

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

CI 20,767

In re: 2480 16<sup>th</sup> Street, N.W.

Ward One (1)

TENANTS OF 2480 16<sup>th</sup> STREET, N.W.  
Tenant/Appellant

v.

DORCHESTER HOUSE ASSOCIATES  
Housing Provider/Appellee

**DECISION AND ORDER**

**August 4, 2004**

**BANKS, CHAIRPERSON.** This case is on appeal to the Rental Housing Commission from a decision and order issued by the Rent Administrator, based on a petition filed in the Rental Accommodations and Conversion Division (RACD). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations (DCMR), 14 DCMR §§ 3800-4399 (1991), govern the proceedings.

**I. THE PROCEDURES**

The Housing Provider filed Capital Improvement petition (CI) 20,767 on November 2, 2001, prior to beginning any improvements, pursuant to Section 210(g) of the Act. Record (R.) at 98. The petition requested approval of rent ceiling increases for the entire building for the installation of a fire suppression system, including a standpipe,

and fire alarm generator, for a total cost of \$479,146 without adding interest. Petition at 7, R. at 76.

Counsel filed motions for continuance pertaining to both capital improvement petitions, CI 20,767 and CI 20,768. On June 28, 2002, the Administrative Law Judge (ALJ) Henry McCoy granted the Housing Provider's motion to continue the July 2, 2002 hearing date, which was rescheduled to July 26, 2002, because the Housing Provider's principal witness would be out of town. However, on July 15, 2002, the ALJ denied the Tenant's consent motion for a continuance based on the conflict with the new July 26, 2002 hearing date, because Tenant's counsel had a previously scheduled case in the Superior Court of the District of Columbia. The hearing for CI 20,767 was held on July 26, 2002, and Campbell Johnson, the president of the Dorchester House Tenant Association, renewed the motion for continuance, stating counsel for the Tenants was before the Superior Court. The Tenants' motion was denied. Dorchester Hous. Assocs. v. Tenants of 2480 16<sup>th</sup> Street, N.W., CI 20,767 (OAD Sept. 30, 2004).

On September 30, 2002, the ALJ issued the decision and order, which granted the Housing Provider's motion to withdraw the petition, which was opposed by both counsel for the Tenants. The decision and order did not contain findings of fact, only the ruling on the motion to dismiss.

The decision stated the Commission treated a motion to withdraw a tenant petition as a motion for voluntary dismissal under Super. Ct. Civ. R. 41(a)(1), which requires a voluntary dismissal to be signed by all the parties, citing Burnett v. Sharma, TP 24,910 (RHC July 10, 2001). Decision at 2. The ALJ also wrote:

In this case, it is not possible for the Housing Provider to file a stipulation of dismissal signed by all the parties because both the counsels

[sic] representing the tenants have filed in opposition to the motion to withdraw. Therefore the motion will be reviewed to ensure that all interests of the parties are protected and that no prejudice to any of the parties will ensue.

As reasons for the withdrawal, the Petitioner [Housing Provider] expressed its serious concern over protracted litigation and the associated cost occasioned by the interlocutory appeal taken by the Dorchester House Tenants Association and the potential prejudice to an ultimate decision on the merits. The Petitioner also argues that withdrawal with subsequent resubmission will provide the Respondents [Tenants] with the relief they seek in having time to secure what they believe will be competent counsel to challenge the petition.

In two separate filings, the Respondents oppose the motion to withdraw. On August 14, 2002, counsel for the Dorchester House Tenants Association, Bernard A. Gray, Sr., Esq., [filed] an opposition to the motion by arguing that a full hearing was held, that the Petitioner failed to provide the necessary permits, and that to allow the withdrawal would give the Petitioner two bites at the apple.

On August 20, 2002, Benoit Brookens, who entered an appearance in this matter on behalf of certain named tenants of the Dorchester House, filed in opposition but as Counsel for Dorchester Tenants in T/P 3788 and T/P 11,552. Notwithstanding Mr. Brookens confusion as to whom he represents, his arguments mirror those made on behalf of the tenant association that a full hearing was held and that another hearing would be prejudicial to the interests of the tenants.

In this case, the interests of all of the parties are protected as counsel represents them in arguing their respective positions.<sup>[1]</sup> Thus the question becomes whether the tenants will be subjected to any legal prejudice by granting the motion. The tenants argue that the hearing on the capital improvement petition has been held and should be decided based on the evidence presented. It is their contention that allowing the housing provider to withdraw and then resubmit the petition will give a second chance to correct any errors that may cause the petition to be denied if decided now. The housing provider counters that by withdraw [sic] the petition now the tenants will be in a better position in that they would then have their counsel present at the hearing, an advantage they did not have when the petition was heard.

