DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-06-28,794

In re: 4501 Connecticut Avenue, N.W., Unit 809

Ward Three (3)

SMITH PROPERTY HOLDINGS FIVE (D.C.) L.P.
Housing Provider/Appellant

v.

KAREN MORRIS AND DAVID POWER
Tenants/Appellees

DECISION AND ORDER

December 23, 2013

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from a final order issued by the Office of Administrative Hearings (OAH) based on a petition filed in the District of Columbia (D.C.) Department of Consumer & Regulatory Affairs (DCRA), Housing Regulation Administration (HRA), Rental Accommodations and Conversions Division (RACD).[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 D.C. Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501- 2-510 (2001 Supp. 2008), and the D.C. 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 tenant petitions from RACD pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.01, -1831.03(b-1)(1) (2001 Supp. 2005). The functions and duties of the RACD were transferred to the Department of Housing and Community Development (DHCD) by the Fiscal Year Budget Support Act of 2007, D.C. Law 17-20, 54 DCR 7052 (September 18, 2007) (codified at D.C. OFFICIAL CODE § 42-3502.03a (2001 Supp. 2008).

I. PROCEDURAL HISTORY

On September 20, 2006, Tenants/Appellees Karen Morris and David Power (Tenants), residing in Unit 809 of 4501 Connecticut Avenue, N.W. (Housing Accommodation), filed Tenant Petition RH-TP-06-28,794 (Tenant Petition) with DCRA, claiming that the Housing Provider/Appellant, Smith Property Holdings Five (D.C.) L.P. (Housing Provider), violated the Act as follows:[2]

1. The rent increase was larger than the amount of increase which was allowed by any applicable provision of the Rental Housing Emergency Act of 1985;

2. A property thirty (30) day notice of rent increase was not provided before the rent increase became effective;

3. The Housing Provider failed to file the proper rent increase forms with the Rental Accommodations and Conversion Division;

4. The rent being charged exceeds the legally calculated rent ceiling for my/our unit(s).

5. The rent ceiling filed with the Rental Accommodations and Conversion Division for my/our unit(s) is improper;

6. My/our rent was increased while a written lease, prohibiting such increases, was in effect;

7. The building in which [m]y/our rental unit(s) is located is not properly registered with the Rental Accommodations and Conversion Division;

8. Services and/or facilities provided in connection with the rental of my/our unit(s) have been permanently eliminated;

9. Services and/or facilities provided in connection with the rental of my/our unit(s) have been substantially reduced;

10. Retaliatory action has been directed against me/us by my/our Housing Provider, manager or other agent for exercising our rights in violation of section 502 of the Rental Housing Emergency Act of 1985;

[2] The Commission recites the Tenants' claims in the same language as they appear in the Tenant Petition, except that the Commission has numbered the claims for ease of reference.

11. A Notice to Vacate has been served on me/us which violates the requirements of section 501 of the Act; [and]

12. The Housing Provider, manager or other agent of the Housing Provider of my/our rental unit(s) have violated the provisions of Section ___ [sic] of the Rental Housing Emergency Act of 1985.

Tenant Petition at 1-5; Record (R.) at 105-109.

On February 13, 2007, Administrative Law Judge Nicholas Cobbs (ALJ) issued a Case Management Order (CMO) that set a hearing date for March 8, 2007. *See* CMO at 1-7; R. at 113-20. On June 20, 2007, the Tenants filed a "Motion for Acceptance of Supplement to Tenant Petition," which was treated by the ALJ as a Motion to Amend the Tenant Petition (hereinafter "Motion to Amend." *See* R. at 199-201. The Housing Provider filed an opposition to the Motion to Amend on July 2, 2007. *See* R. at 228-34. The ALJ entered an Order Granting Tenants' Motion to Amend Petition on July 24, 2007, adding the following three (3) new claims to the Tenant Petition:

> (1) [the] Housing Provider 's [sic] April 4, 2007, rent increase is illegal because [the] Housing Provider failed to perfect a 1996 vacancy increase that bears on the 2007 rent increase as well as on a 2006 rent increase that was challenged in the original [T]enant [P]etition;
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> (2) [the] Housing Provider reduced related services in the Housing Provider [sic] by cutting back on doorman services and services of a resident engineer; [and]
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> (3) [the] Housing Provider engaged in retaliation against [the] Tenants by attempting to breach the parties' parking agreement.

See Order Granting Tenants' Motion to Amend Petition at 1-3; R. at 280-82.

After several continuances were granted by the ALJ, a hearing was held in this matter on August 13, 2007. R. at 327-28. On October 21, 2008, the ALJ issued a final order, Morris v.

Smith Property Holdings Five (D.C.) L.P., RH-TP-06-28,794 (OAH Oct. 21, 2008) (Final Order). R. at 51-65. The ALJ made the following relevant findings of fact in the Final Order: [3]

A. Rent Increases

1. In February 1996 David Power and Karen Morris leased Apartment 809 at 4501 Connecticut Avenue, NW. The initial rent was $1,185 per month. Petitioner's Exhibit ("PX") 111. I credit Mr. Power's testimony that the apartment was empty when he and Ms. Morris inspected it on February 6, 1996. On the date of the inspection, Housing Provider's property manager required the prospective tenants to sign a notice informing them that Housing Provider had filed a "pending" request to raise the rent ceiling for the unit from $1,740, to $2,802 prior to March 31, 1996. Mr. Morris [sic] and Ms. Power [sic] acknowledged the notice in writing. PX 106.

2. Housing Provider documented this rent ceiling adjustment by filing an amended registration form with the RACD on March 29, 1996, 52 days after Tenants signed the notice. PX 105. The amended registration stated that the rent ceiling of Unit 809 was increased from $1,740 to $2,802, an increase of $1,062, or 61%. It justified the rent ceiling increase under Section 213(a)(2) of the Rental Housing Act, D.C. OFFICIAL CODE § 42-3502.13(a)(2) (1996), which, prior to August 2006, allowed a housing provider to increase the rent ceiling of a vacant apartment to match that of a "substantially identical rental unit in the same housing accommodation."

3. On May 22, 1996, less than four months after Tenants moved in, Housing Provider served notice that the rent ceiling would increase $53 to $2,855.00 from $2,802.00 in accord [sic] with the annual adjustment of general applicability, and that Tenants' rent charged would increase $56 from $1,185 to $1,241. PX 111. Mr. Power was angry at this attempt to increase rent so soon after Tenants moved into the apartment. He complained to Housing Provider, and Housing Provider agreed to reduce the rent to its initial level, although Housing Provider did not reduce the rent ceiling.

4. In 2000 Tenants objected to a rent increase that Housing Provider attempted to implement and filed a tenant petition with the Rent Administrator. The petition asserted that the rent increase was illegal and that Housing Provider had reduced services and facilities in the Housing Accommodation. The parties settled. Tenants dismissed the tenant petition in 2001 after Housing Provider agreed to freeze Tenants' rent for two years.

[3] The ALJ's findings of fact are recited in this Decision and Order as they appear in the Final Order, except that the Commission has numbered the findings of fact for ease of reference.

5. By March of 2006 Tenants' monthly rent had risen to $1,909. PX 100. On March 2, 2006, Tenants received a letter from "The Staff of Albemarle House" proposing "flexible lease options." The letter gave Tenants an option to enter into either a 12-month lease at a reduced rent of $2,185 per month, an 11-month lease for $2,230, a ten-month lease for $2,330, a six to nine-month lease for $2,400, or a one to five month lease for $2,425. PX 113. The offer required Tenants to respond by March 21, 2006, or have the lease renewed at the higher monthly rate. *Id.* When Tenants did not respond to the offer, Housing Provider followed up with a "friendly reminder" on March 21, 2006, extending the flexible lease option offer to March 23, 2006. PX 114.

6. Tenants continued to ignore Housing Provider's offer to accept a longer lease term in exchange for a lower rent. On March 29, 2006, Housing Provider served Tenants a Notice of Increase in Rent Charged increasing the monthly rent by 26% from $1,909 to $2,410, effective May 1, 2006, an increase of $501 per month (the "May 2006 Rent Increase"). The Notice justified the rent increase as a partial implementation of a rent ceiling increase of $1,062, effective on March 1, 1996. PX 100.

7. Tenants refused to pay the additional rent. They believed the rent increase was illegal and that Housing Provider was retaliating against them because they refused to accept the offer of the one-year lease. On August 23, 2006, without serving a notice to vacate on Tenants or giving Tenants other prior notice, Housing Provider filed a Complaint for Possession in the Superior Court of the District of Columbia, Landlord and Tenant Branch. PX 115. Tenants then filed the present tenant petition on September 20, 2006. The action for possession was dismissed in November 2006 without prejudice to its renewal.

