

To be argued by
RICHARD HARTZMAN

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of
NICHOLAS E. BRUSCO,

Petitioner-Appellant,

against

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent-Respondent.

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BRIEF OF RESPONDENT-RESPONDENT

PRELIMINARY STATEMENT

This is an appeal by petitioner-appellant, Nicholas E. Brusco from a decision order of the Supreme Court, New York County (Freedman, J.), entered in the office of the Clerk of the County of New York on September 29, 1989. The decision and order of the court below affirmed an administrative determination of the New York State Division of Housing and Community Renewal (hereinafter "DHCR") which established the lawful stabilized rent for the subject housing accommodation and directed the appellant to refund rent overcharges to the tenant.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did DHCR properly and rationally apply its alternative default procedure for calculating the lawful rent stabilized rent and determining the amount of rent overcharges, in accordance with the Rent Stabilization Code and precedent of this Court, in a rent overcharge proceeding commenced prior to April 1, 1984, where the owner failed to submit to DHCR the required rent history?

The Court below answered in the affirmative.

2. Is the Rent Stabilization Law, insofar as it regulates vacancy rents, constitutional?

The Court below answered in the affirmative.

STATEMENT OF THE NATURE OF THE CASE

The Rent Stabilization Law and Code established a system of rent regulation limiting the rents which may be charged to tenants of apartments subject to the law. The constitutionality of rent regulatory systems such as the Rent Stabilization Law have been repeatedly upheld.

Prior to the implementation of centralized rent registration in 1984, the system was self-regulatory in the sense that owners alone were responsible for calculating the rents and for maintaining the required rental histories which form the basis for establishing the lawful stabilized rents. However, as many owners failed to comply with their obligations to maintain and produce rental histories upon demand, the agency was forced to develop an alternative procedure to establish the lawful rent. This procedure, applied in this case, is used when the owner has failed to produce complete rental history documentation. The agency sets the rent at the lowest of three levels: (1)

the lowest rent in the same size apartment; (2) the tenant's initial rent minus the appropriate guideline adjustments; or (3) the last rent of the prior tenant.

This procedure, as employed in this proceeding, has been upheld by the Court of Appeals and by lower courts on numerous occasions. See, 61 Jane Street Associates v. CAB, 65 N.Y.2d 898, 493 N.Y.S.2d 455 (1985), affg, 108 A.D.2d 636, 486 N.Y.S.2d 694 (1st Dept. 1985); Farhadian v. CAB, (n.o.r.) N.Y. Sup. Ct., 2/24/85, (Sherman, J.) affd, ___ A.D.2d ___, 496 N.Y.S.2d 595 (1st Dept. 1985); and Charles H. Greenthal Co., Inc. (DHCR), 126 Misc.2d 795, 484 N.Y.S.2d 445, (N.Y. Sup. Ct. 1984) (Price, J.).

In cases which do not fall within the aegis of the rent registration system, such as the one at bar, i.e., cases where overcharge complaints were filed prior to April 1, 1984, DHCR still uses the alternative method to establish the lawful rent where the owner failed to provide complete rental data. This Court affirmed the continued use of the alternative method for pre-April 1, 1984 complaints in Lavanant v. DHCR, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1989), notwithstanding a contrary Second Department ruling in JRD Management Corp v. Eimicke, 148 A.D.2d 610, 539 N.Y.S.2d 667 (1989), leave to appeal denied, 75 N.Y.2d 927, recon. den., 75 N.Y.S.2d 866, 552 N.Y.S.2d 931 (1990). Thus, the procedure applied herein continues to be an integral part of the rent regulatory system and is a matter of vital concern for those tenants who complained about rent overcharges prior to April 1, 1984.

In the case at bar, DHCR gave the owner ample opportunity to produce the required rental history. But the owner did not satisfy the requirement of producing copies of actual rent records back to the base date for the subject apartment. The owner did not make his request to examine agency records until after the administrative proceeding had been concluded. DHCR accordingly

properly determined the overcharge complaint and established the lawful stabilized rent through the use of the court-approved alternative procedure.

