// ROUND 2 //

State of New York
Division of Housing and Community Renewal
Office of Rent Administration
Web Site: www.nyshcr.org

Gertz Plaza
92-31 Union Hall St.
Jamaica, NY 11433
(718) 739-6400

Docket Number:
AW 230038 RT
ZH 230006 OD

Notice of Filing of Petition for Administrative Review and Opportunity to Respond

Mailing Address of Tenant:	Mailing Address of Landlord:
VARIOUS TENANTS 32 JORALEMON ST BROOKLYN, NEW YORK 11201	JORALEMON REALTY NY c/o KENNETH K. FISHER COZEN O'CONNOR 277 PARK AVENUE - 20TH FLOOR NEW YORK NY 10172

Subject Building (if different from tenant's mailing address):

Number and Street Apartment Number City, State, Zip Code

State of New York Div. of Housing & Comm Renewal Rent Administration RECEIVED JAN 29 2013 • Gertz Plaza • 92-31 Union Hall Street Jamaica Queens, NY 11433 RENT INFORMATION

A petition for Administrative Review has been filed by STEPHEN DOBKIN, TENANTS' REP. Enclosed please find a copy of the petition along with answer forms on which to respond.

You may file an answer or objection to this petition stating your reasons for requesting that the petition be denied, unless you believe it should not be denied. To submit your answer, please be sure to do the following:

1. Prepare your original answer and make two copies using the answer forms enclosed.
2. Within twenty (20) days from the date of mailing appearing below, mail the original and one copy of your answer to the Division of Housing and Community Renewal at the address shown at the top of this notice, to the attention of the "Intake Section" of the bureau specified in this notice.
3. Retain a third copy of your answer for your records.
4. Be sure that your answer clearly displays the Administrative Review Docket number indicated in the upper-right-hand corner of this notice.

Complying with the above requirements will insure that your answer is considered in determining the petition.

January 9, 2013
Date of Mailing

State of New York Div. of Housing & Comm Renewal Rent Administration RECEIVED JAN • Gertz Plaza • 92-31 Union Hall Street Jamaica Queens, NY 11433 MAILROOM

■ Property Management Bureau
☒ Rent Control/ETPA Bureau
☒ Overcharge and Lease Violations Bureau
☒ Luxury Decontrol Bureau

RN-PAR (10/10)

State of New York
Division of Housing and Community Renewal
Office of Rent Administration
Web Site: www.nyshcr.org

Gertz Plaza
92-31 Union Hall St.
Jamaica, NY 11433
(718) 739-6400

Docket Number:
AW 230038 RT
ZH 230006 OD

Answer to Notice And/Or Application

32 JORALEMON ST, BROOKLYN 11201

Number and Street | Apartment Number | City, State, Zip Code

Instructions: Read the accompanying Notice and/or Application carefully. Write your answer to the Notice or Application in the space provided below. Be sure to include your signature and printed name, and the date. Mail or hand-deliver the original and one copy of your answer to the Division of Housing and Community Renewal at the address listed above.

SEE ATTACHED

State of New York
Div. of Housing & Comm Renewal
Rent Administration
RECEIVED
JAN 29 2013
Gertz Plaza
92-31 Union Hall Street
Jamaica Queens NY 11433
MAILROOM

I affirm the above is true of my own information, ~~knowledge~~ and belief.
Signature of ◇ Owner ◇ Tenant

Date: 1/29/12 (Check one and sign): _____

Type or print signer's name here: Joel Wiener

It is not necessary that the above be sworn to, but false statements may subject you to the penalties provided by law.

