To be Argued by
RICHARD HARTZMAN
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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.

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

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

REPLY STATEMENT

The essential tension in this case lies between the possessory interests of the tenants and those of the landlord. The Zimans do not dispute that the sole purpose behind their eviction applications was their desire to live in the entire building which they purchased. This purpose is innocent. Nevertheless, the enactment of Chapter 234 of the Laws of 1984, which protects the

elderly, disabled and long-term tenants from owner-occupancy eviction, was a legislative judgment that the possessory interests of these classes of tenants should take precedence over those of landlords seeking owner-occupancy evictions. The legislature found, during this time in which there is a serious housing emergency and shortage of affordable housing, that preservation of the homes of such tenants is of great public importance and that they should thus be given additional protection against eviction. Chapter 234 serves a legitimate state interest, fostering general welfare, safety and health, and, as this brief will make manifest, Chapter 234 meets all constitutional tests.

A constitutional challenge is only one avenue of attack against this important protection for tenants. Another avenue is through the evasion and circumvention of its requirements. Chapter 234 prohibits the eviction of elderly, disabled, and long-term tenants for the purpose of owner-occupancy. However, a landlord might attempt to evade its restrictions by seeking an eviction under a different ground where the landlord's intent and purpose has nothing to do with that other ground. Owner-occupancy evictions have been most prone to abuse by landlords who single out vulnerable tenants for unjustified evictions. But even where the purpose in seeking evictions is innocent, as appears in the case at bar, the means used to obtain those evictions may not be so innocent. As with any regulatory program, the rent agency is empowered to find that a party is circumventing legal restrictions; that his or her actions, while cloaked in one form, is in substance something else. That was the conclusion reached in the case at bar; that conclusion was rationally based in the record; and that conclusion is entitled to judicial affirmance.

I. THE COMMISSIONER RATIONALLY FOUND THAT THE ZIMANS SOUGHT TO CIRCUMVENT THE RESTRICTIONS ON OWNER-OCCUPANCY EVICTIONS.

The Zimans concede that their sole purpose in seeking eviction of their remaining tenants is for their family to occupy the entire premises; but they argue that, as a matter of law, their admitted intent cannot be considered in determining whether they should be entitled to Section 59[1] evictions because of undue hardship. It is conspicuous that, while the Zimans' brief goes to great length to express the emotional pain they claim to be experiencing because they cannot live in their entire building, there is absolutely no expression of suffering because of their alleged undue hardship. This conspicuous absence has been true during the entire length of the administrative and court proceedings. Just as the Zimans' silence on the Section 59 hardships they allegedly are suffering illustrates the impropriety of their hardship application, the argument in their brief illustrates their misunderstanding of the purpose of Section 59.

Section 59, which is the removal provision of the Rent and Eviction Regulations, permits evictions for removal for four different reasons specified in its four subdivisions. The removal must be sought because of one of those reasons. The first reason is that the owner requires the entire structure for use in connection with an existing business. The evictions for this reasons must be sought because the owner so requires the entire structure. The second reason is that there are serious violations filed against the structure which would be prohibitively costly to cure. Again the evictions must be sought because of the violations. The third reason is where a charitable or educational institution requires the property, in whole or part, for their charitable or educational purposes. Once

[1] Reference in this brief is made to Sections 55 and 59 of the Rent and Eviction Regulations. Those sections have been renumbered as 9 NYCRR 2204.5 and 9 NYCRR 2204.9, respectively.

again, the evictions must be sought because the institution so requires the property. Likewise with the fourth reason, undue hardship, the evictions must be sought because of undue hardship.

The meaning and parallelism of the four subdivisions of Section 59(a) is plain and is not obviated by Respondents' play on the word "and". The grammatical structure of the section does not preclude DHCR's understanding of its meaning and intent.

Section 59 does not contemplate evictions for the purpose of owner-occupancy. That is the purpose of Section 55. If owner-occupancy is the sole purpose for which evictions are sought, as is the case herein, evictions pursuant to Section 59 are not warranted. Prior to the enactment of Chapter 234 of the Laws of 1984, which restricted owner-occupancy evictions, no landlord would consider seeking owner-occupancy evictions under Section 59. It was clear that Section 55 offered the only available route, and that route would be sufficient if the Section 55 criteria were met. It is only with the enactment of the Chapter 234 restrictions against evicting elderly, disabled and long-term tenants that a landlord might seek to evade those restrictions by seeking Section 59 evictions, even though his purpose has nothing to do with the circumstances specified in Section 59. That is what happened in the case at bar.

If respondents' interpretation were accepted over DHCR's interpretation of its own regulation, attempts to evade the requirements of other eviction restrictions would have an increased likelihood of success. One example concerns demolition, which is governed by Section 58 of the Rent and Eviction Regulations (9 NYCRR 2204.8). Respondents claim that "hardship" is defined as the "inability to 'make a net annual return of 8-1/2 percent of the assessed valuation of the subject property.' Section 2204.4(g)(1)." (Respondents' Brief, p.5) The 8-1/2 percent return requirement is from the Sound Housing Act and applies to demolition evictions as well as hardship evictions. But,

in order to obtain approval to demolish, the landlord must meet the requirements concerning relocation of and stipends for his or her tenants and must establish that the purpose of the demolition fits within those specified in Section 58. If we assume that hardship is defined as the respondents claim, an owner who desires to demolish his building could evade the more onerous requirements for demolition evictions by simply applying for hardship evictions. If the landlord meets the Sound Housing Law standard, he or she could then demolish the building without relocating his tenants or providing them stipends, and without needing to show that his purpose in demolishing fits within one of those specified in Section 58. He would thus have successfully evaded and circumvented the requirements of Section 58 by applying for a hardship eviction under Section 59. In the words of the Appellate Division's erroneous opinion in the case at bar, the "express purpose of ... [demolition] ... is consistent with [the landlord's hardship] request to remove the apartments in issue from the housing market". (Record: 6)

The same unwarranted and dangerous results would occur with evictions for alteration or remodeling, which are governed by Section 57 (9 NYCRR 2204.7). The Sound Housing Law applies to Section 57 evictions. Section 57 also requires landlords to meet the relocation and stipend requirements of the regulations. These could be evaded by applying for evictions under Section 59.

A similar deleterious consequence would arise for a Section 59(a)(1) eviction application for use of an entire building for a landlord's existing business if respondents' interpretation were accepted. Under respondents' interpretation, a landlord could evade the relocation and stipend requirements of Section 59(b) by applying for hardship evictions.

If this Court accepted respondents' view, landlords could express their honest intention to demolish, alter, remodel, or use the premises for their business, and still obtain a hardship eviction,

thus circumventing significant regulatory requirements.

DHCR's interpretation of Section 59 is further substantiated when read in conjunction with the general regulatory provisions concerning evictions. Subdivision (c) of Section 54 (renumbered as 9 NYCRR 2204.4(c)) provides that:

> No certificate (including any certificate of eviction issued by the State Rent Commission and enforceable on and after May 1, 1962 under the Rent Law) shall be used in connection with any action or proceeding to remove or evict a tenant, unless such removal or eviction is sought for the purpose specified in the certificate. (emphasis added)

Under this provision, a certificate of eviction issued because of undue hardship cannot be used if the eviction is sought for the purpose of owner-occupancy. Subdivision (d) of Section 54 has a similar prohibition:

> In the event that the landlord's intentions or circumstances has so changed that the premises, possession of which is sought, will not be used for the purpose specified in any such certificate mentioned in subdivision (c) of this section, such certificate shall thereupon be null and void. The landlord shall immediately notify the district rent administrator in writing and surrender the certificate for cancellation.

Clearly, examination of the purpose or motivation for which evictions are being sought are within the province of the rent agency in determining whether certificates of eviction should be issued. If that purpose does not bring an application within the provision under which the eviction is sought, the agency can conclude that there is an attempt at evasion and circumvention and can deny the application. That is just what was done in the case at bar.

The structure of 9 NYCRR Section 2206.7 also shows that owner-occupancy evictions are not contemplated as falling within the category of Section 59 removal evictions. Section 2206.7, which provides for treble damages plus attorney's fees and costs if a landlord fails to use a certificate

of eviction for the purposes stated in the certificate, specifies sharply different time periods where the stated purpose is owner-occupancy and where the purpose is removal from the market. For owner-occupancy the treble damage action accrues if the landlord or his family fails to move in within thirty days after the tenant vacates. 9 NYCRR 2206.7(a) For withdrawing the housing accommodation from the market the treble damage action accrues if the landlord uses it in a manner other than the specified purpose within a period of one year.

When the eviction provisions of the Rent and Eviction Regulations are viewed as a whole, it is apparent that owner-occupancy evictions were not contemplated to be allowed under Section 59. To interpret the regulations otherwise would defeat the purpose of the eviction provisions.

The cases cited by respondents do not warrant a different conclusion. In Village Tenth Co. v. Walsh, 40 A.D.2d 969, 970, 338 N.Y.S.2d 671, 674 (1st Dept. 1972), the Court stated that a landlord must satisfactorily show "that he in fact intends what he proposes to do." The landlord in Village Tenth Co. expressed an intention to demolish the property and construct a new building. The landlord submitted "detailed construction plans, an experienced witness in the construction field (albeit, a member of petitioner) who testified as to the construction costs involved and a bank commitment for a sum in excess of the amount respondent Administrator's own agency estimated as the cost of completion." The Court considered this to be objective evidence required by 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), of the landlord's intent to do what he said he would do. Since there was an objective basis for establishing the landlord's intent, and that intent met the requirements of the eviction regulations, the rent agency could not look further behind that intent into the credibility of the landlord's motivations for doing what was intended.

Likewise in the case at bar there is objective evidence showing that the landlord's sole purpose is to live in the building. The ruling in Village Tenth Co. does not preclude DHCR's resting its determination on the basis of that objectively expressed intention, which is all that was done. In the case at bar, DHCR did not attempt to look into the motivation behind the Ziman's intention, as did the agency in Village Tenth Co.

In Asco Equities, supra, the owner claimed that it had an absolute right to withdraw the subject premises from the housing market. The Appellate Division concluded, as affirmed by this Court, that a landlord does not have an absolute right to withdraw a building from the housing market, but that he or she must meet the criteria of Section 59 by establishing that he or she intends what is proposed. There is nothing in Asco Equities which would require DHCR to reach a different determination than it did in the case at bar.

The ruling in New Year Realty Corp. v. Herman, 11 A.D.2d 643, 201 N.Y.S.2d 226 (1960), is too obscure for one to be sure what it might mean. The proceeding was remanded to the rent agency for reconsideration. There are issues about tax abatements, violations and demolition which are not made clear in the opinion. Without knowing the ultimate outcome of the proceeding, the statement about parking lots cannot be seen as supportive of any particular claim.

The cases cited by amicus curiae Rent Stabilization Association offer no better warrant for the respondents' argument. East Four-Forty Associates v. Ewell, 138 Misc.2d 235, 527 N.Y.S.2d 235 (A.T., 1st Dept. 1988), is not good law. The holding in the case was expressly overruled by the Appellate Division, First Department in Festa v. Leshin, 145 A.D.2d 49, 537 N.Y.S.2d 147 (1989).

