Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable **LAWRENCE V. CULLEN** IAS PART 6
Justice

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In the Matter of the Application of
DELORIS KENNEDY and JOHN KENNEDY,

Petitioners,

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

-against-

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,
NYS OFFICE OF ATTORNEY GENERAL,
ROCHDALE VILLAGE, INC.,

Respondents.

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Index No.: 23415/08

Motion Date: 1/13/09

Motion Cal. No.:18

Motion Seq. No.: 2

The following papers numbered 1 to 11 read on this petition to annul a determination of the respondent.

	PAPERS NUMBERED
Notice of Petition-Petition-Exhibits-Service.....	1 - 4
Verified Answer-Exhibits.....	5 - 6
Respondent's Memorandum of Law.....	7
Respondent's Exhibits.....	8
Verified Answer.....	9
Reply Petition-Exhibits.....	10 - 11

Petitioners move for an Order, pursuant to CPLR §7803(3), annulling the determination of the respondent, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL (hereinafter referred to as "DHCR") dated August 27, 2008, which denied petitioner's appeal challenging the DHCR's decision that petitioner did not qualify for succession rights to the tenancy of an apartment in its state-aided project. Respondents opposed and petitioners replied.

BACKGROUND

Petitioner, JOHN KENNEDY, was the tenant-of-record of apartment 7G in the respondent's state-aided project, known as the Mitchell-Lama project. Pursuant to the regulations governing said apartments, the tenant-of-record must execute an "Occupant Annual Affidavit of Family Income" which lists all household members living in the subject apartment.

It is undisputed that said annual affidavits for the calendar years 2002, 2003, and 2004 listed only John Kennedy as the tenant-of-record.

Petitioner, Deloris Kennedy, contends that her son, John Kennedy, relocated to upstate New York in 2005, and that she had resided in said apartment with her son for two years prior to him relocating.

The annual affidavits for the calendar years 2005, 2006 and 2007 listed both John Kennedy and Deloris Kennedy as occupants, which is also undisputed.

Petitioner, Deloris Kennedy, applied to the respondent for succession rights to the subject apartment, which was denied by DHCR. Petitioner appealed said decision, and on August 27, 2008 the DHCR issued its final determination finding that petitioner, Deloris Kennedy did not qualify for succession rights, which determination is the subject of this proceeding.

ANALYSIS

CPLR §7803 divests this Court with the authority to review a determination by an agency, such as the DHCR. Said review shall be limited to whether the determination was made in violation of lawful procedure; was affected by an error of law; was arbitrary and capricious; or was an abuse of discretion, which shall include an whether there was an abuse of discretion as to the measure or mode of the penalty imposed. (CPLR §7803(3). See, Montefusco v. New York State DHCR, 2009 WL 595564 [N.Y.Sup.]; Windsor Place Corp. V. New York State DHCR, 161 A.D.2d 279).

It is a well settled principle that judicial review of an administrative determination is limited the whether such decision was arbitrary or capricious, that is whether the determination had a rational basis. (See, Mankarios v. New York City Taxi and Limousine Com'n, 49 A.D.3d 316).

A determination will be found to be arbitrary or capricious where the decision is "without sound basis in reason and ...without regard to the facts". (See, Matter of Pell v. Board of Education, 34 N.Y.2d 222, 231).

Where the reviewing Court finds that there is a rational basis to the agency's determination, the same should be affirmed, even if the reviewing court would have come to a different conclusion. (See, Mid-State Management Corp. v. New York City Conciliation and Appeals Board, 112 A.D.2d 72, aff'd 66 N.Y.2d 1032).

The subject apartment located in the Mitchell Lama project is governed by Title 9 NYCRR, Subtitle S, Chapter IV, Parts 1700 through 1750. Said regulations set forth the requirements under which a family member may obtain successor rights to an apartment. Only claimants who meet all of the regulatory requirements may obtain leases in their own names as successor tenants.

Successor rights arise when a tenant-of-record dies or permanently vacates an apartment. (9 NYCRR §§1727-8.1 to 1727-8.6) The three requirements which must be met by the applicant is (1) they are a family member of the vacated tenant as defined in 9 NYCRR Section 1727-8.2(a)(2); (2) they resided in the subject apartment together with the vacated tenant, and it was their primary residence, for the requisite period of time as set forth in 9 NYCRR Section 1727-8.3(a); and (3) their name was on the annual tenant income affidavit and/or on the Notice of Change to Tenant's Family during the qualification period immediately prior to the tenant vacating the apartment.

The requisite time period where the tenant has permanently vacated the subject apartment is not less than two (2) years, unless the applicant is a senior citizen or disabled person as defined by Section 1727-8.2 (a)(3) and (4), then it is not less than one (1) year immediately prior to the permanent vacating of the subject apartment by the tenant.

Inasmuch as petitioner did not qualify as a senior citizen or disabled person as of the time her son vacated the subject apartment, the time period in the case at hand is two (2) years. Based upon petitioner's statement that her son vacated the apartment in 2005, then pursuant to the aforementioned regulations, the petitioner would have had to reside with her son at the subject apartment for the years 2004 and 2003, and her name was listed in the annual affidavit or a Notice to Change Tenant was served upon the agency.

The record of the underlying proceedings contained copies of the annual affidavits for the years 2003 and 2004, and the same reveals that petitioner's name was not listed on the same. Nor has petitioner submitted a copy of any Notice to Change Tenant's Family served upon respondent.

Inasmuch as the petitioner herein did not meet all three requirements to obtain successor rights, the DHCR informed petitioner in letters dated May 15, 2008 and June 18, 2008, that she did not qualify for succession rights to the apartment's tenancy. Petitioner exercised her right to appeal said decision in a letter dated June 27, 2008.

Petitioner alleged in her appeal that she lived with her son for two years prior to the year 2005, however she did not submit any proof to DHCR. The DHCR found that the annual affidavits for the years 2002, 2003 and 2004 did not list petitioner's name, that there was no Notice of Change to Tenant's Family, and the first time petitioner's name appeared in the apartment's records was on the 2005 annual affidavit that was executed in June 2006.

The DHCR noted that the regulations permit the consideration of other documentary evidence (such as tax returns, voting records, driver's licence) to establish that the petitioner resided in the apartment during the qualification period, however the petitioner herein failed to submit any such proof.

Lastly, the DHCR addressed petitioner's claim that she was a senior citizen and therefore the requisite time period would be one (1) year by stating that: (1) petitioner failed to submit any proof of senior citizen status when her son vacated the apartment in 2005; and (2) even if petitioner qualified as a senior citizen, her name did not appear on the annual affidavit during the one year immediately prior to her son vacating the apartment. Accordingly, senior citizen status would not have any bearing on the outcome.

It is clear that the determination by the DHCR, denying petitioner successor rights to the subject apartment, was rationally based upon the fact that petitioner did not satisfy all of the reporting regulations, and, therefore, is not arbitrary, capricious, or in any way improper.

Lastly, petitioner raises a new claims[1], as well as submits new documentary evidence[2] in the instant Article 78 proceeding which were not presented to the DHCR in the underlying appeal proceeding. It is clear that documents submitted in an Article 78 proceeding, which were not presented to the administrative agency who made the initial determination, nor the appeals unit reviewing said determination, cannot be considered as part of the record on appeal. (See, Margolin v. Newman, 130 A.D.2d 312; Molloy v. The New York City Police Department, 50 A.D.3d 98). That is, this Court's consideration herein is confined to those issues property raised in the administrative proceeding, and cannot include materials presented for the first time. (See, Sudarsky v. New York State DHCR, 258 A.D.2d 405).

Based on the foregoing, this Court finds that the DHCR's determination was neither arbitrary nor capricious, and there is nothing in the record properly before this Court that would serve as a basis for relieving the petitioner of the written notice requirements. (See, Hutcherson v. New York City Housing Authority, et al, 19 A.D.3d 246).

Accordingly, it is hereby

ORDERED that the petitioners' Petition is hereby denied; and it is further

ORDERED that this matter is hereby dismissed.

Dated: May 26, 2009

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LAWRENCE V. CULLEN, J.S.C.

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[1] Petitioner asserts that she was informed that she could live with her son for two years before her name had to be placed on the annual affidavit.

[2] Petitioner's son submits a statement concurring with his mother's statement and that he would like to return to the subject apartment. Petitioner also submitted on reply various documents, including but not limited to bank statements and cancelled checks for the payment of rent and utility bills.

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