RTP-3A (10/10)

OWNER'S RESPONSE TO TENANTS' PETITION FOR ADMINISTRATIVE REVIEW

Docket Nos: ZH230002OD through ZH230006OD

Premises: Riverside Apartments
10, 20, 30 Columbia Place
24, 32 Joralemon Street
Brooklyn, NY 11201

Tenants: Various (see list of affected tenants attached as Exhibit B to Tenants' PAR)

Owner: Joralemon Realty NY LLC

Owner's Representative: Kenneth K. Fisher
Cozen O'Connor
277 Park Avenue
New York, NY 10172
(212) 883-4962

State of New York
Div. of Housing & Comm Renewal
Rent Administration
RECEIVED
JAN 29 2013
92-31 Union Hall Street
Jamaica Queens, NY 11433
MAILROOM

PRELIMINARY STATEMENT

Owner respectfully submits this response in opposition to the Petition for Administrative Review ("PAR") filed by the Riverside Apartment Tenants Association ("TA") seeking modification of the Rent Administrator's October 11, 2012 Order ("Order"). The Order denied Owner's August 31, 2011 Application for Modification of Services ("Application") without prejudice on the sole basis of purported prematurity because Owner has not yet obtained all governmental approvals necessary to physically perform the contemplated construction work.

Prematurity provides no rational basis to modify the Rent Administrator's denial of the Application from "without prejudice" to "with prejudice." As demonstrated below, and in Owner's November 15, 2012 Petition for Administrative Review[1] ("Owner's PAR"), the Application should not have been denied on the basis of prematurity because DHCR approval is not contingent on other agencies' approvals and mere speculation that Owner's plan may change

[1] A recitation of the background and procedural history of this dispute is set forth in the Owner's PAR.

State of New York
Div. of Housing & Comm Renewal
Rent Administration
RECEIVED
92-31 Union Hall Street
Jamaica Queens, NY 11433
MAILROOM

while obtaining such approvals does not bolster the Rent Administrator's otherwise erroneous determination of prematurity. *See* Point I, *infra*.

Notwithstanding the fact that the sole basis of denial was prematurity, the TA's PAR seeks to turn the Order into a denial of the Application with prejudice on entirely different grounds. However, as the TA's arguments concerning, *i.e.*, deprivation of services and res judicata were rejected, and therefore did not form the basis of the Order's denial without prejudice, the Order cannot be "modified" to a denial with prejudice, as the TA urges, on alternate, rejected bases. *See* Points II-IV, *infra*.

Finally, the TA seeks to have DHCR more forcefully declare that rent increases will not go into effect until the Owner's plan is actually implemented. This request is unwarranted because, among other reasons, Owner agrees. *See* Point V, *infra*.

Therefore, the TA's PAR should be denied in its entirety.

I. THE APPLICATION IS NOT PREMATURE

As set forth in detail in Owner's PAR, the Application is not rendered premature merely because the contemplated modification or decrease of services will require certain other governmental approvals. Nor is a determination of prematurity properly based on speculation untethered to any record evidence that Owner's plan may change in the course of obtaining such approvals.

A. Approval of the Application Is Not Dependent on Obtaining Permits

The Rent Administrator's refusal to approve the Application before Owner has obtained other approvals necessary to implement the plan is both arbitrary and unprecedented.

If DHCR meant to require DOB-approved plans prior to consideration or approval of an application for permission to change or decrease services, its rules and regulations would so

MAILROOM
State of New Yo
Div. of Housing & Comm

provide. They do not, in contrast to an application for building demolition,[2] or, in the case of major capital improvements, where a completed application must include "copies of all necessary approvals from applicable government agencies for the work done" prior to DHCR's consideration of an application to increase rents.[3]

The absence of any such requirement is further confirmed by DHCR's response to Freedom of Information Law ("FOIL") requests filed by the Owner on October 22, 2012 and November 7, 2012, seeking copies of "[a]ny and all DHCR determinations and orders in the last 5 [and, in the November 7 request, 20] years concerning applications for modification of services, which orders and/or determinations required the applicant to obtain permits and/or approvals from other agencies or entities as a condition to consideration or approval of the application." DHCR's striking response to the first FOIL request, a mere two days after it was filed, contained only a copy of the Order appealed from, along with the July 14, 2009 order denying Owner's prior modification application.[4] DHCR's response to Owner's November 7 FOIL request furnished no additional determinations or orders. In other words, in at least the last twenty years, DHCR apparently has never required any other owner to get a DOB permit for,

---

[2]No order approving an application to demolish a building may be issued "[u]ntil...plans for the undertaking have been approved by the appropriate city agency." 9 NYCRR 2524.5(a)(2)(i). Further, pursuant to DHCR Fact Sheet #11: Demolition, an owner's "application will be rejected and not docketed or accepted for filing, unless it contains...Plans that have been reviewed and approved by the NYC DOB..."
See http://www.nyshcr.org/Rent/FactSheets/orafac11.htm.

