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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

In the Matter of the Application of
BRIGHTWATER TOWERS ASSOCIATES,

Petitioner-Appellant,

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

- against -

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL
and BRIGHTWATER TOWERS
TENANTS' COUNCIL, INC.,

Respondents-Cross-Appellants.

In the Matter of the Application of
PAUL PODHAIZER, et al,

Petitioners-Appellants,

- against -

ANGELO J. APONTE, Commissioner of the
State of New York, Division of Housing
and Community Renewal, et al,

Respondents-Respondents

BRIEF OF RESPONDENT CROSS-APPELLANT DHCR

PRELIMINARY STATEMENT

This appeal involves two Article 78 proceedings commenced by the owner and tenants of a rental housing project which became subject to the Rent Stabilization Law ("RSL") upon voluntary dissolution of its status under the Private Housing Finance Law ("PHFL"). The judgment of the Supreme Court, Kings County (Vaccaro, J.), entered on February 3, 1993, granted the petition in proceeding no. 1 (the owner's proceeding) to the extent of modifying an order of the New York State Division of Housing and Community Renewal ("DHCR"). The Court's modification of the DHCR order, which determined the lawful first stabilized rents for the tenants in the project and directed the owner to refund excess rent payments, concerned the question of whether the tenants should have the option of having the terms of their leases restructured. The petition in proceeding no. 2 (the tenants' proceeding) was denied by the Court below in its entirety.

This brief is submitted in opposition to the appeal of the petitioner in proceeding no. 1 (the "owner") and in support of DHCR's cross-appeal of that part of the judgment which modified the Commissioner's order as to the lease restructuring. According to the briefing schedule agreed to by the parties and approved by this Court, the petitioners in proceeding no. 2 (the "tenants") will perfect their appeal in a subsequent brief. DHCR will thereafter file an answering brief to that appeal.

STATEMENT OF THE QUESTIONS PRESENTED

1. Did DHCR properly direct the restructuring of lease terms at the subject complex by using three year intervals beginning with each tenant's initial date of occupancy, such restructuring being directed because of the owner's failure to timely offer three year lease renewals in violation of the Mitchell-Lama regulations?

The Court below answered in the affirmative.

2. Did DHCR properly direct that the restructuring of leases be at each tenant's option, where tenants who were not adversely affected by delayed lease renewals neither complained about their leases nor agreed to a waiver of their rights under their actual leases?

The Court below incorrectly answered in the negative.

3. Did DHCR properly exclude the $1.76 swimming pool charge from the initial legal regulated rents in the complex, that charge being based upon a court settlement between the owner and tenants to which DHCR was not a party, and which was not part of the rent collectible on the date of the Mitchell-Lama buyout?

The Court below answered in the affirmative.

STATEMENT OF THE NATURE OF THE CASE

These proceedings concern the establishment of initial legal regulated rents in a Mitchell-Lama housing complex which became subject to the Rent Stabilization Law and Code upon the voluntary dissolution and resulting termination of DHCR supervision of the complex pursuant to the PHFL. The Rent Stabilization Law and Code provide that the initial legal regulated rent shall be the rent reserved, charged and paid on the date of dissolution. This figure is determined by operation of law.

In the DHCR order here under review, the Commissioner found that the initial legal stabilized rents in the subject complex include income related surcharges imposed pursuant to the PHFL. However, the Commissioner concluded that the initial rents do not include a separate charge for swimming pool restoration being paid by tenants on the date of dissolution, because the charge only existed pursuant to a private Civil Court stipulation, to which DHCR was not a party, which extended the payment period of a charge ordered by DHCR to end prior to the date of dissolution. Thus, the charge was held not to be part of the rent charged and paid on the date of dissolution.

The Commissioner also exercised his authority to consider the equities by directing the restructuring of the last Mitchell-Lama leases as to their effective dates by using three year intervals beginning with each tenant's initial date of occupancy. This restructuring was directed to avoid premature rent stabilized rent increases caused by the owner's previous delay in executing Mitchell-Lama renewal leases.

The Court below affirmed the Commissioner's determination except for that portion of the order which gave each tenant the option of choosing whether or not to have his or her lease term restructured. The Court below improperly substituted its judgment for that of the

agency and took away the rights of tenants who had not been adversely affected by the delayed lease renewals and had neither complained about their leases nor agreed to a waiver of their rights under their actual leases.

The owner's arguments challenging the Commissioner's determination are without merit. As this brief will make manifest, the Commissioner's determination is reasonable, in accord with applicable law and entitled to judicial affirmance.

COUNTER-STATEMENT OF THE FACTS

This proceeding involves the housing complex known as Brightwater Towers, consisting of over 700 apartments located at 501-601 Surf Avenue, Brooklyn, New York. The complex was built in the 1960's as a government subsidized low and middle income housing development under the Private Housing Finance Law, commonly known as the Mitchell-Lama Law. Pursuant to the PHFL, the complex was subject to the supervision of DHCR. However, the housing company which owned the complex became eligible to dissolve voluntarily, a process commonly known as a Mitchell-Lama buy out. Dissolution involves the removal of a complex from supervision under the PHFL when the housing company prepays the entire principal and interest due on its mortgage or mortgages and pays other outstanding debts. The housing company in the case at bar dissolved, effective January 28, 1987.

Upon dissolution, the property became subject to the requirements of the Rent Stabilization Law ("RSL"). On April 16, 1987, Counsel to DHCR sent a letter to the owner's and tenants' attorneys advising them that the process of rent registration under the Rent Stabilization Law should commence. (Return: B-3, Exhibit E) The owner thereafter filed with DHCR initial rent registration forms in April, 1987. (Return: A-1, B-7) On May 4, 1987, DHCR's General Counsel sent a letter to the owner's attorney directing it to issue new leases for the unexpired term of the existing Mitchell-Lama leases "consistent with the provisions of the Rent Stabilization Code." (Return: B-3, Exhibit G)

On August 7, 1987, the tenants filed a building-wide challenge to the owner's initial rent registration. The tenants claimed, in pertinent part, that the owner had incorrectly included Mitchell-Lama based income surcharges as part of the initial legal registered rent;

that for various tenants the Mitchell-Lama three year lease in effect on the buy out date was not a lease commencing on the anniversary date of the tenant's initial occupancy, and that as a result, the newly substituted stabilization lease expired on an earlier date than it should have, thereby subjecting them to premature rent stabilized guideline increases; and that the Mitchell-Lama swimming pool surcharge, which DHCR ordered only for the year 1986, should not be included in the initial rent stabilized rent. (Return: A-1)

The owner answered, arguing that (1) the Mitchell-Lama leases, having been "voluntarily" executed by the tenants, were proper and therefore binding; and (2) inclusion of surcharges in the initial stabilized rent was in accordance with the Rent Stabilization Code. (Return: A-6)

On March 23, 1990, the Rent Administrator issued an order finding, in pertinent part, that (1) the income-related surcharges charged and paid on the date PHFL regulation terminated were properly included in the initial stabilized rent, (2) the temporary charge for swimming pool restoration, which by DHCR order was added to the rent only during 1986, but payment of which by court stipulation between the owner and tenants was extended beyond 1986, could not be included in the initial rent, and (3) at the tenants' option, the owner was required to re-establish Mitchell-Lama leases for consecutive three year terms based on initial occupancy dates and make appropriate refunds. (Return: A-27)

In response to the Administrator's order, three Petitions for Administrative Review ("PAR") were filed; two by tenants (Return: B-1, B-2) and one by the owner (B-3). After the parties submitted responsive papers, the Deputy Commissioner for Rent affirmed the Administrator's order. (Return: B-16)

In separate Article 78 proceedings, consolidated by the Court below, the tenants challenged the inclusion of the income-related surcharge in the initial stabilized rent, and the owner challenged the exclusion of the pool surcharge and the restructuring of leases. The court affirmed all of DHCR's order except that part which give the tenants an option of having their leases restructured. The court's ruling was based on a theory that those tenants who benefited from not restructuring "would not seek to exercise their option and would thereby be granted an unwarranted windfall." The court thus mandated that all tenants' leases be restructured.

