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New York Supreme Court

Riverside Tenants Ass'n v. N.Y. State Div. of Hous.

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In the Matter of the Application of RIVERSIDE TENANTS ASSOCIATION, Petitioner, for a Judgment under Article 78 of the Civil Practice Law and Rules, v. NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and Joralemon Realty NY, LLC, Respondents.

Attorney for Petitioner, Stephen Gary Dobkin, Esq., Collins, Dobkin & Miller, LLP, 277 Broadway, 14th Floor, New York, New York 10007 Attorney for Respondent New York State Division of Housing and Community Renewal, Kathleen Francis Lamar, Esq., New York State Division of Housing and Community Renewal (self-represented), 641 Lexington Ave, 6th Floor, New York, New York 10022 Attorney for Respondent Joralemon Realty NY, LLC, Kenneth Knight Fisher, Esq., Cozen O'Connor, 277 Park Avenue, 20th Floor, New York, NY 10172

Pamela L. Fisher, J.

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The following efiled papers numbered herein: Papers Numbered

Notice of Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed 7, 1

Opposing Affidavits (Affirmations) 18, 30

Reply Affidavits (Affirmations) 39

Other Papers Paper record before DHCR Volumes 1, 2, 3

Upon the foregoing papers, petitioner Riverside Tenants Association seeks judicial review, under Article 78 of the Civil Practice Law and Rules, of an order issued by respondent New York State Division of Housing and Community Renewal (DHCR), dated June 21, 2019, which denied petitioner's petition for administrative review (PAR) and affirmed an order of the Rent Administrator (RA), dated December 15, 2017, which granted the application of respondent Joralemon Realty NY, LLC (Owner) to modify or decrease services at the subject premises.

Petitioner is an unincorporated association of tenants residing in units subject to the Rent Stabilization Law (RSL) and Code (RSC) or the Rent Control Law, located within a housing complex known as "Riverside Apartments." The

complex, comprised of contiguous buildings located at 10, 20 and 30 Columbia Place and 24 and 32 Joralemon Street in Brooklyn, includes an exterior courtyard which extends from the rear of the L-shaped complex to a concrete retaining wall supporting a raised portion of the Brooklyn Queens Expressway (BQE). The courtyard originally contained grass, trees, benches, an ornamental fountain, play area and other amenities for the enjoyment of residents of the complex. In 1991, without the required approval from the DHCR, the prior owner of the complex paved over the majority of the courtyard area for use as a 31 space parking lot. In 2000, following service reduction complaints from tenants of the complex, the DHCR determined that the prior owner's creation of the parking lot constituted an improper reduction in required services and ordered a rent reduction and a freeze in rent for certain units until the courtyard was fully restored to its original condition. The DHCR prescribed that in order to restore this service, the Owner must return the courtyard to its approximate original condition, including the vegetation, walkways and benches, as they existed before a substantial portion of the area was paved for a parking lot. Additionally, the DHCR directed that access to the area should not be restricted. Although the DHCR's orders directed that the courtyard be restored within 30 days, neither the Owner nor its predecessor complied, and the paved lot remains to date.

In 2008, the Owner filed an application to modify the courtyard service which included a proposal for a parking garage comprised of two levels, one at grade and one level below grade with a courtyard or park area located on the roof. Due to the Owner's difficulties in obtaining approval for the structure from the Landmarks Preservation Commission (LPC), the Owner amended the plan to consist of an underground garage and a landscaped park area laid out above the garage at ground level. The revised plan was subsequently approved by the LPC. Under the revised plan, cars would access the underground garage by entering the courtyard from Joralemon Street and proceeding along the BQE retaining wall before descending down a ramp at the far (southern) end of the courtyard. The revised plan necessitated the removal of the existing tall, old growth trees in order to excavate the courtyard and construct the underground facility. The Owner's application was denied by the RA, who stated in his July 14, 2009 order:

> "Prior orders of this agency have determined that the tenants are entitled to the complete courtyard, garden and play area ...
>
> "The proposed construction would require the removal of the mature trees which currently populate the site. These trees provide a dense canopy of foliage between the complex and the Brooklyn Queens Expressway which mitigates the noise pollution and unsightliness of that highway for the tenants. While the trees have leaves only about half the year that is the same time that the tenants would more often be outdoors and have their apartment windows open. New plantings would not provide the cover of the existing trees for many years into the future, even if trees planted atop a concrete structure could do so at all.
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> "The courtyard play area was meant for recreational use by the tenants. The rent reduction was imposed as that use had been severely reduced for the establishment of parking in the area. The proposed plan does not ameliorate the situation as access to the underground facility continues to be through the courtyard/play area and the increase in vehicular traffic in this small area, as provided for in this plan is greater than currently exists. This proposal is in direct conflict to the intended use of this area and the increase of vehicular traffic would be a further negative impact on this service."

