

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

CI 20,753 and CI 20,754

In re: 2300 Good Hope Road, S.E. and 2330 Good Hope Road, S.E.

Ward Seven (7)

**TENANTS OF 2300 AND 2330 GOOD HOPE ROAD, S.E.**  
Tenants/Appellants

v.

**MARBURY PLAZA, L.L.C. and A&A MARBURY, LLC**  
Housing Providers/Appellees

**DECISION AND ORDER**

March 10, 2015

**SZEGEDY-MASZAK, CHAIRMAN.** This case is on appeal to the Rental Housing Commission (Commission) from a decision and order issued by the Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD).<sup>1</sup> 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- 2-510 (Supp. 2008), and the District of Columbia Municipal Regulations (DCMR), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

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<sup>1</sup> The Office of Administrative Hearings (OAH) assumed jurisdiction over the conduct of hearings on tenant petitions from RACD and the Rent Administrator pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (Supp. 2005). The functions and duties of the RACD were transferred to the Department of Housing and Community Development (DHCD) by the Fiscal Year Budget Support Act of 2007, D.C. Law 17-20, 54 DCR 7052 (September 18, 2007) (codified at D.C. OFFICIAL CODE § 42-3502.03a (Supp. 2008)).

## I. PROCEDURAL HISTORY<sup>2</sup>

On November 9, 2000, Marbury Plaza, LLC filed capital improvement petitions CI 20,753 and CI 20,754 (collectively, “Capital Improvement Petitions”) for 2300 and 2330 Good Hope Road, S.E. (collectively, “Housing Accommodations”), pursuant to D.C. CODE § 45-2520 (Supp. 1999).<sup>3</sup> On December 18, 2008, the Commission granted the motion of A&A Marbury, LLC, who had purchased the Housing Accommodations on March 31, 2004, to intervene as a housing provider in this case. Tenants of 2300 and 2330 Good Hope Rd., S.E. v. Marbury Plaza,

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<sup>2</sup> The Commission notes that the complete procedural history prior to April 18, 2005 is set forth in the Commission’s Decision and Order of the same date: Marbury Plaza, LLC v. Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 and CI 20,754 (RHC Apr. 18, 2005). The Commission, in its discretion, sets forth herein only those facts relevant to the instant Decision and Order.

<sup>3</sup> The provisions of the Act that govern the Commission’s consideration of this appeal are set out in the 1999 supplement to the 1985 edition of the D.C. OFFICIAL CODE, and unless otherwise indicated, all references in this opinion to the D.C. OFFICIAL CODE are to the 1999 supplement to the 1985 edition. D.C. OFFICIAL CODE § 45-2520 provides, in relevant part:

- (a) On petition by the housing provider, the Rent Administrator may approve a rent adjustment to cover the cost of capital improvements to a rental unit or housing accommodation if:
  - (1) The improvement would protect, or enhance the health, safety, and security of the tenants or the habitability of the housing accommodation; . . .
- (b) The housing provider shall establish to the satisfaction of the Rent Administrator:
  - (1) That the improvements would be considered depreciable under the Internal Revenue Code (26 U.S.C.);
  - (2) The amount and cost of the improvement including interest and service charges; and
  - (3) That required governmental permits and approvals have been secured . . . .
- (g) The housing provider may make capital improvements to the property before the approval of the rent adjustment by the Rent Administrator for the capital improvements where the capital improvements are immediately necessary to maintain the health or safety of the tenants . . . .
- (i) The housing provider may petition the Rent Administrator for approval of the rent adjustment for any capital improvements made under section (g) of this section, if the petition is filed with the Rent Administrator within 10 calendar days from the installation of the capital improvements.

This section of the Act is currently codified at D.C. OFFICIAL CODE § 42-3502.10 (2001).

LLC, CI 20,753 and CI 20,754 (RHC Dec. 18, 2008).<sup>4</sup> Hereinafter the Commission shall refer to Marbury Plaza, LLC and A&A Marbury, LLC, collectively, as “Housing Provider.”

On December 10, 2001, RACD hearing examiner Gerald Roper (Hearing Examiner Roper) issued a decision and order: Marbury Plaza, LLC v. Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 (RACD Dec. 12, 2001) (Final Order), approving the Capital Improvement Petitions. R. at 153-75.

A number of tenants<sup>5</sup> filed a Notice of Appeal on December 28, 2001, and the Commission issued an order on March 14, 2002. Tenants of 2300 and 2330 Good Hope Rd., S.E., v. Marbury Plaza, LLC, CI 20,753 (RHC Mar. 14, 2002). The Commission remanded the case to RACD for a hearing to make specific findings of fact and conclusions of law on the identity of the tenants who were parties to the action, and to identify the tenants who were eligible for the elderly and disabled exemption. *Id.* at 16-17. The Commission directed the Housing Provider to serve each tenant in the Housing Accommodations with the exemption form for elderly or disabled status. *Id.* at 15

On March 3, 2003, Hearing Examiner Roper issued an order after remand that listed the tenants who were parties to the case and the tenants who were qualified for the elderly and disabled exemption from the capital improvement surcharge. Marbury Plaza, LLC, CI 20,753 (RACD Dec. 12, 2001). The Housing Provider filed Housing Provider’s Notice of Appeal with the Commission on March 21, 2003, and the tenants filed a Notice of Appeal on April 16, 2003.

