No. 48

In the Matter of Daniel Peckham,
Appellant,
v.
Judith A. Calogero, as Commissioner of the State of New York's Division of Housing and Community Renewal, et al.,
Respondents.

Eileen M. Cunningham, for appellant.
Magda L. Cruz, for respondent Chelsea Partners, LLC.

JONES, J.:

Respondent Chelsea Partners, LLC ("Owner") owns a three-story, 40-foot-deep building with a basement and eight residential units in Manhattan. Petitioner Daniel Peckham, the sole remaining occupant of the building, resides in an apartment subject to the Rent Stabilization Law and Code.

In May 2004, Owner filed an "Owner's Application for

Order Granting Approval to Refuse Renewal of [Petitioner's] Lease and/or to Proceed for Eviction" ("application") with the New York State Division of Housing and Community Renewal ("DHCR"). Owner plans to demolish the building and construct a six-story, 70-foot-deep building with 12 dwelling units in its place. According to Owner's plan, "[t]he Demolition will entail the removal of (a) the roof, (b) entire interior of the Building, (c) all partitions, (d) floor joints, (e) subfloors, and (f) building systems. In addition, much of the facade, and the entire rear wall of the Building will be removed." Petitioner opposed Owner's application, arguing that (1) Owner advised the New York City Department of Buildings ("DOB") that the job involves "a reconstruction or an alteration" and (2) the evidence of financial ability could not be relied upon because the only thing it established was that the funds in question were held in the name of an entity other than Owner. On December 13, 2005, the Rent Administrator granted Owner's application, stating that "the owner has satisfied the conditions set forth under Section 2524.5 (a) (2) (i) of the New York City Rent Stabilization Code."[1]

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[1] Rent Stabilization Code (9 NYCRR) § 2524.5 provides:

> "(a) The owner shall not be required to offer a renewal lease to a tenant . . . and shall file on the prescribed form an application with the DHCR for authorization to commence an action or proceeding to recover possession in a court of competent jurisdiction after the expiration of the existing lease term, upon any one of the following grounds: . . .

One month later, petitioner filed a petition for administrative review (PAR) of the Rent Administrator's order, arguing, in part, that Owner failed to provide adequate proof of its financial ability to complete the undertaking. DHCR disagreed and, by order issued July 27, 2006, denied petitioner's PAR. Subsequently, petitioner commenced this article 78 proceeding against DHCR and Owner, seeking reversal of DHCR's order denying petitioner's PAR. For the first time, petitioner challenged DHCR's standards regarding what constitutes a "demolition" and what an apartment building owner has to show in order to demonstrate its "financial ability" to perform a particular undertaking. Despite DHCR's arguments that the order denying petitioner's PAR was properly supported, Supreme Court granted the petition to the extent of remanding the matter to DHCR "to clarify the standard used to determine a 'demolition' and whether this project is a 'demolition,' and to clarify the financial ability of Chelsea Partners to complete the project."

Following Supreme Court's order and judgment, DHCR agreed to abide by the court order remanding the matter. Owner appealed to the Appellate Division pursuant to that court's leave

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> (2) Demolition. (i) The owner seeks to demolish the building. Until the owner has submitted proof of [its] financial ability to complete such undertaking to the DHCR, and plans for the undertaking have been approved by the appropriate city agency, an order approving such application shall not be issued."

grant. At the Appellate Division, DHCR sought an affirmance of Supreme Court's order. DHCR argued that (1) "articulation of a standard for demolition applications will allow for more meaningful court review and give both owners and tenants guidance in a controversial area of rent regulation that has created uncertainty and confusion" and (2) more evidence of Owner's "financial ability" is needed.

In a 3-2 decision, the Appellate Division reversed Supreme Court, concluding that the granting of the petition and remand of the matter to DHCR were improper. According to the court, Owner was entitled to treat DHCR's determination as final. Further, the court ruled that Supreme Court erred in finding that DHCR lacked a conclusive definition of "demolition," that DHCR's order denying petitioner's PAR was not based upon an incomplete factual record, arbitrary, capricious, irrational or contrary to law, that DHCR properly determined that Owner had the financial ability to complete the undertaking, and that Owner established its intent to demolish and replace the building in question. The court also noted that petitioner's argument regarding DHCR's lack of appropriate "demolition" standards was not properly before Supreme Court. The dissenting Justices argued in support of Supreme Court's remand to DHCR by pointing out that the agency should be allowed to exercise its legislatively granted authority to develop rent regulations and accompanying standards. Specifically, they explained that given DHCR's concessions that

there is no definition of demolition in the Rent Stabilization Law or Code, that its demolition determinations have been made on a case-by-case basis and that it did not address the weakness of the evidence regarding Owner's financial ability, Supreme Court's remand would give DHCR the opportunity to create standards courts could employ in determining whether DHCR's determinations are rationally based. Petitioner appeals as of right, pursuant to CPLR 5601 (a), and we now affirm.[2]

Petitioner argues that Owner did not have standing to appeal Supreme Court's decision. We disagree and hold that the Appellate Division did not act in excess of its powers in granting Owner leave to appeal.

