

Dated: June 25, 2007

J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X

In the Matter of the Application of
DANIEL PECKHAM,
Petitioner,

Index Number 13788/2006

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

Mot. Seq. No. 001

-against-

DECISION, ORDER AND JUDGMENT

JUDITH A. CALOGERO, as Commissioner of the State of New York's DIVISION OF HOUSING and COMMUNITY RENEWAL; PAUL ROLDAN, Deputy Commissioner of the DHCR; and, CHELSEA PARTNERS, LLC (Landlord),
Respondents.
----------X

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Papers considered in review of this petition to reverse and remand determination:

Papers	**Numbered**[1]
Notice of Petition & Affidavits Annexed, Affirmation of Service	1, 2
Verified Answer & Brief	3, 4
Verified Answer, Affirmation in Opposition & Memo of Law	5, 6, 7
Reply Brief & Affirmation	8

PAUL G. FEINMAN, J.:

Pursuant to CPLR Article 7803(3), petitioner seeks reversal of a July 27, 2006 determination by the Division of Housing and Community Renewal ("DHCR") that the respondent Chelsea Partners, LLC had satisfied Section 2524.5 of the Rent Stabilization Code

[1] The court considered the Return of the administrative proceedings before the DHCR which is not part of the Clerk of the Court's file.

and could lawfully deny petitioner a renewal lease based on its "demolition" of the building. Petitioner also seeks a preliminary injunction staying his eviction or any other proceedings against him pending final determination of this proceeding and, implicitly, pending completion of the administrative proceedings upon remand. For the reasons which follow, the petition is granted to the extent that it is remanded to the Division of Housing and Community Renewal for further findings and determination consistent with this decision.. The request for injunctive relief is denied for the reasons set forth below.

Background

Petitioner has been a tenant for more than 10 years in a rent-stabilized apartment in a building owned by respondent Chelsea Partners. Most of his income is derived from Social Security Disability Insurance, and he participates in the food stamp program. In May 2004, the owner-landlord commenced an administrative proceeding at the DHCR seeking permission to refuse the renewal of petitioner's rent stabilized lease on the ground that it plans to demolish the premises (Pet. Ex. K). Its plan is to entirely gut the interior of the current three-story structure with basement, and create a six-story building with concrete floors, as well as increase the depth from 40 to 70 feet (DHCR Record Ex. A-9, letter from Feingold & Gregory, Architects to DHCR, Sep. 10, 2004; DHCR Record A-14 [DOB Application]). The Work Permit Application filed by the general contractor indicated that the type of permits sought were for "Alteration" and "Construction Equipment" (DHCR Record A-14).

Petitioner put in his opposing answer in August 2005. On December 13, 2005, the rent administrator of the DHCR issued an opinion granting the owner's application, finding that the owner had satisfied the conditions set forth under the New York City Rent Stabilization Code (9

NYCRR§ 2524.5[a][2]) (Ver. Pet. Ex. N). The rent administrator noted that the owner had submitted evidence that it had obtained the necessary approval from the New York City Department of Buildings (DOB) and had the financial ability sufficient to complete the project. This proof was in the form of permits issued by the Department of Buildings (DHCR Record A-28, ex.A), the approved architectural plans submitted by the owner (see DHCR Record A-13), and a letter from an assistant vice president at JP Morgan Chase Bank to Mr. Larry Tauber, dated August 3, 2004, confirming that "Three Stars Associates LLC" had established a separate account in July 2004 for the purpose of funding construction of the property at the address of the building in question (DHCR Record A-4 [ex. B]).[2] Thus, the rent administrator directed that petitioner had three months to vacate his apartment and to qualify for the relocation stipend set forth under Section 2524.5(a)(2)(ii)(a) of the Rent Stabilization Code.

Petitioner filed a petition for administrative review (PAR) with the DHCR on about January 12, 2006 (Pet. Ex. J). His PAR contended that the rent administrator should have undertaken a "real" investigation into petitioner's allegations and made a "substantive review of the record" including the history of building code violations issued against the premises and two rent abatements awarded to petitioner in one year due to violations of the warranty of habitability. It argued that because the owner only received approval in December 2005, five months after the date of the expiration of his renewal lease, the notice sent to petitioner in 2004 of a "pending" demolition application was improper and untimely. It alleged that one of the violations issued in September 2005 concerned performance of work outside the scope of the

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[2]Tauber is also the "agent" for respondent Chelsea Partners LLC, whose address is the same as Three Stars (see, e.g., Smith Aff. in Opp., Ex. D, Letter dated Jun 29, 2004 from DHCR to petitioner and respondent).

permits, and argued that the owner must not be allowed to do a "gut" renovation and perform unlawful work when petitioner still lived in the building. It noted that respondent failed to inform the Department of Buildings (DOB) of petitioner's occupancy. It further argued that, "at a minimum," because petitioner received food stamps and Social Security Disability Insurance payments, the owner should relocate him to housing at the same or lower regulated rent with the stipend waived so as not to jeopardize his receipt of food stamps.

