DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

NV 09-001

In re: 3133 Connecticut Ave., N.W.

Ward Three (3)

TENANTS OF 3133 CONNECTICUT AVENUE, N.W.
Tenants/Appellants

v.

KLINGLE CORPORATION
Housing Provider/Appellee

DECISION AND ORDER

September 1, 2015

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from a final order issued by Acting Rent Administrator Keith Anderson (Acting Rent Administrator), based on a petition filed in the Rental Accommodations Division (RAD) of the District of Columbia Department of Housing and Community Development (DHCD).[1] The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

[1] OAH assumed jurisdiction over petitions arising under the Act from the Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD) pursuant to the Office of Administrative Hearings Establishment Act, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD in DCRA were transferred to DHCD by § 2003 the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.)).

I. PROCEDURAL HISTORY

Housing Provider/Appellee Klingle Corporation (Housing Provider), filed an "Application for Approval of Issuance of Notice to Vacate Pursuant to D.C. Code § 42-3505.01(f) (501(f) Application) with RAD on July 31, 2009, with respect to the housing accommodation located at 3133 Connecticut Avenue, N.W. (Housing Accommodation). On October 21, 2009, the Acting Rent Administrator issued a "Notice of Pending Application for Approval to Issue Section 501(f) 120 Day Notices to Vacate and Tenants' Statutory Right to Comment," notifying the tenants of the Housing Accommodation that the 501(f) application was pending, providing information regarding the process for the 501(f) Application's consideration, and notifying the tenants of their statutory right to comment on the 501(f) Application. Klingle Corporation v. Tenants of 3133 Connecticut [Ave.] NW, NV 09-001 (RAD Oct. 21, 2009).

The Acting Rent Administrator issued a final order on March 3, 2010: Klingle Corporation v. Tenants of 3133 Connecticut [Ave.] NW, NV 09-001 (RAD Mar. 3, 2010) (Final Order). The Final Order indicated that comments had been filed by the following tenants of the Housing Accommodation: Kenneth Mazzer and Wendy Tiefenbacher (Unit 115), Robert Barnes (Unit 223), Joyce and Walker Diamanti (Unit 414), Harry and Karen Marks (Unit 415), Mary Sue Flanagan (Unit 419), Lloyd and Margot Siegel (Unit 502), Nicole Witenstein (Unit 504), Don Wassem (Unit 506), Mark Stopher and Sachiko Murase (Unit 519), James and Betty Jane Sakes (Unit 602), Lee and Nicole Cohen (Unit 714), Carol Mergen (Unit 715), Blake and Wendy Nelson (Unit 802), Suzanne Crawford (Unit 805), Philipia Rappoport (Unit 818), Christine Burkhardt (Unit 901), Tamara Browne (Unit 1006), and Peter and Kaia Schwartz (Unit 1024). Final Order at 4; R. at 695.

The Acting Rent Administrator made the following findings of fact in the Final Order:[2]

1. On July 31, 2009, Petitioner Klingle Corporation filed 501(f) Application for Approval of Issuance of Notices to Vacate Pursuant to D.C. Code 42-3505.01(f) with RAD for authorization to require that Tenants temporarily vacate their rental units in order to perform renovations including and relating to the plumbing, electrical and mechanical systems, which can not [sic] safely or reasonably be completed while the rental units are occupied.

2. The Application contains the following information:

   (1) A copy of the Notice to Tenants of Application for Approval of Issuance of Notice to Vacate Pursuant to D[.]C[.] Code Sect. 42-3505.01(f) with the following attachments:

      (a) A copy of D[.]C[.] Official Code Sect. [501](f)(1);

      (b) List of sources of technical assistance for Tenants;

      (c) Summary of the plan for the alterations and renovations; and

      (d) A copy of the Application Memorandum.

   (2) Detailed statement regarding the necessity for the alterations and renovations and the need for Tenants to relocate while the work is being performed, including a Third Party Engineer's Report and Repair Logs[;]

   (3) Timetable for the alterations including:

      (a) Building vacancy chart;

      (b) Schematic of work zones by groups of tiers;

      (c) The relocation of the Tenant from the rental unit and back to the rental unit;

      (d) The commencement of the work; and

      (e) The completion of the work;

   (4) Relocation Plan including the amount of relocation assistance and a list of tenants and their addresses and phone numbers;

[2] The findings of fact are recited herein using the language of the ALJ in the Final Order.

(5) Schematic of each unit's finished work; and

(6) Draft 120 - Day Notice to Vacate for each Tenant.

3. In the Application, Petitioner proposes to replace the electrical, plumbing and mechanical systems; install a new life safety system and air conditioning throughout the housing accommodation; and install dishwashers and clothes washers and dryers in each unit. The proposed alterations and renovations are necessary to bring the rental units and the housing accommodation into compliance with the District of Columbia Housing code insofar as the infrastructure systems are chronically in states of disrepair and prone to failure because they are old, worn and are far beyond the useful life for each system. The new life safety system is needed for compliance with the District of Columbia Building Code.

   More specifically, the Application states that:

   1. The Kennedy-Warren commenced use as a housing accommodation in 1929. The electrical, plumbing and mechanical systems are the original systems installed in 1929 and are approximately eighty (80) years old.

   2. Each system is beyond its useful life and is constantly in need of repair and maintenance. The systems are leaking, corroded, blocked, worn-out, and potentially unsafe and poised for chronic and/or major failure.

   3. Replacement of the electrical, plumbing and mechanical systems will require the tenants to vacate their rental units. Currently 78 of the 309 units are occupied.

   4. The alterations and renovations can be done sequentially in four vertical zones or tiers so that while one or two are being renovated, the other zones will not be affected. Each of the 78 Tenants can remain in the building and will be temporarily relocated to comparable units in one of the four tiers.

   5. In 2006, Petitioner renovated the horizontal infrastructure/feeder located in the basement for the plumbing and electrical systems without relocating any Tenants, which included installing new electric switchgear and replacing the sanitary sewer lines, gas distribution lines and domestic water supply lines. The vertical portions of the two systems, once replaced, can be "plugged into" the new horizontal infrastructure, which will minimize the amount of time the tenants are relocated from their current units.

6. The subject renovations will involve alterations and renovations to the units themselves. They will include removing and replacing all of the original plumbing lines which will accommodate washer and dryers and dishwashers; replacing the electrical systems to accommodate modern data transfer lines; replacing the fire alarm bells in the hallways with a modern fire life system that will include sprinklers in the units and common areas; and replacing the steam engine boilers to accommodate a new heating, ventilation and air conditioning (HVAC) system.

7. The exiting piping system serving the bathrooms will be removed from the building by tiers and through the roof where necessary. Walls and ceilings concealing the existing waste piping will be either removed or cut open to access the piping for removal and replacement. Plumbing fixtures will be removed, store and reinstalled. Existing water closets and kitchen piping will be replaced, including bath and kitchen faucets. New kitchen sinks with garbage disposals and dishwashers will be installed. New piping will be installed to accommodate the new washers and dryers and dishwashers, which will require drilling through the floors of the units.

8. Exiting Tenants can choose to have the dishwasher/disposal and a washer/dry appliance package installed, while the new amenities will be installed in all vacant units. In order to replace the piping, the water supply to the tier will be shut off and walls and ceilings will be cut open for access, requiring that each tier be vacated while the work is performed. The water supply piping system will also be similarly removed and replaced.

9. New electrical wiring will be installed from the main switch gear room in the garage/basement area through the walls to new electric panels in each apartment. The new electrical system will replace the current sub panel fuse box system located in the hallways and will provide circuit breaker protection for the Tenants. Petitioner also proposes to install new telephone/date [sic] wiring with telephone jacks and data outlets in each apartment. The electrical system replacement is necessary to meet new Code requirements.

10. A new two-pipe, central heating and air conditioning system will be installed including a new chiller plant and boiler plant to be constructed in the garage/basement. The new system will replace the original steam heat system that uses radiators and window air conditioning units. The piping runs vertically up through the building to the units and must be installed tier by tier, as with the plumbing and electrical system renovations. Only two of the four boilers are

currently in use. They have exceeded their useful lives by at least thirty (30) years and are obsolete.

11. The plumbing, electrical and mechanical renovations require the installation of a life safety system under the District of Columbia Building Code. The system proposed by Petitioner will consist of sprinkler, alarm, smoke detector and strobe lighting system. The sprinkler main line will be installed in the center of the corridor ceiling on each floor. From the main line, branch lines will be installed in each apartment which will be enclosed in a drywall bulkhead along the perimeter of the room ceilings. To conceal the sprinkler main line and the electrical wiring for the alarms, smoke detectors and strobe lights, new drywall ceiling will be installed in the corridors along with new ceiling lighting. Carpet will also be replaced.

4. Tenants argue that the Application does not sufficiently describe the renovations to be performed, and therefore, should be denied as improperly filed. (See Comments of Tenants; Report by J. Marsh, dated August 21, 2009). RAD disagrees. The Application submitted provides sufficient information that puts both the Tenants and the Government on notice as to what Petitioner intends to accomplish by the proposed renovations. RAD determines that while the Application could provide more detailed information, as urged by the Marsh report, it is not deficient as presented. DCRA and DHCD officials reviewed the Application without the need for supplemental documentation or additional explanations. Accordingly, RAD determines that the Application was complete when filed on July 31, 2009. (See Report by Don Masoero, dated October 19, 2009 and Report by Paul Walker, dated December 4, 2009).

5. Tenants argue that Petitioner has not provided a sufficient explanation as to why the electrical, plumbing and mechanical systems need to be replaced. RAD disagrees. RAD finds that assertions made by Petitioner's third[-]party contractor were verified, as the statute requires, by building inspectors from DCRA as well as from DHCD. Moreover, in responding to specific questions posed by the OTA regarding assertions Petitioners made in the application, both DCRA and DHCD unequivocally confirmed the need for the systems replacement. Specifically, site visits to the property by Petitioner's third[-]party contractor, and building inspectors from DCRA and DHCD revealed, among other things, that each system is far beyond its useful life; is poised for chronic and/or major failure; and in their present condition warrants the scope of work presented in the proposed renovation plan. The current electrical system has shorted-out wires and receptacles, and cracks and disintegrating parts on main risers and fuse boxes; and instead of using breaker panels, the current electrical system is comprised of fuse boxes that are antiquated and below current electrical standards. The entire plumbing system shows signs of corrosion and cracking and needs replacement. There is no mechanical

cooling system in many of the common areas which require natural or mechanical ventilation and the radiators in the units are obsolete and susceptible to leaking water which can come into contact with the electrical system, creating a potentially hazardous condition in the units. (See Petitioner's Application/Third[-]Party Engineering Report, dated July 29, 2009; Report by Don Masoero, dated October 19, 2009; and Report by Paul Walker, dated December 4, 2009).

5. [sic] Tenants also argue that Petitioner did not demonstrate that the renovations cannot be done safely or reasonably while the units are occupied, or whether there are methods that allow the renovations to be done safely without temporarily evicting Tenants. RAD disagrees. The Application states and government officials concur that the alteration and renovation plan proposed will require the water and electricity supply to be shut off and walls and ceilings to be opened for access and then restored with new drywall and plaster work. This will require each unit to be vacated while the work is performed; and no reasonable alternative method to perform such an expansive renovation is available. Government officials also concur that the proposed alteration and renovation plan submitted by Petitioner is reasonable. (See Petitioner's Application/Third[-]Party Engineering Report, dated July 29, 2009; Report by Don Masoero, dated October 19, 2009; and Report by Paul Walker, dated December 4, 2009).

6. Tenants argue further that Petitioner failed to provide an adequate timetable for the alteration and renovation plan or to address whether there are methods which would shorten the eviction time period, if any. (See Comments by Tenants; Tilgham Report dated August 29, 2009; and Marsh Report, dated August 21, 2009). The timetable provided by Petitioner in the application states that the renovation plan will take 120 days for work in each tier to be completed and that the work will be documented by the submission of status reports every 60 days, as required by the statute. Petitioner also took steps to shorten the period of eviction by completing work that did not require Tenant relocation prior to submitting the instant Application. RAD finds that the timetable for the alterations and repairs submitted by Petitioner to be sufficient and consistent with the requirements of the statute.

7. Tenants argue that the proposed alterations and renovations are not in the interest of the Tenants because (1) the alterations and renovations will expose Tenants to hazardous particles and lead paint chips; (2) the proposed timetable for relocation is too long; (3) moving away from and back to their current units will inherently cause an undesirable, stressful disruption in their lives; (4) Petitioner has not provided the identity and condition of the unit to which it proposes to relocate each tenant; (5) the addition of the washer and dryers, dishwashers, HVAC system and sprinklers are unnecessary and unwanted; and (6) the alterations and renovations will substantially alter or destroy certain facilities in each unit. (See Comments by Tenants).

8. RAD finds that Petitioner's proposal to move tenants out of the tier where the work is being completed and separate those from the construction site will avoid exposing tenants to dust particles, lead paint chips or other hazardous conditions. Petitioner began work related to the application in or around October 2009 and has continued such work to date. Between October 2009 and the present, RAD and the OTA received numerous complaints from Tenants that the construction has seriously compromised living conditions at the property, including adverse environmental and physical impacts and intrusions into occupied units. Though unconfirmed by inspections conducted by DCRA, these complaints raise health and safety concerns that must be addressed through negotiations between the Parties and the Government.

9. RAD also finds that the 120-day relocation period is neither too long nor unreasonable, given the nature and scope of the proposed alteration and relocation plan. (See Comments by Tenants). RAD also determines that moving - in and of itself - under any circumstances is an inherently stressful ordeal; however, it is not appropriate to deny the Application because tenants will be inconvenienced, even if to a considerable degree. Petitioner has attempted to minimize the inconvenience and disruption of having to move by proposing to relocate each Tenant to a unit in another tier within the housing accommodation. RAD also finds that while Petitioner has not identified the specific unit where each tenant will be relocated, Petitioner state in the Application that each tenant will be moved to a unit that is as large as or larger than their current unit. Accordingly, RAD rejects Tenants' argument that the proposed alterations and renovations are not in the interest of the Tenants based on reasons (1) through (4) above.

10. RAD agrees that, while the plumbing, electrical and mechanical system replacements are needed, the washers and dryers and dishwashers are unnecessary and not in the interest of certain Tenants. The housing accommodation currently has a laundry room with large washers and dryers, and washers and dryers and dishwashers have already been installed in some units in the housing accommodation without requiring Tenants to temporarily relocate. The washers and dryers to be installed are smaller than those in the laundry room and will result in a higher electricity cost. Petitioner, however, stated in the Application that tenants may choose whether to have the dishwashers and washers and dryers installed in their units. Consequently, RAD finds that the issue of whether these amenities are necessary and in the interest of the tenants is moot.

11. RAD agrees that the proposed alterations and renovations will alter certain facilities in each unit. Based on the schematic and the renovation plans provided in the Application by Petitioner; the Tilgham Report submitted by Tenants Blake and Wendy Nelson; and comments submitted by several Tenants, the proposed alterations will result in (1) the reduction in certain

amounts of storage space, in linen closets, bedroom closets, sunroom closets, and kitchen pantries, as a result of the washer and dryer plumbing and HVAC installation; (2) the alteration of kitchen cabinetry by the installation of an HVAC unit where a broom closet and other unique antique cabinetry are presently located; (3) the alteration of bathroom fixtures; (4) the replacement of antique bathroom tiles; and (5) the lowering of ceilings for sprinklers. Given the critical need to replace the plumbing, electrical and mechanical systems, however, RAD finds that the new infrastructure systems and the new life safety systems will result in a significant improvement on the habitability of the entire housing accommodation and compliance with application housing and building code requirements. Considering the overall positive impact the renovations will have on the physical condition of the housing accommodation, even when compared to the impact the renovations will have on the rental units, RAD finds that it is reasonable to determine that the proposed renovations as enumerated above are in the interest of each affected tenant, but that Tenant concerns regarding alleged reductions in services and facilities warrants Petitioner's attention.