In a decision issued April 18, 2005, the Commission reversed the findings of Hearing

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<sup>4</sup> The Commission notes that this appeal involves two consolidated capital improvement petitions: CI 20,753 and CI 20,754. For ease of discussion, hereinafter the Commission will cite to these consolidated petitions as follows: “CI 20,753.”

<sup>5</sup> The Commission notes that the complete list of the tenants of the Housing Accommodations that are parties to these capital improvement petitions is contained in the RACD order dated March 7, 2008. Marbury Plaza, LLC, CI 20,753 (RAD Mar. 7, 2009) at 1-11; R. at 309-19. Neither party has appealed the identity of the parties contained in the March 7, 2008 order.

Examiner Roper regarding the identity of the tenants who were parties to the proceedings.

Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 (RHC Apr. 18, 2005). The

Commission remanded the case again to RACD with directions to issue final findings of fact that identified all of the tenants who were parties to the proceedings, all the tenants who were denied party status (with the reasons for the denial), and all of the tenants who were eligible for the elderly or disabled exemption from the capital improvement surcharge. *Id.* at 20-21. The Commission directed RACD to modify and reissue the Final Order by incorporating all revised findings of fact regarding the appropriate tenant-parties. *Id.* at 21.

On March 7, 2008, hearing examiner Keith Anderson (Hearing Examiner Anderson), with the Rental Accommodations Division (RAD) of DHCD,<sup>6</sup> issued a proposed decision and order in which he listed the names of the tenants that would be considered parties to the case (hereinafter referred to collectively as “Tenants”).<sup>7</sup> Marbury Plaza, LLC, CI 20,753 (RAD Mar. 7, 2009) at 1-11; R. at 309-19. Hearing Examiner Anderson incorporated into the decision the list of elderly or disabled tenants, with minor corrections, identified in the prior RACD order of March 3, 2003.<sup>8</sup> *Id.* at 10; R. at 310. Additionally, the Hearing Examiner indicated that the Final Order was being reissued, pursuant to the Commission’s instructions. *Id.* at 11; R. at 309. The Final Order contains the following findings of fact:<sup>9</sup>

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<sup>6</sup> See *supra* at p. 1, n.1.

<sup>7</sup> The proposed order became final on April 10, 2008, after neither party filed exceptions and objections. Marbury Plaza, LLC, CI 20,753 (RAD Mar. 7, 2008) at 12; R. at 308; see D.C. OFFICIAL CODE § 2-509(d); 14 DCMR § 4012.4.

<sup>8</sup> The Commission notes that some, but not all, of the tenants designated as elderly or disabled were also identified as tenant-parties to this case. See Marbury Plaza, LLC, CI 20,753 (RAD Mar. 7, 2008) at 3-10; R. at 310-317; Marbury Plaza, LLC, CI 20,753 (RAD Mar. 3, 2003) at 4-5; R. at 278-79. Neither party has contested the identity of the elderly and disabled tenants.

<sup>9</sup> The findings of fact are recited herein using the same language and paragraph numbers as appears in the Final Order.

1. The subject [H]ousing [A]ccommodations, 2300 and 2330 Good Hope Road, S.E., registered with the District of Columbia Department of Consumer and Regulatory Affairs, Rental Accommodations and Conversion Division, in May, 1985; the registration numbers are 39406916 and 39406915, respectively.
2. The subject [H]ousing [A]ccommodations contain 316 rental units (2300 Good Hope Road, S.E.) and 257 rental units (2330 Good Hope Road, S.E.), respectively, all of which would be affected by the proposed capital improvements.
3. The proposed capital improvements would protect or enhance the health, safety, and security of the tenants and the habitability of the [H]ousing [A]ccommodation[s] for the reasons discussed at greater length above in the "Evaluation of the Evidence and Legal Analysis"; [sic] that discussion is hereby incorporated in these findings by reference.
4. The improvements are depreciable under the Internal Revenue Code.
5. The cost of the proposed capital improvements, inclusive of interest and service charges, is \$589,451 (2300 Good Hope Road, S.E.) and \$445,526 (2330 Good Hope Road, S.E.), respectively.
6. All required governmental permits or approvals for the capital improvements have been obtained.
7. The Housing Provider made all reasonable efforts to obtain a housing inspection of the subject [H]ousing [A]ccommodations.
8. Four Tenants of 2330 Good Hope Road, S.E. (Jocelyn Brinkley, Apt. No. 304; Jeremy Christopher Simon Norris, Apt. No. 718; Eric Jessup, Apt. No. 713, and Ellen P. McCauley, Apt. No. 607) received Petitions that erroneously contained the rent schedule for 2300 Good Hope Road, S.E. No Tenant was prejudiced by the receipt of the incorrect rent schedule.
9. The Housing Provider filed the Petitions on the approved forms for capital improvement petitions, which do not have instructions for completion of the form that include[s] notification to the tenants of the right to claim status as an elderly or disabled tenant.
10. The tenants represented by the Tenant Association in this proceeding are listed in Appendix A (2300 Good Hope Road, S.E.) and Appendix B (2330 Good Hope Road, S.E.). The Tenant Association does not represent a majority of the tenants in either [H]ousing [A]ccommodation.

