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

PRESENT: MARCY S. FRIEDMAN PART 57
Justice

B-U Realty Corp.

INDEX NO. 104630/07

- v -

MOTION DATE

MOTION SEQ. NO. 001

NYS DHCR et al.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this ~~motion~~ petition for Art. 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2-5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED
FEB 19 2008
NEW YORK COUNTY CLERK'S OFFICE

RECEIVED
FEB 11 2008
MOTION SUPPORT OFFICE

CASE DISP

Dated: 2-1-08

MARCY S. FRIEDMAN 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 ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

In the Matter of the Application of
B-U REALTY CORP.,

Petitioner,

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

- against -

NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL,

Respondent,

And

945 WEST END AVENUE TENANTS ASSOCIATION and DANIEL ZWEIG,

Intervenors-Respondents.

Index No.: 104630/07

DECISION/ORDER

In the Matter of the Application of
945 WEST END AVENUE TENANTS ASSOCIATION and DANIEL ZWEIG,

Petitioner,

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

- against -

NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL,

Respondent,

And

B-U REALTY CORP.,

Intervenors-Respondents.

Index No.: 104777/07

In these Article 78 proceedings which have been consolidated for disposition, petitioner B-U Realty Corp. ("B-U" or "Owner"), the owner of an apartment building located at 945 West End Avenue in Manhattan, and petitioners 945 West End Avenue Tenants Association and Daniel Zweig, the tenants' association of the building and its Chairperson, respectively (collectively "Tenants") each challenge the order of the New York State Division of Housing and Community Renewal ("DHCR"), dated February 8, 2007 ("final order"), which granted in part the Tenants' Petition for Administrative Review of an order of the Rent Administrator. The Rent Administrator's order had granted in part the Owners' application for a major capital improvement ("MCI") rent increase based on exterior restoration and roof installation work. The DHCR's final order upheld the majority of the MCI increases granted by the Rent Administrator's order, but excluded increases for the roof installation and window sills. In this Article 78 proceeding, the Owner argues that the DHCR should have approved MCI increases for the excluded items. The Tenants argue that the DHCR should not have approved any increases for exterior restoration.

It is well settled that the DHCR's order must be upheld unless the DHCR's determination was arbitrary and capricious or without a rational basis. (See Matter of Simkowitz v State of New York Div. of Hous. & Community Renewal, 251 AD2d 5 [1st Dept 1998].) The DHCR's determination as to whether work constitutes a major capital improvement "necessarily entails the agency's expertise in evaluating factual data and is entitled to deference if not irrational or unreasonable." (Matter of Ansonia Residents Assn. v New York State Div. of Hous. & Community Renewal, 75 NY2d 206, 213 [1989].)

The court finds that the DHCR had a rational basis for its disallowance of increases for the roof installation and window sills. The DHCR excluded the roof installation from the MCI increase on two bases: First, the DHCR found that the Owner violated the requirement that an owner who seeks an MCI increase must perform improvements on all similar components of the building complex, except similar components not in need of such improvements. It was undisputed that B-U replaced the roof above the top floor apartments, but did not replace a lower roof over the lobby/vestibule area until a year later, after it had filed for the MCI increase based on the upper roof replacement. The DHCR reasoned that the roofs "constitute a single roofing system for the subject building," and that both were required to have been replaced when the Owner filed the MCI application. Second, the DHCR found, based on an inspection, that after the replacement of the roof above the top floor, three of the four top floor apartments had leaks, and that the roof installation therefore was not performed in a "workmanlike manner" and did not qualify for an MCI increase. (Final Order at 3-4.)

Rent Stabilization Code § 2522.4(a)(2)(i)(c) provides that an owner may file an application to increase the legal regulated rents of a building based on a major capital improvement which meets prescribed criteria including that it "is an improvement to the building or to the building complex * * * which includes the same work performed in all similar components of the building or building complex, unless the owner can satisfactorily demonstrate to the DHCR that certain of such similar components did not require improvement."

