PREPARED BY THE COURT

FILED
MAY 24 2017
KAREN M. CASSIDY
A.J.S.C.

CHILTON TOWERS, LLC, Plaintiff, v. FAIR RENTAL HOUSING BOARD OF THE CITY OF ELIZABETH, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – UNION COUNTY DOCKET NO.: UNN-L-1991-16 Civil Action **ORDER**

THIS MATTER having come before the Court, the Honorable Karen M. Cassidy, A.J.S.C., by Gary D. Gordon, Esq. of Feinstein Raiss, Kelin & Booker, L.L.C. for plaintiff Chilton Towers, LLC, by an Action in Lieu of Prerogative Writs filed on June 16, 2016; and the Court having considered the submissions of the parties, including the submission of Rocco DiPaola, Esq., attorney for defendant, Fair Rental Housing Board of the City of Elizabeth (the "Board"); and a final hearing having been held on May 10, 2017, with counsel for plaintiff and defendant appearing; and for the reason set forth in the attached Statement of Reasons;

IT IS on this 24 day of **May, 2017**, hereby **ORDERED** as follows:

1. Plaintiff Chilton Tower LLC's Complaint is dismissed with prejudice.

A copy of this Order has been provided to all parties by the Court on this date.

K. M. Cassidy
KAREN M. CASSIDY, A.J.S.C.

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LAW DEPARTMENT

STATEMENT OF REASONS

Chilton Towers LLC v. Fair Rental Housing Board of the City of Elizabeth, et al.

Action in Lieu of Prerogative Writs
UNN-L-1991-16

This matter is before the Court on Plaintiff, Chilton Tower's ("Chilton") Action in Lieu of Prerogative Writs challenging defendant, Fair Rental Housing Board of the City of Elizabeth's (the "Board") denial of an application for a capital improvement surcharge. Chilton's Application sought to impose a monthly rent surcharge in connection with the installation of (1) fan coil units for heating systems, (2) fan coil units for air conditioning systems, and (3) new riser lines.

Factual Background

Plaintiff, Chilton is the owner of 220 West Jersey Street, Elizabeth, New Jersey. The property is an apartment building built in the early 1960s known as Chilton Towers and contains one hundred and ninety-seven (197) apartment units.

In 2015, Legow Management Company, the property manager for Chilton Towers began upgrading the fan coil and riser system in 30% of the building. The cost of the upgrades was $1,272,935.21. On or about July 7, 2015, Chilton filed an application with Fair Rental seeking to impose a Capital Improvement surcharge for the installation of the new riser lines and fan coil units, as well as remove asbestos around pipe insulation, perform carpentry work to conceal riser lines, and install access panels. The surcharge would be recouped over a twenty (20) year period at a cost of $130.06 per room, per year, or $10.84 per room per month.

Fair Rental considered the application at public meetings on January 20, 2016 and March 26, 2016. At the meetings, Nick Minocha, manager of Chilton Towers testified that the project involved "demolishing ceilings and walls, removing asbestos insulation around the elbows of

pipes, replacing steel pipes with copper piping, and installing fan coil supply lines with insulation, and installing fan control thermostats." Def's Brief at 3. The project is anticipated to take between 10 to 12 years. Of particular relevance, the fan coil units will produce a better and more effective heating and air conditioning system. The new units will allow for tenants to automatically set the temperature in their unit through a thermostat. The old system only allows for settings of low, medium, and high for the units.

The current fan coil system has been in place since 1962, when the building was constructed. Mechanical contractor Larry Robbins testified the projected life for fan coil unit is 18 years and 50 years for pipes. Mr. Robbin further testified that the projected life for the new fan coil units is 18 years as well. Residents of Chilton Towers testified against the capital improvement surcharge at the public meetings. Residents also submitted letters in support of the fan coil units and capital improvement application, which were admitted as evidence and considered by the Board.

On May 18, 2016, the Board voted to deny the capital improvement application and passed a memorializing resolution. The Board opined that proposed improvements were mere repairs or replacements of an existing system, and the City Ordinance did not authorize a surcharge for a replacement of an already existing facility or service. The Board further reasoned that upgrading of the heating and air conditioning systems that were over fifty (50) years old was not a substantial change or benefit constituting a capital improvement, and instead were a necessity for the tenants of the building which reflected advances in current technology.

