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 ADMINISTRATIVE APPEALS OF:

Riverside Tenants' Association
and
Joralemon Realty LLC

PETITIONERS

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ADMINISTRATIVE REVIEW
DOCKET NOS: AW230034RT through AW230038RT
and
AW230030RO through AW230034RO

RENT ADMINISTRATOR'S
DOCKET NOS: ZH230002OD through ZH230006OD

ORDER AND OPINION DENYING OWNER'S AND TENANTS' PETITIONS FOR ADMINISTRATIVE REVIEW

On November 14, 2012, the above-named Tenants' Association filed Petitions for Administrative Review (PAR) of orders issued by the Rent Administrator on October 11, 2012, concerning the housing accommodations known as 10, 20, and 30 Columbia Place and as 24 and 32 Joralemon Street, Brooklyn, NY 11201. On November 15, 2012, the above-named owner also filed PARs against the same Rent Administrator's orders. Because these PARs all concern Rent Administrator's orders that address the same facts and law (which orders were consolidated), they have been consolidated for a determination herein.

The proceeding below was commenced on August 31, 2011, when the owner filed an application to modify the courtyard area of the subject complex with a commensurate reduction in the legal regulated rents of affected tenants. The owner's application sought permission to modify the courtyard service by building an underground garage under the area at issue, and creating a new courtyard service on top of said garage. The lengthy and involved history surrounding the courtyard service is set forth by the subject Rent Administrator's orders and need not be repeated herein. The Rent Administrator denied the owner's application, finding that the application was premature in that the proposed modification is complex and includes significant issues that need to be approved by other municipal and state agencies having expertise in the areas of complexity involved before it can be approved by DHCR. The owner's application was denied without prejudice to the owner's re-filing said application when the owner has obtained the necessary final plans and permits from the appropriate agencies required to execute these plans.

The Commissioner notes that there is presently an outstanding rent reduction order for the loss of the full courtyard service, which has been in effect since 2000. The owner's claim, that the tenants' could file service complaints if the garage project was completed and the modified service was not provided, is meaningless. The Agency would not issue another rent reduction order for failure to maintain the courtyard service that was already not being maintained and was already the basis of an outstanding rent reduction and rent freeze.

The owner's PARs allege, in substance, that the application herein is complete enough for the Agency to render a determination.

The owner's PARs further allege that due process and fairness require that the owner's application be approved now, contingent on approval by necessary reviewing agencies, before the owner expends significant time and expense getting additional approvals; that, should the project differ from the plan proposed in the application under consideration herein, DHCR could modify its determination as appropriate at that time, or entertain a tenants' complaint that the modified service is not being provided; that the application herein is supported by several reports; and that the denial of the owner's application was based on speculation that the plans at issue might change, which is erroneous pursuant to the holding of WEOK Broadcasting Corp. v. Planning Bd. Town of Lloyd, 79 N.Y.2d 373 (1992).

In their PARs, the tenants allege, in substance, that, due to the massive and unique nature of the proposed substitution and reduction of services, which is dependent upon the approval of numerous agencies, the Rent Administrator properly terminated the owner's application as premature; that the application should have been denied with prejudice because the project will result in increased commercial traffic, and in the total deprivation of the courtyard service for several years (or perhaps forever) while the project is under construction. Further, the tenants allege that DHCR is bound by previous decisions of DHCR in previous proceedings dealing with these identical issues, as affirmed by the Supreme Court and by the Appellate Division; and that no rent increases can be charged or collected until an approved plan is implemented and there is an actual restoration of the service at issue.

Both parties made further submissions disputing the arguments submitted by the opposing side.

The Commissioner is of the opinion that these PARs should be denied and that the Rent Administrator's order at issue should be affirmed.

The Commissioner finds that the owner's and tenants' allegations

are insufficient to revoke the Rent Administrator's determination. The Commissioner finds that the Rent Administrator's determination that the application under consideration is different from prior applications, and is therefore not barred from consideration due to rejections by DHCR and by the Courts of prior, and different, plans is correct. The Rent Administrator was also correct to give substantial weight to the findings of an unannounced Agency inspection conducted on September 26, 2012. Said inspection found that the entrance to the proposed garage will be better than the entrance to the garage that was proposed pursuant to the previous 2008 application, which will improve traffic problems associated with the previous application, and that there is presently a high level of noise from the BQE, despite the fact that, at the time of inspection, the canopy of leaves from presently existing trees was full and there was less than normal traffic on the BQE. The Rent Administrator was therefore correct to find that these factors support the plan in the owner's application to modify the courtyard service with a commensurate reduction in rent for affected tenants pursuant to RSC Section 2522.4(d).

The tenants' claim that the RSC does not permit an owner to eliminate a required service, even for a temporary time, and that, if the owner is allowed to proceed, the required courtyard service under consideration will be lost for years while construction of the proposed project takes place, or might even be lost forever. While the Commissioner understands the tenants concerns regarding safety and noise issues connected with construction of the proposed project, if the owner is in the future permitted to carry out such construction, the construction will have to be carried out in conformance with all applicable codes, rules, and laws providing for the safety and comfort of those who, like the tenants herein, are in proximity to such construction.

The above-outlined reasons further support the Rent Administrator's determination to deny the owner's application without prejudice to the owner re-filing said application when, and if, the owner has obtained the necessary plans and permits to execute the modification proposed by such application.