The PAR was denied by the DHCR deputy commissioner by order and opinion issued on July 27, 2006 (Ver. Pet. Ex. A). The opinion takes note of petitioner's several arguments and the owner's defenses, but specifically indicates that the scope of the review was limited to whether the owner had met the requirements under Section 2524.5 of the Rent Stabilization Code so to allow DHCR to approve its application to refuse to renew petitioner's lease so as to recover the apartment and demolish the building (Ver. Pet. Ex. A, DHCR Order and Opinion at 5). The deputy commissioner's review of the record found that the owner had met the requirements (Ver. Pet. Ex. A, DHCR Order and Opinion at 6). The opinion affirms the findings of the rent administrator but modifies them to the extent of giving the owner permission to refuse to renew the petitioner's lease and to pursue an eviction proceeding if he had not removed himself from the apartment and sought qualification for the relocation benefits within three months of the date of the decision.

The opinion by the DHCR deputy commissioner declined to address petitioner's allegations of building code violations as they were to be handled by the DOB and New York City Housing Preservation and Development (HPD). It found the Housing Court proceedings were not pertinent to its decision making, and that the allegations concerning improper securing

of work permits and work performed outside the scope of the work permits or performed unsafely, were under the jurisdiction of the proper supervising authorities and not within the scope of the instant DHCR proceeding. The opinion noted that petitioner had in fact commenced a harassment proceeding with DHCR which was monitored for about six months in order to provide that the violations of record were removed and to try to resolve the eviction issue, and that the proceeding was closed in January 2005 based on the finding that "essentially all HPD violations of record have been removed from the subject premises." It noted that petitioner had not appealed that decision, nor filed a diminution of services complaint or a second harassment complaint with DHCR although advised he could do so if the facts warranted (Ver. Pet. Ex. A, DHCR Order and Opinion at 5).[3] It reiterated that a review of the record found that the owner had established that it met the criteria under Rent Stabilization Code § 2524.5, and that there was therefore no need to hold a hearing or conduct an inspection to further investigate the matter (Ver. Pet. Ex. A, DHCR Order and Opinion at 6). It noted that the building plans and a letter from the architect, along with photographs and allegations made by petitioner's attorney, clearly showed intent to "demolish" the building. The opinion further noted that there is no requirement that an owner already have an approved work permit from the DOB at the time it files its application with DHCR, and that the owner had not misrepresented the facts when it filed its application on May 7, 2004. It also noted that petitioner's lease expired on September 24, 2005, more than a year after the owner filed its application (although several months before its application was approved by DHCR).

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[3]The letter closing the harassment proceeding, dated January 3, 2005, is Exhibit B of the Verified Petition.

Petitioner timely commenced the instant proceeding seeking a preliminary injunction to stay eviction proceedings against him, and a reversal and remand of the DHCR determination on the grounds that it was arbitrary and capricious and in violation of lawful procedure (CPLR 7808[3]). He argues that there was an "abject failure" by DHCR to fully examine the record which includes a history of harassment against tenants and withholding of services and "false applications" filed by the owner to agencies (Newton Aff. in Supp.¶¶ 14, 22). He questions the sufficiency of evidence provided by the owner to DHCR regarding financial ability to perform the construction, and argues that the DHCR is ignoring the intent of the Rent Stabilization Code to promote and safeguard affordable housing if it permits landlords to evict rent stabilized tenants from perfectly sound buildings in order to renovate and sell them as market rate housing (Newton Aff. in Supp. ¶¶ 23, 24). He also seeks an order directing the owner to provide a rent-stabilized apartment at the same or lower regulated rent in a nearby area.