To prevail in this matter, it is not enough that the tenants show that they will be forced to suffer the incidental annoyance of another hearing on this matter. The tenants need to show a real and substantial detriment. Thoubboron v. Ford Motor Co., 624 A.2d 1210 (App. D.C. 1993). This the tenants have not done. The tenants have only shown that they will be inconvenienced by another hearing.

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<sup>1</sup> The Commission's rule, 14 DCMR § 3824 (1991), requires the Commission to consider whether the interests of the parties are protected. This is not the standard under Super. Ct. Civ. R. 41. See infra.

## II. THE APPEALS

### A. Appeals filed by Attorney Bernard Gray, Sr.

On July 23, 2002, Attorney Gray filed in the Commission a notice of appeal from the decision dated July 15, 2002 in CI 20,767, which stated the following issues: 1) The hearing examiner abused his discretion when he denied the Occupants [Tenants] request for a continuance; and 2) this is a final order in that the Occupants are being denied the right to have legal counsel of their choice.

On August 9, 2002, the Commission issued an order, which dismissed the appeal filed on July 23, 2002 by Attorney Gray based on the July 15, 2002 denial of his motion for a continuance of the hearing. Attorney Gray asserted the ALJ's order was arbitrary and capricious. The Commission dismissed the appeal, because it was not from a final decision or order in the case.

On October 15, 2002, Attorney Gray filed in the Commission a second notice of appeal from the decision and order dated September 30, 2002 in CI 20,767, which stated the following issues:

1. The Administrative Law Judge (ALJ) had no authority to permit the Petitioner to withdraw the Petition voluntarily without prejudice once Petitioner began the hearing.
2. The JLA [sic] abused his discretion when he dismissed the [capital improvement] Petition without prejudiced [sic] and without any conditions.
3. The conclusion that the interest of the Parties [sic] was protected do [sic] not follow from the findings of fact and are not supported by the evidence.
4. The ALJ erred when he decided the Tenants would suffer no prejudice.

B. The Appeal filed by Benoit Brookens:

On October 29, 2002, Benoit Brookens filed a notice of appeal of the OAD order denying attorney fees. On November 14, 2002, the Commission issued an order for hearing on representation, which was held on December 19, 2002. On January 24, 2003, the Commission issued an order denying Mr. Brookens status as an attorney, who could represent tenants before the Commission, and dismissed his appeal for attorney's fees, because Mr. Brookens is not an attorney licensed to practice law in the District of Columbia. He was prohibited from practicing law in the District by the court in Brookens v. Comm. on Unauthorized Practice of Law, 538 A.2d 1120, 1126-1127 (D.C. 1988). On February 26, 2003, Attorney Venola Rolle entered her appearance as co-counsel for the Dorchester Tenants. On March 25, 2003, the Commission issued its order on reconsideration, which denied Mr. Brookens motion for reconsideration of the order dismissing the appeal on attorney fees. On June 19, 2003, the appeals court affirmed the Commission's two orders, which dismissed the appeal of the denial of attorney's fees and the Commission's denial of the order on the motion for reconsideration.

The Commission's hearing on the notice of appeal was held on March 13, 2003.

### III. THE COMMISSION'S DECISION

1. **[Whether] the Administrative Law Judge (ALJ) had no authority to permit the Petitioner to withdraw the Petition voluntarily without prejudice once Petitioner began the hearing.**
2. **[Whether] the JLA [sic] abused his discretion when he dismissed the [capital improvement] Petition without prejudiced [sic] and without any conditions.**
3. **[Whether] [t]he conclusion that the interest of the Parties [sic] was protected do [sic] not follow from the findings of fact and are not supported by the evidence.**

The ALJ did not cite to a rule or other authority that allowed him to grant the Housing Provider's motion to dismiss the capital improvement petition. The Commission's rules provide at 14 DCMR § 4018, D.C. Reg. (Feb. 6, 1998) at 687:

When these rules are silent on a procedural issue before the Rent Administrator, issues must be decided by using as guidance the current rules of civil procedure published and followed by the Superior Court of the District of Columbia.