8. On March 28, 2007, Housing Provider served Tenants with a Notice of Increase in Rent Charged informing Tenants that their rent would increase by $132 per month from $2,410 to $2,542 as of June 1, 2007 (the "June 2007 Rent Increase"). PX 116. Housing Provider attributed the [sic] to an annual adjustment of general applicability under D.C. OFFICIAL CODE § 42-3502.08(h)(2) [(2001)], which, for 2007, was 5.5%. Soon after, on April 4, 2007, Housing Provider also increased the fee for parking at the Housing Accommodation from $105 to $175 per month. PX 101. Tenants continued to pay the lower rate until May 2007, when Tenants found a notice on their car stating that it would be towed because it did not have a resident parking decal. Tenants agreed to pay the increased fee and were given a parking label for the windshield.

B. Services and Facilities Issue

9. Tenants' outrage at Housing Provider's 2006 and 2007 rent increases was augmented by their belief that the services and facilities in the building had

declined. Specific conditions that Mr. Morris described included: (1) the building no longer had full time doormen; (2) the front lock on the entrance door to the building was inoperable for two years or more; (3) the building no longer had a resident engineer; (4) Housing Provider did not give Tenants notice of major repair work in Tenants' apartment or arrange for prompt cleanup after the work was performed; and (5) the building elevators were frequently out of service.

10. Until 2003 Tenants' building was serviced by two doormen who were on duty from 7:00 a.m. to 11:00 p.m. In addition, a desk clerk in the building lobby was on duty 24 hours per day. The registrations on file with the RACD do not list doormen service as a service provided with the rent. Respondent's Exhibit ("RX") 200, 205.

11. In 2003 the doorman who covered the morning shift died and was not replaced. A doorman continued on the afternoon shift from 3:00 p.m. to 11:00 p.m. But in the late spring of 2006 the afternoon doorman took medical leave and eventually died after a long illness. He was not replaced until June of 2007. For about a year, from June 2006 to June 2007, the building had no doorman at all, although the 24 hour desk clerk service was not interrupted. Tenants were unhappy with this situation, but they did not complain to the building management about the absence of doormen.

12. The security concerns caused by the absence of a doorman were compounded, in Tenants' view, by Housing Provider's prolonged failure to fix the door to the building entrance. From at least April 2005 to June 2007, the front door would not close fully or lock. PXs 117, 118. Housing Provider was aware of this defect, which was obvious to its maintenance staff and to anyone who entered the building. Although the desk clerk was in a position to see everyone who came in, Tenants and other tenants in the building complained that the unlocked door posed a security problem. In June 2007 Housing Provider replaced the front door with a new door that closed and locked.

13. Prior to the fall of 2005, the building had an engineer who lived in the building. Tenants believed the engineer's residency enabled him to understand the building's maintenance problems and to supervise maintenance projects and contractors carefully. In the fall of 2005, the resident engineer was terminated and replaced by a non-resident maintenance supervisor who was supported by two non-resident service technicians. The supervisor and technicians were on duty from 7:30 a.m. to 5:00 p.m. In addition, an engineer or technician was always on call for emergency work.

14. The Housing Accommodation, an old building, requires continual maintenance and occasional major repair work. The risers, pipes that carry the building's water and sewer lines, were especially problematic. To repair leaks in the risers workmen must break through the walls of tenant

apartments. Contractors had to enter Tenants' apartment to repair risers in the summer of 2005, in the spring of 2006, and in the spring 2007. In 2005, under the old resident engineer, Tenants were given advance notice of the work and the workmen cleaned up the work area carefully. In 2006, Tenants received no notice that workmen would have to gain access to their apartment. The workmen left tools and equipment scattered around the apartment and made no effort to clean up afterwards. PX 120. In 2007 Tenants received a written notice of repairs to the risers that promised to provide "a cleaning crew in behind the contractors to clean up any debris." PX 109. But the workmen left the apartment littered with plaster chips and dust and the promised cleaning crew did not appear. After two days Tenants cleaned up the apartment themselves.

15. Like the risers, the elevators in the building were aging and required frequent maintenance. During 2006 there would be elevator malfunctions two or three times a month, and occasionally two of the building's three elevators were inoperable at the same time. But the outage was usually short. Housing Provider had a contract for elevator maintenance with Avery Elevator Corp., whose technicians respond to calls whenever the elevators malfunctioned.

16. Housing Provider contracted for annual inspections of the elevators by Consolidated Engineering Services. An inspection in October 2004 reported, overall, that the elevators were in "average" condition and that no upgrades or modernization was recommended. RX 202 at 4, 5. Reports in December 2005 and August 2006 made similar findings. [sic] RX 202A at 3, RX 202B at 3, although all three reports noted certain specific deficiencies in particular elevators, including repairs to the freight elevator in 2004 and 2005 that required immediate attention. RX 202 at 11, RX 202A at 10. The reports were accompanied by checklists of some one hundred specific items that had been inspected in each elevator. RXs 203, 203A, 203B.

17. On September 28, 2006, a DCRA inspection cited 16 code violations with the building elevators, although a number of these involved administrative or record-keeping oversights. PX 110. Prompt repairs by Avery Elevator Corp. addressed these concerns. PX 107. The freight elevator seemed to have more serious problems than the passenger elevators. Avery responded to five maintenance calls for the freight elevator from June to September 2006. PX 107.

C. Claims Concerning Registration[4]

[4] The Commission omits a recitation of the ALJ's findings of fact regarding the Tenants' "claims concerning registration," because neither party has challenged these findings in a notice of appeal. *See* Final Order at 10; R. at 391.

Final Order at 3-10; R. at 391-98 (footnotes omitted). The ALJ made, in relevant part, the following conclusions of law in the Final Order:[5]

. . .[6]

B. Tenants' Claims Concerning Improper Rent Increases

1. Tenants' first allegation in the [T]enant [P]etition is that Housing Provider implemented rent increases that were impermissible under the Rental Housing Act. The crux of Tenants' contention is that Housing Provider's May 1, 2006, $502 rent increase was illegal because it derived from a rent ceiling increase that was not properly taken and perfected. The Housing Regulations, as they applied prior to August 2006, required that a housing provider take and perfect any rent ceiling increase by filing an amended Registration/Claim of Exemption Form with the RACD "as required by § 4103.1." 14 DCMR [§] 4204.9 [(2004)]. The referenced section, in turn, requires that the Registration/Claim of Exemption Form for any rent ceiling increase arising from a vacancy be filed "[w]ithin thirty (30) days after the implementation of any vacant accommodation rent increase pursuant to § 213 of the Act[,] D.C. OFFICIAL CODE § 42-3502.13 [(2001)]." 14 DCMR [§] 4103.1(e) [(2004)].

2. The proper interpretation of these two regulations is challenging because the regulation governing perfection of rent ceiling increases, 14 DCMR [§] 4204.9 [(2004)], incorporates a regulation that applies specifically to rent increases, and makes no mention of rent ceilings. 14 DCMR [§] 4103.1 [(2004)]. But any ambiguity as to the proper application of the Rental Housing Commission's requirements for taking and perfecting rent ceiling increases arising out of vacancies was eliminated by the District of Columbia Court of Appeals in *Sawyer Prop. Mgmt. Inc. v. D.C. Rental Hous. Comm'n*, 877 A.2d 96, 109 (D.C. 2005), where the court held that "a housing provider must perfect a vacancy adjustment within thirty days of the rental unit becoming vacant."

3. It follows, here, that the vacancy rent ceiling adjustment that Housing Provider implemented in May 2006, was illegal because the underlying adjustment was not properly taken and perfected. Mr. Morris [sic] testified that the apartment was empty when Tenants inspected it on February 6, 2006 [sic], a situation corroborated by Housing Provider's notice of that date that a request for a rent ceiling adjustment was "pending" with the RACD. PX 106.

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[5] The ALJ's conclusions of law are recited in this Decision and Order as they appear in the Final Order, except that the Commission has numbered the conclusions of law for ease of reference.

[6] The Commission omits from its recitation of the conclusions of law the ALJ's statement of jurisdiction. *See* Final Order at 10; R. at 391.

Housing Provider's rent control administrator, Ms. Brookins, speculated in her testimony that the rental unit, although empty, was not technically vacant because the amended registration listed the "date of change" as March 1, 2006 [sic], based on Housing Provider's computer records. But Ms. Brookins' conjecture was not supported by any records, such as rent receipts, to show that the previous tenant still had the right to occupy the apartment in February 2006 [sic]. PX 105. Therefore, I credit Mr. Power's testimony and find that the rental unit was vacant on February 6, 2008 [sic], 52 days before the Amended Registration was filed. Housing Provider's Amended Registration was not timely filed. It follows, under the Court of Appeals' ruling in *Sawyer*, that the May 2006 rent increase was illegal.

4. The situation here does differ from *Sawyer* in one key respect. The rent ceiling increase that was implemented in *Sawyer* occurred within the Rental Housing Act's three-year statute of limitations, D.C. OFFICIAL CODE § 42-3502.06(e) [(2001)]. The limitations provision of the Act prohibits the filing of a petition "with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment." *Id.* In its post-hearing memorandum of law Housing Provider urges at length that *Sawyer* is inapplicable here because the 1996 rent ceiling adjustment occurred more than three years before the [T]enant [P]etition was filed. Housing Provider contends that the Court of Appeals' decision in *Kennedy v. D.C. Rental Hous. Comm'n*, 709 A.2d 94, 99 (D.C. 1998) bars any challenge to the implementation of a rent ceiling adjustment that was taken more than three years before the [T]enant [P]etition was filed.

5. I agree with Housing Provider that the *Kennedy* decision can fairly be interpreted to apply the Rental Housing Act's statute of limitations to bar challenges to rent ceiling adjustments that arose more than three years before the [T]enant [P]etition was filed. But I am constrained from such an interpretation by the Rental Housing Commission's decision in *Grant v. Gelman Mgmt. Co.*, TP 27,995 (RHC Feb. 24, 2006, Mar. 30, 2006), a case where, as here, the tenant challenged a rent ceiling adjustments [sic] that were taken, but not properly perfected, more than three years before the tenant petition was filed. The Commission concluded in *Gelman* that: "If the housing provider attempts to justify a rent increase using a rent ceiling adjustment that was not perfected, the rent increase cannot stand. It matters not if the rent ceiling adjustment was filed within three years or thirty years of the effective date of the rent increase." *Gelman*, [TP 27,995 (RHC] Mar. 30, 2006[)], [(]Order on Mot. for Recons.[)] at 11.

6. Housing Provider's post-hearing memorandum urges that *Gelman* was wrongly decided and, in any event, should not be applied retroactively because it constitutes a "marked departure from the previous decision of the Rental Housing Act [sic] regarding the statute of limitations." Housing Provider/Resp.'s Legal Brief and Closing Argument at 11. These same

arguments were presented in *Hinman v. United Dominion Mgmt.*, 2007 D.C. Off. Adj. Hear. LEXIS 42 (Oct. 5, 2007), a case in which the housing provider, represented by the same counsel as Housing Provider here, urged that *Gelman* should not be followed or applied retroactively. After extensive analysis, I concluded in *Hinman* that *Gelman* is controlling on this administrative court until the Rental Housing Commission or the District of Columbia Court of Appeals declares otherwise. I adopt my analysis in *Hinman* to my decision here. *See* 2007 D.C. Off. Adj. Hear. LEXIS 42, at *6-*21.

7. Because the May 2006 Rent Increase was invalid, Tenants are entitled to a refund of $501 per month through the date of the hearing. *See Mann Family Trust v. Johnson*, TP 26,191 (RHC Nov. 21, 2005) at 16.

8. Tenants failed to prove that the subsequent June 2007 Rent Increase was invalid. The Notice of Increase in Rent Charged, PX 116, provided specific information as to the amount of the rent adjustment, the amount of the adjusted rent, the effective date of the rent increase, the authorization for the increase, and certification that the rental unit was in substantial compliance with the Housing Regulations. 14 DCMR [§] 4205.4(a) [(2004)]. The notice was served more than 30 days before the rent increase took effect. *Id.* The amount of the increase, 5.5%, was the amount of the annual adjustment of general applicability permitted under the amended Rental Housing Act, D.C. OFFICIAL CODE § 42-3502.08(h)(2) [(2001 Supp. 2007)]. There was no evidence that Housing Provider failed to comply with any other regulations that would invalidate the rent increase.

9. However, the amount of Housing Provider's June 1, 2007, rent increase is excessive in light of my determination that Housing Provider's prior 2006 rent increase was illegal. The $132 amount was 5.5% of $2,410, the rent charged after Housing Provider imposed the illegal rent increase. Because Housing Provider was only entitled to charge rent of $1,909, I will reduce the 2006 [sic] rent increase to 5.5% of $1,909, or $105. I will award Tenant[s] the difference of $27 per month from June 1, 2007 through the date of the hearing.

10. Tenant conceded at the hearing that parking was not a service or facility that was included as part of the lease. The registration documents confirm that parking was an optional service. RX 200. Housing Provider's increase of the parking fee in April 2007 therefore did not violate the Rental Housing Act.

C. Tenants' Claims of Reduction in Services and Facilities

11. The [T]enant [P]etition contained two allegations asserting that related services and facilities at the Housing Accommodation had been either eliminated or substantially reduced. At the hearing, Mr. Power testified

concerning a number of perceived reductions in services and facilities, specifically: (1) sporadic elevator service; (2) a reduction in the number of doormen in the building and the hours that a doorman was on duty; (3) a reduction in the quality of maintenance at the building due, in part, to the termination of a resident engineer and his replacement by a maintenance supervisor who did not live in the building; and (4) Housing Provider's failure to repair the lock on the front entrance door for over two years. I conclude that only the last of these allegations, concerning the broken front door, justifies relief under the Rental Housing Act and will award a modest refund of Tenants' rent to compensate for it.

12. The starting point for any analysis of a reduction in services and facilities is the Rental Housing Act itself, which contains separate definitions for "related services" and "related facilities." "Related services["] are defined as:

> services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, janitorial services, or the removal of trash and refuse.

D.C. OFFICIAL CODE § 42-3501.03(27) [(2001)].

13. "Related facility" is defined as:

> any facility, furnishing, or equipment made available to a tenant by a housing provider, the use of which is authorized by the payment of the rent charged for a rental unit, including any use of a kitchen, bath, laundry facility, parking facility, or the common use of any common room, yard, or other common area.

D.C. OFFICIAL CODE § 42-3501.03(26) [(2001)].

14. To be actionable under the Rental Housing Act, Tenants' complaints must relate to services that qualify as "related services" or to facilities that qualify as "related facilities." Because elevator and maintenance services are specifically referenced in the [A]ct, Tenants' complaints concerning these services are appropriate. But Tenants have not proven that services of the doormen was [sic] required by law or provided in the lease. Therefore, I conclude that the doormen services did not constitute "related services" within the meaning of the Rental Housing Act, and the reduction of doormen is not within the purview of the Act.

15. The assessment of Tenants' claims for reduction of the elevator and maintenance services requires a three-part analysis.

16. First, the reduction in services must be "substantially" reduced. D.C. OFFICIAL CODE § 42-3509.01(a) [(2001)]. Although the Act does not say what constitutes a substantial reduction in services, the District of Columbia Court of Appeals has applied the Act's definition of a "substantial violation" as a measure of a substantial reduction in services. This requires a housing condition in violation of a statute or regulation that "may endanger or materially impair the health and safety of any tenant or person occupying the property." *Parreco v. D.C. Rental Hous. Comm'n*, 885 A.2d 327, 337 (D.C. 2005) (quoting D.C. OFFICIAL CODE § 42-3501.03(35) [(2001)]).

17. Second, the evidence must show that Housing Provider did not act "promptly" to restore the service to its previous level. *Parreco*, 885 A.2d at 337; 14 DCMR [§] 4211.6 [(2004)].

18. Finally, Tenants must present "competent evidence of the existence, duration, and severity of the reduced services." *Jonathan Woodner Co. v. Enobakhare*, TP 27,730 (RHC Feb. 3, 2005) at 11 (citations omitted). For discrepancies inside the rental unit, Tenants must show that they gave Housing Provider notice of the condition that needed attention and an opportunity to correct it. *See Hudley v. McNair*, TP 24,040 (RHC June 30, 1999) at 11 ("If the tenant claims a reduction of services in the interior of his unit, he must give the housing provider notice of the allegations that constitute violations of the housing code.") (citing *Hall v. DeFabio*, TP 11,554 (RHC Mar. 6, 1989)).

