

**Matter of Citylights at Queens Landing, Inc. v New  
York City Dept. of Env'tl. Protection**

2007 NY Slip Op 33943(U)

November 27, 2007

Supreme Court, Queens County

Docket Number: 0018455/2006

Judge: David Elliot

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 14

IN THE MATTER OF THE APPLICATION X  
OF CITYLIGHTS AT QUEENS  
LANDING, INC.,

INDEX NO. 18455/2006

SEQ. NO. 2

Petitioner,

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

BY: ELLIOT, J.

DATED: November 27, 2007

- against -

NEW YORK CITY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION and  
NEW YORK CITY WATER BOARD,

Respondents.

X

In this Article 78 proceeding, petitioner Citylights at Queens Landing Inc. (Citylights), seeks an order restoring the proceeding to the calendar and, upon restoration, a judgment vacating the water bill of February 26, 2004 and restricting respondent New York City Water Board (Water Board) from back billing petitioner for charges allegedly incurred more than two years prior to the issuance of a bill.

Petitioner Citylights initially commenced an Article 78 proceeding on August 22, 2006, in which it sought to vacate the water bill of February 26, 2004 and to restrict the Water Board's back billing to a two-year period. The parties thereafter sought to

settle the matter and, pursuant to a stipulation entered into between the parties on October 6, 2006, the proceeding was marked off the calendar on October 17, 2006. On June 29, 2007 the parties stipulated to restore the matter to the court's calendar pursuant to an amended petition made returnable on September 18, 2007. That stipulation was not so ordered by the court. Petitioner, thereafter, served the within motion on August 27, 2007, which was made returnable on September 18, 2007, and seeks a judgment on the amended petition or, in the alternative, an order restoring the matter to the calendar.

Petitioner's request to restore this matter to the calendar is granted. In view of the fact that the petition, answer and all papers in support and opposition to the proceeding have been fully submitted, the petition is decided as follows:

Citylights is the long term lessee of a 42 story building located at 474 48th Avenue, Long Island City, New York. Queens West Development Corp. is the owner of the premises known as 4-15 49th Street to 48-09 Center Boulevard, Block 18, Lot 1, which includes the subject improved real property. This subject building was constructed in 1997 by Parcel 10 Associates, L.P., the sponsor of the cooperative plan, and contains 522 residential units, 14 commercial units, and a public school. On July 7, 1997, the New York City Department of Environmental Protection (DEP) issued permits to install water meters on the subject property, and two

water meters bearing numbers N84001054 (Meter 54) and N84001316 (Meter 16) were installed as "entire premises" meters. The building is billed on a quarterly-metered basis under account number 9000856848001. The DEP commenced billing this account on December 17, 1997, via two six inch by one inch compound meters. The DEP issued regular bills and performed inspections of the meters and the customer paid its bills. Citylights, pursuant to its lease with Queens West Development Corp. is required to pay all water charges relating to water usage at the subject buildings and has paid these bills.

On February 3, 2004, the DEP conducted an inspection and determined that, due to incorrect measurements provided by the owner's plumber, the two meters installed on the premises were billed with an incorrect multiplier, i.e. the number by which a meter reading must be multiplied to convert the reading into units of hundreds of cubic feet.

On February 23, 2004, the DEP adjusted the charges by cancelling \$111,170.30 in charges and upwardly re-billing both meters for a total of \$491,274.00, for the period of February 3, 2000 to February 3, 2004. A new water bill was issued to Queens West Development Corp., care of Citylights, in the sum of \$379,740.26. For the four-week period of January 7, 2000 through February 3, 2000, no upward adjustment was made, as this period was

beyond the four-year period of limitations set forth in the Water Board Rules.

On May 13, 2005 the DEP received a telephone call from an attorney disputing the February 23, 2004 bill, and advised counsel to submit a written complaint. No complaint was made to the DEP at that time. On June 6, 2005, the DEP sent a letter to Citylights in which it stated in pertinent part that:

"A review of your account history shows that charges for the service period July 7, 1997 through November 30, 2003 were grossly under-billed at an average daily consumption (ADC) of approximately 20 hundred cubic feet (HCF). This was due to a clerical error, which resulted in the 6" registers of the two domestic meters being billed for one-tenth of their actual usage.

