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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 113148/2007

COLUMBUS 95TH STREET LLC

INDEX NO.

VS

HOUSING & COMMUNITY RENEWAL

MOTION DATE

Sequence Number : 007

MOTION SEQ. NO.

DISMISS

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: X **Yes** **No**

Upon the foregoing papers, it is ordered that this ~~motion~~ proceeding and the cross-motion by the Attorney General are decided in accordance with the accompanying memorandum decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

NOV 25 2009

Dated: November 25, 2009

ALICE SCHLESINGER J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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COLUMBUS 95TH STREET LLC,

Petitioner,

-against-

Index No. 113148/07
Motion Seq. No. 007

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent,

COLUMBUS HOUSE TENANTS ASSOCIATION AND LESLIE BURNS, INDIVIDUALLY AND AS PRESIDENT OF THE COLUMBUS HOUSE TENANTS ASSOCIATION,

Interveners-Respondents,

-and-

THE ATTORNEY GENERAL FOR THE STATE OF NEW YORK,

Statutory-Intervener.

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SCHLESINGER, J.

Before the Court in this hotly contested case and the related case *Highbridge House Ogden LLC et al., v. DHCR, et al.*, Index No. 100845/08, is the validity of a 2007 amendment to Rent Stabilization Code §2522.3 (the Code). That amendment relates to applications made by owners of buildings formerly subject to Mitchell-Lama for rent increases based on "unique or peculiar" circumstances. The language at issue, found in subdivision (f)(4) of the Code provision, reads as follows:

> Previous regulation of the rent for the housing accommodation under the PHFL [including Mitchell-Lama] or any other State or Federal law shall not, in and of itself, constitute a unique and peculiar 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 ... section 2522.4(b) and (c) of this Part.[1]

Central to the parties' competing arguments in this case is the 2005 decision by the Court of Appeals in *KSLM-Columbus Apartments, Inc. v. New York State Division of Housing and Community Renewal*, 5 NY3d 303.

Background Facts

Petitioner Columbus 95th Street LLC (Columbus) is now and has been since March 2006 the owner of the apartment building at 95 West 95th Street in Manhattan. Before that time, the building was subject to Article II of the New York State Private Housing Finance Law (PHFL), commonly known as Mitchell-Lama. Mitchell-Lama is a program designed in 1955 to encourage the construction of affordable apartments. Under the program, the limited profit housing corporation which owns the building receives tax abatements and other benefits in exchange for being subject to government regulations regarding rents charged, tenant selection, and profits earned. *See KSLM*, 5 NY3d at 308.

Initially, the Mitchell-Lama law allowed the housing corporation as owner to seek approval from the supervising government agency to exit the program after thirty-five years.[2] In 1960, the law was amended to shorten the time to twenty years and to allow the housing corporation to withdraw from the program without government approval. *See* PHFL §35(2). Upon such withdrawal, the limited profit housing corporation dissolves and

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[1] The identical language was added as subdivision (b)(4) to §2520.3 of the Tenant Protection Regulations. The cited section 2522.4 relates to rent increase applications based on hardship.

[2]The supervising agencies in New York City are the New York City Department of Housing Preservation and Development (HPD) and the U.S. Department of Housing and Urban Development (HUD).

a new private entity takes ownership of the property. The apartments are no longer subject to the PHFL but instead become subject to rent regulation under either the Rent Stabilization Law (RSL) or the Emergency Tenant Protection Act (ETPA), depending on the dates of the building's construction and the commencement of the tenant's occupancy. *KSLM*, 5 NY3d at 308. In the case at bar, the limited profit housing company which had owned the building under Mitchell-Lama was dissolved on March 3, 2006, and petitioner became the legal and equitable owner of the building. All the apartments became subject to Rent Stabilization by virtue of the ETPA, and the rents were set at the last rent charged by HUD, in accordance with RSL §26-512.

On or about April 20, 2006, Columbus filed with DHCR 248 individual applications to increase the rents of the various apartments in the building pursuant to RSL §26-513(a) based on "unique or peculiar" circumstances (the U/P applications). That section provides that:

> The tenant or owner of a housing accommodation made subject to this law by the emergency tenant protection act of nineteen seventy-four may, within sixty days of the local effective date of this section or the commencement of the first tenancy thereafter, whichever is later, file with the commissioner an application for adjustment of the initial legal regulated rent for such housing accommodation. The commissioner may adjust such initial legal regulated rent upon a finding that the presence of unique or peculiar circumstances materially affecting the initial legal regulated rent has resulted in a rent which is substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations.

DHCR assigned an omnibus docket number to the 248 U/P applications (UD-42007-AD) and served each tenant with a copy of the application and an opportunity to answer. Various tenants have answered and intervened in this proceeding as the Columbus House Tenants Association.

