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SCANNED ON 12/2/2010

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

PRESENT: JANE S. SOLOMON Justice

PART 55

Index Number : 103262/2010
NEUWIRTH, ROBERT
VS.
N.Y.S.D.H.C.R.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

See annexed Decision and Judgment

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room [illegible])

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/29/10

JANE S. SOLOMON J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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In the Matter of the Application of
LENORE SCHLOSSBERG, ROBERT NEUWIRTH, STANLEY SANDS, ROSEMARY DELEON, THOMAS SIRACUSE and THE COMMITTEE TO PROTECT RENT CONTROL TENANTS,

Index No.: 103262/10

DECISION and JUDGMENT

Petitioners,

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

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SOLOMON, J.:

In this Article 78 proceeding, petitioners seek an order and judgment reversing, modifying or remanding the 2010/2011 Standard Adjustment Factor (SAF), which sets the amount of rent increase for rent-controlled apartments in New York City. Petitioners challenge the adoption, by respondent New York State Division of Housing and Community Renewal (DHCR), of the 2010/2011 SAF, which increases the maximum base rent for affected tenants by 12.9% over two years. Petitioners argue that DHCR's adoption and formulation of the 2010/2011 SAF: (1) is arbitrary and capricious; (2) is inconsistent with the rent-control statute; (3) unconstitutionally discriminates against the individual petitioners and other rent-controlled tenants, who are primarily senior citizens, and fails to provide equal protection to

petitioners; (4) violates the New York State Administrative Procedure Act (SAPA); and (5) violates DHCR's obligations under the Freedom of Information Law (FOIL).

Petitioner The Committee to Protect Rent Control Tenants is a group of tenants who occupy rent-controlled apartments in New York City. Its chairman, petitioner Thomas Siracuse, and the other individual petitioners state that they are tenants of rent-controlled apartments in the City and County of New York. They explain that DHCR is a division of New York State, charged with, among other things, the administration of the laws regulating rent and terms of occupancy for rent-controlled and rent-stabilized residential tenants.

The laws applicable to New York City rent-controlled apartments that are relevant to the instant proceeding are set forth at both the Administrative Code of the City of NY § 26-401 *et seq.* and McKinney's Uncons. Laws of NY § 26-401 *et seq.* (Rent Control Law or RCL). The RCL sets forth a formula by which buildings with rent-controlled apartments establish a maximum base rent (MBR) for each such apartment. The MBR is a ceiling above which the rent for a particular rent-controlled apartment cannot rise. Pursuant to RCL § 26-405 (a) (3) and (a) (4), the MBR formula, adjusted biennially, is computed on the basis of real estate taxes, water rates and sewer charges, allowances for

operation and maintenance expenses, a vacancy allowance, a collection loss allowance, and an 8.5% return on the capital value of the building. Pursuant to RCL § 26-405 (a) (5), a rent-controlled tenant's annual rent increase is limited to no more than 7.5% per year.

The law creating the MBR system was enacted in 1970. New MBR's, to take effect on January 1, 1972, were calculated for each of the city's then 1.1 million rent-controlled apartments, and were based upon a building-by-building computation of the statutory factors that comprise the MBR. The RCL provides for the scheduled biennial adjustments to the MBR to be derived from an audit of the MBR factors in each building. The audits, however, were never conducted. With more than a million rent-controlled units involved at that time, the agency then administering the rent-control program determined that it was impractical to conduct individual audits for so many units every two years.

In 1974, the agency adopted the practice of promulgating the SAF as the standard percentage by which all MBR's were to be increased. The SAF would be calculated in accordance with statutory guidelines, but would be based upon the average experience of a small fraction of the then approximately 74,000 rent-controlled buildings. The SAF calculated an average

percentage increase in the cost of the components of the MBR formula, after which each building's individual 1972 MBR would be adjusted biennially by the percentage increase in cost determined by the SAF, so each building's individual 1972 MBR would still serve as the base upon which the biennial adjustments would be added. The sampling technique, including the use of the SAF, was upheld by the Court of Appeals in *Matter of Tenants' Union of W. Side v Beame* (40 NY2d 133 [1976]).

Petitioners point out that the statutory requirement for individual audits, which the court in *Beame* recognized as an important part of the administrative apparatus, remains in place. Petitioners note that, although the number of units subject to rent control has been reduced since 1970 by more than 95%, to fewer than 50,000, DHCR continues to use the SAF.

In fall of 2009, DHCR circulated a document entitled "Preliminary Standard Adjustment Factor Report for the 2010/2011 Maximum Base Rent Cycle for Rent Controlled Housing Units in New York City" (the Preliminary SAF Report), which set forth the SAF to be adopted and a summary of the measure and weight DHCR was planning to give to the statutory MBR factors. According to petitioners, the SAF that the DHCR sets forth every two years in its preliminary report is inevitably adopted.