The RA's order was affirmed by the Deputy Commissioner by order dated April 28, 2010. In his order, the Deputy Commissioner stated:

> "While deference should be given to experts when appropriate, the decider of fact must not check their logic and reason at the door. Here [the Owner's] counsel strives to point to the submission of the landscape architect hired by the owner as definitive, however, no expert opinion is needed to review facts which are self-evident and thus it cannot be said that the Administrator erred in determining that mature trees which are as tall as the buildings provide more of a barrier than the proposed new plantings which when new would be less than half the height of the mature ones.
>
> "As to the contention by the owner that vehicular traffic would be significantly reduced, it must be remembered that there was originally no vehicular traffic in the courtyard. Even as [the Owner's] counsel argues that it will be very limited ... [t]his is clearly more than existed before the initial rent reduction orders were issued."

The Owner's Article 78 proceeding challenging the DHCR's April 28, 2010 determination was dismissed by order of the Supreme Court entered on May 6, 2011. The Supreme Court's order was subsequently affirmed by the Appellate Division, Second Department (*Matter of Joralemon Realty NY, LLC v State of NY Div. of Hous. & Community Renewal* , 102 AD3d 965 [2d Dept 2013]).

In August 2011, subsequent to the issuance of the Supreme Court's order and during the pendency of the appeal, the Owner filed a new application with the DHCR to modify and/or decrease services with a new proposal for vehicular traffic to access the garage through a repositioned ramp located right off Joralemon Street, thereby purporting to eliminate the DHCR's concern regarding vehicles traversing the courtyard. The new application nonetheless still required removal of the old growth trees. In conjunction with the new application, on September 26, 2012, the DHCR

inspected the courtyard when the existing trees had their full foliage and on a day of religious observance when traffic on the BQE would have been reduced. According to the inspection report, "from anywhere in the court yard" the "constant loud noise coming from the passing vehicles" on the BQE was audible. On October 11, 2012, the RA issued an order denying the Owner's new application as premature insofar as "significant issues [needed] to be resolved by other agencies having expertise regarding zoning, construction and excavation." The RA denied the application "without prejudice" to re-file after the Owner had obtained the necessary plans and permits to execute the proposal in the application. Petitioner and the Owner each challenged the RA's order in separate PARs, which were both denied by the Deputy Commissioner by order dated March 21, 2014. In his order, the Deputy Commissioner agreed with the RA's determination that the application under consideration was different from prior applications, and is therefore not barred from consideration due to rejections by the DHCR and by the Courts of prior, and different, plans. The Deputy Commissioner also found that the RA was correct to give substantial weight to the findings of the September 26, 2012 inspection, that the entrance to the proposed garage will improve traffic problems associated with the previous application and that a high level of noise was generated from the BQE despite the fact that, at the time of inspection, the canopy of leaves from presently existing trees was full and there was less than normal traffic on the BQE.

The Deputy Commissioner further stated:

> "The tenants claim that the RSC does not permit an owner to eliminate a required service, even for a temporary time, and that, if the owner is allowed to proceed, the required courtyard service under consideration will be lost for years while construction of the proposed project takes place, or might even be lost forever. While the Commissioner understands the tenants' concerns regarding safety and noise issues connected with construction of the proposed project, if the owner is in the future permitted to carry out such construction, the construction will have to be carried out in conformance will all applicable codes, rules, and laws providing for the safety and comfort of those who, like the tenants herein, are in proximity to such construction."

Both the Owner and petitioner challenged the DHCR's determination by way of an Article 78 proceeding. The Supreme Court denied the Owner's Article 78 petition and granted petitioner's Article 78 proceeding to the extent of modifying the DHCR's orders to provide that the Owner's application for modification of the courtyard service to include the construction of a parking facility was denied "with prejudice." Following appeal, the Appellate Division, Second Department modified the Supreme Court's order to provide that the Owner's application was denied "without prejudice" as the Owner's application to decrease required services was not barred by the doctrine of collateral estoppel based on the denial of the Owner's 2008 application to modify services (*Matter of Riverside Tenants Assn. v New York State Div. of Hous. & Community Renewal* , 133 AD3d 764, 766 [2d Dept 2015]). The Owner then filed a third set of applications seeking permission to modify the courtyard by constructing the underground garage with the recreational area above the garage. The application included a proposal for a permanent rent reduction for the decrease in the recreational

