SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

LEONEL GOMEZ, IRIS HERNANDEZ, ROSAURA SOSA, GRISELDA UVALDO, DARRIN DOTSON, BINTA DIOP, GALE LEE, and ABDOULAYE NIANG,

Petitioners,

For a judgment pursuant to Articles 30 and 78 of the CPLR

-against-

KAZIMIR VILENCHIK, as acting Commissioner of the New York City DEPARTMENT OF BUILDINGS, RUTHANNE VISNAUSKAS as Commissioner of NEW YORK STATE HOMES AND COMMUNITY RENEWAL, WILLIAM YANG LLC, XIANG YANG, JANE YANG, 240-42 WEST 116 HOUSING DEVELOPMENT FUND CORPORATION, and SHINDA MANAGEMENT CORPORATION,

Respondents.

Mot. Seq. No. 001

Index No. 452607/2022

Part 52
Hon. Nicholas Moyne

PETITIONERS' MEMORANDUM OF LAW IN REPLY TO RESPONDENT KAZIMIR VILENCHIK'S (COMMISSIONER OF THE DEPARTMENT OF BUILDINGS) ANSWER AND MEMORANDUM OF LAW

TABLE OF CONTENTS

I. Introduction 1
II. Petitioners are not required to exhaust administrative remedies. 3
A. Petitioners' claims involve pure questions of law. 4
B. Pursuit of an administrative remedy would be futile. 5
C. Pursuit of an administrative remedy would have caused Petitioners irreparable harm. 6
III. Petitioners' claims are not time-barred. 6
IV. DOB's failure to require landlords' compliance with the Rent Stabilization Code is arbitrary and violates its duties under the City Charter and other laws. 8
V. Petitioners are entitled to relief. 12
VI. Conclusion 13

TABLE OF AUTHORITIES

Cases

Community Hous. Improvement Program v New York State Div. of Hous. & Community Renewal, 175 AD2d 905 [2d Dept 1991] 8
Doe v Kelly, 5 Misc 3d 453 [Sup Ct, NY County 2004] 8
Forest Close Assn., Inc. v Richards, 45 AD3d 527 [2d Dept 2007] 6
Jiggetts v Perales, 202 AD2d 341 [1st Dept 1994] 6
Klostermann v Cuomo, 61 NY2d 525 [1984] 8
Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation, 87 NY2d 136 [1995] 3, 5, 6
Lombard v Station Sq. Inn Apts. Corp., 94 AD3d 717 [2d Dept 2012] 6
Matter of Contest Promotions-NY LLC v New York City Dept. of Bldgs., 93 AD3d 436 [1st Dept 2012] 4
Matter of Koukla, Inc. v New York State Liquor Authority, 37 AD2d 955 [1st Dept 1971] 7
Matter of Lite View, LLC v New York State Div. of Hous. & Community Renewal, 97 AD3d 105 [1st Dept 2012] 10
Matter of Pell v Board of Educ., 34 NY2d 222 [1977] 8
Matter of R.B. v Dept. of Educ. of the City of New York, 2013 NY Misc LEXIS 3412 [Sup Ct, NY County, Aug. 1, 2013, 100738/13] 3, 6
Matter of Riverside Tenants Assn. v. New York State Div. of Hous. & Community Renewal, 133 AD3d 764 [2d Dept 2015] 10
Matter of Sievers v New York Dept. of Bldgs., 146 AD2d 473 [1st Dept. 1989] 3, 4
Matter of Weissman v New York, 96 AD2d 454 [1st Dept 1983] 4
Matter of Wilkins v Babbar, 294 AD2d 187 [1st Dept 2002] 4
Matter of Yarbough v Franco, 95 NY2d 342 [2000] 7
Peyton v PWV Acquisition LLC, 39 Misc. 3d 1228(A) [Sup Ct, NY County, May 20, 2013, 111379/11] 13
Queens Neighborhood United v New York City Dept. of Bldgs., 2019 NY Misc LEXIS 268 [Sup Ct, Queens County, Jan. 23, 2019, 101700/2018] 5
Rezoagli v Blum, 433 NYS2d 491 [2d Dept 1980] 8
Rosenberg v 135 Willow Co., 130 AD2d 566 [1st Dept 1987] 4
Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52 [1978] 6