Petitioners state that, according to the Preliminary SAF Report, DHCR gathers data from a sample of buildings regarding the change in cost of the mandated MBR factors and then assigns weight to each of the factors in deriving the SAF. Petitioners explain that the allocation of MBR factors adopted by DHCR gave substantial weight to two factors, return on investment and real estate taxes. In the present SAF, the total weight accorded to these two factors is 51.13%. Petitioners explain that the reason for the allocation is not provided, and they contend that such an allocation leads to rent increases based primarily on the increase in the market value of buildings rather than on actual expenditures or costs. According to petitioners, DHCR fails to justify the weight it affords to these factors in the promulgation of the SAF.

Petitioners further point out that, since the establishment of the rent-stabilization program, there are some buildings that contain certain apartments subject to rent control and other apartments subject to rent stabilization, such that it is possible for identical apartments within a building to be subject to different regimes, different rents and different rates of rent increase. Petitioners assert that the cumulative scheduled rent increase for rent-controlled units over time is much greater than the increase under rent stabilization. They point out that a

tenant in a rent-controlled apartment will, under the SAF proposed by DHCR, pay an increase of 12.9% over the next two years, whereas a tenant in the same apartment under rent stabilization is subject to a 6% increase. According to petitioners, the impact of the increase in rent-control rents falls on tenants who are substantially older than, and whose income is substantially less than, tenants in other regulated units.

In the first cause of action, petitioners argue that the promulgation of the 2010/2011 SAF is arbitrary and capricious, in that DHCR: (a) arbitrarily apportions values among the MBR factors, causing the rents to rise based on assertions of value rather than cost; (b) arbitrarily chooses the samples; (c) refuses to review and revise the formula to measure and account for changes in the market since the initial promulgation of the formula; and (d) refuses to conduct audits or sample audits of buildings to determine the accuracy of the formulas used.

The second cause of action alleges that the promulgation of the 2010/2011 SAF violates the RCL in that DHCR: (a) fails to consider the standards set forth in the RCL for the biennial implementation of the MBR; (b) fails to conduct audits either as to the means to establish rents or to determine the accuracy of

the formula adopted; and (c) permits rent increases to be based on factors that should not be the basis of rent increases.

The third cause of action alleges that the implementation of the rent increase based on the SAF by DHCR, and/or as mandated by the RCL, discriminates against rent-controlled tenants and denies them equal protection of the law required by federal and state constitutions. The fourth cause of action claims that the implementation of the rent increases based on the SAF by DHCR and/or as mandated by the RCL discriminates against such tenants on the basis of age and denies them equal protection of the law required by the federal and state constitutions.

The fifth cause of action asserts that the implementation of the SAF violates SAPA in that: (a) neither the proposal nor the rate when adopted is published; (b) adverse comments are not published; (c) no regulatory impact statement is published; and (d) the determination is made based on facts or assertions not available to the citizens of the state. In the sixth cause of action, petitioners allege that DHCR violated FOIL by failing to respond to petitioners' request for information.

The relief petitioners seek is a judgment: (a) reversing, annulling and remanding the 2010/2011 SAF; (b) enjoining DHCR or others from implementing the 2010/2011 SAF as the basis for rent increases; (c) requiring DHCR to implement a standard for

increases in rent for rent-controlled units that is consistent with the RCL and with the rights of such tenants; and (d) awarding petitioners costs and disbursements.

DHCR argues that petitioners have failed to meet the burden established by the Court of Appeals for challenges to the SAF and have failed to meet their burden in showing that the establishment of the 2010/2011 SAF was arbitrary or capricious, that it violated the RCL, that the implementation of the rent increases discriminated against rent-controlled tenants in general, or against tenants on the basis of age, or that it denied those tenants equal protection of the laws. DHCR further contends that the promulgation of the SAF did not violate SAPA, nor is DHCR in violation of FOIL.

DHCR contends that the SAF procedure has been judicially approved and that petitioners have failed to establish a basis for overturning it. In 2005, this court addressed many of the issues raised by petitioners herein in *Committee to Protect Rent Controlled Tenants and Frederick Marshall v New York State Division of Housing and Community Renewal* (Sup Ct, NY County, Sept. 9, 2005, Goodman, J., index No. 106234/04) (Marshall). In Marshall, this court upheld the method by which the SAF was derived. The court found that there was no evidence that the use of sampling techniques and statistical averages used by DHCR

failed to meet criteria set forth by Court of Appeals in the *Beame* case. The court also found that DHCR was not required by law to periodically re-evaluate the MBR formula and concluded that the Court of Appeals had already determined that individual building audits referred to in RCL § 26-405 (a) (4) were not mandatory, but rather were a matter of administrative discretion. This court denied all of the claims raised by petitioners in Marshall, and dismissed the proceeding.