12. Tenants also argue that the Application should be disapproved because (1) Petitioner's intent in filing the proposed renovation plan is to permanently evict all Tenants and convert the building to a luxury housing accommodation; and (2) Petitioners have threatened to file a capital improvement rent adjustment petition to increase the rents based on the proposed renovations if the Application is approved. RAD finds that both arguments are without merit.

13. First, the Application calls for temporary relocation within the housing accommodation, which means that current Tenants will only be temporarily removed from their current rental unit and not permanently evicted from the housing accommodation. Second, the 501(f) statute addresses eviction and possession issues and does not involve the request for approval of a rent adjustment. Third, petitions for rent increases based on capital improvements must be filed prior to commencement of the work to be performed and Petitioner has filed no such petition based on the proposed renovation plan. There is no exception to this requirement for phased construction by zones within the building, as the application sets forth. After commencing work on capital improvements in one part of the building prior to filing a petition, Petitioner is not entitled to rent increases for the same capital improvements yet to be made in units in other areas of the building. Finally, the infrastructure and life safety alterations and renovations are necessary to bring the rental units and the housing accommodation into compliance with District housing and building codes. As a result, Tenants have the right to reoccupy their apartments at the same rent level they were charged at the time they were temporarily relocated.

14. Tenants Blake and Wendy Nelson filed a joint request for Extension of Time to Respond to Application, Discovery, a Hearing and Stop Work Order in this matter. RAD denies Tenants' request for an extension of time and discovery to comment as moot based on the passage of time and RAD's determination that Petitioner's application contains sufficient information upon which RAD can base an informed decision to grant or deny the Application. RAD also denies Tenants' request for a hearing as unripe. Section 4300.5 of Title 14 of the D[.]C[.] Municipal Regulations states that a hearing may be held on the merits of a notice to vacate. RAD determines that the legislative intent of Sect. 501(f) is to require RAD to first assess a 501(f) application administratively before a hearing is convened. The issue regarding Petitioner's alleged improper commencement of work has been addressed in RAD's December 11, 2009 Order directing Petitioner to discontinue work related to the Application until a decision on the Application has been rendered.

Final Order at 4-10; R. at 689-95. The Acting Rent Administrator made the following conclusions of law in the Final Order:[3]

1. Petitioner filed Application for Approval of Issuance of Notices to Vacate with RAD on July 31, 2009, pursuant to Section 501(f) of the Act, D[.]C[.] Official Code Sect. 42-3505.01(f) (2008 Supp.)[,] to replace the plumbing electrical, and mechanical systems; install new HVAC and life safety system equipment including central air conditioning and sprinklers, strobe lights, alarms and smoke detectors; and install new washers and dryers and dishwashers.

2. The Application contains detailed plans for the alterations and renovations in compliance with Sect. 42-3505.01(f)(1)(B)(i).

3. The Application contains a detailed statement setting forth the reasons why the alterations and renovations are necessary and the reasons why the alterations and renovations cannot be reasonably accomplished while the units and housing accommodation are occupied, in compliance with Sect. 42-3505.01(f)(1)(B)(i).

4. The Application contains a timetable for all aspects of the plan for alterations and renovations, in compliance with Sect. 42-3505.01(f)(1)(A)(v)(I).

5. The proposed replacement of the plumbing, electrical and mechanical (HVAC) infrastructure systems is necessary, in accordance with Sect. 42-3505.01(f)(1)(A)(v)(I). The infrastructure renovations are also necessary to

[3] The conclusions of law are recited herein using the language of the ALJ in the Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

bring the rental units and housing accommodation into compliance with the District housing code, pursuant to Sect. 42-3505.01(f)(A)(v)(II).

6. The proposed installation of the new life safety system is required by law based on the subject renovation and, therefore, is necessary to bring the housing accommodation into compliance with the housing code, pursuant to Sect. 42-3505.01(f)(A)(v)(II).

7. The proposed installation of the washer and dryers and dishwashers is not necessary or in the interest of the tenants, pursuant to Sect. 42-3505.01(f)(A)(v)(I) and (III). The issue regarding the necessity or preference for the washers and dryers and dishwashers is moot insofar as each tenant may elect to have either amenity installed in their apartment.

8. The Application complies with all other requirements set forth under Sect. 42-3505.01(f).

9. Petitioner has already commenced work related to the application. Tenants report that the ongoing work has compromised living conditions at the property, including adverse environmental and physical impacts and intrusions into occupied units. Notwithstanding the merits of the application, intrusions into occupied units and other Tenant complaints raise questions and concerns about the ongoing work.

10. Under the circumstances, the manner in which any work authorized by this Order is to be conducted; and other tenant concerns that fall within the scope of any work authorized by this Order should be addressed through negotiations between the Parties rather than adjudication.

11. Upon 120 days [sic] notice to Tenants in accordance with the statute, Petitioner may recover possession of each rental unit for the immediate purpose of making alterations and renovations to the housing accommodation and each rental unit that cannot be safely or reasonably be [sic] accomplished while the rental unit is occupied, pursuant to Sect. 42-3505.01(f)[(1)](A).

12. Because the infrastructure and life safety system renovations are necessary to bring the rental units and housing accommodation into compliance with the District housing and building codes, Tenants shall reoccupy their rental units at the same rents charged at the time of relocation, pursuant to Sect. 42-3505.01(f)(1)(A)(v)(II).

Final Order at 10-11; R. at 688-89.

Several tenants filed motions with RAD in response to the Final Order, as follows: (1) on March 15, 2010, "Motion for Reconsideration of Procedural Instructions and Information,"

submitted by Don Wassem, R. at 700-04; (2) on March 22, 2020, "Consolidated Motion for Reconsideration, Relief From Judgment, and or to Stay Or Rescind Orders," submitted by Marc David Block (Unit 518), Andrew Reamer (Unit 317), and Philippa Rappaport (Unit 818), through counsel, R. at 714-16; (3) on March 22, 2010, "Motion for Reconsideration," submitted by Harry Mark (Unit 415), R. at 717-21; (4) on March 22, 2010, "Motion for Reconsideration and Motion for Relief from Judgment" submitted by Christine Burkhardt (Unit 901), Donald Wassem (Unit 506), Lloyd and Margot Siegel (Unit 502), Nicole Witenstein (Unit 504), Peter Schwartz (Unit 1024), and Kenneth Mazzer and Wendy Tiefenbacher (Unit 115), R. at 721A-831, 838-1601; and (5) on March 22, 2010, "Motion for Reconsideration, Motion for Relief from Judgment, or in the Alternative, Motion to Stay Orders and Motion to Rescind Notices to Vacate," submitted by Blake Nelson (Unit 802), R. at 1602-1723.

Similarly, several notices of appeal were filed with the Commission, as follows: (1) on March 19, 2010, by Kenneth Mazzer and Wendy Tiefenbacher (Unit 115); (2) on March 22, 2010, by Lee Cohen (Unit 714), Carol Nippert (Unit 1105), Betty Sakes (Unit 602), Richard Manegio (Unit 816), Harry and Karen Marks (Unit 415), Charles Kupchan (Unit 907), Peter Schwartz (Unit 1024), Donald Wassem (Unit 506), Lloyd and Margot Siegel (Unit 502), Christine Burkhardt (Unit 901), Walter Shapiro (Unit 315), Nicole Witenstein (Unit 504), and Blake and Wendy Nelson (Unit 802); (3) on April 19, 2010, by Blake Nelson (Unit 802); (4) on April 20, 2010, by Christine Burkhardt (Unit 901), Kenneth Mazzer and Wendy Tiefenbacher (Unit 115), Peter Schwartz (Unit 1024), Lloyd and Margot Siegel (Unit 502), Nicole Witenstein (Unit 504), and Donald Wassem (Unit 506); and (5) on April 2, 2010, by Suzanne Crawford (Unit 805).

A brief was submitted jointly by Christine Burkhardt and Donald Wassem on June 17,

2013; the Housing Provider filed a brief on June 28, 2013. The Commission held a hearing in this case on July 2, 2013.

II. PRELIMINARY ISSUES

A. Failure to Appear at the Commission's Hearing

The Commission has consistently held that failure to appear at the Commission's scheduled hearing is grounds for dismissal of an appeal. Stancil v. D.C. Rental Hous. Comm'n, 806 A.2d 622, 622-25 (D.C. 2002); *see also* Hardy v. Sigalas, RH-TP-09-29,503 (RHC July 21, 2014) (dismissing tenant's cross-appeal where tenant failed to appear at the Commission's hearing); Carter v. Paget, RH-TP-09-29,517 (RHC Dec. 11, 2013) (dismissing appeal where appellant failed to appear at the Commission's hearing); Wilson v. KMG Mgmt., LLC, RH-TP-11-30,087 (RHC May 24, 2013) (dismissing the tenant's notice of appeal where she failed to appear at the Commission's hearing).

The District of Columbia Court of Appeals (DCCA) held in Stancil, that the Commission has authority to dismiss an appeal when the appellant fails to attend a scheduled hearing. Stancil, 806 A.2d at 622-25. The DCCA recognized that, although the Commission does not have a specific regulation that prescribes dismissal when a party fails to appear, 14 DMCR § 3828.1 (2004)[4] empowers the Commission to rely on the DCCA's rules when its rules are silent on a matter before the Commission. *Id.* The DCCA noted that DCCA Rule 14 (D.C. App. R. 14) permits dismissal of an appeal "for failure to comply with these rules or for any other lawful reason," and that DCCA Rule 13 (D.C. App. R. 13) "authorizes an appellee to file a motion to

[4] 14 DCMR § 3828.1 provides as follows:

> When these rules are silent on a procedural issue before the Commission, that issue shall be decided by using as guidance the current rules of civil procedures published and followed by the Superior Court of the District of Columbia and the rules of the District of Columbia Court of Appeals.

dismiss whenever an applicant fails to take the necessary steps to comply with the court's procedural rules." Stancil, 806 A.2d at 625. The DCCA concluded that "both [DCCA] Rule 13 and Rule 14 support the proposition that dismissal is an appropriate sanction when an appellant is not diligent about prosecuting his appeal." *Id.*; *see also* Radwan v. D.C. Rental Hous. Comm'n, 683 A.2d 478, 480 (D.C. 1996) (favoring the Commission's adoption of other court rules absent a regulation specifically governing the Commission's discretion).

The Commission notes that five notices of appeal were filed by one or more of the following nineteen tenants:

Kenneth Mazzer (Unit 115),
Wendy Tiefenbacher (Unit 115),
Lee Cohen (Unit 714),
Carol Nippert (Unit 1105),
Betty Sakes (Unit 602),
Richard Manegio (Unit 816),
Harry Marks (Unit 415),
Karen Marks (Unit 415),
Charles Kupchan (Unit 907),
Peter Schwartz (Unit 1024),
Donald Wassem (Unit 506),
Lloyd Siegel (Unit 502),
Margot Siegel (Unit 502),
Christine Burkhardt (Unit 901),
Walter Shapiro (Unit 315),
Nicole Witenstein (Unit 504),
Blake Nelson (Unit 802),
Wendy Nelson (Unit 802), and
Suzanne Crawford (Unit 805).

However, only one tenant, Christine Burkhardt, appeared at the Commission's hearing. The Commission notes that on June 17, 2013, Don Wassem filed a "Request to Participate by Telephone," stating that he would be away from the District on the hearing date, and requesting that he be allowed to participate in the hearing by telephone, or that he "be deemed to be present at their hearing" through the appearance of another tenant of the Housing Accommodation.

Request to Participate by Telephone at 1. On June 28, 2013, the Commission issued an Order stating that Don Wassem would not be permitted to participate in the hearing by telephone, but that it would be permissible for him to be represented by other tenants involved in this matter. Klingle Corp. v. Tenants of 3133 Connecticut Ave., NW, NV 09-001 (RHC June 28, 2013).

Aside from Christine Burkhardt, who appeared at the hearing, and Don Wassem, who requested the Commission's permission to be absent from the hearing, none of the remaining seventeen tenants appeared at the Commission's hearing, either in person or through a representative.[5] The Commission's review of the record reveals no evidence that any of the remaining seventeen tenants authorized Ms. Burkhardt to act in a representative capacity before the Commission, nor did Ms. Burkhardt allege at the Commission's hearing that she was appearing on behalf of anybody other than herself. Hearing CD (RHC July 2, 2013); *see* 14 DCMR § 3812.6.[6]

Moreover, the Commission's review of the record reveals no evidence that the remaining tenants did not receive actual notice of the Commission's hearing. The Commission's Notice of Scheduled Hearing and Notice of Certification of Record (Notice of Hearing), issued on June 5, 2013, was mailed by first-class mail to each of the above-named nineteen tenants at their respective addresses of record. Notice of Hearing at 3-7. The Notice of Hearing warns the parties that "[t]he failure of an Appellant to appear may result in the dismissal of the party's appeal." *Id.* at 1.

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[5] The Commission notes that Blake Nelson filed a Notice of Inability to Attend Oral Argument (Blake Nelson's Notice) on July 2, 2013 – the same day as the scheduled hearing – informing the Commission that he and Wendy Nelson would not be able to attend the hearing. However, unlike the Request to Participate by Telephone filed by Don Wassem, Blake Nelson's Notice does not request the Commission's permission to be absent from the hearing in order to avoid dismissal of his appeal. *Compare* Blake Nelson's Notice, *with* Request to Participate by Telephone.

[6] 14 DCMR § 3812.6 provides in relevant part the following: "Any individual who wishes to appear in a representative capacity before the Commission shall file a written notice of appearance stating the individual's name, local address, telephone number . . . and for whom the appearance is made."

Accordingly, the Commission dismisses the following tenants from this appeal, for failure to appear at the scheduled hearing:

Kenneth Mazzer (Unit 115),
Wendy Tiefenbacher (Unit 115),
Lee Cohen (Unit 714),
Carol Nippert (Unit 1105),
Betty Sakes (Unit 602),
Richard Manegio (Unit 816),
Harry Marks (Unit 415),
Karen Marks (Unit 415),
Charles Kupchan (Unit 907),
Peter Schwartz (Unit 1024),
Lloyd Siegel (Unit 502),
Margot Siegel (Unit 502),
Walter Shapiro (Unit 315),
Nicole Witenstein (Unit 504),
Blake Nelson (Unit 802),
Wendy Nelson (Unit 802), and
Suzanne Crawford (Unit 805).

Stancil, 806 A.2d at 622-25; Hardy, RH-TP-09-29,503; Carter, RH-TP-09-29,517; Wilson, RH-TP-11-30,087.

The remaining two tenants, Christine Burkhardt and Don Wassem (hereinafter collectively "Tenants"), joined in the notice of appeal filed on March 22, 2010 (March Notice of Appeal), which raised the following issues:

1. The Rent Administrator did not have the authority to administratively grant the Application, where one or more tenants sought to dispute and rebut the facts and the opinions and inferences stated in the Application; the ARA had only the authority to administratively deny the Application or to schedule an adjudicative hearing.

2. The due process rights, and the leasehold rights, of tenants were violated because an adjudicative hearing was not held.

3. The Acting Rent Administrator did not give tenants the opportunity to timely comment on all the "Evidence and Documentation" he considered.

4. It was error for the ARA to determine that the Application as of July 31, 2009 was sufficiently complete.

5. The Acting Rent Administrator did not give tenants the opportunity to respond to *ex parte* communications between the Klingle [Corporation] (including any of its agents or assigns) and the Acting Rent Administrator (including other District officials who relayed communications with Klingle et al. to the Acting Rent Administrator).

6. The Acting Rent Administrator did not give tenants (and their experts) the opportunity to be present during "inspections" of the building.

7. The Acting Rent Administrator did not give tenants the opportunity to cross-examine DCRA inspectors and Applicant engineers.

