DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-12-30,182

In.re: 2359-2401 Ontario Road, N.W.

Ward One (1)

URBAN INVESTMENT PARTNERS XIII AT ONTARIO, LLC
Housing Provider/Appellant/Cross-appellee

v.

2359-2401 ONTARIO ROAD TENANT ASSOCIATION
Tenant/Appellee/Cross-appellant

ORDER

August 11, 2016

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 Rental Accommodations Division ("RAD") of the Department of Housing and Community Development ("DHCD").[1] The applicable provisions of the Rental Housing Act of 1985 ("Act"), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2012 Repl.), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-501-510 (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern there proceedings.

On October 28, 2014, and October 30, 2014, respectively, housing provider/appellant/ cross-appellee Urban Investment Partners XIII at Ontario, LLC ("Housing Provider") and

[1] OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division (RACD) of the Department of Consumer and Regulatory Affairs (DCRA) pursuant to the Office of Administrative Hearings Establishment Act, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-l)(1) (2007 Repl.). The functions and duties of RACD in DCRA were transferred to the RAD in DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. Official Code § 42-3502.04b (2010 Repl.)).

tenant/appellee/cross-appellant 2359-2401 Ontario Road Tenants' Association, Inc. ("Tenants' Association") filed notices of appeal from a final order by the OAH: 2359-2401 Ontario Road Tenant Association v. Urban Investment partners XIII at Ontario, LLC, 2012-DHCD-TP 30,182 (OAH August 28, 2014) ("Final Order"). On June 22, 2016,[2] the parties jointly filed two motions: (1) a stipulation of dismissal with prejudice ("Motion to Dismiss"); and (2) a motion to vacate the $5,000 civil fine imposed by the Final Order ("Motion to Vacate"). The parties attached, as Exhibit A to the Motion to Vacate, a settlement agreement and release ("Settlement Agreement").

The Commission's rules provide the following with regard to the withdrawal of a pending appeal:

> 3824.1 An appellant may file a motion to withdraw an appeal pending before the Commission.
>
> 3824.2 The Commission shall review all motions to withdraw to ensure that the interests of all parties are protected.

14 DCMR § 3824 (2004). The Commission has consistently stated that settlement of litigation is to be encouraged. *See, e.g.*, Batts v. Sansbury, RH-TP-14-30,474 (RHC Jan. 8, 2016); Gordon v. United Prop. Owners (USA), RH-HP-06-20,806 (RHC May 15, 2015).

In Proctor v. D.C. Rental Hous. Comm'n, 484 A.2d 542, 548 (D.C. 1984), the District of Columbia Court of Appeals ("DCCA") established the following five (5) factors for the Commission to use in evaluating settlement agreements:

1. The extent to which the settlement enjoys support among affected tenants;
2. Its potential for finally resolving the dispute;

[2] The Commission notes that, according to its internal records, on October 28, 2014, the Clerk of Court requested the record of this case be certified and transmitted to the Commission. *See* 14 DCMR § 3804.1. To date, the Commission has not received a complete, certified record, but has received a copy of the Final Order in response to a supplemental request by the Clerk.

3. The fairness of the proposal to all affected persons;

4. The savings of litigation costs to the parties; and

5. The difficulty of arriving at a prompt, final evaluation of the merits, given the complexity of law, and the delays inherent in the administrative and judicial processes.

See, e.g., Batts, RH-TP-14-30,474; Crawford v. Dye, RH-TP-30,472 (RHC Sept. 25, 2015).

In applying the Proctor factors, the Commission's review of the Settlement Agreement indicates the following:

1. The Settlement Agreement appears to have nearly unanimous support because it is signed by all but two tenants identified as parties in the Final Order;

2. The Settlement Agreement does not appear to resolve this dispute completely. First, it indicates that the tenants of two rental units "settled claims separately," but the Commission has not been provided with evidence of their settlement. Second, although the Settlement Agreement provides for the notices of appeal filed by both parties to be withdrawn and for the Tenants' Association's pending motion for attorney's fees before OAH to be withdrawn upon payment from the Housing Provider to the Tenants' Association, it is unclear to the Commission whether the civil fines imposed by the Final Order can be properly vacated by the Commission on appeal pursuant to a private agreement;

3. The Settlement Agreement appears to be fair to all signatory parties because it provides $412,284 in payments to tenants (as opposed to $109,777.79 in total refunds provided in the Final Order) to be distributed by a formula approved by the Tenants' Association, fixes rents charged for current tenants for specified time periods (in lieu of rent rollbacks in the Final Order), provides for $37,716 in payment of the Tenants' Association's counsel's expenses, and releases the Housing Provider from all claims;

4. The Settlement Agreement will save litigation costs on appeal (since the OAH hearing-level costs have already been incurred) because the briefing and oral argument of the case before the Commission have not yet been scheduled, and will not need to be; and

5. The Settlement Agreement leads to the avoidance of the following: (1) further delay in obtaining the certified record of this case from OAH; (2) any potential delay in the Commission rendering a decision due to the

> apparent complexity of the 32 total issues raised in the notices of appeal; and (3) any other costs and delays inherent in prompt and complete appellate adjudication of any claims by the parties.