See Radwan v. District of Columbia Rental Hous. Comm'n, 683 A.2d 478 (D.C. 1996) (where the court approved this rule). Since this case was before the Rent Administrator, the appropriate Superior Court rule for the ALJ to consider was Super. Ct. Civ. R. 41, not the Commission's rule, 14 DCMR § 3824 (1991). The ALJ stated that Super. Ct. Civ. R. 41 did not apply, because the tenants objected and refused to consent as required by Super. Ct. Civ. R. 41(a)(1). Instead, the ALJ used the Commission's appeal rule for withdrawal of appeals, 14 DCMR § 3824 (1991), which states: "[a]n appellant may file a motion to withdraw an appeal pending before the Commission," § 3824.1, and "[t]he Commission shall review all motions to withdraw to ensure that the interests of all parties are protected," § 3824.2. The ALJ next gave an analysis of § 3824, the Commission's rule for withdrawal of appeals, as follows.

In this case, the interests of all of the parties are protected as counsel represents them in arguing their respective positions.<sup>[2]</sup> Thus the question becomes whether the tenants will be subjected to any legal prejudice by granting the motion. The tenants argue that the hearing on the capital improvement petition has been held and should be decided based on the evidence presented. It is their contention that allowing the housing provider to withdraw and then resubmit the petition will give a second chance to correct any errors that may cause the petition to be denied if decided now. The housing provider counters that by withdraw

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<sup>2</sup> The Commission's rule, 14 DCMR § 3824 (1991), requires the Commission to consider whether the interests of the parties are protected. This is not the standard under Super. Ct. Civ. R. 41. See infra.

[sic] the petition now the tenants will be in a better position in that they would then have their counsel present at the hearing, an advantage they did not have when the petition was heard.

See supra, p. 2-3. The ALJ erred by applying the Commission's rule, 14 DCMR § 3824 (1991), rather than Super. Ct. Civ. R. 41, which provides:

***Voluntary Dismissal: Effect Thereof.***

- (1) *By Plaintiff, By Stipulation.* Subject to the provisions of Rule 23(e), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by the plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
- (2) *By Order of the Court.* Except as provided in paragraph (1) of this subdivision of this Rule, an action shall not be dismissed at the plaintiff's instance, save upon order of the Court and upon such terms and conditions as the Court deems proper. ....

**(b) Involuntary Dismissal: Effect Thereof:** For failure of the plaintiff to prosecute or to comply with these Rules or any order of Court, a defendant may move for dismissal of an action or for any claim against the defendant or the Court may, sua sponte enter an order dismissing the action or any claim therein.... Unless the Court in its order for dismissal otherwise specified, a dismissal under this subdivision and any dismissal not provided for in this Rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. (emphasis added.)

The Tenants did not file an answer or motion for summary judgment before the Housing Provider made the motion for dismissal of the capital improvement petition and there was no stipulation of dismissal signed by the parties, since the Tenants opposed the motion to dismiss. Therefore, Super. Ct. Civ. R. 41(a)(1) did not apply to this case.

Super. Ct. Civ. R. 41(a)(2) requires that the plaintiff (Housing Provider) not dismiss a case, unless the court (ALJ) issues an order with “terms and conditions as the court deems proper.” There were no terms and conditions in the ALJ’s dismissal order.

Super. Ct. Civ. R. 41(b) provides for an involuntary dismissal for failure of the plaintiff (Housing Provider) to prosecute. In this case, the Housing Provider failed to produce the required permits at the hearing, and therefore, failed to prosecute his claim for the fire suppression system capital improvements in the petition. The Act at D.C. OFFICIAL CODE § 42-3502.10 (2001) provides for capital improvements, and requires proof of the required government permits and approvals, § 42-3502.10(b)(3) (2001). The court in Columbia Realty Venture v. District of Columbia Rental Hous. Comm’n, 590 A.2d 1043 (D.C. 1991) stated the Commission erred by not requiring proof of all necessary permits. Likewise, at the hearing in this case the Tenants opposed the capital improvement, because the Housing Provider did not prove he had the required governmental permits to perform the capital improvements. Specifically, the Housing Provider did not have the electrical permit. Upon realizing at the hearing the lack of proof of the permits, counsel for the Housing Provider moved to dismiss the petition, after a completed hearing. At this point, the Housing Provider was in litigation with the Tenants, who defended against the capital improvement petition by showing the failure of the Housing Provider’s proof of required permits at the hearing. The proper rule to apply was Super. Ct. Civ. R. 41(b), which provides for involuntary dismissal when the plaintiff (Housing Provider) failed to prosecute (prove) the required governmental permits for the capital improvements.<sup>3</sup> Therefore, the ALJ abused his discretion by granting the Housing

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<sup>3</sup> Counsel for the Housing Provider admitted in a post hearing letter to the ALJ dated August 9, 2002, “our client has been unable to secure the permit for the fire alarm generator thus far.”

