DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-06-28,830; RH-TP-06-28,835

In re: 2714 Quarry Road, N.W., Unit B-1

Ward One (1)

CARMEL PARTNERS, INC. d/b/a QUARRY II, LLC
Housing Provider/Appellant/Cross-Appellee

v.

MICHAEL JOSEPH LEVY
Tenant/Appellee/Cross-Appellant

DECISION AND ORDER FOLLOWING REMAND

May 16, 2014

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 District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501- 2-510 (2001 Supp. 2008), 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.

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[1] OAH assumed jurisdiction over tenant petitions from RACD pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.03(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[2]

On November 6, 2006, Tenant/Appellee/Cross-Appellant Michael Joseph Levy (Tenant), residing at Unit B-1 of 2714 Quarry Road, N.W. (Housing Accommodation), filed tenant petition RH-TP-06-28,830 with the Rent Administrator, claiming that the Housing Provider/Appellant/Cross-Appellee, Carmel Partners, Inc. d/b/a Quarry II, LLC (Housing Provider), violated the Act as follows:

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

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

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

5. A rent increase was taken while my/our unit(s) were not in substantial compliance with the D.C. Housing Regulations;

6. The Housing Provider, manager or other agent of the Housing Provider of my/our rental unit(s) has violated the provisions of Section ____[3] of the Rental Housing Emergency Act of 1985.

See RH-TP-06-28,830 at 1-5; Record for RH-TP-06-28,830 at 26-30. Subsequently, on November 13, 2006, the Tenant filed a second tenant petition, RH-TP-06-28,835, against the Housing Provider, claiming the same six (6) aforementioned violations of the Act. *See* RH-TP-

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[2] A detailed factual background prior to this cross appeal is set forth in the Commission's Decision and Order in Levy v. Carmel Partners, Inc., RH-TP-06-28,830; RH-TP-06-28,835 (RHC Mar. 19, 2012), and the Commission's Order on Reconsideration in Carmel Partners, Inc. v. Levy, RH-TP-06-28,830; RH-TP-06-28,835 (RHC Apr. 18, 2012) (Order on Reconsideration). The Commission sets forth in this decision only the facts relevant to the issues that arise from the Housing Provider's appeal filed on August 23, 2012, and the Tenant's cross-appeal filed on August 28, 2012.

[3] The Commission notes that the Tenant did not indicate a specific section of the Act in claim six (6) of his Tenant Petition. *See* Tenant Petition RH-TP-06-28,830 at 5; R. at 26.

06-28,835 at 1-5; Record for RH-TP-06-28,835 at 26-30. On April 26, 2007, Administrative Law Judge (ALJ) Arabella Teal entered an order consolidating RH-TP-06-28,830 and RH-TP-06-28,835 (hereinafter, collectively, "Tenant Petition"). *See* Levy v. Carmel Partners, Inc., RH-TP-06-28,830; RH-TP-06-28,835 (OAH Apr. 26, 2007); Record for RH-TP-06-28,830; RH-TP-06-835 (R.) at 97.

The ALJ held evidentiary hearings on these matters on June 12, 2007, and July 13, 2007; on December 12, 2008, the ALJ issued a Final Order, Michael Joseph Levy v. Carmel Partners, Inc. d/b/a Quarry II, LLC, RH TP 06-28,830; RH-TP-06-28,835 (OAH Dec. 12, 2008)), dismissing all of the Tenant's claims. *See* Levy, RH TP 06-28,830; RH-TP-06-28,835; R. at 359-368.

On December 23, 2008, the Tenant filed a *pro se* notice of appeal with the Commission, and the Commission held a hearing on May 7, 2009. On March 19, 2012, the Commission issued a Decision and Order, Levy v. Carmel Partners, Inc., RH-TP-06-28,830; RH-TP-06-28,835 (RHC Mar. 19, 2012) (Decision and Order). The Commission addressed only one of the Tenant's issues on appeal: "[w]hether the Housing Provider complied with tenant notice requirements applicable to exemptions from the Act." *See* Decision and Order at 7. *See also* D.C. OFFICIAL CODE § 42-3502.05(d) & (h) (2001); 14 DCMR § 4101.6 (2004).[4]

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[4] D.C. OFFICIAL CODE § 42-3502.05(d) & (h) (2001) state the following:

> . . .
> (d) Prior to the execution of a lease or other rental agreement after July 17,1985, a prospective tenant of any unit exempted under subsection (a) of this section shall receive a notice in writing advising the prospective tenant that rent increases for the accommodation are not regulated by the rent stabilization program.
> . . .
> (h) Each registration statement filed under this section shall be available for public inspection at the [Rental Housing] Division, and each housing provider shall keep a duplicate of the registration statement posted in a public place on the premises of the housing accommodation to which the registration statement applies. Each housing provider may, instead of posting in each housing accommodation comprised of a single rental unit, mail to each tenant of the housing accommodation a duplicate of the registration statement.

Based upon the substantial evidence in the record the Commission determined that the Housing Provider gave the notice required by 14 DCMR § 4101.6 more than sixteen (16) months after its filing of the Registration/Claim of Exemption Form with RACD on April 12, 2005. *See* Decision and Order at 9-11. Relying on over twenty (20) years of substantial Commission precedent, the Commission determined that a housing provider's failure to provide a tenant timely written notice of the exempt status of a housing accommodation (or otherwise timely notify the tenant by posting notice) renders the exemption void *ab initio* because it violates the provisions of the Act, D.C. OFFICIAL CODE § 42-3502.05(d) and 14 DCMR § 4101.6, which require timely written notice to tenants that their units are exempt from the Act. *See id.* (citing Daly v. Tippett, TP 27,718 (RHC June 1, 2007); Kornblum v. Zegeye, TP 24,338 (RHC Aug. 19, 1999); Stets v. Featherstone, TP 24,480 (RHC Aug. 11, 1999); Young v. Rybeck, TP 21,984 (RHC Jan. 28, 1992)).

The Commission determined that the Housing Accommodation is not exempt from the Act under D.C. OFFICIAL CODE §§ 42-3502.05(a)-(h) and 14 DCMR § 4101.6. *See* Decision and Order at 9. The Commission reversed the ALJ's holding that the Housing Accommodation is exempt from the Act, and remanded the case to OAH for further proceedings. *See id.* at 11-12.

On March 30, 2012, the Housing Provider filed a Motion for Reconsideration contending that the Commission erred in its interpretation of the Act's provisions and regulations by concluding that the Housing Accommodation is not exempt from the Act, because, in sum: "the

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14 DCMR § 4101.6 states the following:

> Each housing provider who files a Registration/Claim of Exemption form under the Act shall, prior to or simultaneously with the filing, post a true copy of the Registration/Claim of Exemption form in a conspicuous place at the rental unit, or housing accommodation to which it applies, or shall mail a true copy to each tenant of the rental unit or housing accommodation.

Commission confuses the entitlement to a claim of exemption with the notice requirement to tenants in ruling that a tenant must receive a copy of the claim of exemption prior to or simultaneous with its filing." *See* Housing Provider's Motion for Reconsideration at 7. The Commission issued an Order on Motion for Reconsideration on April 18, 2012, denying the Housing Provider's Motion for Reconsideration. *See* Order on Reconsideration.

On August 15, 2012, the ALJ issued a Final Order After Remand, Michael Joseph Levy v. Carmel Partners, Inc. d/b/a Quarry II, LLC, RH TP 06-28,830; RH-TP-06-28,835 (OAH Aug. 15, 2012) (Final Order After Remand). R. at 408-437. In the Final Order After Remand, the ALJ made the following findings of fact: [5]

1. The Housing Accommodation at issue is a multi-unit building located at 2714 Quarry Road N.W., Washington, DC 2009 [sic]. Tenant has continuously resided in the basement apartment, B-1, of this building since August 4, 1995.

2. On May 18, 1979, a Certificate of Occupancy ("C of O") was issued to former owner, H & M Enterprises, of 2714 Quarry Road, N.W. Washington, DC 2009 [sic]. Respondent's Exhibit ("RX") 208. The C of O was for an 18-unit apartment house. RX 208.

3. In March 1981 the former owner obtained a building permit to construct additional units in the unoccupied basement of the existing building. RX 207 and 206. A new C of O, for 22 units, was issued for 2714 Quarry Road, N.W. on October 3, 1985. RX 205.

4. On August 4, 1995, Tenant and the former Housing Provider, H & M Enterprises, entered into a six-month lease agreement for Tenant's apartment. Petitioner's Exhibit ("PX") 106.