Final Order at 20-21; R. at 156-57.

The Final Order contained the following conclusions of law:<sup>10</sup>

1. The [Housing Provider] is entitled to a capital improvement rent ceiling surcharge of \$19 per apartment per month for 2300 Good Hope Road, S.E., and a capital improvement rent ceiling surcharge of \$18 per apartment per month for 2330 Good Hope Road, S.E., to reimburse [the Housing Provider] for the cost of the proposed capital improvements. This rent ceiling surcharge will not be a permanent part of the rent ceiling, but shall be rolled back when the [Housing Provider] has recovered the costs of the capital improvements, including interest and service charges, as provided by law.
2. This case has not involved any determination of the proper rent ceilings prior to the date of this decision, and accordingly this decision shall not constitute a bar to any subsequent action with respect to the proper rent ceilings prior to the date of this decision.

Final Order at 21; R. at 156.<sup>11</sup>

On May 9, 2008, the Tenants filed a Notice of Appeal (Notice of Appeal),<sup>12</sup> indicating that they were appealing the December 10, 2001 Final Order, which had been “incorporated in the Decision and Order dated March 7, 2008.” Notice of Appeal at 1. The Notice of Appeal stated the following issues:<sup>13</sup>

1. The [Hearing] Examiner erred by excusing the Housing Provider from the requirements of [t]he Rental Housing Commission that satisfaction of the inspection requirement be met before a capital improvement petition may be granted. The Hearing Examiner made a [f]indings [sic] of [f]act [that] the Housing Provider only made reasonable efforts to obtain a housing inspection of the subject [H]ousing [A]ccommodations.
2. The [Hearing] Examiner erred by failing to dismiss the [Capital Improvement] [P]etition[s] or holding the petition[s] in abeyance until the Housing Provider provided the notice required to be given the [tenants] concerning the exemption for the elderly or disable[d] by the Commission through the

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<sup>10</sup> The conclusions of law are recited herein using the same language and paragraph numbers as appears in the Final Order.

<sup>11</sup> The Act was amended by the Rent Control Reform Amendment Act of 2006, effective August 5, 2006, which eliminated the term “rent ceiling” and replaced it with the term “rent charged.” D.C. Law 16-145 §§ 2(a) and (c), 53 DCR 4889-90.

<sup>12</sup> Hereinafter, the term “Notice of Appeal” shall refer exclusively to the Tenants’ May 9, 2008 Notice of Appeal.

<sup>13</sup> The issues on appeal are recited herein using the same language as appears in the Notice of Appeal.



[r]egulations. By the Housing Provider's testimony the notice required by the [r]egulations was not given.

3. The evidence does not support the findings [sic] of fact number 7 that the Housing Provider made all reasonable efforts to obtain a housing inspection of the subject [H]ousing [A]ccommodations. The Housings [sic] Provider requested an inspection of 2330 via a letter dated October 25, 2000 and filed the [Capital Improvement] Petition[s] on November 9, 2000. This only allowed the Inspection Division 15 days to arrange to inspect 573 units. Not only was this not a reasonable effort, it was not even a good faith attempt to get the inspection performed within thirty (30) days of filing the [Capital Improvement] Petition[s].

Notice of Appeal at 1-2. The Housing Provider filed a brief on January 26, 2009; the Tenants did not file a brief. The Commission held its hearing on this appeal on April 14, 2009.<sup>14</sup>

## **II. ISSUES ON APPEAL**<sup>15</sup>

- A. The [Hearing] Examiner erred by excusing the Housing Provider from the requirements of [t]he Rental Housing Commission that satisfaction of the inspection requirement be met before a capital improvement petition may be granted. The Hearing Examiner made a [f]indings [sic] of [f]act [that] the Housing Provider only made reasonable efforts to obtain a housing inspection of the subject [H]ousing [A]ccommodations.
- B. The evidence does not support the findings [sic] of fact number 7 that the Housing Provider made all reasonable efforts to obtain a housing inspection of the subject [H]ousing [A]ccommodations. The Housings [sic] Provider requested an inspection of 2330 via a letter dated October 25, 2000 and filed the [Capital Improvement] Petition[s] on November 9, 2000. This only allowed the Inspection Division 15 days to arrange to inspect 573 units. Not

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<sup>14</sup> The Commission notes that counsel for the Tenants raised an additional issue on appeal for the first time at the Commission's April 14, 2009 hearing: whether RACD erred in approving the capital improvement petitions because the Housing Provider failed to prove that all of the rental units in the Housing Accommodations had been properly inspected. Hearing CD (RHC Apr. 14, 2009) at 2:19-2:21. The Commission has consistently stated that its review is limited to those issues raised in the notice of appeal. 14 DCMR § 3807.4 ("Review by the Commission shall be limited to the issues raised in the notice of appeal"); Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014); Dorsey v. Bailey, RH-TP-11-30,165 and RH-TP-12-30,222 (RHC July 2, 2014). Accordingly, where the Tenants failed to raise the issue of whether all of the units in the Housing Accommodations were inspected in their Notice of Appeal, the Commission will not address that issue in this Decision and Order. 14 DCMR § 3807.4; Burkhardt, RH-TP-06-28,708; Dorsey, RH-TP-11-30,165 and RH-TP-12-30,222.

