

**Matter of 158-160 W. 76th St., LLC v State of  
New York**

2007 NY Slip Op 33191(U)

September 28, 2007

Supreme Court, New York County

Docket Number: 0118865/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

158-160 West 76<sup>th</sup> St. LLC

INDEX NO.

118865/06

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

DHCR

- v -

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
OCT 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: Sept 28, 2007

JUDITH J. GISCHE, J.S.C. *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

Supreme Court of the State of New York  
County of New York

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In the Matter of the Application of  
158-160 West 76<sup>th</sup> Street, LLC,

Petitioner,

Decision/Order

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

-against-

State of New York, Department of Housing  
and Community Renewal,

Respondent.

Index # 118865/06  
Seq. #:001  
(Action # 1)

**FILED**

OCT 05 2007

NEW YORK  
COUNTY CLERKS OFFICE

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In the Matter of the Application of  
Kyle W. Ahrold,

Petitioner,

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

-against-

State of New York, Department of Housing  
and Community Renewal,

Respondent.

Index # 100880/07  
Seq. #: 001  
(Action #2)

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Kyle W. Ahrold,

Plaintiff,

-against-

158-160 West 76<sup>th</sup> Street, LLC and  
Nicola S. Brusco,

Defendants.

Index # 103711/07  
Seq. #: 001  
(Action # 3)

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Pursuant to CPLR 2219(a) the following numbered papers were considered by  
the court in connection with these motions:

PAPERS

(Index # 118865/06)

NUMBERED

Notice of Petition, Petition, exhibits A through Q..... 1

Petition Exhibits R through PP.....2  
 NEB Affirmation in Support, appendices.....3  
 Verified Answer, exhibit.....4  
 Amended Verified Answer, exhibit.....5  
 NEB Reply Affirmation in support of petition and in opp to tenant’s petition, exhibits.....6  
 DHCR return.....7  
 (index # 100880/07)  
 Notice of Petition, Petition, exhibits.....1  
 Verified Answer, exhibit.....2  
 (index # 103711/07)  
 OSC, NEB affd, exhibits.....1  
 Movant’s documents in support of OSC [vol 1].....2  
 Movant’s documents in support of OSC [vol 2].....3  
 DLF affirm. In Opp. Exhibits.....4

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Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

158-160 West 76<sup>th</sup> Street, LLC, (“160 West”) is the owner and landlord of a multifamily residential building located at 160 West 76<sup>th</sup> Street in Manhattan (“building”). Kyle W. Ahrold (“Ahrold”) is the rent controlled tenant residing in apartment B (“apartment B”) at the building. The State of New York Division of Housing and Community Renewal (“DHCR”) is the New York City administrative agency having jurisdiction over issues concerning rent controlled apartments.

Action # 1, as denoted above, is a petition pursuant to CPLR Article 78 brought by 160 West challenging decisions made by the DHCR on November 21, 2006; June 8, 2006 and June 1, 2006 relative to apartment B. 160 West also seeks a declaration by this court that apartment B is luxury decontrolled. Action # 2, as denoted above, is a petition pursuant to CPLR Article 78 brought by Ahrold challenging the same November 21, 2006 DHCR decision (albeit for different reasons) that is challenged by 160 West in Action # 1. Action # 3, as denoted above, is a plenary action for monetary damages for

rent overcharges, brought by Ahrold against 160 West. It is based upon the extant DHCR orders that are the subject of the Article 78 petitions. Presently before the court are the two article 78 petitions and 160 West's motion to stay the plenary action, pending determination of 160 West's article 78 petition. Given that the matters are interrelated, the court consolidates them for consideration and determination in this single decision.

The Challenged Orders are as follows:

DHCR Order dated June 1, 2006, which computed the 2004-2005 Maximum Base Rent ("MBR") for apartment B at \$1,312.95 per month ("June 1, 2006 Order").

DHCR Order dated June 8, 2006, which computed the January 1, 2006 Maximum Collectible Rent ("MCR") for apartment B at \$1,391.70 per month ("June 8, 2006 Order").

DHCR Order dated November 21, 2006, which denied both 160 West's and Ahrold's Petitions for Administrative Review ("PAR") of the June 8, 2006 Order ("November 21, 2006 Order").

The underpinning for each of the challenged DHCR determinations is that from the time tenant first occupied apartment B in 1974, the owner failed to establish an MBR. All the resulting calculations are based upon this "finding" by the DHCR.