In addition, petitioner challenges DHCR's lack of a specific definition for the term "Demolition." This argument was not raised before the Rent Administrator or at petitioner's PAR. It was raised for the first time in the article 78 proceeding. As it is well settled that an argument "may not be raised for the first time before the courts in an article 78 proceeding" (Matter of Yonkers Gardens Co. v State of N.Y. Div. of Hous. & Community Renewal, 51 NY2d 966, 967 [1980]), this argument is not properly before us.

Petitioner further argues that the evidence of financial ability Owner submitted pertains to a different entity

[2] DHCR has agreed to abide by the Appellate Division order and has not appealed to this Court.

(Three Stars Associates, LLC) and that such evidence does not necessarily inure to the benefit of Owner. Although this argument was raised before the Rent Administrator, it was never repeated at the PAR or in the instant petition. Accordingly, we may not consider this argument.

However, petitioner's general arguments that DHCR's actions were arbitrary and capricious are before us. We hold that these arguments lack merit because there was a rational basis for DHCR's determination. "In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious" (Matter of Gilman v New York State Div. of Hous. & Community Renewal, 99 NY2d 144, 149 [2002] [citation omitted]). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts (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, 231 [1974]). If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency (id.). Further, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise (see Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459 [1980]).

Here, DHCR's determination denying petitioner's PAR is consistent with its own rules and precedents; accordingly, there is a rational basis for the determination. It is of no moment that there is no precise or expansive definition of "demolition" in the Rent Stabilization Law and Code. Numerous terms and concepts lack such a definition (see e.g., Rent Stabilization Law § 26-507 [does not contain a precise definition of "primary residence"]). Further, over the years, DHCR and its predecessor, the Conciliation and Appeals Board of the City of New York ("CAB"), have not required the proponent of a demolition application to show that it intends to "raze the structure to the ground" (the dictionary definition of "demolition") in order to be successful. An intent to gut the interior of the building, while leaving the walls intact, has been held as sufficient (see e.g., Villas of Forest Hills, CAB Op 15,680, at 103-104 [1981]; Matter of Mazzia, DHCR Admin Review Docket No. PF410002OE [September 27, 2002]; Matter of Schneider, DHCR Admin Review Docket No. TB420052RT, at 7 [March 16, 2006]). Courts reviewing this interpretation of the term "demolition" have held likewise (see e.g., Application of Gioeli, 221 NYS2d 568 [Sup Ct NY Co 1961]; Application of Mahoney v Altman, 63 Misc2d 1062, 1064 [Sup Ct NY Co 1970]; Matter of 412 W. 44th St. Corp., NYLJ, Oct. 19, 1971, at 2, col 5). Here, Owner's demolition plan comports with DHCR's long-held interpretation of "demolition."

Regarding the "financial ability" that must be shown

before a demolition application is granted, DHCR has stated that "[e]vidence of financial ability to complete the project may include a letter of intent or a commitment letter from a financial institution, or such other evidence as DHCR may deem appropriate under the circumstances" (DHCR Operational Bulletin 2002-1). Here, Owner submitted (1) a printout from JP Morgan Chase Bank verifying that a bank account had been opened and funded in the amount of $4,800,000 and (2) a letter indicating that these funds were to be applied toward Owner's demolition/construction project. Although the letter was addressed to Three Stars Associates, LLC, there was ample basis for DHCR to infer that this entity and Owner were affiliates; that is, the addressee of the letter (Mr. Larry Tauber) is the principal and agent of both entities. Further, according to the letter, Mr. Tauber indicated how the funds in the bank account would be used. In accordance with DHCR's procedure, therefore, Owner has demonstrated the requisite financial ability.

As there is a rational basis for DHCR's order denying petitioner's PAR, we hold that Owner is entitled to treat this determination as final. Because Owner has satisfied DHCR's requirements and obtained the necessary approvals, it should be able to proceed with its demolition project without the threat of having to revisit the entire administrative process again. To be sure, DHCR has a great deal of authority to modify the orders it renders and the regulations--along with accompanying standards--

it administers. However, the question here is not whether DHCR can change its regulation, standards or orders (it certainly can), but when. Here, DHCR may not get what amounts to a second chance to rule on Owner's application after setting and applying a new standard regarding what constitutes a "demolition." DHCR may, of course, modify its standards, but it must apply them on a going forward basis.[3]

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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Order affirmed, with costs. Opinion by Judge Jones. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Pigott concur.

Decided May 5, 2009

[3] Under DHCR's proposed demolition regulations, which will amend Rent Stabilization Code § 2524.5 (a) (2), "demolition" is defined in a manner consistent with DHCR's application in this case.