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

PRESENT: O. PETER SHERWOOD PART 61
Justice

In the Matter of the Application of

RIVERCROSS TENANTS' CORP.

Petitioner,

For a Determination pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

INDEX NO. 111433/08
MOTION DATE Sept. 17, 2008
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 9 were read on this petition pursuant to Article 78 of the CPLR

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1-4
Answering Affidavits — Exhibits	5-6
Replying Affidavits	7-8
Sur-Reply Affidavit	9

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, this petition pursuant to CPLR Article 78 is decided in accordance with the accompanying decision and judgment issued this same date.

Dated: November 19, 2008

O. P. Sherwood

O. PETER SHERWOOD, J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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O. PETER SHERWOOD, J.:

This Article 78 proceeding initiated by petitioner, Rivercross Tenants' Corporation ("Rivercross") brings to a head Rivercross' longstanding dispute with respondent, New York State Division of Housing and Community Renewal ("DHCR") regarding DHCR's authority to fix the maintenance surcharge to be imposed on over-income residents of a residential apartment cooperative facility located on Roosevelt Island in New York City. DHCR is represented by agency counsel. The Office of the New York State Attorney General was given notice of the proceeding pursuant to Executive Law § 63 (1). That Office has declined to participate.

Rivercross was incorporated in the 1970's as a limited profit mutual housing company pursuant to Article II of the Private Housing Finance Law ("PHFL"). Housing cooperatives such as Rivercross, commonly known as Mitchell-Lama housing, receive government issued financing and tax abatements which enable the corporation to assure that rents (or in the case of cooperative corporations, carrying charges) remain at affordable levels. In exchange for these taxpayer benefits, the corporation is subject to the supervisory power of DHCR, the mandates of the PHFL and the regulations promulgated pursuant to that law *(see, Scruggs-Leftwich v. Rivercross Tenants' Corp.*, 70 N.Y.2d 849, 850 [1987]).

PHFL § 31 limits admission to or continued occupancy of Mitchell-Lama apartments by income formulas based either on a multiple of the annual rent or carrying charges or a percentage of median income for the area where the development is located. Generally, only families with annual incomes that do not exceed seven or eight times the annual carrying charges are eligible to

occupy cooperative apartments (*see*, PHFL § 31 [2] [a] and [b]). Cooperators occupying such apartments with annual incomes exceeding the income limit are required to pay a surcharge, set by the cooperative corporation with the approval of DHCR, on the existing carrying charge (*see*, PHFL § 31 [2] and [3]).

At the time the building opened in the middle 1970's, the initial offering plan of Rivercross specified that income based surcharges would not exceed 10% of carrying charges. In 1999, Rivercross increased the surcharge maximum to 20% upon the recommendation of DHCR. Certain dissenting shareholders sued unsuccessfully to prevent imposition of this increase (*see Vink v. DHCR*, 285 AD2d 203 [1st Dept. 2001]).

In 2007, the Board of Directors of Rivercross ("Board") approved and submitted to DHCR an application seeking to increase the monthly maintenance charge to shareholders by 4% in order to allow Rivercross to meet its expenses. Rivercross did not seek to change the surcharge schedule applicable to residents with incomes exceeding the maximum income allowed for continued occupancy. Despite an absence of any request to alter the surcharge schedule, the DHCR staff examined the impact of an adjustment of the surcharge schedule on the size of the maintenance charge increase required to enable Rivercross to meet all of its projected expenses. The DHCR staff analysis revealed that the maintenance charge increase could be avoided by increasing the surcharge maximum to 40%. PHFL § 31(3) authorizes maximum surcharges of up to 50% of the carrying charges.

Prior to taking action on the application, DHCR recommended that Rivercross give consideration to an increase of the maximum surcharge. Rivercross considered the request but elected to retain the existing surcharge schedule without modification. Thereafter, the DHCR Commissioner signed an order approving a smaller increase of the maintenance charge than was requested and imposing an increase of the maximum surcharge from 20% to 30% ("Order").

Rivercross then commenced this Article 78 proceeding to overturn the Order asserting, *inter alia*, that the Order exceeds the Commissioner's authority, unlawfully usurps the authority and business judgment of the Board, and is arbitrary and capricious (*see*, CPLR § 7803 [3]). Rivercross also seeks an order directing DHCR to approve the increase in carrying charges previously approved

by the Board. The Board does not seek review of the increase allowed based on projected revenues from all sources, including maintenance charges and the surcharge imposed on over-income residents.

For the reasons discussed below, the petition must be dismissed.

DISCUSSION

Article II of the PHFL grants DHCR broad supervisory authority over limited-profit housing companies (*see*, PHFL § 27; *Scruggs-Leftwich*,70 NY2d at 850). That authority extends to regulation of the fiscal affairs and rental practices of limited profit housing companies organized under the PHFL. Pursuant to PHFL § 31(3) and as applicable here:

> [a]ny person or family in occupancy [of a Mitchell-Lama apartment] whose income exceeds the maximum prescribed by law shall pay a rental surcharge in accordance with a schedule of surcharges to be promulgated by the [limited profit housing] company with the approval of the [DHCR] commissioner. . .