[3]DHCR Fact Sheet # 24: Major Capital Improvements, available at http://www.nyshcr.org/Rent/FactSheets/orafac24.htm. Likewise, the Instructions for DHCR Form RA-79 for a rent increase based on MCI advises owners that they may apply for an increase if they have "applied for or secured all required approvals" but that no increase will be issued until final approvals are received. *See* http://www.nyshcr.org/Forms/Rent/ra79ins.pdf (emphasis added). *See also, e.g., In re Claudia Henschke v. DHCR*, NYLJ, p. 27, col.3 (4/30/98) (1st Dep't) (landlord's failure to submit required DOB certification regarding a new plumbing system as required by DHCR justified denial of application for MCI rent increase).

[4] The July 14, 2009 order is not in any way responsive to the FOIL request. Although the 2009 order mentions Owner's lack of a permit from DOB in its recitation of the contents of the record, DCHR did not deny the application on the basis of prematurity despite the tenants having strenuously argued that issue.

Div. of Housing & Comm Renewal
Rent Administration
RECEIVED
JAN 22 2013
92-31 Union Hall Street
MAIL ROOM

say, replacing an operator-elevator with an automated elevator, or changing the size and location of a laundry room, each of which would require a construction permit.

Because denial of the Application based on a lack of other agency approvals constitutes a clear error of law, the TA's PAR seeking to modify the Order to a denial "with prejudice," based on prematurity, must be denied.

B. Mere Speculation Does Not Warrant a Finding of Prematurity

The Rent Administrator's musings that, *i.e.*, "the plans will most likely be subject to change" and that "one can anticipate...various entities...may require changes for the plan" (Order at 2 and 3) are patently insufficient to deny the Application based on prematurity. *WEOK Broadcasting Corp. v. Planning Bd. of Town of Lloyd*, 79 N.Y.2d 373, 384 (1992) (agency's findings which are not "supported by any factual data and at best are mere conjecture...cannot be deemed a 'reasoned elaboration' of its determination"). Leaving aside that, as discussed below, the approval process indicates that the plans will not change in a manner that affects the tenants, certainly neither the Rent Administrator nor the TA knows if the plans will change during the DOB approval process. Once the zoning analysis was approved pursuant to Directive 14, a requirement for Landmark Commission approval, the remaining DOB review is of the means and method of construction, not the design.[5]

Any approval-related changes will be technical in nature and will have no effect on the tenants or the overall plan as approved by the Landmarks Commission. Accordingly, such information is completely irrelevant to DHCR's determination as to whether the proposed plans are consistent with the RSL and RSC. The issues for determination by the Rent Administrator are only a) whether the proposed modification restores courtyard services, b) whether the modification comports with the RSL and c) whether rents should be decreased and if so to what

[5] *See, e.g.*, http://www.nyc.gov/html/dob/html/development/permits_howto.shtml.

extent. Note, the services in question have already been defined in DHCR's 2000 rulings as a courtyard "including vegetation, walkways and benches" with unrestricted tenant access.[6]

The plans, along with Owner's extensive expert submissions, contain all the information DHCR needs to make the determination regarding restoration and modification of services and any reduction of rent. Indeed, the plans already have been approved by one critical reviewing agency: the Landmarks Commission.[7] And the Landmarks Commission requires preliminary zoning approval from DOB, which Owner also obtained.[8] Were the plans to change in any material respect, Owner would be required to re-seek approval of the modified plans from the Landmarks Commission. Owner's PAR, Exhibit B at 3 ("[t]he Commission reserves the right to amend or revoke this permit...in the event that the actual building or site conditions are materially different from those described in the application or disclosed during the review process.").[9] There is no record basis supporting the Rent Administrator's speculation that the Landmarks Commission approved plans will need to be modified. DOB's review of the plans will not and cannot change the essential design of the project or the services Owner proposes to provide to tenants.