The Commissioner finds that the Rent Administrator correctly found that DHCR could not make a decision on the basis of evidence submitted by the owner in support of the application herein. The owner has also submitted documents from the Landmark Preservation Commission (LPC) and from NYC Department of Buildings (DOB), placing great emphasis and importance on a Permit obtained from the LPC. The Commissioner notes that this Permit is dated May 28, 2009, and can only be based upon the prior plans under consideration in the 2008 application which was, as explained above, rejected by DHCR as affirmed by the courts. As the

project proposed in the instant application is materially different from the project proposed by the 2008 application (or it would have to be rejected pursuant to previous DHCR and Court decisions), said LPC Permit cannot apply to the instant project. The DOB document relied on by the owner likewise pertains to the previous 2008 plans and application, as said document is dated March 24, 2008. Accordingly, the Commissioner finds there are no valid LPC or DOB permits, or other agencies' approvals, submitted by the owner that pertain to the instant project.

The Commissioner finds that the Rent Administrator correctly determined that the project under consideration is extremely complicated and technical in nature, and that the review and permit process conducted by other agencies with jurisdiction over relevant issues will inform DHCR (and the parties) with respect to the form that the project will finally take. Before the Rent Administrator, the owner submitted a "Geotechnical Investigation and Foundation Recommendations" Report conducted by URS (the "URS Report"), while the tenants submitted an "Environmental and Land Use Impact Report" prepared by the New York Environmental Law and Justice Project (the "NYELJ Report"). It is noted that the Commissioner refers to the owners "revised April 3, 2009" URS Report as this is the most recent URS report submitted by the owner. Section 5.3 of the URS report suggests that certain aspects of the project should be "...analyzed carefully in conjunction with discussions with the NYCDOT engineering department to verify that no special construction provisions or restrictions will be required which could impact the project." Said URS Report also raises various issues pointed out by the NYELJ report, including liquefaction, interference with the structural supports of the BQE, problems with bearing soils, possible soil contamination and required environmental clean-up caused by an abandoned fuel tank, groundwater and lateral earth pressures, other groundwater considerations, and possible impact on adjacent structures.

The NYELJ Report, submitted by the tenants, further indicates that the owner needs to obtain a Highway Work Permit from the NYSDOT pursuant to Section 52 of the NY Highway Law, that NYSDOT will also probably require a full environmental analysis, that NYSDOT and NYCDOT will probably not approve the project because of potential impact on the BQE, that final approval from various state agencies cannot be obtained without the project first undergoing a NYS Environmental Quality Review, that the project site is located within New York City's coastal zone which means that the project is subject to review by the WRP, that NYSDOT will not give permission for the project to go forward without Waterfront Revitalization Program (WRP) approval, and that WRP review would also be required for any local land use approval proceeding, including local discretionary actions, including those subject to the city's land use review (ULURP), including environmental (CEQR) and

variance procedures, and including other 197-a plans.

The owner makes no specific rebuttals regarding the allegations of the above cited statements of the NYELPJ and of the tenants that significant review and approval of other agencies will be required before the proposed modification can begin. Contrary to the administrative record, the owner claims that LPC approval has been obtained and that only DOB approval is still required. As stated above, the owner has not submitted an LPC Permit for the current proposed modification. Further, the owner's simple and unsupported statements that only LPC and DOB approval of the modification is required is not persuasive in the face of the detailed and supported allegations of the tenants and the NYELPJ Report stating that review of many other agencies will be required in the initiation and completion of the proposed modification.

The owner is correct in stating that, generally, DHCR does not make the granting of an application for modification of services contingent on the prior approval of other agencies. However, the instant case is more complicated and involves more construction and safety issues than usual. This case involves many interrelating and often highly technical issues of feasibility, permissibility and safety in the construction of the proposed underground parking garage with a landscaped courtyard on top of it. As set forth above, these issues include proximity of the BQE and other structures, coastal considerations, water table and landfill issues, possible contamination of the site and required cleanup thereof, and ongoing archeological requirements and oversight by the LPC. In such a project, it is highly reasonable to expect that there will be extensive involvement of other agencies, and that such involvement may very well materially change the nature of the proposed modification, or even render such modification untenable. The Commissioner therefore finds that the Rent Administrator acted reasonably in dismissing the owner's application until the owner can obtain required review and approval from agencies with expertise and jurisdiction over the many complicated aspects of the proposed modification.

Finally, the Commissioner does not find that the WEOK decision (supra.) supports the owner's contention that the instant modification may not be denied on the basis that the plans for such modification might change. WEOK is not analogous to the instant case, and did not, in fact, concern a situation in which a proposed plan might change. Rather, in WEOK, the Court of Appeals agreed with the lower Courts' findings that the courts' role in reviewing determination made pursuant to the State Environmental Quality Review Act (SEQRA) is to determine whether the agency took a hard look at the proposed project and made a reasonable determination based thereon, that review under SEQRA is not a vehicle for adjudicating zoning issues, that the Town Planning Board in

that case made an erroneous determination in the face of detailed and extensive factual evidence contrary to said determination, and that aesthetic impact may be considered when a proposal is reviewed pursuant to SEQRA. The WEOK decision, did not address a proposed project that might change, and does not stand for the proposition that a proposed project may not be denied because it might change. Thus, the Commissioner finds that WEOK decision is not analogous or relevant to the instant case.

The parties are advised that no rent restoration for the courtyard service will be allowed until the owner has completed a project approved by the Agency pursuant to an owner's application for modification of said service, with or without commensurate rent reductions as ordered, or until the Agency has issued a rent restoration order pursuant to a successful owner's rent restoration application.

THEREFORE, in accordance with the provisions of the Rent Stabilization Code and the Rent and Eviction Regulations, it is

ORDERED, that the findings of the Rent Administrator as set forth in the orders docketed under Docket Numbers ZH230002OD through ZH230006OD are affirmed, and that the tenants' and owner's PARs are denied.

ISSUED: MAR 2 1 2014

Woody Pascal
Deputy Commissioner