Rosenbluth v. Finkelstein, 300 N.Y. 402, 91 N.E.2d 581 (1950) simply explains what is meant by "good faith" in the context of an owner-occupancy eviction proceeding.

As for Whitney Museum of American Art v. New York State Division of Housing and Community Renewal, 139 A.D.2d 444, 527 N.Y.S.2d 26 (1st Dept. 1088), aff'd, 73 N.Y.2d 938, 537 N.E.2d 621, 540 N.Y.S.2d 938 (1989), the Court's decision bears no resemblance to the discussion of the case by the amicus. The question of the museum's ultimate intent to demolish the subject structure was not addressed in the Court's opinion. What the Court held was that a charitable institution is entitled to an eviction of part of a building when it seeks those evictions for its charitable purposes; that it need not seek to evict all of the tenants under the language of Rent Control Law. The matter was remanded to DHCR for "a hearing as to the Museum's good faith intention to withdraw the subject housing accommodations for its own immediate use in connection with its educational purposes." 139 A.D.2d at 448, 527 N.Y.S.2d at 29. Clearly, the Court recognized that the museum's intention to withdraw the apartments from the housing market must be based on its educational purposes. The Court did not place limits on the outcome of the remanded proceeding with regard to what effect the other intentions of the museum may have on that outcome.

The issue in the case at bar is not the interpretation of Chapter 234, as erroneously claimed by respondents and as incorrectly stated by the Appellate Division, but the interpretation of Section 59 of the Rent and Eviction Regulations and the factual determination reached thereunder. (DHCR has not said that Chapter 234 protections apply to Section 59 applications at any stage of this litigation, contrary to respondents' suggestion.) While a court might not accord full deference to the expertise of a regulatory agency in construing a statutory provision, the interpretation or construction placed upon an agency's own regulations, if not unreasonable 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). DHCR's interpretation of Section 59 is not unreasonable or irrational. It is determinately persuasive and entitled to deference.

DHCR can, as a matter of law, reach a finding that a landlord seeks to evade or circumvent the requirements of one provision of the Rent and Eviction Regulations by applying for evictions under another provision; and DHCR's factual finding to that effect in the case at bar was rationally based in the record. The instant case in essential ways parallels a Massachusetts case, Kahn v. Brookline Rent Control Board, 394 Mass. 709, 477 N.E.2d 390 (Mass. Sup. Ct. 1985), in which a landlord was found to have evaded eviction restrictions. In Kahn the landlord sought an eviction of a tenant on the ground that he made chronic late payments of rent, a justifiable reason for eviction under the local rent regulations. The Court upheld the local board's denial of the eviction and its finding that "the landlord's 'real purpose and intention in [seeking eviction] ... was to obtain possession of ... the only remaining unsold condominium unit in the building", because there was substantial evidence to support the agency's determination. 477 N.E.2d at 393 [brackets and ellipsis in original]. Likewise, DHCR's determination herein has a rational basis in the record. The Appellate Division improperly substituted its judgment and must be reversed.

II. THE APPELLATE DIVISION'S ERRONEOUS HARDSHIP FINDING, WHICH WAS THE FIRST TIME SUCH FINDING WAS MADE IN THIS PROCEEDING, IS SUBJECT TO REVIEW BY THE COURT OF APPEALS.

Contrary to respondents' assertions DHCR did contend that it had not reached a finding of hardship both at the Supreme Court and Appellate Division level. DHCR's brief before the Supreme Court, pp. 30-31 raised the following argument:

> The petitioners erroneously argue that once the Division made a finding of hardship under Section 59, the granting of a certificate of eviction must mechanically follow. There are two errors in this reasoning. First, the Division did not make such a finding. The report issued by the Accounting Department does not constitute a finding by the Division unless and until its conclusions are adopted in a final order of the Division, something not done in the case at bar. Second, even if a finding of hardship were made, the granting of a certificate does not mechanically follow. The question of good faith intention, as discussed above, must be resolved in favor of the landlord before a certificate of eviction can be granted. In the case at bar this question of fact was resolved against the landlord. (emphasis added)

The contention was not elaborated upon because the litigation did not then warrant it. The Supreme Court, which ruled in DHCR's favor did not make a finding of hardship but merely stated in dictum that "it appears that petitioners would qualify under 2204.4 and 2204.9 for Certificates of Eviction." (Record: 17) During the litigation before the Appellate Division, DHCR's brief, pp. 36-37, contained the same contention, verbatim except for substituting appellants for petitioners. The litigation before the Appellate Division also did not warrant elaboration of the issue, although it was clearly preserved by DHCR. To say that the issue is now res judicata is nonsense. DHCR was not required to cite chapter and verse, and lay out all the evidence in the record to support its contention. A cursory review of the record would be sufficient to show that no hardship determination had been

reached by DHCR.

Moreover, Section 26-411(a)(2) of the Rent Control Law, which provides for judicial review of DHCR determinations expressly authorizes the reviewing court to consider new evidence when requested to do so by the agency. See, McMurray v. New York State Division of Housing and Community Renewal, 72 N.Y.2d 1022, 531 N.E.2d 645, 534 N.Y.S.2d 924 (1988). In the case at bar, DHCR is simply elaborating on a contention that was raised below by referring to the relevant statutory provisions and pointing to evidence which is already in the record. This Court is not barred from considering the impropriety of the Appellate Division's hardship finding.

The Zimans' argument that the Administrative Law Judge reached a hardship finding also has no merit. The mention of the staff report from the Accounting Bureau in the "Background" section of the Administrative Law Judge's report and recommendation (A-220) does not constitute a finding. In the section of the Administrative Law Judge's report and recommendation which is entitled "Findings and Conclusions", there is no mention of the Accounting Bureau report, nor was any finding made which even implied that there was hardship. (A-224 to 225)

The remaining arguments concerning the need for a remand on the hardship issue, should this Court not accept DHCR's arguments regarding evasion, have been addressed in appellant's main brief.

III. CHAPTER 234 OF THE LAWS OF 1984, IS CONSTITUTIONAL, FACIALLY AND AS-APPLIED.[2]

DHCR fully addresses the constitutional issues raised in the respondents' brief although it is of the opinion that this Court need not rule on them; in particular, the facial challenge to the constitutionality of Chapter 234. The facts in the case at bar are unusual in that the landlords seek to evict all of their remaining tenants even though they already occupy the majority of building. Most landlords who seek owner-occupancy evictions in New York City only seek one of many apartments in their buildings and have no plans to stop renting the remaining apartments. The conditions present in that type of case are very different from the one at bar. A challenge to the constitutionality of Chapter 234 would best be addressed in a case involving a more typical situation than the one at bar.

Property interests are protected against state governmental interference by the Fifth and Fourteenth Amendments of the United States Constitution and by Article I of the New York State Constitution. However, property rights under these constitutional provisions are not absolute. Rather, such rights have long been subject to uncompensated restrictions through a state's exercise of its police power in prescribing regulations "to promote the health, peace, morals, education, and good order of the people." Barbier v. Connolly, 113 U.S. 27, 31-32 (1885). As the Supreme Court recently explained in Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S.470, 491, 107 S.Ct. 1232, 94 L.Ed.2d 472, 492 (1987), "Under our system of government, one of the state's

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[2] The respondents challenge the constitutionality of only one provision of Chapter 234, the prohibition under the Rent Control Law against evicting elderly, disabled and long-term tenants for owner-occupancy. There are other provisions of Chapter 234 which are not attacked by respondents.

primary ways of preserving the public weal is restricting the uses individuals can make of their property .... these restrictions are 'properly treated as part of the burden of common citizenship'" (citation omitted). See also, Matter of Golden v. Planning Board, 30 N.Y.2d 359, 377-378 (1972) (governmental restrictions upon the beneficial use and enjoyment of one's property are permissible if necessary to promote the ultimate good of the community).

With respect to landlords and tenants, the Supreme Court has noted that the "'states have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.'" Pennell v. City of San Jose, 485 U.S. 1, 12, n.6, 108 S.Ct. 849, 857-858, n.6, 99 L.Ed.2d 1 (1988) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982)). See also, Federal Communications Commission v. Florida Power Corporation, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987); and Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S.875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983). Similarly, in Seawall Associates v. City of New York, 74 N.Y.2d 92, 112, n.11, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989), cert. denied, __U.S.__, 110 S.Ct. 500, 107 L.Ed.2d 503 (1989), the New York Court of Appeals pointed out that "government has considerable latitude in regulating landlord-tenant relationships to preclude eviction in hardship, emergency and rent-control cases."

Indeed, through the years, federal, state and local governments have, in response to significant housing shortages, enacted legislation declaring the existence of a serious public emergency and restricting the ability of landlords to raise rents and evict tenants. Both the Supreme Court and the New York Court of Appeals have consistently upheld these restrictions and rejected claims that such measures were constitutionally infirm. See, e.g., Bowles v. Willingham, 321 U.S.

503, 64 S.Ct. 641, 88 L.Ed. 892 (1944); Pennell v. City of San Jose, supra, 485 U.S. at 12, n.6, 108 S.Ct. at 857-858, n.6 (1988); Teeval Co. v. Stern, 301 N.Y. 346 (1950); Benson Realty Corp. v. Beame, 50 N.Y.2d 994 (1980).

Here, too, Chapter 234 was enacted in response to the housing shortage in New York City which the Legislature and the City Council have declared to be a serious public emergency. The challenged law addresses a specific problem which has arisen during the emergency: the eviction of elderly, disabled, and long-term tenants from their rent controlled apartments. The law prohibits the eviction of such individuals for the purpose of owner-occupancy. Similar provisions in other jurisdictions which prohibit the eviction of tenants for specific purposes, including owner-occupancy, have frequently been upheld as constitutional. See, e.g., Stamboulos v. McKee, 134 N.J.Super. 567, 342 A.2d 529 (N.J. 1975) (owner-occupancy); Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S.875, 104 S.Ct. 218 (1983) (demolition); Nash v. City of Santa Monica, 688 P.2d 894 (Cal. Sup. Ct. 1984), appeal dismissed for want of federal question, 470 U.S. 1046, 105 S.Ct. 1740, 84 L.Ed.2d 807 (1985) (demolition); Troy Ltd. v. Renna, 727 F.2d 287 (3rd Cir. 1984) (condominium conversion); Flynn v. City of Cambridge, 418 N.E.2d 335 (Mass. 1981) (condominium conversion).

