To be argued by:
RICHARD HARTZMAN

New York County Clerk's Index No. 400357/94

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

ALEX MOREIRA and MAMIE CHAMBERS,
Plaintiffs-Respondents/Cross-Appellants,

—against—

DONALD M. HALPERIN, as Commissioner of the New York State Division of Housing and Community Renewal,
Respondent-Appellant/Cross-Respondent.

BRIEF FOR RESPONDENT-APPELLANT/ CROSS-RESPONDENT

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SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FIRST DEPARTMENT

In the Matter of the Application of
ALEX MOREIRA and MAMIE CHAMBERS,

Plaintiffs-Respondents,

- against -

DONALD M. HALPERIN, as Commissioner
of the NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT DIVISION OF HOUSING AND COMMUNITY RENEWAL

PRELIMINARY STATEMENT

This is an appeal of a decision and judgment of the Supreme Court, New York County, rendered by the Hon. Charles E. Ramos on August 1, 1995, and entered in the Office of the Clerk of New York County on August 10, 1995. The judgment declared null and void Policy Statement 92-1 issued by Respondent-Appellant New York State Division of Housing and Community Renewal ("DHCR"). Policy Statement 92-1 concerns the payment of annual registration fees by the owners of rent-stabilized housing accommodations.

STATEMENT OF QUESTIONS PRESENTED

1. Do the respondents have standing to challenge DHCR's Policy Statement in view of the fact that they fail to show that they were aggrieved or that they fall within the cognizable zone of interests which are related to the Policy Statement?

The Court below answered in the affirmative.

2. Does the doctrine of laches warrant dismissal of the action because the delay in challenging the Policy Statement has both significantly and substantially prejudiced owners on a city-wide basis, as well as the proper administration of the rent-stabilization program by DHCR?

The Court below answered in the negative.

3. Did the issuance of Policy Statement 92-1 constitute a proper exercise of DHCR's authority and discretion as granted by the Rent Stabilization Law and the Emergency Tenant Protection Act?

The Court below answered in the negative.

STATEMENT OF THE NATURE OF THE CASE

This appeal raises an issue, which if decided in favor of the respondents, would adversely affect the rent rolls of thousands of residential apartment buildings in New York City ("City"), and could result in building-wide rent freezes at 1980s or early 1990s levels and substantial rent refunds in numerous cases; not because of wrongful conduct committed by owners against tenants, but because of a failure to pay perhaps one or a few out of many years of registration fees to the City. Such substantial rent roll-backs

would be far in excess of and grossly disproportionate to the ten dollar fee per apartment which an owner may have failed to pay in any particular year.

The result would be chaos. A prime goal of the rent stabilization program is the maintenance and preservation of the housing stock of New York City. If the decision of the Court below is affirmed, the housing stock would be jeopardized, and the rent stabilization program significantly undermined. Even were the respondents victorious in this litigation, it would likely be a pyrrhic victory.

The case involves an action for a declaratory judgment and injunction brought by two rent-stabilized tenants seeking to nullify DHCR's Policy Statement 92-1.

Policy Statement 92-1 concerns the payment of annual registration fees by the owners of rent-stabilized housing accommodations. The collection of fees is a way of reimbursing the City of New York for funds which the City in turn is required to pay to DHCR as part of the cost of administering the rent stabilization program. The City pays those funds to the State whether or not fees are paid by owners.

The Policy Statement explains the circumstances under which owners become subject to penalties for failure to pay their annual registration fees. In accordance with the requirements of the Emergency Tenant Protection Act of 1974 ("ETPA") and the Rent Stabilzation Law, the Policy Statement provides that the City is to notify DHCR of those owners who have not paid the fee, and DHCR in

turn is to notify the owners. Upon failure to pay within sixty days of DHCR's notice, a rent freeze becomes effective as of the date the payment was originally due.

Policy Statement 92-1, by elaborating the enforcement mechanism for the collection of registration fees, creates a bridge between the New York City Department of Finance and DHCR. It addresses the problem of the inevitable lag time involved in the exchange of information between DHCR and the City's Department of Finance. It was issued in light of the problems in the exchange of information between DHCR and the City, and in consideration of the legislative goal of preserving the housing stock. The Policy Statement reasonably addresses the problems presented in enforcing the collection of registration fees and falls within the discretion granted to DHCR by the State Legislature.

In ruling upon the parties' respective motions for summary judgment, the Court below incorrectly rejected DHCR's threshold defenses of standing and laches. The penalty of a rent freeze which inures to tenants in the event of non-payment bears no relation to the purpose for which the fee payment system was established. It is a windfall based solely on the means of enforcing fee payments. Tenants are thus not within the zone of interests covered by the fee law and lack standing to challenge Policy Statement 92-1. Moreover, the respondents have made no showing that they personally are adversely affected by Policy Statement 92-1.

As for laches, respondents two-year delay in challenging the Policy Statement significantly prejudiced owners and the entire rent-regulatory program because of potentially much greater city-wide rent-rollbacks and rent refunds that resulting from that delay. The respondents cause of action should be barred by the doctrine of laches.

With regard to the merits, the Court below, in incorrectly concluding that the Policy Statement violated the Rent Stabilization Law, ignored the purpose of the law, which is to provide a means for the City to collect annual registration fees in order to defray payments from the City to DHCR. The Court also ignored the discretionary authority to develop an appropriate enforcement mechanism which was granted by the State Legislature to DHCR under provisions of the Emergency Tenant Protection Act, provisions which must be read together with the relevant provisions of the Rent Stabilization Law.