5. The 1995 lease provided for a total rent of $3,750 (in monthly installments of $625) due on or before the first day of each ensuing month. PX 106.

6. In June of 2004, Carmel Partners, Inc., d/b/a Quarry II, LLC, purchased the Housing Accommodation.

7. On March 29, 2005, Housing Provider filed a claim of exemption form with the RACD. Housing Provider claimed an exemption from the rent

[5] The findings of fact are recited here as stated by the ALJ in the Final Order After Remand.

stabilization provisions of the Act for the basement units in the existing building for which the C of O was issued after January 1, 1980. RX 202.

8. On April 12, 2005, Housing Provider filed a Registration/Claim of Exemption Form with the RACD.

9. Housing Provider gave Tenant written notice of the property's exempt status on August 16 and August 31, 2006. RX 200 and 201. Housing Provider gave this notice more than sixteen months after it filed the Registration/Claim of Exemption form with the RACD (April 12, 2005). In each notice, Housing Provider informed Tenant that his apartment was exempt from rent control regulations and that his monthly rent was increasing to $1,250 as of October 1, 2006. RX 200 and 201. Each notice was signed by Sandy Burke, representative for Housing Provider. RX 200 and 201.

10. In March 2006 DCRA inspected the Housing Accommodation's roof deck and issued a Housing Violation Notice ("HVN"). Violations specified in the HVN included: rotting deck boards, missing floor boards, and a broken guard rail. PX 101.

11. The building's roof deck was located on top of the building. Access to the roof deck was through a door located at the top of an interior stairwell.

12. Housing Provider placed a deadbolt lock on the roof deck in April 2006. Housing Provider considers the roof deck closed and does not intend to open the deck to tenant use.

13. On May 30, 2007, a tenant notified Housing Provider that bricks were falling from the building façade on the third story of the building onto a patio landing outside Tenant's exterior front door. That same day, Housing Provider's maintenance personnel went to the Housing Accommodation to investigate the issue. Housing Provider immediately had a third-party brick expert come to the building and secure the loose bricks. The source of falling bricks was fully secured by the following day.

14. Tenant asked Housing Provider to determine if new window bars should be placed on his apartment window, so that window could serve as a fire escape. Housing Provider discussed the issue with Tenant, but did not replace or alter existing bars on the window.

15. Sometime between January and February 2007, a rental unit two floors above Tenant's basement apartment flooded when a pipe in that unit burst. A tenant called Housing Provider to report sounds of gushing water. A few hours later, Housing Provider staff responded to the flood. Housing Provider staff removed excess water, treated carpet and wood flooring in the unit, and conducted needed restoration. Water damage occurred in the source unit, the

unit below, and in part of the interior hallway. The flood water did not reach Tenant's unit.

Final Order at 3-6; R. at 432-35. The ALJ made the following conclusions of the law in the Final Order After Remand:[6]

A. Burden of Proof[7]

. . .

B. Improper Rent Increase

2. Tenant claims in his [T]enant [P]etition that Housing Provider violated the Act in numerous ways, and that these violations resulted in an improper increase in his rent. Claimed violations have been organized into three categories: untimely notice of exemption; substantial housing code violations; and substantially reduced facilities and services. The following subsections analyze each category of claims:

1. Tenant's [C]laim of Improper Notice of Exemption

3. The District of Columbia Rental Housing Commission determined that Tenant's unit is not exempt from the Act. *Carmel Partners v. Levy* (RHC Order on Motion for Reconsideration). The Act provides that any unit newly constructed, or rental unit added to [an] existing structure and covered by a certificate of occupancy for housing use issued after January 1, 1980 is exempt from the Act's rent stabilization requirements. D.C[.] Official Code § 42-3502.05 [(2001)]. Exempt properties must be registered with the Rent Administrator. D.C. Official Code § 42-3502.05(a)(3)(f). The Act also requires Housing Provider to notify a tenant that his or her unit is exempt. 14 DCMR [§] 4101.6 [(2004)]. Such notice must be given to the tenant "prior to or simultaneously with the filing." *Id.*

4. Housing Provider did not give Tenant the required notice until more than 16 months after filing the Registration/Claim of Exemption Form with RACD. The Commission found "housing provider's failure to provide a tenant timely written notice of the exempt status of a housing accommodation....[sic] renders the exemption void *ab initio*." *Carmel Partners v. Levy* (RHC Order on Motion for Reconsideration). Accordingly, the exemption notice is

[6] The conclusions of law are recited here as stated by the ALJ in the Final Order After Remand except that the Commission has numbered the ALJ's paragraphs for ease of reference.

[7] The Commission omits the ALJ's statement regarding the applicable burden of proof under the Act. *See* Final Order After Remand at 7; R. at 431.

improper and Tenant's unit is not exempt from the rent stabilization provisions of the Act.

5. Housing Provider improperly increased Tenant's rent when it knowingly demanded an improper rent increase after failing to notify tenant of the claimed exemption. A housing provider improperly increases rent when he or she knowingly demands or receives rent in excess of the maximum allowable amount. 14 DCMR § 4217.1. Tenant proved by a preponderance of the evidence that Housing Provider improperly increased his rent when it took a rent increase that was improper, beginning October 1, 2006, and knew that it was taking this increased rent.

6. First, Housing Provider demanded and received rent in excess of the maximum allowable amount. As discussed in the section above, Housing Provider failed to notify Tenant prior to or simultaneously with the exemption filing. The Commission found this failure rendered the Housing Provider[']s exemption void from the start. *Carmel Partners v. Levy* (RHC Order on Motion for Reconsideration). Because Tenant's unit is not exempt, Housing Provider can only take rent increases equal to the Consumer Price Index for Urban Wage Earners and Clerical Workers ("CPI-W"), plus 2%. *Id.* The CPI-W for 2006 was 4.2%. This means that the maximum allowable rent increase under the Act for the year 2006 is 4.2%, plus 2%, for a total of 6.2%. The Housing Provider increased Tenant's rent from $718 to $ 1,250 [sic] in October 2006. RX. [sic] 200. This is an increase of approximately 74%. This rent increase is substantially higher than the 6.2% increase allowed for the year 2006. *Id.* Thus, the 2006 rent increase is improper.

7. Second, Housing Provider *knowingly* demanded and received this improper rent increase. A Housing Provider demands or receives rent when it "takes an illegal increase, or where he charges [rent] in excess of the [allowable] rent." *Grayson v. Welch*, TP 10,878 (RHC June 30, 1989) at 18 (citing *Dismer Auxier Co. v. Brown*, TP 10,090 (RHC Oct. 24, 1983)). Housing Provider demanded excess rent when it sent Tenant a letter, on August 16 and August 31, 2006, stating it would increase rent to $1,250, beginning October 1, 2006. RX 200. Tenant's undisputed testimony indicates he paid the increased rent from October 1, 2006 to the date of the hearing (July 13, 2007).

8. Housing Provider demanded and received this rent increase knowingly. A Housing Provider *knowingly* demands improper rent when it has knowledge of a rent increase that is demanded from tenants. *RECAP v. Powell*, TP 27,042 (RHC Dec. 19, 2002) (emphasis added). Tenant does not need to show Housing Provider had intent to improperly raise rent, only that it raised the rent. *Id.* Simply put, the Tenant does not have to prove that the Housing [P]rovider has actual knowledge that a rent increase is improper; rather Tenant need only show that Housing Provider has knowledge of the "essential facts" that bring the Housing Provider's act of increasing the rent into conflict with

the law. *Quality Mgmt. Inc. v. D.C. Rental Hous. Comm'n*, 505 A.2d 73, 76 n.6 (D.C. 1986) (finding the law presumes knowledge of the legal consequences arising from a prohibited conduct). The D.C. Court of Appeals held that *knowingly* simply means that a Housing Provider knows it is increasing the rent, and that there is no need to prove it intended to violate the law. *Id.* (finding that "if you know that you are increasing the rent, the fact that you don't intent [sic] to violate the law would be 'knowingly.' If you also intended to violate the law, that would be 'willfully'["]).

9. It is undisputed that Housing Provider knew that it increased Tenant's rent because it sent Tenant a letter notifying him that his rent would be increased. RX. [sic] 200. Housing [P]rovider's witness, Sandy Burke, stated in her testimony that she was not aware that the Act requires Tenants to be notified of an exemption at a specific time relating to the filing date. This testimony indicates that Housing Provider did not know it took an improper rent increase. However, this does not show that Housing Provider lacked knowledge of the fact that Tenant's rent was increased. The rent increase notification letter sent to Tenant clearly indicates that the Housing Provider knew it was increasing his rent.

