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By Fedex and Fax

June 6, 2012

Rent Administrator Lilia Albano
New York State Division of Housing
and Community Renewal
92-31 Union Hall Street
Jamaica, New York 11433

Re: Docket Nos. : ZH230002OD
ZH230003OD
ZH230004OD
ZH230005OD
ZH230006OD

Premises: 10, 20 and 30 Columbia Place
& 24, 32 Joralemon Street
Brooklyn, NY 11201

Dear Ms. Albano:

This office represents The Riverside Apartments Tenants Association a/k/a the Riverside Tenants Association ("the TA") in opposition to the above-referenced identical applications (hereafter "Application") by Joralemon Realty NY LLC ("the Owner") for an order modifying services at the above referenced premises, and for a corresponding reduction in legal regulated rent.

On behalf of the Association, I am replying to the Agency's Requests for Additional Information dated March 22 and April 24, 2012.

The Application, Which Would Require the Total Elimination of All Courtyard Services for a Prolonged and Indefinite Period, Is Entirely Inconsistent with the RSL and RSC, Above and Beyond the Inconsistencies Already Found by DHCR

Jack was able to create his amazing beanstalk by dropping a few seeds on the ground, but the construction of the fairy tale courtyard and garden depicted by the Owner's experts, which will supposedly sit atop the proposed garage facility, will not spring magically to life. Instead it will require the *total destruction of the majestic old trees*[1] *and the present Courtyard*, the approval of actual architectural and engineering plans by the New York City Department of Buildings ("DOB") and a host of other governmental agencies, and the prolonged inability of the tenants to utilize the Courtyard or garden in any fashion, while demolition work is performed and a new underground facility is constructed, with the real possibility of an environmental disaster or building collapse.

The effectuation of whichever one of the Owner's proposals it happens to be peddling when the Agency decides this proceeding, will indisputably result in

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[1] It appears that the Owner has now conceded that the trees were fully grown on the respective base dates, but gracefully suggests that since their days are likely numbered they should be put out of their misery and replaced by younger ones. This approach appears to be entirely consistent with the Pinnacle policy toward long term tenants.

the *complete elimination of all Courtyard services for a period of years,* a necessary byproduct of the Owner's insistence on a modification which, instead of simply removing the concrete, and restoring the Courtyard, requires the destruction of the majestic trees, the total demolition of the Courtyard, and the construction of a below ground facility adjacent to the triple cantilever support structure for the Brooklyn Queens Expressway ("BQE").

The Owner has no right to whine about the continuing rent reduction since it is only its own intransigence in insisting on this Rube Goldberg solution to a simple problem that has caused this rent reduction to remain in place.[2]

The Owner fails to cite a single precedent permitting a substitution of services, whether or not a rent decrease is provided for, in which the required service will be *eliminated* for a prolonged indefinite period. This inherent element of the proposal makes it entirely inconsistent with the RSL and RSC which require the continued maintenance of required services such as the Courtyard. RSL §26-514; RSC §2523.4(a).

The Owner has failed to demonstrate that there is any *need* for this prolonged interruption of services. In *State Lafayette Co. v. DHCR,* 306 A.D.2d 414,

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[2] The RA can also take judicial notice of numerous pending rent overcharge proceedings which document that this Pinnacle entity, consistent with the documented practice of its parent company, has frequently ignored the rent reduction order and charged unlawful rents.

761 N.Y.S.2d 488, 489 (1st Dept. 2003) the Appellate Division stated its conclusion that the required service of a swimming pool could not be eliminated absent a showing by the Owner that "pool usage had dropped, that the cost of operating the pool had increased substantially from that of prior years, or that there were any changes in circumstances making continuation of the pool unfeasible." An owner's desire to take financial advantage of the neighborhood shortage of parking spaces is not within the enumerated class of justifications.

In fact, it is only now disclosed that the Owner's only purported *reason* for constructing this parking lot, which the Owner conveniently left out of its application, is "accommodating accessory parking for tenants." Thanks, but no thanks. The Riverside tenants have made it abundantly clear that they are overwhelmingly opposed to the construction of a parking lot, and at least one of the four "tenants" who the Owner previously cited in support of the lot has reneged on that commitment.

Since it is apparent to everyone that the obvious goal is the commercial exploitation of the property, the Owner's ridiculous claim in this respect reaches a new pinnacle of disingenuousness.

As noted above, it is precisely the Courtyard service that the Owner insists led to the rent reduction order which will be *totally eliminated for a prolonged*

and indefinite period of time during the demolition and construction phase of this "project", so fraught with uncertainties, according to the Owner's own expert engineering firm.

