

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

CIIs 20,760 – 20,763

In re: 1460 Irving Street, N.W.

Ward One (1)

**TENANTS OF 1460 IRVING STREET, N.W.**

Tenants/Appellants

v.

**1460 IRVING STREET, L.P.**

Housing Provider/Appellee

**DECISION AND ORDER**

**April 5, 2005**

**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**

On March 30, 2001, 1460 Irving Street L. P., Housing Provider, filed four (4) Capital Improvement (CI) petitions in RACD. The petitions were consolidated for hearing and decision.

On March 30, 2001, the Housing Provider filed CI 20,760 for improvements to the common areas on the site of the housing accommodation consisting of the façade, new entry canopy, vestibule, new entry door, new mailboxes, painting of lobby and all corridors, new entrance lighting, asbestos removal, and new outside drain with related concrete work. The cost stated on the petition was \$108,943.00. Record (R.) at 71.

On March 30, 2001, the Housing Provider filed CI 20,761 for replacement of the elevator at the housing accommodation. Petition at 3a; R. at 4. The total cost stated in the petition was \$273,036.00. R. at 31.

On March 30, 2001, the Housing Provider filed CI 20,762 for replacement of most of the plumbing system, including fixtures. The plumbing consists of supply pipes, waste pipes, and water heaters. The fixtures were primarily the toilets, sinks and tubs. R. at 46. The total cost listed in the petition was \$356,076.00. R at 33.<sup>1</sup>

On March 30, 2001, the Housing Provider, filed CI 20,763 for replacement of wooden frame single pane glass windows with thermal glass windows, removal of existing radiators and steam risers replaced by heat-pump units, installation of heat lamps in the bathrooms, related electrical work, testing and monitoring for lead based paint, patching and painting. The total cost in the petition was \$450,369.00. R. at 52.<sup>2</sup>

The consolidated hearing began on January 6, 2003 and was completed on January 13, 2003, before Hearing Examiner Gerald Roper. He issued the decision and order on May 1, 2003. The decision and order contained the following findings of fact and conclusions of law:

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<sup>1</sup>The decision finding of fact stated the cost was \$156,591.00 at p. 21.

<sup>2</sup>The decision finding of fact stated the cost was \$467,201.00 at p. 21.

## Findings of fact

1. The subject housing accommodation located at 1460 Irving Street, N.W. is registered with RACD.
2. The subject Housing Accommodation contains 66 rental units, all of which are affected by the proposed improvements.
3. The capital improvements set forth in petitions CI#20,760, 761, 762, and 763 are depreciable under the Internal Revenue Code and a capital improvement under the Act.
4. (a) The improvements in CI 20,760 will protect or enhance the health, safety and security of the tenants and the habitability of the housing accommodation in the following manner: the new lighting improves safety. The asbestos removal and additional drainage remove health hazards. The new entry door improves security, and the new mailboxes are sturdy and lockable. The remaining improvements enhance the habitability of the Housing Accommodation.  
  
(b) The improvements in CI 20,761 to the [] will protect and/or enhance the health, safety and security of the tenants and the habitability of the Housing Accommodation by providing a modern sliding door in place of a "scissor" door; adding ADA compliant doors; providing solid state controls; and by providing faster, more efficient service.  
  
(c) The improvements in CI 20,762 to the plumbing fixtures and hot water heaters will protect and/or enhance the health, safety and security of the tenants and the habitability of the housing accommodation by providing a more reliable hot water supply, and safe and reliable plumbing fixtures, as well as a more functional shower.  
  
(d) The improvements in CI 20,763 to the heat pump installations will protect and/or enhance the health, safety and security of the tenants and the habitability of the housing accommodation and rental units by adding a feature which is not currently available, i.e., air conditioning; new windows which are better insulated; by providing reliable heating and cooling year [] and by removal of potentially hazardous asbestos and lead paint.
5. There are no cost of energy savings accruing to the Housing Provider from the improvements.
6. The necessary permits and approvals to proceed with the capital improvements have been obtained.
7. (a) The total cost of the improvements in CI 20760, including interest and

service charges, is \$108,943.00.

