To be argued by:
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Aplication of 19 EAST 80TH STREET TENANTS' ASSOCIATION,

Petitioner-Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

—against—

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Appellant,

DAVID FRANKEL REALTY CO., INC.,

Intervenor-Appellant.

BRIEF OF RESPONDENT-APPELLANT DIVISION OF HOUSING AND COMMUNITY RENEWAL

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PRELIMINARY STATEMENT

This is an appeal by the New York State Division of Housing and Community Renewal (hereinafter "DHCR") of two decisions and orders of the Supreme Court, New York County (Schoenfeld, J.), one entered in the Office of the Clerk of New York County on May 26, 1995, and the second entered on April 11, 1996. The Court granted in part an Article 78 petition brought by the tenants of the subject building, overturning a DHCR order which found that the owner of the premises had restored building-wide services. The

Court remanded the matter to DHCR for a redetermination as to whether or not the other services had been restored. On motion for reargument, the Court adhered to its prior decision.

STATEMENT OF THE QUESTIONS PRESENTED

1. Was it proper for DHCR to grant the owner's application to restore rents upon concluding that doorman, handyman and elevator services had been restored?

The Court below in part answered in the negative, and in part remanded the matter to DHCR for further consideration.

STATEMENT OF THE NATURE OF THE CASE

The issue in this appeal is whether the Court below improperly substituted its judgment for that of the administrative agency. The case involves DHCR's grant of an owner's application to restore rents based upon a restoration of building-wide services. The building in question is a well-maintained luxury building located in a prime Manhattan residential neighborhood. Although certain building-wide services had not been maintained for a number of years, those services were restored in early 1991.

The tenants do not dispute that the services have been restored - as indeed they have been - rather they contend that there has not been a full restoration of services sufficient to justify a restoration of rents. If the tenants were to prevail, rents would remain frozen at the level in effect in early 1990, and the owner would be required to refund excess rents collected from

the date DHCR ordered rents restored -- March 1, 1991 -- notwithstanding the fact that the building is well maintained.

The tenants complain (1) that, although doorman service has been restored during two disputed shifts, there is no "relief" doorman for periods when the regular doorman is away from his duty-post and that this constitutes a decrease in doorman service, front door security, and intercom service; (2) that, although five-day handyman service has been restored, the service is not provided on weekends as was done formerly; and (3) that service elevator hours have been curtailed.

However, the record shows that the services in issue have been restored. The owner, in addressing the issue of the doorman being away from his station during meal and bathroom breaks, installed a manned television monitoring system in the passenger elevator, including an intercom to the front door and a release mechanism to unlock the door from the elevator. This substitution for a relief doorman constitutes a satisfactory restoration of the doorman service, front door security, and the intercom service.

With regard to weekend handyman service, the record discloses that not employing the handyman on weekends does not constitute a failure to maintain the actual services provided by the handyman service -- assistance in making repairs and help in the general maintenance and upkeep of the building. The restoration of the

service on a five-day basis without regard to days of the week was properly found to be adequate.[1]

With regard to the complaint that the hours of operation of the service elevator have been curtailed from twelve to eight hours a day, there is no indication that the concrete needs provided by the service elevator - garbage collection, deliveries, access to the laundry room, and access for moving - are not being satisfactorily provided.

Turning briefly from the merits, three of the issues raised by the tenants in this restoration proceeding -- substitute doorman during the regular doorman's breaks, front door security, and weekend handyman service -- constitute a collateral attack on an earlier Commissioner's order in a separate compliance proceeding. The tenants failed to seek judicial review of that order and are now barred by the doctrine of res judicata/collateral estoppel from relitigating the three issues.

The circumstances in this case fall within the parameters of this Court's recent holding in Grenadier Realty v. DHCR, __A.D.2d__, 639 N.Y.S.2d 367 (1996):

> In our view, the alleged changes in building services here at issue -- curtailment of operation of a laundry room to 18 hours per day, reduction of playground hours to 10 hours per day, a limiting the freedom of messengers to roam the building -- cannot be viewed as a failure to maintain required services necessitating rental adjustment pursuant to the Rent Stabilization Code.

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[1] Upon information and belief, the handyman service is now being provided Tuesday through Saturday, eight hours a day.

As in Grenadier Realty, in the case at bar, it would be "contrary to reason" to continue a freeze in rents at the 1990 level and award substantial refunds to tenants. The changes in service in the instant case "cannot be viewed as a failure to maintain services".

