

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

CI 20,794

In re: 3133 Connecticut Avenue, N.W.

Ward Three (3)

TENANTS OF 3133 CONNECTICUT AVENUE, N.W.  
Tenants/Appellants

v.

KLINGLE CORPORATION  
Housing Provider/Appellee

**DECISION AND ORDER**

**January 27, 2006**

**BANKS, CHAIRPERSON.** This case is on appeal to the Rental Housing Commission (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 (2004), govern the proceedings.

**I. THE PROCEDURES**

On November 5, 2003, Klingle Corporation filed capital improvement (CI) petition 20,794 to install new windows building-wide in 317 rental units at the housing accommodation named the Kennedy - Warren. On January 12, 2004 a hearing was held in the Housing Regulation Administration (HRA) by Hearing Examiner Carl Bradford.

On March 24, 2004, the hearing examiner issued the decision and order, which contained the following:

**Findings of Fact**

1. The subject housing accommodation located at 3133 Connecticut Avenue, N.W. is registered with RACD.
2. The subject [h]ousing [a]ccommodation contains 317 rental units, all of which are affected by the proposed improvements.
3. The proposed improvement is depreciable under the Internal Revenue Code and is a capital improvement under the Act.
4. The capital improvement window replacement will protect or enhance the health, safety and security of the tenants and the habitability of the [h]ousing [a]ccommodation and rental units by eliminating leaks and drafts and providing a better acoustical barrier than the existing 70 year [old] single glazed windows.
5. The necessary permits and approvals to proceed with the capital improvement have been obtained.
6. The total cost of the improvements in CI 20,794, including interest and service charge, is \$5,448,762.00.
7. No tenants qualify as an elderly or disabled tenant under D.C. Official Code § 42-3502.06 and §42-3502.10(j).
8. The surcharge in CI 20,794 is \$179.00 per rental unit per month for each rental unit in the Housing Accommodation. As of the date the petition was filed, the surcharge does not exceed 20% of the rent ceiling for each unit prior to the surcharge, with the exception of units 118; 223; 229; 419; 521; 804; 904; 1105; and A-910.
9. The Housing Accommodation was thoroughly inspected by the Housing Inspection Division of DCRA on October 8, 2003.
10. The Memorandum of Agreement, dated January 6, 1997, between the Housing Provider and KWRA does not prohibit the Housing Provider from obtaining a capital improvement surcharge based on installation of new windows.

Klinge Corp. v. Tenants of 3133 Connecticut Ave., N.W., CI 20,794 (RACD

Mar. 24, 2004) at 18-19 (Decision).

## Conclusions of Law

1. Petitioner is entitled to a rent ceiling surcharge as set forth in the Findings of Fact above in the amount of \$179.00 per rental unit per month for each of the 317 rental units in the Housing Accommodation to reimburse Petitioner for the costs of performance of capital improvements pursuant to the Act and the Regulations with the exception of the following units, as to which the surcharge will be limited to 20% of the rent ceiling in effect at the time that the surcharge is implemented or \$179.00 per month, whichever is less: units 118; 223; 229; 419; 433; 621; 804; 904; 1105; A-910.
2. This case has not involved any issue or determination with regard to the proper rent ceilings, or the rent charged prior to the date of this Decision. Accordingly, this decision shall not constitute a bar to a subsequent action by a Tenant, the Housing Provider or the Rent Administrator, with regard to the proper rent ceilings, or the lawfulness of any rent charged, prior to the date of this Decision.

Id. at 19.

On April 9, 2004, the Tenants filed a notice of appeal in the Commission, which held its appellate hearing on September 21, 2004.

## **II. THE ISSUES**

The notice of appeal raised the following issues:

1. [Whether] the agency below lacked jurisdiction to adjudicate the matter, jurisdiction having been vested in the Office of Administrative Hearings.
2. [Whether] the hearing examiner's ruling that the rent increases sought by Appellee's capital improvements petition rent increase amount were not barred by the Memorandum of Agreement dated January 5, 1997, was not supported by substantial evidence, and was contrary to law.
3. [Whether] the hearing examiner's ruling that [the Kennedy Warren Residents Association] KWRA was required to submit evidence establishing its tenant members was not supported by substantial evidence and was contrary to law and evidence in this case.
4. [Whether] the hearing examiner's ruling that the Memorandum of Agreement of January 6, 1997 pertained only to members of the KWRA, rather than to all tenants of the subject property, was not supported by substantial evidence and was contrary to law.

5. [Whether] the hearing examiner's ruling that windows installed in certain units were temporary mock windows was not supported by substantial evidence, and was an abuse of discretion.