ARGUMENT

DHCR'S DETERMINATION ESTABLISHING THE INITIAL LEGAL REGULATED RENT AND DIRECTING THE REALIGNMENT OF LEASE TERMS WAS NEITHER ARBITRARY NOR CAPRICIOUS BUT WAS IN COMPLIANCE WITH THE APPLICABLE LAW

A. Regulatory Background

It is undisputed by the parties that the Brightwater Towers complex was supervised by DHCR pursuant to the Private Housing Finance Law, Article 2 (popularly known as the Mitchell-Lama Law), from the time of its construction in the early 1960's, until January 28, 1987, the effective date of the voluntary dissolution of the housing company.

The Mitchell-Lama Law was enacted in 1955. L. 1955, c. 407. The purpose of the Mitchell-Lama program was to make private-sector housing available to the middle income and low income residents of this State (*See* PHFL §§11 and 11-a). Mitchell-Lama housing companies receive low-interest government mortgage loans and municipal real property tax benefits, in exchange for which they are subject to regulation concerning, among other things, profit, disposition of property, rental rates and tenant income. (*See*, *generally*, Special Message of Governor Averell Harriman to the Legislature (March 28, 1955), *reprinted in* 1955 McKinney's Session Laws of N.Y., at 1639-40; Memorandum in Support of S. 133, *reprinted in* 1955 New York State Legislative Annual, at 279.)

The Mitchell-Lama Law authorizes the creation of "limited-profit housing companies" which can be organized to provide dwelling space on either a rental or a "mutual" (*i.e.*, coopera-tive) basis (*See* PHFL §§12 (2-a), (2-b) and 13.); it also provides significant real property tax benefits for limited-profit housing companies. Essentially, a company is taxed only on the assessed valuation of its land prior to the construction of the housing project, plus assessment for any improvements provided by the locality in which the project is situated. With the consent -- never refused -- of the locality in which it is located, the company is exempt for thirty years from the payment of all property taxes attributable to the increased value of the land

resulting from its development (*See* PHFL §33). The law set a maximum return on investment (PHFL §28(1)), regulates rents (PHFL §31(1)), and limits occupancy to lower and middle income persons (PHFL §31(2)).

More importantly, in the context of this litigation, the Mitchell-Lama Law imposes limitations on the rent that housing companies may charge. Under PHFL §31, all rents are set by the Commissioner of the Division of Housing and Community Renewal. The Commissioner is authorized to vary the rental rates in order to maintain the ability of the company to meet its financial obligations. Additionally, residence in a development is limited, by statute, to persons of middle and low income. The income ceiling for each dwelling unit is defined as a multiple of the unit's approved rental rate (*See* PHFL §31(2).). The statute also provides that tenants whose incomes exceed the maximum prescribed by law "...shall pay a rental surcharge in accordance with a schedule of surcharges to be promulgated by the company with the approval of the commissioner..." (*See*, PHFL §31(3))

In addition to the specific statutory provisions concerning the setting of rents, the Mitchell-Lama Law gives the DHCR Commissioner broad regulatory authority over limited-profit housing companies. These powers are enumerated in PHFL §§32 and 32-a. As part of this broad grant of authority, PHFL §32 (3) authorizes the Commissioner to promulgate regulations for the purpose of implementing PHFL Article 2. Pursuant to said authority, DHCR promulgated 9 (C) NYCRR §§1727-4.2, and 1727-4.3, both of which deal with rental surcharges, and 9 (C) NYCRR §§ 1227-3.2, 1727-3.4, and 1727-5.1, all of which deal with leases.

Over the years, courts have upheld both DHCR's authority to regulate and the procedure developed to establish the rents for apartments in State-supervised Mitchell-Lama housing. Courts have referred favorably to DHCR's experience and expertise in these matters, *Hanks v. Urstadt*, 74 Misc.2d 536, 345 N.Y.S.2d 254 (Sup. Ct. Bx. Co. 1971), *aff'd*, 37 A.D.2d 1044, 326 N.Y.S.2d 373; *Riverpark Towers Tenants Association v. Goldman*, 94 Misc.2d 856, 405 N.Y.S.2d 907 (Sup. Ct. Bx. Co. 1978). Courts have also commented on the necessity of balancing tenants' needs together with the need to provide sufficient funds for the operation and maintenance of the premises. (*Greene v. Goodwin*, 46 A.D.2d 69, 361 N.Y.S.2d 186 (2d Dept. 1974); *Riverpark Towers Tenants Association v.*

Goldman, *supra*; *Winthrop Gardens, Inc. v. Goodwin*, 58 A.D.2d 764, 396 N.Y.S.2d 400 (1st Dep't. 1977); *Rappaport v. Gaynor*, 75 Misc.2d 649, 348 N.Y.S.2d 451 (Sup. Ct. Bx. Co. 1965) *aff'd without op* 26 A.D.2d 620, 272 N.Y.S.2d 694 (1st Dep't 1966); *Hamer v. Urstadt*, 74 Misc.2d 719, 344 N.Y.S.2d 765 (Sup. Ct. N.Y. Co. 1973).)

The Mitchell-Lama Law provides for the removal of housing from Mitchell-Lama regulation after a period of not less than twenty years after the date on which the first tenants commenced occupancy. This can be done pursuant to PHFL §35(2) by the voluntary dissolution of the limited-profit housing company owning the property upon prepayment of its government aided mortgage (commonly known as a Mitchell-Lama buy out). PHFL §35(2) provides that:

> A company aided after a loan made after May first, nineteen hundred fifty-nine, may voluntarily be dissolved...not less than twenty years after the occupancy date upon payment in full of the remaining balance of principal and interest due and unpaid upon the mortgage or mortgages...

PHFL §35(3) goes on to provide, in pertinent part, as follows:

> After such dissolution...the provisions of this article shall become and be inapplicable to any such project and its owner or owners and any tax exemption granted with respect to such project pursuant to section thirty-three hereof shall cease and terminate.

Under the statutory scheme, an owner of a property subject to supervision pursuant to the Mitchell-Lama Law, may, but need not, exercise the option of removing the property from regulation under the PHFL upon prepaying the mortgage and foregoing any property tax exemptions. The appellants herein chose to exercise this option and remove the Brightwater Towers complex from supervision pursuant to the PHFL.

After voluntary dissolution, Brightwater Towers automatically became subject to the jurisdiction of the Rent Stabilization Law and Code. The Administrative Code of the City of New York §26-

504(a)(1) (hereinafter "Rent Stabilization Law" or "RSL") provides, in pertinent part, as follows:

> This law shall apply to:
>
> a. Class a multiple dwellings not owned as cooperative or as a condominium, except as provided in section three hundred fifty-two-eeee of the general business law, containing six or more dwelling units which:
>
> (1) were completed after February first, nineteen hundred forty-seven, except dwelling units... (b) subject to rent regulation under the private housing finance law or any other state law...

Clause (1)(b) is one of seven exceptions to RSL jurisdiction. Upon voluntary dissolution and removal of a property from the Mitchell-Lama program, the exception is no longer applicable to the property. None of the other exceptions apply to Brightwater Towers.

Similarly, 9 (C) NYCRR §2520.11 (hereinafter "Rent Stabilization Code" or "RSC") provides, in pertinent part, as follows:

> This Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL or any other provision of law, except the following housing accommodations for so long as they maintain the status indicated below:
>
> (c) housing accommodations for which rentals are fixed by the DHCR or the HPD...However, housing accommodations in buildings completed or substantially rehabilitated prior to January 1, 1974, and whose rentals were previously regulated under the PHFL or any other state or federal law, other than the RSL or the City Rent Law, shall become subject to the ETPA, the RSL, and this Code, upon the termination of such regulation.

