WESTVIEW TASKFORCE, Inc.

P.O. Box 289 • Roosevelt Island • New York 10044

BY EMAIL AND FACSIMILE

August 21, 2009

Mr. Rich McCurnin
Assistant Commissioner
New York State Division of Housing & Community Renewal
25 Beaver Street
New York, New York 10004

RE: Westview Rent Increase

Dear Rich:

Thank you for meeting with us to review our questions regarding the Westview budget. We appreciate your willingness to reconsider any budget items in Westview's year-end June 30, 2010 budget that reflect material errors and subsequent adjustments. After carefully reviewing the budget line by line we have identified a number of items that reflect material errors. As this matter is urgent and time is of the essence we would like to review the following points with you and discuss making appropriate adjustments as necessary.

- **Inclusion of Arrears Funding**: The final budget for Westview includes a line item for $163,800 for "Debt Service – Arrears" (see line 90). The 1997 Workout Agreement applicable to Westview provides that arrears payments may only be funded in years when the building's income exceeds its expenses. Further, § 1728-1.5(h) allows arrears to be funded only in the first year of a two year budget cycle.

To remedy this error, the $163,800 allocated for "Debt Service – Arrears" in the Budget should be reduced to zero and the Rent Increase Order adjusted accordingly.

- **Forward Biennial Budget Required**: Under the rules and regulations governing BRD's, DHCR is required to finalize and act upon a two-year budget (see, e.g., 9 NYCRR §§1728-1.2(a) ("Preparation and approval of biennial budget"), 1728-1.5(c)(4) ("Fuel cost projections for the second year of the two-year budget shall be made at the same rate for the first year unless . . . a different rate is appropriate."), 1728-1.6(b) ("The approved biennial budget, currently in effect, may be modified by the division . . . ."). The requirement that DHCR produce a forward biennial budget at the conclusion of the BRD process is reflected throughout the regulations governing the BRD process (see §§1728-1.2-1.6) including in the initial step required to commence a BRD, in which "[t]he [housing] company shall submit a proposed budget for the two succeeding one-year periods." See §1728-1.2(a)(1).

The most recent rent determination is based on only a one-year budget for year ending June 30, 2010. This deviation from the legally mandated two-year budget requirement has dire consequences for Westview Tenants.

1) A Forward Bienniel budget will enable accounting for falling electricity and gas prices as well as other expense items that contribute to a projected deficit. Both electricity and gas are approaching 2002 levels (see Rebecca Smith, *Electricity Price Plummet*, Wall Street Journal at A1 (Aug. 12, 2009)) and (see Christine Buurma and Jason Womack, *Natural Gas Falls to Seven-Year Low*, Wall Street Journal (Aug. 19, 2009)).

2) Only a Forward Bienniel budget will provide Westview tenants with opportunity for a significant rent reduction upon the anticipated Mitchell-lama dissolution pursuant to § 1728-1.6.

To remedy this error, the deviation from the legally mandated two-year budget requirement, a complete an accurate, forward-looking, two-year budget for the years ending June 30, 2010 and June 30, 2011 should be determined and the Rent Increase Order adjusted accordingly.

- **\$686,000. for Reserve Funding**: The primary objective of all budget rent determination processes is set forth in the words that commence the regulations governing BRDs. That language says, "It is hereby declared to be the purpose of this Subpart to formulate a systematic and objective budget and rent determination procedure; . . ." § 1728-1.1(a). The terms "systematic and objective" point to the requirement that DHCR take whatever measures are reasonable and necessary to make a reliable and accurate rent determination; in fact, the remaining sections governing the BRD process provide rule after rule aimed at ensuring BRD processes are as fair and accurate as possible. While the reliance on projections is a necessary part of a BRD, and while projections cannot be expected to be 100 percent reliable, the BRD process requires DHCR to gather and analyze financial data to ensure its final budget is as accurate as possible. Specifically, we are concerned because a major line item in the current budget uses the figure of \$686,200 (see budget line 86) which accounts for income but there is no information about what expenditures, if any, will be paid for out of this reserve. This line item alone represents approximately 10% of monthly rents in Westview and has not been applied responsibly to fund necessary building maintenance.

To remedy this error, \$686,000 in unaccounted Reserve Funding, a specific list of maintenance items should be identified and funds specifically budgeted from this line item. Additionally, any specific line items including the elevator upgrade (\$752,000.) documented in the 2003 Rent Determination and never completed should be credited to the current budget and the Rent Increase Order adjusted accordingly.

