

**Matter of Southbridge Towers, Inc. v New York State  
Div. of Homes & Community Renewal**

2020 NY Slip Op 31025(U)

April 20, 2020

Supreme Court, New York County

Docket Number: 159398/19

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

SOUTHBRIDGE TOWERS, INC.,

Petitioner,

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

Index No.: 159398/19  
 DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOMES AND  
 COMMUNITY RENEWAL,

Respondents,

-and-

ZHUANG LING LIU,

Respondent-Intervenor.

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**HON. CAROL R. EDMEAD, J.S.C.:**

In this Article 78 proceeding, petitioner Southbridge Towers, Inc. (Southbridge) seeks a judgment to overturn an order of the respondent New York State Division of Homes and Community Renewal (DHCR) as arbitrary and capricious (motion sequence number 001). For the following reasons, this petition is denied, and this proceeding is dismissed.

FACTS

Southbridge is a New York State licensed co-operative corporation which manages nine residential apartment buildings, including one located at 77 Fulton Street in the County, City and State of New York (the building). *See* petition, ¶¶ 1-3, 10, 13. Southbridge formerly operated the building pursuant to the Private Housing Finance Law (PFHL) as a “Mitchell-Lama Co-op” until September 10, 2015. *Id.*, ¶ 4. On that date, the building’s shareholders voted to accept a privatization plan, and the building was thereupon reconstituted as a “free market co-op” by

order of the New York State Attorney General. *Id.*, ¶ 10. The DHCR is the state agency charged with overseeing the operation of Mitchell-Lama co-ops and other rent regulated housing. *Id.*, ¶¶ 6-7. Respondent-intervenor Zhuang Ling Liu (Zhuang) is a tenant/occupant of apartment 2/22D in the building. *Id.*, ¶ 13.

The parties do not dispute that Zhuang is permanently disabled as a result of mental illness. *See* petition, ¶ 24; Hershey-Webb affirmation in opposition, ¶ 2, 6. She states that her parents, Ying Kuan and Xun Xiang Liu, and her brother, Zhung Mu Liu, became apartment 2/22D's original shareholder/tenants pursuant to a Mitchell-Lama lease dated September 30, 2004. *See* answer (DHCR), ¶ 13; Hershey-Webb affirmation in opposition, ¶¶ 5-6. Zhuang also states that her father, Xun Xiang Liu, passed away in February 1996, and that her brother, Zhung Mu Liu, left apartment 2/22D at some point in 2003. *See* answer (DHCR), ¶ 20; petition, exhibit A (DHCR order). Zhuang avers that she herself first began residing in apartment 2/22D with her mother, Ying Kuan, in 2004, and that she has lived there continually since that time. *See* answer (DHCR), ¶¶ 21-23. Ying Kuan also evidently left apartment 2/22D at some point, but the DHCR noted that there was no evidence in the administrative record as to exactly when she did so.<sup>1</sup> *See* petition, exhibit A (DHCR order).

In any case, Zhuang submitted a "succession apartment application" to Southbridge at some point in 2014. *See* answer (DHCR), ¶ 13. On July 2, 2014, Southbridge sent Zhuang a letter decision that denied her application on the ground that "you did not reside with the

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<sup>1</sup> The affirmation accompanying the DHCR's answer avers that the tenant of record died on November 26, 2014. *See* Melnitsky affirmation in opposition, ¶ 27. However, that affirmation bears a different Index Number (159384/19) and appears to discuss the facts of an Article 78/succession rights claim commenced by another tenant named Melissa Mejias Parker. Therefore, the court discounts all of the allegations in that affirmation.

shareholders of record for the required two-year period.”<sup>2</sup> See petition, exhibit B. Zhuang appealed this denial to the DHCR via a letter dated August 12, 2014. *Id.*, exhibit A (DHCR order). The DHCR sought and received additional submissions from Zhuang, her brother Zhung Mu Liu, and Southbridge during 2014 and 2015. *Id.* Thereafter, the DHCR issued an order on May 31, 2019 that granted Zhuang’s appeal, and found, in pertinent part, as follows:

“Under the regulatory system, succession claimants must make an affirmative showing to establish their eligibility for that relief. *Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 653 (2013). Only claimants who meet the Regulations' requirements will obtain succession. *Hampton v. Div. of Hous. & Community Renewal*, 2005 NY Slip Op 51433(U) at 3 (Sup Ct, NY Co 2005).

