To be argued by:
RICHARD HARTZMAN

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of MOUNTBATTEN EQUITIES,
Petitioner-Appellant-Respondent,

For a Judgment Pursuant to Article 78 of the CPLR

against

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Respondent-Respondent,

and

421 HUDSON STREET TENANTS ASSOCIATION, and GEORGE S. TRISCIUZZI, LEN GELSTEIN, SETH BERSHADSKY and VIRGINIA STEWART, as Officers and Members of the 421 Hudson Street Tenants Association,
Respondents-Intervenors-Respondents-Appellants.

New York County Index No. 103465/93

In the Application of 421 HUDSON STREET TENANTS ASSOCIATION, and GEORGE S. TRISCIUZZI, LEN GELSTEIN, SETH BERSHADSKY and VIRGINIA STEWART, as Officers and Members of the 421 Hudson Street Tenants Association, and Individually on behalf of all other tenants similarly situated at 421 Hudson Street, New York, New York,
Petitioners-Appellants,

for a Judgment Pursuant to Article 78 of the CPLR

against

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and, MOUNTBATTEN EQUITIES,
Respondents-Respondents.

New York County Index No. 103603/93

BRIEF FOR RESPONDENT NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL

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BRIEF FOR RESPONDENT NEW YORK STATE
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PRELIMINARY STATEMENT

This brief addresses appeals by the landlord (Mountbatten Equities) and by the tenants (421 Hudson Street Tenants Association) of the subject housing accommodations from two judgments of the Supreme Court, New York County (B. Cohen, J.) entered in the office of the Clerk of the County of New York under the two above-captioned names on March 31, 1994, and from an order entered on May 10, 1995, granting in part reargument and modification. The judgments dismissed both the owner's and tenants' Article 78 petitions which had challenged a single order issued by respondent-respondent New York State Division of Housing and Community Renewal ("DHCR"). The reargument order modified the terms for administering an escrow account required to be established pursuant to the DHCR order.

The tenants as well as the owner have perfected their respective appeals under the "Mountbatten Equities" caption only, although the court below decided the two cases under their respective captions. DHCR does not object to the court's deeming the two cases consolidated; and hereby submits one brief addressing both appeals.

The two appeals involve challenges to different aspects of an order issued by the New York State Division of Housing and Community Renewal ("DHCR") which determined the landlord's application for a building-wide rent increase based upon the

institution of a 24 hour doorman service in the subject premises. The order allowed a $30 per month rent increase for certain categories of tenants and disallowed the increase for others. The DHCR order also directed (1) that refunds should be made to those tenants who were not required to pay the increase but had done so prior to issuance of the order; (2) that the refund money be placed in an escrow account for vacated tenants; and (3) that money placed in the escrow account not claimed by tenants within one year be forfeited to the State. The court below, with DHCR's consent, modified the escrow provisions of the DHCR order to allow the owner certain offsets against the amounts placed in escrow.

In these appeals, the owner is seeking to have rent increase apply to all tenants in the subject building. On the other hand, the tenants seek to have the rent increase denied in its entirety. Both parties also seek other subsidiary relief which will be addressed in this brief.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Was it rational for DHCR to exercise its authority to apply equities in granting a rent increase in part for a new doorman service, i.e., for those tenants of the subject building who consented to the increase and for new tenants who moved into the building after the service had been instituted, and to direct a refund of excess rents collected for that service from the remaining categories of tenants?

The court below answered in the affirmative.

2. Did DHCR properly direct the forfeiture to the State of refunds ordered to be paid to certain tenants which remain uncollected after a one year period, based upon the equities of the case?

The court below answered in the affirmative.

3. Is it rational for DHCR to deny treble damages, attorneys' fees and interest to tenants who are entitled to a refund in a proceeding which is not a rent overcharge proceeding?

The court below answered in the affirmative.

COUNTER-STATEMENT OF THE NATURE OF THE CASE

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. Under the appropriate circumstances it is proper for DHCR to invoke its authority to consider the equities in determining whether or not to allow rent increases.

The case at bar, which involved an owner's application for a rent increase for instituting a doorman service, is one of those unusual cases which warranted the invocation of the equities. The factors which warranted invocation of the equities were (1) that the tenants had been receiving the doorman service since 1983; (2) that the owner had expended a substantial sum to provide such service; (3) that the provisions of the former Code were not as specific as those of the current Code with regard to consent requirements; (4) that the 24 hour doorman service, in light of

present urban realities and concern for security, is a significant benefit to tenants; and (5) that the $30.00 monthly charge reasonably covers the actual cost of the service.

The Commissioner's determination is fair and equitable. The rent increase is applicable only to those tenants who expressly consented and did not object to the rent increase, or who moved into the premises after the institution of the doorman service. In return, they are and have been receiving a valuable service at a charge directly related to the cost of that service. Those tenants who did not expressly consent or who objected during the course of the proceedings do not have to pay the rent increase and are entitled to a rent refund. Finally, the owner must establish an escrow account for tenants who have vacated the building; and is required to forfeit any uncollected refunds so that he may not obtain a windfall from those who have moved away and cannot be located.

The Commissioner's determination is a carefully crafted effort to do equity while giving due regard for protecting tenants and the public interest against unreasonably high rent increases. As this brief will make manifest, there is no merit to the multifarious arguments raised by the tenants and owner regarding the interpretation and applicability of the Rent Stabilization Law and Code, the creation of the escrow account and forfeiture of uncollected funds in that account, and the issue of treble damages and attorneys' fees.

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. Where the determination has a rational basis, the Court may not substitute its own judgment for that of the agency. The administrative determination in the instant case meets that test. It is therefore entitled to judicial affirmance.

COUNTER-STATEMENT OF THE FACTS

This matter involves the building located at 421 Hudson Street, New York, New York. The administrative proceeding commenced with the owner's filing of an application on June 6, 1983 with the Conciliation and Appeals Board for a building-wide $30 per month rent increase for a new 24-hour doorman service.

The owner had previously - in 1981 - filed a different application for a $15 rent increase for part-time doorman service. That application was not the same as the 1983 application for 24-hour doorman service. The 1983 application was processed separately from the 1981 application and superseded the earlier application.

The Rent Administrator issued an order (CDR 6045) on December 30, 1985 granting the owner's 1983 application and allowing the $30.00 rent increase effective upon the institution of such service. The order noted that the 1981 application had been superseded by the 1983 application.

On February 3, 1986, the tenants filed a Petition for Administrative Review, contending, inter alia, that the owner had failed to obtain the requisite consent of a majority of the tenants to the rent increase.

By order issued March 2, 1988, the Commissioner remanded the proceeding to the Rent Administrator to ascertain the validity of a poll of the tenants conducted by the owner in 1983.