<sup>15</sup> The Commission, in its discretion, has reordered the issues on appeal for ease of discussion and to group together issues that involve the application and analysis of common facts and legal principles. *See, e.g., Barac Co. v. Tenants of 809 Kennedy St., N.W.*, VA 02-107 (RHC Sept. 27, 2013) at n.11; Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014) at n.10; Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC July 2, 2014) at n.6.

only was this not a reasonable effort, it was not even a good faith attempt to get the inspection performed within thirty (30) days of filing the [Capital Improvement] Petition[s].

- C. The [Hearing] Examiner erred by failing to dismiss the [Capital Improvement] [P]etition[s] or holding the petition[s] in abeyance until the Housing Provider provided the notice required to be given the [tenants] concerning the exemption for the elderly or disable[d] by the Commission through the [r]egulations. By the Housing Provider's testimony the notice required by the [r]egulations was not given.

### III. DISCUSSION

- A. The [Hearing] Examiner erred by excusing the Housing Provider from the requirements of [t]he Rental Housing Commission that satisfaction of the inspection requirement be met before a capital improvement petition may be granted. The Hearing Examiner made a [f]indings [sic] of [f]act [that] the Housing Provider only made reasonable efforts to obtain a housing inspection of the subject [H]ousing [A]ccommodations.
- B. The evidence does not support the findings [sic] of fact number 7 that the Housing Provider made all reasonable efforts to obtain a housing inspection of the subject [H]ousing [A]ccommodations. The Housings [sic] Provider requested an inspection of 2330 via a letter dated October 25, 2000 and filed the [Capital Improvement] Petition[s] on November 9, 2000. This only allowed the Inspection Division 15 days to arrange to inspect 573 units. Not only was this not a reasonable effort, it was not even a good faith attempt to get the inspection performed within thirty (30) days of filing the [Capital Improvement] Petition[s].

The Commission notes that despite being represented by counsel, the Tenants' Notice of Appeal does not make any reference or citation to the Act, its regulations, relevant case law precedent, the certified record in this case, or any other support for the assertions made in issues A and B on appeal. *See* Notice of Appeal. Moreover, counsel for the Tenants opted not to submit a brief to the Commission, and thus provided no additional legal or factual support for these issues, aside from the bare statements contained in the Notice of Appeal and recited above.

*Id.* Even when prompted at the Commission's hearing, counsel for the Tenants was not able to



provide any legal support for these issues on appeal, such as citations to the Act or relevant case law precedent.<sup>16</sup> Hearing CD (RHC Apr. 14, 2009).

The Commission's long-standing precedent requires that issues on appeal contain a "clear and concise statement of the alleged error(s)" in the lower court's decision. 14 DCMR § 3802.5(b) (2004);<sup>17</sup> *e.g.*, Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014); Bohn Corp. v. Robinson, RH-TP08-29,328 (RHC July 2, 2014); Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013). The Commission will dismiss issues that are "vague, overly broad, or do not allege a clear and concise statement of error." Burkhardt, RH-TP-06-28,706 (dismissing the following issue as too vague for review: "[w]hether the ALJ erred in applying [the Act's statute of limitations]"); Bohn Corp., RH-TP-08-29,328 (dismissing housing provider's contention that the ALJ gave the tenant legal advice where the housing provider failed to provide any additional details concerning the alleged advice given); Barac Co., VA 02-107 (finding issue stating "the Hearing Examiner used the wrong burden of proof" was too vague for review).

The Commission's review of the Tenants' statements of issues A and B on appeal, recited above, reveals that they are vague, overly broad, and do not contain a clear and concise statement of the alleged error(s) in the Final Order. Notice of Appeal at 1-2; *see* 14 DCMR § 3802.5(b); Burkhardt, RH-TP-06-28,706; Bohn Corp., RH-TP-08-29,328; Barac Co., VA 02-107. The Commission notes that the Tenants assert generally that Hearing Examiner Roper erred in his interpretation of the "Rental Housing Commission's" inspection requirement, without any

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<sup>16</sup> The Commission notes that the conduct of the Tenants' counsel in this case falls below the Commission's expectation for attorneys appearing before it. The Notice of Appeal filed by counsel lacked any citation to legal authority, and counsel failed to file a brief. The Commission's role is not to manufacture legal arguments for a party that is represented by counsel, where counsel fails to present any legal justification for issues raised on appeal.

