DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION

★ ★ ★

GABRIEL FINEMAN, Appellant /Tenant, V. SMITH PROPERTY HOLDINGS VAN NESS L.P., Appellee/Housing Provider	:	Case No.: 2016 DHCD **TP 30,842** 3003 Van Ness Street, N.W., Apt. W-1131

APPELLANT/TENANT GABRIEL FINEMAN'S OPPOSITION TO THE LANDLORD'S MOTION FOR RECONSIDERATION

The Appellant/Tenant Gabriel Fineman (the "**Tenant**") hereby submits this opposition to the Motion for Reconsideration (the "**Motion**"), filed by the Appellee/Housing Provider (the "**Landlord**"), of the decision (the "**Decision**") issued on January 18, 2018, by the Rental Housing Commission (the "**Commission**") in the case referenced above.

I. BACKGROUND

The Commission should reject this Motion because it raises no valid errors of law and fact in the Decision. As in all of the proceedings below, the Landlord has misconstrued the Tenant's claims and the

issues.[1] The Commission states the issues very clearly when it says that the only issue is:

> Whether the Housing Provider Was Required to List the Post-concession Amount of Rent Owed by the Tenant under the Lease Agreements as the "Rent Charged" on the RAD Forms. Decision, section II, page 14.

That is, the issue is one of notice. There is no issue in this case about the validity of concession leases because that issue was not raised by the Tenant. This was made crystal clear again in footnote 27 of the Decision that said in part:

> In this case, unlike Double H or Wilson, the crucial issue is not whether the Housing Provider and Tenant were free to enter into a contract below the rent level that could have otherwise legally been charged, but what the effect of such a contract is on the Housing Provider's future obligations to file and serve notice of the "rent charged" as regulated by the Act and, by implication, how much any future rent increases may be. Decision, footnote 27, page 36.

Yet, the Landlord again tries to find error relating to concession leases.[2] Perhaps future cases will deal with such issues, but this is not the case.

II. STATEMENT OF THE ISSUES RAISED BY THE MOTION

A. Did the Commission err in basing its holding in the Decision on the record of the proceedings before the Office of Administrative Hearings ("**OAH**")?

B. In reconsidering its holding, what weight should the Commission give to the new evidence introduced by the party requesting reconsideration?

[1] "As the Tenant stated in his Tenant Petition, in his Request for Summary Judgment, and in his Reply to the Landlords Opposition to the Request for Summary Judgment, the matter at issue in this case is the notice given to the tenant and specifically does not include the lease, how the rent is calculated, flex-leases, concession leases, or rent ceilings. Nonetheless, both the Landlord in its Opposition, …and OAH in its Order, focused primarily on the notion that concession leases are legal and proper. As will be shown below, OAH did not directly address the issues at the core of this case and committed multiple errors in construing the rent increase notice requirements that apply to housing providers." Tenant's Brief on Appeal, pages 1-2.

[2] This is most evident in that the first major issue raised by the Landlord is "… whether under the Rental Housing Act … there can exist a maximum legal rent which is greater than the amount actually paid by the tenant." Motion. section I.1, page 2.

C. Does the holding require particular results other than a change in the dollar amount placed on the Notice of Rent Adjustment to the Tenant?

III. ARGUMENT

A. THE COMMISSION DID NOT ERR IN BASING ITS HOLDING IN THE DECISION ON THE RECORD OF THE PROCEEDINGS BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS.

1. The Commission did exactly what it is supposed to do in reviewing an OAH decision – review claims of errors in the OAH decision that were raised on appeal and decide whether such errors were made by the OAH. In doing so, it may look only at the evidence before it from the record created in the OAH proceeding (the same evidence on which OAH is required to base its decision) and determine whether that evidence substantially supports the OAH decision.[3] Therefore, it was not an error by the Commission to use only the evidence that was before it and not to use documents only available to Landlord.[4] It was the Landlord's obligation to provide such evidence to the OAH at the hearing below and thus make it part of the record.