Legal Analysis

The trial court's review of a local rent control board's determination is limited to an examination of the record before the board. Green Acres of Verona, Inc. v. Borough of Verona,

146 N.J. Super. 468, 470 (App.Div. 1977). To survive judicial scrutiny, "a board must articulate the basis for arriving at its conclusions and make factual findings supporting them." Parker Tower Apts., Inc. v. City of Bayonne, 185 N.J. Super. 211, 222 (App.Div. 1982). "The determination of a local rent control board is presumptively valid, and the burden is on the party challenging the board to prove . . . that the board's action was arbitrary, capricious, and unreasonable. Liberty Terrace, LLC v. Rent Leveling Board, 2011 N.J. Super. Unpub. LEXIS 970, 8 (App. Div. 2011), *citing* Parker Towers at 222. However, deference to the rent control board's decision does not apply to the board's interpretation of an ordinance. Schulmann Realty v. Hazlet Twp. Rent Control Board, 290 N.J. Super. 176 (App.Div. 1996). The interpretation of an ordinance is a purely legal matter within the discretion of the trial court. Id.

The City of Elizabeth's Rent Control Ordinance, Chapter 5.70.010 provides the definition of capital improvements as:

> Capital improvements shall be defined as an added benefit to the use of the building and enjoyment of the tenant therein. It shall be a benefit which substantially changes the housing accommodations. Capital improvements shall not include any repair or replacement of an already existing facility or those items of service required by law, or previously required by law. The addition of or improvement to the laundry rooms, vending equipment and facilities and items of like nature shall not be considered capital improvements. The conversion of one heating system for another or the replacement of windows of similar quality shall not be deemed a capital improvement.

Plaintiff argues that the ordinance encompasses the work proposed in the capital improvement application. Green Acres of Verona is the leading case addressing capital improvement in New Jersey. Green Acres of Verona, Inc. v. Verona, 146 N.J. Super. 468 (App.Div. 1977). In Green Acres, the trial court determined that the installation of electrical lines to accommodate air conditioning represented a "major capital improvement" as defined under Section 10 of the Verona Rent Leveling Ordinance. Green Acres at 470-471. The Appellate

Division affirmed and set forth certain criteria to evaluate whether proposed changes constitute a major capital improvement. Id. The criteria include: (1) the nature of the improvement; (2) the extent and cost of the improvement; (3) the benefit to the building and the tenants' enjoyment thereof; and (4) the degree of permanency of the improvement. Id.

The Georgian Gardens case expanded upon the discussion in Green Acres. In Georgia Gardens, the East Orange Rent Control Board granted the property owner's application for a capital improvement surcharge in connection with the cost of a replacement boiler, electric costs, and replacement costs of an expansion tank. Tenants Association v. Georgian Gardens, 249 N.J. Super. 475 (App.Div. 1991). The Tenants' Association appealed the rent board's decision, arguing that the proposed work did not qualify as a capital improvement under the East Orange municipal ordinance. Id. at 478. Specifically, the Tenants' Association argued that the replacement boiler was normal upkeep, maintenance, and repair – and therefore not a capital improvement. Id. at 477.

The Appellate Division reviewed the East Orange code regarding capital improvement expenditures and determined that under the East Orange ordinance, the boiler replacement qualified as a capital improvement. Id. The East Orange Ordinance provided certain criteria defining a capital improvement, and stated that "in order to qualify . . . the improvement must be a betterment to the building." Id. at 478. The Appellate Division reasoned that the new boiler system was obviously an improvement because it added features and more effective heat, satisfied the relevant criteria, **benefits the residence and constitutes a "betterment of the building".** Id (emphasis added).

In an unreported decision, the Appellate Division distinguished the capital improvement findings in Green Acres and Georgian Gardens. Carlyle Towers v. Rent Review Board of the Borough of Caldwell, A-6381-04T3 (App.Div. 2006); cert. denied 189 N.J. 426 (2007). In Carlyle,

the property owner sought to provide new windows and air conditioning components to the building. Carlyle at 10. The court noted that Caldwell had a more expansive definition of a capital improvement than those in Verona and East Orange. Id. Specifically, the ordinance required that the capital improvement not only serve to better or materially alter the building, but also required that the item was "not previously provided or required to be provided by law" and that it not constitute a replacement of an item or service. Id.