In the Order, the Rent Administrator claimed a need to review DOB-approved plans in order to assess the "impact on the residents." Order at 3. But no part of the DOB approval process will change the "impact" of the plans on tenants to an extent that would affect whether or not the Application should be approved by DHCR. The DOB approval process may result in a change in <u>how</u> the plans are implemented, but it will not result in a change in the fundamental

---

[6] *See* Owner's March 2, 2012 submission in further support of Application, Exhibit M at p.4.
[7] *See* Exhibit B to Owner's PAR.
[8] *See* Exhibit C to Owner's PAR.
[9] In *Denova, Inc.*, Adm. Rev. Dckt. No. OD230022RO (9/26/00) (Exhibit I to Owner's PAR), the Rent Administrator disallowed a portion of the owner's application to increase rent based on an MCI involving façade work because masonry work was not performed on all of the exposed sides of the building. The owner filed a PAR, contending that the restoration work was completed and approved by the Landmarks Commission. In granting owner's PAR, the Commissioner – citing "LPC's approval of the work" – approved the rent increase for the façade work.

design of the plans or the courtyard and parking services to be provided. Thus, the remaining approvals are irrelevant to DHCR's determination, which is why DHCR has apparently never imposed this requirement on any one else.

Lastly, the Order erroneously observes that "owner seeks immediate final and dispositive relief ... on the basis of plans it intends to effectuate in the future." Order at 3 (emphasis added). This is not the case. Owner has always maintained that any approval by DHCR could be made contingent on Owner obtaining all other necessary approvals and completing the work.[10] Indeed, the commencement of the work depends on such approvals (and actual completion of the work is a prerequisite to restoration of the rents), so the specification of such contingency in the Rent Administrator's Order is, in point of fact, not even necessary. Moreover, this position is contrary to DHCR's invitation to seek advance guidance on what could be done and its implications, as set forth in the 1999 Order.

Because denial of the Application based on the speculative possibility that the plans may change in the course of obtaining other agency approvals constitutes a clear error of law, the TA's PAR seeking a modification of the Order to a denial with prejudice, based on prematurity, must be denied.

II. THE ORDER CORRECTLY FOUND THAT THE APPLICATION IS CONSISTENT WITH THE RSL AND RSC

Contrary to the TA's bald contention, the Application is fully consistent with the RSL and the RSC, and thus satisfies RSC § 2252.4(d)(3) (permitting decrease in services and rent if "such decrease is not inconsistent with the RSL or [the RSC]"). The Application also amply shows how the proposal constitutes the virtually complete restoration of services as specified in DHCR's prior orders concerning the rent reduction. Accordingly, the Rent Administrator correctly determined that:

[10] *See* Owner's March 2, 2012 submission in further support of Owner's Application at p. 15 n.13.

State of New York
Div. of Housing & Comm Ren
Rent Administration
MAILROOM

> Generally, the new design if effectuated is an improvement...as vehicles entering the area would immediately, upon clearing the building line of the driveway, execute a sharp left turn and descend a ramp into the underground garage...[and] the result would be that the remainder of the area past the garage would be vehicle free.
>
> The trees...remain a concern but staff...observed that the noise level in the recreation area from traffic on the [BQE] was very high...
>
> These factors support that portion of the owner's application pursuant to RSC § 2522.4(d) that it should be allowed to proceed with the proposed project with an appropriate permanent rent decrease.

Order at 3. While the TA claims – without support – that the proposal will allegedly "introduce routine commercial traffic" (TA's PAR at 2), the Order correctly recognizes that Owner has relocated the entrance to the parking garage to address the previously expressed concern concerning traffic.[11] Likewise, the TA's unsupported claim that removing the existing trees is an "impermissible deprivation of services" (TA's PAR at 2) was properly rejected. As the Order correctly recognized, the replacement of the existing trees with more trees will have no measurable effect on noise, air quality, or tenant enjoyment of the courtyard. Moreover, DHCR has never held that a replacement landscape feature must be identical to what it replaces, because specific landscaping features are not a required service.[12]

The TA fails to make any substantive argument that the Application is inconsistent with the RSC and RLS and, accordingly, the TA's attempted reliance on its rejected arguments concerning an alleged deprivation of services fails to provide any valid basis for modification of the Order.