<sup>17</sup> 14 DCMR § 3802.5(b) provides the following, in relevant part: "The notice of appeal shall contain the following: . . . (b) . . . a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator."

reference to why this constituted error, what provisions of the Act were violated, or any other support for the contention that the Commission has imposed an inspection requirement on housing providers prior to the approval of a capital improvement petition. Notice of Appeal at 1-2. Additionally, the Tenants assert that the Housing Provider's efforts to obtain an inspection of the Housing Accommodations were not reasonable, without citing to any record evidence that supports their position or contradicts the findings of Hearing Examiner Roper. *Id.* Without such additional details, or any reference to factual or legal support for issues A and B, the Commission determines that these issues do not provide the required "clear and concise statement of alleged error," and thus will be dismissed. 14 DCMR § 3802.5(b); Burkhardt, RH-TP-06-28,706; Bohn Corp., RH-TP-08-29,328; Barac Co., VA 02-107.

Moreover, to the extent that the Tenants are asserting in either issue A or B that the Housing Accommodations were not in substantial compliance with the housing regulations prior to the approval of the Capital Improvement Petitions, the Commission's review of the record reveals that the Tenants did not raise this issue at the RACD hearing, and thus may not raise it for the first time now on appeal. Hearing Tape (RACD Feb. 7, 2001);<sup>18</sup> Burkhardt, RH-TP-06-28,708 (holding that the Commission cannot review an issue that was not raised before the ALJ) (citing 1880 Columbia Rd. N.W. Tenants' Ass'n v. D.C. Rental Accommodations Comm'n, 400 A.2d 333, 339 (D.C. 1979)); *see also, e.g.* Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC July 2, 2014) (citing Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994)); Bohn Corp., RH-TP-08-29,328.

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<sup>18</sup> The Commission's review of the record reveals that counsel for the Tenants made a motion to dismiss the Capital Improvement Petitions on the sole basis that no inspection had been completed of the Housing Accommodations prior to the filing of the Capital Improvement Petitions. Hearing Tape 1 (RACD Feb. 7, 2001).

Finally, to the extent that the Tenants are arguing in either issue A or B that the Act requires an inspection of the Housing Accommodations prior to the filing of the Capital Improvement Petitions, the Commission is satisfied that the Tenants are mistaken.<sup>19</sup> See D.C. OFFICIAL CODE § 42-3502.08(b) (2001); 14 DCMR § 4216.3; Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696 (D.C. 2008).<sup>20</sup> Rather, the District of

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<sup>19</sup> Even if the Tenants' statement of the law were correct, the Commission's review of the record reveals uncontested substantial evidence that Mr. Journey, Senior Vice President for the Housing Provider, made reasonable efforts to obtain a housing inspection, by, for example, sending a written request for an inspection on October 25, 2000, and then by rescheduling the inspection to a date when both the Housing Provider and the Tenants were available to participate. PXs 9-10; R. at 191-92; Hearing Tape 1 at 1059-1223 (RACD Feb. 7, 2001).

<sup>20</sup> D.C. OFFICIAL CODE § 42-3502.08(b) provides as follows:

(b) A housing accommodation and each of the rental units in the housing accommodation shall be considered to be in substantial compliance with the housing regulations if:

(1) For purposes of the adjustments made in the rent ceiling in §§ 45-2516 and 45-2517, all substantial violations cited at the time of the last inspection of the housing accommodation by the Department of Consumer and Regulatory Affairs before the effective date of the increase were abated within a 45-day period following the issuance of the citations or that time granted by the Department of Consumer and Regulatory Affairs, and the Department of Consumer and Regulatory Affairs has certified the abatement, or the housing provider or the tenant has certified the abatement and has presented evidence to substantiate the certification. No certification of abatement shall establish compliance with the housing regulations unless the tenants have been given a 10-day notice and an opportunity to contest the certification; and

(2) For purposes of the filing of petitions for adjustments in the rent ceiling as prescribed in § 45-2526, 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.

D.C. OFFICIAL CODE § 42-3502.08(b). The Commission notes that the Final Order in this case was decided under a previous, but identical, codification of this section of the Act: D.C. OFFICIAL CODE § 45-2518 (1985).

14 DCMR § 4216.3 provides as follows:

4216.3 In a hearing on a housing provider's petition for a rent ceiling adjustment, there shall be a rebuttable presumption of substantial compliance with the housing regulations for each rental unit and the common elements of a housing accommodation, if the following applies:

(a) The housing accommodation was last inspected for housing code violations more than thirty (30) days prior to the date of filing of the petition for adjustment, and all substantial violations then cited have been abated within the time set forth in the notice of violations; or

Columbia Court of Appeals (DCCA) has clearly held the opposite: that the Act does not contain an inspection requirement prior to the filing of a capital improvement petition.<sup>21</sup> Dorchester House, 938 A.2d 696.

In Dorchester House, 938 A.2d 696, the DCCA affirmed that the Commission is authorized by the Act to require a showing of a housing accommodation's presumptive or actual substantial compliance with the housing regulations as a condition of approval of a capital improvement petition. Dorchester House, 938 A.2d at 704-707. In discussing the evidence required to show compliance with the housing regulations, the DCCA identified three (3) methods by which a housing provider would be able to demonstrate substantial compliance: (1) on the basis of a pre-petition inspection of the housing accommodation under D.C. OFFICIAL CODE § 42-3502.08(b)(2); (2) on the basis of a certification that all violations identified at an earlier inspection had been abated, under D.C. OFFICIAL CODE § 42-3502.08(b)(1); or (3) because D.C. OFFICIAL CODE § 42-3502.08(b) is not "the exclusive means by which housing code compliance could be demonstrated – on the basis of other evidence satisfactory to the [Commission]." *Id.* at 707 (emphasis added).

