DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,838

In re: 1701 16th Street, N.W., Unit # 320

Ward Two (2)

KAREN BOWER
Tenant/Appellant

v.

CHASTLETON ASSOCIATES
Housing Provider/Appellee

DECISION AND ORDER

March 27, 2014

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission from a decision and order issued by the Rent Administrator, based on a petition filed in the Rental Accommodations and Conversion Division (RACD), Housing Regulation Administration (HRA), of the Department of Consumer and Regulatory Affairs (DCRA). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations (DCMR), 14 DCMR §§ 3800-4399 (2004) govern the proceedings.[1]

[1] The Office of Administrative Hearings (OAH) assumed jurisdiction over the conduct of hearings on tenant petitions from the RACD and the Rent Administrator 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 Rental Accommodations Division (RAD) of 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 May 16, 2003, Tenant/Appellant, Karen Bower (Tenant) filed Tenant Petition (TP) 27,838 with RACD, regarding 1701 16th Street, N.W., Unit # 320 (Housing Accommodation), claiming that Chastleton Associates/American Rental Mgmt. Co. (Housing Provider) violated the Act as follows: (1) the Housing Provider took a rent increase larger than the amount of increase which was allowed by any applicable provision of the Act; (2) failed to provide the Tenant with a proper thirty (30) day notice of rent increase before the rent increase became effective; (3) failed to file the proper rent increase forms with RACD; and (4) charged rent exceeding the legally calculated rent ceiling for her unit. Record for TP 27,838 (R.) at 9. The Housing Provider contested the claims in TP 27,838 under D.C. OFFICIAL CODE § 42-3502.05(a)(1) (2001) and 14 DCMR § 4106.10 (2004) on the grounds that the Housing Accommodation was and remains exempt from the Act because the Housing Accommodation had been continually receiving mortgage subsidy assistance from the District of Columbia Housing Finance Agency (DCHFA) from November 1986 through the time when the Tenant Petition was filed.[2]

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[2] D.C. OFFICIAL CODE § 42-3502.05(a)(1) (2001) states as follows, in relevant part:

> (a) §§ 42-3502.05(f) through 42-3502.19, except § 42-3502.17, shall apply to each rental unit in the District except:
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> (1) Any rental unit in any federally or District-owned housing accommodation or in any housing accommodation with respect to which the mortgage or rent is federally or District-subsidized except units subsidized under Subchapter III; ...

The 1981 codification of this provision in effect at the time when the exemption was originally filed with the Rent Administrator on November 6, 1986 was at D.C. OFFICIAL CODE § 42-2525(a)(1) (1981). The text of the provision in the 2001 codification is identical with respect to paragraph "(1)", and only differs from that in the 1981 codification in its reference to "§§ 42-3502.05(f) through 42-3502.19, except § 42-3502.17" instead of "sections 45-2515(f) through 45-2529, except 45-2527", respectively. The reason for the difference is that the sections in the 1981 codification were renumbered in the 2001 codification. Despite different identifying section numbers, the section headings remained identical. *Compare* D.C. OFFICIAL CODE §§ 45-2515(f) through 45-2529, except § 45-2527 (1981) *with* D.C. OFFICIAL CODE §§ 42-3502.05(f) through 42-3502.19, except § 42-3502.17 (2001). In this

A hearing was held on March 15, 2004, before Hearing Examiner Gerald J. Roper (Hearing Examiner). The Hearing Examiner issued a Decision and Order on March 21, 2005. Bower v. Chastleton Associates/American Rental Mgmt. Co., TP 27,838 (RACD March 21, 2005) (Final Order).[3]

The Hearing Examiner explained his analysis of this case as follows, in relevant part:[4]

1. Petitioner, Karen Bower [(Tenant)], brought this petition to challenge two rent increases: a $390 rent increase taken in July 2001 and a $125 rent increase taken in July 2002. At the time both increases were implemented, Respondent [(Housing Provider)] claimed to be exempt, by virtue of an "Amended Registration/Claim of Exemption" form filed on May 30, 2001.

Decision and Order, the Commission will primarily cite to the applicable provisions of the 2001 codification of the D.C. OFFICIAL CODE, and, if necessary, to the parallel provisions of the 1981 codification.

The current codification of 14 DCMR § 4106.10 (2004) is identical to the earlier codification of this regulation, in effect at the time of TP 27,838 – namely, 14 DCMR § 4106.10 (1991). All citations hereafter to this regulation will refer to the codification currently in effect, which provides as follows:

> The Rent Administrator shall approve a claim of exemption under §205(a)(1) of the Act, where a housing accommodation or rental unit is enrolled in a formal program of the federal or District of Columbia government under which the operating expenses or a mortgage are subsidized and the rents charged the tenant(s) are determined and regulated by formula.

See 14 DCMR § 4106.10.

[3] The parties proceeded on the basis of submitting stipulations and briefs in lieu of a hearing on the merits. *See* Final Order at 2. The Final Order lists the following as "Evidence and Pleadings Considered:"

1. Tenant Petition Complaint # 27,838.
2. The Petitioner's and Respondent's written briefs, stipulations and responses.
3. The financing and regulatory agreement (Financing Agreement) between the District of Columbia Housing Finance Agency and Chastleton Apartments Associates.

Id. at 2-3. Present at the hearing were the Tenant, Tenant's counsel and counsel for the Housing Provider.

[4] The Hearing Examiner presented his analysis of the case in two sections of the Final Order entitled "Summary of the Case," and "Whether the building in which the rental unit is located is to not [sic] properly registered with the RACD," respectively. The text of these sections of the Final Order is presented herein in language identical or substantially similar to that in the Final Order.

2. Respondent claims exemption because (1) it was receiving financing from the D.C. Housing Finance Agency and (2) the building had been continuously vacant since January 1, 1985. The exemption based on financing from the D.C. Housing Finance Agency was first filed in 1986 and most recently filed in 2001. Petitioner does not challenge the 1986 claim of exemption.

3. Petitioner claims that Respondent's 2001 claim of exemption is invalid because (1) Respondent was no longer receiving financing from the Housing Finance Agency, having paid off its subsidized mortgage in December 2000; (2) Respondent was not entitled to claim that the building was continuously vacant from January 1, 1985, on its 2001 Landlord Registration/Claim of Exemption because the building was occupied for several years before the claim of exemption was filed; and (3) Respondent did not perfect its claim of exemption in May 2001 because it did not post the Amended Registration/Claim of Exemption in the building, nor did it mail notice of the claim of exemption to the tenants.

   . . .

4. The facts in this case are not disputed. Petitioner became a tenant in 1995. At that time, Respondent had on file a Registration/Claim of Exemption, file stamped November 6, 1986. The basis for the exemption is mortgage subsidy or financing from the District of Columbia Housing Finance Agency (DCHFA). Petitioner does not challenge this claim of exemption, nor does she challenge any increase in the rent from 1995 through 2000.

5. The financing by the DCHFA took the form of a mortgage subsidy. The Housing Provider and DCHFA entered into a Financing and Regulatory Agreement[5] dated July 1, 1985. In December 2000, Respondent paid off the mortgage subsidy and DCHFA released Respondent from the terms of its Financing Agreement, and the Housing Provider obtained a new mortgage from a private lender.