[11] Owner maintains that DHCR erred in finding that Owner's prior 2008 Application introduced or increased traffic *in* the courtyard. Under the prior plan, cars would have used the BQE Easement access road, which was never part of the required service.

[12] Were DHCR to hold to the contrary, the flood of disputes over trees displaced by superstorm Sandy would be enormous.

State of New York
Div
92-31 Union
Jamaica Queens
MAILROOM

III. THE ORDER CORRECTLY DISCUSSED THE APPLICATION

The TA's contention that the Discussion section of the Order contains errors is demonstrably false and, in any event, fails to support its request for modification of the Order.

A. The Order Correctly Found that the New Design Is an Improvement

In discussing the impact of vehicles on the courtyard services, DHCR properly found that the new design is "an improvement" over the prior plan because the underground parking facility will have no deleterious effect on noise levels in the Courtyard, air quality or tenant safety. No cars will be in or even alongside the western edge of the Courtyard, because the access ramp has been moved to the northern end of the Courtyard. Accordingly, DHCR correctly determined that the "result would be that the remainder of the area past the garage would be vehicle free." Order at 3. The Order did not err in finding that the lack of vehicular traffic in or near the Courtyard is an improvement.

B. The Order Correctly Found that the Construction of the Garage Would Result in a Loss of About 3% of the Original Recreation Areas

As set forth in the Owner's Application, the only quantifiable decrease in the base date recreational area as represented by the 2011 Proposal is that 3% of the Courtyard area (700 square feet of courtyard space) will facilitate vehicular access to the below-grade parking facility. Thus, the 2011 Proposal would preserve more of the original green space than the approved 2002 Application, which called for retention of seven (7) parking spaces, comprising approximately 2,700 square feet of Courtyard space, or the 2008 Proposal, which called for something closer to a 10% reduction in total Courtyard area. *See* Application at 15.

The Order correctly found that the "construction of the garage would result, according to owner's plan, in a loss of about three percent of the original (pre-service reduction) recreation area." Order at 2. The TA's current and prior submissions concede this calculation.

MAILROOM
State of New York
Div. of Housing & Comm Ren

C. The Order Correctly Found that the New Trees Will Grow to Heights Similar to the Existing Trees

As set forth in the Owner's Application, 8 trees will be replaced by 25 new trees that together have a total caliper and canopy comparable to those they are replacing. Application at 19.[13] As nothing in the TA's submissions refuted this contention, the Order correctly found that the "proposal calls for...new trees planted which will purportedly grow to heights similar to the existing trees." Order at 2.

* * *

As demonstrated above and in Section II, *supra*, the Order correctly found that the improvements to the way in which vehicles will access the underground parking facility and the value of the replacement trees as measured against the current trees' impact on noise levels in the Courtyard from traffic on the Brooklyn-Queens Expressway "support that portion of the Owner's Application pursuant to RSC § 2522.4(d) that it should be allowed to proceed with the proposed project with an appropriate permanent rent decrease imposed." Order at 3.

IV. THE ORDER CORRECTLY DETERMINED THAT THE APPLICATION IS NOT BARRED BY PRIOR PROCEEDINGS

As DHCR itself has articulated, the Division's review of this Application is entirely de novo.[14] Because the current Application is significantly different from the prior application, DHCR properly rejected the TA's argument that the Application is barred by Owner's prior application:

> Res judicata and collateral estoppel prevent adjudicative bodies from hearing a case which has already been heard or re-deciding issues that have already been determined. In the instant case there are differences in the proposed plan from the previous submission

JAN 2 9 2013
92-31 Union Hall Street
Jamaica, Queens, NY 11433
MAIL ROOM

[13] Under the RSC, tree replacement is a de minimis landscaping change of a required service. See 9 NYCRR § 2523.4(e)(11); 9 NYCRR § 2202.16(g)(11) (listing as de minimis condition "Landscaping – modification; failure to maintain a particular aspect of landscaping where the grounds are generally maintained"); MED, LLC v. DHCR, 2008 N.Y.Misc LEXIS 10172, at *1 (N.Y. Sup. Ct. 2008) ("[t]he modification or failure to maintain a particular aspect of landscaping ... are de minimis").