area. In support of the application, the Owner argued, in essence, that the prior PAR orders and Appellate Division decision indicated that the current proposal was acceptable to the DHCR and all that was necessary was for the Owner to obtain approvals from the New York City Department of Buildings, New York State Department of Transportation, and documents from other agencies which would allow the Owner to commence construction. In response, petitioner claimed, among other things, that the current plan was worse than the original plan filed in 2008 in that the vehicle entrance to the underground facility was less obtrusive in the 2008 plan compared to the current plan; that the old growth trees have many beneficial effects and shield the building from the noise, fumes and deleterious environmental effects of the adjacent BQE; and that the project will entail an extended period of loud vibration-filled construction, which is an even further reduction of services to the tenants and is a clear showing that the proposal is inconsistent with the RSL, RSC and Rent Control Law.

In his determination, dated December 15, 2017, the RA stated:

"Requests to modify or decrease or discontinue services may have elements of the plan which are objectionable to the Rent Laws but a reapplication with the objectionable aspects removed or diminished may be considered and it is not barred by a previous decision as the facts (plans) would have materially changed. Thus in this situation, the denial of the application in the first proceeding does not under the Rent Stabilization Law and Code and the City Rent Law prevent a party from seeking relief where the plan is different ... In this case, the plan changed significantly to address a concern raised by the Rent Administrator in the July 14, 2009 order, a position the Appellate Division sustained in its November 18, 2015 order ...

"The change in the garage entrance in the application resulted in more free space being available for the recreational area. Inquiry as to the level of noise in the area during the 2011 proceeding brought the report that noise was excessive from staff who were on site on a religious holiday where traffic was lighter. Based upon those factors, it was determined that the old growth trees may not have been as effective as a noise barrier as was earlier thought and because the plan resulted in the restoration of most of the recreational area the plan would be consistent with the Rent Laws and Regulations. Had such a review not been performed there would have been no reason to tell the owner to obtain approved plans and reapply. If the services were not to be restored adequately, the application would have been denied. In addition, those findings even if not dispositive to prevent their re-litigation, are, still found to be persuasive to the Rent Administrator. In reviewing this proceeding, as well as the earlier

applications, the evidence that the noise levels at most times of the day and night are extreme, it is apparent that the ameliorating effect of the "old growth trees" is minimized as the noise despite the presence of the trees in full canopy is very great. The evidence hereby indicates that this particular issue is of lesser import than previously thought.

"The record in this matter provided some new evidence regarding the effect of the old growth trees as a barrier for the subject buildings but review of the information relative to the trees impact, especially the noise, makes it clear they do not make a sizable difference in noise levels as a factor supported by the staff who visited the site and found the area to have "constant loud noise" even though the visit was on a religious holiday where traffic was presumably lighter.

"This factor combined with the primary change of the entrance to the garage keeping the majority of the area vehicle free leads to a logical conclusion, as the Rent Administrator previously found, that the proposal is not inconsistent with the provision and intentions of the rent laws."

In formulating the appropriate rent reduction for the decrease in services, the RA determined that the percentage of the courtyard area that will be used for the garage was 11.32%. The RA determined that the approximate square footage of the courtyard was approximately 33% of the total site and thus calculated that the loss of 11.32% of the courtyard adjusted by 33% of the site (11.32% x 33%) warranted a rent regulated rent reduction of 3.7%. The adjustment would be effective on a restored rent when the subject work was completed, the recreational courtyard restored and the issuance of a DHCR order restoring rent. The RA stated:

"The legal regulated rents or the apartments listed in the rent reduction orders shall be fixed at the amounts directed and frozen in those orders and that the owner shall have waived its rights to any of the accumulated rent increase it may have been entitled to in the intervening years. By operation of the rent restoration order, if any is issued, as applicable the rent shall be unfrozen on a prospective basis and the owner shall be able to increase said rents pursuant to law going forward. Rent Controlled units who received a rent reduction shall have their rent permanently reduced by the rent reduction provided in the rent reduction orders and in addition lowered by 3.7% as their rents were not frozen. Any rent regulated units at the subject buildings that were not included in the rent decrease orders for the recreational area shall at the time any rent restoration order is issued have their rent reduced permanently by 3.7%."