On or about August 1, 2007, while the Columbus applications were still pending, DHCR promulgated the proposed amendment (Code §2522.3 quoted above) and invited public comment. In November 2007, the amendment was adopted. In the intervening period, on or about September 28, 2007, Columbus filed the instant Article 78 proceeding to compel DHCR to determine its U/P applications pursuant to the law and regulations in effect at the time of filing. After the amended Code provision was adopted, Columbus amended its petition to assert that the amended Code provision was invalid on a number of grounds and that, in any event, the amendment should not be applied to the Columbus applications which had been filed before the amendment was promulgated. The Attorney General has moved to dismiss the constitutional claims, and DHCR and the tenants have opposed the petition.

In the meantime, a related case entitled *Highbridge House Ogden, LLC, et al., v. DHCR, et al.*, Index No. 100845/08, was commenced on or about January 18, 2008 and has been proceeding on a parallel track.[3] *Highbridge* is a declaratory judgment action commenced by 16 different owners of buildings located in New York City and its suburbs, all of which were previously subject to Mitchell-Lama. As in *Columbus*, upon the

[3]The somewhat convoluted procedural history will not be detailed here as it is not relevant to the determination. Suffice it to say, both *Colombus* and *Highbridge* are now assigned to this Court, and DHCR is temporarily stayed from determining any of the U/P applications pursuant to the order of Justice Stone, to whom the *Columbus* case was originally assigned.

dissolution of the limited profit housing company and the transfer of ownership to the current private owner in each instance, the units at issue became subject to Rent Stabilization by virtue of the ETPA and the rents were set at the level last charged by HUD pursuant to RSL §26-512. Thereafter, plaintiffs timely filed U/P applications with DHCR requesting a rent increase for each individual apartment. DHCR assigned an omnibus docket number for each building and served each tenant with a copy of the U/P application and notice of the right to answer. Various tenant groups have intervened in the action. The owners have moved for summary judgment, and DHCR and the tenants have cross-moved for summary judgment. The Attorney General has cross-moved to dismiss the constitutional claims.

Simply put, both the *Columbus* and the *Highbridge* owners contend that the Court of Appeals in *KSLM* held that owners of buildings formerly subject to Mitchell-Lama are entitled to a rent increase pursuant to the "unique or peculiar circumstances" statute based solely on the fact that the building was previously subject to Mitchell-Lama. They further assert that the recently promulgated amendment to the RSC is invalid as it contravenes the holding in *KSLM* and deprives owners of the right to a U/P rent increase.

DHCR, the Attorney General and the tenants read *KSLM* differently. They assert that the Court simply held that owners are eligible to apply for U/P rent increases for apartments subject to the ETPA, whereas they are not eligible to apply for those apartments made subject to rent regulation by the Rent Stabilization Law of 1969. The distinction is based on the fact that the governing U/P statute, §26-513(a), by its express terms applies only to ETPA tenants. As for the Code amendment, they insist that it preserves the right of eligible owners to apply for the U/P increase and simply advises

those owners that the prior Mitchell-Lama status, standing alone, does not constitute a unique or peculiar circumstance automatically entitling the owner to receive a U/P rent increase. The amendment further indicates that those owners seeking a rent increase based on financial hardship allegedly attributable to the prior Mitchell-Lama status should seek that rent increase under Code §2522.4(b) and (c) relating to hardship, rather than file a U/P application.

The *KSLM* Decision

The resolution of the dispute between the parties requires a careful analysis of the *KSLM* decision. *KSLM* involved three apartment buildings located on Manhattan's Upper Westside, all of which had previously been subject to Mitchell-Lama and owned by the same limited profit housing company, known as Westgate Housing Corp. When the buildings exited Mitchell-Lama, Westgate dissolved, KSLM became the owner, and the apartments became rent stabilized.

KSLM then applied to DHCR for U/P rent increases pursuant to RSL §26-513. The KSLM applications were the first DHCR had received involving buildings previously subject to Mitchell-Lama. 6 AD3d 28, 33. Parroting the statutory language, the owner alleged in its application that the rents were "substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations." The owner further claimed that the rent differential existed because the buildings had been subject to Mitchell-Lama for nearly 30 years, and it contended that the buildings were not economically viable without the requested rent increases. 5 NY3d at 310.

The series of decisions which followed focused on the applicability language included at the very beginning of the U/P statute, RSL §26-513(a) quoted above. That

language makes clear that the statutory right to seek a U/P rent increase applies only to the "tenant or owner of a housing accommodation made subject to this [the rent stabilization] law by the emergency tenant protection act [ETPA] of nineteen seventy-four..." The limitation of the statute to ETPA tenants is highly significant. Some history of rent regulation is necessary to fully appreciate that significance.