See also, "Mitchell-Lama Buyouts: Policy Issues and Alternatives", David J. Sweet and John D. Hack, 17 Fordham Urban Law Journal 117, 129 (1989):

> Upon removal from the Mitchell-Lama program, a rental project located in New York City immediately becomes subject to rent stabilization. (footnotes omitted)

In the instant proceeding the premises (1) contain more than six dwelling units; (2) were completed between February 1, 1947, and January 1, 1974: (3) were subject to regulation under the PHFL until the certificate of dissolution was accepted for filing by the Secretary of State on January 28, 1987; and (4) since January 28, 1987, have been subject to regulation under the Rent Stabilization Law and Code.

The issues raised by the owner and tenants in this proceeding concern (1) the establishment of the initial stabilized rent once the property became subject to the Rent Stabilization Law, and (2) the means used for determining the commencement dates for the tenants' initial Rent Stabilized leases.

B. DHCR's restructuring of the lease terms to deem them as if renewed on the tenants' anniversary date at three year intervals has a rational basis in law and fact

The owner challenges that portion of DHCR's order which directed the housing company, at the tenant's option, to restructure the leases by using three year intervals beginning with each tenant's initial date of occupancy so that all leases would expire on the tri-annual anniversary of the date on which the tenant originally commenced his or her occupancy. What is at issue in this ruling is not the setting of the initial stabilized rent but the determination of the date on which tenants' leases are to be renewed. This in turn, is determinative of two significant factors: (1) the first date on which the owner is entitled to stabilized rent increases, above the initial legal regulated rent and in accordance with the guidelines promulgated annually by the Rent Guidelines Board; and (2) the first date an owner could attempt to evict a tenant based on the grounds for refusal to renew a lease which are listed in the Rent Stabilization Code.

The owner's position, stripped of its niceties and novel interpretations of its legal obligations, essentially boils down to this: while its violation of the Mitchell-Lama regulations will result in premature and unwarranted rent increases for many of the affected tenants, DHCR is without authority to do anything about it. This is incorrect.

DHCR, as was its predecessor, the Conciliation and Appeals Board, is charged under the Rent Stabilization Law and Code with the responsibility of hearing and determining tenant's complaints and owner's applications regarding, *inter alia*, the issues of lease renewals and lawful stabilized rents for apartments subject to the Rent Stabilization Law. In order to fulfill this responsibility, DHCR is vested with broad powers to apply to individual apartments the standards set forth in the Rent Stabilization Code and the guidelines promulgated by the Rent Guidelines Board in a manner which is most compatible with the spirit and purpose of the law. These broad powers include the authority to consider the equities in determining issues of lease renewals and lawful stabilized rents where it is considered proper. Section 2522.7 of the Rent Stabilization Code provides:

> 2522.7 Consideration of equities.
>
> In issuing any order adjusting or establishing any legal regulated rent, or in determining any applications by tenants pursuant to section 2523.5(f) of this Title (Renewal Lease Rights Determinations), or in determining when a higher or lower legal regulated rent shall be charged pursuant to an agreement between the DHCR and governmental agencies or public benefit corporations, the DHCR shall take into consideration all factors bearing upon the equities involved, subject to the general limitation that such adjustment, establishment, or determination can be put into effect with due regard for protecting tenants and the public interest against unreasonably high rent increases inconsistent with the purposes of the RSL, for preventing imposition upon the industry of any industry-wide schedule of rents or minimum rents, and for preserving the regulated rental housing stock.

This section flows from Section 26-511(c)(1), which provides for DHCR's responsibility to promulgate a code that "provides safeguards against unreasonably high rent increases and, in general, protects tenants and the public interest".

In resolving disputes between owners and tenants as to the adjustment or establishment of the legal regulated rent, DHCR is authorized, pursuant to Section 2522.7 of the Rent Stabilization Code, to take into account all of the factors bearing upon the equities involved in each case. The factors which DHCR takes into consideration in determining whether or not to consider the equities in the exercise of its authority include those which arise where the landlord or tenant conduct themselves in such a manner as to justify DHCR's invoking its authority to consider the equities and setting a lease term which can act as a basis for determining future stabilized rent increases.

The Courts have upheld the rent agency's authority to deem the existence of such leases where it is most equitable under the circumstances. Thus, in *Chessin v. New York City Conciliation and Appeals Board*; 100 A.D.2d 297, 474 N.Y.S.2d 293, 298 (1st Dept. 1984), the Appellate Division held that:

> Respondent [Conciliation and Appeals Board] had the authority under Section 35A of the Rent Stabilization Code [the former Code] to deem this a three-year lease, under the circumstances, notwithstanding the stated commencement date in the amended lease. That section of the Code permits CAB to "take into consideration all factors bearing upon the equities involved" in adjusting stabilization rents to conform to legal standards. The Rent Guidelines Board Order was not intended to remove respondent's discretion in determining the intention of the parties, and to replace it with an inflexible standard.

For other cases involving differing circumstances in which the rent agency deemed leases, *see*, *Century Operating Corp. v. Prince*, 66 A.D.2d 742, 411 N.Y.S.2d 477 (1st Dept. 1978), *aff'g*, N.Y.L.J., March 6, 1978, p. 11, cols. 1 and 2 (Sup. Ct., Bloom, J.); *Lefer and Turkel v. Conciliation and Appeals Board*, N.Y.L.J., July 20, 1978, p. 11, col. 2 (Sup. Ct., N.Y. Co., Helman, J.); *Matter of Mendlow v.*

Prince, N.Y.L.J., February 14, 1976, p. 11, col. 3 (Sup. Ct., N.Y. Co., Rubin, J.); *Lewin v. New York City Conciliation and Appeals Board*, 88 A.D.2d 516, 450 N.Y.S.2d 1 (1st Dept. 1982), *aff'd*, 57 N.Y.2d 760, 454 N.Y.S.2d 990 (1982); *Savage v. Eimicke*, 169 A.D.2d 495, 564 N.Y>S.2d 170 (1st Dept. 1991), *lv. to appeal den.*, 78 N.Y.2d 861, 576 N.Y.S.2d 219.

In the case at bar, the Commissioner found that:

> By letter dated May 4, 1987 DHCR's counsel directed the owner to supplant the Mitchell-Lama leases with new leases consistent with the ETPA, the RSL and the Code. Subsequently, it was determined that the owner had not complied with the rules and regulations governing the renewals of Mitchell-Lama leases pursuant to section 1727-32(c) [sic], which mandates that leases be renewed, for terms not exceeding three years, at the end of a lease term, i.e., on the anniversary date of the tenant's initial occupancy. It was the DHCR approved form of lease for the project and the owner's practice to have leases for a term of three years which should, therefore, have been renewed for successive three year period during the period that the project was subject to the Private Housing Finance Law. (R. 114)

It was because of the owner's non-compliance with the Mitchell-Lama lease renewal requirements, and the resulting unfair windfall which would accrue to the owner were the leases not restructured, that the Commissioner exercised his discretion to consider the equities under the circumstances and direct the restructuring of leases so that, at the tenants' option, they would be allowed to expire either on the anniversary of the date on which the tenant originally commenced his or her occupancy, or on the termination date of the executed lease.

Once the premises became subject to regulation under the RSL, the expiration date of the lease had a major impact on the tenants. The effect of the owner's "realignment" of the lease terms, in many instances, enabled it to obtain an extra rent guidelines increase. For example, in the case of a tenant who first occupied the premises in February, 1968, if successive three year renewals were

granted immediately upon the expiration of the original and all following leases, that tenant's last Mitchell-Lama lease would be due to expire in February, 1989. Thus, after the premises became subject to the RSL on January 28, 1987, the owner would not have been entitled to obtain a guidelines increase until two years later. However, if the lease termination date had been "realigned" so that the last Mitchell-Lama lease expired in February, 1987, the owner would have been entitled to an immediate guidelines increase at that time, followed by a second guidelines increase in 1989. In these instances, the owner, would reap a large financial windfall from, and the tenants be harmed by, the owner's failure to comply with the Mitchell-Lama lease renewal requirements.