10. On this record, I find Housing Provider took an improper rent increase on Tenant's unit in October 2006, because it knowingly increased Tenant's rent, and the rent increase was taken in violation of the Act.

2. Tenant's Claim that Housing Accommodation was in Substantial Violation of D.C. Housing Regulations[8]

. . .

3. Reduction in Facilities and Services[9]

. . .

C. Remedies

34. Tenant is entitled to a rent rollback and rent refund beginning in October 2006, to include interest, because Housing Provider violated the Act when it failed to timely notify Tenant of its claim of exemption. Tenant is not entitled to any other decrease in rent because he failed to show that Housing Provider

[8] The Commission omits a recitation of the ALJ's conclusions of law related to the Tenant's claim of housing code violations, because neither party has appealed the ALJ's conclusions on this issue. *See* Final Order After Remand at 10-19; R. at 419-28.

[9] The Commission omits a recitation of the ALJ's conclusions of law related to the Tenant's claim of reductions in services and/or facilities, because neither party has appealed the ALJ's conclusions on this issue. *See* Final Order After Remand at 19-21; R. at 417-19.

increased rent when substantial housing code violations existed in his unit or common areas, or that Housing Provider reduced or eliminated a previously provided facility or service.

1. Housing Provider [G]ave Improper Notice of Exemption – Rent Rollback and Reimbursement Awarded

35. As discussed in section IV(B)(1) Housing Provider failed to provide Tenant with proper notice of the property's status. The Commission found this failure voids Housing Provider's exemption under the Act. Housing Provider took a rent increase in October 2006 that was well above the permitted rent increase allowed for a non-exempt unit regulated under the Act. Housing Provider is liable for the excess rent demanded or received and a rent rollback is issued. D.C. Official Code § 42-3509.01(a); [*s*]*ee* 14 DCMR [§] 4217.1. A Housing Provider that knowing [sic] demands or receives rent in excess of the maximum allowable amount is liable for "(1) the amount by which the rent exceeds the applicable rent charged, or for (2) treble that amount if Housing Provider acted in bad faith, or (3) rent rollback for a specific period or until specific conditions are complied with." 14 DCMR § 4217.1. The rent rollback remedy can apply in addition to a rent refund or in lieu of a rent refund. In this case I issue both a rent rollback and refund.

(a) Rent Rollback

36. Tenant is entitled to a rent rollback beginning October 2006. The Act provides for a rent rollback when a housing provider demands or receives rent in excess of the maximum allowable rent. D.C. Official Code § 42-3509.01(a); 14 DCMR [§] 4205.6; *Redmond v. Majerle Mgmt., Inc.*, TP 23,146 (RHC March 26, 2002) at 48. The Commission has held that rent rollbacks can be applied prospectively. *See Grayson v. Welch*, TP 10,878 (RHC June 30, 1989) at 13 (holding that a failed property registration could result in [sic] Rent Administrator rolling back the rent to the last date when landlord legally registered and ordering the tenants to pay the reduced rent amount until landlord properly registers). A rent rollback "directly affects the terms of the existing lease," and "alters the amount of rent on which the landlord and the tenant have already agreed." *Id.*

37. As discussed in section IV(B)(1) the Commission found the exemption claimed on Tenant's apartment to be "void *ab initio*," or invalid from the outset. *Carmel Partners v. Levy* (RHC Order on Motion for Reconsideration). Housing Provider's October 2006 rent increase was based on this void exemption. Therefore, I order Housing Provider to rollback Tenant's monthly rent to **$718 per month**, the rent Tenant was paying prior to the October 2006 improper rent increase. The rollback will continue until Housing Provider implements a legal and permissible rent increase under the law.

(b) Rent refund

38. Tenant is awarded a rent refund for excess rent paid or demanded beginning October 1, 2006 through July 13, 2007, plus interest. Tenant's undisputed testimony indicates that he paid the demanded excess rent amount in October 2006. Although no evidence in the record indicates that Tenant paid the increased rent from November 2006 through July 2007, the record does establish that Housing Provider demanded the increased amount for these months. It is well established that Tenant is entitled to a rent refund if the excess rent is demanded, regardless of whether Tenant paid the excess rent or not. *See* D.C. Official Code § 42-3501.03 (28) (defining "rent" as money "demanded" by a housing provider); *Kapusta v. D.C. Rental Hous. Comm'n*, 704 A.2d 286, 287 (D.C. 1997). Accordingly, I find that Tenant is entitled to a refund for the rent demanded between October 1, 2006 and the last day of the hearing.

39. I award Tenant a rent refund of $532/month, plus interest, for October 2006, through July 13, 2007 (based on hearing dates). **Total amount due to Tenant is $5,011.10, plus interest,** as set forth in Appendix A, attached to this order.

(c) Interest

40. Housing Provider owes Tenant interest on the rent refund. The regulations that implement the Act require me to award interest on rent refunds. 14 DCMR [§] 3826.2. The interest is calculated from the date of the violation to the date of the issuance of the Final Order. *Id.* The interest rate imposed is the judgment interest rate used by the Superior Court of the District of Columbia on the date of issuance of the decision. *See* 14 DCMR [§] 3826.3. The Superior Court interest rate is currently 2% per annum. Appendix A, attached to this Order, reflects the interest due on each month's overcharge, totaling **$553.35 in interest.**

(d) Bad Faith

41. The Act provides for an award of treble damages in circumstances where a housing provider acts in "bad faith." D.C. Official Code § 42-3509.01(a). Housing Provider did not act in bad faith when it improperly increased rent. A finding of bad faith requires inquiry into the "intent or state of mind of the actor." *Third Jones Corp. v. Young*, TP 20,300 (RHC Mar. [sic] 1990) at 9. It requires a finding that Housing Provider acted out of some "interested or sinister motive" involving "the conscious doing of a wrong because of dishonest motive or moral obliquity." *Id.* The standard requires only that the Housing Provider's action reflect a "continuing, heedless disregard of a duty." *Cascade Park Apartments v. Walker*, TP 26,197 (RHC Jan. [sic] 2005) at 35.

42. Tenant failed to show Housing Provider acted with a sinister motive or continuing disregard of a duty. Tenant alleged that Housing Provider acted improperly when it increased his rent without giving him timely notice of the corresponding exemption filling [sic]. Tenant provided no evidence to show that Housing Provider had a sinister motive for giving him improper notice, or that this act was among a series of similarly improper notices. Additionally, Housing Provider's witness, Sandy Burke, testified that she did not know the Act requires a Housing Provider to notify tenants of an exemption at a designated time. This testimony counters Tenant's claim that Housing Provider acted with sinister motive when it failed to timely notify him of exemption. Weighed against Tenant's unsubstantiated claim of bad faith, I find Ms. Burke's testimony more credible.

43. Not only did Tenant fail to provide evidence to substantiate his claim that Housing Provider acted in bad faith regarding the notice of exemption, but Housing Provider gave credible testimony contrary to this allegation. Accordingly, no treble damages will be awarded.

2. No Substantial Housing Code Violations Existed [D]uring Rent Increase – No Remedy Awarded[10]

. . .

3. Housing Provider did not Substantially Reduce any Facility or Service – No Remedy Awarded[11]

. . .

D. Conclusion

46. Tenant is entitled to a rent rollback and rent refund because Housing Provider failed to timely notify Tenant that his unit was registered for exempt status with the RACD. Tenant failed to sustain his burden of proof on the remaining issues, including substantial housing code violations and reduction in facilities or services. Accordingly, these issues are dismissed and no remedy is provided.

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[10] The Commission omits a recitation of this section of the ALJ's conclusions of law because neither party has appealed the ALJ's determination that the Tenant is not entitled to a remedy related to his claim of substantial housing code violations. *See* Final Order After Remand at 24; R. at 418.

[11] The Commission omits a recitation of this section of the ALJ's conclusions of law because neither party has appealed the ALJ's determination that the Tenant is not entitled to a remedy related to his claim of a reduction in services and/or facilities. *See* Final Order After Remand at 24-25; R. at 417-18.

Final Order at 7-26; R. at 412-31 (emphasis in original) (footnotes omitted). On August 23, 2012, the Housing Provider filed a "Notice of Appeal of Housing Provider/Appellant Carmel Partners Inc./Quarry II, LLC" (Housing Provider's Notice of Appeal), alleging that the ALJ made the following errors in the Final Order After Remand:[12]

1. The Final Order is erroneous as a matter of law to the extent it orders a rollback in rent "until the Housing Provider implements a legal and permissible rent increase under the law" in that the Tenant Petitioner's claim is barred by the statute of limitations in D.C. [Official] Code ¶ [sic] 42-3502.06(e).

