To be argued by:
RICHARD HARTZMAN

NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

S & M ENTERPRISES, BARTON MARK PERLBINDER and STEPHEN PERLBINDER,
Petitioners-Appellants,

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

against

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

and

THERESA AGLI, CHARLES BACHRACH, JOAN BEECHER, LYNN CANTRELLA, PAUL COFFARO, JAY HARPER, ANDRES JIMINEZ, ROBERT LAMMERT, ANNABEL LARKIN, JAMES MCCARTHY, DENNIS MCDONNOUGH, RALPH MOLTER, BUN WAH NIP, KARL OHM, ADRIENNE SCHERBERG, EDGAR TATUM and ANTHONY VERLAAN,
Respondents-Tenants-Respondents.

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BRIEF OF RESPONDENT-RESPONDENT DIVISION OF HOUSING AND COMMUNITY RENEWAL

PRELIMINARY STATEMENT

In this appeal, appellants, who are the owners of the subject premises at 665 and 669 Second Avenue and 243 and 245 East 36th Street, seek to reverse an decision and order of the Supreme Court, New York County (Silbermann, J.) entered on March 2, 1992. The Court's order affirmed an order of the Deputy Commissioner of respondent New York State Division of Housing and Community Renewal (hereinafter the "DHCR"), issued March 19, 1991, which denied, after a full hearing, appellants' application to terminate a finding of harassment that had been imposed against them by DHCR by order issued on October 30, 1985, and that had been affirmed by this Court.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

1. Did the Commissioner properly deny appellants' application to terminate a finding of harassment?

The court below answered in the affirmative.

STATEMENT OF THE NATURE OF THE CASE

One of the most serious findings that DHCR, the city rent agency, can make is that a landlord is guilty of harassment. The statute, §26-412(d) of the Administrative Code of the City of New York, requires that there be a full oral evidentiary hearing before there can be a finding made that the landlord:

> with intent to cause any tenant to vacate housing accommodations or to surrender or waive any rights of such tenant under this chapter or the regulations promulgated thereunder, to engage in any course of

> conduct including, but not limited to, interruption or discontinuance or essential service which interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, or quiet of such tenant in his or her use or occupancy of the housing accommodations.

In this case, there had been a long trial before Justice Ascione, in which the Court dismissed all the attempts by the landlords to evict the tenants. The Court also entered a series of injunctions against appellants, finding that they had conducted what the Court labeled as a "total assault" on the tenants from the time they purchased the subject premises in the early 1980's. Based on the findings of Supreme Court, and the testimony and exhibits before it, DHCR concluded that the landlords had conducted "guerilla warfare" against the tenants, found appellants liable for the willful and unlawful harassment of the tenants at the subject premises, and assessed civil penalties in the amount of $13,500.00. The stabilized apartments were, as required by law, made subject to the city rent control law. By judgment dated March 28, 1986, the Court (Dontzin, J.) dismissed the Article 78 proceeding challenging this finding of harassment.

The rent and eviction regulations permit a landlord to apply to vacate the findings of harassment. Pursuant to 9 N.Y.C.R.R. §2206.5(c), a landlord may, no earlier than one year after the order finding harassment is issued, apply to the rent agency for an order terminating the finding of harassment "by submitting affirmative proof that the proscribed course of conduct has not been engaged in since the issuance of such order." Appellants have twice applied under this provision to vacate the harassment finding. In both proceedings, DHCR found that appellants had failed to establish that they met this significant burden.

In the instant proceeding, after reviewing the harassment order and the order denying the first application to vacate; after a 19-day hearing in which both the appellants and the tenants presented

extensive testimony concerning the landlords' conduct since the harassment order had been issued; and after reviewing the hundreds of documents -- legal papers, photographs, letters, bills, private investigators' reports, etc. -- submitted by both sides, DHCR determined that the credible evidence did not support a conclusion that the course of conduct that had led to the finding of harassment had ceased. Thus, the applications were denied.

It must be noted that appellants bought the buildings in order to demolish them. They stated their intention immediately. They continue to this day to desire to demolish the building. But now that there is a finding of harassment against the buildings, the landlords cannot demolish them until the finding is vacated.

The Commissioner's ruling denying the first application to vacate the harassment finding demonstrated that wholesale misconduct had been continued by the landlords.

Security, a critical concern because the subject premises are located near the Midtown Tunnel in an area where there are many "flower peddlers, window washers and vagrants", continued to be ignored by the landlords. The landlords had allowed their employees to aid these people, who have caused a very significant disruption in the lives of the tenants (in fact, even appellants' own employees testified about their fear of these people). The firing of the on-site superintendent and the other actions taken by appellants exacerbated this problem of security for the subject premises. Rather than terminating their proscribed course of conduct, the landlords, in several significant respects, continued the same pattern as before.

Other actions of appellants also showed that the landlords had not established that the course of conduct had been terminated. Unjustified private investigations of tenants continued; unjustified rent bills were sent to the tenants; a tenant was served in court for non-primary residency when she

still resided in the building; another tenant was accused of causing "structural" damage, when appellants had no reason to so believe; letters which could have been sent by regular mail were instead sent by certified mail in order to upset tenants. All these actions caused the tenants great distress and fear (especially in the context of the past "guerrilla warfare" by the landlords against the tenants). They believed that appellants still would attempt to force them to leave their homes.

With regard to the second application to vacate the harassment finding, although the Administrative Law Judge's findings and recommendations noted areas of improvement, appellants still had not ceased the proscribed course of conduct in three significant areas: private investigations, security, and the hiring of an on-site superintendent.

The private investigations, which appellants euphemistically characterize as "paper" investigations, demonstrate a calculated, willful, and extensive invasion of privacy. The information gathered in these investigations include details of telephone calls such as date, telephone number and party called, information on bank accounts such as account numbers and balances, information on health insurance and credit accounts, dates and nature of traffic violations, and employment information. The Administrative Law Judge found that there was no reasonable justification for these investigations.

The appellants were found to have continued to decrease services by failing to provide an on-site superintendent. This was found to be an essential service in the April 12, 1988 order denying the first application to vacate the harassment finding, and in a separate services proceeding decided by the Commissioner and affirmed by the Court. S&M Enterprises v. DHCR, Index No. 21710/88, Sup. Ct., N.Y. Co., L.Cohen, J., Oct. 4, 1989.

Finally, the Administrative Law Judge found that appellants had continued in their failure to fully provide security services with regard to front entrance doors, fences, and the provision of a resident superintendent.

Under all the circumstances, and after reviewing the evidence, the Deputy Commissioner concluded that appellants had not adequately established that the "course of conduct" had terminated. Therefore, he denied appellant's application to terminate the finding of harassment.

This finding is without prejudice to an application by appellants at an appropriate time in the future, at a time when they can affirmatively establish that the course of conduct that led to the finding of harassment has indeed been terminated and that they maintain all essential services for the tenants and have not unilaterally withdrawn essential services, (unless they have received an order from DHCR permitting the withdrawal of such services).

As the finding of the Deputy Commissioner was neither arbitrary nor capricious, the proceeding should be dismissed and the petition denied. It is respectfully submitted that the order in this case fully meets that test and therefore the order is subject to judicial affirmance.

BACKGROUND

To understand the circumstances of this proceeding, one must look to the background and history of the relationship between these landlords and the tenants. In August 1980 and January 1981 the landlords purchased six buildings at Second Avenue and 36th Street, including the four remaining buildings which are the subject of this proceeding.

