

**2316 Wallace Ave. Realty Corp. v Department of  
Hous. Preserv. & Dev. of the City of N.Y.**

2025 NY Slip Op 31046(U)

April 1, 2025

Supreme Court, New York County

Docket Number: Index No. 156948/2024

Judge: Jeffrey H. Pearlman

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 44M

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2316 WALLACE AVENUE REALTY CORP.	INDEX NO. <u>156948/2024</u>
Petitioner,	MOTION DATE <u>07/30/2024</u>
- v -	MOTION SEQ. NO. <u>001</u>
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,	
Respondent.	<b>DECISION + ORDER ON MOTION</b>
-----X	

HON. JEFFREY H. PEARLMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74  
 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this action, Petitioner 2316 Wallace Avenue Realty Corp. (“Petitioner”) moves to vacate an Order to Correct (“OTC”) issued by Respondent, the Department of Housing Preservation and Development of the City of New York (“Respondent,” “HPD”), pursuant to Article 78 of the CPLR. When a party makes an Article 78 motion, “judicial review is limited to whether the determination was irrational, arbitrary and capricious or contrary to law.” Article 78 of the CPLR allows a challenge to state administrative law where “a determination was... as arbitrary and capricious or an abuse of discretion.” CPLR 7803(3). "Administrative action is irrational or arbitrary and capricious if 'it is taken without sound basis in reason or regard to the facts.'" *Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135, quoting *Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280 (2010). "If a determination is rational it must be sustained even if ... another

result would also have been rational." *Matter of Madison County Indus. Dev. Agency v State of*  
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*N.Y. Auths. Budget Off.*, 33 NY3d at 135. Further, the determination must be sustained “even if the court concludes that it would have reached a different result than the one reached by the agency.” *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222). Moreover, when “the judgment of the agency involves factual evaluations in the area of the agency’s expertise and is supported by the record, such judgment must be accorded great weight and judicial deference,” *Flacke v. Onondaga Landfill Sys.*, 69 N.Y.2d 355, 363 (1987).

On January 31, 2024, Respondent placed Petitioner in HPD’s Alternative Enforcement Program (“AEP”), which “identif[ies] distressed buildings,” making them “subject to building-wide inspections, fees for inspections, and other enforcement actions taken by HPD.” 28 RCNY § 36-05; Admin. Code § 27-2153(j), (k), (p), (q). After carrying out three inspections of the Subject Building in February 2024 and two in March 2024, each of which revealed a number of deficiencies in the Subject Building, the HPD issued an OTC on March 29 and mailed it on April 3. The OTC required Petitioner to replace the roof, replace the mortar between bricks on the building’s façade (“Pointing”), replace waste lines, and perform integrated pest management throughout the building. *AEP Order 24/007, Order to Correct*, Pet. Exh. A., NYSCEF Doc. 4.

At the same time that it placed Petitioner in the AEP, HPD sued Petitioner in Bronx County Housing court. In *HPD v. 2316 Wallace Ave Corp et. al.*, (Index Number LT-301471-24-BX), HPD sought an Order to Correct and civil penalties due to heating violations. *HPD v. 2316 Wallace Ave Corp Petition*, Pet. Exh. F., NYSCEF Doc. 9. On May 20, 2024, the parties reached a stipulation ensuring the building would receive proper heating from October 2024 through May

2025; the stipulation was so-ordered on July 9, 2024. *HPD v. 2316 Wallace Ave Corp Stipulation*, Pet. Exh. G, NYSCEF Doc. 10. Through the Spring and Summer of 2024, HPD filed three more actions in Bronx Housing Court, one regarding heating and hot water, one regarding mold, and one regarding emergency repairs.<sup>1</sup>

Petitioner alleges that HPD's actions were arbitrary and capricious on three fronts. First, Petitioner argues that HPD's notice of placement into the AEP was defective, making Respondent's actions invalid as a matter of law. Second, Petitioner asserts that HPD was arbitrary and capricious for demanding repairs without a rational basis and contrary to evidence submitted by Petitioner. Finally, Petitioner claims that HPD was arbitrary and capricious because it pursues claims in Housing Court despite being barred from doing so by *res judicata*.

The Alternative Enforcement Program was established by Local Law 29 of 2007 and codified by Admin. Code § 27-215 to create an enforcement mechanism that ensures that the most distressed buildings in New York City are repaired. A building with fifteen or more units is distressed if it has

“(i) A ratio of open hazardous and immediately hazardous violations that were issued by the Department within the five-year period prior to such identification that equals in the aggregate three or more such violations for every dwelling unit in the multiple dwelling; and

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<sup>1</sup> Each of these cases is titled DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK v. 2316 WALLACE AVE REALTY CORP.. The respective index numbers of the heating and OTC cases are 313120-24/BX and 319508-24/BX. Pet. Exhs. H and K, NYSCEF Docs. 11 and 14. While Petitioner provides an index number for the case regarding mold, there are no exhibits matching that index number, nor can the court find the case from any other source.

