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

PRESENT: MARCY S. FRIEDMAN PART 57

Index Number : 106092/2009
LAWRENCE ALAN
VS
NEW YORK STATE D.H.C.R.
Sequence Number : 001
ARTICLE 78

INDEX NO. 106092/09
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to ____ were ... this motion to/for Art 78

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

Memos of Law M1-3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is determined as per decision/order dated 8-28-09

FILED
SEP - 1 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8-28-09

MARCY S. FRIEDMAN

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

ALAN LAWRENCE, INDIVIDUALLY AND IN HIS CAPACITY AS CHAIRMAN OF THE 279 EAST 44TH STREET TENANTS ASSOCIATION, et al.,

Petitioners,

For a Judgment pursuant to Article 78 of the CPLR,

- against -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, et al.,

Respondents.

Index No.: 106092/09

DECISION/ORDER

In this Article 78 proceeding, petitioner-tenants challenge the determination of respondent New York State Division of Housing & Community Renewal ("DHCR"), dated March 6, 2009, deciding a petition for administrative review. The challenged determination upheld a rent administrator's order that granted the owner's application for a major capital improvement ("MCI") increase based on the installation of a new boiler.

Petitioners challenge the DHCR determination primarily on the ground that the owner was not entitled to an MCI increase for the new boiler because the old boiler had not outlived the useful life set forth in the schedule in the Rent Stabilization Code ("RSC"). (See RSC § 2522.4[a][[2][i][d].) In upholding the MCI increase, the DHCR did not find that the boiler had

outlived its useful life, and it does not appear to be disputed that it was approximately 20 years old and therefore did not reach the useful life of 25 to 35 years specified by the schedule. (See id.) Rather, the DHCR reasoned that the owner had not previously received an MCI rent increase for a new boiler installed in the 90's, and "[a]ccordingly, there is no basis to deny an MCI rent increase for the boiler installation at issue based on a useful life requirement." (Determination at 3.)

In the instant proceeding, the DHCR acknowledges that the Code requires an application for a waiver if the item that is being replaced does not meet the useful life schedule. The DHCR thus cites Code § 2522.4(a)(2)(i)(e)(3)(iv) which provides in pertinent part:

> An owner may apply for, and the DHCR may grant, a waiver of the useful life requirements set forth in the useful life schedule, if the owner satisfactorily demonstrates the existence of one or more of the following circumstances:
> (iv) The replacement of an item or equipment which has proven inadequate, through no fault of the owner, is necessary, provided that there has been no major capital improvement rent increase for that item or equipment being replaced.

However, the DHCR now takes the position, which was not articulated in the challenged determination, that "the Owner did note its right to a waiver of the useful life requirement in its original [MCI] application." (Resp. Memo. at 5.) The original application to which the DHCR refers (Return A-1, p. 2) nowhere by its terms requests a waiver. At most, it states that the boiler that was replaced was approximately 20 years old and that the DHCR had previously denied benefits for the old boiler.

Significantly, the Code provides that "[a]n owner who wishes to request a waiver of the useful life requirement . . . must apply to the DHCR for such waiver prior to the commencement

of the work for which he or she will be seeking a major capital improvement rental increase." (RSC §2522.4(a)(2)(i)(e)(1). The owner's MCI application was dated March 21, 2006 and sought the increase for work performed from March 25, 2005 through October 17, 2005. (Return A-1, p. 2.) It thus clearly appears from the face of the application that the waiver was not requested before the work was done.

It is well settled that "[j]udicial review of the propriety of any administrative determination is limited to the grounds invoked by the agency in making its determination." (Timmerman v Board of Educ. of the City Sch. Dist. of the City of New York, 50 AD3d 592, 593 [1st Dept 2008], quoting Matter of Missionary Sisters of Sacred Heart, Ill. v New York State Div. of Hous. & Community Renewal, 283 AD2d 284, 288 [1st Dept 2001]. See Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 758 [1991].)

Here, there was no agency interpretation of the Code requirement that an application for waiver be made before the work and no finding that a waiver should be authorized, although the challenged determination did cite grounds supporting a waiver (namely, the absence of a prior increase for the replaced item). Under these circumstances, the court finds that the matter should be remanded to the agency for appropriate findings so that the court can determine whether there was a rational basis for the agency's opinion. (Compare Matter of Peckham v Calogero, 12 NY3d 424 [2009].)

The court has considered, and finds without merit, petitioners' remaining bases for challenging the DHCR determination, including their claim that prior litigation bars an MCI increase for a boiler (see Matter of Elghanayan v New York State Div. of Hous. & Community Renewal, 181 AD2d 638 [1st Dept 1992]), that the residential room count is erroneous, and that

the MCI increases should also have been allocated to the commercial spaces.

It is accordingly hereby ORDERED that the petition is granted to the extent of remanding the matter to the DHCR for further proceedings consistent with this opinion; and it is further

ORDERED that in the event petitioners seek review of the DHCR determination upon remand, they shall commence a new Article 78 proceeding.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
August 28, 2009

MARCY FRIEDMAN, J.S.C.