19. In light of these requirements, I conclude that Tenants have not proven that either the problems with the elevator or the perceived reduction in the quality of maintenance constituted a sufficiently substantial reduction in services to merit a reduction in the rent ceiling or rent charged under the Rental Housing Act. Although the record demonstrates that there were frequent problems with some of the building's elevators, the building had three elevators, so an elevator was available to Tenants even on the rare occasions when two elevators were inoperable at the same time. Housing Provider had a contract with Avery Elevator Corp. to service the elevators whenever there was a malfunction. Annual inspections of the elevators reported that the elevators were in adequate condition and that no updates were required. PX [sic] 202, 202A, 202B. Elevator code violations cited by the DCRA in its September 28, 2006, inspection were promptly abated. PX 107. The occasional inconvenience Tenants experienced with the building elevators did not rise to a level that would justify any reduction in Tenants' rent or rent ceiling.

20. For similar reasons, I conclude that Tenants have not proved that the perceived reduction in maintenance services following Housing Provider's termination of the resident engineer justifies relief under the Rental Housing Act. It was undisputed that, although the building no longer had an engineer in residence, Housing Provider employed a full time building engineer and

two service technicians to maintain the building. The essence of Mr. Power's testimony is that, on two occasions in 2006 and 2007, outside contractors entered his apartment, broke into the walls, and left a mess behind. Mr. Power acknowledged that, in both cases, the workmen ultimately finished the job. Tenants presented no evidence that they notified Housing Provider about the contractor's poor performance or asked Housing Provider to correct the problem. Thus, the evidence demonstrates that any reduction in maintenance services that Tenants suffered was not substantial enough to merit any remedy under the Rental Housing Act.

21. The other deficiency that Mr. Power complained about in his testimony was Housing Provider's failure to fix the lock on the building entrance door. Housing Provider did not controvert Mr. Power's testimony that the front door would not close or lock for a period of at least two years prior to April 2007. While Housing Provider's failure to fix the door could be viewed as a reduction in maintenance service, it is more precise to appraise this omission as a reduction in related facilities because Housing Provider failed to provide equipment whose use was authorized by the lease. D.C. OFFICIAL CODE § 42-3501.03(26) [(2001)].

22. Although related services and related facilities are often lumped together when the Rental Housing Commission or the Court of Appeals reviews services and facilities claims, the Rental Housing Act definitions underscore an important distinction in the remedies that are available. To recover for a reduction in a related service the tenant must show that the service was "required by law or by the terms of a rental agreement." D.C. OFFICIAL CODE § 42-3501.03(27) [(2001)]. A related facility, by contrast, need only be one "the use of which is authorized by the payment of the rent charged for a rental unit." D.C. OFFICIAL CODE § 42-3501.03(26) [(2001)]. It follows that tenants can recover for reductions in related facilities that are not prescribed in the lease or required by law. *See Pinnacle Realty Mgmt. Co. v. Voltz*, TP 25,092 (RHC Mar. 4, 2004) at 9 (holding that a housing provider's removal of a roof deck not provided in the lease could give rise to a claim for reduction of facilities).

23. Prior to its amendment in August 2006, the Rental Housing Act provided for award of a rent refund "for the amount by which the rent exceeds the applicable rent ceiling . . . and/or for a roll back of the rent to the amount the [Administrative Law Judge] determines." D.C. OFFICIAL CODE § 42-3509.01(a) (2001). The Rental Housing Commission has consistently interpreted the statute to limit the remedy for reduced services and facilities to a reduction in the rent ceiling, limiting rent reductions to cases in which the rent charged exceeded the reduced rent ceiling. *Jonathan Woodner Co. v. Enobakhare*, TP 27,730 (RHC Feb. 3, 2005) at 14; *Kemp v. Marshall Heights Cmty. Dev.*, TP 24,786 (RHC Aug. 1, 2000) at 8; *Hiatt Place P'ship v. Hiatt Place Tenants' Ass'n*, TP 21,249 (RHC May 1, 1991) at 26.

24. As of August 2006 the Rental Housing Act was amended to abolish rent ceilings. The amended Act provides that a housing provider may be held liable for "the amount by which the rent exceeds the applicable rent charged." D.C. OFFICIAL CODE § 42-3509.01(a) ([2001 Supp.] 2007); [*s*]*ee* 53 D.C. Reg. 4489 (Jun. [sic] 23, 2006); 53 D.C. Reg. 6688 (Aug. 18, 2006).

25. In light of this analysis, I conclude that Housing Provider's failure to secure the front entrance door for a period of over two years was a reduction in related facilities that was sufficiently substantial to merit a reduction in Tenants' rent ceiling prior to August 2006, and Tenants' rent charged after that date. Evidence of the existence, duration, and severity of a reduction in services and facilities is competent evidence upon which an Administrative Law Judge can find the dollar value of a reduction in the rent ceiling or rent charged. Expert or other direct testimony is not required. *Norman Bernstein Mgmt. Inc. v. Plotkin*, TP 21,282 ([RHC] May 10, 1989) at 5; *Harris v. Wilson*, TP 28,197 (RHC July 12, 2005) at 5.

26. The security of the entrance door is clearly an important factor in the safety of an apartment building where there is no full-time doorman. But here the security of the entrance door was not the only safeguard available to prevent unauthorized people from gaining access to the building. The entrance area was visible from the front desk, which was staff round the clock, so that strangers could be challenged and required to leave. In light of this evidence, I conclude that a reduction of $25 per month is an appropriate adjustment of the rent or rent ceiling.

27. I conclude that Tenants may receive no refund on account of the reduction in services and facilities prior to August 2006 because they failed to prove that the rent charged exceeded the rent ceiling. The Amended Registration filed on March 29, 1996, reflects a rent ceiling of $1,740 prior to the vacancy rent ceiling adjustment that was not properly taken or perfected. PX 105. But the only evidence of the rent ceiling after that date is the statement in the March 29, 2006, Notice of Increase in Rent Charged that the rent ceiling was $3,620. PX 100. If this figure is correct, and we disallow the $1,062 increase in rent ceiling in March 1996, the rent ceiling as of March 2006 would be reduced to $2,558, an amount in excess of the $1,909 rent that Tenants were charged prior to the May 1, 2006, rent increase and the $2,410 rent that applied after the increase. As I discussed in Part III (E) above, Tenants did not present any evidence to establish the rent ceiling prior to August 2006. Consequently, I cannot conclude that a $25 reduction in the rent ceiling would reduce the rent ceiling below the rent charged to as to [sic] justify a rent refund under the Act prior to the 2006 amendment. D.C. OFFICIAL CODE § 42-3509.01(a) (2001).

28. Mr. Power acknowledged that the front door was replaced in mid June 2007. Based on this evidence, I will award Tenants a refund of $25 per month from

August 1, 2006, to June 15, 2007, to compensate for the reduction in facilities arising from the unsecured door.

. . .[7]

M. Summary

29. In summary, I conclude that Tenants have proven two of the twelve claims asserted in the [T]enant [P]etition. They have proven that: (1) Housing Provider imposed an illegal rent increase in May 2006; and (2) Housing Provider significantly reduced related facilities by failing to repair the front entrance door for more than two years. Tenants failed to prove that: (1) Housing Provider served an improper 30-day notice of rent increase either in March 2006, or at any other time; (2) Housing Provider filed improper forms with the Rent Administrator; (3) the rent charged for the rental unit exceeded the rent ceiling for the unit; (4) the rent ceiling filed with the RACD was improper; (5) Housing Provider implemented a rent increase in violation of the terms of a written lease; (6) the building was not properly registered; (7) Housing Provider permanently eliminated any services or facilities; (8) Housing Provider retaliated against Tenants; (9) Housing Provider served Tenants with an improper notice to vacate in violation of the Rental Housing Act[;] and (10) Housing Provider committed any other violations of the Rental Housing Act.

N. Remedies

30. Tenants are entitled to a rent refund for the amount of Housing Provider's illegal rent increase in May 2006. D.C. OFFICIAL CODE § 42-3509.01(a) [(2001)]; *Gelman*, TP 27,995 (RHC Mar. 30, 2006) at 11. It is irrelevant that Tenants did not pay the rent increase. The Rental Housing Act defines "rent" to include money demanded by a Housing Provider as well as money actually paid. D.C. OFFICIAL CODE § 42-3501.03(28). It follows that a rent refund is due whenever a housing provider demands an illegal rent increase. *Kapusta v. D.C. Rental Hous. Comm'n*, 704 A.2d 286, 287 (D.C. 1997). Therefore, I award Tenants a rent refund in the amount of the illegal rent increase, $501 per month, from May 1, 2006, through August 13, 2007, the date of the hearing.