B. IN DECIDING WHETHER TO RECONSIDER ITS HOLDING, THE COMMISSION SHOULD GIVE LITTLE WEIGHT TO THE NEW EVIDENCE INTRODUCED BY THE PARTY REQUESTING RECONSIDERATION.

1. The Commission may consider legislative history pertaining to the intent of the Rent Control Amendment Act of 2006 (the "**2006 Amendments**") in determining whether the ruling by the OAH in this case was lawful and if the legislative history is relevant and meets certain

[3] "[I]t is a basic principle of administrative law that decisions 'should rest solely upon evidence appearing in the public record of the agency proceeding.' Harris v. District of Columbia Rental Hous. Comm'n, 505 A.2d 66, 69 (D.C. 1986). The Commission's approach comports with that principle, as well as with the requirement that administrative decisions be based on substantial evidence. D.C. Code § 2–510 (a)(3)(E) (2012 Repl.)" Carmel Partners v Commission 14-AA-623 & 14-AA-636 (2015).

[4] This is the general rule as illustrated by the Sawyer case: "Sawyer is therefore faced with the general rule that 'contentions not urged at the administrative level may not form the basis for overturning the decision on review.' Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1301 (D.C.1990)." Sawyer Prop. Mgmt. of Maryland, Inc. v. District of Columbia Rental Hous. Comm'n, 877 A.2d 96, 106 (D.C. 2005).

standards. However, most of the new exhibits submitted by the Landlord in connection with its Motion have no probative value because they: (a) are not related to the issue under consideration; (b) were created after the enactment of the 2006 Amendment; or (c) have not been authenticated or are not subject to judicial notice.

a) Exhibit 1 consists of:

(1) communications purporting to be from and to a lobbyist for landlord interests that occurred six years after the enactment of the 2006 Amendments. Statements made after the enactment of a law generally do not have any relevance as legislative history for that law.

(2) a purported copy of the Rental Housing Act (the "**Act**") before the enactment of the 2006 Amendments that was produced by the lobbyist and is not official. Again, this evidence has little relevance to the legislative history of the 2006 Amendments.

(3) a communication dated Feb. 6, 2006, concerning Mayor Anthony Williams's legislative proposal that was not approved by the Council and cannot be used to explain legislative intent with respect to a different bill that was eventually enacted as the 2006 Amendments.

b) Exhibit 3 is a transcript of a hearing on the Rent Control Amendment Act of 2005, a bill that was not passed by the Council and differed in many ways from the 2006 Amendments, including its retention of rent ceilings.

c) Exhibit 5 contains the April 13, 2006, bill approved by the Committee on Consumer and Regulatory Affairs that was discarded and replaced by a substitute bill on June 6,

2006, when the full Council acted on the 2006 Amendments.[5] Because the April 13, 2006, bill is a different bill than the bill approved by the Council on June 6, 2006, it is not part of the legislative history of the 2006 Amendments as it does not provide dispositive or meaningful guidance with regard to legislative intent.

d) Exhibit 6 is a summary of the legislative proposal submitted to the Council by Mayor Anthony Williams that was not adopted and should not be considered as part of the legislative history of the 2006 Amendments.

e) Exhibit 8 is a May 7, 2009, order approving a Voluntary Agreement that was issued several years after the enactment of the 2006 Amendments and therefore is not part of the legislative history of the 2006 Amendments.

C. THE HOLDING DOES NOT REQUIRE PARTICULAR RESULTS OTHER THAN THE CHANGE IN THE DOLLAR AMOUNT PLACED ON THE NOTICE OF RENT ADJUSTMENT TO THE TENANT.

1. It is premature to speculate on the impact of this holding on future cases involving different issues and different facts other than its impact on the present case of what dollar amount should be specified as the "current rent" on the RAD notice forms. The Commission, in its role as the promulgator of rent control regulations, is in the process of developing new rental housing regulations.[6] The comment cycle on these draft regulations would be the proper forum to seek

[5] The April 16, 2006, bill was replaced by the "consensus legislation" on June 8, 2006. Tenant's Reply to the Housing Provider's Opposition to the Motion for Summary Judgment, Exhibit 6, page 5. On June 8, 2006, the Committee "reconsider[ed] 3 bills approved by the Committee on March 16, 2006, which were subsequently mooted by the consensus legislation: Bill 16-457, the 'Rent Control Reform Amendment Act of 2006,' Bill 16-48, the 'Disclosure of Rent Ceiling Calculation Amendment Act of 2006,' and Bill 16-51, the 'Rent Control Statute of Limitations Amendment Act of 2006.'" Id. page 5. Thus, this Exhibit has no real probative value with regard to the 2006 Amendments.

