

At IAS Part ____ of the Supreme Court of the State of New York as and for the County of New York, at _____ Street, New York, New York on the ____ day of September, 2009.

P R E S E N T: _____
Justice of the Supreme Court

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In the Matter of the Application of Index No. /2009

WESTVIEW TASKFORCE, INC. and
JANET M. SHEA, YADIRA CERRATO,
HIRAM JACOBS, VIRGINIA CHAMBERS
and PETER ALBER, on behalf of the
Westview Taskforce, Inc., the official Tenants'
Association for the buildings located at 595
and 625 Main Street, Roosevelt Island,

Petitioners,

ORDER TO SHOW CAUSE

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

-against-

THE STATE OF NEW YORK DIVISION
OF HOUSING AND COMMUNITY RENEWAL,
ASSISTANT COMMISSIONER RICHMOND
MCCURNIN and NORTHTOWN PHASE III
ASSOCIATES, LP and NORTH TOWN
PHASE III HOUSES, INC.,

Respondents.

-----X
SIR AND/OR MADAM:

UPON THE ANNEXED VERIFIED PETITION OF WESTVIEW TASKFORCE, INC., duly
verified on the ____ day of September, 2009, the exhibits annexed thereto, and upon all of the prior
papers and pleadings and each of them heretofore had herein,

LET THE RESPONDENTS AND/OR THEIR ATTORNEYS AND/OR OTHER LEGAL REPRESENTATIVES, SHOW CAUSE before a Justice of this Court, at a IAS Part _____, of the Supreme Court of the State of New York, as and for the County of New York, at the Courthouse thereof located at _____ Street, Room _____, Borough of Manhattan, County, City and State of New York, on the _____ day of October, 2009, at _____ o'clock in the _____ noon of that day, or as soon thereafter as counsel may be heard, why an ORDER should not be made:

- a. Pursuant to Article 78 of the Civil Practice Law and Rules (CPLR) reversing, setting aside and/or otherwise modifying the Order of the Commissioner of the Division of Housing and Community Renewal, UDC-68 dated July 29, 2009; and
- b. Granting to the Petitioners such other and all further relief as this Court deems just, proper, equitable and appropriate under all of the circumstances herein.

It is further

ORDERED BY THIS COURT that pending the hearing and determination of this motion, the enforcement of the Order dated July 29, 2009 is hereby STAYED.

NOW, SUFFICIENT CAUSE HAVING BEEN ALLEGED AND APPEARING THEREFOR, let service of a copy of this Order, and copies of the papers upon which it was signed, along with exhibits if any, upon the Respondents as required by law, on or before the _____ day of October, 2009, be deemed service good and sufficient.

E N T E R :

Justice of the Supreme Court

b. Granting to the Petitioners such other and further relief as this court deems, just, proper, equitable and appropriate under all of the circumstances herein.

3. It is respectfully submitted that the instant Petition must be granted in its entirety, due to the fact that the Order of the Commissioner is arbitrary and capricious because: (a) the Commissioner permitted a line item for Debt Service Arrears in the amount of \$163,800.00 in violation of the 1997 workout agreement between Westview, the Respondent agency, and the Respondent owner; (b) in violation of Section 1728-1.5(h) the Commissioner allocated a portion of the increase in rent to cover debt service arrears in the second year for the Budget/Rent Determination Budget cycle; (c) failed to account for \$1,000,000.00 of lost revenues resulting from the owner's illegal warehousing of apartments (d) failed to engage in a strict balancing process in the Budget/Rent determination process by failing to minimize the impact of the increase on the tenants, relying on outdated projections for replacement funding and not requiring the owner to maximize efficiency; and (e) violated Section 1728-1.2-1.6 by failing to provide a forward looking biennial budget.

THE PARTIES

4. The Petitioner, Westview Taskforce, Inc., is the official tenants' association for the buildings located at 595 and 625 Main Street, a 361 unit family dwelling on Roosevelt Island, and maintain this special proceeding on behalf of all tenants affected by the Order sought to be reviewed herein.

5. Petitioners are members of the Westview Taskforce, Inc., and are representative of tenants of the Westview.

6. Upon information and belief, The New York State Division of Housing and Community Renewal ("DHCR"), the Administrative Respondent herein, is responsible for the supervision of certain Mitchell-Lama developments as mandated by the Private Housing Finance Law and various sections of Title 9 NYCRR.

7. Upon information and belief, Richmond McCurnin is the Assistant Commissioner of DHCR and a necessary party to this proceeding. It is Assistant Commissioner McCurnin's Order which is sought to be reversed herein.