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[7] Because the Commission observes that neither party has challenged these issues in a notice of appeal, the Commission omits a recitation of the ALJ's conclusions of law related to the following claims: Tenants' Claim of Retaliation, Tenants' Claim that Housing Provider Failed to Give Tenants a Proper 30-Day Notice, Tenants' Claims that Housing Provider Failed to File Proper Forms, Tenants' Claims that the Rent Charged Exceeded the Rent Ceiling, Tenants' Claim that the Rent Ceiling Filed with the RACD Was Improper, Tenants' Claim that the Rent Increase Violated a Written Lease, Tenants' Claim that the Building Is Not Properly Registered, Tenants' Claim Concerning an Improper Notice To Vacate, Tenants' Claims of Other Violations of the Rental Housing Act. *See* Final Order at 21-28; R. at 373-80.

31. In addition, because Housing Provider's June 2007 rent increase was computed on a base that incorporated the illegal 2006 rent increase, I have reduced the 2007 rent increase by $27 per month and award that additional amount from June 1, 2007, through August 13, 2007.

32. To compensate Tenants for the reduction in facilities arising from Housing Provider's failure to repair the front entrance door, I award Tenants an additional rent refund of $25 per month from August 1, 2006, when the amendments to the Rental Housing Act permitted services and facilities reduction [sic] to be based on the rent charged rather than the rent ceiling, to June 15, 2007, the date when the installation of the new entrance door restored the facilities to their previous level.

33. The Rental Housing Commission Rules implementing the Rental Housing Act provide for the award of interest on rent refunds at the interest rate used by the Superior Court of the District of Columbia from the date of the violation to the date of issuance of the decision. 14 DCMR [§§] 3826.1-3826.3; *Marshall v. D.C. Rental Hous. Comm'n*, 533 A.2d 1271, 1278 (D.C. 1987). Interest at the 4% interest rates applicable to Superior Court judgments on the date of this decision is included in the award chart below.

. . . [8]

34. Tenants' refund of $501 per month increased in August 2006 to $526, when the additional refund for the reduction in facilities became effective. In June 2007 Tenants became entitled to an additional $27 per month refund to compensate for the illegal portion of Housing Provider's rent increase that month. But, in the middle of that same month, Housing Provider replaced the building front door, so Tenants' award for reduction of facilities is pro-rated to $13 for a total of $541. Tenants' award for July 2007 is $528, the sum of the $501 and $27 rent refunds. The award for August 2007 is pro-rated to the date of the hearing, August 13. The August refund, $221.42, is the monthly refund of $528 times 13/31. The interest award, in turn, is computed by multiplying the rent refund due each month by the number of months the refund was held through the date of the decision at the applicable interest rate of 4% per annum.

35. In addition, the Rental Housing Act provides for a roll back of illegal rent increases. D.C. OFFICIAL CODE § 42-3509.01(a) [(2001)][;] *Sawyer Prop. Mgmt. v. Mitchell*, TP 24,991 (RHC Oct. 31, 2002) at 2, *aff'd Sawyer Prop. Mgmt. Inc. v. D.C. Rental Hous. Comm'n*, 877 A.2d 96 ([D.C.] 2005) at 2, 23 [sic] (affirming roll back imposed by hearing examiner); *Redmond v. Majerle*

[8] The Commission omits from its recitation of the ALJ's conclusions of law a graph showing the ALJ's computation of the Tenants' award. *See* Final Order at 31; R. at 370.

Mgmt., Inc., TP 23,146 (RHC Mar. 26, 2002) at 48. Accordingly, I direct a roll back of Tenant's rent to $2,014 per month as if [sic] August 13, 2007, the date of the hearing. This is the sum of the $1,909 rent that Tenants paid prior to the illegal May 2006 rent increase, plus $105, the amount that Housing Provider was legally entitled to implement in the June 2006 [sic] rent increase. The roll back shall be the basis for computation of any further rent increases.

36. Tenants' total award is $8,654.44. I award no treble damages in the absence of proof of bad faith and no fine in the absence of any evidence of willfulness.

Final Order at 10-32; R. at 369-91 (footnotes omitted).

On October 28, 2008, the Housing Provider filed an appeal (Notice of Appeal) with the Commission, in which it raises the following issues:[9]

1. The ALJ interprets the RHC's decision in Grant v. Gelman Management [sic] Co., TP 27,995 (RHC Feb. 24, 2006; [M]ar. 30, 2006) as authorizing challenges to rent ceiling increases taken over 10 years prior to the filing of the tenant petition. This reading is in error and is contrary to the holding of Kennedy v. D.C. Rental Housing [sic] Commission [sic], 709 A.2d 94 (D.C. 1998). His decision also misinterprets Sawyer Property [sic] Management [sic], Inc. v. D.C. Rental Housing [sic] Commission [sic], 877 A.2d 96 (D.C. 2005).

2. The ALJ erred in reducing the Tenants [sic] by $25 per month commencing August 1, 2006, because rent ceilings were not eliminated by the 2006 amendments of the Rental Housing Act until August 4, 2006, when those amendments took effect, nor was there proof that security was impacted in any way by the ill-fitting door.

3. OAH has no authority to award interest on its decisions, only the Superior Court, [sic] is authorized to award interest, and then only upon the entry of judgment.

Notice of Appeal at 1. On January 16, 2009, the Tenants submitted "Tenants Brief in Opposition to Housing Provider's Appeal" ("Tenants' Opposition Brief"). *See* Tenants' Opposition Brief at 1. The Housing Provider filed its Brief ("Housing Provider's Brief) on January 21, 2009, and "Supplemental Points and Authorities in Support of Housing Provider's Brief on Appeal"

[9] The Commission recites the issues here using the language of the Housing Provider in the Notice of Appeal.

("Housing Provider's Supplemental Points and Authorities") on January 29, 2009.[10] *See* Housing Provider's Brief at 1; Housing Provider's Supplemental Points and Authorities at 1. Thereafter, the Tenants filed "Tenants' Response to Housing Provider's Brief" ("Tenant's Responsive Brief") on February 4, 2009. *See* Tenants' Responsive Brief at 1. On February 10, 2009 the Tenants filed "Tenants' Petition to Correct Plain Error," requesting that the Commission correct certain issues of "plain error," as identified by the Tenants, under the authority of 14 DCMR § 3807.4 (2004).[11] *See* Tenants' Petition to Correct Plain Error at 1. The Commission held a hearing in this matter on February 17, 2009.

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[10] The Commission notes that the Housing Provider raised two additional issues in its Brief: (1) "[t]he ALJ was barred by the doctrine of *res judicata* from disallowing rent increases based on filings made in 1996;" and (2) the "way" the ALJ "calculated interest here was in error." *See* Housing Provider's Brief at 3-6, 10-11.

[11] 14 DCMR § 3807.4 (2004) provides the following (emphasis added): "Review by the Commission shall be limited to the issues raised in the notice of appeal; provided, that the Commission may correct plain error."

The Commission notes that the "Tenants' Petition to Correct Plain Error" is indistinguishable from a notice of appeal, and in its discretion the Commission will treat it as such herein. 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* 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); Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8; Levy v. Carmel Partners, Inc., RH-TP-06-28,830; RH-TP-06-28,835 (RHC Mar. 19, 2012) at n.9. Under its regulations, the Commission is required to dismiss appeals that are untimely filed. 14 DCMR § 3802.2 (2004); United States v. Robinson, 361 U.S. 209 (1960); Yu v. D.C. Rental Hous. Comm'n, 505 A.2d 1310 (D.C. 1986); Totz v. D.C. Rental Hous. Comm'n, 474 A.2d 827 (D.C. 1974). Pursuant to 14 DCMR § 3802.2 (2004), the Tenants had thirteen business days to appeal the ALJ's Final Order, which ended on November 7, 2008. The Tenants' Petition to Correct Plain Error was filed on February 10, 2009, more than thee (3) months after the time period for filing an appeal expired. 14 DCMR § 3802.2 (2004); Tenants' Petition to Correct Plain Error at 1.

Insofar as the Tenants are attempting to circumvent the mandatory filing deadline of 14 DCMR § 3802.02 (2004) by styling their issues on appeal as issues of "plain error," the Commission notes that the doctrine of plain error contained in 14 DCMR § 3807.4 is intended only for use in the circumstance where neither party has raised an issue before the Commission in a notice of appeal. 14 DCMR § 3807.4 (2004); Proctor v. D.C. Rental Hous. Comm'n, 484 A.2d 542, 550 (D.C. 1984) (holding that the Commission, under its rules, is permitted, though not required, to consider issues not raised in notice of appeal insofar as they reveal "plain error"). The Commission has consistently only applied the doctrine of plain error to issues that were not raised by either party. *See, e.g.* Dreyfuss Mgmt., RH-TP-07-28,895 (raising two (2) issues of plain error in the ALJ's calculation of damages that were not raised by either party in a notice of appeal); Williams v. Thomas, TP 28,530 (RHC Sept. 27, 2013) (raising issues of plain error in the hearing examiner's calculations of damages, interest and treble damages, where neither party raised such issues in a notice of appeal). *See also* Miller v. Daro Realty, RH-TP-08-29,407 (RHC Sept. 18, 2012) (explaining that the Commission has applied the "plain error" doctrine to correct technical errors of calculation, apparent mistakes in date and numbers, minor procedural or administrative errors, errors that are generally not

II. ISSUES ON APPEAL[12]

A. Whether the ALJ erred in failing to find that the Tenants were barred by the Act's statute of limitations at D.C. OFFICIAL CODE § 42-3502.06(e) (2001), from challenging the May 1, 2006 rent increase, on the basis of an invalid 1996 rent ceiling increase.