The test upon judicial review of a determination rendered by an administrative agency is whether the determination has a rational basis in the record and is in accord with the applicable law. The determination in the instant case fully meets that test, and the applicable law is fully constitutional. The petition, being devoid of merit, should be dismissed with costs.

COUNTER STATEMENT OF THE FACTS

This proceeding involves the housing accommodation known as 118 West 69th Street, Apartment 1B, New York, New York. The tenant filed a rent overcharge complaint with the Conciliation and Appeals Board on February 15, 1984. (Return: A-1)

The owner was twice notified that he would be required to provide the full rent history for the subject accommodation back to June 30, 1984 (Return: A-2 and 3), and on October 11, 1984 was asked to do so by DHCR (Return: A-4 and 5). The owner responded on October 18, 1984, claiming that he had bought the building in 1980, and that the previous owner had not supplied him with leases for the subject apartment except for the lease beginning in July, 1979. Leases from 1979 on were submitted. (Return: A-5) The owner was again asked to provide the complete rent history for the subject apartment on May 21, 1986, and on June 2, 1986. (Return: A-7 and 10)

The owner having failed to provide the complete rent history, the District Rent Administrator issued an order on August 12, 1986, finding the owner in default, setting the rent at \$564.75 as of August 1, 1984, and finding an overcharge, including interest and excess security of \$5810.03. (Return: A-12)

On September 17, 1986, the owner filed a Petition for Administrative Review ("PAR") arguing that there was no evidence of an overcharge, and that he could not produce leases prior to 1980, when he purchased the building. (Return: B-1) He subsequently filed a supplement to the PAR arguing that the imposition of a ceiling on vacancy rents and DHCR's method of computing rents upon default by an owner is unconstitutional. (Return: B-2)

After an answer by the tenant the Deputy Commissioner issued an order on January 30, 1989, denying the PAR and finding that the District Rent Administrator had properly found the owner in default and properly computed the legal regulated rent in accordance with established procedures. (Return: B-6)

Subsequently the owner commenced an Article 78 proceeding challenging the Commissioner's determination, which proceeding was dismissed by the Court by decision and order dated September 22, 1989.

ARGUMENT

THE RENT AGENCY'S DETERMINATION ESTABLISHING THE LAWFUL STABILIZATION RENT, ON THE BASIS OF JUDICIALLY APPROVED ALTERNATIVE PROCEDURES FOR SETTING THE RENT UPON AN OWNER'S FAILURE TO SUPPLY COMPLETE RENT RECORDS, AND DIRECTING THE LANDLORDS TO REFUND MONIES TO THE TENANT HAS A RATIONAL BASIS, AND IS THEREFORE, FULLY ENTITLED TO JUDICIAL AFFIRMANCE.

A. The Commissioner Properly Found that the Owner Failed to Provide the Complete Rent History as Required by the Code.

The administrative proceeding in the case at bar was initiated before the Conciliation and Appeals Board prior to April 1, 1984, when a system of centralized rent registration went into effect

pursuant to Chapter 403 of the Laws of 1983. Prior to April 1, 1984, the rent stabilization system was self-regulatory in the sense that owners alone were responsible for calculating the lawful rent for each apartment each time a lease was executed, and for maintaining the records necessary to determine the lawful rent and to prove the legality of the rent charged upon a tenant's complaint. Neither the CAB, nor the Rent Stabilization Association, nor the Department of Housing Preservation and Development, nor any other public or private body was authorized by the Rent Stabilization Law or the Emergency Tenant Protection Act to maintain such records.

Under this system owners were required to maintain rent records in the form of copies of all prior leases back to the base date, i.e., the date a particular apartment initially came into the rent stabilization system. The lawful stabilization rent would be determined by starting with the base date rent, and adding the appropriate guideline increases for each successive lease and other adjustments to which the owner was entitled.

