

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

CI 20,768

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

Ward One (1)

TENANTS OF 2480 16<sup>TH</sup> STREET, N.W.  
Tenants/Appellants

v.

DORCHESTER HOUSE ASSOCIATES LIMITED PARTNERSHIP  
Housing Provider/Appellee

**DECISION AND ORDER**

**August 31, 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**

On November 2, 2001, Dorchester House Associates Limited Partnership, Housing Provider, pursuant to D.C. OFFICIAL CODE § 42-3502.10(g) (2001), filed Capital Improvement (CI) Petition 20,768 in RACD after the replacement of boiler number two (2), at the housing accommodation. Record (R.) 82. The petition was filed after the completion of the capital improvement that was deemed immediately necessary to

prevent the loss of heat during the winter months, and maintain the health and safety of the Tenants.

Administrative Law Judge (ALJ) Henry McCoy scheduled the hearing on the petition for July 2, 2002; however, he granted the motion of the Housing Provider to reschedule the case, because a Housing Provider witness was not available on July 2, 2002. The hearing was rescheduled to July 26, 2002, which caused Tenants' counsel, Bernard Gray, Sr., to file on July 12, 2002, a consent motion for another hearing date, due to the conflict with his court schedule on July 26, 2002. R. at 1234. The ALJ denied the consent motion on July 15, 2002. Attorney Gray, counsel for the Tenants did not appear at the July 26, 2002 hearing for this capital improvement. Therefore, Campbell Johnson, president of the tenants' association, renewed the motion for a continuance, because the Tenants were denied counsel by the denial of Tenants' counsel's consent motion for a continuance, due to the hearing date's conflict with counsel's court date. The renewed motion was denied. According to the ALJ, Attorney Gray appeared around 11:40 a.m. and stayed until 1 p.m. for the Office of Adjudication (OAD) hearing in another case, CI 20,767, held on the same day for a different capital improvement at the same housing accommodation. During that morning time period, the ALJ stated he observed Attorney Gray coach Mr. Johnson in CI 20,767, not this case. Attorney Gray's appearance in CI 20,767, was one of the reasons the ALJ denied Mr. Johnson's motion for continuance in this case. Decision at 2; OAD Hearing Tape (July 26, 2002). Mr. Johnson represented the tenants at the hearing in the instant petition, because counsel hired by the tenants had a conflict with the petition hearing and his court schedule. Counsel did not appear to

represent the tenants. There was no indication on the hearing tape or in the decision that Tenants' counsel was present at the hearing for this petition.

On October 4, 2002, the ALJ issued the decision and order, which approved the petition. The decision and order was vacated and reissued on November 6, 2002, based on an order on the motion filed by the Housing Provider that stated the decision and order was not timely delivered to allow the full ten days for motions and appeal.

The ALJ made the following findings of fact in the decision and order:

1. The Petitioner manages the subject housing accommodation for the owner, Dorchester House Associates.
2. A new boiler has a service life of 15-20 years and the replacement of one is not a routine expense so it is depreciable under the Internal Revenue Code.
3. The capital improvement, replacement of the #2 boiler, will protect or enhance the health, safety, and security of the tenants by eliminating and [sic] old and worn out boiler and replacing it with a new boiler that will meet the heating and hot water needs of all the tenants in the building.
4. The Petitioner replaced the #1 boiler in 2000 and overhauled the #2 boiler.
5. The Petitioner decided to replace the #2 boiler after it was advised that the overhaul of the #2 boiler was not successful.
6. The replacement of the #2 boiler was immediately necessary to provide heat and hot water to the building during the winter months of 2001-2002, thus protecting the health and safety of the tenants.
7. On October 22, 2001, a District of Columbia government boiler inspector approved the installation of the #2 boiler.
8. Installation of the boiler was completed when the Petitioner was contracted [sic] to pay the balance of the cost after the completion of the engineer's punch list, which was two months after the government inspection.

9. On November 2, 2001, the Petitioner filed the instant capital improvement petition.
10. The replacement of the present boiler with a new one will not result in a net reduction in the amount of energy used by the rental units or the housing accommodation.
11. The Petitioner obtained the necessary permit to replace the boiler.
12. The Petitioner had the housing accommodation inspected for housing code violations within 30 days of filing the petition.
13. The total cost of the proposed capital improvement, including interest and service charges, is \$128,258.00.
14. The monthly surcharge is \$3.00 per residential unit.
15. The rent ceiling surcharge as calculated does not exceed 20% of the rent ceiling for each unit prior to the surcharge.

Decision at 4-5.

#### CONCLUSIONS OF LAW

Based on the foregoing findings of fact and Discussion, the ALJ concluded, as a matter of law:

1. The replacement of the boiler was immediately necessary to the health or safety of the tenants to justify making the capital improvement prior to the approval of the Rent Administrator pursuant to D.C. [sic] Code [§] 42-3502(g) [sic].
2. The capital improvement petition was filed within 10 calendar days from the installation of the capital improvement as required by D.C. [sic] Code [§] 42-3502.10(i).
3. The Petitioner is entitled to a rent ceiling surcharge of \$3.00 per rental unit per month for the cost of replacing the #2 boiler as a capital improvement as provided by D.C. [sic] Code [§] 42-3502.10 [sic].

## II. THE APPEAL ISSUES

On November 21, 2002, Attorney Gray filed a notice of appeal on behalf of the Tenants.<sup>1,2</sup> The notice of appeal stated the following issues:

- A. Whether the ALJ erred in his analysis that the Housing Provider met its burden of proof on the inspection of each rental unit requirement of D.C. OFFICIAL CODE § 42-2518(b) (2001), as interpreted by the court in Tenants of 500 23<sup>rd</sup> Street, N.W. v. District of Columbia Rental Hous. Comm'n, 585 A.2d 1330 (D.C. 1991).
- B. Whether the ALJ failed to make a finding of fact that the accommodation was registered as required by the Act.
- C. Whether the evidence supports a finding that the accommodation is properly registered as required by the Act.
- D. Whether the ALJ erred by failure to address 14 DCMR § 4101.9 (1991).
- E. Whether the ALJ erred by failure to address the registration fee.
- F. Whether the ALJ erred by failure to make findings on the current management agent.
- G. Whether the ALJ erred by failure to make findings of fact on the public posting of the registration statement at the housing accommodation.
- H. Whether the ALJ abused his discretion by failure to grant the Tenants' counsel's consent motion for a continuance.

## II. THE COMMISSION'S DECISION ON THE ISSUES

- A. Whether the ALJ erred in his analysis that the Housing Provider met its burden of proof on the inspection of each rental unit requirement of D. C. OFFICIAL CODE § 42-3502.08(b)(2) (2001), as the court**

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<sup>1</sup> On November 12, 2002, Benoit Brookens filed "Tenants' Notice of Appeal." Pursuant to 14 DCMR § 3802.13 (1991), on March 19, 2003, the Commission dismissed the appeal, because it did not comply with 14 DCMR § 3802.5(b) (1991), which requires a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator.

<sup>2</sup> On January 24, 2003, the Commission issued an order dismissing Mr. Brookens' appeal of the denial of attorney's fee by the ALJ, because Mr. Brookens is not authorized to practice law in the District of Columbia. On June 19, 2003, the court affirmed the order. See Brookens v. District of Columbia Rental Hous. Comm'n, No. 03-AA-418 (D.C. June 19, 2003). On February 26, 2003, Venola Rolle, Esquire entered an appearance on behalf of the tenants represented by Mr. Brookens.

**interpreted in *Tenants of 500 23<sup>rd</sup> Street, N.W. v. District of Columbia Rental Hous. Comm'n*, 585 A.2d 1330 (D.C. 1991).**

The notice of appeal states:

The ... [ALJ] failed to address the Rental Housing Commission's decision in *Tenants of 500 23<sup>rd</sup> Street, N.W. v. District of Columbia Rental Hous. Comm'n*, [585 A.2d 1330 (D.C. 1991)] requiring the application of 45 DC [sic] Code [§] 2518(b)[.] Now known as 42 DC [sic] Code [§] 3502.08 which reads:

(2) 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.

[T]he Rental Housing Commission requirement [is] that satisfaction of the inspection requirement be met before a capital improvement petition may be granted.

In *Tenants of 500 23<sup>rd</sup> Street, NW* [sic][.] the Commission [sic] applied the inspection requirement prior to approval of capitol [sic] improvement petitions. While the ALJ performed his own analysis to address the inspection issue, he did not address the failure of the Housing Provider to have the inspection performed according to the law.

As a matter of law the Housing Provider failed to carry its burden to show that each of the units was inspected within the thirty (30) days immediately preceding the filing of a petition for adjustment.

The Housing Provider's Exhibit 6, Certification of Inspection and Exhibit 11, Housing Deficiency Notices fall short of carrying its burden. There are 394 units in the accommodation of which only 148 were inspected.<sup>3</sup> The certificate provides no information to show that there was any attempt to inspect each unit as required. The attached 24-hour notice is not evidence that the required inspection took place. The document only shows an inspection took place in four units. Petitioner's Exhibit 11 only shows that 141 units were inspected on October 3, 2001 and no other attempts were made.

This certificate does not comply with the intent of the statute.

Notice of Appeal at 1-2. (emphasis added.)

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<sup>3</sup> Housing Provider's Exh. 11 shows only 148 apartments were inspected on three days. September 13 and 18 [.] and October 3, 2001 are not within the 30 day limit.

The Commission reviewed the official file in this appeal. The file shows a document marked, "P. Ex. #6," stating:

Certificate of Inspection

Pursuant to the decision and order of the Rental Housing Commission, I hereby certify that at our request the Housing Inspection Division of the District of Columbia Department of Consumer and Regulatory Affairs conducted an inspection of Dorchester House, 2480 16<sup>th</sup> Street, N.W. on October 3, 2001. The inspection report itself is not yet available, but the attached 24-hour notice is evidence that the inspection took place.

/s/  
Robert E. Schoenemann  
Lease and Rent Control Administrator  
MPM Management, Inc., Agent  
For Dorchester House Associates  
Fourth Floor, 1701 K Street, N.W.  
Washington, DC [sic] 20006-1503

R. at 1402; (emphasis added.)

The above quoted document does not certify the number of rental units inspected. Moreover, it was written by the Housing Provider, not the Department of Consumer and Regulatory Affairs, which has the statutory authority to conduct the inspections of the rental units. D.C. OFFICIAL CODE § 42-3502.08(b)(2) (2001). See pp.5-6, supra; p. 8 infra. The document attached to P. Exh. 6 lists the four (4) rental units that were inspected on October 3, 2001, and had housing code violations. R. at 1401.

Petitioner's Exh. 7, referenced under Evidence and Pleadings Considered, is listed as, "Housing Deficiency Notices for [the] October 3, 2001 inspection of all rental units." Decision at 3; R. at 1576. The Commission reviewed those Housing Deficiency Notices in the official certified record. R. at 1403-59. The Commission counted the units in the Housing Deficiency Notices which had inspection dates within the 30 days immediately preceding the filing of the capital improvement petition on November 2,

2001. There were 135 units in the Housing Deficiency Notices, plus the four (4) additional rental units attached to P. Exh. 6, for a total of 139 units. The housing accommodation contains 394 units,<sup>4</sup> with proof that at a maximum only 139 units were inspected. That leaves (394-139=) 255 units, which were either not inspected or there was no proof of inspection 30 days prior to the filing of the capital improvement petition. Accordingly, the exhibits and testimony show that the Housing Provider did not meet the inspection requirement of D. C. OFFICIAL CODE § 42-3502.08(b)(2) (2001), which 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 court in Tenants of 500 23<sup>rd</sup> Street, N.W. v. District of Columbia Rental Hous. Comm'n, 585 A.2d 1330 (D.C. 1991), affirmed the Commission's application of D. C. OFFICIAL CODE § 42-3502.08(b)(2) (2001) to capital improvement petitions that are filed as immediately necessary, pursuant to § 42-3502.10(g) (2001), as in this appeal. Accordingly, the record does not support the ALJ's finding of fact numbered 12, which stated, "[t]he Petitioner had the housing accommodation inspected for housing code violations within 30 days of filing the petition." A partial inspection, such as 139 of 394 units, does not satisfy the Act's requirement that each rental unit be inspected within the 30 days preceding the filing of the petition.

In addition, the capital improvement petition was filed on November 2, 2001. The four (4) inspections on the attachment to P. Exh. 6 occurred on October 3, 2001, and therefore meet the requirements of the Act. Some of the inspections in P. Exh. 7

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<sup>4</sup> Testimony of John Hoskinson. OAD Hearing Tape (July 26, 2002); Decision at 2.



occurred on September 13 and 18, 2001, which is more than 30 days before the November 2, 2001 filing date of the capital improvement petition, and therefore, do not meet the requirement of the Act that the inspection occur “within the 30 days immediately preceding the filing of a petition for adjustment.” D. C. OFFICIAL CODE § 42-3502.08(b)(2) (2001), supra. Therefore, the Commission reverses the ALJ on this issue related to the 30 day maximum time period for the inspections to occur before the capital improvement petition was filed, and the failure of the Housing Provider to prove each rental unit was inspected in compliance with the Act. The capital improvement surcharge is denied.

- B. Whether the ALJ failed to make a finding of fact that the accommodation was registered as required by the Act.**
- C. Whether the evidence supports a finding that the accommodation is properly registered as required by the Act.**
- D. Whether the ALJ erred by failure to address 14 DCMR § 4101.9 (1991).**
- E. Whether the ALJ erred failure to address the registration fee.**
- F. Whether the ALJ erred by failure to make findings on the current management agent.**
- G. Whether the ALJ erred by failure to make findings of fact on the public posting of the registration statement at the housing accommodation.**

In Stone v. Keller, TP 27,033 (RHC May 19, 2004) at 9, the Commission held:

[T]his issue was not raised below at the hearing and cannot be raised on appeal to the Commission. See 1880 Columbia Rd. Tenants' Assoc. v. District of Columbia Rental Hous. Comm'n, 400 A.2d 330, 339 (D.C. 1979); Lenkin Co. Mgmt, Inc. v. District of Columbia Rental Hous. Comm'n, 642 A.2d 1282 (D.C. 1994) (where the court stated failure to raise a claim at the agency level precludes raising it on appeal). The hearing examiner is affirmed on this issue.

Likewise, in the instant appeal, the above listed issues, B-G, were not raised as issues before the ALJ at the OAD hearing on the capital improvement petition.

In addition, the Tenants cannot raise registration issues as a defense to petitions for rent ceiling increases. See Tenants of 2301 E Street, N.W. v. District of Columbia Rental Hous. Comm'n, 580 A.2d 622 (D.C. 1990) (where the court held tenants cannot raise counterclaim issues in capital improvement proceedings, because the housing provider did not have proper notice of those issues) Id. at 624-6; Tenants Council of Tiber Island-Carrollsborg Square v. District of Columbia Rental Accommodations Comm'n, 426 A.2d 868 (D.C. 1981) (where the court held the tenants' registration issues are germane to prohibiting rent increases, not rent ceiling increases, when action to raise the rent charged is taken by the housing provider.) Id. at 874-5. Accordingly, these issues cannot be raised on appeal before the Commission. Therefore, these issues are denied.

**H. Whether the ALJ abused his discretion by failure to grant the Tenants' counsel's consent motion for a continuance.**

The Commission does not decide this issue, H, because it is moot, based on the Commission's decision on issue A, which reversed the ALJ on the inspection issue, and denied the capital improvement surcharge. See McChesney v. Moore, 76 A.2d 389 (D.C. 1951), (here the court stated "it is not within the province of appellate courts to decide abstract, hypothetical or moot questions, disconnected with the granting of actual relief or from the determination of which no practical relief can follow). Id. at 390. Here, there is no further relief the Commission can grant after reversing the ALJ in issue A.

### III. CONCLUSION

The Commission reversed the ALJ on issue A (inspections), denied the appeal of issues B through G, and determined issue H is moot. Accordingly, the decision and order granting the capital improvement surcharge for boiler number two (2) is reversed.

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

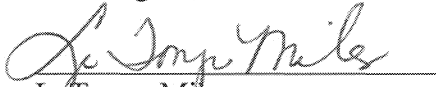
## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in CI 20,768 was mailed by priority mail, with confirmation of delivery, postage prepaid this **31<sup>st</sup> day of August, 2004**, to:

Venola Rolle, Esquire  
212 Mississippi Avenue, S.E.  
Unit 202  
Washington, D.C. 20011

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

Bernard A. Gray, Sr., Esquire  
2009 18<sup>th</sup> Street, S.E.  
Washington, D.C. 20020

  
LaTonya Miles  
Contact Representative  
(202) 442-8949