The effect of the Commissioner's order is to conform the position of the parties to what it would have been had the owner complied with the Mitchell-Lama regulations, which it admittedly failed to do, i.e., provide three year renewal leases on the anniversary date of the tenants' first occupancy, not some date more convenient to the owner.

The remedy fashioned in this case is similar in intent to the remedy provided for in the Rent Stabilization Code for those situations in which an owner fails to offer timely renewal leases. RSL §2523.5(c) provides:

> Where the owner fails to timely offer a renewal lease or rental agreement in accordance with subdivision (a) of this section, the one or two year lease term selected by the tenant shall commence at the tenant's option, either (1) on the date a renewal lease would have commenced had a timely offer been made or (2) on the first rent payment date occurring no less than 120 days after the date that the owner does offer the lease to the tenant. In either event, the effective date of the increased rent under the renewal lease shall commence on the first rent payment date occurring no less than 120 days after such offer is made by the owner, and the guidelines rate applicable shall be no greater than the rate in effect on the commencement date of the lease for which a timely offer should have been made.

The intent of this regulation is to protect the vested right of rent stabilized tenants to renewal leases.[1] Similarly, the Mitchell-Lama regulations vest in tenants the right to regular periodic lease renewals. 9 NYCRR §1727-3.2 provides as follows:

> (a) Leases shall commence on the first day of month and shall not exceed 36 months' duration.
>
> (c) At the end of a lease term, if a tenant holds over with the permission of the housing company, the lease *must* be renewed either by preparation of a new lease, by an extension agreement, or by a rider. (Emphasis added)

In addition, 9 NYCRR §1727-5.1, provides in pertinent part:

> Possession of premises by tenant is held under a lease in rental developments, usually for a term of three years...

Clearly, the policy embodied in the regulations is that the tenant must be given a lease signifying the right to possession. Reading the two sections together, it is obvious that renewal leases are to be issued to all tenants remaining in tenancy, and that a housing company has no discretion to decide when to offer a renewal lease, it being required at the end of the prior lease term.

As for lease terms, the Mitchell-Lama regulations were drafted to indicate a maximum lease term not exceeding three years, rather than a specified term, in order to account for the fact that the regulations are effective statewide. They are written to be applicable under local market conditions that vary greatly among the different regions throughout the state. Although for many years the common practice in the Upstate regions has been to offer one year leases because the market does not warrant a longer term, the reverse has been true in the tight rental market in New York City, where DHCR practice in supervising Mitchell-Lama projects has always been to require three year initial and renewal leases. Indeed, the owner

---

[1] *See*, *generally*, *Short v. Graves*, 107 Misc.2d 194, 433 N.Y.S.2d 561, *aff'd*, 109 Misc.2d 672, 442 N.Y.S.2d 359, *aff'd*, 88 A.D.2d 796, 450 N.Y.S.2d 928.

concedes that Mitchell-Lama renewal leases at Brightwater Towers, whenever they might have been executed, always had three year terms.

The owner raises a number of arguments against the lease directive, none of which have merit. The owner argues that DHCR's Counsel, by letter dated May 4, 1987 (R. 119-120), directed it to replace the tenants' Mitchell-Lama leases with initial rent stabilized leases for the unexpired term of the lease being replaced and that DHCR later improperly "reversed the position" set forth in Counsel's May 4 letter (*See*, Brief of Brightwater Towers Associates, pp. 31-32, 34). The Commissioner clearly and adequately addressed the alleged inconsistency between Counsel's letter and the order of the District Rent Administrator. There is in fact no such inconsistency. The May 4, 1987 letter assumed that the owner had been in compliance with the Mitchell-Lama regulations relating to leases, the tenants having not yet filed their objections to the stabilized registration statements. In the May 4, 1987 letter, Counsel only addressed the problem of tenants not having leases with provisions reflecting their new status as rent stabilized tenants rather than Mitchell-Lama tenants, and accordingly indicated that the term of the new leases should be for the unexpired term of the leases they replaced. It was not until the tenants subsequently filed their objections and the administrative record was developed before both the District Rent Administrator and the Deputy Commissioner, that it became apparent that the owner had been violating the Mitchell-Lama regulations with regard to lease renewals. Under the circumstances, there is no real inconsistency between the position of the District Rent Administrator and the Commissioner, and that taken in Counsel's May 4, 1987 letter. The record is clear that the issue of the proper expiration date of the Mitchell-Lama leases never arose in this context. As the Court below stated:

> [A]t the time the letter was written, the tenants had not yet filed their objections to the stabilized registrations statement. Consequently, DHCR was not aware of Brightwater's realignment of the leases until the administrative record become more fully developed. (R. 51)

Given the circumstance that DHCR was not aware of the improper alignment of lease until after Counsel's May 4 letter, the

owner's argument that it has been unfairly treated because it relied upon Counsel's "representation" is totally vacuous.

Moreover, the text of the letter plainly shows that Counsel was concerned with whether the Mitchell-Lama leases contained various provisions required under the RSL. The determination was that the Mitchell-Lama leases were unsatisfactory in this regard, and Counsel therefore directed the issuance of new leases. As the Court below found:

> In any event, the purpose of the letter was to ensure that tenants were given the proper safeguards under the RSL by avoiding inconsistent lease provisions, and therefore counsel ordered new leases in place of the unsatisfactory Mitchell-lama leases (*see*, 9 NYCRR 2520.12). (R. 51)

It requires a highly strained reading of Counsel's May 4, 1987 letter, which directed the issuance of new leases pursuant to 9 NYCRR §2520.12, to conclude that Counsel was inviting a wholesale violation of vested rights which ordinarily accrue under the RSL. §2520.12 directs the "...provision of new leases consistent with the ETPA, the RSL and this Code." Moreover, by directing as the above-cited regulation does, that "...no renewal lease or vacancy lease offered to a tenant shall contain any right of cancellation or eviction by the owner during the term thereof except as provided for by the ETPA, the RSL or this Code," DHCR was clearly attempting to protect tenants from premature eviction.

The owner erroneously argues that it was not required to offer renewal leases until a 1976 amendment to Section 1727-3.2(c) of the Mitchell-Lama regulations changed the renewal requirement from "may" to "must." Indeed, it places great significance on the 1976 amendment. However, this contention was not raised during the administrative proceeding, but rather, was improperly raised for the first time in this Article 78 proceeding. It is axiomatic that court may not consider contentions or evidence not contained in the administrative record, but must determine whether an agency's determination is rational on the basis of the administrative record before the agency. This Court, in *Klaus v. Joy*, 85 A.D.2d 603, 444 N.Y.S.2d 69 (1981), held:

> In an article 78 proceeding, a specific objection to an order of the city rent agency cannot be considered by the court unless such objection has been first presented to the agency in the tenant's protest of the order (Administrative Code of the City of New York, Section YY51-9.0, subd. a, par. 2; *Matter of La Russo v. McGoldrick*, 232 App. Div. 720, 127 N.Y.S.2d 410). Petitioner's claims that (1), the order in question is violative of the equal protection clause of the United States Constitution and the New York State Constitution; and (2) the District Rent Director was equitably estopped from issuing the order, appear nowhere in the petitioner's protest and therefore are not properly before this court.

Likewise, the First Department, in *Rozmae Realty v. State Division of Housing and Community Renewal*, __ A.D.2d __, 553 N.Y.S.2d 738, 739 (1st Dept. 1990), held that:

> The landlord now urges that the apartment used by DHCR to establish the legal stabilized rent of the apartment in question was not the same size or otherwise comparable to the apartment whose legal rent was at issue. *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). (emphasis added)

See also, *Fanelli v. Conciliation and Appeals Board*, 58 N.Y.2d 952, 460 N.Y.S.2d 534 (1983), *aff'g*, 90 A.D.2d 756, 455 N.Y.S.2d 814 (1st Dept. 1982), *rev'g*, N.Y.L.J., January 11, 1982, p. 7, col. 3, (Sup. Ct., N.Y. Co., Blangiardo, J.); *Plaza Realty Investors v. CAB*, 110 A.D.2d 704, 487 N.Y.S.2d 607 (2nd Dept. 1985).