The Court's judgment must be reversed and the action dismissed.

STATEMENT OF THE FACTS

A. The Rent Registration System

The State Legislature in 1983 enacted the Omnibus Housing Act (Chapter 403 of the Laws of 1983) which amended the Rent Stabilization Law (Title YY, N.Y.C. Admin. Code, renumbered as Title 26). This law constituted a major overhaul of the rent regulatory programs and a transfer of administrative responsibilities from the

City of New York and the Conciliation and Appeals Board to DHCR. Among other things the Act amended the Rent Stabilization Law to provide for central registration of rents by owners and service on each tenant of his/her rent and the opportunity for tenants to challenge the registration. The registration system was devised to address the problem of owners' failure to maintain and produce rent records to the rent agency for the purpose of verifying the lawfulness of rent stabilized rents.

As of April 1, 1984, the effective date of the Omnibus Housing Act, owners of rent-stabilized housing accommodations are required to register those accommodations with DHCR. Under the rent registration system, failure by a owner to properly register can result in rent freezes and can freeze the base rent date used for determining rent overcharges until there has been compliance with the law.

The statutory provisions concerning the rent registration system are contained in Section 26-517 of the Rent Stabilization Law (N.Y.C. Admin. Code; Book 65, McKinney's Unconsol. Laws, Section 8581 to 8700). Subsections 26-517(a) and (c) concern the initial registration of apartments subject to rent stabilization prior to April 1, 1984. Subsection 26-517(f) provides for the filing of annual registration statements. Subsection 26-517(e) sets forth the penalties to be incurred by owners when they fail to comply with the requirements for filing registration statements and serving them on tenants.

Section 26-516(a) of the Rent Stabilization Law contains clauses which explain the effect of rent registration on the calculation of lawful rents and overcharges when a tenant files a rent overcharge complaint.

The aforesaid statutory provisions concerning the structure, operation and effect of the registration system contain absolutely no reference to the payment of registration fees by owners. The proper functioning of the system or any other aspect of the rent stabilization program is in no way affected by or dependent upon the payment of those fees.

B. The Registration Fee Mechanism

As with the registration system itself, the registration fee mechanism for New York City was authorized by the Omnibus Housing Act of 1983. (Section 3, ch. 403, L. 1983, amending ETPA Section 8628.) It was established in conjunction with the transfer of the administration of the rent program to the State. The registration fees are designed to defray payments which the City must make to DHCR to partially cover the cost of administering the Rent Stabilization Law for New York City.

The enabling provision for charging fees to owners is contained in ETPA Subsection 8628(b):

> The legislative body of any city, town or village acting to impose regulation of residential rents pursuant to the provisions of this act may impose on the owner of every building containing housing accommodations subject to such regulation an annual charge for each such accommodation in such amount as it determines to be necessary for the expenses

> to be incurred in the administration of such regulation.

Subsection 8628(c) limits the amount of the annual fee to be paid by owners to ten dollars per housing accommodation. Subsection 8628(c) also contains the provisions which require the City to make payments to DHCR to defray part of the cost of administering the rent stabilization program. As with owners, the City is not required to pay more than ten dollars per housing unit.

Under Subsection 8628(b) of ETPA, it is within the discretion of New York City to decide whether or not to collect fees from owners. However, under Subsection 8626(c) the City must make payments to DHCR whether or not it collects fees from owners.

In response to the enabling provisions, Local Law 95 of 1985 was enacted by the New York City (now codified as Section 26-517.1 of the Rent Stabilization Law). Subsection 26-517.1(a) of provides for the collection by New York City of the annual registration fee from owners of rent stabilized apartments:

> The Department of Finance shall collect from the owner of each housing accommodation registered pursuant to Section YY51-6.0.6 [now 26-517] of this law an annual fee in the amount of ten dollars per year for each unit subject to this law, in order to defray costs incurred by the city pursuant to subdivision c. of section eith of the emergency tenant protection act of nineteen hundred seventy-four.

Subsection 26-517.1(b) provides for a penalty for non-payment of the fee:

> Pursuant to the provisions of subdivision d of section eight of the emergency tenant protection act of nineteen hundred seventy-four, the failure to pay the fee imposed by the provisions of subdivision a of this section shall

> preclude an owner from applying for or collecting any further rent increases authorized under this title or any other provision of law, and the late payment of such fee shall result in the prospective elimination only of the sanctions contained therein. Interest shall be imposed on such late payment at the same rate as is imposed on a delinquent tax on real property.

This subsection, which refers back to ETPA, has virtually the same language as contained in ETPA Subsection 8628(d) regarding the imposition of sanctions for failure to pay the registration fees. Most importantly, ETPA Subsection 8628(d) also provides that:

> The city of New York shall certify to the division such information as the division shall deem necessary to comply with the provisions of this subdivision.

It is this provision which signifies that there is to be a bifurcated mechanism for the payment and enforcement of registration fees.

Local Law Nos. 26 and 66 of 1986 added a Subsection (c) to 26-517.1, the effect of which was to make the requirement for payment of registration fees retroactive to April 1, 1984, the date on which the registration system first came into existence.

None of the provisions concerning the payment of registration fees has any effect on the operation of the registration system. However, a rent freeze occuring due to a failure to pay fees does have an affect on DHCR's determination of rent overcharge complaints simply as a result of the way the enforcement of payment is structured in the law. There can be an overcharge notwithstanding the fact that the failure to pay constitutes neither misconduct in

an owners relation to his tenants, nor a failure to comply with registration requirements.