In this proceeding, the first and second causes of action are dismissed. The Court of Appeals upheld the use of the SAF, as long as the sampling techniques and statistical methods used to develop the SAF are "sound, fair, representative and, in general, designed to produce an accurate result." *Beame*, at 138. The Preliminary SAF Report explains that the SAF was based on a sample of 3,112 buildings with rent-controlled apartments from 2007 to 2009, and that the SAF was derived from the median of the percentage change in each of the sample's building-wide MBR's.

It is petitioners' burden to show that the SAF falls short of the standards set forth by the Court of Appeals. *Beame* at 138. They have not met their burden. The Preliminary SAF Report states that the sample consists of those buildings that have filed for the last six biennial cycles for the MBR. According to DHCR, such buildings would contain MBR levels and increases in

the components appropriately reflective of those participating in the MBR program. The court in Marshall noted that there were only 14,000 buildings with rent-controlled units at that time. DHCR states that the number is surely even lower now.

As was argued by the petitioners in Marshall, the petitioners herein also contend that the allocation of MBR factors adopted by DHCR gives substantial weight to two factors, return on investment and real estate taxes. Petitioners argue that, as a result, rent increases are based primarily on increases in market value rather than on costs, and that there is no justification for the weight afforded to them. Petitioners, however, do not present any evidence that the weight afforded to these two factors violates the criteria set forth by the Court of Appeals in *Beame* or is an irrational application of the court-approved methodology for the SAF. DHCR shows that the percentages allocated to those two factors are within the range of past percentages. Furthermore, as pointed out by this court in Marshall, petitioners do not offer any expert opinion, by an economist or otherwise, in support of their contention that DHCR's weighting process violates the RCL.

The third cause of action is dismissed. Petitioners' argument that rent-stabilized tenants are granted more favorable terms than rent-controlled tenants, and that such differential

treatment is unconstitutional, is unavailing. The rent-control and rent-stabilization laws "were enacted as separate and distinct systems to address different problems in the housing market, even though each was primarily directed at ameliorating the effects of the shortage of housing accommodations." *Matter of Hicks v New York State Div. of Hous. & Community Renewal*, 75 AD3d 127, 132 (1st Dept 2010). As the court stated in Marshall, "[p]etitioners are also not denied equal protection of the laws because apartments subject to rent control are treated differently than apartments subject to rent stabilization." Marshall, at 12, citing *Felner v Office of Rent Control of N.Y. City Dept. of Rent & Hous. Maintenance*, 27 NY2d 692 (1970).

The fourth cause of action is dismissed. Petitioners and DHCR acknowledge that the average age of rent-controlled tenants is older than the average age of tenants in New York City overall. DHCR notes, however, that, according to the 2008 New York City Housing and Vacancy Survey, while the majority of rent-controlled units were rented by householders over 62, one-third were under 62, with more than 10% of the total renters between 35 and 46. DHCR points out that there is no means testing or age testing involved in rent control program. As to the incomes of the tenants, DHCR points out that the legislature has provided a remedy for what it considers the truly needy elderly under the

Senior Citizen Rent Increase Exemption Program, which exempts from rent increases tenants who are 62 and older and of limited income under both rent control and rent stabilization.

The fact that the tenants tend to be older than tenants overall in the City of New York, however, is a consequence of the framework of the rent-control law. As stated by DHCR in the Preliminary SAF Report, "[g]enerally, the rent control program applies to buildings constructed before February, 1947 and containing apartments in which the tenant has been in continuous occupancy since June 30, 1971." Thus, inevitably, the number of rent-controlled apartments will shrink over time, and the average age of the tenants who remain in rent-controlled apartments will increase over time. Presumably, those who have remained in their apartments for the almost 40 years since the cut off date of June 30, 1971, have done so, in part, based on the perceived value of their rent-controlled apartments in relation to other available options in the City of New York.

The fifth cause of action is dismissed. This court agrees with the holding in Marshall that DHCR has satisfied its procedural obligations by complying with the procedures required under RCL § 26-405 (a) (9). The court in Marshall pointed out that neither petitioners nor the court had found a court decision indicating that DHCR must comply with SAPA in promulgating the

biennial adjustments to the MBR. Thus, there is no merit to petitioners' claim that the SAF was promulgated in violation of SAPA.

The sixth cause of action is dismissed. DHCR maintains that it is not in violation of FOIL. It asserts that it responded to FOIL request by e-mail, which, on information and belief, was forwarded to petitioners' attorney on March 15, 2010. DHCR contends that, to the extent that petitioners' FOIL request is an appropriate FOIL matter, DHCR has complied with it. If petitioners found DHCR's response inadequate, however, their next step was to file an appeal with a FOIL appeals officer, not to bring that issue in an Article 78 proceeding. *See e.g. Matter of Reubens v Murray*, 194 AD2d 492 (1st Dept 1993); Public Officers Law § 89 (4) (a).

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: November 29, 2010

ENTER:

J.S.C.
JANE S. SOLOMON