To be argued by:
RICHARD HARTZMAN
TIME FOR ARGUMENT: 10 MINUTES

NEW YORK SUPREME COURT
APPELLATE DIVISION—SECOND DEPARTMENT

APPLICATION OF NOLD, BUETI and ANELLO, INC.,

Petitioner-Appellant,

For a Judgment pursuant to
Article 78 of the CPLR

against

THE DIVISION OF HOUSING AND COMMUNITY RENEWAL, OFFICE OF RENT ADMINISTRATION, and RICHARD L. HIGGINS, As Commissioner,

Respondents-Respondents.

Brief for Respondent
Division of Housing and Community Renewal

DENNIS B. HASHER
Attorney for Respondent-Respondent
New York State Division of Housing
and Community Renewal
One Fordham Plaza, 4th Floor
Bronx, New York 10458
(212) 519-5769

RICHARD HARTZMAN
Of Counsel

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BRIEF OF RESPONDENT-RESPONDENT DHCR

PRELIMINARY STATEMENT

This is an appeal from a judgment of the Supreme Court (West, J.) entered in the office of the Westchester County Clerk on July 28, 1989, which affirmed an administrative determination by the New York State Division of Housing and Community Renewal (hereinafter "DHCR"). DHCR found that the owner-appellant's premises, located in Hastings, New York, is a horizontal multiple dwelling containing six or more units subject to the jurisdiction of the Rent Stabilization Law.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did DHCR properly conclude that the subject premises constitutes a horizontal multiple dwelling complex subject to the jurisdiction of the Rent Stabilization Law?

The court below answered in the affirmative.

COUNTER-STATEMENT OF THE NATURE OF THE CASE

The Division, as the administering agency for rent regulation, has the responsibility of determining whether ostensibly separate structures may in fact constitute an integrated real estate entity arranged horizontally rather than vertically, thereby mandating protection of the subject tenancies. Although no single factor is determinative, common services, ownership and common facilities have been the benchmark of those decisions. See, Salvati v. Eimicke, 72 N.Y.2d 784, 537 N.Y.S.2d 16 (1988). The Courts have deferred to the judgment of the agency where there is a rational basis to support it. See, e.g., Castleton Estates Inc. v. Abrams, 208 Misc. 824, 147 N.Y.S.2d 889, aff'd, 1 A.D.2d 390, 152 N.Y.S.2d 181, lv to app. den., 2 A.D.2d 673, 153 N.Y.S.2d 551 (1956); Menoudakos v. Berman, 32 A.D.2d 631, 300 N.Y.S.2d 740, aff'd, 25 N.Y.2d 723, 307 N.Y.S.2d 225, Love Securities v. Berman, 38 A.D.2d 169 328 N.Y.S.2d 8 (1st Dept. 1972). In the recent decision in Salvati v. Eimicke, supra, the Court of Appeals reaffirmed that horizontal multiple dwellings can be other than garden-type maisonette dwellings. See also, Bambeck and Lukey v. Division of Housing and Community Renewal, 129 A.D.2d 51, 517 N.Y.S.2d 130 (1st Dept. 1987).

If there were sufficient common facilities and common ownership and management on the local effective date of the adoption of the Emergency Tenant Protection Act ("ETPA")--May 1, 1979 in Hastings, New York--or any time thereafter, neither the subsequent "subdivision" of the subject premises, nor subsequent vacancies act to bring the subject premises out from the jurisdiction of the

ETPA. By "subdivision" is meant either the separate sale of a part of the premises, or the separation of some or all of the common facilities. Thus, the fact that portions of the premises can be separately sold is not conclusive on the issue of whether those premises constitute a horizontal-multiple dwelling.

The instant case involves three adjoining buildings with various common facilities and common ownership and management.

