(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

ARISTOCRAT CONDOMINIUM ASSOCIATION,

Petitioner-Appellant,

v.

48 STREET WEEHAWKEN, L.L.C.,

Respondent,

and

DEPARTMENT OF COMMUNITY AFFAIRS,

THE BUREAU OF HOMEOWNER PROTECTION,

NEW HOME WARRANTY PROGRAM,

Respondent-Respondent.

November 14, 2014

Argued January 23, 2014 – Decided

Before Judges Grall, Nugent and Accurso.

On appeal from the Department of Community Affairs, Agency Docket No. BHP-428-10.

Richard T. Garofalo argued the cause for appellant (Garrity, Graham, Murphy, Garofalo & Flinn, P.C., attorneys; Mr. Garofalo, of counsel; Jane Garrity Glass, on the brief).

Debra A. Allen, Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Ms. Allen, on the brief).

The opinion of the court was delivered by

GRALL, P.J.A.D.

This appeal concerns the administration of the New Home Warranty and Builders' Registration Act (the Act), N.J.S.A. 46:3B-1 to -20 (Chapter 3B of Title 46 as amended and

supplemented). Among other things, the Act establishes "a new home warranty security fund." N.J.S.A. 46:3B-7(a).

"The purpose of the fund" is payment of claims made by owners of new homes "for defects in new homes covered by the new home warranty" and the "costs of administering the new home warranty program." N.J.S.A. 46:3B-7(a)(1)-(2). And, "[t]he Fund is required to pay the homeowner an amount sufficient to correct a covered defect if a builder is unable or willfully refuses to correct the covered defect or the claim arises during . . . the warranty. N.J.S.A. 46:3B-7(c); N.J.A.C. 5:25-5.2(a)." Lakhani v. Bureau of Homeowner's Protection, New Home Warranty, Dept. of Cmty. Affairs, 356 N.J. Super. 132, 135 (App. Div. 2002) (emphasis added).[1]

To that end, the Act provides that the Commissioner of the Department of Community Affairs (Commissioner) "shall investigate each claim to determine the validity thereof, and the amount of the award that shall be made thereon and shall hold a hearing if requested by either party, in accordance with the provisions of the 'Administrative Procedure Act' [(APA)] . . . applicable to contested cases." N.J.S.A. 46:3B-7(c).

The Legislature provided the framework for the program, but the Legislature "authorized and directed" the Commissioner "to prescribe by rule or regulation" the "procedures for the implementation and processing of claims against the new home warranty security fund . . . ." N.J.S.A. 46:3B-3(a). By regulation, the "Commissioner has delegated responsibility for processing claims against the Fund to the Bureau of Homeowner Protection (Bureau). N.J.A.C. 5:25-1.4." Lakhani, supra, 356 N.J. Super. at 135. But the Commissioner has retained the authority to adopt, amend and repeal regulations and "the power to make final determinations resulting from any of the hearings required or permitted to be held pursuant to the Act." N.J.A.C. 5:25-1.4(a).

Without question, the Commissioner and Bureau must perform their responsibilities "fairly, reasonably and in conformity with the rules and regulations adopted to implement the Act. See Citizens for Equity v. New Jersey Dep't of Envtl. Prot., 126 N.J. 391, 397-98 (1991); W.V. Pangborne & Co. v. New Jersey Dep't of Transp., 116 N.J. 543, 561-62 (1989)." Lakhani, supra, 356 N.J. Super. at 142. Moreover, any policy of the Commissioner affecting the homeowners' obligations in filing a claim must be imposed by regulation that "provides notice of th[e] requirement to potential claimants." Lakhani, supra, 356 N.J. Super. at 144-45; see also Metromedia Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 330-31 (1984).

