

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-SF-15-20,126

In re: 1754 Lanier Pl., N.W.

Ward One (1)

TENANTS OF 1754 LANIER PLACE, N.W.

Tenants/Appellants

v.

1754 LANIER, LLC

Housing Provider/Appellee

DECISION AND ORDER

March 25, 2016

McKOIN, COMMISSIONER. This case is on appeal to the Rental Housing Commission (“Commission”) from a final order of the Office of Administrative Hearings (“OAH”), based on a petition filed in the Rental Accommodations Division (“RAD”) of the Department of Housing and Community Development (“DHCD”).¹ 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 (2012 Repl.), the District of Columbia Administrative Procedure Act (“DCAPA”), D.C. OFFICIAL CODE § 2-501 - 510 (2012 Repl.), and the District of Columbia Municipal Regulations (“DCMR”), 1 DCMR §§ 2800-2899, 1 DCMR §§ 2920-2941, and 14 DCMR §§ 3800-4399, govern these proceedings.

¹ OAH assumed jurisdiction over contested petitions from the Rental Accommodations and Conversion Division (“RACD”) of the Department of Consumer and Regulatory Affairs (“DCRA”) pursuant to the Office of Administrative Hearings Establishment Act of 2001, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD in DCRA were transferred to the RAD in DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.).

I. PROCEDURAL HISTORY

On January 27, 2015, 1754 Lanier, LLC (“Housing Provider”) filed related services or facilities petition RH-SF-15-20,126 (“SF Petition”), which requested authorization to convert the housing accommodation located at 1754 Lanier Place, N.W. (“Housing Accommodation”) from a centrally metered electrical system to individual metering and payment and to implement a corresponding reduction in rents charged. R. at 3-147. The SF Petition was opposed by several tenants residing in the Housing Accommodation (collectively, “Tenants”). *See* Scheduling Order; R. at 174.

An evidentiary hearing on the SF Petition was held before Administrative Law Judge Margaret A. Mangan (“ALJ”) on May 28, 2015. *See* Transcript of May 28, 2015 Evidentiary Hearing (“Tr.”); R. at 192-307. On October 29, 2015, the ALJ issued a final order approving the SF Petition. 1754 Lanier, LLC v. Tenants of 1754 Lanier Pl., N.W., 2015-DHCD-SF 20,126 (OAH Oct. 29, 2015) (“Final Order”); R. at 341-50. The Final Order requires the Housing Provider to implement rent reductions for each rental unit in accordance with a schedule developed by its expert witness, and provides for the Tenants to begin directly paying their electric bills to the utility company (“Pepco”). *Id.* at 5-6; R. at 344-45.

In the Final Order, the ALJ made the following findings of fact:²

1. The housing accommodation at issue, at 1754 Lanier Place, NW, has 33 units. The 26 studio units range from 310 to 480 square feet; the six one-bedroom units range from 338 to 628 square feet; and the single two-bedroom unit has 650 square feet.
2. Housing Provider 1754 Lanier Place LLC purchased the housing accommodation in April 2014. At the time of the purchase, the electrical system at the housing accommodation had one electrical meter and the boiler provided heat for the entire building, which often was uneven. Parts

² The findings of fact are recited here using the same language and numbering as used by the ALJ in the Final Order.

of the electrical system, installed when the building was constructed, did not meet current national and local electrical codes.

3. Housing Provider paid – and continues to pay – for heat and electricity, except for air conditioning, in all rental units, and in the common areas. Tenants who wanted air conditioning paid \$65 per month for four months in the summer for the service.
4. Housing Provider upgraded the electrical system at the housing accommodation and decommissioned the boiler that provided uneven heat. In rental units, deteriorating wires were replaced. And, outdated fuse boxes were replaced with circuit breakers, with 125 amp service. Housing Provider is installing individual electrical meters for each rental unit.
5. Each rental unit now has an individual heating, ventilation, and air conditioning (HVAC) unit. Each Tenant now has a thermostat and can control the temperature in that Tenant's unit.
6. A building with individual meters is environmentally friendly because tenants who pay their own electric costs are more energy conservative and therefore individual metering is recommended by the International Energy Conservation Code, which has been adopted by the District of Columbia.
7. Housing Provider proposes to reduce rent in each unit in amounts ranging from \$35.67 to \$57.30 (2.48% to 8.49%), in exchange for Tenants paying for electricity. The new rent will apply going forward to current and future tenants.
8. Tenants propose basing the rent reduction on actual Pepco bills for each apartment. Under this proposal, the tenant will receive the bill, deduct the amount from the rent, and will submit the bill to Housing Provider to confirm the accuracy of the calculation.
9. Scott Kaufman, Housing Provider's expert, a Mechanical Engineer from Intec, arrived at rates for individual apartments. Intec determined by engineering estimates and historical data energy usage level for each of the occupied apartment types and assigned the annual and monthly cost at today's electric utility rates. PX 100 at 18. The heating requirements for the apartment and typical general electrical usage for similar residences were the bases for the energy assessment. *Id.* at 20.
10. At the beginning of the analysis, heating usage and general electrical (non-heating) usage were considered separately. *Id.* at 19-20. The analysis of general electrical usage was made from combining data for EIA (Energy Information Association), HUD (Department of Housing and Human [sic] Development), DOE (Department of Energy), EPRI (Electric Power Research Institute) and prior Intec work. *Id.* at 21.