The Court, as this brief will show, made serious mistakes in its analysis of the requirements of the law and the factual record. It improperly substituted its judgment for that of the agency. The continuation of the rent reduction and freeze under the circumstances of the case at bar is unwarranted. The orders of the Court below should be vacated a and DHCR's determination affirmed.

However, were this Court to conclude that the matter should still be remanded to DHCR, it should direct that it be done so without the preconditions imposed by the Court below. The Court concluded that both the doorman and intercom services had been decreased, and remanded the proceeding to DHCR for further consideration "consistent with the instant decision." (R. 26)[2] Thus, the Court's order binds the agency and pre-ordains the outcome. It would require DHCR to deny a restoration of rents, since the failure to restore even one service is ground to deny a rent restoration. See, ANF Company v. DHCR, 176 A.D.2d 518, 574 N.Y.S.2d 709, 711 (1st Dept. 1991).

If there is to be remand, it should be without preconditions.

[2] References are to the Record on Appeal.

STATEMENT OF THE FACTS

This appeal, which concerns the owner's rent restoration application, stems from an earlier DHCR determination that the owner was not maintaining certain building-wide services. In addition, there was a non-compliance proceeding regarding the provision of those services, resulting in a separate order by the Commissioner, and an application from the owner to modify services. These proceedings are described below.

A. The Services Proceeding.

The matter commenced when the tenants filed a complaint in June, 1985, alleging a decrease in building-wide services described by the tenants as follows:

> Handyman
>
> Doorman Service - Thursdays 3PM to 11 PM
> Sundays 7AM to 3PM
>
> Service Elevator - Weekdays 7AM to 8AM
> 4PM to 7PM
>
> Non-substitution of staff on vacation, holiday or sick days
>
> Intercom system

(R. 72) The tenants' complaint explained these items as follows:

> The services listed were provided when we rented our respective apartments. The position of Handyman has been completely eliminated. There is no longer doorman service or a service elevator operator at the times and on the days noted. In addition, Management has been increasingly remiss when they are absent from work. The intercom system is the kind that must be manned. Without an attendant tenants calls are not answered and visitors enter the building unannounced. Since we are so often short-staffed, this service has

> become sporadic. The security initially provided by the system is now minimal.

(R. 72-73)

On December 6, 1986, the District Rent Administrator issued an order deciding the tenants' complaint and directing the restoration of services as follows:

> 1. Handyman service.
>
> 2. No doorman on duty in building between hours 3 P.M. to 11 P.M. thursdays [sic] and sundays 7 A.M. to 3 P.M.
>
> 3. Secure door when doorman and/or elevator operator are off on hours noted in No.#2 above or substitution of employees.

(R. 71) There was no further specification of the services which were required to be restored. Significantly, although the time and day of service was stated for the doorman service, no days or hours were specificied for the handyman or elevator service. The District Rent Administrator did not order a rent reduction.

In response the tenants timely filed a Petition for Administrative Review ("PAR") in January, 1987, making the following allegations with regard to the services:

> We concur with your order directing the landlord to restore a handyman and doorman service, however, we think the order should be extended to encompass all services previously rendered and listed on our original complaint. Failure to provide these services causes diminution of other interrelated services...
>
> Specifically, the order should be extended to include service on the service elevator. There is a minimum service loss of 28 daytime hours per week. When this service is not provided, the passenger elevator operator or doorman takes on the additional chores of the service elevator operator, shirking his own

> duties and further weakening the security of the building.

(R. 78) In addition, the tenants requested that rents be reduced because of the owner's failure to maintain services.

The PAR was decided by an order issued by the Commissioner on May 18, 1992, after the completion of proceedings detailed in the order. (R. 82) The PAR order granted the tenants' petition insofar as it held that the agency was required to reduce rents in accordance with the Court of Appeals decision in Tenants of Hyde Park v. DHCR, 73 NY2d 998, 541 NYS2d 345, 539 NE2d 101 (1989). With regard to the kind and level of services required to be provided, the order found as follows with regard to the service elevator and intercom:

> The Commissioner notes that a careful reading of the tenants' complaint reveals that the allegations regarding the service elevator and the intercom do not concern the malfunction of these services but relate to the general issue of inadequate personnel available to run the service elevator or man the intercom or to provide replacement employees when the assigned employees are absent from work. The Commissioner finds that this issue is adequately addressed in the Administrator's order finding a diminution of services based on reduced personnel and is, therefore, included in the rent reduction ordered herein.