The Regulations provide three requirements to obtain succession to an apartment in a State aided housing project subject to the PHFL. 9 NYCRR § 1727-8.2 (a). *Murphy v New York State Div. of Hous. & Community Renewal*, supra at 653. See also *Myers v New York State Div. of Hous. & Community Renewal*, 68 AD3d 1518, 1519 (3d Dept 2009).

First, succession claimants must establish by a preponderance of credible evidence they are family members of the subject apartment's tenant-of-record. 9 NYCRR §§ 1727-8.1, 1727-8.2(a), and 1727-8.4(a). See also *Calistro v Lawlor*, 2011 NY Slip Op. 30409 (U) at 4 (Sup Ct NY Co 2011); *5th & 106th St. Assocs., LP v Montanez*, 2015 NY Slip Op 31876 (U) at 9 (Civ Ct NY Co 2015). The Regulations identify those who may qualify as family members. 9 NYCRR § 1700.2 (a) (7).

Second, the succession claimant and tenant-of-record must jointly have occupied the subject apartment as their primary residence. That primary residence must exist throughout the applicable co-occupancy period immediately prior to the date the tenant permanently vacates the apartment. 9 NYCRR § 1727-8.2 (a) (1). Cf. 9 NYCRR § 1727-8.3 (a) (succession in case of tenant's death). A succession claimant may have only one primary residence. 9 NYCRR § 1727-8.2 (a) (2) (ii). See e.g., *Sherman v New York State Div. of Hous. & Community Renewal*, 144 AD3d 533, S34 (1st Dept 2016).

Third, the Regulations provide for the succession claimant to submit established proof of primary residency. 9 NYCRR § 1727-8.2 (a) (2). That proof includes the listing of the claimant and tenant-of-record's names together on the subject apartment's required filings with the housing company during the applicable co-occupancy period, 9 NYCRR § 1727-8.2(a)(2)(a), and other pertinent documentation or facts, 9 NYCRR § 1727-8.2 (a)

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<sup>2</sup> As will be discussed, Zhuang’s succession rights application is actually governed by a one-year qualifying period in view of her disabled status.

(2) (b).

The required filings include the following items: a contemporaneous, written notice to the housing company of any change to the apartment's household composition [9 NYCRR § 1727-2.4 (c)]; and the apartment's required annual affidavits, which disclose household income and occupancy information (9 NYCRR § 1727-2.4 (b)) or periodic certifications, which relate to the tenant's qualification for subsidy benefits. 9 NYCRR § 1727-8.2 (a) (2) (a).

The Regulations provide for tenants-of-record to give housing companies written notice of any change to the subject apartment's household composition within ninety days of such an occurrence. 9 NYCRR § 1727-2.4(c). The required annual affidavits are effective as of their execution dates. *Martino v Southbridge Towers, Inc.*, 68 AD3d 412, 412 (1st Dept 2009); *McAlee v New York State Div. of Hous. & Community Renewal*, 2010 NY Misc LEXIS 1206, 2010 NY Slip Op 30209 (U) at 7 (Sup Ct, NY Co 2010). The subsidy-related, periodic certifications specify their individual effective dates, which vary on a case-by-case basis.

Those filings should fully document the tenant-of-record and succession claimant as members of the subject apartment's household during the applicable co-occupancy period. 9 NYCRR § 1727-8.2 (a) (2) (a). 'However, the tenant's failure to file the required annual affidavits or periodic certifications or the absence of a claimant's name from them may not necessarily be fatal to a succession claim.' *Murphy v New York State Div. of Hous. & Community Renewal*, supra at 654.