11. Intec looked at the square footage of units, construction of walls, window types, and sizes, and the type of equipment installed in each unit in determining general energy usage. *Id.* at 24.
12. The estimate of heating energy used was based on the exposure of the apartment to weather conditions, the hours of use, equipment, and fuel used. Once the maximum heating required, based on the coldest day of the year, was determined, a degree-day method was used to estimate heating energy for the season. *Id.* at 29.
13. Usage was converted to dollars based on Pepco rates, which varied by several factors, including the number of kilowatt hours used and whether usage was at peak or non-peak times. Air conditioning was not part of the analysis.
14. Mr. Kaufman does not plan to recalculate costs based on actual energy use. Tr. 28:1-7; 69:21-70[:]4.
15. At least nine units were vacant at the time the Intec report was generated.
16. Housing Provider does not know how much tenants will actually pay for electricity. Tr. 33:19. Tenants may pay less or more than what Intec estimated. Tr. 25-26.
17. Heating units in some apartments do not look exactly like those proposed, and in one Tenant's opinion, the new unit did not provide enough heat. Tr. 77:16-20; 83:22-85[:]1. But, no expert testimony was presented to prove that the heat production was different.
18. Actual energy usage in a particular apartment depends on a number of factors, including the hours the electricity is used and the equipment in a particular unit. A tenant who does not use much electricity because of frequent travel will pay less than one who is away from the apartment during a work day, and even less than one who works at home. Such a difference occurs even when the apartments are the same size and equipment is comparable.

Final Order at 2-4; R. at 342-44.

In the Final Order, the ALJ made the following conclusions of law:³

A. Issues: Has Housing Provider proven that its Petition should be granted and that the proposed rent reductions are reasonable?

³ The conclusions of law are recited here using the same language and headings as used by the ALJ in the Final Order, except that the Commission has numbered the paragraphs for ease of reference.

B. Legal Standard for Granting a Services and Facilities Petition

1. The housing regulations provide that I shall approve a related services or related facilities petition if I find the following:
 - (a) The change shall not adversely affect the health, safety, and security of the tenants;
 - (b) The change shall not directly result in a substantial violation of the Housing Code;
 - (c) The change shall not be retaliatory, as defined in § 502 of the Act; and
 - (d) The change shall not be intended to cause displacement of tenants from the housing accommodation.

14 DCMR [§] 4211.2.

2. In considering these factors, I find that Housing Provider's petition should be granted because: (a) [t]here is no evidence that the change adversely affects the health, safety, or security of the Tenants[;] (b) [t]he change does not result in a violation of the Housing Code[;] (c) [t]here was no evidence presented by the Tenants that the change in services was retaliatory[;] (d) [n]o tenants were displaced because of the renovations and no Tenants will be displaced as a result of assuming responsibility for the payment of their own electrical costs.
3. Having determined that the petition should be granted, the Act provides that I may increase or decrease the rent charged to reflect proportionally the value of the change in services or facilities. D.C. Official Code § 42-3502.11 (2005) [sic]. As such, the remaining issue is how much the rent should be decreased.

C. Amount of Rent Increase

4. Housing Provider bases its proposed rent reduction on an opinion of an expert and his scientific model. Mr. Kaufman determined by engineering estimates a realistic energy usage level for each of the occupied apartment types and assigned the annual and monthly cost at today's electric utility rates.
5. Tenants object to rates determined by the expert, arguing that actual energy use should be the basis for the rent reduction. That argument, however, ignores that the cost reduction is based on usage level for a rental unit, not on the variability inherent in an individual tenant's electricity use.

6. Further, Mr. Kaufman’s opinion is based on numerous factors, including mathematical models, heating and non-heating units, data from several sources, and conversion to Pepco rates—subjects that are beyond the ken of a layperson. In response, the [Tenants] did not refute the opinion with its own expert testimony. *See, District of Columbia v. Peters*, [527 A.2d 1269, 1273 (D.C. 1987)]; *District of Columbia v. Davis*, [386 A.2d 1195, 1201 (D.C. 1978)] (citing *Waggaman v. Forstmann*, 217 A.2d 310, 311 (D.C. 1966)); *Toy v. [District of Columbia]*, 549 A.2d 1, 6 (D.C. 1988). Lay opinions based on preferences are not sufficient to refute the expert opinion presented. Hence, the rent reductions calculated by Mr. Kaufman are accepted.

Final Order at 4-5; R. at 344-45.

