Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

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In the Matter of the Application of
THERESA MARS,

Index No. 25962/09
Motion Date: 10/6/10
Motion Cal. No. 25

Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules,

-against-

STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL, DEPUTY COMMISSIONER FOR RENT ADMINISTRATION LESLIE TORRES AND BRIDGEVIEW II, LLC.,

Re: Administrative Review
Docket Number XC 110005 RT

Rent Administrator's
Docket Number WB 110002 AD

Respondents.

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The following papers numbered 1 to 16 read on this petition for an order setting aside the determination of the Deputy Commissioner of the **New York State DIVISION OF HOUSING and COMMUNITY RENEWAL** ("DHCR") and deeming Petitioner a rent stabilized tenant at the subject premises.

	PAPERS NUMBERED
Notice of Petition-Petition-Exhibits.....	1-3
Affidavit of Service.....	4
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Memorandum of Law.....	9-10
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Reply.....	15
Record of DHCR Proceeding	

Upon the foregoing papers it is ordered and adjudged that the Petition for an order setting aside the determination of the Deputy Commissioner of the DHCR on the Petition for Administrative Review, and deeming Petitioner a rent stabilized tenant at the subject premises is denied, for the following reasons:

Petitioner is a residential tenant of apartment 203, at the building located at 26-45 9th Street, Astoria, County of Queens, State of New York. Respondent DHCR is the state agency responsible for the regulation of rents in all housing accommodations subject to the Rent Stabilization Law and DHCR had original administrative jurisdiction over this matter. Respondent **BRIDGEVIEW II, LLC** ("Bridgeview) is the owner of the building in which the Subject Premises are located. Petitioner is seeking judicial review of an Order and Opinion issued by the Deputy Commissioner under administrative review docket number XC110005RT which affirmed a Rent Administrator's order which determined the subject apartment was not subject to the Rent Stabilization Law. The Rent Administrator determined that as the subject apartment is governed by a "HUD Lease Agreement" contract, DHCR lacked jurisdiction over the apartment.

The administrative proceeding was initiated by the Petitioner as a request to determine the regulatory status of the subject apartment. Petitioner submitted a response to the proceeding, in which she stated that the prior managing agent had advised her that the subject apartment was a "non-section 8 unit" but nevertheless subject to the HUD guidelines. The Petitioner also stated that a prior DHCR order held that non-HUD apartments will become rent stabilized and that the current managing agent issued rent stabilized leases. She also stated that in 2004 and 2006 the subject apartment was registered as rent stabilized and, according to the prior DHCR order issued under docket number TI 120005OC, any units which ceased to be in the "HAP" contract shall be subject to the Rent Stabilization Law. In support of her response the Petitioner submitted various documents.

Bridgeview submitted a response in which it stated that the subject apartment is located in a building that has a Federal Department of Housing and Urban Development (HUD) Housing Assistance Payments (HAP) Project-based Section 8 Contract which provides rent subsidies for 101 of the 110 apartments. HUD provides these rent subsidies to eligible low income residents who pay up to 30% of their income towards a rent which is established by HUD, modified annually and that is consistent with market rents. Eligible occupants are re-certified annually to insure that they remain income eligible for the rent subsidies. If an occupant of a Section 8 unit earns a higher income that results in 30% of that income equaling or exceeding the HUD rent established for the unit, that tenant is no longer eligible to receive the rent subsidy and must pay the HUD contract rent. Upon a change in household income, that tenant can be "recertified" and once again become eligible to receive a rent subsidy. Should a tenant vacate a unit covered by the HAP contract, the property owner is required to rent that Section 8 unit to the next available low income applicant on the Section 8 waiting list. When

the current owner purchased the property in July 2004, there were certain units where the tenants' annual income exceeded the HUD income limits for the Section 8 subsidy and the tenants in those units were required to pay the full HUD contract rent. The new owner, Bridgeview II LLC, entered into a Use Agreement with HUD to maintain affordability through the year 2017 for the 101 units occupied by income eligible tenants. Therefore, under the Use Agreement, the owner must maintain the HUD, HAP Project-based Section 8 contract for the 101 units.