The Rent Stabilization Law was promulgated in 1969 in the face of a housing shortage to "prevent speculative, unwarranted and abnormal increases in rents" so as to secure tenants in their homes. RSL §26-501.[4] In 1971, in an effort to encourage the construction of more housing, the Legislature promulgated the Vacancy Decontrol Law (VDL) which authorized the decontrol, or exemption from Rent Stabilization, of apartments vacated on or after July 1, 1971. Recognizing thereafter that the law was not serving its intended purpose and that instead the housing shortage and rents had increased rather dramatically during the VDL period, the Legislature promulgated the Emergency Tenant Protection Act (ETPA) in 1974 to authorize the re-institution of rent regulation and protect tenants in a time of housing emergency. 5 NY3d at 310-311.

Simply stated, the ETPA enabled New York City to extend rent stabilization protection to three classes of apartments: (1) those which had been deregulated pursuant to the VDL while that law was in effect; (2) those in buildings completed between March 10, 1969 (the effective date of the RSL) and January 1, 1974 (the year the ETPA was promulgated); and (2) rent-controlled apartments vacated thereafter. *See* ETPA §8623 and RSL 26-504(a). Recognizing that the VDL had had some anomalous results and that

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[4] The Rent Control Law had gone into effect well before that time but applied to different classifications of housing.

widespread regulation was being reimposed, the Legislature included the U/P provision in the ETPA to allow both tenants and owners to seek rent adjustments (presumably downward and upward, respectively) based on "unique or peculiar circumstances." No such provision had been included in the Rent Stabilization Law of 1969.

Returning the focus to the *KSLM* litigation, DHCR's Rent Administrator denied KSLM's applications, finding that the owner was not eligible to apply for a U/P rent increase under RSL 26-513(a) because, when the building left the Mitchell-Lama program, "it became subject to the [RSL] not by virtue of the [ETPA] but by virtue of the [RSL]" of 1969. 5 NY3d at 310. DHCR's Deputy Commissioner denied the owner's administrative appeal, finding that KSLM had erred in assuming that every apartment was rent stabilized by virtue of the ETPA simply because the building had left Mitchell-Lama after July 1, 1974. *Id.*

KSLM then challenged DHCR's determination in Supreme Court, pursuant to CPLR Article 78. Deferring to DHCR, the trial court denied the petition and dismissed the proceeding. The Appellate Division unanimously reversed, granted the petition, and remanded the matter to DHCR "for consideration of petitioner's application for adjustment of initial rent pursuant to Rent Stabilization Law §26-513(a)." 6 AD3d at 40. The appellate court noted that the ETPA covered those apartments which had been "*exempted from* regulation and control under the provisions of the emergency housing rent control law, the local emergency housing rent control act or *the New York city rent stabilization law of nineteen hundred sixty-nine.*" 6 AD3d at 36, quoting the ETPA (emphasis in original). As the Court of Appeals later explained, the "Appellate Division reasoned that since the buildings in question were clearly exempted from the Rent Stabilization Law [while subject

to Mitchell-Lama], they were covered by the ETPA" when the buildings left Mitchell-Lama and the exemption no longer applied. 5 NY3d at 310.

The Court of Appeals modified. While the decision includes a thorough and scholarly review of the rent laws, it is the first and last sentences of the decision which are the key to this Court's conclusion that the *KSLM* court made no determination on the merits of the U/P applications but simply held that only ETPA apartments were even eligible to apply. At the beginning of the decision (at p 308), Judge Smith makes clear that the decision is limited to determining whether the apartments at issue, upon exiting Mitchell-Lama, became subject to the RSL or the ETPA:

> In this appeal by the Division of Housing and Community Renewal (DHCR), the issue is whether buildings previously constructed and operated pursuant to the Mitchell-Lama program are made subject to the Rent Stabilization Law of 1969 (RSL) by the RSL itself, or by the Emergency Tenant Protection Act of 1974 (ETPA). We conclude that apartments inhabited continuously since before July 1, 1971 [the effective date of the VDL] were made subject to stabilization by the RSL, and those in which there has been a vacancy on or after July 1, 1971 were made subject to stabilization by the ETPA.

In other words, the key was not the date when the building exited Mitchell-Lama and lost its statutory exemption from rent stabilization. Rather, the key was whether the apartment would have otherwise been exempt from stabilization based on the date the tenant vacated the apartment.

Noting that the statutory basis for a U/P application, RSL §26-513(a), expressly limits its applicability to tenants and owners of apartments "made subject to this law by the emergency tenant protection act of nineteen seventy-four" (i.e., those apartments where the tenant had vacated on or after July 1, 1971), the Court concluded (at 315-16) that only ETPA apartments were eligible to apply for the U/P rent adjustment:

> Therefore, we conclude that the KSLM apartments vacated on or after July 1, 1971 are subject to the ETPA and that as to those apartments pursuant to RSL §26-513(a), KSLM **may apply** to DHCR for "unique or peculiar" rent adjustments.

(Emphasis added).