This appeal, filed by the Aristocrat Condominium Association (Association), is taken from two final orders of the Commissioner rejecting its claim for numerous defects in the condominium building's common elements. The first order was entered following a hearing in the Office of Administrative Law (OAL) requested by the Association. The Commissioner affirmed the Bureau's dismissal of the Association's claim on the ground that it was filed after the date the one-year warranty expired. In its entirety, the Commissioner's decision provides: "Having reviewed the Initial Decision of the Administrative Law Judge [(ALJ)] in this matter, together with any exceptions or replies submitted, I hereby adopt the Initial Decision as the Commissioner's Final Decision."

The second order at issue was entered on the Association's motion for the Commissioner to vacate his final decision and remand to the OAL for further action on issues and argument not previously raised or incompletely considered. See N.J.A.C. 1:1-18.7 (authorizing the requested action on that ground). The Association questioned whether the Commissioner had considered supplemental arguments and evidence submitted after the ALJ's and before the Commissioner's decisions. In denying that motion, the Commissioner simply noted, "there are no issues or arguments not previously raised or incompletely considered contained in the motion necessitating an Order of Remand back to the [OAL]."

The Commissioner's final decision is so inadequately supported by findings of fact and a reasoned application of the Act and regulations, we have no basis for concluding that it is consistent with the Act or the regulations. Accordingly, remand is required. In the remainder of this opinion we address the matters that require further consideration.

The evidence, including the supplemental materials submitted prior to the Commissioner's decision, can be summarized as follows. Arthur Christy and Ernesto Garcia developed the property through 48 Street Weehawken, L.L.C.

A.C. Construction, owned by Christy and Garcia, was also the builder. Construction on the building commenced in 2006 and a certificate of occupancy for the building was issued on May 19, 2009.

The first owner of a residential unit, Jared Smollik, closed on his cash purchase of the unit on December 2, 2008, and with only a temporary certificate of occupancy, he moved into the building on December 31, 2008. At that point, the building was still under construction. Smollik testified that he had limited access to the common elements of the condominium. Some areas were locked and other features, like the elevator, were not working.

No additional units were sold or occupied until after May 19, 2009, when a certificate of occupancy for the building was issued. The builder held the majority voting interest on the Association's board of directors until March 10, 2010.

On December 15, 2008, Smollik wrote to Christy bringing defects in the common areas to his attention. He explained that he wanted to move in but could be prevented from doing that because of problems with security, doors, keys, alarms and utilities. Smollik's list of defects in the common elements included water raining down from a ceiling in a hallway leading to the garage and entering the garage from under a door. He further noted that the exterior first-floor doors providing access to common areas had no lock and others had locks that he had no key to

open or secure. Recognizing he had submitted "quite a list," Smollik explained "many of these things definitely need to be taken care of for myself and all future residents."

On January 12, 2009, Smollik sent Christy another email noting that it had been "some time since [he had] received any response at all regarding issues" he had raised and was trying again. Smollik reminded Christy that Christy had told him "it would be faster and easier to ask [him] directly," and asked Christy to let him know if he should direct his questions elsewhere. Smollik warned, "I have been patient and I am willing to continue to be so if I see that something is being done to resolve them, but if I continue to perceive that I am being ignored or told that things will be done without any results then I will be forced to pursue a legal remedy to at least those things that I have a contractual right to."

According to Smollik's testimony in the OAL, Christy told Smollik he could not file a claim with the New Home Warranty Program (NHWP) because the builder still had control over the Association and was the only one that could file a common elements claim. Accordingly, Smollik did not file a claim.

Smollik was not the only resident to press the builder about common elements while the builder held the majority interest on the Association's board of directors. Benjamin Quinones purchased a condominium in May 2009; his closing was delayed because he could not get a mortgage until a certificate of occupancy was issued. According to Quinones' testimony, he tried to work with the builder when he first moved in but was ignored until the city building inspection department had the residents make a punch list, which the city sent to Christy and Garcia.