The Board in Carlyle concluded that the proposed changes were mere replacements of necessary items **despite their enhanced features**. Id. at 12 (emphasis added). The Appellate Division affirmed the Board's conclusion ruling that so long as the Board's decision comported with the interpretation and intent of the capital improvement statute, deference was owed to the Board's ruling. Id. at 13 (emphasis added). Additionally, the Appellate Division overruled plaintiff's arguments regarding the interpretation of capital improvements in Green Acres and Georgian Gardens stating "although the term major capital improvement has a generally recognized meaning, we have been cited nothing to suggest that such a meaning cannot be narrowed, as here, by a duly enacted and otherwise unassailable ordinance." Id. at 11.

The reasoning in Carlyle is reflected in the 2011 decision by the Appellate Division in Liberty Terrace, LLC v. Rent Leveling Board of North Bergen. 2011 N.J. Super. Unpub LEXIS 970 (App. Div. 2011). In Liberty, the Appellate Division upheld the Board's denial of a capital improvement application for new boilers with "special features", finding that although the proposed improvement may have resulted in a betterment of the building and benefit the tenants, the Board's consideration of the special features and improvements as repairs should not be disturbed when supported by adequate factual findings and testimony. Liberty at 5-7.

The situation presented to this Court parallels the conclusions of our courts in Carlyle and Liberty. Chilton's application for a capital improvement surcharge sought to impose the surcharge in connection with the installation of fan coil risers and related equipment, in addition to asbestos removal and carpentry work to conceal riser lines and access panels. Chilton's application was denied by the Elizabeth Fair Rental Housing Board by resolution dated May 18, 2016. The Board denied Chilton's application and stated that "although the new system was an improvement from the previous system, it was a replacement and not a substantial improvement to the housing accommodations of residents. See May 18, 2016 Resolution. Furthermore, the Board noted that the Elizabeth Ordinance regarding capital improvements does not authorize a surcharge for a repair of a system or replacement of an already existing facility.

In Carlyle Towers and Liberty, the Appellate Division upheld the denial of a capital improvement application. In both cases, the Court found that the local Rent Control Board's denial was founded upon adequate factual findings and along with an appropriate interpretation of the relevant statute. In Carlyle Towers, the Court upheld the Board's conclusion that the new air conditioners and windows were replacements of items or services as defined under the Caldwell Rent Control Ordinance. Carlyle at 2. The Court finds the following portion of the decision directly applicable to the facts presented here;

> "The evidence unequivocally supports the conclusion that windows and the components of Carlyle Towers' air conditioning system necessary to its operation had been previously provided and were required by law and lease and the further conclusion that the new items constituted replacements needed as the result of the effects of aging.. . . The Board found that the enhancements did not function [as capital improvements], and the windows and air conditioning components remained replacements of necessary items **despite their enhanced features.**"

The Elizabeth Rental Control Ordinance, like the Caldwell Ordinance in Carlyle, states that a capital improvement does not include the replacement of an already existing facility. It also

specifically states that "the conversion of one heating system for another . . . shall not be deemed a capital improvement." Elizabeth Code, Chapter 5.70.010(A). Here, the Board reasoned that the proposed improvement was a mere replacement of an already existing facility based upon the evidence and testimony presented at the January 20, 2016 and March 16, 2016 Fair Rental Housing Board meetings. Commissioner Herbert Goodfriend's testimony at the May 18, 2016 meeting summarizes the Board's position to deny the application. Commissioner Goodfriend stated that the testimony presented indicated that the system was "very old" and "needed to be replaced". See Transcript of May 18, 2016 Fair Rental Housing Board meeting, at pg. 4, lines 20-22. Furthermore, Chilton demonstrated that "the present system is deteriorated and needs repairs and so on." Id. at lines 22-25. Additionally, all the Commissioners emphasized that while the system may be better and provide tenants with a benefit, replacement of an existing, failing old system does not constitute a capital improvement under the Ordinance. See generally, Transcript of May 18, 2016 Fair Rental Housing Board meeting at pg. 3-6.

