To be argued by:
RICHARD HARTZMAN

NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

MARIN MANAGEMENT,

Petitioner-Appellant,

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

against

DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent,

and

JEAN SPENCE,

Respondent.

Brief for Respondent-Respondent Division of Housing and Community Renewal

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BRIEF OF RESPONDENT-RESPONDENT
DIVISION OF HOUSING AND COMMUNITY RENEWAL

PRELIMINARY STATEMENT

This is an appeal by the landlord of a rent stabilized apartment building of a decision and order of the Supreme Court, New York County (Schlesinger, J.) entered in the Office of the Clerk

of New York County on April 26, 1991. The Court affirmed a rent overcharge determination of the New York State Division of Housing and Community Renewal (hereinafter "DHCR") and dismissed the landlord's Article 78 petition.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Was it proper for DHCR to apply its alternative default procedure for determining the lawful rent, pursuant to Lavanant v. DHCR, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1st Dept. 1989), because of appellant's failure to produce the complete rental history?

The court below answered in the affirmative.

2. Is there a rational basis supporting DHCR's determination establishing the lawful stabilized rent for the subject apartment and imposing treble damages?

The court below did not answer this question as it was not raised before that court.

3. Was it proper for the Rent Administrator to reopen the proceeding on the basis of an irregularity in a vital matter where there was a failure to substantiate the base rent date for the subject apartment?

The court below answered in the affirmative.

STATEMENT OF THE NATURE OF THE CASE

This proceeding involves a rent overcharge proceeding in which DHCR, upon reopening the proceeding, established the lawful rent stabilized rent and directed the refund of rent overcharges, including treble damages. Appellant, although not challenging the determination of the lawful rent, the calculation of the overcharge or the imposition of treble damages in the court below, does so on this appeal. In addition, it claims (1) that it was improper for DHCR to reopen the initial

determination which found no overcharge, and (2) that DHCR was precluded by the holding of the Appellate Division, Second Department 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), from the application of its alternative default procedure used where an owner fails to provide the complete rent history for the subject apartment.

As this brief will show, the appellant is improperly raising a number of issues for the first time on this appeal, some of which were not even raised during the administrative proceeding. This brief will also make manifest that DHCR's determination, which applied the default procedure calculating the lawful rent and amount of overcharges and treble damages, was proper and lawful. Moreover it will be shown that DHCR properly acted within its power and authority in reopening the proceeding because of an irregularity in a vital matter.

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 applicable law. The determination in the instant case fully meets that test, and the petition, being devoid of merit, should be dismissed with costs.

COUNTER-STATEMENT OF THE FACTS

The tenant of the subject premises, 423 W. 45th Street, Apartment 4RE, New York, New York, filed a rent overcharge complaint on March 29, 1984. (Return: A-1) On April 2, 1984, a notice was sent to the landlord advising it of the complaint and informing it that "you will be required to produce rent records for the subject apartment dating back at least to June 30, 1974 or the date on which the apartment first became subject to rent stabilization, if later." (Return: A-2)

By notice dated October 17, 1984, the landlord was given an opportunity to answer the overcharge complaint. (Return: A-3) The answer form contained the following notice:

> PLEASE TAKE NOTICE that DHCR demands complete copies of all leases (including Riders) for the subject apartment covering the entire period from the Base Rent Date to the date on which the tenant who filed the complaint took occupancy. In the event that any lease entered into during this time period is not available, you may submit rent ledgers or other satisfactory proof of rent collected for the subject apartment.

(Return: A-4).

The landlord answered the overcharge complaint on November 12, 1984, submitting copies of leases for the complaining tenant back to April 15, 1980, and claiming that the base rent date for the apartment was 1980 in that the apartment was rent controlled prior to April 15, 1980. The landlord stated that it took over management of the building on September 16, 1981, and alleged that the previous owners said that the apartment had been rent controlled prior to the current tenant taking occupancy. (Return: A-4)

On August 26, 1986, DHCR requested that the landlord submit leases or rent ledgers from June 30, 1974 to April 14, 1980, and a copy of applicable statutory decontrol or Maximum Base Rent orders. (Return: A-6) The landlord responded as follows:

> Please be advised that we do not have any Rent ledgers etc... or any information prior to April 14, 1980.
>
> We did not own the building prior to September 16, 1981 (see our previous answer filed November 2, 1984) and we have only the records from April 14, 1980 to the present for this building which we submitted.

(Return: A-7) The landlord did not submit any documentation which could establish the alleged date of decontrol.