6. On May 30, 2001, the Housing Provider filed an Amended Registration/Claim of Exemption based upon the property being continuously vacant since January 1, 1985, and financing provided by the District of Columbia Housing Finance Agency.

   . . .

[5] Hereinafter in the text of this Decision and Order, this "Financing and Regulatory Agreement" shall be referred to as "Financing Agreement."

7. According to the stipulated facts there was a deed of trust [sic] issued by DCHFA in December 2000.[6] The Housing Provider obtained a private mortgage and DCHFA and the Housing Provider signed a Release of Deed of Trust and Termination of the Financing Agreement (Deed of Release), which cancelled the mortgage subsidy. The restrictive covenant remained in effect . . .

8. Exhibit C, [(included at R. at 72),] of the Financing Agreement, section 10 entitled Declaration of Restrictive Covenants,[7] provides in the last full sentence that:

> Except as specifically provided in section 5 hereof, or unless sooner terminated in accordance with section 9 hereof, such covenants, reservations, agreements and restrictions as are contained herein shall continue in full force and effect during the Rental Period, it being expressly agreed and understood that the provisions hereof are intended to survive the expiration of the Financing Agreement and the payment of the loan, if such expiration or payment occurs prior to the termination of the Rental Period.

9. Based on this provision, the Hearing Examiner finds the Financing Agreement obligation survives the release of the DCHFA Agreement releasing the mortgage subsidy in December 2000, evidenced by the 2001 [sic] original Deed of Trust.[8] Therefore the claim of exemption provisions of the D.C. OFFICIAL CODE § 27-2703.08 (2001) [sic][9] providing for housing projects

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[6] The Commission's review of the record indicates that, in December 2000, the Housing Provider secured private financing that enabled it to "pay off" or "cancel" the mortgage subsidy with respect to DCHFA, which was memorialized not in another "deed of trust" with DCHFA, but in a "Release of Deed of Trust and Termination of Financing and Regulatory Agreement" as correctly referred to in the following sentence of Paragraph 7 above. The "Release" above is referred to herein as "Deed of Release."

[7] Hereinafter in the text of this Decision and Order, this "Declaration of Restrictive Covenants" shall be referred to as "Declaration of Covenants."

[8] The Commission observes that the Hearing Examiner mistakenly referred in the Final Order to the year of the Housing Provider's "pay off" of the mortgage subsidy or "release" as "[December] 2001" instead of the correct "[December] 2000." Final Order at 7-8. The Commission is satisfied, based on the substantial record evidence, that the correct year that the Housing Provider paid off the mortgage subsidy was December 2000. *See* Housing Provider's Brief at p. 4.

[9] DCHFA was created by the "District of Columbia Housing Finance Agency Act," as amended, D.C. OFFICIAL CODE §§ 42-2701.01-2706.05 (2001) (DCHFA Act). It was created as an independent corporate body, not as a District government agency, and is an instrumentality of the District government to "effectuate certain public purposes." *See* D.C. OFFICIAL CODE § 42-2701.01.

With respect to such public purposes, in its Declaration of Policy, D.C. OFFICIAL CODE § 42-2701.01(a), the DCHFA Act states that "a major cause of [the District's] housing crisis is the cost of funds made available by mortgage lenders in the District to finance housing for low and moderate income families." In order to address this issue, according to D.C. OFFICIAL CODE § 42-2701.01(b):

> (b) The Council determines that a corporate instrumentality of the District shall be created and given authority to generate funds from private and public sources to increase the supply and lower the cost of funds, available for residential mortgages and construction loans and thereby help alleviate the shortage of adequate housing. The Council further determines that this purpose can be accomplished through programs whereby mortgage lenders and/or the Agency [DCHFA] make mortgage, construction and rehabilitation loans for single and multifamily rental and home ownership units on terms designed to expand available housing opportunities. The Council further determines that this purpose can also be accomplished through a program whereby the Agency issues bonds and lends the proceeds thereof to Eligible State and Local Government Units to enhance the Agency's ability to generate revenues and to fulfill its duties under this chapter. The Council further determines that the goals of neighborhood and fiscal stability can be achieved through a policy of residential economic diversity.

(emphasis added). The Council declared that the creation of DCHFA, its authority and powers, and any expenditures it makes are to serve such "valid public purposes." *See* D.C. OFFICIAL CODE § 42-2701.01(c).

In order to carry out its public purposes, DCHFA's legal authority is specifically de-limited in D.C. OFFICIAL CODE § 42-2702.06 as follows:

> The Council delegates to the Agency [DCHFA] the authority of the Council under [D.C. OFFICIAL CODE] § 1-204.90 [authority to issue, *inter alia*, taxable and tax-exempt revenue bonds] to issue revenue bonds, notes and other obligations to borrow money to finance or assist in the financing of undertakings authorized by this chapter. An undertaking financed or assisted by the Agency shall constitute an undertaking in the area of primarily low and moderate income housing if the housing project or homeownership program complies with the income restrictions, rent limitations, tenant income mixtures and other restrictions as established by the Internal Revenue Service [IRS], or the Department of Housing and Urban Development [HUD] as applicable under the plan of financing determined by the Agency at the time it approves the undertaking for financing or assistance, or State or Local Government Loans are made that generate revenues which benefit programs authorized under this chapter.

(emphasis added).

The DCHFA Act makes the following cross-reference to the Act in a section entitled "Exemption from Rent Control," which provides as follows, in relevant part:

> (a) Housing projects assisted by the Agency [i.e., DCHFA] or through the auspices of the Agency under the provisions of this chapter shall be exempt from the provisions of chapter 35 of this title [the Act]. . .
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> (d) Each owner of a rental accommodation subject to the provisions of this chapter shall file simultaneously with the Agency and with the Rental Housing Commission an exemption statement which shall contain the following information:
>
> > (1) The actual rent for each rental unit in the accommodation, the services included, and the facilities charges therefor;

assisted by the Housing Finance Agency or through the auspices of the Agency under the provisions of this chapter shall be exempt from the Rent Control Provisions of Chapter 35 is applicable to the Housing Provider and continues in effect from the 1986 filing until released. Therefore, the Hearing Examiner finds that the building in which the rental unit is located is properly registered with the RACD and is exempt from Title II of the Act, D.C. OFFICIAL CODE § 42-3502.05(a)(3) (2001). Thus, the Respondent is exempt from § 42-3502.05(f) through § 42-3502.19 of the CODE.

Id. at pp. 5-8.

The Hearing Examiner made the following specific Findings of Fact in the Final Order:[10]

1. The Housing Provider entered into a Financing and Regulatory Agreement with the DCHFA July 1, 1985.

2. The building in which the rental unit #320 is located, 1701-16th Street, NW, was registered with the RACD November 6, 1986 as exempt under financing provided by DCHFA.

3. The Petitioner took possession of apartment # 302 [sic] in 1995.[11]

4. The Housing Provider paid off the mortgage subsidy under the DCHFA Agreement on December 28, 2000.

5. The restrictive covenant provision of the Financing and Regulatory Agreement survived the payoff of the mortgage subsidy.