The DCCA explained that D.C. OFFICIAL CODE § 42-3502.08(b)(2) does not require a "complete inspection within the 30 days preceding the filing of capital improvement petition . . . [as] the *sine qua non* of approval" of a capital improvement petition. Dorchester House, 938 A.2d at 702-703. Instead, the DCCA held that D.C. OFFICIAL CODE § 42-3502.08(b)(2)

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(b) The housing accommodation shall have been inspected at the housing provider's request within thirty (30) days immediately preceding the date of filing of the petition for adjustment.

The Commission observes that the current version of 14 DCMR § 4216.3 is identical to the version that was in effect at the time that the Capital Improvement Petitions were filed. *Compare* 14 DCMR § 4216.3 (2004), *with* 14 DCMR § 4216.3 (1991).

<sup>21</sup> At the Commission's hearing, counsel for the Tenants conceded that the DCCA's opinion in Dorchester House, 938 A.2d 696, "may control" the outcome of this case. Hearing CD (RHC Apr. 14, 2009) at 2:09-2:12.

described merely one circumstance in which a housing provider would be entitled to a presumption of compliance with the housing regulations. *Id.* at 703.<sup>22</sup>

For all of the foregoing reasons, the Commission dismisses issue A and B on appeal.<sup>23</sup>

**C. The [Hearing] Examiner erred by failing to dismiss the [Capital Improvement] [P]etition[s] or holding the petition[s] in abeyance until the Housing Provider provided the notice required to be given the [tenants] concerning the exemption for the elderly or disable[d] by the Commission through the [r]egulations. By the Housing Provider's testimony the notice required by the [r]egulations was not given.<sup>24</sup>**

<sup>22</sup> On remand, the Commission clarified that DCRA housing inspection notices, DCRA notices of abatement, testimony, and other documentary evidence, were examples of evidence that could be introduced by a housing provider to show whether a housing accommodation is in substantial compliance with the housing regulations. Tenants of 2480 16<sup>th</sup> St. N.W. v. Dorchester House Assocs. Ltd. P'ship, CI 20,768 (RHC Nov. 18, 2014) at 8 (citing Tenants of 1460 Irving St., N.W. v. 1460 Irving St., L.P., CIs 20,760-20,763 (RHC Apr. 5, 2005); Tenants of 2480 16<sup>th</sup> St., N.W. v. Dorchester House Assocs., CIs 20,739 & 20,741 (RHC Jan. 14, 2000)). The Commission also stated that a housing provider could "self-certify" that a housing accommodation was in compliance with the housing regulations, so long as such self-certification contained all of the facts necessary to establish that each unit in the housing accommodation was in actual or presumptive compliance with the housing regulations. *Id.* at 8-9.

<sup>23</sup> At the Commission's hearing, counsel for the Housing Provider represented, without dispute, that no rent charged increase has been taken as a result of the Capital Improvement Petitions at issue in this case. Hearing CD (RHC Apr. 14, 2009) at 2:40. The Commission observes that, in the absence of any implemented increase in rent charged on the basis of the errors alleged by the Tenants, the Tenants' challenges to the Capital Improvement Petitions at most would appear to constitute "harmless error." See Karpinski v. Evolve Prop. Mgmt., RH-TP-09-29,590 (RHC Aug. 19, 2014) (defining "harmless error" as an error which "was not prejudicial to the substantive rights of the party assigning it, and in no way affected the final outcome of the case.") See, e.g., Young v. Vista Mgmt., TP 28,635 (RHC Sept. 18, 2012) at n.5 (determining that hearing examiner's failure to include ex parte communication in the record was harmless error where the Commission was satisfied the hearing examiner did not consider the communication in the final order); Jackson v. Peters, RH-TP-12-28,898 (RHC Feb. 3, 2012) at n.21 (deciding that ALJ's statement that the tenant could not appeal an order was harmless error where the Commission exercised jurisdiction over the appeal by accepting the filing of the tenant's notice of appeal). However, since neither party has raised this issue before the Commission, the Commission will not address it in this Decision and Order.

<sup>24</sup> The Commission notes that the Tenants' statement of Issue C suffers from many of the same deficiencies as their statements of issues A and B: namely, that the statement does not direct the Commission to any specific section of the Act, regulations, case law precedent, or record evidence to support the assertions made. Notice of Appeal at 1; see 14 DCMR § 3802.5(b); Burkhardt, RH-TP-06-28,706; Bohn Corp., RH-TP-08-29,328; Barac Co., VA 02-107. However, the Commission, in its discretion, has determined that there are certain critical differences between the statements of Issues A and B, and the statement of Issue C. First, regarding the Commission's ability to interpret the propriety of the Tenants' statement of Issue C under 14 DCMR § 3802.5(b), the Commission notes that it has addressed the identical issue about proper notice to the elderly and disabled tenants at length in the Commission's previous decisions in this case. See, e.g., Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 (RHC Mar. 13, 2002). Second, unlike issues A and B, the Commission notes that the Tenants' statement of issue C at least provides that the legal basis for their assertion of error lies within the Act's "regulations," albeit they have not specified any specific regulation. Notice of Appeal at 1. The only similar reference to any statutory or regulatory basis for Issue A is merely its vague, general, non-statutory and non-regulatory reference to "requirements" of the Commission. See *supra* at 8. For the above reasons, and limited to the specific circumstances of this appeal, the Commission deems the statement of Issue C to meet – albeit minimally – the requirements of 14 DCMR § 3802.5(b).