The Code Amendment Does Not Contravene *KSLM* or Otherwise Diminish Owner Rights

As discussed above, *KSLM* cannot reasonably be read to guarantee an owner an automatic entitlement to a U/P rent increase upon exiting Mitchell-Lama. Rather, it simply acknowledges the owner's right to apply for such a rent increase. As the Code amendment does not deprive the owner of its right to apply for a U/P rent increase, it neither contravenes *KSLM* nor otherwise diminishes the owner's statutory rights.

Given its plain and ordinary meaning, the 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. It further advises that a claim focused on economic hardship allegedly attributable to the former Mitchell-Lama status is more properly processed under the provisions allowing rent increases based on hardship.[5] 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.

This Court rejects the owner's claim (Highbridge Memo pp 15-16) that Justice Stone when presiding over this case "concluded as a matter of law that DHCR's November, 2007 Regulations were an attempt by DHCR to 'eviscerate such remedy,' i.e., Plaintiffs' right to

[5] This provision is consistent with the 2000 amendment to RSC § 2520.11(c) which removed language that had impeded the ability of former Mitchell-Lama buildings to qualify for hardship rent increases.

initial rent adjustments pursuant to RSL § 26-513(a)." The statement was included in *dicta*, as part of Justice Stone's characterization of the competing arguments. The statement does not constitute law of the case, nor bind this Court in any way.

KSLM includes no determination on the merits as to how DHCR should proceed once a U/P application has been filed. Its characterization of the owner's arguments and its outline of the application process (5 NY3d at 312) can in no way be viewed as part of the holding, particularly in light of the clear and unequivocal language quoted above limiting the issue to the statute's applicability to ETPA tenants. Similarly unavailing is the owner's claim that the Appellate Division's discussion of certain DHCR letters constitutes a determination that a building's former Mitchell-Lama status, standing alone, automatically entitles the owner to a U/P rent increase. *See* 6 AD3d at 38. First, the Court of Appeals made no mention of the letters, and it thus cannot be said that our highest court agreed with that part of the Appellate Division's decision, which it modified significantly. Moreover, the letters cannot be construed as binding policy or precedent that a building's former Mitchell-Lama status, standing alone, automatically entitles an owner to a U/P rent increase.

The three referenced letters were presented to the *KSLM* court, and this Court as well. The first was written by then DHCR Commissioner Halperin in 1994, and the other two were written in 1995 and 1996 by then DHCR Deputy Commissioner Roldan. None of the letters related to a pending proceeding; nor were they issued as formal Advisory Opinion letters. Instead, it appears that the letters were written in response to requests by the US Department of Housing and Urban Development to clarify how the Rent Stabilization Law could affect the appraisal of a building that hypothetically could exit a government-

subsidized housing program, where the appraisal requires an estimate of the property's highest market rental value. The letters appear to suggest that various provisions (such as hardship, U/P and luxury decontrol) exist which allow an owner to apply to adjust the initial rent-stabilized rent, and that the appraiser could consider those possibilities when completing the calculations. In no way can these letters be construed as a definitive policy statement that an owner is automatically entitled to a U/P increase when the building exits Mitchell-Lama, particularly because the HUD requests are missing, allowing only speculation based on an incomplete record. And again, our highest court neither cites to them nor relies on them in any way.

Further, to construe *KSLM* as securing an automatic entitlement to a U/P increase upon exiting Mitchell-Lama would run counter to the statute which has long been applied regarding Mitchell-Lama rents. That statute, RSL §26-512, and its counterpart Code §2521.1(j), provides that the initial stabilized rent upon exiting Mitchell-Lama shall be the last rent charged and paid by the tenant. Adopting the owner's arguments in this case would permit a wholesale increase in rents on a building-wide basis in excess of 200% per tenant as soon as the building becomes rent stabilized. Such a result would be at odds with the existing statutory and regulatory scheme and the overall policy behind the rent laws to prevent excessive rent increases.

DHCR Did Not Exceed its Rulemaking Authority when Promulgating the Amendment

The *Columbus* and *Highbridge* owners allege that DHCR has violated the separation of powers doctrine by usurping the role of the Legislature and promulgating a regulation designed to set public policy. Pointing to various failed attempts by the Legislature following *KSLM* to pass a law addressing the U/P issue, the owners contend that DHCR

promulgated the regulation to resolve the dispute and thereby violated the limits on administrative action emphasized in *Boreali v Axelrod*, 71 NY2d 1 (1987).