Shortly after purchasing the properties, the landlords filed applications with the CAB to remove the buildings from the rental market and to demolish the buildings. They also commenced a campaign of "guerilla warfare" against the tenants. As found by Justice Ascione in a Supreme

Court decision dated October 14, 1981, the landlords' assault was total. They improperly demanded that the tenants "voluntarily" relocate, subjected them to "a barrage of phone calls at all hours of the day of night" and "a campaign of strict enforcement of lease provisions", sending a series of letters by certified mail, rather than by regular mail, solely to upset and inconvenience tenants. After commencing holdover proceedings against all the tenants and after the tenants started their own action in Supreme Court, staying the termination notices, the landlords unilaterally destroyed fences and a backyard garden on March 17 and 18, 1981.

After a massive month-long trial, the Justice Ascione stated:

> In reviewing the testimony and exhibits of this trial in its totality, this court is impressed by the massive effort of defendant [landlords] to empty these buildings of their tenants. The "assault" was total. Apart from the activities previously recited, defendants went so far as to retain private investigators at great expense, to follow tenants and observe and repeat their habits and personal lifestyles..... these tenants were literally besieged in their own apartments and at their places of employment, and subject to unrelenting and unwarranted harassment and pressure.

The trial court refused to force the tenants to turn over keys to their apartments or to allow inspections by the part-time superintendent or the landlords, as the landlords would simply use such a procedure as a pretext to evict tenants.

After denying the landlords' motion for reargument, the Court (Ascione, J.) entered a judgment dated March 20, 1984 and entered on May 31, 1984, which dismissed all the landlords' causes of action but granted an extensive permanent injunction to the tenants. This injunction, among other things, permanently enjoined the landlords from "destroying, altering or interfering with the backyards, from "harassing plaintiffs [tenants] through the use of private investigators" and

mandatorily enjoined the landlords to increase security by requiring him to erect a chain-link fence, install secure fireproof entrance doors and maintain all fencing along the building lines of the site.

The Appellate Division, First Department affirmed the judgment of the trial court on October 29, 1985. On January 7, 1986, the landlords' motion for reargument and/or leave to appeal was denied by the Appellate Division, First Department.

Meanwhile, applications 1) by the landlords to demolish the buildings and 2) by the tenants for a finding of harassment were pending before the New York City Conciliation and Appeals Board. Tenants testified about the landlords' failure to make repairs and repeated efforts to force them to vacate their regulated apartments. For example, one tenant was threatened with vandalism and fires if she would not leave. The CAB hearings were adjourned pending the trial before Justice Ascione. On December 22, 1981, after Justice Ascione's 1981 decision, the CAB issued an order pursuant to §§7 and 52A of the former Rent Stabilization Code finding the landlords guilty of harassment, revoking their membership in the Rent Stabilization Association and subjecting all the apartments to the City Rent Control Law.

The landlords commenced an Article 78 proceeding challenging the determination. In S & M Enterprises v. CAB, Index No. 8758/82, N.Y. Sup. Ct., 9/28/82 (Hon. George Bundy Smith, J.), the Court, by judgment entered November 29, 1982, dismissed the petition, finding that based on the total evidence, including the hearing testimony before the CAB and the trial testimony before Justice Ascione, that the Order was neither arbitrary nor capricious. On April 10, 1984, the Appellate Division, First Department affirmed the judgment with costs, on July 3, 1984 and October 18, 1984, the Appellate Division and the Court of Appeals, respectively, denied leave to appeal.

Additionally, in 1982, twenty-one days of hearings were held by the Office of Rent Administration of the New York City Department of Housing Preservation and Development ("HPD"), after the tenants of the rent control apartments in the buildings filed claims of harassment by the landlords and HPD issued a Notice of Hearing. A further five days of hearings were held in 1984 before the same Administrative Law Judge, then employed by DHCR, as DHCR assumed the responsibilities of HPD on April 1, 1984, pursuant to Chapter 403 of the Laws of 1983.

By order dated October 30, 1985, the Deputy Commissioner adopted the findings and recommendations of the Administrative Law Judge in finding of the landlords guilty of harassment and in imposing $13,500 in penalties.

The landlords were found to be guilty of several courses of conduct constituting harassment. They were found to have "unilaterally engaged in guerrilla war against the entire tenant body" by serving frivolous notices and commencing proceedings which were a "misuse of civil process", based on questionable and speculative grounds. Furthermore, the landlords had "unleashed" investigators and photographers in order to annoy and frighten the tenants. The Commissioner also found a decrease in essential services (the superintendent services and the backyard). The landlords were required to maintain all essential services, unless and until they received an order from DHCR which permitted him to terminate an essential service. He was also found to have failed to timely and adequately make numerous and needed repairs, both to the exterior and interior of the apartments. The landlords, it was also found, failed to sweep and wash the public halls, maintain the garbage rooms, and maintain extermination services, and heat and hot water systems.

The landlords also commenced an Article 78 proceeding against that determination. By decision and judgment dated March 28, 1986, the Court (Dontzin, J.) denied the application and

dismissed the petition. The landlords raised a multitude of claims as to why the finding of harassment was arbitrary and capricious. The Court rejected them all.

In pertinent part, the Court stated:

> Respondent [DHCR] expressly took cognizance of the corollary proceedings before the CAB and in the Supreme Court before Justice Ascione in the McDermott case. Respondent issued its findings of harassment based on the such evidence of record including the above Supreme Court decision of October, 1981. Respondent found that petitioners had "unilaterally engaged in guerrilla warfare" and in "general and wholesome misuse of civil process." Again, respondent clearly had before it sufficient evidence to enable it to make an independent finding of harassment. Respondent is unquestionably entitled to take cognizance of the corollary action in the Supreme Court. Between these parties which involved many of the same facts and allegations (Schwartz v. Public Administration of Bronx, 24 NY2d 65, see also, S & M Enterprises v Conciliation and Appeals Board, et al, Sup Ct NY Co, Index No. 8758/82, Smith, J., aff'd __AD2d__).

The Court, in its decision and judgment, also noted that questions of credibility are for DHCR the administrative agency, to determine, and that the penalties did not shock the conscience of the Court, that there was a rational basis in the record for the agency's determination even in the absence of the complaining tenant:

> The administrative agency responsible for the enforcement of the rent control laws, also has a protectible interest and may proceed (even) in the absence of the tenant.

Furthermore, the Court held:

> Respondent's finding that petitioner had repeatedly instituted often groundless eviction proceedings is certainly supported by substantial evidence (see Equity Investments v. Joy, 58 AD2d 539).

At the same time that appellants were pursuing all this litigation, it was also pursuing its administrative remedies.

From the time it purchased the various properties in 1980 and 1981, appellants made it clear that they intended to demolish the buildings. At both 247 and 249 East 36th Street, appellants were able to empty the premises of tenants and demolish them. (It is the fencing around the vacant lots formerly occupied by those buildings which was found to be inadequate in the instant proceeding.)

For the other buildings, however, it made application to the rent agencies for permission to demolish after their initial campaign of "voluntary" relocation proved unsuccessful. The initial application, filed with the rent agencies in January 1981, was not granted. The regulations forbid a landlord to obtain an order allowing demolition within one year of the issuance of an order finding harassment. See §26-413(b)(3)(a) of the Administrative Code of the City of New York.

After the one year had expired, on July 1, 1986 appellants again filed applications with DHCR to evict the tenants and demolish the buildings. The District Rent Administrator denied the application on March 31, 1987. A PAR was filed by the landlords.

In addition, on December 3, 1986, the landlords filed an application with DHCR seeking to have the harassment finding vacated. After extensive proceedings, including ten days of hearings and the submission of numerous exhibits, DHCR issued an order on April 12, 1988, finding that the landlords had failed to establish that the proscribed courses of conduct had ceased for the required one year period. The Commissioner made the following findings:

(1) The landlords had continued their practice of having tenants investigated by private detectives and having employees and independent contractors observe and report on the tenants' activities, whereabouts and living situations.