Statutes

CPLR 217 6
CPLR 3001 12
CPLR 7803 12
CPLR 7806 12
NYC Admin. Code § 28-104.8 11
NYC Admin. Code § 28-105.9 10
NYC Charter § 643 ..... 4, 5, 9

Other Authorities

9 NYCRR 2520.6 9
9 NYCRR 2522.4 9

Homes & Community Renewal, Office of Rent Admin., Fact Sheet #11 [2020], available at https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-11-11-2020.pdf 11

I. Introduction

Petitioners are rent-stabilized tenants who have been temporarily forced from their homes through no fault of their own. Many of them have lived in their apartments for decades. They want to return to their apartments, and to the extent possible, to normalcy. However, their landlords are attempting to use the circumstances to make drastic, unwanted, and detrimental changes to Petitioners' apartments. These changes are blatant violations of the Rent Stabilization Code, which requires landlords to obtain pre-approval from Respondent Division of Homes and Community Renewal (DHCR) before decreasing or modifying services. The pre-approval process allows tenants to participate and oppose the changes; in response, DHCR may deny or limit the owner's request.

Respondent Department of Buildings (DOB) did not inquire or ensure that Petitioners' landlords had complied with this DHCR approval process. Instead, pursuant to policy, it approved plans and issued permits for alterations that clearly amount to modifications or reductions in services, enabling the landlords to proceed with the illegal changes. Such issuance of plans and permits is unlawful under DOB's governing charter and statutes and nullifies Petitioners' rights under the Rent Stabilization Code. Faced with evidence of the consequences of this practice, DOB and DHCR have done nothing. Their inaction has forced Petitioners to turn to this Court for relief.

The 43rd Street Petitioners are four rent-stabilized tenants at 475 43rd Street, Brooklyn, NY. They have been displaced due to a fire since November 2021. While they have been displaced, their landlords, Respondents William Yang LLC, Xiang Yang, and Jane Yang (43rd Street Landlords) initially obtained approval of plans and permits in January and February 2022. Then, on May 26, 2022, they obtained approval for substituted plans. These plans clearly show

that the 43rd Street Landlords planned to install second bathrooms in each of the apartments, reducing the size of one of the bedrooms; add a hallway, reducing the size of bedrooms; and move the kitchen and reduce it to a kitchenette.[1] The 43rd Street Petitioners neither need nor want an additional bathroom, and the reduction of the size of the bedrooms and kitchen will render them unsuitable for their needs. The 43rd Street Landlords used the issued permits and approved plans to carry out the work depicted in the plans. They did not seek approval from DHCR prior to commencing the work, and DOB did not inquire whether they had obtained such approval before approving the plans and issuing permits. Neither the landlords nor DHCR notified the 43rd Street Petitioners about the changes, and the tenants had no opportunity to challenge the alterations before the landlords began making them.

The West 116th Street Petitioners are four rent-stabilized tenants at 240 or 242 West 116th Street, New York, NY. They have been displaced since February 2022 due to poor building conditions. Their landlords, Respondents 240-42 West 116 Housing Development Fund Corporation and Shinda Management Corporation (West 116th Street Landlords), have indicated that they intend to obtain permits based on plans that were previously approved in October 2019 and reinstated in April 2021. These plans propose to completely change the size and layout of the West 116th Street Petitioners' apartments. For example, the apartments presently have either four or five bedrooms. Under the plans, the two buildings will only contain one- and two-bedroom apartments. These smaller apartments will be unsuitable for the West 116th Street Petitioners, as most of them have families of four or more people. The West 116th Street landlords did not obtain DHCR approval before submitting the plans to DOB in the past, and they have indicated that they intend to seek the reinstatement of these plans and to begin the

[1] The submitted plans do not accurately show the existing layouts of the apartments, and the plans effect other changes to the apartments' layouts.

alterations as soon as permits are issued. DOB previously approved the plans without inquiring whether the landlords had obtained DHCR approval, and DOB's express policy is that they will not make such an inquiry in the future. DOB's imminent approval of the plans and issuance of permits will prevent the West 116th Street Petitioners from challenging the drastic reduction of their apartments.