In its PAR, petitioner argued that the proposal of a partially restored courtyard above the underground garage is inconsistent with the RSL, RSC and Rent Control Law; the construction project will eliminate the already reduced courtyard for an indeterminate number of years, creating horrendous conditions for the tenants for at least two years; the conversion of the courtyard into a parking garage is incompatible with the intended use of the courtyard; the former and present owners have disregarded the DHCR's order to restore courtyard service for more than 20 years; the DHCR had previously rejected plans by the Owner for the use of the courtyard space as a garage and an application to eliminate required services cannot be used to make a permanent service reduction that has already occurred; the RA ignored evidence that the plan is worse than

the 2008 proposal which was rejected by the agency; and the RA's order violated the State Administrative Procedure Act.

In denying the PAR and affirming the RA's order, the Deputy Commissioner stated:

"The Commissioner wants to make it clear that DHCR is not permitting the termination of the courtyard service. In fact, the rent reduction orders are still in effect and the Owner is still required to follow those orders and is required to provide the courtyard services.

"DHCR is not approving the current state of the courtyard which is a parking lot. Similarly, DHCR is not giving the Owner permission to build an underground garage facility as DHCR does not have jurisdiction to permit such construction. The Rent Administrator's determination is based upon the courtyard service as it pertains to the regulated tenants. The Rent Administrator reviewed the plans provided in the Owner's application to decrease the courtyard service and determined that the plans which include the renovation of the courtyard/recreation area were not inconsistent with the rent laws and that such a decrease in service could be offset with a rent reduction and therefore granted the Owner's application to reduce the courtyard service ...

"In regard to the Petitioner's contention that the tenants will not be able to use the courtyard as intended and will have to live with a construction site and all of its inconveniences for at least two years while the courtyard and garage are being built, the Commissioner notes that this was considered by the Rent Administrator and was a factor in the Rent Administrator's determination to limit the rent of the regulated units as described above. It is important to emphasize that the rent reduction orders will remain in effect through the construction and will remain in effect until the Rent Administrator determines that the courtyard service has been restored."

In the instant Article 78 petition, petitioner essentially reiterates the arguments raised in the PAR, contending, among other things, that the Owner's plan for the destruction of required courtyard services, already subject to rent reduction orders, which will disturb the tenants' quiet enjoyment of their apartments, is inconsistent with the RSL and RSC and that the DHCR's determination is contradicted by the record before the agency and its own factual findings.

A court's function in an Article 78 proceeding is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious *(Pell v Bd. of Educ.* , 34 NY2d 222, 230-231 [1974]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*id.* at 231). If a rational basis exists for its determination, the decision of the administrative body must be sustained (*id.* at 230 ; *Matter of Jamaica Estates, LLC v New York State Div. of Hous. & Community Renewal* , 78 AD3d 1053, 1054 [2d Dept 2010] ; *Matter of Tener v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.* , 159 AD2d 270 [1st Dept 1990]). "[A]bsent an explanation by the agency, an administrative agency decision which, on essentially the same facts as underlaid a prior agency determination, reaches a conclusion contrary to the prior determination is arbitrary and capricious" (*Matter of Charles A. Field Delivery Serv. (Roberts)* , 66 NY2d 516, 518 [1985]).

Pursuant to the RSL and RSC, an owner of a rent regulated building must maintain and continue all services provided to its tenants (*see* RSL § 26-514; RSC §§ 2520.6 [r] [1] & [3] and RSC §§ 2522.4 [d] & [e]). The DHCR is required to reduce the rent for rent-stabilized tenants if an owner improperly reduces, eliminates or inadequately maintains a service (*see* RSL § 26-514; RSC § 2523.4 [a]). Rent control tenants enjoy similar protections for the continuation of essential services (*see* New York City Rent and Eviction Regulations [9 NYCRR § 2202.22 [a]).

RSC § 2522.4 (e) provides that "[a]n owner may file an application to modify or substitute required services, at no change in the legal regulated rent, ... on the grounds that: ... such modification or substitution ***is not inconsistent with the RSL or this Code*** " (emphasis added). RSC § 2522.4 (d) provides that "[a]n owner may file an application to decrease required services for a reduction of the legal regulated rent ... on the grounds that: ... such decrease ***is not inconsistent with the RSL or this Code*** " (emphasis added).

In this matter, there is no dispute that the courtyard was a required service that the Owner was obligated to maintain. The failure of the Owner to maintain the service by paving over the courtyard resulted in the 2000 order which not only reduced and froze the rent but directed that the service be restored within 30 days. Further, the order directed that tenants must have continued access to the courtyard. The courtyard service remained unrestored, without explanation, for over twenty years. In the 2008 proceeding, the DHCR rejected the Owner's modification of services plan which would have required removal of the old growth trees and installation of a driveway along the rear of the courtyard. The current plan, while relocating the garage entrance, would still require destruction of the old growth trees, which was a significant concern for the RA in the prior proceeding. While the DHCR and the Owner argue that the DHCR is not bound by the prior proceeding for purposes of collateral estoppel, such does not preclude a determination that the agency arbitrarily and capriciously rejected its previous factual findings, nor does it preclude a determination that the agency was arbitrary and capricious insofar as it approved a decrease in services application that was inconsistent with the RSL and RSC and in contravention of the agency's own regulations.