The error was discovered on February 3, 2004 and the billing was revised accordingly. Charges previously issued in the amount of \$111,170.30 were cancelled and reissued in the amount of \$491,274.00—a net increase of \$380,103.70. The revised ADC of 97HFC is consistent with a well-maintained building of a similar size.

Under the NYC Water Board's rules, bill revisions of this type (i.e., upward adjustments of previously billed service) are limited to a period of four years from the date of service provided. A reasonable administrative delay is permitted between the date of discovery of an under-billed period and the date the revised bill is issued. Accordingly the revised bill issued February 23, 2004 covers the service period February 3, 2000 through February 3, 2004. It should be noted that the service period July 7, 1997 through February 2, 2000 has been similarly under-billed. Charges for this

period were not revised, due to the four-year limit on back billing.

Since the February 23, 2004 adjustments, our meter reading contractor (Con Edison) has experienced some difficulty accessing/locating the meters at this location. As a result, DEP inspectors will now read the meters each quarter. A DEP inspector visited the property on May 16, 2005 and found the meters and remotes to be in working order."

In a letter dated September 29, 2005, Citylights appealed the February 23, 2004 bill and the DEP's June 6, 2005 explanation of said bill. Citylights asserted that it qualifies as a residential customer within the meaning of Public Service Law § 118(2), and therefore the Water Board was prohibited from back billing for a period of more than two years; that the DEP did not provide an explanation as to the nature of the "clerical error"; that the revised bill purported to set forth actual meter readings in the building, when in fact there had been no actual meter readings on the dates set forth in the revised bill; and that Citylights had timely paid all bills when rendered.

The DEP in a letter dated October 14, 2005, responded to the appeal letter of September 29, 2005, set forth the review of the account in which it was determined that from the time the meters were originally installed in 1997, consumption was "under-calculated due to an error in the size of the meter's registration device". The DEP found that the adjustment of the charges was appropriate. The agency stated that water consumption at the subject property is

registered by two six inch by one inch meters that were installed on July 7, 1997; that when the plumber contractor obtained the permit to install the service lines, the sizes of the service lines were understated, and that the incorrect registration of the meters and service lines caused an under-calculation of the actual water consumption at the property for the period in question. The DEP corrected the mistake, increased the billing, and left in place the under-billed amounts for the charges prior to February 3, 2004, due to the Water Board rules limiting upward billing adjustments to four years from the date of discovery.

In a letter dated November 10, 2005 Citylights appealed the water bill of February 23, 2004, as well as the DEP's October 14, 2005 rejection of its appeal. In a letter dated April 24, 2006 William Kusterbeck, Acting Executive Director of the New York City Water Board, denied this appeal. Mr. Kusterbeck stated that the:

"account was underbilled for an extended period of time due to an incorrect meter multiplier recorded in the DEP's billing system. A review of the account's history indicates that the building's plumber understated the size of the building's service line when applying for a permit to install water meters at the premises. This resulted in the premises being underbilled for water consumption due to what is referred to as a 'multiplier error'. This error occurs when a clerk sets up a billing account with the incorrect multiplier, which is intended to convert the meter reading to the billing unit, which for the DEP is units of one hundred cubic feet (HCF). This error results in incorrect bills, but has no effect on the accuracy of the

meter readings which have been regularly recorded throughout this period. In this case the meters were being underbilled for water consumption by a factor of 10 on one side of two separate compound meters. This underbilling started on the date of the installation, July 7, 1997, and continued to the date of the DEP's discovery of the underbilling, February 3, 2004.

Upon discovery of this error, DEP issued a backbill for February 2004 for service from February 3, 2000 through February 3, 2004 with the correct multipliers. This resulted in the cancellation of the previously underbilled charges of \$111,170.30 and a rebilling based on the correct multiplier for actual total consumption of \$491,274.00. Pursuant to the Water Board's four-year backbilling limitation, underbilled charges issued prior to February 3, 2000 remain at their original level of underbilling.