The premises have a common roof, common fuel tank, common facade, common yard, common fence and common porches, and had been bought and sold as a common unit until 1987, long after the 1979 base date for Hastings. There are two furnaces drawing on a common fuel tank for the three addresses, each furnace serving one of the "end" buildings plus a part of the "middle" building. Likewise, there are two water and sewer lines, one of each serving two of the buildings. Also, there is a connection between the basements in one of the "end" buildings and the "middle" building. As noted by the court below, there were a "plethora of common facilities and services that interrelate and overlap on the premises." (A-10)

The appellant mischaracterizes the evidence of record and the proceedings below, and misunderstands the various factors which are to be considered in determining whether or not a group of structures constitutes a horizontal multiple dwelling. Moreover, the appellant attempts to raise issues which were not raised during the administrative or lower court proceedings, i.e., the challenge to DHCR's denial of appellant's request for reconsideration, and the issue whether a hearing was required; the latter being only impliedly raised for the first time in appellant's reply papers in the Article 78 proceeding. In any case, appellant presents nothing which shows that either DHCR's determination or the decision of the lower court was improper.

Based upon the record before him the Commissioner rationally concluded that the subject premises is a horizontal multiple dwelling and therefore subject to the Rent Stabilization Law.

The Division's determination is in full accord with the controlling statutory provisions and applicable precedent. It is supported by a rational basis and is entitled to judicial affirmance.

COUNTER-STATEMENT OF THE FACTS

This proceeding involves the premises known as 491, 493 and 495 Warburton Avenue, Hastings-on-Hudson, New York. On October 10, 1985, the landlord of the premises filed an application with the Division for exemption from the Emergency Tenant Protection Act. The landlord alleged that the premises are three separate buildings, each containing less than six apartments (491 containing 4 apartments, 493 containing 6 apartments, and 495 containing 3 apartments), because each building is located on a separate tax lot, they are separated from basement to roof with no "cross overs", there are separate Con Edison bills for each of the buildings, and each building has its "own old coal stack (chimney)". (Return: A-1)

Various tenants of the premises answered the landlord's application during October, 1985. One tenant stated as follows:

> ... There is one continuous roof which can be walked across. There is one buttress and front of the building. There is one garbage shed, one fenced in yard, and one oil tank that feeds two (2) furnaces. One furnace is at 491, it heats that address and three apts in 493. The other furnace is in 493 and heats the rest of 493 and all of 495. There is no furnace in the basement area of 495. There are two water meters at 491 (one is for the bar) and one meter at 493, there is no meter at 495 area. The meter at 493 is read in the hallway of 495. So there is cross-over of heat an utilities. ... There are no alleyways between the addresses. These addresses have ben bought and sold together as one piece of property as follows: to Murray/Keane from Legsen, to Legsen from Bianci, and also previously. Because of heat and utility sharing they haven't been sold separately. The coal stack at 491 has

> the furnace pipes using the flue; the other two coal stacks are in the basement of 493. Neither appear in use, one is sealed with cement. 495 has no coal stack. Ther [sic] is a usable doorway to cross between the basement areas of 493 and 495. The porches of 491 and 493 are connected....

Another tenant stated:

> ... 491, 493, & 495 Warburton Avenue have same owners, 493 & 495 have a common boiler, common outlet sewer line and one water main for both buildings...

(Return: A-3)

Copies of deeds were submitted showing the transfer of the three addresses in common in 1962, 1968, and 1973, (Return: A-4), as well as photographs of the front of the premises. (Return: A-6)

The Division conducted a physical inspection of the premises on November 6, 1985, at which time the inspector found the building is completely attached on all sides; that each building has its own entrance; that there is one continuous roof from 491 to 495; that there is one common yard and common attached porches at the rear of the building and one fence that runs from 491 to 495. The inspector was unable to obtain access to the basements. (Return: A-5)

On January 9, 1986, the District Rent Administrator issued orders finding that the subject premises is a "single horizontal multiple dwelling containing six (6) or more housing accommodations and is therefore subject to the Emergency Tenants [sic] Protection Act." (Return: A-7)

On February 7, 1986, the landlord filed a Petition for Administrative Review ("PAR") substantially reiterating the prior allegations. He further argued that, since the premises have two furnaces, water and sewer lines from the three addresses instead of one, they cannot be a horizontal multiple dwelling; that the tenant's allegation that the three buildings have always been sold as one

unit is unverified hearsay; and that when the subject premises were constructed, they were heated by three independent coal fuel furnaces. (Return: B-1) The tenants answers to the PAR were substantially the same as their earlier answers. (Return: B-2)

On November 10, 1988, the Deputy Commissioner issued an order denying the landlord's PAR, finding:

> After a careful consideration of the entire evidence of record the Commissioner is of the opinion that the administrative appeal should be denied.
>
> The record discloses that the premises have a common roof, fuel tank, facade, yard and porches and have been bought and sold as unit. There is a furnace in each of the "end" buildings drawing on a common fuel tank with each furnace serving the building in which it is located plus part of the "middle" building. There are two water and sewer lines one of which serves two buildings. The basements of the "middle" and one "end" building have a connection.
>
> The Commissioner finds that there are sufficient common elements and connections to constitute the premises as one horizontal multiple dwelling containing more than 6 units and that the accommodations are, therefore, subject to stabilization.