Subject to the approval of the commissioner, the company may also "fix the maximum rents...to be charged" but the commissioner may "upon his . . . own motion . . . vary the rental rates." PHFL § 31(1)(a). The phrase "rental rates" has been held to apply to the monthly "carrying charge" paid by the residents of cooperative apartments (*see Strycker's Bay Apartments, Inc. v. Walsh*, [Sup. Ct, N.Y. Co. 1971]).

Petitioner asserts that under PHFL § 31(3), the authority to promulgate an increase in the surcharge schedule rests "solely" with the Rivercross Board, that the courts have confirmed the Board's (and not DHCR's) authority in this regard, that DHCR's Order substituting its judgment for that of the Board was arbitrary and capricious and that DHCR's Order is barred under the doctrine of *res judicata* by virtue of the Appellate Division's decision in *Vink* (285 AD2d 203, *supra*).

A careful reading of the Appellate Division's decision in *Vink* reveals that DHCR possesses the authority to set rental rates, including the surcharge schedule component of those rental rates. In that case, the court noted that Rivercross had argued that DHCR lacks the authority to impose any

particular surcharge schedule and that DHCR disagreed, maintaining that it has the power to direct Rivercross to do so (*id* at 208). There was no need for the court to resolve the issue because the Rivercross Board had fixed the increases and DHCR had approved them. In the Supreme Court, Justice Figueroa held that the actions of Rivercross and DHCR in increasing the surcharge schedule were consistent with the PHFL. He also noted that Rivercross and DHCR were intended by the Legislature to have "interlocking, rather than unilateral, capacities" (*id* at 209). The Appellate Division held, however, that DHCR is "empowered" (*id* at 211) to vary rents and that "while retaining oversight authority on the matter of amending surcharge schedules, has in [that] case, eschewed any greater role in micro-managing these essentially financial issues." (*id* at 210). Clearly, the Appellate Division was satisfied that DHCR possessed the authority to micro-manage the fiscal affairs of regulated Mitchell-Lama projects but had no occasion to exercise it in that case. Further, in rejecting an effort by some residents to require DHCR to order Rivercross to increase the surcharge schedule to the maximum provided for in the PHFL, the Appellate Division held that DHCR's powers in this area are "discretionary, rather that ministerial" (*id* at 211). The Appellate Division having determined that DHCR has the discretion to amend the surcharge rates, petitioner's claim that DHCR exceeded its authority when it ordered amendment of the surcharge schedule over petitioner's objection must be rejected.

Justice Figueroa read the legislative purpose of PHFL § 31(3) as intending that the surcharge schedule be promulgated by the cooperative's Board pursuant to a consultative process with DHCR (*see Committee for Maintenance and Privatization Fair Play At Rivercross v. DHCR*, [Sup. Ct, N.Y. Co.; Index No.: 114701/99] at p. 3). However by affording the Board an opportunity to promulgate the surcharge schedule the court did not thereby endorse Rivercross' assertion that the Rivercross Board has sole authority to set it. Rivercross is not entitled to thwart DHCR's supervisory authority by stubbornly refusing to consider and act on DHCR's recommendations.

In this case, DHCR invited the Board to consider and promulgate carrying charge and surcharge increases that would allow Rivercross to cover its expenses, mindful that the Mitchell-Lama Law is "directed mostly at maintaining a stratum of middle rather than high income people" while not excluding higher income people from these buildings that receive substantial government financial support (*id* at 20). DHCR exercised its supervisory powers only after it engaged the Board and the Board refused to make any change to the surcharge schedule. Rivercross has not shown that

DHCR acted outside the scope of its authority in this instance.

Rivercross also argues that DHCR's action was contrary to its own regulations and previous actions and therefore is arbitrary and capricious. It argues further that DHCR is estopped from taking "inconsistent positions" regarding the Board's authority to set the surcharge schedule[1] and that DHCR's order is barred by the doctrine of *res judicata*. Petitioner relies principally on DHCR's acquiescence in 1999 in the Board's decision setting the carrying charge and surcharge schedule to meet Rivercross' then existing financial obligations. Petitioner assumes erroneously that having once accepted a budget proposed by the Board in a prior year, DHCR is forever bound to accept all future budgets the Board may adopt provided the budget set by the Board is not fiscally irresponsible. Nothing in the DHCR regulations or caselaw requires such a result.

The application is denied and the petition is hereby dismissed.

This constitutes the decision and judgment of the court.

DATED: November 19, 2008

E N T E R,

O. PETER SHERWOOD
J.S.C.

[1]The claim is meritless. As noted above, the Board and DHCR have long disputed whether DHCR has the authority to set the surcharge schedule over the objection of the Board.