As described further below, DOB's policy and practice of approving plans and issuing permits for alterations that clearly amount to modifications and decreases in services without requiring proof of DHCR pre-approval is arbitrary, capricious, and contrary to law. The Court should stop this practice and protect Petitioners' rent-stabilized rights by granting the requested Article 78, declaratory, and injunctive relief against DOB. None of the objections raised by DOB has merit.

II. Petitioners are not required to exhaust administrative remedies.

DOB argues that Petitioners' claims should be dismissed due to their failure to exhaust administrative remedies. However, the requirement that a party challenging an administrative agency's action must exhaust administrative remedies before turning to the courts has exceptions, at least three of which apply here: 1) the challenge involves a pure question of law; 2) the pursuit of an administrative remedy would be futile; and 3) the pursuit of the administrative remedy would cause irreparable injury (*see, e.g.*, *Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 140-41 [1995]; *Matter of Sievers v New York Dept. of Bldgs.*, 146 AD2d 473, 473 [1st Dept. 1989]; *Matter of R.B. v Dept. of Educ. of the City of New York*, 2013 NY Misc LEXIS 3412, at *12 [Sup Ct, NY County, Aug. 1, 2013, 100738/13]).

A. *Petitioners' claims involve pure questions of law.*

Administrative exhaustion is not required where the claims solely involve legal questions, such as interpretation of a statute (*see Sievers*, 146 AD2d at 473). Petitioners allege that DOB has violated applicable laws, including NYC Charter § 643 and NYC Administrative Code § 28-105.8, by approving plans and issuing permits for obvious and significant layout changes in rent-stabilized apartments without verifying that DHCR has approved such decreases or modifications of services (*e.g.*, amended petition ¶¶ 74-82). On this basis, Petitioners seek Article 78, declaratory, and injunctive relief. Petitioners' claims hinge on two questions of law: 1) did the landlords violate the Rent Stabilization Code by failing to obtain pre-approval for a decrease or modification in service before submitting such plans and obtaining permits and 2) did DOB act arbitrarily and capriciously and/or fail to perform a legally required duty when it approved these plans and permits? These questions do not implicate the expertise of the Board of Standards and Appeals (BSA). Consequently, Petitioners were not required to seek redress from the BSA prior to bringing its claims against DOB (*see Rosenberg v 135 Willow Co.*, 130 AD2d 566, 567 [1st Dept 1987] ["The only question raised here is a question of law . . . . Therefore, [the] expertise of the Board of Standards and Appeals is not involved and has no relevancy to the case at bar."] (citation and internal quotation marks omitted)).

The cases cited by DOB involve fact-dependent applications of zoning and other building laws, such as determining whether a particular use was nonconforming (*Matter of Wilkins v Babbar*, 294 AD2d 187, 187 [1st Dept 2002]); interpreting "various zoning resolutions" (*Matter of Weissman v New York*, 96 AD2d 454, 457 [1st Dept 1983]); or performing a "detailed assessment of the nature, content, and setting" of certain signs (*Matter of Contest Promotions-NY LLC v New York City Dept. of Bldgs.*, 93 AD3d 436, 437 [1st Dept 2012]). Such determinations

require the BSA to utilize its expertise to interpret context-dependent zoning and building regulations (*see Queens Neighborhood United v New York City Dept. of Bldgs.*, 2019 NY Misc LEXIS 268, *12-13 [Sup Ct, Queens County, Jan. 23, 2019, 101700/2018]).

