360 E. 65th St. Tenants' Assn. v New York State Div. of Hous. & Community Renewal
2021 NY Slip Op 30575(U)
March 1, 2021
Supreme Court, New York County
Docket Number: 158788/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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360 EAST 65TH STREET TENANTS' ASSOCIATION,

Plaintiff,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, S/P EAST 65 LLC

Defendant.

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INDEX NO. 158788/2020

MOTION DATE 10/19/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

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

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner 360 East 65th Street Tenants' Association (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

In this Article 78 proceeding, petitioner 360 East 65th Street Tenants' Association (petitioner) seeks a judgment to overturn an order of the respondent New York State Division of Housing & 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

Petitioner is a tenants' association whose members are the occupants of the rent stabilized and rent controlled[1] units in a residential apartment building (the building) located at 360 East 65th Street in the County, City and State of New York. *See* verified petition, ¶ 1. Co-respondent S/P East 65 LLC (landlord) is the building's owner. *Id.*, ¶ 3. The DHCR is the administrative agency charged with overseeing all rent regulated apartment units located inside New York City. *Id.*, ¶ 2.

Non-party Consolidated Edison of New York, Inc. (Con Ed) installed the building's original steam radiator heating system in 1962, which the parties agree was a date more than 50 years before landlord replaced the steam radiator system with a new boiler heating system in 2014.[2] *See* verified petition, ¶¶ 5,11; exhibit A; verified answer (landlord), ¶¶ 5, 8. On January 31, 2017, landlord submitted an application to the DHCR for a "major capital improvement" (MCI) rent increase (pro-rated for the building's rent regulated apartments) based on its installation of the new heating system. *See* return, exhibit A-1. Petitioner opposed this application, and the DHCR solicited submissions from both parties. Id., exhibits A-4 - A-17. On February 27, 2018, a DHCR rent administrator (RA) issued a decision that granted landlord's

[1] Landlord's records appear to indicate that 46 of the building's 158 apartment units are either rent stabilized or rent controlled. *See* verified answer (landlord), exhibit F.

[2] Landlord's records indicate that its contractors performed the boiler replacement and installation work between 2014 and 2015, and that they completed all of the related work in February, 2016. *See* verified answer (landlord), exhibit D.

MCI application (the RA's decision). *Id.*, exhibit A-18. Petitioner thereafter filed a petition for administrative review (PAR) to challenge the RA's order on April 11, 2018. *Id.*, exhibit B-1. The DHCR then solicited more submissions from both parties. *Id.*, exhibits B-2-B-17. On August 18, 2020, the DHCR's deputy commissioner's office issued a decision denying petitioner's PAR (the PAR order). *Id.*, exhibit B-18. The relevant portion of the PAR order found as follows:

> "Regarding the tenants' claim that the boiler/burner installation does not meet the MCI useful life requirement, the Commissioner notes that since the *Elghanayan* case (1992) the Division held in *Wembly* (2004) that public utility supplied steam heating system equipment does not have an indefinite useful life and the replacement of such a system with a boiler/burner would qualify as an MCI. In *Wembly*, an increase was granted for a boiler/burner after it was established that the Con Ed steam system still requires equipment that has to be maintained and replaced as necessary by the owner of the building, and that such equipment includes a heat exchanger and high pressure reducing equipment which are required to supply steam in a residential building, and which become old and beyond repair after 50 years of use. It is noted that an increase was denied for the MCI boiler/boiler installation in the *BLDG Management* case (2007) because the replaced Con Ed steam system was only 25 years old and its 50 year useful life had not expired. The Commissioner further notes that Docket No. CO410046RT, decided on 3/21/2018 [i.e., *Matter of Westgate Tenants Association*, discussed below], followed the decision in the W*embly* and the *BLDG Management* cases and affirmed the 50 year useful life policy for a Con Ed steam system. Accordingly, as the record in this case shows that the 50 year useful life of the replaced Con Ed steam system had expired, and the owner submitted the requisite documentation substantiating the MCI installation of the subject boiler/burner, the Commissioner finds that the MCI rent increase was properly granted by the Rent Administrator.
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> "The assertion that the boiler/burner installation MCI rent increase was granted to conform to the DHCR['s] earlier approval of the conversion from [the] Con Ed steam system to the boiler/burner system, and that said approval should bar an MCI increase is without merit. The Commissioner notes that a boiler/burner installation in and of itself constitutes an MCI for which a rent increase may be warranted, provided that the owner otherwise so qualifies. It is further noted that since the owner only changed the manner in which heat was being provided and not the service itself, the installation did not constitute a modification of services. Thus, Division approval of the heating system change was not required and there was no bar to the owner applying for a rent increase for the MCI eligible installation."