(Return: B-4)

By letter dated November 25, 1988, the landlord requested reconsideration of the Commissioner's determination. (Return: B-5) The request was denied by letter dated January 5, 1989 (Return: B-6), the date the Article 78 petition herein was verified.

The court below, in ruling on appellant's Article 78 petition, affirmed DHCR's determination in all respects. In concluding its review of the issues raised by the owner, the court below found that:

> The Respondent's [DHCR's] Order and Opinion denying administrative appeal was not arbitrary, capricious or irrational considering the plethora of common facilities and services that interrelate and overlap on the premises. Accordingly, this Petition is hereby denied and

dismissed in all respects.

(A-10)

ARGUMENT

THE RENT COMMISSIONER'S ADMINISTRATIVE FINDINGS THAT THE STRUCTURE OWNED BY THE LANDLORD CONSTITUTES A "HORIZONTAL MULTIPLE DWELLING" WAS FULLY SUPPORTED BY THE FACTUAL RECORD, AND WAS NEITHER ARBITRARY NOR CAPRICIOUS. IT IS THEREFORE ENTITLED TO JUDICIAL AFFIRMANCE.

The law is well settled that the Rent Commissioner has the authority to find that ostensibly separate structures having features of commonality such as common ownership, services and operation may in fact comprise a "horizontal multiple dwelling" so as to bring them under the jurisdiction of rent control, the Emergency Tenant Protection Act ("ETPA"), and the Rent Stabilization Law. Salvati v. Eimicke, 72 N.Y.2d 784, 537 N.Y.S.2d 16 (1988). In re Krakower, 137 A.D.2d 688, 524 an.Y.S.2d 778 (2d Dept. 1988). Courts have made clear that given the combination of factors which can be involved, no one factor is determinative; that the Commissioner should be affirmed if his determination has a rational basis. As the Court of Appeals stated in Salvati, the question is

> ....whether there are sufficient indicia of common facilities, common ownership, management and operation to warrant treating the housing as an integrated unit and multiple dwelling subject to regulation (Matter of Bambeck v. State Div. of Hous. & Community Renewal, 129 A.D.2d at 58, 517 N.Y.S.2d 130, supra; Matter of Love Sec. Corp. v. Berman, 38 A.D.2d 169, 170-171, 328 N.Y.S.2d 8).

The Supreme Court and Appellate Division dealt with the horizontal apartment house concept in Castleton Estates Inc. v. Abrams, 208 Misc. 824, 147 N.Y.S.2d 889 (Nathan, J.), aff'd, 1 A.D.2d 390, 152 N.Y.S.2d 181 (1st Dept. 1956), lv to app. den., 2 A.D.2d 673, 153 N.Y.S.2d 551

(1956). The case made clear that certificates of occupancy were not controlling and that premises which were not "structurally integrated" could constitute a horizontal multiple dwelling. The Supreme Court (147 N.Y.S.2d 889 at 890) described the housing structures as follows:

> The apartments in question are located in various buildings in Castleton Park, an area owned by the petitioner which is described as including "twenty-six structures covering approximately six acres on three levels: one seven-story manually operated elevator apartment having three apartments per floor, totaling twenty-two apartments; one four-story manually operated elevator apartment having four apartments per floor totaling seventeen apartments; twenty-two cottages of sixty-four varied sized apartments of 3 1/2 rooms; one two-story garage and carpenter maintenance shop and two summer houses.
>
> * * * *
>
> A New York City certificate of occupancy for one such structure describes it as a two-family dwelling. But such certificate of occupancy has been held not conclusive upon a determination under the emergency housing rent law. Matter of Saxon House, Inc., v. McGoldrick, N.Y.L.J., April 14, 1954, p. 7, col. 5, Sup.Ct., N.Y.Co., Walter J., Index No. 4392/1954; see also, Matter of Karol v. McGoldrick, N.Y.L.J., Dec. 1, 1952, p. 1333, col. 4, Sup. Ct., Queens Co., Conroy, J., and Matter of Jackson & Feldstein v. McGoldrick, N.Y.L.J., October 25, 1954, p. 14, col. 1, Sup. Ct., Richmond Co., Norton, J.
>
> * * * *
>
> ...Respondent has held in effect that these accommodations were part of a unified development or "horizontal apartment house" whose exemption from control was not contemplated by the statute. Upon all the facts disclosed, it does not appear that this determination was arbitrary, capricious or contrary to law. (emphasis added)

In unanimously affirming the Supreme Court decision, the Appellate Division, First Department held:

> The record before the Commission amply demonstrates that the development has always been operated as a single project. There is

> no proof that any one building in this development at any time during its existence has ever been operated or maintained as a single, individual, separate unit apart from the others. Whether the apartments are located in a multiple dwelling, or in buildings containing four apartments or only two, the operation has always been an integrated one....
>
> ...The cost of maintenance of the premises was not segregated for each building, but was bulked together to include wages of employees, the cost of heat, water, electricity and gas, janitorial materials and supplies, insurance, and other items.
>
> With respect to the three apartments located in separate two-family structures, the contention of the appellant that these could be sold and then individually owned and operated does not seem to be borne out by the documentary proof before the Commission... Special Term has heretofore held that the operation of a multiple number of one-and two-family houses under single ownership constitutes "a horizontal apartment house" and has denied applications for decontrol. In re Jackson & Feldstein v. McGoldrick, 152 NYS2d 180; Norton J., Karol v. McGoldrick, 150 NYS2d 875, Conroy, J. In the cited case, heat and hot water was supplied from a common source.
>
> While we cannot adopt these criteria as establishing an invariable rule upon which to grant or deny decontrol, these factors together with the other circumstances present in this case impel the conclusion that the refusal of the Administrator to decontrol the subject premises was not violative of the statute and was not arbitrary, unreasonable or capricious.

In Karol v. McGoldrick, 150 N.Y.S.2d 875 (Sup. Ct., Queens Co., 1952), there were three structures containing six housing units. Even two bungalows located to the rear of two other buildings have been held to be part of a "horizontal multiple dwelling" under rent control. Matter of Kahan v. Weaver, 12 A.D.2d 641, 209 N.Y.S.2d 70 (2nd Dept., 1960, lv. to appeal den., 12 A.D.2d 806, 211 N.Y.S.2d 705 (1961):

> In our opinion, the facts and circumstances warrant the finding that the subject housing accommodation constitutes part of a multiple dwelling, and justify the conclusion that the Administrator's determi-

> nation in denying the decontrol was not unreasonable, arbitrary or capricious.

See also, Love Securities v. Berman, 38 A.D.2d 169 328 N.Y.S.2d 8 (1st Dept. 1972), in which two structures originally constructed as stables and physically separate from the front houses were held to be part of a horizontal multiple dwelling, and Matter of Cuccia v. Weaver, 19 A.D.2d 689, 191 N.Y.S.2d 644 (2nd Dept. 1959) which reversed Special Term and found a rational basis existed for determining that the structures in question were one four-family house and not 2 two-family houses.

In Bambeck and Lukey v. State Division of Housing, 129 A.D.2d 51, 517 N.Y.S.2d 130, 132-33 (1st Dept. 1987), the Court set forth a comprehensive statement of the appropriate standard that is to be applied when a Court reviews the factual findings made by the Division:

> Over the years, the issue of horizontal multiple dwelling status has been the subject of much litigation, as a result of which certain clearly delineated principals have evolved. In Matter of Love Securities Corp. v. Berman, 38 A.D.2d 169, 170-171, Associate Justice Steuer, in an opinion for this court, enunciated the controlling rule in terms of judicial review of an administrative determination as follows:
>
> > "The factors which contribute to determination of such a question are common ownership, management, including supply of services, and common facilities. As usual in such questions, cases present different combinations of those factors and no one factor can be said to be determinative (see Matter of Coyle v. Gabel, 21 N.Y.2d 808; Matter of Castleton Estates v. Abrams, 1 A.D.2d 390; Matter of Goldstein v. Gabel, 44 Misc.2d 20); although in all probability diversified ownership alone would indicate separate units (Matter of Amorelli v. Berman, 19 N.Y.2d 960). Where there are divergent factors which might well lead to different conclusions, the initial decision is for the respondent Rent Administrator, and his determination, unless arbitrary, is final (Matter of Venizelos v. Abrams, 1 A.D.2d 782). The presence of the several enumerated factors shows that there is a rational basis for the Administrator's conclusion, and as such it should not be disturbed (Matter of Colton v. Berman, 21 N.Y.2d 322;