Legal Analysis

1. The DHCR Proceedings

The New York City Rent Stabilization Law addresses the "serious public emergency" which exists in New York City of an acute shortage of dwellings for residence (New York City Admin. Code § 26-501 [hereinafter "RSL," codified at New York City Admin. Code §26-501 *et seq.*]). In general, under the RSL and the regulations promulgated pursuant to the statute as the Rent Stabilization Code (9 NYCRR § 2520 *et seq.* ["RSC"]), when a lease for a rent stabilized apartment expires, the landlord must offer the tenant a renewal. "The right to a renewal lease is one of the cornerstones of the rent stabilization system" (*Caine v Carreker*, 116 Misc 2d 419, 420 [App Term, 1st Dept., 1982]). Nevertheless, a landlord may recover possession of a rent

stabilized unit when in good faith it intends to demolish the building (RSL § 26-511[c][9][a]; RSC § 2524.5[a][2]). Disputes concerning a landlord's right to demolish a regulated building are primarily adjudicated by the DHCR and, to a lesser extent, by the HPD (*Sohn v Calderon*, 78 NY2d 755, 765-766 [1991]).

Where the owner or landlord of property seeks to demolish a rent-stabilized building, the RSC requires an approval by the DHCR of the landlord's plan to withdraw the protected apartment units from the market (RSC § 2524.5 [a] [2]; *see, Sohn v Calderon*, 78 NY2d at 765). The owner must provide proof of its financial ability to complete the project, and that the "appropriate City agency" has approved of the plan, after which DHCR will approve the property owner's request not to renew leases so as to demolish the building (RSC § 2524.5[a][2][I]; *see Calamaris v 23rd Second Ave., LLC*, 305 AD2d 216 [1st Dept. 2003] [" authorization . . . requires a showing of a good faith intention and financial ability to construct a new building on the site of the buildings in which plaintiffs live"]). In addition, the DHCR will require the owner to pay "all reasonable moving expenses" and provide the tenant a "reasonable period of time" to vacate the premises, as well as a stipend as set forth in the Code (RSC § 2524.5[a][2][ii][a]). The DHCR retains jurisdiction until all moving expenses, stipends, and relocation requirements have been met (RSC § 2524.5[a][2][f]).

The owner will be required by DHCR, among other things, either to relocate the tenant to a "suitable housing accommodation," which must be "at the same or lower legal regulated rent in a closely proximate area," or to "a new residential building if constructed on the site" and to provide interim housing at no additional cost until construction is completed (RSC § 2524.5[a][2][ii][a], and [b][1]). A suitable accommodation is defined as one "similar in size and

features to the respective housing accommodations now occupied by the tenants," freshly painted and with "substantially the same required services and equipment the tenants received in their prior housing accommodations," in a building which is "free from violations" that constitute fire hazards or dangerous or detrimental conditions or affect the maintenance of required services (RSC § 2524.5[a][2][iii]). The tenant may file an objection to the apartment offered challenging the suitability within 10 days after the owner has allowed the tenant to inspect the premises, after which the DHCR will inspect and determine whether the offered housing accommodation is suitable (RSC § 2524.5[a][2][iii]). If the accommodation is deemed unsuitable, the owner must offer another accommodation; if the accommodation is deemed suitable, the tenant must either accept and if he or she refuses, he or she forfeits the right to relocation by the owner and to receive payment for moving expenses and any stipend (RSC § 2524.5[a][2][iii]).

The DHCR has issued "Operational Bulletin 2002-1," interpreting the RSC and RSL as concerns the procedures a building owner must comply with in order to obtain approval to refuse to renew rent stabilized leases (Chelsea Partners Memo of Law in Opp. Ex. A [hereinafter Op. Bull.]). The application is to be made in the name of the owner and the owner is to submit the necessary documentation to the DHCR. "Evidence of financial ability to complete the project may include a Letter of Intent or a Commitment Letter from a financial institution, or such other evidence as DHCR may deem appropriate under the circumstances" (Op. Bull. § II). The Bulletin indicates that for a demolition project, where there "remain 3 or fewer occupied housing accommodations, which constitute 10 percent or less of the total dwelling units in the building, or one occupied housing accommodation, if the building contains 10 or fewer dwelling units," the tenant(s) must be provided with the relocation, moving expenses, stipend and any other

benefits provided under the RSC., and if the project is for "substantial alteration or remodeling," the same relocation provisions apply (Op. Bull. § 2 n. 1). It also sets forth charts for calculating stipend and relocation benefits (Op. Bull. § V).