Further, as the Deputy Commissioner correctly noted in her Order of April 28, 2010 (Exhibit "B" to TA's submission dated February 6, 2012), the rent reduction order was based, in part, upon the introduction of motor vehicles into the space now occupied by the Courtyard, the number of which will be approximately *tripled* by the cars using the parking facility.

The Owner's interpretation of the Code would also permit it to add insult to injury. The simple reason that the May 10, 2000 rent reduction did not specifically cite the elimination of the old trees was that the prior owner at least had the decency to leave these magnificent trees standing. The proposed *removal* of those trees, the central feature of the Courtyard, will eliminate all vestiges of protection from the smog, noise and unsightliness of the BQE, functions that the Deputy Commissioner has already determined are served by the trees.

The Owner has failed to cite any authority for the proposition that the modification of a required service (the Courtyard) may permissibly be accomplished by the elimination of another required service (the trees).

In the Absence of Demolition and Construction Plans, Let Alone Approved Plans,

or Even a Definite Proposal, the Owner's Application Is Entirely Speculative

Nowhere in the Owners' responses does it dispute the TA's contention, fully supported in the submission by the New York Environmental Law and Justice Project ("NYELPJ"), that the approval of *actual plans* by, *inter alia*, the DOB, the New York State Department of Transportation ("NYSDOT") the New York City Department of Transportation ("NYCDOT"), the New York City Waterfront Revitalization Program ("WRP") and Metropolitan Transportation Authority ("MTA"), and the issuance of permits by these agencies, charged with the responsibility of protecting the health and safety of the public, will be needed before any work can even begin.[3]

To make matters worse, at this time, the Owner is refusing to be pinned down on which of its two pending proposals it intends to go forward. At Point IC of if its March 2 submission the Owner states "Owner does not intend to seek approval for two proposals, only one or the other." Will it be the original proposal, still before the Appellate Division, which provides for the full-time use of the DOT easement

[3] The Owner's continuing suggestion that this project involves a "de minimis" change is comparable to a suggestion that the destruction of the earth by a meteor would be de minimis in relation to the cosmos. The Owner's attempt to analogize the TA's position to an objection "to eliminating a doorman in favor of an intercom and electronic lock because the buzzer might work" deserves a Nobel Prize for invidious comparisons.

adjacent to the Brooklyn Queens Expressway ("the Easement Plan")[4], or the current proposal, which appears to require the line of cars entering the garage to make a left-turn and head directly down a ramp directly adjacent to one of the fully tenanted buildings ("the Left Turn Plan") ? [5] Perhaps the question should be submitted to an American Idol type vote.

Or will there be a new proposal, also unsupported by actual plans ? The Agency doesn't like this proposal ? No problem, the Owner will provide a sketch of an even more fantastic magical Courtyard.

The Owner's repeated insistence that the TA's objections to its proposal are *speculative* turns reality on its head. It is the Owner's proposal that is speculative - a *moving target* that changes at the Owner's whim, with no explanation or justification.

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[4] In the rejected application, the Owner's proposal called for the precise area of the BQE easement to be used, full time, as the entrance and exit ramp for the parking lot. In its March 2 submission, the Owner notes that [b]ecause the BQE Easement access road must be available for repairs to the highway, it cannot be considered tenant common area." If this is correct, what possible right would the Owner have to use this easement as a parking ramp ? It appears likely that the proposed change of the location of the ramp resulted from the Owner's realization that the use of the easement as a full time parking lot ramp is impermissible. Without actual approved plans, there is no way for this Agency to determine exactly what is permitted and what is not.

[5] One of the Owner's selling points for the rejected proposal was that it would not route traffic directly in front of any of the buildings. The present proposal does precisely that, creating an obvious danger to tenants and their children.

In the subject proceeding the Owner argues mightily that the present proposal is "materially different" from the one already rejected by the Agency. Shouldn't the Owner at least be required to identify which proposal it intends to carry out ?

If, as the Owner continues to insist, the Agency's determination that is presently before the Appellate Division is in no way, shape or form binding on the Agency's determination in the "de novo" present proposal, there is nothing preventing this Agency from requiring the Owner to identify precisely which proposal it intends to go forward with, and insisting that architectural and engineering plan approved by the Agencies with jurisdiction be provided.[6] Otherwise, isn't this proceeding nothing more than a massive waste of the Agency's, and the TA's, time and budget?

