SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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LANGHAM MANSIONS LLC,

Petitioner,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

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INDEX NO. 159123/2021

MOTION DATE 02/15/2022

MOTION SEQ. NO. 001

DECISION + ORDER, JUDGMENT ON MOTION

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

were read on this motion to/for ARTICLE 78.

The petition to set aside an order by respondent is granted in part.

Background

In this proceeding, petitioner seeks to challenge a portion of an order issued by respondent that stated petitioner was not entitled to increase the rents of regulated apartments at the property it owns. Petitioner claims it spent hundreds of thousands of dollars on installing a new generator and constructing new storage rooms. It insists that this work should have permitted it to increase rents as a Major Capital Improvement ("MCI").

Petitioner claims that this specific work is covered under the Rent Stabilization Law and the Rent Control Law because the work is depreciable under the Internal Revenue Code, it did not constitute ordinary repairs, it was performed for the operation, preservation and maintenance of the building and it was a building wide improvement applicable to all tenants. It argues that to

the extent the PAR order relied upon an amendment to the applicable regulations from a recently passed law (the HSTPA), it should be rejected as those amendments were not effective when the original MCI order was issued.

In opposition, respondent claims that it properly denied an increase for these items because they did not meet the criteria to qualify for an MCI increase. It argues that the PAR order did not apply amendments passed along with the HSTPA and maintains the decision was rational. Respondent asserts that a denial of rent increase for an auxiliary generator and for the installation of new storage rooms was neither arbitrary nor capricious.

It insists that the storage rooms do not apply to the operation of the building and instead only provides convenience to the tenants. Respondent points out that these storage rooms are not for the preservation or maintenance of the building. It also questions whether it would apply to all tenants or only some of the tenants.

With respect to the generator, respondent claims that installing a backup to public utility supplied electricity does not qualify as an MCI increase because the building already receives electricity. Respondent argues that petitioner should not be able to increase rents to provide a service it must already provide.

In reply, petitioner emphasizes that the applicable regulations are meant to encourage landlords to improve their buildings and that is exactly what happened here. It insists that the PAR order included language not part of the criteria used to assess whether a proposed expenditure qualified as an MCI increase by adding the word necessary. Petitioner argues that the word “necessary” is not part of the regulations. It concludes that this proceeding should be remanded to DHCR.

Discussion

In an article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*id.*). "If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*id.*).

The applicable MCI order approved certain expenses for an MCI increase and denied others (NYSCEF Doc. No. 4). This proceeding involves the generator work and the creation of additional storage rooms. The PAR order stated that:

> "The claim that the disallowed items qualify for [an] MCI rent increase is without merit. The claim that the electric generator, including the related work, and the work at the new mezzanine levels qualify as MCIs because they are depreciable under the IRS Code is not sufficient to grant an MCI rent increase if they do not meet the definitional requirements of an MCI. The Commissioner finds that the installation of an electric generator as a backup to public utility supplied electricity, and the creation additional storage rooms at the new mezzanine levels do not qualify for an increase because they are not necessary requirements for the operation, preservation, and maintenance of the structure, Thus, the items, including all the related work were properly disallowed as ineligible for MCI rent increase" (NYSCEF Doc. No. 3 at 2).

Because the requested MCI increases affected both rent stabilized and rent controlled apartments, the application regulations form the Rent Stabilization Law and the Rent Control Law apply (*see* Rent Stabilization Law § 26-511[c][6][b]; Rent Control Law § 26-405[g][1][g]). These provisions require that the improvements be depreciable under the Internal Revenue Code. The Rent Stabilization Code § 2522.4(a)(2)(i) and Regulation 2202.4(c)(1)(ii) add three more components in order for an improvement to be eligible for an MCI increase:

> "There has been a major capital improvement, including an installation, which must meet all of the following criteria:
> (a) deemed depreciable under the Internal Revenue Code, other than for ordinary repairs;
> (b) is for the operation, preservation and maintenance of the structure;
> (c) is an improvement to the building or to the building complex which inures directly or indirectly to the benefit of all tenants, and which includes the same work performed in all similar components of the building or building complex, unless the owner can satisfactorily demonstrate to the DHCR that certain of such similar components did not require improvement; and
> (d) the item being replaced meets the requirements set forth on the following useful life schedule, except with DHCR approval of a waiver, as set forth in clause (e) of this subparagraph."