#### Factual and Procedural History

The facts are not in dispute. 160 West's predecessor in interest owned and operated the building since before 1972. In 1972, in accordance with a newly enacted statute, 160 West and/or its predecessor in interest (collectively referred to as "owner") applied for and was granted a computed Maximum Base Rent ("MBR") for the entire building. In 1974, the owner then gut rehabilitated the building and, as a consequence,

first created apartment B. Although the other apartments in the building preexisted the rehabilitation, apartment B that is the subject of these proceedings had never before existed. The rehabilitation was made pursuant to a J-51 tax abatement program. It is undisputed that the newly created apartment became subject to the rent control regime.

The owner and Ahrold negotiated a lease for apartment B with a reserved rent of \$625 per month. On April 5, 1976 DHCR's predecessor in interest ("HDA") issued an order "fixing Maximum Rent" at \$625 per month, reserving only an adjustment that might be warranted if a tax abatement was granted. The tax abatement was granted and by order dated December 15, 1976, the Maximum Collectible Rent was decreased by \$25.45 per month. The Owner continued to charge Ahrold \$599.55 per month (\$625 less \$25.45) until 1988.

In or about 1988 the owner first submitted and was granted an order of eligibility to increase the MBR of all apartments in the building. Using \$599.55 as both the MBR and the MCR and following the formulaic computations set forth in the 1988 order of eligibility, the owner calculated the new MBR to be \$1,113.36 but the new MCR to be \$644.51. Biennially thereafter the Owner applied for and was granted MBR increases for the building. Rent charged for apartment B was calculated based upon the formulaic computations set forth in the orders. In general the new MBR was calculated each time by multiplying the prior MBR by a "factor" while the new MCR was calculated each time by multiplying the new MCR by a different factor. In any event all computations were based upon the calculations made according to the preceding order. Since from 1988 forward the MCR was always lower than the MBR, Ahrold was charged and paid rent only equal to the calculated MCR plus any other allowable charges. Appropriate

notifications of the orders and the calculations were given to Ahrold as the orders were made.

By 2004 the owner had calculated the MCR for apartment B to be \$2,024.16. As a consequence, the owner filed an application with the DHCR to have apartment B luxury decontrolled. 9 NYCRR §2200.2(f). At that time the DHCR claims to have "discovered" that the owner never properly set an initial MBR and that, therefore, all of the owner's calculations of rent from 1988 forward were incorrect. It issued an order dated February 14, 2005 denying the application finding that "...the maximum rent was not \$2,000.00 or more per month on April 27, 2004...".

The DHCR findings prompted Ahrold to file a rent overcharge complaint with the agency.

After exhausting its administrative remedies, 160 West filed a prior Article 78 proceeding. That petition was dismissed on October 14, 2005 by order of the Hon. Diamond. The dismissal was without prejudice and the matter remitted to the DHCR for further proceedings in which the agency was to "compute the MBR for the subject apartment and update the amount of rent which can be legally collected in order to determine whether luxury decontrol is appropriate."

Apparently as part of the remitter the DHCR commenced its own proceeding to determine apartment B's maximum rent. This resulted in the June 1, 2006 order establishing the calculation of the MBR. The DHCR did not further rule on the collateral issue of luxury decontrol in that order.

The DHCR then issued the June 8, 2006 order establishing the MCR for apartment B, but it did not further rule on the tenant's application for an order

establishing overcharge. Instead it noted the pendency of an overcharge proceeding before it under another index number and also stated that the tenant's remedy for a refund of rents was to file an action in a court of competent jurisdiction. This necessitated the plenary action (#3) for overcharge that is presently before the court.

160 West attempted to challenge the June 1, 2006 order, but its challenge was rejected by the DHCR for technical reasons.

Both parties challenged the June 8, 2006 order which resulted in the November 21, 2006 order also being challenged herein.

#### Applicable Law

The standard for evaluating the DHCR's determinations is whether they were made in violation of lawful procedure, were affected by an error of law or were arbitrary and capricious. CPLR § 7803[3]. In order for the court to find that an agency determination is arbitrary and capricious, it would have to find that the action taken was without sound basis in reason and taken without regard to the facts. The question for the court is generally whether the agency determination has a rational basis. Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222 (1974). Pure issues of law, however, should be determined by the court. Issues concerning the interpretation of a statute or regulation by the agency responsible for its administration will be upheld, if they are not irrational or unreasonable. Madison-Oneida Board of Comparative Educational Services. Mills, 4 NY3d 51 (2004); Allstate Ins. Co. V. Libow, 106 AD2d 110 ( 2<sup>nd</sup> dept. 1984) affd. 65 NY2d 807 (1985).