The Zimans, nevertheless, have challenged the constitutionality of Chapter 234 of the Laws of 1984, claiming that it is invalid under the Fifth and Fourteenth Amendments of the United States Constitution, and under Article I, Section 7 of the New York State Constitution; that it constitutes a physical and regulatory taking; and that it violates equal protection. The Zimans attack Chapter 234 both facially and as-applied. They also argue that the rent laws unconstitutionally preclude them from withdrawing the property from the housing market and that Chapter 234 forces them to remain

in business. In raising such a challenge they assume the burden of rebutting the long adhered to presumption in favor of the constitutionality of legislation. See, Cook v. City of Binghampton, 48 N.Y.2d 323, 422 N.Y.S.2d 919, 398 N.E.2d 525 (1979); ILFY Co. v. Temporary State Housing Rent Commission, 10 N.Y.2d 263, 219 N.Y.S.2d 249 (1961), app. dismd., 369 U.S. 795, 82 S.Ct. 1155, 8 L.Ed2d 285. In mounting a facial attack under the Takings Clause, the Zimans face what the Supreme Court has termed an "uphill battle", Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987), a battle in which it "bears the heavy burden of overcoming the presumption of constitutionality that attaches to the [Act]." De St. Aubin v. Flacke, 68 N.Y.2d 66, 76, 496 N.E.2d 879, 505 N.Y.S.2d 859, 865 (1986).

For many of the same reasons that courts invoke the ripeness doctrine in order to avoid deciding a takings claim in the absence of an actual factual setting, they are even more loathe to hold "that the mere enactment of a statute constitutes a taking." Keystone Bituminous Coal Ass'n, supra, 480 U.S. at 493, 107 S.Ct. at 1247. The general rule that a statute is presumed to be constitutional, e.g., Hotel Corset Company v. Trust for Cultural Resources, 46 N.Y.2d 358, 370, 413 N.Y.S.2d 357, 362 (1978), and thus will not be struck down on its face unless it "can never be applied in a valid manner," New York State Club Association v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1 (1988), is applied with especial vigor in the takings area because of the "ad hoc factual inquiry" into economic impact required for a takings analysis. See generally, Keystone Bituminous Coal Ass'n, supra, 480 U.S. at 493, 107 S.Ct. at 1246-47 (posture of takings case crucial; facial analysis disfavored due to inherent factual nature of inquiry).

The Zimans cannot meet their heavy burden of overcoming the presumption of constitutionality that attaches to Chapter 234. Their constitutional claims against the Act must fail.

Even though the central focus of the respondents' challenge is their "takings" argument, this brief first addresses their claim that they have a constitutional right to withdraw their building from the rental market, as this claim cuts much broader than their "takings" challenge to Chapter 234.

A. Landlords Do Not Have an Unlimited Right to Withdraw Rental Housing From the Rental Market.

The Zimans's contend without any merit that the owner of a building which contains rent regulated apartments has an unlimited constitutional right to withdraw apartments from the rental market. This Court in Loab Estates, Inc. v. Druhe, 300 N.Y. 176, 180, 90 N.E.2d 25 (1949), long ago considered this argument and found it to be without merit:

> Appellant's chief contention is that the local law deprives a landlord of property without due process of law, because it denies to him the power to withdraw his property from the rental market. Conceding that the issue may be posed thus -- for the condition upon appellant's right to evict its tenants for the purpose alleged below should be regarded as prohibitive under the present emergency -- the argument, nevertheless, must fail. Similar restrictions upon the power of a landlord, induced by an earlier and lesser emergency, were said to fall within the lawful scope of "the police power in its proper sense, under which property rights may be cut down and to that extent taken, without pay." Block v. Hirsh, 256 U.S. 135, 155-158. Confronted with the threat of "chaos and confusion", Administrative Code of City of New York, Section U41-7.0, subd. a., and impelled to balance the conflicting interests of landlords and tenants in possession, the city council and Legislature have concluded that the former must suffer a temporary restraint upon the right to withdraw their property from the rental market. Appellant does not contend that it has been deprived of a reasonable return upon its property, see Bowles v. Willingham, 321 U.S. 503, 517, nor has it challenged the existence of an emergency. As legislation designed to meet an immediate and pressing exigency, the local law cannot be held to operate as a "taking" of appellant's property without due process of law.

In Loab this Court upheld the rent agency's denial of evictions for the purpose of demolition. See also, Suppus v. Bradley, 278 App. Div. 337 (1st Dept. 1951); Asco Equities, Inc. v. McGoldrick, 309 N.Y. 738, 128 N.E.2d 426 (1955).

The underlying principle is well stated by the Massachusetts Supreme Court in Flynn v. City of Cambridge, supra, 418 N.E.2d at 338 (Mass. 1981):

> If the power to control rents is to be anything more than an interim measure effective for only the short period needed to convert the entire rental housing stock, it must include by implication the power to make reasonable regulations governing removals from the rental housing market.

The Supreme Court has also upheld local rent agency determinations precluding the removal of housing accommodations from the rental market. Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S.875, 104 S.Ct. 218 (1983) (appeal dismissed for want of a federal question); Nash v. City of Santa Monica, 688 P.2d 894 (Cal. Sup. Ct. 1984), appeal dismissed for want of federal question, 470 U.S. 1046, 105 S.Ct. 1740 (1985).

These decisions control the issue at bar. The cases relied upon by the respondents do not compel a contrary conclusion. The rulings Wilson v. Brown, 137 F.2d 348 (Emer. Ct. App. 1943), and Taylor v. Bowles, 145 F.2d 833 (Emer. Ct. App. 1944), concerned the wartime federal Emergency Price Control Act, which did serve as the background for the New York rent control law. But the federal rent control program was not as developed as the subsequent New York law in so far as limitations the removal of housing from the rental market are concerned.

The provision of the federal law quoted in Wilson and Taylor, as well as by Justice Douglas in Bowles v. Willingham, 321 U.S. 503, 517, 64 S.Ct. 641, 88 L.Ed. 892 (1944) -- "nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations

for rent" -- was significantly qualified when adopted in the New York law -- "but housing accommodations already on the rental market may be withdrawn only after prior written approval of the city rent agency, if such withdrawal requires that a tenant be evicted from such accommodations." N.Y.C. Admin. Code Section 26-408(j)(1). There is nothing in the holdings in Wilson, Taylor, or Bowles which entail the conclusion that the qualification later added in the New York law, or the regulations promulgated thereunder, are unconstitutional.

The challenge in Wilson concerned the setting of rent ceilings, not evictions or withdrawal of accommodations from the rental market. The Court in Taylor had no quarrel with the federal regulations restricting evictions but found that the facts of the case did not preclude the owner from withdrawing his accommodations from the rental market. In Bowles, the owner sued to restrain the issuance of rent orders.

The passing references in these cases to the constitutionality of the federal law in light of the then existing withdrawal provision was no more than dicta having no bearing on the constitutionality of the additional limitations on removal subsequently incorporated into the New York rent control system and found to be constitutional by this Court. Those limitations, in conformity with the general provision quoted above, do not compel the offering of housing accommodations on the rental market, but do limit their withdrawal from the market after having been rented.

As for the New York cases cited by respondents on pages 43 and 44 of their brief, the lower court decision in In re Klein, 124 N.Y.S.2d 460 (Sup. Ct., Kings Co., 1953), certainly did not overturn this Court's decision in Loab Estates, supra. And this Court's determination NYU v. Temporary State Housing Rent Commission, 304 N.Y. 124, though raising doubts about the constitutionality of Section 59 of the Rent and Eviction Regulations, did not rule on that issue.

Section 59 was subsequently amended into its current form and now specifically provides for withdrawal under the circumstances which occurred in NYU, i.e. withdrawal for an institution's charitable or educational purposes. Moreover, in Asco Equities v. McGoldrick, 309 N.Y. 738, 128 N.E.2d 426 (1955), a case decided after Klein and NYU, this Court found the regulatory limitations on removal to be constitutional.

Respondents did not and cannot cite any higher court New York decisions which have found the limitations in the Rent Control Law on removal of housing accommodations from the housing market to be unconstitutional. The controlling decisions, as cited above, clearly hold that those limitations are constitutional.

B. Chapter 234 Has Repeatedly Been Found to Be Constitutional.

Although this Court has not ruled on the constitutionality of the twenty-year rule, it has considered the question in its denial of a motion to reargue in 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), rearg. denied, 73 N.Y.2d 918, 539 N.Y.S.2d 302, 536 N.E.2d 631 (1989). However, the Appellate Division in McMurray did hold the rule to be constitutional. In McMurray, for which the respondents only cite the Appellate Division opinion, this Court held that Chapter 234 protected the tenant from eviction, even though he did not become a 20-year tenant until after entry of judgment by the Supreme Court; even though the landlord first filed the eviction application in 1983, i.e., before the effective date of Chapter 234; and even though DHCR had already issued a certificate of eviction.

The lower courts, including the Appellate Division, First Department in McMurray, have repeatedly and uniformly held that the protection against eviction afforded to twenty-year residents is constitutional. See, Matter of Lopez v. Mirabel, 127 A.D.2d 771, 512 N.Y.S.2d 164 (2d Dept. 1987); Lavalle v. Scruggs-Leftwich, 133 A.D.2d 313, 519 N.Y.S.2d 218 (1st Dept. 1987); Vitaliotis v. Mossesso, 130 Misc.2d 141, 495 N.Y.S.2d 111, 115 (Civ. Ct., N.Y.C., 1985); Budhu v. Grasso, 125 Misc.2d 284 (Civ. Ct., N.Y. Co., 1984); Maloney v. The State of New York Division of Housing and Community Renewal, N.Y.L.J., March 13, 1985, p. 11, col. 1 (Sup. Ct., N.Y. Co.); Matter of Ortiz v. Div. of Housing and Community Renewal, N.Y.L.J., May 21, 1985, p. 12, col. 4, n.o.r. (Sup. Ct., Kings Co.).

Those cases, in finding that Chapter 234 constitutionally protects 20-year tenants, implicitly upheld the law with regard to the elderly and disabled. Were the statute found to be facially unconstitutional, the protections afforded by Chapter 234 to the elderly and disabled would necessarily be struck down along with the protections for long-term residents, as it does not appear that the provisions protecting the three different classes of tenants are severable.

The respondents have shown no basis for reaching a conclusion contrary to the holdings in the cited cases.

C. There Has Been No Per Se Physical Taking.

In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 245 at 434-435, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), the Supreme Court restated the well-established rule that a compensable taking will be found where the character of governmental action is a permanent

physical occupation -- either by the government itself or by someone authorized by the government to do so -- "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Elaborating on this rule, the Supreme Court, in Nollan v. Coastal Commission, 483 U.S.825, 832, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), found that a physical occupation -- per se compensable -- has occurred where the government gives the public "a permanent and continuous right" to pass and repass across private property.

This Court, in applying these Supreme Court cases to a New York City law which obligated the owner of single-room occupancy ("SRO") properties to restore all uninhabitable units to habitable condition and lease them at controlled rents for an indefinite period, concluded that a per se physical taking had occurred because the law "'interfere[s] so drastically' with the SRO property owners' fundamental rights to possess and to exclude." Seawall Associates v. City of New York, 74 N.Y.2d 92 at 106, 544 N.Y.S.2d 542 (1989) [citations omitted].

Respondents here contend that, under Seawall, Nollan, and Loretto, Chapter 234 effects a per se taking by requiring them to rent their property to persons whom they do not wish to have as tenants. The cases upon which they rely, however, do not support this argument.