(2) The landlords had continued to threaten and pursue spurious proceedings against the tenants.

(3) The landlords had further decreased services by firing the on-site superintendent and failing to replace him.

(4) The landlords had failed to make diligent, prompt and workmanlike repairs.

(5) The landlords had failed to properly maintain the public areas and garbage disposal areas.

(6) That there had been a decrease of security at the subject properties in that (a) the on-site superintendent was removed despite the increase in vagrants, window washers and peddlers in and around the premises, (b) doors had been left unlocked for extended periods of time, (c) the cellar entrance doors had been locked without furnishing keys to tenants.

(7) The landlords billed tenants for sums in excess of registered rents.

Subsequent to the denial of the application to vacate the harassment finding the Deputy Commissioner, on April 28, 1988, affirmed the denial of the applications to demolish the buildings. The landlords brought Article 78 proceedings challenging both the denial of the application to vacate the April 12, 1988 harassment finding and the denial of the application for permission to demolish. The denial of the application to vacate the harassment finding was confirmed by the Appellate Division, First Department by order issued on April 25, 1989, without opinion. Leave to appeal to the Court of Appeals was denied. After the conclusion of that litigation, appellants withdrew the Article 78 proceeding which had challenged the denial of the demolition application.

In a separate administrative proceeding commenced by nineteen tenants residing in the subject buildings alleging a reduction in services, the Commissioner, in a PAR order issued on September 27, 1988, found that the landlords were required to provide a resident superintendent at one of the four buildings or within 200 feet of the premises, and that the services of an outside contractor and off-site superintendent to do emergency repair work is not a proper substitute. This

order was upheld by the Court in S&M Enterprises v. DHCR, Index No. 21710/88, L.Cohen, J., October 4, 1989:

> This court finds that, even if the building were not required to have a resident superintendent under the Housing Maintenance Code, DHCR reasonbly [sic] found that a resident superintendent had been provided on the applicable date and that the landlord then improperly sought to reduce such service.

Appellants a second time applied to DHCR on April 20, 1989, for termination of the October, 1985 harassment finding.

In another set of separate proceedings, the Rent Administrator, in four orders issued in June, 1989, and modified on January 4, 1990, found that there was a resident superintendent, that front door locks were adequate, and that fences were not defective. However, the tenants have pending PARs seeking administrative review of those determinations. Additionally, with regard to the superintendent service, the Commissioner, in the order hereunder review, has found the Rent Administrator to be in error. The PARs are still pending with regard to the remaining issues.

COUNTER-STATEMENT OF THE FACTS

Based on the landlords' application to terminate the finding of harassment, on May 18, 1989, DHCR sent a Notice of Formal Hearing, scheduling hearings on the application. During nineteen days of hearings over a seven month period, the Administrative Law Judge heard testimony from multiple witnesses testifying for the appellants and tenants.

The testimony of the witnesses is set forth in great detail in the "Findings and Recommendations for Continuance of Finding of Harassment". In addition, numerous exhibits were introduced at the hearing by both landlords and tenants. The Court is respectively referred to the Findings and

Recommendations for an accurate summary of the testimony of the witnesses and the exhibits submitted by all sides.

On March 6, 1991, the Administrative Law Judge issued his "Findings and Recommendations', finding that appellants had failed to establish that the finding of harassment should be vacated. On March 19, 1991, the Deputy Commissioner issued the order under review herein, denying the application to vacate the finding of harassment.

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

> ... the ALJ's conclusions are based upon credible evidence which rationally and reasonable allowed the ALJ to conclude that petitioner had not discontinued the conduct which had been proscribed in the earlier harassment order. Petitioner's argument that the ALJ was "nitpicking" technicalities does not overcome the burden which petitioner must meet to reverse an administrative agency's findings.

(R. 12) A copy of the Court's opinion is annexed to this brief.

ARGUMENT

THE COMMISSIONER'S FINDING THAT APPELLANTS HAD NOT TERMINATED THE COURSE OF CONDUCT THAT WAS THE BASIS OF THE PRIOR FINDING OF HARASSMENT, SO THAT THE LANDLORDS' APPLICATION TO VACATE THE FINDING OF HARASSMENT WAS DENIED, WAS NEITHER ARBITRARY NOR CAPRICIOUS AND IS ENTITLED TO JUDICIAL AFFIRMANCE.

A. Legal Framework.

The Local Emergency Housing Rent Control Law (§§8600 et seq. of McK. Uncons. Laws) and its implementing regulations allow a landlord who has had a finding of harassment imposed against him to seek to have that finding vacated by filing an application to the city rent agency, now the New York State Division of Housing and Community Renewal, at least one year after the order is issued, on the basis that he can affirmatively establish that the proscribed course of conduct has been terminated.

9 N.Y.C.R.R. §2206.5(c), formerly §74(c) of the City Rent and Eviction Regulations, the regulation that permits a landlord to apply to vacate a finding of harassment, provides as follows:

> Where the administrator makes a finding of harassment with respect to housing accommodations in which the affected tenant or tenants have not vacated, the landlord may, no sooner than one year after such harassment order is issued, apply for an order terminating such finding by submitting affirmative proof that the proscribed course of conduct has not been engaged in since the issuance of the order. In the event the tenant or tenants of housing accommodations affected by such order vacate at any time after the commencement of the harassment proceeding, the landlord may, no sooner than two years after the issuance of such order, apply for an order terminating the finding of harassment by submitting affirmative proof of the voluntary surrender of the vacated housing accommodation by the tenants in occupancy when the harassment order was issued and the

> discontinuance of the proscribed course of conduct from the dated of such order. (emphasis added)

As correctly understood by the court below, the criterion for determining whether or not a finding of harassment should be terminated differs from the elements upon which a finding of harassment in the first instance are based. Appellants, throughout this litigation, have obfuscated the issue by claiming that the Commissioner made "findings of harassment" in the administrative proceeding. The Commissioner did not make findings of harassment. That was done in the 1985 harassment order. Rather, in this proceeding, the Commissioner concluded that the appellants had failed to establish that the previously proscribed course of conduct had ceased. That is the only finding to be made in considering whether or not to vacate a finding of harassment.

The standard is made clear in Meko Holding Inc. v. Joy, 107 A.D.2d 278, 486 N.Y.S.2d 201 (1st Dept. 1985):

> Thus, the controlling law establishes that once a finding of harassment has been issued in the form of an order against a landlord, with sanctions imposed, there is an affirmative duty on that landlord, or his successors, to come forward with convincing evidence that the conditions of harassment which led to those sanctions no longer exist, before the findings can be vacated and the sanctions lifted. (emphasis added)

486 N.Y.S.2d at 205. In Meko, the landlords who sought to have the harassment finding lifted were the successors to the landlord who was found guilty of harassment in the first instance. The new landlords' application was denied despite the Commissioner's conclusion that harassment motivation was not present in their conduct. This Court upheld the denial of the application to vacate. In concluding that the presence of harassment motivation was not relevant in considering the termination of a harassment finding, the Court noted that:

> Based upon the record of hearings before him the rent commissioner reached the conclusion, in his order of March 2, 1981, that the failure to provide essential services in the form of maintenance and operation of the premises at a satisfactory level, "similar [to the] failures of maintenance and operations [which] were part of the basis for harassment findings in 1971 and 1975", were still in evidence as late as June 29, 1979, the date of the last hearing. The Commissioner concluded that the present landlords did not appear to have a harassment motivation in failing to provide these essential services. While such a conclusion might have been relevant in considering de novo harassment allegations, that was not the case before the Commissioner. Rather he was considering an application to terminate sanctions for harassment. At least as of June 29, 1979, the new landlords had not borne the burden of improving the conditions brought about by their predecessors to such an extent as to be entitled to a lifting of those sanctions for the earlier findings of harassment. And the Commissioner so ruled.
>
> (emphasis added)

486 N.Y.S.2d at 205. In the case at bar, the court below properly applied the standard as enunciated by this Court in Meko.

