STATE OF NEW YORK
DIVISION OF HOUSING AND COMMUNITY RENEWAL
OFFICE OF RENT ADMINISTRATION
GERTZ PLAZA
92-31 UNION HALL STREET
JAMAICA, NEW YORK 11433

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IN THE MATTER OF THE ADMINISTRATIVE APPEAL OF	ADMINISTRATIVE REVIEW DOCKET NO.: CU930005RO
GEM Management Partners LLC / 280 Dobbs Ferry Road GEM, LLC, PETITIONER	RENT ADMINISTRATOR'S DOCKET NO.: CN930017B

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ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

On September 9, 2014, the above-named owner, by counsel, filed a timely petition for administrative review (PAR) of an amended order issued on August 12, 2014 by a Rent Administrator concerning the various housing accommodations at the premises 461 Riverdale Avenue, Yonkers, New York. This order directed a reduction in rent based on a determination of a decrease in building-wide services.

The Commissioner has carefully reviewed the entire record including that portion of the record that is relevant to the issues raised by the owner's appeal.

On February 27, 2014 the tenant of Apartment 7G, as tenant representative on behalf of himself and eleven joining tenant signatories, filed an application for a rent reduction based upon decreased building-wide services (services complaint). The services complaint alleged that the building intercom system was not being maintained by management and had been changed from an audio-based system to a telephone-based system. The tenant representative stated that the building management switched from a fully-functioning intercom system to one that requires of tenants to have and disclose a personal telephone number in order to allow access to visitors; and that those tenants, usually seniors, who neither have a cell phone number nor wish to divulge their private numbers, have been left with no alternative means for allowing entry or intercommunication with building visitors.

The tenant representative further stated that new tenants do not have phones, and that the elderly tenants who cannot reach their phones have trouble accessing visitors, which results in numerous break-ins to the building.

The owner's answer, filed on April 4, 2014, alleged in substance that management had changed the existing intercom system out of necessity due to the failure of intercom riser cables,

the replacement of which would require significant structural damage. The owner alleged that the existing intercom was replaced with a Keri Access Intercom System and this new system was far more cost effective, was not previously complained about by any of the tenants, has been working properly for the building as intended, and has been in compliance with the requirements of the City of Yonkers Building Department.

The owner further claimed that the tenant had filed a number of services complaints since July of 2013, all of which were dismissed by the DHCR; and that the tenant specifically raised an issue about the non-maintenance of the intercom system in a prior DHCR proceeding referenced under Docket Number CM910055S and the Rent Administrator, in like fashion, terminated this complaint.

In the order appealed herein, the Rent Administrator determined that the owner failed to rebut the tenants' allegations regarding the replacement of the intercom system with a new technology which requires the tenant to have either a landline or mobile phone, and that such action by the owner, without prior approval of the DHCR, warrants a rent reduction.

On appeal, the owner-petitioner contends that the Rent Administrator's determination was legally and factually in error based on several grounds. First, the owner asserts that the complainant-tenant and the joiners have not alleged that intercom services are not provided, and in point of fact intercom services are being provided and have been so provided since 2008 by a new and better system. The owner asserts secondly that if the basis for the rent reduction is the owner's filing for a major capital improvement (MCI)[1], then any finding that a replacement of the existing intercom with an improved system now warrants a rent reduction is irrational, especially since no tenants have complained about the replacement system for six years, and since the tenant representative never filed a PAR and the time for doing so has expired. The owner asserts thirdly that the tenant representative does not cite the name of any tenants who have actually experienced trouble 'reaching their phones' or 'accessing visitors', nor does the Rent Administrator surmise that seniors would have less of a problem getting to their cell phones, which is usually kept on one's person, as opposed to a wall receiver situated next to the entrance door. The owner asserts fourthly that the Rent Administrator did not send an inspector to the building and should have done so instead of relying upon the word of a tenant known to have filed a number of meritless services complaints in the past.

The owner-petitioner further argues that the appealed order is contrary to rent agency precedent. Reference is made to the decision in *Matter of Tramutola* (Docket Number UE410036RT, issued 11/03/2006) wherein the Commissioner specifically denied a tenant appeal and upheld a Rent Administrator's order holding that a new intercom system which utilizes tenant phone lines did not constitute a reduction in services. According to the owner, the appealed order's statement about the need for prior approval by the DHCR, in addition to being against DHCR's precedent, constitutes a due process violation because this cited ground was raised for the first time by the Rent Administrator, not by the tenant, and the owner was therefore not given an opportunity to respond in the proceeding below.

[1] Reference is being made to the proceeding under Docket Number XH910001OP, discussed infra.

The answers to the PAR filed by the tenant representative and three other joining tenants object to the owner's contentions and essentially reiterate all previously raised points. The tenants collectively urge that the appealed order was correct and should be upheld.

The Commissioner is of the opinion that the PAR should be denied.

Pursuant to Section 8627 of the Emergency Tenant Protection Act (ETPA), an owner of rent regulated property has an affirmative duty to maintain required services and to certify annually that all required services are being maintained. Pursuant to Section 2503.4 of the Tenant Protection Regulations (TPR), the DHCR is authorized to order a rent reduction, upon application by a tenant, where it is found that an owner has failed to maintain required or essential services.