On November 13, 1986, the District Rent Administrator issued an order finding no rent overcharge based on the landlord's submission of leases from April 15, 1980. (Return: A-8) This finding was improperly reached despite the absence of proof of the date of decontrol being April, 1980, as claimed by the landlord.

On July 5, 1988, the tenant requested that the proceeding be reopened, stating that she did not receive the order of the District Rent Administrator until June, 1988, and that the proper information regarding the rental history was never submitted. (Return: B-1) In response, the Rent Administrator, on July 18, 1988, issued a Notice of Commencement of Proceeding to Reconsider Previous Order stating that:

> The Rent Administrator has reopened this proceding [sic] based upon fraud, illegality, or irregularity in a vital matter...
>
> A review of the record revealed the owner failed to substantiate his claim the base date for the subject apartment was April 15, 1980.
>
> Based on the aforementioned, the Division proposes to afford the owner a final opportunity to submit documentation needed to substantiate the Base Date Rent.

(Return: B-2)

A notice of the proceeding and a copy of the tenant's complaint was also sent to the prior owner of the premises, at the address listed in the tenant's first lease. However, the notice was returned to DHCR by the Postal Service. (Return: B-4 and B-7)

Despite the landlord's earlier claim to have not information prior to April 15, 1980, it submitted, in response to a new request from DHCR, information concerning comparable rents from other apartments in the subject building, including lease renewal forms dating from 1978 and 1979. (Return: B-9)

In a subsequent submission by the landlord, it again claimed without substantiation that "This was the first lease [the current tenant's lease] after prior rent control tenant", and that the present owners "have no prior rent ledgers since they purchased the building in 9/81". (Return: B-16)

During the proceeding, the tenant issued a subpoena against the former landlord. (Return: B-18, B-19) On February 16, 1989, the former landlord appeared in response to the subpoena and affirmed the following:

> As subpoenaed (Docket # CG410063-RP) I do not have any records for the above steet [sic] and apt. [423 W. 45th St, Apt. 4RE] It hase [sic] been over seven years since that building has been sold to Marin Mgmnt.

(Return: B-20)

On April 27, 1989, the landlord's attorneys sent a letter to DHCR requesting a copy of the order granting reconsideration, a request that DHCR search its rent control records to determine the date of decontrol, and a request that the former owner be served with a copy of the tenant's complaint and requests for documentation. (Return: B-29) On May 23, 1989, DHCR responded to that letter by sending the landlord's attorneys a copy of the order granting reconsideration. (Return: B-35)

DHCR conducted a search of its rent control records. (Return: B-43) Those records reveal that the former landlord ceased to list the subject apartment 4RE as rent controlled in the mid-1970's. The 1979 Master Building Rent Schedule dated January 16, 1979, which was filed by the former landlord, lists Apartment 4RE as a rent stabilized apartment. A copy of the relevant rent records from item B-43 of the Return are annexed to this brief as an exhibit.

On June 22, 1989 the landlord's attorneys again wrote to DHCR claiming that the base rent date cannot go back more than four years from the latest registration on the basis of the Second

Department decision in J.R.D. Management Corp. v. Eimicke, N.Y.L.J., 3/24/89, p. 25, col. 1. (Return: B-41)

On July 28, 1989, the Rent Administrator issued an order revoking the prior order of November 13, 1986, finding that the apartment had been decontrolled prior to April, 1980 based on a search of agency records, establishing the lawful stabilized rent at $265.19 per month as of May 1, 1988, and directing the refund of $15,616.77 in overcharges, excess security deposit, and treble damages. The Rent Administrator found in pertinent part as follows:

> By notice dated April 17, 1989, the Division requested the owner to submit leases from the date of decontrol, or to submit documentation substantiating that the complaining tenant was the first tenant to occupy the subject apartment after rent control.
>
> To date, the owner has failed to comply with the Division requests.
>
> A search of the Agency's records indicate that the last rent controlled tenant of the subject apartment (4RE) was "Fonesca" and that the prior owner ceased to list apartment 4RE as a rent controlled unit on February 5, 1975, when filing the 1974 master building schedule. The 72/73 MCR for apartment 4RE was $55.33 and the MBR was $94.93. No registration cards or R42 were available.
>
> * * * *
>
> The record in this case establish [sic] that the owners have made various inconsistent submissions to the Agency and have failed upon request to substantiate the veracity of their submissions.
>
> A review of the records in the instant case indicate that the complaining tenant is not the first rent stabilized tenant to occupy the subject apartment after vacancy decon-trol.
>
> The owner has failed to submit the rent history of the subject apartment from the date of decontrol; including the initial rent charged the first stabilized tenant which is necessary in order to process a Fair Market Rent application.