Your appeal questions why the average daily consumption reported on the February 2004 bill for the period of January 7, 2000 to February 3, 2000 is less than subsequent periods, even though actual consumption has remained consistent. The reason is that all changes issued prior to February 3, 2000 are unadjusted and remain on a proportionally reduced average daily consumption due to the incorrect multiplier.

Your appeal also questions why the February 2004 bill appears to indicate that there were actual meter readings recorded on February 3, 2000 and on June 30th of various years. As indicated in DEP's letter, the February 2004 bill was based upon actual meter readings properly recorded but incorrectly billed throughout the period of January 7, 2000 to February 3, 2004. As indicated above, the period of January 7, 2000 to February 3, 2000 must remain at the level of underbilling due to the backbilling limitation, so the consumption for this period was prorated and based upon the previously underbilled

average daily rate of consumption. Charges commencing February 3, 2000 are based upon the actual rate of consumption and have been prorated to start on this date. In addition, rates for water and sewer service in New York City change each fiscal year. The fiscal year runs from July 1, to June 30 of the following year. As the February 2004 bill overlapped a number of rate changes, the system proportionately separates water use into the number of days occurring prior to and after the differing rates. This results in a bill which appears to indicate that the meter reading on June 30 is an actual meter reading, even though it is system calculated. All bills issued to this account have been based on verified actual readings and have remained relatively consistent.

As noted above, this account has been receiving deeply discounted water and sewer service for more than six and one-half years. When this was discovered by DEP in February 2004, a four year backbill was issued pursuant to Water Board Regulations. Your appeal requests two additional years of severely underbilled service, indicating that the account should have been backbilled for only two years because 1) Public Service Commission Rules limit backbilling to two years and 2) a portion of the under-billing occurred when the Water Board had a two-year backbilling limitation in effect.

With respect to the latter argument, the backbilling limitation was modified a number of times during the period of Fiscal Year 1999 through Fiscal Year 2003, from a six-year period, briefly to a two-year period, and ultimately to a four-year period. Limitations on backbilling are applicable on the date the bill is issued not the service period covered by the bill. Your appeal alleges that the backbilling limitation in effect prior to the issuance of the bill should be applied rather than the limitation applicable on the date the backbilling actually occurred. I find this argument to be without merit. The purpose of

the rule change is to effect a change in the way transactions are processed. It was and is the Board's judgment that the backbilling limitation, which applies to newly issued bills and to the possible upward adjustment of bills previously issued, should be the same as the complaint-filing period which applies for customers who generally seek reductions in previously issued bills. Effective July 1, 2002, which coincided with the beginning of the Board's Fiscal year 2003, both of these periods, the backbilling period and the complaint filing period, were changed from two years to four years and these four-year periods have continually been adopted in each successive fiscal year. While it is financially advantageous to argue in this case that older rules should have applied to this bill, the bill was issued in Fiscal Year 2004 (FY2004) and administrative rules promulgated and set forth in the Board's FY2004 Rate Schedule are applicable. In February 2004 a four-year backbilling limit was in effect, making the bill in question, therefore, correct when issued. In addition, the Water Board is not subject to the jurisdiction of the Public Service Commission and its rules, therefore, are inapplicable.

Finally, your appeal requests that the Executive Director in his discretion shorten the backbilling period to provide an increased benefit and additional years of underbilled service to your building. This request is denied. As noted above, the problem arose due to your building's plumber incorrectly completing the meter installation permits. I note that the Board's four-year backbilling limitation does not apply where culpable conduct of the owner or owner's agent contributed to the failure to render accurate billing. Given this explicit exception in the Water Board's rules, it would not be unreasonable to find that DEP erred in limiting the backbilling to four years and that in fact the entire period should be upwardly adjusted due to the contributing culpability of the owner's agent. Given that the DEP made this

error in restricting the adjustment to four years, as an administrative matter, I will not direct that this error be corrected and instead will allow it to stand.