Matter of Mounting & Finishing Co. v. McGoldrick, 294 N.Y. 104" (emphasis added).

In the case at bar the Commissioner's determination has fully met these standards. As the record shows, several of the relevant factors were present which warranted the conclusion that the premises constitute a horizontal multiple dwelling. There is a common roof, common fuel tank, common facade, common yard, common fence and common porches, and the premises have been bought and sold as a common unit. The former owner admitted in his PAR that there are two furnaces drawing on a common fuel tank for the three addresses, each furnace serving one of the "end" buildings plus a part of the "middle" building. He likewise admitted that there are two water and sewer lines, one of each serving two of the buildings. (Return: B-1) Also, there is a connection between the basements in one of the "end" buildings and the "middle" building.

Although, there were two furnaces, water and sewer lines serving the three buildings, each of these facilities serves more than one of the premises in differing combinations. Since there is no way to clearly divide the facilities so that one set serves only one or two of the addresses, the Commissioner reasonably found them to be common to all three of the addresses. The overlap and interrelatedness of these facilities is such as to constitute, along with the other aforementioned items, substantial common facilities for the three premises and result in a integrated whole subject to common management and ownership. This is particularly, but not solely, the case with the one fuel tank serving the two furnaces which in turn each service two of the three addresses.

The premises clearly shared common facilities and had common ownership and management. None of the factors mentioned by petitioner--the fact that each address is on a separate tax lot, can be sold separately, that they have separate street addresses and entrances, electric and gas meters and

the like--warrant a determination different from the one reached by the Commissioner. None of the factors mentioned by the petitioner as being separate facilities in the different structures warrant a determination different from the one reached by the Commissioner.[1] It was within the Commissioner's discretion to accord greater weight to the common water, sewer, heating services--factors which the statute recognizes as being the more significant types of common facilities--as well as to the common roof, yard, fence and porch.

Regarding ownership, the deeds in the record clearly show a history of common ownership. (Return: A-4) The alleged transfer of 493 Warburton in October, 1987, not only was never raised during the administrative proceeding, but is irrelevant, as shown below. The relevant factors being present, the Commissioner's determination was rationally based in the record.

Appellant makes a bald claim that the unified heating system was temporary in nature. However, there is not one shred of evidence in the record to support that claim. Nor is there any evidence in the record to substantiate the claim that bills "have always been rendered separately", another claim not raised during the administrative proceeding.

The claim that the unified front facade, common fence and backyard are common characteristics of buildings in the neighborhood is absolutely meaningless. The issue in the case at bar concerns the totality of common facilities in the subject premises, not the nature of the surrounding neighborhood. The Commissioner does not have to take account of the whole neighborhood in reaching a determination. Nor is there any evidence in the record as to the nature

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[1] It should be noted that these factual assertions and arguments were not raised during the administrative proceeding even though appellant had over a year to do so after it purchased the property. As argued on pages 18-20 of this brief, facts and arguments not raised during an administrative proceeding cannot be raised during judicial review.

or status of the neighborhood buildings, many of which may themselves be subject to rent regulation.

Appellant's claim that the rear facades are not adjoined is shown to be false by the its own surveys which show that 491 and 493 Warburton do have a common rear facade (A-34 and A-36). These surveys also demonstrate the falsity of their claim that none of the structures share a common rear porch. In fact, 491 and 493 Warburton do have a common porch.