### III. THE DISCUSSION OF THE ISSUES

1. **[Whether] the agency below lacked jurisdiction to adjudicate the matter, jurisdiction having been vested in the Office of Administrative Hearings.**

The jurisdiction for the Rent Administrator to adjudicate rent control petitions is D.C. OFFICIAL CODE § 42-3502.04(c)-(d) (2001). This section of the Act was never amended. However, the Office of Administrative Hearings (OAH) was created and granted jurisdiction over the Rent Administrator's hearings under the Act, effective October 1, 2004. See D.C. OFFICIAL CODE § 2-1831.03(b)(2) (2001) (2004 Pocket Part). However, the transfer of jurisdiction was never effective, because of several extensions of the original grant of jurisdiction. Subsequently, this section of the OAH legislation was amended by emergency legislation to delay transfer of jurisdiction to October 1, 2006. See D.C. Act 16-246, effective Dec. 22, 2005 and expires on Mar. 22, 2006. Currently, a permanent bill, 16-279, is before the District of Columbia Council to make the emergency legislation permanent law. Therefore, at all times while this case was pending, the Rent Administrator had jurisdiction to hear and decide the case. This issue is denied and the hearing examiner is affirmed.

2. **[Whether] the hearing examiner's ruling that the rent increases sought by Appellee's capital improvements petition rent increase amount were not barred by the Memorandum of Agreement dated January 5, 1997, was not supported by substantial evidence, and was contrary to law.**

The hearing examiner made the following finding of fact, numbered ten (10):

The Memorandum of Agreement, dated January 6, 1997, between the

Housing Provider and KWRA does not prohibit the Housing Provider from obtaining a capital improvement surcharge based on installation of new windows. (emphasis added.)

See p. 2 supra.

Finding of fact number 10 relates to rent surcharges or rent ceiling adjustments based on the capital improvement. It does not state anything about rent charges or rent increases to the Tenants. Rent ceiling adjustments, such as those based on capital improvements, are not rent charges. See D.C. OFFICIAL CODE § 42-3502.07 (2001) for the list of rent ceiling adjustments under the Act, including capital improvements, which are abated when the Housing Provider recovers all costs of the capital improvement. D.C. OFFICIAL CODE § 42-3502.10(c)(3) (2001). Counsel for the Tenants did not direct the Commission to a rent increase amount in the decision. However, there is in evidence a chart, attached to the petition, with the proposed surcharge and rent increases. R. at 221-225. Nevertheless, this petition does not involve implementation of the rent increases. This capital improvement is for approval of the rent surcharge. Accordingly, this issue is denied and the hearing examiner is affirmed.

- 3. [Whether] the hearing examiner's ruling that KWRA was required to submit evidence establishing its tenant members was not supported by substantial evidence and was contrary to law and evidence in this case.**
- 4. [Whether] the hearing examiner's ruling that the Memorandum of Agreement of January 6, 1997 pertained only to members of the KWRA, rather than to all tenants of the subject property, was not supported by substantial evidence and was contrary to law.**

The decision stated:

With respect to the KWRA, 14 DCMR § § 3904.2 and 3904.3 provide that if 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 that if a majority of the tenants are represented by the

association, the association shall be listed in the caption as a party as to its members.

The hearing Examiner is not able to find, based on the evidence proffered by the KWRA that it represents a majority of the rental units in the building. In fact, no evidence as to its membership was presented. Therefore it may not be named as a party to the petition. Steven Falkenstein was called as a witness by Petitioner [Housing Provider], but his testimony was disallowed following objection by the Respondent [Tenants].

Decision at 2.

Paragraph 18, [in] the *Memorandum of Agreement* provides that it is binding upon the parties who execute the Agreement. The parties to the Agreement are the Housing Provider and KWRA. Neither in the Agreement nor any testimony presented at the hearing did KWRA identify its membership. At best, the Agreement would have been binding upon those individual tenants who were members of the KWRA when it was signed in 1997. However, the burden was on KWRA to identify those persons, which it failed to do. (emphasis added.)

Decision at 17.

The Commission reviewed the law and record and makes the following decision.

D.C. OFFICIAL CODE § 2-509 (DCAPA) (2001) states:

(b) In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof.