With regard to the handyman and doorman service, the May 18, 1992 order found as follows:

> Accordingly, the Commissioner finds that as to the owner's response to the tenants' petition, it is the law of this case, and res judicata, pursuant to the Supreme Court's decision, which was affirmed by the Appellate Division, that the owner is to hire a handyman and to provide doorman service during the hours stated in the Administrator's order; that the

> Administrator's order concerning the restoration of services was clear and unambiguous; that DHCR had no duty to inform the owner that it may have misinterpreted the Administrator's order, and that the owner may not attack the Administrator's order as it did not file its own petition.

In addition, although the PAR order made no findings with regard to whether or not services had been restored, it incorrectly contained a decretal clause allowing the restoration of rents as of March 1, 1991, in accordance with a separate Rent Administrator's restoration order rendered with regard to the owner's application to restore rents.

Article 78 proceedings were brought by both the owner and tenants challenging the services PAR order. As to claims raised by both sides with regard to the restoration of rents, the parties stipulated to a remit to DHCR to have those issues considered in the PARs brought from the Administrator's restoration order. (R. 135-137) There being no further claims in the owner's Article 78 petition, it was withdrawn.

As to the tenants' Article 78 proceeding, 19 East 80th Street Tenants' Association v. DHCR, N.Y. Co. Index No. 111043/93, there were two additional claims; one concerning the amount of rent reduction for rent controlled tenants, which claim was withdrawn; and one seeking to have included in the rent reduction for stabilized tenants fourteen tenants who did not join in the original services complaint. The proceeding was submitted to the Court with regard to the remaining claim, and the Court found in an order dated January 7, 1993, that DHCR had correctly determined not

to grant those fourteen tenants a rent reduction. (R. 168) The tenants took an appeal from the Court's order on February 26, 1993, but did not perfect that appeal.

B. The Owner's Application to Modify Service.

In November 1988, the owner applied for permission to modify services, i.e., the station the elevator man at the front door during the time the doorman service was not being provided - Thursdays from 4 P.M. to 12 A.M. and Sundays from 8 A.M. to 4 P.M. (R. 80) The application was denied by the District Rent Administrator on June 27, 1990, on the ground that the proposed modification contradicted the services reduction order which required restoration of full doorman service during the aforesaid Thursday and Sunday shifts. (R. 79-80)

The application and DHCR determination was plainly limited to the question of the doorman service during the two particular time slots. The doorman service during the two time slots was subsequently restored by the owner.

C. The Compliance Proceeding.

After issuance of the Rent Administrator's December 9, 1986 order directing the restoration of services, the tenants, separate and apart from the PAR in the services proceeeding, described above, filed an affirmation of non-compliance. The affirmation complained of a failure to restore the following services:

1. Handyman position still eliminated.
2. Doorman hours 3 P.M. to 11 P.M. Thursdays and 7 A.M. Sundays have not been restored.

3. The above diminished services leave us short-staffed and lack of substitution of employees continues.

(R. 95)

Subsequently, a compliance proceeding was opened by DHCR and five days of hearings were held in 1989. Among other things, during the hearings the tenants, for the first time alleged that handyman services was required on weekends.

On January 24, 1990, the Commissioner issued an order deciding the compliance proceeding, finding in relevant part that:

> The credible evidence of record reveals that more than three years after the issuance of the Division's order the owner had still not complied with the order to restore handyman service or to restore doorman presence on Thursdays 3:00 p.m. to 11:00 p.m. and Sundays 7-00 a.m. to 11:00 a.m.
>
> * * * *
>
> The owner sufficiently established through testimony that it has installed a security system to cover the time when the doorman is away from the door.

(R. 98-99) The order, notwithstanding the tenants' complaints about the days the handyman service was provided, the Commissioner declined to go beyond the terms of the 1986 services reduction, which did not specify days on which the service must be provided. As for tenant complaints about substitute doormen when the regular doormen were on breaks, the Commissioner held that such service was now covered by the "security system".

Notwithstanding these holdings, the tenants failed to bring any Article 78 challenge to the Commissioner's compliance order.