In the Seawall decision, this Court emphasized that the local law in question compelled owners to be residential landlords by requiring them to rehabilitate vacant and uninhabitable property, and offer it for rent to persons having no previous attachment to the property. 74 N.Y.2d at 106. In contrast, this Court specifically distinguished rent control laws from the law in question:

> rent-control and other landlord-tenant regulations that have been upheld by the Supreme Court and this court merely involved restrictions imposed on existing tenancies where the landlords had

> voluntarily put their properties to use for residential housing . . . those regulations did not force the owners, in the first instance, to subject their properties to a use which they neither planned nor desired.

74 N.Y.2d at 105 (emphasis added).

Chapter 234, which the Zimans here challenge, is similar to the landlord-tenant regulations which, as noted by this Court in Seawall, have been consistently upheld. Unlike the New York City law at issue in Seawall, Chapter 234 does not impose any affirmative responsibilities on residential landlords which they have not previously borne. The landlords affected by Chapter 234 have voluntarily placed their apartments on the residential rental market and have thus subjected their property to the requirements of the Rent Control Law. Purchasers of property subject to the Rent Control Law purchase subject to the rights of current tenants to continue in possession. See, 52 Riverside Realty Company v. Eberhardt, 119 A.D.2d 452, 500 N.Y.S.2d 259 (1986); Bank of New York, Albany v. Hirschfeld, 37 N.Y.2d 501, 374 N.Y.S.2d 100 (1975).

To be sure, in Seawall, this Court repeatedly stated that forcing a landlord to rent his or her property to "strangers" constitutes a per se physical taking. 74 N.Y.2d at 105-106. Nevertheless, tenants who are in possession through the voluntary letting of an apartment by a landlord are not "strangers". Nor are they "strangers" to a purchaser buying subject to their tenancies. Indeed, paragraph 36 of the Zimans' contract of sale expressly states that "The subject premises are sold and are to be conveyed subject to: * * * (m) Existing leases and tenancies as set forth in Schedule C annexed hereto..." (A-8 and 10)

Unlike the local law in Seawall, Chapter 234 does not require a landlord to rent or re-rent an apartment which has become vacant. In fact, in the case at bar, the Zimans have obtained possession of one of the three apartments which were occupied when they purchased. They have not been

forced to re-rent that apartment or the other four which had previously been vacant.

The distinction made by this Court in Seawall is echoed by the Supreme Court opinion of Justice Scalia, writing for the majority in Nollan, 483 U.S. at 831, 107 S.Ct. at 3145:

> We have repeatedly held that, as to property reserved for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" [citations omitted] [emphasis added]

A building which is being used as residential rental property has not been reserved for the private use of the landlord. It is subject to the existing tenancies and the rights attendant thereto.

Justice Scalia continued in a footnote:

> The holding of PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed2d 741 (1980), is not inconsistent with this analysis [finding a physical taking in Nollan], since there the owner had already opened his property to the general public, and in addition permanent access was not required...

483 U.S. at 832, 107 S.Ct. at 3145. In PruneYard Shopping Center, the Supreme Court upheld a California decision requiring access to a shopping center for the exercise of speech and petition rights, concluding that the ruling did not constitute a taking. Just as the owner of a shopping center who has "opened his property to the general public," cannot exclude persons who wish to exercise their lawful rights, a landlord of residential property who has opened it to residential tenants cannot claim that the government is coercing a physical occupation by those tenants.

The determinative case on the physical occupation issue in the rent regulation field is Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S.875, 104 S.Ct. 218 (1983). In Fresh Pond, the Supreme Court dismissed, for want of a substantial federal question, an appeal of a Massachusetts court decision which affirmed the denial by the Cambridge Rent Control Board of an application to

demolish a rent-controlled apartment building.[3] Fresh Pond Shopping Center acquired the six-unit building, which was adjacent to property it already owned, planning to demolish the building and provide a parking lot for a commercial tenant of the shopping center. Fresh Pond first had to obtain permission from the Cambridge Rent Control Board to remove the property from the rental housing market. The Board denied the permit although only one of six units was occupied at the time.

In his dissenting opinion Justice Rehnquist argued that the ordinance, which permitted denial of a "removal" permit, effected a physical taking. Nevertheless, the other eight Justices, who plainly did not accept the physical taking argument, voted for dismissal.

The majority decision in Fresh Pond reflects a basic understanding of the dynamics of rent regulatory systems. If restrictions on evictions or on the removal of residential rent property from the market were considered to be a per se physical taking, rent regulation would simply not work. If rents are to be effectively controlled, there must be restrictions on evictions. As Justice Holmes wrote in Block v. Hirsh, 256 U.S. 135, 157-158, 41 S.Ct. 458, 65 L.Ed. 865 (1921), the first of the many cases in which the Supreme Court upheld restrictions on eviction in the context of rent control:

> The preference given to the tenant in possession is an almost necessary incident of the policy, and is traditional in English Law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail.

Although any particular restriction on evictions may arguably be a regulatory taking or violative of due process or some other constitutional provision, to hold that any one restriction on

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[3] A summary affirmance is binding as a decision on the merits. Hicks v. Miranda, 422 U.S. 332 (1975). As Justice Rehnquist stated in his dissenting opinion in Fresh Pond, "we act on the merits whatever we do." 104 S.Ct. at 218. Fresh Pond was cited by the Supreme Court itself as precedent in Federal Communications Commission v. Florida Power Corporation, 480 U.S. 245, 252, 107 S.Ct. 1107 (1987) in which the Court characterized Fresh Pond as "dismissing [a] challenge to [a] rent control ordinance under Loretto for want of [a] substantial federal question".

evictions effects a physical taking may well lead to the conclusion that all restrictions on evictions effect a physical taking, at least insofar as they are considered to be permanent. As a physical taking, there would be no way to distinguish one type of restriction on evictions from another. Such is not the case under other constitutional principles. Were Chapter 234 to be found to effect a physical taking, the ruling would consequentially take the heart out of the entire Rent Control Law. Justice Holmes' sound observation and its implicit recognition by the majority in Fresh Pond forcefully makes the case against restrictions on evictions effecting a physical taking.

The Zimans reliance on three additional cases for their physical taking argument is misplaced. In Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), the Court found a physical taking in a situation where the Army Corps of Engineers directed that public access be provided to a marina joined to a bay as a result of the private development of an inland lagoon. As in Nollan, the governmental action required public access where previously the property had been reserved for private use. The previously discussed distinction made by Justice Scalia in Nollan and by this Court in Seawall is applicable to Kaiser Aetna, and marks the latter case as fundamentally different from the one at bar in which the property had been voluntarily opened to the tenants in possession. In Kaiser Aetna, the government attempted to force public access where none had been allowed before.

In Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986), cert. denied, 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), also relied upon by the Zimans, the Court found unconstitutional a mobile home ordinance which had provisions going far beyond the typical rent control law such as the one in the case at bar. The Santa Barbara ordinance not only gave tenants the right to possession for an indefinite period, but also gave the tenant, if he or she should move,

sole power to choose a stranger as a successor tenant. Thus, a landlord would have no meaningful say in who would live on the property. Moreover, a market was created for tenants' transferable right to possession, allowing tenants to reap a monetary windfall while landlords were subject to the rent limits of the ordinance. What the Court found so objectionable in this ordinance was the extremity of the limitations put on landlords' rights and the over-extension of tenants rights. All balance was lost between the competing interests of landlords and tenant. Chapter 234, in contrast, does not give the occupants in possession any right to choose an unrelated stranger as a successor tenant and thus force that stranger upon the landlord. Nor does Chapter 234 create a market for rent controlled apartments from which tenants can reap a windfall profit. Chapter 234 does not go beyond constitutional limits.

The final case relied upon by the Zimans is Kennedy v. City of Seattle, 617 P.2d 713 (Wash Sup. Ct. 1980). Kennedy, which concerned the constitutionality of a houseboat ordinance, was not a physical takings case, but rather a regulatory taking case. The Washington Supreme Court found that the ordinance's restrictions on evictions were so restrictive as to be confiscatory, not that they effected a physical taking. The defect in the houseboat ordinance was that the only way it allowed for evicting a houseboat from a moorage site was an impossibility. It required the landlord to locate a nonexistent alternative moorage site for the houseboat owner. The New York City Rent Control Law does not create such an impossibility. It provides several grounds for evictions. The fact that one or more might not be available to a particular landlord at a particular point in time, or that an additional restriction was added by Chapter 234 does not render the law unconstitutionally restrictive.

Granat v. Keasler, 633 P.2d 830 (Wash. 1983), cited by amicus curiae Rent Stabilization

Association, is a carbon copy of Kennedy. The Seattle City Council passed an ordinance amending and superceding the one with the provision found unconstitutional in Kennedy. The amended houseboat ordinance had a removal provision which was exactly the same as the one in Kennedy. The Court in Granat thus found the new removal provision to be unconstitutional.

A case which is directly on point and which is not mentioned by the Zimans or amici is Troy Ltd. v. Renna, 727 F.2d 287 (3rd Cir. 1984). There, the Third Circuit Court of Appeals found that a New Jersey statute prohibiting the eviction of senior citizens and disabled tenants for 40 years after the date of converting an apartment to condominium ownership did not effect a permanent physical taking and was otherwise constitutional.

The Zimans' physical taking argument is also defective in that Chapter 234 is not a permanent enactment. Section 4 of Chapter 234 provides for the automatic expiration of that chapter at such time as the rent laws themselves expire. The Rent Control Law, which was enacted after an express finding that a serious public emergency exists, NYC Admin. Code, Section 26-401, will expire upon a finding by the City that the emergency no longer exists. McKinneys' Unconsol. Laws Section 8603. Section 8603 requires that every three years a survey be conducted and a determination made as to the need for continuing the regulation and control of residential rents and evictions.

In addition, the Rent Control Law provides for the decontrol of classes of housing accommodations in which the vacancy rate reaches five percent (5%) or more. NYC Admin. Code, Section 26-414.

This Court can only assume that the events which will render this temporary emergency law ineffective in fact can and will occur; it cannot infer in the absence of evidence and findings that a law temporary on its face is in fact a permanent enactment.

There is no basis for Respondents' claim that Chapter 234 effects a per se permanent physical occupation in contravention of constitutional limits.

D. Chapter 234 Does Not Effect A Regulatory Taking, Either Facially or As-applied.

A law or regulation will not be held to effect a regulatory taking so long as (1) it is "reasonably necessary to the effectuation of a substantial government purpose", or it "substantially advances legitimate state interests", and (2) does not "deny an owner economically viable use of his land." See, Keystone Bituminous Coal Association v. DeBenedictis, supra, 480 U.S. at 485, 107 S.Ct. at 1241 (1987); Agins v. Tiburon, 447 U.S. 255 at 260, 100 S.Ct. 2138 at 2141, 65 L.Ed.2d (1980); Penn Central Transportation Company v. City of New York, 438 U.S. 104 at 127, 98 S.Ct. 2646 at 2660 (1978); Seawall Associates v. City of New York, 74 N.Y.2d 92, 544 N.Y.S.2d 542 (1989). Both factors have been interpreted in a manner which gives great deference to governmental action. The Supreme Court has stated that "a broad range of governmental purposes and regulations satisfies" the state interest requirement. See, Nollan v. California Coastal Commission, supra, 483 U.S. at 835, 107 S.Ct. at 3147. Landlord-tenant relations have been particularly singled out as a field in which great deference is accorded to governmental regulation. See, Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. at 440; Pennell v. City of San Jose, supra, 485 U.S. at 12, n.6.

The "denial of economically viable use" factor has also been interpreted in a manner which gives government action great latitude without there being a taking. To deprive an owner of the economically viable use of his land a regulation must make it "impossible" or "commercially

impracticable" for the owner to profitably engage in his business, or unduly interfere with the owner's reasonable "investment backed expectations."[4] See, Keystone Bituminous Coal, supra, 480 U.S. at 482, 485, 493; Agins, supra, 447 U.S. at 262, 100 S.Ct. at 2142; Penn Central, supra, 438 U.S. at 104, 127, 136, 98 S.Ct. at 2659, 2662, 2665. Moreover, a regulation will not be held to have worked such a denial merely because it deprives the owner of the most profitable use of property, so long as the property retains some "beneficial" alternative use. See, Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264 at 296, 101 S.Ct. 2352 at 2370-71, 69 L.Ed.2d 1; Spears v. Berle, 48 N.Y.2d 254, 262, 263, 422 N.Y.S.2d 636, 639, 640 (1979). The New York Courts require the owner to "establish that the regulation attacked so restricts his property that he is precluded from using it for any purpose for which it is reasonably adapted", and that the property's "economic value, or all but a bare residue of the economic value....ha[s] been destroyed." De St. Aubin v. Flacke, 68 N.Y.2d 66, 77, 505 N.Y.S.2d 859, 865 (1986). Accord, e.g., Spears v. Berle, supra, 48 N.Y.2d at 262, 422 N.Y.S.2d at 639; Penn Central (Court of Appeals decision), supra, 42 N.Y.2d at 329-31, 397 N.Y.S.2d at 916-18.

i. Chapter 234 Serves a Legitimate State Interest.

The purposes served by Chapter 234 -- the protection of elderly, disabled, and long-term tenants -- are valid governmental concerns. A primary purpose of the Rent Control Law is to "prevent uncertainty, hardship and dislocation" of tenants during a period of "serious public emergency" in housing. Section 26-401, N.Y.C. Admin. Code. This Court in Braschi v. Stahl

[4] This Court noted in Seawall, supra, 72 N.Y.2d at n.6, that the consideration that a regulation might substantially frustrate "reasonable investment backed expectations" would be relevant to an as-applied challenge, not a facial challenge.

Associates Company, 74 N.Y.2d 201, 212, 544 N.Y.S.2d 784 (1989) recognized one of the purposes of the rent control laws to be "the protection of individuals from sudden dislocation". The Supreme Court, in Pennell v. City of San Jose, 485 U.S. 1, 12, 13, 14, n.8, 108 S.Ct. 849, 857, 858, 859, n.8, (1988) identified the "preven[tion of] excessive and unreasonable rent increases" and the "protection of consumer welfare" by limiting rents and "reducing the costs of dislocation" as legitimate public purposes.

The purpose of Chapter 234 is precisely to reduce the costs of dislocation to three particularly vulnerable groups: the elderly, disabled, and long-term tenants. The legislature gave recognition to the devastating impact that evictions can have on such tenants and their communities. The statute plainly advances the legitimate state interest in (1) ameliorating the hardship and devastation which can be the result of evicting elderly, disabled and long-term tenants, many of the latter having limited incomes and being elderly, and (2) preserving the integrity of neighborhood 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.

These legislative findings are well supported by research results. In one survey of the consequences of displacement, i.e., "the dislocation of households from city neighborhoods", R.T. LeGates, C. Hartman, "Gentrification-Caused Displacement", 14 Urban Lawyer, 31, 53-54 (1982), the authors concluded:

> ...displacement imposes substantial hardships on some classes of displacees, particularly lower income households and the elderly. While some displacees report finding similar or improved dwelling units and neighborhoods, a substantial number report a deterioration in post-move dwelling units and/or neighborhood quality. Rents almost always increase, modestly for some households, but substantially for others. Lower income outmovers are particularly hurt, finding the least satisfactory alternative units and neighborhoods, and facing the highest proportional shelter cost increase. For elderly displacees, the neighborhood studies show particular hardship.

Studies of the effects of displacement in the context of urban renewal projects reveal similar conclusions. A study of the impact of relocation in Washington, D.C. supports the conclusion that displacement can have seriously damaging social and psychological consequences:

> This investigation reveals a poignant fact. No matter how dirty, inadequate, and unsanitary the old Southwest was, it was also <u>home</u> for families that had been there for a long time....For many, the loss was deep and continues to be felt. They have not 're-adjusted' and one-fourth of the respondents have not made a single friend since leaving the old Southwest. (emphasis in original)

D. Thurz, <u>Where Are They Now? A Study of the Impact of Relocation on Former Residents of</u>

Southwest Washington Who Were Served in an HWC Demonstration Project, pp. 100-01 (1966).

In another study of the effects of displacement caused by urban renewal, the authors found:

> A small number ascribed a positive role to relocation in their lives. These persons had usually already planned to move, and urban renewal gave them a push that they later felt they needed. Others, perhaps 1 in 10, remain emotionally neutral to the relocation process, which might be best described as "just one of those things."
>
> About 4 out of every 5 reported some negative impact, either short- or long-term, from relocation. For more than half of these people time seemed to have healed the initial wounds. Some of these still felt a sense of loss, particularly for the people in the neighborhood, but their new homes or neighborhoods or perhaps just life in general, was providing sufficient compensation to relegate the relocation experience to its place in their personal histories. For others, however (probably more than a third but less than half of all interviewed relocatees), two years had passed but had not erased or replaced their sense of loss. Some were "grieving for a lost home," and some were grieving for a lost neighborhood. A few even feel that relocation marked the end of their lives in any meaningful sense.

Terreberry, "Household Relocation: Resident's Views", in Studies in Change and Renewal in an Urban Community (C. Lebeaux & E. Wolf, dirs. 1965), pp. 427-28.

Displacement has also been studied in the context of condominium conversions. One commentator has noted:

> The displaced pay a high price in both financial and psychological terms. On the one hand, low-income tenants must pay for relocation out of constrained budgets. On the other hand, relocation disrupts the security, social networks, and settled expectations that residents develop during their tenancies. This disruption most severely affects elderly people who are uprooted from their lifetime homes.

V.A. Judson, "Defining Property Rights: The Constitutionality of Protecting Tenants from Condominium Conversion", 18 Harv. Civ. Rts. Civ. Libs. Law Rev. 179, 190-191 (1983). This author shares conclusions from a study conducted by the Department of Housing and Urban

Development, and from research submitted to the U.S. Senate:

> "[C]onversion is associated with a substantial amount of outmigration of former residents from their preconversion neighborhoods." [citation omitted] "This 'exodus' is a fatal shock to nay sense of community" and can "destroy the existing social fabric." [citation omitted]

Id. at 191, n.38.

Another commentator has noted:

> The elderly and disabled also suffer peculiar hardships when displaced. They frequently require assistance to search for an apartment and may encounter considerable difficulty locating suitable housing with the accessibility and other amenities they may need. [footnote omitted] Additionally, medical studies have indicated that the elderly suffer significant stress and adjustment problems in coping with disruption when displaced. Elderly people tend to stay in one home until the end of their lives. Their subsequent displacement or involuntary relocation, due to a conversion, may lead to suicide or premature natural death. [footnote omitted]

Comment, Conversion of Apartments to Condominiums: Social and Economic Regulations Under the California Subdivision Map Act, 16 Cal. West. L. Rev. 466, 468-469 (1980).

Perhaps the social scientific and medical research can best be summed up by a quote from Justice Holmes:

> The true explanation of the law of prescription seems to me to be that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life!

Letter from O. Holmes to W. James (April 1, 1907), reprinted in M. Lerner, The Mind and Faith of Justice Holmes, 417 (1943).

There can be no question that the protection of long-term (20 year) tenants, as well as the elderly and disabled, from dislocation and displacement, from being uprooted from their homes and

communities, serves a public purpose and is a legitimate state interest. The Zimans complain (Respondent's Brief, p. 49) that long-term tenants "receive special status even if they are healthy and rich". Do they intend to say by this that the elderly are never healthy and rich; but if they are, that they are not entitled to the protections accorded them by the State?[5] The State Legislature legitimately gave expression to concerns that go beyond age and health condition, and affect individuals and families whatever their economic status. That the protections might not be precisely limited to those who would suffer the most hardship does not render Chapter 234 unconstitutional. The classic statement made by the Supreme Court with regard to equal protection is applicable to the analysis of Chapter 234 as well:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 US 61, 78, 31 S Ct 337, 55 L Ed 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific." Metropolis Theatre Co. V. City of Chicago, 228 US 61, 69-70, 33 S Ct 441, 57 L Ed 730. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 US 420, 426, 81 S Ct 1101, 6 L Ed 2d 393.

Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct 1153, 25 L.Ed.2d 491, reh den, 398 U.S. 914, 90 S.Ct. 1684, 26 L.Ed.2d 80 (1970).

As the Zimans themselves state in their brief, p. 13, "The State Legislature, first of all, which

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[5] New York State has until now rejected tenant-income as a factor in rent regulation, although under Pennell, supra, it has been held to be a constitutionally legitimate basis for determining rents.

is fully familiar with the New York City housing market, engaged in a careful 'balancing of the equities' in drafting ch. 234." The law does in fact fairly and constitutionally balance public purposes and private interests.

Respondents argue without merit that the protection of 20 year tenants imposes unconstitutional durational requirements. However, the cases which they cite all involved the denial of government benefits because of the short-term state residency requirements. The case at bar involves the grant of an additional protection resulting from long-term residency. The 20-year rule is akin to the law of prescription addressed by Justice Holmes or seniority rights acquired by employees, not the outright denial of government benefits because of short-term residency.

Finally, respondents argue that Chapter 234 does not meet the means-ends test: that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." Penn Central, supra, 438 U.S. at 104, 124 (1978). They also argue that the heightened scrutiny applied in Nollan, what this Court characterized as the "close nexus" test in Seawall, should be applied in the case at bar. While the heightened scrutiny applied in Nollan and Seawall need not and should not be applied in the case at bar,[6] Chapter 234 nevertheless satisfies

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[6] DHCR submits that these decisions do not signal a total departure from the traditional "rational basis" test applied in takings jurisprudence but is rather limited in its application to exceptional circumstances which do not apply in the case at bar. Professor Michaelman, in a carefully reasoned analysis of Nollan, argues that the heightened scrutiny applied by the Supreme Court in that case is most satisfactorily understood as an elaboration of the "permanent physical invasion" analysis of Loretto v. Teleprompter Manhattan CATV Corp., supra.; and that the case, thus understood, is "hardly a novelty at all". F. Michaelman, "Takings, 1987," 88 Columbia L. Rev. 1600, 1608-09 et passim (1988). Seawall, falls under the same category under Professor Michaelman's analysis. It should be noted that the Supreme Court did not use heightened scrutiny in Keystone Bituminous Coal, supra, which was decided during the same term as Nollan. See also, Comment, Trespass at High Tide: The Supreme Court Gives Heightened Scrutiny to a State Imposed Easement Requirement, 54 Brooklyn L. Rev. 991 (1988)

In Nash v. City of Santa Monica, 688 P.2d 894 (Cal. Sup. Ct. 1984), appeal dismissed for

both standards. It would be hard to imagine a closer means-ends nexus than that found in Chapter 234. The goal of protecting elderly, disabled, and long-term tenants from dislocation from their homes and communities, is directly achieved by prohibiting their eviction.

ii. It Has Not Been Shown that Chapter 234 Deprives Landlords Generally Or the Zimans in Particular of Economically Viable Use of Their Property.

It is oddly striking that, in a case in which the Zimans claim to be entitled to evict their tenants on the basis of undue hardship, they make no showing that Chapter 234 deprives them of the economically viable use of their property. And though there was no final determination on the Zimans' hardship application, this much can be said: They continue to receive rents for the two remaining tenants in the building and they are entitled to apply for Maximum Base Rent increases from those two tenants just like every other landlord with rent controlled tenants[7]. In addition, the Rent and Eviction Regulations allow a landlord to apply for increases in excess of the normal Maximum Base Rent increases where a building is producing below a certain return on capital value, where there are certain unavoidable increases in operating costs, and where labor costs exceed the Maximum Base Rent allowance for such costs. See, 9 NYCRR 2202.8 to 2202.11. The regulations

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want of federal question, 470 U.S. 1046 (1985), which albeit was decided before Nollan, the Court declined to apply a strict scrutiny standard in a case involving the denial of a permit to demolish rent regulated apartments. The case is extensively discussed below, p. 64 et seq. The Court in Nash correctly observed that "The strict scrutiny standard which Nash invokes would call into question a variety of land use regulations which have thus far withstood constitutional scrutiny. Id. at 899.

If Professor Michaelman is correct in his analysis, there is no reason to apply heightened scrutiny to landlord-tenant regulations, a field in which the Supreme Court, from Loretto to Pennell (decided after Nollan), has consistently expressed deference.

[7] To the extent that the Zimans or their predecessors did not apply for such increases, the loss in income is self-inflicted and not chargeable against the statute in a constitutional weighing.

also provide for fuel cost adjustments. 9 NYCRR 2202.13.

As for the five other apartments in the building, the Zimans use of them for their personal living space assuredly counts as economically viable use of the property. For several years now they have had use and occupancy of a majority of the space in the building. In the alternative, those apartments can be rented out at market rents, which in Greenwich Village would be substantial, even for small studios.

Finally, the building can be sold. With the increase in New York real estate values during the 1980s, and the desirability of the Greenwich Village neighborhood, a building with five vacant apartments would have substantial value. There has been an active market for comparable buildings throughout New York City, even with rent controlled tenants in occupancy.

It cannot be said that the value of the property was significantly diminished with the passage of Chapter 234. The tenants in occupancy, even prior to its enactment, had substantial protections against evictions. The market value of the property prior to enactment of Chapter 234 would have already reflected the fact that there were at that time three (now two) rent controlled tenants in occupancy. The additional protection for those tenants would not have a significant effect on value except for those buyers who might, like the Zimans, be interested in occupying the entire structure. And for those who, like the Zimans, would buy, the value was presumably already discounted because of the uncertainty in obtaining evictions even under the restrictions in effect before the enactment of Chapter 234. Indeed, for the Zimans, the price they paid must be adjusted by the commitment by the former owner to pay up to $20,000 for expenses which the Zimans would incur in seeking the evictions.

The property clearly retains "beneficial" alternative uses including the Zimans living in most

if not all of the building. Hodel v. Virginia Surface Mining Ass'n, supra, 452 U.S. 264, 296, 101 S.Ct. 2352, 2370-71; Spears v. Berle, 48 N.Y.2d 254, 262, 263, 422 N.Y.S.2d 636, 639, 640 (1979). They are not precluded from using it for the purposes for which it is adapted, nor has the economic value of the property suffered more than a minimal decrease, if that. De St. Aubin v. Flacke, 68 N.Y.2d 66, 77, 505 N.Y.S.2d 859, 865 (1986). The Zimans have not been unconstitutionally deprived under any of the formulations of the economic viability factor. And for the reasons set forth above, no other owner would be so deprived. Thus, it cannot be said that there has been either a facial or as-applied regulatory taking.

iii. Chapter 234 Does Not Unconstitutionally Frustrate Reasonable Investment-Backed Expectations.

The Zimans claim that their "reasonable investment-backed expectations" were unconstitutionally frustrated because the sole purpose for which they purchased the property was curtailed. The claim has no merit as a facial challenge to Chapter 234, and is at best an as-applied challenge. The New York City residential rental market is a heavily regulated and controlled market. Landlords who owned buildings with rent controlled tenants for substantial periods of time prior to enactment of Chapter 234, or who purchased prior to its enactment without any intention to seek evictions for owner-occupancy, surely cannot claim that their reasonable investment-backed expectations have been frustrated, since those expectations had little or nothing to do with occupying the apartment of an elderly, disabled or long-term rent controlled tenant. Nor did the law frustrate the investment-backed expectations of purchasers or owners who did have a wish to occupy an apartment in their building, but where the building was large enough (as most are in New York City) to give the owner

a variety of apartments from which to choose. Moreover, Chapter 234 cannot be said to have frustrated the investment-backed expectations of those who purchased property after the law was enacted, as they were on notice of the restriction of the law and knew or should have known of its impact on their expectations. See, Flynn v. City of Cambridge, 418 N.E.2d 335, 339 (Mass. 1981).

Hence, the only question remaining under this rubric is whether, as applied to the Zimans, Chapter 234 unconstitutionally frustrated their reasonable investment-backed expectations even though they now occupy more than half of their building. This claim must be placed within the context of the broader scope of takings jurisprudence, and within the scope of traditional principles concerning vested rights and the rule that administrative determinations be rendered on the basis of the law at the time of the determination. As the Supreme Court stated in Penn Central:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole -- here to city tax block designated as the "landmark site." (emphasis in original)

438 U.S. at 130-131. Similarly, in Andrus v. Allard, 444 U.S.51, 65-66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) the Court held that

> where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.

The Supreme Court has adhered to this principle most recently in Keystone Bituminous Coal, supra, 480 U.S. at 497, 107 S.Ct. at 1265.

Owner-occupancy, which is only one of the strands of property rights that owners have in rent controlled rental property in New York City, was substantially curtailed by the enactment of Chapter

234 by preventing evictions of the elderly, disabled and long-term tenants for owner-occupancy, during the pendency of the housing emergency, for as long as such a tenant remains in the apartment and otherwise performs his or her obligations under the rent laws. However, Chapter 234 does not extinguish the right of an owner to occupy the apartment of such a tenant after the tenant vacates. Nor does it extinguish or curtail any of the other rights attaching to the use of the tenant's apartment or the building as a whole, including evictions for other available reasons. As for the Zimans saying that they did not buy the building to operate it as an investment, the fact is that the building's value as an investment remains intact. Given the total bundle of rights which landlords can exercise in a heavily regulated rental market such as New York City's, the curtailment of one of those rights does not unconstitutionally frustrate reasonable investment-backed expectations.

Moreover, the Zimans have in good measure been able to assert their right of owner-occupancy. They now live in five of the seven apartments in the building, including one apartment on the second floor and the entire third and fourth floors.[8] The situation here is analogous to that in

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[8] Their claim that they are "currently crammed into less than 700 square feet of space" in a building of with "1364 square feet of usable interior space" (Respondents' Brief, pp. 1, 4) does not appear to bear up on closer examination. In the Section 55 application (A-18) Mr. Ziman stated that

> each floor contain[s] interior space of approximately 18 feet by 30 feet [540 square feet], <u>including stairwells</u>. Accordingly, the useable square footage in the entire building is only 2,000 square feet in total. [approximately 160 square feet of the 2160 -- 4 feet by 10 feet on each floor -- for the stairwells] [emphasis in original]

At the DHCR hearing Mr. Ziman testified that the total utilizable space was only 1364 square feet (A-148), that the "interior dimensions of the building wall to wall is 30 by 17 1/2, that's wall to wall bare space [525 square feet]." (A-145) He came up with a figure of 341 square feet of utilizable space per floor by subtracting 50 square feet for a bathroom, 50 square feet for closets, and 84 square feet for "a stairwell, which takes out four by, no six by fourteen feet. Which is 84 square feet." (A-145)

Keystone Bituminous Coal Association v. DeBenedictis, supra, where the Supreme Court found that a Pennsylvania statute, which restricted mining operations in order to prevent subsidence damage, did not effect a taking of property. Although a portion of the coal owned by mining companies would have to permanently remain in the ground, their investment-backed expectations were found not to be unconstitutionally frustrated. If anything, the law in the case at bar is less onerous than the Pennsylvania subsidence statute. Chapter 234 does not permanently cut off owner-occupancy since a landlord can occupy an apartment after it has been vacated by the rent controlled tenant.

Respondents' argument is more like a traditional vested rights or retroactivity argument than an expectations argument. They claim that they were entitled to rely on the law at the time they purchased their property, i.e., before Chapter 234 was enacted and complain about its retroactive application. This claim has no merit.

The controlling case is St. Vincent's Hospital and Medical Center of New York v. New York State Division of Housing and Community Renewal, 109 A.D.2d 711, 407 N.Y.S.2d 36 (1st Dept. 1985), aff'd on opinion below, 66 N.Y.2d 959, 498 N.Y.S.2d 799 (1985). In St. Vincent's, the

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The Zimans' architect had somewhat different dimensions. He testified that there was 2100 square feet of gross space, in agreement with Mr. Ziman, but stated that there was 1700 square feet of usable space, or 425 per floor (A-158 to 159), although he later claimed that a plan to use the top three floors for the Zimans would cover only 1100 rather than 1275 square feet. (A-163) But even with the lower figure, if you subtract the square footage for Mr. Danna's apartment on the second floor -- claimed to be 203 square feet by Mr. Ziman (A-149) -- there is currently about 900 square feet of usable space available for the Zimans (outside the stairwell and hallway) rather than the 700 claimed in their brief.

The Zimans' brief, p. 33, misleadingly characterizes their current quarters as those illustrated in the floor plan shown on page 49 of the Record. That page shows only the third floor. In addition page 50 shows half of the fourth floor. However, they now occupy all of the fourth floor, as well as the third floor and half of the second floor. Their living situation is not as dire as they say. It may also be noted, that, as stated in the Helmsley-Spear literature, it may be possible to add space through construction on the roof. (A-89)

hospital/landlord challenged the denial of its application, pursuant to the Rent Stabilization Law, to not renew the leases for twenty tenants. Subsequent to a public hearing on the application, but before the rent agency rendered its determination, the statute which gave the hospital a right to evict tenants for its own use was repealed. In an opinion affirming the rent agency's denial of the hospital's application, the Court held:

> Where a statute has been amended during the pendency of a proceeding, the application of that amended statute to the pending proceeding is appropriate and poses no constitutional problem (Bucho Holding Co. v. Temporary State Housing Rent Commission, 11 N.Y.2d 469, 230 N.Y.S.2d 977, 184 N.E.2d 569; I.L.F.Y. Co. v. City Rent and Rehabilitation Administration, 11 N.Y.2d 480, 230 N.Y.S.2d 986, 184 N.E.2d 575; Matter of Taleff Realty Corp. v. Joy, 54 A.D.2d 423, 389 N.Y.S.2d 838), unless it can be demonstrated that "the CAB deliberately or negligently delayed processing the application[s] before it" in which event the petitioner would be entitled to have the applications processed under the earlier law [citations omitted].
>
> Here there was is no claim that CAB deliberately or negligently delayed processing the applications presented to it. Accordingly, CAB was justified in determining the matter in accordance with the law as it existed at the time of its disposition and we find no error in its decision.

109 A.D.2d at 712, 487 N.Y.S.2d at 37.

This Court in I.L.F.Y. Co. v. City Rent and Rehabilitation Administration, 10 N.Y.2d 263, 270, 219 N.Y.S.2d 249, 254 (1961), held, with regard to rent regulations, that an owner does not "have in any particular rule an interest so vested as to entitle it to keep the rule unchanged [citations omitted]. In such situations the applicability and validity of statutes are determined as of the date we make our decision [citations omitted]."

In evictions cases in particular, the courts have been loathe to grant evictions where the law changes before a final judgment of eviction has been entered (and in some cases even after a final

judgment has been entered), where the change nullifies the validity of an eviction proceeding commenced prior to the change in the law. See, Whitmarsh v. Farnell, 298 N.Y.2d 336, 83 N.E.2d 543 (1949) (warrant of eviction not effective because not executed before law became effective); Tegreh Realty Corp. v. Joyce, 88 A.D.2d 820, 451 N.Y.S.2d 99 (1st Dept.1982) (change in law intended to include within coverage those persons against whom final judgments of eviction had been entered); Jillandrea Realty Associates v. Johnson, 118 Misc.2d 520, 463 N.Y.S.2d 130 (A.T. 1st Dept. 1983) (retroactive application of remedial housing legislation is preferred so that tenants in possession will be safeguarded from eviction).

With regard to Chapter 234 itself, this Court held that a rent controlled tenant is entitled to remain in possession, even after DHCR issues a certificate of eviction, if the tenant accumulates the requisite 20 years of occupancy during the pendency of a judicial proceeding challenging DHCR's determination.[9] McMurray v. New York State Division of Housing and Community Renewal, 72 N.Y.2d 1022, 531 N.E.2d 658, 534 N.Y.S.2d 934 (1988). See also, Vitaliotis v. Mossesso, 130 Misc.2d 141, 495 N.Y.S.2d 111, 115 (Civ. Ct., N.Y.C., 1985); Budhu v. Grasso, 125 Misc.2d 284 (Civ. Ct., N.Y. Co., 1984).

In Stamboulos v. McKee, 134 N.J. Super. 567, 342 A.2d 529 (N.J. Super. Ct. App. Div. 1975), a New Jersey appellate court, in what appears to be a "takings" case, found constitutional a law which prohibits owner-occupancy from serving as a reason for terminating a tenancy or for

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[9] Section 4 of Chapter 234 provides that:

> 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)

obtaining possession. The landlord in Stamboulos had given the tenant notice to quit before the new statute took effect. However, the landlord's right to possession did not vest until five days after the new statute took effect. Since the right to possession had not vested when the new law became effective, the landlord was precluded from evicting the tenant.

The preceding series of cases are in harmony with the "investment-backed expectations" analysis of the Supreme Court.

Indeed, the Supreme Court has found "takings" challenges to be without merit in a wide variety of situations where government actions prohibited a beneficial use to which property had previously been devoted. In contrast, the Zimans were seeking a future use of their property, a use which was far from having vested, and for which they had only just applied.

In Keystone Bituminous Coal, supra, 480 U.S. at 499, 107 S.Ct. at 1396, the Supreme Court found that the mining companies' reasonable investment-backed expectations were not "materially affected" because a small percentage of coal would have to remain in the ground. This conclusion was reached even though the companies had long owned and mined the coal.

In Penn Central Transportation Company v. City of New York, supra, 438 U.S. 104 at 127, 98 S.Ct. 2646 at 2660, the case in which the Supreme Court first used the conceptual tool dubbed "investment-backed expectations", the owner of Grand Central Terminal in New York City was prevented from using air space above the terminal by the Landmarks Preservation Law. The Court concluded, in holding the law constitutional, that it did not interfere with Penn Central's primary expectation concerning the use of the property, even though it sought to use its additional air rights, as the property could be used precisely as it had been in the past. The situation is the same in the case at bar.

See also, Andrus v. Allard, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) (ban on sale of Indian bird artifacts constitutional; denial of one traditional property right does not always amount to a taking); Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (claimant effectively prohibited by local safety ordinance from continuing a sand and gravel business in operation since 1927; ordinance did not constitute a taking).

A case directly on point is Flynn v. City of Cambridge, 418 N.E.2d 335, 338 (Mass. Sup. Ct. 1981). In Flynn the plaintiffs contended that an ordinance which regulated evictions from rent control apartments converted to condominiums was unconstitutional because it eliminated an owner's right to possess his condominium. The ordinance denied a condominium owner the right to occupy his or her unit if it was used for rental housing on and not converted before the effective date of the ordinance. The Massachusetts Supreme Court, in holding that the ordinance did not effect a taking as to owners who purchased either before or after the effective date of the ordinance, found that the investment-backed expectations of neither class of owners was unduly frustrated:

> By definition, any owner in the second class [owners before the effective date] was using his unit for rental housing on the effective date of the ordinance, so his primary expectation has not been frustrated. While the use restrictions subsequently enacted undeniably diminish the value of the property, this alone does not establish a taking. See Euclid v. Ambler Realty Co., 272 U.S. 265, 47 S.Ct. 114, 71 L.Ed. 303 (1926); Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed 322 (1922).

418 N.E.2d at 340. In the case at bar, likewise, the Zimans' building was being use for rental housing on the effective date of Chapter 234.

The subsequent Massachusetts case relied upon by respondents, Polednak v. Rent Control Board of Cambridge, 397 Mass. 854, 494 N.E.2d 1025 (Mass. Sup. Ct. 1986), did not overrule Flynn and can perhaps best be seen as a vested rights type of case. The plaintiff in Polednak contended that she was entitled to remain in occupancy of her own condominium unit without first obtaining a permit removing it from the rental market. The court summarized the essential facts as follows:

> Prior to purchasing the unit, she had been a tenant in that unit beginning July 1, 1980. When she began her tenancy, she knew the unit was for sale but had no intention of purchasing it. She intended to remain a tenant, however, indefinitely. Shortly thereafter, though, she changed her mind and purchased the unit on September 6, 1980.
>
> When the plaintiff moved into the unit as a tenant and when she purchased the unit, she was subject to c. 23 of the Code of the City of Cambridge, Ordinance 926, which provided that "[n]o owner or other person shall remove from the market any controlled rental unit, unless the Board after hearing grants a permit." Ordinance 926, Section 1(c)[footnote omitted]. While the ordinance applied to an owner's occupation of a condominium, "if the last previous occupant was a tenant," the ordinance did not apply "if the same person will occupy" the unit as owner." Id. at Section 1(b)(4)(i). On September 20, 1979, the rent control board of Cambridge (board) had promulgated regulation 13-01(u), which defined "last previous occupant" as used in Ordinance 926 to mean "the last occupant prior to August 10, 1979" (the effective date of that ordinance".

494 N.E.2d at 1026-27. Since the plaintiff had moved into the unit in July, 1980, and was hence not the tenant on August 10, 1979, the board denied her application to remove her unit from the rental housing market. Under the board's ruling she would have had to move out of her apartment and offer it for rent. 494 N.E.2d at 1030.

The Massachusetts Supreme Court found that the board did not have the statutory authority to issue the regulation, and that the subsequent enactment by the City of Cambridge of the provision defining the "last previous occupant" to be "the last occupant prior to August 10, 1979" could not

be retroactively applied to the plaintiff. The Court did not find the provision facially unconstitutional but only that it could not be applied retroactively against her to frustrate her primary expectation of living in the unit.

What is central in Polednak is that the owner was already living in the unit and had even lived in it as a tenant prior to purchasing. Her expectation of living in the unit was "fully crystallized", to use the words of amicus curiae Pacific Legal Foundation, and she could be seen has having had a vested right in that "fully crystallized" expectation which could not be retroactively voided.

In the case at bar, however, the Zimans' expectations were not fully crystallized. Their tenants were still living in their apartments and they had only just applied for certificates of eviction when the Chapter 234 was enacted. Their expectations were no more crystallized than were the landlords in the eviction cases cited above in which the tenants could not be evicted because the law changed before the landlords had obtained a vested right to possession.

The expression "fully crystallized" derives from the seminal source of the concept of reasonable investment-backed expectations, the source cited by the Supreme Court when it first used the concept in Penn Central, supra, 438 U.S. at 128. Professor Michaelman, in his classic essay, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law", 80 Harv. L. Rev. 1165, 1233 (1967), speaks of "some distinctly perceived, sharply crystallized, investment-backed expectation." He illustrates the concept with the example of established "non-conforming uses" and says:

> What explains, then, the universal understanding that only those nonconforming uses are protected which were demonstrably afoot by the time the regulation was adopted? [footnote omitted] The answer

> seems to be that actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation.
>
> (emphasis added)

Id. at 1233. See also, Peterson, "Land Use Regulatory 'Takings' Revisited: The New Supreme Court Approaches", 39 Hastings L.J. 335, 346 (1988).

The analysis of the concept of "reasonable investment-backed expectations" in light of the idea of "crystallization" or "actual establishment" of a use, shows that the concept does not alter and is in harmony with traditional doctrine concerning vested rights, in particular in relation to evictions, and with the principle that an administrative agency should apply the law at the time of the determination.

The Zimans were far from having actually established the use of their property to which they wished to put it. Their desire to evict all their tenants to live in the entire building was not "fully" or "sharply" crystallized.

Finally, it should be noted that, in a heavily regulated market where laws are subject to frequent amendment, such as in the rental market in New York City, the Supreme Court has held that one's reasonable expectations include the possibility of new requirements. In Connolly v. Pension Benefit Guaranty Corporation, 475 U.S.211, 227, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986), employers who were affected by amendments to federal pension laws failed to convince the Court that they reasonably expected that the multiemployer pension program would not be changed to impose new withdrawal liabilities:

> "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to

> achieve the legislative end." FHA v The Darlington, Inc. 358 U.S. 84, 91, 79 S.Ct. 141, 3 L Ed 2d 132 (1958). See also Usery v Turner Elkhorn Mining Co. 428 U.S. at 15-16, 96 S Ct 2882, 49 L Ed 2d 752 and cases cited therein.

See also Peterson, supra, 39 Hastings L. J. at 347-348.

The Zimans' "reasonable investment-backed expectations" have not been unconstitutionally frustrated by Chapter 234.

E. Even Were There a "Physical" or "Regulatory" Taking, it Would Be Constitutional Because the Rent Control Law Provides Just Compensation to the Zimans in Any Event.

The emptiness of Ziman's argument that its property has been taken unconstitutionally is demonstrated by the fact that the very statute which it challenges provides the compensation to which it would be entitled were there a taking of its property. In Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), the Supreme Court upheld a statute extending the period for redemption of real property sold after mortgage foreclosure; during the extended period the purchaser was prohibited from ousting the former owner and obtaining possession. The Supreme Court found the restriction constitutional, noting inter alia that

> While the mortgagor remains in possession, he must pay the rental value as that value has been determined, upon notice and hearing, by the court.... While the mortgagee-purchaser is debarred from actual possession, he has, so far as rental value is concerned, the equivalent of possession during the extended period.

Id. at 425.

Here too, to the extent that Chapter 234 debars the Zimans from possession of any unit in

their building, they are entitled under that very statute to a rental for the unit at a level which has been repeatedly upheld as constitutional by this Court. See, e.g., I.L.F.Y. Co. v. City Rent and Rehabilitation Administration, 11 N.Y.2d 480, 230 N.Y.S.2d 986, 184 N.E.2d 575. Hence, unlike the property owner in Loretto, who was given a one-time $1 payment, the Zimans are provided with exactly the payment to which it would be entitled if the Chapter 234 indeed did "take" the unit for occupation by a tenant during the pendency of the housing emergency. Moreover, the Rent Control Law entitles the Zimans to apply for Maximum Base Rent increases, and also allows a landlord to apply for increases in excess of the normal Maximum Base Rent increases where a building is producing below a certain return on capital value, where there are certain unavoidable increases in operating costs, and where labor costs exceed the Maximum Base Rent allowance for such costs. See, 9 NYCRR 2202.8 to 2202.11. They may also receive fuel cost adjustments, under the circumstances allowed by the Rent and Eviction Regulations. 9 NYCRR 2202.13. In fact, the Commissioner's order denying the Zimans' application advised them of the availability of relief under the "MBR" and "hardship" provisions of the regulations. (A-233)

The Zimans certainly cannot claim that they have not received just compensation if they have not even exhausted their administrative remedies of seeking MBR, hardship and other relief offered by the statute. See, Hall v. City of Santa Barbara, 833 F.2d 1270, 1281 (9th Cir. 1986). The Zimans have not shown that Chapter 234 effects a taking of their property without just compensation. As such they are not entitled either to any compensation in addition to that already provided by the Rent Control Law or to evict their tenants.

F. Chapter 234 Does Not Unconstitutionally Force the Zimans to Become Landlords.

The contention by the Zimans that they were forced to become landlords is contradicted by their own action. They chose of their own free will to purchase the property at a time when it was being used as rental property with existing tenancies. Their contract for sale expressly stated that they purchased subject to those existing tenancies. Thus, they knowingly entered a heavily regulated market and assumed the rights and obligations of being landlords.

Moreover, the restriction placed on evicting their tenants by Chapter 234 does not unconstitutionally force the Zimans to stay in business as landlords. The controlling case is Nash v. City of Santa Monica, 688 P.2d 894 (Cal. Sup. Ct. 1984), appeal dismissed for want of federal question, 470 U.S. 1046 (1985). See also, Terminal Plaza v. City & County of San Francisco, 223 Cal. Rptr. 379 (Cal. App. 1 Dist. 1986). In Nash the owner sought a removal permit so that he might demolish his residential rental building and allow the land to appreciate in value. Upon denial of the permit application he challenged the constitutionality of the provision which restricted removal claiming that it was 'a means of forcing him to remain a landlord despite his wish to "go out of business' -- an interest which he asserts is among the 'basic values 'implicit in the concept of ordered liberty' [citations]".' 688 P. 2d at 896. The Court found the removal provision constitutional concluding:

> ...while the challenged provision may be said to implicate interests which are entitled to a high degree of constitutional protection -- including one's choice whether to remain in a particular business or occupation -- the actual limitation upon those interests posed by the challenged provision is minimal and not significantly different from other, constitutionally permissible, limitations upon the use of private property imposed by government regulation. At the same time, the

> provision, by protecting existing tenants against eviction and the scarce supply of residential housing in Santa Monica against further erosion, clearly serves important public objectives.

688 P.2d at 896. The Court further analyzed the alleged infringement of Nash's purported liberty interest and countered with the minimal burden placed upon him:

> Nash contends that there must be limitations upon the power of the state to compel a person to pursue a particular business or occupation against his will.
>
> We agree. The Thirteenth Amendment to the United States Constitution prohibits involuntary servitude. This court has spoken of the basic liberty to pursue and obtain happiness by engaging in the common occupations of the community. [citation omitted] The exercise of state power to force upon an individual a career chosen by the state would surely raise substantial questions of constitutional dimension.
>
> The City of Santa Monica has not done that to Nash, however. Rather, it has told him that so long a tenants remain in his apartment, and so long as he continues to receive a fair rate of return on his investment, he may not evict them an demolish the building. Nash remains free to minimize his personal involvement by delegating responsibility for rent collection and maintenance to a property manager. He remains free under the ordinance to withhold rental units from the market as they become vacant. and he remains free to sell his property and invest the proceeds elsewhere. The problem arises from the fact that Nash prefers to do none of these things, but to demolish the building and keep the land as an investment. This he claims an absolute right to do, as owner of the property.
>
> (emphasis added)

688 P.2d at 898. The Court pointed out that "Although one owns property, he may not do with it as he pleases any more than he may act in accordance with his personal desires", and then continued:

> All regulation of property entails some limitation upon the liberty of the owner; and, to the extent that the regulation limits the uses to which the property may be put, it entails limitation upon the owner's liberty to pursue his chosen occupation or business at that location. If the owner wishes to pursue his preference, he may be constrained

> to sell his property and move elsewhere. If the value of his property has decreased as a result of the regulation, he may perceive that to be an undesirable alternative, and to that extent feel constrained to continue in his present field of endeavor.

688 P.2d 899.

The essence of the Court's analysis in Nash is that the limitations on removal, and hence on evicting tenants, affected, not the owner's liberty interest to engage in whatever occupation he chose, but only the extent to which he could use his property. Likewise in the case at bar, Chapter 234 places a limit on only one use which the Zimans may make of their property, and that only a partial limit, as they now occupy five of the seven apartments on the premises. Like the owner in Nash, the Zimans may sell their property at fair value; they may hire a professional property manager to insulate themselves from management of the property; and they may empty the building through attrition. The Zimans are simply precluded from taking one particular route "out of the business." They may sell the property and invest the capital and resources elsewhere. But their right to go out of business does not encompass a right to change use.

Moreover, since they live on the property, the minimal additional burden upon the Zimans of collecting rents from two tenants and providing services for those tenants hardly counts as a major business occupation. As for the need to pay for building-wide utilities, taxes, insurance, and other expenses, and to comply with building code provisions, these requirements, with perhaps some difference in scope, exist whether or not the two tenants remain in occupancy.

Once again, the opinion of the Court in Nash is directly on point:

> Nash is not being called upon to operate or engage in a profession unrelated to the property; his landlordly obligations are those which arise out of the ownership of the sort of property which he acquired. As Justice Holmes said, in rejecting a Thirteenth Amendment attack

> by a landlord upon an ordinance which made it a misdemeanor to fail to furnish certain services to tenants: "It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he has contracted to render them. But the services in question ['water, heat, light, elevator, telephone, or other services as may be required by the terms of the lease and necessary to the proper or customary use of the building'] although involving some activities are so far from personal that they constitute the universal and necessary incidents of modern apartment houses. They are analogous to the services that in the old law might issue out of or be attached to the land." (Marcus Brown Holding Co., Inc. v. Feldman (1921) 256 U.S. 170, 199, 41 S.Ct. 465, 466, 65 L.Ed. 877; accord Marquam Investment Corp. v. Beers, (1980) 47 Or. App. 711, 615 P.2d 1064.)
>
> [bracketed quote in original]

688 P.2d at 900.

Respondents' principal cases, Textile Workers Union v. Darlington, Mfg. Co., 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965), and Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972), do not support their argument for a fundamental right to go out of business. The Supreme Court stated in Textile Workers Union, that "We hold here only that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice." 380 U.S. at 274 (emphasis added). Nothing in the opinion suggests that it would be unconstitutional to limit the ways in which a landlord may go out of business. In Robinson the issue of a landlord going out of business was only posed in dicta. The issue was not presented in the case; nor was it considered in the context of a law such as Chapter 234 which is aimed at protecting tenants from being evicted from affordable rental housing.

Textile Workers Union and Robinson were also relied upon by the owner in Nash and were rejected as unpersuasive. See, 688 P.2d at 901. The Zimans have not made out a claim that they are unconstitutionally being forced to stay in the landlord business.

G. Chapter 234 Does Not Violate Equal Protection

The Zimans' equal protection claim is apparently that they are being unfairly made to bear the costs of a social program which should be borne by the public as a whole. To respond to this argument one need look no further than Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988). Pennell involved a challenge to a rent control ordinance containing a provision which allowed consideration of the hardship to a tenant when determining whether to approve a landlord's proposed rent increase. The Supreme Court unanimously[10] held that the provision did not arbitrarily select those landlords with hardship tenants to bear a burden that ought to be borne by all of society, and did not violate equal protection by the provision's disparate treatment between those landlords with and those without hardship tenants. 485 U.S. at 14-15.

Where one class of tenants is afforded protection because all who seek homes cannot be provided therewith, such classification denies to no one the equal protection of the laws if the distinction which is made as to this class of tenants is real and rests on a substantial basis. See, People v. Beakes Dairy Co., 222 N.Y. 416. Equal protection does not require identity of treatment. It only requires that a classification rest on real and not feigned differences; that the distinction have some relevancy to the parties for which the classification is made and that the different treatments be not so disparate relative to the differences in classification as to be wholly arbitrary. See, Walters v. City of St. Louis, 347 U.S. 231, 237.

In enacting the new Chapter 234, the Legislature recognized that elderly, disabled and long-term tenants are particularly vulnerable to eviction by landlords. Governor's Bill Jacket, A.3586-B,

[10] The two dissenters agreed with the majority that there was no violation of equal protection.

Budget Report on Bills, p. 2, (1984). For this reason alone, Chapter 234 is clearly justified as resting on a rational basis. Furthermore, the Legislature went on to consider the devastating impact on both these classes of tenants and their community if these people were forced out of their homes. Thus, it was both the identity of circumstances between elderly, disabled and long-term tenants and a balancing of the equities that led to the protections of such tenants. The State Legislature engaged in a careful balancing of the equities in drafting Chapter 234, a law which serves legitimate state interests as discussed in Section III.D.i. of this brief, p. 37 et seq. Clearly, Chapter 234 does not violate the Equal Protection clause of the Constitution.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed, or in the alternative the proceeding remanded to DHCR, and the respondent granted costs.

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Respectfully submitted,

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