The basis for the Commissioner's determination is not vitiated by the inadvertent statements in the his order that the two furnaces are in the "end" buildings rather than one being in an "end" and one being in the "middle" building, and that there are "common porches" rather than that the common porch extends to only two of the buildings. The fact remains that they are common facilities which are part of the totality warranting the conclusion reached by the Commissioner. The court below correctly found that the Commissioner's inadvertent statements did not warrant reversal:

> The Petitioner claims that there were numerous factual errors contained in the November 10, 1988 Opinion and Order. The Commissioner incorrectly stated that the two furnaces are in the "end" buildings rather than correctly stating that one furnace is in an "end" building and the other furnance [sic] is in the "middle" building. There was also an error regarding the three units sharing common porches. These factual errors are relatively insignificant and, thus, reversal of the Respondent's determination is inappropriate."

(A-9).[2]

As for appellant's argument that the determination was improper because DHCR's inspector did not inspect the basement, the Court below found:

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[2] Appellant's discussion of the lower court's finding on this point (Appellant's Brief, p. 15) misleads this Court by selective quoting from the decision. The appellant falsely asserts that the court recognized that there were "numerous factual errors". To the contrary, the court merely characterized the scope of appellant's claims and then pointed to the two inconsequential errors, correctly concluding that they were "insignificant".

> The fact that the inspector did not have access to the basement of the premises does not demonstrate the arbitrariness of the Respondent's determination. Even without an inspection of the basement, there was sufficient evidence in the administrative record to support the determination.

(A-10) Indeed, the information concerning the common fuel tank, and water and sewer mains were admitted to by the former owner, and the information concerning the common roof, facade, yard, fence, and porches did not require an inspection of the basement. Moreover, the statement by one of the tenants that there is a "usable doorway to cross between the basement areas of 493 and 495" (Return: A-3), was never refuted during the administrative proceeding.

The Commissioner properly weighed the evidence in reaching his determination. As stated by the Court in Matter of Weiner v. Gabel, 18 A.D.2d 1025, 239 N.Y.S.2d 48 (2nd Dept. 1963),

> ...And where the conflicting evidence leaves room for choice, the Court may not weigh the evidence or reject the choice made by the officer or board (Matter of Stork Rest., Inc., v. Boland, 282 N.Y.2d 256, 267; 26 N.E.2d 247, 252)...

The cases relied upon by appellant, Salvati v. Eimicke, and Heller v. Mirabal, both reported at 72 N.Y.2d 784, 537 N.Y.S.2d 16 (1988), do not compel a different result. Appellant disingenuously argues that there were substantially more common facilities in Salvati and Heller than in the case at bar. An examination of the decisions in Salvati and Heller shows just the opposite. In both of those cases the only common facility was a boiler. In the case at bar there are not only a common fuel tank and common boilers, but also common water and sewer systems, a common roof and common backyard and porches. Clearly there was ample basis in the record for concluding that there were sufficient common facilities as well as common ownership and management to constitute a horizontal-multiple dwelling.

In DeLorenzo v. Krizman, N.Y.L.J., May 16, 1986, p. 12, col. 1 (App. Term, 1st Dept.), aff'd, 125 A.D.2d 1015, 508 N.Y.S.2d 965, also relied upon by appellant, there was likewise only a common heating system. Furthermore, the Appellate Division, First Department in Bambeck & Lukey, supra, itself has distinguished DeLorenzo, where the horizontal-multiple dwelling issue was raised in the first instance in a court proceeding and not in an administrative proceeding, from cases where judicial review of an administrative determination is sought:

> However, and significantly unlike our case, the issue in DeLorenzo and in Nicholson was presented to the courts in the first instance and not, as here, on judicial review of an administrative determination. In concluding otherwise in our case, Special Term misperceived its role on judicial review, limited to whether the administrative agency's findings had a rational basis or were arbitrary and capricious. Considering the close factual issue presented on this record, there was a rational basis for the determination, which must be sustained.

517 N.Y.S.2d at 134.

Finally, a review of the facts in Bambeck and Lukey reveals that there was no departure from the typical administrative consideration of the various common facilities in the case at bar.

