To be argued by:
RICHARD HARTZMAN

NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application

of

LINA YANNI,

Petitioner-Respondent-Cross-Appellant,

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

against

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Appellant-Cross-Respondent.

Brief of Respondent-Appellant Division of Housing and Community Renewal

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BRIEF OF RESPONDENT-APPELLANT DIVISION OF HOUSING AND COMMUNITY RENEWAL

PRELIMINARY STATEMENT

This is an appeal from an order of the Supreme Court (Franklin R. Weissberg, J.) rendered on September 5, 1991, and entered in the office of the New York County Clerk on November 27, 1991. The order granted an owner's Article 78 proceeding challenging a rent overcharge determination issued by the New York State Division of Housing and Community Renewal ("DHCR") to the extent of remanding the proceeding to the agency. The court remanded the proceeding for a redetermination of the lawful rent and the amount of the rent overcharge in accordance with specific instructions.

QUESTIONS PRESENTED

1. Did the court below improperly substitute its own judgment for that of the agency, basing its ruling upon a misapprehension of the nature of and rationale for DHCR's court-approved alternative formula for determining the lawful stabilized rent, in reaching its finding that the DHCR rent overcharge determination was arbitrary and capricious, and in remanding the proceeding to DHCR with limitations on how to recalculate the lawful rent and amount of overcharges?

The court below impliedly answered in the negative.

STATEMENT

The Rent Stabilization Law and Code established a system of rent regulation limiting the rents which may be charged to tenants of apartments subject to the law. Under this system DHCR is required to determine whether or not a tenant has been overcharged when that tenant has filed a rent overcharge complaint with the agency.

In rent overcharge proceedings where owners fail to comply with their obligation to maintain and produce required rental histories upon demand, the agency applies an alternative procedure to establish the lawful rent. Under this procedure DHCR sets the rent at the lowest of three levels: (1) the lowest rent in a comparable apartment in the building; (2) the tenant's initial rent minus the appropriate guideline adjustments; or (3) the last rent

of the prior tenant. This procedure has been upheld by the courts on numerous occasions. See, e.g. 61 Jane Street Associates v. CAB, 65 N.Y.2d 898, 493 N.Y.S.2d 455 (1985), aff'g, 108 A.D.2d 636, 486 N.Y.S.2d 694 (1st Dept. 1985), Lavanant v. State Division of Housing and Community Renewal, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1st Dept. 1989).

This proceeding involves a transparent attempt by a landlord to claim that a duplex apartment located in a residentially-zoned class-A multiple dwelling was exempt from coverage under the Rent Stabilization Law because it had purportedly been rented for commercial purposes to the prior tenant as well as to the complaining tenant. The record, however, contains no evidence in support of the landlord's claim. Rather, the record establishes that both the lease to the prior tenant as well as the one to the complaining tenant contemplated the residential use of the apartment. (An apartment is exempt from the coverage of the Rent Stabilization Law only if it is used exclusively for commercial or professional purposes).

As the record failed to provide a factual basis for the landlord's claimed exemption from the coverage of the Rent Stabilization Law, the landlord was required to establish the legality of the rent being charged for the subject apartment by providing leases from the April 1, 1980, base date for the apartment. DHCR gave the owner ample opportunity to produce the required rental history. As the owner failed to do so, the Commissioner properly established the rent for the apartment using

the alternative formula to calculate the rent. However, in the absence of another four room duplex in the building which could be used to determine the lowest rent for a comparable apartment, DHCR doubled the lowest stabilized rent for a two room apartment and established such figure as the rent for the subject apartment.

Furthermore the Commissioner found that the owner could not establish by a preponderance of the evidence that the overcharge was not willful and accordingly directed the imposition of treble damages as required by the Rent Stabilization Law.