Here, there is no need to determine the content of the landlords' plans or how the zoning regulations apply to them. Indeed, DOB admits that it approves plans and issues permits without requiring an applicant to produce any DHCR documents and contends that this is a lawful practice (*e.g.*, DOB answer ¶¶ 54, 80). Petitioners' claim is that this policy and practice—which includes greenlighting dramatic layout changes—enables landlords' violations of the Rent Stabilization Code in violation of edicts that DOB enforce all laws which govern construction and alteration in New York City (*e.g.*, NYC Charter § 643) and consigns Petitioners to challenging these harmful layout changes to their rent-stabilized homes after the work is complete and the damage is done. The Court should decide this legal dispute.

B. *Pursuit of an administrative remedy would be futile.*

Administrative exhaustion is also not required if pursuit of the administrative remedy would be futile (*see, e.g.*, *Lehigh Portland Cement Co.*, 87 NY2d at 140-41). In *Lehigh Portland Cement Co.*, the agency had a firm policy that certain timeframes did not apply to a particular application type, making it futile to challenge this policy through administrative channels (*id.*). Similarly, DOB has a long-standing, blanket policy that it is neither authorized nor required to verify whether DHCR approved layout changes to rent-stabilized apartments before approving plans, no matter what the layout changes are (DOB answer ¶¶ 54, 80). Therefore, as in *Lehigh*, it would have been futile for Petitioners to appeal to the BSA in these cases: the application of the policy would have led to the denial of Petitioners' appeals without any consideration of the underlying facts. Appealing to the BSA would not have led to "a clearer definition or resolution

of issues than already provided" (*Lehigh Portland Cement Co.*, 87 NY2d at 142), and Petitioners properly brought their claims before this Court.

C. *Pursuit of an administrative remedy would have caused Petitioners irreparable harm.*

Finally, Petitioners may bring this proceeding because pursuing an administrative remedy would have risked irreparable harm (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978] (citations omitted); *Matter of R.B*, 2013 NY Misc LEXIS 3412, at *12). Petitioners have been forced to leave their apartments and have no way to monitor any work that occurs in their units. Once plans are approved and permits are issued, landlords can proceed with alterations or construction. When landlords proceed with alterations in violation of the Rent Stabilization Code's procedures, if tenants do not stop the alterations before they occur, they have two options. One is to accept the changed apartment (which may not be suitable for their needs) and seek a rent reduction that cannot fully compensate them for the harm caused by, for example, no longer having enough bedrooms to house their family members. The other is to be forced out of the apartment due to the changes. In both scenarios, tenants would suffer irreparable harm (*see, e.g.*, *Lombard v Station Sq. Inn Apts. Corp.*, 94 AD3d 717, 721 [2d Dept 2012]; *Forest Close Assn., Inc. v Richards*, 45 AD3d 527, 529 [2d Dept 2007]; *Jiggetts v Perales*, 202 AD2d 341, 342 [1st Dept 1994]). DOB's actions lead directly to the risk of irreparable harm.

III. Petitioners' claims are not time-barred.

Petitioners timely filed their claims.

First, Petitioners challenge DOB's approval of revised plans for 475 43rd Street on May 26, 2022 (amended petition ¶¶ 45-52). Petitioners filed this proceeding on September 24, 2022, within CPLR 217's four-month statute of limitations. Although DOB originally issued construction permits on February 4, 2022, and February 11, 2022, those permits were based on

plans dated January 24, 2022. The revised plans accepted by DOB on May 26, 2022, were significantly different from the original plans approved in February. These new plans contained significant layout changes to the subject apartments—changes that would require prior approval by DHCR as decreases or modifications of services. DOB's acceptance of the new plans significantly altered the work that the 43rd Street landlords could undertake.

When an administrative agency makes a decision that creates a "fresh situation" with new facts, this re-starts the four-month clock for requesting Article 78 review (*see Matter of Koukla, Inc. v New York State Liquor Authority*, 37 AD2d 955, 956 [1st Dept 1971], cited in *Matter of Yarbough v Franco*, 95 NY2d 342, 348 [2000]). As shown in this case, an owner may submit plans to DOB and then, months after the original permit issuance, receive DOB approval for completely new plans, while maintaining the original permits. A requirement that an Article 78 proceeding be brought within four months of the original permit issuance would make it impossible to challenge consequential DOB decisions, such as the approval of new plans, that are made throughout the permitting process and completely insulate such DOB decisions from review. DOB made a significant determination and created a "fresh situation" by approving the revised plans on May 26, 2022, and Petitioners timely filed this Article 78 proceeding challenging that determination on September 24, 2022.