Thus, this Court should not consider the owner's claim regarding the change in the regulation. The Court below was incorrect in ruling that it was proper for the owner to raise the contention for the first time in the Article 78 proceeding. But even

were the contention to be considered, it has no merit, as was recognized by the Court below.

In the first place, the owner admits in paragraph "84" of its Article 78 petition that the so-called "realignment" of renewal lease dates did not begin until 1983, seven years after the mandatory language was added by the 1976 amendment:

> In the instant case, between the Fall of 1983 and the Spring of 1984, the petitioner began to align renewal leases with the anniversary of the painting date (rather than the anniversary of the initial occupancy date) for administrative and record keeping convenience. (R. 97-98)

See also, Brief of Brightwater Towers, p. 29. Thus, even were the owner correct in interpreting the 1976 regulatory amendment as meaning that lease renewals were only required after 1976, the lease renewal requirement would nevertheless be in effect, not only for those tenants who took occupancy after the 1976 amendment, but also, as of the date of the amendment, for those who were in occupancy prior to the amendment. Even under the owner's incorrect interpretation, any gaps in renewal leases after 1976 (which admittedly occurred in 1983 and 1984) violated the requirements of the Mitchell-Lama regulations. As the Court below correctly found, "even assuming issuance of renewal leases prior to 1976 was permissive, it is undisputed that Brightwater's realignment policy occurred subsequent to the amendment, i.e., in 1983 and 1984."

Moreover, the reason for the regulatory amendment has nothing to do with the version of reality concocted by the owner. Prior to August, 1976, the applicable regulation, 9 NYCRR §1727-3.2 read in pertinent part as follows:

> 1727-3.2 Initial date and duration of Lease. (a) Leases shall commence on the first day of month and shall not exceed 36 months' duration.
>
> * * * *
>
> (c) At the end of a lease term, if a tenant holds over with the permission of the housing company, the lease

> *may* be renewed either by preparation of a new lease, by an extension agreement, or by a rider. (Emphasis added)

The August 26, 1976 amendment replaced the word "may" with "must". The owner argues that the change can only mean that prior to 1976 an owner had complete discretion either to renew or not to renew leases. In actuality, the permissive "may" referred, not to an owner's discretion as to whether to renew or not, but to the form or method of renewal, i.e., whether the lease was renewed through the preparation of a "new lease" agreement, "extension agreement," or "rider." The regulation was amended because some housing companies insisted on reading the permissive language as relating to the requirement of lease renewal - despite the unambiguous language of §1727-5.1 - and not as relating to the mechanism that was to be employed. As the Court below noted in finding that the owner's argument was without merit, "it is nevertheless belied by the fact that section 1727-5.1 of the regulations specifically states that 'possession of premises by tenant is held under *lease* in rental developments' (emphasis added)." (R. 51)

DHCR's interpretation of its Mitchell-Lama regulations is reasonable and is entitled to deference. See, *Matter of Salvati v. Eimicke*, 72 N.Y.2d 784, 537 N.Y.S.2d 16 (1988); *Mounting & Finishing Co. v. McGoldrick*, 294 N.Y. 104 (1945); *White v. Winchester County Club*, 315 U.S. 32 (1942). Indeed, the Administrator's view has been called "determinately persuasive". *United States v. Hammers*, 221 U.S. 220, 228 (1911); *Bowles v. Seminole Rock Co.*, 325 U.S. 410 (1945); *Plaza Management Co. v. City Rent Agency*, 48 A.D.2d 129, 368 N.Y.S.2d 178; *unan. aff'd*, 37 N.Y.2d 837, 378 N.Y.S.2d 33 (1975). The owner's interpretation has no merit and is not entitled to any deference. At the time of the "realignment" in 1983 and 1984, tenants continued in occupancy for some time without the benefit of a lease, a clear violation of 9 (C) NYCRR §1727-5.1.

With regard to the owner's argument that the regulations allow an owner to choose any length of lease renewal up to three years, the Court is referred to the discussion in this brief on pages 17-18. To reiterate, DHCR's practice in supervising Mitchell-Lama projects in New York City has always been to require three year lease renewals. Moreover, an owner does not have discretion to change the length of

term for each lease renewal period. In fact, the term of lease renewals at Brightwater Towers has always been three years. *See*, Owner's Answer to Objections, Return: A-12, p. 4, in which the owner categorically states that the policy of Brightwater was to renew leases for three year terms. The owner's argument can easily be refuted by examination of official agency documents. DHCR's Mitchell-Lama files on Brightwater Towers show that tenants were offered *only* three year renewals *even* before the 1976 amendment about which so much is made. On October 16, 1972, Brightwater Towers, Inc. requested DHCR approval for a revision of their standard form lease extension agreement regarding security deposits. That extension agreement provided that the lease would be renewed and extended "...for the further period of thirty-six (36) calendar months from the date of expiration thereof..."[2] (R. 399)

Moreover, to argue that there is no requirement that the lease renewals be consecutive is simply to read the requirements set forth in §§1727-3.2 and 1727-5.1 right out of the regulations. *See*, generally, McKinney's, Statutes §98. Under the theory that "there is no language that states that renewal leases must be consecutive" a housing company could allow a tenant to continue in occupancy for a year or so after the expiration of the lease, and then offer a renewal lease whenever it chose to do so, perhaps years after the expiration of the previous lease. As noted above, such a result is a clear violation of the provisions of 9 (C) NYCRR §1727-5.1.

The owner erroneously argues that the governing statute establishing lease duration in New York State financed Mitchell-Lama housing is PHFL §31(1)(b), and that that provision impliedly allows the duration in State financed housing to be at the owner's option since it concerns only concerns federally financed projects. The argument is fallacious because it erroneously presumes that DHCR's authority to mandate lease terms derives only from PHFL

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[2] DHCR does not claim to maintain "...detailed files as to lease dates for each and every tenant...." as alleged below by the owner. The DHCR's files show that a form lease, containing a three year extension clause was approved pursuant to 9 (C) NYCRR §1727-3.4. The DHCR does not maintain separate individual files on each tenant showing the initial occupancy and subsequent lease renewal dates. In fact, DHCR's approval of each new tenancy while the premises was subject to its supervision was limited to insuring that only income eligible tenants, from DHCR approved waiting lists, are offered apartments.

§31(1)(b). The argument ignores the fact that DHCR has general authority to promulgate regulations for the purpose of implementing the Mitchell-Lama program. PHFL §32. This authority has always included the power to regulate Mitchell-Lama leases as part of the agency's supervisory duties, whether a project was federally financed or not.

The owner argues, without any merit, that the grounds upon which the Commissioner's order was defended were manufactured during the Article 78 litigation and improperly accepted by the Court below, and thus do not represent a basis upon which the order can be upheld. The basic principle regarding the scope of judicial review is that review is limited to the grounds invoked by the agency, and that a court may not substitute for insufficient or improper grounds. See, e.g., *Trump-Equitable Fifth Avenue Company v. Gliedman*, 57 N.Y.2d 588, 457 N.Y.S.2d 466 (1982).

Contrary to the owner's argument, DHCR did invoke sufficient and proper grounds in its administrative determination; those grounds being that the owner failed to comply with the requirement that Mitchell-Lama leases be renewed every three years upon expiration of the prior lease. DHCR has not attempted to claim that its determination was based upon different grounds than those stated in the Commissioner's order. The determination has a factual and legal basis which is sufficiently spelled out in the Commissioner's order, and which the Court below found to be reasonable.