2. The Final Order is erroneous as a matter of law to the extent it orders a rollback in rent "until the Housing Provider implements a legal and permissible rent increase under the law" in that the Tenant Petitioner's claim is barred by res judicata and/or collateral estoppel.

3. The Final Order is erroneous as a matter of law to the extent it holds that the Housing Provider's Claim of Exemption was invalid and void.

Housing Provider's Notice of Appeal at 1-2. The Tenant filed a notice of appeal (Tenant's Notice of Cross-Appeal) on August 28, 2012, alleging the following errors in the Final Order After Remand:[13]

> ARGUMENT ONE
> On page 23 of the **Final Order After Remand "Rent Refund"** is footnoted "(6)" and connects at the bottom of the page to 14 DCMR [§] 3826.2. That refers to [sic] interest rate calculation. I cite here DC [Official] Code [§] 42-3509.01(a)(1):
>
> > **Penalties.**
> > (a) Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of subchapter II of this chapter, or (2) substantially reduces or eliminates related services previously provided for a rental unit, shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent charged or for

[12] The Housing Provider's issues on appeal are stated herein using the language from the Housing Provider's Notice of Appeal.

[13] The Commission recites the Tenant's issues as presented in the Tenant's Notice of Appeal.

treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.

Besides the above Order citing elsewhere 14 DCMR [§] 4217.1, I add additionally:

Court of Appeals – Abstracts of Decisions
Kapusta v. DC Rental Housing Commission*, [sic] 704 A. 2nd [sic] 286 ([D.C.] 1997) – Rental Housing Act is designed to stabilize rents and in establishing rent ceilings commands that violator shall be held liable for the amount by which the entire amount of money demanded, received or charged exceeds the applicable rent ceiling.
http://ota.dc.gov/ota/cwp/view,a,3,q,577181.asp#2

ARGUMENT TWO
To refund anything less than the entire amount overpaid would be allowing business conduct, though adjudged illegal, to be profitable.

ARGUMENT THREE
In the RHC **DECISION AND ORDER** [March 19, 2012] the RHC ordered the instant case be remanded to OAH "for further proceedings…consistent with the determinations herein." My argument is, did that not, in effect, necessitate the ALJ to hold an additional hearing(s) and re-open the case to another hearing date, though going unscheduled, since an order was handed down without doing so; thus it is self-evident the ALJ deemed the case file contained all the ingredients necessary to issue a ruling. So just as rent demanded is deemed rent paid regardless whether it in fact was paid, I'm saying the case record here wasn't closed as there was another hearing existent virtually just not as yet scheduled and remained so until the Final Order After Remand was signed off on.

Other than by custom or dictum, I have found no codification for "improper rent adjustment may go up to the date the record closed, which is usually the hearing date." [Jenkins v. Johnson, TP 23,410] This conflicts with the codified cites in ARGUMENT ONE as neither contains any such caveat.

Tenant's Notice of Cross-Appeal at 1-2 (emphasis in original). On March 12, 2013, the Housing Provider filed a brief with the Commission ("Housing Provider's Brief"). The Tenant did not file a brief with the Commission. The Commission held a hearing on the Housing Provider's appeal and the Tenant's cross-appeal on March 21, 2013.

II. HOUSING PROVIDER'S ISSUES ON APPEAL

A. Whether the Final Order is erroneous as a matter of law to the extent it orders a rollback in rent "until the Housing Provider implements a legal and permissible rent increase under the law" in that the Tenant Petitioner's claim is barred by the statute of limitations in D.C. [Official] Code ¶ [sic] 42-3502.06(e).

B. Whether the Final Order is erroneous as a matter of law to the extent it orders that the Housing Provider is not exempt from the Act, in that the issue of exemption is barred by res judicata and/or collateral estoppel.[14]

C. Whether the Final Order is erroneous as a matter of law to the extent it holds that the Housing Provider's Claim of Exemption was invalid and void.

III. TENANT'S ISSUES ON CROSS-APPEAL[15]

A. Whether the ALJ erred by not holding a new hearing after remand, and thus allowing the Tenant to present evidence that he continued to pay the illegal rent increase after the July 13, 2007, evidentiary hearing.

IV. DISCUSSION OF THE HOUSING PROVIDER'S ISSUES ON APPEAL

A. Whether the Final Order is erroneous as a matter of law to the extent it orders a rollback in rent "until the Housing Provider implements a legal and permissible rent increase under the law" in that the Tenant Petitioner's claim is barred by the statute of limitations in D.C. [Official] Code ¶ [sic] 42-3502.06(e).

The Housing Provider objects on appeal to the following statement by the ALJ in the Final Order After Remand: "The [$718 rent] rollback will continue until Housing Provider implements a legal and permissible rent increase under the law." Housing Provider's Notice of Appeal at 2-3 (quoting Final Order After Remand at 22; R. at 416). The Housing Provider asserts that this statement by the ALJ violates the Act's statute of limitations, at D.C. OFFICIAL

[14] The Commission, in its discretion, has rephrased the Housing Provider's statement of the issue on appeal, consistent with the assertions presented in support of this issue in the Housing Provider's Brief. *See, e.g.* Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Barac Co. v. Tenants of 809 Kennedy St., NW, VA 02-107 (RHC Sept. 27, 2013); Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8.

[15] In its reasonable discretion, the Commission determines that its statement of the Tenant's Issues on Cross-Appeal appropriately summarizes the legal issues raised in the Tenant's Notice of Cross-Appeal, *supra* at 13-14. *See, e.g.* Campbell, RH-TP-09-29,715; Barac Co., VA 02-107; Ahmed, Inc., RH-TP-28,799 at n.8.

CODE § 42-3502.06(e) (2001),[16] by attempting to invalidate any rent increases taken by the Housing Provider for the nearly six year period between issuance of the Final Order After Remand, on August 15, 2012, and the date the Tenant Petition was filed, in November, 2006. Housing Provider's Brief at 5-6.

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.

In the Final Order After Remand, the ALJ invalidated a rent increase, from $718 per month to $1,250 per month that became effective on October 1, 2006. *See* Final Order After Remand at 5, 7-10, 21-22; R. at 415-16, 428-29, 433. Thereafter, the ALJ ordered that the Tenant's monthly rent be rolled back to the amount that the Tenant was paying prior to the illegal increase – namely, $718. *See id.* at 22; R. at 416.

Under the Act's statute of limitations, a tenant has up to three years from the date that a rent increase becomes effective to file a tenant petition challenging the rent increase. *See* D.C. OFFICIAL CODE § 42-3502.06(e); Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013); United Dominion Mgmt. v. Coleman, RH-TP-06-28,833 (RHC Sept. 27, 2013); United Dominion Mgmt. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013).

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[16] D.C. OFFICIAL CODE § 42-3502.06(e) (2001) provides, in relevant part, 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 . . . .

The Commission's review of the record reveals that the two (2) tenant petitions at issue in this case were filed on November 6, 2006 and November 13, 2006, respectively.[17] *See* Tenant Petition RH-TP-06-28,830 at 1; R. at 30; Tenant Petition RH-TP-06-28,835 at 1; R. at 30. The Commission notes that the October 1, 2006 rent increase at issue in this case occurred less than three (3) years prior to the filing of either tenant petition, and thus within the Act's statute of limitations, as follows: (1) approximately five (5) weeks prior to the filing of RH-TP-06-28,830 on November 6, 2006; and (2) approximately six (6) weeks prior to the filing of RH-TP-06-28,835, on November 13, 2006. *See* D.C. OFFICIAL CODE § 42-3502.06(e). Thus, the Commission is satisfied, based on its review of the record, that the ALJ's invalidation of the October 1, 2006 rent increase did not violate the Act's statute of limitations. *See id. See also* Smith Prop. Holdings Five (D.C.) L.P., RH-TP-06-28,794; Coleman, RH-TP-06-28,833; Hinman, RH-TP-06-28,728.

Furthermore, the Commission is not persuaded that the ALJ's language in the Final Order After Remand directing that the Tenant's rent be rolled back until the "Housing Provider implements a legal and permissible rent increase under the law," violates the Act's statute of limitations, where the record reflects that the only rent increase invalidated by the ALJ occurred within the three (3) years prior to the filing of the Tenant Petition, as discussed *supra*. Instead, the Commission interprets the ALJ's language to be merely directing the Housing Provider to do that which it is already obligated to do: namely, to implement increases that are in accordance with the rent stabilization provisions of the Act. *See* D.C. OFFICIAL CODE § 42-3502.08. Furthermore, as discussed *infra* at 23-25, the ALJ properly determined that the Tenant had paid an illegal rent increase through the date of the final evidentiary hearing, and thus awarded

[17] *See supra* at 2.

damages to the Tenant from the date of the improper increase, October 1, 2006, through the date of the final evidentiary hearing on July 13, 2007. *See* Final Order After Remand at 23 and n.6; R. at 415.

Based on its review of the Final Order After Remand, the Commission is satisfied that the ALJ's invalidation of the October 1, 2006 rent increase, and resulting rent rollback, in the Final Order After Remand were not arbitrary, capricious, or an abuse of discretion, and were in accordance with the provisions of the Act, and supported by substantial evidence. *See* D.C. OFFICIAL CODE § 42-3502.06(e); 14 DCMR § 3807.1; Smith Prop. Holdings Five (D.C.) L.P., RH-TP-06-28,794; Coleman, RH-TP-06-28,833; Hinman, RH-TP-06-28,728. The ALJ is thus affirmed on this issue.

B. Whether the Final Order is erroneous as a matter of law to the extent it orders that the Housing Provider is not exempt from the Act, in that the issue of exemption is barred by res judicata and/or collateral estoppel.

The Housing Provider contends that an OAH decision issued in a different case, TP 29,384, acts as a "complete bar" to the Tenant's claims in the Tenant Petition under the doctrine of res judicata, or alternatively, collateral estoppel.[18] *See* Housing Provider's Brief at 7-8. The Housing Provider states that TP 29,384 was filed by the Tenant against the Housing Provider on

[18] The Commission notes that the doctrine of res judicata has been defined by the District of Columbia Court of Appeal ("DCCA") as follows: "Under the doctrine of res judicata, 'a final judgment on the merits of a claim bars relitigation in a subsequent proceeding of the same claim between the same parties or their privies.'" EDCare Mgmt. v. Delisi, 50 A.3d 448 (2012) (quoting Patton v. Klein, 746 A.2d 866, 869 (D.C. 1999)). *See also, e.g.* Sollars v. Cully, 904 A.2d 373, 376 (D.C. 2006); Nuyen v. Luna, 884 A.2d 650, 658 (D.C. 2005); Pipher v. Odell, 672 A.2d 1092, 1094 (D.C. 1996); Dreyfuss Mgmt. v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013); Bedell v. Clarke, TP 24,979 (RHC Apr. 29, 2003).

The DCCA has explained that the doctrine of collateral estoppel may be invoked in the following circumstances: "(1) the issue was actually litigated, (2) was determined by a valid, final judgment on the merits, (3) after a full and fair opportunity for litigation by the party, (4) under circumstances where the determination was essential to the judgment." Wilson v. Hart, 829 A.2d 511, 514-15 (D.C. 2003). *See also, e.g.* Modiri v. 1342 Rest. Group, Inc., 904 A.2d 391, 394 (D.C. 2006); Davis v. Davis, 663 A.2d 499, 501 (D.C. 1995) (quoting Washington Medical Center v. Holle, 573 A.2d 1269, 1283 (D.C. 1990)); Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012); Baker v. Bernstein Mgmt. Corp., TP 24,919 (RHC Sept. 29, 2000).

August 7, 2008, and that a final order was issued by OAH in that case on January 5, 2010, finding that the Housing Accommodation was exempt from rent control. *See id.* at 7.

As the Commission stated previously, *see supra* at 16, the ALJ's Final Order After Remand will be upheld so long as it is in accordance with the provisions of the Act and supported by substantial evidence. *See* 14 DCMR § 3807.1. The Commission has consistently held that it may not receive new evidence on appeal. *See* 14 DCMR § 3807.5.[19] *See, e.g.* Barac Co., VA 02-107 (determining that the Commission was not able to consider a document submitted for the first time with the notice of appeal); Watkis v. Farmer, RH-TP-07-29,045 (RHC Aug. 15, 2013) (deciding that, where a document was not part of the record below, the Commission was not permitted to consider it on appeal); Mann Family Trust v. Johnson, TP 26,191 (RHC Nov. 1, 2005) (stating that where the evidence and records supporting the housing provider's res judicata claim were not presented to the hearing examiner, such new evidence could not be considered by the Commission on appeal).

The Commission's review of the record reveals that the Housing Provider did not make a claim, or present any evidence to support a claim, of either res judicata or collateral estoppel to the ALJ. *See, e.g.* Housing Provider's Brief at 7-8; Final Order After Remand at 1-27; Final Order at 1-7; R. at 361-67, 412-37. Moreover, the Commission notes that the Housing Provider did not raise either res judicata or collateral estoppel to the Commission prior to the March 19, 2012 Decision and Order, nor did the Housing Provider assert the claims of res judicata or collateral estoppel in its Motion for Reconsideration, filed with the Commission on March 30, 2012. *See* Decision and Order; Order on Reconsideration. Accordingly, the Commission is satisfied that the Housing Provider's assertions regarding res judicata and collateral estoppel

[19] 14 DCMR § 3807.5 provides the following: "The Commission shall not receive new evidence on appeal."

were not presented to the ALJ below, or at any other time throughout these proceedings prior to the current appeal, and thus are new evidence that the Commission may not consider for the first time on appeal. *See* 14 DCMR § 3807.5; Barac Co., VA 02-107; Watkis, RH-TP-07-29,045; Mann Family Trust, TP 26,191.

Furthermore, by raising res judicata and collateral estoppel for the first time on appeal, the Commission observes that the Housing Provider has prevented the Tenant from having any meaningful opportunity to contest, and to provide rebuttal evidence regarding, the Housing Provider's assertion that the claims in the Tenant Petition were barred by res judicata or collateral estoppel, in direct contravention of the safeguards contained in the DCAPA providing a right to a hearing in contested cases. *See* D.C. OFFICIAL CODE § 2-509(b);[20] 14 DCMR § 3903.1 ("[t]he parties to petitions before the Rent Administrator have a right to a hearing in accordance with the provisions of the Act . . ."); Richard Milburn Pub. Charter Alt. High Sch. v. Cafritz, 798 A.2d 531, 539 n.7 (D.C. 2002) ("among the procedures required during contested case proceedings are . . . an opportunity . . . to all parties to present evidence and argument"); Washington v. A&A Marbury, RH-TP-11-30,151 (RHC Dec. 27, 2012) (citing Cafritz, 798 A.2d at 539).

Based on its review of the record, the Commission is satisfied that the ALJ did not err in the Final Order After Remand by failing to determine that the claims in the Tenant Petition were barred by res judicata or collateral estoppel, where the record reflects that the Housing Provider never raised either a claim of res judicata or collateral estoppel before the ALJ. *See* 14 DCMR

[20] D.C. OFFICIAL CODE § 2-509(b) (2001) provides, in relevant part, as follows:

> . . . Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts . . . .

§ 3807.1. Accordingly, the Commission determines that the Housing Provider's assertions regarding res judicata and collateral estoppel are new evidence that the Commission may not consider for the first time on appeal. *See* 14 DCMR § 3807.5; Barac Co., VA 02-107; Watkis, RH-TP-07-29,045; Mann Family Trust, TP 26,191. Thus the ALJ is affirmed on this issue.

C. Whether the Final Order is erroneous as a matter of law to the extent it holds that the Housing Provider's Claim of Exemption was invalid and void.

The Housing Provider asserts in its Notice of Appeal that the ALJ's Final Order After Remand was erroneous "to the extent that it holds that the Housing Provider's claim of exemption was invalid and void." Housing Provider's Notice of Appeal at 2. In its brief, the Housing Provider lists three (3) reasons in support of this issue on appeal, as follows: (1) "[t]he unit is exempt;" (2) "[a]s notice has been provided, the exemption cannot be invalidated;" and (3) "[b]ecause the Commission has changed its interpretation, it may only be applied prospectively." Housing Provider's Brief at 8-12.

The Commission observes that the Housing Provider's issue "C" on appeal, whether the Housing Provider's claim of exemption is valid, was resolved by the Commission in the initial appeal of this matter. *See* Decision and Order. *See also* Order on Reconsideration. The Commission determines that the law of the case doctrine, which prohibits the Commission from reopening and reconsidering an issue that the Commission resolved in an earlier appeal, applies to this issue. *See, e.g.* King v. McKinney, TP 27,264 (RHC June 17, 2005) (citing Lynn v. Lynn, 617 A.2d 963 (D.C. 1992)) ("The law of the case doctrine prohibits the Commission from reopening issues that the Commission resolved in an earlier appeal"); Dias v. Perry, TP 24,349 (RHC July 30, 2004) (refusing to reconsider Ms. Perry's status as a tenant, when the Commission had previously made a definitive ruling on the issue); Goff v. Edward Tiffey Co.,

TP 24,855 (RHC Dec. 29, 2000) (stating that where the housing provider did not appeal the hearing examiner's finding of housing code violations, the finding became the law of the case).

In its Decision and Order, entered in response to the initial appeal in this case, the Commission determined that the Housing Accommodation is not exempt from the Act under D.C. OFFICIAL CODE §§ 42-3502.05(a)-(h) and 14 DCMR § 4101.6, reversed the ALJ's holding that the Housing Accommodation is exempt from the Act, and remanded the case to OAH for further proceedings. *See* Decision and Order at 9-12. *See also supra* at 3-4. Additionally, the Commission denied the Housing Provider's subsequent Motion for Reconsideration, based on substantially identical grounds as its Notice of Appeal.[21] *See* Order on Reconsideration.

The Commission observes that the entire basis of the Housing Provider's issue "C" on appeal is merely a reiteration of the issue that the Commission previously addressed and resolved in its Decision and Order and Order on Reconsideration – namely, whether the Housing Accommodation is exempt under the Act. *See* Housing Provider's Brief at 8-14. Accordingly, under the law of the case doctrine, the Commission is prohibited from reconsidering the issue of the Housing Accommodation's exemption in this Decision and Order Following Remand. *See* King, TP 27,264; Dias, TP 24,349; Goff, TP 24,855.

The Commission notes that its Decision and Order contained a statement of the parties' rights regarding motions for reconsideration, as well as obtaining judicial review of the Decision and Order before the DCCA. *See* Decision and Order at 12-13. The Commission notes that the Housing Provider availed itself of the opportunity to file a motion for reconsideration with the

[21] In comparing the Housing Provider's Motion for Reconsideration with the Housing Provider's Brief on Appeal, the Commission observes that the Housing Provider's arguments made in the Motion for Reconsideration appear to be repeated almost identically in the section of the Brief on Appeal addressing issue "C." *Compare* Brief on Appeal, *with* Motion for Reconsideration. Notably, the three arguments that the Housing Provider identified in its Brief in support of issue "C" on appeal, *see supra*, are identical to the three arguments identified in support of this issue in the Motion for Reconsideration. *See id.*

Commission, which was denied after careful consideration in the Commission's twenty-six (26) page April 18, 2012 Order on Reconsideration. *See* Order on Reconsideration at 9-25. The Commission notes, furthermore, that its Order on Reconsideration also enumerated the parties' rights regarding obtaining judicial review before the DCCA. *Id.* at 25. However, the Commission's review of the record reveals no evidence that the Housing Provider availed itself of the opportunity to obtain judicial review of the Commission's Decision and Order regarding the Housing Accommodation's exemption status. The Commission observes that if the Housing Provider disagreed with the Commission's Decision and Order, the remedy was to seek judicial review with the DCCA, pursuant to D.C. OFFICIAL CODE § 42-3502.19,[22] and within the timelines governed by DCCA's rules. Having failed to do so, the Commission will not entertain a second appeal of this issue, under the guise of an appeal from the ALJ's Final Order After Remand.

Thus, this issue is dismissed on appeal.

V. TENANT'S ISSUE ON CROSS-APPEAL

A. Whether the ALJ erred by not holding a new hearing after remand, and thus allowing the Tenant to present evidence that he continued to pay the illegal rent increase after the July 13, 2007, evidentiary hearing.

The Tenant contends on appeal that the Commission's Decision and Order, remanding the case to OAH "for further proceedings," required that the ALJ hold an additional hearing. *See* Tenant's Notice of Cross-Appeal at 1. Additionally, the Tenant states that he should be entitled to a refund of the entire amount of rent that he overpaid, not just through the date of the final OAH evidentiary hearing on July 13, 2007. *See id.*

[22] D.C. OFFICIAL CODE § 42-3502.19 provides the following, in relevant part: "Any person or class of persons 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."

As the Commission stated previously, *see supra* at 16, the ALJ's Final Order After Remand will be upheld so long as it is in accordance with the provisions of the Act and supported by substantial evidence. *See* 14 DCMR § 3807.1.

The Commission notes initially that its Decision and Order did not order the ALJ to hold any additional evidentiary hearings on remand, and thus, the Commission determines that the ALJ did not err by failing to hold such evidentiary hearings. 14 DCMR § 3807.1. *See* Decision and Order at 11-12.[23]

Moreover, the Commission has consistently held that the ALJ may award damages up to, and including, the date of the final evidentiary hearing in a case. *See, e.g.* Mann Family Trust, TP 26,191 (reversing where hearing examiner awarded damages past the date of the evidentiary hearing, when the record closed); H.G. Smithy Co. v. Alston, TP 25,033 (RHC Sept. 30, 2003) (reversing where hearing examiner awarded damages past the date of the evidentiary hearing); Linen v. Lanford, TP 27,150 (RHC Sept. 29, 2003) (affirming hearing examiner's refusal to award damages through the date of the decision and order, because the record closed after the evidentiary hearing).

In the Final Order After Remand the ALJ determined that the Tenant had paid an illegal rent increase through the date of the final evidentiary hearing, and thus awarded damages to the Tenant from the date of the improper increase, October 1, 2006, through the date of the final evidentiary hearing on July 13, 2007. *See* Final Order at 23 and n.6; R. at 415. Where the final evidentiary hearing occurred on July 13, 2007, the Commission's review of the record necessarily reveals no evidence demonstrating whether the Tenant paid an increased rent amount

[23] The Commission's Decision and Order stated the following regarding "further proceedings" on remand: "The Commission reverses the ALJ's holding that the Housing Accommodation is exempt from the Act, and remands the case to OAH for further proceedings on RH-TP-06-28,830 & RH-TP-28,835 (Consolidated) consistent with the determinations herein." Decision and Order at 12.

at any time after the hearing. The Commission is thus satisfied that the ALJ's award of damages only through the date of the final evidentiary hearing in this case was in accordance with the provisions of the Act, and supported by substantial record evidence, and affirms the ALJ on this issue.[24] 14 DCMR § 3807.1; Mann Family Trust, TP 26,191; H.G. Smithy Co., TP 25,033; Linen v. Lanford, TP 27,150.

VI. RESPONSE TO DISSENT

The Dissent, *see infra* at 31, does not disagree with the Majority's application of the "law of the case" doctrine in this second appeal. It rather voices its disagreement with the Commission's original Decision and Order and Order on Reconsideration in the first appeal.

In the Motion for Reconsideration of the Decision and Order, the Housing Provider raised the identical claim which he raises in this appeal: the Commission erred in its interpretation of D.C. OFFICIAL CODE §§ 42-3502.05(a)-(h) and 14 DCMR § 4101.6 in determining that the Housing Provider's claim of exemption was invalid under the Act because he failed to either post or mail necessary notice of his exemption to affected tenants "prior to or simultaneously with" his filing for the exemption as required by § 4101.6. *See* Housing Provider's Brief at 8-12; Motion for Reconsideration at 7.

The Dissent's position and reasoning in this appeal completely reverses its position and reasoning in approving the Order on Reconsideration in the original appeal. In approving the Order on Reconsideration, the Dissent provided unconditional approval of the Commission's interpretation of the Act and relevant longstanding case precedent in its original Decision and

[24] The Commission notes that the Tenant's remedy in this instance was to file a new tenant petition after the July 13, 2007, evidentiary hearing, in order to recover any illegal rent payments that occurred after the record closed in this case.

Order, whose case analysis, reasoning and holding served as the sole basis for the Order on Reconsideration.