> Therefore, the complaining tenant's base rent will be established pursuant to procedures promulgated for Section 42A of the Code.

(Return: B-44)

The landlord did not object to the reopening of the proceeding at any time during the pendency of the proceeding before the Rent administrator.

On August 29, 1989, the landlord filed a Petition for Administrative Review ("PAR") (1) claiming, in pertinent part, that the Rent Administrator improperly processed the complaint in that the prior owner was not served with notices, that the prior owner could have proven the date of decontrol if it had been given notice, that the prior owner's rent records were not available to the current owner who had allegedly had no legal means of obtaining such records; (2) again asserting that the current tenant was the first rent stabilized tenant; and (3) arguing that the proceeding should be determined in light of J.R.D. Management Corp. v. Eimicke, supra. (Return: C-1)

After the tenant answered the PAR the Deputy Commissioner on August 9, 1990, issued an order and opinion denying the landlord's PAR. The Commissioner found in pertinent part:

> Since the decision in JRD, the Appellate Division, First Department, in the case of Lavanant v. DHCR, 148 A.D.2d 185, 544 N.Y.S.2d 331 (App. Div. 1st Dep't 1989), has issued a decision in direct conflict with the holding in JRD. The Lavanant court expressly rejected the JRD ruling, finding that the DHCR may properly require an owner to submit complete rent records, rather than records for just four years, and that such requirement is both rational and supported by the law and legislative history of the Omnibus Housing act.
>
> Since in the instant case the subject dwelling unit is located in the First Department, the Lavanant decision governs and complete rent records from the date of decontrol are required.
>
> DHCR rent control records consisting of master building rent schedules filed by the prior owner indicate that the last rent controlled tenant of the subject apartment was "Fonseca" and that the prior

> owner ceased listing the subject apartment as rent controlled with the filing of the 1976 Master building rent schedule in January 1976. The 1979 master building rent schedule contains a notation by the prior owner indicating that the subject apartment was rent stabilized. The Commissioner finds these documents to be of greater probative value in determining the regulated status of the subject apartment than the tenant's statements as to the prior tenant's rent or a comparison of the Maximum Base Rent and the prior rent, as urged by the owner. The Commissioner therefore finds that the Administrator properly determined that the complainant tenant was not the first rent stabilized tenant to occupy the subject apartment after decontrol and properly determined the lawful stabilized rent based on the owner's failure to submit complete rent records from the date of decontrol.
>
> Regarding the owner's assertion that the Administrator improperly failed to serve the prior owner with notices in this case, the prior was not named by the tenant in her complaint and the Administrator was not obligated to serve the prior owner with notices. Moreover, it was the owner's obligation pursuant to Section 42A of the former Rent Stabilization Code to obtain rent records from the prior owner and to produce such records indicating the rent history, including the date of decontrol, of the subject apartment. The owner failed to produce such records. Further, a representative of the prior owner did appear tat the DHCR office and indicated that he had no rent records for the subject apartment. Therefore, the Commissioner finds that there has been no prejudice to the owner in the processing of this case.

(Return: C-5)

The appellants commenced an Article 78 proceeding challenging the Commissioner's order. In affirming the Commissioner's order and dismissing the Article 78 proceeding, the Supreme Court (Schlesinger, J.), concluded:

> In summary, I find that the reopening of the proceeding and the final order confirmed by the Deputy Commissioner was in all respects proper and rational. Based on this, the petition is dismissed.

(R. 10)

ARGUMENT

POINT I

A RATIONAL BASIS SUPPORTS THE DHCR'S FINAL ORDER WHICH ESTABLISHED THE LAWFUL STABILIZATION RENT FOR THE SUBJECT APARTMENT AND DETERMINED THE AMOUNT OF RENT OVERCHARGES, INCLUDING TREBLE DAMAGES.

The rent overcharge 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. Section 42 A(1) of the former Code made it clear that owners could not collect any rent increases unless they maintained such complete rental records.

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), aff'g 108

A.D.2d 636, 486 N.Y.S.2d 694 (1st Dept. 1985), aff'g N.Y.L.J., May 9, 1984, p.11, col. 4 (Sup. Ct., N.Y. Co., Greenfield, J.).

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. The Appellate Division, First Department, in affirming 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, as is the appellant in the case at bar.

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, §2526.1(a)(4), 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.

It is clear that the alternative procedure used by DHCR in this case is 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 the base date for the subject apartment, despite the opportunities given by DHCR. Thus, DHCR properly applied the alternative procedure in establishing the lawful rent and determining the amount of the rent overcharge.