8. Upon information and belief, the Attorney General of the State of New York, although not an actual party to the instant proceeding, is statutorily required to be served with the instant papers.

9. Respondent Northtown Phase III Associates LP was the applicant which, on behalf of Respondent North Town Phase III, Inc., filed an application for an increase in the maximum average monthly room.

PROCEDURAL HISTORY

10. The Order and Opinion sought to be reversed in the instant Article 78 is an Order of the Commissioner of Housing and Community Renewal, UDC-68 dated July 29, 2009, (hereinafter referred to as the "order") which awarded a 14.9% rent increase, a copy of which is annexed hereto as **EXHIBIT A**. This Order was issued following the filing of an application dated January 23, 2008 by Respondent North Town Phase III Associates LP on behalf of co-Respondent North Town Phase III Houses, Inc., requesting that the present rentals for the subject development be increased. Annexed hereto as **EXHIBIT B** is a copy of the proposed budget submitted by the Respondent owner.

11. The Petitioners herein submitted opposition to rent increase application, a copy of which is annexed hereto as **EXHIBIT C**. Annexed hereto collectively as **EXHIBIT D** are copies of subsequent submissions by Petitioner prior to the final determination.

12. The DHCR issued the final approved budget, a copy of which is annexed hereto as **EXHIBIT E**.

13. As the Court will note, the DHCR awarded what amounts to a 14.9% rent increase.

14. The Article 78 proceeding allows aggrieved persons to bring an action against a government body or officer so as to have the court review the administrative agency's determination.

In the instant case, this is the only vehicle by which Petitioners may challenge the Order of the Commissioner dated July 29, 2009.

15. In addition to the CPLR, other applicable statutes, rules, regulations or codes include the Private Housing Finance Law and Title 9, subtitle S, Chapter IV. Subchapter C of the New York Codes, Rules and Regulations the relevant section discussed herein are annexed hereto in their entirety as **EXHIBIT F**.

THE BUDGET AND RENT DETERMINATION PROCESS

16. 9 NYCRR Section 1728.1.2 sets forth the procedure that must be followed by the housing company and DHCR at the beginning of the budget/rent determination process.

17. First, 165 days prior to the commencement of the applicable two year period the housing company must submit a proposed budget for two succeeding one year periods. The DHCR's obligation prior to this submission is that 45 days prior to that 165 day window period the administrative agency must issue a directive requiring the submission along with necessary forms and instructions to the housing company, and within 15 days from the deadline from the submission, the DHCR must send a second notice. See 9 NYCRR Section 1728-1.2 (a) .

18. Subdivision 2 of Section 1728.1.2 requires the Division to analyze and review the proposed budget within a thirty day period following the deadline for budget submission. Subdivision 2 further requires the administrative agency while conducting its analysis to review opportunities that the housing company has to: (a) "maximize revenues, including, inter alia: increasing residential and non-residential occupancy rates, strengthening the terms of commercial and professional leases, reducing vacated and current arrears, adjusting air conditioning and other ancillary charges and the prudent investing of available operating cash and reserves;" and (b) reduce projected expenditures, including, inter-alia identifying and eliminating non-recurring expenses and achieving cost efficiency in ongoing expense items. See 9 NYCRR Section 1728-1.2 (a) (2)(i) and (ii).

19. After the submission of the proposed budget, if the administrative agency finds that projected revenues for the two year period will be sufficient to fund all housing company obligations without a rental adjustment, then the agency will grant approval to the housing company of the two one year budgets either by approving the budget that was actually submitted by the company or by approving the budget prepared by the administrative agency, whatever the case may be.

20. However, if the Division finds that the projected revenues for the applicable two year period do not appear to be sufficient without a rental adjustment then the final approval of the budget shall take place upon the conclusion of the rent determination procedure set forth in Section 1728.1.2 (b), which is separately annexed hereto as **EXHIBIT G**.

THE ORDER OF JULY 29, 2009 IS ARBITRARY AND CAPRICIOUS.

21. As indicated above, the Order dated July 29, 2009 of the Respondent DHCR is arbitrary and capricious.

DHCR Erroneously Included Debt Service in its Budget Analysis.

22. The court's attention is respectfully directed to **EXHIBIT E**, specifically line item 90, entitled "Debt Service Arrears." Such inclusion is in violation of the 1997 workout agreement, which is referenced in page 17 of the owner's certified financial statements, a copy of which is annexed hereto as **EXHIBIT H**, specifically applicable to the Petitioners herein. Such workout agreement clearly provides that arrears payments may only (emphasis added) be funded in years when the building's income exceeds its expenses.