As a result of the finding of non-compliance with regard to other services, the Commissioner fined the owner $1,500 and barred it "from applying for or collecting any rent increases for the affected housing accommodations until the Division determines that it has complied with this order." (R. 97-100)

The owner challenged the compliance order in an Article 78 proceeding; but the order was affirmed by both the Supreme Court as well as this Court. David Frankel Realty Co. v. DHCR, 176 A.D.2d 617, 575 N.Y.S.2d 59 (1st Dept. 1991), lv. to appeal den., 79 N.Y.2d 754, 581 N.Y.S.2d 281 (1992).

D. The Rent Restoration Proceeding.

The Rent Restoration proceeding which underlies this Article 78 proceeding commenced upon the owner's filing of a rent restoration application on December 17, 1990, after the Supreme Court, in David Frankel Realty Co. Inc. v. DHCR, Index No. 17074/90, Nov. 2, 1990, Sup. Ct., N.Y. Co., Weissberg, J., informed the owner that there could be no rent restoration until the proper rent restoration application had been filed and administrative procedures completed.

On May 15, 1992, the Rent Administrator issued an order finding that services had been restored. Both the tenants and owner filed PARs challenging various aspects of the order. In addition, as noted in part "A" above, the parties stipulated to a remit of the restoration issues in the Article 78 litigation challenging the services PAR. (R. 135-137)

On March 5, 1993, the Commissioner issued the PAR order challenged herein, finding that the rents were properly restored for rent stabilized tenants as of March 1, 1991. (R. 58)

The tenants then brought an Article 78 proceeding, challenging the specific findings of the Commissioner as to services having been restored. (R. 27) The Court below found that the doorman service had been diminished, and that the utilization of the electronic security system in place of substitute doormen constitutes a decrease in service. The Court remanded the matter to DHCR for further consideration in light of these, as well as other findings concerning the handyman and service elevator. (R. 6 and 16)

Both DHCR and the owner have appealed the Court's ruling.

ARGUMENT

THE COURT BELOW ERRED IN THAT IT IMPROPERLY SUBSTITUTED ITS OWN JUDGMENT FOR THAT OF THE AGENCY IN CONCLUDING THAT THERE HAD BEEN A DECREASE IN BUILDING-WIDE SERVICES.

A. Scope of Review.

The courts have repeatedly held that it is for the administrative agency to determine under the Rent Stabilization Law and Code whether services are being maintained. See, Matter of Fresh Meadows Associates v. Conciliation and Appeal Board, 88 Misc.2d 1003, 390 N.Y.S.2d 351 (Sup. Ct., N.Y. Co., 1976), aff'd 55 A.D.2d 599, 390 N.Y.S.2d 69 (1st Dept. 1976), aff'd, 42 N.Y. 927, 397 N.Y.S.2d 1007 (1977) (what services are to be maintained is a

factual issue to be determined by the rent agency); Oriental Boulevard v. Conciliation and Appeals Board, 92 A.D.2d 470, 459 N.Y.S.2d 50, (1st Dept. 1983), aff'd, 60 N.Y.2d 633, 467 N.Y.S.2d 355 (1983).

In reviewing administrative proceedings, the rational basis test is the standard to be applied. Under well settled principles of law, the Court's function upon judicial review is completed upon finding that a rational basis supports the agency's determination. Thus the Court cannot substitute its judgment for that of the Commissioner. Matter of Fresh Meadows Associates v. New York City Conciliation and Appeals Board, supra; Matter of Pell v. Board of Education, 34 N.Y.2d 222, 230, 356 N.Y.S.2d 833 (1974); Colton v. Berman, 21 N.Y.2d 322, 287 N.Y.S.2d 647 (1967). As this brief will make manifest, the record in the case at bar clearly provides a rational basis for the Commissioner's order. Thus, it is entitled to judicial affirmance.

B. The Commissioner Rationally Concluded that the Handyman Service Has Been Restored.

It is undisputed that before the handyman service was discontinued there had been a handyman on the premises five days a week; and that since the service has been restored the handyman is on premises five days a week. However, the tenants argue that the service has not been fully restored because the service is not being provided on weekends, as was formerly done.[3]

[3] Upon information and belief, the handyman now works on one weekend day, being scheduled to work from Tuesday through Saturday.

The Court below, in reviewing the handyman issue, remanded the matter to DHCR for consideration as to whether or not the service must be provided on weekends. In this, the Court improperly substituted its judgment for that of the agency.