The appellant 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.

However, 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 the contrary Second Department ruling in JRD Management Corp.

This Court has repeatedly reaffirmed its ruling in Lavanant, most recently in Drewbar Realty Co. v. New York Division of Housing and Community Renewal, N.Y.L.J., March 26, 1992, p. 28, col. 1:

> We agree with the IAS court that petitioner's failure to provide leases for 1974 to 1977 as requested by respondent left respondent without a complete rent history, and gave it reason to utilize its formula in calculating the rent for the subject apartment. In Matter of Lavanant v. State Division of Housing and Community Renewal (148 AD2d 185, 192), this court specifically upheld respondent's policy of requiring apartment owners to furnish a complete rent history in all rent overcharge proceedings commenced prior to April 1, 1984.

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

Appellant argues that DHCR erred in its overcharge determination in that the record does not support the DHCR finding that the tenant was not the first tenant to occupy the apartment after vacancy decontrol. However, this argument is not properly before this Court as it was not raised before the court below. It is elementary that an appellate court may not consider, nor may a party argue on appeal theories not presented to a court of original jurisdiction. See, Recover Consultants, Inc. v. Marilan Shih-Hsieh, 141 A.D.2d 272, 534 N.Y.S.2d 374 (1st Dept. 1988).

But even if the argument were considered, it is plainly contradicted by the administrative record and has no merit. First, appellant alleges in its brief that the complaining tenant occupied the subject apartment in 1979. However, the tenant states in her rent overcharge complaint that she moved into the apartment on April 15, 1980, a fact confirmed by appellant's own agent. (R. 182, 198)

Furthermore, during the administrative proceeding DHCR conducted a search of its rent control records DHCR at the request of appellant's attorney. (Return: B-29) Those records reveal that the former landlord ceased to list the subject apartment 4RE as rent controlled in the mid-1970's. (Return: B-43) The 1979 Master Building Rent Schedule dated January 16, 1979, which was filed by the former landlord, lists Apartment 4RE as a rent stabilized apartment. (R. 455-460)

It is on the basis of this information that the Commissioner found the appellant's claim to have no merit. As the Commissioner found (R-47-48):

> DHCR rent control records consisting of master building rent schedules filed by the prior owner indicate that the last rent controlled tenant of the subject apartment was "Fonseca" and that the prior owner ceased listing the subject apartment as rent controlled with the filing of the 1976 Master building rent schedule in January 1976. The 1979 master building rent schedule contains a notation by the prior owner indicating that the subject apartment was rent stabilized. The Commissioner finds these documents to be of greater probative value in determining the regulated status of the subject apartment than the tenant's statements as to the prior tenant's rent or a comparison of the Maximum Base Rent and the prior rent, as urged by the owner. The Commissioner therefore finds that the Administrator properly determined that the complainant tenant was not the first rent stabilized tenant to occupy the subject apartment after decontrol and properly determined the lawful stabilized rent based on the owner's failure to submit complete rent records from the date of decontrol.

Appellant's reference to the so-called comparable rents submitted during the administrative proceeding is irrelevant. Comparable rents play no role in determining when an apartment has been decontrolled, that being a question of when the apartment was vacated by the last rent controlled tenant.

The record clearly supports the determination that the complaining tenant was not the first rent stabilized tenant, and that the appellant failed to supply the complete rental history for the apartment back to the date of vacancy decontrol. Indeed, the appellant has continuously misrepresented the rental history of the apartment throughout this proceeding - from the time it first answered the tenants rent overcharge complaint up to the filing of its brief in this appeal.

The appellant argues that treble damages should not have been assessed. This claim was not only not raised in the court below, as with the argument regarding the date of decontrol; it was not even raised during the administrative review proceeding. The instant case is on all fours with this

Court's recent decision in 985 Fifth Avenue, Inc. v. State Division of Housing and Community Renewal, 171 A.D.2d 572, 567 N.Y.S.2d 657, 659 (1991):

> As for the issue of treble damages, it should be pointed out that the landlord did not challenge the assessment of such damages at the PAR, and judicial review is limited to matters contained in the administrative record (see Brusco v. New York Division of Housing and Community Renewal, __A.D.2d__ 565 N.Y.S.2d 86; In re Rozmae Realty v. State Division of Housing and Community Renewal, 160 A.D.2d 343, lv.to app. den. 76 N.Y.2d 712, 563 N.Y.S.2d 517).