On March 23, 1990 under Docket Number CC 410135-RP, the Rent Administrator revoked his prior order of December 30, 1985, and the building wide rent increase, and directed the owner to recompute all guideline adjustments which included said increase; and to refund excess rent payments, establishing an escrow account in connection therewith, within ninety days. This order was based on the evidence of record including the findings and recommendations of an Administrative Law Judge made after a hearing with the parties.

It was specifically found that, pursuant to a poll taken by the owner in 1983, there were 186 apartments (including one superintendent's apartment and three then vacant apartments); that the tenants of 64 apartments agreed to the increased service, 47 did not agree and 71 abstained or did not respond to the poll; that the abstentions would not be counted as consents nor would the fact that many tenants paid the rent increase without objection; and that even under Sections 20C(3) and 35 of the former Rent Stabilization Code, the owner could not prevail.

Both the owner and tenants filed PARs, challenging the Rent Administrator's 1990 order. In its PAR, the owner urged, among other things, that the matter should have been decided pursuant to the former rather than the current Code since its initial application was filed prior to April 1, 1984; that the prior order of December 30, 1985 demonstrates that the owner did satisfy the requirements of the former Code; and that the abstentions should have been counted as consents since the tenants have enjoyed 24 hour doorman service since 1983 and would otherwise be given an unwarranted "windfall".

The tenants in their PARs, individually and by their representatives, urged, among other things, that the Administrator should have imposed interest, treble damages and attorneys' fees because of the bad faith, discrimination and misrepresentations of the owner.

On September 27, 1991, under Administrative Review Docket Number ED 430121RO et al., the Commissioner denied the tenants' petitions and granted in part the owner's petition by authorizing the rent increase for two categories of tenants: (1) those tenants who originally consented to the rent increase in the 1983 poll conducted by the owner; and (2) new tenants who moved in after the commencement of 24 hour doorman service in 1983. The rent increase was denied for: (1) tenants who objected to the rent increase in the 1983 poll; (2) tenants who joined in the tenants' earlier petition in 1986; and (3) tenants who were silent or abstained from

the 1983 poll. Retroactive refunds were directed for the first two categories of tenants.

Both the owner and tenants filed separate Article 78 petitions against the Commissioner's order of September 27, 1991, whereupon the proceeding was remitted to DHCR by the Supreme Court for further consideration. Subsequently, DHCR served the parties various documents and afforded them an additional opportunity to file submissions.

On September 25, 1992, the tenants submitted to DHCR a reply memorandum wherein they contended in substance that (1) DHCR should grant their petition for administrative review in its entirety by denying the owner any rent increases; (2) the proceeding must be determined in accordance with the current Rent Stabilization Code; (3) the same result would have obtained under the former Rent Stabilization Code; (4) a majority of tenants never agreed to pay a rent increase for doorman service; (5) the rent increase should not have been permitted for vacancy leases; (6) the Administrative Law Judge's finding of the owner's bad faith was correct and should not be overturned; (7) the absence of affirmative evidence and the "unclean hands" doctrine precludes consideration of any alleged "undue hardship" and "costs" in the owner's favor; and (8) the owner should be assessed treble damages and attorneys' fees.

On October 19, 1992, the Administrative Review Unit of the Owner Multiple Bureau requested from the owner a 1983 rent roll, and also clarification regarding the owner's contention in its

Article 78 petition that the list of tenants attached to the Commissioner's order of September 27, 1991 was incorrect.

On October 29, 1992, the owner filed an additional submission contending, among other things, that, since the silence of some tenants must be considered an agreement to the rent increase, a majority of the tenants in occupancy at the inception of the doorman service did agree to the rent increase.

On December 16, 1992, the Commissioner issued the order here under review, granting in part both the tenants' and owner's PARs. The order set forth several categories of tenants and results as to each category. The relevant ones are:

I. Tenants not subject to a rent increase for the doorman service, and entitled to full retroactive rent reductions and refunds:

(1) tenants who voted against the addition of 24-hour doorman service in the owner's poll;

(2) tenants who voted for the addition of the service but who joined in the tenants' 1986 petition for administrative review; and

(3) tenants in occupancy at the commencement of the service who neither opposed nor consented to the service, i.e., abstentions and those who did not respond.

II. Tenants required to pay the rent increase for the doorman service:

(1) tenants who consented to the addition of the service in the owner's poll; and

(2) tenants who moved into the building after the institution of the service.

The Commissioner denied the tenants' claim for treble damages and attorneys fees but directed the owner to deposit the refund money due the tenants in an escrow account and pay each tenant entitled to a refund a single lump sum payment upon the tenant's written request. Any refunds remaining uncollected after one year would be forfeited to DHCR.

Both the owner and tenants challenged the Commissioner's order in Article 78 proceedings, the owner seeking to have the rent increase applied to all tenants or in the alternative eliminating the forfeiture of the uncollected escrow funds; and the tenants seeking to have the rent increase denied for all tenants, and, in addition, the imposition of treble damages for rent overcharges and attorneys' fees.

The court below denied both Article 78 petitions in all respects except that it allowed an offset against a tenant's escrowed refund entitlement of unsatisfied judgments against that particular tenant. Upon reargument, the offset allowance was extended to include settlements and releases demonstrating that a tenant entitled to a refund owed rent arrears.

ARGUMENT

DHCR'S DETERMINATION OF THE OWNER'S RENT INCREASE APPLICATION WAS FAIR AND EQUITABLE AND WAS NEITHER ARBITRARY NOR CAPRICIOUS BUT WAS IN COMPLIANCE WITH APPLICABLE LAW.

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, questions regarding the setting of 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 disputes when 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 35 of the former Rent Stabilization Code; from Sections 26-511(c)(1) and (c)(6) of the Rent Stabilization Law which set forth the responsibility to promulgate a code that "provides safeguards against unreasonably high rent increases and, in general, protect tenants and the public interest" and which "provides criteria whereby the commissioner may act upon applications for owner for increases in excess of the level of fair rent increase established under this law; and from Section 26-516b. which provides as follows:

> In addition to issuing specific orders provided for by other provisions of this law, the state division of housing and community renewal shall be empowered to enforce this law and the code by issuing, upon notice and reasonable opportunity for the affected party to be heard, such other orders as it may deem appropriate.

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. Under the appropriate circumstances it is proper for DHCR to invoke its authority to consider the equities in determining whether or not to allow rent increases. Section 2522.1 of the Rent Stabilization Code provides that "Legal regulated rents may be increased or decreased only as hereinafter

specified." One of the circumstances specified is where the equities justify an increase or decrease.

