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

NEW YORK SUPREME COURT
APPELLATE DIVISION—SECOND DEPARTMENT

Application of TERRY S. TRIADES and MARGARET WOLINETZ, for a Judgment Pursuant to Article 78 of the CPLR,

Petitioners-Respondents-Cross-Appellants,

—against—

MANUEL MIRABAL, as Deputy Commissioner Division of Housing and Community Renewal,

Respondent-Appellant-Cross-Respondent,

—against—

TIMOTHY HOGUE, WILLIAM NELSON, KENNETH BURNS, ALFRED HARTMAN, MORRIS SALEMI, THOMAS DOYLE, and MARTIN SEIDNER,

Respondents.

Brief for Cross-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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- and -

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HARTMAN, MORRIS SALEMI, THOMAS DOYLE, and
MARTIN SEIDNER, Respondents.

Respondents,

BRIEF OF RESPONDENT-CROSS-RESPONDENT DHCR

This is an appeal from a judgment of the Supreme Court (DiTucci, J.) entered in the office of the Queens County Clerk on November 28, 1988, which affirmed an administrative determination by the New York State Division of Housing and Community Renewal (hereinafter "DHCR"), except

for that portion of the determination which placed the subject premises under rent control and established the maximum rents. DHCR found that the owners'-appellants' premises is a horizontal multiple dwelling containing six or more units subject to the jurisdiction of the Rent Stabilization Law which should be placed under Rent Control because the premises had not been registered with the Rent Stabilization Association. DHCR is not appealing that portion of the court's judgment which found that the premises should not have been placed under rent control.

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.

2. Did DHCR have authority to reopen the administrative proceeding based upon an irregularity in a vital matter?

The court below answered in the affirmative.

COUNTER-STATEMENT OF THE NATURE OF THE CASE

DHCR, as the administering agency for rent regulation, has the responsibility to determine 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., In re Krakower, N.Y.L.J., February 23, 1988, p. 15, col. 2 (App. Div., 2nd Dept.), 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, In re Krakower, supra, Bambeck and Lukey v. Division of Housing and Community Renewal, 129 A.D.2d 51, 517 N.Y.S.2d 130 (1st Dept. 1987).

The courts have also upheld determinations finding that complexes involving structures not physically connected to each other are horizontal multiple dwellings. See, e.g., Nine Hunts Lane Realty Corp. v. Division of Housing and Community Renewal, January 5, 1988, Index No. 16719/87, n.o.r., Sup. Ct., Kings Co., Dowd, J., aff'd, 151 A.D.2d 465, 542 N.Y.S.2d 255 (2nd Dept. 1989) (one structure 40 feet to the rear of the other); Blane v. New York State Division of Housing and Community Renewal, 147 A.D.2d 401, 537 N.Y.S.2d 820 (1st Dept. 1989) (one structure 40 feet to the rear of the other); Love Securities v. Berman, supra (two buildings to the rear originally constructed as stables for the two front buildings); 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) (two bungalows located to the rear of two other buildings).

The Rent Stabilization Law and Regulations further provide that subsequent subdivision of a premises subject to rent stabilization does not act to remove all or part of the premises from stabilization jurisdiction. See, 9 NYCRR 2510.11(d) and Nine Hunts Lane Realty Corp. v. Division of Housing and Community Renewal, January 5, 1988, Index No. 16719/87, n.o.r., Sup. Ct., Kings Co., Dowd, J., aff'd, 151 A.D.2d 465, 542 N.Y.S.2d 255 (2nd Dept. 1989).

The instant case involves two four family adjoining structures which had a common boiler,

common electric and gas facilities and were on a single tax lot until mid-1979. The structures were in common ownership and management until the end of August, 1984. Furthermore, the former owner, in 1979, filed a report indicating that there were eight apartments in the premises; and the current owners conceded in their Petition for Administrative Review that the premises in 1979 constituted an "eight-family horizontal multiple dwelling. Subdivision of the premises in 1979, which involved installation of separate boilers and electric metering for each of the adjoining structures and creating separate tax lots, did not act to remove the premises from rent stabilization jurisdiction. Based upon the totality of the circumstances before him, the Deputy Commissioner rationally found that the premises constituted a horizontal multiple dwelling subject to the jurisdiction of the Rent Stabilization Law.