In Rozmae Realty v. State Division of Housing and Community Renewal, 160 A.D.2d 343, 553 N.Y.S.2d 738 (1990), lv. to appeal denied, 76 N.Y.2d 712, this Court held:

> 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 AD2d 603)
>
> (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.); Oriental Boulevard v. Conciliation and Appeals Board, 92 A.D.2d 470, 459 N.Y.S.2d 50 (1st Dept. 1983).

If anything, appellant's failure to preserve the issue regarding treble damages is even more egregious in the case at bar than it was in the cited cases since the issue was not even raised in the court of original jurisdiction.

But even had it been properly raised, it has no merit. This Court has held that treble damages may be imposed when DHCR applies its alternative Section 42A default procedure to determine the

lawful stabilized rent where an owner fails to provide the complete rent history. Lavanant v. State Division of Housing and Community Renewal, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1st Dept. 1989). This Court has also affirmed treble damage awards in situations where the alternative default procedure has been applied, where there is a new landlord, and where the overcharge was initially imposed by the former landlord. Kama Associates v. DHCR, Sup. Ct., N.Y. Co., Index No. 1281/87 (Evans, J.), affirmed no opinion, 143 A.D.2d 1975, 533 N.Y.S.2d 356 (1st Dept. 1988); Flagg Associates v. DHCR, Sup. Ct., N.Y. Co., Index No. 22162/86 (Sherman, J.), affirmed no opinion, 143 A.D.2d 1070, 533 N.Y.S.2d 355 (1st Dept. 1988).

In a community where a change of ownership occurs frequently, a rule such as that suggested by the appellant would have far-reaching and disastrous consequences. The statute itself does not create such an exception. Rather, it clearly places the burden on the landlord to establish that the overcharge was not willful. Under Section 42A of the former Rent Stabilization Code, the landlord was required to secure and maintain records of rent increases imposed from the time the apartment was subject to stabilization.

Here, the appellant failed to secure the required documentation from the prior owner. Moreover, the appellant has, throughout this proceeding, adamantly maintained that the complaining tenant was the first rent stabilized despite clear and compelling evidence to the contrary. This stance does not prove non-willfulness by a preponderance of the evidence, as the Rent Stabilization Law requires if treble damages is not to be imposed. See, §26-516.

Additionally, it is well settled that a new owner stands in the shoes of a prior owner. See, e.g., Coulston v. Singer, 86 Misc. 2d 1001, 383 N.Y.S.2d 74 (A.T., 1st Dept. 1976). His remedy, as in any arms length real estate transaction, is to secure the appropriate records and representations

from the prior owner, during the sale and seek redress against the prior owner if the representations are improper. Clearly the new owner is in a better position to protect himself than the tenants who have no control over the terms and conditions of the sale of their home or notice of that sale.

Under the rent laws, courts have found the current owner liable for overcharges collected by the prior owner based on the principle that the present owner "stands in the shoes" of the prior owner. For example, in Coulston v. Singer, supra, the court said:

> The court below in a well reasoned opinion properly concluded that the tenant-respondent was entitled to a credit of the total amount of past overpayments of rent, notwithstanding that only a portion of the excess rental payments had been made to petitioner, the current landlord, with the greater amount having been received by his predecessor in interest.

Appellant inappositely relies upon this Court's decision in Round Hill Management Company v. Higgins, N.Y.L.J., November 12, 1991, p. 28, col. 6. As the Appellate Term, First Department has indicated, the Round Hill decision is limited to the facts of that case. See, Franklin Associates v. Klusman, N.Y.L.J., January 7, 1992, p. 21, cols. 4-5. Round Hill does not overrule the general principle upheld by this Court that treble damages is proper where the alternative default procedure has been applied, where there is a new landlord, and where the overcharge was initially imposed by the former landlord.

In Round Hill the Court found that the new owner had every reason to believe that the rent being charged the tenant was the lawful rent. Thus the Court concluded that the overcharge was not a willful act of the new owner. As explained earlier in this brief, that is not so in the case at bar. The appellant herein has not proven non-willfulness.

As for the various PAR orders cited by the appellant in which treble damages were not imposed, those orders all involved circumstances essentially different than those in the case at bar. They are inapplicable herein.

Under well settled principles of law the Court's function herein is completely accomplished upon finding that a rational basis supports the agency's determination. Thus, the Court cannot substitute its judgment for that of the Commissioner. Matter of Fresh Meadows Associates v. New York City Conciliation and Appeals Board, 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 rent overcharge determination, including the application of the default procedure, the conclusion that the tenant is not the first rent stabilized tenant, and the imposition of treble damages, has a rational basis and is neither arbitrary or capricious. It is thus entitled to judicial affirmance.