[6] See the comments of Chairman Bonds at the oversight hearings on April 11, 2017, at 9 hours, 21 minutes into the hearing during the testimony of the Tenant where she said, "It is my understanding that in June they [revised regulations by the RHC] will be made public, and I guess, available for public comment." Available from the Council Hearing Archive at http://dc.granicus.com/MediaPlayer.php?view_id=2&clip_id=3885.

modifications to the regulations implementing the Rental Housing Act to the extent the Landlord deems such changes to be necessary.

2. In the Decision, the Commission goes through the steps of statutory construction that the Landlord and the OAH failed to do in the proceeding below.[7]

Section A.1 of the Decision seeks to answer whether the plain language of the Act clearly and unambiguously reveals and reflects the legislature's intentions. It looked at inconsistent uses of the term "rent charged" in the Rental Housing Act and decided that there was some ambiguity as to its meaning.[8] That was the chief finding in section A.1, despite the Landlord's vociferous objections to the Commission's reasoning as to why it reached that conclusion. Thus, there is nothing to reverse in A.1.

3. Section A.2 then examines the legislative history of the term "rent charged" and, in particular, the history of the 2006 Amendments. The Commission relied on the only legislative history in evidence.[9] It found that the Council used the term "rent charged" in the 2006

[7] Instead, the OAH simply proclaimed that the term "rent charged" was a term of art with no citation to any evidence or any authority. There was no evidence because the Landlord never introduced any or even made that argument. The Tenant in his Appeal noted in footnote 6 that "term of art" means: "a term that has a specialized meaning in a particular field or profession" and thus had to have this meaning between the parties involved with the notice. Tenants certainly use the plain language meaning.

The Commission observed in footnote 20 of the Decision that: "The ALJ did not explain when 'rent charged' took on this purported meaning in the industry or why the Council, in the 2006 Amendments, might have intended that meaning."

[8] The Tenant looked at this same issue in section 3 of Schedule 1 to its Motion for Summary Judgment, and reached the opposite conclusion – that there was no ambiguity. The difference is that the Commission looked at the term in the current law and the tenant looked at the term when the 2006 Amendments were passed. That is, the Commission looked at how the term changed the law and the Tenant looked at what the term meant to the Council in 2006. Both are valid approaches. However, since the Commission is the entity assigned responsibility for interpreting statutory language, the Commission's view must prevail.

[9] Schedule 6 to the Tenant's Motion for Summary Judgment.

Amendments to mean the actual rent.[10] The Landlord has asked the Commission to consider new evidence of legislative intent on reconsideration in the form of such items as: (i) a video of a 2005 hearing; and (ii) communications in 2012 by a lobbyist for landlord interests with an official in the mayor's office to refute this finding.[11] Furthermore, the Commission determined that the term "rent charged," when used in the Act, should ordinarily be read to mean the actual rent wherever the term appears in the Act.[12] At the same time, it made clear that those cases where the term "rent charged" operates as a "legal limit" on the rent would be dealt with individually in "their unique contexts" in future cases.[13] The Landlord raises claims that this approach could lead to results that it considers either inconsistent with the purposes of the Act or unpalatable. However, the possibility that these individual cases may well arise and be dealt with in the future does not constitute a reversible error or require any changes to the Decision.

[10] "It is therefore more plausible, based on the Commission's review of the legislative history, that the Council would have had the original understanding of 'rent charged' in mind when drafting the 2006 Amendments, intending to directly regulate increases in the amount of rent actually paid for covered rental units, rather than the purported usage as a maximum legal limit asserted by the Housing Provider and adopted by the ALJ. See 2006 Committee Report at 16-17." Decision, page 30.