It is a well-settled rule that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a decision is arbitrary or capricious is "'determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). An arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Matter of Pell*, at 232).

Reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). The scope of review does not include "any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority" and "the sanction must be upheld unless it shocks the judicial conscience" (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell*).

Petitioner seeks reversal and remand of the determination on several grounds, most of which were properly addressed in the course of the administrative proceeding and are beyond the

court's jurisdiction to review in an Article 78 proceeding. For instance, his allegations concerning the filing by the owner of "false" or "inaccurate" applications were addressed and dismissed, as were his arguments concerning the necessity to inform various agencies concerning his disability, based on a review of the documents and the relevant law. Petitioner also argues that his due process rights were violated, but due process requires only that he be afforded "reasonable notice of the administrative proceeding and an opportunity to present [his] objections." (*Stavisky v New York State Div. of Hous. & Comm. Renewal,* 204 AD2d 462, 462 [2d Dept. 1994]). There is no requirement either in the RSL or the RSC that the DHCR conduct a hearing in connection with an owner's application to refuse to renew leases based on demolition of the building (see, RSC § 2524.5; RSL § 26-515). The record shows that petitioner was given several extensions, as was the owner, and that both parties were allowed to submit written statements and documentary evidence which was examined by the DHCR.

Petitioner contends that the DHCR failed to address his arguments concerning the evidence of harassment, namely the numerous building code violations which resulted in court-imposed rent abatements. Under the RSL, where the DHCR finds that an owner has harassed a tenant in order to obtain a vacancy of his or her housing accommodations, the commissioner may, after a hearing, impose civil penalties for such a violation (RSL§ 26-516[c][2]).[4] Here, as noted in the deputy commissioner's Opinion, petitioner's claims of harassment were handled by the DHCR in a separate proceeding which apparently did not conclude there was harassment but which did oversee the clearing of most of the violations of record prior to the closing of the

[4]DHCR has the responsibility of adjudicating claimed violations of the rules prohibiting landlords from harassing tenants to induce them to leave their apartments (RSL § 26-412 [d]; § 26-516 [c]; Rent Control Code § 26-413 [b] [2]; see also, RSC § 9 NYCRR 2526.2 [c] [2]).

proceeding. Indeed, petitioner proffers evidence, which was not previously provided to the deputy commissioner, that he continued to complain and send attachments to the enforcement officer and requested that the proceeding be reopened (Ver. Pet. Ex. E). The proceeding was not reopened, and he was instructed that the owner should be given time to correct the particular problems (Ver. Pet. Ex. E). He did not commence another proceeding. He did however, proffer to the agency copies of the court decisions granting the rent abatements because of violations of the warranty of habitability and set forth allegations and arguments addressing the claims of harassment..

Petitioner argues vociferously that the DHCR misinterprets the meaning of "demolish" as set forth in RSC § 2524.5. He contends that the legislature intended the term to have the import of the dictionary definition, that is, of a complete razing of the premises,[5] and that to interpret it to mean anything less improperly allows landlords to remove rent stabilized tenants to pursue more profitable real estate ventures, which subverts the goal of maintaining affordable housing. Petitioner contends that the DHCR determines what is a demolition on an *ad hoc* basis, and the RSC and RSL are therefore void for vagueness. Finally, petitioner points out that the permit acquired by the owner from the DOB was for "alteration" and not "demolition."

The New York City Building Code (NYC Admin. Code § 27-232), defines "demolition" as, "[t]he dismantling or razing of all or part of a building, including all operations incidental thereto." However, there is no definition of "demolish" or "demolition" in the Rent Stabilization Code. In contrast, the Rent Control Code refers to "substantial demolition" (9 NYCRR §

[5]According to the American Heritage Dictionary, "demolish" means "[t]o tear down completely, raze," or "[t]o do away with completely; put an end to." (www.Dictionary.com).

2200.10[c]; see also § 26-403[e][6]) of the Rent Control Law [NYC Admin. Code, § 26-403(e)(6)]). Under the Rent Control Code, housing accommodations resulting from substantial demolition, means in relevant part, "any housing accommodation which is created on or after May 1, 1962 *as a result of the substantial demolition of a multiple dwelling and the reconstruction of such building in such manner as to retain any portion thereof existing prior to such demolition,* and: (1) which is so created after the issuance of one or more certificates permitting the eviction of any tenant or tenants of such multiple dwelling for the purpose of effecting such demolition." (9 NYCRR § 2200.10[c], emphasis added).

