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RENT REGULATION

Horizontal Multiple Dwellings: Then and Now


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In the recent decision of *Kobrick v. New York State Division of Housing and Community Renewal*,[1] New York County Supreme Court Justice Alexander W. Hunter found that the building in question did not constitute a "horizontal multiple dwelling," such that the building contained fewer than six units and was not subject to the Rent Stabilization Law. The decision gives us an opportunity to review the lengthy history of horizontal multiple dwellings under rent regulation.

Historical Background

RSL section 26-504(a) states that as a threshold matter, rent stabilization shall only apply to buildings containing "six or more dwelling units." One might imagine that it is a simple matter to determine how many dwelling units a building has; usually the question can be resolved by the certificate of occupancy, or, if need be, a physical inspection.

Nothing in the rent regulation, however, is a simple matter. For example, imagine that a landlord owns two adjacent buildings, each putatively containing four units. The two buildings share a common boiler, a common roof and a common basement. Further imagine that the buildings share the same tax lot, were built at the same time, and have been jointly owned and managed for 50 years. The landlord would argue that it owns two exempt four-unit buildings. A tenant might argue, however, that the building is really a single "horizontal multiple dwelling" containing eight units, and is thus subject to the RSL.

The issue of whether two or more contiguous buildings constitute a single horizontal multiple dwelling under rent stabilization appears to have been first litigated in *11th Co. v. Joy*, 92 Misc.2d 664 (Sup Ct New York County 1977). There, the landlord owned three adjacent buildings, each with fewer than six units. A tenant filed a complaint of rent overcharge, asserting that his apartment was rent stabilized. Supreme Court affirmed the rent agency's finding that the three buildings were part of a "horizontal multiple family dwelling complex."

By so ruling, the rent agency imported into the RSL a concept that had long existed under rent control. Under the original rent control statute, rent control applied to virtually all residential buildings, including single family houses and apartments located in two-family houses. Because rent control coverage did not depend on a minimum number of units, there was no need for courts to determine whether two or more adjoining buildings were in fact a single entity.

This changed in 1953, when the Legislature amended the rent control statute decontrol housing accommodations located in one- and two-family houses. At that point, the number of units became critical, and tenants attempted to claim regulated status by asserting that the one- or two-unit building they lived in was actually connected to additional residential structures.

In the 1954 case of *Jackson & Feldstein v McGoldrick*,[2] the Supreme Court upheld the rent agency's finding of horizontal multiple dwellings status, stating:

> Each of these eight attached buildings is in a single enterprise, heated by a central heating plant and but one resident janitor for each and every apartment in the housing development. Electricity for common lighting is provided by the landlord and even a single water bill is received for all houses. There does not appear in the record a single evidentiary fact which supports the assertion of the petitioners that these premises constitute two-family houses…[3]

In the 1972 rent control case of *Love Securities Corp. v Berman*,[4] the First Department summarized the criteria for determining horizontal multiple dwelling status:

> The factors which contribute to determination of such a question are common ownership, management, including supply of services, and common facilities. As usual in such questions, cases present different combinations of those factors and no one factor can be said to be determinative; although in all probability diversified ownership alone would indicate separate units. Where there are divergent factors which might well lead to different conclusions, the initial decision is for the respondent Rent Administrator, and his

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determination, unless arbitrary, is final.[5]

Garden Maisonette Dwellings

No history of horizontal multiple dwellings is complete without a discussion of so-called garden maisonette dwellings. When the RSL was enacted in 1969, section YY51-3.1 of the RSL (now renumbered as section 26-505) stated:

> For purposes of this chapter a class A multiple dwelling shall be deemed to include a multiple family garden-type maisonette dwelling complex containing six or more dwelling units having common facilities such as sewer line, water main and heating plant, and operated as a unit under a single ownership on May sixth nineteen hundred sixty-nine notwithstanding that certificates of occupancy were issued for portions thereof as one- or two-family dwellings.

The Emergency Tenant Protection Act,[6] which, inter alia, expanded rent stabilization to include formerly rent controlled units, contains a similar garden maisonette provision. See, ETPA section 5(a)(4)(b). The ETPA provision, and its RSL counterpart, pertained to thousands of garden apartments that were constructed in New York City following World War II. Under the requirements of the Multiple Dwelling Law at the time, these buildings were given one- or two-family certificates of occupancy.

In *Salvati v. Eimicke*,[7] the landlord contended that because the RSL and ETPA referred to horizontal multiple dwellings in the context of garden-maisonettes, garden-maisonettes were the only type of horizontal multiple dwelling that could be recognized under stabilization. In a 1988 ruling, the Court of Appeals held otherwise, stating:

> The inclusive, rather than exclusive, language of the Rent Stabilization Law supports the agency's view that the statute applies to horizontal multiple dwellings other than garden-type maisonette complexes. The statute applies to 'Class A multiple dwellings' which are 'deemed to *include* a multiple family garden-type maisonette complex containing six or more dwelling units.' The Emergency Tenant Protection Act also supports the agency's view by providing for the regulation of all housing accommodations which it does not expressly except, including previously unregulated accommodations. Although buildings containing fewer than six units were expressly excepted, horizontal multiple dwellings containing six or more units are not excepted and garden-type maisonette complexes having the common facilities listed in the statute are expressly included as multiple dwellings containing more than six units.[8]

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'Kobrick v. DHCR'

Kobrick concerned the issue of whether 447 Tenth Avenue and 449 Tenth Avenue constituted a horizontal multiple dwelling. In 1987, DHCR issued an order determining that 447 Tenth Avenue was part of a horizontal multiple dwelling, but issued a contrary order the next year. In 2000, the landlord commenced a proceeding to resolve the conflict between the two orders. DHCR ruled in favor of the tenants, but the matter continued in the courts and before DHCR. Finally, in 2012, DHCR issued an order holding that 447 Tenth Avenue was not part of a horizontal multiple dwelling. As the Supreme Court wrote:

> DHCR determined that the subject buildings did not form an HMD and thus were not subject to rent stabilization. DHCR found that the indicia of commonality were outweighed by the indicia of separateness.
>
> With respect to the indicia of commonality, DHCR determined that the subject buildings were commonly owned and managed; shared a common commercial tenant; shared identical linoleum flooring in the stairwells; shared mutual access to the roofs; shared heat and hot water; shared a Time Warner cable television box; shared a telephone junction box; and shared trash receptacles.
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> The court further wrote:
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> With respect to the indicia of separateness, DHCR determined that each of the subject buildings: was erected separately; has its own multiple dwelling registration number; has its own New York City tax lot number; is assessed separately for the calculation of real estate taxes; has its own metes and bounds description; and is separately built for water and sewer, electricity and natural gas.

Justice Hunter then affirmed DHCR's order, holding that "there is rational basis for the determination contained in the January 27, 2012 Order and Opinion, and, as such, it should not be disturbed."

Conclusion

As can be seen from *Kobrick*, the question of whether a building is part of a horizontal multiple dwelling can only be determined on a case-by-case basis, and the relevant considerations include both physical factors (i.e., common building systems) and non-physical factors, such as common ownership and architectural style. Practitioners attempting to determine whether a building is part of a horizontal multiple dwelling should physically inspect the building and attempt to determine whether indicia of commonality are outweighed by indicia of separateness. If the factors are more or less even, the case could go either way, and DHCR's determination is likely to be affirmed on Article 78.

1. 2014 WL 263412 (Sup Ct New York County).
2. 152 NYS2d 180 (Sup Ct Richmond County 1954).
3. Id. at 181.
4. 38 AD2d 169 (1st Dept 1972).
5. 38 AD2d at 170-71.
6. L 1974, c 576, §4.
7. 72 NY2d 784 (1988).
8. 72 NY2d at 791 (internal citations omitted, material in italics in original).