Eugenio and Beatrice Carrillo purchased the third residential unit on August 13, 2009 and moved in on August 30. In September, the Carrillos notified Garcia and then Christy of defects in the common elements. Their complaints included water seeping through windows, a crack

from top to bottom in the concrete block parking lot wall, water in the concrete block wall of the stairwell, evidenced by corrosion of the metal securing the stairs to the wall, and a disconnected irrigation pipe. After receiving the certified mail from the Carrillos, Christy resolved some of the issues they raised about their unit but none related to the common elements.

By December 28, 2009, Quinones asked the building's property manager, Ana Castro, to file a new home warranty claim for defects in the common elements. On December 28, 2009, Castro sent Quinones an email reporting that Garcia told her "they are sending someone immediately to take care of the water issues." In addition, she asserted that the "State Warranty department told [her that day] that we have to first try with the developer which luckily they have agreed to take care of it."

Between December 28, 2009 and March of 2010, another resident, Dave DiFabio, exchanged a series of emails with Christy in an attempt to have certain issues with his apartment and the common elements, including window leaks and leaks in the garage, repaired. The emails indicate that Christy made some attempts to address the leaks, including contacting the window manufacturers; contemplating new siding to the rear of the building; and sending workers to effect certain repairs.

At the request of Quinones, the Association's first president, Christy attended the first general meeting for residents the day the residents acquired the majority interest on the board, which was on March 9, 2010. The minutes of the meeting include this account of his appearance:

> 1) Art Christy – At president's request
>
> developer makes an appearance to
>
> alleviate any concerns amongst residents
>
> of issues in building.

a. Art states "Project was 95% complete, ran short on money and we tried to cut costs in order to finish up."

b. Cost cutting led to the following issues:

i. Leaks in stairwells and back of building, which caused mold.

ii. Drafts/Leaks in individual units windows.

iii. Plastic stripping over units with Terrace.

c. Art reaffirms he is here to work with board/residents to fix these problems.

Thereafter, DiFabio sent an email to Christy in which he threatened to file a claim with the NHWP. In that email, DiFabio indicated that he had sent a certified letter on December 28, 2009, listing his complaints, and that it had been more than thirty days and the leak issues had not been repaired. The Association provided formal written notice of numerous common elements defects on March 13, 2010. On March 15, 2010, the Association, through Quinones, sent an email to Christy again complaining about leaks through windows and problems with

water leaks in the garage. That same day, Christy responded that he would reply with a repair date "ASAP" and that he was coordinating with contractors.

Both DiFabio and the Carrillos filed claims with the NHWP on or about March 15, 2010. The Bureau denied their claims of leaks from the external areas of the buildings (into the units through the windows) and in the garage and common areas as common elements claims that only the Association could file. On March 29, 2010, Quinones emailed Christy again objecting to the lack of any progress since March 15 and advising that mold had started to grow in the garage. Christy again responded on the same day, stating that he would be onsite within the week to begin repair work.

On April 5, 2010, Christy provided the owners with a spreadsheet which detailed the specific repairs he intended to undertake in response to the owners' individual requests. In the spreadsheet, Christy did not respond to claims of cracked walls in the garage, stated that he had done nothing to repair apparent leaks in the garage which are "common" if not excessive, and was waterproofing and adding siding to exterior walls to correct leaks in the walls and the terrace on the fourth floor.

The Association filed its claim with the Bureau's NHWP, first through the building manager, Castro, on April 7, and then on its own behalf in June of 2010. The Bureau and Commissioner ultimately treated Castro's April 7, 2010 complaint as the Association's complaint. The Bureau conducted an inspection and denied thirteen of the Association's eighteen common elements claims on the ground that the claims were not filed within the first year of the warranty, which they had to be in order to be covered.

The Act and the regulations cannot be construed to permit dismissal of a claim solely because it was filed after the applicable warranty expired. The Act provides three warranties of different duration — one year for "faulty workmanship and defective materials," two years for "faulty

installation of plumbing, electrical, heating and cooling delivery systems," and ten years for "major construction defects." N.J.S.A. 46:3B-3(b)(1)-(3). The one and two year warranties provide that the dwelling "shall be free from defects" for the one or two years, as the case may be, "from and after the warranty date." Ibid. (emphasis added). Because the plain meaning of that provision is that a defect arising in the final minute of the applicable warranty period is covered, we presume that is what the Legislature intended. DiProspero v. Penn, 183 N.J. 477, 492 (2005). To the extent the Bureau's denial rests on the fact that the claim was filed beyond the warranty period, it is in conflict with the statute.

Dismissal of a claim solely because it was filed after the applicable warranty period would also frustrate the Legislature's plainly and unambiguously expressed intention to require a claimant to work with the builder before filing a claim against the fund. In pertinent part, N.J.S.A. 46:3B-7(c) provides:

> Prior to making a claim against the fund for defects covered by the warranty, an owner shall notify the builder of such defects and allow a reasonable time period for their repair. If the repairs are not made within a reasonable time or are not satisfactory to the owner, he may file a claim against the fund in the form and manner prescribed by the commissioner. . . .

The foregoing is the only provision of the Act that gives any guidance on the timing for the filing of a claim. And, it does not support denial of a claim because the defect arose too late in the warranty period to permit the filing of a claim within the period.

Moreover, the Commissioner's regulation discussing the filing of a claim, as it must, recognizes the claimant's statutory obligation to work with the builder before filing a claim. It

plainly states that a claim can be filed after the warranty expires. In pertinent part, N.J.A.C. 5:25-5.5 provides:

> (b) Owner responsibilities rules are as follows:
>
> 1. Except as specifically required in N.J.A.C. 5:25-3.4[— addressing exclusions —] any owner who believes he or she has a covered defect shall provide written notice of the nature of the defect(s) to the builder not later than seven calendar days after the date on which the warranty on that item expires. The notice shall be delivered to the builder's business address.
>
> [(Emphasis added).]

The foregoing provision clearly permits an owner to begin the process of working with the builder as many as seven days after the applicable warranty expires.

Moreover, the regulation allows the owner more time for filing after giving notice to the builder, even notice filed seven days after expiration of the warranty, to allow a resolution of the problem without resort to the fund. N.J.A.C. 5:25-5.5(b)(2)-(3) provides:

> 2. Upon providing written notice to the builder, the owner shall allow the builder 30 days in which to respond and shall arrange to be present and make the home available to the builder for purposes of inspection of defects, for a reasonable period of time between 9: 00 A.M. and 6:00 P.M., Monday through Friday, or other mutually agreeable time.
>
> 3. If the matter cannot be resolved through the informal dispute settlement process established in (a)5, (b)1 and 2 above, then the

> owner may file Notice of Claim and demand, for dispute settlement with the Division. The Notice of Claim shall be filed not later than 14 days after the expiration of the 30 day period provided in (b)2 above. The claim shall state the name of the builder, the date on which the notice of defect was given to the builder, the Certificate of Participation number and a copy of the written notice of the defect, as prescribed in (b)1 above.
>
> i. Except in the case of claims which relate to structural problems or emergencies, a notice of claim shall not be submitted until the expiration of 120 days from the warranty date.
>
> ii. An owner may not file more than one claim for the same defect. However, a new claim may be filed by the owner if new facts arise which could not previously have been known with reasonable diligence.
>
> iii. . . . [Addresses the owner's responsibility to substantiate defects not observable at the time of an inspection.]
>
> [(Emphasis added).]

Noting for the benefit of the Commissioner but setting aside what could, depending on the facts, present a direct conflict between the two clauses emphasized above, this regulation clearly ties the time for filing, as does the statute, to the claimant's obligation to work with the builder. Indeed, the only provision of the regulation expressly linking the expiration and filing date for a claim specifies a filing date well beyond — 120 days after — expiration of the warranty.

