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

PRESENT: Q. PETER SHERWOOD Justice — PART 61

In the Matter of the Application of
40 PARK AVENUE, LLC,
Petitioner,

-against-

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

INDEX NO. 116042/09
MOTION DATE Feb. 25, 2010
MOTION SEQ. NO. 001
MOTION CAL. NO. ____

The following papers, numbered 1 to 10 were read on this petition pursuant to CPLR Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6 7-8 9
Replying Affidavits	10

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, the petition for a judgment pursuant to CPLR Article 78 annulling an order of respondent the New York State Department of Housing and Community Renewal is decided in accordance with the accompanying decision, order and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: May 26, 2010

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: PART 61

----------X

In the Matter of the Application of
40 PARK AVENUE, LLC

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL, 40 PARK AVENUE
TENANTS' ASSOCIATION and INGRID
EISENSTADTER a/k/a INGRID McA
Respondents.

DECISION, ORDER
AND JUDGMENT

Index No. 116042/2009

RE: DHCR Order No. VE-410012-RP.

----------X

O. PETER SHERWOOD, J.:

This is a second proceeding in this court arising from an application by petitioner for a major capitol improvement ("MCI") rent increase based on exterior renovations completed in September 2002 to certain parts of a residential apartment building owned by petitioner. The building has 146 rental units of which 68 units are rent stabilized. In this proceeding, petitioner seeks to annul an Order of Respondent, New York State Department of Housing and Community Renewal ("DHCR") reversing an earlier DHCR determination granting the rent increase.

On October 7, 2004 the DHCR by its Rent Administrator granted an MCI rent increase of $77.10 per room per month on allowed MCI costs of $2,622,165.84 in renovation costs and $77,293.06 in consulting engineer's fees. The decision was affirmed by the DHCR Deputy Commissioner in an Order of Affirmance, dated December 8, 2005 ("PAR Order"). Respondent, 40 Park Avenue Tenants' Association ("Tenants' Association") then commenced an Article 78 proceeding seeking to set aside the PAR Order. In decisions dated May 21, 2007 and July 21, 2007, Justice Emily Jane Goodman of this court vacated the PAR Order, annulled the MCI rent increase and remanded the matter to DHCR. Familiarity with Justice Goodman's decisions is assumed. Facts described there will not be repeated here except as necessary to aid clarity of this decision.

Justice Goodman vacated the PAR Order and remanded the application to the agency on the basis that the agency failed to consider or address petitioner's allegation that the work did not accrue "directly or indirectly to the benefit of all tenants" as required under the New York City Rent Stabilization Code ("RSC") §2522.4(a)(2)(i)(c). She held that

> [w]ork done to the facade of the Building qualifies as a building-wide improvement, even if the work was only done to a portion thereof (*see, 430 East 86th Street Tenants Committee v. DHCR*, 254 AD2d 41 [1st Dept 1998][upholding as rational DHCR determination to grant MCI status to work involving 80% of the building's parapets and masonry repairs]; *Rudin Mgmt. Co., Inc. v. DHCR*, 215 AD2d 243 [1st Dept 1995][upholding as rational DHCR determination to grant MCI status to work involving total replacement of masonry parapet on 20th floor of building]). However, the work at issue was not only done to secure the facade of the building, but improvements were made to individual terraces/balconies, which may have been unrelated to "operation, preservation and maintenance of the structure."
>
> The Building contains 148 apartments, only 68 of which are rent stabilized. Of the 68 rent stabilized tenants, it is alleged that approximately two dozen apartments do not have terraces/balconies, and of those that do have terraces, not all of them were repaired. Therefore, a portion of the work appears to have benefitted only certain tenants- -most of whom are not rent stabilized- -while other tenants may have received even an indirect benefit (*see Riverton Assoc. v. DHCR*, 15 AD3d 225 [1st Dept 2005][MCI properly denied where renovation did not benefit the tenants]). The DHCR Order fails to mention this important issue when reciting petitioners' arguments for reversal, the owner's response thereto, and its rational for upholding the RA Order. Although the agency is entitled to deference, the blatant omission is arbitrary and capricious.

R. B-13, p. 10.

On remand, the DHCR assigned the matter a new docket number and on September 27, 2007 issued a "Notice of Re-opening" ("Notice") addressed to petitioner and the Tenants Association (R.C-2). The Notice states:

> This proceeding was remitted to the DHCR by the order of the New York State Supreme Court, Justice Emily Jane Goodman, Index No 101217/2006, dated may 21, 2007, to address the issue of whether the improvements benefit all tenants directly or indirectly.
>
> Please send in any comments that you may have within twenty (20) days from the date appearing at the bottom of this notice, and display Administrative review Docket VE410012RP on any submission, addressing same to the DHCR, Owner Multiple Applications Bureau, PAR Unit at the above address.