This same standard was applied in J & E Florescent Fixture Assembly & Lighting Co. v. Muniz, Index No. 4427/80, N.Y. Sup. Ct. 9/29/80 (Cahn, J.), in which the Court dismissed a petition challenging an order denying a landlord's application to vacate a finding of harassment:

> Respondents denied the application, on the grounds that the conduct proscribed in the harassment order had not ceased until more than a year later. (Sect. 74c of the regs. require petitioner to show discontinuance of the proscribed course of conduct from the date of such order.)
>
> After carefully considering the transcript of the hearing, and the documents submitted, the court cannot find that the respondents acted in an arbitrary and capricious manner. Therefore the petition is dismissed.

Appellants' characterization of the standard to be applied, and of the holding in Meko, is incorrect. The distinction they attempt to draw between "harassment intent" and "harassment" is

meaningless, as "intention" is one of the elements of harassment itself. This Court was correct in Meko in focussing on the conditions of harassment, not whether harassment itself is continuing.

Appellants on pages 23-24 of their brief make reference to certain findings made by the hearing officer in Meko but not addressed in this Court's opinion. Those findings suggest that the level of continuing misconduct in that case may have been more egregious than that in the case at bar. However, the fact that that may be the case does not vitiate the difference in standards to be applied when making an initial finding of harassment and when deciding whether such a finding should be terminated. Nor does it vitiate this Court's clear enunciation of the difference in those standards in its opinion in Meko.

It is well settled that the agency's interpretation of the statutes and regulations which it administers is entitled to great weight. Salvati v Eimicke, 72 N.Y. 2d 784, 537 N.Y.S. 2d 16 (1988). In 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) this Court, in upholding the Board's application of §54 of the Rent Stabilization Code, stated in pertinent part:

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

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

> Due to the unique nature and the function of the Conciliation and Appeals Board, it might be available to give more than ordinary weight to their opinion in matters of this nature. Ordinarily, courts will defer to construction given statutes and regulations by the

> agencies responsible for their administration if said construction is not irrational or unreasonable' Albano v. Kirby, 36 N.Y.2d 526.

DHCR's interpretation of its regulation concerning the lifting of a finding of harassment is reasonable, follows this Court's holding in Meko, and is entitled to judicial deference. Hence, that portion of appellants' brief (pp. 25-32) which argues that DHCR's order is invalid because the conduct upon which DHCR bases its determination is not harassment, is irrelevant. DHCR is not required to make renewed findings of harassment when a landlord files an application to lift a prior finding of harassment. The issue in the proceeding is not whether appellants' conduct constitutes harassment but whether appellants ceased the proscribed course of conduct - whether the conditions which constituted harassment have ended.

It should be noted that even though a landlord may have eliminated many of the conditions of harassment, if even one of the courses of conduct still remains, it is within the authority of the Commissioner to deny an application to vacate a harassment finding. The situation is similar to that in service decrease cases under the Rent Stabilization Law where there has been a rent reduction based on a failure to maintain services. As this Court held in ANF Company v. DHCR, N.Y.L.J., Oct. 15, 1991, p. 26 cols. 4 and 5, a service reduction case in which some, but not all services had been restored:

> The agency's denial of a partial restoration of the rent in this case is a correct application of section 26-514, which, with respect to restoration, provides, "The restoration of such services shall result in the prospective elimination of such sanctions." The restoration contemplated is not piecemeal compliance but a restoration of all reduced services. (emphasis added)

Similarly, in the case of harassment, piecemeal compliance and half-measures are insufficient.

The standard for judicial review of an administrative proceeding which requires a hearing is whether the determination by the Commissioner is based on substantial evidence. Application of Breger v. Macri, 34 N.Y.2d 727, 357 N.Y.S.2d 494 (1974). As the Court of Appeals said in Breger:

> "In view of the limited jurisdiction of the courts in reviewing administrative determinations under Article 78 of the CPLR, we must confirm the determination here since there is substantial evidence to support it in this record."

It is respectfully submitted that the findings of the Commissioner in the case at bar are amply supported by substantial evidence. In Gramatan Ave. Assoc. v. State Division of Human Rights, 45 N.Y.2d 176, 181, 408 N.Y.S.2d 54, 57 (1978), the Court of Appeals defined substantial evidence as:

> ...proof within the whole record of such quality and quantity as to generate conviction in and to persuade fair and detached fact finder that, from the proof as a premise, a conclusion or ultimate fact may be extracted reasonably - probatively and logically.

The Court added to its characterization of substantial evidence:

> Marked by its substance - its solid nature and ability to inspire confidence, substantial evidence does not rise from bare surmise, conjecture speculation or rumor. [citations omitted] More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt. Supra, at 180 and 56.

Moreover, it is a settled principle of administrative law that issues as to the credibility of witnesses are for the administrative body to determine as the sole trier of fact. The duty of weighing the evidence, where from the evidence either of two conflicting inferences may be drawn, rests solely upon the administrative body. A court may not weigh the evidence and substitute its judgment for

that of the administrative body where the testimony is conflicting and room for choice exists. In Stork Restaurant Inc. v. Boland, 282 N.Y. 256, 26 N.Y.S.2d 247, the Court of Appeals said:

> [w]here there is a conflict in the testimony produced *** where reasonable mean might differ as to whether the testimony of one witness should be accepted or the testimony of another witness be rejected, where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests upon the [administrative agency].The court may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists

And in Berenhaus v. Ward, 70 N.Y.2d 444, 522 N.Y.S.2d 478 (1988), the Court of Appeals said:

> It is basic that the decision by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts, who are disadvantaged in such matters because their review is confined to a lifeless record. The Hearing Officer before whom the witnesses appeared, on the other hand, was able to perceive the inflections, the pauses, the glances and gestures-all the nuances of speech and manner that combine to form an impression of either candor or deception.

The same standard set forth by the Court of Appeals in Stork was applied to a determination of the Conciliation and Appeals Board (DHCR's predecessor in enforcing the Rent Stabilization Law in New York City), by this Court in Lurie v. Popolizio, 86 A.D.2d 835, 447 N.Y.S.2d 464 (1st Dept. 1982). And in Matter of Belnord Holding Corp. v. Joy, 73 A.D. 2d 549, 423 N.Y.S. 2d 3 (1979) unan. aff'd. 52 N.Y. 2d 945, 473 N.Y.S. 2d 968 (1981), the Court stated:

> Questions of credibility and inferences of fact were for appellant to make...On the record we are unable to say that appellant's determination was without rational basis or not based on substantial evidence.

Thus, it is well settled that the Court's function is accomplished when it finds the agency's determination is supported by a substantial basis in the record. Questions as to the credibility of the witnesses are left to the agency before which the hearing took place.

On October 30, 1985, DHCR found these appellants, based on its conduct and actions taken against the tenants at the subject premises, liable for harassment and imposed the appropriate penalties against appellants. The appellants have twice applied to vacate the finding of harassment. The first application was denied by DHCR on April 12, 1988. That denial was confirmed by this Court, on April 25, 1989, and leave to appeal to the Court of Appeals was denied. The second application was denied by DHCR in the order hereunder review.

Within the framework of the law as described above, the Administrative Law Judge reviewed the testimony of the witnesses and the documents presented to DHCR. Detailed findings of fact were made which support the determination of the Deputy Commissioner. It was neither arbitrary nor capricious to conclude for the Commissioner to conclude that the landlords had failed to meet their burden -- their affirmative duty -- to establish that the finding of harassment should be vacated.