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(2) The number of bedrooms in the rental accommodation; and

(3) A list of the outstanding violations of the Housing Regulations of the District of Columbia, issued August 11, 1955 (C.O. 55-1503), applicable to such accommodation. . .

(f) Prior to the execution of a lease or other rental agreement, a prospective tenant of any unit shall receive notice in writing advising him or her that rent increases for the accommodation are not regulated by Chapter 35 of this title.

See D.C. OFFICIAL CODE § 42-2703.08. The Act does not make any specific cross-reference to the DCHFA Act in any of its provisions. *See* D.C. OFFICIAL CODE §§ 42-3501.01-3509.07.

[10] The text of the Findings of Fact and Conclusion of Law, respectively, is presented as contained in the Final Order.

[11] The Commission's review of the record reveals that the Tenant's unit in the Housing Accommodation was #320, not "#302," as stated by the Hearing Examiner in Finding of Fact numbered 8. *See* Final Order at p. 9.

6. The restrictive covenant provision of the Financing and Regulatory Agreement [Financing Agreement] provides that at least 20% of the rental units in the housing accommodation shall rent or be held available for rent to lower-income tenants at a subsidy rent level.

7. On May 30, 2001, the Housing Provider filed an Amended Registration/Claim of Exemption. As grounds for this exemption the Housing Provider checked the box on the registration indicating "the property continuously vacant since January 1, 1985," and also "Other," [namely] "Financing provided by the Distinct of Columbia Housing Finance Agency."

8. The Housing Provider implemented a $390 rent increase in July 2001 and a $125 rent increase in July 2002 for rental unit # 302 [sic].

9. The building in which the rental unit is located is properly registered with the RACD and is exempt from Title II of the Act, D.C. OFFICIAL CODE § 42-3502.05(a)(3) [sic] (2001).[12] Thus, the Respondent is exempt from D.C. OFFICIAL CODE §§ 42-3502.05(f) - 42-3502.19.

Id. at pp. 8–9.

The Hearing Examiner made the following Conclusion of Law in the Final Order:

1. The Respondent has proven by preponderance of the evidence that it is properly registered in accordance with D.C. OFFICIAL CODE § 42-

[12] D.C. OFFICIAL CODE § 42-3502.05(a)(3) (2001) provides, in relevant part, the following:

> (a) Sections 42-3502.05(f) through 42-3502.19, except § 42-3502.17, shall apply to each rental unit in the District except . . . (3) Any rental unit in any housing accommodation of 4 or fewer rental units, including any aggregate of 4 rental units whether within the same structure or not . . . .

The Commission observes that the Hearing Examiner's reference to D.C. OFFICIAL CODE § 42-3502.05(a)(3) (referred to herein as the "small landlord exemption") in Finding of Fact numbered 9 was the first and only reference to that section in the Final Order. *See* Final Order at 1-9. The Commission's review of the record does not reveal any evidence, which supports the Hearing Examiner's reference and citation to the "small landlord exemption" under D.C. OFFICIAL CODE § 42-3502.05 (a)(3), especially when the Brief of Housing Provider/Appellee Chastleton Apartments (Housing Provider's Brief) (at p.1) states that the Housing Accommodation consists of "300 rental units," the Brief of Appellant (Tenant's Brief) (at p. 2) states that it is "a 315 unit building," and the Tenant's unit at issue in this case is identified as "#320." *See* Tenant's Brief at p. 2; Housing Provider's Brief at 1. *See also* Final Order at 1, 8. The Commission is satisfied that the correct citation is: "D.C. OFFICIAL CODE § 42-3502.05(a)(1)" (referred to herein as the "mortgage subsidy exemption"), because the mortgage subsidy exemption has served as the primary basis of the Housing Provider's claim of exemption in both the original 1986 filing and the 2001 Amended Registration/Exemption form. *See generally* Final Order at pp. 3, 5-6, 8-9.

3502.05[13] by filing a Registration/Claim of Exemption Form for the subject housing accommodation in November 1986. Thus the housing accommodation is exempt from D.C. OFFICIAL CODE §§ 42-3502.05(f) - 42-3502.19 (2001).

Id. at p. 9.

The Hearing Examiner ordered that TP 27,838 be dismissed with prejudice. *Id.* at 10.

On April 5, 2005, the Tenant filed a timely notice of appeal (Notice of Appeal). In the Notice of Appeal, the Tenant raised the following issues:

A. Whether the Hearing Examiner erred in deciding that the Housing Accommodation is exempt from D.C. OFFICIAL CODE §§ 42-3502.05(f) - 42-3502.19, except § 42-3502.17.

B. Whether the Hearing Examiner committed an error of law in deciding that the Housing Provider was entitled to claim exemption on the basis of D.C. OFFICIAL CODE § 42-3502.05(a)(1).

C. Whether the Hearing Examiner erred in concluding that the Restrictive Covenants rendered the housing accommodation a "housing accommodation with respect to which the mortgage or rent is federally or District-subsidized" after the District-subsidized mortgage was paid off and the Financing Agreement was terminated.

D. Whether the Hearing Examiner erred in concluding that the Housing Provider's continued obligation to provide 20% of the rental units in the housing accommodation to lower income tenants constituted a subsidy for the entire housing accommodation sufficient to exempt it from the provisions of D.C. OFFICIAL CODE §§ 42-3502.05 (f) – 42-3502.19.

E. Whether, after the Housing Provide paid off the subsidized mortgage and the Financing Agreement was terminated, the Housing Provider was no longer receiving assistance from the Housing Finance Agency within the meaning of D.C. OFFICIAL CODE § 42-2703.08 and was therefore not exempt from the Act.

[13] *See supra* at p. 2 n.2.

On September 15, 2005, the Tenant filed the Tenant's Brief (Tenant's Brief). On October 11, 2005, the Housing Provider filed the Housing Provider's Brief (Housing Provider's Brief). The Commission held its appellate hearing on October 25, 2005.

II. PRELIMINARY ISSUE

Generally, Commission review is limited to the issues raised in the notice of appeal; however, the Commission has the discretion to raise the issue of jurisdiction *sua sponte*. *See* 14 DCMR § 3807.4. *See* Young v. Vista Mgmt., TP 28,635 (RHC Sept. 18, 2012) (undertaking review of the Rent Administrator's jurisdiction *sua sponte*); Vista Edgewood Terrace v. Rascoe, TP 24,858 (RHC Oct. 13, 2000) ("[n]ot only may a party raise jurisdiction for the first time on appeal, but an appellate court may *sua sponte* address the issue of the court's jurisdiction") (*citing* Brandywine Ltd. P'ship v. D.C. Rental Hous. Comm'n, 631 A.2d 415, 416-17 (D.C. 1991)); CIH Props. v. Torain, TP 24,817 (RHC July 17, 2000); King v. Remy, TP 20,962 (RHC May 18, 1988) (reversing decision of Rent Administrator and dismissing tenant petition for lack of jurisdiction).