A claimant's statutory obligation to work with the builder and the regulations addressing the filing of claims were not cited or discussed by the ALJ or Commissioner in resolving this case.

That is so even though there was significant evidence of efforts individual unit owners made to work with the builder before enough residential units were purchased from the builder to permit the Association to act a whole. See N.J.A.C. 5:25-5.5(d)1.

There is a regulation that limits the right of condominium unit owners to file common elements claims. In pertinent part, N.J.A.C. 5:25-5.5(d)1 provides:

> Claims including common elements in a condominium . . . may only be made by an authorized representative of the association. Where, however, the builder retains control of more than 50 percent voting interest in the association, claim may be made by the owners of unit interest directly to the Bureau or the applicable private plan administrator. The claimed common element defect will then be part of the unit claim . . . .

This limitation on the right to file a common elements claim complicated matters in this case. As our discussion of the evidence as it was supplemented prior to the Commissioner's decision indicates, Smollik first moved in on December 31, 2008. He was the only unit owner until around May 19, 2009, when a certificate of occupancy for the building was first issued. It was not until March 9, 2010, a date after a one-year warranty commencing in December 2008 would have expired, that the Association could have filed a common elements claim under this regulation. As conceded in the brief submitted on behalf of the Commissioner, "Up until that time [— March 9, 2010 —] the builder held the majority interest on the Board of Directors."

Moreover, the record includes evidence that supports a finding that once the unit owners held a sufficient voting interest to file a claim, the Association continued to work with the builder on the work the builder promised to do to correct defects in the common elements. Neither the ALJ nor the Commissioner made any findings of fact addressing the evidence of

continuing efforts, starting with Smollik's December 15, 2008 letter, urging correction of defects in the common elements in his interest and the interest of all future residents.

Moving from the problem of the Commissioner's affirming a dismissal of a claim against the fund on the claim being filed after the warranty expired by adopting an initial decision that does not address the regulations setting forth the claims procedures, we turn to consider the Commissioner's identification of the critical "warranty date" in this case involving a defect in the common elements of a condominium unit. The date on which any of the Act's three warranty periods expires cannot be determined without identifying the "warranty date." As discussed above, the Act provides that the "warranty date" is the date the warranty, be it one, three or ten years, commences.

As defined in the Act, "'Warranty date' means the first occupation or settlement date, whichever is sooner." N.J.S.A. 46:3B-2(h). The regulations elaborate on the meaning of a "first occupation," and in that context the Commissioner has given the term "warranty date" that assigns the term "first occupancy" a special meaning that is workable with respect to the common elements of a condominium.[2] In pertinent part, N.J.A.C. 5:25-3.1 provides:

> (c) The following rules concern applicability to condominiums and cooperatives:
>
> 1. In addition to the individual dwelling units, the common elements serving condominiums or cooperatives are covered by this warranty, subject to the exclusions as defined under N.J.A.C. 5:25-3.4. The warranty date on common elements shall be the date on which that common element is first put to use. In the event one unit in a single condominium or cooperative structure is sold all remaining units in that structure shall be warranted

> whether sold or used for rental purposes.
>
> 2. Where the warranty date on common elements has expired, a unit owner who has taken first occupancy after that period may file a notice of defect on a common element directly with the builder and when it is established that such defect could not have been determined prior to occupying the unit, the defect shall be made a part of the unit owner's claim.
>
> . . . .

After hearing the evidence discussed above, the ALJ commenced the "discussion" section of her initial decision by noting that the question whether the Association's claim was timely "turns on the pivotal issue of the date the common elements were deemed to have been 'in use' by the homeowner; on the date the [sic] of the first purchase and possession of the unit, or sometime later while work was continuing on the building."

The ALJ never resolved what she viewed as the "pivotal issue." She avoided deciding what "put to use" means by identifying two dates in December 2008 — December 2, the date Smollik closed on the first unit sold, and December 31, the date Smollik moved into the building. Quite obviously, the statute contemplates a specific warranty date, not one that could be any day of a specified month.