Second, Petitioners do not seek Article 78 review of DOB's prior approvals of the West 116th Street Landlords' plans,[2] so the four-month statute of limitations is inapplicable. Rather, they seek a declaratory judgment (and related injunctive relief) against DOB to protect themselves from DOB's imminent reapproval of these plans (amended petition ¶¶ 60-62)—in other words, they seek relief "'before a 'wrong' actually occurs in the hope that later litigation

[2]These plans have expired, but they illustrate DOB's policy of approving plans without verifying compliance with the Rent Stabilization Code and the imminent risk that this policy creates for Petitioners.

will be unnecessary'" (*Community Hous. Improvement Program v New York State Div. of Hous. & Community Renewal*, 175 AD2d 905, 907 [2d Dept 1991], quoting *Klostermann v Cuomo*, 61 NY2d 525, 538 [1984]). As described above, Petitioners' challenges to DOB's authority to approve plans and issue permits for alterations that violate the Rent Stabilization Code are "purely legal" (*Community Hous. Improvement Program*, 175 AD2d at 907), and their requests for declaratory relief are proper.

IV. DOB's failure to require landlords' compliance with the Rent Stabilization Code is arbitrary and violates its duties under the City Charter and other laws.

Administrative action is arbitrary when it "is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1977]). Simply put, a court reviews the rationality of the administrative determination (*id.*). For this reason, courts have found that administrative agencies act arbitrarily, capriciously, and irrationally when they ignore the realities of a situation (*see, e.g.*, *Rezoagli v Blum*, 433 NYS2d 491, 492 [2d Dept 1980]; *Doe v Kelly*, 5 Misc 3d 453, 459 [Sup Ct, NY County 2004]). Petitioners have shown that DOB's acknowledged practice of granting permits without requiring proof of DHCR approval effectively nullifies their right to challenge proposed decreases or modifications of services before they occur. With approved plans and issued permits in hand, the 43rd Street Landlords proceeded with installing second bathrooms, reducing the size of bedrooms, and relocating and reducing kitchens without seeking DHCR's permission for the changes or even notifying Petitioners. Similarly, once they have approved plans and permits, the West 116th Landlords will be free to remove three or four bedrooms from Petitioners' apartments. In essence, DOB's response is that the deprivation of rights experienced by Petitioners (a problem very much of its making) is not its concern, because nothing it does grants the landlords permission to bypass other legal requirements (*see* DOB memorandum of law 13-

14). This response ignores the reality that landlords who obtain DOB permits *do* flout the Rent Stabilization Code's mandates.

NYC Charter § 643, which defines DOB's functions, states that DOB "*shall* enforce, with respect to buildings and structures, such provisions of the building code, zoning resolution, multiple dwelling law, labor law[3] and *other laws, rules and regulations as may govern the construction, alteration* [and] use . . . of buildings or structures in the city" (emphasis added). Under a plain reading of the Charter, the Rent Stabilization Code is a "law, rule, [or] regulation as may govern the construction [or] alteration" of certain apartments in New York City. Moreover, Sections 2522.4(d) and (e) of the Rent Stabilization Code clearly require owners to obtain pre-approval from DHCR before proceeding with a decrease or modification in services. Because required services include the "space" that comprises an apartment (9 NYCRR 2520.6 [r] [1]), a layout change involving reductions in the size of kitchens or bedrooms or the number of habitable rooms is a decrease or modification in services. And "permits presuming to give authority to violate or cancel the provisions of this code or other law or rule shall not be valid" (NYC Admin. Code § 28-105.8).

Despite this, DOB denies that it has any responsibility to verify that landlords have obtained DHCR pre-approval before approving plans and issuing permits for such alterations, or indeed to prevent the nullification of Petitioners' rent-stabilized rights. Its reasons are irrational.