C. DHCR Policy Statement 92-1

Policy Statement 92-1 was issued on January 23, 1992 to establish policy with respect to enforcement of penalties for failure to pay registration fees. (R. 98) The Policy Statement flows from Section 26-517.1 of the Rent Stabilization Law and ETPA Subsection 8628(d).

Following background information on the requirement for paying the annual fees, the Policy Statement outlines the steps to be taken before the prescribed penalties are to take effect:

> When advised by the municipal agency charged with collecting the annual administrative fee that an owner with a copy of the bill. The owner must pay the billed fee, together with any additional charges or interest, to the municipal agency and submit proof of such payment to the DHCR within 60 days of the date of the notice or DHCR shall issue an order subjecting the owner to the penalties prescribed by law, as described below.

The triggering of the enforcement mechanism occurs first by the transmittal of information from the City to DHCR, and second by DHCR's notice to the owner. The burden on triggering the enforcement mechanism is upon the City - the entity which would be directly concerned with reimbursement of the fees it has paid to DHCR.

If the owner fails to pay in accordance with DHCR's notice, the agency is to issue an order freezing the rent at the level in effect before the original due date for the fee:

> Failure to pay the billed fee will result in a DHCR order fixing the rent for the subject housing accommodation at the level registered with the DHCR as of the April 1st before the due date of the original administrative fee billing. The owner will be precluded from collecting any rent in excess of such level from the first rent payment date following such due date stated in the original administrative fee billing.

As a consequence of the issuance of a rent freeze order by DHCR, the Policy Statement provides for treble damages if an owner collects rent in excess of the frozen level:

> If the owner has collected a rent in excess of the frozen rent, the owner shall be liable to the tenant for a penalty equal to three times the amount of such overcharge. In addition, until the fee is paid, the owner is barred from applying for or collecting any further rent increases.

Finally, the Policy Statement precludes a lifting of the rent freeze until the owner has submitted proof of payment of the registration fee:

> The rent as established above shall remain in effect until the owner has paid the delinquent amount to the municipal agency charged with collecting the administrative fee. Upon submission of proof of payment (the cancelled check in the precise amount of the bill issued by the municipal agency and made payable to such agency) to DHCR, the DHCR will issue a notice lifting the penalty.

The salient elements of the enforcement mechanism are as follows: (1) New York City must take the initiative in transmitting information on non-payment to DHCR[1]; (2) based on information

[1] The City has not transmitted such information since the issuance of Policy Statement 92-1, except with regard to one recalcitrant owner, and that at DHCR's request.

provided by the City, DHCR will put an owner on notice of the potential for a rent freeze if fees are not paid within sixty days; (3) DHCR will issue a rent freeze order if an owner does not pay within the sixty-day period; and (4) as a counterweight to the sixty-day "grace period", treble damages will be imposed if an ordered rent freeze is ignored by an owner.

D. The Litigation in the Court Below

After DHCR answered the respondents' complaint (R. 125, 134), respondents moved for summary judgment (R. 22) and DHCR cross-moved for leave to amend the answer and for summary judgment (R. 54). DHCR's cross-motion for summary judgment sought dismissal of the complaint on the basis of various affirmative defenses, including lack of standing and laches, as well as on the merits of the case. On the merits DHCR showed that the statutory provisions allow DHCR discretion to issue the Policy Statement. (R. 56-90)

Respondents contended, among other things, that the Policy Statement is in conflict with the sanction provisions of Section 26-517.1(b) of the Rent Stabilization Law. They claimed that the relevant statutory language requires an immediate rent freeze upon the failure of owners to pay their annual fees to the City so that the sixty-day "grace period" allowed by Policy Statement 92-1 is contrary to statutory requirements and was issued ultra vires. Respondents also argued that, pursuant to the State Administrative Procedure Act ("SAPA"), Policy Statement 92-1 is subject to the notice and comment requirements of SAPA.

In determining the motions of the respective parties, the Court declared (1) that the law provides for an immediate rent freeze upon owners' failure to pay their annual fees until the subsequent payment of the fees; (2) that Policy Statement 92-1, by allowing owners sixty days after notice from DHCR to pay before a rent freeze is imposed, is in variance with the law; (3) that the enactment of Policy Statement penalizes tenants; and (4) that Policy Statement 92-1 is null and void as of the date of Court's order (August 1, 1995). The Court also concluded that the tenants had standing to commence the action, and that the doctrine of laches did not warrant dismissial of the action. (R. 10-21)

ARGUMENT

POINT I

RESPONDENTS LACK STANDING TO CHALLENGE POLICY STATEMENT 92-1.

It is well established that to be entitled to challenge an administrative action a complaining party must show that the interest which he or she asserts is arguably within the zone of interests to be protected by the law under which the litigation is commenced. A party not within the zone of interests to be protected by that law does not have standing to challenge the administrative order. Dairylea Cooperative Inc. v. Walkley, 38 N.Y.2d 6, 377 N.Y.S.2d 451 (1975), Sun-Brite Car Wash, Inc., v. Board of Zoning and Appeals, 69 N.Y.2d 406, 515 N.Y.S.2d 418 (1987).

A party's standing constitutes a question of subject matter jurisdiction, Murray v. State Liquor Authority, 139 A.D.2d 461, 527 N.Y.S.2d 384 (1st Dept. 1988). The question as to whether a party seeking relief is a proper party to request an adjudication is an aspect of justiciability which must be considered at the outset of any litigation as a threshold issue. Dairylea Cooperative Inc., v. Walkley, 38 N.Y.2d 6, 377 N.Y.S.2d 451 (1975); Brindisi v. University Hospital, 131 A.D.2d 667, 516 N.Y.S.2d 745 (2nd Dept. 1987).