Moreover, the ALJ did not address Smollik's testimony about the building still being under construction and his lack of access to all of the common elements. The plain language of the regulation suggests that the warranty date on a common element is the date on which the element at issue was "put to use."

Finally, the ALJ did not address defects in common elements such as leaking from the exterior into individual units purchased after December 2008, which is addressed in N.J.A.C. 5:25-3.1(c)2, set forth above. In other words, if there were defects in common elements that were exhibited only after the units were occupied they can form a basis for a common elements claim under N.J.A.C. 5:25-3.1(c)2.

Moreover, the ALJ did not address the fact that Castro filed the common elements claim for the Association in April 2010, only after the Association ended its efforts to work with the builder because it was clear the work promised and started would not be completed. Under a prior decision of the Commissioner, upon which the Association relied, promises backed up with some show of progress, are pertinent to considering the timeliness of a claim by a homeowner who has delayed in reliance upon the builder's representations and actions. See Lloyd v. Bureau of Homeowner's Protection, Department of Community Affairs, 95 N.J.A.R.2d (CAF) 71, 74 (Dept. of Community Affairs 1995). In addition, no consideration was given to Smollik's and Castro's testimony indicating that the builder and the Bureau gave inaccurate information about the right to file a common elements claim. The Bureau has an obligation to do better. Lakhani, supra, 356 N.J. Super. at 142-48 (discussing the Bureau's mishandling of claims).

Before concluding, it is worth noting that the Commissioner relies heavily on the passages in the Department's Handbook issued to purchasers of covered homes at closing. The issue is not before us, but to the extent that the information it provides differs from the regulations, it is ineffective. Absent adoption by rule, the Handbook cannot modify a regulation or the Act. See Lakhani, supra, 356 N.J. Super. at 144-45. In fact, that basic principle of administrative law is prominently announced in the Handbook.

Because of the inadequacy of the discussion of the evidence and reasoning supporting the denial of the Association's claims as untimely filed, we cannot conclude that the Bureau and the Commissioner met their obligation to resolve this claim "fairly, reasonably and in conformity

with the rules and regulations adopted to implement the Act." Id. at 142. As the Supreme Court explained long ago, "It has been said that it is a fundamental of fair play that an administrative judgment express a reasoned conclusion. A conclusion requires evidence to support it and findings of appropriate definiteness to express it." New Jersey Bell Tel. Co. v. Commc'n Workers of America, 5 N.J. 354, 375 (1950). Accordingly, we vacate the Commissioner's determination and remand for further proceedings. Given our disposition of the case, there is no reason to address the other arguments raised on appeal. There is a need for the Commissioner, who is charged with the responsibility for the regulations and final decisions adjudicating claims, to address the issues and evidence that we have identified as overlooked. We suspect the Commissioner will welcome the opportunity because the Commissioner filed a motion for a remand that another panel of this court denied. Our reversal and remand cannot be considered a reconsideration of the panel's order. It is based on the reasons set forth in this decision.

Reversed and remanded for further proceedings.

1 Judge Skillman, discussing a defect the Department deemed "'a major structural defect which is covered within the ten year warranty period,'" referenced the ten year warranty period applicable to such defects. See id. at 135-36; N.J.S.A. 46:3B-3(b)(3). Because the Association does not contend that any of the defects it alleges were warranted against for ten years, we have omitted the reference from the passage quoted in the text accompanying this footnote. See N.J.S.A. 46:3B-3(b)(1)-(2) (providing one and two year warranties against other less serious defects).

2 Given the breadth of the authority the Legislature delegated to the Commissioner and the unique nature of ownership of common elements of condominiums, we see no serious reason to question whether the Commissioner acted beyond the scope of his authority in giving the term "first occupancy" a special meaning applicable to common elements. Because the Association does not argue otherwise, we decline to address that question.