Over the years, the courts have addressed the issue of whether particular buildings were "demolished" or were planned to be "demolished," in both commercial and residential premises under the various configurations of the applicable statutes. In *Friedman v Ontario Holding Corp.*, 279 AD 23 (1st Dept. 1951), *aff'd* 304 NY 625 (1952), the Court found, in disagreement with the commercial tenants who were being evicted from a building, that the plan to "reconstruct" the building to add 20 stories and combine it with the adjoining building, was a demolition, despite the fact that the building had been built with an eye to eventual enlargement. *Friedman* held that even though "technically" the building operation was "an alteration rather than demolition as classified in the New York City Building Code," the Legislature, in enacting subdivision (c) of section 8 of the Business Rent Law, did not intend a technical distinction as concerns the facts of that case (*Friedman* at 25). *Friedman* held that in the New York City Building Code and the Business Rent Law, the term "demolish" was "evidently employed in its commonly accepted meaning, rather than in a professional architectural sense.," and that "[p]ractically speaking this building was demolished." (*Friedman* at 25). Additionally, "[t]he

mere circumstance that part of the former structure could be salvaged or was usable in erecting the new twenty-story building, does not change the result." (*Friedman* at 25). As proof, in "common parlance," "new" commercial spaces were erected, "notwithstanding that they have the same foundation, are supported by the same steel columns, and are ornamented on the outside by the same stone column facing and cornice" (*Friedman* at 25).

Similarly, in *Jack LaLanne Biltmore Health Spa, Inc. v Builtland Partners*, 99 AD2d 705, 705 (1st Dept.), *app. dismissed* 62 NY2d 777, *rehg denied* 63 NY2d 771 (1984), it was held that "[f]or all practical purposes the [hotel] was demolished" where all that remained was "most of the steel skeleton and two structural slabs. . . while everything else such as the exterior masonry, internal walls, floors, ceilings, elevators, fixtures, electrical and plumbing conduits have been removed." *Jack LaLanne* cited *Friedman* for establishing "the principle that a commonsense meaning of 'demolish' is not confined to razing the building." (*Jack LaLanne*, at 705-706). *See also North Shore Mart v F.W. Woolworth Co.*, 124 AD2d 574 (2d Dept. 1986) (interpreting commercial lease and holding that "the term 'demolish' is not necessarily confined to the complete razing of a building," but where less than 50% of the ground floor building area was to be demolished, the owner had not established that the work was demolition).

In the residential context, the DHCR's determination that an owner's proposed creation of 43 modernized apartments out of the current 26, entailing installing air-conditioning and an incinerator, and removing and replacing existing interior partitions, bathroom and kitchen equipment, wiring, gas lines, flooring, and plumbing, was a renovation rather than a demolition as the same 13-story building would remain, was upheld in *Robbins v Herman*, 11 NY2d 670 (1962). In *Weitzen v 130 East 65th Street Sponsor Corp.*, 86 AD2d 511 (1st Dept. 1982), the

court granted a landowner a preliminary injunction prohibiting the owners next door from demolishing an existing four-story brownstone above the first story in order to erect a 17-story building, where the owners were attempting to act under the aegis of an alteration permit rather than a demolition permit although it was clear that they were engaged in demolition under the then-Administrative Code section C26-201 which defined demolition as "dismantling or razing of all or part of a *building,"* and alteration as the "*addition*, or change or modification of a *building."* (*Weitzen,* at 511, emphases in original).

In the proceeding at bar, respondent DHCR argues that the owner's projected work is so extensive, leaving only the exterior walls after gutting the interior and removing the roof, and creating a six-story building out of a three-story plus basement building with a much greater depth, that it must be considered a demolition, even though the DOB only issues "demolition" permits when the plans also entail the shutting down of gas, electricity, water, steam and other service lines (DHCR Brief at 17). Nonetheless, the lack of a bright line definition is troubling as there remain inconsistencies in interpreting the term. Notably, a recent opinion issued from the New York City Housing Court held that, "a gut renovation is different from demolishing a building" (*Malta v Brown*, 2006 NY Slip Op 51028U, *6; 819 NYS2d 210 [Civ. Ct., New York County 2006 [Lebovits, J.] [concerning conversion of apartments into two duplexes, citing *Robbins v Herman*, 11 NY2d at 671-672]).

"'Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or

unreasonable, it will be upheld.'" (*Ansonia Res. Assn. v New York State Div. of Hous. & Community Renewal,* 75 NY2d 206, 213 [1989], quoting, *Kurcsics v Merchants Mut. Ins Co*, 49 NY2d 451, 459 [1980]). However, where the "'question is one of pure statutory reading and analysis, dependent only upon accurate apprehension of legislative intent,'" the courts "need not and do not defer to the agency in construing the statute" (*Ansonia Res. Assn.*, 75 NY2d at 213 [administrative expertise or evaluation of factual data is not involved in evaluation of the legislature's intended meaning of word "amortized" in relevant statue]; *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451 [interpreting meaning of "first party benefits" in Insurance Law]).

Here, given that there is no statutory definition of the term in the RSC, and apparently no printed and circulated definition offered by the DHCR, it can be concluded that the DHCR determines whether a particular building is being demolished or renovated by employing Supreme Court Justice Potter Stewart's methodology for determining if an item is obscene, i.e., that they know it when the see it (*see, Jacobellis v Ohio*, 378 U.S.184, 197 [1964]). While the legislature may have intended the agency involved in overseeing and administering the provisions of the Rent Stabilization and Rent Control Laws to determine what constitutes a demolition, the DHCR has not set forth sufficient criteria to inform parties involved or the courts. Therefore, this proceeding must be remanded to the DHCR so that it may set forth a more precise explanation of the term and its applicability to the facts.

More troubling in the instant proceeding is that the DHCR appears to have accepted proof of financial ability based on a letter from JP Morgan Chase addressed to a different entity, Three Stars Associates LLC, who shares the same agent and agent's address, with respondent Chelsea Partners. Notably the bank's letter was written nearly two months after Chelsea Partners

submitted its application to the DHCR, thus calling into question the identity of the entity with access and entitlement to the funds. That the DHCR rent administrator did not comment on this discrepancy nor does it seem that clarification was made, calls into question the agency's approval process and suggests that the decision was made arbitrarily and capriciously.

2. Injunctive Relief

Petitioner also seeks injunctive relief, namely a stay of eviction proceedings until the final determination of this proceeding and, implicitly, pending determination of any administrative proceedings upon remand. To prevail on a motion for preliminary injunctive relief, the movant must demonstrate a likelihood of success on the merits, irreparable injury if the relief is not granted and that the balance of equities tilts in his or her favor (*W.T. Grant v Srogi,* 52 NY2d 496, 517 [1981]). Preliminary injunctive relief is a drastic remedy that will only be granted where the movant establishes a clear right thereto under the law and should not be granted if there are disputed issues of fact (*see Lincoln Plaza Tenants Corp. V MDS Properties,* 169 AD2d 509 [1s Dept. 1991]). Here, the court has not been made aware of a pending Housing Court proceeding premised on a holdover after expiration of the petitioner's lease nor of the existence of any warrant of eviction arising out of a holdover case. As best this court can decipher, there have been nonpayment proceedings already had in the Housing Court, the outcome of which are not legally dependent on the DHCR's determination about whether the landlord has properly established that this is a demolition. Thus, there is no imminent threat of eviction based on the particular determination from the DHCR which is the subject of this proceeding. In other words, whether the tenant violated a duty to pay rent or use and occupancy and whether the landlord violated warranties of habitability, issues particularly within the expertise and province of the

Housing Court, are legally distinct issues from whether the DHCR properly determined that the landlord may refuse a renewal lease based on a finding that the building is being demolished. It remains to be determined what the DHCR will articulate as a standard for demolition upon remand. Thus, it cannot be said that either party will prevail in any eventual Article 78 proceeding arising out of the DHCR's determination upon remand, and the issuance of an injunction at this point would be premature. Of course, if respondent landlord should commence a proceeding premised on a holdover theory, the petitioner may move to renew and reargue this portion of the court's decision and order. Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent that the matter is remanded to the DHCR for further proceedings consistent with this decision and, in particular, to clarify the standard used to determine a "demolition" and whether this project is a "demolition," and to clarify the financial ability of Chelsea Owners to complete the project, and is otherwise denied; and it is further

ORDERED that the branch of the petition which seeks injunctive relief is denied.

This constitutes the decision, order and judgment of this court.

ENTER:

Paul G. Feinman

J.S.C.

Dated: June 25, 2007
New York, New York