> As the Majority and the Dissent both agreed in the Order on Reconsideration:
>
> In light of its foregoing analysis of the language of 14 DCMR § 4101.6 (2004) in the context of the Act's provisions as well as the cases either cited by the Housing Provider or simply addressing the same "notification" requirements and issues under 14 DCMR § 4101.6 (2004) as in the instant case, the Commission is satisfied that its Decision and Order is neither a "clear departure" from prior Commission decisions, nor "reverses" longstanding Commission precedent as claimed by the Housing Provider. *See* Motion for Reconsideration at 8 – 9. To the contrary, the Commission is satisfied that over twenty (20) years of substantial Commission precedent clearly supports its determination that the Housing Provider's failure to fully comply with 14 DCMR § 4101.6 (2004) in the instant case, by failing to either post or mail necessary notice of its exemption from the Act to affected tenants "prior to or simultaneously with" its filing for the exemption, renders the claimed exemption void *ab initio*. *See* Chaney, TP 20,347; Kornblum, TP 24,338; Young, TP 21,976 & TP 21,984; Daly, TP 27,718; Renjilian, TP 27,686; Richards, TP 27,588; Butler, TP 27,262; Stets, TP 24,480. *See also,* Kornblum v. Smith Residential Realty, L.P., TP 26,155. The Housing Provider must fully comply with all registration requirements of the Act, including the timing requirements for mailing or posting notice in 14 DCMR § 4101.6 (2004), in order to render the exemption valid and effective under the Act. *See* Chaney, TP 20,347; Kornblum, TP 24,338; Young, TP 21,976 & TP 21,984; Daly, TP 27,718; Renjilian, TP 27,686; Richards, TP 27,588; Butler, TP 27,262; Stets, TP 24,480. *See also,* Kornblum v. Smith Residential Realty, L.P., TP 26,155.

Order on Reconsideration at 22 (emphasis added). *See also* Decision and Order at 8-12.

> Now, in a 180 degree turn, the Dissent states as follows:
>
> The majority decision and order in this case would overturn 25 years of Commission precedent, that is a housing provider who claims that his housing accommodation is exempt from the Act, but who fails to provide a tenant with notice of his claimed exempt status is subject to the provisions of the Act until such notice is given . . . . The majority decision and order establishes a new precedent for the Commission, that is, a housing provider who fails to timely comply with 14 DCMR § 4101.6, is forever barred from his right to establish an exemption from the Act.

See infra at 34 (emphasis added).

The Dissent's self-contradictory positions above display an inexplicable, but unambiguous, reversal in its interpretation of the Act's provisions, case precedent and statutory purposes with respect to the exemption and notice requirements of D.C. OFFICIAL CODE §§ 42-3502.05(a)-(h) and 14 DCMR § 4101.6 in the course of this single, extended, appeal. While the Majority is at a loss to explain, or to attempt to provide any principled rationale for, such a significant and unexplained reversal, the Majority nonetheless continues to ground its overall response to the Dissent in the legal precedent, analysis, reasoning and holding in the Decision and Order and Order on Reconsideration.

The Majority offers these additional responsive comments to the Dissent's pirouette.

The Dissent does not dispute that, under the Act, a housing provider is required to provide notice of an exemption to a tenant "prior to or simultaneously with the filing." *See* 14 DCMR § 4101.6 (emphasis added). It is also undisputed that the Housing Provider filed its Registration/Claim of Exemption form on March 29, 2005, but in fact waited for more than 16 months to notify the Tenant on August 16 and 31, 2006 of the exemption. *See infra* at 32. Yet, the Dissent makes no attempt to provide any legal grounds, precedent or provisions under the Act to support its contention that the Housing Provider's notice to the Tenant of the exemption 16 months after the filing of the Registration/Claim of Exemption Form can be interpreted as "prior to or simultaneously with" the filing for purposes of compliance with 14 DCMR § 4101.6.

Similarly, the Dissent fails to provide any textual or other analytical support from the Decision and Order, the Order on Reconsideration or otherwise for its claim that the majority's interpretation of 14 DCMR § 4101.6 would "forever" bar a housing provider from claiming an exemption if the housing provider fails to "timely" comply with 14 DCMR § 4101.6. To the contrary, as both the Decision and Order and the Order on Reconsideration make unquestionably

clear, a housing provider can at any time file an Amended Registration/Claim of Exemption in order to comply with notice requirements of 14 DCMR § 4101.6, if the housing provider had previously failed to meet the notice requirements of 14 DCMR § 4101.6 with an initial filing. The record in this case does not indicate that the Housing Provider filed any such Amended Registration/Claim of Exemption, which would have validated the notice to the Tenant on August 16 and 31, 2006 under 14 DCMR § 4101.6 because such notice could easily have been provided "prior to or simultaneously with" the filing of an Amended Registration/Claim of Exemption. The Majority's review of the record in this case provides no support for any claim by either the Dissent or the Housing Provider that the filing of an Amended Registration/Claim of Exemption poses any prohibitive burden – financial or otherwise – on a housing provider to secure compliance with the tenant notice requirements in 14 DCMR § 4101.6.

Finally, the Dissent relies on the "remedial" purposes of the Act for support of its position. *See infra* at 31. Contrary to its present position, and prior to reversing his course in this appeal, the Dissent had agreed with the Majority that furthering the "remedial" purposes of the Act was a fundamental consideration of the Majority, as articulated in the Decision and Order and Order on Reconsideration, in the Commission's interpretation of D.C. OFFICIAL CODE §§ 42-3502.05(a)-(h) and 14 DCMR § 4101.6:

> The Commission observes that its interpretation of 14 DCMR § 4101.6 (2004) is entirely consistent with, and effectuates, the remedial purposes of the Act. Goodman v. District of Columbia Rental Housing Comm'n., 573 A.2d 1293, 1299 – 1300 (D.C. 1990). As noted, under Commission precedent, the tenant notice provision of 14 DCMR § 4101.6 (2004) is deemed to be an inextricable part of the Registration/Claim of Exemption process. *See, e.g.*, Chaney, TP 20,347; Kornblum, TP 24,338; Young, TP 21,976 & TP 21,984. As such, the Commission observes that, under 14 DCMR § 4101.6 (2004), the requirement of prior or simultaneous notification of the filing of a Registration/Claim of Exemption form by a housing provider to a tenant appears clearly reasonable, especially in light of a potentially significant financial impact on a low-moderate income tenant of future rent increases not regulated by the Act. Moreover, the

> Commission notes that the requirement of prior or simultaneous tenant notification by posting or mailing under 14 DCMR § 4101.6 (2004) does not, in the Commission's view, pose an unreasonable financial or other burden on a housing provider.

Order on Reconsideration at n. 13.

In light of the Dissent's change of direction, the Majority disagrees that the Dissent's position is consistent with the "remedial" character of the Act for a number of reasons. *See, e.g.,* Goodman, 573 A.2d at 1297, 1299; Dreyfuss Mgmt., LLC, RH-TP-07-28,895; Highland Park Apartments v. Sutton, RH-TP-09-29,593 (RHC Sept. 27, 2013); Hinman, RH-TP-06-28,728. The underlying statutory context for this appeal is an "exemption" from the Act, *see* D.C. OFFICIAL CODE §§ 42-3502.05(a)-(h), and, by extension, an exemption from the mandatory "remedial" provisions of the Act to protect low and moderate income tenants through the limitations on rent increases. It is precisely because exemptions from the Act may threaten the achievement of its "remedial" purposes that the DCCA and the Commission must "narrowly construe" any exemptions – to assure that any deviation from the Act's "remedial" purposes is carefully evaluated, restricted and minimized. *See, e.g.,* Goodman, 573 A.2d at 1297, 1299; Dreyfuss Mgmt., LLC, RH-TP-07-28,895; Highland Park Apartments, RH-TP-09-29,593; Hinman, RH-TP-06-28,728. "Exemptions from rent control laws should be narrowly construed in light of the intent of the legislature and plain meaning of the legislation." James Parreco & Son v. D.C. Rental Hous. Comm'n, 567 A.2d 43, 48 (D.C. 1989); Remin v. D.C. Rental Hous. Comm'n, 471 A.2d 275, 279 (D.C. 1984); Bernstein v. Lime, 91 A.2d 841, 843 (D.C. 1952).

In this case, the plain meaning of the regulation at issue – 14 DCMR § 4101.6 – is evident from its language:

> Each housing provider who files a Registration/Claim of Exemption form under the Act shall, prior to or simultaneously with the filing, post a true copy of the Registration/Claim of Exemption form in a conspicuous place at the rental unit, or

> housing accommodation to which it applies, or shall mail a true copy to each tenant of the rental unit or housing accommodation.