I note that consumption has remained relatively consistent throughout this period and is at an appropriate level for this type and size of property. All charges for water and sewer service provided to this property are based on actual meter readings and accurately represent the quantity of services provided, other than the aforementioned underbilling of charges prior to February 3, 2000. All charges have been reviewed and found to be consistent with DEP and Board policies. There is no error in billing and thus no basis for a reduction in charges.

Accordingly, your appeal requesting a reduction in charges is denied and DEP's October 14, 2005 billing determination is affirmed."

Petitioner asserts that the Water Board's determination of April 24, 2006 is arbitrary and capricious, in that there was no error in the building's application for meter permits. It is also asserted that respondents' determination lacks a factual basis in that there were no actual readings of meters on the dates set forth in the revised bill of February 23, 2004, and respondents failed to maintain records of the meter readings or copies of the bills. Finally, it is asserted that even if the revised bill has a basis in fact, it should be annulled as petitioner is a residential customer, and therefore respondents may only back bill for a two-year period pursuant to the Public Service Law.

Respondents, in opposition, assert that its determination was neither arbitrary nor capricious, that the revised bill accurately reflects the amount of water used during the period in question, and that Public Service Law § 118(2) does not limit the Water Board to a two-year back billing period.

It is well settled that the court's power to review an administrative action is limited to whether the determination was warranted in the record, has a reasonable basis in law, and is neither arbitrary nor capricious (see Scherbyn v Wayne-Finger Lakes Board, 77 NY2d 753, 758 [1991]; Matter of Pell v Board of Educ., 34 NY2d 222, 230-231 [1974]; Westmoreland Apt. Corp. v N.Y. City Water Bd., 294 AD2d 587, 588 [2002]). The "judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (Ostrer v Schenck, 41 NY2d 782, 786 [1977]; see also Pell v Board of Education, 34 NY2d 222, 231 [1974]). A "court may not overturn an agency's decision merely because it would have reached a contrary conclusion" (Sullivan County Harness Racing Association, Inc. v Glasser, 30 NY2d 269, 278 [1972]).

In 1984, the New York State Legislature enacted the New York City Municipal Water Finance Authority Act (L 1984, chs 513-515; Public Authorities Law §§ 1045-a, 1046) in response to the City's financial crisis. The Legislature declared that the purpose of the legislation was to provide alternative financing

methods to the City for raising capital "necessary to maintain the city's water and sewer systems in an adequate condition so that they continue to provide vital water and sewer services to the public" (L 1984, ch 513, § 1 [reprinted in Historical and Statutory Notes, Legislative Findings and Declaration of Purpose, McKinney's Cons Laws of NY, Book 42, Public Authorities Law § 1045-a, at 601]). In furtherance thereof, the Act created two entities, one of which is the New York City Water Board, whose main function is to "provide sufficient funds--through fixing and collecting water and sewer charges and other revenues--for the City to operate and maintain the Water System" (Giuliani v Hevesi, 90 NY2d 27, 34 [1997]; see also Matter of Village of Scarsdale v Jorling, 91 NY2d 507, 514 [1998]; Perry Thompson Third Co. v City of New York, 279 AD2d 108 [2000]). Public Authorities Law § 1045-g(4) provides, in pertinent part, that the Water Board has the power: "[t]o establish, fix, revise, charge and collect and enforce the payment of all fees, rates, rents and other service charges for the use of, or services furnished by the sewerage system, water system, or both ... so as to receive revenues which, together with other revenues available to the board ... shall be at least sufficient at all times so that such system or systems shall be placed on a self-sustaining basis." In addition, the Water Board has the "sole authority" to set rates for water usage with regard to New York City residents (Matter of Village of Scarsdale v Jorling, supra, at 515).

Public Service Law § 118(2), provides that: "Except as provided for residential utility service pursuant to article two of this chapter, no public utility company or municipality may render a bill for previously unbilled service, or adjust upward a bill previously rendered, to a residential customer after the expiration of twenty-four months from the time service to which the bill or adjustment pertains was provided."