At any time the owner could be called upon, as a member of the Rent Stabilization Association, to prove the legality of any rent charged in his building by producing complete rental records back to the base date. Whenever such a demand was made, the owner was required to produce the complete rental history of the apartment. This requirement was codified in Section 42A of the former Rent Stabilization Code of the Rent Stabilization Association, which provided that:

(2) It shall be the duty of an owner to retain all leases described in paragraph 1 of this subdivision and to produce them on demand of the Association, the CAB, the Department of Housing Preservation and Development or a new purchaser for as long as the Rent Stabilization Law or any extension thereof is in effect for such dwelling unit.

Section 42 A(1) of the former Code further made it clear that owners could not collect any rent increases unless they maintained such complete rental records as follows, in relevant part:

A.(1) Where the owner and tenant have entered into a valid written renewal or vacancy lease with respect to any dwelling unit which provides for the payment of rent in excess of the rent payable under the expiring or prior lease, the stabilization rent shall be automatically increased; provided however that the owner shall be required to exhibit to... (ii) the tenant of a dwelling unit which becomes subject to the RSL July 1, 1974, who is under a vacancy lease, a copy of the lease in effect on June 30, 1974 and any lease or order subsequent thereto;... and further, the owner shall be required to include a rider in all leases which clearly sets forth (i) the tenants right to examine such prior leases and orders, (ii) the rent payable under such prior leases and orders and (iii) the name of the tenant in the last prior lease.

(emphasis added)

However, as many owners failed to comply with their self-imposed obligation to maintain complete rental histories as required by Section 42A, the Conciliation and Appeals Board developed uniform alternative procedures in order to establish the lawful stabilized rent for stabilized apartments where owners, after due notice, failed to provide the required data.

The alternative procedures required that, where a landlord had failed to fulfill its obligations under the Rent Stabilization Code to provide an apartment's complete records since the base date, the complaining tenant's lawful rent be established using the lowest of three amounts under a tripartite test which took into consideration: (a) the lowest rent in the same size apartment in the subject building; (b) the complaining tenant's initial rent, minus the initial guidelines adjustment; or (c) the prior tenant's last rent without any guidelines adjustment.

These procedures were intended to be uniform, and equally applicable to all owners to insure predictability and consistency of outcome in each overcharge case involving non-compliance with Section 42A. They produce a reasonable rent, but not one which rewards an owner for non-compliance. They simply do not make it more advantageous for an owner to withhold rental data than to produce it. Use of the alternative procedures for determining rent overcharge complaints

where the owner failed to produce the required rental history data was upheld by the Court of Appeals in 61 Jane Street Associates v. CAB, 65 N.Y.2d 898, 493 N.Y.S.2d 455 (1985), affg 108 A.D.2d 636, 486 N.Y.S.2d 694 (1st Dept. 1985), affg N.Y.L.J., May 9, 1984, p.11, col. 4 (Sup. Ct., N.Y. Co., Greenfield, J.). See also, Lavanant v. DHCR, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1st Dept. 1989), Sun v. Division of Housing and Community Renewal, N.Y.L.J., October 21, 1987, p. 9, cols. 1-2 (Sup. Ct., N.Y. Co., Rubin, J.); Artnor Realty v. Mirabal, Sup. Ct., N.Y. Co., Index No. 11255/86 (Saxe, J.); Kama Associates v. DHCR, Sup. Ct., N.Y. Co., Index No. 1281/87 (Evans, J.); Farhadian v. CAB, __ A.D.2d __, 496 N.Y.S.2d 595 (1st Dept. 1985), affg Sup. Ct., N.Y. Co., Sherman, J., Index No. 1355/83); Charles H. Greenthal Co. Inc. v. State Division of Housing & Community Renewal, 126 Misc.2d 795, 484 N.Y.S.2d 445 (Sup.Ct., N.Y. Co., Price, J., 1985); General Realty Associates v. Conciliation and Appeals Board, 125 Misc.2d 173, 479 N.Y.S.2d 120 (Sup. Ct., N.Y. Co., Price, J., 1984).