(emphasis added). Because exemptions from the Act impair the realization of its remedial purposes for low and moderate income tenants, a housing provider's notice of an exemption to a tenant "prior to" or "simultaneous with" its filing allows tenants to make timely decisions regarding their tenancies insofar as their rents are not (or will not be) regulated by the Act, and the protections that the Act affords tenants are not (or will no longer be) required by law. Under the Majority's interpretation of the "plain meaning" of 14 DCMR § 4101.6, tenants are afforded the opportunity to know as soon as an exemption is in place that the Act's "remedial" purposes do not (or no longer will) provide the requisite statutory source of future rent adjustments by a housing provider.[25]

In sum, the Dissent's position not only marks a complete about-face from his prior approval of the Majority's reasoning and holding to which he now objects, but also effectively amends the Act by eliminating a tenant notice requirement in 14 DCMR § 4101.6 from the Act that is essential to the preservation of its "remedial character" and has been interpreted as such for two decades. The Majority relies on the case precedent, legal reasoning, and statutory interpretation herein, in its original Decision and Order, and in its Order on Reconsideration as

[25] As the DCCA noted in Goodman: "Indeed, a tenant who litigates a meritorious claim under this statutory scheme acts not only on his own behalf, but also as a private attorney general in vindicating the rights of persons of low and moderate income to afford remedial housing." 573 A.2d at 1299 n. 14 (citing Hampton Courts Tenants Ass'n v. D.C. Rental Hous. Comm'n, 573 A.2d 10 (D.C. 1990) and Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)).

the "law of the case." *See* King, TP 27,264 (citing Lynn, 617 A.2d at 963); Dias, TP 24,349; Goff, TP 24,855.

VII. CONCLUSION

For the foregoing reasons, the ALJ's Final Order After Remand is affirmed.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

CLAUDIA L. McKOIN, COMMISSIONER

YOUNG, COMMISSIONER, dissenting:

The Commission is a creature of the Rental Housing Act of 1985 (Act), D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), which is a remedial statute.[26] The Commission's powers and duties are prescribed by § 42-3502.02,[27] and its actions governed by 14 DCMR §§ 3800-4399 (2004), the DCAPA, D.C. OFFICIAL CODE §§ 2-501- 2-510 (2001 Supp. 2008), Commission precedent, and case law. Parties appearing before the Commission reasonably rely upon the plain language of the Act, regulations, and the rulings in the decisions and orders issued by the Commission, the hearing examiners and the Administrative Law Judges of the Office of Administrative Hearings.

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[26] The Act is a "quintessentially remedial enactment . . . . Like other such legislation, it should be liberally construed to achieve its purposes . . . . [A] tenant who litigates a meritorious claim under this statutory scheme acts not only on his own behalf, but also as a private attorney general vindicating the rights of persons of low or moderate income to afford remedial housing." Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1297, 1299 (D.C. 1990); see also Coles v. Penny, 531 F.2d 609 (1976).

[27] See also Mullin v. N Street Follies, 712 A.2d 487 (D.C. 1998) where the Court noted that the Commission's primary authority flows directly from the Act.

I. SUBSTANTIAL EVIDENCE IN THE RECORD

The ALJ made the following findings of fact in her initial final order:

> In June of 2004, the Housing Provider, Carmel Partners, Inc., d/b/a Quarry II LLC, purchased the property. On March 29, 2005, the Housing Provider filed a claim of exemption form with RACD. The Housing Provider claimed an exemption from the rent stabilization provisions of the Act for the new units in the existing building for which the C of O was issued after January 1, 1980.
>
> On August 16, 2006, the Housing Provider sent the Tenant a letter advising him that his apartment was exempt "from the District's Rent Control Regulations." The letter enclosed a copy of the claim of exemption form. On August 31, 2006, Housing Provider sent another letter to the Tenant informing him that his apartment was "exempt from rent control regulations" and that his rent would be increased effective October 1, 2006. The August 31, 2006 letter also enclosed a copy of the claim of exemption form.

Michael Joseph Levy v. Carmel Partners, Inc. d/b/a Quarry II, LLC, RH-TP-06-28,830 & RH-TP-06-28,835 Consolidated (OAH Dec. 12, 2007) (Levy Final Order I) at 3. The record further reflects that on November 6, 2006, the tenant filed Tenant Petition RH-TP-06-28,830 (TP) with the Rent Administrator. TP at 1.

II. MAJORITY DECISION ON REMAND

In the instant case, in the majority decision and order on remand, the majority compounds an error committed in the original decision issued by the Commission in Levy v. Carmel Partners, Inc., RH-TP-06-28,830 & RH-TP-06-28,835 (RHC Mar. 19, 2012). As restated in the majority decision and order on remand, the Commission addressed only one of the issues raised by the Tenant in his original appeal, that is, "[w]hether the Housing Provider complied with the tenant notice requirements applicable to exemptions from the Act." Levy, RH-TP-06-28,830 & RH-TP-06-28,835 at 7. The Commission, relying upon D.C. OFFICIAL CODE §§ 42-3502.05(d) and (h) (2001) and 14 DCMR § 4101.6 (2004), see supra, n.4, stated in Levy:

> [A] housing provider's failure to provide a tenant timely written notice of the exempt status of a housing accommodation (or otherwise timely notify the tenant by posting notice) renders the exemption void ab initio because it violates the provisions of the Act, D.C. OFFICIAL CODE §§ 42-3502.05(d) and 14 DCMR § 4101.6, which require timely notice to tenants that their units are exempt from the Act.

The Commission citing previous decisions in Daly v. Tippett, TP 27,718 (RHC June 1, 2007); Kornblum v. Zegeye, TP 24,338 (RHC Aug. 19, 1999); Stets v. Featherstone, TP 24,480 (RHC Aug. 11, 1999); Young v. Rybeck, TP 21,984 (RHC Jan. 28, 1992), determined that the housing accommodation was not exempt from the Act under D.C. OFFICIAL CODE §§ 42-3502.05(a)-(h) and 14 DCMR § 4101.6. The Commission reversed the final order of the Administrative Law Judge who held that the housing accommodation was exempt from the Act. The Commission remanded the final order to OAH for further proceedings. Levy, RH-TP-06-28,830 & RH-TP-06-28,835 at 9-12.

III. COMMISSION PRECEDENT

It is clear that a housing accommodation is not exempt from the provisions of the Act until the housing provider has complied with both D.C. OFFICIAL CODE §§ 42-3502.05(a)-(h) and 14 DCMR § 4101.6. In Chaney v. Turner Realty Co., TP 20,347 (RHC Mar. 24, 1989) (wherein the Commission directed a finding that the housing provider failed to comply with the mailing or posting requirements of 14 DCMR § 4101.6), the Commission stated, "[t]he failure to notify the tenant makes the claim of exemption void until proper notification is given." Similarly, in Young v. Rybeck, TP 21,984 (RHC Jan. 28, 1992), the Commission affirmed a decision and order of the Rent Administrator which concluded that a claim of exemption is void until the housing provider gives proper notification of exemption. "The failure to provide notice nullifies the exemption until proper notice is given. Notice at the hearing is not sufficient to comply with

this requirement." Jolly v. Akamune, TP 27,529 (RHC Sept. 30, 2004) (citing, Kornblum v. Zegeye, TP 21,976 (RHC Aug. 19, 1999)).

In this case, the record reflects that the housing provider filed a Registration/Claim of Exemption form with the Office of the Rent Administrator on March 29, 2005. The record further reflects that the housing provider notified the tenant, by letter, of its exempt status on August 16 and 31, 2006. The August 16, 2006 letter also informed the tenant that his rent would be increased effective October 1, 2006. The tenant filed a petition on November 6, 2006, challenging the Notice of Rent Increase.

In this case, following the precedent established in Chaney, Young, Kornblum, and Jolly, the housing provider, subject to a challenge by the tenant of the validity of the claim of exemption, would have been considered exempt from August 16, 2006 and certainly no later than August 31, 2006. The TP was filed after the housing provider complied with 14 DCMR § 4101.6, under the previously cited cases the TP would have been dismissed as OAH lacks the jurisdiction to hear and decide cases not subject to the rent stabilization provisions of the Act.

IV. CONCLUSION

The majority decision and order in this case would overturn 25 years of Commission precedent, that is a housing provider who claims that his housing accommodation is exempt from the Act, but who fails to provide a tenant with notice of his claimed exempt status is subject to the provisions of the Act, until such notice is given. The Commission has previously held that once a housing provider complies with the notice requirement found in 14 DCMR § 4101.6, the housing accommodation is exempt from the rent stabilization provisions of the Act. The majority decision and order establishes a new precedent for the Commission, that is, a housing

provider who fails to timely comply with 14 DCMR § 4101.6, is forever barred from his right to establish exemption from the Act.

Accordingly, I dissent.

RONALD A. YOUNG, 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 AFTER REMAND** in RH-TP-06-28,830 & RH-TP-06-28,835 was mailed, postage prepaid, by first class U.S. mail on this **16th day** of **May, 2014** to:

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