The case at bar involves an agency Policy Statement which, inter alia, explains the circumstances under which a owner may be sanctioned when he or she fails to pay the registration fees required by that statute. This policy, which concerns the rights and obligations of owners, only indirectly affects tenants, and then only in a non-essential fashion. The purpose of the statutory provision concerning registration fees, and of Policy Statement 92-1, is not designed to provide benefits to tenants or to redress wrongs committed against tenants, but to provide an enforcement mechanism for the collection of those fees by the City of New York. The interests served by the law are those of the City of New York, not those of tenants.

The sanction of a rent freeze for non-payment of fees, which is an incentive for owners to pay, is nothing more than a windfall to the affected tenant. The sanction bears no relationship to any breach of the rights or obligations between owner and tenant, such as a rent overcharge or a failure to maintain services or even a

failure to register. It is simply a mechanism devised by the Legislature to encourage fee payment.

The enforcement mechanism chosen is one of several alternatives that could have been selected.[2] Although the cost of enforcement is borne by the City and DHCR, it is the tenant who receives the benefit of the penalty. What the tenant receives is not based on any wrongdoing on the part of the owner in relation to the tenant; the mechanism adopted by the State Legislature is not based on any essential aspect of the Rent Stabilization Law. By selecting the tenant as the party to receive the benefit of the penalty, the tenant truly gets a windfall. The situation is not much different than a lottery.

A tenant is not aggrieved or injured simply because he or she did not receive the windfall of a rent freeze on the basis of the owner's failure to pay a fee to the City of New York; or because Policy Statement 92-1 gives an owner the opportunity to cure a default in paying those fees before the rent freeze goes into effect. The possibility that a tenant will not receive a windfall because of a "grace period" does not constitute an injury to an interest cognizable by the law in question.

The Court below appears to base its conclusion that the tenants have standing on the right of a tenant to file a rent overcharge complaint and receive a determination that their owner had overcharged because there was no rent freeeze based upon non-

[2] For example, penalties could have been required to be paid to New York City rather than imposed by way of a rent freeze to the benefit of the tenant.

payment of the registration fees. But the existence of such a claim in a rent overcharge proceeding is only an incidental and inessential element of the fee payment provision in the Rent Stabilization Law; it is not based on the primary legislative purpose behind the establishment of rent overcharge proceedings, which is "to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices..." (Section 26-501 of the Rent Stabilization Law) Rather, it is part of the administrative mechanism for collecting governmental fees from owners, of which mechanism tenants are incidental benefiaries.

A party must show that it will be adversely affected by the administrative action for which review is sought. See Mobil Oil Corp. v. Syracuse Industrial Development Agency, 76 N.Y.2d 428 , 559 N.Y.S.2d 947 (1990); Har Enterprises v. Town of Brookhaven, 74 N.Y.2d 524, 549 N.Y.S.2d 638 (1989); Sun-Brite Car Wash, Inc., v. Board of Zoning and Appeals, 69 N.Y.2d 406, 515 N.Y.S.2d 418 (1987); Dental Society of the State of New York v. Carey, 61 N.Y.2d 330, 474 N.Y.S.2d 262 (1984); City of New York v. City Civil Service Commission, 60 N.Y.2d 436, 470 N.Y.S.2d 113 (1983).

In order to have standing, a party must have a direct stake in the outcome of the litigation. John J. McConnell v. Coveney, 54 A.D.2d 769, 388 N.Y.S.2d 13 (2nd Dept. 1976). Thus, a party lacks standing unless it can show that it is actually aggrieved by the challenged act. MFY Legal Services, Inc., v. Dudley, 67 N.Y.2d 706, 499 N.Y.S.2d 930 (1986); Dairylea Cooperative Inc., v.

Walkley, 38 N.Y.2d 6, 377 N.Y.S.2d 451 (1975) (standing will be denied where injury-in-fact is lacking); Oriental Boulevard Co. v. Heller, 27 N.Y. 212, 316 N.Y.S.2d 226 (1970), app. dism., 401 U.S. 986, 91 S.Ct. 1234, 28 L.Ed.2d 527 (1971) ("Statutes will not be struck down unless the respondents are actually aggrieved").

In Buckingham Apartments, Inc. v. Doody, 165 A.D.2d 855, 560 N.Y.S.2d 318 (2nd Dept. 1990), the Court held that where the economic harm alleged does not fall within the zone of interests to be protected by the Emergency Tenant Protection Act ("ETPA"), standing is absent. In that case the Town Board had passed a resolution removing certain owner-occupied condominium and cooperative units from ETPA regulation. A group of owner-occupants claimed that their property interests were directly affected. The Court, in finding that the group lacked standing to challenge the resolution, held:

> ...Here, the court correctly found that the plaintiffs have failed to establish that the challenged resolution has caused them any injury which falls within the zone of interests protected by the ETPA.
>
> The ETPA was enacted:
>
> "In order to prevent exaction of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare *** in order to prevent uncertainty, hardship and dislocation" (McKinney's Uncons Laws of NY Section 8622).
>
> The minutes of the public hearing of May 25, 1988, which preceded adoption of the challenged resolution, demonstrate that the plaintiff's interest lie exclusively in the preser-

> vation of the lower assessed values for their properties which result when those properties fall under ETPA regulation. Inasmuch as the ETPA is not intended to regulate or control property tax assessments, the instant complaint fails to allege injury to the plaintiffs that is cognizable under the ETPA, and the Supreme Court properly dismissed the complaint for lack of standing. Where, as here, the "economic harm" alleged is outside the realm of the statutory right sought to be enforced, standing is absent (see, Matter of Sun-Brite Car Wash v. Board of Zoning and Appeals of Town of N. Hempstead, supra; Matter of Sheehan v. Ambach, 136 AD2d, 28-29; see also, Matter of Ayers v. Coughlin, 72 NY2d 346, 355).