The Court, in Charles H. Greenthal Co., succinctly stated the rationale:

Not only does this court consider the new procedure a fair method for establishing a stabilized rent, it also permits the landlord to accept a less harsh penalty than expulsion for his failure to produce required rental data; namely a stabilized rent based on the three-prong test. Furthermore, the new procedure is not intended by the CAB to make it advantageous to owners not to comply with section 42(A); it is merely an alternative, calculated to induce compliance with the law and produce a reasonable stabilized rent; the establishment of which is the obligation of all owners in this self-regulatory system. The procedure, therefore, is not out of harmony nor inconsistent with the plain meaning of the statutory language.

484 N.Y.S.2d 445 at 450.

In 61 Jane Street, CAB established the lawful rent using the CAB's new procedures in the absence of the necessary rental history of the apartment from the landlord. This Court, in upholding

the CAB's order, upheld the CAB's new procedure for determining a lawful rent in all respects, despite the fact that there was a "new" owner. The Supreme Court, New York County, in an opinion which was affirmed by the Appellate Division and the Court of Appeals, held in pertinent part as follows:

The CAB's request for rent records was made pursuant to the Rent Stabilization Association Code ("Code") section 42A. Owners of rent stabilized apartments are required to keep a complete record of leases and rent records to 1968 or 1974 depending on the status of the apartment (Code section 42A). Failure to comply with an order of the CAB is grounds for expulsion from the Rent Stabilization Association and the entire building can be placed under rent control (Code section 7). In 1982, the CAB adopted new procedures for determining the stabilized rent when an owner fails to provide complete rent records. The new procedures provide that the rent shall be established at the lowest of the following three amounts: (1) lowest stabilized rent in the same line of apartments; (2) complaining tenant's initial rent minus vacancy allowances, or (3) last rent paid by prior tenant. The CAB determined that the lowest amount was based on the lowest stabilized rent in that line of apartments.

Petitioner contends that the CAB's determination is arbitrary and capricious because it did not own the building until 1979 and therefore did not have records going back to 1974. However, an owner is not excused under the Code from providing a rental history merely because he did not own the building at that time (see 165 West End Avenue Assoc. v. CAB, No. 28801/81, Sup. Ct., N.Y. Co., May 27, 1982).

* * * *

The CAB's determination was made on a rational basis (Purdy v. Kriesberg, 47 N.Y.2d 354). The alleged "draconian punishment" of reducing rent on one apartment is minimal compared to expelling petitioner from the Rent Stabilization Board ("RSB") entirely and placing the entire building under rent control. Under the Code the CAB could have drafted procedures to expel landlords from the RSA entirely. The procedures adopted will have the salutary effect of compelling the landlords to fulfill their obligations of keeping full rent rolls if they wish to enjoy the benefits of rent stabilization. The sanction rendered does not shock the conscience of this Court nor is

it so disproportionate to the offense in light of the circumstances presented (Pell v. Board of Education, 34 N.Y.2d 222).

Petitioner's article 78 petition is denied. Petition is dismissed. This constitutes the order and judgment of this court. (N.Y.L.J., 5/9/84, N.Y. Sup. Ct., Greenfield, J.)

The CAB procedure was continued by DHCR when it assumed the responsibility of administering the stabilization law in New York City, pursuant to Chapter 403 of the Laws of 1983. Under this Chapter, DHCR was given authority to continue to process complaints filed with the CAB under its procedures. See Sections 16, 19 and 20 of Chapter 403 of the Laws of 1983.

In addition, the amended Rent Stabilization Code, effective May 1, 1987, provides that the provisions of the former Code govern as to overcharge complaints filed prior to April 1, 1984, when the system of rent registration and other changes effected by Chapter 403 of the Laws of 1983 came into effect, except that overcharges collected on or after April 1, 1984, may be subject to treble damages. See, 9 N.Y.C.R.R. 2526.1(a)(4).

It is clear that the alternative procedures used by DHCR in this case are reasonable and within DHCR's authority under the Rent Stabilization Law and Code, and the cases decided thereunder. The owner did not provide leases or rent ledgers for the apartment back to June 30, 1974, the base date, despite the repeated notices given to him by DHCR. Thus, DHCR properly applied the alternative procedure in establishing the lawful rent and determining the amount of the rent overcharge.