As the court below correctly concluded in the case at bar:

> The Petitioner's claims that the Respondent's determination was made prior to the Salvati v. Eimicke, 72 N.Y.2d 784 decision, that they failed to apply the fact as required therein and that the subject buildings in the present case share substantially less services than did the buildings in Salvati v. Eimicke, 72 N.Y.2d 784 are meritless. (emphasis added)

(A-10)

Appellant erroneously argues that its allegations regarding the sale of the middle building, 493 Warburton, and the alleged creation of separate heating systems for the three units require a different conclusion than the one reached by the Commissioner. Whether or not the transfer was

more than illusory[3] or whether the creation of separate heating systems could be substantiated[4], those allegations were not made until after the Deputy Commissioner issued his final order, i.e., not until petitioner's November 25, 1988 request for reconsideration. (Return: B-5) Indeed, no mention of the alleged October, 1987 transfer of the property was made at any time during the more than one year which elapsed prior to the date the Commissioner issued his final determination in November, 1988. Nor was the owner's admission in the PAR that two boilers served the three units ever contested during the proceeding.

It is axiomatic that court may not consider arguments or evidence not contained in the administrative record, but must determine whether an agency's determination is rational on the basis of the administrative record before the agency. This Court, in Klaus v. Joy, 85 A.D.2d 603, 444 N.Y.S.2d 69 (2nd Dept. 1981), held:

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

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[3] The deed for the alleged transfer (Exhibit "B" to the Article 78 petition, A-27) indicates that the property was transferred to a limited partnership for the sum of "Ten dollars and other valuable consideration". There is no indication as to who are the principals of that partnership or whether the transaction was for more than ten dollars.

[4] There is only a bare allegation in the Article 78 petition that the there are now three heating systems serving the three addresses.

In 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.), the Appellate Division, First Department, affirmed by the Court of Appeals, found that Special Term had erred in relying on material which was not before the rent agency when it issued its order. The Court held in pertinent part:

> Likewise improper was Special Term's reliance upon factual matter which had not been adduced before the CAB. The function of the Court upon application for relief under CPLR Article 78 is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. Disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered (see Matter of Levine v. New York State Liquor Authority 23 N.Y.2d 863). The claim, advanced for the first time at Special Term that, in December, 1980, a resolution had been passed to dissolve the corporate owner, was not made before the CAB. Accordingly, although we are in agreement that the issue is without legal effect here, the proof dehors the record should not have been considered by Special Term.

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

In the case at bar the owner had ample opportunity to present its allegations during the administrative proceedings. It failed to do so. Thus the court below correctly precluded those

allegations from consideration as a basis for review of DHCR's determination.

But even if the allegations concerning sale of the property had been made a part of the record, the Commissioner's determination would remain unchanged. The crucial issue is whether, on the local effective date of the adoption of date of the Emergency Tenant Protection Act ("ETPA")--May 1, 1979 for Hastings--or any time thereafter, there were sufficient common facilities and common ownership and management to constitute ostensibly separate structures as horizontal-multiple dwellings. If there were, neither the subsequent "subdivision" of the subject premises, nor subsequent vacancies act to bring the subject premises out from the jurisdiction of the ETPA. By "subdivision" is meant either the separate sale of a part of the premises, or the separation of some or all of the common facilities, such as appellant's alleged but unsubstantiated installation of separate heating facilities.

If, on the local effective date or any time thereafter there were sufficient common facilities and common ownership and management, it is irrelevant that parts of a horizontal-multiple dwelling could always have been sold separately, or that there might always have been separate tax lots, or the like.

This is uniformly the rule within New York City (see, 9 NYCRR Section 2520.11(d)), and in the counties outside New York City which are subject to the provisions of the ETPA. The policy was adopted in order to counter the growing trend of owners who sought to remove apartments from rent stabilization by divesting themselves of portions of commonly owned and operated property and making physical alterations, such as were first alleged to have occurred in the case at bar after the conclusion of the administrative proceeding herein.

This policy was recognized and approved in Nine Hunts Lane Realty Corp. v. DHCR, Index

No. 16719/87, Sup. Ct., Kings Co., Dowd, J., January 5, 1988, aff'd on other grounds, 151 A.D.2d 465, 542 N.Y.S.2d 255 (2nd Dept. 1989), in which the court affirmed a DHCR finding that a two unit structure, separated from a ten unit structure by forty feet, was part of a horizontal-multiple dwelling complex despite the fact of the forty foot separation, despite the subdivision of facilities after the base date, and despite the fact that the two unit structure had been sold separately.