B. Whether the ALJ erred in awarding damages to the Tenants arising out of a reduction in facilities for the period between August 1, 2006 and August 4, 2006, under D.C. OFFICIAL CODE § 42-3509.01(a) (2001 Supp. 2007).

C. Whether the ALJ erred in reducing the Tenants' rent by $25 per month when there was no proof that security was impacted in any way by the ill-fitting door.

D. Whether the ALJ erred in awarding the Tenants interest, because OAH has no authority to award interest on its decisions.

III. DISCUSSION OF ISSUES ON APPEAL[13]

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subject to dispute, as well as to correct issues surrounding substantive and procedural provisions of the Act, the DCAPA and/or prior case law of the District of Columbia Court of Appeals under the Act) (citing Lane v. Nichols, TP 27,733 (RHC Aug. 10, 2004); Norwood v. Peters, TP 27,678 (RHC June 14, 2006)).

Accordingly, the Commission is satisfied that the Tenants failed to timely file a notice of appeal with the Commission, and thus will not address any of the issues raised in the Tenants' Petition to Correct Plain Error. *See, e.g.*, 14 DCMR § 3807.4 (2004); Robinson, 361 U.S. 209; Yu, 505 A.2d 1310; Proctor, 484 A.2d at 550; Totz, 474 A.2d 827.

[12] The Commission, in its discretion, has recast the issues on appeal, consistent with the Housing Provider's language in the Notice of Appeal, but stated in a manner that identifies clearly the Housing Provider's claims of error on appeal. *See* Dreyfuss Mgmt., RH-TP-07-28,895; Watkis, RH-TP-07-29,045; Ahmed, Inc., RH-TP-28,799 at n.8; Levy, RH-TP-06-28,830; RH-TP-06-28,835 at n.9.

[13] The Commission notes that the Housing Provider raised two additional issues for the first time in its Brief: (1) "[t]he ALJ was barred by the doctrine of *res judicata* from disallowing rent increases based on filings made in 1996;" and (2) the "way" the ALJ "calculated interest here was in error." *See* Housing Provider's Brief at 3-6, 10-11. *See also* Hearing CD (RHC Feb. 17, 2009). The Commission's review of the record reveals that the Housing Provider did not raise either of these issues before the ALJ. *See, e.g.* Final Order at 1-28; R. at 372-400; Hearing CD (OAH Aug. 13, 2007).

The Commission has consistently held that it may only address issues raised in a notice of appeal, 14 DCMR § 3807.4 (2004), and that it may not review issues that are raised for the first time on appeal. *See, e.g.* Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013); Stone v. Keller, TP 27,033 (RHC Mar. 24, 2009); Ford v. Dudley, TP 23,973 (June 3, 1999); Terrell v. Estrada, TP 22,007 (RHC May 30, 1991). Accordingly, the Commission is unable to consider the additional claims raised for the first time in the Housing Provider's Brief, where the Housing Provider failed to raise these claims before the ALJ, and failed to include them in its Notice of Appeal.

A. Whether the ALJ erred in failing to find that the Tenants were barred by the Act's statute of limitations at D.C. OFFICIAL CODE § 42-3502.06(e) (2001), from challenging the May 1, 2006 rent increase, on the basis of an invalid 1996 rent ceiling increase.[14]

In the Final Order, the ALJ applied the Commission's holding in Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Mar. 30, 2006) to the Tenant's challenge to the May 1, 2006 rent increase, finding that the challenge was not barred under the Act's statute of limitations. Final Order at 12-13; R. at 388-89 (citing Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Mar. 30, 2006) (Order on Reconsideration) at 26 (hereinafter "Grant Order on Reconsideration")). The Grant Order on Reconsideration thus served as Commission case precedent for the ALJ's Final Order. *See id.*

Furthermore, in the Final Order, the ALJ adopted the analysis of a prior OAH decision which (1) addressed practically identical legal issues related to the statute of limitations in § 42-3502.06(e), (2) provided a thorough analysis of the Commission's holding in the Grant Order on Reconsideration in light of the Act, the Commission's rules and its prior decisions, and the applicable decisions of the District of Columbia Court of Appeals (DCCA); and (3) was the first OAH decision to rely upon the Grant Order on Reconsideration for its interpretation of § 42-3502.06(e) in reaching a decision identical to that in the Final Order. *See* Final Order at 13; R. at 388 (citing Hinman v. United Dominion Mgmt. Co., RH-TP-06-28,728 (OAH Oct. 5, 2007)). The OAH's decision in Hinman, RH-TP-06-28728, was recently affirmed on appeal by the

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[14] D.C. OFFICIAL CODE § 42-3502.06(e) (2001) shall be referred to herein as "D.C. OFFICIAL CODE § 42-3502.06(e)" or as "§ 42-3502.06(e)," and provides the following:

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment, except that a tenant must challenge the new base rent as provided in § 42-3501.03(4) within 6 months from the date the housing provider files his base rent as required by this chapter.

(emphasis added).

Commission in United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013).[15]

The Commission observes that the factual context in this case is virtually identical to that in Hinman, RH-TP-06-28,728.[16] In this case, the Tenant is challenging a 2006 adjustment in rent charged that implements a 1996 adjustment in rent ceiling that was not properly taken and perfected in violation of 14 DCMR § 4204.9 (2004).[17] *See* Final Order at 11; R. at 390. In Hinman, RH-TP-06-28,728, the tenant challenged a 2006 adjustment in rent charged that implemented a 2001 adjustment in rent ceiling that was not properly taken and perfected in violation of 14 DCMR §§ 4204.9, -.10 (2004).[18] *See* Hinman, RH-TP-06-28,728 at 7-8. In each

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[15] Hereinafter, the Commission notes that all citations and references to "Hinman, RH-TP-06-28,728" shall refer to the Commission's Decision and Order in that case, issued on June 5, 2013.

[16] The Commission observes that all factual references in its decision and order in Hinman, RH-TP-06-28,728, were adopted and affirmed from the OAH's findings of fact and conclusions of law in that case.

[17] The Commission observes that a previous, identical version of the regulation governing the taking and perfecting of adjustments in rent ceilings cited by the ALJ in this case, 14 DCMR § 4204.9 (2004), was in effect at the time of the 1996 adjustment in rent ceiling at issue in this case – 14 DCMR § 4204.9 (1991). This regulation provides the following:

> Except as provided in § 4204.10, any rent ceiling adjustment authorized by the Act and this chapter shall be taken and perfected within the time provided in this chapter, and shall be considered taken and perfected only if the housing provider has filed with the Rent Administrator a properly executed amended Registration/Claim of Exemption Form as required by § 4103.1, and met the notice requirements of 4101.6.

14 DCMR § 4204.9 (2004).

[18] The Commission observes that a previous, identical version of the regulation governing the taking and perfecting of adjustments in rent ceilings cited in Hinman, RH-TP-06-28,728, 14 DCMR § 4204.10 (2004), was in effect at the time of the 2000 adjustment in rent ceiling at issue in that case – 14 DCMR § 4204.10 (1991). This regulation provides the following:

> Notwithstanding § 4204.9, a housing provider shall take and perfect a rent ceiling increase authorized by § 206(b) of the Act (an adjustment of general applicability) by filing with the Rent Administrator and serving on the affected tenant or tenants in the manner prescribed in § 4101.6 a Certificate of Election of Adjustment of General Applicability, which shall:
>
> (a) Identify each rental unit to which the election applies;

case, the housing provider claimed that, because the contested rent ceiling adjustment occurred beyond the three-year limitations period of § 42-3502.06(e), the tenant's claim of an illegal increase in the corresponding rent charged was barred by § 42-3502.06(e), even though the allegedly improper adjustment in rent charged occurred within the limitations period of § 42-3502.06(e). *See* Final Order at 12-13; R. at 388-89; Hinman, RH-TP-06-28,728 at 4.