The owner erroneously argues, in reliance upon the Second Department decision in JRD Management v. Eimicke, 148 A.D.2d 610, 539 N.Y.S.2d 667 (1989), leave to appeal denied, 75 N.Y.2d 927, recon. den., 75 N.Y.S.2d 866, 552 N.Y.S.2d 931 (1990), that the alternative procedure

should not have been applied because of an amendment to the Rent Stabilization Law contained in the Omnibus Housing Act which provided that owners would not have to maintain more than four years of rent records. The short response to the owner's argument is that this Court exhaustively considered the question in Lavanant v. DHCR, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1989), and, in holding contrary to the JRD decision, determined that there is a rational basis for requiring complete rent histories for cases filed prior to April 1, 1984. This Court said:

Respondents in a supplemental surreply brief filed upon leave by this court argue that, contrary to the holding in Matter of J.R.D. Management Corp., its application of the law as it existed at the time of the complaint, under these circumstances, was rational, and consistent with both the legislative intent of the Omnibus Housing Act (Chapter 403, Law of 1983) and with the established policies of the Division and of its predecessor agency. Respondent contends that the holding in Matter of J.R.D. Management Corp. v. Eimicke, *supra*, overlooked not only controlling case law and legislative intent but the disastrous effects that the holding would have on some five thousand cases pending before the Division.

We find that the administrative determination that complete rent histories should be required for cases filed prior to April 1, 1984 has a rational basis.

First, the policy appears to accord with legislative intent. The Omnibus Housing Act (the "Act") which created what is now Section 26-516(g) was enacted on June 30, 1983. The Act established for the first time a four year limitation on the calculation of rent overcharges and, concomitantly, on the number of years for which rental records were required. The effective date of Section 26-516(g) was delayed until April 1, 1984 in order to enable tenants whose claims for overcharges had accrued more than four years prior to the enactment time to file claims under the existing law. Widespread publicity, including a "Press Advisory of the Attorney General Robert Abrams" encouraging tenants to file prior to the April 1, 1984 "deadline," resulted in some 30,000 filings.

Prior to that time, the policy of the Conciliation and Appeals Board, adopted August 18, 1982, was to require that all landlords supply a

complete rental history. Section 20 of the Omnibus Housing Act provides for the continuation of proceedings by the Division "in the same manner ... as if conducted and completed by (the) conciliation and appeals board." Similarly, Section 19 provides for the continuance of rules and regulations "until duly modified or abrogated by the division ..." Pursuant to Sections 19 and 20, the Conciliation and Appeals Board on February 16, 1984 voted to continue the policy of requiring that complete rent records to 1974 be produced in connection with all overcharge complaint filed prior to April 1, 1984. This policy finds support in Matter of 61 Jane Street v. New York City Conciliation and Appeals Board, 108 A.D.2d 636, 486 N.Y.S.2d 694 (1st Dept. 1985) aff'd 65 N.Y.S.2d 898, 493 N.Y.S.2d 455, 483 N.E.2d 130 (1985)...

On May 1, 1987, the Division promulgated Section 2526.1(a)(4) of the Rent Stabilization Code which provides:

Complaints filed prior to April 1, 1984 shall be determined in accordance with the Rent Stabilization Law and Code provisions in effect on March 31, 1984, except that an overcharge collected on or after April 1, 1984 may be subject to treble damages pursuant to this section.

Thus, respondents requirement that leases back to 1974 be provided was rational and finds support in both the law and the legislative history of the Act.

Second, the interpretation by an administrative agency of the statutes it administers and of its own rules and regulations should be given deference if not unreasonable. Salvati v. Eimicke, 72 N.Y.2d 784, 537 N.Y.S.2d 16, 18, 533 N.E.2d 1045, 1047 (1988), recon. den. 73 N.Y.2d 995, 540 N.Y.S.2d 1006, 538 N.E.2d 358 (1989).