The test upon judicial review of a determination rendered by an administrative agency is whether the determination has a rational basis in the record and is in accord with applicable law. In deciding the owner's Article 78 proceeding, the court below affirmed DHCR's determination insofar as it found the apartment subject to rent stabilization, applied the alternative formula to establish the lawful rent, and imposed treble damages. However, the court improperly substituted its own judgment (1) in ruling that DHCR had erred in computing the rent under the alternative formula and (2) in limiting the way DHCR is to compute the rent upon remand. The court's ruling is based upon a misunderstanding of the nature of and rationale for the agency developed alternative formula. The construction of a comparable rent by doubling the lowest rent in the building for a two room apartment was a proper exercise of the agency's discretion and is consonant with the rationale upon which the alternative formula is based.

The court below should not have substituted its own judgment and should have affirmed the rent overcharge determination in its entirety. In the alternative, having remanded the proceeding to DHCR for a redetermination of the lawful rent, the court should not have limited the factors to be used by DHCR in redetermining the rent.

FACTS

On February 23, 1987, the tenant of apartment 5A/6A in the building located at 20 West 76th Street, New York, New York, filed a complaint of rent overcharge with the New York State Division of Housing and Community Renewal ("DHCR"). In his complaint the tenant alleged that he had moved into the subject apartment pursuant to a lease commencing March 1, 1985 at a rental of $2,874 per month. The tenant alleged that he believed he was being overcharged and explained that though the certificate of occupancy listed the apartment as residential and though the landlord was aware that he was taking the apartment for residential purposes the landlord had required him to take the apartment in a corporate name and had given him a standard form office lease. The tenant also complained that the landlord had failed to offer him a renewal lease. Together with his complaint, the tenant made the following submissions: a copy of the June 1985 certificate of occupancy for the building, and a copy of a lease and of a letter agreement between Dominick Yanni as landlord and Bruce Brandwen Productions, Inc, as tenant. The lease executed on February 11, 1985 was a

Standard Form of Office Lease and provided at paragraph 2 thereof that the premises were demised for office use only; however, the last page of the lease expressly provided that the lease was subject to a letter agreement. The letter agreement, signed on February 21, 1985, provided among other things, that the landlord would furnish a refrigerator, stove, dishwasher, and a washer and dryer; that the tenant would have the option to renew his lease at levels provided by the Rent Stabilization Guidelines and would receive 4% interest on his security deposit; and that the landlord would allow the tenant to sublet space to Bruce Brandwen and Jill Savitt (Return: 1).[1]

Soon thereafter DHCR served the landlord with a copy of the tenant's complaint and provided the owner with an opportunity to respond. In response the landlord's attorneys, Kucker Kraus & Bruh (who represented the landlord throughout the entire administrative proceeding as well as in the Article 78 proceeding) alleged that DHCR lacked jurisdiction to process the complaint because in 1984 the landlord had registered the apartment with DHCR as exempt due to commercial use, and the registration had not been timely challenged. Additionally, the landlord's attorneys argued the tenant's alleged residential use of the apartment constituted a breach of the lease (Return: A-4). Together with this response, the landlord submitted a copy of the 1984 apartment registration which listed the tenant as Phidon Corporation, the apartment as

[1] References are to the documents contained in the original administrative record which has been submitted to the Court.

exempt due to commercial use, and the total number of rooms in the apartment as 4 (Return: A-5).

In reply, the tenant asserted, among other things, that the landlord's 1984 registration was invalid, that the landlord's claim that the apartment was exempt from rent stabilization because of commercial use was a fraudulent attempt to bypass the Rent Stabilization Law and contrary to the zoning laws and the building's certificate of occupancy. The tenant also alleged that he had not been served with a copy of the apartment's registration, and therefore, his complaint could not be considered untimely, and that he had not used the apartment for commercial enterprise (Return: A-8).

On June 17, 1987, DHCR conducted an inspection of the apartment. The inspection report advised that the apartment was a duplex with 5A consisting of a livingroom, kitchen and den, and 6A of a bedroom and a second room and that the apartment was being mainly used for residential purposes (Return: A-7). Additionally, on June 19, 1987, the tenant submitted a copy of a sublease for the subject apartment dated February 22, 1985 between Bruce Brandwen Productions, Inc, and Bruce Brandwen which provided that the apartment may be used for residential purposes, and a letter from Bruce Brandwen to Dominic Yanni, dated February 25, 1985, accompanying the transmittal of the sublease to the landlord (Return: A-9).

On August 12, 1987, DHCR served the owner with a Notice requesting leases for the subject apartment from April 1, 1980

(Return: A-10). However, the landlord's attorneys refused to do so stating, among other things, that the tenant's complaint was not filed within ninety days of the 1984 registration and accordingly, the landlord was not required to produce leases from April 1, 1980. The landlord also argued that if the complaining tenant was found to be the first rent-stabilized tenant since the applicable base date, then the rent reserved in the lease should be regarded as the initial legal regulated rent.

Together with this response, the landlord's attorneys submitted a copy of the lease between the landlord and the prior tenant. This was a Standard Form of Apartment Lease dated August 31, 1981, between Dominick Yanni as landlord and Phidon Corporation as tenant, with Phil Esposito as guarantor. Paragraph 2 of the lease provided that the apartment was to be used only by the tenant and the immediate family for living purposes only. Paragraph 33 of the lease provided that the apartment was to be used solely for the guarantor's personal use, and paragraph 32 of the lease provided that pets were allowed. In addition the lease permitted the tenant to install a dishwasher, refrigerator, stove, and a washer and dryer (Return: A-11).

On November 4, 1987, DHCR served the landlord a Notice warning that the record indicated that there had been a willful overcharge, which warranted the imposition of treble damages, and affording the owner an opportunity to submit evidence to rebut a finding that the overcharge was willful (Return: A-13). The landlord did not respond to this notice.

On December 17, 1987, however, the Rent Administrator issued an order denying the tenant's application. The order held that the owner had registered the subject apartment pursuant to the Rent Stabilization Code listing the apartment as exempt and had served the tenant of record with a copy of the apartment registration; that the tenant had not filed a timely objection to the registration and as a result the tenant's rent of $2,874 constituted the base rent for the subject apartment; and that, accordingly no overcharge had occurred (Return: A-14).

On January 19, 1988, the tenant filed a Petition for Administrative Review ("PAR") challenging the Rent Administrator's order. The tenant's petition expounded upon his previous arguments concerning the fraudulent nature of the landlord's claim that the apartment was exempt due to usage of the apartment for commercial purposes, and further noted that the tenant had visited the apartment while it was still occupied by Phil Esposito, (the then General Manager of the New York Rangers hockey team), and his wife Donna, that it was clear that the Espositos were using the apartment as their residence, that the apartment contained household appliances, beds and clothes, and that there was no office equipment in the apartment (Return: B-1).

On February 22, 1988, DHCR served the landlord with a copy of the tenant's PAR and afforded the landlord an opportunity to respond (Return: B-2). The landlord's attorneys filed their answer to the PAR on April 7, 1989. In their answer, the landlord's attorneys alleged that the tenant's claim that the subject

apartment was not a commercial unit during the prior tenancy was outside the scope of review because the tenant had not produced evidence to that effect before the Administrator; that the 1984 registration form and the prior tenant's lease indicated commercial usage; and that issues concerning the zoning laws, or the building code should have no bearing in determining the rent for the subject apartment (Return: B-4).

In reply to the landlord's answer, the tenant's attorney argued that examination of the prior tenant's lease submitted by the landlord belied the claim that the apartment had been exempt due to commercial use; that the landlord had submitted no proof of service of the original rent registration form and had never served any registration form on the complaining tenant; and that, even if the landlord could provide proof of service, the landlord should not be permitted to bypass the provisions of the Rent Stabilization Law through the filing of false registration statements (Return: B-5).

By a subsequent letter dated September 9, 1988, the tenant's attorney stated that he had spoken to Phil Esposito, who had advised him that he had used the apartment for residential and business purposes (Return: B-7).

On December 7, 1988, after further communications and submissions, DHCR's Deputy Commissioner for Rent Administration issued a Comprehensive Order and Opinion granting Petition for Administrative Review and Modifying District Rent Administrator's Order. In his order the Commissioner found that the landlord had

not established his claim that the apartment had been rented for commercial purposes. Additionally the Commissioner noted that as the landlord had failed to show that the 1984 registration had been served on the prior tenant, and as the registration was invalid due to its improper listing of the subject apartment as exempt, the complaining tenant was entitled to challenge the initial registration, and the owner was required to provide rent records for the subject apartment from April 1, 1980 to determine the legality of the rent being charged for the subject apartment.

As the owner had refused to provide leases from April 1, 1980, the Commissioner determined the rent for the subject apartment by applying an alternative procedure for establishing the lawful rent used by DHCR where owners fail to produce actual rent records from the base date. DHCR's standard procedure under such circumstances establishes the rent at the lowest of three factors: (1) the lowest rent for a comparable apartment in the building as indicated in DHCR's rent registration records, (2) the complainant's rent reduced by a guideline and vacancy allowance ($2466.95 in the case at bar), or (3) the last rent paid by the prior tenant ($2400 in the case at bar). With respect to the first factor, since the subject apartment constituted the only duplex consisting of four rooms in the building, DHCR calculated the lowest rent for a comparable apartment by doubling the lowest rent for a two room apartment in the building. This resulted in a figure of $923.46, which being the lowest of the three figures, was established as the rent for the subject apartment.

Additionally, the Commissioner determined that the imposition of treble damages on overcharges collected since March 1, 1985 was warranted, noting that the Rent Stabilization Code mandates the imposition of treble damages unless an owner establishes by a preponderance of the evidence that an overcharge was not willful, and further noting that the landlord's requiring the tenant to sign a commercial lease at a rent greatly in excess of the lawful amount despite knowledge that the tenant would be residing in the apartment constituted a deliberate attempt by the owner to evade the requirements of the Rent Stabilization Law and Code and to overcharge the tenant. The Commissioner, however, did not establish the exact amount of the overcharge as the tenant had been withholding rent and the exact amount of the overcharge collected could be determined in the pending Civil Court proceeding wherein the Court could offset any rent arrears due the owner against the refund due to the tenant (Return: B-16).

On December 14, 1988, the landlord's attorneys filed a lengthy request for reconsideration alleging procedural violations and substantive errors in the Commissioner's order (Return:B-17). The tenant's attorney responded to the request on January 6, 1989 refuting the various allegations raised by the landlord's attorneys (Return: B-19).

By letter dated January 17, 1989, the Assistant Deputy Counsel for the Office of Rent Administration denied the owner's request noting that he had carefully considered the landlord's thorough request for reconsideration as well as the record in the matter and

concluded that the due process rights of the parties were not violated and that the proceeding had been correctly determined (Return: B-20).

In the subsequent Article 78 proceeding challenging the Commissioner's determination, the court below upheld the finding that the subject apartment is being used for residential purposes and is subject to rent stabilization and affirmed the ruling that an overcharge occurred and that treble damages should be imposed. However, the court held that the Commissioner improperly determined the amount of the rent overcharge in applying DHCR's court approved default procedure, and remanded with express instructions on the amount to set the rent, allowing no discretion to DHCR:

> Respondent has established a procedure whereby the lowest of three factors is used as the rent: (1) the lowest rent for a comparable apartment in the building; (2) the complaining tenant's rent reduced by a guideline and vacancy allowance (resulting in this case in a figure of $2466.95); or (3) the last rent paid by the prior tenant (here $2400). The use of these alternative procedures has received judicial approval. 61 Jane Street Associates v C.A.B., 65 NY2d 898 (1985). aff'g NYLJ May 9, 1984, p.11, col.4 (Sup.Ct. N.Y.Co., Greenfield, J.).
>
> The subject apartment was the only four room duplex penthouse apartment in the building. The Commissioner determined the lowest base rent for a two room apartment in the building and doubled it. The resultant figure ($923.46) was lower than the figures reached by the other two factors, and the Commissioner used it as the base rent of the duplex.
>
> This was error. There is no equivalency between a duplex penthouse unique to a building located just off Central Park and two small apartments within the same building. See KGS Associates: Adm. Rev. Dckt. No. ARL-