Having noted a virtually identical factual context in this case and Hinman, RH-TP-06-28,728, the Commission also observes that the over-arching legal issue raised in this case is identical to the issue addressed and determined by the Commission in Hinman, RH-TP-06-28,728: whether § 42-3502.06(e), as a matter of law, bars a tenant's claim of an improper adjustment in rent charged that occurs within the three-year limitations period of § 42-3502.06(e), when the allegedly improper corresponding adjustment in rent ceiling upon which the tenant's claim is based occurred beyond the three-year limitations period of § 42-3502.06(e). *See* Notice of Appeal at 2; Hinman, RH-TP-06-28,728 at 4.

Based upon its foregoing analysis, the Commission is satisfied that the relevant factual contexts in this case and in Hinman, RH-TP-06-28,728, are substantially similar, if not virtually identical, s*ee supra* at 21, and that the major legal issues raised in this appeal and in Hinman, RH-TP-06-28,728, regarding the interpretation and application of § 42-3502.06(e) with respect to such similar factual contexts, are also substantially similar, if not virtually identical. *See supra*. Due to the similarity of factual contexts and legal issues regarding the interpretation and application of § 42-3502.06(e) in this case and in Hinman, RH-TP-06-28,728, the Commission

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(b) Set forth the amount of the adjustment elected to be taken, and the prior and new rent ceiling for each unit; and

(c) Be filed and served within thirty (30) days following the date when the housing provider is first eligible to take the adjustment.

14 DCMR § 4204.10 (2004).

determines that its decision in Hinman, RH-TP-06-28,728, serves as appropriate and controlling legal precedent for its decision and order in this case.

In Hinman, RH-TP-06-28,728, the Commission determined that the "effective date" of an adjustment in rent ceiling is the date that it is implemented through a corresponding adjustment in rent charged, and not the date when it is "taken and perfected" through the filing of an amended registration form by a housing provider pursuant to 14 DCMR §§ 4204.9-.10 (2004). Hinman, RH-TP-06-28,728 at 23-24. The Commission further concluded that, just as in this case, when a contested adjustment in rent ceiling is beyond the three-year limitations period in § 42-3502.06(e), but the date of its implementation through a corresponding adjustment in rent charged is within the limitations period, any claims under the Act regarding an alleged impropriety in either the adjustment in rent charged or the adjustment in rent ceiling are not barred by § 42-3502.06(e). Hinman, RH-TP-06-28,728 at 23-24.

For the foregoing reasons, and on the basis of the legal standards and holdings on the same issues addressed by the Commission in Hinman, RH-TP-06-28,728, the Commission is satisfied that the Final Order is not erroneous as a matter of law, and that the ALJ correctly determined that the Tenant's claim that the Housing Provider implemented an adjustment in rent charged in violation of the Act is not barred by the statute of limitations in D.C. OFFICIAL CODE § 42-3502.06(e). *See* Hinman, RH-TP-06-28,728 at 7-44. Accordingly, the Commission affirms the ALJ on this issue. *See* Hinman, RH-TP-06-28,728.

B. Whether the ALJ erred in awarding damages to the Tenants arising out of a reduction in facilities for the period between August 1, 2006 and August 4, 2006, under D.C. OFFICIAL CODE § 42-3509.01(a) (2001 Supp. 2007).

The Commission observes that in the Final Order, the ALJ determined that the Housing Provider's failure to fix the lock on the Housing Accommodation's entrance door constituted a

reduction in related facilities, during a two-year period ending on June 15, 2007. Final Order at 18; R. at 282. However, the ALJ found that the Tenants were not entitled to a refund based on the reduction in facilities prior to "August 2006 because they failed to prove that the rent charged exceeded the rent ceiling." Final Order at 20; R. at 381. The ALJ awarded Tenants a refund of $25 per month commencing on "August 1, 2006" related to the reduction in facilities arising out of the unsecured front door. Final Order at 21; R. at 380.

The Housing Provider asserts that the ALJ erred in awarding the Tenants a $25 rent reduction commencing August 1, 2006, "because rent ceilings were not eliminated by the 2006 amendments of the Rental Housing Act until August 4, 2006." Notice of Appeal at 1.

The Commission's standard of review is contained at 14 DCMR § 3807.1 (2004) 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, or 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.

The Commission notes that the Act was amended, effective August 5, 2006, by the "Rent Control Reform Amendment Act of 2006," D.C. Law 16-145 (Aug. 5, 2006), which amended the Act by eliminating the term "rent ceiling," and in its place, substituting the term "rent charged." *See* D.C. OFFICIAL CODE § 42-3502.06(a) (2001 Supp. 2007). *See* D.C. Law 16-145 §§ 2(a) & (c), 53 D.C. Reg. at 4889, 4890 (2006).

The Commission notes that prior to the amendment of the Act, the remedy for a reduction in services and/or facilities was an increase or decrease in the rent ceiling rather than the rent charged, and a tenant could only recover for a reduction in services and/or facilities if the rent charged exceeded the reduced rent ceiling. *See* D.C. OFFICIAL CODE § 42-3502.11 (2001)

(hereinafter, "pre-August 5 provision of § 42-3502.11").[19] Beginning on August 5, 2006, the remedy for a reduction in services and/or facilities is an increase or decrease directly to the rent charged to reflect the value of the reduction. *See* D.C. OFFICIAL CODE § 42-3502.11 (2001 Supp. 2007) (hereinafter "post-August 5 provision of § 42-3502.11").[20]

Although the ALJ cited in the Final Order to both the pre-August 5 provision of § 42-3502.11 and the post-August 5 provision of § 42-3502.11, as the basis for his calculation of the rent refund resulting from a reduction in facilities, the Commission observes that the ALJ erroneously calculated the Tenants' rent refund from August 1, 2006 through August 4, 2006 on the basis of the post-August 5 provision of § 42-3502.11. *See* Final Order at 21; R. at 380. The Commission therefore reverses the ALJ's calculation of damages for this period for the reasons described *supra*. 14 DCMR § 3807.1 (2004).

Accordingly, the Commission remands this issue for the ALJ to adjust his calculation of the Tenants' rent refund for the period of August 1, 2006 through August 4, 2006 to reflect the pre-August 5 provision of § 42-3502.11 that was in effect during that period, as described *supra*. *See* D.C. OFFICIAL CODE § 42-3502.11 (2001). The Commission instructs the ALJ on remand to only issue a rent refund for the period of August 1, 2006 through August 4, 2006 if the $25 award for the reduction in facilities decreased the rent ceiling to a value below the rent charged,

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[19] D.C. OFFICIAL CODE § 42-3502.11 (2001) provides the following:

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

[20] D.C. OFFICIAL CODE § 42-3502.11 (2001 Supp. 2007) provides the following:

> 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.

and the Tenants are then only entitled to the difference between the two values. *See* D.C. OFFICIAL CODE § 42-3502.11 (2001 Supp. 2007). Furthermore, the Commission instructs the ALJ on remand to adjust the overall award of damages and interest due to the Tenants arising out of the reduction in facilities, in accordance with any adjustments that are made to the award for the period of August 1, 2006 through August 4, 2006.

C. Whether the ALJ erred in reducing the Tenants' rent by $25 per month when there was no proof that security was impacted in any way by the ill-fitting door.

The Housing Provider asserts in its Notice of Appeal that the ALJ erred in awarding the Tenants a rent refund of $25 per month because "there [was no] proof that security was impacted in any way by the ill-fitting front door." Notice of Appeal at 1. The Commission observes that the Housing Provider does not provide any statute, regulation or relevant caselaw precedent in support of this issue on appeal, nor does the Housing Provider address this issue in its brief. *See generally* Housing Provider's Brief.

The Commission has determined that an ALJ may fix the dollar value of a reduction in services and/or facilities without expert testimony or other direct testimony on the dollar value of the reduction once the existence, duration, and severity of the reduction in services is established. *See* 1773 Lanier Place, N.W. Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug. 31, 2009); Jonathan Woodner Co. v. Enobakhare, TP 27,730 (RHC Feb. 3, 2005) (citing Norman Bernstein Mgmt., Inc. v. Plotkin, TP 21,182 (RHC May 8, 1989); George I. Borgner, Inc. v Woodson, TP 11,848 (RHC June 10, 1987)).

The Commission observes that the ALJ made the following finding of fact related to the existence, duration and severity of the reduction in facilities:

> 12. The security concerns caused by the absence of a doorman were compounded, in Tenants' view, by Housing Provider's prolonged failure to fix the door to

the building entrance. From at least April 2005 to June 2007, the front door would not close fully or lock. PXs 117, 118. Housing Provider was aware of this defect, which was obvious to its maintenance staff and to anyone who entered the building. Although the desk clerk was in a position to see everyone who came in, Tenants and other tenants in the building complained that the unlocked door posed a security problem. In June 2007 Housing Provider replaced the front door with a new door that closed and locked.