See Settlement Agreement at 1-13 & A1-A2; Final Order at 5-6, 82-90; Proctor, 484 A.2d at 548; Batts, RH-TP-14-30,474. Moreover, the Commission observes that both the Tenants' Association and the Housing Provider are represented by experienced and knowledgeable counsel in the signing of the Settlement Agreement and the filing of the Motion to Vacate and Motion to Dismiss. Settlement Agreement at 13.

Although the majority of the Proctor factors weigh in favor of affirming the Settlement Agreement, the Commission is not satisfied that it finally resolves all issues arising from this dispute for the following two reasons. *See* Proctor, 484 A.2d at 548.

First, as noted *supra* at 3, the tenants of two rental units are not included in the Settlement Agreement because they "settled claims separately," and the Commission has had no ability to determine whether the interests of those two tenants have been protected in their withdrawal from this appeal as required by 14 DCMR § 3824.2, or whether they agree to the withdrawal of the appeal by the Tenants' Association. The Commission is required to apply the legal factors in Proctor, 484 A2d at 548, to the respective settlement agreements of the two tenants who did not participate in the Housing Provider's Settlement Agreement with the Tenants' Association in order to ensure that the respective interests of the two tenants are protected under 14 DCMR § 3824.2. Crawford, RH-TP-30,472; Gordon, RH-HP 20,806.

Second, in the Settlement Agreement, the parties agreed to "file a Joint Motion to Vacate the $5,000 Fines assessed to Respondent in the August 28, 2014 Final Order." Settlement Agreement at 4. In so doing, the private parties in this case have attempted to settle fines payable to, and for the benefit of, the District of Columbia, which appears to be the real party in

interest,[3] for substantial housing code violations that impact public safety and health of the residents of the District of Columbia.

The Commission, as an appellate tribunal, retains authority to vacate fines imposed by the presiding Administrative Law Judge ("ALJ") in the OAH proceeding that the Commission determines are not supported by substantial evidence on the record. *See* Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013); Cascade Park Apts. v. Walker, TP 26,197 (RHC Jan. 14, 2005). However, in the context of a settlement agreement, the Commission has denied a consent motion to withdraw an appeal when a Housing Provider failed to provide evidence that it paid the civil fine imposed by the ALJ. Ahmed, Inc. v. Torres, RH-TP-07-29,064 (RHC Jan. 31, 2013).

Based upon the Commission's review of the Act, its regulations, and substantial case precedent, the Commission has been unable to find any precedent or legal standards to guide Commission deliberations regarding its authority under the Act to vacate civil fines pursuant to a settlement agreement solely between private parties.[4] Persuasive legal precedent is especially important in this case where the ALJ imposed the fines for a "willful (and potentially lethal) violation of the Act." Final Order at 82; R. at 653. As the ALJ distinctly noted:

> [T]he lack of a working smoke detector in the appropriate area is a substantial violation as a matter of law. 14 DCMR 4216.2(s). This form of violation is especially hazardous in the highly condensed urban area of the District. The Housing Provider placed the Tenant Petitioners at risk of serious bodily harm

[3] *Cf.* United States ex rel. Eisenstein v. City of New York, 540 F.3d 94, 98 (2d Cir. 2008) (noting requirement under federal statute that "the government must consent to any settlement that would call for the dismissal of a *qui tam* action . . . is surely a sensible requirement, inasmuch as the United States, is the 'real party in interest,'" (internal citations omitted)).

[4] The Commission observes that the Settlement Agreement contains a severability clause, stating that if any portion of it is unenforceable, the remaining provisions "shall remain in effect and be interpreted so as best to reasonably effect the intent of the Parties." Settlement Agreement at 5. The Commission is therefore satisfied that, even if the civil fines cannot be vacated by the Settlement Agreement, the remainder of the issues on appeal may be dismissed and the Settlement Agreement may be otherwise enforced.

every day that they did not have the appropriate fire prevention and control system in place.

Final Order at 81; R. at 654 (emphasis added).

For the foregoing reasons, the Commission requests that the parties jointly provide the following. First, the Commission requests submission of the settlement agreements of the two tenants who settled their respective claims separately with the Housing Provider to allow the Commission to review and evaluate such settlement agreements for compliance with 14 DCMR § 3824.2 and Proctor, 484 A.2d at 548.

Second, the Commission requests briefing that provides the legal standards and supporting arguments for the Commission's authority under the Act or otherwise to approve the Joint Motion of the parties to vacate the $5,000 fines imposed by OAH on the Housing Provider. As already suggested in this Order, *see supra* at 4-5, the critical issue to the Commission is whether the Commission has the legal authority under the Act or otherwise to approve and enforce a covenant in a settlement agreement between solely private parties/litigants to vacate statutory civil fines imposed by OAH, a government agency, for a substantial, willful violation of the Act.

Because the critical issue discussed *supra* arises from the Settlement Agreement, the terms of which were jointly negotiated and supported by the parties, the Commission requests only a single joint brief from the parties. The parties shall file shall file a joint brief at the Commission's offices no later than Friday, September 9, 2016.

SO ORDERED.

PETER B. SZEGEDY-MASZAK, CHAIRMAN

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **ORDER** in RH-TP-12-30,182 was mailed, postage prepaid, by first class U.S. mail on this **11th day** of **August, 2016,** to:

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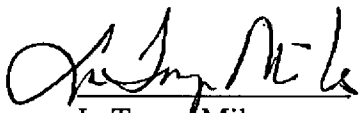

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