In short, while in theory the respondents in Buckingham could be economically affected by the resolution, they had no standing to challenge it because their economic interests were not within the zone of protection of the resolution.

Likewise, in the case at bar, the sanction provision in the Rent Stabilization Law, which relates to the requirement of owners to pay registration fees, is not intended to provide a benefit to tenants but to enforce the payment of those fees. Even if there were an injury in fact caused by Policy Statement 92-1, that injury is outside the zone of interests involved in the registration fee provisions of the Rent Stabilization Law. Respondents have therefore failed to allege an injury cognizable under those provisions and have no standing to challenge a Policy Statement issued to explain and interpret those provisions.

Moreover, neither of the two respondents herein make any allegations of harm in the complaint which bear a relationship to the Policy Statement 92-1 or the underlying statutory provision.

Respondent Mamie Chambers merely alleges that her rent in 1981 was $250.00 per month, and that it is now $299.67. (R. 24, 131) That her rent has increased some $50 per month over a 14 year period - assuredly within the limits of allowable guideline increases - rather than having it frozen at some lower level because of her owner's alleged failure to pay the registration fee for the apartment to the City of New York, fails to even imply an injury-in-fact.

As for respondent Alex Moreira, he alleges that his current monthly rent is $300.00, that he suffered an injury in 1989 and has been unable to work since then, that his family receives a shelter allowance of $286.00 per month from the Department of Social Services, and that the legal rent for the apartment was $250.00 in 1984. (R. 26, 130) There is no allegation as to when Mr. Moreira moved into the apartment.

Accepting these allegations as true, that his current shelter allowance is less than his current rent, they nevertheless do not constitute harm or injury cognizable by the registration fee provision of the law. The sanction which might be imposed for a failure by a owner to pay the registration fee is utterly lacking in connection with the kind of financial circumstances alleged by Mr. Moreira. He, as well as Ms. Chambers, has made absolutely no showing of actual injury.

Respondents are neither within the zone of interests intended to be protected by the statute, and thus have no cognizable interest in Policy Statement 92-1; nor have they shown that they

are adversely affected by the Statement. Thus, they have no standing to challenge the issuance or method of application of the Statement, and the action must be dismissed in its entirety.

POINT II

THE EQUITABLE DOCTRINE OF LACHES BARS THE FIRST, SECOND, THIRD AND FIFTH CLAIMS FOR RELIEF.

The first, second, third and fifth claims for relief should be barred by the equitable doctrine of laches.

The Court of Appeals has recently discussed the applicability of laches in Schulz v. State, 81 N.Y.2d 336, 599 N.Y.S.2d 469, 474 (1993), a case in which an action challenging the issuance of state bonds was held to be barred by the doctrine of laches:[3]

> [T]his Court has said:
>
> > "Laches is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse part, operates as a bar in a court of equity.' * * * The essential element of this equitable defense is delay prejudicial to the opposing party." (Matter of Barabash, 31 N.Y.2d 76, 81, 334 N.Y.S.2d 890, 286 N.E.2d 268).
>
> Because the effect of delay on the adverse party may be crucial, delays of even under a year have been held sufficient to establish laches (see, Matter of Eberhart v. La Pilar Realty Co., 45 A.D.2d 679; 355 N.Y.S.2d 791;

[3] That case, in which the Court found that the plaintiffs had constitutional voter standing, should not be confused with the case at bar on the standing issue, as the plaintiffs herein have made no allegations which would suffice to constitute such standing.

> Finn v. Morgan Is. Estates, 283 App.Div. 1105, 132 N.Y.S.2d 46).

Thus, prejudice is the essential element in laches.

The finding of prejudice made by the Court of Appeals in Schulz is similar to the prejudice which would occur in the case at bar, were the Policy Statement to be nullified:

> The State defendants' arguments persuade us that the time periods involved here do not meet the threshold test in light of the great prejudice certain to be inflicted on the State and its citizens at large when financial transactions of such magnitude and destabilizing impact are at stake and may be upset. Time must be of the essence and here applicants, for all their good-faith intentions in acting expeditiously as pro se litigants, did not satisfy that essential ingredient.

599 N.Y.S.2d at 474.

In the case at bar, respondents' owners, as well as many other owners, have been able to rely on Policy Statement 92-1 since the beginning of 1992 in the conduct of their affairs. To suddenly nullify the Statement could have substantial and unforeseen financial consequences for those owners, including the possibility of rent freezes being imposed from some indeterminate past date, and substantial refunds and perhaps even treble damages having to be paid to tenants. Due to the two year lapse of time before respondents challenged the Policy Statement, the size of any such freeze and refunds would have significantly increased. Severe prejudice may thus occur because of the lapse of time in bringing this action. The respondents, who are not pro se litigants, as in Schulz, but are represented by the Legal Aid Society, did not act expeditiously in seeking to challenge the Policy Statement.

The reason given by the Court below for rejecting DHCR's laches defense was the alleged absence of prejudice to DHCR:

> Here, defendant/respondent has failed to show how it has been harmed, referring instead to the possible problems of owners who are not parties to this action, with respect to the outcome of this case. This is not sufficient proof of prejudice to defendant/respondent.