First, DOB argues that it is not obligated to require proof of DHCR approval at the permit application and plan approval stage, because a landlord only needs to obtain DHCR approval before it makes the changes, not before it obtains permits. However, this response ignores reality. Due to the limited duration of permits if work is not commenced (NYC Admin. Code § 28-

[3] This list's inclusion of the labor law makes clear that DOB is also required to ensure compliance with applicable laws that are overseen by other governmental bodies.

105.9), most landlords will begin work immediately—indeed, DOB gives them a strong incentive to do so.

Matter of Riverside Tenants Assn. v. New York State Div. of Hous. & Community Renewal, 133 AD3d 764, 767 [2d Dept 2015] is not to the contrary. *Riverside Tenants* involved the construction of a parking garage under a building courtyard, which implicated zoning and permitting issues beyond DHCR's expertise. The exact scope of the project (and therefore the scope of the decrease in services) was unsettled (*see id.*). For this reason, DHCR *departed* from its "normal practice" and deferred its own ruling pending DOB approval (*see id.*). *Riverside Tenants* does not support DOB's argument that DHCR may defer its own decisions in decrease in services cases pending DOB's issuance of permits, especially where, as here, the layout changes are evident (amended petition exhibits G, M), and DHCR would not need DOB's input to rule on a decrease or modification in services application (*see, e.g.*, *Matter of Lite View, LLC v New York State Div. of Hous. & Community Renewal*, 97 AD3d 105 [1st Dept 2012]).

Given the Rent Stabilization Code's requirement that DHCR rule on a decrease or modification in services application before work commences, and the risk created by DOB's approval of the plans and issuance of permits before the DHCR process occurs, it is irrational for DOB not to adopt procedures that require landlords to submit proof of DHCR approval for such alterations. DOB's failure to take any action to protect tenants in these situations is especially irrational given that requiring landlords to provide proof of DHCR approval would place no administrative burden whatsoever on DOB itself—indeed, DOB would spare itself the burden of processing permit applications that will ultimately be disapproved by DHCR. DOB's failure to put such measures in place means that it is failing to fulfill the enforcement mandate contained in the City Charter.

Second, DOB argues that it is not required or authorized to make landlords submit proof of DHCR approval because such a requirement is not contained in the NYC Administrative Code. DOB is correct that NYC Administrative Code § 28-104.8 mandates that the owner make certain statements, and that a signed statement that the owner has complied with DHCR requirements is only required from buildings subject to rent control.[4] However, just because the Administrative Code mandates certain content for an application does not mean that DOB is restricted to requesting only this content when evaluating plans and permit applications—the Administrative Code provides a floor, not a ceiling, for application contents. Given the results that flow from DOB not requiring the landlords to submit proof of compliance with the Rent Stabilization Code (the harm to tenants and the abdication of DOB's Charter mandate), and the ease with which DOB could adopt such a requirement, it is irrational for them not to do so.

Finally, DOB's interpretation of NYC Administrative Code § 28-105.8 would render it nonsensical. "Permits presuming to give authority to violate or cancel the provisions of this code or other law or rule shall not be valid" (NYC Admin. Code § 28-105.8). The principal import of Section 28-105.8 is that the issuance of a building permit does not protect the owner where it obtained a permit to which it is not entitled, such as due to a mistake or misrepresentation, and the Commissioner may stop work or revoke approvals even after a permit has been issued (*id.* ["The commissioner is authorized to prevent any occupancy, use or work in violation of this code, the zoning resolution or other law or rule enforced by the department."]). However, the fact that permits that allow the violation of "other laws" are deemed "invalid" does not imply

[4] The difference in treatment between rent-stabilized and rent-controlled buildings maps onto the different procedures that DHCR requires for applications to demolish buildings, which are not at issue in this proceeding (*see* Homes & Community Renewal, Office of Rent Admin., Fact Sheet #11 [2020], available at https://hcr.ny.gov/system/files/documents/2020/11/fact-sheet-11-11-2020.pdf [last accessed Apr. 18, 2023]).

that DOB is authorized to issue such "invalid" permits when a simple procedure would prevent their issuance and the consequent risks to vulnerable tenants. For Section 28-105.8 to have any rational meaning, DOB must deny applications that, on their face, depict construction or alterations that would violate the law.