(ii) Paid or unpaid Emergency Repair Charges of two thousand five hundred dollars (\$2,500.00) or more, which were incurred within the five-year period prior to such identification.”

28 RCNY 36-05(c)(3). Upon placing a building into the AEP, HPD must “provide written notification to the owner of such building, the occupants of such building and the council member in whose district the building is located, that such building is subject to the [AEP].” Admin. Code § 27-2153(g). The owner must respond in writing, notifying HPD “whether [they intend] to correct the existing violations of this code and the multiple dwelling law in such building.” Admin. Code § 27-2153(i)(i). If the “owner believes that such violations have been corrected, such owner shall request a reinspection of such violations for dismissal by the department.” *Id.* During the reinspection process, HPD must issue notices of violation for new violations observed and has twenty days to respond to the owner with a determination.<sup>2</sup> *Id.* If the building is not discharged from the AEP after reinspection or if the owner fails to respond to the notification of placement in the AEP, HPD “shall perform a building-wide inspection” and “issue an order...to correct existing violations...and any new violations” found since notification was provided and “repair the related underlying conditions as shall be specified in such order.” Admin. Code § 27-2153(k)(i). After issuing an OTC, HPD must “prepare a scope of work necessary to correct the violations and repair the related underlying conditions as are specified in such order,” begin the work as quickly as possible, and monitor all repairs. Admin. Code § 27-2153(k)(ii). Under Admin. Code § 27-2153(p), the owner of a building in the AEP is “subject to

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<sup>2</sup> A finding of substantial compliance may be found if “at the time of reinspection by the department, all violations relating directly to providing heat and hot water and all immediately hazardous violations related to mold, eighty percent of all hazardous violations related to mold, eighty percent of all vermin violations and eighty percent of all other open hazardous and immediately hazardous violations have been determined by the department to have been corrected.” Admin. Code § 27-2153(i)(i).

fees for any inspection, reinspection or any other action taken by the department in relation to such building during the time period that the building is in such program.”

Petitioner’s first claim, that the OTC is procedurally defective, is dismissed, as it is incorrect as a matter of law. Petitioner argues that the notice provided was insufficient because it “burie[d]” the requirement that the owner respond without making clear the consequences of not responding. The claim that the notice is invalid because it does not state consequences for not responding is without merit; there is no statutory requirement that consequences be provided nor is there any case law that Petitioner can cite. The same is true of the insinuation that because the requirement is shared in the final paragraph of the notice, it does not properly put Petitioner on notice. Regardless of Petitioner’s confusion, Admin. Code § 27-2153(i)(i) states that a written response by the subject building’s owner is required. The Court cannot find that sharing this requirement was insufficient. Moreover, in its second paragraph, the notice does include a list of consequences that the owner of the Subject Building may incur upon failure to take immediate action in response to the notice. *Notice re AEP Program*, Pet. Exh. C, NYSCEF Doc. 6. Even if the notice were not entirely in compliance with the law, that HPD would treat it as though a requirement for immediate compliance with the notice would apply to *all* requirements laid out in the document is rational, meaning the Court must defer to HPD’s judgment. *Matter of Madison County Indus. Dev. Agency*, 33 NY3d 131, 135.

Additionally, Petitioner asserts that the notice contradicts itself by stating that HPD had the ability to come in at any time and saying that HPD would perform an inspection in four months to reevaluate the subject building. Here Petitioner again mistakes the plain communication of statutory authority with a violation of the law. The notice says that to “be discharged from the AEP you must, by May 31st, 2024, meet all of the requirements listed

below. Please be advised that HPD may immediately take action under the AEP, including commencing repair work in the subject property.” Notice re AEP Program, Pet. Exh. C, NYSCEF Doc. 6. These are not contradictory statements but reflections of a statutory requirement that HPD must meet and a statutory power that HPD may exercise. Admin. Code § 27-2153(i)(i) says that an owner must correct code violations identified in an OTC within four months, meaning that HPD must inspect the Subject Building four months after putting an owner on notice. Separately, Admin. Code § 27-2153(i)(i) states “[n]othing in this subdivision shall preclude the department from determining after such identification that the provisions of subdivision k[, which governs building inspections] may be immediately implemented.” Admin. Code § 27-2153(k) simply states that an inspection may be carried out if the owner of the Subject Building fails to comply with the OTC or fails to respond to the notice of placement in the AEP. Not only do these provisions not contradict one another, they are actively complimentary. The agency is promising an inspection in four months assuming immediate action is taken while reserving the right to conduct an immediate inspection if the owner does not comply with the notice.

