'Horizontal Multiple Dwellings' Through History

Imagine that you just have purchased two adjoining brownstones in Manhattan, each containing four apartments. You do not have to worry about rent stabilization, because the statute only applies to buildings containing six or more units. You are the master of your domain, free to charge market rents and evict troublesome tenants.

Or maybe not. If the two buildings share sufficient common elements — if they share the same roof or the same electrical service, for example — DHCR or a court may rule that you are in fact the owner of a single eight-unit "horizontal multiple dwelling" (HMD) subject to rent stabilization coverage.

In the recent case of *721 Ninth Avenue, LLC v. New York State Division of Housing and Community and Renewal*,[1] the landlord escaped that unhappy fate. The Appellate Division, First Department, annulling DHCR's order, ruled that the adjoining buildings in question did not constitute a single, stabilized building. The case gives us an opportunity to explore the 51-year history of horizontal multiple dwellings.

RENT REGULATIONS

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In the Beginning

When rent control first began during World War II, it applied (with few exceptions) to all housing accommodations, even to one- or two-family houses put to rental use. 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.

All of this changed when the Legislature enacted L. 1953, ch. 321. Chapter 321 exempted from control housing accommodations in one- and two-family houses vacated on or after April 1, 1953. Thus, the question of whether a single family house was just that, or was part of a larger entity, became a critical issue for rent control coverage.

The rent agency (at the time, the Temporary State Housing Rent Commission) immediately made clear it would not exalt form over substance, and that a one- and two-unit building that was sufficiently interconnected to other buildings would be deemed subject to rent control coverage. In the 1954 case of *Jackson & Feldstein v. McGoldrick*,[2] one of the very first HMD decisions, Supreme Court upheld the Rent Administrator's finding of HMD 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]

If two buildings share common elements, such as a roof, they may be subject to rent control even though neither by itself has enough units to fall under the law.

The following year, in *Bobal Holding Corp. v. McGoldrick*,[4] the Second Department affirmed the rent agency's determination that:

> ... the apartment in question is subject to rent control because it is located in one building with four housing accommodations, rather than that it is a component part of one of two buildings, each with two housing accommodations.[5]

By the 1960s, the factors for determining whether two or more buildings qualified as an HMD were well established. Courts would look at such factors such as ownership, taxes, mortgages, insurance, date of construction, house numbers, certificates of occupancy, common areas, backyards, fire walls, building entrances, sewer service, water mains, heating plants and basements. See, *Amorelli v. Berman*, 19 N.Y.2d 960, 281 N.Y.S.2d 360 (1967). Courts would also look at management, janitorial service, electrical service, gas service, roofs and deeds.

In the oft-cited case of *Love Securities Corp. v. Berman*,[6] the Court summarized the substantive and procedural considerations when challenging a rent agency finding as to HMD 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 divergent 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 determination, unless arbitrary, is final (internal citations omitted).[7]

Garden Maisonettes

The jurisprudence of HMDs took an interesting turn in 1969, when the New York City Council enacted the Rent Stabilization Law (RSL).[8] The law generally applied to housing accommodations in buildings with six or more units completed between Feb. 1, 1947, and March 10, 1969. Following World War II, however, thousands of garden apartments were constructed in New York City. Due to the requirements of the Multiple Dwelling Law as it existed at the time, the Department of Buildings classified these garden apartments as one- or two-family houses. To ensure that the structures would fall within the statute, §YY51-3.1 of the RSL (now renumbered as §26-505) states in full:

> 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 plan, 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 (L. 1974, ch. 576, §4), which expanded rent stabilization to include formerly rent controlled units, contains a similar garden maisonette provision. See, ETPA §5(a)(4)(b).

In *Salvati v. Eimicke*,[9] the landlord argued that RSL §26-505 and its ETPA counterpart necessarily implied that a horizontal multiple dwelling could only be made up of garden-type maisonette structures; not surprisingly, the two adjoining buildings Ms. Salvati owned were not garden maisonettes. In a 1988 ruling, the Court of Appeals rejected the landlord's argument:

> 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.
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> 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 exempt, including previously unregulated accommodations [citation omitted]. Although buildings containing fewer than six units are expressly excepted ... horizontal multiple dwellings containing six or more units are not except-

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ed and garden-type maisonette complexes having the common facilities listed in the statute are expressly included as multiple dwellings containing more than six units [citation omitted]. Accordingly, DHCR's interpretation that the statutes apply to these buildings, which are not garden-type maisonette dwellings, is rational and should be upheld [citations omitted].[10]

'721 Ninth Avenue v. DHCR'

In *721 Ninth Avenue*, the landlord owned a building with four housing units located at 721-23 Ninth Avenue, and an adjoining building with three units located at 401-03 West 49th Street. In 1996, the tenants in one of the apartments at 721 Ninth Avenue asked DHCR to determine whether their apartment was subject to rent stabilization on the ground that the two adjoining buildings comprised an HMD. DHCR inspected the premises and an administrative law judge thereafter held a hearing. The administrative law judge determined that the buildings qualified as an HMD. The rent administrator adopted his findings, and the rent administrator's order was thereafter affirmed by both DHCR's deputy commissioner and by the New York County Supreme Court.

The Appellate Division thereafter reversed. The court first recited the relevant facts, which show disparate physical elements, albeit with common ownership and management:

> The record here discloses that there are two separate boilers in the Ninth Avenue basement, each serving one building, and that in each of the two buildings there are separate electric meters, water lines, sewer lines, gas lines, electric lines, electric meters, roof lines, fire escapes, mail boxes, postal service, zip codes, and entrance doors. Petitioner also produced records from Department of Buildings and the Department of Housing Preservation and Development which indicated that the buildings were separate structures and were issued separate certificates of occupancy. One of the buildings (721 Ninth Ave.) has a basement; the other (403 West 49th St.), a small cellar. The basement can be accessed through a door between it and the cellar. The proof shows that the door is kept locked. Both buildings were conveyed together in the same deed and have been owned and managed together for decades.

The Appellate Division observed that DHCR, in a prior case involving similar facts, ruled that the buildings did not qualify as an HMD. The court made no independent finding in this case as to whether common elements predominated over disparate ones. Instead, the Appellate Division reversed DHCR's ruling because the agency "inexplicably failed to follow a prior determination in a proceeding with remarkably similar facts or explain its reasons for reaching a contrary result." The court then went on to cite prior judicial rulings where, also on similar facts, the buildings were found not to qualify as an HMD.

721 Ninth Avenue may ultimately have more to do with issues of stare decisis and administrative law than HMDs. But the court's laundry list of factors, including physical elements, services, ownership and management, should give the practitioner a good indication of what DHCR or a Court will be looking at.

1. 8 A.D.3d 41, 778 N.Y.S.2d 35 (1st Dep't 2004).
2. 152 N.Y.S.2d 180 (Sup. Ct. Richmond Co. 1954).
3. Id. at 181.
4. 285 A.D. 1177, 141 N.Y.S.2d 926 (2d Dep't 1955).
5. Id.
6. 38 A.D.2d 169, 328 N.Y.S.2d 8 (1st Dep't 1972).
7. 38 A.D.2d at 170.
8. Loc. L. 1969, No. 16.
9. 72 N.Y.2d 784, 537 N.Y.S.2d 16 (1988).
10. 72 N.Y.2d at 791.