Before turning to some of the collateral disputes raised in these proceedings, the

court will address the gravamen of the parties' dispute, which is: whether the DHCR correctly determined that an MBR had to be calculated for apartment B before any rent increases were available and further, whether the DHCR correctly retroactively calculated the MBR as of 1988, allowing increases to rent through 2006. 160 West claims that when apartment B first came under the rent control regime it was subject to a provision of law that exempted it from the usual formulaic calculation of MBR. It argues further that the rents having been initially legally set under that exception, any biennial MBR and /or MCR adjustment had to be made using the maximum rent established as the first rent. The DHCR claims that when the owner first sought MBR increases in 1988, it was obligated at that time to have the agency set an MBR for apartment B consistent with the general formula. As a result the DHCR claims it appropriately recalculated the rent under the general MBR formula as of 1988 and calculated all later increases on that newly calculated MBR. Ahrold supports the DHCR's position that the owner failed to appropriately establish the MBR in 1988, but argues that the consequence of such omissions is that any increases over and above the \$625 initial rent are not collectable until a correct MBR is set and she is properly notified of same. She argues that the increases can only be prospective and challenges the DHCR's authority to retroactively establish MBR after finding that it was not correctly established in the first instance.

As Chief Justice Breitel observed in 1974 when writing the Court of Appeals decision in 89 Christopher v. Joy, (35 NY2d 213 [1974]): "the patchwork of rent-control legislation in recent years has created an impenetrable thicket, confusing not only to laymen but to lawyers." The central issue before the court is whether the DHCR's own

interpretation of these dense and confusing laws is rational or reasonable under the circumstances presented. The court holds that it is not.

Rent control is a system of regulating rents in privately owned housing that originally came into effect after World War II as an emergency measure to confront the existing housing shortage in New York City. **Scherer**, *Residential Landlord-Tenant Law in New York*, § 4:1 (2006). In 1970 there was a major overhaul of rent control which established the MBR system of charging rents. This overhaul was intended to address the problem of disinvestment and abandonment of rent control buildings that resulted from the depressed rent rolls. Its aim was to permit the gradual de-control of rents in a manner that would take into consideration the landlords' interest in making their enterprises profitable and the competing interests of tenants in continued upkeep of their buildings without precipitous rent increases. 89 Christopher v. Joy, 32 NY2d at 217.

In general the MBR system provides that an MBR would be established for the majority of rent controlled apartments as of January 1972 according to a formula grounded in operating expenses. The MBR would then be adjusted biennially beginning in 1974 to accommodate changes in operating expenses. The biennial adjustments were percentage adjustments to the prior MBR and the new calculated amount was intended to supplant the existing MBR amount. The MBR was a ceiling toward which the rents of each building could rise at a rate of no more than 7 ½ % each year. Thus apartments could and frequently did have MBRs that were greater than the rent that could be legally collected ("MCR"). The MBR and the MCR however are interrelated under the established mathematical formulas. 89 Christopher v. Joy, 32 NY2d at 217.

The new law culled out exceptions to the general formulaic approach for establishing initial MBRs. It was not applicable to housing accommodations for which first rents were established under 2201.1(b), 2202.3 or 2202.22 of the law where "rehabilitation or improvement of substandard or deteriorated housing accommodations was financed under a governmental program providing assistance through loans, loan insurance or tax abatement, or has been undertaken under another rehabilitation program not so financed but approved by the administrator." Clearly this exception was intended to encourage owners to rehabilitate housing by, in part, allowing them to establish first rents consistent with the market place for such rehabilitated apartments.

Contrary to the DHCR's argument, nothing in the statutory language limits this exception only to apartments where the rents were established prior to 1972. Although the law is effective January 1, 1972, there is no limiting language in its application, exceptions and all, to after created apartments that came within the rent control regime.

9 NYCRR §2201.1(b) provides that where there was no maximum rent in effect on April 30, 1962 and the accommodation was rented subsequent to such date, the maximum rent is generally the first rent charged.

The apartment thus meets all the criteria for the exception to the application of the general MBR formula. There was no rent in effect on April 30, 1962 because apartment B did not exist. Apartment B was rented in 1974, which was after April 30, 1962. Most importantly, the rehabilitation of the building in which apartment B was located was financed through a J-51 tax abatement program.