8. It was error for the ARA to base his Order and Amended Order on the letter of October 19, 2009 to Mr. Joel Cohn of OTA by Don Masoero, Chief Building Inspector, DCRA; the November 20, 2009 letter from Mr. Masoero to the Chief [T]enant Advocate and the Acting Rent Administrator; the December 4, 2009 Memorandum to the Acting Rent Administrator from Paul Walker of DHCD; and the January 11, 2010 Memorandum to the Acting Rent Administrator from Christopher Earley of DHCD, all attached to the Amending Order, as the findings in those letters are based on biased, leading questions (such as "Can numerous repairs of clogged drain pipes alone indicate a need to replace the system?", when, in fact, the Petitioner presented little if any evidence of "numerous" repairs of clogged drain pipes and whose own leases make "clearing of clogged pipes, toilets, and drains" a *tenant's* "maintenance obligation") instead of objective inquiries, and on *ex parte* communications with the Petitioner without affording opposing tenants and their experts a chance to rebut.

9. It was error to base the Order on the findings in the DCRA report when that report did not contain, as mandated by law, findings on every substantial statement of fact in the Application.

10. By granting/approving the "application", the Acting Rent Administrator impermissibly administratively-granted a reduction-in-facilities/services petition embedded in the 501(f) application, which petition requires an adjudicative hearing.

11. The unnecessary work such as the installation of washers and dryers will result in a reduction of the area of apartments, even for tenants who do not want that installation, due to the installation of ducts and vents in all units. This reduction in space constitutes a permanent eviction from part of the unit, which is not permissible in a 501(f) application.

12. The Acting Rent Administrator stated findings of fact without citing to specific pages or documents within the record.

13. The Acting Rent Administrator made findings of fact that were unsupported by sworn statements in the record.

14. The Acting Rent Administrator made findings of fact that were not supported by substantial evidence in the record.

15. The Acting Rent Administrator made legal conclusions that do not flow from analyses of the record and from understandable explications and applications of the legal standards for 501(f) application review as required by the DC APA [sic].

16. The Acting Rent Administrator did not explain the standards he used to find various things to be "necessary."

17. The Acting Rent Administrator, in his Orders, uncritically adopted and re-used phrasings and characterizations made by the Applicant and its agents in the Application and elsewhere thus allowing the Applicant to ghostwrite portions of the Orders.

18. It was error for the ARA to treat the applied-for work as an all-or-nothing proposition to be approved or denied, and to not consider reasonable alternatives for each of the proposed alterations and renovations, as means [sic] of addressing the purported reliability and capacity deficiencies in the electric, water, drain, and heating service delivery equipment that would be more in the interests of tenants.

19. It was error for the ARA to conclude that "There is no mechanical cooling system in many of the common areas which require natural or mechanical ventilation" when in fact the common areas are cooled either by air-conditioning or by a mechanical system of fans (in place and functioning for decades) that circulates air throughout the building.

20. It was error for the ARA to approve the Application on finding that "no reasonable alternative method to perform such an expansive renovation is available" without affording tenants or others [sic] to provide evidence of such alternative methods.

21. The ARA erred in not ordering Klingle to allow daily inspection by displaced tenants of work does [sic] in vacated-thru-eviction apartment[s].

22. The ARA erred in confusing "useful life" estimates with "remaining life" estimates, ignoring empirical evidence of particular situations (e.g., human life expectancy (median? mean?) at birth might be 75 years, but that does not mean that at age 75 life expectancy is zero).

23. The ARA made clear error or abused his discretion or was capricious or arbitrary in his assessment of "evidence" regarding the purposed "necessity" of channeling into walls above the garage and basement levels and inside apartments to replace any, let alone all, vertical and horizontal runs of copper wire, water supply lines, drain/waste/vent pipes, and heating pipes.

24. The ARA made clear error or abused his discretion or was capricious or arbitrary in his assessment of "evidence" regarding the purposed "necessity" of evicting tenants and their possessions from the leased premises for more than only a few days or a couple of weeks in order to replace the following (assuming the replacements of [the] following are "necessary"): copper wires, water pipes, drain/waste/vent pipes, radiator pipes inside a particular apartment's walls.

March Notice of Appeal at 1-4. The Tenants also joined in the notice of appeal filed on April 20, 2010 (April Notice of Appeal), which raised the following issues:

1. It was error for the Acting Rent Administrator ("ARA") to issue the Order and Amending Order when the ARA did not have jurisdiction over the matter after Klingle filed a notice of appeal filed in December 2009 (in which Klingle announced, among other things, that Klingle would not be honoring the order Klingle appealed from).

2. It was error for the ARA to grant any aspect of the 501(f) application where tenants disputed factual assertions and opinions and inferences stated in a 501(f) application, because the Office of Administrative Trials and Hearings Establishment Act of 2001, D.C. Law 14-076, as amended, moved jurisdiction over contested cases away from the Rent Administrator.

3. It was error for the Acting Rent Administrator to not stay the above-captioned proceeding where issues related to this proceeding are being litigated in other administrative and legal proceedings.

4. It was error for the Acting Rent Administrator to fail to find that the Application was in violation of the Memorandum of Agreement (dated January 1997) between the Klingle Corporation and the Kennedy-Warren Residents Association, to the benefit of all tenants of the Housing Accommodation.

5. It was error for the Acting Rent Administrator to fail to deny the Application based on Klingle's (and its agents') conduct surrounding the seeking of the Application, including retaliatory conduct, violations of the Act, and acts against public policy, including Housing Provider's attempts to circumvent the 501(f) process.

6. It was error for the ARA to not rule upon motions for relief from judgment.

7. It was error for the ARA to not rescind the notices to vacate pursuant to Section 501(f)(5).

8. It was error (a violation of the Tenants' constitutional due process rights) for the ARA to order tenants to proceed through mediation, and not to proceed through adjudication or other legal remedies if they so chose.

9. It was error for the ARA to conclude that a request for a hearing was "unripe."

10. It was error for the ARA to determine that the purported legislative intent of the Tenant Eviction Reform Amendment Act of 2006 required the ARA to make administrative determinations prior to any hearing.

11. By approving the plan, the ARA impermissibly approved reductions in services and facilities (e.g., loss of apartment floor space, wall space, closet space, ceiling height; loss of quiet occupancy/use of units and common areas) without a hearing and without ordering Klingle to pay damages to tenants and to reduce rents.

12. It was error for the ARA to apply the definition of 'tenant' in Chapter 34 of Title 42 of DC Code where the proper definition of tenant for this proceeding is in Chapter 35 of Title 42.

13. It was error for the Acting Rent Administrator to fail to take into account the interests of each affected tenant as required by D.C. Code § 42-3505.01(f)(1)(a)(v).

14. It was error for the Acting Rent Administrator to fail to apply the appropriate statutory requirements and legal standards to the Application.

15. It was error for the Acting Rent Administrator to fail to deny the Application because the notices to vacate submitted with the Application did not comply with the Rental Housing Act of 1985, as amended (the "Act"), or other controlling law.

16. Tenants reserve the right to raise any additional errors in their briefs on appeal in this proceeding.

April Notice of Appeal at 1-3.

B. Notice of Appeal filed on October 12, 2010

The Commission notes that a notice of appeal was filed in this case on October 12, 2010

(October Notice of Appeal), by the following tenants of the Housing Accommodation: Marc David Block, Christine Burkhardt, Suzanne Crawford, Kenneth A. Mazzer, Blake J. Nelson, Wendy Nelson, Lloyd Siegel, Margot Siegel, Wendy Tiefenbacher, Donald Wassem, and Nicole Witenstein. October Notice of Appeal at 1. The October Notice of Appeal states, in relevant part, that it is in response to a "Status on Motion for Clarification" issued by Acting Rent Administrator Theresa Lewis in a separate case, Tenant Petition 28,724. *Id.* at 7. The Commission is satisfied that it has no jurisdiction over any of the proceedings or orders issued in relation to Tenant Petition 28,724, in the instant appeal of NV 09-001, and thus dismisses the October Notice of Appeal.

III. ISSUES ON APPEAL[7]

A. The Rent Administrator did not have the authority to administratively grant the Application, where one or more tenants sought to dispute and rebut the facts and the opinions and inferences stated in the Application; the ARA had only the authority to administratively deny the Application or to schedule an adjudicative hearing.

B. The due process rights, and the leasehold rights, of tenants were violated because an adjudicative hearing was not held.

C. The Acting Rent Administrator did not give tenants the opportunity to cross-examiner DCRA inspectors and Applicant engineers.

D. It was error for the ARA to grant any aspect of the 501(f) application where tenants disputed factual assertions and opinions and inferences stated in a 501(f) application, because the Office of Administrative Trials and Hearings Establishment Act of 2001, D.C. Law 14-076, as amended, moved jurisdiction over contested cases away from the Rent Administrator.

E. It was error (a violation of the Tenants' constitutional due process rights) for the ARA to order tenants to proceed through mediation, and not to proceed through adjudication or other legal remedies if they so chose.

[7] The Commission, in its discretion, has reordered the issues on appeal for ease of discussion and to group together issues that involve the application and analysis of common facts and legal principles. *See, e.g.*, Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014) at n.10; Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC July 2, 2014) at n.6; Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013) at n.11.

F. It was error for the ARA to conclude that a request for a hearing was "unripe."

G. It was error for the ARA to determine that the purported legislative intent of the Tenant Eviction Reform Amendment Act of 2006 required the ARA to make administrative determinations prior to any hearing.

H. The Acting Rent Administrator did not give tenants the opportunity to respond to *ex parte* communications between the Klingle [Corporation] (including any of its agents or assigns) and the Acting Rent Administrator (including other District officials who relayed communications with Klingle et al. to the Acting Rent Administrator).

I. The Acting Rent Administrator did not give tenants (and their experts) the opportunity to be present during "inspections" of the building.

J. It was error for the ARA to base his Order and Amended Order on the letter of October 19, 2009 to Mr. Joel Cohn of OTA by Don Masoero, Chief Building Inspector, DCRA; the November 20, 2009 letter from Mr. Masoero to the Chief [T]enant Advocate and the Acting Rent Administrator; the December 4, 2009 Memorandum to the Acting Rent Administrator from Paul Walker of DHCD; and the January 11, 2010 Memorandum to the Acting Rent Administrator from Christopher Earley of DHCD, all attached to the Amending Order, as the findings in those letters are based on biased, leading questions (such as "Can numerous repairs of clogged drain pipes alone indicate a need to replace the system?", when, in fact, the Petitioner presented little if any evidence of "numerous" repairs of clogged drain pipes and whose own leases make "clearing of clogged pipes, toilets, and drains" a *tenant's* "maintenance obligation") instead of objective inquiries, and on *ex parte* communications with the Petitioner without affording opposing tenants and their experts a chance to rebut.

K. It was error for the ARA to treat the applied-for work as an all-or-nothing proposition to be approved or denied, and to not consider reasonable alternatives for each of the proposed alterations and renovations, as means [sic] of addressing the purported reliability and capacity deficiencies in the electric, water, drain, and heating service delivery equipment that would be more in the interests of tenants.

L. It was error for the ARA to approve the Application on finding that "no reasonable alternative method to perform such an expansive renovation is available" without affording tenants or others [sic] to provide evidence of such alternative methods.

M. The ARA erred in not ordering Klingle to allow daily inspection by displaced tenants of work does [sic] in vacated-thru-eviction apartment[s].

N. The ARA erred in confusing "useful life" estimates with "remaining life" estimates, ignoring empirical evidence of particular situations (e.g., human life expectancy (median? mean?) at birth might be 75 years, but that does not mean that at age 75 life expectancy is zero).

O. It was error for the Acting Rent Administrator to fail to find that the Application was in violation of the Memorandum of Agreement (dated January 1997) between the Klingle Corporation and the Kennedy-Warren Residents Association, to the benefit of all tenants of the Housing Accommodation.

P. It was error for the Acting Rent Administrator to fail to deny the Application based on Klingle's (and its agents') conduct surrounding the seeking of the Application, including retaliatory conduct, violations of the Act, and acts against public policy, including Housing Provider's attempts to circumvent the 501(f) process.

Q. It was error for the ARA to not rescind the notices to vacate pursuant to Section 501(f)(5).

R. It was error for the Acting Rent Administrator ("ARA") to issue the Order and Amending Order when the ARA did not have jurisdiction over the matter after Klingle filed a notice of appeal filed in December 2009 (in which Klingle announced, among other things, that Klingle would not be honoring the order Klingle appealed from).

S. It was error for the ARA to not rule upon motions for relief from judgment.

T. By granting/approving the "application", the Acting Rent Administrator impermissibly administratively-granted a reduction-in-facilities/services petition embedded in the 501(f) application, which petition requires an adjudicative hearing.

U. The unnecessary work such as the installation of washers and dryers will result in a reduction of the area of apartments, even for tenants who do not want that installation, due to the installation of ducts and vents in all units. This reduction in space constitutes a permanent eviction from part of the unit, which is not permissible in a 501(f) application.

V. By approving the plan, the ARA impermissibly approved reductions in services and facilities (e.g., loss of apartment floor space, wall space, closet space, ceiling height; loss of quiet occupancy/use of units and common areas) without a hearing and without ordering Klingle to pay damages to tenants and to reduce rents.

W. It was error for the Acting Rent Administrator to fail to deny the Application because the notices to vacate submitted with the Application did not comply with the Rental Housing Act of 1985, as amended (the "Act"), or other controlling law.

X. The Acting Rent Administrator did not give tenants the opportunity to timely comment on all the "Evidence and Documentation" he considered.

Y. It was error for the ARA to determine that the Application as of July 31, 2009 was sufficiently complete.

Z. It was error to base the Order on the findings in the DCRA report when that report did not contain, as mandated by law, findings on every substantial statement of fact in the Application.

AA. It was error for the Acting Rent Administrator to fail to take into account the interests of each affected tenant as required by D.C. Code § 42-3505.01(f)(1)(a)(v).

BB. It was error for the ARA to conclude that "There is no mechanical cooling system in many of the common areas which require natural or mechanical ventilation" when in fact the common areas are cooled either by air-conditioning or by a mechanical system of fans (in place and functioning for decades) that circulates air throughout the building.

CC. The ARA made clear error or abused his discretion or was capricious or arbitrary in his assessment of "evidence" regarding the purposed "necessity" of channeling into walls above the garage and basement levels and inside apartments to replace any, let alone all, vertical and horizontal runs of copper wire, water supply lines, drain/waste/vent pipes, and heating pipes.

DD. The ARA made clear error or abused his discretion or was capricious or arbitrary in his assessment of "evidence" regarding the purposed "necessity" of evicting tenants and their possessions from the leased premises for more than only a few days or a couple of weeks in order to replace the following (assuming the replacements of [the] following are "necessary"): copper wires, water pipes, drain/waste/vent pipes, radiator pipes inside a particular apartment's walls.

EE. Tenants reserve the right to raise any additional errors in their briefs on appeal in this proceeding.

FF. The Acting Rent Administrator stated findings of fact without citing to specific pages or documents within the record.

GG. The Acting Rent Administrator made findings of fact that were unsupported by sworn statements in the record.

HH. The Acting Rent Administrator made findings of fact that were not supported by substantial evidence in the record.

II. The Acting Rent Administrator made legal conclusions that do not flow from analyses of the record and from understandable explications and applications of the legal standards for 501(f) application review as required by the DC APA [sic].

JJ. The Acting Rent Administrator did not explain the standards he used to find various things to be "necessary."

KK. The Acting Rent Administrator, in his Orders, uncritically adopted and re-used phrasings and characterizations made by the Applicant and its agents in the Application and elsewhere thus allowing the Applicant to ghostwrite portions of the Orders.

LL. It was error for the Acting Rent Administrator to not stay the above-captioned proceeding where issues related to this proceeding are being litigated in other administrative and legal proceedings.

MM. It was error for the ARA to apply the definition of 'tenant' in Chapter 34 of Title 42 of DC Code where the proper definition of tenant for this proceeding is in Chapter 35 of Title 42.

NN. It was error for the Acting Rent Administrator to fail to apply the appropriate statutory requirements and legal standards to the Application.