Clearly, the owner's argument that the Lavanant holding applies only with respect to the award of treble damages utterly fails to reflect the actual holding of the case. Moreover, the owner's footnote 5 on page 5 of his brief makes the incorrect assertion that JRD and Lavanant are consistent on the basis of the denial of leave to appeal by the Court of Appeals. Not only does this assertion ignore the plain meaning of the decisions in those two cases, but it is axiomatic that the denial of

leave to appeal by the Court of Appeals has no precedential value. See, e.g., Calandra v. Rothwax, 65 N.Y.2d 897, 493 N.Y.S.2d 304 (1985). In Brownstone Publishers v. NYC Department of Finance, 75 N.Y.2d 791, 552 N.Y.S.2d 92 (1990), the Court held that the denial of a motion for leave to appeal is "not equivalent to an affirmance and has no precedential value."

The owner has presented nothing which warrants a departure from the holding of this Court's decision in Lavanant.

The owner's argument that he was not permitted access to rent control records of the subject premises is equally without merit. The request was not made until after the Commissioner had issued his final order in the proceeding. The PAR order was issued on January 30, 1989. (Record: 51-54) The FOIL request was not made until February 24, 1989. (Record: 55-56) A post hoc request for rent records made after a determination finding a landlord in default for having failed to submit the required rent history does not render that determination in any way defective. It is well settled that a court, upon judicial review of an administrative determination must determine whether an agency's determination is rational on the basis of the administrative record before the agency. As this Court held in Fanelli v. New York City Conciliation and Appeals Board, 90 A.D.2d 756, 455 N.Y.S.2d 814 (1st Dept. 1982), aff'd, 58 N.Y.2d 952, 460 N.Y.S.2d 534 (1983):

The function of the court upon an application for relief under CPLR Article 78 is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. Disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered (see Matter of Levine v. New York State Liquor Authority, 23 N.Y.2d 863, 298 N.Y.S.2d 71, 245 N.E.2d 804). The claim, advanced for the first time at Special Term that, in December 1980, a resolution had been passed to dissolve the corporate owner, was not made before the CAB. Accordingly, although we are in agreement that the issue is without

legal effect here, the proof dehors the record should not have been considered by Special Term.

Moreover, the contention regarding the FOIL request and possible rent control records was not raised during the administrative proceeding. It is equally well settled that a court may not consider arguments or evidence not contained in the administrative record. This Court recently held in Rozmae Realty v. State Division of Housing and Community Renewal, __ A.D.2d __, 553 N.Y.S.2d 738, 739 (1st Dept. 1990), with regard to an issue raised for the first time during the court proceedings:

This contention, however, was not raised in the administrative proceedings before DHCR, and may not be considered for the first time in the judicial review of those proceedings pursuant to CPLR Article 78 (Matter of Klaus v. Joy, 85 A.D.2d 603, 444 N.Y.S.2d 691).

See also, Plaza Realty Investors v. CAB, 110 A.D.2d 704, 487 N.Y.S.2d 607 (2nd Dept. 1985); Lynch v. New York City Employees Retirement System, 64 N.Y.2d 1103, 490 N.Y.S.2d 165 (1988); rev'g 103 A.D.2d 695, 478 N.Y.S.2d 620 (1st Dept. 1984); Yonkers Gardens Co. v. State Division of Housing, 51 N.Y.2d 966, 435 N.Y.S.2d 706 (1980); Coronet Properties Company v. State of New York Division of Housing and Community Renewal, 134 A.D.2d 967, 520 N.Y.S.2d 692 (1st Dept., November 10, 1987), aff'g, Index No. 9547/86, n.o.r., October 21, 1986, Sup. Ct., N.Y. Co. (Hughes, J.).