The further dispute is whether the initial maximum rent on apartment B, set in accordance with the rent control laws in effect at the time, can serve as the base

calculation for the biennial percentage increases.

9 NYCRR § 2201.5 provides that biennially after January 1, 1974 “Maximum Rent” shall be adjusted to reflect changes in the maximum gross building rental, as that term is statutorily defined. It expressly provides: “Such adjustment shall be made **whether or not** the property, or any housing accommodation therein, received or was eligible for **maximum base rents** under section 2201.4 of this part.” (Emphasis added)

While the parties and the DHCR often interchangeably refer to “maximum rent” and “maximum base rent” or MBR, they are not the same. Maximum rent is a much broader concept as it is defined in the rent control Laws. Thus, 9 NYCRR §2200.2(I) defines “maximum rent” as “The maximum lawful rent for use of housing accommodations. Maximum rents may be formulated in terms of rents or other charges and allowances.” Maximum rents include maximum base rents but they also include rents set according to methods that are otherwise exceptions to the formula in 9 NYCRR §2201.4. Such rents are nonetheless still eligible to receive biennial increases under 9 NYCRR §2201.5.

Thus the plain language of the rent control laws permit biennial adjustments to maximum rents regardless of whether they were set as maximum base rents according to the general formula or set according to an exception to the formula. That statute permits biennial adjustments maximum rent and expressly does not limit such adjustments to maximum base rent. Here the predecessor agency issued an order in 1976 that expressly set maximum rent in accordance with a recognized exception to the statutory MBR formula. 160 West still had the right thereafter to apply for and get

increases to maximum rent on apartment B, which it did beginning in 1988.

DHCR's interpretation which still requires the owner to apply for an MBR for apartment B even though it properly established maximum rent according to a recognized exception to the MBR formula, renders the exception meaningless. Since statutes are to be interpreted in a manner that gives meaning to each and every term, the DHCR's interpretation must be rejected. In re Tristram K, 36 AD3d 147 (1<sup>st</sup> dept. 2006); Statutes, McKinney's Volume 1 § 98. Moreover, the DHCR's interpretation is contrary to the general intent of the 1970 law to provide incentives for landlords to rehabilitate deteriorating housing stock. Under the DHCR's interpretation the so called incentive would be only a one time establishment of rent for a newly created apartment, without the right to any increases thereafter unless and until the rent is recalculated under the general MBR formula. This is hardly any incentive for a property owner to invest the sums necessary to gut rehabilitate housing.

The court finds that the DHCR's interpretation of its own regulations was affected by an error of law. CPLR § 7803.3. It, therefore, finds that the challenged orders erroneously establishing the legal rent must be vacated.

To the extent that 160 West claims that the determinations by DHCR are *ultra vires*, the arguments are virtually indistinguishable from the those made under CPLR § 7803.3. Since this argument does not implicate any further relief than is otherwise available under Article 78, the court makes no further analysis of the issue of "ultra vires." See: Schultz v. Town Bd. Of Town of Queensbury, 253 AD2d 956 (3<sup>rd</sup> dept. 1998).

160 West also challenges the DHCR's procedural rejection of its initial challenge

to the June 1, 2006 order and its conclusion in the November 21, 2006 order that the issues were no longer reviewable. On June 1, 2006 the DHCR issued an order computing the 2004-05 Maximum Base Rent for apartment B. The order expressly provided that:

“Challenges to this order must be filed with the DHCR on the Challenge form RA-94 MBR. An owner’s challenge must be filed within thirty-five (35) days after the issue Date of this Order.”

160 West followed the directions in the order and filed a challenge. The DHCR refused to consider the challenge on the merits, but instead on July 5, 2006 mailed 160 West a letter stating that in order to challenge the June 1, 2006 order the owner was required to file a PAR within 35 days of the date of issue of the order. The letter was mailed only one day before the expiration of the 35 day time period permitted for the filing of a PAR. 160 West made attempts to have the DHCR reconsider its decision to not consider the initial challenge on the merits, but DHCR refused. The DHCR in part based its November 21, 2006 order upon a conclusion that 160 West’s failure to challenge the June 1, 2006 precluded consideration of the basis of such earlier order.