[14] *See* DHCR Reply Affirmation in opposition to June 24, 2010 Article 78 Petition at ¶¶ 5, 15.

that are significant as well as alternate relief suggested here that is new.

Order at 2 (emphasis added). As demonstrated below, the Order correctly determined that differences in the instant Application render res judicata and collateral estoppel inapplicable.

A. The 2008 and 2011 Applications Have Significant Differences

The Rent Administrator correctly determined that there are "differences" in the proposed plan from the previous submission which are "significant."

First, the Application explicitly seeks approval for a decrease in services pursuant to Section 2522.4(d) of the RSC, as opposed to a modification of services pursuant to RSC 2522.4(e).[15]

Second, the current Application places the entrance to the below grade parking facility immediately next to the entrance to the Courtyard at Joralemon Street. Thus, any cars going into the parking area will do so without driving next to the Courtyard at all, let alone entering it.

Third, the Application calls for the use of only 3 percent (approximately 700 square feet) of the Courtyard to provide access to the below-grade facility, in contrast to the 10 percent provided in the 2008 Application. Also, the Application, unlike the 2008 Application, converts a 2,730 square foot portion of the BQE Easement from asphalt to greenspace.[16]

Accordingly, the Order correctly determined that "there are differences in the proposed plan from the previous plan that are significant." Order at 2. The TA's reliance on inapposite decisions involving reconsideration of a single application to DHCR (*Matter of Peckham v. Calogero*, 54 A.D.3d 27 (1st Dep't 2008) (TA's PAR at 4) does nothing to alter the Order's proper rejection of the TA's res judicata argument because, in this case, Owner has clearly

[15] Although Owner continues to reserve its position that the Application does not in fact represent a decrease in services, Owner has filed for such a decrease due to DHCR's rulings on the 2008 Application.

[16] Because the BQE Easement access road must be available for repairs to the highway, it cannot be considered tenant common area. However, replacing the asphalt with lawn improves the overall visual experience from within the courtyard.

• Gertz Plaza •
90-31 Union Hall Street
Jamaica Queens, NY 11433
MAILROOM
JAN 29 2013
Rent Administration
RECEIVED

submitted two separate applications with two different courtyard plans under two distinct provisions of the RSC that result in different determinations by DHCR.

V. THE ORDER CORRECTLY PROVIDES FOR RENT ADJUSTMENTS "ONCE THE PLAN IS EFFECTUATED"

Finally, the TA's frivolous request to have the Order more forcefully declare that rent increases will not go into effect until the plan is actually implemented is patently unwarranted because the timing of rent adjustments is not disputed. As Owner previously acknowledged, "obviously any order determining this Application and determining the new rents would be contingent on completion of the restoration and/or the order could authorize the restoration to proceed, with the rents to be set upon completion of the work."[17] The TA's argument suggests that they would have Owner proceed with the excavation and construction and have DHCR determine the effect on rents after the fact. Whether or not such a step is practical, it is certainly contrary to public policy. As there is no dispute as to the timing of rent adjustments, the Order appropriately recognized that "under DHCR policy the rent will be then increased if granted once the plan is effectuated." Order at 3. No further emphasis or clarification is necessary.

CONCLUSION

For the foregoing reasons, the TA's PAR should be denied in its entirety.

State of New York
Div. of Housing & Comm Renewal
Rent Administration
RECEIVED
JAN 29 2013
Gertz Plaza
92-31 Union Hall Street
Jamaica, Queens, NY 11433
MAILROOM

[17] Owner's March 2, 2012 submission in further support of Application at p.15, n.13.