Bridgeview also presented evidence that the prior landlord did not provide accurate information to Bridgeview on the status of all of the apartments and, as a result of this misinformation, some apartments were inadvertently registered with DHCR as Rent Stabilized (RS) apartments and subsequently, the incorrect registrations were withdrawn. The rents for these should have been registered at the full HUD contract rent upon transfer of ownership in July 2004. According to Bridgeview, these residents, which include the instant Petitioner, have enjoyed below market rents in a HUD subsidized unit that could have been rented to someone with financial need. To support these claims, Bridgeview submitted, the HUD-HAP contract, the HUD Rent Schedule for April 1, 2007, and the HUD Use Agreement HUD rent schedule.

In response to Bridgeview's submissions, Petitioner claimed that has not received Section 8 benefits since 2007, when the managing agent advised her that her annual income no longer qualified to receive Section 8 benefits. Accordingly, the Petitioner asserted that the subject apartment was subject to rent stabilization. The Petitioner argues that Bridgeview is attempting to "lock in" rents at market rent. The Petitioner submitted leases from 2001 to 2003; letters from the managing agent; a 2004 lease; a letter from the prior managing agent; rent registrations for 2004; a rent stabilized lease for 2004-2006; a letter from the owner and a Section 8 re-certification package.

In response, Bridgeview submitted a statement in which it set forth that the apartment occupied by Ms. Mars, #203, was an apartment which was covered by the original Federal Department of Housing and Urban Development (HUD) Housing Assistance Payment (HAP) contract, more commonly known as a HUD Section 8 housing unit. In fact, the apartment complex was covered by a project based Section 8 HAP contract. Bridgeview pointed out that Ms. Mars was a non Section 8 tenant because at some point during her prior years of tenancy, her total household income rose and that income exceeded the income eligibility requirement for Section 8 and therefore, she was required to pay the full HUD approved maximum rent for the apartment, which was $955.00. Bridgeview also claims that although Ms. Mars, as well as several other tenants, continued to occupy their Section 8 apartments, even though they were not eligible for the HUD Section 8 subsidy, this occupancy did not change the status of the apartment which continued to be covered by the HAP contract.

Bridgeview also stated that she was a tenant at the time of the mortgage pay-off, and although she was over the Section 8 income eligibility requirements, her apartment remained in

the contract and her rent was inadvertently set at the HUD maximum rent at that time. When the HUD BMIR mortgage was paid off, there was some confusion about whether her apartment fell under the regulation of the New York State Rent Stabilization Law and Regulations and therefore would be subject to rent stabilization. Based on this, the prior managing agent registered the incorrect Initial Regulated Rent for the apartment, which was subsequently corrected with the filing of an amended Rent Registration form. Bridgeview submitted a "U.S. Department of Housing and Urban Development" form entitled "Schedule of Tenant Assistance Request Due" for the subject building. The schedule listed all apartments subject to the HAP-HUD contract. The schedule listed the subject apartment as subject to the HAP-HUD contract, but noted that the Petitioner was "over income" on market rents.

The administrative record also contains a prior Rent Administrator's order, issued under docket number TI120005UC, entitled "Order Determining Facts or Establishing Rent" which was issued on May 4, 2007. The order concerned the subject apartment and six other apartments. In the order, the Rent Administrator determined that "[T]hese are temporarily exempt from the Rent Stabilization Code due to the Housing Assistance Program (HAP) Contract. Any units which ceased to be in the HAP contract shall be subject to the Rent Stabilization Code."

On February 6, 2009 the Rent Administrator issued an "Order Denying Application or Terminating Proceeding." In the order the Rent Administrator held that "[A]fter a review of the information/evidence in the record,…that the rent for the subject apartment is established pursuant to the terms and conditions of the HUD Use Agreement Contract." The Rent Administrator determined that DHCR had no jurisdiction over the "instant matter." On March 5, 2009 the Petitioner filed a "Petition for Administrative Review (PAR)" claiming that the subject apartment should be rent stabilized

On July 30, 2009, the Deputy Commissioner Torres issued an "Order and Opinion Denying Petition for Administrative Review." The Deputy Commissioner noted the following:

> In the instant case, however, since federal rent assistance is project-based and the owner, by its contract with HUD, has agreed to rent apartment 814 to an income-eligible person on a waiting list if the current tenant vacates, the Division cannot reduce the HUD-approved contract permitted to be charge the tenant who is not income-eligible. Since a rent-stabilized rent lower than the HUD contract rent would materially affect the goal of the federal housing program of placing income-eligible tenant into the subject apartment and keeping most the occupied by income-eligible tenants, the Division cannot find that the apartment is rent stabilized.
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> The owner's prior error in registering the apartment as rent-

> stabilized does not make the apartment rent-stabilized where the conditions for rent stabilization coverage are not present. DHCR has no jurisdiction to determine the tenant's eligibility to receive a subsidy.
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> Accordingly, as the petitioner has not raised any basis to modify or revoke the Administrator's determination based on the law and the record, the Administrator was correct in determining that DHCR has no jurisdiction over the subject tenant's claim.

