RENT REGULATION

Court Accepts New Evidence In an Article 78 Proceeding

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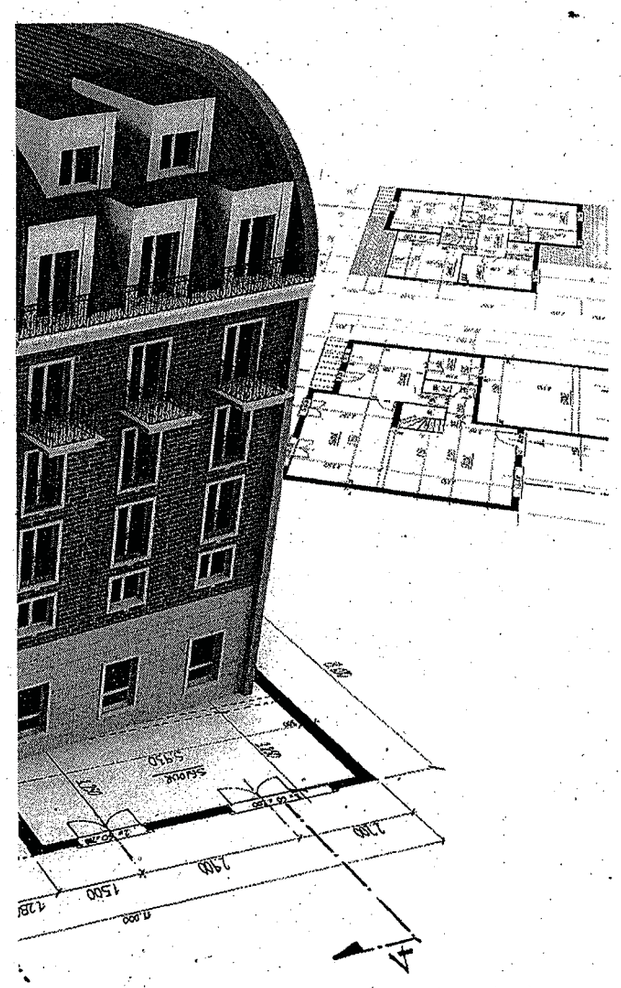
A party aggrieved by an order of DHCR's Rent Administrator ("RA") may file a Petition for Administrative Review ("PAR") with DHCR's commissioner. See RSC §2529. The commissioner's job is to determine whether the RA — based on the evidence before him or her — reached the correct conclusion. RSC §2529.6 provides:

> Review pursuant to this Part shall be limited to facts or evidence before a Rent Administrator as raised in the petition.
>
> Where the petitioner submits with the petition certain facts or evidence which he or she establishes could not reasonably have been offered or included in the proceeding prior to the issuance of the order being appealed, the proceeding may be remanded for re-determination to the Rent Administrator to consider such facts or evidence.

Courts have enforced DHCR's general policy of refusing to consider new evidence at the administrative review level. See e.g., *Gilman v. DHCR*, 99 NY 2d 144, 753 N.Y.S.2d 1 (2002); *PCV ST Owner LP v. DHCR*, 37 AD 3d 315, 830 N.Y.S.2d 130 (1st Dept. 2007).

In a recent Article 78 proceeding captioned *Ditmas Gardens Inc. v. DHCR*, 24 Misc.3d 1205(A), 2009 WL 1789382 (Sup. Ct. King Co.), Justice Martin Schneier held that even absent a showing of good cause, DHCR must accept evidence for the first time on administrative review, at least where the proffered evidence pertains to the threshold issue of whether the apartment is subject to rent stabilization at all.



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'Ditmas Gardens' may be best explained as creating an exception to a general rule of administrative law where the new evidence relates to the threshold issue of rent regulatory coverage.

Jurisdictional Background

Section 5(a)(5) of the ETPA provides that rent stabilization shall not apply to "housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January first, nineteen hundred seventy-four." Where such substantial rehabilitation is found to have taken place, a tenant's complaint before DHCR will be denied for lack of jurisdiction.

Special rules have evolved as to evidence pertaining to the threshold issue of stabilization status. While landlords in landlord-tenant and DHCR matters are frequently found to have waived their rights, it is well settled that rent regulatory status itself cannot be created by waiver or equitable estoppel. See *Ruiz v. Chwatt Assocs.*, 247 AD 2d 308, 669 N.Y.S.2d 47 (1st Dept. 1998); *Gregory v. Colonial DPC Corp. III*, 234 AD 2d 419, 651 N.Y.S.2d 150 (2d Dept. 1996). Indeed, even if both parties agree to treat an apartment as rent stabilized, the courts will refuse to do so if the apartment is otherwise statutorily exempt. See *546 West 156th Street v. Smalls*, 43 AD 3d 7, 839 N.Y.S.2d 62 (1st Dept. 2007). Thus, an apartment is what it is, no matter what the parties do or say, intentionally or unintentionally.

'Ditmas Gardens'

In *Ditmas Gardens*, the complaining tenant moved into her apartment in 1994 at a rent of $750 per month. Her lease contained a provision stating as follows:

> 32. Rent Regulations
> This Section applies if the apartment is subject to the N.Y.C. Rent Stabilization Law and Code....

In September of 2007, the tenant filed a complaint with DHCR alleging rent overcharge. The landlord, allegedly having been told by the tenant that she was withdrawing her complaint, did not bother to answer. On May 6, 2008, the RA issued an order, on default, (1) finding a rent overcharge; (2) granting the tenant treble damages; (3) reducing and freezing the tenant's rent, and (4) directing a refund of $8,855.25.

The landlord then filed a PAR with DHCR, asserting that the apartment in question was exempt from stabilization because it was located in a building that had been substantially rehabilitated as family units after 1974. Specifically, the landlord asserted that the building had been an empty shell when purchased in 1984, at which time the landlord created all of the apartments and building systems therein.

On Aug. 28, 2008, DHCR's Commissioner issued an order denying the landlord's PAR. The commissioner wrote in relevant part:

> Furthermore even if the Commissioner were now to accept as credible evidence, petitioner's brief statement...as to the condition of the building when bought...and the Certificate of Occupancy mentioned in the footnote (impermissibly proffered for the first time on appeal), there would still be insufficient evidence that the premises were deregulated. Operational Bulletin 95-2 of this division requires inter alia that at least 75% of 17 enumerated systems must each have been replaced; the owner's rejected PAR is simply too vague to constitute such evidence.

The landlord thereafter filed a request for reconsideration with DHCR, in which it sub-

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mitted additional documentation to support a claim of substantial rehabilitation after Jan. 1, 1974. The documentation appeared to bear out the landlord's claim. A 1919 certificate of occupancy indicated that the building had been used non-residentially, whereas the certificate of occupancy immediately superseding the 1919 certificate, dated Sept. 11, 1986, established that the building consisted of six residential apartments.

By letter dated Oct. 24, 2008, DHCR denied the request for reconsideration, refusing to accept the landlord's new evidence. DHCR's letter also stated:

> Further, the tenant submitted an executed rent-stabilized lease executed by the current owner and tenant in 1994, and a copy of said lease was served upon the owner with the tenant's complaint. Said Lease shows that the owner has, at some time since the alleged rehabilitation considered the apartment at issue to be subject to rent-stabilization. The owner did not address this lease in the PAR.

The landlord then commenced an Article 78 proceeding. Acknowledging the general principle that DHCR need not accept evidence offered for the first time on administrative review, Justice Schneier pointed to RSC §2527.5, which states that at any stage of an administrative proceeding, DHCR may make investigation of all facts and materials relevant to the proceeding. Justice Schneier then framed the issue on Article 78 as follows:

> Thus, DHCR may at any stage of this proceeding consider new evidence not previously submitted to the Rent Administrator. The State of New York Division of Housing and Community Renewal and the Court should both be concerned with the search for TRUTH because justice, indeed law itself, not based on TRUTH will not endure. It is often said that TRUTH is the handmaiden of justice (emphasis in original).

The court then rejected DHCR's finding that the building had not satisfied the criteria for substantial rehabilitation set forth in Operational Bulletin 95-2. The court quoted the following language in the operational bulletin:

> The rehabilitation was commenced in a building that was substandard or seriously deteriorated condition. The extent to which the building was vacant of residential tenants when the rehabilitation was commenced shall, in addition to the items described in III "Documentation," constitutes evidence of whether the building was in fact in such condition. Where the rehabilitation was commenced in a building that was at least 80% vacant of residential tenants, there shall be a presumption that the building was substandard or seriously deteriorated at that time. *Space converted from nonresidential use to residential use need not meet this standard.*

Based upon this language in Operational Bulletin 95-2, Justice Schneier concluded:

> It is apparent from the uncontroverted documentary evidence the landlord submitted to the PAR [sic] and to DHCR in its request for reconsideration, but had never previously submitted to the Rent Administrator, that the subject apartment was never rent stabilized.

Supreme Court was correct. A building converted from nonresidential to residential use after Jan. 1, 1974, without more, is necessarily exempt from rent stabilization.

The court then sharply criticized DHCR's reliance on the language in the initial lease, which language merely stated that the "rent regulation" paragraph only applied if the apartment were indeed rent stabilized:

> The reference continually by DHCR to "an executed rent stabilized lease executed by the current owner and tenant in 1994" is a misstatement and a totally false description of the parties' lease. A plain reading of the lease shows that nowhere in the lease do the parties acknowledge that the subject apartment is rent stabilized, in fact the contrary is true.

Finally, citing *546 West 156th Street v. Smalls*, supra, Justice Schneier observed that irrespective of whatever the lease may or may not have said, it was well-settled that "'[i]n determining whether a dwelling is subject to rent regulation, what the parties think might be its status or even what they agree to be its status is not dispositive; what is controlling is whether the premises meet the statutory criteria for protection under the applicable regulatory statute'."

Practitioners should recognize that *Ditmas Gardens* turns on a very peculiar set of facts. *Ditmas Gardens* may be best explained as creating an exception to a general rule of administrative law where the new evidence relates to the threshold issue of rent regulatory coverage.