- **Lost Income From Warehousing of Apartments 2004-2007**: As you know, beginning in 2004, in connection with the attempted sale of Westview to Sheldrake, the Housing Company began the illegal process of warehousing the building's apartments over the repeated objections of WTI and numerous Westview tenants. According to the press release that accompanied New York State Inspector General

Kristine Hamann's report entitled *An In-Depth Review of the Division of Housing and Community Renewal's Oversight of the Mitchell-Lama Program*, "Rather than safeguarding the integrity of the program, DHCR, through its own shortcomings, allowed housing companies to flout rules regarding apartment allocation, financial reporting, and contracting". According to WTI's accountant, Marc Freedman, by the time the warehousing ended in 2007, the practice had cost the building $1,000,000 in lost rental income. DHCR has correctly pointed out that WTI signed a September 2006 Letter of Intent for the sale of Westview that called for the pre-existing vacancies to be used to generate cash to meet the Housing Company's demand on price. However, DHCR's suggestion that WTI's eleventh-hour support to facilitate a deal that would have secured the future for all Westview tenants and that WTI is now estopped from seeking to recover lost income due to these vacancies is simply not accurate. Warehousing was initiated in 2004 by the Housing Company in anticipation of a building conversion that did not involve the tenants, a full 2 years before Tenant negotiations were initiated in 2006. In fact, only the Housing Company and DHCR have standing to affect the outcome of illegal warehousing. Tenants have no authority to implement any action on this matter, yet have been left to bear the financial consequences. We respectfully disagree with DHCR's position that the Housing Company's violation lacks a remedy, rendering any remedy meaningless and unenforceable.

To the contrary, to remedy this error, $1,000,000. in Lost Income From Warehousing, DHCR should set a repayment schedule requiring the Housing Company to credit Westview's budget an annual amount to be determined, until $1,000,000. has been repaid in full and the Rent Increase Order adjusted accordingly.

- **Unsupportable Cost Projections**: The final budget produced by DHCR contains several dramatic increases in cost projections over the prior year's actual costs that create *prima facie* questions about their reliability and accuracy. These include: (1) a 171.6% increase in administrative offices expenses from $15,797 (actual) in 2008 to $42,900 (projected) for the budget year ending June 30, 2010; (2) an 8.3% increase in security protection expenses from $282,497 (actual) in 2008 to $306,000 (projected) for the budget year ending June 30, 2010; (3) a 30.0% increase in water and sewer expenses from $249,915 (actual) in 2008 to $325,000 (projected) for the budget year ending June 30, 2010; and (4) a 24.5% increase in insurance expenses from $174,409 (actual) in 2008 to $217,200 (projected) for the budget year ending June 30, 2010. These increases are made all the more surprising by the fact that the Consumer Price Index for the New York City metropolitan area dropped by 0.6% from June 2008 to June 2009, the largest drop since 1955 (see United State Bureau of Labor Statistics, *Consumer Price Index, New York-Northern New Jersey: June 2009* (July 15, 2009) < http://www.bls.gov/ro2/bluecard.htm>). These four increases, alone, account for $168,482 in cost increases that have been passed on to Westview's tenants through higher rents. Each of these figures should be re-examined to ensure their accuracy and ultimately adjusted downwards.

  Equally problematic is DHCR's projections involving gas and electric costs. DHCR projected a 0.2% decrease in electric expenses from $1,531,501 (actual) in 2008 to $1,527,900 (projected) for the budget year ending June 30, 2010. This miniscule projected decrease seems wildly discordant with the fact that spot market prices for gas and electricity have fallen 40% and are approaching 2002 levels (see Rebecca Smith, *Electricity Price Plummet*, Wall Street Journal at A1 (Aug. 12, 2009)) and (see Christine Buurma and Jason Womack, *Natural Gas Falls to Seven-Year Low*, Wall Street Journal (Aug. 19, 2009)). Please note that WTI Accountant's electricity projections were based on information obtained from DHCR's Howard Friedman.

Again, the remedy here is for DHCR to re-examine its projections and complete an accurate, forward-looking, two-year budget for the years ending June 30, 2010 and June 30, 2011 that reflects a real and significant downward trend in expenses and the Rent Increase Order adjusted accordingly.

- **Minimizing Impact of a Rent Increase on Tenants**: § 1728-1.2(6) states that "[a rent] determination shall be based upon budget projections which shall take into account, among other factors . . . [the] economic impact on residents". This can be accomplished for any rent increase DHCR determines to be necessary based on complete and accurate projections. Specifically, WTI believes that in the event a projected deficit still exists after the foregoing remedies have been implemented, then, in light of the dire state of the economy and the fact that dozens of Westview tenants are already behind in their rents, DHCR should authorize or otherwise instruct the Housing Company to fund such one-time shortfall from the $1.1 million presently in Westview's tenant-funded reserve fund. The reserve fund is, afterall, funded by rents and could be used in part to alleviate the hardship of Westview's mostly low- and middle-income tenants now facing a rent increase during the midst of a dramatic recession. This proposed solution would lessen the blow of any increase for Westview's tenants (consistent with § 1728-1.2(6)'s mandate) without harming the Housing Company. As such, we believe this proposed alteration to the Rent Increase Order should be welcomed and accepted by DHCR.

We hope DHCR will give due consideration to the material errors in Westview's recent budget rent determination and proposed remedies presented above. As this is an urgent matter and time is of the essence, a prompt reply to this letter would be greatly appreciated. We look forward to discussing solutions and working to resolve these issues with you.

Sincerely,

Opher Pail — Co-Chair

Johan Marfey — Co-Chair

CC: Gary R. Connor, Esq., General Counsel, DHCR
Sheldon Melnitsky, Esq., Principal Attorney, DHCR Office of Legal Affairs
Hon. Debra VanAmerongen, Commissioner, DHCR
Jessica Lappin, NYC Council Member
Micah Kellner, NYS Assembly Member
Jose Serrano, NYS Senate