The Commission observes that the Tenants' issue C, recited above, relates to the issue of whether the Capital Improvement Petitions should be dismissed because notice was not given to all of the tenants of the Housing Accommodations<sup>25</sup> regarding the right to claim status as an elderly or disabled tenant, under 14 DCMR § 4210.2 (1998).<sup>26</sup> Notice of Appeal at 1-2. Counsel for the Tenants elaborated at the Commission's hearing, asserting that in light of the Housing Provider's failure to give notice of the right to claim status as an elderly or disabled tenant at the time of filing the Capital Improvement Petitions, the petitions must be dismissed. Hearing CD (RHC Apr. 14, 2009) at 2:24.

This Commission notes that this issue was resolved in its previous decision in this case dated March 13, 2002. Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 (RHC Mar. 13, 2002); *see also* Notice of Appeal at 1-2. The Commission determines that the law of the case doctrine, which prohibits the Commission from reopening and reconsidering an issue that the Commission resolved in an earlier appeal, applies to this issue. *See, e.g. Morris*, RH-TP-06-28,794 (refusing to reconsider the application of the Act's statute of limitations where the Commission's previous decision in the case had definitively ruled on the issue); Carmel Partners, Inc. v. Levy, RH-TP-06-28,830 and RH-TP-06-28,835 (RHC May 16, 2014) (stating that it

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<sup>25</sup> As the Commission previously defined, "Tenants" (with a capital "T") refers to only those tenants of the Housing Accommodation that have been identified as parties to this case; "tenants" (with a lower-case "t") is meant to generally refer to all tenants of the Housing Accommodation, whether or not they are parties to this case. *See supra* at 4.

<sup>26</sup> The Commission notes that 14 DCMR § 4210.2 was amended in 1998, and the regulation in effect when the Capital Improvement Petitions were filed provides as follows:

A housing provider shall file a capital improvement petition on a form approved by the Commission. The form shall be accompanied by instructions for completion of the form, which shall include notification to the affected tenants that the petition has been filed and notification of the right to claim status as an elderly or disabled tenant.

45 D.C. Reg. 684 (Feb. 6, 1998). The amended regulation as recited above is identical to the version of the regulation currently in effect. 14 DCMR § 4210.2 (2004).



would not consider the issue of exemption, where the issue had been resolved in a previous decision); King v. McKinney, TP 27,264 (RHC June 17, 2005) (citing Lynn v. Lynn, 617 A.2d 693 (D.C. 1992)) (“The law of the case doctrine prohibits the Commission from reopening issues that the Commission resolved in an earlier appeal”).

The Commission’s March 13, 2002 decision determined that the Tenants had not received notice of their right to claim an exemption from a capital improvement surcharge due to elderly or disabled status, as required by 14 DCMR § 4210.2. Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 (RHC Mar. 13, 2002) at 11. However, the Commission determined that at the time the Capital Improvement Petitions at issue in this case were filed, the Rent Administrator had failed to issue to the Tenants any necessary form to claim an elderly or disabled exemption. *Id.* at 12-14 (citing 14 DCMR § 4210.47).<sup>27</sup> The Commission concluded its

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<sup>27</sup> The Commission notes that 14 DCMR § 4210.47 was amended in 1998, and the regulation in effect when the capital improvement petitions were filed provides as follows:

The procedures for an elderly or disabled tenant to claim exemption from payment of capital improvement rent ceiling increase shall be as follows:

- (a) If the increase in the rent charged is based on an approved capital improvement petition for which the notice of hearing was issued on or after the effective date of § 4210.45 through § 4210.52 of these rules, the elderly or disabled tenant, who claims the benefit of § 4210.46 shall:
  - (1) File with the Rent Administrator a claim of exemption in writing on a form approved by the Commission, within fifteen (15) days after receipt of the notice of hearing on the capital improvement petition;
  - (2) State on the form that the tenant is an elderly or disabled tenant, and submit any supporting documents that prove the tenant qualifies as an elderly or disabled tenant, as defined by § 4299.2(a) and (b); and
  - (3) Serve a copy of the claim and supporting documents on the housing provider named in the petition, or if the housing provider is represented, serve the housing provider’s representative in accordance with § 3911.
- (b) The claim for status as an elderly or disabled tenant shall be determined as part of the hearing on the capital improvement petition.