23. It is obvious that the building income does not exceed its expenses otherwise the application itself would be fraudulent. As such, the DHCR erred by including \$163,800.00 for "Debt Service Arrears."

24. Of equal import, not only did the inclusion violate the workout agreement, but it also independently violates 9 NYCRR Section 1728-1.5(h). Said section reads in its entirety as follows: (h) Debt Service arrears. Debt service arrears shall be funded in the first year of the budget cycle. The required funding shall be the lesser of : the total debt service arrears or an amount equal to the

current debt service requirement, unless otherwise provided in an agreement restructuring the mortgage loan and approved by the Commissioner. See 9 NYCRR Section 1728-1.5 (h).

25. In the instant case the order sought to be reviewed issued after the first st year of the budget cycle had ended and consequently results in the arrears being serviced in the second year of the budget cycle.

DHCR Failed to Credit Lost Revenues from Unlawfully Warehoused Apartments

26. Beginning in 2004, in connection with the attempted sale of the buildings, Westview's owner began the illegal process of warehousing the buildings' apartments. In other words, rather than renting out the apartments to maximize income to the building, the owners left apartments vacant so as to maximize their value of the property upon its sale to investors who wanted to have the vacant apartments to rent or sell at unrestricted market rates.

27. Evidence of this fact is found in the September 2007 report by New York State Inspector General, Kristine Hamann entitled An In Depth Review of the Division of Housing and Community Renewal's Oversight of the Mitchell-Lama Program, a copy of which is annexed hereto as **EXHIBIT I**. As the court will note by a review of same, the Inspector General's report specifically provide that Westview, despite having a waiting list of more than 1,000 applicants as of August 2006, had 31 vacant apartments, each of which has been vacant for an average of 327 days. Further in the report the Inspector General traced the problem back to the purported sale of the Westview to a private entity known as Sheldrake with the clear intent of converting it to condominium ownership and almost immediately upon reaching an agreement of an intent to purchase vacancies began to rise.

28. Not only did the Inspector General's report go on to state that the DHCR took no action with respect to the warehousing but it is clear that the warehousing seems to again have been overlooked by the Commissioner on granting the application of the housing company for a rent increase. The illegal warehousing cost the building \$1,000,000.00 in lost rental income.

29. The DHCR's failure to account for this \$1,000,000.00 loss due to the owner's warehousing is in effect asking the tenants to pay for the lost revenue suffered as a result of the illegal acts of the owners by warehousing vacant apartments.

DHCR Failed to Provide a Forward Biennial Budget

30. Section 1728-1.2(a) requires that the DHCR finalize and approve a biennial budget. It is obvious that since the first year of the two year budget cycle had ended before the final budget was approved that the DHCR determination is based only on a one year budget for the budget year ending June 30, 2010.

31. . The final budget contains several increases in cost projections over the prior years' actual costs which raise issues regarding their reliability and accuracy.

32. These increases include but are not limited to (a) an increase of 171.6% increase in administrative office expenses from the actual amount of \$15,797.00 in budget year 2008 to the projected amount of \$42,900.00 for the budget year ending June 30, 2010; (b) a 30% increase in water and sewer expenses from the actual costs of \$249,915.00 in 2008 to a projected amount of \$325,000.00 for the budget year ending June 30, 2010; (c) a 24.5% increase in insurance expenses from the actual cost of \$174,409.00 to the projected amount of \$217,200.00 for the budget year ending June 30, 2010; and (d) an 8.3% increase in security protection expenses from \$282,497.00 actual costs in 2008 to \$306,000.00 projected for budget year ending June 30, 2010.

33. These projected increases alone amount to \$168,482.00 in cost increases that through this budget have been passed on to the Westview Tenants through the rent increase.

34. Of equal import, is the administrative agency's legal obligation with respect to Westview's first budget year. In the case of the present budget and rent determination process, Westview's first budget year already had come and gone as of the date of the Order sought to be reversed herein.

35. As such, the administrative agency could and should have made a full accurate rent determination for the first budget year, based on West view's actual income and expenses, to wit,

from the period of July 1, 2008 through June 30, 2009. See Section 1728-1.2(c)(1) (requiring the administrative agency to take into account actual experience and budget modifications during the current year to date).

36. Annexed hereto as **EXHIBIT J** is a report showing that in calendar year July 1, 2008 through June 30, 2009, based on income and expenses actually derived during that year, Westview actually broke even, and did not run any deficit, as the owner inaccurately projected that it had envisioned in its budget proposed to the DHCR at the beginning of the process. As such, DHCR, in reviewing the second year projected budget, should have taken into account that there was no deficit for 2008.