Plaintiff argues that the improvements in this case are significant, long term, and clearly beyond the scope of mere maintenance and repair of existing systems. In particular, plaintiff highlights that the fan coil units will provide tenants with the ability to control temperature (as opposed to general settings), and provide improved riser lines and valve shutoffs. Plaintiff submits that the units will provide tenants with greater comfort and constitute a benefit which substantially changes the housing accommodation as provided under the Ordinance. Additionally, Plaintiff argues that the definition of a capital improvement under the Elizabeth Ordinance provides, "conversion of one heating system for another . . . shall not be deemed a capital improvement." Elizabeth Code, Chapter 5.70.010. Plaintiff argued that the new systems are not a conversion as defined in Chapter 5.70.010, nor a mere replacement because the new system offers substantial

benefits previously unavailable under the previous system and the advancements in technology represent a dramatic increase in services to tenants. Plaintiff sought to distinguish the Carlyle ruling, where enhanced features were not deemed a capital improvement; arguing that here, Chilton could have offered a substantially similar system to the previous system and thus, the decision to offer a more advanced system with new technology constitutes a capital improvement - not a conversion, repair, or replacement.

Plaintiff suggests that this case is distinguishable from Carlyle because Chilton could have provided as substantially similar system instead of the technologically advanced system proposed in the Application. Plaintiff's witness, Larry Robbin, a Vice President of Dyna Temp the heating and cooling contractor testified at both hearings regarding the specific of the project. During questioning by the Board, Mr. Robbins ("LR") and Commissioner Goodfriend ("CG") had the following exchange:

> CG: All right. I went through the papers. And I went on the Trane website and I looked at their category log of air terminal devices. From the number on the proposal, is this the unit Trane fan coil?
>
> LR: I believe that's right.
>
> CG: I understand that one way which this unit is better than the previous unit is the thermostat control, yes?
>
> LR: Yes.
>
> CG: Looking through the [trane] catalog, this looked like it is the only device that was suitable for this system. Do they sell any air improvement device fan coils that do not have this type of fan coil, that has the older primitive two-speed blower or three-speed blower?

LR: I do not believe so.

Transcript of March 16, 2016 Fair Rental Housing Board Meeting, pg. 25, lines 19-25 – pg. 26, line 10.

Thus, while plaintiff correctly notes that the new system provides enhanced services, this case is not distinguishable from Carlyle when, as noted by plaintiff, there is no system available that is comparable to the older system. Upgraded services cannot be deemed a capital improvement when the upgraded services merely provide the present industry standard, and the prior, inferior services are no longer available.

Furthermore, under Chapter 5.70.160 of the Elizabeth Code, a landlord is required to maintain heat and air conditioning at the same standards of service provided for in the commencement of the lease. Plaintiff's upgraded systems merely provide the same standard of service applicable under the present technology available. Commissioner Goodfriend's testimony during the May 18, 2016 Hearing states, "the tenants testified that this is the current basis technology. **And the landlord did not present anything to indicate that this is in some way better than what would have been done by a mere replacement.**" Transcript of May 18, 2016 Fair Rental Housing Board Meeting, pg. 5, lines 4-7. (emphasis added) Thus, in the absence of any evidence or testimony which distinguishes the enhanced services from the minimum that could have been provided in a replacement or repair, this Court cannot find that the new services constitutes a capital improvement.

Plaintiff has failed to prove that the Elizabeth Fair Rental Housing Board's decision was arbitrary, capricious, and unreasonable. This Court finds that the Board's decisions was based on adequate findings, in particular the conclusions that despite the improvements to the fan coil system (heating and air conditioning), the added benefits or "upgrade" constituted a replacement

of a pre-existing condition as defined in Chapter 5.70.010(A) of the Elizabeth Town Code. In addition, it can also be interpreted as a conversion of one heating system for another which, by ordinance, "shall not be deemed a capital improvement". Id. Because the Board's findings are supported by adequate evidence in the record, the Board's denial of plaintiff's application is affirmed.

Conclusion

For the foregoing reasons, plaintiff's Complaint in Lieu of Prerogative Writs is DISMISSED with prejudice.