The Court's remand was specifically to consider whether weekend handyman service is "the equivalent" of weekday handyman service, i.e., whether weekend service "might be more advantageous for at least some tenants." (R. 22) In this the Court erred. The issue in a services case is not whether weekend service "might be more advantageous", but, as this Court recognized in Grenadier Realty v. DHCR, __A.D.2d__, 639 N.Y.S.2d 367 (1996), whether the owner is failing to maintain the service. That it might be more advantageous "for at least some tenants" to have weekend handyman service does not constitute a ground for concluding that an owner has failed to maintain services, and for reducing rents building-wide on that basis.

The duties of the handyman in the case at bar "are to assist the superintendent in making repairs and to participate in the general maintenance and upkeep of the building." (R. 59) That such duties are to be fulfilled during the week, when the superintendent is on the premises, rather than on weekends -- that some tenants may have to occasionally remain home on a weekday for a repair rather than have it done on the weekend -- neither constitutes a failure to maintain services nor justifies a building-wide rent reduction.

With regard to the handyman service, the Commissioner's order concluded that

> According to the payroll records submitted by the owner and the tenants' own admissions, a handyman has been hired and is employed five days a week. This is sufficient to support a determination that this service has been restored to the extent required.

(R. 61) This is a reasonable determination. What days of the week the handyman is employed is not determinative.

Where there is an evidentiary issue in an administrative proceeding, the duty of weighing the evidence, where from the evidence either of two conflicting inferences may be drawn, rests solely upon the administrative body. A court may not weigh the evidence and substitute its judgment for that of the administrative body where the testimony is conflicting and room for choice exists. In Stork Restaurant Inc. v. Boland, 282 N.Y. 256, 26 N.Y.S.2d 247, the Court of Appeals said:

> [w]here there is a conflict in the testimony produced *** where reasonable mean might differ as to whether the testimony of one witness should be accepted or the testimony of another witness be rejected, where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests upon the [administrative agency].The court may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists

The Court below, not only erred in substituting its judgment for that of the agency, but in doing so, applied an incorrect standard.

Moreover, the Court below incorrectly concluded that the tenants' claim regarding weekend handyman service was not a collateral attack on an already decided issue. The Commissioner's PAR order in the instant proceeding held as follows with regard to the handyman service:

> The Administrator's order directed the owner to restore "handyman service". It did not identify specific hours or days that a handyman must be available, and the tenants' attempts to elaborate in the restoration proceeding on what was meant in the 1986 Administrator's order constitutes an impermissible collateral attack on a final order. It is noted that the Commissioner's order granting the tenants' PAR of that order did not modify the directive to the owner to restore "handyman service" and that the tenants' Article 78 petition for judicial review of the Commissioner's order did not result in any modification to this portion of the order.

The Commissioner's determination is well founded in the record. Neither the tenants initial complaint nor the Rent Administrator's December 9, 1986 determination make any reference to the days of the week on which the handyman service should have been or must be provided. The services order (R. 70-71), while making reference to specific days and times with regard to the restoration of the doorman service (Thursday evenings and Sundays), makes no such reference with regard to the handyman service.

Nor did the tenants make any reference to the days of handyman service in their PAR challenging the December 6, 1986 determination. The only reference to the handyman service in the PAR was as follows:

> To date there are no indications that the landlord has rehired or will rehire a handyman

> or restore doorman service to the hours so ordered.

(Exh. "E" to Art. 78 Pet.) The hours so ordered in the December 9, 1986 order concerned the doorman service not the handyman.

The May 18, 1992 order determining the tenants' PAR found only that the owner was required to hire a handyman. Nothing was said as to the days on which a handyman would have to be present on the premises. (R. 82-94) The same is true with regard to the findings in the Commissioner's compliance order. (R-97-101)

The first time the tenants raised the issue of weekend handyman service was in the compliance proceeding, injecting a new demand almost four years after filing their services complaint. The Commissioner's compliance order declined to impose this new demand on the owner, simply concluding that the owner was required to restore handyman service specifying the days of the week the service needed to be provided. (R. 98) As in the original December 1986 services order, days and times for providing the doorman were specified for the doorman service, but not for the handyman service.

Notwithstanding this compliance determination by the Commissioner, the tenants failed to seek judicial review of that determination. Under the doctrine of res judicata/collateral estoppel, they were foreclosed from relitigating the issue in the restoration proceeding.