[11] Even if the Commission decided to consider these documents, it would have to weigh their probative value. Obviously, statements at a committee hearing on several different bills than the bill eventually enacted that was designed to gather input to the decision-making process is less meaningful in interpreting the meaning of the provision of a law than the statements of the actual bill's sponsor as he submitted it to the Council for a vote.

[12] "The Commission determines, to the contrary, that the meaning of the phrase 'rent charged' in the Act's sometimes-conflicting text should, ordinarily, be construed based on the Act's definition of 'rent' as the 'entire amount of money, money's worth, benefit, bonus, or gratuity' that is actually 'demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit.'" Decision, page 31.

[13] "To the extent the context of a particular statutory or regulatory use of the term 'rent' or 'rent charged' only makes sense as a legal limit (for example, the vacancy adjustment or the rent refund provisions), the Commission is satisfied that those few circumstances can be addressed individually, in their unique contexts, and in a manner consistent with the overarching 'remedial purposes of the Act,'. . . . and with the stated effect of the 2006 Amendments that '[r]ent ceilings are abolished.'" Decision at 31 (citations omitted).

4. A far more serious assertion is the Landlord's claim that the Commission is not permitted to interpret an ambiguous statutory term like "rent charged" based on the Act's purposes.[14] In fact, the Commission is required to review legal questions raised by the OAH's interpretation of the Act *de novo*.[15] The courts have repeatedly given great deference to such interpretations.[16] The Landlord is apparently objecting to the Commission's use of the method of statutory interpretation approved by the courts.[17] Neither the Landlord, here in this reconsideration request, nor the OAH, below, made any attempt at statutory construction, but instead just pronounced their preferred interpretation of the term at issue, leaving the matter of statutory construction to be handled by this Commission in this appeal.

5. After completing its statutory construction of the term "rent charged," the Commission proceeded to apply the term to the case of the Tenant and, in particular, to the RAD Form 8 notices and the RAD Form 9 certificates of those notices. The Commission determined that the use of the term "rent" in a lease informs, but is not determinative of, the legal meaning of the term "rent charged" for purposes of the Act's rent stabilization provisions and the relevant RAD Forms. In the process, the Commission makes a number of statements in its Decision that the Landlord considers to be errors. The Commission should not reconsider its Decisions simply because it contains these statements found by the Landlord to be objectionable.

---

[14] "The Commission states that it finds the statute to be ambiguous as to the definition of the term 'rent charged' and ultimately appears to base its conclusions on its 'reconciliation' of the ambiguity with the purposes of the Act. The Commission is not empowered to do so." Motion, section II.E, page 14.

[15] See the Decision at page 16.

[16] See e.g., Sawyer Prop. Mgmt. of Md., Inc. v. District of Columbia Rental Hous. Comm'n, 877 A.2d 96, 102 (D.C. 2005) and Wilson, D.C. Court of Appeals No. 15-AA-1168 (2017) pages 6-7.

[17] The rules of statutory construction are well established in this jurisdiction. District of Columbia v. Place, 892 A.2d 1108, 1108 (2006).

a) The statement to which the Landlord objects the most strongly is the Commission's statement that:

> For the reasons described supra at 17-31, the Commission is not persuaded that preservation of a maximum legal rent level is consistent with the language, structure, or remedial purposes of the Act generally and the purposes of the abolition of rent ceilings specifically. Decision III.B at page 36.