Id., exhibit B-18.

Petitioner then commenced this Article 78 proceeding to challenge the PAR order on October 19, 2020. *See* verified petition. Landlord and the DHCR each filed separate answers on January 11, 2021. *See* verified answer (landlord); verified answer (DHCR). The parties have submitted all necessary opposition and reply papers, and this matter is now ready for disposition (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine whether, upon the facts before an administrative agency, a challenged agency 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). An agency's determination will be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell*, 34 NY2d at 231. Further, an agency's determination will be presumed to be arbitrary and capricious "when it 'neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts.'" *Matter of 20 Fifth Ave., LLC v New York State Div. Of Hous. & Community Renewal*, 109 AD3d 159, 163 (1st Dept 2013), quoting *Matter of Lantry v State of New York*, 6 NY3d 49, 58 (2005). However, if there is a rational basis for the agency's determination, there can be no judicial interference. *Matter of Pell*, 34 NY2d at 231-232.

Here, petitioner's sole argument is that the PAR order is arbitrary and capricious because the DHCR did not follow its own precedent regarding the "useful life" of Con Ed-provided steam heating systems. *See* verified petition, ¶¶ 24-41. Petitioners specifically assert that "[i]t

has long been DHCR's policy and precedent that *a public utility provided steam beating system has no useful life* and therefore, its replacement does not qualify for an MCI rent increase (emphasis added)." *Id.*, ¶ 27. Petitioner bases its argument on the 1992 decision by the Appellate Division, First Department, in *Matter of Elghanayan v New York State Div. of Hous. & Community Renewal* (181 AD2d 638 [1st Dept 1992]) and on two older PAR order rulings by the DHCR in *Matter of Wembly Mgt. Co.* (Docket No. SA430014RP) and *Matter of Park Ave. South* (Docket No. GB430238RO). *Id.*; exhibits F, E.

The DHCR rejects petitioner's contention that Con Ed-provided steam heating systems have an indefinite useful life, and instead asserts that it "properly found herein that the previous system equipment had surpassed its useful life and *that the useful life was 50 years* (emphasis added)." *See* respondent's mem of law (DHCR) at 4-11. The DHCR argues that petitioner has misconstrued and misapplied the *Elghanayan*, *Wembly* and *Park Ave. South* decisions, and supports its own argument by citing the 2019 decision of this court (Engoron, J.) in *Kips Bay Tenants Ass'n. v New York State Div. of Hous. & Community Renewal* (2019 WL 2766682 [Sup Ct., NY County, June 27, 2019]), as well as its own decisions in *Matter of Westgate Tenants' Assn.* (Docket No. CO410046RT), *Matter of Kips Bay Tenants Assn.* (Docket No. SA430014RP) and *Matter of BLDG Mgt.* (Docket No. SA410049RO). *Id.*; verified answer (DHCR), exhibit B; verified petition, exhibit C.

The court has reviewed all of the extant case law concerning the useful life of utility-supplied heating systems, and has also considered the DHCR rulings on this topic which the parties have submitted. It now makes the following findings regarding the applicable law and the facts of this case.

The DHCR's former policy was indeed that Con Ed-installed steam heating systems had an indefinite "useful life," pursuant to Rent Stabilization Code (RSC) § 2522.4 (a) (2) (i).[3] The First Department acknowledged that policy in the 1992 *Elghanayan* decision, which noted that:

> "Respondent [i.e., the DHCR] has determined, in the course of these administrative proceedings and in its issuance of the useful life schedule contemplated by the above regulation, that the steam system, operated and maintained by a public utility, Consolidated Edison, had an indefinite useful life."