The owner's argument boils down to the claim that there was an insufficient ground for DHCR's determination because certain sections of the Mitchell-Lama regulations and Rent Stabilization Code were not mentioned in the Commissioner's order - Sections 1727-3.2(a), 1727-5.1, and 2522.7 - but were only referred to during the subsequent litigation. However, the owner cites no precedent for the proposition that an administrative determination must recite every regulatory and statutory section or subsection which might bear on the legal basis for that determination; or that a complete legal analysis is required in an administrative determination. If an administrative determination were required to contain an exhaustive legal analysis, and every relevant statutory and regulatory section had to be recited, there would be no reason to prepare briefs in defense of those determinations.

The two cases cited by the owner are inapposite. The situation in the case at bar is unlike that in *In re Scherbyn v. Wayne-*

Finger Lakes Board of Cooperative Educational Services, et. al., N.Y.L.J., May 13, 1991, p. 24, c. 1 (N.Y. May 9, 1991), and in *Eastern Pork Products Co. v. DHCR*, __A.D.2d__, 590 N.Y.S.2d 77 (1st Dept. 1992). In *Scherbyn* the petitioner was dismissed from her job. In the administrative proceeding the Board cited as the reason for her dismissal what it perceived to be a legal bar against encumbering two separate civil service positions at the same time. Later, the Board defended the Article 78 petition by arguing that petitioner's actions were tantamount to a resignation. The within case is hardly akin to one in which an agency dismissed an employees, and later argued to the court that the employee resigned. In the instant case the Division has continually recited the owner's violation of the regulations as the rationale underlying its determination.

Similarly, in *Eastern Pork Products*, the Court held that there was a shift in the agency's factual position from one presuming the truth of an owner's submissions regarding the extent of renovations, to a position stating that the extent of work done was less than that claimed by the owner. There has been no such shift in position in the case at bar.

That the Commissioner's order does not recite two section numbers (one being a subsection in the same section which was recited) in support of its statement that the regulations require tri-annual lease renewals upon expiration of prior leases does not constitute a failure to set forth the grounds upon which the order was defended upon judicial review. Nor does the fact that a section is not recited in support of its authority to apply equities. The legal basis for the determination is the rule that there must be tri-annual lease renewals and that the agency has equitable authority to redress non-compliance with regulatory and statutory provisions. DHCR has not added to these grounds in defending against this Article 78 proceeding, and as previously argued in this brief those grounds constitute a reasonable and proper basis for the determination.

The owner makes the frivolous argument that it was proper to realign leases in order to allegedly help with compliance with the provisions of the New York City Housing Maintenance Code §27-2013 requiring that apartments be repainted every three years. The Mitchell-Lama lease renewal requirements have never been connected to the triennial painting requirements of the Housing Maintenance Code; nor is there anything in the Mitchell-Lama regulations which permit or require the realignment of lease terms to coincide

with a painting schedule. Indeed, such a realignment is contrary to the provisions of the 9 NYCRR §1727-3.2 and §1727-5.1. The regulations do not permit an owner to realign leases for his or her own convenience and at his or her own whim, whether it be for the purpose of setting a repainting schedule or for any other purpose.

The repainting argument is nothing but a chimerical fantasy; at best, a disingenuous attempt to turn inside out the tenants' complaints that the owner consistently delayed both painting and issuing lease renewals. As the tenants stated in their Objection to Rent Registration, Return: A-1, par. 7(f):

> ...the owner of these housing accommodations failed to promptly issue renewal leases or redated these leases. For example, if the occupant of a unit was entitled to have a paint job and yet that paint job was not completed as of the date of expiration of the existing lease, a new lease would not be dated until the paint job had been completed.

Further evidence of Brightwater's violation of the lease renewal regulations is in DHCR's Brightwater Towers files. In a letter dated August 23, 1978, from Robert N. Hochberg, Esq. to DHCR (R. 400-401), a tenant lodged a complaint that Brightwater failed to either paint or renew the lease for a ten month period.

If, as the owner asserts, it is advantageous for the expiration date of the lease to coincide with the date on which repainting is required, the practice should have been to repaint at the time of every third anniversary of a tenant's occupancy.

By "realigning" the lease terms "for administrative and record keeping convenience", Brightwater was in blatant violation of the Mitchell-Lama regulations. As held by the Court below:

> There is nothing in the regulations which permits or requires the realignment of lease terms to coincide with a painting schedule. Brightwater merely claims that the realignment enabled it to comply with the painting requirements of the HMC and that it resulted in a cost savings to tenants but does not connect the painting requirements of the HMC with the lease renewal provisions in the regulations.

The owner argues that it did nothing improper because the tenants signed the realigned leases. The owner fails, however to offer even a scintilla of evidence in even one case that the owner and tenant mutually agreed to "realign" the lease. All of the evidence before DHCR, and indeed, all of the owners submissions, demonstrate beyond a doubt that the decision to "realign" the leases was unilaterally made by the owner.

The timing of the "realignment" is also significant. The owner admits that its policy of "realignment" commenced in 1983, almost four (4) years before the dissolution of the Limited Profit Housing Company -- or just when it would most benefit an owner contemplating voluntary dissolution to realign the leases to insure that the maximum number of tenants would be subject to the earliest possible guidelines increases once the premises became rent stabilized. Although the owner claims that, "[i]n 1983-84, the owner could not have known if and when dissolution was going to occur", who better than the owner, who had to have been aware that it would be eligible for voluntary dissolution in less than two years, could have made such a prediction? Certainly neither the tenants, who were not informed of the imminent change of the regulated status of the premises at any time prior to the dissolution, nor DHCR, who first learned of the owner's plans to dissolve voluntarily when the Housing Finance Agency, which held the mortgage on the premises, telephoned DHCR to notify it that the mortgage had been prepaid. The owner's brief states that DHCR did not announce until April 1986 that Mitchell-Lama housing projects would become subject to the Rent Stabilization Law upon dissolution. However, DHCR's Advisory Opinion does nothing more than publicize what was already clear in the law.

To sum up, the owner herein, being an owner of State-supervised, Mitchell-Lama housing, was under an obligation to offer leases to tenants. Under the existing regulatory scheme, the standard, DHCR-approved, Mitchell-Lama lease has a set term of years, and, by its terms, is automatically required to be renewed by the owner upon its expiration. Brightwater Towers was not in compliance with this requirement. In the absence of a proper lease, the owner would be in a position to attempt to terminate tenancies prematurely upon transition to rent stabilized status, and to seek increased rents immediately after dissolution, before the date that the properly renewed leases would otherwise expire. Under the circumstances, it

was appropriate for DHCR to consider the equities and direct a restructuring of the renewal dates of leases.

As the Commissioner's restructuring of leases has a rational basis in fact and law and is neither arbitrary or capricious, it is entitled to judicial affirmance. *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).

C. The Court below erred in modifying that part of DHCR's order which determined that lease realignment would be at each tenant's option

DHCR cross-appeals that portion of the Court's decision which reversed that part of DHCR's order which gave the tenants of the subject complex the option of having their leases restructured. The Court improperly substituted its judgment for that of the agency and erroneously ruled that all leases should be restructured without the option.

Under the option which was allowed by DHCR, tenants leases would be allowed to expire either on the anniversary of the date on which the tenant originally commenced his or her occupancy, or on the termination date of the tenant's lease last executed before the occurrence of the Mitchell-Lama buyout in January, 1987. The consequence of not allowing the option and forcing a restructuring for all tenants is that a large number of tenants (one-third, by one of the owner's many varied estimates) would face rent guideline increases, and perhaps evictions, by as much as three years earlier than would be the case under their last executed leases; and could be subjected to two rent guideline increases during a period in which there would otherwise be no rent increases.