IV. SECTION 501(f) OF THE ACT

The Commission observes that the rights and obligations of the Housing Provider, the Tenants, and the Acting Rent Administrator, with respect to the 501(f) Application at issue in this appeal are contained in D.C. OFFICIAL CODE § 42-3505.01(f)(1) (Supp. 2007) (hereinafter, "Section 501(f)"). The Commission sets forth below the provisions of Section 501(f)(1) relevant to its Decision and Order in this case:[8]

[8] The provisions of Section 501(f) of the Act applicable to this appeal, and as recited *infra* at 26-29, were the result of amendments in 2006 to the 2001 codification of Section 501(f) contained in the Tenant Evictions Reform Amendment Act of 2006, Law 16-140, codified as Section 501(f) (effective June 22, 2006) (Tenant Reform Act). The original text of Section 501(f) in the 2001 codification is as follows:

> (f)(1)(A) A housing provider may recover possession of a rental unit for the immediate purpose of making alterations or renovations to the rental unit which cannot safely or reasonably be accomplished while the rental unit is occupied, so long as the plans for the alterations or renovations have been previously filed with and approved by the Rent Administrator and the plans demonstrate that the proposed alterations or renovations cannot safely or reasonably be accomplished while the unit is occupied. The housing provider shall serve on the tenant a 120-day notice to vacate in advance of action to recover possession of the rental unit. The notice to vacate

(f)(1)(A) A housing provider may recover possession of a rental unit for the immediate purpose of making alterations or renovations to the rental unit which cannot safely or reasonably be accomplished while the rental unit is occupied, so long as:

(i) The plans for the alterations or renovations have been filed with the Rent Administrator and the Chief Tenant Advocate;

(ii) The tenant has had 21 days after receiving notice of the application to submit to the Rent Administrator and to the Chief Tenant Advocate comments on the impact that an approved application would have on the tenant or any household member, and on any statement made in the application;

(iii) An inspector from the Department of Consumer and Regulatory Affairs has inspected the housing accommodation for the accuracy of material statements in the application and has reported his or her findings to the Rent Administrator and the Chief Tenant Advocate;

(iv) On or before the filing of the application, the housing provider has given the tenant:

(I) Notice of the application;

(II) Notice of all tenant rights;

(III) A list of sources of technical assistance as published in the District of Columbia Register by the Mayor;

(IV) A summary of the plan for the alterations and renovations to be made; and

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shall comply with and notify the tenant of the tenant's right to relocation assistance under the provisions of subchapter VII of this chapter.

(2) Immediately upon completion of the proposed alterations or renovations, the tenant shall have the absolute right to rerent [sic] the rental unit.

(3) Where the renovations or alterations are necessary to bring the rental unit into substantial compliance with the housing regulations, the tenant may rerent [sic] at the same rent under the same obligations that were in effect at the time the tenant was dispossessed, if the renovations or alterations were not made necessary by the negligent or malicious conduct of the tenant.

(4) Tenants who are displaced by actions under this subsection shall be entitled to receive relocation assistance, as set forth in subchapter VII of this chapter, if the tenants meet the eligibility criteria of that subchapter.

(V) Notice that the plan in its entirety is on file and available for review at the office of the Rent Administrator, at the office of the Chief Tenant Advocate, and at the rental office of the housing provider; and

(v) The Rent Administrator, in consultation with the Chief Tenant Advocate, has determined in writing:

(I) That the proposed alterations and renovations cannot safely or reasonably be made while the rental unit is occupied;

(II) Whether the alterations and renovations are necessary to bring the rental unit into compliance with the housing code and the tenant shall have the right to reoccupy the rental unit and the same rent; and

(III) That the proposal is in the interest of each affected tenant after considering the physical condition of the rental unit or the housing accommodation and the overall impact of relocation on the tenant.

(B) As part of the application under this subsection, a housing provider shall submit to the Rent Administrator for review and approval, and to the Chief Tenant Advocate, the following plans and documents;

(i) A detailed statement setting forth why the alterations and renovations are necessary and why they cannot safely or reasonably be accomplished while the rental unit is occupied;

(ii) A copy of the notice that the housing provider has circulated informing the tenant of the application under this subsection;

(iii) A draft of the notice to vacate to be issued to the tenant if the application is approved by the Rent Administrator;

(iv) A timetable for all aspects of the plan for alterations and renovations, including:

(I) The relocation of the tenant from the rental unit and back into the rental unit;

(II) The commencement of the work, which shall be within a reasonable period of time, not to exceed 120 days, after the tenant has vacated the rental unit;

(III) The completion of the work; and

(IV) The housing provider's submission to the Rent Administrator and the Chief Tenant Advocate of periodic progress reports, which shall be due at least once every 60 days until the work is complete and the tenant is notified that the rent[al] unit is ready to be reoccupied;

(v) A relocation plan for each tenant that provides:

(I) The amount of the relocation assistance payment for each unit;

(II) A specific plan for relocating each tenant to another unit in the housing accommodation or in a complex or set of buildings of which the housing accommodation is a part, or, if the housing provider states that relocation within the same building or complex is not practicable, the reasons for the statement;

(III) If relocation to a rental unit pursuant to sub-sub-subparagraph (II) of this sub-subparagraph is not practicable, a list of units within the housing provider's portfolio of rental accommodations made available to each dispossessed tenant, or, where the housing provider asserts that relocation within the housing provider's portfolio of rental accommodations is not practicable, the justification for such assertion;

(IV) If relocation to a rental unit pursuant to sub-sub-subparagraph (II) or (III) of this sub-subparagraph is not practicable, a list for each tenant affected by the relocation plan of at least 3 other rental units available to rent in a housing accommodation in the District of Columbia, each of which shall be comparable to the rental unit in which the tenant currently lives; and

(V) A list of tenants with their current addresses and telephone numbers.

(C) The Chief Tenant Advocate, in consultation with the Rent Administrator, shall:

(i) Within 5 days of receipt of the application, issue a notice, which shall include the address and telephone number of the Office of the Chief Tenant Advocate, to each affected tenant stating that the tenant:

(I) Has the right to review or obtain a copy of the application, including all supporting documentation, at the rental office of the housing provider, the Office of the Chief Tenant Advocate, or the office of the Rent Administrator;

(II) Shall have 21 days in which to file with the Rent Administrator and serve on the housing provider comments upon any statement made in the application, and on the impact an approved application would have on the tenant or any household member; and

(III) May consult with the Office of the Chief Tenant Advocate with respect to ascertaining the tenant's legal rights, responding to the application or to any ancillary offer made by the housing provider, or otherwise safeguarding the tenant's interests;

(ii) At any time prior to or subsequent to the Rent Administrator's approval of the application, make such inquiries as the Chief Tenant Advocate considers appropriate to determine whether the housing provider has complied with the requirements of this subsection and whether the interests of the tenants are being protected, and shall promptly report any findings to the Rent Administrator; . . .

D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)-(C)(ii). The Commission observes that the remaining provisions of D.C. OFFICIAL CODE § 42-3505.01(f)(1), not recited herein, govern the issuance of notices to vacate, and notice to tenants, the Rent Administrator, and the Chief Tenant Advocate when the proposed renovations have been completed—both of which necessarily occur after the approval of an application for approval to issue notices to vacate under Section 501(f), and are thus not relevant to this appeal. *See* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(C)(iii)-(F).

V. DISCUSSION OF ISSUES ON APPEAL

A. The Rent Administrator did not have the authority to administratively grant the Application, where one or more tenants sought to dispute and rebut the facts and the opinions and inferences stated in the Application; the ARA had only the authority to administratively deny the Application or to schedule an adjudicative hearing.

B. The due process rights, and the leasehold rights, of tenants were violated because an adjudicative hearing was not held.

C. The Acting Rent Administrator did not give tenants the opportunity to cross-examiner DCRA inspectors and Applicant engineers.

D. It was error for the ARA to grant any aspect of the 501(f) application where tenants disputed factual assertions and opinions and inferences stated in a 501(f) application, because the Office of Administrative Trials and Hearings

Establishment Act of 2001, D.C. Law 14-076, as amended, moved jurisdiction over contested cases away from the Rent Administrator.

E. It was error (a violation of the Tenants' constitutional due process rights) for the ARA to order tenants to proceed through mediation, and not to proceed through adjudication or other legal remedies if they so chose.

F. It was error for the ARA to conclude that a request for a hearing was "unripe."

G. It was error for the ARA to determine that the purported legislative intent of the Tenant Eviction Reform Amendment Act of 2006 required the ARA to make administrative determinations prior to any hearing.[9]

In each of the above issues raised on appeal by the Tenants, the allegation of error relates to the Acting Rent Administrator's failure to transfer this case to OAH for an evidentiary hearing on the 501(f) Application. *See* March Notice of Appeal; April Notice of Appeal. Based upon the above-stated issues, it appears that the Tenants are contending that the Acting Rent Administrator's transfer of the 501(f) Application to OAH for a hearing should have occurred after the Tenants had submitted comments on, and before the approval of, the 501(f) Application. *See* March Notice of Appeal; April Notice of Appeal.

The Commission's standard of review is contained at 14 DCMR § 3807.1, and provides the following:

> The Commission shall reverse final decisions of the Rent Administrator which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, of which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the Rent Administrator.

In accordance with the Office of Administrative Hearings Establishment Act, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1),[10] *see supra* at p. 1 n.1, prior to the filing of the

[9] Issues A, B, and C correspond to issues 1, 2, and 7, respectively, from the Tenants' March Notice of Appeal. Issues D, E, F, and G correspond to issues 2, 8, 9, and 10, respectively, from the Tenants' April Notice of Appeal.

501(f) Application at issue in this case, OAH assumed jurisdiction over "adjudicated cases" that had previously been under the jurisdiction of the Rent Administrator. D.C. OFFICIAL CODE § 2-1831.03(b-1)(1). "Adjudicated case" is defined as follows:

> [A] contested case or other administrative adjudicative proceeding before the Mayor or any agency that results in a final disposition by order and in which the legal rights, duties, or privileges of specific parties are required by any law or constitutional provision to be determined after an adjudicative hearing of any type . . . .

Id. § 2-1831.01(1).[11] Accordingly, a hearing must be held in cases arising under the Act only if such a hearing is required either by the Act, or by the U.S. Constitution. *Id.*

Under the Act, a party has a right to request a hearing on petitions filed by a housing provider under D.C. OFFICIAL CODE §§ 42-3502.10 (capital improvement petitions), 42-3502.11 (services and facilities petitions), 42-3502.12 (hardship petitions), 42-3502.13 (petitions for vacant accommodation rent adjustments), and 42-3502.14 (substantial rehabilitation petitions), and on petitions filed by a tenant to challenge a rent adjustment made under D.C. OFFICIAL CODE § 42-3502.06. D.C. OFFICIAL CODE § 42-3502.16(a).[12] The Commission is satisfied that the Act does not provide a right to a hearing in cases arising under Section 501(f).

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[10] D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) provides the following: "In addition to those agencies listed in subsections (a) and (b) of this section, as of October 1, 2006, this chapter shall apply to adjudicated cases under the jurisdiction of the Rent Administrator in the Department of [Housing and Community Development]."

[11] The Commission notes that the definition of "contested case" under the DCAPA is encompassed within the definition of "adjudicated case" quoted herein. *Compare* D.C. OFFICIAL CODE § 2-502(8), *with* D.C. OFFICIAL CODE § 2-1831.01(1). The DCAPA defines a "contested case" in relevant part as follows: "[A] proceeding before the Mayor or any agency in which the legal rights, duties, or privileges of specific parties are required by any law (other than this subchapter), or by constitutional right, to be determined after a hearing before the Mayor or before an agency[.]"

[12] D.C. OFFICIAL CODE § 42-3502.16(a) provides in relevant part, as follows: "The Rent Administrator shall consider adjustments allowed by §§ 42-3502.10, 42-3502.11, 42-3502.12, 42-3502.13, and 42-3502.14 or a challenge to a § 42-3502.06 adjustment, upon a petition filed by the housing provider or tenant."

The sole justification presented by the Tenants for a hearing is "due process," without any reference to a particular supporting provision of the Constitution and without any further elaboration of the meaning of the term "due process." *See* March Notice of Appeal at 1. The DCCA has observed that the Fifth Amendment to the U.S. Constitution prohibits the District of Columbia and its instrumentalities from depriving a person of a property interest without due process of law. Baltimore v. District of Columbia, 10 A.3d 1141, 1154 (D.C. 2011); Richard Milburn Pub. Charter Alt. High Sch. v. Cafritz, 798 A.2d 531, 540-41 (D.C. 2002) (citing Mathews v. Eldridge, 424 U.S. 319, 33 (1976)); s*ee also,* U.S. Const. amend. V ("[n]o person shall...be deprived of life, liberty, or property, without due process of law.") Property interests protected by the Fifth Amendment are created and defined by "existing rules or understandings that stem from an independent source such as state law – rules or understandings that create certain benefits and that support claims of entitlement to those benefits." Cafritz, 798 A.2d at 541 (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

The Commission's review of the record initially reveals that, during the RAD proceedings below, the Tenants did not assert a Fifth Amendment due process right to an evidentiary hearing.[13] *See* Motion for Reconsideration and Motion for Relief from Judgment at 1-2; Comments of Christine Burkhardt; Comments of Don Wassem; R. at 293, 294-203, 830-31. The Commission has consistently held that it may not address issues on appeal that were not properly raised and developed in the proceedings before the RAD. *See, e.g.,* Tillman v. Reed, RH-TP-08-29,136 (RHC Sept. 18, 2012) (determining that an issue not raised before the ALJ did not constitute a cognizable legal claim on appeal); Hawkins v. Jackson, RH-TP-08-29,201 (RHC

[13] The Commission notes that the Tenants did assert a right to a hearing on the 501(f) Application in their Motion for Reconsideration and Motion for Relief from Judgment, filed on March 22, 2010; however, there was no mention that the right to a hearing was based on "due process" under the Fifth Amendment. Motion for Reconsideration and Motion for Relief from Judgment at 1-2; R. at 830-31.

Aug. 31, 2009) (stating that the Commission could not consider factual allegations in support of tenant's issue on appeal where they had not been raised below); Stone v. Keller, TP 27,033 (RHC Feb. 26, 2009) (noting that an issue that was not raised before the hearing examiner could not be raised on appeal).

Similarly, the DCCA has stated that constitutional claims not made in the trial court are ordinarily unreviewable on appeal. Price v. Independence Fed. Sav. Bank, 110 A.3d 567, 573 n.9 (D.C. 2015) (citing In re J.W., 837 A.2d 40, 47 (D.C. 2003)); Thompson v. District of Columbia, 407 A.2d 678, 679 n.2 (D.C. 1979) (declining review of Fifth Amendment due process claim for failure to raise the issue below); Valentine v. United States, 394 A.2d 1374 (D.C. 1978). Nonetheless, the DCCA has also observed that such constitutional issues may be reviewable by means of a "plain error" standard, but "only in exceptional situations and when necessary to prevent a clear miscarriage of justice apparent from the record." Price, 110 A.3d at 573 n.9 (quoting In re J.W., 837 A.2d at 47); Williams v. Gerstenfeld, 514 A.2d 1172, 1177 (D.C. 1986); *see, e.g.,* 14 DCMR § 3807.4 ("Review by the Commission shall be limited to the issues raised in the notice of appeal; provided, that the Commission may correct plain error."); Lenkin Co. Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Proctor v. D.C. Rental Hous. Comm'n, 484 A.2d 542, 550 (D.C. 1984) (noting that the Commission, under its rules, is permitted, though not required, to consider issues not raised in the notice of appeal insofar as they reveal plain error). In the context of constitutional issues, the DCCA has directed that "[t]o invoke the plain error exception, the appellant must show that the alleged error is obvious and so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the proceeding." Price, 110 A.3d at 573 n.9 (quoting In re J.W., 837 A.2d at 47 (emphasis added)); In re D.S., 747 A.2d 1182, 1188 (D.C. 2000).