The Commission observes that the Hearing Examiner's March 21, 2005 Decision and Order dismissed TP 27,838 based on his determination that the Housing Provider was properly registered as exempt from the Act under D.C. OFFICIAL CODE § 42-3502.05(a)(1).[14] *See* Final Order at 9. In his interpretation of the Act, the Hearing Examiner referred to the definition of "subsidy" provided in the DCHFA Act, at D.C. OFFICIAL CODE § 42-2701.02(18),[15] as well as

[14] For the text of D.C. OFFICIAL CODE § 42-3502.05(a)(1), *see supra* at p. 2 n.2.

[15] For the text of D.C. OFFICIAL CODE § 42-2701.02(18), *see infra* at p. 20.

the DCHFA Act's provision referencing exemption from the Act, at D.C. OFFICIAL CODE § 42-2703.08.[16]

The Hearing Examiner assumed jurisdiction over TP 27,838 without discussion. Neither party raised the issue of jurisdiction on appeal. The Commission therefore undertakes a review of the Rent Administrator's jurisdiction over TP 27,838, and thus its own jurisdiction over this matter, *sua sponte*. *See* Young, TP 28,635; Vista Edgewood Terrace, TP 24,858; CIH Props., TP 24,817; King, TP 20,962. The Commission's standard of review of the Hearing Examiner's decision is contained at 14 DCMR § 3807.1, which 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 is satisfied in this case that the Hearing Examiner did not abuse his discretion by exercising jurisdiction over the Housing Provider's claim of exemption under D.C. OFFICIAL CODE § 42-3502.05(a)(1). *See* 14 DCMR § 3807.1. The Commission notes that the jurisdiction of the Rent Administrator is limited by D.C. OFFICIAL CODE § 42-3502.04(c), which provides as follows: "[t]he Rent Administrator shall have jurisdiction over those complaints and petitions arising under subchapters II, IV, V, VI, and IX of this chapter and title V of the Rental Housing Act of 1980 which may be disposed of through administrative proceedings." *See also* Young, TP 28,635; Johnson v. Am. Rental Mgmt. Co., TP 27,921 (RHC Sept. 30, 2005); Lane v. Davis, TP 24,841 (RHC Sept. 30, 2002). The Commission's jurisdiction under the Act is to

[16] For the text of D.C. OFFICIAL CODE § 42-2703.08, *see supra* at p. 5 n.9.

decide appeals from decisions of the Rent Administrator and administrative law judges of OAH.[17] *See* D.C. OFFICIAL CODE § 42-3502.02 (a)(2).[18]

The exemptions from the Act are found in subchapter II, including the exemption at issue in this case, based on a federally subsidized mortgage. *See* D.C. OFFICIAL CODE § 42-3502.05(a)(1)-(7); 14 DCMR § 4106. The Commission has addressed a variety of issues regarding claims under the "mortgage subsidy" exemption in D.C. OFFICIAL CODE § 42-3502.05(a)(1). *See, e.g.*, Munonye v. Hercules Real Estate Servs., RH-TP-07-29,164 (RHC July 7, 2011) (reversing summary determination by ALJ that housing accommodation is exempt from Act under D.C. OFFICIAL CODE § 42-3502.05(a)(1) on the basis of a federal subsidy); Belmont Crossing v. Jackson, TP 28,292 (RHC Mar. 6, 2009) (determining lack of substantial evidence of tax credit status in the record to support "federal subsidy" exemption under D.C. OFFICIAL CODE § 42-3502.05(a)(1)); Vista Edgewood Terrace, TP 24,858 (determining lack of substantial evidence in the record to support "federal subsidy" exemption under D.C. OFFICIAL CODE § 42-3502.05(a)(1) where only evidence proffered at hearing was Registration/Claim of Exemption Form and off-record statement of assistant property manager to hearing examiner that housing accommodation received federal subsidy); Horne v. Edgewood Mgmt. Corp. et al., TP 24,119 (RHC Mar. 5, 1997) (determining lack of substantial evidence in the record to support findings of fact that federal subsidy existed and that housing accommodation was exempt under "federal subsidy" requirement in D.C. OFFICIAL CODE§ 42-3502.05(a)(1)).

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[17] *See supra* at p.1, n.1.

[18] D.C. OFFICIAL CODE § 42-3502.02(a)(2) provides the following: "The Rental Housing Commission shall: . . .(2) Decide appeals brought to it from decisions of the Rent Administrator including appeals under the Rental Accommodations Act of 1975, the Rental Housing Act of 1977, and the Rental Housing Act of 1980."

Based upon its review of applicable provisions of the Act and the DCHFA Act and relevant case law, respectively, the Commission determines that the Hearing Examiner did not exceed his jurisdiction by utilizing provisions of the DCHFA Act (which governed the mortgage at issue in this case) in his analysis of the Housing Provider's claim of exemption. Within the context of adjudicating tenant petitions filed under the Act, the Rent Administrator has had occasion to interpret and apply provisions of a statute other than the Act, specifically the Rental Housing Conversion and Sale Act ("RHCS Act"), in the cases of Sendar v. Burke, TP 20,772 (RHC Apr. 6, 1988) and Taylor v. Bain, TP 28,071 (RHC June 28, 2005). In Sendar, TP 20,772, the Commission determined that the Rent Administrator had jurisdiction to determine the allowable rents for qualified elderly tenants under § 208(b) of the RHCS Act, *see* D.C. OFFICIAL CODE § 42-3402.08(b) (2001),[19] because the RHCS Act provision at issue contained a specific reference to the Act, and the Commission further explained that the determination of allowable rents under the RHCS Act involved the "same kinds of issues that are routinely considered by the Rent Administrator." *See* Sendar, TP 20,772. The Commission reached the same conclusion, under a nearly identical fact pattern, in Taylor, TP 28,071. In that case, applying the principles enumerated in Sendar, TP 20,772, the Commission determined that interpretation and application of the elderly tenancy provision of the RHCS Act, at D.C. OFFICIAL CODE § 42-3402.08(b), was within the Rent Administrator's jurisdiction, because the statute at issue contained a specific

[19] D.C. OFFICIAL CODE § 42-3402.08(b) provides the following: "*Rent level.* – Any owner of a converted unit shall not charge an elderly tenant rent in excess of the lawful rent at the time of request for a tenant election for purposes of conversion plus annual increases on that basis authorized under the Rental Housing Act." The Commission observes that the 1986 codification of D.C. OFFICIAL CODE § 42-3402.08 at issue in Sendar, TP 20,772 is identical to the 2001 codification in effect at the time that the Commission issued its decision in Taylor, TP 28,071. *Compare* D.C. OFFICIAL CODE § 42-3402.08 (1986) *with* D.C. OFFICIAL CODE § 42-3402.08(b) (2001).

cross-reference to the Act, and involved the same kinds of issues routinely considered by the Rent Administrator. *See* Taylor, TP 28,071.