(c) The Mayor or the agency shall maintain an official record in each contested case, to include testimony and exhibits, but it shall not be necessary to make any transcription unless a copy of such record is timely requested by any party to such case, or transcription is required by law, other than this subchapter. The testimony and exhibits, together with all papers and requests filed in the proceeding, and all material facts not appearing in the evidence but with respect to which official notice is taken, shall constitute the exclusive record for order or decision. No sanction shall be imposed or rule or order or decision be issued except upon consideration of such exclusive record, or such lesser portions thereof as may be agreed upon by all the parties to such case. (emphasis added.)

The Tenants are the proponents of the order with the burden of proof, but did not present evidence of the identity of the members of the KWRA or the identity of the residents in the Kennedy – Warren housing accommodation. In evidence was the Memorandum of Agreement, which states who signed the agreement. The signatures are B. Francis Saul, Vice President of Klingle Corporation, the Housing Provider, and Julia B. Foraker, President of the KWRA. (Record (R.) at 92.) The membership of KWRA is not in evidence. Paragraph 18, of the Memorandum of Agreement states, “[t]he terms of this Agreement contained herein are binding between the parties who execute this agreement.” R. at 95. See Lenkin Co. Mgmt. v. Rental Hous. Comm’n, 642 A.2d 1282 (RHC 1994) n.7 (where the court noted that all tenants could not benefit from the appeal, because all tenants did not both contest and appeal the capital improvement decision). In the instant appeal, the record shows who attended the RACD hearing, but does not show either the membership of the KWRA or the identities of the individuals appealing the hearing examiner’s decision. Only KWRA is listed as the appellant on the notice of appeal.

In Tenants of 1460 Irving St., N.W. v. 1460 Irving St., L.P., CIs 20,760-763 (RHC Apr. 5, 2005) at 7-8, the Commission stated:

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.’

...

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 ... 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."

Id. at 9.

Likewise, in the instant appeal, the Tenants did not offer a list of the members of KWRA, or a list of all the other tenants in the housing accommodation.

To the contrary, in Tenants of 2300 and 2330 Good Hope Rd. v. Marbury Plaza, LLC, CI 20,753 (RHC Mar. 14, 2002) the Commission ordered a remand for determination of the identity of the tenants, because of 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 affected the appeal rights of the tenants.

Accordingly, since the Tenants in the instant appeal did not put in evidence the names of the members of KWRA, that organization is not a party to this case. The tenants who appeared for the Rent Administrator's hearing did not individually appeal the decision to the Commission. Therefore, the hearing examiner is affirmed.

**5. [Whether] the hearing examiner's ruling that windows installed in certain units were temporary mock windows was not supported by substantial evidence, and was an abuse of discretion.**

The decision stated:

[W]ith respect to the fact that the Housing Provider installed windows in certain units on the 4<sup>th</sup> floor of the Housing Accommodation on a temporary basis (and happened to take that opportunity to have the

contractor develop “mock up” windows to test their performance), is not evidence that the Housing Provider began the capital improvement petition prematurely or that the work will be less than building-wide.

The un rebutted testimony of Mr. Newcome is that all of the windows, including the windows temporarily installed, will be replaced as part of the capital improvement petition and that the temporary installation was necessary to protect the structural integrity of the Housing Accommodation, testimony which the Hearing Examiner finds fully credible.

Decision at 17-18.

In contrast to the hearing examiner’s decision, quoted above, the Tenants introduced into evidence photographs, taken by Tenant Peter Schwartz, on December 15, 2003, of completely installed windows in several rental units, i.e., unit 404, (R. 139); unit 432 (R. 140); and unit 406 (R. 138). The date, December 15, 2003, is 40 days after the capital improvement petition was filed on November 5, 2003. Also, that date, December 15, 2003, is prior to the expiration of the 60 days the Housing Provider must wait, by law to install the windows. See D.C. OFFICIAL CODE § 42-3502.10(e)(1)-(2) (2001). These photographs and Schwartz’ testimony that windows were replaced in rental units 432, 430, 428, 404, 406, 408, and 324, show that the Housing Provider violated the Act by commencing the capital improvement by installing windows prior to the 60 day waiting period allowed by the Act for the Rent Administrator to issue a decision. See Lenkin Co. Mgmt. v. District of Columbia Rental Hous. Comm’n, 642 A.2d 1282 (D.C. 1994).

The Act, D.C. OFFICIAL CODE § 42-3502.10(e)(1)-(2) (2001), provides that if the Rent Administrator does not render the decision within 60 days after the petition was filed, the Housing Provider may commence the capital improvements. See Lenkin Co. Mgmt. supra. The capital improvement petition was filed on November 5, 2003. For this petition, the 60 days for the decision to issue expired on January 4, 2004. The hearing

was held on January 12, 2004 and the decision issued on March 24, 2004, which was approximately 138 days after the filing of the capital improvement petition on November 5, 2003. Therefore, the decision was rendered after the expiration of the 60 days for the issuance of the decision. However, the Housing Provider, in accordance with the 60 day waiting period, could not proceed with the capital improvements before January 4, 2004, but did so by December 15, 2003, as shown by the Tenants' photographs.