The Commission's review of the RAD record, the March Notice of Appeal and the April Notice of Appeal does not indicate or reveal the requisite showing by the Tenants of clear prejudice to their substantial rights by the ARA in his consideration of, and the process of approval for, the 501(f) Application. *See* Price, 110 A.3d at 573 n. 9 (quoting In re J.W., 837 A.2d at 47); In re D.S., 747 A.2d at 1188. For example, the Commission observes that apart from the general statement in the March Notice of Appeal that the Tenants' "due process" rights were violated, the Tenants have not provided any additional details regarding the clear prejudice arising from the alleged "due process" deprivation of their right to a hearing prior to the ARA's approval of a 501(f) application. April Notice of Appeal; March Notice of Appeal; Tenants' Brief. *See* Price, 110 A.3d at 573 n.9 (quoting In re J.W., 837 A.2d at 47); In re D.S., 747 A.2d at 1188. The Tenants have also not identified the "property right" or entitlement to a benefit created by District law that is protected by the Fifth Amendment, or the ARA's actions and procedures that allegedly deprived them of such an alleged property right. April Notice of Appeal; March Notice of Appeal. *See* Cafritz, 798 A.2d at 541 (citing Bd. of Regents of State Colls., 408 U.S. at 577).

Moreover, the Commission observes that the Tenants' failure to make the requisite showing of prejudice to their constitutional rights for invoking the plain error exception under Price, 110 A.3d at 573 n.9 (quoting In re J.W., 837 A.2d at 47); In re D.S., 747 A.2d at 1188, also significantly undermines their compliance with the Commission's requirement that they provide in their notices of appeal "a clear and concise statement" of the error of the Acting Rent Administrator with respect to the deprivation of their due process rights. 14 DCMR

§ 3802.5(b);[14] *see, e.g.,* Tenants of 2300 & 2330 Good Hope Rd., S.E. v. A&A Marbury Plaza, LLC, CI 20,753 & CI 20,754 (RHC Mar. 10, 2015); Smith Prop. Holdings Consulate, LLC v. Lutsko, RH-TP-08-29,149 (RHC Mar. 10, 2015); Burkhardt, RH-TP-06-28,708.

Finally, the Commission notes that the provisions of the Act applicable to the ARA's consideration and approval of the 501 Application in this case, *supra* at 26-29, were the result of amendments to Section 501(f) of the Act in 2006 contained in the Tenant Reform Act. *See supra* at n.8. With respect to the legislative intent of the D.C. Council regarding amended provisions of the Act relating to the ARA's consideration of a 501(f) Application, the Commission's review of the legislative history of the Tenant Reform Act reveals that the inclusion of a hearing requirement was proposed at a legislative Public Roundtable, but was ultimately not adopted by the D.C. Council. Council of the District of Columbia, Committee on Consumer and Regulatory Affairs, Report on Bill 16-556, "Tenant Evictions Reform Amendment Act of 2006," (Feb. 10, 2006) at 5-6.

Moreover, the Tenant Reform Act included several new provisions requiring the participation of the D.C. Office of the Tenant Advocate (OTA) throughout each step of the 501(f) Application process, with the specific purpose of protecting the interests and rights of affected tenants. *Id.* at 7-8; *see* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(C). As the Committee Report states:

> . . . [A]mong the most critical [procedural elements of the amendments] to section 501(f)] is the Rent Administrator's determination as to whether the proposal is in the interests of each tenant. The provision requires the Rent Administrator to afford the tenants a 21-day comment period, consult the Chief Tenant Advocate, and consider the physical condition of the rent (sic) unit or the housing accommodation and the overall impact of relocation on the tenant . . .

[14] 14 DCMR § 3802.5(b) states in relevant part that "[t]he notice of appeal shall contain . . . a clear and concise statement of the alleged error(s) in the decision of the [Acting] Rent Administrator[.]"

> Subparagraph (C) [now D.C. OFFICIAL CODE § 42-3505.01(f)(1)(C)] sets forth duties of the Chief Tenant Advocate, including providing notice to affected tenants of tenant rights, the opportunity to comment on the application, and the Chief Tenant Advocate's availability to assist tenants, making inquiries into the housing provider's compliance with the section's requirements, and, if the Rent Administrator approves the application, maintaining a registry of tenants and relocation addresses. . .

Id. at 7-9. The Commission's review of the record in this case reveals substantial evidence that OTA participated in each step of the 501(f) Application process, communicating with tenants, the Acting Rent Administrator, and the Housing Provider in order to ensure that the rights of affected tenants were protected. *See, e.g.,* Aug. 22, 2009, Ltr. from OTA to Tenant Kenneth Mazzer and Acting Rent Administrator; Aug. 11, 2009 Ltr. from OTA to DCRA; July 9, 2010 Ltr. from OTA to Housing Provider; R. at 236-37, 250-53, 328.

For the foregoing reasons, the Commission dismisses these issues insofar as the Tenants are asserting that they had a constitutional due process right to a hearing on the 501(f) Application. *See supra* at 32-36; *see also,* 14 DCMR § 3802.5(b); Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 & CI 20,754; Lutsko, RH-TP-08-29,149; Burkhardt, RH-TP-06-28,708; Tillman, RH-TP-08-29,136; Hawkins, RH-TP-08-29,201; Stone, TP 27,033. Furthermore, for the foregoing reasons and based upon its review of the substantial evidence in the record, its interpretation of the provisions of Section 501(f) and its legislative history, and in the exercise of its reasonable discretion, the Commission determines that the Acting Rent Administrator did not err by issuing a final order on the 501(f) Application without transferring the case to OAH for a hearing, and affirms the Acting Rent Administrator on these issues. 14 DCMR § 3802.5(b); Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 & CI 20,754; Lutsko, RH-TP-08-29,149; Burkhardt, RH-TP-06-28,708; Tillman, RH-TP-08-29,136; Hawkins, RH-TP-08-29,201; Stone, TP 27,033.

H. The Acting Rent Administrator did not give tenants the opportunity to respond to *ex parte* communications between the Klingle [Corporation] (including any of its agents or assigns) and the Acting Rent Administrator (including other District officials who relayed communications with Klingle et al. to the Acting Rent Administrator).[15]

The Tenants assert on appeal that improper *ex parte* communications occurred between the Housing Provider and the Acting Rent Administrator; the Tenants do not provide any specifics regarding the nature of the *ex parte* communications, the date(s) and time(s) that the communications occurred, or the method of the communications. *See* March Notice of Appeal.

The relevant regulation governing *ex parte* communications during proceedings before RAD provides the following:

> Oral or written communications regarding a petition or other contested issue pending disposition before the Rent Administrator or staff of [RAD], for the benefit of one party only, and without notice to or contestation by the opposing party or any other person adversely interested, shall be considered *ex parte* communications.

14 DCMR § 4002.1.[16] As the language of the regulation states, *ex parte* communications are only prohibited in proceedings related to petitions under the Act and contested cases. *Id.* As explained in detail in the discussion of issues A-G, *supra* at 30-36, the Commission has determined that the 501(f) Application is not a "petition" under the Act, and the Acting Rent Administrator's consideration of the 501(f) Application was not a "contested case" proceeding requiring a hearing as that term is defined by the DCAPA. *See* 14 DCMR § 3802.5(b); Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 & CI 20,754; Lutsko, RH-TP-08-29,149; Burkhardt, RH-TP-06-28,708; Tillman, RH-TP-08-29,136; Hawkins, RH-TP-08-29,201; Stone, TP 27,033. Accordingly, the regulation prohibiting *ex parte* communications does not apply to

[15] Issue H corresponds to issues 5 from the Tenants' March Notice of Appeal.

[16] The Commission notes that this provision appears in the DCMR at Chapter 40, titled "Rental Accommodations . . . Division Hearings."

the proceedings in this case, and the Commission dismisses this issue on appeal. 14 DCMR §§ 3802.5(b) & 4002.1; Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 & CI 20,754; Lutsko, RH-TP-08-29,149; Burkhardt, RH-TP-06-28,708; Tillman, RH-TP-08-29,136; Hawkins, RH-TP-08-29,201; Stone, TP 27,033.

I. The Acting Rent Administrator did not give tenants (and their experts) the opportunity to be present during "inspections" of the building.

J. It was error for the ARA to base his Order and Amended Order on the letter of October 19, 2009 to Mr. Joel Cohn of OTA by Don Masoero, Chief Building Inspector, DCRA; the November 20, 2009 letter from Mr. Masoero to the Chief [T]enant Advocate and the Acting Rent Administrator; the December 4, 2009 Memorandum to the Acting Rent Administrator from Paul Walker of DHCD; and the January 11, 2010 Memorandum to the Acting Rent Administrator from Christopher Earley of DHCD, all attached to the Amending Order, as the findings in those letters are based on biased, leading questions (such as "Can numerous repairs of clogged drain pipes alone indicate a need to replace the system?", when, in fact, the Petitioner presented little if any evidence of "numerous" repairs of clogged drain pipes and whose own leases make "clearing of clogged pipes, toilets, and drains" a *tenant's* "maintenance obligation") instead of objective inquiries, and on *ex parte* communications with the Petitioner without affording opposing tenants and their experts a chance to rebut.

K. It was error for the ARA to treat the applied-for work as an all-or-nothing proposition to be approved or denied, and to not consider reasonable alternatives for each of the proposed alterations and renovations, as means [sic] of addressing the purported reliability and capacity deficiencies in the electric, water, drain, and heating service delivery equipment that would be more in the interests of tenants.

L. It was error for the ARA to approve the Application on finding that "no reasonable alternative method to perform such an expansive renovation is available" without affording tenants or others [sic] to provide evidence of such alternative methods.

M. The ARA erred in not ordering Klingle to allow daily inspection by displaced tenants of work does [sic] in vacated-thru-eviction apartment[s].

N. The ARA erred in confusing "useful life" estimates with "remaining life" estimates, ignoring empirical evidence of particular situations (e.g., human life expectancy (median? mean?) at birth might be 75 years, but that does not mean that at age 75 life expectancy is zero).

O. It was error for the Acting Rent Administrator to fail to find that the Application was in violation of the Memorandum of Agreement (dated January 1997) between the Klingle Corporation and the Kennedy-Warren Residents Association, to the benefit of all tenants of the Housing Accommodation.

P. It was error for the Acting Rent Administrator to fail to deny the Application based on Klingle's (and its agents') conduct surrounding the seeking of the Application, including retaliatory conduct, violations of the Act, and acts against public policy, including Housing Provider's attempts to circumvent the 501(f) process.

Q. It was error for the ARA to not rescind the notices to vacate pursuant to Section 501(f)(5).[17]

The Commission has set forth, *supra* at 26-29, the provisions of Section 501(f) of the Act that are relevant to the filing and consideration of the 501(f) Application. D.C. OFFICIAL CODE § 42-3505.01(f)(1). The Commission observes that each of the above-recited issues on appeal, I-Q, allege error related to the Acting Rent Administrator's failure to take some action that was not required by the provisions of section 501(f). *Compare* D.C. OFFICIAL CODE § 42-3505.01(f)(1), *with* March Notice of Appeal, *and* April Notice of Appeal.[18]

For example, issue I asserts that it was error for the Acting Rent Administrator to not give the Tenants the opportunity to be present during inspections of the Housing Accommodation. March Notice of Appeal at 2. However, D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(iii), which contains the requirement that an inspector from the Department of Consumer and Regulatory

[17] Issues I, J, K, L, M, and N, correspond to issues 6, 8, 18, 20, 21, and 22, respectively, from the Tenants' March Notice of Appeal. Issues O, P, and Q correspond to issues 4, 5, and 7, respectively, from the Tenants' April Notice of Appeal.

[18] The DCCA has explained that a court must look at the "plain meaning" of the words of a statute or regulation when the words are clear and unambiguous, and construe the words according to their ordinary sense and with the meaning commonly attributed to them. *See* District of Columbia v. Edison Place, 892 A.2d 1108, 1111 (D.C. 2006); *see also* Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007); Tenants of 4021 9th St., N.W. v. E&J Props., LLC, HP 20,812 (RHC June 11, 2014); Bower v. Chastleton Assocs., TP 27,838 (RHC Mar. 27, 2014); Carpenter v. Markswright Co., RH-TP-10-29,840 (RHC June 5, 2013).

Affairs (DCRA) inspect the Housing Accommodation for the accuracy of the statements in the 501(f) Application, does not provide that tenants have the right to be present for the DCRA inspection. *Compare* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(iii), *with* March Notice of Appeal at 2. Similarly, in issue J, the Tenants assert that the Acting Rent Administrator erred by accepting a report of the DCRA inspector that was based on "leading questions" instead of "objective inquiries;" nevertheless, the inspection requirement in the Act only states generally that the DCRA inspector must verify the accuracy of the statements in the application, but does not prescribe any particular method for doing so. *Compare* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(iii), *with* March Notice of Appeal at 2.

In issues K and L, the Tenants assert that the Acting Rent Administrator erred by treating the 501(f) Application as "an all-or-nothing proposition" and by failing to allow the Tenants to provide evidence of alternative methods of performing the work identified in the 501(f) Application, which would not require the displacement of Tenants. March Notice of Appeal at 3. While Section 501(f) requires the Acting Rent Administrator to determine whether the proposed renovations cannot be made while the units are occupied, whether the proposed renovations are necessary to bring the housing accommodation into compliance with the housing code, and whether the proposed alterations are in the interests of the affected tenants, it neither requires, nor otherwise circumscribes the Rent Administrator's discretion regarding, any consideration or determinations by the Rent Administrator regarding whether there are other available or appropriate alternatives to implementing the alterations or renovations proposed by a housing provider. *Compare* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(v), *with* March Notice of Appeal at 3. At the same time, while Section 501(f)(1)(C)(II) of the Act provides tenants twenty-one (21) days to comment on any statement made by a housing provider in the Section 501(f)

Application and "the impact [that] an approved application would have" on them, it neither requires, nor prevents tenants from making, proposals to the Rent Administrator to consider alternative implementation strategies for any alterations or renovations, which proposals the Rent Administrator in any event has discretion to address . *Compare* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(ii), *with* March Notice of Appeal at 3.

In issue M, the Tenants assert that the Acting Rent Administrator erred in failing to order the Housing Provider to allow daily inspections of work performed pursuant to the 501(f) Application. March Notice of Appeal at 3. The Commission notes that the only inspection requirement under the Act is that the Housing Accommodation must be inspected by an inspector from DCRA for the accuracy of statements in the 501(f) Application; there is no requirement that the Housing Provider allow the Tenants to conduct daily inspections of work being performed pursuant to the 501(f) Application. *Compare* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(iii), *with* March Notice of Appeal at 3.

In issue N, the Tenants assert that the Acting Rent Administrator erred in confusing "'useful life' estimates with 'remaining life'" estimates. March Notice of Appeal at 3. The Commission notes that, under the Act, the Acting Rent Administrator was required to make three (3) determinations regarding the proposed renovations: (1) that the proposed renovations could not be made with the Housing Accommodation was occupied, (2) that the proposed renovations were necessary to bring the Housing Accommodation into compliance with the housing code, and (3) that the proposed renovations are in the interest of the affected tenants. D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(v)(I)-(III). The Commission's review of Section 501(f) does not indicate that the Rent Administrator's discretion is in any way restricted with respect to any

consideration of "remaining life" or "useful life" estimates in addressing the merits of a 501(f) Application.

In issue O, the Tenants assert that the Acting Rent Administrator erred by failing to find that the 501(f) Application violated a 1997 Memorandum of Agreement (MOA) between the Tenants and the Housing Provider. *See* April Notice of Appeal at 2. R. at 812-823. The Tenants provide no references to the record of this case before the Rent Administrator, no citations to relevant provisions of Section 501(f) or other provisions of the Act, and no case law to support or explain this claim of error by the Rent Administrator. Furthermore, the Tenants do not cite to any specific terms or provisions of the MOA to support their claim that the Rent Administrator erred in failing to find that the 501(f) Application violated the MOA. *Id.*

The Commission's review of the record, indicates that the claim of alleged violations by the Housing Provider of the MOA was also made in the Tenants' Motion for Reconsideration and Motion from Relief of Judgment and in litigation between the Tenants and the Housing Provider in D.C. Superior Court in Block v. Klingle Corp., Civil Action No. 2009 CA009369B filed in December 2009.[19] R. at 790-794, 829-830.

