

Fordham Law School

## FLASH: The Fordham Law Archive of Scholarship and History

---

[All Decisions](#)

[Housing Court Decisions Project](#)

---

2022-02-24

### 239 Elizabeth Realty LLC v. New York State Div. of Hous. & Community Renewal

Follow this and additional works at: [https://ir.lawnet.fordham.edu/housing\\_court\\_all](https://ir.lawnet.fordham.edu/housing_court_all)

---

#### Recommended Citation

"239 Elizabeth Realty LLC v. New York State Div. of Hous. & Community Renewal" (2022). *All Decisions*. 59.

[https://ir.lawnet.fordham.edu/housing\\_court\\_all/59](https://ir.lawnet.fordham.edu/housing_court_all/59)

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

**239 Elizabeth Realty LLC v New York State Div. of  
Hous. & Community Renewal**

2022 NY Slip Op 30595(U)

February 24, 2022

Supreme Court, New York County

Docket Number: Index No. 154071/2021

Judge: Erika Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ERIKA EDWARDS**

**PART 10M**

*Justice*

-----X

**INDEX NO. 154071/2021**

239 ELIZABETH REALTY LLC,

**MOTION DATE 04/27/2021**

Petitioner,

**MOTION SEQ. NO. 001**

- v -

NEW YORK STATE DIVISION OF HOUSING AND  
COMMUNITY RENEWAL and LIZA JERNOW

**DECISION + ORDER ON  
MOTION**

Respondents.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 58, 59, 62, 63

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents and oral argument held on February 24, 2022, for the reasons stated on the record and as set forth herein, the court denies Petitioner 239 Elizabeth Realty LLC's ("Petitioner") Article 78 amended petition, filed under motion sequence 001, and the court dismisses the amended petition without costs to any party.

Petitioner brought this Article 78 proceeding against Respondents New York State Division of Housing and Community Renewal ("DHCR") and Liza Jernow ("Jernow") seeking a court order and judgment vacating, annulling, reversing and setting aside DHCR's Order and Opinion issued in its Petition for Administrative Review ("PAR"), dated February 26, 2021. Petitioner argues in substance that in this court's decision and order, dated February 7, 2019, referring to DHCR the issues of whether Jernow was entitled to exclusive use of a wooden deck or platform in the rear of her rent stabilized apartment and whether her use of the area constituted a "required service" or "ancillary service" under the Rent Stabilization Code and Rent Stabilization Law, DHCR erred by exceeding the scope of its authority by rendering a final

determination instead of an advisory opinion. Additionally, Petitioner argues that DHCR's determination was an abuse of discretion, arbitrary and capricious, and without basis in law.

As an initial matter, the court rejects Jernow's Answer filed on February 13, 2022, as untimely. Petitioner filed an amended petition on September 24, 2021. The court extended the time to file opposition papers (Answers) until January 12, 2022. DHCR filed its Answer in opposition to the amended petition on December 17, 2021. Petitioner filed its reply on January 25, 2022. Although Petitioner unilaterally agreed to grant Jernow an extension of time to file her Answer by January 16, 2022, which was beyond the deadline set forth in the court's order, Jernow failed to request an extension from the court until she filed her Answer on February 13, 2022. This was a little over one month after the court's deadline, a little less than one month after Petitioner's extension and after oral argument had previously been adjourned. Petitioner opposed any further extensions and asked the court to reject Jernow's untimely Answer, or if the court accepted it, then Petitioner requested an adjournment to file a reply. Therefore, since Jernow missed the court ordered deadline, the deadline extended by Petitioner and failed to file her Answer until February 13, 2022, the court rejects Jernow's Answer and deems it to be untimely.

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (*see* CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; and *Scherbyn v BOCES*, 77 N.Y.2d 753, 757-758 [1991]). In reviewing an administrative agency's determination, courts must ascertain whether there is a rational basis for the agency's action or whether it is arbitrary and capricious in that it was without sound basis in reason or regard to the facts (*Matter of Stahl York Ave. Co., LLC v City of New York*, 162 AD3d 103, 109 [1<sup>st</sup> Dept 2018]; *Matter of Pell*, 34 NY2d



at 231). Where the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (*Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1<sup>st</sup> Dept 2010]). When a court reviews an agency's determination it may not substitute its judgment for that of the agency and the court must confine itself to deciding whether the agency's determination was rationally based (*Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N.Y.*, 72 NY2d 753, 763 [1<sup>st</sup> Dept 1988]).

Furthermore, an agency is to be afforded wide deference in the interpretation of its regulations and, to a lesser extent, in its construction of the governing statutory law, however an agency cannot engraft additional requirements or assume additional powers not contained in the enabling legislation (*see Vink v New York State Div. of Hous. and Community Renewal*, 285 AD2d 203, 210 [1<sup>st</sup> Dept 2001]).

Here, for the reasons set forth on the record during oral argument on February 24, 2022, the court finds that Petitioner failed to meet its burden of demonstrating that DHCR erred by exceeding the scope of its authority when it rendered a final determination instead of an advisory opinion, or that its determination was an abuse of discretion, arbitrary and capricious, or without basis in law. Based upon the language used in this court's order referring the issues regarding Jernow's exclusive use of the deck/platform and whether such use was a "required service" or "ancillary service" to DHCR, it is clear that the court exercised its discretion and referred these issues to DHCR for its full determination of the issues because of its expertise. As the court mentioned in its decision, the court provided DHCR "the initial opportunity to address" the issues so that the court would have the benefit of DHCR's "wisdom" prior to the court addressing the issues. Additionally, the court stayed the proceedings and held the portion of the

court’s decision on those issues in abeyance pending DHCR’s determination of the issues and the court retained “jurisdiction over all issues not decided by DHCR.”

Therefore, it is clear that the court intended to confer initial jurisdiction of these matters to DHCR and DHCR did not exceed its authority or abuse its discretion in fully determining these issues. Furthermore, the court stated in its Decision and Order, dated June 4, 2021, on the related matter under Index No. 100729/2018, that the court agreed with and adopted DHCR’s determination. Finally, the court finds that DHCR’s determination was rationally based and was not made in violation of lawful procedures, was not arbitrary and capricious, and was not affected by an error of law.

The court has considered the additional arguments and requests for relief raised in this matter which are not discussed herein.

Therefore, the court denies Petitioner’s amended petition and dismisses it.

As such, it is hereby

ORDERED that the court denies Petitioner 239 Elizabeth Realty LLC’s Article 78 amended petition and dismisses it without costs to any party.

This constitutes the decision and order of the court.

2/24/2022  
DATE   
ERIKA EDWARDS, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE