To be Argued by
RICHARD HARTZMAN
TIME FOR ARGUMENT: 30 MINUTES

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of

JERROLD D. ZIMAN and ELLEN ZIMAN,
Petitioners-Respondents,

For a Judgment Pursuant to Article 78 of the CPLR

against

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

ROBERT WALKER and DEVEREUX DANNA,
Intervenors-Appellants.

Brief for Respondent-Appellant New York State Division of Housing and Community Renewal

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Respondent-Appellant,

- and -

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

PRELIMINARY STATEMENT

This is an appeal by the New York State Division of Housing and Community Renewal (hereinafter "DHCR") from an order of the Appellate Division, First Department, entered on August 10, 1989. That order, with Ellerin, J., dissenting, reversed a judgment of the Supreme Court (Dennis

Edwards, J.) dated August 24, 1988, and entered September 12, 1988, which dismissed the Article 78 petition of Petitioners-Respondents (the owners). Their petition sought to annul a determination of DHCR which denied the owners' applications for certificates of eviction of rent controlled tenants residing in the subject building. The Appellate Division, in reversing the lower court's judgment, directed DHCR to issue the requested certificates of eviction. Leave to appeal was granted by the Appellate Division.

STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Appellate Division err in finding that DHCR's order was arbitrary and capricious in denying the owners' consolidated applications for certificates of eviction on the grounds of owner-occupancy and hardship, where the owners admitted that their purpose in seeking the evictions was for owner-occupancy, and where the grant of the application would constitute an evasion and circumvention of the statutory restrictions on evictions for owner-occupancy?

The court below impliedly answered in the negative.

2. Did the Appellate Division err in finding that the owners had established hardship simply because a DHCR staff report concluded that the owners could not make an 8 1/2% return, even though DHCR had not made a ruling on whether or not the report was acceptable or whether the results of that report were sufficient for a finding of hardship?

The court below impliedly answered in the negative.

STATEMENT OF THE NATURE OF THE CASE

This proceeding concerns regulatory efforts to prevent the evasion and circumvention of limitations on a landlords' ability to evict rent-controlled tenants. Limitations on evictions are an integral part of the rent regulatory system established to respond to the emergency created by the shortage of affordable housing. They reflect the community's interest in preserving the existing stock

of rent-regulated housing for the purpose of maintaining affordable housing. It is indisputable that the authors of the rent control laws and regulations carefully weighed the competing interests of landlords and opted in favor of preserving the existing stock of rent-regulated housing and imposing broad limitations upon a landlord's ability to evict existing tenants from such housing[1].

Landlords have nevertheless frequently sought to evade the limitations on evictions through a variety of guises; and the legislature and rent agencies have reacted by attempting to close off opportunities for circumvention. Indeed, there is a strong policy embodied in the rent control law against evasionary practices.

In addition to the traditional limitations on evictions and the many hedges against evasion of those limitations, the legislature, in 1984, in response to public concern for protecting elderly, disabled and long-time tenants, enacted legislation which precluded their eviction from rent-controlled apartments where a landlord seeks such eviction for his or her family's use and occupancy. This provision has been broadly construed to effectuate the legislative purpose. See,McMurray v. New York State Division of Housing and Community Renewal, 135 A.D.2d 235, 524 N.Y.S.2d 693, 695 (1st Dept. 1988), aff'd, 72 N.Y.2d 1022, 534 N.Y.S.2d 924 (1988).

The question in this appeal is whether DHCR can, as a matter of law, find in a particular case that a landlord has sought to evade the foregoing restrictions on eviction for owner-occupancy by applying for eviction on the grounds of owner-occupancy and alleged hardship when the landlord's admitted purpose in seeking the eviction is owner-occupancy, and not based upon the alleged hardship?

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[1] The case at bar involves the potential eviction of existing tenants. It does not involve a question of requiring an owner to rent to new tenants.

In similar cases, the courts have upheld the rent agency's denial of applications for evictions made under more than one section of the rent control regulations where the landlord has sought to evade the requirements of one of the sections. See, e.g., Oste v. Berman, 51 Misc.2d 274 N.Y.S.2d 468 (Sup. Ct. Kings Co., Damiani, J., 1966); Matter of Tombini v. Berman, 25 N.Y.2d 936, 305 N.Y.S.2d 152 (1969); aff'g, 31 A.D.2d 647, 298 N.Y.S.2d 453 (1st Dept.).; Malmud v. Abrams, N.Y.L.J., January 27, 1956, p. 7 (Sup. Ct., N.Y. Co., McGivera, J.), aff'd, 1 A.D.2d 952, 151 N.Y.S.2d 612 (1st Dept. 1956), appeal dismissed, 3 N.Y.2d 937, 146 N.E.2d 187, 168 N.Y.S.2d 5 (1957); Matter of McCoy v. McGoldrick, 278 App. Div. 384, 105 N.Y.S.2d 537, reversed on other grounds, 303 N.Y. 744; Mendlovitz v. Herman, N.Y.L.J., October 4, 1962, p. 13, col. 3 (Sup. Ct., N.Y. Co., Markowitz, J.).

In the instant case, the Appellate Division failed to address the issue of evasion and circumvention despite the clear and compelling evidence in support of DHCR's determination that the owners sought the evictions, not because of their alleged hardship, but for their own use and occupancy. The owners' hardship claim was not even a thinly disguised attempt to circumvent the newly enacted law protecting the elderly, disabled and long-term tenants from evictions for owner-occupancy. The owners purchased the property with the intent of evicting the remaining tenants so they could occupy the building with their family. Only after the law changed and they were notified by one of the tenants that he qualified for protection under the new law, did the owners tack on the hardship claim to their owner-occupancy claim. Nevertheless, they continued to express throughout this proceeding--including the litigation--their true intent of seeking the evictions so they could live in the entire building. They were not in good faith seeking the evictions because of financial hardship.

DHCR's determination was amply supported by the evidence of record and was not arbitrary or capricious.

In failing to address the issue of evasion, the Appellate Division misconstrued DHCR's interpretation of the law protecting the elderly, disabled, and long term tenants of twenty or more years standing. That law admittedly does not apply to applications for hardship evictions. But in administering the law, DHCR can, and in the instant case properly did conclude that the consolidated application for hardship and owner-occupancy evictions is an attempt at evading the protections for the aforesaid classes of tenants.

The Appellate Division also erred in ignoring the required elements of a finding of hardship. In making its own ad hoc finding of hardship where none was made by DHCR, the Appellate Division seemingly assumed that hardship is determined solely on a basis of a ministerial calculation made by DHCR staff which concludes that an owner cannot make an 8 1/2% return on his or her investment, without the hearing required by regulation. In fact, an owner must show, not only that he or she cannot make an annual return of 8-1/2 %, but also that he or she has not con-tributed to such financial condition, that he or she is suffering financial hardship because of that condition, and that his or her good faith intention in seeking eviction is to permanently remove the housing from the market because of the hardship.

Both aspects of this case raise issues of general public importance. If upheld, the Court's decision can be expected to encourage owners of the still substantial stock of rent controlled housing to use manipulative methods both to evade the legislative restrictions on evicting elderly, disabled and long-time tenants, most of whom are individuals of limited incomes, and to seek unjustified evictions on the basis of other provisions of the law and regulations. This would have a deleterious

effect on the legislative goal of maintaining the stock of affordable housing in New York City.

In light of the important policy issues at stake and the clear and compelling evidence in the administrative record, DHCR's determination should be affirmed and the decision of the Appellate Division reversed. DHCR's determination was not arbitrary or capricious, but rather had a rational basis.

STATEMENT OF THE FACTS

The subject accommodations are located at 5 Minetta Lane, New York, New York, Apartments 1E and 2F. The four story building, located in Greenwich Village, was acquired by the Zimans on February 21, 1984, at a cost of $280,000, with the explicit intention of seeking the eviction of all tenants from the premises. (Appendix: A-1, A-14)[2]. At the time of purchase there were only three occupied apartments out of the seven in the building. (Appendix: A-18)

Within two weeks of purchase, on March 5, 1984, the Zimans filed applications for certificates of eviction for Apartments 1E, 2F and 4F pursuant to Section 55 of the Rent and Eviction Regulations (owner use and occupancy evictions)[3]. Mr. Ziman claimed that it was his "sole and expressed purpose in purchasing that building to reside in the entire building, utilizing all of the available space therein for my family occupancy." (Appendix: A-18, A-27, A-36).

A few months after commencement of the administrative proceeding, in June of 1984,

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[2] Citations are to the Record or Appendix on Appeal. The Return, i.e., the original administrative record, was submitted by DHCR to the Supreme Court but was misplaced by that court and could not be located despite a diligent search. Copies of relevant documents from the administrative proceeding were compiled and stipulated to by the parties and included in the Appendix on Appeal. DHCR has also submitted to this Court the transcipt of the hearing held during the administrative proceeding.

[3] The tenant residing in apartment 4F died on 1987, rendering the application as to him moot.

Chapter 234 of the Laws of 1984, which bars the eviction of rent-controlled tenants who are elderly, disabled, or have been occupying an apartment for 20 years or longer, was enacted by the State Legislature. As a result, Robert Walker, the tenant in apartment 1E requested, by letter from his attorney, dated July 25, 1984, that the eviction application as to him be denied since he had resided in his apartment for more than 20 years (Appendix: A-43). Based on this representation, the Ziman's withdrew their Section 55 eviction application as against Mr. Walker. (Appendix: A-45)

Immediately thereafter, on August 9, 1984, the Zimans filed additional eviction applications for the three apartments, requesting certificates of eviction under Sections 54 and 59 of the Rent and Eviction Regulations (withdrawal of the building from the rental market because of hardship). An accompanying letter from their attorney requested that the earlier applications be deemed amended so that the applications be considered under Sections 54, 55 and 59[4], except for the one involving Mr. Walker for which the request under Section 55 (owner's use and occupancy) was dropped. The Zimans, while claiming financial hardship, nevertheless said,

> However, our primary concern is not monetary. We did not buy the house to make money. Rather, we only want a good home for ourselves and our two young children...

(Appendix: A-47, A-51, A-55).

On August 13, 1984, the District Rent Administrator, by order, found that Mr. Walker could not be evicted under Section 55 since he had resided in the premises for more than twenty years and terminated the Walker eviction proceeding. (Appendix: A-64). Subsequently, pursuant to the owner's request, the remaining March and August eviction applications were consolidated.

By Notice dated September 4, 1984, the owners were requested to submit a "Statement of

[4] These section have been renumbered as 9 NYCRR 2204.4, 2204.5 and 2204.9, respectively.

Building's Economic Viability" with regard to the hardship considerations under Section 59 (Appendix: A-65). The Statement was filed with attachments on October 11, 1984 (Return: A-66 to A-79), answered by the tenants by affidavit filed November 1, 1984 (Return: A-80), and followed by additional affidavits from the landlord and others in support of the landlord's application, all filed on November 27, 1984 (Appendix: A-98 to A-138).

After additional requests for information, DHCR's accounting department issued a report finding on April 2, 1985 (Appendix: A-139), concluding that "for the one year period commencing with February, 1984, an 8 1/2 % return [on assessed value] is not realizable." (Appendix: A-141) However, the report noted that certiorari proceedings were pending to reduce the assessed value of the property and warned that:

> Cognizance should be taken of the fact that in the event of future actions regarding this property, the status of these Writs should be explored for the reason that a reduction of the base used in our computation may affect the 8 1/2% return position established for this building.

(Return: A-141).

Subsequently, a hearing was scheduled for June 5, 1986 to determine whether the landlords were entitled to certificates of eviction (Return: A-47). A second day of hearings was held on June 26, 1985.

At the hearings, the Zimans testified, among other things, that they purchased the subject building to convert into a one family house to live in. Their architect testified that they had requested plans for using 2 out of 3 apartments but that the space would be quite small and he would not professionally recommend it. (Hearing Transcript, 87).

Following the close of the hearing, the Zimans moved into the subject building, there being

four empty apartments at the time. (Appendix: A-211)

On July 8, 1985, the tenants moved for a further hearing concerning DHCR's report on the economic viability of the premises. Their attorney stated that they had not received a copy of the economic report until minutes before commencement of the June 5 hearing. They also requested an opportunity to examine at a hearing DHCR's staff member who prepared the report and to present testimony on the rental value of the apartments in the premises. (Appendix: A-169 to A-174).

The landlords opposed the motion (Appendix: A-175) but on July 16, 1985, the administrative law judge gave the tenants two weeks to submit evidence regarding the report; gave the landlords seven days to reply; and ruled that the report would be referred to the Accounting Bureau for further consideration (Appendix: A-187).

After further submissions, the Accounting Bureau issued a followup report dated October 7, 1985, concluding that an 8 1/2% return was still not realizable and again noting that there were pending certiorari proceedings to reduce the assessed value of the property. (Appendix: A-200) Within days after the report was issued, the tax certiorari proceedings were discontinued, although DHCR was not notified by the owners until mid-January, 1986. (Appendix: A-211 to A-218)

On January 6, 1986, the tenant in apartment 2E, Devereux Danna, wrote to the administrative law judge indicating that, as of January 1, 1986, he had been residing in the premises for 20 years. (Appendix: A-203).

After briefing by the parties, the administrative law judge recommended that the eviction applications be dismissed, finding as follows:

THE SECTION 59a(4) CASE

4. The owner, Jerrold Ziman, testified that he and his family wished

to occupy the subject building and convert it into a one family house.

5. Accordingly, I find that the owner's sole purpose in bringing these eviction applications is to occupy the subject building to live in as his primary residence. Section 59a(4) of the Regulations is only to be used when an owner seeks to remove occupied housing accommodation from the rental markets because of an undue hardship. In the instant case there is a specific section within the Eviction Regulations (Section 55) that controls this factual situation. The owner shall not avoid a specific Section of the Regulations (Section 55) by looking into another general Section (Section 59). Therefore, the Division must only consider this application under Section 55.

THE SECTION 55 CASE

6. Section 55 of the Regulation provides in its relevant part that a certificate of eviction shall be issued where a landlord seeks in good faith to recover possession of a housing accommodation because of an immediate and compelling necessity for his personal use or for the use of his family. This Section was amended to conform to Chapter 234 of the Laws of 1984 which provided inter alia that a landlord shall not evict a tenant who has resided in the subject building for 20 years or more.

7. The Division has already determined that Robert Walker in apartment 1E has resided in the building for more than twenty years, I also find that Devereux Danna has resided in apartment 2F for more than twenty years. Mr. Danna lawfully took occupancy as a subtenant/roommate of Albert Flettrich on January 1, 1966. On February 1, 1967 Mr. Danna took over the lease in his own name from Mr. Flettrich, Mr. Danna submitted reliable documentary evidence (such as telephone account opened in 1966, a copy of the 1966 phone book, bank checks, tax records) showing that he resided there as of January 1, 1966.

8. Based upon the above determination, it therefore becomes apparent that the owner cannot convert the subject building to a one family house since he will at most only be able to obtain possession of one out of three apartments. Moreover, I further find that the owner would not occupy just one apartment, since one apartment would clearly be inadequate for his needs.

9. Accordingly, based upon the entire record I find that the owner's

applications for certificates of eviction should be dismissed.

(Appendix: A-219 at A-224 to A-225).

On June 10, 1986 the District Rent Administrator issued an order denying the application, finding that:

> after a hearing before an administrative Law Judge, the Division finds that the owner cannot convert the subject building to a one family house as two out of three tenants have resided in the building for more than 20 years. In addition the Division finds the owner's application only to be appropriate under Section 2204.5 [Section 55] of the Regulations.

(Appendix: A-226).

The landlords filed a Petition for Administrative Review (PAR) on July 11, 1986 arguing (1) DHCR had already deemed Section 2204.5 (Section 55) to be applicable and that there was no basis for finding that they could not apply for relief under that section; (2) they were being subject to undue hardship by virtue of owning a building with only three tenants; (3) DHCR unconscionably delayed the processing of the applications denying them due process; (4) the order is unconstitutional; (5) Mr. Danna never established that he had a lease for 20 years; and (6) even if Walker and Danna had lived in the building for 20 years, there was no basis for denying the application as to the third tenant, Mr. Pagnano (Appendix: A-227 to A-230).

On February 26, 1987, the Deputy Commissioner issued an order denying the landlords' PAR (Appendix: A-231 to A-233), finding, among other things:

> One section of the rent control laws and regulations may not be used to circumvent another section. The case here is one where the owners are seeking to evict tenants for their own use and occupancy. The legislature chose to extend special protection to certain classes of tenants in that situation. The parties may not use other sections of the regulations (NYCRR 2204.4 and 2204.9) to evade the intent of the

Legislature.

With regard to the landlords' argument that Mr. Danna had not established that he had a lease for 20 years, the Commissioner found:

> It is common for rent controlled (as opposed to rent stabilized) tenants not to have leases.

With regard to denying the application as to the third tenant (Pagnano)[5], the Commissioner found:

> Only one apartment (Mr. Pagnano's) [of the three which were tenant-occupied] might now be available to the landlords for reasons above discussed. It is obviously not suitable for the landlords' purposes and the Commissioner cannot now believe they would occupy it. The Commissioner notes, however, that the landlords are not precluded from refiling an application for the remaining apartment if they can establish a credible plan for occupying it.

With regard to the issue of economic hardship the Commissioner noted that:

> ...financial relief may be available to the landlords under the "MBR" and "hardship" provisions of the regulations.

The owners then commenced an Article 78 proceeding, challenging both DHCR's determination and the constitutionality of Chapter 234 of the Laws of 1984. (Record: 20) The Supreme Court found that DHCR's determination had a rational basis and was based upon substantial evidence, and denied the petition. (Record: 14-19)

On appeal to the Appellate Division, First Department reversed the Supreme Court decision, finding that:

> .... since there is no question that petitioners meet the hardship

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[5] Pagnano is the tenant who died in 1987, leaving his apartment in the owners' possession along with the four previously vacant apartments. Thus, the owners have possession of one apartment on the second floor, and all of the third and fourth floors.

> requirements of sections 2204.9 and 2204.4 and their express purpose of converting their house to its original use as a single family residence is consistent with their request to remove the apartments in issue from the housing market, to deny them the requested certificates of eviction was arbitrary and capricious.

(Record: 6) Justice Ellerin, in her dissenting opinion had a contrary view of the matter:

> It is clear that, no matter how their application was styled, petitioner-landlords were seeking to recover possession of the rent-controlled apartments here at issue in order to occupy them for their own personal use. Respondent DHCR properly held that petitioners could not use one section of the rent control laws and regulations (i.e., Section 59) to circumvent or evade another section (i.e., Section 55) wherein the Legislature extended special protection to a certain class of tenants. By granting the petition herein, and overturning the DHCR determination, the majority is permitting petitioners to do precisely that.
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> * * * *
>
> In rejecting DHCR's determination in this case, the majority limits its focus to the uncontradicted fact that audits disclosed that an 8 1/2% net annual return on this property was not realizable, and concludes that such showing alone, without more, automatically establishes the landlord's right to a hardship eviction under Section 59. But to prevail under that section it is not enough to simply show that an 8 1/2% annual return is not possible. What is necessary is a showing that it is the landlord's <u>good faith</u> intention in seeking eviction to permanently remove the housing accommodation from the market <u>because of</u> financial hardship....(emphasis in original)
>
> The record in this case is replete with evidence supporting the Division's finding that the only purpose for which the petitioners were seeking these evictions was to occupy the units themselves and that the assertion of hardship was not made in good faith. Accordingly, that finding is beyond our review. (<u>Matter of Pell v. Board of Education</u>, 34 NY2d 222.)

(Record: 7, 9-10)

The Appellate Division, on November 2, 1989, granted DHCR and the tenants-intervenors

leave to appeal to this Court. (Record: 1)

ARGUMENT

POINT I

THE DETERMINATION DENYING THE OWNERS' EVIC-TION APPLICATIONS ON THE GROUND THAT THEY SOUGHT TO EVADE THE RESTRICTIONS ON EVICTIONS FOR OWNER-OCCUPANCY WAS RATIONALLY BASED IN THE RECORD AND WAS ENTITLED TO JUDICIAL AFFIRMANCE

The case at bar has a significance extending well beyond its immediate effect on the particular owner and tenants. Its outcome will affect the perceived ability of owners to evict elderly, disabled and long-term tenants from moderately-priced rent-controlled apartments. A significant percentage of the stock of rent-controlled apartments is contained in small buildings such as the one in the case at bar. Owners of those buildings could easily expand eviction applications for owner-occupancy to include the entire building on the basis of an alleged hardship, jeopardizing the tenancies of those elderly, disabled and long-term tenants which the legislature intended to protect. Thus it is important to place the case in its larger context; that is, the crisis in providing affordable housing for New York City residents and the strategies developed to protect such housing.

The shortage of moderately-priced housing in New York City is a longstanding problem that continues to worsen. According to City statistics, the number of rent-controlled apartments plummeted by 63,000 units from 218,361 to 155,361 (a 29% decline) in the years between 1984 and 1987. M. Stegman, Housing and Vacancy Report: New York City 1987, at ii, 37. As of 1987, rent-controlled apartments represented less than 8.2% of all rental units in New York City. Id. at 36. The shortage of affordable apartments is confirmed by their low vacancy rates; for affordable apartments

renting at less than $300 per month, the 1987 vacancy rate was less than one percent; for apartments in the $300-499 per month category, the vacancy rate was below 2.5%. Id. at ii. In contrast, the City gained 37,000 units overall in that same period, with the greatest increases registered among newly constructed units (27,000). Id. at 31. In apartments that were rent-controlled in 1984, vacated and reoccupied under rent stabilization by 1987, rents increased by an average of 123%. Id. at iii.

As stated by this Court in Braschi v. Stahl Associates Company, 74 N.Y.2d 92, 543 N.E.2d 49, 544 N.Y.S.2d 784 at 787 (1989):

> Rent Control was enacted to address a "serious public emergency" created by "an acute shortage of dwellings," which resulted in "speculative, unwarranted and abnormal increases in rents" (L 1947 ch 274, codified, as amended, at McKinney's Uncons Laws of NY Sections 8581, et seq). These measures were designed to regulate and control the housing market so as to "prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health * * * [and] to prevent uncertainty, hardship and dislocation" (id.). Although initially designed as an emergency measure to alleviate the housing shortage attributable to the end of World War II, "a serious public emergency continues to exist in the housing of a considerable number of person" (id.). Consequently, the Legislature has found it necessary to continually re-enact the rent control laws, thereby providing continued protection to tenants.
>
> To accomplish its goals, the Legislature recognized that not only would rents have to be controlled, but that evictions would have to be regulated and controlled as well (id.).

In Braschi, this Court extended the non-eviction protections of surviving members of a tenant's family, which are contained in the Rent and Eviction Regulations, to those persons residing in a household "having all of the normal familial characteristics", 544 N.Y.S.2d 789, including so-called "gay lovers." The Court noted that "[t]he manifest intent of [the non-eviction protections of

surviving family] is to restrict the landowners' ability to evict a narrow class of occupants other than the tenant of record", 544 N.Y.S.2d at 787, and that it "is a means of protecting a certain class of occupants from the sudden loss of their homes." 544 N.Y.S.2d at 788. Thus, this Court has recognized the great importance attaching to the protections against evicting rent controlled tenants.

It is in light of the current housing emergency and the limitations on evictions, as recognized by the Courts, that the policy against evasionary landlord practices embodied in the rent control law takes on the highest importance. The concern about evasion with regard to evictions is expressed in various parts of the statute:

(a) Section 26-408b(4)(d) provides that a certificate of eviction shall be issued only where its issuance is "not inconsistent with the purpose" of the rent control law.

(b) Section 26-408c. requires that tenants be given notice of applications for evictions on the ground of alteration or demolition as the rent agency "deems necessary to prevent evasion of the law and regulations governing evictions."

(c) Section 26-408d. provides for the revocation of a certificate of eviction where it was obtained by fraud or illegality, or where the landlord's intentions or circumstances have so changed that the premises will not be used for the purpose specified in the certificate.

(d) Where a landlord has failed to use the premises for the purpose for which a certificate of eviction was obtained, Section 26-408g. provides for liability to the tenant in the amount of three times the damages sustained by the tenant plus attorney's fees as costs.

(e) Where a landlord has used an accommodation for a purpose different from that stated in a certificate of eviction, Section 26-408h. provides that the accommodation is deemed subject to rent control, unless the rent agency approves the different use, which use "would not be likely to result

in the circumvention or evasion" of the rent law.

The Rent and Eviction Regulations have also, for decades, embodied the policy against circumvention and evasion of the restrictions on evictions. Section 54 (renumbered 9 NYCRR 2204.4) states in pertinent part:

> (a)....The administrator shall issue an order granting a certificate if the removal or eviction meets the requirements of section 2204.5, 2204.6, 2204.7, 2204.8 or 2204.9 of this Part [Sections 54, 55, 56, 57, 58, 59]. The administrator may also issue orders granting certificates in other cases if the requested removal or eviction is not inconsistent with the purposes of the Rent Law or these regulations, and would not be likely to result in the circumvention or evasion thereof....

Landlords have nevertheless frequently sought to evade the limitations on evictions through a variety of guises; and the rent agencies have reacted by attempting to close off opportunities for circumvention. In particular, there have been cases in which the courts have affirmed the denial by the rent agencies of applications for evictions made under more than one section of the rent control regulations on the ground that the landlord has sought to evade the requirements of one of the sections. (Those cases are discussed below at pp. 33-34).

In addition to the policy against evasionary practices which is enunciated in the statute, regulations, court decisions and agency determinations, the legislature in 1984 recognized the particular threat to long-term tenants, senior citizens, and disabled persons and gave them additional protection under the rent control law by prohibiting their eviction for the purpose of owner-occupancy[6]. As amended, Section 26-408b(1) of the rent control law provides for evictions where:

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[6] As said with apt perspicuity in Baer, "Guidelines for Drafting Rent Control Law: Lessons of a Decade", 35 Rutgers L. Rev. 723, 758 (1983):

> Owner occupancy exemptions are subject to manipulation and, in many jurisdictions, have been the most controversial of all the

> The landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy or for the use and occupancy of his immediate family provided, however, that this subdivision shall not apply where a member of the household lawfully occupying the housing accommodation is sixty-two years of age or older, has been a tenant in a housing accommodation in that building for twenty years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment;..." (emphasis added)

Section 55 of the Rent and Eviction Regulations (renumbered as 9 NYCRR 2204.5) was amended to incorporate the provisions of Chapter 234.

Prior to the enactment of Chapter 234, the Rent Control Law did not protect long term tenants, senior citizens, or disabled persons from owner-occupancy eviction.

Section 4 of Chapter 234 of the Laws of 1984 provides, in pertinent part:

> This act shall take effect immediately and shall apply to any tenant, in possession at or after the time it takes effect, regardless of whether the landlord's application for an order, refusal to renew a lease or refusal to extend or renew a tenancy took place before this act shall have taken effect..." (emphasis added)

Chapter 234 of the Laws of 1984 clearly protects rent-controlled tenants who have occupied their housing accommodations for twenty years or more, or are elderly or disabled, from eviction for

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> exemption provisions. Because the exemption typically makes controlled units in smaller buildings subject to future decontrol, it is subject to abuse by owners who occupy or threaten to occupy units solely for the purpose of obtaining higher rents. Good faith requirements which are designed to stem the abuse of owner-occupation provisions are generally ineffective. Furthermore, the mere threat of owner-occupancy can give a landlord substantial leverage over a tenant in a tight housing market.

the purpose of owner-occupancy,. This protection was enacted in recognition of the devastating impact that evictions can have on such tenants and their communities. The memorandum of the New York State Assembly in support of the legislation explained:

> Eviction is a serious hardship for senior citizens, long term tenants, and the disabled. Moving often means harmful amounts of physical effort for senior citizens and may be nearly impossible for the disabled. In the present housing market, renting a new apartment can be financially devastating to a person on a retirement or limited income. Yet these people are often singled out by landlords for eviction because they often have been in the apartment for many years and thus pay lower rents. The "landlord use and occupancy" eviction is a convenient route for many landlords to oust people and soon thereafter re-rent the apartment at a much higher rent. The humane protection provided by the bill is similar to that given to senior citizens and disabled persons in co-op conversions and under the new Rent Stabilization laws. It would not prevent a landlord from obtaining an apartment, but would merely bar him from doing so at the expense of senior citizens, disabled persons and long term residents.

The Budget Report, contained in the Governor's Bill Jacket, A-3586-B, also noted that:

> ... long-term tenants of two decades are often elderly, although not 62 years of age, and have limited incomes. These tenants, by virtue of their longevity, have become an integral part of their community and have not violated their obligations to the landlord. In view of this, these individuals should be afforded protection from eviction since forcing them out of their housing accommodations after 20 years could have a devastating effect on them and their community.

The Appellate Division correctly recognized that the protection afforded by Chapter 234 does not extend to hardship applications under 9 NYCRR Sections 2204.9 and 2204.4(g). DHCR does not interpret the statute differently, as incorrectly claimed by the Court in its decision. Record, 6. However, DHCR does maintain that landlords should not be allowed to evade the protections of Chapter 234 by applying for a certificate eviction under other provisions in addition to the owner-

occupancy provision when a landlord's real and admitted intent in seeking the eviction is to occupy the apartment and not for any other reason. Just as courts will look to the gravamen of a party's claims, so too does DHCR have the authority to look to the gravamen of an eviction application to determine under what provision it properly falls. The high importance which attaches to the policy against evasion and circumvention of the requirements of rent control laws warrants close scrutiny of an eviction application. Where there is a rational basis in the record supporting a conclusion that an owner has sought to evade restrictions on evictions, the denial of an application for certificates of eviction is not arbitrary and capricious and is entitled to judicial affirmance.

In the case at bar DHCR's conclusion that the owners sought to evade the restrictions on eviction for owner use and occupancy is well grounded in the administrative record. Indeed, both the the history of the administrative proceeding as well as the owners' explicit statements are indicative of the soundness of the administrative determination.

In February, 1984, the respondents purchased the subject housing accommodations, a small, one hundred and fifty year old townhouse, for the express purpose of converting the seven unit structure to use as a one family residence for themselves and their children. At the time of purchase, only three of the seven apartments in the premises were occupied, the tenants all being under rent control.

When they purchased the building, the Zimans were well aware of the difficulties attendant in seeking to accomplish their purpose. They obtained an agreement from the former owner to pay up to $20,000 for legal fees incurred in obtaining the desired evictions. The Contract of Sale for the property, Paragraph 43, reads as follows:

> From and after the date of closing of title hereunder, Purchaser has

> informed Seller that it shall, in a reasonably and economically prudent manner, seek to evict all tenants from the premises. Seller agrees to co-operate with Purchaser by paying up to one-half (1/2) of all legal fees and disburse-ments properly incurred in connection with any proceedings brought by Purchaser to remove such tenants. Within twenty (20) days after receipt of Purchaser's certification accompanied by a detailed paid invoice from its attorneys, Seller shall remit to Purchaser one-half (1/2) of the amount of any such fees incurred within 10 days after written demand for same is made. In no event, however, shall Seller's obligation hereunder exceed $20,000...

(Owner's Exhibit 4, Return: A-51).

Within two weeks of purchase the respondents filed applications for certificates of eviction of the three tenants for the "sole and expressed purpose" of residing "in the entire building, utilizing all of the available space therein for my family occupancy." (Appendix: A-18)

A few months later the legislature enacted Chapter 234 of the Laws of 1984 which prohibits the grant of certificates of eviction under rent control on the ground of owner use and occupancy where a tenant is elderly, disabled, or has resided in the apartment for more than twenty years.

One of the tenants then informed respondents that he had resided in the building for more than twenty years.

In response to these events, respondents immediately thereafter expanded their applications for evictions by adding the hardship claim. Although claiming financial hardship, respondents nevertheless admitted that:

> However, our primary concern is not monetary. We did not buy the house to make money. Rather, we only want a good home for ourselves and our two young children...

(Appendix: A-47)

As part of their hardship applications, which they wanted consolidated with their owner-

occupancy applications, the owners included a prior affidavit dating back to June 1984, which again stressed their true motive:

> 6. My motives in seeking to occupy the home owned by myself and my wife could not be more simple. We have two small children, aged 7 and 2, and need a suitable place to make our home.
>
> 7. There are not hidden motives of any kind. My wife and I own no other real estate. We purchased the premises so that it would be our primary residence and we plan to remain there indefinitely.

(Appendix: A-59)

Thus, it is clear that from the outset, the Zimans' purpose in seeking the evictions was not to remove the premises from the market because of financial hardship, but to live in the building for their own use and occupancy, for which reason they purchased the property.

At the June 5, 1985 hearing, which focussed primarily on the owners' claimed need to occupy the premises, they made it abundantly clear that their purpose in seeking evictions was to occupy the building themselves.[7]

After denial of their application, the owners filed a Petition for Administrative Review, which was denied by the Deputy Commissioner who found in pertinent part that:

> One section of the rent control laws and regulations may not be used to circumvent another section. The case here is one where the owners are seeking to evict tenants for their own use and occupancy. The legislature chose to extend special protection to certain classes of tenants in that situation. The parties may not use other sections of the regulations (NYCRR 2204.4 and 2204.9) to evade the intent of the Legislature.

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[7] The Court should bear in mind that the owners moved into vacant portions of the premises after conclusion of that hearing. The owners are in possession of five of the seven apartments in the premises; one of the tenants having died in 1987, while the remaining two have met the twenty year criterion. The apartments occupied by the two remaining tenants are on the first floor and half of the second floor of the four story building (See, Appendix: A-92).

Even after this conclusion, the owners continued to emphasize that the gravamen of their application was owner-occupancy, not hardship. Respondent Jerrold Ziman states in paragraph 3 of his April 24, 1987 affidavit in support of the Article 78 petition herein that:

> This is not a case about money. This is a case involving shattered lives and my home, which is also the home of my wife and our two children. (emphasis added)

(Record, 32)

It is apparent from the record that the owners' eviction applications included an illusory claim that they were seeking the evictions because of financial hardship. DHCR's finding that this was not their actual intent, is abundantly supported by the administrative record. The owners' Section 59 application was not even a thinly disguised attempt to circumvent the newly enacted law protecting the elderly, disabled and long-term tenants from evictions for owner-occupancy. The owners purchased the property with the intent of evicting the remaining tenants so they could occupy the building with their family. Only after the law changed and they were notified by one of the tenants that he qualified for protection under the new law, did the owners tack on the hardship claim to the owner-occupancy claim. Nevertheless, they continued to express throughout this proceeding--including the litigation--their true intent of seeking the evictions so they could live in the entire building. They were not in good faith seeking the evictions because of financial hardship. The Zimans are not landlords who have owned their property for some time, now seeking to do something else with it because of hardship.

The Commissioner's conclusion that the landlords were seeking to circumvent the restrictions on evictions for owner-occupancy is soundly based in the record, as was the conclusion of the administrative law judge that "the owner's sole purpose in bringing these eviction applications is to

occupy the subject building to live in as his primary residence." (Appendix: A-224).

It is well settled that DHCR is the trier of facts. As this Court stated in the classic case of Matter of Stork Rest., Inc., v. Boland, 282 N.Y.2d 256, 26 N.E.2d 247 (1940):

> Where there is conflict in testimony produced before the Board, where reasonable men 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 solely upon the Board. The courts may not weigh the evidence or reject the choice made by the Board where the evidence is conflicting and room for choice exists. Cf. National Labor Relations Board v. Waterman Steamship Corporation, 309 U.S. 206, 60 S. Ct. 493, 84 L.Ed 704 decided unanimously by Supreme Court of U.S., Feb. 12, 1940. (emphasis added).

The findings made by the administrative law judge, which were followed by the Commissioner in reaching his determination that the owners were seeking to evade and circumvent the intent of the law, was a proper exercise of his fact-finding duty under the Rent Control Law and Regulations.

As Justice Ellerin stated in her dissenting opinion in the case at bar:

> It is clear that, no matter their application was styled, petitioner-landlords were seeking to recover possession of the rent-controlled apartments here at issue in order to occupy them them for their own personal use. Respondent DHCR properly held that petitioners could not use one section of the rent control laws and regulations (i.e., Section 59) to circumvent or evade another section (i.e., Section 55) wherein the Legislature extended special protection to a certain class of tenants. By granting the petition herein, and overturning the DHCR determination, the majority is permitting petitioners to do precisely that.

(Record, 7)

The majority opinion of the Appellate Division completely failed to address the central point

of this entire case: the evasion of a statutory provision and the administrative finding of fact based upon it. As a result, they erroneously concluded that the owners' hardship application was consistent with their application for owner use and occupancy.

Section 59(a)(4) (renumbered as 9 NYCRR 2204.9(a)(4)) requires a landlord to establish "that he seeks in good faith permanently to withdraw occupied housing accommodations from both the housing and nonhousing markets...and: (4) that the continued operation of the housing accommodations would impose other undue hardship upon the landlord." In addition, Section 54(g)(1) (renumbered as 9 NYCRR 2204.4(g)(1)), which is based upon the Sound Housing Law, requires a finding by the rent agency that the landlord cannot make an annual return of 8-1/2 % on the property, and that neither the owner nor immediate predecessor has managed the property to impair the ability to earn such return.

Contrary to the holding of the majority in the Appellate Division, it is insufficient in a hardship application for a landlord to simply show that he or she cannot make an annual return of 8-1/2 %.[8] He or she must also show that he has not contributed to such financial condition, that he or she is suffering hardship because of that condition, and that his good faith intention in seeking eviction is to permanently remove the housing from the market because of financial hardship (hardship with regard to the family's living quarters does not fall within the ambit of Section 59).

Since the last element was not met, i.e., since the Zimans were not seeking the evictions because of their alleged hardship, their owner-occupancy claims were not consistent with their

[8] The Supreme Court, which correctly affirmed DHCR's determination, nevertheless erred in its dicta in stating that "it appears that petitioners would qualify under 2204.4 and 2204.9..." (emphasis added) Although that court affirmed DHCR's finding of evasion and rested its analysis thereon, it did not fully comprehend the elements necessary to justify hardship evictions.

hardship claims, even if they were to satisfy the other requirements for obtaining hardship evictions[9]. The gravamen of their eviction applications was plainly the desire to live in the building. They were not motivated by any alleged hardship. Indeed, DHCR's conclusion that the Ziman's sought to evade the restrictions on owner-occupancy evictions, which was ignored by the majority in the Appellate Division, is essentially a conclusion that the eviction applications were not consistent with the requirements for hardship evictions. The majority in the Appellate Division misunderstood DHCR's determination as an attempt to extend the statutory protection of elderly, disabled and long term tenants in owner-occupancy evictions to applications for evictions on the ground of hardship, rather than what it actually is: a finding that the owners' application was in fact not a hardship application, but an attempt to evade the foregoing statutory protections. In reaching that finding, DHCR properly looked to the owners' intentions.

As Justice Ellerin cogently concluded in her dissenting opinion:

> But to prevail under that section [59] it is not enough to simply show that an 8 1/2% annual return is not possible. What is necessary is a showing that it is the landlord's good faith intention in seeking eviction to permanently remove the housing accommodation from the market because of financial hardship....(emphasis in original)
>
> The record in this case is replete with evidence supporting the Division's finding that the only purpose for which the petitioners were seeking these evictions was to occupy the units themselves and that the assertion of hardship was not made in good faith. Accordingly, that finding is beyond our review. (Matter of Pell v. Board of Education, 34 NY2d 222.)

The courts have long recognized the importance of looking at an owner's intent in seeking

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[9] DHCR did not have to reach the other elements under the hardship application since it based its decision on the finding of evasion. As argued in Point II below, the Appellate Division prematurely and incorrectly concluded that there was hardship.

evictions. In Asco Equities v. McGoldrick, 285 App. Div. 381, 137 N.Y.S.2d 446 (1st Dept. 1955), aff'd, 309 N.Y. 738, 128 N.E.2d 426 (1955), the Appellate Division, affirming the agency's denial of a certificate of eviction under Section 59, held:

> Obviously the rent commission has the burden and the responsibility of determining the good faith of the intention expressed by the landlord. It would be senseless to hold that the rent commission is bound by the landlord's bare assertion. That would be an illusory control indeed. Consequently, the rent commission must be satisfied, on objective grounds, that a landlord intends as he says.

The situation in the case at bar is similar to other cases in which the courts have affirmed the denial by the rent agency of applications for evictions made under more than one section of the rent control regulations on the ground that the landlord has sought to evade the requirements of one of the sections. In Oste v. Berman, 51 Misc.2d 971, 274 N.Y.S.2d 468 (Sup. Ct. Kings Co., Damiani, J., 1966), a case involving another subdivision of Section 55 and Section 59, and closely paralleling the instant case, the court stated:

> Section 55-c of the regulations was expressly designed and promulgated to cover evictions for co-operative ventures. There is no question that the co-operative procedure adopted by the petitioner here wholly failed to comply with the requirements of this section and that application for eviction certificates by him under this regulation could not be granted. Apparently in recognition of this obstacle petitioner turned to section 59, and it is his position that the regulations do not bar this approach. With this contention the court cannot agree. Section 55-c was clearly intended as the exclusive method for these applications and was tailored to eliminate abuses incident to previous illusive co-operative ventures.

In Malmud v. Abrams, N.Y.L.J., January 27, 1956, p. 7 (Sup. Ct., N.Y. Co., McGivera, J.), aff'd, 1 A.D.2d 952, 151 N.Y.S.2d 612 (1st Dept. 1956), appeal dismissed, 3 N.Y.2d 937, 146 N.E.2d 187, 168 N.Y.S.2d 5 (1957), the Court held:

> The State Rent Administrator found that Section 54 of the Regulations may not be used as an avenue to relief when other sections of the Regulations had been promulgated expressly to grant relief of the nature sought herein.

In Mendlovitz v. Herman, N.Y.L.J., October 4, 1962, p. 13, col. 3 (Sup. Ct., N.Y. Co., Markowitz, J.), in which the requirements of the co-op provisions of Section 55 could not be met, the Court upheld the agency's refusal to grant a certificate of eviction under Section 54 of the Regulations:

> Petitioner concedes that the building owner, when converting the premises into a co-operative in 1958, did not comply with the requirements of section 55, subdiv. 3(3), of the Rent and Eviction Regulations, which afford tenants certain specified and important rights of notice and purchase. Petitioner admittedly purchased his interest in the subject apartment fully cognizant of this deficiency. Now, however, he seeks to circumvent the clear intent of the aforesaid section by reliance on section 54, subdiv. 1, of the regulations, which permits the administrator to issue certificates of eviction in special cases, not covered by other sections of the regulations, and where the removal would not be inconsistent with the purposes of the said regulations. Petitioner may not accomplish his purpose by such means. The circumstances herein are fully covered by section 55, subdiv. 3, of the regulations. The fact that the owner of the building did not choose to comply therewith cannot afford any greater rights to purchasers with full notice.

See also, Matter of Tombini v. Berman, 25 N.Y.2d 936, 305 N.Y.S.2d 152 (1969); aff'g, 31 A.D.2d 647, 298 N.Y.S.2d 453 (1st Dept.).

Evictions have also been denied under the Rent Stabilization Law where landlords have sought to evade statutory or regulatory provisions[10]. In Colby v. Ward, Index No. 1258/82, N.Y.L.J., July 7, 1982, n.o.r., (Sup. Ct., N.Y. Co., Goldman, J.), the court upheld an agency determination

[10] The Rent Stabilization Code contains a provision prohibiting the evasion of the "legal regulated rent and other requirements" of the Code. See 9 NYCRR 2522.2.

finding that the owner of a cooperative apartment unit could not circumvent the restrictions of one section of the Rent Stabilization Code by seeking, under another section of the Code, to evict a rent stabilized tenant in order to obtain possession for his own use.

In J.H. Taylor Management Corp. v. Conciliation and Appeals Board of the City of New York, (1st. Dept., November 16, 1982), the court upheld a rent agency determination which found that an owner was not entitled to evict a tenant using a tactic which would subvert the purpose of the "Non-Primary Residence Law" of alleviating the critical housing shortage through the conversion of underutilized apartments.

Clearly, DHCR, as a matter of law, can find that an application for a certificate of eviction should be denied as an attempt to evade and circumvent statutory and regulatory requirements. Furthermore, such finding, if it has a rational basis in the administrative record, is entitled to affirmance.

DHCR's determination is in conformity with principles of statutory interpretation, as applied in general and with specific reference to the rent laws. It is well settled that remedial statutes should be liberally construed to carry out the reform intended and to spread their beneficial results as widely as possible. Thus, McKinney's Statutes, Section 321, provides in pertinent part:

> Generally speaking remedial statutes meet with judicial approval and are liberally construed, to spread their beneficial results as widely as possible. Such statutes should be so construed as to give effect to the intention of the law-makers, that is, to effect or carry out the reforms intended and to promote justice, particularly where the statutes are designed to correct imper-fections in a prior law. A liberal construc-tion of such statutes is one which is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the letter of the law. While a remedial statute is construed with greater liberality than is allowed with reference to a penal statute, it is nevertheless to receive

> a reasonable interpretation with a view of accomplishing the purpose intended.

In light of these principles, the courts have pursued a liberal interpretation of the rent statutes so as to give as full effect as possible to the purpose of these laws and thereby afford protection to tenants in occupancy whenever possible. See, e.g., Braschi v. Stahl Associates Company, 74 N.Y.2d 92, 543 N.E.2d 49, 544 N.Y.S.2d 784 at 787 (1989), (gay lover of deceased tenant held to be protected from eviction under the Rent Control Law). See also, Sommer v. New York City Conciliation and Appeals Board, 93 A.D.2d 481, 462 N.Y.S.2d 200 (1st Dept. 1983), aff'd, 61 N.Y.2d 973, 475 N.Y.S.2d 280, 463 N.E.2d 621 (1984) (provisions excluding from coverage to be strictly construed as counter to purpose of rent laws; protective provisions to be liberally construed as implementing purposes for which rent laws were enacted).

It is also well settled that the interpretation or construction placed upon a statute and implementing regulations by the agency or one who drew the regulations, if not unreason-able or irrational, is entitled to deference. In the Matter of Salvati v. Eimicke, 72 N.Y.2d 784, 537 N.Y.S.2d 16 (1988); Mounting & Finishing Co. v. McGoldrick, 294 N.Y. 104 (1945); White v. Winchester County Club, 315 U.S. 32 (1942). Indeed, the Administrator's view has been called "determinately persuasive". United States v. Hammers, 221 U.S. 220, 228 (1911); Bowles v. Seminole Rock Co., 325 U.S. 410 (1945); Plaza Management Co. v. City Rent Agency, 48 A.D.2d 129, 368 N.Y.S.2d 178; unan. aff'd, 37 N.Y.2d 837, 378 N.Y.S.2d 33 (1975).

DCHR's interpretation of its own regulations--Sections 55 and 59 of the Rent and Eviction Regulations, 9 NYCRR 2204.5 and 2204.9--are reasonable and effectuate the purposes of the rent laws.

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 Division. 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). Justice Ellerin, in her dissenting opinion was correct in concluding that:

> Since the record here clearly demonstrates that a rational factual basis exists for the conclusions in the administrative determination, it should be upheld.

POINT II

THE APPELLATE DIVISION IMPROPERLY CONCLUDED THAT THE HARDSHIP REQUIREMENTS WERE MET BY THE OWNERS

The Appellate Division erred in ignoring the required elements of a finding of hardship. In making it own ad hoc finding of hardship where none was made by DHCR, the Appellate Division seemingly assumed that hardship is determined solely on a basis of a ministerial calculation made by DHCR staff which concludes that an owner cannot make an 8 1/2% return on his or her investment. This is but one element, including the required findings under the Sound Housing Law, which must be determined by the rent agency in reaching a hardship determination in an eviction case.

The Sound Housing Law (Chapter 1022, Laws of 1974, as amended by Chapter 360 of the Laws of 1975) (codified as Section 26-408b(5)(a) of the N.Y.C. Admin. Code) grants exclusive jurisdiction to the "city rent agency" to make the determinations mandated by that law:

> (5) Notwithstanding any provisions to the contrary contained in this subdivision or in subdivision d of section 26-410 of this chapter or in the local emergency housing rent control act:
>
> (a) no application for a certificate of eviction under paragraph three or four of this subdivision and no application for a certificate of eviction under paragraph one of subdivision j or under subdivision c of this section for the purpose of withdrawing a housing accommodation from the housing market on the grounds that the continued operation of such housing accommodation would impose undue hardship upon the landlord, pending or made on the effective date hereof shall be granted by the city rent agency unless the city rent agency finds that there is no reasonable possibility that the landlord can make a net annual return of eight and one-half per centum of the assessed value of the subject property without recourse to the remedy provided in said paragraph three or four or said subdivision c or j and finds that neither the landlord nor his or her immediate predecessor has intentionally or willfully managed the property to impair the landlord's ability to earn such return...

Section 26-403c. of the N.Y.C. Admin. Code defines "City rent agency" as "[t]he state division of housing and community renewal."

Under the substantive requirements of the Sound Housing Law and the regulation promulgated thereunder, 9 NYCRR 2204.4(g), an owner is not entitled to a certificate of eviction unless (1) after a hearing, the rent agency finds that there is no reasonable possibility that he or she can make an 8 1/2% return, (2) the owner or predecessor owner has done nothing to cause a low rate of return, and (3) the owner has satisfied the other elements necessary for warranting the grant of a certificate of eviction pursuant to the specific section under which the application was filed.

DHCR, the agency with exclusive jurisdiction to make a finding under the Sound Housing

Law, reached no such finding in the case at bar. Neither the District Rent Administrator, who made the initial determination, nor the Deputy Commissioner, who rendered the PAR determination, made a finding that respondents herein can or cannot can make an 8-1/2% return. Contrary to the assertion of the Appellate Division (Record, 5), an staff report issued by the Accounting Bureau does not constitute a finding by DHCR unless and until its conclusions adopted in an order of DHCR; something not done in the case at bar. A staff report is subject to test at a hearing, as mandated in 9 NYCRR 2204.4(g)[11], and final review by the DHCR officer who renders a determination, whether that be the District Rent Administrator or the Commissioner.

In the case at bar, a determination under the Sound Housing Law was unnecessary because of the conclusion that the Section 59 application was an attempt at circumventing the restrictions on owner-occupancy evictions. Hence, the application was only considered as an owner-occupancy eviction. There was no finding under the Sound Housing Act which was ripe for judicial review.

Thus, the Appellate Division acted without jurisdiction in reaching its conclusion that "there is no question that petitioners meet the hardship requirements of sections 2204.9 and 2204.4". Even if the Appellate Division had addressed the issue of evasion of the restrictions on owner-occupancy evictions and reached a correct conclusion, it was nevertheless without jurisdiction to reach a finding under the Sound Housing Law and hence similarly without jurisdiction to reach a finding under the hardship eviction provision. Only if the agency had already made such a determination would the Court, on judicial review, have had the jurisdiction to reach the finding that it made.

Furthermore, the Appellate Division erroneously concluded that the hardship requirements

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[11] The second staff report in the case at bar was released after the hearings took place, and after the tenants had requested further hearings on the owner's Economic Viability Report in part because they had not received that report until the commencement of the June 1985 hearing.

were met solely by virtue of the staff reports, (1) despite the fact that the staff reports did not reach the conclusion required by 9 NYCRR 2204.4(g)(1) that there was no way to make more than an 8-1/2% return "without recourse to the evictions sought", and (2) despite the fact that an inability to make an 8-1/2% return is not ipso facto hardship.

With regard to the second point, it is apparent from the language of the Sound Housing Law, as amended (quoted supra at pp. 36-37), that a finding that an owner cannot make an 8 1/2% return is only a necessary, but not a sufficient condition for a finding of hardship under Section 59. The legislature did not contemplate an equating of a Sound Housing Law finding with that of a finding of hardship. The Appellate Division improperly equated the conclusion of the staff report with a finding of hardship.

In addition, there remain questions as to whether the owners even meet the requirements of the Sound Housing Law, which questions may warrant further investigation and consideration.

First is the question as to the rental value of the four empty apartments. At the oral hearing there was testimony that one of those Greenwich Village apartments, which was valued at $189 for purposes of the DHCR report, was worth $300 to $350 on the market. (Transcript, 250-254) If that is so for this as well as the other three apartments, a recalculation could lead to a very different conclusion by the Accounting Bureau. The inspection upon which the staff report valuation was based is by no means the last word on the question of rental values. In the course of the administrative proceeding there was no final determination as to whether or not to accept the higher rental value of the testimony, since the District Rent Administrator concluded that the owners, by their hardship application, sought to circumvent the restrictions on evictions for owner use and occupancy. If faced with having to make a finding under the Sound Housing Law, DHCR may well

conclude that further investigation into the rental values is necessary.

Second is the question as to tax certiorari proceedings which were pending at the time the first and second reports were issued but were discontinued days after issuance of the second report. Appendix: A-216 to A-218. It is standard practice for DHCR not to make a finding under the Sound Housing Law until such proceedings have been concluded, as they can and do often result in a reduced assessed valuation for a property. Furthermore, if such proceedings have been settled or discontinued, investigation may be warranted to determine whether or not the purpose of the settlement or discontinuance was to keep the assessed valuation at a higher level so that the landlord might be more likely to satisfy the requirements of the Sound Housing Law and be granted a certificate of eviction.

Third, if the staff report conclusion should remain the same after the foregoing considerations, there must still be a determination as to whether the low return is a result of intentional or willful mismanagement of the current or former owner, whether eviction is the only recourse to the inability to earn an 8-1/2% return, and whether this inability constitutes hardship in this particular situation.

Clearly, the finding of hardship reached by the Appellate Division was premature and improper. It lacked jurisdiction to reach such a finding, as there was no administrative finding of hardship which could have been subject to judicial review. Nor was there a basis in the record for such a finding.

CONCLUSION

For the foregoing reasons, the order of the Appellate Division directing DHCR to issue certificates of eviction should be reversed, the determination of the Commissioner should be affirmed, and the respondent granted costs; or in the alternative, the matter should be remanded to DHCR for a hardship determination.

Dated: Bronx, New York
February 6, 1990

Respectfully submitted,

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