Thereafter, the Petitioner commenced the subject Article 78 Petition to challenge the determination that the subject apartment was not subject to rent stabilization. The DHCR and Bridgeview, in opposition, assert, *inter alia*, that the PAR determination was neither arbitrary nor capricious and has a reasonable basis in the law and the record.

It is well settled that the court's power to review an administrative action is limited to a review of the record which was before the DHCR and to the question of whether its determination was arbitrary and capricious and without a rational basis (*see* Matter of Colton v Berman, 21 NY2d 322 [1967]; Matter of 36-08 Queens Realty v New York State Div. of Hous. & Community Renewal, 222 AD2d 440 [1995]). In the case at bar, the Court finds that the DHCR's order and opinion of September 30, 2009, which found that the subject apartment is not subject to the Rent Stabilization Law is in full accord with all applicable laws.

As noted in the PAR order the rent of the subject apartment is regulated by the Project-based HUD-HAP contract which was executed under the authority of the United States Housing Act and MAHRA. The United States Housing Act in conjunction with MAHRA provide the methodology by which HUD is granted the authority to establish rents for the subject apartment. The record unequivocally shows that the subject apartment is covered by the HUD-HAP contract. The Rent Stabilization Law sets forth restrictions on the amount of rent an owner may charge on a rent stabilized apartment. The Rent Stabilization constraints on rent conflict with the federal law. Section 8 of the United States Housing Act and MAHRA permit the Owner to charge a higher rent than permitted by the Rent Stabilization Law. Moreover, as noted in the PAR the Rent Stabilization Law constraints on the rent increases materially affects the goal of the federal housing program. As the Rent Stabilization Law interferes with the methods by which the federal law and statute was designed to achieve its goal, the state statute (in this case the Rent Stabilization Law) is pre-empted by the specific federal law. The Rent Administrator and Deputy Commissioner properly recognized the conflict between Section 8 of the United States Housing Act (as supplemented by MAHRA) and the RSL. DHCR properly recognized that the RSL interferes with the methods by which the federal statute are designed to reach its goal of providing housing to low income families. Accordingly, DHCR correctly

determined that the subject apartment is covered by the Project-based HUD-HAP contract and this specific federal statute preempts the RSL. *See*, Mother Zion Tenant Association v. Donovan, 55 A.D.3d 333 (1st Dept. 2008); *See also*, Real Estate Board of New York v. City Council, 16 Misc.3d 530 (2007).

Additionally, the fact that the prior owner provided the Petitioner leases on rent stabilized lease forms and registered the subject apartment with DHCR as rent stabilized is insufficient to confer rent stabilized status on the apartment. Thus the Petitioner's allegation that the Owner waived pre-emption is without merit. Rent regulatory status cannot be changed by estoppel or waiver and the existence of a lease on a rent stabilized lease from is insufficient to confer jurisdiction where the Rent Stabilization Law is pre-empted by a federal statute. See, Heller v. Middagh Street Assoc., 4 A.D.3d 332, 771 N.Y.S.2d 533 (2nd Dept. 2004.)

An administrative agency's interpretation of applicable statutes and regulations shall be given due deference where such construction is not irrational or unreasonable (*see* Salvati v Eimiche, 72 NY2d 784 [1984]; Matter of Albano v Kirby, 36 NY2d 526 [1975]; 985 Fifth Ave., Inc. V State Div. of Hous. & Community Renewal, 204 Ad2d 630 [1994]). Based on the above, the determination by Deputy Commissioner Torres, in the July 30, 2009 Order has a reasonable basis in the law and record and is neither arbitrary nor capricious. Accordingly, Petitioner's application is denied and the Petition is dismissed.

The Court notes that it has separated the NYS DHCR File from the moving papers, pursuant to McKinneys Unconsolidated Law Section 8608 and this file will be kept in Chambers for the NYS DHCR to pick up.

Dated: October 12, 2010

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ORIN R. KITZES, J.S.C.