Clearly, the petitioner's arguments are without merit. The 1987 sale of a portion of the property, which occurred years after the premises became subject to the ETPA, does not act to remove it from stabilization jurisdiction, either with regard to the current tenants, or with regard to any subsequent tenants. The transaction in the instant case, a transfer to a limited partnership for the sum of "Ten dollars and other valuable consideration", could well be the type which the Division's policy was designed to address--i.e., a subterfuge calculated to evade rent stabilization jurisdiction.

Similarly, with appellant's unsubstantiated claim that the heating system was temporary and has been separated. The former owner admitted to the common heating system but claimed that, when the structures were originally constructed, there were three independent coal fuel furnaces. (Return: B-1) However, what is determinative is not the configuration at the time of construction, but the commonality of facilities on the May 1, 1979 base date. There is no evidence to indicate that there were separate heating facilities on that date; and the alleged but unsubstantiated subsequent separation of those facilities after the base date is irrelevant.

Appellant raises a new issue--indeed a new cause of action-- on appeal in arguing that the DHCR's denial of reconsideration was arbitrary and capricious. At the time the Article 78 Petition was verified, appellant admitted that its request for reconsideration had not been responded to. (A-16) It is fundamental that issues or theories not raised in the court of original jurisdiction cannot be

raised on appeal. See, Shelton v. Shelton, __A.D.2d __, 542 N.Y.S.2d 719, 720 (2nd Dept. 1989); Reed v. Trailways Bus Systems, 145 A.D.2d 763, 537 N.Y.S.2d 71 (2d Dept. 1989). In the instant case, appellant seeks to raise, not just a new issue, but a new cause of action challenging an administrative action which had not even occurred at the time the Article 78 petition was verified. The claim that the denial of reconsideration was arbitrary and capricious may not be considered by this Court.

But even if it were, there is no merit to the claim. The major issue raised by the appellant in its request for reconsideration was the October, 1989 transfer of ownership of 493 Warburton, the middle of the three addresses. As already argued at length in this brief, that transfer, occurring long after the base date, has no effect on the determination that the structures constitute a horizontal multiple dwelling. Also, nothing of substance was raised in the request as to the sharing of facilities which would warrant reconsideration. (Return: B-5)

Finally, appellant claims that DHCR erred in not holding a hearing. This argument was raised, neither during the administrative proceeding, nor in the Article 78 petition. The issue was raised only impliedly in appellant's reply papers submitted to the court below. In any case the claim has no merit. First of all it ignores the fact that appellant had over a year after purchasing the property to raise the issues which it thought relevant to the proceeding, but failed to do so. Secondly, there were no assertions made at the administrative level which raised issues required a hearing. See, Aguayo v. New York State Division of Housing and Community Renewal, __A.D.2d__, 541 N.Y.S.2d 133 (2d Dept. 1989). The courts have consistently held that the agency is not mandated to hold an oral hearing in proceedings before it, but is only required to afford the parties an opportunity to be heard. This was done so in the case at bar. Friedman v. Conciliation and Appeals

Board, N.Y.L.J., December 20, 1977, p. 5, col. 3 (Sup. Ct., N.Y. Co., Hughes, J.), aff'd, 63 A.D.2d 943, 406 N.Y.S.2d 982 (1st Dept. 1978); Sendar v. Conciliation and Appeals Board, 65 A.D.2d 985, 411 N.Y.S.2d 98 (1st Dept. 1978), aff'g, N.Y.L.J., October 5, 1977, p. 10, col. 2 (Sup. Ct., N.Y. Co., Korn, J.), motion for leave to appeal to Court of Appeals denied, 46 N.Y.2d 709, 414 N.Y.S.2d 1027 (1979); Cohen v. McGoldrick, 198 Misc. 1036, 104 N.Y.S.2d 103 (Sup. Ct., Kings Co., Arkwright, J., 1950).

The court below correctly concluded that an oral hearing was unnecessary. (A-9)

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). Clearly, the determination of the Deputy Commissioner in the case at bar has a rational basis in fact and law and is neither arbitrary nor capricious. It is thus entitled to judicial affirmance.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed and the respondent granted costs.

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Respectfully submitted,

DENNIS B. HASHER
Attorney for Respondent
New York State Division of
Housing and Community Renewal
1 Fordham Plaza - 4th Floor
Bronx, New York 10458
(212) 519-5769

Richard Hartzman
of counsel

nold.brf/hart16