The case at bar is one of those unusual cases which warranted the invocation of the equities. The circumstances which warranted invocation of the equities were (1) that the tenants had been receiving the doorman service since 1983; (2) that the owner had expended a substantial sum to provide such service; (3) that the provisions of the former Code were not as specific as those of the current Code with regard to consent requirements; (4) that the 24 hour doorman service, in light of present urban realities and concern for security, is a significant benefit to tenants; and (5) that the $30.00 monthly charge reasonably covers the actual cost of the service. The Commissioner appropriately and reasonably considered the circumstances as follows:

> However, the Commissioner notes that the tenants have, in fact, been receiving the benefits of 24 hour doorman service since 1983; that the owner has expended a substantial sum of money to provide such service to the tenants; that the provisions of the former Rent Stabilization Code (Section 20C(3)) were not as specific as those of the current Code (Section 2522.4(a)(2)(iv) with regard to the consent requirements; that 24 hour doorman service, in light of present urban realities and concern for security, is a significant service of benefit to tenants; and that the $30.00 monthly charge, in view of the payroll data submitted and modern economic realties, is not unreasonable (S30.00 x 12 months x 185 apartments divided by 4 [3 shifts and a relief] = $16,6500.00 per doorman per year). The Commissioner further notes that the owner's expectation of approval of the increase, although erroneous, was not unreasonable in light of the fact that a clear majority of the tenants who responded to the owner's 1983 poll consented to the rent in-

> crease. Based on the totality of circumstances surrounding the instant case, the Commissioner finds that the Administrative Law Judge's conclusions as to the conduct of the owner are not sufficient to override the above-mentioned equitable considerations. Pursuant to Section 2522.7 of the Rent Stabilization Code, the Commissioner finds that the owner is entitled to collect the monthly increase of $30.00 from all tenants who agreed to pay the increase and who did not join in the tenants' 1986 petition for administrative review, effective June 1, 1983 (the first rent payment date following the date of service [May 31, 1983] by the owner on the tenants of the owner's application and the polling cards); and from those tenants who took occupancy after the service commenced regardless of the fact that they may have joined in the tenants' 1986 petition for administrative review, effective upon the commencement of their vacancy leases.

The Commissioner's determination is fair and equitable. The rent increase is applicable only to those tenants who expressly consented and did not object to the rent increase, or who moved into the premises after the institution of the doorman service. In return, they are and have been receiving a valuable service at a charge directly related to the cost of that service. Those tenants who did not expressly consent or who objected during the course of the proceeding do not have to pay the rent increase and are entitled to a rent refund. Finally, the owner is being forced to forfeit any uncollected refunds so that he may not obtain a windfall from those who have moved away and cannot be located.

The Commissioner's determination is a carefully crafted effort to do equity while giving due regard for protecting tenants and the public interest against unreasonably high rent increases.

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). As the Commissioner's determination has a rational basis and is neither arbitrary or capricious, it is entitled to judicial affirmance.

A. The Owner's Contentions.

1. The owner incorrectly claims that the matter must be determined in accordance with the former Code rather than the new Code, and that under the former Code all tenants would have been subject to a rent increase.

The owner argues that the proceeding should have been decided under the former Rent Stabilization Code which was in effect when the rent application was filed in 1983, rather than under the new Rent Stabilization Code, which became effective on May 1, 1987. The owner's argument improperly relies upon Section 2527.7 of the new Rent Stabilization Code which provides as follows:

> 2527.7 Pending proceedings.
>
> Except as otherwise provided herein, unless undue hardship or prejudice results therefrom, this Code shall apply to any proceeding pending before the DHCR, which proceeding commenced on or after April 1, 1984, or where a

> provision of this Code is amended, or an applicable statute is enacted or amended during the pendency of a proceeding, the determination shall be made in accordance with the changed provision.

This section does not preclude applying the new Code to proceedings commenced before April 1, 1984, as it makes no reference to such proceedings.

The owner erroneously argues that the reference in the Code section to proceedings commenced after April 1, 1984 is a "special exception" from which can be inferred the general intent to apply the old Code to proceedings commenced before April 1, 1984. This argument ignores the fact that there are a number of sections in the new Code which carve out exceptions, not for proceedings commenced after April 1, 1984, but for proceedings commenced before April 1, 1984; exceptions that require the application of the old Code to those pre-April 1, 1984 proceedings.[1] The proper inference is thus that the new Code is to be applied to all other proceedings commenced before April 1, 1984, unless there is due hardship or prejudice.

Indeed, it is well settled general principle that an administrative agency may apply the law in effect at the time an administrative determination is rendered where it has been amended during the course of the administrative proceeding. See, St. Vincent's

[1] The exceptions concern (1) the processing of Fair Market Rent Appeals, Section 2521.1(d)(1); (2) the processing of rent overcharge complaints, Section 2526.1(a)(4); and (3) the processing of the request for a determination of the legal regulated rent where the rent is in dispute, in doubt, not known, or where it must be fixed, Section 2522.6.

Hospital and Medical Center v. New York State Division of Housing and Community Renewal, 66 N.Y.2d 959, 498 N.Y.S.2d 799 (1985), aff'g, 109 A.D.2d 711, 487 N.Y.S.2d 36 (1st Dept. 1985). In St. Vincent's Hospital, the hospital/landlord challenged the denial of its application, pursuant to the Rent Stabilization Law, to not renew the leases for twenty tenants. Subsequent to a public hearing on the application, but before the rent agency rendered its determination, the statute which gave the hospital a right to evict tenants for its own use was repealed. In an opinion affirming the rent agency's denial of the hospital's application, the Court held:

> Where a statute has been amended during the pendency of a proceeding, the application of that amended statute to the pending proceeding is appropriate and poses no constitutional problem (Bucho Holding Co. v. Temporary State Housing Rent Commission, 11 N.Y.2d 469, 230 N.Y.S.2d 977, 184 N.E.2d 569; I.L.F.Y. Co. v. City Rent and Rehabilitation Administration, 11 N.Y.2d 480, 230 N.Y.S.2d 986, 184 N.E.2d 575; Matter of Taleff Realty Corp. v. Joy, 54 A.D.2d 423, 389 N.Y.S.2d 838), unless it can be demonstrated that "the CAB deliberately or negligently delayed processing the application[s] before it" in which event the petitioner would be entitled to have the applications processed under the earlier law [citations omitted].
>
> Here there was is no claim that CAB deliberately or negligently delayed processing the applications presented to it. Accordingly, CAB was justified in determining the matter in accordance with the law as it existed at the time of its disposition and we find no error in its decision.

109 A.D.2d at 712, 487 N.Y.S.2d at 37.

The Court of Appeals in I.L.F.Y. Co. v. City Rent and Rehabilitation Administration, 10 N.Y.2d 263, 270, 219 N.Y.S.2d

249, 254 (1961), held, with regard to rent regulations, that an owner does not "have in any particular rule an interest so vested as to entitle it to keep the rule unchanged [citations omitted]. In such situations the applicability and validity of statutes are determined as of the date we make our decision [citations omitted]."