The Housing Provider defends its actions by stating there was an emergency, which made the installation of the windows immediately necessary. However, the Housing Provider did not file a capital improvement petition based on the emergency, and therefore, there are no findings of fact on that issue. See D.C. OFFICIAL CODE § 42-3502.10(g) (2001); Lenkin Co. Mgmt., 642 A.2d at 1286.

In Lenkin, the Commission had a record which reflected exactly ten (10) lighting fixtures were installed before the 60 day waiting period expired.<sup>1</sup> Therefore, the rent ceiling surcharge was adjusted to reflect that error. In the instant case, the record consists of three photographs for three rental units, and testimony that other units had windows installed prior to the expiration of the 60 day waiting period.<sup>2</sup> Therefore, this case merits a remand for findings of fact and conclusion of law on the number of rental units where the windows were installed prior to the expiration of the 60 day waiting period. The hearing examiner is directed to deny the rent ceiling surcharge on the rental units where the windows were installed prior to the expiration of the 60 day waiting period, since no

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<sup>1</sup> In Lenkin, the record contained substantial evidence from the Housing Provider that only ten (10) of 112 lighting fixtures were ordered and installed. Those ten fixtures were excluded from the capital improvement surcharge. Conversely, in the instant case, there is no admission, by record evidence, by the Housing Provider of the number of windows installed prior to the expiration of the 60 day waiting period.

<sup>2</sup> The Housing Provider testified that units 404, 408 and 428 had windows installed on an emergency basis.

emergency capital improvement petition was filed for the windows in those units.

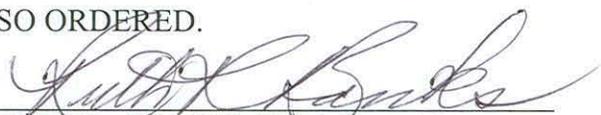
Lenkin, supra. Therefore, the hearing examiner is reversed and this issue is remanded.

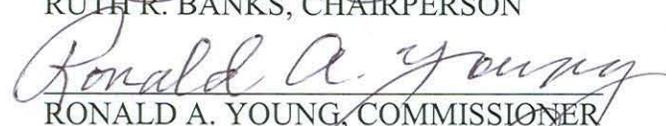
No new hearing is ordered.

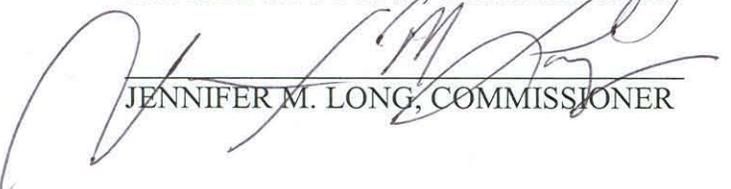
#### IV. THE CONCLUSION

The Commission, in issue one, held that the Rent Administrator had jurisdiction to hear and decide the issues in this capital improvement petition. In issue two, the Commission held the rent increase amount was not before the Commission, only the rent surcharge or rent ceiling increase. In issues three and four, the Commission held that KWRA did not put in evidence its membership and that was a fatal error which prevented the hearing examiner determining whether KWRA represented a majority of the Tenants, and which Tenants appeared before both the Rent Administrator and the Commission. The fifth issue is remanded for a determination of the number of rental units where the windows were installed before the expiration of the 60 day waiting period in the Act, and a reduction of the rent ceiling surcharge to reflect the failure of the housing provider to wait 60 days to install the windows in those rental units.

SO ORDERED.

  
RUTH R. BANKS, CHAIRPERSON

  
RONALD A. YOUNG, COMMISSIONER

  
JENNIFER M. LONG, COMMISSIONER

## MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (2004) 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:

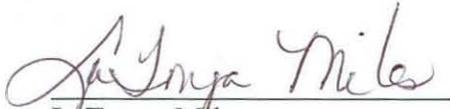
D.C. Court of Appeals  
Office of the Clerk  
500 Indiana Avenue, N.W.  
6th Floor  
Washington, D.C. 20001  
(202) 879-2700

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in CI 20,794 was mailed by priority mail, with confirmation of delivery, postage prepaid this 27<sup>th</sup> day of **January, 2006**, to:

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