181 AD2d at 638. The two DHCR PAR decisions which petitioner presented indicate that that policy endured for a time. *See* verified petition, exhibits E, F. The 2002 decision in *Matter of Park Ave. South* recited that "there can be no 'useful life' for a public utility supplied steam powered system nor provision for waiver thereof since, upon conversion to Con Edison steam heat, there is no privately owned equipment to be maintained, such a public utility system having an indefinite useful life span." *Id.*, exhibit E. The 2004 *Matter of Wembly Mgt. Co.* also acknowledged the "DHCR's policy that there can be no 'useful life' for a public utility supplied steam power system nor provision for waiver thereof since such a public utility system has an indefinite useful life span," although it later departed from that policy.[4] *Id.*, exhibit F. However, during the ensuing 15 years, the DHCR revisited its "indefinite useful life" policy. The PAR order at issue in this case referred to both the *Wembly* opinion and to the DHCR's 2007 decision in *Matter of BLDG Mgt.*, which enunciated a new policy that deemed a building's Con Ed-installed steam heating system to have a 50-year useful life.[5] *See* verified petition, exhibit A. The DHCR's more recent 2018 decision in *Matter of Westgate Tenants Assn.* stated that

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[3] a/k/a 9 NYCRR § 2522.4 (a) (2) (i).

[4] *But see* discussion below.

[5] The DHCR acknowledged, however, that it denied the landlord's PAR application in *Matter of BLDG Management* because only 25 of the 50 "useful life" years had passed at the time the landlord replaced the building's Con Ed-supplied steam heat system. *See* verified petition, exhibit A.

> ". . . it is the established position of the [DHCR] that the installation of new burners/boilers constitutes a [MCI] for which a rent increase may be warranted, provided that the owner otherwise so qualifies. The Commissioner notes that the owner in the instant proceeding demonstrated below that the installation met the MCI requirements for a new boiler/burner replacing a public utility-supplied steam heating system. As for the tenant's contention that the useful life of the prior steam heating system was indefinite, this Division has previously held that public utility supplied steam heating system equipment does not have an indefinite useful life. Accord: [*Matter of Wembly Mgt. Co.*]."

See verified answer (DHCR), exhibit B. The DHCR's contemporaneous 2018 decision in *Matter of Kips Bay Tenants Assn.* also found that:

> "It is the established position of the [DHCR] that the installation of new boilers/burners constitutes a major capital improvement for which a rent increase may be warranted, provided that the owner otherwise so qualifies. The record of the instant proceeding shows that the owner adequately demonstrated below that the installation met the MCI requirements for a new boiler/burner replacing a public utility-supplied steam heating system. As for the 2002 order [i.e., *Matter of Park Ave. South*] cited in support of the tenants' contention that a steam heating system has no useful life, the Commissioner notes that the [DHCR] has since held that public utility-supplied steam heating system equipment does not have an indefinite useful life and the replacement of such a system may qualify as an MCI (Accord [*Matter of Wembly Mgt. Co.*])."

See verified petition, exhibit C.

The court notes that all of these recent DHCR decisions cited *Matter of Wembly Mgt. Co.* as the precedent that established the agency's new policy that Con Ed installed steam heating systems have a 50 year useful life rather than an indefinite useful life. It is true that the *Wembly* decision initially mentioned the DHCR's "indefinite useful life" policy. *See* verified petition, exhibit F. Nevertheless, that decision later granted the landlord's application for an MCI based on the installation of a boiler heating system, finding as follows:

> "However, in the remand proceeding the owner submitted persuasive evidence that the heating system based upon the supply of steam from Con Edison still requires equipment that has to be maintained and replaced as necessary by the owner of the building. According to a report by William F. Beschner of Energy Strategies Company, such equipment includes a heat exchanger and high pressure reducing equipment which are required to supply steam in a residential building.
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> "The Commissioner notes that the owner asserts that the original Con Edison system was installed in 1939 and that cost of replacement of the heat exchanger and high pressure reducing equipment is $75,000 while the cost [of] the boiler/burner is $70,000.

> According to the affidavit of Lawrence P. Wolf of BLDG Management CO., Inc., in 1986 the heat exchanger and steam pressure reducing equipment was 50 years old and beyond repair and needed to be replaced.
>
> "The Commissioner also notes that based upon the Energy Strategies Company's report, the energy savings from use of Con Edison steam has been reduced since the mid-1980's when Con Edison started to end the practice of producing steam as a byproduct of electricity generated at its plants. The steam that was provided to the subject building was generated at the Con Edison plant using fossil fuel.
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> "Based upon these considerations, the Commissioner will allow an [sic] rent increase for the boiler and burner as it meets the criteria of an MCI. Significantly, it was established by the owner herein that the equipment needed by the owner to utilize the steam system has exceeded its useful life and was actually more expensive to replace than installing the boiler, and that the owner would have to replace equipment for the Con Edison steam system to work properly.
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> "Therefore, the portion of that MCI increase granted under Docket No. AK430193OM which is attributed to the boiler/burner is allowed."

Id., exhibit F. In literal terms, the *Wembly* decision established an exception to the DHCR's then-existing policy that Con Ed-installed steam heating systems had an indefinite useful life (and that no MCI would be granted when they were replaced) in cases where: 1) a landlord establishes that such a heating system is more than 50 years old; and 2) that it would be less expensive to replace it with a boiler system than it would be to replace its degrading component parts. However, instead of describing this as an exception, the DHCR's subsequent rulings simply assert that *Wembley* established a new agency policy that now deems Con Ed-installed steam-based heating systems to have a 50 year useful life (and that entitles landlords to seek an MCI whenever they replace them with boiler-based heating systems). The Court of Appeals recognizes the DHCR's authority to do so, as long as the agency provides a reason for its new rule. *See e.g.*, *Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal*, 18 NY3d 446, 453 (2012) ("an agency that deviates from its established rule must provide an explanation for the modification so that a reviewing court can 'determine whether the agency has changed its prior interpretation of the law for valid reasons'"); *see also Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal*, 96 AD3d 524, 526-527

(1st Dept 2012), quoting *Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal*, 18 NY3d at 454 (because the matter before the court concerns the interpretation of interrelated statutes, "the deference we are required to give the agency extends to its interpretation of [those statutes]"). Petitioners nevertheless argue that the DHCR's new policy is inconsistent with agency precedent.

"When a party mounts an attack upon a decision by DHCR as inconsistent with prior determinations, our task is to examine DHCR's precedent in similar situations." *Matter of 20 Fifth Ave., LLC v New York State Div. of Hous. & Community Renewal*, 109 AD3d 159, 164 (1st Dept 2013). Here, the relevant portion of the August 18, 2020 PAR order compared the facts of this case to those of the 2004 opinion in *Matter of Wembly Mgt. Co.,* and found them sufficiently similar to justify granting landlord's MCI application. *See* verified petition, exhibit A. As was noted, the operative facts in *Wembly* were that the original steam heating system had been in service for more than 50 years, that it was in need of repair or replacement, and that the cost of replacing it was less than the likely cost of repairing it. Here, the PAR order found that: 1) the useful life of a Con Ed-installed steam heating system is 50 years; 2) the building's original heating system was more than 50 years old, having been installed in 1962 and replaced between 2014 and 2016; and 3) the 2004 *Wembly* decision represented a departure from the previous "indefinite useful life" policy which the DHCR has consistently applied since that time. *See* verified petition, exhibit A. The court notes that the administrative record in this proceeding supports the second finding, since landlord's submissions establish the building's age and the steam heating system's installation and replacement dates. *See* return, exhibits A-1, A-8, A-12, A-13, A-14, A-16, A-17, B-7, B-12, B-16. The court also notes that, with the exception of the PAR order issued in the *Kips Bay* case, all of the DHCR's post-*Wembly* PAR orders presented

herein have stated that Con Ed-installed steam heating systems have a 50 year useful life, and all of them have granted MCI applications to landlords who replace such systems after their useful life has expired. *See* verified petition, exhibits A (PAR order, including *BLDG Mgt.*), C (*Kips Bay*), E (*Park Ave. South*), F (*Wembly*); verified answer (DHCR), exhibit B (*Westgate*). The court therefore concludes that the instant PAR order is consistent with the DHCR's post-*Wembly* 50 year useful life policy for Con Ed-installed steam heat systems. This does not end the inquiry, however, since petitioner argues that the DHCR's post-*Wembly* policy does not adhere to the pre-*Wembly* precedent which recognized an indefinite useful life for such systems. *See* verified petition, ¶¶ 29-41.