Applying to this appeal the identical legal principles enunciated in Sendar, TP 20,772, and Taylor, TP 28,071, the Commission observes that the DCHFA Act (as the RHCS Act) contains a specific reference to the Act, at D.C. OFFICIAL CODE § 42-2703.08(a). Furthermore, the Commission observes that application of the DCHFA Act involves the "same kinds of issues that are routinely considered by the Rent Administrator" under the Act, namely, the applicability and validity of an exemption based on DCHFA financing. *Compare* D.C. OFFICIAL CODE § 42-2703.08(a) *with* D.C. OFFICIAL CODE § 42-3502.05(a)(1). *See also* Taylor, TP 28,071; Sendar, TP 20,772. For the foregoing reasons, the Commission is satisfied that the determination of whether the Housing Accommodation at issue in this case was exempt from the rent stabilization provisions of the Act, based on the exemption provision in the DCHFA Act, was within the jurisdiction of the Rent Administrator. *See* Taylor, TP 28,071; Sendar, TP 20,772.[20]

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[20] The Commission observes that the legislative history of the DCHFA Act manifests a legislative intent to assure the compatibility and consistency of the provisions of the DCHFA Act with the provisions of the Act through "substantially similar" protections to tenants in DCHFA-assisted housing (which the DCHFA would be able to accomplish through its rulemaking authority) as are provided to tenants in housing accommodations covered under the Act. In a memorandum entitled "Proposed Amendments to Bill 2-161, The District of Columbia Housing Finance Agency Act" (May 23, 1978), the General Counsel of the D.C. City Council recommended approval of certain proposed amendments to Bill 2-161. These amendments included the current provision establishing the exemption of DCHFA-assisted housing from the Act. *See* D.C. OFFICIAL CODE § 42-2703.08(a).

The memorandum states in relevant part as follows:

> Sec. 308(a) [now D.C. OFFICIAL CODE § 42-2703.08(a)]
>
> Re-draft as follows:
>
> (a) Housing projects assisted by the Agency [i.e., DCHFA] or through the auspices of the Agency under the provisions of this [DCHFA] Act shall be exempt from D.C. Law 2-54, the "Rental Housing Act of 1977" [now "chapter 35 of this title", i.e., the Rental Housing Act of 1985, as amended].

III. PLAIN ERROR

In accordance with the applicable regulations, the Commission may always correct "plain error." *See* 14 DCMR § 3807.4 ("Review by the Commission shall be limited to the issues raised in the notice of appeal; provided, that the Commission may correct plain error."). *See, e.g.,* Lenkin Co. Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Proctor v. D.C., 484 A.2d 542, 550 (D.C. 1984) (Commission, under its rules, is permitted, though not required, to consider issues not raised in the notice of appeal insofar as they reveal plain error).

The Commission identifies the following issue as plain error in the Final Order: the Hearing Examiner's citation generally to "D.C. OFFICIAL CODE § 42-3502.05" as the basis for the conclusion that the Housing Accommodation was properly registered in November 1986.

A. The Hearing Examiner's citation generally to "D.C. OFFICIAL CODE § 42-3502.05" as the basis for the conclusion that the Housing Accommodation was properly registered in November 1986 constituted plain error.

Rationale:

> Based upon the opinion of bond counsel, the inclusion of rent control may cause an adverse reaction in the investment community, and is likely to affect the [DCHFA] bond rating. Moreover, the Agency is vested with rulemaking authority inclusive of all areas presently covered by rent control. Thus, the inclusion of rent control by reference to D.C. Law 2-54 [the Rental Housing Act of 1977] does not materially affect the authority of the Agency to provide substantially similar protection to tenants of Agency[-]assisted housing.

(emphasis added).

While an exemption from rent control may have been deemed important to assure the marketability, investment-grade quality and positive bond rating for the DCHFA bonds for projects assisted by DCHFA bond financing, it is apparent from the above legislative history that DCHFA Act was not intended to deprive tenants from the protections that they would otherwise and ordinarily enjoy under the Act, which for example may be provided through the DCHFA's rulemaking authority under the DCHFA Act. In the absence of any statutory or regulatory language to the contrary in either the DCHFA Act and the Act, respectively, both statutes should be interpreted to ensure compatibility and consistency between the DCHFA Act and the Act with respect to assuring the protection of tenants' rights.

The Commission's review of the record leads it to conclude it was "plain error" for the Hearing Examiner to simply and generally refer to "D.C. OFFICIAL CODE § 42-3502.05," without identifying the specific, applicable provision(s) of D.C. OFFICIAL CODE § 42-3502.05 that formed the basis for his conclusion that the Housing Accommodation was properly registered in November 1986. Conclusions of law must "flow rationally" from the findings of fact, and should contain citations to the appropriate statutory provision, regulation and/or cases under the Act or otherwise on which the ALJ bases his decision. *See, e.g.,* Perkins v. D.C. Dep't of Emp't Servs., 482 A.2d 401, 402 (D.C. 1984); Washington v. A&A Marbury, LLC, RH-TP-11-30,151 (RHC Dec. 27, 2012); Hemby v. Residential Rescue, Inc., TP 27,887 (RHC Apr. 16, 2004) (finding conclusions of law flawed where hearing examiner incorrectly cited provisions of the Act). The DCAPA requires a detailed application of the applicable legal standards and tests to the facts of a case in order to allow the Commission to make a determination whether the conclusions of law flow or follow rationally from the findings of fact. *See, e.g.,* Majerle Mgmt. v. D.C. Rental Hous. Comm'n, 866 A.2d 41, 46 (D.C. 2004); ABC, Inc. v. D.C. Dep't of Emp't Servs., 822 A.2d 1085, 1089 (D.C. 2003); Perkins, 482 A.2d at 402. *See also, e.g.,* Sindram v. Tenacity Grp., RH-TP-07-29,094 (RHC Sept. 14, 2011).

The Commission determines that the Hearing Examiner's general reference to "D.C. OFFICIAL CODE § 42-3502.05" as the statutory basis for his determination that the Housing Accommodation was properly registered as exempt in November 1986, constitutes plain error because it fails to make the appropriate citation to, and identification of, the specific exemption upon which his decision is based, fails to address the legal probity and applicability of the

Amended Registration/Claim of Exemption form of May 30, 2001 addressed in Finding of Fact numbered 7, and fails to flow rationally from the Findings of Fact (especially Finding of Fact numbered 9) which collectively and individually identify D.C. OFFICIAL CODE § 42-3502.05 (a)(1) (the "mortgage financing exemption") as the exclusive basis for the 1986 exemption of the Housing Accommodation under the Act and as at least one basis of the 2001 Amended Registration/Exemption Form. *See* Majerle Mgmt., 866 A.2d at 46; Perkins, 482 A.2d at 402; Washington, RH-TP-11-30,151; Sindram, RH-TP-07-29,094; Hemby, TP 27,887.

Based upon its review of the substantial evidence in the record, the Commission determines that the sole and exclusive basis for the Housing Provider's November 1986 exemption was the mortgage financing exemption, at D.C. OFFICIAL CODE § 42-3502.05(a)(1).

IV. ISSUES ON APPEAL

A. Whether the Hearing Examiner erred in deciding that the Housing Accommodation is exempt [under D.C. OFFICIAL CODE § 42-3502.05 (a)(1)] from D.C. OFFICIAL CODE §§ 42-3502.05(f) - 42-3502.19, except § 42-3502.17.