The remedy fashioned by DHCR in this case derives from basic principles historically applied under the Rent Stabilization Law. One of those principles is that rents are limited by ceilings rather than having an absolute basis. Another is that an owner is bound by his or her voluntary choices and must accept the consequences of those choices. Thus, for example, if a landlord, in reletting an apartment increases the rent by an amount lower than the maximum allowable increase, all future rents for that apartment are based on the rent actually charged, not the rent the landlord could have charged. The

same principle holds if a landlord has executed a renewal lease at a lower rent than would be permissible under the Rent Guidelines. *See*, *North Carolina Leasing Corp. v. DHCR*, 156 A.D.2d 452, 548 N.Y.S.2d 565 (2nd Dept. 1989); *Mid-State Management Corp. v. New York City Conciliation and Appeals Board*, 114 A.D.2d 1052, 495 N.Y.S.2d 159 (1st Dept. 1985); *Collingwood Enterprises v. Gribetz*, N.Y.L.J. April 24, 1975, p. 17, col. 6 (Sup. Ct., N.Y. Co., Fine, J.); *Matter of Angelique v. CAB*, N.Y.L.J., June 27, 1972, p. 15, col. 3 (Sup. Ct., Queens Co., Giacio, J.). Applying these principles to the case at bar, the landlord should not be allowed to evade the consequences of its voluntary action in delaying lease renewals.

The remedy fashioned in this case also parallels the long established principle, codified in the Rent Stabilization Code, which gives a tenant certain options when an owner fails to offer a timely renewal lease. In such a situation Section 2523.5(c) of the Code gives a tenant the option of choosing that commencement date which is most beneficial to the tenant, and at the lowest applicable guideline increase:

> Where the owner fails to timely offer a renewal lease or rental agreement in accordance with subdivision (a) of this section, the one or two year lease term selected by the tenant shall commence at the tenant's option, either (1) on the date a renewal lease would have commenced had a timely offer been made or (2) on the first rent payment date occurring no less than 120 days after the date that the owner does offer the lease to the tenant. In either event, the effective date of the increased rent under the renewal lease shall commence on the first rent payment date occurring no less than 120 days after such offer is made by the owner, and the guidelines rate applicable shall be no greater than the rate in effect on the commencement date of the lease for which a timely offer should have been made.

Similarly, the tenants in the case at bar were properly given the option of choosing whether or not to restructure their leases.
The remedy fashioned by DHCR in this case also conforms with the general principle that a tenant does not waive rights under the Rent

Stabilization Law and Code. Section 2520.13 of the Rent Stabilization Code provides:

> 2520.13 Waiver of benefit void.
>
> An agreement by the tenant to waive the benefit of any provision of the RSL or this Code is void; provided, however, that based upon a negotiated settlement between the parties and with the approval of the DHCR, or a court of competent jurisdiction where a tenant is represented by counsel, a tenant may withdraw, with prejudice, any complaint pending before the DHCR. Such settlement shall not be binding upon any subsequent tenant, except to the extent that the complaint being settled is subject to the time limitations set forth in the RSL and this Code.

In the case at bar, the tenants who were not adversely affected by the delayed lease renewals did not even complain about the commencement dates of their leases, let alone agree to a waiver of any rights they had under their actual leases.

What the Court below did in the case at bar is take away the rights of tenants to maintain existing leases which were freely executed by the landlord, and give a remedy to the landlord where there is none under the Rent Stabilization Law or Code. There is no provision which allows a landlord to change a lease date so as to obtain premature rent increases. The decision in *Lewin v. New York City Conciliation and Appeals Board*, 88 A.D.2d 516, 450 N.Y.S.2d 1 (1st Dept. 1982), *aff'd*, 57 N.Y.2d 760, 454 N.Y.S.2d 990 (1982), which was cited by the Court below, is inapposite. That case involved a situation in which there was no executed lease, and the tenant had refused to accept an offered lease renewal. In the case at bar, the tenants had executed the leases offered by the landlord. There is no precedent under the Rent Stabilization Law for allowing landlords premature rent increases under any kind of circumstances, let alone by restructuring lease terms.

In giving tenants the option of restructuring their leases, DHCR was insuring that only those tenants who had legitimate complaints about the landlord's delay in offering renewal leases would be affected by the DHCR order. The remedy fashioned by

DHCR was meant to return those tenants who were adversely affected by the landlord's conduct to the *status quo ante*, and to leave unchanged the existing lease arrangements of the other tenants. The tenants' initial objection, which started the underlying administrative proceeding, in complaining about the lease terms, only referred to those tenants who were adversely affected. There was no basis for the Court below to disturb the vested rights of the other tenants in their leases. Contrary to the conclusion reached by the Court below, tenants who choose not to restructure leases unilaterally realigned by the owner will not receive an unwarranted windfall.

It is well settled that 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). The Commissioner's determination that tenants should have the option of whether or not to restructure their leases in accordance with the law, and is neither arbitrary or capricious. Contrary to the erroneous conclusion of the Court below, it is thus entitled to judicial affirmance.

D. DHCR's Exclusion of the Pool Surcharges from the Initial Legal Regulated Rent was Rational and in Compliance with all Applicable Statutes and Regulations

Upon the termination of supervision pursuant to the PHFL, and upon commencement of regulation pursuant to the RSL and RSC, the initial legal regulated rent (also known as the initial stabilized rent or the base rent) is established by operation of law. The initial stabilized rent for each unit subject to regulation constitutes the basis from which all future vacancy and renewal rent increases are calculated.

The relevant criteria for determining the initial regulated rent for premises coming under rent stabilization after removal from

supervision pursuant to the PHFL is set forth in §26-512(b)(3) of the RSL:

> The initial regulated rent for housing accommodations subject to this law on the local effective date of the emergency tenant protection act of nineteen seventy-four or which become subject to this law thereafter, pursuant to such act, shall be:
>
> * * * *
>
> (3) For housing accommodations other than those described in paragraphs one and two of this subdivision, the rent reserved in the last effective lease or other rental agreement.

The Rent Stabilization Code implements this provision in 9 NYCRR §2521.1(l), which reads, in pertinent part, as follows:

> For housing accommodations whose rentals were previously regulated under the PHFL, or any other state or federal law, other than the RSL or the City Rent Law, upon termination of such regulation, the initial legal registered rent shall be the rent charged to and paid by the tenant in occupancy on the date such regulation ends....

The owner concedes that the Code provision is a proper implementation of the statute and that the two should be read in conjunction with each other.

The challenged DHCR order stated, "...the Commissioner finds that the Rent Administrator's determination, that the income related surcharges ordered by the DHCR and collectible on the date PHFL regulation terminated are included in the initial legal regulated rent, was correct."

Pursuant to PHFL §31(a)(1) the rents at a Mitchell-Lama project are determined by the Commissioner. DHCR regulations relevant to surcharges are to be found at 9 NYCRR §1727-3.3(a):

> *Rent* entered on lease form *shall be actual rent, including surcharges if any*, being assessed tenant or

> cooperator at time the lease is signed. *Any later increase or decrease from this actual rent resulting from either a change in tenant's or cooperator's income or a duly authorized general rent increase, shall be handled by a rent change authorization or by a rider attached to the lease*. (Emphasis added)

Commissioner Eimicke's Advisory Opinion No. 1 of 1986 defined the initial legal regulated rent for a building first coming under Rent Stabilization after a Mitchell-Lama buyout to be "the last rent ordered by the supervisory agency (DHCR or HPD), *and legally required to be paid for the remainder of the lease term*." (emphasis added) The rent ordered *and* legally required to be paid is the per room rent plus surcharges.

The owner challenges that portion of the DHCR's order which excluded from the initial rent the $1.76 per room swimming pool charge. With regard to this issue, the Commissioner concluded as follows:

> However, the Commissioner finds that the temporary charge for swimming pool restoration and debt service payment ($12.94), which by DHCR order was collectible only during the 1986 calendar year and, therefore, was not collectible on the date PHFL regulation terminated (January 28, 1987), but which various tenants by court stipulation, agreed to pay on a pro rata basis ($1.79/month/room) during the 1986, 1987, 1988 and 1989 calendar years and, therefore, were paying on the date PHFL regulation terminated, was properly excluded from the initial legal regulated rent by the Rent Administrator...