POINT II

THE RENT ADMINISTRATOR DID NOT EXCEED HIS AUTHORITY IN REOPENING THE PROCEEDING.

With regard to the reopening issue the landlord failed to object to the reopening at any time before the Rent Administrator and thus failed to preserve the issue for administrative review. An administrative review proceeding is not a de novo proceeding. Absent good cause, an appeal to the Commissioner from an initial agency order issued by a Rent Administrator is limited to the issues and evidence which were before the Administrator. 235 East 22nd Street Assoc. v. State of New York Division of Housing and Community Renewal, Sup. Ct., N.Y. Co. Clerk's Index No. 2222/85

(Edwards, J.), noted N.Y.L.J., October 18, 1985, p. 11, col. 5; Wyndham Realty Co. v. DHCR, Sup. Ct., Bronx Co. Clerk's Index No. 7277/87, May 9, 1987 (Tompkins, J.).

Moreover, appellant's claim that the Rent Administrator erred in reopening the proceeding without giving the appellant prior notice was not raised in either its PAR or its Article 78 petition. Thus, the issue has not been preserved for judicial or appellate review. But even if it had been preserved, the Rent Administrator nevertheless acted properly in reopening the proceeding.

The courts have long recognized that administrative agencies have authority to reopen proceedings where the determination is the result of illegality, irregularity in a vital matter, or fraud. See, Cupo v. McGoldrick, 278 A.D. 108, 103 N.Y.S.2d 633 (1st Dept. 1951) (State Rent Administrator); Jones v. Schenectady Boys Club, Inc., 276 App. Div. 879, 93 N.Y.S.2d 764 (3rd Dept. 1949) (Workers Compensation Board). Indeed the Court in Jones speaks of the agency's "continuing jurisdiction" to rescind and modify its determinations.

The Rent Stabilization Code, Section 2527.8 provides for the reopening of orders by the Rent Administrator:

> Section 2527.8. Modification or Revocation of Orders
>
> The DHCR, on application of either party, or on its own initiative, and upon notice to all parties affected, may issue a superseding order modifying or revoking any order issued by it under this or any previous Code where the DHCR finds that such order was the result of illegality, irregularity in vital matters or fraud.

In promulgating this provision, DHCR did not limit its authority to reopen, modify or rescind orders as provided for in the State Enabling Act. The language of the regulation shows that it does not defeat the Division's "continuing jurisdiction", Jones v. Schenectady Boys Club, Inc., supra. That this should be so is a matter of common sense. To take the most obvious example, fraud may not

be discovered until long after an administrative determination. Should reopening upon discovery of fraud be precluded simply because a request for consideration was not made within the time to file a PAR? Clearly not.

Moreover, contrary to appellant's argument DHCR is not required to give prior notice that it is intending to reopen a proceeding. What is required is notice of the reopening with the parties having the opportunity to respond to that reopening. The Rent Stabilization Code, §2526.9, permits reopening "on application of either party, or on its own initiative, and upon notice to all parties affected". It is undisputed that the appellant was given notice of the reopening. The notice of reopening mailed to the appellant states that "You are hereby afforded an opportunity to file and answer in response to this Notice" (Return: B-2), and appellant indeed was actively involved in the reopened proceeding. (Return: B-9 to B-40)

Furthermore, the application by the tenant requesting reopening does not constitute an improper ex parte communication. The Rent Stabilization Code permits reopening upon "application of either party" and petitioner was promptly served with notice of the reopening.

The case cited by appellant, Alcoma Corp. v. NYS Division of Housing and Community Renewal, 170 A.D.2d 324, 566 N.Y.S.2d 254 (1st Dept. 1991), aff'd, __N.Y.2d__, N.Y.L.J., January 13, 1992, p. 21, cols. 4-5, contrary to appellant's assertions, squarely supports DHCR's understanding of the notice requirement upon reopening. Cohen v. Mirabal, 138 A.D.2d 665, 527 N.Y.S.2d 34 (2nd Dept. 1988), also cited by appellant, has absolutely no bearing on the case at bar.

The courts in the past have upheld the rent agency's reopening of a proceeding even after a lengthy period of time, where it was otherwise appropriate. In Luchetti v. Office of Rent Control, 49 A.D.2d 532, 370 N.Y.S.2d 565 (1st Dept. 1975), the First Department found that the rent agency

had authority to reopen a matter two years after an order had previously been issued in the proceeding. In Fiesta Realty Corp v. McGoldrick, 284 App. Div. 551, 131 N.Y.S.2d 40 (1st Dept. 1954), rev'd on other grounds, 308 N.Y. 869, 126 N.E.2d 308 (1955), the First Department similarly concluded that the rent agency had authority to reopen a matter a second time almost two years after it had been first decided. The matter had previously been reopened a year after the first decision.