Appellants argue that they have been held to a higher standard than other landlords. What they ignore in this argument is that they, unlike most other landlords, have been the subject of repeated administrative orders and court injunctions proscribing the type of behavior which they nevertheless continue to manifest. What is singular is not the allegedly different standards to which they are being held, but the nature and arrogance of their conduct over the past decade. Although their conduct has apparently improved in certain areas, partial compliance and half-measures are insufficient. Given the horrific history of these landlords - their "guerilla warfare" and "total assault" on the tenants - and their failure to fully comply with prior administrative orders and court injunctions and cease all proscribed conduct, the Commissioner was fully justified in refusing to vacate the finding of harassment.

B. <u>Private Investigations</u>

Appellants admitted at the hearing that they hired private investigators to determine if three tenants, Ms. Bun Wah Nip, Ms. Janet Verlaan, and Mr. Dennis McDonough, were using the subject premises as their primary residences or if appellants could start summary proceedings to evict them.

In the context of these landlords' actions ever since it purchased the building, this conduct is especially critical. As part of its guerrilla warfare and the "total assault" on the tenants, the Supreme Court found that appellants used private investigators to disrupt the tenants' lives and commence summary proceedings against tenants, actions that the Court found baseless. In the thirteenth paragraph of its interlocutory judgment dated March 20, 1984, the Court (Ascione, J.) enjoined appellants from "harassing the tenants through the use of private investigators or photographing of plaintiffs [tenants]". (R. 211) Years later, in 1989, after having completed the three investigations in question, the landlords sought a modification of the injunction so as to permit "paper" investigations. The Court (Glen, J.) concluded that "an order now permitting defendants to so limit the original order [to permit "paper" investigations] would severely prejudice the plaintiffs." (R. 266)

In addition to these court orders, the October, 1985 harassment finding was also based, in part, on the use of private investigators:

> ....respondents unleashed private investigators and photographers on the tenants including respondent, Mark Perlbinder, who used the situation as a frolic in one case to pursue an elderly tenant who did not know him, from the lobby to the top floor of her building, understandably frightening her, all in the name of and claimed purpose of identifying the tenants.

(R. 164)

The April 12, 1988 findings upon which the Commissioner denied the first application to vacate the harassment finding also addressed the continuing problem of private investigations:

> Based upon the credible evidence of record it is found:
>
> 1. That the applicants have failed to prove, that since the issuance of the harassment order, they have not engaged in proscribed courses of conduct, including those which led to the harassment finding.
>
> (A) The testimony of Mark Barton Perlbinder himself as well as the testimony of Susan Bogutsky clearly supports a finding that the applicants have continued their earlier practices of having tenants investigated by private detectives as well as having employees and independent contractors observe the tenants and report on the tenants' activities, whereabouts and living situations.

(R. 203)

In the order here being challenged, the Administrative Law Judge found that appellants did not meet their burden of establishing that the investigations were justified:

> The applicants have continued the practice of having tenants investigated by private investigators without reasonable cause. It is undisputed that Barton Mark Perlbinder authorized investigations of three tenants in the summer of 1988 to determine whether or not such tenants actually resided elsewhere. Such authorization was given only three months after an Order was issued by DHCR denying the landlord's previous application to terminate the finding of harassment. Considering that the denial was based in part on the landlord's continued practice of investigating tenants, it would have been prudent for the landlord to refrain from engaging in such conduct altogether. However, once the landlord decided to resume the practice of investigating tenants, the burden was on the landlord to prove that there was a reasonable justification for such action.

(R. 131) The Administrative Law Judge also noted that Justice Glen, in referring to the October, 1985, and April, 1988 DHCR orders,

> ...stated that those orders "make clear that the use of private investigators without good cause constitutes harassment under the Rent Control Law." (emphasis added)

(R. 133)

Appellants argue that the Commissioner improperly denied the application to vacate the harassment finding because the investigations were done only on "paper" and the tenants were unaware of them. This argument erroneously implies that the prior court and administrative orders only precluded investigations which involved following, surveillance, or photographing the target. This is not the case. Neither the Court's injunction nor the prior DHCR orders make any distinction between "paper" and other types of investigations. Justice Glen, as noted by the Administrative Law Judge, found that:

> "In seeking clarification of the earlier judgment, defendants are collaterally attempting to have the determinations of the DHCR set aside by enlarging the judicially permissible uses of private investigators, such a result may not be allowed."

(R. 133)

Appellants read their obligations far too narrowly. The hiring of private investigators, whether for "paper" or other types of investigations, are encompassed in the proscribed "course of conduct" that appellants must terminate. Appellants cannot be allowed to escape the finding of harassment by slightly changing the tactics that constituted the original conduct that resulted in the harassment finding.

Nor can appellants evade the restrictions placed upon them by claiming that the proscribed course of conduct is the use of "private investigations as an instrument of harassment." This phrase is appellants' gloss on the administrative and court orders. As discussed on pp. 19-22 of this brief,

the issue in this proceeding is not whether the current conduct constitutes harassment, nor whether the current conduct has harassment as a motivation, but whether the conduct or conditions which led to the original finding of harassment have ceased. Clearly, they have not.

In the court below, appellants characterized the investigations as "unobtrusive". However, the investigative reports in fact demonstrate a calculated, willful, and extensive intrusion into the tenants' privacy. The information gathered in these investigations include details of telephone calls such as date, telephone number and party called, information on bank accounts such as account numbers and balances, dates and nature of traffic violations, information on health insurance and credit accounts, and employment information. If these investigations were to be characterized as unobtrusive simply because the targets did not know of them at the time of the investigations, the use of secret cameras installed to film activities in an individual's apartment without the knowledge of that individual would equally be considered unobtrusive.

It is clear from Justice Ascione's injunction, from the subsequent DHCR determinations, and from Justice Glen's order, that private investigations, as well as the taking of photographs and the like, are proscribed. No distinction is made between "paper" investigations and other kinds of investigations in those orders and determinations. Appellants' claim that their conduct should be excused has no merit.

They also argue without merit that the private investigations were justified. They base this argument on two basic points; one, that the absence of a tenant over a period of several weeks during the summer is sufficient justification to trigger an investigation into their primary residency; and two, that the tenants' buyout demands warranted a surreptitious investigation to see if they actually resided on the premises.

The evidence revealed that Bun Wah Nip was visiting family in Hong Kong for six weeks during the summer of 1988; that Dennis McDonough was away for long weekends during that summer and did not have a house-sitter or telephone answering machine; and that Janet Verlaan had not been seen by two neighbors that summer, including one who lived around the corner.

The Administrative Law Judge stated the general lack of cause in these instances well:

> All tenants have the right to the peaceful and quiet enjoyment of their housing accommodations without interference from their landlord and this includes the right to be away from their apartment on occasion without notifying the landlord. If tenants were burdened with the knowledge that private investigators might be sent by the landlord to check on their whereabouts whenever they went on vacation or otherwise left their apartment for more than a few days, then their peaceful and quiet enjoyment of their housing accommodations would be severely compromised.

(R. 134) Moreover, the minimal time during which the affected tenants were observed to be away does not come near to constituting a reasonable suspicion that their primary residence might have been elsewhere.

As for appellants' alleged justification based on the buy-out negotiations (if it has any merit at all), the concern for proof of the tenants' primary residence could have been directly and openly addressed in the negotiations rather than through surreptitious investigations.