The Commissioner takes notice that the initial 1984 registration for the subject building shows that building-wide services include "Intercom, Bell & Buzzer System." TPR Sections 2500.3, 2502.4(b) and 2503.4 require that an owner provide and maintain on the applicable base date all essential services unless and until an owner files an application to decrease such services and an order permitting such decrease has been issued. TPR Section 2502.4(b) provides that no such reduction in rent or decrease in services, or modification or substitution of essential services shall take place prior to the approval of the owner's application by the DHCR, and that such decrease, modification or substitution must not be inconsistent with the ETPA or the TPR.

There is no issue that the intercom system for the subject building was unilaterally modified by the owner 2008. The owner acknowledges that the original intercom system was replaced with technology utilizing a Keri Access Intercom System, which operated by the use of a tenant's personal landline or mobile phone number. It is the DHCR's policy that such a modification constitutes a reduction in services in the absence of an approved modification application, and therefore the Commissioner finds that the Rent Administrator's determination to impose a rent reduction was correct without the need for additional investigation by way of a physical inspection.

The DHCR's policy has been upheld by the courts. In the case of 254 PAS Property, LLC v. DHCR, Index No. 113797/2011, Sup.Ct., New York County, issued on March 28, 2012, the Court dismissed the owner's Article 78 proceeding as against the PAR decision in *Matter of Sgroi* (Administrative Review Docket Number YG410029RT, issued 07/28/2011). In Sgroi, the Deputy Commissioner found that the Rent Administrator had erred by failing to find that the intercom system, as modified, did not warrant a rent reduction. In the Article 78 proceeding, Justice Cynthia Kern upheld the Deputy Commissioner's decision and stated in her decision, in pertinent part, as follows:

> ...respondent unilaterally discontinued the previous intercom system whereby one could communicate with tenant's apartment via a communication system installed and maintained by the building owner at no additional cost to the tenant and without reliance upon the telephone system. Respondent instead put in place a system by which the building can only contact tenant via tenant's cellular phone. Based on these facts, Deputy Commissioner Pascal rationally found that because respondent changed the mode of

> delivery of intercom services to the tenants in the building without first filing an application for a modification of services with DHCR, a rent reduction regarding the intercom/telephone system service was in order. This Court finds that the DHCR's determination reversing the Rent Administrator's order ..., and modifying such order to add the intercom/telephone system to the list of building services which are not maintained, was therefore rational.

In Tramutola the owner replaced the intercom system for the building, however the issue in that administrative review proceeding (UE410036RT) centered not upon a building-wide complaint about the replacement system but rather upon a single tenant's complaint about her inability to contact the doorman in the lobby by the use of a cell phone. The Sgroi PAR decision referred to above specifically distinguished the facts in Tramutola and clarified that the rent reduction in Tramutola was based on the tenant's action in ordering the telephone company to disconnect services to her apartment. Furthermore, to the extent that Tramutola cited a ruling in an earlier (2004) administrative review decision under Docket Number RC410058RT, the Commissioner will note that such ruling is no longer the policy of the DHCR especially in light of the above-cited court decision.

While the owner-petitioner alludes to the fact that the replacement intercom system should be viewed favorably as a capital improvement, the available evidence does not support this conclusion. In its PAR, the owner submitted a "Prior Opinion on Proposed Major Capital Improvement(s) (MCI)" issued on August 18, 2009 in the proceeding under Docket Number XH910001OP, as concerns a Security Camera System. The determination to the owner's prior opinion request was cited as: the Security Camper System constitutes a major capital improvement if certain requirements are met, ie. *must be a new system, and must monitor all entrances to the building on a 24-hour basis OR new security monitoring system with visual capacity installed in each apartment and with functioning intercom system.* The Commissioner will point out that this order constituted an advisory opinion only, and did not address the propriety of any modification to the existing intercom system.

Further, the DHCR's case tracking records disclose that the owner applied on May 23, 2011 for an MCI rent increase for two capital improvements listed as Intercom and Camera System, and such application was denied by an order under Docket Number ZE930032OM, issued on February 3, 2012, on grounds that 1) the owner failed to file the application within two years from the completion date of the installations (intercom completed 05/13/08 and Camera System installed 02/16/09), and 2) the installations do not constitute an MCI but are considered as repairs and maintenance.

Since no order has been issued by the DHCR approving the replacement intercom system as a major capital improvement, the Commissioner finds that the tenants were not subject to a limitations period per se. Nor would the tenants have been barred from filing the services complaint in any event, as the law specifically prohibits a tenant's waiver of the benefit of any provision of the TPR or ETPA (TPR Section 2500.12).

Lastly, a review of the order under Docket Number CM910055S shows that the Rent Administrator terminated the tenant-representative's services complaint alleging fire damage to his individual apartment (7G) based upon the results of an inspection of the apartment and upon the absence of a vacate order. Contrary to the owner's claim, this order did not render any findings concerning the tenant's intercom system and thus had no preclusive effect for purposes of the instant proceeding.

THEREFORE, in accordance with the applicable provisions of the Emergency Tenant Protection Regulations, it is

ORDERED, that the petition for administrative review be, and the same hereby is, denied; and, that the Rent Administrator's order be, and the same hereby is, affirmed.

ISSUED:

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WOODY PASCAL
Deputy Commissioner