- (b) The total cost of the improvements in CI 20761, including interest and service charges, is \$273,036.00.
  - (c) The total cost of the improvements in CI 20762, including interest and service charge[s], is \$156,591.00.
  - (d) The total cost of the improvements in CI 20763, including interest and service charges, is \$467,201.00.
8. (a) The surcharge in CI 20,760 is \$17.00 per rental unit per month for each rental unit in the Housing Accommodation.
- (b) The surcharge in CI 20,761 is \$43.00 per rental unit per month for each rental unit in the Housing Accommodation.
- (c) The surcharge in CI 20,762 is \$25.00 per rental unit per month for each rental unit in the housing accommodation. The surcharge does not exceed 20% of the rent ceiling for each unit prior to the surcharge.
- (d) The surcharge in CI 20,763 is \$74.00 per rental unit per month for each rental unit in the housing accommodation. The surcharge does not exceed 20% of the rent ceiling for each unit prior to the surcharge.
9. None of the tenants in 1460 Irving Street, NW [sic] applied for the elderly or disabled tenant exemption under D.C. [Official] Code §§ 42-3502.06 [sic] and § 42-3502.10(j) [2001].
10. The Housing Accommodation was inspected by the Housing Inspection Division of DCRA on March 1, 2001.
11. The Housing Provider is entitled to a permanent increase in the rent ceiling for each unit in the housing accommodation based on a increase in services and facilities for the addition of air conditioning, in the amount of \$8.00 per unit per month.

1460 Irving St., L. P. v. Tenants of 1460 Irving St., N.W., CI 20,760 -763 (RACD May 1, 2003) at 22-23.

#### Conclusions of law

- 1. (a) Petitioner is entitled to a rent ceiling surcharge in CI 20,760 as set forth in the Findings of Fact above in the amount of \$17.00 [per] rental unit per month for each of the 66 rental units in the Housing Accommodation to reimburse

Petitioner for the costs of performance of capital improvements pursuant to Section 210, D.C. Law 6-10, D.C. Code § 42-3502.10 (2001).

(b) Petitioner is entitled to a rent ceiling surcharge in CI 20,761 as set forth in the Findings of Fact above in the amount of \$43.00 [per] rental unit per month for each of the 66 rental units in the housing accommodation to reimburse Petitioner for the costs of performance of capital improvements pursuant to Section 210, D.C. Law 6-10, D.C. Code § 42-3502.10 (2001).

(c) Petitioner is entitled to a rent ceiling surcharge in CI 20,762 as set forth in the Findings of Fact above in the amount of \$25.00 [per] rental unit per month for each of the 66 rental units in the housing accommodation to reimburse Petitioner for the costs of performance of capital improvements pursuant to Section 210, D.C. Law 6-10, D.C. Code § 42-3502.10 (2001).

(d) Petitioner is entitled to a rent ceiling surcharge in CI 20,763 as set forth in the Findings of Fact above in the amount of \$74.00 [per] rental unit per month for each of the 66 rental units in the housing accommodation to reimburse Petitioner for the costs of performance of capital improvements pursuant to Section 210, D.C. Law 6-10, D.C. Code § 42-3502.10 (2001).

2. Petitioner is entitled to a rent ceiling increase as set forth in the Findings of Fact above in the amount of \$8.00 per rental unit per month for each of the sixty-six (66) rental units in the housing accommodation to reimburse Petitioner for the increase in related services and facilities based on the addition of air conditioning to the Housing Accommodation.

Decision at 23-24.

The Tenants filed a notice of appeal on June 9, 2003. The Commission held the appellate hearing on November 12, 2003.

## II. THE ISSUES

- A. Did the Hearing Examiner commit reversible error when he failed to consider the list that the appellant filed which would have led to certification of the Appellant as a Tenant Association pursuant to 14 DCMR § 3904.2-3 and 14 DCMR § 3905.1 [1991]. The hearing examiner's error led to an incorrect caption that should be corrected to read "1460 Irving Street Tenants Association: Comité por la Dignidad de Inquilinose, Inc[.]?["]
- B. Did the Office of Adjudication lack jurisdiction to hear and adjudicate the housing provider's Capital

Improvement petitions because of the decision in Collins v. Charles E. Smith Mgmt. Co., TP #23,731 (R.H.C. December 30, 1998), thereby requiring the RHC to vacate the DECISION AND ORDER?

- C. Did the Hearing Examiner commit reversible error by failing to make a finding of fact of whether the work began within 60 days of the filing of the Capital Improvement petition, which would invalidate the grant of the petitions pursuant to 42 [sic] D.C. [Official] Code § [sic] 3502.10(e)(1)-(2) [2001], given that the Decision indicates that the work on all Capital Improvements began before the decision was rendered?
- D. Did the Hearing Examiner commit reversible error when he determined that the entire building received the required inspection pursuant to 42 [sic] D.C. [Official] Code [§] 3502.08(b)(2) [2001]?
- E. Did the Hearing Examiner commit reversible error when he determined that the rent ceiling should be raised by \$8.00 per unit because of an increase in services, when in fact, the tenants, and not the housing provider, pay for any electricity used to provide air conditioning?
- F. Did the hearing examiner commit reversible error when he permitted operating expenses for each capital improvement, including but not limited to Mr. Luchs' fees, mailing expenses, and copying expenses, to be charged to the tenants as part of the capital improvement, especially given that Mr. Luchs' legal fees are billed to another apartment complex?
- G. Did the Hearing Examiner commit reversible error when he failed to make findings of fact supported by the evidence to justify his statements that no tenants qualified for the disabled or elderly tenant exemption provided under 42 D.C. [Official] Code [§] 3502.06 (f) (1) – (2) and 42 D.C. [Official] Code [§] 3502.10 (j) [2001]?
- H. Did the Hearing Examiner commit reversible error when he determined that the housing provider had secured all required permits and approvals to proceed with the proposed capital improvements as provided un 42 [sic] D.C. [Official] Code [§] 3502.10(b)(3) [2001]?