The DHCR’s decision to disallow the original challenge because it was not filed according to the correct procedure was arbitrary, capricious and deprived 160 West of due process. The owner filed a challenge according to the rules expressly set out in the DHCR June 1, 2006 order. Only when its time to challenge had virtually expired did the DHCR first notify 160 West that it was using an incorrect procedure. Consequently, the DHCR never reviewed the merits of the challenge and thereafter precluded the owner from challenging such findings which formed the underpinning of the November 21, 2006 order. The DHCR should have considered the merits of the owner’s challenge to

the June 1, 2006 order, since such challenge was filed according to the procedure set forth in the order itself. Moreover, as already determined above, the challenge attacking the substantive basis for the June 1, 2006 order has merit.

160 West argues that it was entitled to biennial increases from 1988 forward and that the calculations demonstrate that it is now entitled to luxury decontrol. It seeks a declaration of such fact by this court.

It is the province of the DHCR to determine whether apartment B should be luxury decontrolled. Although the court has found that the DHCR's underlying analysis in calculating the legal rent was incorrect, the DHCR should be allowed to reconsider the issue of luxury decontrol and to calculate the legal rent in accordance with this decision. Thus, the issue of rent calculation and whether apartment B should be luxury decontrolled is again remanded to the DHCR. In this regard, the court makes no determination setting the legal rent as of 2004 and whether it qualifies for luxury decontrol. This court only directs that the maximum rent as original set in the 1976 orders shall serve as the basis for the biennial increases from 1988 forward.

The court also notes that after Judge Diamond's remand, the DHCR chose to separately address the issues of calculating the legal rent and luxury decontrol. While this court is not directing the DHCR how to administratively assign its cases, the court does direct that all decisions concerning apartment B be made consistent with this court's order and with each other. Thus, the scope of this remand is for the DHCR to make determinations consistent with this decision on the issues of: [1] calculating the 2004 legal rent for apartment B, [2] determining whether 160 West is entitled to luxury decontrol and [3] determining Ahrold's overcharge complaint.

In her Article 78 proceeding Ahrold challenges the DHCR's authority to retroactively calculate an MBR. Basically her argument is that if an owner fails to have an MBR properly calculated, then until it does so, it is not entitled to any increases in rent whatsoever. The MBR program, she argues, is a prospective program that is based upon the owner's compliance with its provisions. She argues that as a consequence of the landlord's failure to establish an MBR, the DHCR should have found that she has been overcharged rent.

Ahrold's petition must be denied as moot, since this court finds that the underlying orders establishing the legal rent must be vacated. Moreover, since the court has found that an initial MBR did not have to be calculated at all in order for the owner to obtain biennial increases, there are no longer any issues of whether the DHCR has the authority to retroactively calculate such MBR.

Based upon the extant DHCR orders, Ahrold filed a plenary proceeding for based upon rent overcharge claims. 160 West moved to stay the plenary action pending determination of its Article 78 petition (action # 1) challenging the DHCR orders setting the legal rent. Since the court has now determined the underlying Article 78 petition, 160 West's request for a stay is now moot. Given that the court has vacated the DHCR orders on which the claims of overcharge are based, the court and the parties need to determine what, if any, issues remain in the plenary action. The court, therefore, directs that the parties to the plenary action appear before the court on for a conference on November 1, 2007 at 9:30 am.

#### Conclusion

In accordance with this decision, it is hereby:

ORDERED that the Article 78 petition brought under index # 118865/2006 is granted to the extent that DHCR orders dated June 1, 2006 and June 8, 2006 and Order after PAR dated November 26, 2006 are hereby vacated and the matter is remanded to the DHCR for a determination of legal rents and the related issues of luxury decontrol and overcharge to be made in accordance with this decision, and it is further

ORDERED that the Article 78 petition brought under index # 118865/2006 is denied to the extent that it seeks to have this court declare that apartment B at 160 West 76<sup>th</sup> Street, New York, New York is luxury decontrolled and instead the issue of luxury decontrol is remanded to the DHCR to be made in accordance with this decision, and it is further

ORDERED that the Article 78 petition brought under index # 103711/2007 is denied as moot, and it is further

ORDERED that defendants motion for a stay of the plenary action brought under index # 103711/2007 is denied as moot and that the parties in such action are directed to appear for a conference before the court on November 1, 2007 at 9:30 a.m., and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and that this shall constitute the decision and order of the court.

Dated: New York, NY  
September 28, 2007

**FILED**  
OCT 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

SO ORDERED:  
\_\_\_\_\_  
J.G. J.S.C. 