B. Whether the Hearing Examiner committed an error of law in deciding that the Housing Provider was entitled to claim exemption on the basis of D.C. OFFICIAL CODE § 42-3502.05 (a)(1).

C. Whether the Hearing Examiner erred in concluding that the Restrictive Covenants rendered the Housing Accommodation a "housing accommodation with respect to which the mortgage or rent is federally or District-subsidized" [under D.C. OFFICIAL CODE § 42-3502.05 (a)(1)] after the District-subsidized mortgage was paid off and the Financing Agreement was terminated.

D. Whether the Hearing Examiner erred in concluding that the Housing Provider's continued obligation to provide 20% of the rental units in the housing accommodation to lower income tenants constituted a subsidy [under D.C. OFFICIAL CODE § 42-3502.05 (a)(1)] for the entire Housing

Accommodation sufficient to exempt it from the provisions D.C. OFFICIAL CODE §§ 42-3502.05 (f) – 42-3502.19.

E. Whether, after the Housing Provider paid off the subsidized mortgage and the Financing Agreement was terminated, the Housing Provider was no longer receiving assistance from the Housing Finance Agency within the meaning of D.C. OFFICIAL CODE § 42-2703.08 and was therefore not exempt from the Act.

V. DISCUSSION OF ISSUES ON APPEAL[21]

The Tenant contends on appeal that the Hearing Examiner erred in determining that the Housing Accommodation was exempt from the Act under D.C. OFFICIAL CODE § 42-3502.05(a)(1). *See* Notice of Appeal at pp. 1-2. She asserts that the basis for the exemption – a mortgage subsidy financed by DCHFA – terminated on December 28, 2000 when the Housing Provider "paid off" in full and satisfied its financial obligation under the Financing Agreement to DCHFA, which was memorialized in the Deed of Release. *See* Notice of Appeal at pp. 1-2; Tenant's Brief at pp. 7-10. The Tenant maintains that, while the Declaration of Covenants may have been intended to survive the termination of the Financing Agreement with respect to the continuation of the set-aside of 20% of the units in the Housing Accommodation for lower income tenants, the Act "plainly ties the exemption [under D.C. OFFICIAL CODE § 42-3502.05 (a)(1)] to the receipt of the [mortgage] financing. When the housing provider is no longer receiving financing, the exemption expires." *See* Tenant's Brief at pp. 9-10.

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[21] The Commission, in its discretion, will combine its discussion of the five (5) issues raised in the Notice of Appeal, because it observes that these issues raise substantially similar contentions – namely, whether the Hearing Examiner erred in his determination that the Housing Accommodation was exempt from the Act under D.C. OFFICIAL CODE § 42-3502.05(a)(1), and because these issues involve overlapping legal issues and the application of common legal principles. *See, e.g.,* Barac Co. v. Tenants of 809 Kennedy St., VA 02-107 (RHC Sept. 27, 2013); Ahmed, Inc., RH-TP-28,799 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.

Additionally, the Tenant contends that the Amended Registration/Claim of Exemption form which the Housing Provider filed on May 30, 2001 was thus invalid under D.C. OFFICIAL CODE § 42-3502.05(a)(1) because the Housing Provider was no longer receiving a mortgage subsidy from DCHFA. *Id.* at p. 10. Furthermore the Tenant claims that the Housing Provider violated the Act when he failed to comply with certain filing and/or notice requirements contained in 14 DCMR §§ 4103.1, 4101.6 (2004).[22] Section 4103.1 requires the Housing Provider to file the Amended Registration/Claim of Exemption form with RACD "within thirty (30) days after the termination of the exempt status" of the Housing Accommodation which occurred on December 28, 2000 when the Deed of Release became effective. *Id.* at pp. 11, 15. Section 4101.6 requires the Housing Provider to "simultaneously" with the filing of the Amended Registration/Claim of Exemption form with RACD either "post a true copy of the [Amended] Registration/Claim of Exemption form in a conspicuous place" at the Housing

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[22] The current codification, 14 DCMR § 4103.1 (2004), is identical to the earlier codification of this regulation, in effect at the time that the Housing Provider filed the Amended Registration/Claim of Exemption Form – 14 DCMR § 4103.1 (1991). All citations hereafter to 14 DCMR § 4103.1 will refer to the codification currently in effect. 14 DCMR § 4103.1 provides the following, in relevant part:

> Each housing provider of a rental unit or units covered by the Act shall file an amendment of the Registration/Claim of Exemption form provided by the Rent Administrator in the following circumstances: . . . (b) Within thirty (30) days after the termination of the exempt status of a rental unit or housing accommodation. . .

The current codification of 14 DCMR § 4101.6 (2004) is identical to the earlier codification of this regulation, in effect at the time that the Housing Provider filed the Amended Registration/Claim of Exemption Form –14 DCMR § 4101.6 (1991). All citations hereafter to 14 DCMR § 4101.6 will refer to the codification currently in effect. 14 DCMR § 4101.6 provides the following, in relevant part:

> [E]ach 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.

Accommodation, or "mail a true copy" of the said form to each tenant of the Housing Accommodation. *Id.*

In response to the Tenant's contentions, the Housing Provider asserts that the Hearing Examiner correctly determined that the Housing Accommodation is exempt under D.C. OFFICIAL CODE § 42-3502.05(a)(1), because under the Declaration of Covenants, the Housing Provider remains obligated to set aside 20% of the units in the Housing Accommodation for rent to lower income tenants. *See* Housing Provider's Brief at p. 5. In support of this assertion, the Housing Provider points to the DCHFA Act, D.C. OFFICIAL CODE § 42-2701.02(18), in which the term subsidy is defined as "any resources generated through appropriation by the federal or District government, or donated by a public or private source." *Id.* (emphasis added). Under the authority of this provision of the DCHFA Act, the Housing Provider maintains that the Housing Accommodation is merely providing a "self-subsidy"[23] in the form of the set-aside units, that nothing in the DCHFA Act prohibits the Housing Provider from such self-subsidy, and that the Declaration of Covenants essentially requires the continuing self-subsidy of the set-aside units until the termination of the Declaration of Covenants by DCHFA. *Id.* at pp. 5-6. The Housing Provider also asserts that the set-aside units remain "assisted . . . through the auspices of" DCHFA under the Declaration of Covenants, and are thus exempt from the Act under D.C. OFFICIAL CODE § 42-2703.08 (2001).[24] *Id.* at 6.

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[23] The Commission observes that the term "self-subsidy" is the Housing Provider's own term for its obligations under the Declaration of Restrictive Covenant. *See* Housing Provider's Brief at 5-6. The term "self-subsidy" does not appear as, or constitute, a specific exemption under the Act. *See* D.C. OFFICIAL CODE § 42-3502.05(a)(1).

[24] The text of D.C. OFFICIAL CODE § 42-2703.08 is recited *supra* at pp. 5-7 n. 9.