Finally, there is nothing but the merest speculation in the owner's brief on appeal that there may be relevant rent control records for the subject apartment. The administrative or court records contain no information which would indicate that the subject apartment was rent controlled after June 30, 1974, the relevant date for calculating the lawful stabilized rent. If the owner believed that

such information existed, it was his obligation under the Section 42(A) of the Rent Stabilization Code to produce it. No such effort was made during the administrative proceeding; nor was any request made to the agency to conduct a search of any records which may have been relevant. Furthermore, even if the apartment was decontrolled after June 30, 1974, but before the date for which a rental history had been provided, there would still be a gap in the rent history necessitating the application of the alternative default procedure.

Where there is a rational basis in the record to support an administrative determination, it should not be disturbed. Thus, the court cannot substitute its judgment for that of the administrative agency. See, Matter of Fresh Meadows Associates v. New York City Conciliation and Appeals Board, 88 Misc. 2d 1003, 390 N.Y.S.2d 351 (Sup. Ct., N.Y.Co., 1976, aff'd 55 A.D.2d 559, 390 N.Y.S.2d 69 (1st Dept. 1976), aff'd, 42 N.Y.2d 925, 397 N.Y.S. 2d 1007 (1977); 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). Clearly, the determination of the Deputy Commissioner for Rent Administration has a rational basis in fact, was rendered in full accordance with law, and is neither arbitrary or capricious. It is thus entitled to judicial affirmance.

B. The Rent Stabilization Law Does Not Impose An Unconstitutional Taking and is Constitutional.

The Rent Stabilization Law and the alternative procedure used in the case at bar have long been upheld by the courts. However, the landlord has challenged the constitutionality of the law, erroneously claiming that, insofar as it imposes a ceiling on rents for vacant apartments, it subjects an owner to an unconstitutional taking of property without just compensation.

In raising such a challenge the owner assumes the burden of rebutting the long adhered to

presumption in favor of the constitutionality of legislation. See, Cook v. City of Binghamton, 48 N.Y.2d 323, 422 N.Y.S.2d 919, 398 N.E.2d 525 (1979); ILFY Co. v. Temporary State Housing Rent Commission, 10 N.Y.2d 263, 219 N.Y.S.2d 249 (1961), app. dismd., 369 U.S. 795. This he has not done.

As the Supreme Court said in Spring Realty Co., et al v. New York City Loft Board, 127 Misc.2d 1090, 487 N.Y.S.2d 973 (Sup. Ct., N.Y. Co., 1985), aff'd, 498 N.Y.S.2d 241 (1st Dept. 1986), aff'd, New York Court of Appeals, N.Y.L.J., December 19 1986, p. 17, col. 5 (modified on other grounds), in upholding the constitutionality of the rent guidelines:

The exercise of the state police power may properly place restrictions on the use or return on property if it is reasonably related to a legitimate public purpose. Golden v. Planning Board of Ramapo, 30 N.Y.2s 359, 381, 334 N.Y.S.2d 138, 285 N.Y.2d 291, app. dism. 409 U.S. 1003, 93 S.Ct. 440, 34 L.E.2d 294; Society for Ethical Culture v. Spatt, 68 A.D.2d 112, 416 N.Y.S.2d 246, aff'd 51 N.Y.2d 449, 434 N.Y.S.2d 932, 415 N.E.2d 922. A taking in the constitutional sense only occurs when the owner is deprived of any use of the property for which it is reasonably adapted, rather than merely restricting its use or depreciating its value. Spears v. Berle, 48 N.Y.2d 254, 263, 422 N.Y.S.2d 636, 397 N.E.2d 1304; Fred French Investing Co. v. City of New York, 39 N.Y.2d 587, 596, 385 N.Y.S.2d 5, 350 N.E.2d 381, app. dism. 429 U.S. 990, 97 S.Ct. 515, 50 L.Ed.2d 602; Seidner v. Town of Islip, 56 N.Y.2d 1004, 453 N.Y.S.2d 636, 439 N.E.2d 352 and Jensen v. City of N.Y., 42 N.Y.2d 1079, 399 N.Y.S.2d 645, 369 N.E.2d 1179, are readily distinguishable since the plaintiffs were deprived of "all" use of the property. A proper exercise of the police power is not invalidated by its imposition of financial burdens upon the affected parties. Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421, 424, 79 S.Ct. 405, 407, 96 L.Ed. 469; Levitt v. Village of Sands Point, 6 N.Y.2d 269, 273, 189 N.Y.S.2d 212, 160 N.E.2d 501. There is no constitutional right to any particular rate of return on property....(emphasis added)