The principles of res judicata/collateral estoppel bar parties to a previous litigation from litigating matters which

were decided in the prior proceeding. Schwartz v. Public Administrator of the County of Bronx, 24 N.Y.2d 65, 298 N.Y.S.2d 955 (1969). Res judicata applies to situations in which a judgment in the second proceeding would destroy or impair interests established by the first, as well as where a claim arises from a transaction or series of transactions as to which a claim has previously been brought to a final conclusion, whether or not the particular issue being raised was litigated in the prior proceeding. Schuylkill Fuel Corp. v. B. &. C. Nieberg Realty Corp., 250 N.Y. 304 (1929). This state has adopted the transactional analysis approach in deciding res judicata issues. Thus, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. O'Brien v. City of Syracuse, 54 N.Y.2d 353, 445 N.Y.S.2d 687 (1981). Res judicata applies where the second action is based on the same gravamen of the wrong upon which the first action was brought. Smith v. Russell Sage College, 54 N.Y.2d 185, 445 N.Y.S.2d 68 (1981).

It is well established that the principles of collateral estoppel and res judicata are applicable to determinations of administrative agencies as well as judicial proceedings. When such determinations become final, they become conclusive and binding on the courts. Bernstein v. Birch Wathen School, 71 A.D.2d 129, 132, 421 N.Y.S.2d 574 (1st Dept. 1979), aff'd., 51 N.Y. 2d 932, 434 N.Y.S.2d 994 (1980); Capital Telephone Co. v. Patterson-

ville Telephone Company, Inc., 56 N.Y.2d 11, 451 N.Y.S.2d 11, 436 N.E.2d 461 (1982).

The Court below not only ignored the doctrine of res judicata/collateral estoppel in holding that the tenants "surely cannot be faulted to appeal an order directing the restoration of 'handyman service'", but based this holding on the erroneous factual conclusion that "the issue of weekend handyperson service was continually being raised". (R. 22) To the contrary, as the review of the facts above show, the issue of weekend handyman service was not raised until the hearings in the compliance proceeding. It was not even raised in the tenant's affirmation of non-compliance. (R-94-96)

The Court improperly substituted its judgment for that of the agency; and did so on the basis of mistaken factual conclusions. Under the circumstances, the Commissioner correctly concluded that the tenants, in opposing the owner's restoration application on the ground of weekend handyman service, were impermissibly seeking to collaterally attack the original finding.

It is undisputed that a full time handyman service was reinstituted by the owner in 1990. Thus, it was proper for the Commissioner to conclude that the service had been restored as of March 1, 1991.

C. The Commissioner's Determinations Regarding the Doorman Service and Front Door Security Were Rational.

What the Court below discussed as two separate issues, doorman service and front door security, in actuality boils down to one issue: whether or not there is a requirement to provide substitute

or relief doormen personnel when the regular doorman is on a break.[4]

As correctly held by the Commissioner, this issue was previously determined in the compliance order, which determination was no longer subject to attack (R. 62):

> As for the directive to secure the door when the doorman is off, the Commissioner finds that the compliance order issued on January 24, 1990, also by the Commissioner, determined that this portion of the Administrator's order had been complied with. This too is a final agency determination which was affirmed on appeal and is not subject to collateral attack in this restoration proceeding.

On the question of front door security and substitute personnel the compliance order concluded that the installation of the electronic surveillance system adequately addressed the issue of front door security (R. 99):

> The owner sufficiently established through testimony that it has installed a security system to cover the time when the doorman is away from the door.

To understand this finding, it is important to keep in mind that the 1986 services order is entitled "Order directing restoration of service(s)". (R. 70) Thus the compliance order, though finding that the owner had not complied with certain elements of the 1986 order, did conclude in essence that there was a restoration of security services for the periods when the doorman is on a break.

As with the issue of the handyman service, by not having

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[4] It is undisputed that the owner has restored doorman service during the two shifts specified in the Rent Administrator's December 9, 1986 order, i.e., on Thursdays from 3 P.M. to 11 P.M. and Sundays from 7 A.M. to 3 P.M.

challenged the Commissioner's compliance determination, the tenants were precluded from any subsequent challenge by the doctrine of res judicata/collateral estoppel. The tenants had a full opportunity to litigate the issue in the compliance proceeding, and to challenge the compliance order. They cannot now collaterally attack that order.