The DHCR responds that pre-*Wembly* precedent no longer controls because the agency "has rejected the idea that there is an indefinite useful life to the prior system under any circumstances," and that it "does not have to blindly follow its own old prior determinations to perpetuate a policy in potential conflict with its statutory mandate." See respondent's mem of law (DHCR) at 7-8. The court agrees, since the governing case law plainly acknowledges that the DHCR may alter its policies under certain circumstances. In *Matter of Kips Bay Tenants Association*, wherein Judge Engoron vacated the DHCR's 2018 PAR denial, he found that:

> "While it is true, as demonstrated supra, that *agencies, like courts, may depart from previously stated policies, the agency must state a reason for so doing*. In the instant proceeding, DHCR does not articulate what the useful life of a utility-supplied steam heating system is; instead, it merely states in a conclusory fashion that the 'owner[s] adequately demonstrated below that the installation met the MCI requirements for a new boiler/burner replacing a public utility-supplied steam heating system.' Moreover, DHCR failed to address the age of the owners' public utility-supplied heating system entirely. DHCR also failed to address its prior determinations, in one cause finding that a utility-supplied steam heating system has an unlimited useful life, and in another finding its useful life to be 50 years.
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> "Accordingly, this Court finds that the determination of DHCR in the instant proceeding was arbitrary, as it directly contradicts its previous determinations without providing an explanation therefore."

2019 WL 2766682, *2 (emphasis added). The observation that "agencies, like courts, may depart from previously stated policies," provided that they "state a reason for so doing" is significant. Judge Engoron quoted this language from the First Department's 2003 holding in *Matter of Klein v Levin* (305 AD2d 316 [1st Dept 2003]), which applied that rule to annul the Superintendent of Insurance's denial of a petitioner's application for a public adjuster's license. The First Department specifically stated that "while administrative agencies, like courts, are free to correct prior erroneous interpretations of law or to depart from previously stated policies, they must state their reasons for doing so," and that "[a]bsent such an explanation, failure to conform to agency precedent will ... require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made." 305 AD2d at 318, citing *Matter of Charles A. Field Delivery Serv. (Roberts)*, 66 NY2d 516, 519-520 (1985). More recently, the First Department applied the *Klein* holding in 2015 in *Matter of Sol Goldman Invs. LLC v New York State Div. of Hous. & Community Renewal* (124 AD3d 414 [1st Dept 2015]) to overturn a DHCR PAR order which had excluded a petitioner/landlord's expenditures on a consulting engineer's fees from an MCI award. The court held that the "DHCR's failure to meaningfully explain why it departed from its precedent renders its determination arbitrary and capricious." 124 AD3d at 415, citing *Matter of Klein v Levin*, 305 AD2d at 317-318. Although all of these First Department decisions overturned an administrative ruling on the ground that it was inconsistent with prior agency determinations, the court finds it significant that, in each case, the First Department also acknowledged the agency's discretion to depart from its existing policy by providing a rationale for doing so.[6] As a result, the court concludes that the law authorizes the

[6] The court further notes that a functionally identical rule obtains in the context of zoning board decisions, in which the Court of Appeals famously held in *Matter of Cowan v Kern* (41 NY2d 591 [1977]) that "[u]nlimited discretion vested in an administrative board by ordinance is not

DHCR to depart from its old "indefinite useful life" policy in favor of its current "50 year useful life" policy. The remaining question, as it was in *Matter of Kips Bay Tenants Assn.*, is thus whether the PAR order gave an adequate explanation for why it applied its post-*Wembly* policy instead of its pre-*Wembly* policy when it assessed the landlord's MCI application. In *Kips Bay*, Judge Engoron found that it had not; here, the court finds that it did.

As previously discussed, the August 18, 2020 PAR order discussed the operative facts of the DHCR's 2004 opinion in *Matter of Wembly Mgt. Co.,* and found that the same facts are present in the instant proceeding, which justified the decision to grant landlord's MCI application. *See* verified petition, exhibit A. In *Wembly*, the operative facts were that the subject Con Ed-installed steam heating system had been in service for more than 50 years, that it was in need of repair or replacement, and that the cost of replacing it was less than the cost of repairing it would be.[7] In *Kips Bay*, Judge Engoron found that the DHCR had failed to: 1) "articulate what