The Administrative Law Judge aptly characterized the underlying attitude of disregard displayed by appellants:

> There is a certain arrogance demonstrated by engaging in questionable conduct only three months after DHCR has issued an order proscribing such conduct and then going into court many months later in an attempt to validate such conduct. Had Mr. Perlbinder truly intended to clean up his act, the motion [before Justice Glen] to limit the prohibition on private investigations would have been made shortly after the April 12, 1988 DHCR Order instead of ten months

> later and the further investigation of tenants would have awaited the outcome of such motion.

Appellants' evidentiary arguments as to the inferences drawn by the Administrative Law Judge are misplaced. In the first place, even if the hearsay testimony as to conversations with neighboring tenants about Janet Verlaan is relevant to appellants' state-of-mind, the state-of-mind which would have been produced in appellants' mind by such conversations would not be sufficient to justify the private investigations. (See the preceding discussion in this section of the brief.) Second, one of the neighbors, Edgar Tatum, appeared as a witness. Nevertheless, he was not questioned by appellants as to the conversations which allegedly took place. Thus, there was nothing improper about the inferences drawn by the Administrative Law Judge. The duty of weighing the evidence, where from the evidence either of two conflicting inferences may be drawn, rests solely upon the administrative body. See, discussion and case citations, supra at pp. 24-26. Finally, these evidentiary issues, even if they did have merit, apply to only one of the three private investigations.

There was substantial evidence for the finding that the private investigations were conducted without reasonable cause.

Under all the circumstances, the Administrative Law Judge was justified in concluding that appellants' pattern of unjustifiable investigations of tenants had not ceased over the year in question. The hiring of private investigators, whether for "paper" or other types of investigations, was clearly encompassed in the "course of conduct" that appellant had to establish had been terminated. Appellants have not met their burden of showing that the proscribed course of conduct has ceased. Their application to vacate the harassment finding was properly denied.

C. On-Site Superintendent

In the proceeding concerning the first application to vacate the harassment finding, it was undisputed by appellants that they unilaterally terminated the services of the on-site superintendent and did not replace him with a new on-site superintendent. Despite the Commissioner's April 12, 1998, order denying that first application and finding that appellants "have further decreased services at the subject premises by firing the on-site superintendent and failing to replace him", appellants continued in their refusal to provide an on-site superintendent. Contrary to appellants' claims, the Administrative Law Judge correctly concluded, on the basis of the record before him, that the Housing Maintenance Code had not been complied with. In the first place, the Commissioner relied upon that Code in the April 12, 1988 order denying the first application to vacate the harassment finding. (R. 204) The order was affirmed by the Appellate Division.

Second, the Administrative Law Judge correctly concluded, on the basis of the administrative record, that appellants had not obtained approval from the New York City Department of Housing Preservation and Development ("HPD") to substitute 24-hour janitorial services for a resident superintendent pursuant to 27-2053(b)(3). The letters and HPD policy statement which have been submitted in this Article 78 proceeding for the first time were not in the administrative record. It is well settled that a court, in reviewing administrative determinations of the Division may not consider arguments or evidence not contained in the administrative record, but must determine whether the agency's determination is rational on the basis of the administrative record before the agency at the time it made its determination. This principle was recently affirmed by this Court in Brusco v. New York State Division of Housing and Community Renewal, __A.D.2d__, 565 N.Y.S.2d 86 (1991), notice of appeal to ct. of appeals dismissed (on different issue); Rozmae Realty v. State Division of

Housing and Community Renewal, 160 A.D.2d 343, 553 N.Y.S.2d 738 (1st Dept. 1990), lv. to appeal den., 76 N.Y.2d 712, 563 N.Y.S.2d 768. In Rozmae the Court stated:

> The landlord now urges that the apartment used by DHCR to establish the legal stabilized rent of the apartment in question was not the same size or otherwise comparable to the apartment whose legal rent was at issue. This contention, however, was not raised in the administrative proceedings before DHCR, and may not be considered for the first time in the judicial review of those proceedings pursuant to CPLR Article 78. (Matter of Klaus v. Joy, 85 AD2d 603)
> (emphasis added)

See also, Fanelli v. Conciliation and Appeals Board, 58 N.Y.2d 952, 460 N.Y.S.2d 534 (1983), aff'g, 90 A.D.2d 756, 455 N.Y.S.2d 814 (1st Dept. 1982), rev'g, N.Y.L.J., January 11, 1982, p. 7, col. 3, (Sup. Ct., N.Y. Co., Blangiardo, J.); Oriental Boulevard v. Conciliation and Appeals Board, 92 A.D.2d 470, 459 N.Y.S.2d 50 (1st Dept. 1983).

Third, it is clear that the Housing Maintenance Code requires a landlord with nine or more dwelling units to maintain an on-site superintendent. It cannot be disputed that 665 Second Avenue and 669 Second Avenue are both buildings with 9 or more dwelling units (as shown by their Certificates of Occupancy). On the base date appellants provided, and therefore must continue to provide an on-site superintendent. The landlord cannot avoid its legal obligations by not renting out an apartment (or several apartments) -- the buildings continue to have the required number of dwelling units, whether or not the landlord chooses to rent out each dwelling unit. Therefore, this provision of the law remains relevant and a legal requirement for this property. This same claim was raised by appellants in S&M Enterprises v. DHCR, Index No. 21710/88, L.Cohen, J., October 4, 1989, and was found to be wanting by the Court.

Fourth, contrary to appellants' allegations, DHCR did not find that there has to be a "24 hour" superintendent. In describing the required "presence" of a resident superintendent, the Administrative Law Judge, discussed the availability of a superintendent to maintain the building and respond to complaints and referred to the "real or perceived" 24-hour presence. He did not reach a conclusion that the resident superintendent has to be full or part-time. What he found to be important was not whether the resident superintendent was employed full or part-time, but that there be the presence of a resident superintendent who carried full superintendent responsibilities rather than the light duties of a caretaker.

Fifth, even were there a lingering question as to the correct application of the Housing Maintenance Code, the fact remains that appellants' continuing failure to provide a resident superintendent without applying to DHCR to substitute or decrease services violates Justice Ascione's directive as well as prior DHCR orders. As Justice L. Cohen held in S&M Enterprises v. DHCR, Index No. 21710/88, October 4, 1989:

> This court finds that, even if the building were not required to have a resident superintendent under the Housing Maintenance Code, DHCR reasonbly [sic] found that a resident superintendent had been provided on the applicable date and that the landlord then improperly sought to reduce such service.

The Administrative Law Judge found that, under the unique circumstances presented in this case, security is central to the issue of providing a resident superintendent. The vagrants, automobile window washers and flower peddlers referred to in the testimony and Administrative Law Judge's findings must be seen as a very real and significant problem for the tenants, one that appellants severely exacerbated when they failed to replace the on-site superintendent.

An on-site superintendent would not have been able to eliminate the security problems, but such a person would be able to significantly aid in controlling the problem. An on-site superintendent would have be around while performing his duties at the premises. As someone representing the landlords, an on-site superintendent would have the authority to remove them from the property. Obviously, someone working four blocks away could do far less to resolve this problem. Similarly, an independent contractor doing maintenance work would have no responsibility with regard to security.

It is indisputable that the on-site superintendent is an "essential service" that the landlords were required by law to maintain for the benefit of the tenants, and that the appellants have never made an application to DHCR to provide substitute services. That this is so has been determined, not only in the various harassment proceedings, but in the Commissioner's PAR order issued on September 27, 1988, in a proceeding involving the tenants' complaints about lack of services. The Commissioner, in that proceeding, found that the landlords were required to provide a resident superintendent at one of the four buildings or within 200 feet of the premises. The order was upheld by the Court in S&M Enterprises v. DHCR, Index No. 21710/88, L.Cohen, J., October 4, 1989:

> This court finds that, even if the building were not required to have a resident superintendent under the Housing Maintenance Code, DHCR reasonbly [sic] found that a resident superintendent had been provided on the applicable date and that the landlord then improperly sought to reduce such service.