Moreover, Section 20 of the Omnibus Housing Act of 1983 (Chap. 403 of the Laws of 1983) implicitly authorizes DHCR to apply the law or code in effect at the time of the determination:

> Any proceeding or other business or matter undertaken or commenced by or before the conciliation and appeals board, and pending on April first, nineteen hundred eighty-four, may be conducted and completed by the division of housing and community renewal in the same manner and under the same terms and conditions an with the same effect, as if conducted an completed by such conciliation and appeals board.

Since the section uses the term "may", the legislature plainly gave DHCR the authority to decide pre-April 1, 1984 cases in accordance with any newly promulgated Rent Stabilization Code. The implication of the permissive language of Section 20 is that DHCR would generally determine proceedings under any new Code unless the agency were to conclude in its sound discretion that the old Code should be applied. This implication tracks the general principle enunciated in St. Vincent's Hospital that pending administrative proceedings be determined on the basis of new laws and regulations.

The owner's reliance on Rose Associates v. Bernstein, 138 Misc.2d 1044, 526 N.Y.S.2d 383 (Civ. Ct., N.Y. Co., Friedman, J., 1988), is inapposite. That is a Housing Court case in which DHCR

was not a party, and which is therefore not binding on DHCR. The case involves the interpretation of a procedural provision of the Rent Stabilization Code, i.e., a notice provision, which has no application in the case at bar. Moreover, the holding in that case is not in conflict with the general rule that the law in effect at the time of the determination is to be applied.

The decision in Shell Realty Co. v. Elliot, 15 HCR 200 (Civ. Ct., N.Y. Co. 1987), is another Housing Court decision in which DHCR was not a party, in which the rule in question is not in question in the instant case, and in which the issue concerned the retroactive application of a rule on a procedural, not a substantive question. It is therefore inapplicable to the case at bar.

The owner also inappositely relies upon this Court's decision in Lavanant v. DHCR, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1989), and the Court of Appeals' decision in Century Tower Associates v. DHCR, 83 N.Y.2d 819, 611 N.Y.S.2d 491 (1994). In both of those cases, DHCR's application of the old law and Code to rent overcharge proceedings commenced prior to April 1, 1984, was upheld as an exception to the general principle that new law should be applied. The basis for the exception was the legislative intention regarding rent overcharge complaints as evidenced by statements and actions around the time the Omnibus Housing Act was to take effect. This Court and the Court of Appeals took cognizance of the special circumstances surrounding the processing of rent overcharge complaints, something which the Second Department had ignored in its application of the general principle in J.R.D. Management Corp.

v. Eimicke, 148 A.D.2d 610, 539 N.Y.S.2d 667 (1989). Neither Lavanant nor Century Tower require DHCR to apply the old Code in this proceeding, which involved, not a rent overcharge complaint, but an owner's application for a rent increase based upon a new service.

The simple response to the owner's arguments concerning vested rights and delay, and the cases cited in relations to those arguments, is that (1) there was no vested right in having the agency determine the owner's application on the basis of the old Code; and (2) there was no negligent or deliberate delay in processing the application. The owner has failed to demonstrate either. See, the St. Vincent's Hospital and I.L.F.Y. Co., supra.

In any case, the owner's entire argument concerning which Code should have been used is academic. As the Commissioner's order noted, even if DHCR had been required to apply the former Code in this proceeding the determination would not have been different.

Former Code Section 20 set forth provisions for determining lawful stabilized rents. Subsection 20C(3), which is the pertinent provision in question, provided that:

> For dwelling units for which there has been since May 31, 1968, or the date as of which required services are determined pursuant to Section 2(m) of this Code, and increase in rental value beyond required services from:
>
> * * * *
>
> (3) an increase in services on a building wide basis on vacancy leases or by agreement with the tenant, the stabilization rent shall be increased by the pro rata charge allocable to the dwelling unit.

This subsection was the basis under the former code for allowing rent increases for new services such as the doorman service involved in this case. The subsection was interpreted by the CAB as requiring the consent of a substantial number of tenants in the building.

Determining this case under the old Code would have led to the same result because the owner would not have met the requirements of Section 20(C)(3) for obtaining a building-wide rent increase.

Although the owner claims that, in the instant proceeding, a sufficient number of tenants consented under the terms of Section 20(C)(3) of the former Code, the very CAB orders cited by the owner in the case below contradict that claim. In Bilota Corporation, Opinion No. 20,040, the CAB found that 65 percent of the building's tenants (114 out of 176) had requested the new guard service.

In Forest Hills Associates, Opinion No. 14,560, there were 66 apartments of which 39 were rent stabilized. Of the stabilized tenants, 28 (or 72 percent) supported the new service, 6 (or 15 percent) opposed the new service, and 5 (or 13 percent) did not respond. Of 29 rent controlled tenants (2 controlled apartments became stabilized during the pendency of the proceeding), 15 supported the new service. The CAB granted the application contingent upon approval by the Office of Rent Control.

In Royal Terrace Inc., Opinion No. 7535, out of 68 apartments 42 of the tenants (62 percent) consented in writing to the service and rent increase, 7 tenants (10 percent) objected, and 19 tenants

(28 percent) failed to object after being advised that failure to respond would be considered as consent.

Nothing like these percentages of tenant support existed in the case at bar. Here, 63 tenants out of 186 (34 percent) consented to a rent increase for the new service - a far smaller percentage than in any of the cited CAB cases - and 48 tenants voted no (26 percent). Of the remaining apartments, 71 tenants did not respond to the survey (38 percent), one apartment was occupied by a superintendent and three apartments were vacant. The figure used by the owner, consent by 57 percent of responding tenants, is not the relevant figure - the relevant number being the percentage of all tenants, not just responding tenants.

The owner argues that the 71 tenants who did not respond to the owner's survey should be counted as having consented, citing two of the three aforementioned CAB opinions. However, in the CAB cases the tenants were put on notice that a failure to respond would be construed as a consent. Such a notice was not sent to the tenants in the case at bar. Without such notice it would be improper to construe silence as consent. The Commissioner addressed the issue as follows:

> The Commissioner notes that the increase order [which was reversed] had been based, among other things, on the mistaken belief that 141 tenants had consented. The owner had apparently counted the abstentions and new tenants as consents. The Commissioner notes that only where the tenant have been individually informed in writing that their continued silence would be deemed to be a consent to the owner's application and an agreement to pay the rent increase could the abstentions be counted as

> consents. Such was not the case in the instant proceeding.

Whether or not it was standard practice for the CAB to send a notice to tenants that a failure to respond would be construed as consent, as alleged by the owner, such failure does not negate the fact that the tenants did not receive notice. The agency's alleged failure cannot be held against the tenants. The tenants cannot be said to have impliedly consented if they never were given notice that a failure to respond would be deemed consent.