A landlord cannot, by way of a modification application, seek DHCR authorization for a service reduction for which the landlord is willing to allow a reduction in the lawful rent (*see Matter of Sutton House Associated v New York State Div. of Hous. & Community Renewal* , 2009 NY Slip Op 30333 [U] [Sup Ct., NY County 2009]). Here, instead of restoring the full courtyard service, the Owner now seeks permission to restore the courtyard services only as part of an application to ***decrease*** those services by over 11% in order to construct a parking garage from which the Owner, rather than the building tenants, would be the primary economic beneficiary. Moreover, on top of the fact that the proposed new courtyard would be smaller than the original, and without the tall, old growth trees, the construction of the garage would eliminate any access to the courtyard by the tenants (which was mandated by the prior reduction order) for a period of two years or possibly more. During this time, many tenants in the courtyard facing apartments may be denied quiet enjoyment of their units due to the inevitable noise, vibration and airborne detritus ensuing from the excavation and construction involved. Such disturbance may be considered unlawful under Rent Stabilization Code § 2525.5, which prohibits a landlord from engaging "in any course of conduct (including but not limited to interruption or discontinuance of required services ...) which interferes with, or disturbs ... the privacy, comfort, peace, repose or quiet enjoyment of the tenant in his or her use or occupancy of the housing accommodation." Needless to say, the proposal to decrease services in this matter is considerably different from an application to remove laundry machines or eliminate elevator operators or overnight concierge service.

With respect to the removal of the trees, which was of particular concern to the RA in the prior 2008 proceeding, the RA in the instant proceeding stated:

> "Inquiry as to the level of noise in the area during the 2011 proceeding brought the report that noise was excessive from staff who were on site on a religious holiday where traffic was lighter. Based upon those factors, it was determined that the old growth trees may not have been as effective as a noise barrier as was earlier thought and because the plan resulted in the restoration of most of the recreational area, the plan would be consistent with the Rent Laws and Regulations ...
>
> "In reviewing this proceeding, as well as the earlier applications, the evidence that the noise levels at most times of the day and night are extreme, it is apparent that the ameliorating effect of the 'old growth trees' is minimized as the noise despite the presence of the trees in full canopy is very great. The evidence thereby indicates that this particular issue is of lesser import than previously thought."

However, in the report relied upon by the DHCR, the inspector merely noted that "[f]rom anywhere in the court yard one can hear the constant loud noise coming from the passing vehicles above." From this generalized observation taken at ground level, the RA irrationally leaped to the conclusion that the trees do not provide any noise calming benefit or pollution mitigation whatsoever to those residing in the higher apartments facing the courtyard. The RA does not cite to any inspection report or other study performed which demonstrates that noise levels would be the same whether the trees existed or not. Moreover, the RA did not address any other beneficial effects the old growth trees may provide, such as obscuring unsightly views of the BQE from the courtyard facing apartments or providing shade cover to those units or to tenants using the courtyard.

While the DHCR and the Owner may argue that the denial of access to the courtyard during the construction period, the tumult resulting from the

excavation and construction process and the further decrease in courtyard service upon completion of the project are adequately compensated by adjustments in rent, it is significant that petitioner, which represents the tenants of the building, has been steadfast in its opposition to all of the Owner's garage proposals and, its view, the multi-year disturbance ensuing from the construction of the garage and the increased traffic and noise which may result from its operation far outweighs any percentage point discounts or offsets in the legal rent.

Under the unique circumstances, the court finds that the DHCR's order allowing the Owner a decrease in services, when the Owner neglected its obligation to restore the services for two decades, as well as the agency's approval of a plan which will result in a significant reduction in the quality of life for the tenants and the quiet enjoyment of their units, for two or quite probably more years, is inconsistent with the RSL and RSC and is thus precluded by RSC § 2522.4. Accordingly, the orders of the RA and Deputy Commissioner approving the current application of the Owner to modify or reduce the courtyard services are arbitrary and capricious.

Petitioner's Article 78 petition is hereby granted and the orders of the RA and Deputy Commissioner, dated December 15, 2017 and June 21, 2019, respectively, are vacated.

The foregoing constitutes the decision, order and judgment of the court.