- I. Did the Hearing Examiner commit reversible error when he allowed operating expenses including, but not limited to, repair of the outside building façade, removal of asbestos, etc., that do not qualify as capital improvements under the definition provided at 42 D.C. [Official] Code [§] 3501.03(6) to be charged to the tenants when he granted all of the capital improvement petitions?
- J. Did the Hearing Examiner commit reversible error when he failed to balance the need for alleged proposed capital improvements with the need to maintain affordable moderate and low income housing for the tenants in violation of the dictates of Fort Chaplin Park Assoc. v. District of Columbia Rental Housing Comm'n, 649 A.2d 1076 (D.C. 1994)?
- K. Did the Hearing Examiner commit reversible error by not combining the total cost to the tenants of the capital improvements, which are \$139 per month, to determine whether the capital improvements exceeded 20% of each unit's rent ceiling?
- L. Did the Hearing Examiner commit reversible error by determining that the capital improvement costs, standing separately, did not exceed 20% of any unit's rent ceiling?
- M. Did the Hearing Examiner commit reversible error by copying almost verbatim the proposed Decision & Order of the Housing Provider, leaving out critical evidence that the respondents filed as part of their case?

### III. THE LAW AND DISCUSSION OF ISSUES

- A. Did the Hearing Examiner commit reversible error when he failed to consider the list that the appellant filed which would have led to certification of the Appellant as a Tenant Association pursuant to 14 DCMR § 3904.2-3 and 14 DCMR § 3905.1 [1991]. The hearing examiner's error led to an incorrect caption that should be corrected to read "1460 Irving Street Tenants Association: Comite por la Dignidad de Inquilinose, Inc[.]?"**

The Rent Administrator's regulation, 14 DCMR § 3904.2-3 (1991) states: "[i]f a tenant association seeks to be a party, the hearing examiner shall determine the identity

and number of tenants who are represented by the association” and 14 DCMR § 3905.1 (1991) states: “[i]n order to achieve uniformity of pleadings before the Rent Administrator in all contested proceedings arising under this Act, and to ensure that the rights and liabilities of proper parties in interest are secured, all cases rising from complaints and petitions shall be properly captioned as provided in this section.” Cf. Tenants of 2300 and 2330 Good Hope Rd. v. Marbury Plaza, LLC, CI 20,753 (RHC Mar. 14, 2002) (Discussing the failure of the hearing examiner to identify the tenants in the case caption after a witness presented in evidence the list of names of the tenant members in the tenant association, and that failure affects the appeal rights of the tenants. Remand ordered for determination of the identity of the tenants.)

The file for CI 20,760 contains a document sent by fax to Stacy Washington [an employee of OAD] from the Tenants’ attorney, Gail Laster, Esquire, with the subject, “Request for 1460 Irving St. Tenant Association Members.” R. at 139. The document was date stamped into the Office of Adjudication on December 12, 2001. The text of the document states:

Per your request, below is a listing of the tenants represented by the 1460 Irving St. N.W. [sic] Tenants Association. The 55 names were compiled from a handwritten list (attached). Therefore, there may be some spelling inaccuracies.

The Housing Provider’s Brief states that the document was not offered into evidence at the hearing, and the one tenant who appeared at the hearing did not testify that she represented a tenant association.

The Rent Administrator’s rule, 14 DCMR § 4007.1 (1991) states, “[t]he record of a proceeding at RACD shall consist of the following: (c) [a]ll documents and exhibits offered into evidence at the hearing[.]” (emphasis added). The Tenant, Daisy Perla,

contrary to the statement in the Housing Provider's brief, testified that she was the president of the tenants' association. Decision at 14. However, she did not, through counsel at the hearing, offer into evidence the list of the tenant members in the tenants' association. Without the list of the tenants, before him in evidence, the hearing examiner had no foundation "to determine the identity and number of tenants who are represented by the association," pursuant to 14 DCMR § 3904 (1991). Therefore, the caption on the case shall remain as stated. The hearing examiner did not err and is affirmed on this issue.

**B. Did the Office of Adjudication lack jurisdiction to hear and adjudicate the housing provider's Capital Improvement petitions because of the decision in Collins v. Charles E. Smith Mgmt. Co., TP #23,731 (R.H.C. December 30, 1998), thereby requiring the RHC to vacate the DECISION AND ORDER?**

The decision in Collins v. Charles E. Smith Mgmt. Co., TP 23,731 (RHC Dec. 30, 1998) held, in the absence of a valid delegation of authority from the Rent Administrator, that decisions issued by hearing officers, were invalid. In the instant appeal, the decision was issued by Hearing Examiner Gerald Roper, who holds a valid delegation of authority dated June 30, 2000 from the Rent Administrator.<sup>3</sup> See D.C. OFFICIAL CODE § 42-3502.04(d)(2) (2001). This issue is denied. The hearing examiner is affirmed.

**C. Did the Hearing Examiner commit reversible error by failing to make a finding of fact of whether the work began within 60 days of the filing of the Capital Improvement petition, which would invalidate the grant of the petitions pursuant to 42 [sic] D.C. [Official] Code § 3502.10(e)(1)-(2) [2001], given**

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<sup>3</sup> Pursuant to D.C. OFFICIAL CODE § 2-509(c) (2001), the Commission took official notice of agency records which show the Rent Administrator's delegation of authority to Hearing Examiner Roper. In accordance with D.C. OFFICIAL CODE § 2-509(b) (2001), if any party has evidence to the contrary, the party may submit it to the Commission within ten days of receipt of this decision and order.

**that the Decision indicates that the work on all Capital Improvements began before the decision was rendered?**

D.C OFFICIAL CODE § 42-3502.10(e)(1)-(2) (2001) provides:

(e) (1) A decision by the Rent Administrator on a rent adjustment under this section shall be rendered within 60 days after receipt of a complete petition for capital improvement.

(2) Failure of the Rent Administrator to render a decision pursuant to this section within the 60-day period shall operate to allow the petitioner to proceed with a capital improvement.

Under this Section of the Act, the Housing Provider may not start the capital improvements until 60 days pass to allow the Rent Administrator time to issue the decision and order on the capital improvement petitions. If the decision is not issued within the 60 days, the Housing Provider may start the capital improvements. See Lenkin Co. Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 642 A.2d 1282 (D.C. 1994).

The Tenants did not demonstrate how “the Decision indicates that the work on all Capital Improvements began before the decision was rendered” as stated in this issue, was a violation of the Act. After sixty (60) days from the filing date of the capital improvement petitions, the Housing Provider was authorized by the Act to commence with the capital improvements on the petitions. D.C OFFICIAL CODE § 42-3502.10(e)(1)-(2) (2001). The capital improvement petitions were filed on March 30, 2001, and the decision rendered on May 1, 2003, more than two (2) years later. Accordingly this issue is denied and the hearing examiner is affirmed.

**D. Did the Hearing Examiner commit reversible error when he determined that the entire building received the required inspection pursuant to 42 [sic] D.C. [Official] Code [§] 3502.08(b)(2) [2001]?**

D.C. OFFICIAL CODE § 42-3502.08(b)(2) (2001) states:

For purposes of the filing of petitions for adjustments in the rent ceiling as prescribed in § 42-3502.16, the housing accommodation and each of the rental units in the housing accommodation shall have been inspected at the request of each housing provider by the Department of Consumer and Regulatory Affairs within the 30 days immediately preceding the filing of a petition for adjustment. (emphasis added.)

The decision lists two housing inspection reports, one from the Housing Provider and one from the Tenants, but no witness laid a foundation for the second report to be in evidence and to be considered by the hearing examiner.<sup>4</sup> The first housing inspection report entered into evidence was produced by the Tenants. It was marked by the hearing examiner as, Respondents' Exhibit (Exh.) 1-Housing Inspection Report No. 575741. Decision at 8. It was identified by Lead Housing Inspector Ronald Butler. Initially, Tenants' Exh. 1 consisted of three Housing Inspection Reports. Hearing Examiner Roper stated on the hearing record that he returned to the Tenants two of the exhibits, which were a part of Tenants' Exh. 1, related to two other housing inspectors, Kathryn Booth and James Hauser, who never testified at any of the hearings on these capital improvement petitions. Oddly, those same rejected housing inspection reports are a part of the Housing Provider's (Petitioner's) Exh. 3. Decision at 7.

Inspector Butler testified that on March 1, 2001, he inspected six (6) of the sixty-six (66) rental units at the housing accommodation. Only Tenants' Exh. 1, Housing Inspection Report No. 575741 (Decision at 8), was identified by Inspector Butler as his report for the six (6) units he inspected. He testified that two other housing inspectors inspected the housing accommodation, but those inspectors did not testify at the hearing.

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<sup>4</sup> The Housing Provider produced "Petitioner's Exhibit 3" which is listed in the decision and order under "Evidence and Pleadings Considered." Exhibit 3 contains three (3) inspection reports from three different inspectors. However, only one inspector, Ronald Butler, testified. Decision at 7-8.

He reported his findings in housing inspection report numbered 575741. The housing code violations resulted in \$3100.00 in fines.

The testimony of Housing Inspector Butler as summarized in the decision follows:

Mr. Butler was asked to identify Respondents' Exhibit 1, which is one of the inspection reports generated as a result of an inspection conducted (at the request of the Housing Provider), prior to the filing of the petition. Mr. Butler identified the report, but was unable to state whether the noted violations had been abated because he has not returned to the property for a reinspection. Mr. Butler also testified that he personally only inspected the third floor of the Housing Accommodation, and that the other floors were inspected by other inspectors. (emphasis added.)

Decision at 14. No other housing inspector's testimony is summarized in the decision, and no other housing inspector testified at the hearings on these capital improvement petitions.

The decision lists a second housing inspection report as, "Petitioners Exhibit 3 Copy of Housing Inspection report evidencing housing inspection preformed [sic] by Housing Inspection Division of DCRA." Decision at 7. No housing inspector witness identified this document and testified as to its contents. At the end of the hearing, counsel for the Housing Provider moved all of his exhibits into evidence without identifying each exhibit.

The failure to prove a complete inspection of each rental unit in a housing accommodation defeats a capital improvement petition, because it does not comply with D.C. OFFICIAL CODE § 42-3502.08(b)(2) (2001), which requires "each of the rental units" in the housing accommodation be inspected. The hearing record contains proof of the inspection of only 6 of 66 rental units, which is a mere 9% of the rental units, which leaves no proof of inspections for 60 rental units or 91% of the rental units. No other

housing inspector testified, after Lead Housing Inspector Butler. See Emmet v. American Insurance Co., 265 A.2d 602 (D.C. 1970) (which states it was error to admit into evidence the report of an official of the fire department on the cause of a fire, when the official did not testify about his opinion.) Cited in Malone v. Chaney, TP 21,372 (RHC Mar. 26, 1992). At the hearing, it was error to admit the housing inspection reports of inspectors Booth and Hauser without their testimony to authenticate the documents and the opportunity for cross-examination, especially after the hearing examiner rejected those same reports when proffered by the Tenants. More importantly, a review of all three reports does not show all the remaining 60 units, not including the 6 units inspected by Butler, were inspected.<sup>5</sup> There was no testimony indicating why “each of the rental units” was not inspected.

Accordingly, the Housing Provider did not prove “each” rental unit was inspected, as required by D.C. OFFICIAL CODE § 42-3502.08(b)(2) (2001). See Tenants of 500 23<sup>rd</sup> St., N.W. v. District of Columbia Rental Hous. Comm’n, 585 A.2d 1330, 1333-4 (D.C. 1991) (where the court affirmed the Commission’s requirement of proof that the inspection occurred for each rental unit within 30 days before the capital improvement petition was filed); Tenants of 2480 16<sup>th</sup> St., N.W. v. Dorchester Hous. Assoc. Ltd. P’ship, CI 20,768 (RHC Aug. 31, 2004) (where the Commission reversed the hearing examiner, because there was no record proof that each of the rental units was inspected prior to the filing of the capital improvement petitions). Therefore, the hearing examiner is reversed and the surcharges for all the capital improvements are reversed.

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<sup>5</sup> A review of the housing inspection reports made by Inspectors Booth and Hauser revealed, in total, they inspected only nine (9) rental units in the housing accommodation. Combined with the six (6) rental units inspected by Butler, the total rental units inspected was 15 of 66 rental units in the housing accommodation.

**E. Did the Hearing Examiner commit reversible error when he determined that the rent ceiling should be raised by \$8.00 per unit because of an increase in services, when in fact, the tenants, and not the housing provider, pay for any electricity used to provide air conditioning?**

The decision states, “heat pumps will add a significant feature to the building, i.e., air conditioning, which is not available....” Decision at 17; see also Decision at 12-13.

The Housing Provider incurred a cost for the installation of the heat pumps, as explained in the decision. The heat pumps are a part of CI 20,763, which increased the rent ceilings by \$74.00. Decision at 21.

Nothing in the decision and order explained how the hearing examiner arrived at the rent ceiling increase of \$8.00 per unit for the addition of air conditioning, based on an increase in services and facilities. (Decision at 12-13) (Finding of fact 11, Decision at 23 and Conclusion of law 2, Decision at 24). This figure, \$8.00 per rental unit, appears to be arbitrary and capricious, because there is nothing in the hearing record to support it. See D.C. OFFICIAL CODE § 42-3502.16 (2001), which provides “[t]he Rental Housing Commission may reverse in whole or in part, any decision of the Rent Administrator which it finds to be arbitrary, capricious, an abuse of discretion, not in accordance with [the Act], or unsupported by substantial evidence in the record.”

Moreover, the Housing Provider did not file a petition for increase in services and facilities to give notice to the Tenants for the \$8.00 increase in the rent ceilings. D.C. OFFICIAL CODE § 42-3502.11 (2001). Cf. Tenants of 2301 E St., N.W. v. District of Columbia Rental Hous. Comm’n, 580 A.2d 622 (D.C. 1990) (where the court held the tenants could not raise a de facto counterclaim to lower the rent ceiling in a capital improvement petition, because of lack of proper notice of the issues. The tenants had to

file a tenant petition.) *Id.* at 625. Similarly, the Housing Provider in this appeal cannot obtain a rent ceiling increase for an increase in services and facilities without giving the Tenants notice in a petition for an increase of services and facilities. D.C. OFFICIAL CODE § 42-3502.11 (2001). Accordingly, for the two reasons discussed, this issue is granted, and the hearing examiner is reversed.

**F. Did the hearing examiner commit reversible error when he permitted operating expenses for each capital improvement, including but not limited to Mr. Luchs' fees, mailing expenses, and copying expenses, to be charged to the tenants as part of the capital improvement, especially given that Mr. Luchs' legal fees are billed to another apartment complex?**

The Tenants offered no explanation of this issue. It was not a part of the hearing evidence. Accordingly, it is denied and the hearing examiner is affirmed.

**G. Did the Hearing Examiner commit reversible error when he failed to make findings of fact supported by the evidence to justify his statements that no tenants qualified for the disabled or elderly tenant exemption provided under 42 D.C. [Official] Code [§] 3502.06 (f) (1) – (2) and 42 D.C. [Official] Code [§] 3502.10(j) [2001]?**

The Commission's rule, 14 DCMR § 3802.5 (1991), requires a clear and concise statement of the error(s) in the decision and order. See *Norwood v. Peters*, TP 27,678 (RHC Feb. 3, 2005) (where the Commission denied appeal issues because they were vague); *Parreco v. Akassy*, TP 27,408 (RHC Dec. 8, 2003); *Pierre-Smith v. Askin*, TP 24,574 (RHC Feb. 29, 2000); *Tenants of 2480 16<sup>th</sup> St., N.W. v. Dorchester Hous. Ass'n*, CI 20,739 & CI 20,741 (RHC Jan. 14, 2000) (review denied because the appealing party failed to provide a clear statement of the alleged error in the decision and order as required by the Commission's regulation, 14 DCMR § 3802.5 (1991)).

The Tenants have not referred to any record evidence to reverse the decision of the hearing examiner on the finding of fact on the failure of anyone who was elderly or disabled to apply for exemption from the capital improvement surcharge. D.C. OFFICIAL CODE § 42-3502.10(j) (2001). This issue is denied and the hearing examiner is affirmed.

**H. Did the Hearing Examiner commit reversible error when he determined that the housing provider had secured all required permits and approvals to proceed with the proposed capital improvements as provided in 42 D.C. [Official] Code [§] 3502.10(b)(3) (2001)?**

The Tenants have not provided any record evidence that the Housing Provider had not secured all of the permits and approvals for the capital improvement petitions.

Therefore, this issue is denied.

**I. Did the Hearing Examiner commit reversible error when he allowed operating expenses including, but not limited to, repair of the outside building façade, removal of asbestos, etc., that do not qualify as capital improvements under the definition provided at 42 D.C. [Official] Code [§] 3501.03(6) to be charged to the tenants when he granted all of the capital improvement petitions?**

Asbestos removal can qualify as a capital improvement. See Magizine v. Tenants of the Berkshire Apartments, CI 20,200 (RHC Sept. 27, 1988). However, if the proper evidence is not before the hearing examiner, a petition for asbestos removal may be denied. See Hamilton Hous. Ltd. P'ship v. Tenants of 1255 New Hampshire Avenue, N.W., CI 20,384 (RHC May 2, 1990). The Tenants have not demonstrated why the work on the outside building façade, the asbestos removal, etc., were not capital improvements. Accordingly, this issue is denied and the hearing examiner is affirmed.

**J. Did the Hearing Examiner commit reversible error when he failed to balance the need for alleged proposed capital improvements with the need to maintain affordable moderate and low income housing for the tenants in violation of the**

**dictates of Fort Chaplin Park Assoc. v. District of Columbia Rental Housing Comm'n, 649 A.2d 1076 (D.C. 1994)?**

The Tenants, in their brief, cite the court in Fort Chaplin Park Assoc. v. District of Columbia Rental Hous. Comm'n, 649 A.2d 1076 (D.C. 1994), where it stated:

As § 45-2502(5) [currently D. C. Official Code § 42-3501.02 (2001)]<sup>6</sup> demonstrates, inherent in the determination of whether a proposed improvement enhances the habitability of the housing accommodation is the requirement to balance the need for moderately priced housing against the housing provider's desire to realize a return on their investment. Id. The delicacy of this balancing process can not be overstated.

We recognize that where the proper balance lies on any particular item does not lend itself to an easy calculation.<sup>[1]</sup> The analysis must include, not only, a determination that the proposed item would increase the value or worth of the habitability of the housing accommodation, but also whether the proposed improvement would singularly, or in conjunction with other proposed improvements serve to erode the availability of moderately-priced housing. (emphasis added.)

Id. at 1081.

In this appeal, the record shows that Ms. Perla, the president of the tenants' association, testified that her monthly rent was 50% of her salary. Counsel for the Tenants offered a witness, Sczerina Perot, as an expert on affordable housing. Ms. Perot was a staff attorney with the Washington Legal Clinic for the Homeless. She testified that she focused on cases involving housing code violations and homelessness. Counsel for the Tenants proffered she could testify about standards used by the federal government on affordable housing. Counsel for the Housing Provider objected. The

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<sup>6</sup> D. C. OFFICIAL CODE § 42-3501.02(5) (1991) states:

In enacting this chapter, the Council of the District of Columbia supports the following statutory purposes:

...

(5) To prevent the erosion of moderately priced rental housing while providing housing providers and developers with a reasonable rate of return on their investments.

hearing examiner rejected Ms. Perot as a witness on affordable housing, stating that issue was not before him.

The Act, D.C. OFFICIAL CODE § 42-3501.02 (2001), entitled “Purpose” states:

In enacting this chapter, the Council of the District of Columbia supports the following statutory purposes:

(1) To protect low- and moderate-income tenants from the erosion of their income from increased housing costs;

....

(5) To prevent the erosion of moderately priced rental housing while providing housing providers and developers with a reasonable rate of return on their investments.

A part of the statutory scheme under “this chapter” above is the processing of capital improvement petitions, pursuant to D.C. OFFICIAL CODE § 42-3502.10 (2001). In this appeal, four capital improvement petitions were consolidated for hearing. There is nothing in the decision to explain why these four capital improvement petitions will not erode moderately priced housing or protect low- and moderate-income tenants from the erosion of their income, which are two of the stated purposes of the Act. In addition, Fort Chaplin Park Assoc., 649 A.2d at 1081 supra, required an analysis on moderately priced housing. Accordingly, the hearing examiner erred by not allowing the testimony of Ms. Perot on affordable housing, and by not making the Fort Chaplin Park analysis. This issue is granted and the hearing examiner is reversed. There is no remand due to the reversal of the hearing examiner on issues D and E.

**K. Did the Hearing Examiner commit reversible error by not combining the total cost to the tenants of the capital improvements, which are \$139 per month, to determine whether the capital improvements exceeded 20% of each unit’s rent ceiling?**

Prior to the testimony of the first witness, counsel for the Housing Provider stated on the record that the four capital improvement petitions represented separate improvements. They were filed on the same date for the purpose of scheduling only one housing inspection, rather than four housing inspections – one for each capital improvement petition.

Moreover, the Act does not provide for aggregating capital improvement petitions for one rent ceiling increase. D.C. OFFICIAL CODE § 42-3502.08(h)(1) (2001). Each petition represents one authorized rent ceiling increase, and the Housing Provider has the option of implementing all or a portion of only one rent ceiling increase. D.C. OFFICIAL CODE § 42-3502.08(h)(2) (2001). See Blake v. Pied -A- Terre/Turnkey, LLC, TP 27,199 (RHC June 25, 2004). The Act requires a minimum of 180 days to pass between rent increases. D.C. OFFICIAL CODE § 42-3502.08(g) (2001). Accordingly, the hearing examiner did not commit reversible error by not combining the total cost of all the capital improvement petitions, since the Housing Provider may implement only one or a portion of one rent ceiling increase at a time. This issue is denied and the hearing examiner is affirmed.

**L. Did the Hearing Examiner commit reversible error by determining that the capital improvement costs, standing separately, did not exceed 20% of any unit's rent ceiling?**

The Tenants wrote in their brief:

42 D.C. [Official] Code § 3502.10 gives the Hearing Administrator [sic] the authority to approve a rent adjustment to cover the cost of a capital improvement, but in the case of a building-wide major capital improvement, “[n]o increase in this paragraph may exceed 20% above the current rent ceiling.” [footnote omitted.] The Hearing Examiner in this case found that no unit’s rent ceiling would be raised more than 20% by any of the capital improvement petitions, however this finding was erroneous. [footnote omitted.]

According to Capital Improvement petition 20,761, the proposed rent ceiling surcharge of \$43.00 would increase apartment 511's rent ceiling by 21.39%. [footnote omitted.] Under Capital Improvement petition 20,762, the proposed rent ceiling surcharge of \$56.00 would raise apartment 311's rent ceiling by 20.44%, apartment 501's rent ceiling by 21.79%, apartment 505's rent ceiling by 20.44%, and apartment 511 rent ceiling by 27.86%. [footnote omitted.] Finally, in the amended petition for Capital Improvement 20,763, the proposed rent ceiling surcharge of \$65.00 would increase apartment 302's rent ceiling by 20.1%. [footnote omitted.]

The Housing Provider responded that the Tenants did not raise this issue below.

A review of the record shows none of the Tenants, who testified or signed the attendance sheet at the hearing, are residents of the units affected by rent ceilings above 20%. See Lenkin Co. Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 642 A.2d 1282 (D.C. 1994) (where the court noted that two other tenants attended the hearing on the capital improvement petition, however, no Tenant, except the intervenor, appealed to the Commission.) Accordingly, in this appeal, no Tenants, other than the Tenants residing in the affected units where the rent increases were above 20%, have standing to raise this issue, and they have not appealed to the Commission, nor appeared at the RACD hearing. The hearing examiner is affirmed on this issue.

**M. Did the Hearing Examiner commit reversible error by copying almost verbatim the proposed Decision & Order of the Housing Provider, leaving out critical evidence that the respondents filed as part of their case?**

In Bright v. Westmoreland County, 380 F.3d 729 (3<sup>rd</sup> Cir. 2004), the court reversed and remanded the lower court based on a ghostwritten decision by one party's counsel. The court stated, "there was no record evidence to conclude that the district court conducted its own independent review or that the opinion was the product of its own judgment." "There is authority for the submission to the court of proposed findings

of fact and conclusions of law by the attorneys for the opposing parties in a case, and the adoption of such of the proposed findings and conclusions as the judge may find to be proper. But there is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side. That practice involves the failure of the trial judge to perform his judicial function.” The Bright case reversed and remanded the trial judge’s decision.

In the appeal before the Commission the Hearing Examiner requested a proposed decision and order from each party. The Commission compared the proposed decision and order submitted by the Housing Provider with the final decision and order issued by the hearing examiner. The two, the proposed decision and the final decision, are almost identical, except for editorial deletions and additions. However, due to the Commission’s decision on issues D and E, which reversed the granting of the capital improvement petitions and reversed the granting of the rent ceiling increases based on an increase in services and facilities, no more relief is available to the Tenants. Accordingly, this issue is moot.

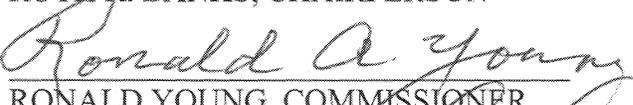
#### **IV. THE CONCLUSION**

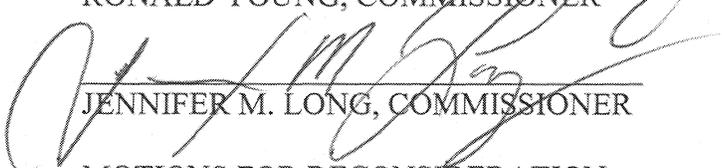
The Commission affirmed issues A, B, C, F, G, H, I, K and L. The Commission reversed the hearing examiner on issues D, E, and J. The Commission determined that issue M was moot, because of the issues that reversed the hearing examiner. The grants

of the four capital improvement petitions are reversed and the grant of the \$8.00 per unit rent ceiling increase for additional services and facilities is reversed.

SO ORDERED.

  
RUTH R. BANKS, CHAIRPERSON

  
RONALD YOUNG, COMMISSIONER

  
JENNIFER M. LONG, 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 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 20,670-673 was mailed by priority mail, with confirmation of delivery, postage prepaid this **5th day of April, 2005**, to:

Richard W. Luchs, Esq.  
Greenstein DeLorme & Luchs, P.C.  
1620 L Street, N.W.  
Suite 900  
Washington, D.C. 20036

Gail Laster, Esq.  
Mr. Duane Blackman  
Ms. Elizabeth Piff  
Ms. Sarah Yaramishyn  
American University Legal Clinic  
4801 Massachusetts Avenue, N.W.  
Washington, D.C. 20008

  
\_\_\_\_\_  
LaTonya Miles  
Contact Representative  
(202) 442-8949