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narrowed through its exercise . . . [t]he (board) may refuse to duplicate previous error; it may change its views as to what is for the best interests of the (town); it may give weight to slight differences which are not easily discernible." 41 NY2d at 595, quoting *Matter of Larkin Co. v Schwab*, 242 NY 330, 336-337 (1926). The *Cowan* holding acknowledged the right of zoning boards to change their criteria for granting variances, provided that they furnish an explanation for doing so. The Second Department has repeatedly invoked this holding to uphold zoning board decisions against challenges that they were arbitrary and capricious for failing to adhere to zoning board precedent. *See e.g.*, *Matter of Monte Carlo 1, LLC v Weiss*, 142 AD3d 1173 (2d Dept 2016); *Matter of Waidler v Young*, 63 AD3d 953 (2d Dept 2009); *Matter of Josato, Inc. v Wright*, 35 AD3d 470 (2d Dept 2006); *Knight v Amelkin*, 150 AD2d 528 (2d Dept 1989). Further, the First Department has long recognized 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 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988).

[7] Petitioner's reply papers claim that, in the *Wembly* case, "it was the owner's own heat exchanger and high pressure reduction equipment that had a fifty-year useful life, not the entire steam heating system," and argue that the DHCR should not have considered "the amount that the owner's own equipment would cost to replace - when that equipment had exceeded its useful life." *See* Hall reply affirmation, ¶¶ 11-12. However, nothing in the Wembly decision justifies

the useful life of a utility-supplied steam heating system is"; 2) establish that the subject steam heating system was more than 50 years old; or 3) address the apparent disparity between its older MCI denials and its present MCI grant. 2019 WL 2766682, *2. Here, by contrast, the PAR order asserted that: 1) the useful life of a Con Ed-installed steam heat system is 50 years; 2) the building's original heating system was more than 50 years old, having been installed in 1962 and replaced between 2014 and 2016; and 3) the 2004 *Wembly* decision represented a departure from the previous "indefinite useful life" policy, and the DHCR has applied it consistently since that time. *See* verified petition, exhibit A. The court notes that the administrative record in this proceeding supports the second finding, since landlord's submissions establish both the building's age and the steam heating system's installation and replacement dates. *See* return, exhibits A-1, A-8, A-12, A-13, A-14, A-16, A-17, B-7, B-12, B-16. The court also notes that, with the exception of the PAR order issued in the *Kips Bay* case, all of the DHCR's post-*Wembly* PAR orders did uniformly state that Con Ed-installed steam heating systems have a 50 year useful life, and did uniformly grant MCI applications to landlords who replaced such systems after their useful life had expired. *See* verified petition, exhibits A (PAR order, including *BLDG Mgt.*), C (*Kips Bay*), F (*Wembly*); verified answer (DHCR), exhibit B (*Westgate*). The court therefore concludes that the instant PAR order contained the rationale that Judge Engoron found lacking in *Kips Bay*.[8] As a result, the court finds that the DHCR was justified in departing from its pre-*Wembly* "indefinite useful life" policy in favor of its post-*Wembly* "50 year useful life"

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petitioner's assertion that the landlord itself owned or replaced any components of its' building's heating system. *See* verified petition, exhibit F.

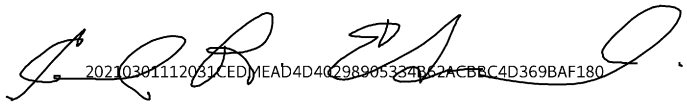
[8] The court also notes that the facts of *Kips Bay* significantly differ from those of this case, since the DHCR PAR order therein did *not* find that the subject Con Ed-installed steam heating system had exceeded the 50 year useful life period. *See* verified petition, exhibit C.

policy in this case.[9] Therefore, the court rejects petitioner's argument that the PAR order was arbitrary and capricious for failing to adhere to agency precedent. Instead, the court finds that that order was rationally based in the administrative record, and that it adhered to the DHCR's prevailing, post-*Wembly* administrative determinations. Accordingly, having rejected petitioner's sole argument, the court concludes that the instant Article 78 petition should be denied and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner 360 East 65th Street Tenants' Association (motion sequence number 001) is denied, and this proceeding is dismissed.



3/1/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[9] Petitioner contended that the "DHCR appears to have misread *Wembly* at some recent point, erroneously stating that it found a 50 year useful life for a public utility provided steam heat system, and simply is repeating the error in recent determinations." *See* verified petition, ¶ 36. However, this assertion ignores the First Department precedent which clearly acknowledges the DHCR's authority to effect policy changes.