The Rent Administrator did not issue a final order with respect to the Tenants' Motion for Reconsideration and Motion from Relief of Judgment. In the absence of any action by the Rent Administrator, the Motion for Reconsideration and Motion from Relief of Judgment was denied by operation of law under 14 DCMR § 4013.5. *See infra* at 48-50.

In the D.C. Superior Court action, the Tenants sought declaratory and injunctive relief and damages for "breaches of contract, intentional interferences with contractual expectations,

[19] The Tenants' Motion for Reconsideration and Motion from Relief from Judgment indicates that this action was filed in the D.C. Superior Court in December 2009. R.at 829-830. The only pleading allegedly from this action in the record is an unsigned and undated "First Amended Complaint for Declaratory & Injunctive Relief & Damages." R. at 769-806

misrepresentations, negligence, retaliation . . . in their acts and omissions related to contractual agreements made with and or benefiting the Tenants." R. at 806. The Commission's review of the record does not provide any final orders or other information with respect to the D.C. Superior Court's final or other decisions regarding the aforementioned civil action.

The Commission's review of the MOA reveals neither any specific or direct reference to the 501(f) Application, nor any term according to which the performance of the Housing Provider or Tenant under the MOA is conditioned in any way upon, or related in any way to, the 501(f) Application. R. at 808-823. The Commission's review indicates that the primary purpose of the MOA was for the Housing Provider to obtain the support of the KWRA for a zoning change and Planned Unit Development proposal to the D.C. Zoning Commission. R. at 822.

The Commission observes that the Tenants' statement of this issue suggests that the Rent Administrator erred in failing to determine that the 501(f) Application violated the MOA, not that the MOA violated the Act's requirements for a 501(f) Application. In its discretion, the Commission thus interprets the Tenants' contention as stating that the Housing Provider's 501(f) Application constituted a breach of the terms of the MOA. Based upon its interpretation of the issue statement and its review of the record, the Commission determines that the Tenants' allegation of error is that the Rent Administrator failed to determine that the 501(f) Application breached the terms of the MOA, a private agreement between the Tenants and the Housing Provider.

The jurisdiction of the Rent Administrator is limited by D.C. OFFICIAL CODE § 42-3502.04(c), which provides as follows: "[t]he Rent Administrator shall have jurisdiction over those complaints and petitions arising under subchapters II, IV, V, VI, and IX of this chapter and title V of the Rental Housing Act of 1980 which may be disposed of through administrative

proceedings." *See* Bower, TP 27,838; Johnson v. Am. Rental Mgmt. Co., TP 27,921 (RHC Sept. 30, 2005); Lane v. Davis, TP 24,841 (RHC Sept. 30, 2002). The Rent Administrator's jurisdiction "does not extend to every dispute over occupancy of residential property or services provided, even for consideration." Sindram v. Tenacity Group, RH-TP-07-29,094 (RHC Aug. 18, 2011) (quoting King v. Remy, TP 20,962 (RHC May 18, 1988)).

Based upon its review of the record, the Commission is unable to determine that the Tenants' contention arises under the provisions of the Act which conferring jurisdiction upon the Rent Administrator. *See* D.C. OFFICIAL CODE § 42-3502.04(c); *see, e.g.*, Bower, TP 27,838; Johnson, TP 27,921; Lane, TP 24,841. Furthermore, the Commission is unable to affirm that the Tenants' claim would be able to be disposed of through administrative proceedings before the Rent Administrator. *See* D.C. OFFICIAL CODE § 42-3502.04(c); *see, e.g.*, Bower, TP 27,838; Johnson, TP 27,921; Lane, TP 24,841.

To the contrary, the Commission's review of the record indicates that the appropriate venue for adjudicating the Tenants' breach of contract claim is through a civil action before the D.C. Superior Court. *See* D.C. OFFICIAL CODE §§ 11-921(a).[20] As noted *supra* at 42-3, the record of this appeal indicates that the Tenants appropriately filed suit on claims similar to their issue in this appeal in the Superior Court, thereby not depriving them of an appropriate venue and remedy for their claim. *See supra* at 42-3.

In issue P, the Tenants assert that the Housing Provider's conduct surrounding the 501(f) Application constituted "retaliatory conduct" and "violations of the Act." April Notice of Appeal at 2. Section 501(f) does not contain any provisions with respect to retaliation or any

[20] D.C. OFFICIAL CODE § 11-921(a) provides, in relevant part, as follows: "[T]he Superior Court has jurisdiction over any civil action or other matter (at law or in equity) brought in the District of Columbia."

cross-references to the section of the Act that addresses any claims of retaliation, D.C. OFFICIAL CODE § 42-3502.02(a)-(b), within the context of 501(f) Application process. *Compare* D.C. OFFICIAL CODE § 42-3505.01(f), *with* D.C. OFFICIAL CODE § 42-3502.02(a)-(b). Section 501(f) contains no provisions which would impair or preclude a tenant from filing a separate Tenant Petition regarding a retaliation claim. *See* D.C. OFFICIAL CODE § 42-3505.01(f). The Commission's review of the record does not indicate that the Tenants filed any separate tenant petitions with claims of retaliation under D.C. OFFICIAL CODE § 42-3502.02(a)-(b). Based upon its review of the provisions of 501(f), the Commission determines that claims of retaliation and violations of the Act outside of the requirements for the 501(f) Application must be alleged through the filing of a separate tenant petition. D.C. OFFICIAL CODE §§ 42-3502.02(a)-(b), 42-3502.16(a); 14 DCMR § 4214.4(b).[21]

In issue Q, the Tenants assert that the Acting Rent Administrator erred by not rescinding notices to vacate issued pursuant to the 501(f) Application. April Notice of Appeal at 2. The Commission notes that a tenant's challenge to the sufficiency of a notice to vacate that has been issued must be brought through the filing of a tenant petition, and is necessarily not a consideration during the application for permission to issue the notice to vacate pursuant to section 501(f). *See* 14 DCMR § 4214.4(a).[22]

In sum, the Commission only has jurisdiction to determine whether the Acting Rent Administrator complied with the statutory and regulatory requirements in the Act for the review

[21] 14 DCMR § 4214.4(b) provides the following: "The tenant of a rental unit . . . may, by petition filed with the Rent Administrator, complain of and request appropriate relief for . . . (b) Any proposed retaliatory eviction or other retaliatory act in violation of § 502 of the Act[.]"

[22] 14 DCMR § 4214.4(a) provides, in relevant part, as follows: "The tenant of a rental unit . . . may, by petition filed with the Rent Administrator, complain of and request appropriate relief for . . . (a) Any violation of the notice requirements of § 501 of the Act[.]

and approval processes related to the 501(f) Application. *See, e.g.,* Doyle v. Pinnacle Realty Mgmt., TP 27,067 (RHC Mar. 10, 2015); Jackson v. Peters, RH-TP-12-28,898 (RHC Sept. 27, 2013); Vista Edgewood Terrace v. Rascoe, TP 24,858 (RHC Oct. 13, 2000). The Commission's standards of review for the ARA's approval of the 501(f) Application in this appeal are contained in 14 DCMR § 3807.1. The Commission determines that errors alleged by the Tenants in issues I-Q with respect to the ARA's approval of the 501(f) Application do not arise from, or state legally cognizable claims under, the provisions of 501(f). The Commission is without jurisdiction to consider any legal claims that do not arise from specific provisions of the Act. D.C. OFFICIAL CODE §§ 42-3502.02(a)(2) & 42-3502.04(c); 14 DCMR § 3807.1;[23] *see, e.g.,* Doyle, TP 27,067; Bower, TP 27,838; Jackson, RH-TP-12-28,898; Vista Edgewood Terrace, TP 24,858. Accordingly, the Commission dismisses issues I-Q.[24]

R. It was error for the Acting Rent Administrator ("ARA") to issue the Order and Amending Order when the ARA did not have jurisdiction over the matter after Klingle filed a notice of appeal filed in December 2009 (in which Klingle announced, among other things, that Klingle would not be honoring the order Klingle appealed from).[25]

On December 22, 2009, several months prior to the issuance of the Acting Rent Administrator's Final Order, the Housing Provider filed an appeal with the Commission from an order of the Acting Rent Administrator, dated December 11, 2009. Housing Provider's Notice of Appeal at 1. In an order dated June 28, 2013, dismissing the Housing Provider's Notice of Appeal, the Commission stated the following: "the December 11, 2009 Order [of the Acting Rent

[23] D.C. OFFICIAL CODE § 42-3502.02(a)(2) provides in relevant part as follows: "The Rental Housing Commission shall: . . . (2) Decide appeals brought to it from decisions of the Rent Administrator . . . [.]"

[24] The Commission notes that, to the extent that the Tenants believe that the provisions of Section 501(f) of the Act do not provide them with sufficient protections, their remedy is to seek redress from the Council of the District of Columbia through legislative amendments to the Act.

[25] Issue R corresponds to issue 1 from the Tenants' March Notice of Appeal.

Administrator] was not appealable to the Commission because it was not a final decision and order[.]"[26] Klingle Corp. v. Tenants of 3133/3131 Connecticut Ave., N.W., NV 09-001 (RHC June 28, 2013) (Order on Motion to Withdraw Appeal) at 2.

Where the Commission has previously determined in the context of this case that the December 11, 2009 Order was not a final, appealable order to the Commission, the Commission is satisfied that the Housing Provider's filing of an appeal of that Order did not remove the jurisdiction of the Acting Rent Administrator over the 501(f) Application, and thus dismisses this issue on appeal. 14 DCMR § 3802.2-.3;[27] Order on Motion to Withdraw Appeal at 2.

S. It was error for the ARA to not rule upon motions for relief from judgment.[28]

The Tenants in this case filed a single document with RAD entitled Motion for Reconsideration and Motion for Relief from Judgment on March 22, 2010. Motion for Reconsideration and Motion for Relief from Judgment at 1; R. at 831. The pleading asserted

[26] The Commission notes that the doctrine of "law of the case," prohibiting the Commission from reopening and reconsidering an issue that was previously resolved in a particular case, applies to the Commission's consideration of whether the December 11, 2009 Order was a final, appealable Order. Douglas v. Dorchester House Assocs., LLC, RH-SF-09-20,098 (RHC Apr. 8, 2015); King v. McKinney, TP 27,264 (RHC June 17, 2005); Dias v. Perry, TP 24,349 (RHC July 30, 2004).

[27] 14 DCMR § 3802.2-.3 provide the following, in relevant part:

> 3802.2 A notice of appeal shall be filed by the aggrieved party within ten (10) days after a final decision of the Rent Administrator is issued . . . [.]
>
> 3802.3 The filing of a notice of appeal removes jurisdiction over the matter from the Rent Administrator; provided, that if both a timely motion for reconsideration and a timely notice of appeal are filed with respect to the same decision, the Rent Administrator shall retain jurisdiction over the matter solely for the purpose of deciding the motion for reconsideration, and the Commission's jurisdiction with respect to the notice of appeal shall take effect at the end of the ten (10) day period provided by § 4013.

[28] Issue S corresponds to issue 6 from the Tenants' April Notice of Appeal.

that it was meant to serve as both a motion for reconsideration under 14 DCMR § 4013,[29] and a motion for relief from judgment under 14 DCMR § 4017.[30] *Id.*

The Commission observes that the caption of the Motion for Reconsideration and Motion for Relief from Judgment thus combines two (2) separate and distinct post-hearing actions for relief. *See* 14 DCMR §§ 4013, 4017. However, despite such caption, the Motion for Reconsideration and Motion for Relief from Judgment seeks the same, single relief:

> For the foregoing reasons, the grants to Klingle in the Orders should either be rescinded, or their finality and effectiveness stayed pending other proceedings, and the Application should either be denied outright or scheduled for an adjudicative hearing. Moreover, Klingle should be ordered to show cause why it should not be fined, and why its Application should not be denied outright, for reducing facilities and services without prior approval of the Rent Administrator, for violating the ARA's orders in this proceeding, and for violating 14 DCMR 4400.4.

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[29] 14 DCMR § 4013 provides, in relevant part, as follows:

> 4013.1 Any party served with a final decision and order may file a motion for reconsideration with the hearing examiner within ten (10) days of receipt of that decision, only in the following circumstances:
>
> (a) If there has been a default judgment because of the non-appearance of the party;
>
> (b) If the decision or order contains typographical, numerical, or technical errors;
>
> (c) If the decision or order contains clear error that is evident on its face; or
>
> (d) If the existence of newly discovered evidence which could not have been discussed prior to the hearing date has been discovered.

[30] 14 DCMR § 4017 provides, in relevant part, as follows:

> 4017.1 On motion and upon such terms as are just, the Rent Administrator may relieve a party from a final judgment, order, or proceeding for the following reasons:
>
> (a) Mistake, inadvertence, surprise, excusable neglect; newly discovered evidence that by due diligence could not have been discovered in time to move for reconsideration under § 4013;
>
> (b) Fraud, misrepresentation, or other misconduct of an adverse party; or
>
> (c) The decision has been satisfied, released, or discharged, or a prior decision upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the decision have prospective application.

R. at 825.

It is axiomatic that "the nature of a motion is determined by the relief sought, not by its label or caption." Recio v. D.C. Alcohol Beverage Control Bd., 75 A.3d 134, 143-44 (D.C. 2013) (quoting Wallace v. Warehouse Emps. Union # 730, 482 A.2d 801, 803-804 (D.C. 1984); Bansda v. Wheeler, 995 A.2d 189, 194 (D.C. 2010); Nichols v. First Union Nat'l Bank, 905 A.2d 268, 272 n.5 (D.C. 2006). In its discretion, the Commission interprets the relief sought by the Tenants in their Motion for Reconsideration and Motion for Relief from Judgment as similar to that sought customarily by litigants before the Rent Administrator in a motion for reconsideration under 14 DCMR § 4013.1. *See* United Dominion Mgmt. v. Hinman, RH-TP-06-28,782 (RHC June 5, 2013) (citing Sawyer Prop. Mgmt. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 102-103 (D.C. 2005)) ("[t]he DCCA has provided the Commission with considerable deference and discretion in its interpretation of the Act"); *see also,* Dreyfuss Mgmt. v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013); Watkis v. Farmer, RH-TP-07-29,045 (RHC Aug. 15, 2013). Insofar as the Commission interprets the Tenants' Motion for Reconsideration and Motion for Relief from Judgment in the nature of a Motion for Reconsideration, *see* Recio, 75 A.3d at 143-44; Bansda , 995 A.2d at 194; Nichols, 905 A.2d at 272 n.5, the Commission determines that, as a Motion for Reconsideration, it was appropriately denied by the Rent Administrator by operation of law under 14 DCMR § 4013.5, since it was not granted or denied in writing by the Rent Administrator within ten (10) days of its receipt.[31]

[31] Under 14 DCMR § 3802.3, the filing of the March Notice of Appeal would ordinarily have removed jurisdiction from the Acting Rent Administrator; however, the Tenants also filed a motion for reconsideration, and therefore the Acting Rent Administrator retained jurisdiction over the 501(f) Application for the ten-day period under 14 DCMR § 4013.1 for deciding the motion for reconsideration. 14 DCMR §§ 3802.3 & 4013.1; *see, e.g.,* Beckford, RH-TP-07-28,895 at n.15; Haka v. Gelman Mgmt. Co., TP 27,442 (RHC Feb. 9, 2006). After the expiration of the ten-day period under 14 DCMR § 4013.1, the Motion for Reconsideration was denied by operation of law, and the Acting

Accordingly, the Commission determines that the Acting Rent Administrator addressed and disposed of the Tenants' Motion for Reconsideration and Motion for Relief in compliance with the applicable regulations of the Act, and that consequently this contention of the Tenants lacks merit. The Commission affirms the Acting Rent Administrator on this issue. 14 DCMR §§ 3802.3 & 4013.1; *see, e.g.,* Beckford, RH-TP-07-28,895; Haka, TP 27,442.

T. By granting/approving the "application", the Acting Rent Administrator impermissibly administratively-granted a reduction-in-facilities/services petition embedded in the 501(f) application, which petition requires an adjudicative hearing.