The legislative findings contained in the Emergency Tenant Protection Act of 1974, McK. Unconsol. Laws, Section 8622, which were quoted in the owner's brief, clearly enunciates a

legitimate purpose underlying the regulation of rents, including vacancy rents. The findings state in relevant part:

...that preventive action by the legislature continues to be imperative 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 health, safety and general welfare...

The fact that the rent regulation system grew out of the wartime emergency of the 1940s does not nullify its presently legitimate purpose as found by the State Legislature.

The reasonableness of a legislative choice is not determined by whether or not the choice was the best or most accurate available. The constitutional validity and sufficiency of the limitations on rents, whether for vacant or occupied apartments depend only on whether the legislative body had a rational basis and prescribed a reasonable method. It is not necessary to show that a reasonable method invariably produces the ideal result for all landlords in all cases. Even if in isolated cases hardship may be caused by the use of an otherwise reasonable standard, the constitutional sufficiency of that standard is not impugned by such an occasional aberrational result.

In Benson Realty Corp. v. Beame, 50 N.Y.2d 994 (1980), the appellant argued, *inter alia*, that the return on their investment was so low as to amount to a "taking" of property in contravention of the constitutional guarantees against deprivation of property without due process of the law. The United States Supreme Court in Benson Realty Corp. v. Koch, 449 U.S. 1119, 67 L.Ed.2d 106, 101 S.Ct. 933, dismissed the appeal after reviewing these same arguments. The guarantee against deprivation of property without due process protects individuals from direct governmental appropriation. It does not insulate one from the effects of even consequential injuries from lawful regulation. Bowles v. Wellingham, 321 U.S. 503; Basin inc. v. Federal Energy Administration, 552

F.2d 931, 938 (Temp. Em. Ct. Apps. 1977), cert. den. 434 U.S. 821; Condor Operating Co. v. Sawhill, 514 F.2d 351, 361 (Temp. Em. Ct. Apps. 1975), cert. den. 976.

In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982), the Supreme Court expressly upheld the States' broad power to regulate landlord-tenant relationships. The Court, while finding a New York statute which required a landlord to permit cable television installations to constitute a taking under the physical occupation rule, nevertheless stated:

Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. (emphasis added)

This statement was reaffirmed by the Supreme Court in Pennell v. City of San Jose, 485 U.S. ___, 108 S.Ct. ___, 99 L.Ed 2d 1 (1988), a case upholding a rent control provision which allows consideration of the tenant's hardship in fixing a reasonable rent. The Court reiterated the constitutionality of government regulation of rates and prices where there is a discrepancy between supply and demand, 99 L. Ed. 2d at 14, and further noted that rent laws are not per se takings:

And in FCC v. Florida Power Corp., 480 US ___, 94 L. Ed 2d 282, 107 SCt 1107 (1987), we stated that "statutes regulating the economic relations of landlords and tenants are not per se takings." Id., at ___, 94 L Ed 2d 282, 107 S ct 1107. Despite amici's urgings, we see no need to reconsider the constitutionality of rent control per se.

99 L.Ed. 2d at 14, n. 6.

It is plain that long-standing constitutional doctrine upholding the validity of rent regulation permits the regulation of vacancy rents. Indeed, the New York rent control statutes, which are constitutional, for many years froze rents, including vacancy rents, at then existing levels. The

legislative findings as to the need for rent regulation are rationally based, as are the means adopted to achieve the constitutionally permissible legislative ends. In sum, the owner has not shown, and indeed cannot show, that the Rent Stabilization Law as applied to vacancy rents is unconstitutional. Given this conclusion, the application of the Rent Stabilization Law in the case at bar is clearly constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the court below and the determination of DHCR should be affirmed, and the petition dismissed with costs.

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Respectfully submitted,

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