(Return: B-16, p. 4)

As previously noted, the initial legal regulated rent is the rent reserved in the "last effective lease or other rental agreement" and charged to and paid by the tenant on the last date of supervision under the PHFL. RSL §26-513(b)(3) and 9 NYCRR 2521.1(l). If the owner on such date charges an additional amount for which the "last effective lease or other rental agreement" did not provide, such additional amount is not a part of the initial legal regulated rent.

Thus, the issue in this case, stripped to its essentials, is whether there was provision for the $1.76 swimming pool charge in the last effective lease or other rental agreement, whether it was ordered by DHCR and thus implicitly included in such lease or rental agreement, and whether this charge was part of the last rent charged to and paid by the tenants in occupancy on the date supervision under PHFL terminated.

It is undisputed that the charge was not included in the last effective Mitchell-Lama lease or any other rental agreement, but rather derived from a settlement of litigation between the owner and tenants. Nor was the charge, insofar as the period of payment of the swimming pool surcharge was extended by stipulation between the owner and tenants, ordered by DHCR. Indeed, the last effective rent order, the terms of which are incorporated by reference into the Mitchell-Lama leases under the Mitchell-Lama regulatory scheme, specifically provided that the pool reconstruction charge could only be included in the 1986 rents. DHCR was not a party to the Civil Court stipulation which extended the period of payment beyond 1986. The court had no power to alter DHCR's duly issued rent order, and the stipulation cannot serve to modify the terms of the DHCR's duly issued rent order. It was a private agreement which did not alter the tenants' leases or the DHCR order. The stipulated payment schedule is separate from the last rent charged to the tenants. Thus, the swimming pool charge is wholly independent of the calculation of the initial legal regulated rent.

It should be clear that DHCR does not object to the owner's collecting the $1.76 charge for the stipulated period, but asserts only that the charge was not part of the rent charged on the date of dissolution and hence properly excluded from the initial stabilized rent, from which all future rent increases will be calculated.
The owner's interpretation of the regulatory language is misleading; it conveniently ignores the word "rent". The court stipulated charge is not "rent" reserved in the "last effective lease or other rental agreement" and thus was properly not included in the initial legal regulated rent. This contrasts with the income surcharges which are part of the rent and thus are properly included in the initial legal regulated rent.

The owner's theory, if accepted, would lead to untoward results not intended by the law and regulations. Consider, for example, a Mitchell-Lama tenant who has fallen behind in his or her

rental payments and has stipulated to pay the monthly rent plus $150.00 per month arrears for a specified number of months. This tenant, under the owner's theory, would find that the $150.00 arrears charge becomes a part of the initial legal regulated rent, if PHFL supervision terminates and the premises is subjected to regulation under the Rent Stabilization Law and Code before the rental arrears were paid off. Such a result is patently absurd.

The fact remains, notwithstanding all the owner's bluster in its brief about tenants allegedly receiving a "significant financial windfall", seeking to "evade" the consequences of the court stipulation on the swimming pool charge, and "profiting" from "disobedience", that the owner has collected the full amount of the swimming pool charge from the tenants. DHCR's order did not deprive the owner of the right or ability to collect the monthly $1.76 per room fee. The only effect of the order is to make certain that this fee is not included in the base rent from which all future rent increases are determined. If this Court accepts the owner's position, the tenants who signed the stipulation will find that, in exchange for spreading the swimming pool costs over a greater number of months than originally ordered, they must now pay these costs in perpetuity.

The tenants have not evaded payment of that charge nor received any financial windfall from the stipulation to which the owner was a party. That the charge is not included in the initial regulated rent does not constitute a windfall to the tenants. The owner's hyperbole is nothing more than empty rhetoric.

The owner erroneously argues the Commissioner's order is inconsistent with the "spirit and intent" of DHCR's November 26, 1985 Mitchell-Lama rent order which specified the inclusion of the swimming pool related fees during the year 1986; and with the "so-ordered" stipulation extending the payment period for the swimming pool fee. With regard to the stipulation, DHCR was not even a party. As far as the alleged disregard of the spirit and intent of the 1985 order, there is nothing in the "spirit and intent" of that order to the effect that DHCR should include in the include in the initial rent stabilized rents delayed payments for amounts owed to the owner. As pointed out above, acceptance of the underlying theory for such a view would lead to untoward and unjustified results.

There is nothing in the Myron Holtz affidavit which indicates that DHCR should have included the pool charge in the initial rent

stabilized rent. Sure, Mr. Holtz, in defending DHCR's December 1985 Mitchell-Lama rent order against the tenants' challenge, pointed to the time period in which the swimming pool fee was to remain in effect, the reasons why, and the stipulation entered by the tenants which relied upon the December order. But his affidavit does nothing to demonstrate that the "spirit and intent" of the 1985 order required that the swimming pool fee be included in the initial regulated rent.

What the owner is seeking is a punishment for the tenants having forced him into a stipulation which delayed the full payment of the swimming pool fee. But there is nothing in the law which mandates that the initial legal regulated rent be based upon such a punishment.

The owner makes a spurious argument that the "so-ordered" stipulation signed by Judge Andreacchi and entered into by the tenants and owner constitutes a superseding order as contemplated by DHCR's December 1985 order. The order states that:

> Effective January 1, 1987, *unless this order is superceded by a subsequent order*, the rents shall be reduced by $12.94 per rental room per month reflecting the completed payment of debt service arrears and swimming pool costs. (emphasis added)

It is plain from the context of this provision of the order that "a subsequent order" refers to a subsequent rent order issued by DHCR, not some "so-ordered" stipulation to which DHCR is not even a party.

The owner points out that the language in the version of RSC §2521.1(l) as promulgated differs from that in an earlier, draft version and erroneously argues that the Commissioner "impermissibly used" the "standard" of that earlier draft rather than the promulgated version. The earlier version stated that "...the initial legal registered rent shall be the last monthly rent ordered by HPD or the DHCR". The final version stated that "...the initial legal registered rent shall be rent charged to and paid by the tenant in occupancy on the date such regulation ends". The owner's argument on appeal stemming from the change in language differs from that made in the Court below. In the Court below, the owner argued that the change in language signified DHCR's recognition that the parties "may stipulate that an increase authorized by DHCR could be reduced and paid over a longer period of time than was authorized in the order granting the

rent increases." This argument does not even remotely reflect the intent of the drafters of the regulation. In fact, the reason for the change was to make clear that the initial legal regulated rent would include the income-driven surcharges allowed in Mitchell-Lama housing along with the per room rent.

As for the argument made on appeal, which relies upon the term "ordered", it is simply empty semantics. Under the terms of the promulgated regulation, the "rent charged" could only be the rent "ordered" by DHCR plus permissible surcharges.

Finally, in the Court below the owner attempted to confuse the issue by drawing another meaningless semantic distinction - this time between the term "paid" and the term "collectible" - and arguing that the Commissioner's order was improper because it was based on the term "collectible". This is a distinction without a difference. Indeed, the owner itself, in a number of its submissions during the administrative proceeding, relied on the term "collected". For example, in the owner's PAR, Return: B-3, p. 9, there is the following assertion: "The only relevant issue is what constituted the rent charged and *collected* on the RSL base date..." *See also*, Owner's Answer to Tenant's PAR, Return: B-13, p. 5; Attachment to Letter from Rosenberg & Estis, dated March 7, 1990, Return: A-24, p. 10. The owner's semantic arguments are totally irrelevant to the essential issue.

In conclusion, the Commissioner's exclusion of the $1.76 swimming pool charge from the initial legal regulated rent was rational and proper, and must be upheld.

CONCLUSION

For the reasons stated above, that part of the judgment of the Court below which modified the Commissioner's order should be reversed, the Commissioners order should be affirmed in its entirety, and DHCR should be awarded costs.

Dated: Bronx, New York
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Respectfully submitted,

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