U. The unnecessary work such as the installation of washers and dryers will result in a reduction of the area of apartments, even for tenants who do not want that installation, due to the installation of ducts and vents in all units. This reduction in space constitutes a permanent eviction from part of the unit, which is not permissible in a 501(f) application.

V. By approving the plan, the ARA impermissibly approved reductions in services and facilities (e.g., loss of apartment floor space, wall space, closet space, ceiling height; loss of quiet occupancy/use of units and common areas) without a hearing and without ordering Klingle to pay damages to tenants and to reduce rents.[32]

Each of the above-recited issues on appeal relates to allegations of a change in the services and facilities at the Housing Accommodation. The Commission notes that a services and facilities petition under D.C. OFFICIAL CODE § 42-3502.11, is a petition for a rent adjustment and constitutes a separate, legally cognizable action under the Act, distinct from and unrelated to (and not embedded in) a housing provider's application to issue notices to vacate under Section 501(f).[33] *See, e.g.,* Karpinski v. Evolve Prop. Mgmt., LLC, RH-TP-09-29,590 (RHC Aug. 19,

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Rent Administrator lost jurisdiction over this case in light of the March Notice of Appeal. 14 DCMR §§ 3802.3 & 4013.5; *see, e.g.,* Beckford, RH-TP-07-28,895; Haka, TP 27,442.

[32] Issues T, and U, correspond to issues 10, and 11, respectively, from the Tenants' March Notice of Appeal. Issue V corresponds to issue 11 from the Tenants' April Notice of Appeal.

[33] D.C. OFFICIAL CODE § 42-3502.11 provides as follows:

2014) (tenant filed tenant petition for a reduction in rent to reflect a reduction in services); Dejean v. Gomez, RH-TP-07-29,050 (RHC Aug. 15, 2013) (tenant petition filed by tenant seeking compensation for reduction in services); Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Dec. 27, 2012) (tenant filed tenant petition to recover value of reductions in services). Unlike a services and facilities petition, an application under Section 501(f) does not involve any adjustment to the rents in a housing accommodation. *See* D.C. OFFICIAL CODE § 42-3505.01(f)(1). Accordingly, the Commission is satisfied that any consideration of changes in the services and facilities at the Housing Accommodation was outside of the scope of the 501(f) Application, and the Commission dismisses these issues on appeal. *Compare* D.C. OFFICIAL CODE § 42-3505.01(f)(1), *with* D.C. OFFICIAL CODE § 42-3502.11; *see also* Karpinski, RH-TP-09-29,590; Dejean, RH-TP-07-29,050; Kuratu, RH-TP-07-28,985.

To the extent that the Tenants contend that the services and facilities have been reduced in their units or in the common areas of the Housing Accommodation, their remedy is to file a separate tenant petition. 14 DCMR § 4214.4(d);[34] Karpinski, RH-TP-09-29,590; Dejean, RH-TP-07-29,050; Kuratu, RH-TP-07-28,985.

> If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent charged, as applicable, to reflect proportionally the value of the change in services or facilities.

[34] 14 DCMR § 4214.4(d) provides, in relevant part, the following:

> The tenant of a rental unit . . . of a housing accommodation may, by petition filed with the Rent Administrator, complain of and request appropriate relief for . . . (d) any unauthorized reduction in services or facilities related to the rental unit not permitted by the Act or authorized by order of the Rent Administrator.

W. It was error for the Acting Rent Administrator to fail to deny the Application because the notices to vacate submitted with the Application did not comply with the Rental Housing Act of 1985, as amended (the "Act"), or other controlling law.[35]

The above-recited issues on appeal relate to allegations regarding the contents of the notice to vacate submitted with the 501(f) Application. April Notice of Appeal at 3. The Commission's regulation requiring that a housing provider submit a draft notice to vacate with a 501(f) application does not specifically provide that a deficient draft notice to vacate would be grounds for denying the 501(f) application. *Compare* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(B)(iii), *with* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(D). Instead, the Act provides and describes substantive requirements for the contents of such a notice to vacate only at the time it is served on tenants. D.C. OFFICIAL CODE § 42-3505.01(f)(1)(D); *see, e.g.,* Shipe v. Carter, RH-TP-08-29,411 (RHC Sept. 18, 2012); Pena v. Woynarowsky, RH-TP-06-28,817 (RHC Feb. 3, 2012). Moreover, the Commission notes that the Tenants may challenge the contents of any notice to vacate that was actually served on them through the filing of a tenant petition. 14 DCMR § 4214.4(a).

Accordingly, where the Commission is satisfied that the Act, under D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)-(C), does not require the denial of the 501(f) Application where the draft notice to vacate may be claimed to have been deficient in certain respects, and the Commission is satisfied that the Act provides Tenants with the right to challenge any notice to vacate that was served on them through the filing of a tenant petition, the Commission affirms the Acting Rent Administrator on this issue. D.C. OFFICIAL CODE §§ 42-3505.01(f)(1)(D) & 42-3505.01(f)(1)(B)(iii); *see, e.g.,* Shipe, RH-TP-08-29,411; Pena, RH-TP-06-28,817.

[35] Issue W corresponds to issue 15 from the Tenant's April Notice of Appeal.

X. The Acting Rent Administrator did not give tenants the opportunity to timely comment on all the "Evidence and Documentation" he considered.[36]

In the Final Order, the Acting Rent Administrator listed the following "evidence and documentation considered:"

1. The RAD Case File for NV 09-001;

2. Petitioner's Application for Approval to Issue 120-Day Notices to Vacate Pursuant to D[.]C[.] Official Code Sect. 42-3505.01(f);

3. Comments in Response to Petitioner's 501(f) Application for Approval from . . . [t]enants . . .

4. Report by Casey Tilgham, Associate AIA, dated August 20, 2009, on Review of Petitioner's 501(f) Application for Approval;

5. Report by Joseph D. Marsh, Ph.D., P.E., Senior Manager, Delta Consulting Group, Inc., dated August 21, 2009, on Review of Petitioner's 501(f) Application for Approval;

6. Report by Don Masoero, Chief Building Official, Inspection and Compliance Administration, D[.]C[.] Department of Consumer and Regulatory affairs (DCRA), dated October 19, 2009, on Review of Petitioner's 501(f) Application for Approval and DCRA Inspection of the housing accommodation;

7. Supplemental Report by Don Masoero, Chief Building Official, Inspection and Compliance Administration, DCRA, dated November 20, 2009, on Review of Petitioner's 501(f) Application for Approval and DCRA On-Site Inspection of the housing accommodation;

8. Initial Report by Paul Walker, Architect/Construction Inspector, Development Finance Division, D[.]C[.] Department of Housing and Community Development, dated December 4, 2009, on review of Petitioner's 501(f) Application for Approval; and

9. Final Report on Petitioner's 501(f) Application for Approval and On-site Inspection of housing accommodation by Paul Walker, Architect/Construction Inspector, Development Finance Division, D[.]C[.] Department of Housing and Community Development, dated January 11, 2010.

Final Order at 3-4; R. at 695-96.

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[36] Issue X corresponds to issue 3 from the Tenants' March Notice of Appeal.

Under D.C. OFFICIAL CODE §§ 42-3505.01(f)(1)(A)(ii) & 42-3505.01(f)(1)(C)(i)(II), tenants have twenty-one (21) days to comment on "any statement made in the application." Section 501(f) does not provide the right for tenants to comment on any of the other "evidence and documentation" considered by the Acting Rent Administrator in the Final Order.[37] D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(ii) & 42-3505.01(f)(1)(C)(i)(II).

The Commission's review of the record in this case reveals that the Acting Rent Administrator issued a "Notice of Pending Application for Approval to Issue Section 501(f) 120-Day Notices to Vacate and Tenants' Statutory Right to Comment" on October 21, 2009. Klingle Corporation v. Tenants of 3133 Connecticut St., NW, NV 09-001 (RAD Oct. 9, 2009) (Notice of Pending 501(f) Application) at 1; R. at 501. The Notice of Pending 501(f) Application stated that the tenants at the Housing Accommodation would have 21 days to comment on the 501(f) Application. *Id.* at 3; R. at 499.

The Commission observes that the Final Order was issued on February 26, 2010, more than four (4) months after the Notice of Pending 501(f) Application. Final Order at 1; R. at 698. The Commission is unable to determine that substantial record evidence indicates that the Tenants were prevented or impaired in any way from commenting upon the 501(f) Application during the twenty-one (21) day period. D.C. OFFICIAL CODE §§ 42-3505.01(f)(1)(A)(ii) & 42-3505.01(f)(1)(C)(i)(II). Accordingly, the Commission is satisfied that the Acting Rent Administrator provided the Tenants with at least twenty-one (21) days to comment on the statements made in the 501(f) Application before issuing his Final Order. 14 DCMR § 3807.1. The Acting Rent Administrator is thus affirmed on this issue. D.C. OFFICIAL CODE § 42-

[37] The Commission observes that the rights of tenants are protected throughout the process under Section 501(f) by the statutorily required involvement and assistance of OTA. D.C. OFFICIAL CODE § 42-3505.01(f)(1)(C).

3505.01(f)(1)(A)(ii) & 42-3505.01(f)(1)(C)(i)(II); 14 DCMR § 3807.1; Final Order at 1; Notice of Pending 501(f) Application at 1; R. at 501, 698.

Y. It was error for the ARA to determine that the Application as of July 31, 2009 was sufficiently complete.[38]

Aside from the statement in the March Notice of Appeal, recited above, the Tenants have not provided any additional details for this issue on appeal, including what, specifically, was missing from the 501(f) Application at the time it was filed, and what the appropriate remedy should be if, in fact, the 501(f)Application were not complete when filed. March Notice of Appeal at 1.

The Act requires that the following be included with the 501(f) Application: (1) a statement regarding why the renovations are necessary and why they cannot be completed while the housing accommodation is occupied; (2) a copy of the notice given to tenants informing them that an application has been filed under section 501(f); (3) a draft of the notice to vacate to be issued to tenants if the application is approved; (4) a timetable for the renovations; and (5) a relocation plan for each tenant. D.C. OFFICIAL CODE § 42-3505.01(f)(1)(B).

In response to the Tenants' comments, the Acting Rent Administrator determined in the Final Order that the 501(f) Application was complete when filed on July 31, 2009. Final Order at 7; R. at 692. As the Commission stated *supra* at 30, the Commission will affirm the Final Order where the Commission is satisfied that the findings of fact are supported by substantial record evidence, and that the conclusions of law are in accordance with the Act. 14 DCMR § 3807.1. *See, e.g.,* Richardson v. Barac Co., TP 28,196 (RHC June 24, 2015); Lutsko, RH-TP-08-29,149; Carmel Partners, LLC v. Barron, TP 28,510, TP 28,521 & TP 28,526 (RHC Oct. 28, 2014).

[38] Issue Y corresponds to issue 4 from the Tenants' March Notice of Appeal.

The Commission's review of the record reveals substantial evidence to support the Acting Rent Administrator's finding that each of the five (5) elements required under D.C. OFFICIAL CODE § 42-3505.01(f)(1)(B) were included with the 501(f) Application when filed, including a document addressing the necessity of the renovations and the necessity of vacating the tenants during the renovations, R. at 51-215, a notice to the tenants that the 501(f) Application would be filed, R. at 235, a draft notice to vacate, R. at 1-4, a timetable for the renovations, R. at 16-20, and a relocation plan, R. at 5-15. Accordingly, the Commission affirms the Acting Rent Administrator's finding that the 501(f) Application contained all of the required materials under D.C. OFFICIAL CODE § 42-3505.01(f)(1)(B). Final Order at 7; 501(f) Application; R. at 1-20, 51-215, 235, 692.

Z. It was error to base the Order on the findings in the DCRA report when that report did not contain, as mandated by law, findings on every substantial statement of fact in the Application.[39]

The Commission notes that in the Tenants' statement of issue Z, recited above, the Tenants have not identified any specific statement of fact contained in the 501(f) Application that was not addressed by the DCRA Inspector in his inspection report. March Notice of Appeal at 2.

The Act states that prior to the approval of an application under section 501(f), an inspector from DCRA will inspect the housing accommodation to ensure the accuracy of the application materials, and that the inspector will report his findings to the Rent Administrator and OTA. *See* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(iii). There is no requirement that the inspection contain "findings of fact" like those required under the DCAPA for a contested case, but only that the inspector will report his or her findings regarding the accuracy of "material

[39] Issue Z corresponds to issue 9 from the Tenants' March Notice of Appeal.

statements in the application." *Compare* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(iii), *with* D.C. OFFICIAL CODE § 2-509(e).

The Commission's review of the record reveals that DCRA Inspector Don Masoero filed a report on October 19, 2009, stating that he had completed an inspection of the Housing Accommodation with the aim of checking the accuracy of material statements contained in the Housing Provider's 501(f) Application as required by D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(iii). DCRA Inspection Report at 1; R. at 502A. Inspector Masoero stated that as a result of the inspection he concluded that the proposed renovations in the 501(f) Application were justified, and that the engineering report submitted with the 501(f) Application gave a "factual account" of the conditions of the Housing Accommodation. *Id.* The Commission is satisfied that substantial evidence in the record supports the Acting Rent Administrator's determination that the DCRA Inspection Report meets the Act's requirement that a DCRA inspector report his or her findings regarding the accuracy of the statements made in the 501(f) Application. D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(iii); DCRA Inspection Report at 1; R. at 502A. The Commission thus affirms the Acting Rent Administrator on this issue. 14 DCMR § 3807.1.

AA. It was error for the Acting Rent Administrator to fail to take into account the interests of each affected tenant as required by D.C. Code § 42-3505.01(f)(1)(a)(v).[40]

Under D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(v), the Acting Rent Administrator was required to determine, in consultation with OTA, "[t]hat the proposal is in the interest of each affected tenant after considering the physical condition of the rental unit or the housing accommodation and the overall impact of relocation on the tenant." The Commission's review

[40] Issue AA corresponds to issue 13 from the Tenants' April Notice of Appeal.

of the record reveals that the Acting Rent Administrator made detailed findings of fact in the Final Order regarding whether the 501(f) Application was in the interest of the tenants at the Housing Accommodation, including responding to six specific concerns raised by the Tenants in their comments. Final Order at 8-9; R. at 690-91. For example, although the Acting Rent Administrator agreed that relocating "under any circumstances is an inherently stressful ordeal," he found that the 120-day proposed relocation period was not unreasonable, and that the Housing Provider had attempted to minimize the inconvenience by relocating each tenant to a unit within the Housing Accommodation. *Id.* at 8; R. at 691. Additionally, the Acting Rent Administrator found that the "new infrastructure systems and the new life safety systems will result in a significant improvement on the habitability" of the Housing Accommodation, offsetting any negative impacts that the proposed renovations would have. *Id.* at 9; R. at 690. Moreover, the Commission's review of the record does not reveal either that the Acting Rent Administrator failed to consult with OTA, or that OTA objected or otherwise disagreed with the Acting Rent Administrator's findings.

Accordingly, the Commission is satisfied that the Acting Rent Administrator considered whether the 501(f) Application was in the interest of each affected tenant, as required by Act, and thus affirms the Acting Rent Administrator on this issue.[41] D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(v); 14 DCMR § 3807.1; Final Order at 8-9; R. at 690-91; *see, e.g.,* Richardson, TP 28,196; Lutsko, RH-TP-08-29,149; Barron, TP 28,510, TP 28,521 & TP 28,526.