Beginning in 1989, the New York City Water Board, Water and Wastewater Rate Schedule (15 RCNY, ch 42, Appendix A) tracked the back-billing restrictions set forth in the Public Service Law. The 1989 and 1999 Rate Schedules contained a back billing provision which distinguished between residential and commercial customers, and set forth a two-year period of limitations for residential customers and a four year limitation for commercial customers (see Perry Thompson Third Co. v City of New York, supra). The 2000 and 2001 Rate Schedules eliminated the distinction between residential and commercial customers, and provided a two-year period of limitations for back billing for unbilled service or upward adjustments (see 15 RCNY Ch-41 Appendix A [2001]). The Rate Schedule, effective July 1, 2003, submitted herein, does not distinguish between residential and commercial customers, and provides a four-year period of limitations for back billing for unbilled services or upward adjustments. The 2003 Rate Schedule was in effect in February 2004 when the DEP discovered the billing error

and issued the subject upward revised bill. The current rate schedule, effective July 1, 2007, (available on the DEP's website) also provides a four-year period of limitations for unbilled services and upward adjustments, and makes no distinctions between residential and commercial customers.

The court finds that the Water Board's adoption of a regulation setting forth a four-year period of limitations for back-billing limitation is neither arbitrary or capricious nor irrational (see generally Kuppersmith v Dowling, 93 NY2d 90, 96 [1999]), and that it falls squarely within the broad powers granted that entity by the Public Authorities Law (Perry Thompson Third Co. v City of New York, supra at 116-117). The court further finds that petitioner's reliance on the provisions of Public Authorities Law § 118(2) to be misplaced. Section 118, is set forth in Article 6 of said law, whose purpose is to "prescribe additional provisions affecting two or more kinds of the public service regulated by this chapter and affecting the persons and corporations furnishing such service" (Public Service Law § 105). The provisions of the Public Authority Law, however, do not extend to water rates of a municipally owned or operated water supply system, and the Public Service Commission's jurisdiction over municipally owned or operated water supply system is specifically limited by statute to the requirement that each municipality that furnishes water must file with the Commission a copy of the annual report of its water

division, bureau, or department (Public Service Law § 89-1; Waterbury v City of Oswego, 251 AD2d 1060 [1998]). The back billing provisions of Section 118(2), therefore, are inapplicable to the Water Board.

The court further finds that both the DEP and the Water Board adequately explained the nature of the "clerical error" which resulted in the underbilling. The DEP, in its letter of October 14, 2005, explicitly stated when the plumber contractor obtained the permit to install the service lines in 1997, that the size of the service lines were understated, and that the incorrect registration of the meters and service lines caused an under-calculation of the actual water consumption at the property for the period in question. Petitioner, in its November 10, 2005 appeal merely asserted that this explanation was unsatisfactory, and did not offer any evidence regarding the accuracy of the information supplied by the builders' plumber. It is well established that "judicial review of administrative determinations is confined to the facts and record before the agency," and this court may not consider evidence that was not part of the administrative record (Featherstone v Franco, 95 NY2d 550, 554 [2000]; Khan v New York State Dept. of Health, 96 NY2d 879 [2001]; 985 Fifth Avenue v State Div. Of Hous. & Community Renewal, 171 AD2d 572 [1991]). Here, the undated and unsworn statement of Willie Morales lacks probative value and, as it was not submitted during the course of the

administrative appeal, said statement will not be considered by this court.

Finally, petitioner's claims regarding the meter readings are rejected. Prior to receiving the revised bill, petitioner was well aware of the fact that some of its bills were based upon estimates and others were based upon actual meter readings, and that an adjustment to the estimated bills would be made once the meter was read. Petitioner does not assert that respondent may not bill for water consumption based upon an estimate of such usage. In addition, petitioner does not assert that the amount of water usage it was billed for was excessive. The court therefore finds that the respondents' use of both estimates and actual meter readings, to which the corrected multiplier was then applied, has a rational basis in the record and is neither arbitrary nor capricious.

In view of the foregoing, petitioner's request to restore this proceeding to the calendar is granted, and upon said restoration, the request to vacate the water bill of February 26, 2004 and to restrict back billing to two years prior to the issuance of said bill is denied and the petition is dismissed.

Settle order.

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J.S.C.