It is well settled that the agency's interpretation of the regulations which it promulgates and administers, if reasonable, is entitled to judicial deference. 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).

In Cale Development Inc. v. Conciliation and Appeals Board, 94 A.D.2d 229, 463 N.Y.S.2d 814, aff'd, 61 N.Y.2d 976, 475 N.Y.S.2d 278 the Appellate Division, First Department in upholding the Board's application of Section 54 of the Code stated in pertinent part:

> As with all administrative agencies the Board's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight. (Matter of Herzog v. Joy, 74 A.D.2d 372, 375, see: Hazel Armstrong v. Temporary State Housing Rent Comm., 11 A.D.2d 392, also Matter of Pell v. Board of Education, 31 N.Y.2d 222).

Similarly, in Minton v. Domb, 63 A.D.2d 36, 406 N.Y.S.2d 772 (1st Dept. 1978), the Appellate Division upheld the Board's interpretation of the statute stating in its decision:

> Due to the unique nature and the function of the Conciliation and Appeals Board, it might be advisable to give more than ordinary weight to their opinion in matters of this nature. "Ordinarily, courts will defer to construction given statutes and regulations by the agencies responsible for their administration if said construction is

not irrational or unreasonable', Albano v. Kirby, 36 N.Y.2d 526."
(Emphasis Supplied)

Where the agency's interpretation is founded upon a rational basis, that interpretation should be affirmed by the Court even if the Court would have come to a different conclusion. In the case at bar, DHCR's interpretation of its own regulation is reasonable and entitled to be affirmed.

In the case at bar the proceeding was reopened twenty months after issuance of the Administrator's order. The tenant requested that the proceeding be reopened, stating that she did not receive the order of the District Rent Administrator until June, 1988 (in which case she could not have previously filed a PAR), and that the proper information regarding the rental history was never submitted. (Return: B-1)

The Rent Administrator reopened the proceeding "based upon fraud, illegality, or irregularity in a vital matter" because of the failure to substantiate the base rent date for the subject apartment. (Return: B-2) Without a proven base date rent, the rent determined in the order had absolutely no basis in law or fact. The result was a finding of no overcharge whatsoever when in fact there was a substantial overcharge. The order which was reopened was clearly processed in an erroneous manner. It is standard practice to require proof from the landlord of the alleged date of decontrol, and in the absence of such proof, to determine the lawful stabilized rent using the default procedure. Nevertheless, no such proof was submitted by the landlord. Rather, the landlord misrepresented the facts in alleging that the subject apartment was decontrolled on April 15, 1980, and in falsely claiming that he had no rent records for the subject building prior to April 15, 1980. The Administrator, upon recognizing the improper processing and the absence of proof, properly reopened the matter.

As the record was incomplete, there was an insufficient basis for the Division's determination. And since it goes to an obviously "vital matter" - the base rent date upon which the lawful stabilized rent and the amount of any rent overcharge is calculated - there was clearly an irregularity in a vital matter warranting the reopening of the administrative proceeding. This unusual circumstance, in which there was an extreme departure from standard requirements, is not a question of a "mere change of mind" by the Division, but a complete failure in proof. As the Court of Appeals stated in People ex rel. Finnegan v. McBride, 226 N.Y. 252, 259 (1919):

> A mere change of mind is insufficient. Further action must, where power is not entirely spent, be for cause, with good reasons and proper motives for the correction of improper action.

In the case at bar, the reopening was "for good cause, with good reasons and proper motives for the correction of improper action." The overcharge proceeding was improperly processed initially but correctly determined upon reopening.

The decision in Abrahams v. Board of Education, 26 Misc.2d 624 (Sup. Ct., Kings Co., 1960), shows the correctness of DHCR's determination in the instant case. In Abrahams, the court found that the Board of Education could rescind an appointment of a person who was lower on an eligibility list than someone else added to the list. The court held that "[t]here was here no mere error of judgment but, in my view, an error of fact which the Board properly proceeded to correct". 209 N.Y.S.2d at 663. In the case at bar, the error went beyond an error of fact. The record was not developed to point that facts could even be properly determined, let alone their determination being in error. If the base rent date was unknown, the lawful stabilized rent could not be determined. There was clearly an irregularity in a vital matter which warranted the reopening.