Petitioner argues that even if the notice was sufficient to put Petitioner on notice, it lacks conformity with HPD procedures, making it arbitrary and capricious. While Petitioner is correct that an agency is required to follow its own procedures and that the Court may grant relief under Article 78 for failure to do so, there is no actual evidence that HPD met that standard here. *Gilman v. New York State Div. of Housing and Comm. Ren.*, 99 NY2d 144, 151 (2002). As described extensively throughout this decision, the text of Admin. Code § 27-2153 clearly describes the process of placing a building in the AEP as well as the requirements for notice.

Respondent met those requirements and properly communicated its powers and Petitioner's obligations upon placement in the program. There is no lack of conformity to be found.

Petitioner's second claim, that HPD was arbitrary and capricious for demanding repairs without a rational basis and contrary to evidence submitted by Petitioner, is dismissed. Firstly, Respondent was not required to take evidence submitted by Petitioner into account when drafting the OTC at issue. This is not because Petitioner is incorrect that HPD must consider evidence that is beneficial to the Subject Building but because the evidence referenced in the petition was not related to this OTC nor was it properly submitted. *Roone v. New York City Dept. of Educ.*, 53 Misc3d 380, 391 (Sup. Ct. N.Y. Cty., 2016). Petitioner states that because the OTC does not reference a report by architect Gino Longo submitted as part of a Request for Recission of Underlying Condition in 2023, the OTC is arbitrary and capricious. However, the Longo Report, dated April 12, 2023, and submitted as part of "another program" is not a proper basis for refuting the OTC. Petitioner provides no evidence of any request to be discharged from the AEP nor is there evidence that the Longo Report was submitted in response to the issuance of the OTC. Moreover, the Longo Report was submitted as part of a different process in 2023 while the OTC was issued based on a 2024 inspection of the Subject Building. It was rational for Respondent to ignore the report and rely on its own determination based on its area of expertise, a year after the report was published and the Court defers. *Flacke v. Onondaga Landfill Sys.*, 69 N.Y.2d 355, 363 (1987).

Secondly, Petitioner's claim that the OTC is itself arbitrary and capricious is incorrect.<sup>3</sup>

As a matter of law, HPD has the power to address not only open violations but underlying

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<sup>3</sup> In addition to the claims addressed in the body of this decision, Petitioner takes issue with a long list of supposed demands not based in the factual record, including demands to repair features that the Subject Building does not even have. This is based on a misunderstanding of the Order to Correct. The OTC lists specific conditions that need to be fixed followed by a list of *all potential* specific conditions that *could* need to be corrected and the conditions

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conditions that caused said violations and “any new violations written since the notification of the owner.” Admin. Code § 27-2153(k)(i). That power was exercised based on the facts unveiled in Respondent’s inspection, which demanded. The OTC requires Petitioner to replace the roof, perform pointing, replace waste lines, and perform integrated pest management. *AEP Order 24/007, Order to Correct*, Pet. Exh. A., NYSCEF Doc. 4. HPD’s inspector found leaks cause by damage to the roof, deteriorating bricks, vermin, and defective waste lines. *Wilson Affirmation*, NYSCEF Doc. 64. Petitioner’s primary issue is with the order for pointing, which it believes is not supported by the record, despite the inspector’s findings. However, this issue is based on an assumption that the entire façade is meant to be replaced when Respondent only requires defective portions of the façade to be repaired. That order is supported by the record and is not arbitrary and capricious.

Petitioner’s third claim, that HPD was arbitrary and capricious for pursuing remedies in housing court while the OTC was pending, is dismissed. Admin. Code § 27-2153(t) explicitly states “Nothing in this section shall prevent the department from enforcing the provisions of this code or the multiple dwelling law pursuant to any other provision of this code, the multiple dwelling law or any other law where the department determines that additional enforcement mechanisms are necessary to do so.” The statute explicitly authorizes Respondent to pursue simultaneous paths to enforcement through its own mechanisms and through the court system.

All other claims not addressed in this decision are dismissed.

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that need to be met in correcting them. *AEP Order 24/007, Order to Correct*, Pet. Exh. A., NYSCEF Doc. 4. Petitioner was only meant to correct the four bolded underlying conditions in the OTC, not every potential underlying condition.

Upon the foregoing documents, it is

ADJUDGED that the application of Petitioner (MS 001) is denied and the petition is dismissed.

4/1/2025  
DATE

  
**HON. JEFFREY H. PEARLMAN**  
J.S.C.  
JEFFREY H. PEARLMAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
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