The Court below erroneously addressed the question of issue preclusion as follows (R. 23-24):

> However, it appears, as petitioner argues, that petitioner preserved this issue by raising it in the PAR of the December 9, 1986 Order, and that petitioner was not obligated to address this issue in the compliance proceeding, since there was no question that Frankel was locking the door. Thus DHCR erred in finding that Petitioner had waived its right to appeal the front door security issues.

The Court erred in its analysis in concluding that, by raising the issue in the PAR of the December 1986 order, the tenants were not obligated to address the issue in the compliance proceeding. The fact that an issue has been raised in one administrative proceeding does not relieve a party of the obligation to litigate that issue in a parallel proceeding, if the latter comes up for resolution first in that parallel proceeding.

The Compliance proceeding was initiated at the behest of the tenants. In that proceeding, the owner claimed that he was in compliance on the issue in question, i.e. that he had restored the service. Once he presented testimony as to such, the burden was on the tenants to refute the claim. The Court below was fundamentally

incorrect in saying that the tenants were under no obligation to address the issue.

The Court's reference to the locking of the door is unintelligible. How would the fact that the owner was locking the door relieve the tenants of the obligation of addressing the issue of front door security and substitute doormen in the compliance proceeding? The question of the locking of the front door when the doorman is on break, in conjunction with the installation of the television monitor manned by the passenger elevator operator, was one of the issues in question during the compliance proceeding; and the tenants were obliged to address the issue in that proceeding if they wanted it addressed at all.

Failure to challenge the compliance order's finding as to the acceptability of the electronic security system precluded any further attack on the Commissioner's finding as to the adequate provision of front door security while the doorman is on break. Once that finding was final and no longer subject to judicial review, it was binding with regard to both the pending PAR from the services order, and the subsequent restoration proceeding which is here under review.

The Court below also erred in ruling on the merits that the doorman service has been diminished, an erroneous ruling reaffirmed by the Court in its order deciding the motion to reargue. (R. 6-10) The Court's analysis is set out most plainly in the latter reargument order, referring to three points. They will here be taken up in reverse order.

In the third point, which concerns DHCR's factual finding, the Court expresses a misunderstanding. It states that

> However, it appears that the adminstrative agency either decided that a mechanical system was no diminution in services over a doorman, which for reasons set forth in the Decision was based on an error of law or was arbitrary and capricious, or decided that on the base date there was no substitute doorman service, which for reasons stated herein was arbitrary and capricious.

(R. 9-10) Contrary to the Court's characterization, DHCR did not make either of those two decisions. What DHCR did decide (in the compliance order) was that the installation of a manned electronic security system, consisting of a locked door with a mechanism for releasing the door, an intercom between the door and the manned passenger elevator, and a manned television monitoring system in the passenger elevator, was an adequate replacement for substitute personnel stationed at the door when the doorman is on a break. This was not a the replacement of personnel by a mere mechanical device, as mischaracterized by the Court. The new system still requires that it be manned; but by utilization of mechnical and electronic devices, manned at a place removed from the door for those short periods when the doorman is on a break. It was certainly reasonable for DHCR to conclude that this constituted an adequate provision for the service.

As for the Court's second point - what service was being provided on the 1968 base date - it is simply irrelevant. Whether or not there had been substitute doorman service on the base date

is not determinative of the issue. What is relevant is that DHCR found the replacement to be adequate.

As for the Court's first point, regarding the DHCR letters from John Marino, an agency employee, to the landlord (R. 130-134), which characterized the service requirements, the Court concedes that the letters were not binding on the agency, nor dispositive for the Court. (R. 8) Indeed, it is the Commissioner's determinations which are dispositive and binding. For a further discussion of the letters and the owner's response, the Court is respectfully referred to the owner's brief on this appeal. Those letters cannot form a basis for concluding that the owner has diminished the doorman service or front door security.

The Court below improperly substituted its judgment for that of the agency and must be reversed on the issue of doorman service and front door security.

In the alternative, should this Court affirm the remand to DHCR, it should nevertheless vacate the finding that the owner has diminished the doorman service. Otherwise, DHCR will have no authority to reconsider the issue and will be forced to conclude that the owner has not restored services, precluding the restoration of rents. If there is to be a remand, DHCR should not be constrained in advance of its new determination.

