[* 1]

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

PRESENT: _____ PART 55
Justice

In the matter of the Application of 98 Riverside Drive Tenants Assoc.

- v -

NYS Division of Housing and Community Renewal, et.al

INDEX NO. 102796/12

MOTION DATE 01

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

FILED

SEP 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/15/12

_____ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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 55

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In the Matter of the Application of
98 RIVERSIDE DRIVE TENANTS ASSOCIATION
AND GARY SCHATSKY,

Petitioners,

Index No. 102796/2012

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL AND ROSE ASSOCIATES, INC.,

Respondents.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioners, the Tenants Association and its president of the building located at 98 Riverside Drive ("the building"), brought this petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") challenging a final order issued by respondent New York State Division of Housing and Community Renewal ("DHCR"). For the reasons set forth below, the petition is denied.

The relevant facts are as follows. On or about July 15, 2009, the Tenants Association filed

an application for a rent reduction based upon decreased building wide services. The petitioners claimed, inter alia, that there were decreased services based on the loss of the use of the public roof space and the closing of a basement bicycle storage space. In response to the petitioners' application, the owner of the building stated that access to the bicycle storage space was a de minimis condition under the Rent Stabilization Code since the storage room did not contain individual formal storage bins and was not provided pursuant to specific tenant lease provisions. Petitioners' attorneys then submitted sworn statements from the various tenants stating that the present owner had stopped the use of the bicycle room as well as closing access to the area of the roof which had previously been open to all tenants for recreational purposes. The tenants also stated that there were concrete benches and planters on the roof. On June 16, 2010 DHCR's rent administrator issued his orders reducing rents for rent controlled and rent stabilized tenants. The rents administrator determined that the owner had reduced services by failing to maintain access to the roof and bicycle room. The owner challenged the rent administrator's order by filing a petition for an administrative review ("PAR") and a request for reconsideration of the order. The request for reconsideration was granted and additional statements were submitted by the tenants and by the owner. On September 20, 2011, the rent administrator issued his order pursuant to reconsideration where he once more found that the storage room for bicycles and roof access were required services and that there was a failure to maintain the services which warranted a reduction in rent for regulated tenants. The owner filed a PAR on October 13, 2011 challenging the order of the rent administrator. On March 30, 2012, DHCR's Commissioner issued his order and opinion granting the PAR. The Commissioner reversed the rent administrator's order and found that the failure to provide access to the roof and the removal of the storage room for bicycles constituted de minimis

conditions under RSC section 2523.4(e)(19) and (21) and therefore did not warrant the imposition of rent reductions for rent regulated tenants. The petitioners then commenced the present Article 78 proceeding to challenge the order of the Commissioner.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); *see Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell,* 34 N.Y.2d at 231 (internal citations omitted). More specifically, the First Department held that it "is for the administrative agency to determine what constitutes a required service and whether that service is being maintained." *Matter of Mehon v New York State Division of Housing and Community Renewal,* 234 A.D.2d 23 (1st Dept 1996).

In the present case, this court finds that the determination made by the Commissioner that the discontinuation of the tenants' use of the roof space was a de minimis condition which did not warrant a rent reduction had a rational basis and was not arbitrary and capricious. A rent reduction will be ordered where it is found that an owner has failed to maintain a required service. Section

26-514 of the Rent Stabilization Law and section 2523.4 of the Rent Stabilization Code. Section 2523.4(e) of the Rent Stabilization Code provides that certain conditions may be de minimis in nature and that they do not rise to the level of a failure to maintain the required service or warrant a rent reduction. Under section 2523.4(e) of the Rent Stabilization Code, discontinuance of recreational use of a roof such as sunbathing is a de minimis condition unless a tenant's lease provides that the tenants may use the roof or "formal facilities(e.g., solarium) are provided by the owner." The Commissioner found that the record supported the conclusion that the owner's discontinuation of the roof terrace area was de minimis in nature and thus did not warrant a reduction in rent based upon a decrease in services. He stated that assuming that chairs, tables and planters were actually provided by the prior owners, it cannot have been reasonably concluded that such items taken as a whole rose to the level of a formal facility as envisioned by the code language which sets forth the example of a solarium. He stated that such items, even if made of cement, are plainly removable and not affixed to the rooftop. It was rational for the Commissioner to find that the discontinuance of the recreational use of a roof was a de minimis condition and that the cement benches and planters were not formal facilities such as a solarium. Even if this court might have reached a different conclusion, that is not a basis for overturning the determination of the Commissioner. As it was rational to determine that the cement benches and planters did not constitute formal facilities, the decision of the Commissioner must be upheld.

Similarly, the determination of the Commissioner that the removal of the bicycle storage room was a de minimis condition which did not warrant a rent reduction had a rational basis and was not arbitrary or capricious. Rent Stabilization Code section 2523.4(e)(21) provides that storage space removal is considered de minimis in nature unless storage space service is provided for in a

specific rider to the lease or the owner has provided formal storage boxes or bins to tenants within three years of the filing of the tenants' complaints alleging an elimination or reduction in storage space service. The Commissioner found that the record supported the conclusion that the owner's removal of the bicycle room was de minimis in nature and thus did not warrant a reduction in rent based upon a decrease in services. The Commissioner found that the bicycle storage room constituted storage space as envisioned by the regulations. He stated that the record contained no evidence of the current owner or prior owners' actual provision of formal storage bins or formal designated bicycle spaces to tenants within four years of filing of the services complained of in this matter. There was a rational basis for the determination of the Commissioner that the owner's removal of the bicycle room was de minimis based on his finding that the use of the room to store bicycles made the room a storage space as envisioned by the regulations which the owner was entitled to eliminate.

Accordingly, petitioner's request for relief under Article 78 of the CPLR is denied. The petition is hereby dismissed in its entirety. This constitutes the decision, order and judgment of the court.

Dated: 8/15/12

Enter: _____
J.S.C.