(R. 20) The Court's reasoning ignores both the fact that the tenants failed to name their owners as parties to action, and the fact that DHCR, as the administrator of the rent stabilization system, has a direct responsbility for assuring the proper administration of that system. Were there to be widespread rent freezes, the result would affect the preservation and maintenance of New York City's housing stock - "a significant goal of the Rent Stabilization Law" (See, ANF Company v. DHCR, 176 A.D.2d 518, 574 N.Y.S.2d 709, 711 (1st Dept. 1991)) - and could thus undermine the rent regulatory program. Under these circumstances, any significant prejudice to owners would also prejudice DHCR. Moreover, DHCR could be saddled with a huge additional administrative burden, compounded by the delay in challenging the Policy Statement. The situation is like that in Schulz where the Court of Appeals took note of prejudice "to be inflicted on the State and its citizens at large".

As in Schulz, time was of the essence in bringing a broadside challenge to Policy Statement 92-1. Under the circumstances, the first, second, third and fifth claims are barred under the equitable doctrine of laches and must be dismissed.

POINT III

POLICY STATEMENT 92-1 CONFORMS WITH THE REQUIREMENTS OF THE RENT LAWS AND CONSTITUTES A REASONABLE INTERPRETATION OF THOSE LAWS.

As noted above, there are two statutory sources for Policy Statement 92-1: Section 26-517.1 of the Rent Stabilization Law and ETPA Subsection 8628(d).

In reaching its erroneous finding that Policy Statement 92-1 is in conflict with the law, the Court below ignores this latter ETPA provision - a provision which allows DHCR discretion in establishing an appropriate mechanism for enforceing the payment of registration fees. The law as a whole establishes a bifurcated structure. First, in section 26-517.1(a) of the Rent Stabilization Law, the City is directed to collect the fees, meaning that the City must send out bills to owners. No sanction can attach unless the City sends out bills. But ETPA further provides that the City shall certify to DHCR such information on non-payment as DHCR "shall deem necessary to comply with the [the penalty subdivision]". This clause gives DHCR the discretion to take reasonable further steps to obtain owner compliance before sanctions are applied, such as those contained in Policy Statement 92-1. The Policy Statement constitutes a natural and reasonable interpretation of the law. First, the City is to certify to DHCR information on non-payment of the registration fees. Then this information forms the basis of obtaining compliance with the law, that is,

notice to non-paying owners giving them an appropriate amount of time to pay before the sanction kicks in.

In this bifurcated procedure, the City has the responsibility for fee billing and collection, while DHCR has the responsibility for enforcement. DHCR is never aware of who has or has not paid the fee unless and until the City provides the agency with a listing of delinquent owners. The lynchpin for enforcement of fee payment is this timely flow of information.

In turn, the City's billings to owners are based on DHCR's rent registration database for each particular registration year. A major problem inherent in the bifurcated mechanism set up by the law is the lag time between the submission of registration information to DHCR and its transmission to the City's Department of Finance. Annual registration statements, which reflect information as of April 1, are not required to be filed with DHCR until the end of June.[4] DHCR does not transmit registration information to the City's Department of Finance until about one year after the date of record of registration. This is due to the time necessary to perform data-entry into DHCR's computerized records system for more than 900,000 apartments; and to clean up that data. Because of the inevitable lag-time, there will often be a change in ownership, with the previous owner being likely to discard the bill from the Department of Finance.

[4] In some years, DHCR has extended the filing time because of problems of one kind or another.

For these reasons, even though overall owner compliance in paying the registration fees may be quite high, there will be inevitable gaps in payment of bills resulting from changes in ownership - and through no fault of current owners who do attempt to comply with the law. The number of such gaps in any one year may not be large; but over time that number will inevitably grow.

There can be a myriad of other reasons, other than an owner's knowing delinquency, for non-payment of the annual fees, such as incorrect computerized information on a building's identity, incorrect recording of payments, failure to send out a bil, loss of a bill in the mail, and the like.

Given this context, the provision in Section 8628(d) of ETPA has special significance. The State Legislature understood the difficulties which would be inherent in the cumbersome mechanism it established for enforcing the payment of fees, and thus allowed DHCR discretion to develop a way to bridge the gap which would inevitably arise with the City.

This discretion flows from the following sentence in ETPA Section 8628(d):

> The city of New York shall certify to the division such information as the division shall deem necessary to comply with the provisions of this subdivision.

The sentence has two operative parts: (1) it directs the City to provide "such information" which DHCR "deems necessary"; and (2) by directing DHCR to "comply with the provisions of this subdivision", it gives DHCR the responsibility for enforcing the payment of fees. Thus, the provision gives DHCR enforcement power and refers to the

penalty to be utilized in enforcing the law - a rent freeze; but it does not specify the enforcement mechanism to be used. That was left to DHCR's discrection by the State Legislature.

There would be no need for a legislative instruction to DHCR to take steps to "comply with the provisions of this subdivision", if the rent freeze were to be immediate and automatic upon an owner's failure to pay upon receipt of the City's original bill - as urged by respondents and held by the Court below. The most sensible construction of the clause is to view it as a legislative grant of discretion to DHCR to develop an appropriate and reasonable enforcement mechanism; a task accomplished by Policy Statement 92-1.