Nevertheless, the mere listing of a claimant's name on those filings, alone and in the absence of other evidence, is not sufficient to prove primary residence. *Grossbard v New York State Div. of Hous. & Community Renewal*, 137 AD3d 661, 661 (1st Dept 2016); *Renda v New York State Div. of Hous. & Community Renewal*, 22 AD3d 382, 382 (1st Dept 2005).

\* \* \*

The record does not clearly indicate when the Tenant vacated the Apartment. The last date that the Tenant was listed on an income affidavit was April 6, 2009. Based on that date, the one-year co-occupancy period in this matter began, at the earliest, on April 6, 2008.

The Applicant has stated that she took occupancy of the Apartment in 2004 and continually resided there until the present. Accordingly, the Applicant has claimed to have been in occupancy long enough [more than two years before the Tenant vacated the Apartment] to qualify for succession to the Apartment.

The Applicant's name first appeared in the Apartment's required records as an occupant in the unit's annual affidavit executed in 2005, and she was listed in the income affidavit executed in 2006, but not on later affidavits. The Applicant has not explained

the absence of her name from those affidavits.

In the context of a claim for succession to an apartment in a State-aided housing project, the Regulations specify that the subject unit's required annual affidavits provide evidence of the unit's household composition during the applicable, co-occupancy period. 9 NYCRR § 1727-8.2 (a) (2) (a). The Regulations also provide for the consideration of other evidence. 9 NYCRR § 1727-8.2 (a) (2) (b). *See also, Murphy v New York State Div. of Hous. & Community Renewal*, supra at 654.

The annual affidavits relevant to the issue of the Applicant's occupancy of the Apartment as a primary residence during the applicable co-occupancy period are those for the calendar years 2008 and 2009. Collectively, those affidavits document the Apartment's household composition for the entire co-occupancy period.

“Those affidavits list the Tenant but not the Applicant as the Apartment's occupants. Accordingly, those annual affidavits do not provide evidence of the Applicant's occupancy of the Apartment in accordance with the Regulations' requirements. 9 NYCRR § 1727-8.2 (a) (1) (a).

The presence or absence of an apartment's annual affidavit from the unit's required documentary record, or the omission of a claimant's name from an existing affidavit is not, in itself, solely determinative of a claim for succession to an apartment in a State-aided housing project. *Murphy v New York State Div. of Hous. & Community Renewal*, supra at 654; *Grossbard v New York State Div. of Hous. & Community Renewal*, supra at 2. The Regulations provide for the consideration of other evidence to establish a succession claimant's occupancy of such an apartment as a primary residence during the applicable co-occupancy period. 9 NYCRR § 1727-8.2 (a) (2) (b).

As to other evidence in support of her co-occupancy of the Apartment during the required period, the Applicant submitted bank statements, income tax returns and medical records.

The earliest bank statement submitted by the Applicant is dated October, 2004, and lists the Apartment as her address. That bank statement confirms the initial occupancy date alleged by the Applicant. Later bank statements submitted by the Applicant list her at the Apartment from December 2007 through December 2009, through the entire co-occupancy period.

The medical records submitted by the Applicant from June and July 2008 list the Apartment as her address during the co-occupancy period.

The only relevant income tax return submitted by the Applicant is the return for 2009; that income tax return lists the Apartment as her address, showing that she resided there in 2009, during the co-occupancy period.

Based on the evidence submitted by the Applicant, DHCR makes a finding of fact that the Applicant resided in the Apartment with the Tenant during the required one-year co-occupancy period.

The Applicant established that she met the Regulations' requirements to qualify for succession to the Apartment. For that reason, the Applicant's appeal provides sufficient basis for a determination overturning the decision to deny her succession claim. Therefore, the DHCR grants the Applicant's appeal. The Housing Company shall provide the Applicant with a stock certificate and any other documents necessary to show her legal tenancy of the Apartment.”