D. The Commissioner's Determination Regarding the Intercom Service Was Rational.

The issue concerning the intercom system relates to the issue concerning the substitution of the doorman during breaks. The

Commissioner concluded that the owner had made appropriate arrangements with regard to the intercom service:

> The intercom issue relates to the availability of personnel to answer the door and announce visitors. The testimony at the hearing conducted in the Compliance proceeding reveals that monitoring the intercom is one of the functions of the doorman and that no one was available to operate the intercom when the doorman was not on duty or away from his station. With the undisputed hiring of additional personnel to cover the previously eliminated doorman shifts and the installation of an electronic security system, the door is now covered at all required times. The finding in the Compliance proceeding that a security system has been installed to cover the door when the doorman is away from his post sufficiently establishes that the owner has made appropriate arrangements for those times when the doorman takes his meal or bathroom breaks. The security system provides for electronic surveillance of the door which can be viewed through a monitor in the elevator, allowing the elevator operator to determine if someone who buzzes should be admitted, and if so, to release the door lock under his control. This apparatus precludes the need for the hiring of additional personnel to fill in when the doorman must be away from his post.

(R. 62-63)

The Court's conclusion that the service has been decreased is based on a number of confusions. The Court first equates the modification of a service with a decrease in service, and then states that the question is not whether a service is satisfactory, but whether it has been decreased. This scheme would require maintenance of the service without any change in how it is provided. The scheme does not reflect the proper factors to be considered under the law. The correct way to frame the issue is to ask whether a substitution of one method of providing a service for

another method constitutes a decrease in that service, i.e., whether that substitution is a satisfactory substitution in terms of the level of service which must be provided. (See, e.g., Grenadier Realty v. DHCR, __A.D.2d__, 639 N.Y.S.2d 367 (1st Dept. 1996)) That is the way the intercom service was analyzed by the Commissioner. The Court's confusing analysis shows why it is important that a Court not substitute its judgment for that of an administrative agency. If the correct framework is used, contrary to the finding of the Court, the conclusion must be that the Commissioner's determination is reasonable.

E. The Commissioner Rationally Concluded that the Elevator Service Has Been Restored.

With regard to the service elevator, the tenants complain that the owner has failed to fully restore the hours of operation of that elevator. The Commissioner, in finding that the service elevator service had been restored, stated that (R. 62):

> The Commissioner's order and opinion issued in BA410150RT found that the tenant's complaint regarding the service elevator, the intercom, and the substitution of absent employees was included in the Administrator's finding that building personnel had been reduced. The tenants Article 78 petition seeking judicial review of that order did not result in any modification of that portion of the order and it is not now subject to further review.
>
> The evidence of record supports a finding that these services have also been restored. The payroll records establish that the service elevator is available 8 hours a day, 7 days a week. Although the Administrator's order did not specify the hours the service elevator is to be provided, the owner is cautioned to maintain no less than these hours of operation.

This ruling is entitled to judicial affirmance. The Court's remand of the elevator service issue to consider whether there has been a reduction in service because of the curtailment of hours, is unwarranted. This situation is very much like that in Grenadier Realty v. DHCR, __A.D.2d__, 639 N.Y.S.2d 367 (1st Dept. 1996):

> In our view, the alleged changes in building services here at issue -- curtailment of operation of a laundry room to 18 hours per day, reduction of playground hours to 10 hours per day, a limiting the freedom of messengers to roam the building -- cannot be viewed as a failure to maintain required services necessitating rental adjustment pursuant to the Rent Stabilization Code.

In the case at bar, like in Grenadier Realty, there is no indication that the concrete needs provided by the service elevator - garbage collection, deliveries, access to the laundry room, and access for moving - are not being fully maintained because of the curtailment of the hourse of operation of the service elevator from twelve to eight hours a day. (The hours in question are 7 to 8 A.M and 4 to 7 P.M.) It would be contrary to reason to conclude that the building-wide rent reduction should remain in effect because of the curtailment.

Moreover, the Commissioner's caution to the owner to continue to maintain the hours of operation of the service elevator imposes a binding obligation on the owner. The service cannot be further curtailed.

The Commissioner's determination is reasonable and must be affirmed.

CONCLUSION

There being a rational basis in the administrative record for the Commissioner's determination permitting a rent restoration, the PAR order must be affirmed. The Decision and Order of the Court below should be vacated and the Order of the DHCR, should be affirmed and the petition dismissed, together with costs and disbursements. In the alternative this Court should modify the Decision and Order of the Court below to the extent the findings of a decrease in services be vacated and the remand to DHCR for further consideration contain no pre-conditions.

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Respectfully submitted,

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