In addition, the ALJ made the following conclusions of law in the Final Order regarding the existence, duration and severity of the reduction in facilities:

> 25. In light of this analysis, I conclude that Housing Provider's failure to secure the front entrance door for a period of over two years was a reduction in related facilities that was sufficiently substantial to merit a reduction in Tenants' rent ceiling prior to August 2006, and Tenants' rent charged after that date. Evidence of the existence, duration, and severity of a reduction in services and facilities is competent evidence upon which an Administrative Law Judge can find the dollar value of a reduction in the rent ceiling or rent charged. Expert or other direct testimony is not required. *Norman Bernstein Mgmt. Inc. v. Plotkin*, TP 21,282 ([RHC] May 10, 1989) at 5; *Harris v. Wilson*, TP 28,197 (RHC July 12, 2005) at 5.
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> 26. The security of the entrance door is clearly an important factor in the safety of an apartment building where there is no full-time doorman. But here the security of the entrance door was not the only safeguard available to prevent unauthorized people from gaining access to the building. The entrance area was visible from the front desk, which was staff round the clock, so that strangers could be challenged and required to leave. In light of this evidence, I conclude that a reduction of $25 per month is an appropriate adjustment of the rent or rent ceiling.

Final Order at 20; R. at 381.

As the Commission stated *supra* at 24, the Commission will uphold decisions by the Hearing Examiner that are supported by substantial evidence in the record. 14 DCMR § 3807.1 (2004). The Commission's review of the record reveals that the ALJ made the necessary findings of fact and conclusions of law regarding the existence, duration, and severity of the reduction in facilities, as recited above. Final Order at 20; R. at 381. *See* Drell, TP 27,344; Jonathan Woodner Co., TP 27,730. Moreover, the Commission is satisfied that the ALJ's

findings of fact and conclusions of law on this issue are supported by substantial record evidence, namely the testimony of Tenant David Power at the August 13, 2008 OAH hearing.[21] Hearing CD (OAH Aug. 13, 2008). Accordingly, the Commission affirms the ALJ on this issue.

D. Whether the ALJ erred in awarding the Tenants interest, because OAH has no authority to award interest on its decisions.

In the Final Order, the ALJ awarded the Tenants interest on the damages that were awarded, in accordance with 14 DCMR § 3826.1-.3 (2004). Final Order at 30; R. at 371 (citing Marshall v. D.C. Rental Hous. Comm'n, 533 A.2d 1271, 1278 (D.C. 1987)). The Housing Provider contends on appeal that the ALJ lacked the authority to award interest on the damages awarded to the Tenants. *See* Notice of Appeal at 1. The Housing Provider asserts that "[n]either the Rental Housing Act nor any other statute authorizes the Rent Administrator, or the Rental Housing Commission, to award interest on decisions in tenant petitions." Housing Provider's Brief at 10-11.

As previously stated, the Commission's standard of review is contained at 14 DCMR § 3807.1 (2004). The Commission will sustain the Hearing Examiner's interpretation of the Act unless it is unreasonable or embodies a material misconception of the law, even if a different interpretation also may be supportable. *See* Barac Co., VA 02-107; Carpenter v. Markswright

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[21] For example, the Commission observes that Tenant David Power testified, in relevant part, at the August 13, 2008 OAH hearing as follows:

> They subsequently replaced all the doors in mid-June . . .June of 2007. But for at least two years prior to June of, April of 2007 when I took this photo, these doors had been chronically in disrepair, and not latching like they were supposed to . . . . This is the front door, the main entrance on the Connecticut Avenue side at the lobby level . . . . If someone was away from the front desk, college students coming to meet their friends and classmates who lived in the building would just walk right through. No one would challenge them, they didn't sign in or sign out, even though there's a book for that. But all sorts of people could just walk in, and did.

Hearing CD (OAH Aug. 13, 2007) at 10:53-10:55. Additionally, the Commission observes that the Tenants submitted two photographs of the front door (Exhibits 117 and 118). *See* R. at 394-95. Mr. Power testified that Exhibit 118 was a photograph of the front door demonstrating that "there's just no lock hardware in the portion of the door where the lock should be, there's just nothing there." Hearing CD (OAH Aug. 13, 2007) at 10:57.

Co., Inc., RH-TP-10-29,840 (RHC June 5, 2013) (citing Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007)); Falconi v. Abusam, RH-TP-07-28,879 (RHC Sept. 28, 2012) (citing Sawyer, 877 A.2d at 102-103); Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 28, 2012).

The DCCA has provided the Commission with considerable deference and discretion in its interpretation of the Act, holding that the Commission's interpretation of the Act will be upheld unless it is unreasonable, plainly wrong, incompatible with the statutory purposes of the Act or embodies a material misconception of the law, even where a different interpretation may also be supportable. *See, e.g.,* Sawyer, 877 A.2d at 102-103; Kennedy v. D.C. Rental Hous. Comm'n, 709 A.2d 94, 97 (D.C. 1998); Jerome Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 682 A.2d 178, 182 (D.C. 1996); Winchester Van Buren Tenants Ass'n v. D.C. Rental Hous. Comm'n, 550 A.2d 51, 55 (D.C. 1988); Charles E. Smith Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 492 A.2d 875, 877 (D.C. 1985).

The Commission's regulations provide that the "Rent Administrator or the Rental Housing Commission may impose simple interest on rent refunds, or treble that amount under § 901(a) of § 901(f) of the act." 14 DCMR § 3826.1 (2004). Furthermore, the Commission notes that OAH assumed jurisdiction over tenant petitions from RACD pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.01, -1831.03(b-1)(1) (2001 Supp. 2005), including jurisdiction to hold hearings and issue decisions. Finally, the Commission has consistently affirmed decisions from OAH which include an award of interest. *See, e.g.,* United Dominion Mgmt. Co. v. Kelly, RH-TP-06-28,707 (RHC Aug. 15, 2013) (affirming an ALJ's final order which included an award of interest to the tenant); Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012) (finding "no merit in any claims of the Housing

Providers regarding the purported impropriety of the fine, rent rollback and award of interest"); Humrichouse v. Boyle, RH-TP-06-28,734 (RHC Aug. 8, 2008) (affirming ALJ's final order which included interest on damages awarded to the tenant).

Accordingly, the Commission is satisfied that the ALJ's determination that the Tenants were entitled to interest was in accordance with the Act, and was not "unreasonable, plainly wrong, incompatible with the statutory purposes of the Act or embodies a material misconception of the law." 14 DCMR §§ 3807.1, 3826.1 (2004). *See, e.g.*, Sawyer, 877 A.2d at 102-103; Kennedy, 709 A.2d at 97; Jerome Mgmt., Inc., 682 A.2d at 182; Winchester Van Buren Tenants Ass'n, 550 A.2d at 55; Charles E. Smith Mgmt., Inc., 492 A.2d at 877. Thus, the Commission affirms the ALJ on this issue.

IV. CONCLUSION

In accordance with the foregoing, the Commission reverses the ALJ's calculation of damages for the reduction in facilities during the period of August 1, 2006 through August 4, 2006. The Commission remands this issue for the ALJ to adjust his calculation of the Tenants' rent refund for the period of August 1, 2006 through August 4, 2006 to reflect the pre-August 5 provision of § 42-3502.11 that was in effect during that period, as described *supra*. *See* D.C. OFFICIAL CODE § 42-3502.11 (2001). The Commission instructs the ALJ on remand to only issue a rent refund for the period of August 1, 2006 through August 4, 2006 if the $25 award for the reduction in facilities decreased the rent ceiling to a value below the rent charged, and the Tenants are then only entitled to the difference between the two values. *See* D.C. OFFICIAL CODE § 42-3502.11 (2001 Supp. 2007). Furthermore, the Commission instructs the ALJ on remand to adjust the overall award of damages and interest due to the Tenants arising out of the reduction

in facilities, in accordance with any adjustments that are made to the award for the period of August 1, 2006 through August 4, 2006.

The Commission affirms the ALJ on all other issues.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

MARTA W. BERKLEY, 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, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** was mailed, postage prepaid, by first class U.S. mail on this **23rd day** of **December, 2013** to:

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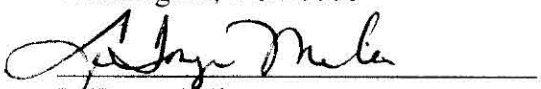

LaTonya Miles
Clerk of the Court
(442-8949)