24 A.D.3d 269, 807 N.Y.S.2d 22, 2005 N.Y. Slip Op. 10026
(Cite as: 24 A.D.3d 269, 807 N.Y.S.2d 22)

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Supreme Court, Appellate Division, First Department, New York.
In re WEINREB MANAGEMENT, Petitioner-Appellant,
v.
NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, Respondent-Respondent,
Allen Cohen, Respondent-Intervenor-Respondent.
Dec. 22, 2005.

Background: Landlord filed application to annul determination of Division of Housing and Community Renewal (DHCR) denying its request for major capital improvement rent increase. The Supreme Court, New York County, Herman Cahn, J., denied application, and landlord appealed.

Holdings: The Supreme Court, Appellate Division, held that:
(1) denial of landlord's request for extension of time to provide requested information was not arbitrary and capricious, and
(2) failure to provide landlord with copies of tenants' answers did not violate due process.

Affirmed.

West Headnotes

[1] Landlord and Tenant 233 ⚖200.69

233 Landlord and Tenant
233VIII Rent and Advances
233VIII(A) Rights and Liabilities
233k200.63 Proceedings for Adjustment
233k200.69 k. Review. Most Cited Cases
Division of Housing and Community Renewal (DHCR) rent administrator's denial of landlord's request for extension of time to provide requested information in connection with landlord's petition for administrative review of request for major capital improvement rent increase was not arbitrary and capricious, even though rent administrator had granted landlord's five previous requests without comment.

[2] Landlord and Tenant 233 ⚖200.69

233 Landlord and Tenant
233VIII Rent and Advances
233VIII(A) Rights and Liabilities
233k200.63 Proceedings for Adjustment
233k200.69 k. Review. Most Cited Cases
Failure of Division of Housing and Community Renewal (DHCR) rent administrator to provide landlord with copies of tenants' answers to landlord's petition for administrative review of request for major capital improvement rent increase did not violate due process, where DHCR's determination to deny rent increase did not depend on any new arguments made by tenants in their answers, but rather determination was entirely, and rationally, based on records of city Department of Housing Preservation and Development showing immediately hazardous violations and on landlord's failure to adduce evidence that such violations had been removed. U.S.C.A. Const.Amend. 14.
****23** Borah, Goldstein, Altschuler, Schwartz & Nahins, P.C., New York (William J. Eberight of counsel), for appellant.

David B. Cabrera, New York (Patrice Huss of counsel), for respondent.

Collins, Dobkin & Miller, LLP, New York (W. Miller Hall of counsel), for Allen Cohen, intervenor-respondent.

BUCKLEY, P.J., MAZZARELLI, ANDRIAS, SAXE, SULLIVAN, JJ.

***269** Judgment, Supreme Court, New York County (Herman Cahn, J.), entered June 3, 2004, which

denied petitioner's application to annul the determination of respondent Division of Housing and Community Renewal (DHCR) denying petitioner a major capital improvement rent increase, and dismissed the petition, unanimously affirmed, without costs.

[1][2] The Rent Administrator's issuance of an order almost six months after she had requested information from petitioner, and after petitioner had obtained five extensions, was not arbitrary and capricious (*cf. Matter of Dworman v. DHCR,* 94 N.Y.2d 359, 375, 704 N.Y.S.2d 192, 725 N.E.2d 613 [1999] [five-month delay cannot fairly be characterized as de minimis]; *Matter of IG Second Generation Partners v. DHCR,* 294 A.D.2d 300, 303-304, 743 N.Y.S.2d 424 [2002], *lv. denied* 99 N.Y.2d 503, 753 N.Y.S.2d 806, 783 N.E.2d 896 [2002] [landlord's history of delay, not just last request for an extension, should be considered in determining whether refusal of extension was rational]), or a violation of due process (*see e.g. Matter of E.G.A. Assoc. v. DHCR,* 232 A.D.2d 302, 648 N.Y.S.2d 589 [1996]). While it appears that all of petitioner's requests for an extension had stated, "Unless I hear from you to the contrary, I will assume this extension of time is acceptable," petitioner should not have assumed that the Rent Administrator had granted its sixth request for an extension simply because, as with the first five, she did not respond thereto (*see Matter of Boulevard Tenants Corp. v. DHCR,* 264 A.D.2d 444, 694 N.Y.S.2d 442 [1999]). While DHCR should have sent petitioner the answers that the tenants filed on the petition for administrative review (Rent Stabilization Code [9 NYCRR] § 2529.5), its failure to do so was not a violation of due process since DHCR's determination to deny a rent increase did not depend on any new arguments made by the tenants in their ***270** answers. Rather, the determination was entirely, and rationally, based on records of the City Department of Housing Preservation and Development showing "C" (immediately hazardous) violations and on petitioner's failure to adduce evidence that such violations had been removed (*see Matter of 370 Manhattan Ave. Co. v. DHCR,* 11 A.D.3d 370, 372, 783 N.Y.S.2d 38 [2004]; *Matter of Weinreb Mgt. v. DHCR,* 295 A.D.2d 232, 744 N.Y.S.2d 321 [2002]). Petitioner's evidence that it had cured the "C" violations before it had applied for the rent increase, and that its delay in responding to the Rent Administrator's request for additional information was due to its then ongoing efforts to clear HPD's records of the "C" violations, was improperly submitted for the first time in the article 78 proceeding, and therefore cannot be considered (*see Matter of Brotherton v. DHCR,* 193 A.D.2d 500, 502, 597 N.Y.S.2d 377 [1993]).

N.Y.A.D. 1 Dept.,2005.
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