*Id.*

Aggrieved, Southbridge then commenced this Article 78 proceeding to overturn the DHCR's order on September 24, 2019. *See* petition. The DHCR and Zhuang filed their respective answers on February 6 and 7, 2020. *See* verified answer (DHCR); answer (Zhuang). The matter is now fully briefed and before the court (motion sequence number 001).

#### DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1<sup>st</sup> Dept 1996). A determination is only arbitrary and capricious if it is “without sound basis in reason, and in disregard of the facts.” *See Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. Thus, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck*,

*Westchester County*, 34 NY2d at 231-232. Further, it is well settled that “[t]he interpretations of a respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational.” *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1<sup>st</sup> Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988).

Here, Southbridge did not specify its legal arguments in its petition, but instead raised two points in its reply papers. The court finds them both unpersuasive.

First, Southbridge asserts that “the absence of the tenant of record’s vacatur date is fatal to an application for succession rights,” and argues that “it was arbitrary and capricious for DHCR to award [Zhuang] succession rights in the absence of any established date of vacatur by Ying Kuan, and to invent a vacatur date.” See petitioner’s reply mem of law at 7-9. It cites a 2019 trial order entered by this court (Kelley, J.) in *Matter of Marteles v New York City Dept. of Hous. Preservation & Development* (2019 NY Slip Op 30406(U) [Sup Ct, NY County 2019]) for the proposition that a succession rights application must be denied where an applicant fails to establish the exact date when the tenant of record has vacated a Mitchell-Lama apartment, because the law requires that “[i]t is not sufficient to prove residence for one-year or two-years, as applicable, but rather primary residency for such amount of time at the *right time*.”<sup>3</sup> *Id.* (emphasis in original petitioner’s reply mem). For its part, the DHCR acknowledges Southbridge’s contention that “the record does not establish the departure date for” Zhuang’s mother, Ying Kuan, but it also observes that Southbridge did not submit any proof to *dispute* Zhuang’s evidence that she resided in apartment 2/22 D with her mother during the one-year

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<sup>3</sup> The parties both admit that, because Zhuang is disabled, the one-year residency period set forth in 9 NYCRR 1727-8.2 (a) (1) (i), discussed *infra*, applies to her succession rights claim. See petitioner’s reply mem at 7; respondent’s mem of law (DHCR) at 8.

qualifying period between 2008 and 2009, either.<sup>4</sup> *See* respondent's mem of law at 7-8. The DHCR's opposition papers did not discuss the matter of the exact date when Ying Kuan vacated the unit. Nevertheless, the court finds for Zhuang.

Succession rights applications for Mitchell-Lama cooperative apartments are governed by 9 NYCRR 1727-8.2 ("Vacating of apartment by tenant"), which provides, in part, as follows:

"(a) Unless otherwise prohibited by occupancy restrictions based upon income limitations pursuant to Federal or State law, regulations or other requirements of governmental agencies, if a tenant or cooperator has permanently vacated their dwelling unit, any family member, as defined in section 1700.2 (a) (7) of this Title, who meets all of the following requirements shall be entitled to be named as a tenant on the lease and/or as a stockholder on the stock certificate of such unit. Such family members must have:

- (1) immediately prior to the permanent vacating of the dwelling unit by the tenant, occupied the dwelling unit with the tenant as a primary residence, either:
  - (i) for a period of not less than two years, or, where a family member is a senior citizen or disabled person, for a period of not less than one year; or
  - (ii) if for less than such periods, then from the inception of the tenancy or commencement of the relationship; and,
- (2) established proof of such primary residency, which must include:
  - (i) the listing of such person on all annual income affidavits, certifications or recertifications required to be executed and filed during the applicable period; and
  - (ii) such other evidence as establishes that such person actually occupies the dwelling unit for his or her own dwelling purposes and has an ongoing, substantial, physical nexus to the unit, which evidence may include, without limitation, certified copies of tax returns, voting records, motor vehicle registration, driver's license, school registration, bank accounts, employment records, insurance policies, and/or other pertinent documentation or facts. In the event that a tenant notifies the housing company of a change in

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*See* fns 2 & 3, *supra*.

family composition pursuant to section 1727-3.5 of this Part herein, such notice of change shall be effective as a substitute for the annual income affidavit until the next annual income affidavit must be filed. Tenants, cooperators, and persons seeking succession may only have one primary residence and must occupy the dwelling unit subject to this Chapter as their primary residence.”