Furthermore, DHCR properly exercised its discretion in reopening the proceeding because of an irregularity in a vital matter. Not only was the initial determination based upon an incomplete record, but the parties were not given notice of that determination. Thus, were the reopening not allowed, the tenants would be denied due process in that they would not have had an opportunity to challenge the agency's determination.

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

COUNTER-STATEMENT OF THE FACTS

This proceeding involves the premises located at 35-21 and 35-25 190th Street, Flushing, New York.

In August, 1978 one of the tenants in the subject premises complained to the New York Conciliation and Appeals Board that the owner refused to give him a three year renewal lease as then

provided for in the Rent Stabilization Law. The tenant claimed that:

> I filed a complaint with the Rent Stabilization Board and was told that Mr. Galvao's [the then owner] building was not registered with them. However, they investigated the situation and determined that the building was, in fact, under their jurisdiction. They gave Mr. Galvao several opportunities to register the building, but he persistently refused.

(Return: A-1) Since the building was indeed not registered with the Rent Stabilization Association, the matter was referred to the recontrol unit of New York City Department of Housing Preservation and Development ("HPD") which was the agency then responsible for administering the Rent Control Laws. (Return: A-2)

On February 1, 1979 the owner filed with HPD a "Landlord's Report of Statutory Decontrol" for apartment 1F at 35-25 190th Street, stating that there were eight (8) apartments in the building, and that apartment 1F had become vacant on December 1, 1978, and was rented on January 15, 1979. (Return: B-1)

A physical inspection of the subject premises was conducted on August 1, 1979, by the Rent Control Office of HPD. The inspection indicated that (1) 35-21 and 35-25 190th Street were attached to each other with four apartments at each address; (2) there were separate heating plants, entrances and basements at each address. An inspection of the records at the Department of Buildings and register's office revealed that an application was made in 1979 to divide the single lot for both addresses into two separate lots and to divide the premises into two dwellings. A permit was issued for this alteration and a certificate of occupancy applied for. (Return: A-6) These inspections occurred after conversion of the premises and without information as to the physical status of the premises prior to the conversion.

On November 3, 1983, an "Office Copy Only" Order was issued by the District Rent Director of the Office of Rent Control finding that the "subject premises does not fall under the jurisdiction of Rent Control or Rent Stabilization."

(Return: A-8) There were no addresses on the order and the parties were not given notice of the order. (Return: B-11; Record on Appeal, 396)

Subsequently, there was a separate enforcement proceeding against the former owner in which new evidence was presented to DHCR showing that prior to the conversion of the premises in 1979, there were common facilities shared by the two adjoining structures which constituted them as a horizontal multiple dwelling.[1] Therefore, on August 22, 1984, the District Rent Director issued Notices of Proceeding to Modify or Revoke Order, proposing to find the premises to be subject to Rent Control and to set the maximum rent for each apartment. The Notices stated that:

> Due to landlord failure to join or remain a member in good standing of Rent Stabilization Association, subject building is deemed subject to Control and rents established as heretofore stated.
>
> * * * *
>
> This proposal is based upon information obtained at a conference held under Enforcement Case #10,911/17/JL and 10,938HL. Wherein, it was determined that prior to 1979 these two four family building[s] were serviced by one common boiler, thereby, creating an eight family horizontal multiple [dwelling]...

(Return: A-11)

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[1] The tenants filed harassment complaints in October and November of 1983 with the Enforcement Bureau (Return: B-1). The Enforcement Bureau, an office separate from the Recontrol Office which issued the November 3, 1983 order, on November 2, 1983 sent a notice to the owner and tenants of the premises scheduling a conference for November 23, 1983. It was at that conference that the former owner indicated that the premises had been a unified eight unit dwelling in 1979, and that separate boilers had been installed in 1979.