DHCR Failed to Engage in “Strict Balancing Process”

37. It is submitted that the administrative agency failed to comply with the requirements set forth in Section 1728-1.2 (a) and (b) in that it failed to engage in a “strict balancing process” between the needs of the owners and the needs of the tenants.

38. The statute is quite clear during the budget rent determination process, the administrative agency is legally obligated to perform an analysis as to the need for any rent increase in light of what a building’s expenses would be if it was operated as efficiently as possible. See 1728-1.2 (a) (2) (I) (ii).

39. A review of the proposed budget from the owner, the tenants’ response and the final approved budget, demonstrates that the administrative agency failed to properly analyze and account for the housing company’s failures to maximize revenues and minimize costs, by. Inter-alia increasing residential and non-residential occupancy rates, strengthening terms of commercial and professional leases, reducing vacated and current arrears, adjusting air conditioning and other ancillary charges, as well as failing to reduce projected expenditures including identifying and eliminating non-recurring expenses and achieving cost efficiency in ongoing expense items.

40. Under Mitchell-Lama Law, the first half of the balancing process involves the issue presented by the owners in their rent increase application; namely, to have a Mitchell-Lama

building's revenue be adequate to cover its projected expenses. Specifically, § 1728-1.2(4), states that "If [DHCR] finds that projected revenues for the applicable two-year period do not appear to be sufficient to fund all obligations without a rental adjustment, or if the company has applied for such an adjustment in connection with its budget submission" then "final approval of the budget shall take place upon conclusion of the BRD process."

41. The second half of the balancing process is comprised of three distinct statutory regulations that serve to counterbalance § 1728-1.2(4)'s projected income/expense calculation (hereinafter, "Counterbalances"). The first Counterbalance, which is found in Section 1728.1.2(6), applies directly to DHCR. In that section, the law states that "[a rent] determination shall be based upon budget projections which shall take into account, among other factors . . . [the] economic impact on residents" the proposed rent increase will have.

42. This Counterbalance carries particular weight in the case of Westview, as the building already has some of the highest rents in the entire Mitchell-Lama program. Presently, without any increase, Westview's rents are so high that they are borderline unaffordable for working and middle class New Yorkers, which is the very population the Mitchell-Lama program was created to serve. Any rent increase that puts Westview's rents out of reach for average, middle class New Yorkers would undermine the entire purpose of its enrollment in the Mitchell-Lama program.

43. Section 1728-1.2(6) mandates that DHCR's administrators keep this fact in the forefront of their minds when analyzing the Owner's rent increase petition. The State of New York never intended to provide Mitchell-Lama owners with significant tax breaks and low-interest mortgages so they could offer housing that middle-income New Yorkers cannot afford. To do so would constitute an unconscionable waste of taxpayer dollars that DHCR is legally required to prevent from happening.

44. The second and third Counterbalances, unlike the first, place specific legal responsibilities on Mitchell-Lama owners. The DHCR is obligated to follow their regulations, and is obligated to enforce them. Specifically, the second Counterbalance, found in Section 1728-

1.2(a)(2)(I) requires Mitchell-Lama owners to reduce the need for rent increases by “maximize[ing] revenues”, including inter alia: increasing residential and nonresidential occupancy rates, strengthening the terms of commercial and professional leases, reducing vacated and current arrears, adjusting air conditioning and other ancillary charges, and the prudent investing of available operating cash and reserves.” The third Counterbalance, found in Section 1728-1.2(a)(2)(ii) requires owners to reduce the need for rent increases by “reducing projected expenditures, including, inter alia, identifying and eliminating nonrecurring expenses, and achieving cost efficiencies in ongoing expense items.”

45. DHCR’s legally binding obligation to strictly enforce the second and third Counterbalances, is found within the same provision of the law, Section 1728-1.2(a)(2), which states that DHCR must determine if an owners’ two-year projected expense and revenues reflect that they have operated their building as efficiently as possible, and will, over the following years, continue to implement any and all additional efficiencies necessary to reduce the tenants’ rent burden.

46. These three Counterbalances, read collectively, make clear that a Mitchell-Lama owner’s right to have his building’s income cover its expense is not an absolute right, but rather a conditional one. In other words, the party seeking the benefit must first meet certain obligations in order to secure it.

47. Under the Mitchell-Lama Law, those statutory obligations are exceedingly clear: Mitchell-Lama owners must do everything possible to maximize their building’s revenues and to minimize its expenses, both presently and in the future, and that their building’s budget projections must reflect the cost benefits of such efficiencies.