00750-K. Respondent argues that it was the landlord's willful failure to provide a rental history which forced the Commissioner to set the $923.46 figure. The willfulness of the landlord's conduct was properly a consideration in the imposition of treble damages. It was not relevant to the determination of a reasonable rent. Moreover, in the absence of a comparable apartment in the building, the Commissioner had available two other factors, the lower of which should have been used.

The petitioner's motion is granted only to the extent that respondent is directed to issue a new order which fixes monthly rent at the lower of two factors relevant to the subject apartment, and is otherwise denied.

ARGUMENT

THE COURT BELOW ERRED BY IMPROPERLY SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF DHCR, IN RULING THAT DHCR ERRED IN APPLYING ITS ALTERNATIVE FORMULA FOR COMPUTING THE LAWFUL RENT

The issue in this appeal is whether the court improperly substituted its own judgment in concluding that the basis used by the DHCR for computing the rent overcharges was arbitrary and capricious.

The Rent Stabilization Law and Code limit the rents which owners may charge upon the execution of vacancy and renewal leases. Thus, under the Rent Stabilization Law, the lawful rent is determined by adding to the rent on the appropriate base date guideline increases permitted upon the execution of subsequent leases. Landlords are required to maintain rental records and submit them to the Division upon demand to determine the legality of the rent being charged for particular apartments.

The record in the case at bar, however, established that the landlord was intent in evading the requirements of the Rent Stabilization Law by claiming that the apartment was exempt from rent stabilization due to its alleged commercial use, and that the owner failed to provide the rental records necessary to determine the legality of the rent being charged.

In the absence of rental history records, the agency must utilize alternative formulas in order to establish an appropriate rent. Over the years, the rent agency has tried several methods of doing so. At one point, the Conciliation and Appeals Board would set the rent based on the complaining tenant's rent minus a guideline increase. However, this formula did not deter landlords from overcharging or from failing to produce rent records as they could easily benefit by increasing the rent for a vacancy lease well above the guideline allowance.

In 1982, the Conciliation and Appeals Board adopted a new formula to establish the rent in the absence of an apartment's rental history records. The formula sets the complaining tenant's rent at the lowest of: 1) the lowest rent for a comparable apartment; 2) the complaining tenant's rent minus guideline increases; or 3) the last rent paid by the prior tenant. Under this procedure, in the absence of rental history records, the landlord was required to provide a current rent roll which would allow the agency to determine the rents for comparable apartments. The failure to provide the rent rolls would result in the expulsion

of the building from rent stabilization to rent control and in the loss of current guideline increases building-wide.

The procedure and the rationale in support of it has been upheld in the courts numerous times. See, e.g., Lavanant v. DHCR, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1st Dept. 1989), 61 Jane Street Associates v. CAB, 65 N.Y.2d 898, 493 N.Y.S.2d 455 (1985), aff'g, 108 A.D.2d 636, 486 N.Y.S.2d 694 (1st Dept. 1985); Charles H. Greenthal Co., Inc. (DHCR), 126 Misc.2d 795, 484 N.Y.S.2d 445 (Sup. Ct., N.Y. Co., Price, J., 1984); Farhadian v. CAB, February 24, 1984, n.o.r. (Sup. Ct., N.Y. Co., Sherman, J.), aff'd, 151 A.D.2d 1016, 496 N.Y.S.2d 595 (1st Dept. 1985).

The three parts of the alternative formula are interrelated with one acting as a check upon the others in an attempt to ensure that landlords do not benefit from their failure to provide rental history records. The first part of the formula, the rent of comparable apartments, is designed to provide a ceiling on the other two branches as the other two branches are inherently suspect in the absence of rental records. Only where the other two branches are below the rents for comparable apartments can there be said to be a likelihood that the landlord will not be obtaining a windfall if the rent is set based on the complaining tenant's rent minus a guideline or the prior tenant's last rent.

Without the comparable rents ceiling, owners can attempt to circumvent the Rent Stabilization Law with impunity as the rent would be set based on the rent of the complaining tenant or the last prior tenant (if known) without any evidence that those rents

were legal. For example, a landlord could charge $3000 to a complaining tenant though the rent of the prior tenant, or of the tenant before the prior tenant may have been only $800 or $500 or less.

In the case at bar the Commissioner found the lowest of the three figures under the alternative formula to be the first, i.e., the lowest rent for a comparable apartment as indicated in DHCR's apartment registration. In the absence of another four-room apartment in the building, DHCR established this figure by doubling the lowest rent for a two room apartment. The figure was based upon the apartment registration forms filed by the owner with the DHCR, as reflected in the Division's computerized rent roll. That rent roll (which was part of the administrative record herein) lists the rent stabilized apartments in the premises. (Return: B-15) Thus, there was a sound evidentiary basis in the administrative record--derived from the owner's own registration statements--for DHCR's calculation of the lawful rent and the amount of the overcharge.

The court below upheld DHCR's use of the alternative formula, but incorrectly concluded that DHCR erred in the application of the formula, stating that "[t]here is no equivalence between a duplex penthouse unique to a building located just off Central Park West and two small apartments within the same building." This conclusion was an improper substitution of the court's judgment for that of the agency.

While there may not be an exact equivalence between the value of a four room penthouse apartment and the doubling of a two room apartment, the methodology used by DHCR under the circumstances was rational. In the absence of actual records precision cannot reasonably be required. Indeed, the purpose of the alternative formula is to determine the lawful rent on the basis of a rough approximation in the face of a landlord's default.

As the Appellate Division, Third Department stated in Meskouris Brothers, Inc. v. Chu, 139 A.D.2d 813, 526 N.Y.S.2d 679 (3rd Dept. 1988), a case involving the Tax Commission, in upholding the use of an arguably imprecise formula in the face of a party's failure to produce proper records:

> Where the taxpayer's books and records are undeniably inadequate, the Tax Commission cannot be required to compute the tax owed with a high degree of precision or be held to ensure that the amount arrived at accords with statistical norms, for an accurate reckoning has been thwarted by petitioner's failure to comply with the law regarding record keeping (see, Matter of Grant Co. v. Joseph, 2 N.Y.2d 196, 206, 159 N.Y.S.2d 150, 140 N.E.2d 244). Given the abysmal state of petitioner's records, we are unwilling to fault the Tax Commission for its conclusion that the audit method devised, though clearly not immune from attack, was reasonably designed to ascertain what petitioner's taxes should have been. At best, petitioner has only demonstrated that the Tax Commission's tax calculation is imprecise; it has not, however, met its more onerous obligation of proving by clear and convincing evidence that the result of the method used was unreasonably inaccurate or that the amount of the tax assessed is erroneous (see, Matter of Surface Line Operators Fraternal Org. v. Tully, 85 A.D.2d 358, 859, 466 N.Y.S.2d 451).

The court below only obliquely attempts to explain why it thought that there was "no equivalency", erroneously characterizing the apartment selected by DHCR as "two small apartments" and contrasting it with a "duplex penthouse unique" to a building "just off Central Park West." In the first place DHCR selected only one apartment, a two room apartment, and then doubled the rent of that apartment to obtain a rough approximation of a rent for a four room apartment. Secondly, the characterization of the selected apartment as "small" is meaningless and without basis in the record. The building is a six story brownstone consisting primarily of two room apartments (two per floor). The subject apartment, is a duplex containing two rooms on the fifth floor and two rooms on the sixth floor. There is nothing in the administrative record which would indicate that the rooms in the apartment selected for comparability are smaller than the rooms in the duplex. Not only was there no basis in the record to conclude that there is "no equivalency" on the basis of size; DHCR, in the application of the alternative formula will typically look only at room count, not size, if there is no common line of apartments in the building. See, 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 (1990).[2] Thirdly, the fact that the building is just off Central Park West

[2] As in this case, in Rozmae the lower court improperly substituted its judgment for that of DHCR's with regard to the selection of a comparable apartment in the application of the alternative default formula.

is true of both the selected apartment and the subject apartment, and affects their rental value equally.

In sum, there is no rationale for the court's substitution of its judgment for that of the agency. In contrast, DHCR's manner of proceeding was eminently reasonable. The intent of DHCR's alternative procedure is to roughly approximate the lawful rent while eliminating the possibility that an owner would profit by his failure to submit the apartment's rental history records. In the case at bar, given the absence of another four room apartment in the building, the landlord's attempt to evade the rent stabilization law with respect to both the complaining and prior tenants, her refusal to provide the required rental records, and the likelihood under the circumstances that neither the $2400 per month rent charged to the prior tenant nor the $2874.00 per month rent charged to the current tenant bore any relation to the lawful rent, it was within DHCR's discretion to construct a comparable rent by doubling the lowest rent for a two room apartment.

The court below inappositely cites a DHCR order, KGS Associates, PAR Docket No. ARL-00750-K, in support of its decision. In that case, a Fair Market Rent Appeal in which the first rent stabilized rent was established after vacancy decontrol, the Commissioner declined to use the rent of a smaller apartment, adjusted on a per square foot basis, as a comparable rent. However, the Commissioner in KGS Associates did not preclude the use of smaller apartments in constructing comparables; his opinion only states that they "need not be used as comparables". His

determination assumes that comparable rents were available but that the landlord failed to submit them. Thus, it cannot be concluded from the opinion that the Commissioner would have refused to construct a comparable in that proceeding if the landlord had shown that no other comparables were available. It is within the agency's discretion to construct a comparable when the circumstances warrant it. KGS Associates provides no basis for overturning the Commissioner's order in this case.

There was nothing improper in the variant use of DHCR's alternative formula under the circumstances of this case, that is, the construction of a comparable rent using a smaller apartment. When unusual cases come before DHCR which require some variation in the application of its procedure in order to conform with sound practice, the Commissioner has the discretion to use the appropriate method. In the past DHCR has not merely varied its methodology in applying the alternative formula, as it did in the case at bar, but has actually modified that formula. Such modifications have been upheld by the courts. See, Apar Realty Company, Index No. 30567/87, May 19, 1988, n.o.r., Sup. Ct., N.Y. Co., Freedman, J. (discontinuance of fourth leg of formula - the use of updated rent control rents); 36 Hamilton Associates, 0071/88, Aug. 25, 1988, n.o.r., Sup. Ct., Richmond Co., Leone, J. (revision of first leg of formula from lowest rent in same line to lowest rent in comparable apartment). If a modification of the formula is within the agency's discretion, so is the use of a reasonable variant of that procedure. As the Court of Appeals stated in Ansonia Associates v.

State Division of Housing and Community Renewal, 75 N.Y.2d 206, 551 N.Y.S.2d 871, 873 (1989):

> "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charge with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld." [citations omitted]

In the case at bar, the court's conclusion demonstrates a lack of understanding of an operational practice of DHCR, i.e., the alternative default formula. Since DHCR's variant application of the formula in the case at bar was not unreasonable, the court should not have interfered with the agency determination.

As DHCR's determination is supported by a rational basis in the record, even though the court may in the first instance have decided the issue differently, it could not substitute its views during judicial review for that of the agency. 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 (1985). In Bambeck v. State Division of Housing and Community Renewal, 129 A.D.2d 51, 517 N.Y.S.2d 130, 132 (1st Dept. 1987) (reversing judgment entered May 13, 1986, Sup. Ct., N.Y. Co.), this Court held that:

> In our view....the court [below] inappropriately substituted its judgment for that of respondent on factual matters which were within respondent's primary jurisdiction to determine. The central issue at Special Term was whether the determination had a rational basis and, although the court may, in the

> first instance, have decided the issue differently, it could not substitute its own views for those of the agency in the absence of a finding that the administrative determination was arbitrary, capricious or irrational.

See also, 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 (1990) (reversing judgment entered December 14, 1988, Sup. Ct., N.Y. Co.); Phelps Management Co. v. Gliedman, 86 A.D.2d 540, 446 N.Y.S.2d 72 (1982) (reversing judgment entered March 10, 1981, Sup. Ct., N.Y. Co.); Matter of Buhagiar v. DHCR, 138 A.D.2d 226, 525 N.Y.S.2d 202 (1st Dept. 1988) (reversing judgment entered April 20, 1987, Sup. Ct., N.Y. Co.); Matter of Rose Associates, 121 A.D.2d 185, 503 N.Y.S.2d 13 (1st Dept. 1988) (reversing judgment entered June 20, 1985, Sup. Ct., N.Y. Co.).

However, were this Court to conclude that the court below was correct in its conclusions as to the rent computation, it should nevertheless hold that the court below erred as a matter of law in limiting the basis for recomputing the rent upon remand to DHCR. The court directed DHCR to fix the rent "at the lower of two factors relevant to the subject apartment", that is, the lowest of the prior tenant's last rent or the tenant's rent minus a guideline--in this case, the prior tenant's last rent. Under the court's direction the rent would be set at $2,400.00 rather the $923.00, as determined by DHCR.

Given the landlord's failure to produce the apartment's rent records, there is no evidence which could establish the legality of

the $2,400 rent charged to the prior tenant. That rent is inherently suspicious, especially in light of the landlord's evasive practices. The court's decision, however, would have the effect of legitimizing this amount as the legal rent as of 1985 despite the absence of rental records and despite the fact that a two room apartment in the same building was renting for only $461.50.

Moreover, the court's limitation appears to presume that if it is not possible to use the first branch of the three part test, the rent should be based simply on the other two branches. While this solution may appear reasonable at first blush, it misapprehends the nature of the three part test, as the last two branches cannot be expected to prevent windfalls to the landlord in the absence of the first, and the main goal of the formula is precisely to prevent such windfalls.

The court's limitation, providing that in the absence of a comparable apartment in the same building the rent for an apartment should be based solely on the lowest of either the complaining tenant's rent minus a guideline or the prior tenant's last rent (which may or may not be known), would provide a loophole through which landlords of unique apartments could blithely ignore the Rent Stabilization Law by failing to maintain rental records. They would be safe in the knowledge that they could gain from overcharging, confident that even after a rent reduction imposed by DHCR, the established rent would be higher than the law permits.

In precluding DHCR from selecting or constructing a different comparable rent, the court below once again improperly and without

rationale substituted its own judgment, in this instance prior to the agency's reconsideration of the matter.

In Ansonia Associates v. State Division of Housing and Community Renewal, 147 A.D.2d 420, 538 N.Y.S.2d 259, 261 (1st Dept. 1989), this Court reversed an order issued by the Supreme Court because it "improperly limited the scope of the proceeding which is to be remitted to the DHCR." Even were the matter to be remanded to DHCR, the agency, as the trier of fact, should not be subject to unwarranted limits prior to a redetermination.

Accordingly, should this Court adhere to the conclusion of the court below that the Commissioner's setting of the rent at $925.00 was improper, it should remand the matter to the agency for such further proceedings as may be necessary to set the lawful rent without directing the agency to set the rent at any specific amount or in any specific manner.

It is well settled that where there is a rational basis in the record to support an administrative determination, it should not be disturbed. Thus, the court cannot substitute its judgment for that of the administrative agency. See, 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, was rendered in full accordance with law, and is neither arbitrary or capricious. Contrary to the erroneous conclusion of the court below, it is thus entitled to judicial affirmance.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed insofar as it remanded the proceeding for a redetermination of the amount of the rent overcharge, the determination of DHCR should be affirmed, and the petition dismissed with costs.

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Respectfully submitted,

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