9 NYCRR 1727-8.2 (a). The Court of Appeals has held that:

“Regulations providing for succession rights to Mitchell–Lama apartments serve the important remedial purpose of preventing dislocation of long-term residents due to the vacatur of the head of household. Succession is in the spirit of the statutory scheme, whose goal is to facilitate the availability of affordable housing for low-income residents and to temper the harsh consequences of the death or departure of a tenant for their ‘traditional’ and ‘non-traditional’ family members.”

*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 653 (2013) (internal citations omitted). 9 NYCRR 1727-8.2 (a) plainly requires a succession rights applicant to establish that he/she occupied the subject Mitchell-Lama unit as his/her primary residence for a specified time period immediately prior to the tenant of record “permanently vacating the unit.” However, case law interpreting the regulation does not recognize a bright line rule favoring dismissal of claims for lack of proof regarding vacatur, as Southbridge asserts.

Instead, in *Matter of Underhill-Washington Equities, LLC v Division of Hous. & Community Renewal* (157 AD3d 705 [2d Dept 2018]), the Appellate Division, Second Department, upheld the trial court’s ruling that the regulatory requirement of “primary residency” which applies to a family member claiming succession rights does *not* depend on the co-resident tenant of record’s behavior. 157 AD3d at 707-708; c.f. *Matter of Underhill-Washington Equities, LLC v Division of Hous. & Community Renewal*, 47 Misc 3d 1215(A), 2015 NY Slip Op 50632(U) (Sup Ct, Kings County 2015); *see also Mexico Leasing, LLC v Jones*, 45 Misc 3d 127(A) 2014 NY Slip Op 51456(U) (App Term, 2d Dept) (“[T]he

[succession] provision does not mandate, or even allow, a finding of nonentitlement to succession rights solely on the ground that the tenant of record has not maintained her primary residency in the stabilized apartment during the two-year period prior to her permanent vacating . . . Instead, [that regulation] focuses on the remaining family members having resided in the apartment as a primary residence within the two-year period prior to the tenant's permanent vacating of the apartment . . . ”).<sup>5</sup> The date on which a tenant of record vacates a Mitchell-Lama unit is only relevant to establish the preceding time period during which the party claiming succession rights must demonstrate his or her own “primary residency” in the unit. Thus, the court rejects Southbridge’s contention that the absence of a clear indication in the record of the exact date when Ying Kuan vacated apartment 2/22 D is “fatal” to Zhuang’s succession rights claim. 9 NYCRR 1727-8.2 (a) does not state this, and the case law following it favors granting succession rights to long-term residents, not ending them.<sup>6</sup>

The court further finds that the DHCR acted within its administrative competence to choose April 6, 2009 - the date of the last income affidavit for apartment 2/22 D on which Ying Kuan’s name appeared - as the date of her vacatur from the unit. In the *Underhill-Washington Equities, LLC* trial decision, Justice Schmidt summarized the applicable law as follows:

“Regarding fact-based inquiries, an administrative agency may determine the type of documentation necessary or appropriate (*see Greystone Mgt. Corp. v Conciliation & Appeals Bd.*, 94 AD2d 614, 616 [1st Dept 1983], *affd* 62 NY2d 763 [1984]; *Matter of 2084–2086 Bronx Park East, LLP v DHCR*, 303 AD2d 315, 316 [1st Dept 2003]). Importantly, ‘an agency has great discretion in deciding which evidence to accept and

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<sup>5</sup> The court notes that these decisions involved the succession rights regulations contained in the Rent Stabilization Law and the Rent Control Law, both of which are identically worded to the PFHL “Mitchell-Lama” succession rights regulation at bar in this case. The decisions all stated that the same analysis applied to all three regulations, in view of the Court of Appeals’ holding in *Murphy v DHCR*.

<sup>6</sup> The court also notes that DHCR’s administrative record reflects that Southbridge did *not* offer any submissions to contest Zhuang’s evidence that she had occupied apartment 2/22 D with Ying Kuan as their primary residence during the qualifying one-year period.

how much weight should be accorded particular documents or testimonial statements, and its determination in that respect is subject only to the legal requirement that the administrative finding be rationally based’ (*Kogan v Popolizio*, 141 AD2d 339, 344 [1st Dept 1988]). ‘Moreover, where, as here, the determination of the agency involves factual evaluations in the area of the agency’s expertise and is supported by the record, we must accord such determination great weight and judicial deference’ (*Palmer v New York State Dept. of Env’tl. Conservation*, 132 AD2d 996, 997 [4th Dept 1987]). Thus, ‘in an Article 78 proceeding, the reviewing court may not weigh the evidence, choose between conflicting proof, or substitute its assessment for that of the administrative fact finder’ (*Matter of Porter v New York City Hous. Auth.*, 42 AD3d 314, 314 [1st Dept 2007]).” *Matter of Underhill-Washington Equities, LLC v Division of Hous. & Community Renewal*, 47 Misc 3d 1215(A), \* 5. The Second Department’s decision upholding Justice Schmidt’s ruling echoed his interpretation of the governing law, specifically noting that:

“ ‘[I]n an article 78 proceeding, the reviewing court may not weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or witness credibility for that of the administrative factfinder’ (*Matter of Porter v New York City Hous. Auth.*, 42 AD3d 314, 314 [1st Dept 2007]; see *Matter of Prestige Towing & Recovery, Inc. v State of New York*, 74 AD3d 1606, 1607 [3d Dept 2010]).” *Matter of Underhill-Washington Equities, LLC v Division of Hous. & Community Renewal*, 157 AD3d at 707. Here, the DHCR received apartment 2/22 D’s 2009 income affidavit into evidence during its administrative hearing regarding Zhuang’s succession rights application and chose to accord it sufficient weight as to determine the issue of Ying Kuan’s vacatur date. Southbridge’s assertion that this choice amounted to “inventing” that vacatur date is simply a different interpretation of the evidence. The above-quoted appellate case law makes it clear, however, that the court must defer to the DHCR’s fact-finding determinations, so long as they are rationally based, and may not substitute its own. Here, Southbridge has failed to show why there was no rational basis for the DHCR’s decision to rely on the 2009 income affidavit to establish the date of Ying Kuan’s vacatur from apartment 2/22 D. Thus, the court rejects its assertion.

The court also notes that Southbridge’s reliance on *Matter of Marteles v HPD* is not warranted. That case involved a dispute over the date when the tenant of record had vacated the

subject Mitchell-Lama unit. However, unlike this proceeding, it featured submissions by the landlord who claimed that the tenant of record had established his primary residence in Florida several years before his death, and counter-submissions by the tenant's daughter who alleged that the Florida residence was merely a vacation home. HPD found the landlord's evidence more persuasive and determined that the tenant's date of vacatur fell several years before his death, with the result that the daughter was required to establish her own permanent residency in the subject unit from an earlier point in time. Here, by contrast, Southbridge made no submissions to the DHCR at all apart from the incomplete collection of income affidavits mentioned in the agency's May 31, 2019 order. Thus, there was no evidence in the administrative record on which Southbridge could rely to argue that Ying Kuan had permanently vacated apartment 2/22 D at any point other than April 6, 2009. As a result, *Marteles* is factually inapposite. Thus, the court rejects Southbridge's argument that the DHCR acted arbitrarily and capriciously in failing to determine the exact date on which Ying Kuan vacated apartment 2/22D.