Boreali involved a code promulgated by the Public Health Council (PHC) to govern tobacco smoking in areas open to the public. As the Court of Appeals acknowledged at the outset of its decision, the Legislature when enacting Public Health Law §225(5)(a) gave the PHC "broad authority" to promulgate regulations on matters concerning the public health. 71 NY2d at 6. Nevertheless, the Court found that the PHC had exceeded its rulemaking authority "when, following the Legislature's inability to reach an acceptable balance, the Council weighed the concerns of nonsmokers, smokers, affected businesses and the general public and, without any legislative guidance, reached its own conclusions about the proper accommodation among those competing interests." *Id.*

In reaching its determination, the Court of Appeals analyzed four factors or "coalescing circumstances" which are applicable in general to a review of administrative regulations such as the one at issue here. Those factors are as follows: (1) whether the regulation is based solely upon economic and social concerns, with no real foundation in the considerations central to the agency's role; (2) whether the regulation filled in the details of broad legislation which described the policies to be implemented; (3) whether the agency was acting in an area in which the Legislature had tried, but failed, to reach agreement; and (4) whether the regulation resolved issues which required no special expertise or technical competence in the agency's field.

The *Boreali* court found that the regulation had failed as to all four of the factors: (1) PHC had promulgated a comprehensive "regulatory scheme laden with exceptions based solely upon economic and social concerns [with] no foundation in considerations of public

health" (*Id.* at 11-12); (2) the PHC "wrote on a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance" (*Id.* at 13); (3) "the agency acted in an area in which the Legislature had repeatedly tried – and failed – to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" (*Id.*); and (4) "although indoor smoking is unquestionably a health issue, no special expertise or technical competence in the field of health was involved in the development of the anti-smoking regulations challenged here. Faced with mounting evidence about the hazards to bystanders of indoor smoking, the PHC drafted a simple code describing the locales in which smoking would be prohibited and providing exemptions for various special interest groups" (*Id.* at 14).

The owner's attempt to apply the *Boreali* factors to this case must fail. While it is true that the Legislature tried and failed to pass a law addressing the U/P issue (the third factor), none of the other three factors applies here. The presence of one factor is not enough. As the Court made clear when discussing the four factors, "none of these circumstances, standing alone, is sufficient to warrant the conclusion that [the agency] has usurped the Legislature's prerogative"; rather the court must look at all of these circumstances, when viewed in combination," to determine whether the agency has usurped the Legislature's function. (*Id.* at 11). Further, as the First Department noted in *Festa v Leshen*, 145 AD2d 49, 58 (1989), when it upheld DHCR regulations on succession rights, "the Court of Appeals in *Boreali* could not have intended to invalidate a regulation merely because the Legislature had, at some point, considered the same subject matter."

An analysis of the remaining three factors confirms that DHCR did not exceed its rulemaking authority when promulgating the U/P regulation. Pursuant to Legislative

mandate, DHCR has broad rulemaking authority which it has exercised in connection with rent regulation generally for 50 years and with respect to the Rent Stabilization Law since 1984. *See Rent Stabilization Association v Higgins,* 83 NY2d 156 (1993); Omnibus Housing Act of 1983 (Sh. 403, L. 1983). The regulation at issue was promulgated consistent with that authority and consistent with the governing regulation RSL §26-513(a) quoted above which allows a party, be it owner or tenant, to apply for a rent adjustment based on "unique or peculiar circumstances".[6]

The regulation satisfies the first *Boreali* factor. Rather than being a complex code rife with exceptions, the regulation is a single paragraph that simply clarifies that exiting Mitchell-Lama, by itself, does not constitute a unique or peculiar circumstance justifying a rent increase under the statute. While the regulation may arguably affect social and economic concerns, it is primarily founded on considerations directly related to DHCR's traditional role in maintaining affordable rents. As discussed above, the regulation does not change the law or contravene *KSLM*, nor prevent owners from applying for rent increases upon privatization.

Regarding the second factor, the regulation fills the interstices of the governing U/P statute, which provides no guidance as to the definition of "unique or peculiar circumstances". Yet the agency was not acting on a "clean slate" because the Legislature had in the first instance determined that a party could seek a rent adjustment based on unique or peculiar circumstances. Relying on prior applications of the phrase to other types of housing accommodations, DHCR devised a regulation to provide some guidance for

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[6] The use of the word "and" instead of "or" in the regulation does not compel a finding that the regulation is out of harmony with the statute, as DHCR is bound to construe the regulation in a manner consistent with the statute.

housing formerly subject to Mitchell-Lama. As discussed more fully below, the regulation is wholly consistent with previous determinations made by DHCR and its predecessor agencies.

Nor is the final *Boreali* factor shown. The promulgation of the challenged regulation engaged the specialized knowledge and expertise of DHCR. Not only is it the business of the agency to regulate rents, but by omitting any definition of "unique or peculiar circumstances" from the controlling statute, the Legislature effectively called upon the agency to determine the proper application of the term consistent with its mandate to preserve affordable housing.

Nor has the owner satisfied its burden of proving DHCR's noncompliance with the State Administrative Procedure Act (SAPA) or other technical procedures governing the promulgation of administrative regulations. The agency has explained in detail and demonstrated through exhibits the procedures it followed, and the Court is satisfied that substantial compliance has been achieved so as to withstand any challenge on that ground.