Provider's motion to dismiss at the end of the hearing under the Commission's rule, 14 DCMR § 3824 (1991).

Further, the ALJ applied the wrong standard when he wrote the interests of the parties were protected, since that is not a provision in Super. Ct. Civ. R. 41, instead it is an element in the Commission's rule, 14 DCMR § 3824 (1991), which is not applicable to Rent Administrator proceedings. Accordingly, the ALJ abused his discretion, and is reversed on these three issues.

**4. [Whether] [t]he ALJ erred when he decided the Tenants would suffer no prejudice.**

The ALJ wrote:

To prevail in this matter, it is not enough that the tenants show that they will be forced to suffer the incidental annoyance of another hearing on this matter. The tenants need to show a real and substantial detriment. Thoubboron v. Ford Motor Co., 624 A.2d 1210 (App. D.C. 1993). This the tenants have not done. The tenants have only shown that they will be inconvenienced by another hearing.

Decision at 3.

The Tenants "need to show a real and substantial detriment." Thoubboron supra. The Tenants' detriment is that they will pay for the capital improvement surcharge, by an increase in their rent ceiling and ultimately an increase in their rents, for capital improvements, which were performed without the required governmental permits.<sup>4</sup> In other words, the Housing Provider failed to follow the Act and obtain the required governmental permits before beginning the capital improvements. That made the capital

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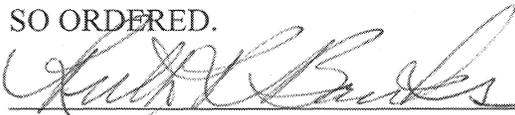
<sup>4</sup> The Housing Provider is allowed to perform the capital improvements if the Rent Administrator does not issue a decision within 60 days of filing the petition. D.C. OFFICIAL CODE § 42-3502.10(e)(1)-(2) (2001). In this appeal, the capital improvement petition was filed on November 2, 2001 and the Rent Administrator's decision and order issued September 30, 2002. That was more than 60 days after the petition was filed, and the Act allowed the Housing Provider to perform the capital improvements, provided it obtained the required governmental permits, § 42-3502.10(b)(3).

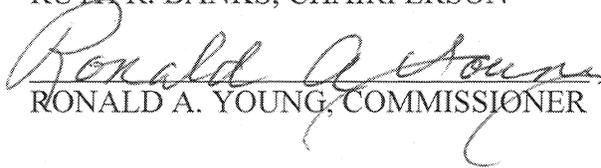
improvements illegal, and not in conformity with the mandates of the Act on permits. The Tenants have shown a real and substantial detriment, based on the illegal capital improvements, which they must pay for over a 96 month period of time. D.C. OFFICIAL CODE § 42-3502.10(c)(1) (2001). The fact that the housing provider performed the capital improvements without the required permits will never change. Accordingly, the ALJ is reversed on this issue, because he was required to apply the correct legal principles and exercise his discretion under Super. Ct. Civ. R. 41. Thoubboron at 1213.

### III. CONCLUSION

This appeal is reversed on all issues, because the Housing Provider performed the capital improvement without the proper permits. This case is remanded to the ALJ, who is directed to enter an order of involuntary dismissal of the capital improvement petition pursuant to Super. Ct. Civ. R. 41(b), which operates as an adjudication upon the merits.

SO ORDERED.

  
RUTH R. BANKS, CHAIRPERSON

  
RONALD A. YOUNG, COMMISSIONER

### MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (1991), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (1991), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

### JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission ... may seek judicial review of the decision ... by filing a petition for review in the District of Columbia Court of Appeals." Petitions

for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The Court's Rule, D.C. App. R. 15(a), provides in part: "Review of orders and decisions of an agency shall be obtained by filing with the clerk of this court a petition for review within thirty days after notice is given, in conformance with the rules or regulations of the agency, of the order or decision sought to be reviewed ... and by tendering the prescribed docketing fee to the clerk." The Court may be contacted at the following address and telephone number:

D.C. Court of Appeals  
Office of the Clerk  
500 Indiana Avenue, N.W., 6th Floor  
Washington, D.C. 20001  
(202) 879-2700

### CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in CIs 20,767 was mailed by priority mail, with confirmation of delivery, postage prepaid this **4<sup>th</sup> day of August, 2004**, to:

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