Indeed, the Policy Statement tracks the language of the sentence in question. The first operative part of the Policy Statement specifies the information to be provided by the City - the information "deemed necessary" by DHCR. The second operative part of the Policy Statement specifies the means of DHCR's complying with the statute, i.e. enforcing the payment of fees to the City - notice to the owner with a sixty-day period to pay, and issuance of a rent freeze order if the owner fails to comply. The third operative part specifies the penalty - the rent freeze coupled with treble damages if the owner does not freeze the rent after receiving an order from DHCR.

By providing for the notice and sixty-day period in which to pay registration fees, as set forth in Policy Statement 92-1, DHCR has a fashioned reasonable and appropriate enforcement mechanism in

accordance with the statutory mandate. It is in harmony with the purpose of the statute, which is to help the City obtain reimbursement for the funds it is required to pay to DHCR.

The Policy Statement avoids the great uncertainty and difficulty in enforcement which would be caused by automatic and immediate rent freezes without notice.

The Policy Statement holds in reserve the draconian sanction of a building-wide rent freeze for non-payment of the fees in order to encourage payment of the fees without destroying the rent base in a wholesale fashion. This way of handling the problem conforms with the important statutory goal of preserving and maintaining the housing stock for New York City in a fashion which does not undercut the parallel statutory goal of preventing the exaction of unjust, unreasonable and oppressive rents and rental agreements, profiteering, speculation and other disruptive practices.

It should be noted that the method utilized by Policy Statement 92-1 for obtaining the payment of registration fees in New York City parallels that utilized in counties outside the City which are subject to ETPA but not the New York City Rent Stabilization Law. In the ETPA counties, DHCR bills each municipality annually for the fee. The bills contain a list of properties and the total number of stabilized units. Municipalities are given sixty days to challenge the correctness of the billing and ninety days to provide payment. The municipality then, in turn bills the individual owners for payment. In the event of non-payment by the property owner, the municipality informs DHCR and the agency

notifies the owner of the rent freeze penalties. There is no good reason why the process should be stricter in New York City - and different in a fashion which would lead to the draconian remedy of automatic and immediate building-wide rent freezes. If anything, the housing emergency in New York City is significantly greater than in the surrounding counties and thus requires greater sensitivity to the need to preserve and maintain the stock of affordable housing.

This case presents a situation analogous in impact to that in Tenants Union of West Side, Inc. v. Beame, 40 N.Y.2d 133, 386 N.Y.S.2d 83 (1976), a case which concerned the method of calculating Maximum Base Rent increases under the Rent Control Law. Petitioners, a group of tenants and tenants organizations, challenged the City's use of a statistical average based upon a small sample to determine allowable Maximum Base Rents, rather than computing the increases on a building-by-building basis, as the statute would have seemed to require. The Court of Appeals upheld the method adopted by the City, pointing to the negative impact on the City's housing stock were the tenants to prevail:

> At the pace at which the city agency was proceeding, it might be literally many years before the statutorily required biennial MBR adjustments to economic change could be put into effect. The achievement of the purposes of rent control -- the preservation of the existing stock of rent-controlled units, the prevention of hardship to tenants and landlords alike, the encouragement of improvement of salvageable buildings and the preservation of other against deterioration -- could not withstand such delay. The need for decent housing for the city's millions and the need for economic feasibility so that owners could

> meet their day-to-day responsbilities, both were -- and regretfully, still are -- at the heart of the needs of the city itself.
>
> Therefore, at a time of recognized and universal monetary inflation, and "in order to avoid turmoil in the housing industry and to enable landlords to maintain their buildings and to avoid large retroactive payments by tenants", we affirmed an order of the Appellate Division which permitted the granting of interim rent increases to owners in advance of the issuance of new MBRs, though such an advance was not in accord with the literal language of the ordinance (Bedford Bldg. Co. v. Beame, 38 N.Y.2d 729, 731, 381 N.Y.S.2d 38, 343 N.E.2d 756, supra). Similarly, an avoidance of disaster for the people of the city today, whether landlords or tenants, now compels us to withhold judicial intervention against the expedient substitution of a statistical average for the individual determinations the statute appears to prefer. If the city or State Legislature intended a less flexible interpretation of the statute, they would long since have applied remedial legislation to the administrative morass in which the New York City Rent Control Agency finds itself.
> (emphasis added; footnote omitted)

386 N.Y.S.2d at 84-85.

Likewise, if the tenants are to prevail in the case at bar, there could be serious consequences. There could be widespread building-wide rent freezes at 1980s or early 1990s levels, with owners required to repay excess collected rents for subsequent years. Such substantial reductions would be far in excess of and grossly disproportionate to the ten dollar fee per apartment which an owner has failed to pay in any particular year.[5] The likely

[5] See, Pell v. Board of Education, 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974) ("... where the finding of guilt is confirmed and punishment has been imposed, the test is whether such punishment is "'so disproportionate to the offense, in the light of all (continued...)

result would be chaos,[6] a result not intended by the Rent Stabilization Law.

In Tenants Unions of West Side the Court of Appeals took cognizance of the legislative silence. So too, should this Court take cognizance of the silence of the State Legislature. Policy Statement 92-1 was issued in early 1992. In the following year, 1993, the State Legislature undertook a substantial reform of the rent laws, enacting the Rent Regulation Reform Act of 1993, Ch. 253, Laws of 1993. Among other things, and most significantly, Sections 22 through 25 of the Act modified the provisions relating to the effect on rent overcharge proceedings of a owner's failure to file with DHCR and serve on tenants annual registration

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[5](...continued)
the circumstances, as to be shocking to one's sense of fairness'.")