In the case at bar, the Administrative Law Judge, in finding that the resident caretakers hired by appellants were not superintendents, noted that:

> They [the caretakers] had full-time jobs during the day and their duties as caretakers were to keep an eye on the buildings (i.e. perform security checks, collect garbage, and be available for tenant com-

> plaints) and not to perform maintenance such as cleaning and repairs except in very limited instances.

(R. 141)

Appellants' failure to hire a new superintendent after issuance of the Commissioner's April 12, 1988 order, or even to apply to DHCR for permission to provide an alternative to a resident superintendent, was part of the same proscribed "course of conduct" that led to the finding of harassment in the first place.

On the question of providing an alternative to a resident superintendent, the regulations are clear that a landlord must apply to the rent agency and secure its approval before decreasing or substituting services. See 9 N.Y.C.R.R. §2202.16. Courts have long required landlords to apply to the rent agency, not the courts, for permission to reduce services. See, e.g., Solomon v. Herman, __Misc.2d__, 219 N.Y.S.2d 465, Sup. Ct., Kings Co., 1961 (Heller, J.).

Moreover, the Justice Ascione's 1981 decision specifically forbade appellants from eliminating essential services without first obtaining permission to do so from DHCR:

> Further, defendants are permanently enjoined from interfering with, demolishing, altering or removing any property from the backyards of 243 and 245 East 36th Street and 665 and 669 Second Avenue and the fences and partitions thereof or from otherwise reducing the essential services to which these plaintiffs are entitled, without first obtaining permission to do so from the applicable administrative agency.

(R. 308)

Appellants failed to meet their burden and establish that they had ceased the proscribed course of conduct. They continued to unilaterally withdraw an essential service - the on-site

superintendent - from the tenants. Under these circumstances, the Commissioner was more than justified in concluding that the finding of harassment should not be lifted.

Appellants argue without merit that DHCR had approved the delivery of janitorial services. In the court below appellants went even further, claiming on the basis of this argument that the denial of the application to vacate the harassment finding is barred by administrative res judicata. In particular they claimed that the Commissioner's finding is barred by orders of the Rent Administrator issued in June, 1989 (R. 241-256), and on January 4, 1990, the latter order modifying the former ones. (R. 313-323) The simple answer to this argument is that PARs have been filed against all of those orders and are pending before the Commissioner. Moreover, appellants fail to apprise the Court that the Administrative Law Judge, in his findings, which were adopted by the Commissioner, makes specific reference to those pending PARs and addresses the question of res judicata:

> Another point that should be addressed is the issue of conflicting findings in two DHCR proceedings. On June 14, 1989, an order was issued (exhibit T6) in reference to the landlord's rent restoration application which partially restored the rent but found that there was no superintendent at the subject premises. On June 21 and 27, 1989, orders were issued (exhibits L43-L46) denying the tenants' building-wide rent decrease application and finding that a resident superintendent was available. The tenants subsequently filed a Petition for Administrative Review (exhibit L56) challenging the determination and the matter is pending to date.

The Administrative Law Judge went on to discuss the merits of the

superintendent issue in the context of the separate proceedings

(R: 143):

> The issue of what constitutes a resident superintendent exists in two parallel proceedings before the Commissioner (the Petitioner for Administrative Review discussed above and the instant case). Consequently, it may be decided in either proceeding. The orders that

> found that a resident superintendent was available at the premises referred to the on-site superintendent was available at the premises referred to the on-site caretakers as the superintendent. This is evidenced by the inspection reports that were relied upon in those cases. In the previous discussion herein, it has been found that the on-site caretakers are not in fact superintendents. Such findings may be used in the Administrative Review proceeding to determine the issue in that case.

Plainly, the Commissioner had the authority to resolve the factual issue in either of the proceedings. He chose to do so in the instant proceeding. Thus, it cannot be said that the Commissioner approved of the superintendent status. Nor does the doctrine of res judicata does apply.

Appellants finally disagree with the finding of the Administrative Law Judge with regard to the hiring and presence of Luis Quintana, i.e., that there was not even a caretaker on the premises for a two-and-a-half month period, from April 12 to June 28, 1988. The Administrative Law Judge's conclusion is based on testimony and other evidence which he found credible. (R. 142) Appellants' point in their brief to other circumstantial evidence in arguing the contrary, and would have the Court blindly accept the testimony of its witnesses. However, as discussed above at pages 24-26, it is a settled principle of administrative law that the duty of weighing the evidence, where from the evidence either of two conflicting inferences may be drawn, rests solely with the administrative body. A court may not weigh the evidence and substitute its judgment for that of the administrative body where the testimony is conflicting and room for choice exists. See, cases cited supra at pages 24-46.

The law - and equally importantly, the appellants' prior conduct - require that appellants not ignore the legal requirements and the injunction issued against them. Appellants could not

unilaterally and intentionally terminate an essential service. Clearly under such circumstances, they are not entitled to have the finding of harassment vacated and to demolish the building.

D. <u>Lack of Security - Doors, Fence, Superintendent</u>

The Administrative Law Judge found that "The applicants have failed to fully and adequately restore the essential service of security at the subject premises since the April 12, 1988 DHCR Order." (R. 143) Specifically there were three measures which the landlords failed to take: (1) the failure to provide a resident superintendent; (2) the failure to install new entrance vestibule doors as required by Justice Ascione's 1984 injunction; and (3) the failure to install higher fences with razor wire around the vacant lot on the premises, as required by Justice Glen. Appellants, in their attempt to minimize the importance of these measures in their Article 78 petition and brief, ignore the fact that the finding of the Administrative Law Judge focussed on the broader question of security and instead characterize the issue as being narrowly focussed on the installation of new doors and higher fences.

The general importance of security on the premises was stressed by the Administrative Law Judge:

> There is no dispute among the parties that security is a high priority issue in this case, particularly in light of the difficult situation caused by the presence of peddlers, automobile washers and vagrants in the vicinity of the buildings. Although the landlord cannot be held responsible for the presence of these individuals on 36th Street and Second Avenue, the landlord is responsible for taking whatever measures are necessary to insure that the subject buildings are secure.

(R. 144) Because of its location, appellants' clearly stated intention to demolish the building, the court's injunction, the formal finding of harassment, and the denial of the first application to vacate the harassment finding, appellants had a clear legal duty to do more than allow the problem to

continue and fester. Given all the circumstances, appellants had the duty to take all reasonable steps to alleviate the problems that existed at his property because of the vagrants.

The issue of installing new entrance doors, and providing adequate fencing at the premises was first addressed by Justice Ascione. In his 1984 injunction, he directed the landlords to increase security by doing the following, among other things: "[i]nstall fireproof, secure entrance doors in all buildings on the site...", and "restore and maintain all other fencing around the plaintiffs' backyards and along the building lines of the site..." (R. 213) DHCR's October, 1985 harassment order incorporated the Justice Ascione's determination. (R. 164)

The issue of both the entrance doors and the inadequate fence around the vacant lot was subsequently raised during the hearings on the landlords' first application to vacate the harassment order. The April 12, 1988 order denying that application summarizes the relevant testimony as follows:

> Of further concern [by Mr. Harper, tenant] was the fact that the fire proof door at the rear of the building never had the alarm installed and further, fireproof entrance doors were never installed pursuant to the court's order.
>
> * * * *
>
> Mr. Molter [a tenant] also testified that there is fencing surrounding the buildings which provides inadequate security. There is chain link fencing around the parking lot topped by razor wiring. However this loop razor wiring was not installed on the vacant lot fencing and the fencing between the rear yards and the parking lot is only stockade fencing. the stockade fencing is frequently knocked down by cars and left in disrepair for lengthy periods of time. It is further insecure since large steel drums have been stacked and stored fence-high against the stockade fencing until a few weeks before this hearing.
>
> * * * *

> Mr. Harper [tenant] testified that security has been an ongoing problem at the premises. After 247 and 249 East 36th Street were demolished the fencing was not put up immediately. In April 1985 Mr. Harper wrote to Mr. Perlbinder complaining about the fencing and other matters. The fencing finally installed was inadequate especially in view of the completion of the parking lot at the end of 1985.