By letters dated October 11, 2007 and December 12, 207, Petitioner and the Tenants' Association, respectively, responded and acknowledged that the issue before DHCR was as framed in the Notice (*see* R. C-3, p. 2 and C-7, p.1).

Eight months later, on August 12 and August 30, 2008, respondent Ingrid Eisenstadter (a/ka Ingrid McTeer)("Eisenstadter") made submissions asserting that the "issues in this proceeding concern whether the MCI...were ones in which

A. 'all tenants benefit,'
B. repairs were building-wide,
C. and performed on all 'same or similar' parts of the building as 'necessary'
D. and whether the MCI was 'completed' all as required by law..."(R. C-8, p. 1).

The DHCR provided copies of Ms. Eisenstadter's submissions and gave the parties opportunities to "comment." Petitioner limited its comments to the issue remanded to the DHCR by the court and identified in the Notice. It expressly declined to address the new issues raised in the Eisenstadter submissions but requested that it be advised and given an opportunity to submit a detailed response if DHCR determined to consider them.

On September 16, 2009, the Deputy Commissioner issued an Order and Opinion Granting Petition for Administrative Review After Reconsideration Pursuant to Court Order" ("Remand PAR"). (R. C-21). Regarding the issue that was the subject of the remand order, the Deputy Commissioner observed that

> it is DHCR's policy that comprehensive exterior work qualifies as a major capital improvement; and when terrace or other related work is performed as part of an exterior restoration work done on a building-wide basis wherever necessary, same also qualifies for an MCI rent increase to be allocated among all tenants regardless of whether their apartments contained terraces. Cases which deal with exterior renovation have never required that all of the individual components of an exterior structure be rehabilitated. Rather, the focus is on rehabilitation of parts of the building which may have deteriorated over time, where necessary, meaning that some areas of a building exterior may not require replacement or rehabilitation.

R. C-21, p. 2 *(citation omitted)*.

Despite this observation which disposed of the issue remanded by the court in favor of the building owner, the Deputy Commissioner denied the MCI rent increase holding that evidence submitted by Eisenstadter showed that the work was not performed on a building-wide basis but

instead was done in a piecemeal fashion. The holding was based on evidence that the building owner had filed an application with the Department of Buildings on April 6, 2006 for a permit to do the same type of work for which the MCI rent increase had been granted in 2004, which was "barely three years after the filing of the owner's MCI rent increase for similar work" (R. C-21, p. 3). The work performed in 2006 was performed essentially on floors that were not involved in the earlier renovations.

In response to an argument advanced by petitioner that the Eisenstadter claim should not be considered, the Deputy Commissioner ruled that under RSC §2527.8, the DHCR is authorized to issue a superceding order modifying or revoking any prior order where the agency finds that such order was the result of "illegality, irregularity in vital matters or frauds" and that a superceding order could be issued at any time. The superceding order issued in this case was grounded on a finding of "irregularity in vital matters" (R. C-13, p. 4).

DISCUSSION

The New York City Rent Control Law (the "RCL") with its implementing provisions in the Rent and Eviction Regulations (the "RER") and the Rent Stabilization Law of 1969, (26-501 to 26-520 of the Administrative Code of the City of New York (the "RSL") with its implementing provisions in the Rent Stabilization Code govern the amount owners may charge for rent-controlled (RCL §26-405[a][1] and RER §2201.1[a]), and rent-stabilized (RSL §26-512[a] and RSC §2522.1), housing accommodations. The regulatory systems also regulate required and ancillary services and permit rent increases under certain specified circumstances (RCL §26-405 and RER §§2202.3 to 2202.12; RSL §26-511[c][6] and RSC §§2522.1 to 2522.7). One of those circumstances allows an owner to apply for a special, building-wide rent increase based on completion of a qualified Major Capital Improvement. Where an owner establishes that it has made such an MCI, the owner is entitled to pass on a permanent, building-wide rent increase, which continues even after initial acquisition cost of the MCI itself has been fully recovered. *Ansonia Residents Assn. v. New York State Division of Housing and Community Renewal*, 75 NY2d 206, 216 (1989); *Versailles Realty Co. v. New York State Division of Housing and Community Renewal*, 76 NY2d 325, 329 (1990), *aff'd.* 154 AD2d 540 (2d Dept 1989), *re-argument denied*, 76 NY2d 890 (1990).