[6] The Court below ruled that the nullification of the Policy Statement would be effective prospectively only (a ruling which DHCR anticipates the tenants will challenge in a cross-appeal). But this ruling is so general and vague that it is not at all clear from what date rent freezes and refunds would be required. For example, the ruling might mean that rent freezes could only be effective prospectively at the rent in effect at the time of the freeze; or it could mean that rent freezes would be effective prospectively, but at a rent frozen from the time of the delinquency, a date which could go back to the mid-1980s.

The uncertainties created by the nullification are immense. How would the four-year limit on imposing rent-overcharges relate to determinations where rents are frozen because of non-payment of fees? If an owner failed to pay the fees in one year, say 1987, but paid in all other years, would he nevertheless be subject to a rent freeze from 1987 on? If there were, let us say, a 1992 cut-off on overcharges because of the four-year limit, would the calculation of the overcharge still be based on the 1987 rent because of a freeze based on non-payment in 1987? What issues would be raised by owner's claims of non-receipt of fee bills from the city's Department of Finance; claims of new ownership; claims of purchase at judicial sales? The difficulties which are certain to arise because of such uncertainties are manifold and complex.

statements. First, these sections eliminated treble damage awards where an overcharge award is "based solely on an owner's failure to file a timely or proper initial or annual rent registration statement." Second, these sections eliminated the power of DHCR to find an overcharge in a situation where an owner charges lawful rent increases except for the failure to file a timely registration statement, where the owner late files such statements, even after the commencement of a rent overcharge proceeding.

Although the State Legislature made specific revisions to the rent registration system, it did nothing to alter the method being used by DHCR under Policy Statement 92-1. Moreover, the second of the aforementioned legislative changes with regard to the late filing of registration statements and its effect on rent overcharge proceedings parallels the method adopted by DHCR in Policy Statement 92-1 with regard to the late payment of registration fees and the imposition of rent freezes.

The State Legislature appears to have been satisfied with the method adopted by DHCR. Surely, its silence about the mechanism adopted by DHCR with regard to the payment of registration fees in the context of reforms of the registration system, as well as many other aspects of the law, signifies legislative acquiescence to DHCR's interpretation of the law underlying Policy Statement 92-1.

In Rent Stabilization Association v. Higgins, 83 N.Y.2d 156, 608 N.Y.S.2d 930, 934, 935 (1993), the Court of Appeals, in upholding new family succession regulations enlarging the defini-

tion of protected family members under the rent laws, took note of the legislative silence:

> This protection has in the past been enlarged by the agency, after which the legislature has voted to extend rent regulation without modifying those provisions.

In the situations referred to by the Court of Appeals, there was simple reenactment without legislative change. In the case at bar, the situation signifying acquiescence is more compelling, as the State Legislature went far beyond mere reenactment.

The Court of Appeals, in Rent Stabilization Association v. Higgins, also noted DHCR's broad mandate to act under the rent laws:

> Appellants recognize that the legislature has provided DHCR a broad mandate to promulgate regulations in furtherance of the rent control and rent stabilization laws that will " ' inevitably require some changes in the legal relationship between landlords and tenants. [citation omitted]

DHCR's issuance of Policy Statement 92-1 falls within the broad mandate provided by the State Legislature under the Emergency Tenant Protection Act. DHCR's action has avoided a serious and potentially disastrous threat to the preservation and maintenance of the City's housing stock; and has done so in a way which does no harm to tenants. If the lower court's nullification of Policy Statement 92-1 were to stand, the result would lead to potentially calamitous consequences not intended by the State Legislature.

It is well settled that the agency's interpretation of the statutes and regulations which it administers is entitled to great weight. In Ansonia Residents Association v. New York State

Division of Housing and Community Renewal, 75 N.Y.2d 206, 551 N.Y.S.2d 871, 873 (1989), the Court of Appeals stated:

> We note at the outset that our review of DHCR's interpretation of the statutes it administers is limited. "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld." [citations omitted]

See also, Salvati v. Eimicke, 72 N.Y.2d 784, 537 N.Y.S.2d 16, 18 (1988).

Similarly in Minton v. Domb, 63 A.D.2d 36, 406 N.Y.S.2d 772 (1st Dept. 1978), the Appellate Division upheld an interpretation of the Rent Stabilization Law by DHCR's predecessor, the Conciliation and Appeal Board's, stating:

> "Due to the unique nature and the function of the Conciliation and Appeals Board, it might be advisable to give more than ordinary weight to their opinion in matters of this nature. "Ordinarily, courts will defer to construction given statutes and regulations by the agencies responsible for their administration if said construction is not irrational or unreasonable", Albano v. Kirby, 36 N.Y.2d 526.

Ansonia Residents and Salvati involved situations much like the one in the case at bar. In Ansonia Residents, DHCR construed the statutory provision involving major capital improvements to allow permanent as opposed to temporary rent increases. The Court of Appeals upheld the agency's interpretation notwithstanding the absence of language which clearly addressed the question.

In Salvati, the Court of Appeals upheld DHCR's view that the Rent Stabilization Law can be applied to horizontal multiple dwellings other than those categorized as "garden-type maisonette complexes", notwithstanding the statute's limited reference to the latter.

Similarly, it is reasonable for DHCR to interpret the language in ETPA as allowing the agency discretion to take steps such as those set forth in Policy Statement 92-1 in order to obtain owner compliance with the requirement to pay registration fees before sanctions are applied.

CONCLUSION

For all of the foregoing reasons, this Court should vacate the judgment of the court below, deny respondent's motion for summary judgment, grant DHCR's cross-motion for summary judgment, and award such other and further relief as is deemed just.

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