The key question in this proceeding is whether the generator and the storage rooms qualify under the second and third factors. There is no dispute that this was not a replacement nor does anyone argue they do not qualify as depreciable under the Internal Revenue Code.

As an initial matter, the Court observes that petitioner is correct that the PAR order added the word "necessary" to the factor concerning the operation, preservation and maintenance of the building. Although adding a single word is not dispositive, it raises questions about how respondent evaluated the improvements. Of course, not everything that might qualify as an MCI is necessary under a plain meaning of the word. The applicable regulations contain a non-exhaustive list of items that might qualify for MCI increases if they are replaced after a certain period of time (Rent Stabilization Code § 2522.4[a][2][i]) and some are clearly not necessary. For instance, installing a new intercom system (only after fifteen years) is not always necessary although tenants might like it.

However, the Court's analysis does not end on a technicality. It must consider whether respondent's reasoning is arbitrary or capricious. This Court finds that it is with respect to the generator and remands this proceeding back to respondent. The rationale that the generator cannot qualify as an MCI because it is a backup to publicly supplied electricity is absurd. Any

tenant in this city would benefit if the landlord could provide backup electricity. There is no question that there are occasional blackouts or, particularly in the summer months, brownouts. And sometimes, especially for brownouts due to heat, the lack of power can create a dangerous situation due to the high temperatures. That absolutely satisfies the factors for the operation, preservation and maintenance of the building and for the benefit of all tenants. After all, the purpose of an MCI increase is to provide an incentive for landlords to improve their buildings while also maintaining affordability for rent stabilized and rent control tenants.

This is not a case where reasonable minds can disagree about the purported improvements and where this Court must then defer to respondent's determination even if it might disagree with the ultimate conclusion (*c.f. Matter of Exec. Towers at Lido v New York State Div. of Hous. and Community Renewal*, 236 AD2d 397, 398, 653 NYS2d 630 [2d Dept 1997] [affirming respondent's finding that the installation of pressure zone valves in the pool, replacing a pool fence, partially replacing a lobby roof and waterproofing did not constitute eligible MCI increases]). Instead, ensuring that residents have power under extreme weather conditions or unforeseen public utility failures is exactly the type of situation for an MCI increase.

With respect to the storage rooms, however, the Court makes a narrower finding. The PAR order noted that the tenants had argued that the storage rooms were not offered to the rent regulated tenants and the ultimate conclusion denying the MCI increase for this improvement did not make a finding about this issue. It merely concluded an increase was not appropriate because they were not necessary. Of course, if petitioner created storage rooms that rent regulated tenants cannot use, it would not qualify for an MCI increase because it would not be a benefit enjoyed by all tenants. Accordingly, the Court cannot make a conclusion about this issue and,

upon remand, respondent is directed to consider the breadth of this purported increase, including how it applies to the rent regulated tenants. It is not enough to simply conclude that the storage rooms are not necessary as that is not what the regulation states. Affording additional storage space could, theoretically, qualify for an MCI increase under the right circumstances. It is, after all, an amenity most New Yorkers can only dream about.

Accordingly, it is hereby

ADJUDGED that the petition is granted to the extent that the instant proceeding is remanded[1] back to respondent with instructions to award petitioner an MCI increase for the generator (and the related work) in accordance with the applicable regulations used to calculate the appropriate amount and to make a finding with respect to additional storage rooms, including the extent to which the rent regulated tenants have access to them, and denied with respect to the remaining relief requested.

2/17/2022
DATE

ARLENE BLUTH, J.S.C.

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

[1] The Court recognizes that respondent sent a letter asking this Court to consolidate this matter with a separate Article 78 proceeding currently pending before a different judge and petitioner belatedly asked for consolidation in reply. For some reason, no party actually moved to consolidate nor did anyone identify a related case on the original RJI in the other case. Shockingly, counsel for respondent's letter actually asked this Court for legal advice about how to proceed. In any event, the Court finds it more efficient to issue a decision on a fully briefed proceeding rather than wait endlessly for the parties to figure out what to do.