Furthermore, the Housing Provider contends that, in addition to the mortgage subsidy exemption in D.C. OFFICIAL CODE § 42-3502.05(a)(1), the Housing Accommodation is exempt from the Act under D.C. OFFICIAL CODE § 42-3502.05(a)(4) and 14 DCMR § 4106.14 since it was "continually vacant and not subject to a rental agreement for the period beginning January 1, 1985, and continuing at least until the effective date of the Act [July 25, 1985]. . ." *Id.* at 3-4.[25]

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[25] The Commission notes that, although the Hearing Examiner acknowledged in the Final Order that the Housing Provider claimed an entitlement to the continuously vacant exemption in the 2001 Amended Registration/Exemption Form, *see* Final Order at 5, the Commission's review of the record does not support any factual or legal determination that the continuously vacant exemption in D.C. OFFICIAL CODE § 42-3502.05(a)(4) serves as an alternative or additional source for exemption of the Housing Accommodation..

The Commission's review of the record reveals that the Final Order only contains two factual references to the continuously vacant exemption:

> On May 30, 2001, the Housing Provider filed an Amended Registration/Claim of exemption based upon the property being continuously vacant since January 1, 1985, and financing provided by the [DCHFA] . . . .
>
> On May 30, 2001, the Housing Provider filed an Amended Registration/Claim of Exemption. As grounds for the exemption the Housing Provider checked the box on their registration indicating "the property continuously vacant since January 1, 1985," and also "Other," "Financing Provided by the Distinct of Columbia Housing Finance Agency."

Final Order at 5, 9.

The District of Columbia Court of Appeals (DCCA) has addressed the adequacy of proffered evidence for an exemption: "[A] landlord's mere assertion [of exemption] . . . contained in a claim of exemption will be insufficient to satisfy a landlord's burden of proof of exemption." Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990); Munonye, RH-TP-07-29,164; Sarzynski v. Ross, TP 28,162 (RHC Apr. 25, 2008) at 7; Oxford House-Bellevue v. Asher, TP 27,583 (RHC May 4, 2005) at 6. *See, also,* Vista Edgewood Terrace, TP 24,858 at 9-10; Davis v. BARAC Co., TP 24,835 (RHC Oct. 27, 2000) at 8-9. The Commission has similarly determined that "[t]he mere filing of a Registration/Claim of Exemption Form does not, *ipso facto*, meet the burden of proof on the exemption, because the facts stated therein must be proven not to be a misrepresentation." Munonye, RH-TP-07-29,164 (citing Revithes v. D.C. Rental Hous. Comm'n, 536 A.2d 1007, 1011-12 (D.C. 1987)); Johnson, TP 27,921 at 6; Vista Edgewood Terrace, TP 24,858 at 9. *See, e.g.,* Davis, TP 24,835 at 8-9. Some evidence of an entitlement to an exemption under the Act must be presented to a hearing examiner – in addition to an assertion, or a statement, or the Registration/Claim of Exemption Form – to allow the Commission to determine that the record contains substantial evidence to support the claim of exemption. *See* D.C. OFFICIAL CODE § 42-3502.16(h) (2001 Supp. 2008). *See also* Munonye, RH-TP-07-29,164; Johnson, TP 27,921 at 6-8; Vista Edgewood Terrace, TP 24,858 at 10. *See, e.g.,* Davis, TP 24,835 at 8-9.

The two factual references noted immediately above – as "mere assertion[s] [of exemption]. . . contained in a claim of exemption" – are insufficient by themselves to establish the Housing Provider's claim of entitlement to the continuously vacant exemption under D.C. OFFICIAL CODE § 42-3502.05(a)(4). *See, e.g.,* Goodman, 573 A.2d at

Finally, the Housing Provider claims that the Tenant was aware upon initially signing the lease for her unit in 1995 that it was exempt from the Act, undermining any claim that the Housing Provider failed to comply with the Act by properly notifying the Tenant of the exemption regarding the Amended Registration/Claim of Exemption in compliance with the mailing and posting requirements of the Act. *Id.* at 6.[26]

The Commission will uphold decisions of a hearing examiner so long as they are in accordance with the provisions of the Act, and are supported by substantial evidence in the record. *See* 14 DCMR § 3807.1. *See, e.g.,* Jackson v. Peters, RH-TP-12-28,898 (RHC Sept. 27, 2013); Barac Co., VA 02-107; Carpenter v. Markswright Co., RH-TP-10-29,840 (RHC June 5, 2013); United Dominion Mgmt. v. Hinman, RH-TP-06-258,728 (RHC June 5, 2013). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." *See, e.g.*, Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.10 (D.C. 1994); Jackson, RH-TP-12-28,898; Eastern

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1297; Munonye, RH-TP-07-29,164; Sarzynski, TP 28,162 at 7. Apart from these "mere assertions," the Commission's review of the Final Order and evidentiary record fails to contain "some evidence of an entitlement" to the "continuously vacant exemption" to prove that the assertion is not a "misrepresentation" but is in fact supported by substantial evidence in the record. *See, e.g.,* Goodman, 573 A.2d at 1297; Munonye, RH-TP-07-29,164; Sarzynski, TP 28,162 at 7; Johnson, TP 27,921 at 6-8; Vista Edgewood Terrace, TP 24,858 at 10. Furthermore, the Hearing Examiner's Conclusion of Law that the Housing Accommodation is exempt under the Act under the 1986 Registration/Claim of Exemption is exclusively predicated upon the mortgage subsidy exemption in D.C. OFFICIAL CODE § 42-3502.05(a)(1), without any reference whatsoever to the "continuously vacant" exemption under D.C. OFFICIAL CODE § 42-3502.05(a)(4) as the source of the exemption. *See* Final Order at p. 9.

Consequently, because of the failure of the Housing Provider to provide any substantial evidence in the record to support its claim for the "continuously vacant" exemption under D.C. OFFICIAL CODE § 42-3502.05(a)(4) either in the 1986 Registration/Claim of Exemption or the 2001 Amended Registration/Claim of Exemption, the Commission is unable to review the merits of, and therefore dismisses, any claim by the Housing Provider for an exemption based on D.C. OFFICIAL CODE § 42-3502.05(a)(4). *See* 14 DCMR § 3807.1. *See, e.g.,* Goodman, 573 A.2d at 1297; Munonye, RH-TP-07-29,164 (citing Revithes, 536 A.2d at 1011-12); Sarzynski, TP 28,162 at 7; Johnson, TP 27,921 at 6-8; Vista Edgewood Terrace, TP 24,858 at 10; Davis, TP 24,835 at 8-9.

[26] *See supra* at p. 21 & n.25.

Savings Bank v. Mitchell, RH-TP-08-29,397 (RHC Oct. 31, 2012); Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012); Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012).

The Commission is guided by well-established rules of statutory construction in this jurisdiction. *See* District of Columbia v. Edison Place, 892 A.2d 1108, 1111 (D.C. 2006); J. Parreco & Son v. D.C. Rental Hous. Comm'n, 567 A.2d 43, 45-46 (D.C. 1989); Tenants of 710 Jefferson St., N.W. v. Loney, SR 20,089 (RHC Sept. 3, 2008). The DCCA has explained that a court must look at the plain meaning of the words of a statute when the words are clear and unambiguous, and construe the words of a statute according to their ordinary sense and with the meaning commonly attributed to them. *See* Edison Place, 892 A.2d at 1111. *See also* Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007). 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 Prop. Mgmt. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 102-103 (D.C. 2005); 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); United Dominion, RH-TP-06-28,728.