This statement was not an error but rather was the product of a long and thorough analysis of the issues and facts before the Commission, in particular, the conflict between the anti-stacking provisions in the Act and the language left in section 206(b) after the 2006 Amendments. In fact, this statement is not actually a part of the holding but rather a conclusion reached as part of the Commission's consideration of the question whether the effects of its interpretation of "rent charged" were so major as to make the Commission's interpretation at odds with the Act. It concluded here that affecting one mechanism for the preservation of a maximum legal rent level was not a real issue, especially when that mechanism seemed to violate the anti-stacking requirements.

b) The Landlord objected to the impact of the Decision on rent concessions, saying "[t]hat the Decision prohibiting rent concessions is contrary to the purpose of the Act …".[18] However, the Decision does not make any ruling on concession leases, and this claim by the Landlord is yet another example of its poor reading of the Decision. See Background at section I, above.

c) The Landlord objected at length about how the Commission's clarification of the term "rent charged" would affect rent increases resulting from voluntary agreements and peti-

[18] Motion, section II.E at page 16.

tions. Motion at 7-13. Once again, the Landlord is asking the Commission to reverse its Decision based on a possible impact down the road on a legal dispute that may or may not arise in the future. The question of the possible impact of the Decision on voluntary agreements and petitions was only briefly touched on when the Commission discussed whether there are any ambiguities in the use of "rent charged" in the voluntary agreement and petition provisions of the law and was not a part of the OAH proceeding below. Speculation about the possible future interpretations or applications of the Decision is not a reason to reconsider a decision and is not a matter that is currently before the Commission. We do not know how this Decision will affect future disputes over voluntary agreements and petitions or how the Commission will deal with voluntary agreements and petitions in future decisions or changes in its rules.

d) The Landlord alleges that the Decision changed the law to require that rents be re-established periodically at the amounts that tenants are asked to pay.[19] However, the Landlord does not identify where the Decision makes that change or specify the error that should be corrected. No clarification is required in this area because no specific error was asserted.

e) The Landlord alleges that the Decision "suggests" various things about the law[20] that might lead to results that it does not like. These items are mainly discussed in the section of the Decision that examines various uses of the term "rent charged" in order to determine

[19] The Council did not intend to "require that rents be re-established periodically at the amounts that tenants are asked to pay (which is the effect of the Commission's Decision)." Motion, section II.A, page 3.

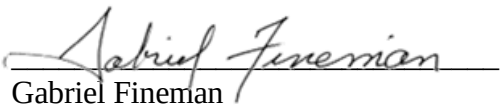
[20] "The [Commission's] suggestion that the Act provides a 'use it or lose it' approach for CPI adjustments is not found anywhere in the Act." Motion, section II.B, page 5.

whether the term is ambiguous, thereby requiring resort to legislative history instead of just relying on the plain language of the term. These are merely explanations of why the Commission found the term "rent charged" to be ambiguous and are not a part of the Commission's core holding. There is no need to clarify or reverse any of the conclusions in this section of the Decision because they are made only as a part of the Commission's finding that the term "rent charged" was ambiguous and should be clarified in the context of the 2006 Amendments' legislative history. Although the Tenant argued for the use of the plain language standard in construing the meaning of the term, he can see no error.

RELIEF SOUGHT

For the foregoing reasons, the Tenant asks the Commission to deny the Landlord's motion to reconsider.

Respectfully submitted,
Appellant /Tenant



Dated: February 22, 2018

Gabriel Fineman
7270 Ashford Place #206
Delray Beach, FL 33446
Telephone (202) 290-7460
Email: gabe@gfineman.com

DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION

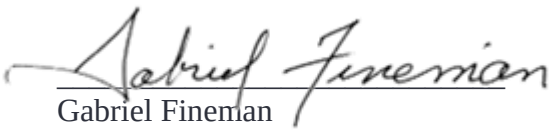
★ ★ ★

GABRIEL FINEMAN,	:	
Appellant /Tenant,	:	
	:	Case No.: 2016 DHCD **TP 30,842**
V.	:	3003 Van Ness Street, N.W., Apt. W-1131
SMITH PROPERTY HOLDINGS VAN NESS L.P.,	:	
Appellee/Housing Provider	:	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of Appellant/Tenant was served on February 22, 2018, by first class mail, postage pre-paid upon the attorney for the housing provider:

Debra F. Leege
Greenstein DeLorme & Luchs, P.C.
1620 L Street N.W., Suite 900
Washington, DC 20036-5605



Gabriel Fineman
7270 Ashford Place #206
Delray Beach, FL 33446
Telephone (202) 290-7460
Email: gabe@gfineman.com