

**Partman v New York State Div. of Hous. &
Community Renewal**

2020 NY Slip Op 31342(U)

May 12, 2020

Supreme Court, New York County

Docket Number: 154633/2019

Judge: W. Franc Perry

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. W. FRANCO PERRY PART IAS MOTION 23EFM

Justice

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INDEX NO. 154633/2019

HOWARD PARTMAN, 210 EAST 68TH STREET TENANTS
ASSOCIATION

MOTION DATE 11/07/2019

Petitioner,

MOTION SEQ. NO. 001

- v -

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL, BLDG MANAGEMENT CO.,
INC.,

**DECISION + ORDER ON
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this Article 78 proceeding, co-petitioners Howard Partman (Partman) and 210 East 68th Street Tenants Association (the tenants' association, and/or petitioners) seek a judgment to overturn an order of the respondent New York State Division of Housing and Community Renewal (DHCR) as arbitrary and capricious (motion sequence number 001). The DHCR opposes this application, as does co-respondent Bldg. Management Co., Inc. (BMC). For the following reasons, this petition is denied, and this proceeding is dismissed.

FACTS

Individually named petitioner Partman is a member of the co-petitioner tenants' association, and all are tenants of rent stabilized apartments in a building located at 210 East 68th Street in the County, City and State of New York (the building). (NYSCEF Doc. No. 1, ¶ 1). Respondent BMC is the building's managing agent. (NYSCEF Doc. No. 15, ¶ 6). The co-

respondent DHCR is the administrative agency which oversees rent stabilized housing stock located within New York City. (*Id.*, ¶ 7).

On February 5, 2016, BMC filed an application with the DHCR for a building-wide rent increase to compensate it for certain “major capital improvement” (MCI) work that it had previously performed; specifically, the installation of new boilers and burners. (NYSCEF Doc. No. 30, exhibit A-1). The tenants’ association objected, and the parties then each submitted evidence to a DHCR rent administrator (RA) in furtherance of, and in objection to, the MCI application. (*Id.*, exhibits A-2 – A-7). On November 1, 2016, the RA issued an order granting BMC’s MCI application (the RA’s order). (*Id.*, exhibit A-8). The RA’s order acknowledged that one of the arguments that the tenants’ association raised against the MCI application was a dispute about “commercial allocations” of the proposed building-wide rent increases. (*Id.*). Thereafter, on December 9, 2016, the tenants’ association filed a “petition for administrative review” (PAR) with the DHCR Commissioner’s office seeking to reverse the RA’s order. ((NYSCEF Doc. No. 30, exhibit B-1). After receiving additional submissions from the parties, the DHCR’s deputy commissioner issued an order on March 5, 2019 which denied the tenants’ association’s PAR (the PAR order). (*Id.*, exhibit B-6). The relevant portion of the PAR order provides as follows:

The commercial deduction dispute raised by the tenants also lacks merit. The petitioner states that the amount of commercial space listed in the subject application ‘dropped nearly 50% from approximately 10,000 square feet in prior granted MCIs to approximately 5,000 square feet in the subject MCL.’ However, a review of Division records shows that the commercial space information provided by the owner in the subject MCI application (5,577 square feet of benefited commercial space, or 2.29% of the building’s total area) matches the commercial space information used to calculate all previous MCI increases granted at the subject premises since 2005, when the Division began using the current commercial allocation method. The Commissioner notes that any prior MCI applications that were denied by the Rent Administrator are not persuasive in the instant proceeding. As for the claim that the owner failed to properly identify commercial tenants at the subject premises, the Commissioner notes that the MCI rent

increase application does not require an owner to provide the names of business entities occupying commercial space in a building.

(*Id.*).

Aggrieved, petitioners then commenced this Article 78 proceeding on May 6, 2019 by filing a verified petition and notice of petition. (NYSCEF Doc. No. 1). BMC and the DHCR filed verified answers to the petition on July 9 and July 11, 2019, respectively. (NYSCEF Doc. Nos. 14 and 19). Petitioners subsequently filed reply papers, and the matter is now before the court for disposition.

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 (1st 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.

Here, petitioners argue that the PAR order was arbitrary and capricious because it "improperly affirmed [BMC]'s self-certifying claim that there is only 5,577 square feet of commercial space in the Building which benefitted from the MCI, even though Petitioners

submitted documentary proof which fundamentally challenged this claim and which was ignored.” (NYSCEF Doc. Nos. 1, and 10, ¶¶ 17-18). The court notes that petitioners’ reply papers merely repeat this initial argument that the “DHCR arbitrarily ignored the evidence before it.” (NYSCEF Doc. No. 31, ¶ 18).