The then owner, Joseph Galvao, acknowledged receipt of the Notices to modify or revoke order on August 25, 1984. (Return:

A-12) Four days later, on August 29, 1984, he sold the subject premises to Terry Triades and Margaret Wolinetz, the petitioners herein. The new owners stated that they were notified at the closing for the subject premises that the recontrol proceedings had been reopened and were pending before DHCR. (Return: A-14)

The new owners were given an opportunity to and did answer in opposition to the proposed revocation of the November 3, 1983 Order (Return: A-14, A-15). Thereafter orders were issued by the District Rent Administrator on December 21, 1984, so revoking said prior order and setting the rent control rent for each accommodation in the subject premises. (Return: A-17)

On January 23, 1985, the new owners filed Petitions for Administrative Review ("PARs") admitting that the subject premises had been converted from an eight-family horizontal multiple dwelling into two separate four family units in 1979, and claiming (1) that the former owner's failure to register the subject premises with the Rent Stabilization Association ("RSA") was not willful, (2) that the former owner was precluded from registering with the RSA because he was not notified that he would be required to do so until August 7, 1984, (3) that one of the apartments was deregulated because the tenant did not occupy the apartment until January 15, 1979, and (4) that the setting of the rents for the accommodations was improper. (Return: B-1, B-2)

The tenants submitted answers to the owners' PARs stating, among other things, that the former owner, Galvao was given many opportunities to register with the RSA but refused to do so. (Return: B-3, B-5).

On April 3, 1986 the Deputy Commissioner issued an Order and Opinion Denying

Administrative Appeals. The Commissioner found as follows:

> The evidence of record, which includes information obtained at a hearing conducted by the Enforcement/Compliance Unit (Enforcement Case Nos. 10,911,17 HL and 10,938HL) reveals that prior to the boiler conversion in 1979 the subject premises, consisting of a total of eight (8) apartments, was serviced by a single common boiler and continued to be operated under a common ownership until its sale to the landlords herein in 1984. In the course of the conversion the electric meters were relocated whereas all gas meters remained located in one building as reflected in the report of physical inspection conducted August 1, 1979. The subject premises was therefore subject to the Rent Stabilization Law of 1969 pursuant to Section YY51-3.0 of the Administrative Code of the City of New York. The record reveals, however, that the subject accommodations had not been properly registered with the Rent Stabilization Association. The conversion of the heating system into two separate units and the obtaining of separate Certificates of Occupancy does not alter the status or rights held by the subject tenants prior to said conversion. Therefore, the Commissioner finds that the District Rent Administrator correctly determined that the subject accommodations were subject to the Rent and Eviction Regulations as a result of the former landlord's failure to properly register with the Rent Stabilization Association. The present landlords are bound as a matter of law by the prior landlord's failure to register the subject premises with the Rent Stabilization Association since their succession to the title of the subject premises does not confer upon them greater rights than those held by the predecessor landlord.

(Return: B-8)

Thereafter the owners instituted a proceeding for judicial review pursuant to CPLR Article 78 seeking annulment of the Commissioner's Order. (Return: B-9) On August 19, 1987, the Court remitted these proceedings to the Division of Housing and Community Renewal for further consideration. (Return: B-10)

Upon reconsideration, the prior PAR Order was affirmed by the Deputy Commissioner in an Order issued on November 5, 1987. The Commissioner again found that the subject premises

constituted an eight unit horizontal multiple dwelling which was subject to rent control because of the former owner's failure to properly register with the RSA. The Commissioner stated:

> The subject premises is comprised of a total of eight housing accommodations which concededly were served by a common heating system until 1979. In the course of the conversion, electric meters were also relocated to the individual buildings and new certificates of occupancy obtained. Despite such alterations both structures were owned in common until August 1984 and in fact a report of decontrol filed by the prior owner (2DR 75436) in February 1979 lists the total number of apartments as 8. Upon referral of these premises to the then Office of Rent Control by the Conciliation and Appeals Board the subject premises came under the jurisdiction of the Rent Control Law.
>
> The repeal of Section YY51-4.0, effective April 1, 1984, did not abolish rights previously established predicated on the failure of the prior owner to register these premises with the industry association but merely eliminated the referral procedure since the two administrative bodies for rent control and rent stabilization had been unified into the present Division and thus the need for referral no longer existed.
>
> * * * *
>
> Having reconsidered the entire record upon remission, the Commissioner is of the opinion and finds that the previous Order and Opinion is in all respects proper and correct, notwithstanding the previous statement in the proceeding below that all tenants were in possession prior to 1979, particularly so since the conversion of these properties occurred subsequent to the new tenancy of Apartment 1F as urged by the owner. In January 1979 the subject premises herein constituted a horizontal multiple dwelling which should have been registered with the Rent Stabilization Association and the subsequent conversion of these buildings into independent buildings did not serve to alter the rights of those tenants in possession to the protection of rent control prior to said conversion. Maximum rents for said apartments were established in accordance with recognized procedures and should be affirmed.

(Return: B-11)

The owners thereafter commenced an Article 78 proceeding challenging the Commissioner's

determination. The court below found that DHCR properly reopened the prior proceeding, that there was a rational basis for the determination that the premises is a horizontal-multiple dwelling subject to the Rent Stabilization Law, but that DHCR erred in placing the premises under the Rent Control Law. (Record on Appeal, 22-23)

DHCR appeal of the latter part of the lower court's decision was withdrawn and dismissed on consent. The owners took a cross-appeal which is now before this Court.

ARGUMENT

POINT I

THE RENT COMMISSIONER'S ADMINISTRATIVE FINDING THAT THE STRUCTURES OWNED BY THE OWNERS CONSTITUTE A "HORIZONTAL MULTIPLE DWELLING" AND ARE SUBJECT TO RENT STABILIZATION WAS FULLY SUPPORTED BY THE FACTUAL RECORD, AND WAS NEITHER ARBITRARY NOR CAPRICIOUS. IT IS THEREFORE ENTITLED TO JUDICIAL AFFIRMANCE.

Pursuant to the Emergency Tenant Protection Act of Nineteen Seventy-Four, L. 1974, ch. 576, housing accommodations (such as the ones involved in this case) which were formerly subject to rent control were placed under the Rent Stabilization Law. The Rent Stabilization Law, in turn, applies to class A multiple dwellings "containing six or more dwelling units". Section 26-504, NYC Administrative Code.

Local Law No. 44, enacted May 6, 1969 clarified that "garden type maisonettes" are also subject to stabilization:

> For purposes of this chapter a class A multiple dwelling shall be deemed to include a multiple family garden-type maisonette dwelling complex containing six or more dwelling units having common facilities such as sewer line, water main, and heating plant, and operated as a unit under a single ownership on May sixth, nineteen

> hundred sixty-nine, notwithstanding that certificates of occupancy were issued for portions thereof as one- or two-family dwellings. Section 26-505, NYC Administrative Code.

Section 5(a) of the Emergency Tenant Protection Act ("ETPA"), Section 8625(a) provides:

> A declaration of emergency may be made pursuant to Section three, as to all or any class of classes of housing accommodations in a municipality, except:
>
> * * * *
>
> (4)(a) housing accommodations in a building containing fewer than six dwelling units...
>
> (b) for purposes of this paragraph four, a building shall be deemed to contain six or more dwelling units if it is part of a multiple family garden-type maisonette dwelling complex containing six or more units having common facilities such as sewer line, water main or heating plant, and operated as a unit under common ownership, notwithstanding that certificates of occupancy were issued for portions thereof as one- or two-family dwellings.

Courts have recognized that dwellings not located in garden-type complexes may also be classified as "horizontal multiple dwellings" so as to place them under the jurisdiction of rent stabilization. See, for example, Salvati v. Eimicke, 72 N.Y.2d 784, 537 N.Y.S.2d 16 (1988); In re Krakower, N.Y.L.J., February 23, 1988, p. 15, col. 2 (App. Div., 2nd Dept.); Bambeck and Lukey v. State Division of Housing, 129 A.D.2d 51, 517 N.Y.S.2d 134 (1st Dept. 1987); McDermott, et al. v. S & M Enterprises, Sup. Ct., N.Y. Co., Index Nos. 488/81; 1567/81; 5169/81 (Ascione, J.); aff'd, 494 N.Y.S.2d 1009 (1st Dept. 1985); Davbern Associates v. Joy, Sup. Ct., N.Y. Co., N.Y.L.J., June 27, 1983, p. 12, col. 4, aff'd, 97 A.D.2d 986, 469 N.Y.S.2d 830 (1st Dept. 1983), lv. to appeal den., 61 N.Y.2d 204 (1984); 11th Avenue Corp. v. Joy, 92 Misc.2d 664, 401 N.Y.S.2d 689 (N.Y. Sup. Ct. 1977); Yanchevsky v. CAB, N.Y.L.J., September 10, 1982, p. 12, col. 2 (Sup. Ct., Bronx

Co., Callahan, J.); Ahearn, et ano. v. Joy, Sup. Ct., N.Y. Co., Index No. 10296/83 (Wright, J.).

In In re Krakower, supra, this Court held that:

> The respondent's interpretation of the applicable regulatory provisions to mean that a "horizontal multiple dwelling" need not also constitute a "garden-type maisonette dwelling complex" as defined by Multiple Dwelling Law Section 163 before it may come under the Emergency Tenant Protection Act is rational....

It is by virtue of the ETPA that the subject premises--built prior to 1947--became subject to the Rent Stabilization Law as of June 30, 1974, the base date for purposes of the ETPA, insofar as any of the apartments had been vacated by rent control tenants.

It is also by virtue of these laws that the subject premises should have been registered with the Rent Stabilization Association during the 1970s. It is undisputed that the former owner of the premises refused to register. Under the statutory mandate in effect at that time, a failure by an owner to register a building with the Rent Stabilization Association meant that the apartments in that building would be recontrolled. As provided in Section YY51-4.0 of the Rent Stabilization Law:

> a. Dwelling units covered by this law as provided in section YY51-3.0 or section YY51-3.1 shall be deemed to be housing accommodations subject to control under the provisions of title Y of chapter fifty-one of the administrative code notwithstanding any provision of such title to the contrary, unless the owner of such units is a member in good standing of any association registered with the housing and development administration pursuant to section YY51-6.0 or section YY51-6.1. For the purposes of this law a "member in good standing" of such an association shall mean an owner of a housing accommodation subject to this law who joined such an association within thirty days of its registration with the housing and development administration or within thirty days after becoming such owner, whichever is later....

See, Wood v. Metropolitan Hotel Industry Stabilization Association, 95 A.D.2d 560, 467 N.Y.S.2d 374 (1st Dept. 1983); Lincoln Plaza Associates v. Barbarisi, 60 Misc.2d 100, 302 N.Y.S.2d

387 (Civ. Ct., N.Y. Co., Stecher, J., 1969), motion denied, 60 Misc.2d 905, 304 N.Y.S.2d 545.

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. 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.

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. (emphasis added)

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 determination 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 (under Rent Control a four unit building is subject to regulation).

Certificates of occupancy, which are issued by the New York City Buildings Department, and may issued separately for the component parts of a horizontal-multiple dwelling, are not determinative of coverage by the Rent Stabilization or Rent Control Laws. See, Phillips v. Weaver,

7 A.D.2d 927, 183 N.Y.S.2d 903 (2nd Dept. 1959); Mandel v. Pitkowsky, 102 Misc.2d 478, 425 N.Y.S.2d 926 (App. Term, 1st Dept., 1979); Gordon & Gordon v. Madavin, Ltd., 108 Misc.2d 349, 441 N.Y.S.2d 574 (App. Term, 1st Dept., 1981), aff'd, 85 A.D.2d 937, 447 N.Y.S.2d 574 (1st Dept., 1981); 128 Central Park South Associates v. Cooney, 119 Misc.2d 1045, 464 N.Y.S.2d 971 (Civ. Ct., N.Y. Co., Lehner, J., 1983). Indeed, the Buildings Department, in deciding whether or not to issue a certificate of occupancy, takes absolutely no account of the Rent Stabilization or Rent Control Laws. Similarly, the criteria for determining coverage of the rent laws are completely different than those for determining whether to issue a certificate of occupancy.

The limited value of certificates of occupancy are particularly apparent in horizontal multiple dwelling cases where courts have upheld agency determinations in which adjoining brownstones and even physically separate structures built at different times have been found to constitute horizontal multiple dwellings.

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 in a comprehensive statement the appropriate standard that is to be applied when a Court reviews the factual findings made by DHCR:

> 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. The administrative record shows that the two attached structures were in common ownership and management, were located on one tax lot, and had common facilities including the heating system, and electric and gas services. Indeed, the former owner stated in a Landlord's Report of Statutory Decontrol filed with the rent agency on February 1, 1979, that there were eight apartments in the building. (Record on Appeal, 328) More importantly, the appellants themselves admitted in their Petition for Administrative Review that the premises were "an eight-family horizontal multiple dwelling" prior to its subdivision in 1979. (Record on Appeal, 247)

The soundness of the Commissioner's determination is not disturbed by the fact that the premises were subdivided in 1979 when separate boilers and electric meters were installed, the tax lots divided and separate certificates of occupancy obtained. The Commissioner properly held that:

> In January 1979 the subject premises herein constituted a horizontal multiple dwelling which should have been registered with the Rent Stabilization Association and the subsequent conversion of these buildings into independent buildings did not serve to alter the rights of those tenants in possession to the protection of rent control prior to said conversion.

This finding is in consonance with Section 2520.11(d) of the Rent Stabilization Code which provides that, if a building has six or more units on the date it first became subject to the Rent Stabilization Law, it remains subject to stabilization jurisdiction even if subsequently subdivided.

Clearly, the 1979 subdivision of the property, which occurred years after the premises became subject to the Rent Stabilization Law, did not act to remove it from stabilization jurisdiction.

Appellants incorrectly claim that certain findings by the Commissioner and the court below have no support in the record. With regard to the finding that the premises was at one time on a single tax lot, an inspection report revealed that the former owner made an application in 1979 to divide the existing lot. (Record on Appeal, 112) This report was never disputed. With regard to relocation of the electric meters, appellants' own attorneys admitted to the relocation in their letter of August 30, 1984. (Record on Appeal, 150) Appellants again admitted to the relocation in their PAR. (Record on Appeal, 182) In sum, there was ample support in the record for the findings.

Appellants cite no authority for their specious argument that the court below erred in not reaching its own de novo conclusion as to the common factors found in the premises. Furthermore, they inconsistently complain that the court took note of the single tax lot for the premises though it was not referred to in the Commissioner's decision. In any case, there was no error on the part of the court below.

Nor did the court err in not finding that the differing decisions by the Commissioner and the District Rent Administrator in her November 3, 1983 order were arbitrary and capricious. These two decisions were not based upon identical facts. Indeed, the November 3, 1983 order was reopened because the facts were not properly developed. All of the subsequent administrative orders, which

took account of the essential facts, were consistent with each other, and only differed from the improper November 3, 1983 order. The administrative review procedure is designed to correct errors at the initial stages of an administrative proceeding. There was nothing arbitrary or capricious in the Commissioner reaching a finding contrary to the one in the November 3, 1983 order.

Finally, appellants rely upon Salvati v. Eimicke, 72 N.Y.2d 784, 537 N.Y.S.2d 16 (1988), and Matter of Heller (which was reported with Salvati) for the meritless argument that there were insufficient common factors in the case at bar to conclude that the premises constituted a horizontal-multiple dwelling. In Salvati and Heller, the Court of Appeals found that the presence of only a common boiler (besides common ownership) was insufficient. But in the case at bar there were other factors in addition to the common boiler, i.e., centralized gas and electric meters, and common tax lot. Such a group of factors, even without a common tax lot, have previously been found sufficient by the courts. 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), which is cited by appellants for the proposition that no one factor can be determinative, the Appellate Division approvingly referred to other cases in which there were no more common factors present than in the case at bar:

> In Matter of 11th Co. v. Joy, 92 Misc 2d 664, Special Term dismissed an Article 78 proceeding to annul an administrative determination which found three adjacent buildings, each containing less than six dwelling units, to be subject to rent stabilization as part of a horizontal multiple family dwelling complex. Citing the critical factors consisting of the long history of uninterrupted common ownership, the presence of a restaurant occupying the basement and cellar of all three houses and the fact that all three shared combined facilities, including a heating plant, centralized gas and electric meters, the court concluded that the matter was one appropriately for the administrative agency to determine and the Commissioner's ruling, having a rational basis, could not be disturbed in the proper exercise of judicial review.

> Recently, in Matter of Gottlieb v. Mirabal, 123 AD 2d 574, lv to app den, __ NY 2d __ (May 5, 1987), we sustained the determination of the Deputy Commissioner of the Division of Housing and Community Renewal, which found that two buildings, located at 415 Bleecker Street and 417 Bleecker (82 Bank) Street, comprised a horizontal multiple dwelling. The administrative determination was based in part upon a physical inspection, which disclosed a combination bar, cafe and restaurant extending through both buildings, the Commissioner's order and opinion also finding that the buildings "share a common boiler and shared a common commercial enterprise* * *."

The determination in the case at bar is clearly in conformity with prior precedent. That there were factors in the attached structures other than the boiler and centralized gas and electric meters which were not shared by the two structures, is no indication that DHCR's determination was improper. As the Court stated in Love Securities v. Berman, 38 A.D.2d 169 328 N.Y.S.2d 8 (1st Dept. 1972):

> 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).

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. It cannot substitute its own judgment for that of DHCR where the agency's decision is rationally based in the record. Colton v. Berman, 21 N.Y.2d 322, 287 N.Y.S.2d 647 (1967); 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); Mid-State Management Corp. v. New York City Conciliation and Appeals Board, 112 A.D.2d 72, 491 N.Y.S.2d 634 (1st Dept. 1985), aff'd, 66 N.Y.2d 1032, 499 N.Y.S.2d 398; Bambeck and Lukey, v. State Division of Housing and Community Renewal, 129 A.D.2d 51, 517 N.Y.S.2d 130 (1st Dept., 1987).

The Commissioner's determination has a rational basis in the record, is in accord with the well settled law concerning horizontal-multiple dwellings, and is entitled to judicial affirmance. Appellants' admission in their PAR that the structures constituted an eight family horizontal-multiple dwelling was an accurate representation of the nature of the premises.

POINT II

THE AGENCY PROPERLY EXERCISED ITS DISCRETION IN REOPENING THE PROCEEDING.

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

In People ex rel. Finnegan v. McBride, 226 N.Y. 252, 259, a Court of Appeals determination showing the clear authority of the Civil Service Commission to reopen proceedings, Justice Pound

stated:

> Error may be corrected by setting aside if it was the result of illegality, irregularity in vital matters, or fraud. The commission may not act arbitrarily. Public officers or agents who exercise judgment and discretion in the performance of their duties may not revoke their determinations nor review their own orders once properly and finally made, however much they may have erred in judgment on the facts, even though injustice is the result. A mere change of mind is insufficient. Further action must, where power is not entirely spent, be for cause, with good reasons and proper motives for the correction of improper action.

This very language was quoted in Cupo v. McGoldrick, supra, which found that the rent agency has the power to reopen. See also, Drew v. State Liquor Authority, 2 A.D.2d 75, 153 N.Y.S.2d 444 (1st Dept. 1956).

In the case at bar there was clearly an irregularity in a vital matter. The November 3, 1983 determination was based on the report of an inspection conducted after the subject premises was subdivided in 1979. (Record on Appeal, 113, 114) Crucial evidence as to the status of the building prior to the subdivision was absent from the record. Although the June 20, 1979 letter from one of the tenants claimed that facilities were being separated, there was insufficient evidence on this central question until the admission by the former owner during the conference in the harassment proceeding that there had previously been a common boiler for both structures. The record having been incomplete, and the new information being central to a correct determination of the jurisdictional status of the premises, DHCR properly reopened the within proceeding. This case involves not just a change of mind or error in judgment, but a determination based upon an incomplete record.

Even more importantly, as the Commissioner found in his determination, the parties did not

have notice of the November 3, 1983 order:

> As to the owner's contention that it was improper to reopen a closed proceeding (2AD 26365), the Commissioner notes that said proceeding was closed internally on November 3, 1983 with an "office Copy Only" termination order. Said closure did not constitute a final and binding order since the time limit in which to commence an administrative review thereof did not begin to run as the parties aggrieved had no notice of same. Hence, the recommendation by the Enforcement-Compliance Unit to reopen Docket No 2AD 26365 based on information obtained in the course of a pending proceeding (Case Nos. 10,911/17 HL & 10,938 HL) was in reality a request for reconsideration of an internal determination under continuing jurisdiction.

(Record on Appeal, 396) Indeed, the November 3, 1983 order has no name or mailing address of either the owner or any of the tenants (Record on Appeal, 114), indicating that the order was not mailed or served on any of the parties. In addition, the Examiner's Progress sheet has explicit instructions to the typist to prepare an "Office Copy Only" order. (Record on Appeal, 113) This case is one instance of the sometimes used practice in HPD's recontrol unit of rendering internal determinations which were not served on the parties. If the reopening were not permitted, the tenants would be denied due process, as the November 3, 1983 order would be held final against them without their ever having had the opportunity to challenge it. Moreover, the tenants would be denied such an opportunity even though they relied upon the reopening of the proceeding in not seeking a direct challenge to the November 3, 1983 order.

None of the cases cited by appellants involve the reopening of an internal order of which the parties had not been given notice. Those cases are thus inapplicable to the circumstances in the case at bar.

Finally, the appellants were not prejudiced by the reopening. To the extent that they were

prejudiced, it was by the former owner who failed to inform them of the reopening until the closing date, despite his having received notice of the reopening sometime earlier. When the proceeding was reopened, appellants were not yet owners of the property. They admit that they were informed of the reopening at the closing for the purchase of the property. Due to the change in circumstances, they had options available to them other than immediately taking title at the scheduled closing. This is not a case in which the parties can claim reliance on a final administrative order. Moreover, appellants had a full opportunity, which they twice availed themselves of, to make submissions in the reopened proceeding. And they had a further opportunity to challenge the subsequent determination during the PAR proceeding.

DHCR soundly exercised its authority in reopening the administrative proceeding in the case at bar.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED WITH COSTS.

Dated: Bronx, New York
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Respectfully submitted,

DENNIS B. HASHER
Attorney for Respondent
New York State Division of
Housing and Community Renewal
One Fordham Plaza--4th Floor
Bronx, New York 10458
Tel No. (212) 519-5769

Richard Hartzman
of Counsel