45 D.C. Reg. 684 (Feb. 6, 1998). The amended regulation as recited above is identical to the version of the regulation currently in effect, 14 DCMR § 4210.47 (2004).

discussion on this issue by stating the following:

Since the form [for claiming an elderly or disabled exemption from the capital improvement surcharge] now exists, this case is remanded for hearing and findings of fact and conclusions of law on both the identity of the Tenants as parties, and the identity of Tenants claiming to be elderly or disabled. Prior to the hearing, the Housing Provider must serve each Tenant in the two housing accommodations the form adopted by the Commission to claim the exemption as an elderly or disabled Tenant. Then the Tenants would have notice pursuant to 14 DCMR § 4210.2.

*Id.* at 14-15 (emphasis added).

The Commission observes that the entire basis of the Tenants' issue C on appeal is merely a reiteration of issues that the Commission previously addressed and resolved in its March 13, 2002 decision: namely, whether the Capital Improvement Petitions should be dismissed because the Housing Provider had failed to give proper notice regarding the right to claim status as an elderly or disabled tenant, under 14 DCMR § 4210.2.<sup>28</sup> *Id.* at 11-15; *see* Notice of Appeal at 1-2. Moreover, the Commission notes that the Tenants do not assert that they were never notified of the elderly and disabled exemption, nor do they assert that the notice given pursuant to the Commission's March 13, 2002 Order was in any way insufficient. Notice of Appeal at 1-2. Accordingly, under the law of the case doctrine, the Commission is prohibited from reconsidering this issue. *See* Morris, RH-TP-06-28,794; Carmel Partners, Inc., RH-TP-06-28,830 and RH-TP-06-28,835; King, TP 27,264.

Finally, the Commission's review of the record reveals that any failure to notify the tenants of the elderly and disabled exemption has since been cured, prior to any implementation of the capital improvement surcharge through a rent charged increase. *See* Marbury Plaza, LLC v. Tenants of 2300 and 2330 Good Hope Rd., S.E., CI 20,753 (RACD Oct. 7, 2002) at 2 (finding

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<sup>28</sup> The Commission notes that the March 13, 2002 decision arose in response to a notice of appeal filed by the Tenants, which raises the same issue regarding notification of the elderly and disabled exemption that was raised in this Notice of Appeal, using identical, or nearly identical language. *Compare* May 9, 2008 Notice of Appeal, *with* Dec. 28, 2001 Notice of Appeal.

that “the Housing Provider has sent the Tenants the Elderly and Disabled Tenant Claim of Exemption From Capital Improvement Rent Charged Increase dated September 9, 2002”), R. at 200; Sept. 11, 2002 Letter, R. at 255 (letter from the Housing Provider to the Rent Administrator, stating that the Housing Provider served the Tenants with the “Elderly and Disabled Tenant Claim of Exemption From Capital Improvement Rent Charged Increase”); Sept. 19, 2002 Letter, R. at 198 (letter from the Housing Provider to the Rent Administrator supplementing the Sept. 11, 2002 letter). Moreover, based on its review of the record, the Commission observes that any tenant of the Housing Accommodation could have contested an increase in the rent charged based on the capital improvement rent ceiling increase, through the filing of a tenant petition, alleging that the capital improvement increase was greater than the amount allowed for an elderly or disabled tenant. *See, e.g.*, 14 DCMR § 4214.3;<sup>29</sup> Bohn Corp., RH-TP-08-29,328.

Based on the foregoing, the Commission affirms the Hearing Examiner’s determination that the failure to provide notice of the elderly and disabled exemption did not warrant dismissal of the capital improvement petitions. *See* Morris, RH-TP-06-28,794; Carmel Partners, Inc., RH-TP-06-28,830 and RH-TP-06-28,835; King, TP 27,264; Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753.

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<sup>29</sup> 14 DCMR § 4214.3 provides, in relevant part, as follows:

The tenant of a rental unit or an association of tenants of a housing accommodation may, by petition filed with the Rent Administrator, challenge or contest any rent increase that is: . . . (b) Greater than the rent ceiling for the rental unit authorized by the Act or order of the Rent Administrator or Commission.

#### **IV. CONCLUSION**

Based on the foregoing, the Commission dismisses the Notice of Appeal.

#### **SO ORDERED**

  
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PETER B. SZEGEDY-MASZAK, CHAIRMAN

  
\_\_\_\_\_  
RONALD A. YOUNG, 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:

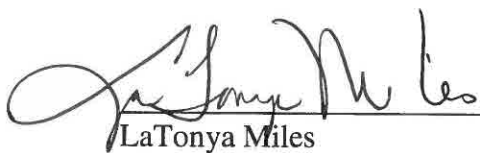
D.C. Court of Appeals  
Office of the Clerk  
Historic Courthouse  
430 E Street, N.W.  
Washington, DC 20001  
(202) 879-2700

**CERTIFICATE OF SERVICE**

I certify that a copy of the **DECISION AND ORDER** in CI 20,753 and CI 20,754 was served by first-class mail, postage prepaid, this **10th day of March, 2015**, to:

Bernard Gray, Sr., Esquire  
2009 18<sup>th</sup> St., S.E.  
Washington, DC 20020

Richard W. Luchs, Esquire  
1620 L Street, N.W.  
Suite 900  
Washington, DC 20036

A handwritten signature in black ink, appearing to read "LaTonya Miles", is written over a horizontal line.

LaTonya Miles  
Clerk of Court  
(202) 442-8949