The Amendment is Not Arbitrary

The Court of Appeals has confirmed that the burden of a party challenging a regulation is "a high one" and the function of the court is a "limited one": "The challenger of a regulation must establish that the regulation 'is so lacking in reason for its promulgation that it is essentially arbitrary.'" *Versailles Realty Co. v DHCR*, 76 NY2d 325, 328 (1990), quoting *Ostrer v Schenck*, 41 NY2d 782, 786. The owners in the case at bar have failed to meet that heavy burden. As discussed above, faced with a statute which gave no definition of the term "unique or peculiar," DHCR promulgated a regulation to

clarify the application of the phrase for applications of housing formerly subject to Mitchell-Lama. The regulation is wholly consistent with DHCR's mandate to promulgate a regulatory Code which "protects tenants and the public interest." 76 NY2d at 329. The regulation is also consistent with the decision by the Court of Appeals in *KSLM.*

What is more, and quite significantly, the regulation is wholly consistent with prior interpretations of the phrase "unique or peculiar circumstances" by the housing agency and the courts. Those interpretations reveal that the opportunity granted to seek U/P rent adjustments was intended to apply to individual housing accommodations with unusual factors, rather than buildings as a whole based merely on their classification under state law.

The phrase "unique or peculiar circumstances" was first included in a 1951 report form the State Housing Rent Commission to the Legislature known as the 1951 Rent Control Plan. The report was intended to present recommendations for changes to the Emergency Housing Rent Control Law following a study. Ch. 443, L. 1951. Among the sweeping changes enacted was an overhaul of the Commission's power to adjust rents. The legislation specified seven grounds upon which the Commission could increase apartment rents, now codified at Unconsolidated Laws §8584(4)(a). The permitted increases were based on the following grounds: increases in services or facilities; an increase in the number of non-family occupants of an apartment; when rental income failed to yield an adequate annual return on the value of the property; increases for owners of buildings with four units or less based on increased operating costs; and voluntary lease agreements entered into by the individual landlord and tenant after bargaining for the value of services. As relevant here, the legislation also included for the first time the following provision:

> (7) the presence of unique or peculiar circumstances materially affecting the maximum rent has resulted in a maximum rent which is substantially lower than the rents generally prevailing in the same area for substantially similar housing accommodations.

As is evident by a review of these various grounds, all involve circumstances that affect an individual housing accommodation, rather than a broad classification of housing accommodations under city or state law. This point is further emphasized by the legislative history. That history also emphasizes the overall intended limit on the use of the provision, consistent with the ordinary meaning of the terms "unique" and "peculiar." Specifically, in the introductory explanation of the newly created "unique or peculiar" remedy, the 1951 Plan stated as follows:

> This adjustment section does not permit an increase based merely on the claim of the landlord that the housing accommodations are rented for less than his neighbors are receiving. It is designed to give relief only in those unique or peculiar cases where abnormal factors caused rents substantially different from those generally prevailing for similar accommodations. **A typical case would be that of a rent frozen at an abnormally low amount because of previous occupancy by a son who was not charged the normal rental.**

McKinney's 1951 Session Laws of New York, p 1451 (emphasis added).

In Advisory Bulletin No. 8 (rev. March 15, 1951), entitled "Section 33(4), Unique and Peculiar Circumstances," the Rent Commissioner provided further confirmation of the limited types of circumstances intended to qualify as unique or peculiar.[7] Included were

[7] Section 33(4) is included in the State Rent and Eviction Regulations, and is now renumbered 9 NYCRR §2102.3(b)(4). See, Rasch, New York Landlord and Tenant, Rent Control and Rent Stabilization, pp 17–73 (2nd ed., 1987).

circumstances such as unusual pressure or necessity affecting the rental of a single housing accommodation at an unusually low rent; rent established by a prior owner who was mentally impaired or suffering from a condition rendering him incapable of normal business judgment; a building in receivership where the receiver set the initial maximum rents substantially below prevailing rents for comparable accommodations; or where a prior owner was renting at below-market rates to a family member.

Significantly, the Bulletin also gave examples of circumstances *not* intended to constitute "unique or peculiar circumstances". For example, the Bulletin specifically states that: "This section does not permit adjustments solely because there are variations in rents for similar housing accommodations."

As particularly relevant here, the Bulletin also excluded circumstances where the maximum rents had been reduced by Federal authorities based on a concession during a period of Federal regulation before the building became subject to the New York State regulatory jurisdiction. The Commissioner opined that, since the rents had been set pursuant to Federal laws then it effect, the circumstances cannot be considered "unique or peculiar" so as to warrant a rent increase upon the building's entry into the State regulatory system. This situation is analogous to the case at bar; the rents were previously set pursuant to the Mitchell-Lama law, and the owner is now seeking to restructure those rents claiming that the building's departure from Mitchell-Lama and entry into the Rent Stabilization system constitutes a "unique or peculiar circumstance", even though RSL §512 includes a specific methodology for setting the rent-stabilized rents in those case.