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[6] While the Agency is *mandated* to require approved DOB plans in a demolition proceeding, RSC §2524.5(a)(2)(i), it undoubtedly has the authority to insist upon such approvals, when appropriate in a modification or reduction of services application under RSC §2522.4(d) and (e). In the recent PAR proceeding, Admin.Review Docket No. ZB430045RT, decided February 24, 2012, (Exhibit "**A**"), in affirming an order by the RA granting permission to the Owner to substitute hallway trash pickup with a compactor system, the Commissioner noted that "there is evidence that the NYC Department of Buildings has approved the layout and design of the proposed compactor system." In his Order denying the prior Riverside Courtyard modification application, the RA noted "[i]t is clear from the record that the Department of Buildings has not approved plans for the proposed work and that the owner has not yet had them drawn." (Exhibit "B" to TA's February 6, 2012 submission). The TA submits that in the present case it would be arbitrary and capricious for the Agency not to insist on these necessary approvals, since, as the Owner has conceded, "[i]t is obviously not DHCR's province to determine whether the proposal is feasible from an engineering or geotechnical standpoint."

As is noted below, the Owner's latest submissions are riddled with indications of the speculative nature of the present application.

The humongous demolition and construction work that will be required to effectuate the present proposal put this application for a modification and permanent reduction in rent in a class by itself. The Owner has not cited any authority for a proposed modification or reduction of services which involves the kind of massive demolition and construction work which would necessitate the approvals of formal plans and the issuance of permits, which are required for the present proposal to become even remotely possible.

The TA respectfully submits that the present proposal, which is almost ethereal in its absence of formal shape, is far too speculative for the Agency to rule upon. Until formal architectural and engineering plans are prepared and submitted for approval, and permits are issued, the ultimate construction of the Fantasy Courtyard, is entirely speculative.

The Owner's Submission of Lengthy Technical Engineering Reports Fully Supports the Conclusion that Prior Approval of Actual Plans by DOB, NYSDOT, NYCDOT, NYCWRP") and MTA, Should Be Required before DHCR Makes A Determination on the Present Theoretical Proposal

The Owner's March 2 submission correctly notes that *"[i]t is obviously not DHCR's province to determine whether the proposal is feasible from an*

engineering or geotechnical standpoint." Emphasis supplied. The TA wholeheartedly agrees with that conclusion.

The Owner then proceeds to attach to this DHCR submission 136 pages consisting of a November 10, 2004 Geotechnical Investigation and Foundation Recommendations, and a revised version of same as of April 3, 2009, filled with engineering and geotechnical "subsurface investigation and site characterizations", "engineering evaluations and recommendations," and various charts and graphs that only an MIT graduate could love.

Presumably the Owner considers these submissions to be directly relevant to the present application or it wouldn't have bothered to include these reports.

However, consistent with its own conclusion contained above, the proper place for an evaluation of this material is *not* DHCR.

Only the various agencies with oversight over the technical requirements for demolition and construction, and the particular rules and requirements for performing such work adjacent to a major highway, and East River subway tunnel and the East River landfill itself, are in a position to make any sense of these reports.

The Owner's March 2, 2012 submission also notes that "URS did not

find that the project was not viable; it simply pointed out issues that might need to be addressed in the course of completing the project."

Nor did either of the URS studies find that the "project" *was* viable.[7] That does not appear to be the question which was addressed. Clearly, the viability of the "project" from an engineering standpoint is a question that must be determined by the agencies with the necessary expertise and oversight responsibilities. Whether the project is viable from a financial standpoint is a question that the Owner must address, but the TA respectfully submits that without formal plans being approved by the supervisory agencies, there is no way in the world that the Owner, or this Agency, can have the slightest inkling of: a) whether this project can actually, and safely, be built; and b) whether the costs are financially feasible.

The TA's February 6, 2012 submission contains a detailed analysis by the New York Environmental Law and Justice Project ("NYELJP") (Exhibit D-V) of the original November 10, 2004 URS Study, which pointed up the numerous potential dangers projected in the URS Report itself.[8]

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[7] Since the second URS study was completed on April 3, 2009, at a time when the Owner's original "Easement" proposal was still pending before the RA, it would appear that this study is based on the original proposal, which the Owner now contends is "materially" and "substantively" different. It is ironic that the Owner has accused the TA of acting in "bad faith" in allegedly submitting a "flagrantly irrelevant document."

[8] Not to worry. The Owner assures the Agency that "[a]ny concerns there are concerning engineering or geotechnical aspects of the project will be addressed at the appropriate time."

The revised URS report, updated on April 3, 2009, is filled with provisos that make it impossible to draw a definite conclusion as to viability. *See,* e.g., p.2, fn 7:

> installation of deep foundations at this site could be hampered at some locations should any pre-existing foundations or debris remain below pile cap locations;" ("...some voids were noted under the footing at that location which extended some distance under the building. It is not known whether this feature is unique to this location, or exists at other locations, but if it does, this would serve to increase the risk of building damage from construction vibrations");

p.12:

> It could have an impact on construction as the piles could serve as potential obstructions to driving temporary sheeting for support of excavations or if a deep foundation is used of support the new building. It is recommended that this issue be studied in more detail as part of the final design process;

p.19:

> the piles supporting the retaining structure for the access roadway of the BQE may pose as obstructions to installation of a temporary retaining structure along the western side of the site. Available information regarding those foundations should be analyzed carefully in conjunction with the DOT engineering department to verify that no special construction provisions or restrictions will be required which could impact the project.