In DOB's view, Section 28-105.8 is not implicated here because "[n]othing about the approval of construction plans or issuance of permits . . . presumes to obviate the landlords' legal obligation to obtain DHCR approval before commencing the work authorized by the permits" (DOB memorandum of law 14). However, given that DOB concededly did not inquire as to whether the landlords had obtained DHCR approval,[5] the impact in these and any similar cases is that the permits *do* presume to give landlords the authority to violate the Rent Stabilization Code, meaning that they are invalid. As this invalidity exists from the outset, it is irrational and an error of law for DOB to approve the plans and permits.[6]

V. Petitioners are entitled to relief.

For the reasons given above, DOB has failed to perform a duty enjoined upon it by law and approved the landlords' plans pursuant to a policy that is arbitrary and capricious and/or affected by an error of law (*see* CPLR 7803). Therefore, Petitioners are entitled to Article 78 relief. They are also entitled to declaratory and injunctive relief to ensure that lawful procedures are followed in the future (*see* CPLR 3001, 7806).

[5] Indeed, the manner in which the permit application asks about rent stabilized buildings provides the impression that no DHCR approval is needed.

[6] Under DOB's interpretation, Petitioners would be forced to monitor the building and notify DOB as soon as the work commenced if DHCR approval had not yet been obtained; then, DOB should invalidate the permits because the landlord is carrying out the work that DOB previously approved. This is an absurd system (and DOB has not invalidated the 43rd Street Landlords' plans and permits despite having been notified that such work is occurring).

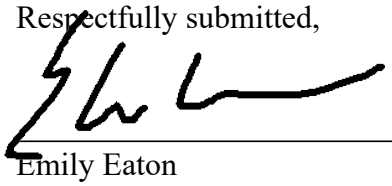
DOB's approval of the 43rd Street Landlords' plans was wrongful, and the Court should vacate DOB's approval of the plans and annul the permits based on these plans. Similarly, the Court should declare that DOB's policy or practice of accepting plans and issuing permits that reconfigure or substantially alter rent-stabilized apartments without first requiring proof of approval from DHCR is unlawful. The Court should also order DOB to implement procedures to require proof of DHCR approval of alterations or reconfigurations of rent-stabilized apartments as a precondition to its review of permit applications involving such alterations or reconfigurations, including any application from the 43rd Street or West 116th Street Landlords.

This relief will protect the 43rd Petitioners by ensuring that their landlord does not obtain approval for new plans or permits after the instant ones are invalidated without first complying with the Rent Stabilization Code. Because the West 116th Street Landlords' job application approvals have expired (DOB answer ¶ 67), it will prevent them from reinstating the approvals and obtaining permits without first complying with the Rent Stabilization Code. Such relief is essential to preserve the status quo, effectuate the policies underlying the Rent Stabilization Code, and protect the tenants from losing valuable rights without due process (*cf. Peyton v PWV Acquisition LLC*, 39 Misc. 3d 1228(A) [Sup Ct, NY County, May 20, 2013, 111379/11]).

VI. Conclusion

For the reasons given above and in Petitioners' Amended Petition, the Court should grant Petitioners' requested relief.

Respectfully submitted,



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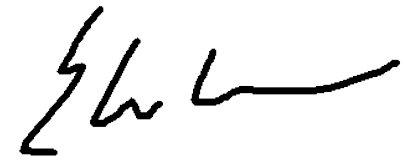
CERTIFICATION PURSUANT TO RULE 202.8-B

I, Evan Henley, hereby certify pursuant to Rule 202.8-b of the Uniform Rules of the Supreme Court, that the length of this memorandum, exclusive of this certification, the caption, table of contents, table of authorities, and signature block, is 4,131 words. In making this certification, I have relied on the word count tool in the word processing program that I used to compose this document, Microsoft Word.

Dated: April 24, 2023
New York, NY



Evan Henley