Consistent with that interpretation, and in a case similar in many ways to the case at bar, the District Rent Administrator in 1983 denied a rent increase application based on

"unique or peculiar circumstances" where the rents in a Rockland County building had formerly been regulated by HUD before becoming subject to the ETPA. (DHCR Dckt. No. HAVLUP 83-1/225. The Rent Administrator stated:

> [R]arely have building-wide unique and peculiar applications been entertained, but instead, review under this provision has involved individual apartment rentals ...
> As its unique and peculiar circumstance, the owner attempts to utilize HUD's previous regulation of its rentals. ... The owner's involvement with HUD was its own business judgment for which it received benefits and still receives benefits which it must have itself, deemed satisfactory. ... The owner's *in terroram* assertions as to the effect that further regulations will have on his cash flow and return on equity are best left to the various mechanisms in the ETPA which are provided for that purpose.

Here, too, the owners withdrew their buildings from Mitchell-Lama knowing that they would lose the financial benefits of that program and that the apartments would become subject to Rent Stabilization. That choice to forego Mitchell-Lama benefits in favor of a different form of rent regulation would not constitute *per se* "unique or peculiar circumstances" on a building-wide basis. However, the regulation as amended does not preclude the possibility that "unique or peculiar circumstances" may exist with respect to an individual housing accommodation which would justify a rent increase under the statute.

The First Department in *D.M.K. Realty v Gabel*, 23 AD2d 637 (1965), similarly excluded from the ambit of "unique or peculiar circumstances" a case where an owner voluntarily followed a particular course, knowing full well the limitations that rent regulation would impose. There, the court upheld the Rent Administrator's denial of a rent increase application based on "unique or peculiar" circumstances where the governing rent regulation imposed room and area requirements which the owner found burdensome.

Since the owner had purchased a vacant and dilapidated building and designed a renovation plan fully cognizant of the room and area requirements, he could not later claim that the burdens imposed by those legal requirements by themselves justified a rent increase.

A handful of other decisions exist consistent with the above limitations on the phrase "unique or peculiar." For example, in *Matter of Admin. Appeal of Saul Perlstein*, DHCR Dckt. No. FG220278RO (1992), the agency granted a U/P rent increase for an individual apartment where the rent was artificially low because of a family relationship between the owner and one of the tenants. In *Matter of Admin. Appeal of Wendy Kaufman*, DHCR Dckt. No. BL410784-RT, the agency granted a U/P rent increase where the first tenant in an individual apartment was a relative and employee of the owner. In *Matter of Admin. Appeal of Marder*, DHCR Dckt. No.DL41011RT, an individual tenant claimed that the owner's fraudulent behavior constituted a unique or peculiar circumstance justifying a downward rent adjustment.

The owner's reliance on *207 Realty Associates, LLC v New York State Div. of Housing and Community Renewal, 297 AD2d 569* (1st Dep't 2002), is unavailing, as the decision is consistent with the position asserted by DHCR in this case. The owner in *207 Realty* had filed several separate U/P applications to increase the maximum rents charged for certain rent-controlled apartments at the building. DHCR had denied the applications, but the Supreme Court granted the owner's Article 78 proceeding to the extent of remanding the proceeding to DHCR to conduct a comparability study.

The Appellate Division affirmed, finding that 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.[8]

In sum, the amendment is consistent with prior decisions and statements by the various housing agencies over the years and the courts. Pursuant to RSL §26-512(b)(3), when an owner voluntarily exits the Mitchell-Lama program, the initial rent-stabilized rent is the rent set forth in the last rental agreement. While the amendment recognizes that such an owner can seek a rent increase based on "unique and peculiar circumstances", the owner must show something more than the change in rent regulation prompted by the owner's knowing and deliberate decision to leave Mitchell-Lama. Had the Legislature intended the rent increase to be automatic, it would have expressly so stated. This Court does not find the amendment arbitrary considering all these circumstances.

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[8] Similarly, in *Paniccioli v DHCR*, 15 Misc.3d 1107(A)(Sup. Ct., Kings Co 2007), a finding of "unique or peculiar circumstances" was made with respect to one individual apartment where the owner did not collect rent increases and paid the tenant a lump sum of $10,000 cash and other consideration, including free rent, in exchange for a commitment to vacate the apartment, but the tenant later refused to vacate.

The Amendment is Constitutional

As the Attorney General has ably demonstrated in its motion to dismiss, the Code amendment at issue does not suffer from any constitutional infirmities.[9] For the reasons discussed above, DHCR did not violate the separation of powers doctrine when promulgating the amendment. Nor does the amendment constitute an unconstitutional taking of property without just compensation in violation of the Fifth and Fourteenth Amendments.