Since the regulatory systems authorize the DHCR to determine the qualification of installations that are the basis for an MCI rent increase application, DHCR accordingly has the

authority and discretion to determine what installations constitute an MCI and what related expenses are eligible for an MCI rent increase. Moreover, DHCR's determinations with respect to what constitutes an MCI "necessarily entails the agency's expertise in evaluating factual data and is entitled to deference." *Matter of Ansonia Residents Assn*, 75 NY2d at 213; *Matter of West Village Associates v. DHCR*, 277 AD2d 111, 112 (1st Dept 2000); *Wesley Ave. Associates v. DHCR*, 206 AD2d 378 (1994); *Versailles Realty Co.*, 76 NY2d at 329. Such factual determinations by the Agency entrusted with the expertise to administer the law and administer and modify the regulatory code are entitled to great weight and judicial deference. Where the agency's determination is based upon the interpretation of statutes, the understanding of operational practices, and the evaluation of factual data, the court must defer to the agency's expertise if a rational basis exists for the decision. *Matter of Ansonia Residents Association*, 75 NY2d at 214 (1989); *Matter of Brightwater Towers Agency v. DHCR*, 212 AD2d 603; *Oriental Boulevard Co. v. NYC Conciliation and Appeals Board*, 92 AD2d 470 (1st Dept 1983), *aff'd*, 60 NY2d 633 (1983).

An installation for which an MCI rental increase is sought must meet the requirements set forth in RSC §2522.4(a)(2). Thus, pursuant to RSC §2522, 4(a)(2)(i)(c), as interpreted by the DHCR, such improvement must be "building-wide", and "inure directly or indirectly to benefit of all tenants". In addition, the installation must be required for the "operation, preservation, or maintenance of the structure" and be "deemed depreciable under the Internal Revenue Code and must replace the useful life of the item it is replacing as interpreted by DHCR" RCL§26-405(g)(1)(g) and RER §2202.4(c); RSL §26-511(c)(6)(b) and RSC §2522.4(a)(2)(i). Where the MCI involves exterior restorations, the building owner is entitled to a rent increase for work performed on all elements which may have deteriorated, that is, in those areas "*as necessary* on all sides of the building" RSC §2522.4(a)(3)(19) (emphasis added).

In the first PAR Order issued on December 8, 2005, the Deputy Commissioner determined that the building owner met the requirements for an MCI rent increase and denied the Tenants' Association's PAR. Upon review, Justice Goodman vacated the PAR Order and remanded the matter to the DHCR because "the agency failed to consider or address [the Tenants' Association's] allegation that the work did not accrue 'directly or indirectly to the benefit of all tenants' as required under [RSC] §2522.4(a)(2)(i)(c)." (R. B-13, p. 9). On remand, DHCR addressed the issue remanded to it and determined that the building owner met this requirement. However, in an exercise of

authority the agency possesses pursuant to RSC §2527.8, it granted the Tenants Association's PAR on grounds outside the scope of the "Notice of Re-Opening" it issued on the remand. The agency did so without giving any notice to the parties of its intention to conduct an administrative review under §2527.8 and affording them an opportunity to be heard. The agency's failure to give notice and an opportunity to be heard was arbitrary and capricious and the Remand PAR dated September 16, 2009 must be set aside (*see* CPLR §7803[3]). The matter must be remanded to the agency for an order granting the MCI rent increase based on the July 15, 2003 application. If warranted on the facts and the agency so determines, it may commence an administrative review on proper notice and issue a superseding order pursuant to RSC §2527.8 after giving the parties an opportunity to be heard (*see Matter of Sherwood 34 Associates v. New York State Department of Housing and Community Renewal*, 309 AD2d 529, 531 [1st Dept 2003]["DHCR may reverse a prior determination, even long after the time to appeal has expired, where the initial order resulted from 'illegality, irregularity in vital matters, or fraud' "]).

Accordingly, it is

ORDERED and **ADJUDGED** that the petition is **GRANTED**; and it is further

ORDERED that the order of respondent, DHCR dated September 16, 2009, is vacated and the matter is remanded to the agency with instructions to restore the MCI rent increase ordered on July 15, 2003 except that pursuant to RCS §2527.8, the agency may reconsider the order dated July 15, 2003 upon notice setting forth the issue to be considered and giving a full and fair opportunity to all interested parties to be heard prior to issuance of any superseding order.

This constitutes the decision order and judgment of the court.

DATED: May 26, 2010

ENTER,

O. PETER SHERWOOD
J.S.C.