Next, Southbridge argues that Zhuang "did not satisfy requirements to establish primary residency during the applicable period." See petitioner's reply mem of law at 9-11. Southbridge particularly complains that: 1) Zhuang was not listed on the 2009 income affidavit; 2) the other evidence of her permanent residency in the subject apartment during the one-year period preceding Ying Kuan's purported departure was not persuasive; and 3) the DHCR acted inconsistently by making negative inferences about Ying Kuan and Zhung Mu Liu but making an unwarranted positive inference about Zhuang. *Id.*

Concerning the first point, the DHCR's May 3, 2019 order correctly noted that the Court of Appeals decision in *Matter of Murphy v New York State Div. of Hous. & Community Renewal*

held that, notwithstanding the income affidavit requirement set forth in 9 NYCRR 1727-8.2 (a) (2) (i), succession rights applications may be properly granted where there exists substantial other evidence of the applicant's residency in the unit. 21 NY3d at 655. The order also noted that Zhuang had submitted such other evidence in the form of "bank statements, income tax returns and medical records," which the DHCR director found to be sufficiently persuasive to justify "a finding of fact that the Applicant resided in the Apartment with the Tenant during the required one-year co-occupancy period."<sup>7</sup> See petition, exhibit A. Pursuant to the *Murphy* holding, this finding compensates for the fact that Zhuang was not listed on Ying Kuan's 2009 income affidavit. Therefore, the court rejects Southbridge's contention that the absence of Zhuang's name on that affidavit requires the denial of her succession rights application.

The court also rejects Southbridge's second point, contesting the persuasiveness of Zhuang's bank statements, income tax returns and medical records, for the reason discussed earlier in this decision; i.e., that it may not substitute its assessment of the evidence in the administrative record for that of the DHCR absent a showing that the agency's determination lacked a rational basis. *Matter of Underhill-Washington Equities, LLC v Division of Hous. & Community Renewal*, 157 AD3d at 706-707. Southbridge has made no such showing.

Finally, the court rejects Southbridge's allegation that the DHCR acted arbitrarily and capriciously by making inconsistent inferences. The assertion that the DHCR merely "inferred" that Zhuang's brother, Zhung Mu Liu, vacated apartment 2/22 D in 2003 is belied by the administrative record, which contains a letter from Zhung Mu Liu in support of Zhuang's succession rights application in which he states that he *did* vacate the apartment in 2003.

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<sup>7</sup> The court also notes that the DHCR's May 31, 2019 decision reflects that Zhuang was listed as a resident on the income affidavits that were filed for apartment 2/22 D in 2005 (for 2004) and 2006 (for 2005), but not on any of the subsequent ones. See petition, exhibit A.

Southbridge's assertion that the DHCR made a "negative" inference that Ying Kuan vacated the apartment in 2009, while simultaneously making an unjustifiable "positive" inference that Zhuang resided there during the qualifying one-year period beforehand, is a false comparison. The DHCR's May 31, 2019 order clearly states that there was only one piece of evidence regarding Ying Kuan's vacatur of the unit while there was a quantity of persuasive evidence to document Zhuang's continued permanent residency there. Thus, the agency's conclusions were not drawn from "inferences" at all but were rather rationally based on evidence in the administrative record. Therefore, the court rejects, in full, Southbridge's argument that Zhuang did not satisfy requirements to establish primary residency during the applicable period, and instead concludes that Southbridge failed to meet its burden of demonstrating that the DHCR's May 31, 2019 was arbitrary and capricious. Accordingly, Southbridge's Article 78 petition is denied, and this proceeding is dismissed.<sup>8</sup>

#### DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Southbridge Towers, Inc. (motion sequence number 001) is denied, and this proceeding is dismissed.

Dated: New York, New York  
April 20, 2020

ENTER:

  
**HON. CAROL R. EDMEAD**, J.S.C.  
J.S.C.

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<sup>8</sup> The court notes that, although Zhuang's answer referred to her as a "proposed intervenor," she did not actually file a motion to intervene in this proceeding, and the answer's prayer for relief asked only that Southbridge's petition be denied. As the court has now done so, the issue of whether or not to permit Zhuang to intervene in this proceeding is now moot.