48. With respect to the second budget year, DHCR clearly failed to take into account the fact that no actual deficit existed in the first year of the budget, and therefore, the second year budget projections upon which the Order is based, should have been significantly altered to reflect this

miscalculation thereby reducing the purported or imagined deficit presumed by the housing company to exist over the two year period of the proposed budget.

49. It is clear that the DHCR failed to take the economic impact upon the residents among the other factors it is required to by Section 1728-1.2 in rendering the decision it did.

50. It is clear that the owners did not in fact maximize revenues and minimize expenses.

**THE MANIFEST NEED FOR AND
ENTITLEMENT TO EQUITABLE INTERVENTION.**

51. As can be seen from all of the above, it is imperative that this court exercise its equitable powers and grant the temporary restraining orders (TRO) as requested herein.

52. It is submitted that there is little doubt that Petitioner's have a strong likelihood of success on the merits of this underlying proceeding.

53. Immediate, irreparable and imminent harm will occur if the Respondent owner is permitted to enforce the DHCR Order sought to be reviewed herein. The rents in the building at issue are among the highest of all the Mitchell-Lama properties in New York State. They have reached a level that no longer makes it affordable to the very people the program was designed to protect.

54. There are at this time numerous tenants who have already reached the "point of no return" in that the rents have reached a level of unaffordability and they are in arrears on their rent at the current rate.

55. If the owner is permitted to enforce the Order and charge and collect the increases before the court can review the Respondent administrative agency's Order, tenants may be evicted for the non-payment of the increase which may ultimately be deemed improper, or may be forced to move because they cannot afford the improper rent increase.

56. The Petitioners have no adequate remedy at law except through the court's exercise of its equitable powers.

57. In granting the TRO as requested the status quo would be maintained until the court can make a decision on the instant Article 78. Westview presently maintains a \$1.1 Million reserve fund that can easily cover any budget shortfalls, should any be found to exist.

58. For the foregoing reasons, it is respectfully requested that the instant petition be granted in its entirety.

59. No prior application for the relief requested herein has been made to this or any other court.

WHEREFORE, it is respectfully demanded that the instant Petition be granted in its entirety and that this court issue an Order:

- a. Pursuant to Article 78 of the Civil Practice Law and Rules (CPLR) reversing, setting aside and/or otherwise modifying the Order of the Commissioner of the Division of Housing and Community Renewal, UDC-68 dated July 29, 2009; and
- b. Granting to the Petitioners any and all further such relief that this court deems just, proper, equitable and appropriate under all of the circumstances herein, including but not limited to the award of attorneys fees.

Dated: New York, New York
September _____, 2009

WESTVIEW TASKFORCE, INC.,
and JANET M. SHEA, YADIRA CERRATO,
HIRAM JACOBS, VIRGINIA CHAMBERS
and PETER ALBER, on behalf of the Westview
Taskforce, Inc.
Petitioners

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Janet M. Shea, being duly sworn, deposes and says to be true and correct, under the penalties of perjury, the following:

I am one of the Petitioners in the instant Article 78 proceeding and have read the foregoing Petition and know the contents thereof. The same are true and correct to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

JANET M. SHEA

Sworn to before me this
_____ day of September, 2009

NOTARY PUBLIC

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Yadira Cerrato, being duly sworn, deposes and says to be true and correct, under the penalties of perjury, the following:

I am one of the Petitioners in the instant Article 78 proceeding and have read the foregoing Petition and know the contents thereof. The same are true and correct to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

Yadira Cerrato

Sworn to before me this
_____ day of September, 2009

NOTARY PUBLIC

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Hiram Jacobs, being duly sworn, deposes and says to be true and correct, under the penalties of perjury, the following:

I am one of the Petitioners in the instant Article 78 proceeding and have read the foregoing Petition and know the contents thereof. The same are true and correct to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

Hiram Jacobs

Sworn to before me this
_____ day of September, 2009

NOTARY PUBLIC

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Virginia Chambers, being duly sworn, deposes and says to be true and correct, under the penalties of perjury, the following:

I am one of the Petitioners in the instant Article 78 proceeding and have read the foregoing Petition and know the contents thereof. The same are true and correct to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

Virginia Chambers

Sworn to before me this
_____ day of September, 2009

NOTARY PUBLIC

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Peter Alber, being duly sworn, deposes and says to be true and correct, under the penalties of perjury, the following:

I am one of the Petitioners in the instant Article 78 proceeding and have read the foregoing Petition and know the contents thereof. The same are true and correct to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

Peter Alber

Sworn to before me this
_____ day of September, 2009

NOTARY PUBLIC