As the court below stated (R. 12-13):

> Here, DHCR's evaluation that there was an "irregularity in a vital matter" requiring it to reopen the proceeding was rational and justified under the circumstances.
>
> It was clear that from the commencement of the original action, DHCR required the landlord to prove the base rent date via the production of all leases and records covering the entire period from the base rent date. The landlord never proved the date of decontrol and never produced the demanded documentation.
>
> Therefore, the original finding that no overcharge existed, lacked a factual or rational basis. When this omission was brought to respondent's attention by the tenant, the agency was clearly within its right in concluding that the original determination was "irregular in a vital matter" and that the proceeding should be reopened and reevaluated.

Appellant's argument that the Rent Administrator could not reopen the proceeding because the tenant had not timely filed a Petition for Administrative Review ("PAR"), even if it had any merit, is misleading and irrelevant to the case at bar. As appellant correctly notes, the tenant claimed in her request of July 5, 1988, that she had never received a copy of the Rent Administrator's November, 1986 order. (Return: B-1) Thirteen days later the Rent Administrator issued the Notice reopening the proceeding based, not on the tenant's claim that she had not received the Administrator's 1986 order, but on "fraud, illegality, or irregularity in a vital matter" because of the failure to substantiate the base rent date for the subject apartment. No finding was ever made as to whether or not the tenant had received the Administrator's 1986 order, and tenant had no reason to file a PAR after the reopening. Had the proceeding not been reopened, the tenant could have filed a PAR, in which event a determination would have been made as to timeliness of the PAR.

Appellant, while correctly noting that the thirty-five (35) day time limit in which to file a PAR is strictly enforced, incorrectly concludes that a PAR must be rejected even where there is proof

that an Administrator's order has not been received, or where DHCR cannot prove mailing of an order. Due process requires that a late filed PAR be accepted where there is proof that a party did not have notice of the Administrator's order. See, e.g., Guirdanella v. DHCR, 165 A.D.2d 667, 564 N.Y.S.2d 13 (1st Dept. 1990) ("fundamental fairness requires that the aggrieved party be notified of the administrative determination before the statutory period in which to seek review commences".) DHCR will accept a late PAR where there is proof that the PAR was incorrectly mailed and/or not received by a party. For example in Valrose Realty Company, Admin. Dckt. No. AK-610173-RO, June 18, 1991 (Art. 78 Pet. pending), a PAR was accepted which was filed five months after issuance of the Administrator's order.

Returning to the instant case, were the appellant's position be accepted with the reopening found to be improper and the tenant barred from filing a PAR, she would be deprived of her fundamental right to establish that a late filed PAR should be accepted in this case, and hence be deprived of her right to administrative review of the initial Administrator's order which found no overcharge and which was clearly improper.

Appellant's argument, based largely on irrelevant rhetorical questions, rests upon a misunderstanding of the basis for the reopening and ignores the basic procedural rights of the tenant.

The cases and PAR orders cited by the appellant with regard to filing of PARs either stand for propositions opposite to those claimed by appellant or have no bearing on the outcome of this case. For example, in Rockaway One Co., Admin. Rev. Dckt. No. BJ 130395-RO, and in Ben Josh Management, Admin. Rev. Dckt. No. BL 410213-RO, late filed PARs were accepted by the Commissioner. In Ancott Associates, Admin. Rev. Dckt. No. ARL 13376U, the Commissioner remanded the proceeding to the District Rent Administrator for further processing because the owner

had not received a copy of the tenant's complaint. In Parkchester Management Corp., ARL 05219-S, the Commissioner accepted rent records from the owner during the PAR because the owner had not been afforded an opportunity to do so before the Rent Administrator. Clearly, appellant's attorneys should not be trusted to cite any cases for the principles actually set forth in those cases.

Finally, this Court should not look to Douglas W. Barnert v. 41 Fifth Avenue Associates, 158 A.D.2d 289, 550 N.Y.S.2d 694 (1st Dept. 1990), a case in which DHCR was not a party. The provision of the Rent Stabilization Code which is at issue herein is different than the one interpreted in Barnert. Barnert concerned the time in which to reopen a proceeding after a PAR order has been issued, not a Rent Administrator's order. Moreover, in Barnert the tenant was not afforded notice of the reopening but first learned that the proceeding had been reopened when a copy of the amended order was served upon him. In the case at bar, the landlord was afforded notice of the reopening and was given an opportunity to respond.

As there is a rational basis for reopening the proceeding, it should be affirmed. 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).

CONCLUSION

The Order of the DHCR, should be affirmed and the petition dismissed, together with costs and disbursements.

Dated: Bronx, New York
April 22, 1992

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