BB. It was error for the ARA to conclude that "There is no mechanical cooling system in many of the common areas which require natural or mechanical ventilation" when in fact the common areas are cooled either by air-

[41] The Commission observes that the Tenants, in their statement of issue AA on appeal, do not allege that the Acting Rent Administrator's findings regarding the interest of the tenants were unsupported by substantial record evidence. April Notice of Appeal at 3.

conditioning or by a mechanical system of fans (in place and functioning for decades) that circulates air throughout the building.[42]

The Tenants assert that the Acting Rent Administrator erred by finding that there is no cooling system in many of the common areas of the Housing Accommodation. March Notice of Appeal at 3. The Commission will uphold the Acting Rent Administrator's findings of fact where they are supported by substantial evidence. 14 DCMR § 3807.1; *see, e.g.,* Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012) at 12 (citing Hago v. Gewirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Aug. 4, 2011)) (stating that substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as able to support a conclusion."). The Commission has consistently asserted that "[w]here substantial evidence exists to support the [ALJ's] findings, even 'the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [ALJ].'" *See* Lutsko, RH-TP-08-29,149; Boyd v. Warren, RH-TP-10-29,816 (RHC June 5, 2013) (quoting Hago, RH-TP-08-11,552 & RH-TP-08-12,085 at 6); Loney v. Tenants of 710 Jefferson St., N.W., SR 20,089 (RHC Jan. 29, 2013) at n.13.

In the Final Order, the Acting Rent Administrator explained that visits to the Housing Accommodation by both the DCRA inspector and the Housing Provider's third-party contractor, confirmed the need for systems replacement, due, in part, to the lack of a "mechanical cooling system in many of the common areas."[43] Final Order at 7; R. at 692 (emphasis added). The Commission's review of the record reveals that the engineering report included with the 501(f) Application states that the renovations will include providing heating and cooling to the

[42] Issue BB corresponds to issue 19 from the Tenants' March Notice of Appeal.

[43] The Commission's review of the record reveals that the Acting Rent Administrator did not make any finding of fact that none of the common areas had cooling systems prior to the renovations.

corridors, one of the common areas of the Housing Accommodation. 501(f) Application; R. at 194. The Commission has consistently held that "[w]here substantial evidence exists to support the [ALJ's] findings, even 'the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [ALJ].'" *See* Lutsko, RH-TP-08-29,149; Boyd, RH-TP-10-29,816 (quoting Hago, RH-TP-08-11,552 & RH-TP-08-12,085 at 6); Loney, SR 20,089 at n.13. Accordingly, the Commission is satisfied that the Acting Rent Administrator's finding on this issue is supported by substantial evidence, and affirms the Final Order. 14 DCMR § 3807.1; *see, e.g.,* Marguerite Corsetti Trust, RH-TP-06-28,207; Final Order at 7; 501(f) Application; R. at 194, 692.

CC. The ARA made clear error or abused his discretion or was capricious or arbitrary in his assessment of "evidence" regarding the purposed "necessity" of channeling into walls above the garage and basement levels and inside apartments to replace any, let alone all, vertical and horizontal runs of copper wire, water supply lines, drain/waste/vent pipes, and heating pipes.

DD. The ARA made clear error or abused his discretion or was capricious or arbitrary in his assessment of "evidence" regarding the purposed "necessity" of evicting tenants and their possessions from the leased premises for more than only a few days or a couple of weeks in order to replace the following (assuming the replacements of [the] following are "necessary"): copper wires, water pipes, drain/waste/vent pipes, radiator pipes inside a particular apartment's walls.[44]

The Tenants assert in issues CC and DD that the Acting Rent Administrator erred in determining that channeling into the walls of the Housing Accommodation, thereby requiring the relocation of tenants, was a "necessity" based on the replacement of "copper wires, water pipes, drain/waste/vent pipes, [and] radiator pipes." March Notice of Appeal at 3-4.

The Commission notes initially that the Tenants have misstated the standard under the Act: the Acting Rent Administrator was not required to find that relocating the Tenants was

[44] Issues CC, and DD, correspond to issues 23, and 24, respectively, from the Tenants' March Notice of Appeal.

necessary, but instead was required to find that the proposed renovations could not "safely or reasonably be made" while the Tenants' units were occupied. *Compare* D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(v)(II), *with* March Notice of Appeal at 3-4. In the Final Order, the Acting Rent Administrator found that the proposed renovations could not be "safely or reasonably" made without relocating tenants, because the work involved shutting off the electricity and water supplies, and opening up walls and ceilings to access pipes and wire. Final Order at 7-8; R. at 691-92. The Commission's review of the record reveals that the Acting Rent Administrator's findings on this issue are supported by substantial record evidence, including the engineering report including with the 501(f) Application, R. at 203-205, the report by DCRA Inspector Don Masoero, R. at 502A, and the report by DHCD Architect Paul Walker, R. at 521-22. *See* Final Order at 8; R. at 691. The Commission has consistently asserted that "[w]here substantial evidence exists to support the [ALJ's] findings, even 'the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [ALJ].'" *See* Lutsko, RH-TP-08-29,149; Boyd, RH-TP-10-29,816 (quoting Hago, RH-TP-08-11,552 & RH-TP-08-12,085 at 6); Loney, SR 20,089 at n.13.

Accordingly, where the Commission is satisfied that the Acting Rent Administrator applied the correct standard under the Act, and that his finding that the renovations could not be completed without relocating the tenants is supported by substantial record evidence, the Commission affirms the Acting Rent Administrator on this issue. D.C. OFFICIAL CODE § 42-3505.01(f)(1)(A)(v)(II); 14 DCMR § 3807.1; Final Order at 7-8; R. at 203-205, 502A, 521-22, 691-92; *Ssee* Lutsko, RH-TP-08-29,149; Boyd, RH-TP-10-29,816 (quoting Hago, RH-TP-08-11,552 & RH-TP-08-12,085 at 6); Loney, SR 20,089 at n.13.

EE. Tenants reserve the right to raise any additional errors in their briefs on appeal in this proceeding.[45]

Review by the Commission is limited to the issues raised in the notice of appeal. 14 DCMR § 3807.4;[46] *see* Burkhardt, RH-TP-06-28,708 at 23; Killingham v. Wilshire Inv. Corp., TP 23,881 (RHC Sept. 30, 1999) at 10. The applicable regulation at 14 DCMR § 3802.7,[47] grants to the parties the right to file briefs in support of their positions, and the Commission has noted that it is appropriate for parties to use the brief as a means of developing issues raised in the notice of appeal. Burkhardt, RH-TP-06-28,708 at 23; Killingham, TP 23,881 at 10. Nonetheless, the use of the brief as a means of advancing issues that were not raised in the notice of appeal "exceeds the permissible scope of the . . . brief." Burkhardt, RH-TP-06-28,708 at 23; Killingham, TP 23,881 at 10; *see* Frye & Welch Assocs., P.C. v. D.C. Contract Appeals Bd., 664 A.2d 1230, 1233 (D.C. 1995); Joyner v. Jonathan Woodner Co., 479 A.2d 308, 312 (D.C. 1984).

In their notice of appeal, the Tenants stated the following for issue EE: "Tenants reserve the right to raise any additional errors in their briefs on appeal in this proceeding." April Notice of Appeal at 3. As 14 DCMR § 3807.4 limits the Commission's review to the issues raised in a notice of appeal, it is not within the Commission's jurisdiction to review any errors raised in the brief that were not first raised in a timely notice of appeal.[48] 14 DCMR § 3807.4; Burkhardt,

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[45] Issue EE corresponds to issue 16 from the Tenants' April Notice of Appeal.

[46] 14 DCMR § 3807.4 provides as follows: "Review by the Commission shall be limited to the issues raised in the notice of appeal; provided, that the Commission may correct plain error."

[47] 14 DCMR § 3802.7 states in relevant part as follows: "Parties may file brief in support of their position . . . ."

[48] The Commission has consistently held that its time limits for filing notices of appeal are mandatory and jurisdictional. *See, e.g.,* Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Mar. 11, 2015); Cascade Park Apartments v. Walker, TP 26,197(RHC Nov. 18, 2014) at n.13; Allen v. LC City Vista LP, RH-TP-12-30,181 (RHC Apr. 29, 2014).

RH-TP-06-28,708 at 23; Killingham, TP 23,881 at 10. Accordingly, this issue is dismissed.

See 14 DCMR § 3807.4; Burkhardt, RH-TP-06-28,708 at 23; Killingham, TP 23,881 at 10.

FF. The Acting Rent Administrator stated findings of fact without citing to specific pages or documents within the record.

GG. The Acting Rent Administrator made findings of fact that were unsupported by sworn statements in the record.

HH. The Acting Rent Administrator made findings of fact that were not supported by substantial evidence in the record.

II. The Acting Rent Administrator made legal conclusions that do not flow from analyses of the record and from understandable explications and applications of the legal standards for 501(f) application review as required by the DC APA [sic].

JJ. The Acting Rent Administrator did not explain the standards he used to find various things to be "necessary."

KK. The Acting Rent Administrator, in his Orders, uncritically adopted and re-used phrasings and characterizations made by the Applicant and its agents in the Application and elsewhere thus allowing the Applicant to ghostwrite portions of the Orders.

LL. It was error for the Acting Rent Administrator to not stay the above-captioned proceeding where issues related to this proceeding are being litigated in other administrative and legal proceedings.

MM. It was error for the ARA to apply the definition of 'tenant' in Chapter 34 of Title 42 of DC Code where the proper definition of tenant for this proceeding is in Chapter 35 of Title 42.

NN. It was error for the Acting Rent Administrator to fail to apply the appropriate statutory requirements and legal standards to the Application.[49]

The Commission's long-standing precedent requires that issues on appeal contain a "clear and concise statement of the alleged error(s)" in the lower court's decision. 14 DCMR § 3802.5(b); *e.g.*, Burkhardt, RH-TP-06-28,708; Bohn Corp. v. Robinson, RH-TP-08-29,328

[49] Issues FF, GG, HH, II, JJ, and KK, correspond to issues 12, 13, 14, 15, 16, and 17, respectively, from the Tenants' March Notice of Appeal. Issues LL, MM, and NN, correspond to issues 3, 12, and 14, respectively, from the Tenants' April Notice of Appeal.

(RHC July 2, 2014); Barac Co., VA 02-107. The Commission will dismiss issues that are "vague, overly broad, or do not allege a clear and concise statement of error." Burkhardt, RH-TP-06-28,708 (dismissing the following issue as too vague for review: "[w]hether the ALJ erred in applying [the Act's statute of limitations]"); Bohn Corp., RH-TP-08-29,328 (dismissing housing provider's contention that the ALJ gave the tenant legal advice where the housing provider failed to provide any additional details concerning the alleged advice given); Barac Co., VA 02-107 (finding issue stating "the Hearing Examiner used the wrong burden of proof" was too vague for review).

The Commission's review of the Tenants' statements of issues FF through NN on appeal, recited above, reveals that they are vague, overly broad, and do not contain a clear and concise statement of the alleged error(s) in the Final Order. March Notice of Appeal; April Notice of Appeal; *see* 14 DCMR § 3802.5(b); Burkhardt, RH-TP-06-28,706; Bohn Corp., RH-TP-08-29,328; Barac Co., VA 02-107. For example, in issue FF, the Tenants assert generally that the Acting Rent Administrator "stated findings of fact without citing to specific pages or documents within the record," without any reference to why this constituted error under the Act, which findings of fact the Tenants are referencing, or what provisions of the Act were violated. March Notice of Appeal at 2.

In issues GG and HH, the Tenants state simply that the Acting Rent Administrator made findings of fact that were unsupported by "sworn statements in the record" or "substantial evidence in the record," without identifying any specific findings of fact in the Final Order that were allegedly unsupported. *Id.* In issue II, the Tenants assert that the Acting Rent Administrator made legal conclusions that "do not flow from analyses of the record and from understandable explications and applications of the legal standards for 501(f) application

review." The Commission observes that the Tenants have failed to identify any specific conclusions of law in the Final Order that were purportedly in error, nor have they identified any legal standard under the Act that was misinterpreted or misapplied by the Acting Rent Administrator. *Id.* at 3.

In issue JJ, while the Tenants state that the Acting Rent Administrator failed to identify the standards used to "find various things to be 'necessary,'" the Tenants have not identified in their statement of issue JJ any specific findings of fact or conclusions of law that were in error, or what purported "things" were found by the Acting Rent Administrator to be necessary, allowing the Commission to identify any particular portion of the Final Order that the Tenants are challenging in this issue on appeal. *Id.*

In issue KK, the Tenants assert that the Acting Rent Administrator "adopted and re-used phrasings and characterizations" made by the Housing Provider in the 501(f) Application. *Id.* However, the Commission notes that the Tenants have not identified in issue KK any specific findings of fact or conclusions of law that were unsupported by substantial evidence or not in accordance with the Act as a result of the adoption of phrases from the 501(f) Application. *Id.*

In issue LL, the Tenants assert that the Acting Rent Administrator erred by failing to stay these proceedings; however, the Tenants have failed to indicate at what point during the proceedings before the Acting Rent Administrator they requested a stay, have failed to specify the issues in the 501(f) Application proceedings that are being litigated in other proceedings, and have failed to identify which "other administrative and legal proceedings" are litigating the same issues. *Id.*

In their statement of issue MM, the Tenants assert that the Acting Rent Administrator incorrectly applied the definition of "tenant" from Chapter 34, Title 42, of the D.C. OFFICIAL

CODE. *See* April Notice of Appeal at 3. In this issue, the Tenants have failed to identify where in the Final Order the Acting Rent Administrator utilized the definition of "tenant" from Chapter 34, Title 42, of the D.C. OFFICIAL CODE, and they have failed to identify any finding of fact or conclusion of law that was purportedly made in error as the result of any allegedly mistaken use of the definition of "tenant" from Chapter 34, Title 42, of the D.C. OFFICIAL CODE. *Id.* The Commission's review of the Final Order reveals that the Acting Rent Administrator cited to Chapter 34, Title 42, of the D.C. OFFICIAL CODE in one spot at the end of his Final Order, stating as follows: "Tenants who are relocated under this Order are considered tenants as defined in Sect. 42-3401.03(17) of the Rental Housing Conversion and Sale Act, as amended, for purposes of rights and remedies under Chapter 34 of Title 42 of the Official Code of the District of Columbia[.]" Final Order at 13; R. at 686. The Commission notes that this statement by the Acting Rent Administrator is merely identifying additional rights and remedies that the Tenants may have under the Rental Housing Conversion and Sale Act, and is unrelated to the analysis and disposition of the 501(f) Application.[50] *Id.* Therefore, the Commission is unable to discern the nature of the error alleged in the Tenants' issue MM.

Finally, in issue NN, the Tenants assert that the Acting Rent Administrator "fail[ed] to apply the appropriate statutory requirements and legal standards to the Application" without citing to any specific provision of the Act, identifying any "statutory requirement" or "legal standard," or directing the Commission to any specific finding of fact or conclusion of law that was purportedly in error. April Notice of Appeal at 3.

[50] The Act defines a "tenant" as follows: "'Tenant' includes a tenant, subtenant, lessee, sublessee, or other person entitled to the possession, occupancy, or the benefits of any rental unit owned by another person." D.C. OFFICIAL CODE § 42-3501.03(36). The Rental Housing Conversion and Sale Act defines a "tenant" in nearly identical language, as follows: "'Tenant' means a tenant, subtenant, lessee, sublessee, or other person entitled to the possession, occupancy or benefits of a rental unit within a housing accommodation[.]"

Without additional details, or any reference to factual or legal support for issues FF through NN, the Commission determines that these issues are vague, overly broad, and do not provide the required "clear and concise statement of alleged error," and thus will be dismissed. 14 DCMR § 3802.5(b); Burkhardt, RH-TP-06-28,706; Bohn Corp., RH-TP-08-29,328; Barac Co., VA 02-107.

VI. CONCLUSION

For the foregoing reasons, the Final Order is affirmed.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

CLAUDIA L. McKOIN, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (2004), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission...may seek judicial review of the decision...by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

D.C. Court of Appeals
Office of the Clerk
Historic Courthouse
430 E Street, N.W.
Washington, DC 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the **DECISION AND ORDER** in NV 09-001 was served by first-class mail, postage prepaid, this **1st day** of **September, 2015**, to:

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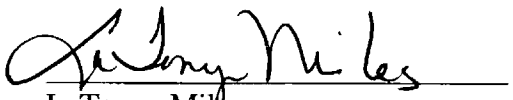

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