(R. 179, 183) Although these items were not expressly addressed in the finding that there was a decrease of security on the premises, appellants were plainly placed on notice that security remained a major problem and that corrective steps were necessary.

This was subsequently recognized by Justice Glen when the landlords moved in February 1989 to modify Justice Ascione's injunction. The motion requested that the court "modify" paragraph 19A to eliminate the requirement that the owner erect an eight-foot chain link fence along the northern side of the site. The tenants agreed that the reference to a fence on the northern side of the site was a typographical error but argued that the site had become more dangerous over the years, that demolition of two buildings on the site left a vacant lot, that the six foot fence around the lot was frequently climbed by strangers and that a much taller fence or razor wire was required to secure the area. Judge Glen held as follows:

> Pursuant to the original decision upon which the judgment at issue here was settled, defendants were "directed to build or rebuild any fences essential to plaintiffs' security." Decision, p. 19. If defendants have since altered the character of the buildings and lots so that the fencing provided for by the original order does not adequately protect the plaintiffs, they must alter the fencing so that the tenants' safety is protected. Defendants are therefore directed to better secure the area in a manner suggested by plaintiffs/tenants in their moving papers.

After reargument, Judge Glen on January 2, 1990, affirmed her earlier order:

> I therefore adhere to that portion of my previous decision which requires defendants to install an eight (8) foot chain link fence topped

> with razor wire on all sides of the empty lot and to maintain the fencing in good condition at all times. As discussed in detail in that decision, defendants' conduct in constructing a parking lot behind their buildings, tearing down vacant buildings and refusing to rent apartments as they become vacant has created conditions requiring additional measures on their part to protect the tenants' safety...

Justice Glen reached similar conclusions with regard to the Justice Ascione's order to replace the entrance doors:

> ...Having done nothing to appeal or set aside that judgment in the five years since its entry, defendants are now barred from asserting that the order is in any way improper, or that the installation of such doors will not serve to improve security in the buildings. Similarly, defendants are not relieved from complying with the order by virtue of the July 17, 1989 finding of DHCR that the vestibule doorlocks are adequate. As noted above, this Court ordered the installation of new doors and locks; DHCR does not have the authority to overrule that decision by subsequent inspection finding the existing locks to be in good repair.

On the basis of this history it was proper for DHCR to conclude that the landlords took only half measures and thus had not fully complied with the requirement of providing adequate security.

Appellants argue without merit that the findings concerning the doors and fence are res judicata, having allegedly been resolved in their favor in the March 9, 1988 order which concerned their first application to vacate the harassment finding, and in the Rent Administrator's orders issued in June, 1989. In neither instance were the issues as to the overall adequacy of the front doors and the fence around the vacant lot specifically decided. The findings in the April 12, 1988 order, while addressing the overall decrease in security, did not mention those two items. The silence on those issues does not imply that they were decided either in for or against the appellants. Since the issues were not decided, the order does not render them res judicata.

Nor does the doctrine of law of the case apply. Law of the case applies only to different stages of the same litigation, not to different litigations. Also, it is limited to questions of law. Weinstein, Korn and Miller, New York Civil Practice, Par. 5011.09. 29 N.Y. Jur. 2d §497. This litigation, including the administrative proceeding, is separate from the litigation involving the March 9, 1988 order. That order was based on a different application, resulted from a different administrative proceeding, and was the subject of its own Article 78 litigation. If any of the multiple doctrines designed to preclude relitigation were applicable in this case, it would be res judicata, not the doctrine of the law of the case.

As for the June 1989 orders, not only are they the subject of pending Petitions for Administrative Review, but the findings made by the Rent Administrator are not the findings made in the Commissioner's order denying the application to vacate the harassment finding. The Commissioner's order is concerned primarily with security and the ability of the items in question to provide an acceptable level of security. The Rent Administrator's orders were limited to finding that the vestibule door locks were adequate, and that the "Chain link fence by the vacant lot is not defective". That an inspector found the locks to be adequate is not the same as finding that the doors as a whole are secure enough to provide the level of security which Justice Ascione found to be necessary. As for the fence, the inspector simply found the six foot fence to be in good repair. He did not reach any conclusion as to whether it adequately served the security need of the premises. The determinations of the Rent Administrator, even were they to be upheld in the pending Petition for Administrative Review, do not have any res judicata effect on the order denying the application to vacate the harassment finding.

Appellants argue that the failure to install new doors and put in adequate fencing does not constitute harassment. However, the issue in the proceeding is not whether the conduct constitutes harassment. The issue is whether the improper conduct has ceased, in this case the failure to provide sufficient security. Moreover, in determining whether or not to vacate a harassment finding, DHCR is not limited to basing its decision solely on the precise conduct which initially led to the harassment finding. If a landlord cures the precise conduct which resulted in the harassment finding but engages in new acts or omissions which fall within the general scope of conduct previously proscribed, denial of an application to vacate is justified. Similarly, entirely new conduct which rises to the level of harassment would justify denial of the application even though that conduct, generally or particularly, was not part the basis for the initial finding of harassment. In deciding whether or not to vacate a harassment finding, the Commissioner is not limited to considering only those matters which were precisely addressed in the prior findings.

In the case at bar, security has been a general area of misconduct by appellants. Thus, it was proper to find, on the basis of a failure over a five and a half year period to comply with Justice Ascione's directive on the entrance doors, that appellants had failed to adequately restore security services. Likewise, it was proper to find that adequate fencing, in the form of a sufficiently high fence with razor wire, had not been provided, as required by Justice Ascione. Justice Ascione could not have given a specific directive regarding the fence around the vacant lot since the buildings on those lots were not demolished until after he issued the injunction. But he did give a general directive requiring adequate fencing; and Justice Glen subsequently recognized the need to provide a better fence in response to the new circumstances created by the demolition and resulting vacant

lot adjoining the subject buildings. The Commissioner went no further than the security requirements imposed by the Court in reaching his determination.

Security was not adequately restored during the year in question. Thus, the Commissioner's conclusions were justified.

CONCLUSION

The Administrative Law Judge, whose findings and recommendations were adopted by the Deputy Commissioner, reasonably determined that the landlords had not met their burden of affirmatively establishing that the proscribed course of conduct had ceased. Under such circumstances, the application to vacate the finding of harassment was properly denied. Meko Holding Inc. v. Joy, 107 A.D.2d 278, 486 N.Y.S.2d 201 (1st Dept. 1985); J & E Florescent Fixture and Lighting Co. v. Muniz, Index No. 4427/80, N.Y. Sup. Ct. 9/29/80 (Cahn, J.).

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 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); Matter of Pell v. Board of Education, 34 N.Y.2d 222, 230, 356 N.Y.S.2d 833 (1974); Colton v. Berman, 21 N.Y.2d 322, 287 N.Y.S.2d 647 (1967). Clearly, the determination of the Deputy Commissioner for Rent Administration has a rational basis in fact and law and are neither arbitrary or capricious. It is thus entitled to judicial affirmance.

For the foregoing reasons, it is respectfully requested that the DHCR order be affirmed and DHCR be awarded costs.

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Respectfully submitted,

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