The owner alleges that the amendment effects a *per se* taking by limiting the owner to rent-stabilized rents below market value and depriving the owner of all economically beneficial uses for the property. The claim must fail. Our Court of Appeals has rejected the argument that limiting rents through rent stabilization constitutes a taking. *See Rent Stabilization Assn. v Higgins*, 83 NY2d 156 (1993). Further, the fact that the tenancy may continue indefinitely "does not, without more, render it a permanent physical occupation of property." *Id.* at 172. And again, nothing prevents the owner from seeking a U/P rent adjustment.

Nor has the owner demonstrated the deprivation of all economically beneficial uses of the property. It cannot be overlooked that the owner chose to participate in the Mitchell-Lama program and received significant financial benefits based on that choice, and then chose again to exit the program, fully aware that rent regulation would be imposed. The owner had no right to expect to receive market rents upon entering Rent Stabilization. Nowhere in the law was such a guarantee given, or even implied.

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[9] Some issue exists whether the constitutional claims are ripe for adjudication, as DHCR has not yet determined the owner's application. Nevertheless, in the interest of judicial economy and to move the case forward, this Court will address the issues.

What is more, the owner can apply for various rent adjustments available under the Rent Stabilization Law for the apartments based, for example, on financial hardship and improvements. Further, as demonstrated above, the owner is not foreclosed from seeking a U/P rent adjustment for an apartment upon a particularized showing of "unique or peculiar circumstances". As it cannot be said that the owner has been deprived of *all* economically viable uses, the taking argument must be rejected. *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992).

Similarly unavailing is the owner's claim that the amendment deprives it of equal protection under the law and thus violates the Fourteenth Amendment. The claim is based on the assertion that the amendment deprives the owner of a former Mitchell-Lama building of its right to apply for a U/P rent increase. Such is not the case. As demonstrated above, the owner, like all other owners, has the right to apply for the increase for ETPA apartments and demonstrate "unique or peculiar circumstances". Neither the prevailing statute, RSL §26-513, nor the *KSLM* decision, entitles the owner to more.

Equally without merit is the claim that the Contracts Clause has been violated. The owner argues that the Mitchell-Lama program was in the nature of a contract between the housing company and the government. The housing company received tax abatements and other benefits in exchange for accepting government regulation of rents charged and tenants selected. However, even if the relationship were viewed as a contractual one, the contract did not include the right to significantly increase rents based on "unique or peculiar circumstances" upon privatization. As demonstrated above, the only right was the right to apply for those rent increases, and the Code amendment preserves that right.

For all these reasons, the Attorney General's motion to dismiss all constitutional claims is granted.

DHCR Should Proceed Expeditiously to Determine the Pending Applications

As Columbus correctly notes, it is entitled to have DHCR process its applications. DHCR responds that it is ready to do so, but that its hands have been tied by the stay issued in this case by Justice Stone at the request of Columbus. Accordingly, the stay is hereby vacated so that DHCR can proceed without further delay.

This Court declines to direct DHCR to issue individual, rather than building-wide, docket numbers for the various applications, as that is a ministerial matter within the discretion of DHCR and not subject to mandamus or judicial dictate. However, the Court will impose a deadline for the decision, which is 150 days from the submission of the final papers permitted by DHCR in accordance with its usual custom and practice. That deadline is set to balance the rights of the various owners and the limited resources which DHCR has to process the thousands of applications which have been filed.

No basis exists for this Court to direct DHCR to apply the law in effect before the 2007 amendment was issued. First, as demonstrated above, the amendment neither represents a change in the law nor suffers from any infirmities. Further, the general rule is that if there is a change in the applicable law while a matter is pending before an agency, that law will be applied "absent a showing that the delay was willful or a result of negligence." *Matter of Evans v DHCR*, 284 AD2d 193 (1st Dep't 2001), quoting *Matter of Goldman v DHCR*, 270 AD2d 169 (1st Dep't 2000); *Matter of Schutt v DHCR*, 278 AD2d 58 (1st Dep't 2000), *lv denied* 96 NY2d 715 (2001). While considerable time has passed since the applications were filed, DHCR cannot be accused of excessive delay which was willful or negligent. Rather, the most significant delay is attributable to the litigation in this courthouse under the stay directed by Justice Stone in response to the request by Columbus, and DHCR cannot be blamed for that delay.

Accordingly, it is hereby

ORDERED AND ADJUDGED, that the motion by the Attorney General to dismiss the constitutional claims is granted; and it is further

ORDERED AND ADJUDGED, that the petition is granted to the extent of directing DHCR to proceed forthwith to process the applications filed by Columbus, as well as those filed by the owners in the *Highbridge* case, and to determine those applications within 150 days of the submission of the final papers; and it is further

ORDERED AND ADJUDGED that the Article 78 petition is otherwise denied. The Clerk is directed to enter judgment accordingly.

This constitutes the decision, order and judgment of this Court.

Dated: November 25, 2009

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J.S.C.

ALICE SCHLESINGER

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).