Here, B-U does not dispute that the lower roof required replacement, but argues that the DHCR departed from its own precedent in holding that the upper and lower roofs had to be replaced together in order for roof replacement to qualify for an MCI increase.

B-U correctly argues that an agency determination will be set aside as arbitrary and capricious where the agency did not adhere to agency precedent, and failed to explain its reasons for reaching a different result on essentially the same facts. (See Matter of Charles A. Field Delivery Serv., Inc. [Roberts], 66 NY2d 516 [1985]; Matter of 2084-2086 BPE Assocs. v State of New York Div. of Hous. & Community Renewal, 15 AD3d 288 [1st Dept 2005], lv denied 5 NY3d 708.) B-U fails, however, to demonstrate that the DHCR deviated from precedent. In the prior DHCR determination on which it chiefly relies (Matter of Executive Towers, DHCR Admin. Review Docket No. KF710030R0), the DHCR allowed an MCI increase for a roof replacement over the lobby where the roofs above the apartment towers were not replaced but, unlike the roof at issue here, did not need repair.

B-U further contends that the DHCR's determination is unreasonable because the top floor roof that it replaced is substantially larger than the roof over the lobby/vestibule that it did not replace and that now stands in the way of its MCI increase. While B-U's dissatisfaction with the DHCR ruling is understandable, this court's "review of DHCR's interpretation of the statutes it administers is limited. 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." (Matter of Ansonia Residents Assn., 75 NY2d at 213 [internal quotation marks and citations omitted].) Here, the court cannot find that the DHCR lacks a rational basis for its prohibition of MCI increases for "piecemeal" improvements to similar components. (See Matter of Executive Towers, supra at 5; Rent Stabilization Code §

2522.4 [a][2][i][c].)

B-U also fails to demonstrate that the DHCR departed from precedent in denying the MCI increase for the roof installation on the independent ground that the work was not properly performed. In the instant case, the DHCR found leaks in three of the four apartments below the new roof. In the decisions on which B-U relies, the DHCR granted MCI increases for roof replacements but exempted apartments with continuing leaks where the number of such apartments was minimal. (See Matter of [Blank], DHCR Admin. Review Docket No. DG430169RO [Ex. E to B-U Reply] [3 out of 22 top floor apartments had leaks]; Matter of [Blank], DHCR Admin. Review Docket No. DH110323RT [Ex. F to B-U Reply] [DHCR had evidence of leaks in 2 of 12 top floor apartments].)

The court further finds that the DHCR had a rational basis for denying increases for window sills or the amount sought for window sills. The Owner made no showing as to how the money for window sills was reallocated after it determined that window sill replacements were not needed.

Turning to the Tenants' petition, the court holds that the Tenants fail to demonstrate that the DHCR lacked a rational basis for the challenged rulings. The Tenants contend that the DHCR should not have allowed MCI increases for pointing and window caulking and for other items such as bricks and work on the water tank because such work either was not performed or was not performed in a professional manner. The record shows that the parties' experts disputed the need for and adequacy of the various repairs, and whether engineering specifications and Building Department approvals were required for certain work. (See Reports of Owner's expert, Caseworks Architects [Return A-33] and Tenants' expert, Future Consulting Co. [Return A-12].)

It was within the province of the DHCR, using its expertise in evaluating MCI applications, to resolve such disputes. The court rejects the Tenants' contention that the DHCR was required, under the circumstances of this case, to conduct a comprehensive inspection of all work performed at the building in order to determine whether the MCI increases should be approved. The record before the DHCR, including the experts' reports, documentary evidence submitted by the Owner and photographs, furnished an adequate basis for the DHCR to make the determination. Finally, the statements on the Owner's MCI application that the Tenants claim were false are not statements of such a nature as should have precluded relief in the Owner's favor.

The court has considered the parties' remaining contentions and finds them to be without merit.

It is accordingly hereby ORDERED that the petition of B-U Realty Corp. is denied; and it is further

ORDERED that the petition of 945 West end Avenue Tenants Association and Daniel Zweig is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
February 1, 2008

MARCY FRIEDMAN, J.S.C.