The DHCR responded that petitioners’ argument is belied by the agency’s archives, which show that, since 2005, it issued orders granting two of BMC’s previous MCI applications for the building and: 1) both of those orders included the factual finding that there is a total of 5,577 square feet of commercial space in the building; but 2) the petitioners failed to file PARs to challenge either order. (NYSCEF Doc. No.25, pp. 2-6). The DHCR noted that, although BMC initially listed a higher commercial square footage amount on one of those prior MCI applications, it later amended the application to claim 5,577 square feet of commercial space. (*Id.*) The DHCR further noted that none of the other agency proceedings which petitioners referred to in their moving papers contained a factual finding that there is more than 5,577 square feet of commercial space in the building.

For its part, BMC explained that the discrepancy in commercial square footage in its earlier MCI application was due to inadvertently relying on a real estate industry web site’s information about the building, rather than conducting an inspection of its own. (NYSCEF Doc. No. 18). BMC further explained that the mistake was caused by incorrectly including the square footage of the building’s seven second-floor professional apartment units as part of its overall commercial space, when those units should only have been included among the building’s apartment count for MCI purposes. (*Id.*). Both respondents asserted that the DHCR deputy commissioner was correct to uphold the RA’s rejection of petitioners’ “commercial allocation” argument, since there was no evidence in the administrative record that indicated that the

building has more than 5,577 square feet of commercial space. (NYSCEF Doc. Nos. 25, pp. 6-7; and 15, ¶¶ 31-39). After careful consideration, the court agrees with respondents.

An agency determination will only be deemed arbitrary and capricious if it is rendered “without sound basis in reason, and in disregard of the facts.” *Century Operating Corp. v Popolizio*, 60 NY2d at 483. It is also true that an agency decision which fails “to adhere to its own prior precedent, without providing a sufficient reason for reaching a different result on identical facts” is always deemed arbitrary and capricious and must be reversed. *Matter of La Casa Di Arturo Inc. v New York City Dept. of Consumer Affairs*, 120 AD3d 1107, 1108 (1st Dept 2014), citing *Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 519-520 (1985); *Matter of Klein v Levin*, 305 AD2d 316, 317-318 (1st Dept 2003), *lv denied* 100 NY2d 514 (2003).

Here, however, a review of the DHCR’s administrative record does not disclose any “failure to adhere to prior precedent” on the issue of the building’s commercial space square footage. The return contains the letter from BMC’s project administrator which explains BMC’s prior error in calculating that square footage, details how BMC later corrected the error, and asserts that BMC has only used the figure of 5,577 square feet of commercial space in all of its subsequent MCI applications. (NYSCEF Doc. No. 30, exhibits A-5, B-4). In the PAR order, the DHCR deputy commissioner found that the 5,577-square foot figure “matches the commercial space information used to calculate all previous MCI increases granted at the subject premises since 2005,” and that “any prior MCI applications that were denied by the Rent Administrator are not persuasive.” (NYSCEF Doc. No. 30, exhibit B-6). Although the “prior MCI applications” were not included in the instant administrative record, it is evident that the deputy commissioner made his findings in reliance “upon ‘agency records,’ . . . [which] necessarily, and

rationality, includes the orders and records in the agency's own files,” and which he was permitted to consider. *See Matter of 333 E. 49th Partnership, LP v New York State Div. of Hous. & Community Renewal*, 165 AD3d 93, 103 (1st Dept 2018), lv denied 33 NY3d 908 (2019); citing *Matter of VR Equities v New York City Conciliation & Appeals Bd.*, 118 AD2d 459 (1st Dept 1986). Thus, there is a “rational basis” in the administrative record to support the deputy commissioner’s determination that petitioners’ alleged “commercial deduction dispute” had been resolved in previous DHCR proceedings.


The court also finds that petitioners have not shown that the DHCR deputy commissioner “arbitrarily ignored evidence” to indicate that there is more than 5,577 square feet of commercial space in the building. The exhibits annexed to the petition were also part of the administrative record below, and it is clear that the DHCR deputy commissioner considered and rejected those exhibits for a valid reason (i.e., that the dispute over commercial space square footage had been previously resolved), rather than ignoring them. Therefore, petitioner’s argument that the DHCR acted arbitrarily and capriciously by failing to adhere to agency precedent must be rejected because it is belied by the record. Accordingly, the court finds that this Article 78 petition should be denied as meritless, and this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the application (motion sequence number 001) is denied and the petition filed by petitioner Howard Partman, individually, and as representative of 210 East 68th Street Tenants Association, is dismissed, without costs and disbursements to respondent.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

<u>5/12/2020</u> DATE		 W. FRANC PERRY, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE