STATE OF NEW YORK
DIVISION OF HOUSING AND COMMUNITY RENEWAL
OFFICE OF RENT ADMINISTRATION
GERTZ PLAZA
92-31 UNION HALL STREET
JAMAICA, NEW YORK 11433

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IN THE MATTER OF THE ADMINISTRATIVE APPEAL OF

ADMINISTRATIVE REVIEW
DOCKET NO.: ZK420046RO

Columbus 95th Street, LLC,

RENT ADMINISTRATOR'S
DOCKET NO.: UD420007AD

PETITIONER

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ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

On November 23, 2011, the above-named owner filed a timely petition for administrative review (PAR) of an order issued on October 21, 2011 by a Rent Administrator concerning the various housing accommodations at the premises 95 West 95th Street, New York, New York. This order denied the owner's application for a rent increase as to each apartment at the subject building.

The Commissioner has reviewed the entire record including that portion of the record relevant to the issues raised by the PAR.

On April 20, 2006, the owner, by its counsel, filed individual applications for a rent increase for each of 248 apartments at the subject building, claiming "unique or peculiar" (U/P) circumstances relative to the subject building's exit from the Mitchell-Lama (M-L) program warranting an appropriate adjustment of the rent.

The owner alleged that the subject building was formerly operated under the M-L program, having been developed under Article II of the Public Housing Finance Law (PHFL) and completed after March 10, 1969; that all apartment rents had been established based solely on a project budget basis pursuant to applicable HUD regulations and procedures; and, that the M-L Housing Company, Columbus House, Inc., was dissolved on March 3, 2006[1] resulting in all apartments becoming subject to the New York City Rent Stabilization Law (RSL). With reference to the Court of Appeals decision in the KSLM case[2], the owner contended that the

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[1] The records of the New York City Department of Finance show that Columbus 95th Street LLC acquired title to the building on the date of Columbus House, Inc.'s dissolution.

[2] KSLM-Columbus Apartments, Inc. v. DHCR and Westgate Tenants Association, 5 N.Y.3d 303, 801 N.Y.S.2d 783 (2005).

tenants' rents required an upward adjustment pursuant to RSL 26-513(a) because the rents had always been subject to PHFL regulation and thus were never subject to a fair market or rent-stabilized rent, and consequently the rent for each individual apartment was a fraction of that generally prevailing in the same geographical area for substantially similar housing accommodations. The owner further contended that each individual apartment was being rented far below the current fair market rent, based upon the fair market rent studies previously submitted to the DHCR in other M-L U/P applications in the 10025 Zip Code area (where the subject building is located), which studies demonstrate that the average fair market per-room rent in 2006 is at least $600.00 per month; and/or the current rent-stabilized rent for a comparable apartment with the same number of rooms in the 10025 Zip Code area.[3]

The Rent Administrator opened an Administrative Determination proceeding referenced under docket number UD420007AD and so advised the parties by a commencement notice dated May 10, 2006. Under cover of this notice, the owner's U/P application was served on each individual tenant with notification of the right to file an answer within twenty days.

On August 1, 2007 the DHCR promulgated a proposed amendment to the New York City Rent Stabilization Code (RSC), consisting of the addition of RSC Section 2522.3(f)(4). This amendment was adopted on November 21, 2007 and the DHCR notified the owner's attorney of this change in circumstances by a letter dated November 27, 2007. This RSC amendment constituted the basis of the appealed order.

In a series of separate filings entitled Owner's Supplemental Application For Rent Increase Based upon Unique & Peculiar Circumstances – RSC Section 26-513(a) dated August 17, 2007 ("Supplemental Application"), the owner requested, as to each individual unit, expeditious processing of its pending U/P applications to avoid the commencement of a mandamus proceeding. The owner further argued that due to the apartment-specific nature of each proceeding, the Rent Administrator's decision to process the separate applications under a single docket number was illogical and constituted an irregularity in a vital matter, further noting that each individual apartment has a different rental amount and may be subject to its own litigation.

Two additional points were raised in the Supplemental Application. First, the owner argued that in determining the amount of the rent increase, the DHCR should be guided by its own processing of the KSLM matter (or "Westgate Case") where the rent increases were computed by the DHCR based on a consideration of apartments located within the area of the 10025 Zip Code, similar to the method used in another unrelated matter: 207 Realty Associates, LLC v. DHCR, 297 A.D.2d 569, 747 N.Y.S.2d 162. Secondly, the owner argued that, as an additional basis for finding a unique or peculiar circumstances, the DHCR should consider that the prior owner's expenditure of $265,000.00 for building-wide improvements that resulted in HUD's approval of a temporary rent increase during a three-year period January 2003 through December 2005, further noting that the prior owner would have been afforded a permanent rent increase if the building had been regulated under the Rent Stabilization regulations.

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[3] No specific DHCR precedent or a formal agency study was cited in support of the first claim, and the owner conceded that the second claim was based on information and belief.

In September 2007, the owner filed an Article 78 proceeding against the DHCR seeking a declaration that the 2007 RSC amendment was invalid, or alternatively, seeking a court order compelling DHCR to decide the owner's U/P applications pursuant to the law in effect at the time of filing (Columbus 95th Street LLC v. DHCR, et al., Sup.Ct. NY County, Index No.: 113148/2007). A stay of the DHCR's processing of the owner's U/P application went into effect pursuant to an order by Justice Stone, to whom the Article 78 proceeding was originally assigned. After the adoption of the RSC amendment in November 2007, the owner amended its Petition in the Article 78 proceeding to assert that the RSC amendment should be found to be invalid on the grounds that it contravenes the Court of Appeals' holding in KSLM and deprives the owner of the right to have a U/P rent increase.

By a decision dated November 25, 2009, the Hon. Justice Alice Schlesinger concluded in substance that the RSC amendment is not invalid and does not contravene KSLM or otherwise diminish owner rights[4]; that the DHCR did not exceed its rulemaking authority when promulgating the RSC amendment; that the 2007 RSC amendment is neither arbitrary nor unconstitutional; and that no basis exists for the Court to direct DHCR to apply the law in effect before the RSC amendment was adopted. The Court also directed that the DHCR "...proceed forthwith to process the applications filed by Columbus ... and to determine those applications within 150 days of the submission of the final papers."

Justice Schlesinger noted in her recitation of the factual background that the DHCR had assigned an omnibus docket number to the 248 U/P applications, served each tenant with a copy of the application, and afforded each tenant an opportunity to answer. It was further noted that various tenants had answered and intervened in the Article 78 proceeding as the Columbus House Tenants Association.

Justice Schlesinger's decision was affirmed by the Appellate Division on December 28, 2010 (Columbus 95th Street, LLC v. DHCR, et al., 81 A.D.3d 269; 916 N.Y.S.2d 2 (1st Dept. 2010)).

The stay having been lifted, the Rent Administrator issued the order here under appeal on October 21, 2011. The order stated as follows:

> The premises were formerly subject to the Mitchell-Lama Regulations. Upon leaving the Mitchell-Lama program, the premises became subject to the Rent Stabilization Law and Code. The owner filed an application for a rent increase citing "unique and peculiar" circumstances. However, pursuant to Section 2522.3(f)(4) of the Rent Stabilization Code, *previous regulation of the rent for the housing accommodation under the PHFL or any other State or Federal law shall not, in and of itself, constitute a unique and peculiar*

[4] As is particularly pertinent to this appeal proceeding, the court stated in the Decision: "Given its plain and ordinary meaning, the [DHCR's] amendment advises the owner that it must do more than merely report that the building was formerly subject to Mitchell-Lama to qualify for a U/P rent increase. ... The amendment does not foreclose the owner from applying to increase the rents of former Mitchell-Lama tenants upon a particularized showing of "unique or peculiar circumstances." That right to apply is the only right secured by the KSLM decision and the governing statute 26-513(a), and it is the same right available to all other owners – no greater and no less."

> *circumstance within the meaning of this subdivision. Any change in economic circumstances arising as a consequence of the termination of such prior regulation of rent may only be addressed in a proceeding for adjustment of the legal regulated rent under paragraphs (b) and (c) of Section 2522.4 of the Code.* The owner, after being given an opportunity to establish unique and peculiar circumstances warranting relief under the applicable regulations, failed to do so. [the italicized portion is the actual wording of the regulatory amendment]

In its PAR and PAR supplement dated May 23, 2012, the owner seeks to have the order reversed based on several grounds. The owner contends, first, that there were procedural and processing deficiencies in this matter hallmarked by the Rent Administrator's non-reference to any of the claims raised by the owner in its initial and supplemental filings. In a related vein, the owner asserts that as further evidence of the DHCR's having made "short shrift" of the U/P applications, the Rent Administrator issued a uniform order for each and every apartment that merely set forth the amended regulation, without regard to the owner's prior request for separate docketing, thereby constituting a departure from the DHCR's established policy and procedures. The owner points out that the U/P applications filed in conjunction with the Westgate Case - involving the building located at 160 West 97th Street, which is nearby to the subject building - were given separate docket numbers and thus each application was decided based on facts attributable to each individual apartment and could be easily appealed by parties on a case by case basis.

The owner contends, secondly, that the Rent Administrator improperly decided the applications without requiring the submission and review of responses from the tenants, and since, to the owner's knowledge, no tenants responded to the applications, the allegations by the owner should have been deemed to be admitted, or in the alternative, the Rent Administrator should have set forth his rationale for not so deeming.

The owner contends, thirdly, that the Rent Administrator's determination constituted a "rush to judgment" and a "rudimentary denial" of the application based upon the newly enacted sections of the Rent Stabilization Code, instead of being the product of a careful review of all of the facts and arguments raised. Such processing, in the owner's view, ran afoul of Justice Schlesinger's directive "to proceed forthwith to process the applications within 150 days *of the submission of the final papers.*" The owner insists that the Rent Administrator, pursuant to standard policy and in compliance with the said court directive, should have notified the tenants of the opportunity to respond to any and all DHCR requests that had not been complied with and afforded them an opportunity to complete the record, and should have given the owner an opportunity to provide additional evidence and amend its original application to establish unique or peculiar circumstances. The owner further insists that the Rent Administrator failed to inquire about any factors determined by DHCR in the past to be relevant in U&P cases, such as: mis-management by the prior owner (see eg, 207 Realty Associates LLC v. DHCR, 297 A.D.2d 569, 747 N.Y.S.2d 162 (1st Dept. 2007); the Administrative Order and Opinion in Matter of Siniscalchi, SI420018RT (2006)), the owner's right to collect lawful rent increases on an apartment-by-apartment basis (eg. air conditioner surcharge), the owner's right to collect permanent MCI rent increases based on expenditures for prior building-wide increases, a consideration of individual tenant incomes at the time of M-L dissolution, consideration of

unique attributes of the building or of an individual apartment, and other matters bearing on the equities.

Fourth, the owner questions the DHCR's authority to issue the appealed order in the first instance because, whereas the Rent Administrator's determination was based on the newly enacted subsection (f) of RSC Section 2522.3 pursuant to the enabling law - RSL §26-513(a), the RSC nonetheless contains a section that bars the determination of an initial regulated rent under RSC 2522.3. Reference is made to subsection (d) of RSC Section 2521.1 (entitled Initial Legal Regulated Rents for Housing Accommodations), which provides:

> (d) Notwithstanding the provisions of any outstanding lease or other rental agreement, the initial legal regulated rent for a housing accommodation in a multiple dwelling for which a loan is made under the PHFL shall be the initial rent established pursuant to such law. **Such rent, whether or not the housing accommodation was previously subject to the RSL, shall not be subject to the proceeding described in section 2522.3 of this Title.** * * *

The attorney for the Columbus House Tenant Association filed responsive submissions to the PAR dated January 11, 2012 and July 16, 2012. These submissions, in substance, argue that the owner's claims in this matter are without merit and do not warrant a reversal of the Rent Administrator's decision, and that the appealed order was correct per regulatory standards and should be affirmed. The tenants' attorney notes, in particular, that an answer to the owner's U&P application was duly submitted to the DHCR on March 1, 2009.

Upon careful consideration, the Commissioner is of the opinion that the owner's PAR should be denied.

Pursuant to RSC Section 2527.5, the Rent Administrator is authorized to consolidate two or more applications or proceedings which have at least one ground in common. Further, as noted by Justice Schlesinger in her November 25, 2009 decision, the question of whether a particular matter should be docketed as an individual or as a building-wide proceeding is within the Rent Administrator's discretion, and not the Court's. The owner's reference to the DHCR's processing procedures in other cases involving a U/P application is not compelling as processing decisions are made on a case-by-case basis, taking into account the unique issue(s) raised by the parties, the exigencies associated with the subject matter, the DHCR's limited resources in its handling of a considerable caseload, and other factors bearing on the equities[5].

In this case, the Commissioner finds that virtually all of the individual applications submitted by the owner were sufficiently similar in nature, to the point of being nearly identical in wording to each other, so as to warrant consolidation and processing under a single, building-

[5] The DHCR's remand proceeding associated with the KSLM litigation utilized individual docketing for each apartment, however the matter had factual circumstances that differed from those in the instant case. For instance, the Rent Administrator in the Westgate case set the legal rent for each individual apartment based, in part, on the size of the apartment as set forth in a stipulation that some (but not all) of the tenants entered into. This underscores the point that every U/P application must be adjudicated and processed based on its own unique set of facts and circumstances.

wide docket number, not unlike the processing normally associated with an owner-multiple (OM) case type. Taken in their totality, the owner's applications in effect sought a building-wide rent increase based upon one alleged unique or peculiar circumstance: the subject building's exit from regulation under the M-L program.

The owner argued in its Supplemental Application that the assignment of single docket numbers was needed because each apartment has a different rental amount, and because each affected apartment may be subject to its own specific litigation. The Commissioner finds however that none of these claims warranted either individualized docketing or a severing of one or more of the apartments from the proceeding pursuant to RSC 2527.5(i). These points were not germane to the basis for the U/P applications (exit from M-L law), and the second point in particular was raised under an assumption that the U/P applications would be granted.

The Commissioner finds, as an overriding point in this matter, that the Rent Administrator properly took into account the Supreme Court's November 25, 2009 decision upholding the validity and retroactive applicability of regulatory amendment RSC Section 2522.3(f)(4). This provision effectively eliminated the claim of an owner's exit from the M-L program as a U/P circumstance warranting a rent adjustment pursuant to RSL Section 26-513(a). The Commissioner also finds, for the reasons set forth below, that the Rent Administrator properly concluded that the owner failed to meet its burden of proof to establish its right to the relief applied for.

The evidence in the case file establishes the tenants were duly notified of the subject U/P application, and that the Rent Administrator sent the owner a letter on November 27, 2007 explaining that all pending applications for rent adjustments based upon unique and peculiar circumstances would be determined pursuant to the current regulations, as amended. This letter afforded the owner additional time, 14 days, in which to amend the pending U/P application, or comment thereon, or make any additional submissions pertaining to the owner's pending application. The record establishes that the owner did not supply any additional evidence, or specific claims of unique or peculiar circumstances apart from the building's exit from the M-L program, within the 14-day period or anytime thereafter. The Commissioner notes that, after the Appellate Division rendered its decision, the owner had nearly ten months in which to do so before the Rent Administrator issued the appealed order.

The Commissioner finds that the Supreme Court's directive that the DHCR "...proceed forthwith to process the applications within 150 days of the submission of the final papers" did not, by implication, impose a requirement upon the DHCR to transmit new notifications to the parties for additional evidence. Again, the DHCR had already given the owner an opportunity to supplement its application once before, therefore the owner had been put on notice of its right to supplement its U/P application. Further, since the tenants, by their counsel, had intervened in the mandamus proceeding and ultimately received a favorable result from the courts, it is unlikely that further evidence would have been supplied by these individuals if the DHCR had made a supplemental request after the Appellate Division rendered its decision. In sum, the Rent Administrator's determination was founded upon a complete record in this matter.

In addition, the Rent Administrator's purported failure to determine the amount of the rent increase adjustment based upon the methodology of a Zip Code analysis did not constitute reversible error in this case. The need to address this issue was precluded by the owner's failure to establish a particularized showing of unique or peculiar circumstances in the first place. It will be noted that Justice Schlesinger's decision specifically distinguished the facts in 207 Realty Associates from those in the instant case, stating, in pertinent part:

> The Appellate Division affirmed [the Supreme Court's decision in 207 Realty Associates granting the owner's Article 78 proceeding to the extent of remanding the proceeding to DHCR to conduct a comparability study], finding that the petitioner had met the criteria for a U/P rent increase: "Petitioner established the existence of unique and peculiar circumstances over a 17-year period based on the expulsion of a prior owner from the Rent Stabilization Association, pervasive mismanagement of the subject premises by a manager appointed by the court pursuant to RPAPL article 7-A, and numerous inconsistent rulings as to the status of various units at the premises issued by administrative agencies, including respondent." Thus, unlike the case at bar where the owner is seeking building-wide rent increases based solely on the owner's deliberate decision to leave Mitchell-Lama rent regulation in favor of Rent Stabilization, the Appellate Division relied on a long-term course of conduct by a prior owner which was unusual in nature and had a significant impact on the rents in a handful of rent-controlled apartments at the building [footnote omitted].

In addition, the owner's claim that the Rent Administrator should have considered, as a separate U/P circumstance, the temporary nature of the building-wide rent increase afforded the prior owner to offset the substantial costs for numerous building-wide capital improvements is not found to have merit. These temporary rent increases, like all other regulated adjustments in effect prior to March 2006, were pursuant to the strictures of the M-L law. Since the amended RSC code provision precludes prior regulation under the M-L law as constituting a U/P circumstance, it necessarily follows that any specific provision of the M-L law that was applied prior to the owner's exit from the program likewise may not constitute a U/P circumstance. Furthermore, the temporary nature of the capital improvement rent increases, as well as the overall "restricted" rent structure itself under the M-L program, would have been factored into the parties' negotiations in arriving at a suitable purchase price when the owner acquired the building in 2006.

The owner's claims about its right to collect lawful individual apartment rent increases such as air conditioner surcharges, and the need to consider additional factors (tenant incomes and unique attributes of the subject building / apartments), were not raised in the proceeding before the Rent Administrator. These claims may not be considered by the Commissioner for the first time on appeal due to the Scope-of-Review doctrine.

Lastly, as concerns RSC Section 2521.1(d), the Commissioner finds that the DHCR's apparent retention of the regulatory language referred to by the owner constitutes a mere drafting oversight at the time the RSC amendment was adopted. At this point, such language cannot be reasonably construed as an invalidation of the RSC amendment.

THEREFORE, in accordance with the applicable provisions of the New York City Rent Stabilization Law and Code, it is

ORDERED, that the owner's petition for administrative review be, and the same hereby is, denied; and that the Rent Administrator's order be, and the same hereby is, affirmed.

ISSUED: DEC 2 0 2013

WOODY PASCAL
Deputy Commissioner

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Right to Court Appeal

In order to appeal this Order to the New York Supreme Court, within sixty (60) days of the date this Order is issued, you must serve papers to commence a proceeding under Article 78 of the Civil Practice Law and Rules. No additional time can or will be given.

In preparing your papers, please cite the Administrative Review Docket Number which appears on the first page of the attached Order.

Court appeals from the Commissioner's orders should be served at Counsel's Office, Room 707, 25 Beaver Street, New York, New York 10004. In addition, the Attorney General must be served at 120 Broadway, 24th Floor, New York, New York 10271.

Since Article 78 proceedings take place in the Supreme Court, you may require the professional help of an attorney.

There is no other method of appeal.