The Tenants filed a timely Notice of Appeal on November 16, 2015, (“Notice of Appeal”) and a timely Motion for Stay Pending Appeal on November 17, 2015 (“Motion for Stay”). In the Notice of Appeal, the Tenants raise the following issues:⁴

1. In the Final Order, the [ALJ] erred in finding that, as a matter of law, housing regulations require the [ALJ] to approve a related services or related facilities petition if the factors listed in 14 DCMR [§] 4211.2 are met.
2. The [ALJ] erred in determining that the rent reductions calculated by the Housing Provider’s expert would be adopted by the Court for the reason that the [T]enants/Respondents did not present their own expert to refute those calculations.
3. The [ALJ] did not apply the correct legal standard in adjudicating the facts of this case regarding the appropriate monthly rent reduction required of Housing Provider.
4. In the Final Order, the [ALJ] erred as a matter of law in requiring that Housing Provider’s rent reductions apply not only to current tenants, but also to new tenants who move into vacant units, both now and in the future.

Notice of Appeal at 1-4.

The Commission granted the Motion for Stay on December 2, 2015. The Tenants filed a brief in support of their appeal on February 19, 2016 (“Tenants’ Brief”), and the Housing

⁴ The issues on appeal are recited here in the language and numbering used by the Tenants in the Notice of Appeal, except that the Commission recites only the introductory language from each issue to omit supporting arguments.

Provider filed a brief in response on February 29, 2016 (“Housing Provider’s Brief”). The Commission held a hearing on March 9, 2016.

II. ISSUES ON APPEAL⁵

1. Whether the ALJ erred in finding that, as a matter of law, housing regulations require the ALJ to approve a related services or facilities petition if the factors listed in 14 DCMR § 4211.2 are met, rather than authorizing the ALJ to approve the petition *only if* those factors are met.
2. Whether the ALJ erred in determining that the rent reductions calculated by the Housing Provider’s expert would be adopted by the court because the Tenants did not present their own expert to refute those calculations.
3. Whether, in failing to determine and award the actual cost to each current tenant of obtaining alternate related services under 14 DCMR § 4211.9(a), the ALJ applied the correct legal standard in adjudicating the facts of this case regarding the appropriate monthly rent reduction required of the Housing Provider.
4. Whether the ALJ erred as a matter of law in requiring that the Housing Provider’s rent reductions apply not only to current tenants, but also to future tenants who move into vacant units

III. DISCUSSION

1. **Whether the ALJ erred in finding that, as a matter of law, housing regulations require the ALJ to approve a related services or facilities petition if the factors listed in 14 DCMR § 4211.2 are met, rather than authorizing the ALJ to approve the petition *only if* those factors are met.**

The Tenants argue that the ALJ misinterpreted the regulations governing related services or facilities petitions to require that the SF Petition be approved. Tenants Brief at 5-6. In the Final Order, the ALJ stated that “[t]he housing regulations [sic] provide that I shall approve a related services or related facilities petition if I find” that the four (4) criteria of 14 DCMR § 4211.2 are met. Final Order at 4 (emphasis added); R. at 344. Because the ALJ found that the

⁵ The Commission, in its discretion, restates the issues on appeal using the language and numbering used by the Tenants as the “Questions Presented” in the Tenants’ Brief at 2.

four (4) criteria were met, she determined that the SF Petition “should be granted.” Final Order at 5; R. at 345.⁶

The Commission’s standard of review is contained in 14 DCMR § 3807.1 and provides the following:

The Commission shall reverse final decisions of the Rent Administrator [or OAH] which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the Rent Administrator [or OAH].

The Commission will review legal questions raised by an ALJ’s interpretation of the Act *de novo* to determine if it is unreasonable or embodies a material misconception of the law. *See United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm’n*, 101 A.3d 426, 430-31 (D.C. 2014); *Dorchester House Assocs. Ltd. P’ship v. D.C. Rental Hous. Comm’n*, 938 A.2d 696, 702 (D.C. 2007) (citing *Sawyer Prop. Mgmt. of Md. v. D.C. Rental Hous. Comm’n*, 877 A.2d 96, 102-03 (D.C. 2005)); *Gelman Mgmt. Co. v. Campbell*, RH-TP-09-29,715 (RHC Dec. 23, 2013); *Carpenter v. Markswright*, RH-TP-10-29,840 (RHC June 5, 2013). Nonetheless, the Commission may find that an error of law is harmless where the application of the correct legal standard would not change the ultimate result. *See, e.g., United Dominion*, 101 A.3d at 430 (erroneous statement of deferential standard of review was immaterial where review was in fact thorough and *de novo*); *LCP, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d 897, 903 (D.C. 1985) (“[R]eversal and remand is required only if substantial doubt exists whether the agency would have made the same ultimate finding with the error removed.”) (quoting *Arthur v. D.C. Nurses’ Examining Bd.*, 459 A.2d 141,146 (D.C. 1983)); *Barac Co. v. Tenants of 809 Kennedy St., N.W.*, VA 02-107 (RHC Sept. 27, 2013) at n.15 (defining “harmless error” as “[a]n

⁶ The Tenants do not argue on appeal that the ALJ erred in finding that each of the four (4) criteria were met.