Nor, as argued by the owner, can the notice allegedly sent to the tenants in October 1981 with respect to the $15 per month rent increase application be deemed to be notice with respect to the application for a $30 per month rent increase, filed more than a year and a half later. The latter application superseded the earlier one and involved different circumstances and different terms. There is no precedent or other justification for implied consent to one set of terms being deemed implied consent to a different set of terms, especially where such consent would be deemed after an extended lapse of time and without any subsequent notice.

In this whole issue concerning implied consent, the owner's argument confuses service on the tenants of the applications for the rent increases - which say nothing about the requirement of tenants' consent - and a polling of tenants, which directly concerns consent by tenants. A tenant's implied consent can only arise in relation to a polling of tenants' wishes, not in relation

to the serving of the owner's application. The 1983 poll was not accompanied by notice that silence would be deemed consent.

Moreover, it is not at all clear from the administrative record that the CAB notice which was sent to the tenants regarding the 1981 application gave sufficient notice that a non-response to any polling would be construed as consent to the rent increase. The answer forms sent to the tenants contain the following notice:[2]

> The owner of your building is applying for the relief on the accompanying form. Unless you submit information contrary to that contained in this Application, it may be assumed by the Conciliation and Appeals Board that the information supplied by your owner is correct. If any of the statements by the owner are incorrect, you should so advise the Conciliation and Appeals Board at once on this Answer Form. The original of your answer together with one copy must be returned to this office within 10 days of the date of mailing appearing below.

This notice says nothing about tenants' silence being construed as consent to the rent increase; and is at best ambiguous as to assuming owner's statements as true. Furthermore, the notice concerns only the accuracy of the information contained in the owner's application, which itself says nothing about tenants' consent. There is no reference to a polling of the tenants as to whether or not they would consent to what the owner is seeking in the application; nor expressly stating the a failure to respond would be deemed consent to the owner's application.

In addition, it cannot be determined whether or not this is the same notice which tenants received in those CAB cases discussed

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[2] Contrary to the owner's assertion, there is no indication that this notice was sent with the 1983 application.

above in which a non-response by tenants was considered a consent to the new service.

The owner contends that "of the 71 tenants who never responded to the survey, but were billed for the service, 37 tenants paid for the service without reservation, and should thus be counted as consenting tenants. The Commissioner correctly addressed this meritless contention as follows:

> The owner argues that DHCR should infer tenant consent from the fact that many tenants actually paid the $30.00 doorman fee that was added to their rent bill. However, none of the tenants were informed in writing that this fee was optional and that by paying said fee they were consenting to the owner's decision to add a full time concierge service.

The cases cited by the owner with regard to the principle that an offer may be accepted by conduct or acquiescence are not at all applicable to the case at bar. Those cases concern contracts between private parties who are acting at arms length where an offer is followed by some action implying acceptance. This proceeding involves an application to the rent agency and the notice or absence of notice of an application by that agency to tenants. Simply because an owner may have circulated a form requesting a tenant's response to a questionnaire with regard to an intended application to a government agency does not lead to the consequence that a tenant's non-action constitutes consent without there being more in the way of notice from that government agency. As already pointed out, the lack of further notice from the CAB cannot be held against the tenants since they had no opportunity to respond to that notice. Nor, for the reasons stated by the

Commissioner, can some tenants' payment of the rent increase prior to the agency's initial approval of that increase be construed as acquiescence or conduct implying acceptance.

The owner argues that the survey should have been found to be "valid" because it "established that the majority of the tenants consented to the application". This contention is supposedly proved by the fact that the response constituted a representative sample of the tenancy and the fact that majority of the responding tenants indicated their consent. The contention must fail, though, because of the principle that consent cannot be implied from silence without notice that silence would be deemed consent. Only 34 percent of the tenants in the building as a whole expressed their consent. Of those who did not respond to the survey, their silence cannot be construed as consent in the absence of the requisite notice.

In support of their contention the owner relies upon the decision in Spring Valley v. Marrero, 100 A.D.2d 93, 474 N.Y.S.2d 311 (2nd Dept. 1984). However, that decision only emphasizes the incorrectness of the owner's argument. In that case the petitioners called into question the validity of a vacancy survey upon which was based a local resolution finding a housing emergency. The Village Attorney twice sent a questionnaire to local landlords requesting that they inform the town as to the number of vacancies in their buildings. The letters expressly stated that if no answer were received, the Village Attorney would assume that there were no vacancies. The Appellate Division upheld the validity of the

survey. Not even once was such explicit notice sent to the tenants in the case at bar.

The owner claims that a 1986 survey conducted by the tenants association "confirmed the fact that the tenants favored Mountbatten's application." However, only a handful of tenants responded to that survey. It utterly fails to show that, by 1986, a substantial number of tenants had come to consent to the owner's application.

The owner's characterization of the evidence adduced at the hearings - that it "demonstrated that the tenants wanted 24-hour doorman service at the building and were willing to pay a rent increase for that service" - does not accord with the nature of the hearing as described in the hearing officer's report. The characterization is nothing but a canard.

Finally, the owner argues that tenants who were silent should not reap the benefit of their silence by receiving rent refunds despite their having utilized the doorman service. This argument ignores the balancing performed by the Commissioner in the crafting of an equitable resolution to this long-standing dispute: the weighing of the benefits gained by the tenants against the improprieties of the owner. Had the owner not instituted the service before the agency had acted upon the application and had the owner accurately reported the results of the survey, the impact on the owner would likely have been significantly different. Under the circumstances, allowing rent increases only for consenting and new tenants was a fair and equitable resolution of this matter.

2. It was proper for DHCR to direct that refund monies escrowed by the owner and uncollected by tenants after one year be forfeited to the State.

The owner does not challenge the Commissioner's order to establish an escrow account for refunds due to tenants who have vacated the building. Rather, it argues that the uncollected portion of the escrowed monies should not be forfeited to the State, claiming that the Commissioner's justification for this action is arbitrary and capricious, i.e., the Commissioner's reliance on Section 2526.1(b) of the Rent Stabilization Code, and the decision in Plaza Realty v. CAB, 111 A.D.2d 395, 489 N.Y.S. 2d 603 (2nd Dept. 1985). In particular, the owner argues that the Code section and court decision are inapposite because they involve rent overcharge proceedings rather than an application for a rent increase for new services, as in this case.

What the owner's argument misses is that the Commissioner's citation to the Code section and court decision is intended to be illustrative of DHCR's power to take such action. The Commissioner also took note of such practice by the Conciliation and Appeals Board, DHCR's predecessor agency in order to further illustrate the historical root of this power. The citation to the Code section was not intended to set forth the Code provisions upon which the Commissioner relied in exercising his power. It is the owner's arguments with regard to Section 2526.1(b) and Plaza Realty which are misplaced.

The agency under Section 26-516b. of the Rent Stabilization Law (quoted above on page 12) has broad power to devise remedies deemed appropriate. See also, Section 2526.2(a) of the Rent Stabilization Code which provides that:

> Upon notice and reasonable opportunity to be heard, the DHCR may issue orders it deems appropriate to enforce the RSL and this Code.

This broad mandate grants authority to DHCR to fashion alternative remedies when it deems it appropriate. The agency is not limited to its own or the CAB's prior practice. The examples noted by the Commissioner simply indicate the breadth of authority available to the agency.

The order that escrowed funds uncollected by tenants after the period of a year be forfeited to the State was part of the equitable balancing achieved by the Commissioner. While the owner was allowed rent increases for certain categories of tenants notwithstanding his misconduct, it was not considered appropriate that the owner gain the benefit of keeping uncollected refunds. Any funds which are forfeited to DHCR will end up in the State's general fund and thus provide a benefit to the public at large. The forfeiture is a reasonable and appropriate remedy under the circumstances of this case.

However, DHCR has no objection to the modification by the court below of the escrow provisions as to offsets. In all other respects the Commissioner's order, being reasonable and equitable, should be upheld by the Court.

B. The Tenants' Contentions

1. The Commissioner was not required to direct a refund for all tenants rather than only some tenants, notwithstanding conclusions reached by the administrative law judge.

In claiming that no tenants should be subject to a rent increase and that all tenants should receive a retroactive refund, the tenants' Article 78 petition rely upon Section 2522.4(a)(2)(iv) of the Rent Stabilization Code which provides for rent increases for additional services with "the express consent of the tenants in occupancy of at least 75 per cent of the housing accommodations"; and upon the findings of the Administrative Law Judge, particularly the finding that the landlord "unreasonably mislead" the Rent Administrator as to the number of consenting tenants.

However, the Commissioner based his PAR determination neither upon Section 2522.4(a)(2)(iv) of the Code nor upon the findings of the Administrative Law Judge, but rather upon other provisions of the Code and equitable considerations. The Commissioner expressly based his determination on Code Section 2522.7 - the equities section - in finding as follows:

> Pursuant to Section 2522.7 of the Rent Stabilization Code, the Commissioner finds that all tenants who agreed to pay the increase and who did not join in the tenants' 1986 petition for administrative review, effective June 1, 1983 (first rent payment date following the date of service [May 31, 1983] by the owner on the tenants of the owner's application and the poling cards)' and from those tenants who took occupancy after the service commenced regardless of the fact that they may have joined in the tenants' 1986 petition for administrative review, effective upon the commencement of their vacancy leases.

In reaching this determination the Commissioner, after reviewing the equities, also expressly addressed the conclusions of the Administrative Law Judge:

> Based on the totality of the circumstances surrounding the instant case, the Commissioner finds that the Administrative Law Judge's conclusions as to the conduct of the owner are not sufficient to override the above-mentioned equitable considerations.

Thus, the Commissioner did not substitute different factual findings for that of the Administrative Law Judge, but rather reached a different legal conclusion in judging that the equitable nconsiderations outweighed the findings as to the owner's conduct.[3] Those considerations, as outlined in the PAR order were the fact that (1) the tenants had been receiving the doorman service since 1983; (2) the owner had expended a substantial sum to provide such service; (3) the provisions of the former Code were not as specific as those of the current Code with regard to consent requirements; (4) the 24 hour doorman service, in light of present urban realities and concern for security, is a significant benefit to tenants; and (5) the $30.00 monthly charge reasonably covers the actual cost of the service.

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[3] The tenants emphasize the absence of transcripts of the hearings. However, as the issues in this Article 78 proceeding concern the legal and equitable conclusions reached by the Commissioner insofar as they differ from those of the Administrative Law Judge and do not concern any modification of the Administrative Law Judge's factual findings, preparation of the transcripts are unnecessary. It was explained to the court below that if it thought transcripts to be necessary, DHCR would make arrangements to prepare them. The court below did not make any request for transcripts.

It is well settled that the Commissioner of a state agency is empowered to exercise administrative review of agency determinations may make independent determination of the issues and reach conclusions which differ from those of an Administrative Law Judge. With regard to the State Commissioner of Health, the Court of Appeals in Doe v. Axelrod, 71 N.Y.2d 484, 490, 527 N.Y.S.2d 368, 371 (1988), held that:

> Given the broad powers conferred upon the Commissioner in matters concerning the public health, and more particularly in regulating professional medical conduct, it would be anomalous if the Commissioner, under the unusual facts of this case, did not have the power to make his independent determination of the issues. In our view, the power to do so is "essential to the exercise" of the far-reaching powers expressly granted to the Commissioner by the Legislature (Lawrence Constr. Corp. v. State of New York, 293 N.Y. 634, 639, 59 N.E.2d 630).

And with regard to the Commissioner of Education, the Appellate Division, Third Department, Hyde Park Central School District v. Ambach, 142 A.D.2d 869, 530 N.Y.S.2d 902, 903 (1988), held that:

> The Commissioner has broad review powers over the findings of teacher disciplinary hearing panels [citations omitted], including the power to substitute his judgment for that of a hearing panel with respect to the penalty to be imposed [citation omitted]. The judicial role in reviewing such a penalty determination is limited to determining whether the Commissioner's decision is arbitrary and capricious, was affected by an error of law or constitutes an abuse of discretion [citations omitted].

The Rent Commissioner has similarly broad powers. Section 26-516h. provides:

> The state division of housing and community renewal may, by regulation, provide for admin-

> istrative review of all orders and determinations issued by it pursuant to this chapter.

such regulations were promulgated as Part 2529 of the Rent Stabilization Code. Section 2529.8 of the Code provides that:

> The Commissioner, on such terms and conditions as he determines, shall:
>
> (a) Dismiss the PAR if it fails substantially to comply with the provisions of the RSL or this Code; or
>
> (b) Grant or deny the PAR, in whole or in part, or remand the proceeding to the Rent Administrator for further action;
>
> The Commissioner shall inform all parties to the PAR of the grounds upon which such decision is based.

Plainly, the Rent Commissioner has the same broad power as the Education and Health Commissioners to substitute his judgment for that of a Rent Administrator or Administrative Law Judge and make an independent determination of the issues in an administrative review proceeding.

In exercising his authority the Commissioner relied, not upon Section 2522.4(a)(2)(iv) of the Code, as did the Administrative Law Judge, but upon Section 2522.7, the equities section. Moreover, the Commissioner did not grant the owner the rent increase which is allowed by Section 2522.4(a)(2)(iv), i.e., a rent increase for all tenants in the building. Rather, he granted rent increases only for limited categories of tenants - those who consented and those who moved in after the service was being provided; and he did so on the basis of well-founded equitable considerations. Thus, the

Commissioner was not granting the relief provided for by Section 2522.4(a)(2)(iv) under the guise of Section 2522.7.

Although Section 2522.4(a)(2)(iv) is the usual regulatory basis for evaluating owner rent increase applications for increased services, the agency may, under appropriate and unusual circumstances, such as in this case, rely upon other provisions and grant rent increases different in scope than those provided for in Section 2522.4(a)(2)(iv). Section 26-516b. of the Rent Stabilization Law provides for the issuance of orders by DHCR "as it may deem appropriate":

> In addition to issuing specific orders provided for by other provisions of this law, the state division of housing and community renewal shall be empowered to enforce this law and the code by issuing, upon notice and reasonable opportunity for the affected party to be heard, such other orders as it may deem appropriate.

And Section 2522.1 of the Rent Stabilization Code provides in general that "Legal regulated rents may be increased or decreased only as hereinafter specified", one of the provisions thereinafter specified being Section 2522.7.

It is well settled that the rent agency's application and interpretation of statutes and regulations entrusted to its administration are entitled to judicial approval where, as here, they have a rational basis. Salvati v. Eimicke, 72 N.Y.2d 784, 537 N.Y.S.2d 16, 18 (1988); Cale Development, Inc. v. Conciliation and Appeals Board, 94 A.D.2d 229, 463 N.Y.S.2d 814 (1st Dept. 1983), aff'd, 61 N.Y.2d 976, 475 N.Y.S.2d 278 (1984); Minton v. Domb, 63

A.D.2d 36, 406 N.Y.S.2d 772 (1st Dept. 1978); Plaza Management Co. v. City Rent Agency, 48 A.D.2d 129, 368 N.Y.S.2d 33 (1975).

The tenants erroneously argue that Section 2522.4(a)(2)(iv) is a specific provision which cannot be superseded by the equities section, which they characterize as a general provision. The relevant general provision, however, is not the equities section but Section 2522.1 of the Code, and 26-516b of the Rent Stabilization Law, both quoted in the preceding paragraph. The equities section is one of the alternatives following Section 2522.1.

The tenants argue that in the absence of consent by 75 per cent of the tenants, as provided in Section 2522.4(a)(2)(iv), Mountbatten is precluded from obtaining the $30.00 charge from any tenant at the premises. However, as already pointed out, the Commissioner, reasonably and properly chose to rely not upon Section 2522.4(a)(2)(iv), which allows a rent increase for all tenants when 75 percent consent, but upon Section 2522.7, limiting the categories of tenants liable for the rent increase.

For the same reasons, the tenants' argument that the rent increases cannot be granted building-wide under Section 2522.4(a)(2)(iv), nor on an individual apartment basis under Section 2522.4(a)(2)(iii), is inapposite. The service was building-wide, not for individual apartments; but the rent increase was not granted building-wide.

The tenants inappositely utilize equity maxims and case law in erroneously arguing that DHCR's application of the equity provision of the Code violates principles of equity. With regard to the

proposition that equity cannot be used as a vehicle to circumvent a statute, there is no circumvention, but application of a different section of the Rent Stabilization Code than the one the tenants would have DHCR apply. The Code itself provides for the application of equities under appropriate circumstances.

With regard to the maxims (1) that the party seeking equity cannot take advantage of his own wrong, (2) that the fact that a benefit has been conferred does not require the invocation of equity, and (3) that a party's unclean hands bar equitable relief, the tenants ignore cases in which the courts have found exceptions to those maxims. See, e.g., Dillon v. Den, 551 N.Y.S.2d 547 (2nd Dept. 1990); Furman v. Krauss, 175 Misc. 1018, 1022, 26 N.Y.S.2d 121, aff'd, 262 App. Div. 1016, 30 N.Y.S.2d 848 ("[a] maxim of equity will not be applied for the purpose of defeating equity"); Miseveth v. Falcone, 29 A.D.2d 829, 287 N.Y.S.2d 627. In the unusual cirumstances of the instant case, the Commissioner concluded that the competing equitable considerations which have been described above outweighed any wrongdoing on the part of the owner. Also, as the Commissioner noted in his final PAR order, "the owner's expectation of approval of the increase, although erroneous, was not unreasonable in light of the fact that a clear majority of the tenants who responded to the owner's 1983 poll consented to the rent increase." Equity was done in this case. To rigidly apply maxims in accordance with the tenants' wishes would defeat equity.

The tenants incorrectly assert that Mountbatten has unlawfully collected at least $30.00 per apartment from 1983 to the present time. While they are correct in asserting that the owner did not have authority to increase rents in 1983 at the time he instituted the doorman service and applied for the rent increase, that act was ratified by DHCR's Rent Administrator in December, 1985. The December 30, 1985 order issued by the Rent Administrator ruled that "the owner's application is granted to the extent that effective upon the institution of 24 hour doorman service [i.e., in 1983], the owner may increase the rent by thirty dollars ($30.00) per apartment for all stabilized apartments." (Record: 81) While the retroactive increase was stayed by the tenants' subsequent PAR, the owner was entitled to collect the $30.00 increase prospectively and throughout the remaining proceedings.[4] The owner did have authority to collect the rent increase after December, 1985. It should be noted that the owner in the court below alleged that many tenants were withholding rent and that there are money judgments outstanding against some of those tenants for back rent.

The tenants refer to an order involving one tenant in the building issued on April 20, 1985 which found that the owner could not collect the additional charge without agency approval.

[4] The Commissioner's March 2, 1988 remand order (Record: 82) expressly allowed the owner to continue to collect the rent increase prospectively. After the Rent Administrator subsequently denied the owner's rent increase application upon the basis of the Administrative Law Judge's findings, both the owner and tenants filed PARs. Pursuant to the owner's, request a stay was granted by the Commissioner (Record: 91) on May 25, 1990, again allowing the owner to continue to collect the rent increase provided that the doorman service was still supplied.

However, as already pointed out, the additional charge was approved in December of that year.

With regard to the order relied upon by the tenants and issued by Judge Gould of the Civil Court on May 20, 1987, it appears that Judge Gould may have misconstrued the stay provision of the Rent Stabilization Code. As already noted, only the retroactive portion of the rent increase was stayed by the filing of a PAR against the December 1985 Rent Administrator's order.

In sum the tenants have not shown that the Commissioner's determination was unreasonable, arbitrary and capricious, or in violation of the law. To the contrary, the determination was a reasonable and equitable solution to this dispute. As such, 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).