Finally, it must be noted that in its April 14, 2012 Response to the

NYELJP Report, URS appears to have abandoned any pretense of engineering objectivity and has become more of an advocate for the Owner. For example the claim is made, at p.2 of the Response, that "[i]n any event, the construction will be performed in accordance with all applicable NYC building code requirements." At p. 3, URS assures the Agency that "[a]ppropriate measures will be taken to ensure that construction vibration threshholds do not cause liquefaction." In the absence of actual plans, it is hard to find the basis for these and other reassuring claims, which will need to be reviewed by the Agencies with the appropriate engineering expertise.

The Doctrines of Res Judicata and Collateral Estoppel Preclude DHCR from Determining Issues and Claims in a Manner Inconsistent with the Prior Determination

The Owner's attempt to distinguish successive agency determinations from the basic rules of res judicata and collateral estoppel is incorrect and unavailing. See, e.g., *D'Alessandro and Baltra v. DHCR et.al.,* 92 A.D.3d 421, 937 N.Y.S.2d 589 (1st Dep't 2012).

Assuming arguendo that the "new and improved" Courtyard application is determined to be substantively or procedurally distinguishable, it remains the law that any issues or claims which were necessarily decided in the prior DHCR determinations are res judicata and the Landlord is barred by the doctrine of collateral estoppel from seeking a new determination with respect to them. *Ryan v.*

New York Telephone Company, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823 (1984) ("What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding.")

These issues and claims which have been definitively determined in the 2008 proceeding include, *inter alia*, a) the existing trees provide noise, pollution and unsightliness protection from the adjacent BQE; b) the removal of the existing trees and the introduction of vehicular traffic comprise a further reduction in services.f

A more complete list of the numerous issues and claims already finally determined by the Agency is set forth on page 15 of the TA's February 6, 2012 submission.

The Owner Has Conceded, With One Last Trick Up Its Sleeve, that No Rent Restoration is Possible Unless and Until Its Magical Mystery Courtyard Is Actually Constructed

Throughout its March 2 submission the Owner continues to engage in the subliminal suggestion, based upon magical thinking, that the making of a *proposal* is sufficient to effectuate an actual physical change.[9] While this may be true in Disneyland, it does not appear to be the case in Brooklyn.

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For example, "the proposal constitutes the virtually complete restoration of services as specified in DHCR's prior order concerning the rent reduction"; "the new courtyard garden is so clearly an improvement upon the current asphalt parking lot"; "In stark contrast, the instant Application does away with the pavement, restoring the Courtyard greenspace."

In its final footnote in its March 2 submission, the Owner concedes that "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 rents to be set upon completion of the work."

As is fully described in this submission, and in the TA's submission of February 6, 2012, the Agency should instead dismiss the Owner's Application.

If the Agency grants the kind of provisional order that is suggested in the aforementioned footnote, the Owner will no doubt jump at the opportunity to destroy the last vestiges of A.T.White's vision centered around a tranquil cloistered courtyard for people to escape the noisy, congested city streets.

The Owner Has Not Denied the TA's Claim that It Will Immediately Knock Down the Majestic Old Trees if the RA Grants the Present Application

Nowhere in the Owner's responses has it denied, contradicted, or assuaged the TA's emphatic concern expressed in the final heading of its February 6, 2012 submission that:

> "if the RA approves the present Application, the Owner will seize on that approval and begin immediately cutting down the majestic old trees that give the Courtyard its character and meaning. This will be done as a direct affront to the current tenants, whom the Owner is anxious to remove. It will be done even though there is a slim to

zero likelihood of the garage proposal ever being effectuated."

Unfortunately, this conclusion, uncontradicted by the Owner, is entirely consistent with well publicized practices of this Ownership group, which will chop down the trees to give the false impression of the parking lot as a fait accompli, or worse yet, "inadvertently" cause damage to these buildings, requiring possible vacature and/or demolition, an otherwise unobtainable goal. The TA urges the RA not be used by this notorious Owner, standing at the very pinnacle of contempt for the rent laws and regulations, to effectuate this underhanded goal.

CONCLUSION

For all the foregoing reasons, the Rent Administrator should deny the pending application for an order modifying services and reducing the legal regulated rent.

Dated: New York, New York
June 6, 2012

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By_____
Stephen Dobkin