2. There is no basis for imposing treble damages or attorneys' fees.

The tenants incorrectly argue that treble damages and attorneys' fees must be imposed against the landlord for collecting the rent increase for the doorman. The Commissioner addressed this claim in the PAR order as follows:

> With regard to the tenants' contention that they should be awarded treble damages, interest and attorneys' fees, the Commissioner notes that the underlying proceeding was an owner's application for a building-wide rent increase, rather than a rent overcharge proceeding. Pursuant to the Rent Stabilization Law and Code, treble damages and interest are only awarded in overcharge proceedings. Also,

> the Commissioner notes that the owner did institute 24 hour doorman service from which the tenants have benefitted for the past eight years. Based on the foregoing, including the other equitable considerations noted, supra, the Commissioner finds that treble damages, interest and attorneys' fees are not warranted. (emphasis in original)

As the Commissioner noted, treble damages and attorneys' fees can only be awarded in rent overcharge proceedings. The tenants, in citing Rent Stabilization Code Section 2526.1(a)(1), ignore the fact that the entire section concerns only rent overcharge proceedings. The section itself is based upon Section 26-516(a) of the Rent Stabilization Law, i.e., the rent overcharge provision of the law. That section makes clear that treble damages can only be imposed in proceedings where a tenant or DHCR has commenced a rent overcharge proceeding:

> Subject to the conditions and limitations of this subdivision, any owner of housing accommodations who, upon complaint of a tenant, or of the state division of housing and community renewal is found the state division of housing and community renewal, after a reasonable opportunity to be heard, to have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter shall be liable to the tenant for a penalty equal to three times the amount of such overcharge....

Likewise Section 26-516(a)(4) limits the imposition of attorneys' fees and interest to overcharge proceedings:

> An owner found to have overcharged may be assessed the reasonable costs and attorney's fees of the proceeding and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules.

As noted above, DHCR's interpretation of the statutes and regulations which it administers, if not unreasonable or irrational is entitled to deference. See, In the Matter of Salvati v. Eimicke, 72 N.Y.2d 784, 537 N.Y.S.2d 16,18 (1988). The case at bar involved an owner's application for a rent increase based upon the institution of a new service. It did not involve a tenant's rent overcharge complaint. There is plainly no basis in the law for the tenants' demand for treble damages or attorneys' fees in the instant proceeding.

But even if treble damages and attorneys' fees could be imposed in this type of proceeding, the Commissioner correctly concluded that they were not warranted. The statute provides that treble damages should not be granted where an owner "establishes by a preponderance of the evidence that the overcharge was not willful." In this regard, the Commissioner noted the equitable considerations which led him to conclude that treble damages should not be imposed. It does not matter that the tenants would rely upon different considerations, as outlined in their Article 78 papers. Unless the Commissioner's determination had no rational basis, the tenants, or for that matter, the Court, cannot substitute their judgment for that of the administrative agency. 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).

It should be pointed out in this context, that the agency itself approved the rent increase in December 1985, having ratified the increase back to 1983 and having allowed the prospective increase to subsequently remain in effect pending a final determination. Given the agency's interim approval of the rent increase, it can hardly be said that the owner should be penalized with treble damages for the additional charge.

As for attorneys' fees, the statute gives DHCR discretion as to whether or not to impose them. The Commissioner set forth ample grounds for denying the request for attorneys' fees.

Finally, the tenants' attorney requests under the "common fund doctrine" that attorneys' fees be directed to be paid to counsel directly out of the escrow fund ordered to be established by the Commissioner. This request must fail for a number of reasons. In the first place, it is not even clear whether this request refers to the award of attorneys' fees under the Rent Stabilization Law for the work done during the administrative proceeding, or an award of attorneys' fees for this Article 78 litigation or any other Article 78 litigation. In neither case would this relief be justified.

Secondly, if the request is for work done during the administrative proceeding, there is no basis to make an award to the tenants' current counsel since he did not represent them during the proceeding. Indeed, the tenants' appeared pro se during the administrative proceeding. Moreover, the tenants' cite no

authority for the proposition that the "common fund doctrine" is applicable to administrative proceedings.

Thirdly, if the request is for work performed during the litigation, the "common fund theory" is inapplicable. The cases and treatise relied upon by the tenants state that the doctrine is applicable in cases "where a party has obtained a decree which creates a fund in which others may share." Sadow v. Poskin Realty Corp., 63 Misc.2d 499, 213 N.Y.S.2d 901, 910 (Sup. Ct., Queens Co., 1970). In the case at bar, the fund in question - the escrow - fund, was directed to be established at the administrative level of proceedings, not during the litigation. The tenants are certainly not responsible for its creation during the litigation, if at all; and the doctrine is therefore not applicable in this case.

Fourthly, there is no provision for the award of any attorneys' fees against a non-governmental party in Article 78 proceedings; and, as already shown, there is no basis for the award of attorneys' fees under the Rent Stabilization Law. But even were the tenants entitled to attorneys' fees for the administrative proceeding, payment out of the escrow fund would be inappropriate. DHCR did not direct the establishment of the escrow fund for the purpose of providing for attorneys' fees but to assure that vacated tenants' would be able to collect their refunds; and to assure that the uncollected refunds would be forfeited to the State in order that the owner not receive an unwarranted benefit.

As to those funds which may end up being forfeited to the State, there is no ground for any portion being paid over as

attorneys' fees. As to those tenants who collect their refunds, the payment of attorneys' fees should be left to the parties themselves. Whether the escrow account is held by the owner or the owner's attorneys, they should not have to act as a collection agency for the tenants' attorneys and be subject to the risk that payments were or were not properly made.

The court below did not abuse its discretion in denying the request for attorneys' fees.

3. The tenants' are not entitled to interest for any period prior to that set by the court below, which period begins after issuance of the DHCR order.

As with the provision for treble damages and attorneys' fees, the Rent Stabilization Law provides for the imposition of interest only in rent overcharge proceedings. Both the section relied upon by the tenants, 26-511c.(3), and Section 26-516a.(3) allow for interest assessments on an "overcharge", a technical term of art in the Rent Stabilization Law and Code which has already been explained. The reference in the two sections of the Rent Stabilization Law to the interest section of CPLR, Section 5004, is only in relation to the rate of interest when it is proper to impose it.

The limitation of interest to overcharge proceedings is related to the fact that only rent overcharge orders, which contain directions to refund specific dollar amounts, can be filed as a judgment in New York Supreme Court. See Section 26-516a.(5). Interest under CPLR can be obtained only on a judgment; and it is only a rent overcharge order which can be filed as a judgment.

The Commissioner's order properly did not award interest; and the court below acted within its discretion in limiting its award of interest to the period commencing after issuance of the Commissioner's order.

CONCLUSION

For the foregoing reasons, both the owner's and the tenants' Article 78 Petitions should be denied and DHCR's order affirmed except as it was modified by the court below which respect to the offsets against the escrow account.

Dated: Bronx, New York
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