As noted *supra* at p. 21 n.25, the Commission has consistently held that a housing provider bears the burden of proving eligibility for an exemption from the Act, and the statutory exemptions are to be narrowly construed. *See* Marguerite Corsetti Trust, RH-TP-06-28,207;

Brooks v. Jones, RH-TP-09-29,531 (RHC May 9, 2012); Pena v. Woynarowsky, RH-TP-06-28,817 (RHC Feb. 3, 2012). *See also* Goodman, 573 A.2d at 1297; Revithes, 536 A.2d at 1017. A housing provider's mere assertion of exemption from the Act contained in a Registration/Claim of Exemption form will be insufficient. Brooks, RH-TP-09-29,531 (citing Goodman, 573 A.2d at 1298); Sarzynski, TP 28,162; Munonye, RH-TP-07-29,164 (citing Revithes, 536 A.2d at 1011-12 (holding that "[t]he mere filing of a Registration/Claim of Exemption Form does not, *ipso facto*, meet the burden of proof on the exemption, because the facts stated therein must be proven not to be a misrepresentation.")); Johnson, TP 27,921; Vista Edgewood Terrace, TP 24,858 at 9. *See, e.g.,* Davis, TP 24,835 at 8-9. Some evidence of an entitlement to an exemption under the Act must be presented to a hearing examiner – in addition to an assertion, or a statement, or the Registration/Claim of Exemption Form – to allow the Commission to determine that the record contains substantial evidence to support the claim of exemption. See D.C. OFFICIAL CODE § 42-3502.16(h) (2001 Supp. 2008). *See also* Munonye, RH-TP-07-29,164; Johnson, TP 27,921 at 6-8; Vista Edgewood Terrace, TP 24,858 at 10. *See, e.g.,* Davis, TP 24,835 at 8-9.

As noted *supra* at p. 2 & n.2, the mortgage subsidy exemption claimed by the Housing Provider in this case is contained in D.C. OFFICIAL CODE § 42-3502.05(a)(1), which exempts from the rent control provisions of the Act "[a]ny rental unit in any federally or District-owned housing accommodation or in any housing accommodation with respect to which the mortgage or rent is federally or District-subsidized . . ." Based on the plain language of D.C. OFFICIAL CODE § 42-3502.05(a)(1), the Commission observes that there are three different sources for exemption: (1) if the housing accommodation is federally or District-owned; (2) if the mortgage

for a housing accommodation is federally or District-subsidized (i.e., mortgage subsidy exemption); or (3) if the rent for a housing accommodation is federally or District subsidized (i.e., rent subsidy exemption). *See supra* at p. 2 & n.2. *See also* Dorchester House, 938 A.2d at 702; Edison Place, 892 A.2d at 1111.

When a housing provider as in this case claims the exemption in D.C. OFFICIAL CODE § 42-3502.05(a)(1) on the grounds that the mortgage for a housing accommodation is federally or District-subsidized, the corresponding regulation under the Act, 14 DCMR § 4106.10, places the following separate and distinct requirements for approval of an exemption: (1) a housing accommodation or rental unit is enrolled in a formal program of the federal or District of Columbia government, (2) under which the operating expenses or a mortgage are subsidized, and (3) the rents charged the tenant(s) are determined and regulated by formula. *See supra* at p. 2 n.2. (emphasis added).

In the Final Order, the Hearing Examiner found that the Housing Provider entered into a Financing Agreement with DCHFA, providing financing to the Housing Provider in the form of a mortgage subsidy, which was terminated in December 2000 when both parties signed the Deed of Release. *See* Final Order at 6. *See supra* at pp. 4-8. The source of DCHFA's mortgage subsidy was bond-financing. *See* Financing Agreement at p. 9; R. at p. 112. Declaration of Covenants at pp. 1-3; R. at pp. 70-72. At the same time that the parties executed the Financing Agreement, the Hearing Examiner also found that the Housing Provider signed a Declaration of Covenants, requiring that the Housing Provider set aside 20% of the units in the Housing Accommodation for "lower-income tenants," which, according to its terms, survived the Deed of Release. *See* Final Order at 6. *See supra* at pp. 3-7. Additionally, the Hearing Examiner

determined that despite the pay off of the mortgage subsidy in the Deed of Release, the continuation 20% set-aside obligation constituted assistance from DCHFA or "through the auspices" of DCHFA, for purposes of exemption from the Act. *See* Final Order at 8. *See supra* at pp. 3-7.

In reaching this conclusion, the Hearing Examiner relied upon a provision from the section of the DCHFA Act entitled Exemption from Rent Control, *see supra* p. 5 n.9, and Paragraph 10 from of the Declaration of Covenants as follows:

> [From the DCHFA Act]
>
> (a) Housing projects assisted by the Agency [i.e., DCHFA] or through the auspices of the Agency under the provisions of this chapter shall be exempt from the provisions of chapter 35 of this title [i.e., the Act] . . .

See D.C. OFFICIAL CODE § 42-2703.08(a) (emphasis added). *See supra* p. 5 n.9.

> [From the Declaration of Covenants]
>
> Section 10. Covenants Run with the Land;Term.
>
> . . . Except as specifically provided in section 5 hereof, or unless sooner terminated in accordance with section 9 hereof, such covenants, reservations, agreements and restrictions as are contained herein shall continue in full force and effect during the Rental Period, it being expressly agreed and understood that the provisions hereof are intended to survive the expiration of the Financing Agreement and the payment of the loan, if such expiration or payment occurs prior to the termination of the Rental Period.

See Final Order at pp. 7-8 (emphasis added). *See supra* at pp. 5-7. The Hearing Examiner determined that, since the Declaration of Covenants "survived" the pay-off of the mortgage subsidy by the Housing Provider to DCHFA and the Deed of Release, the Housing Accommodation remained "assisted by" the DCHFA or under the "auspices" of DCHFA, thereby exempting the Housing Provider from the Act under the 1986 Registration/Claim of

Exemption "until released." *See* Final Order at 7-8. *See supra* at pp. 5-7.[27] Based upon these findings the Hearing Examiner concluded that the Housing Accommodation was exempt from the Act because the Housing Provider had met his burden of proof that it was "properly registered in accordance with [the mortgage subsidy exemption] by filing a Registration/Claim of Exemption Form for the subject housing accommodation in November 1986." *See* Final Order at 9. *See supra* at pp. 8-9.

The Commission determines that the evidence in the record submitted by the Housing Provider does not amount to the substantial evidence required to support the Conclusion of Law by the Hearing Examiner that the filing of the Registration/Claim of Exemption in November 1986 solely on the basis of DCHFA bond financing (or mortgage subsidy) for the Chasleton Apartment building rendered it, as the Housing Accommodation, exempt from the Act under D.C. OFFICIAL CODE § 42-3502.05(a)(1) and 14 DCMR § 4106.10 at the time that TP 27,838 was filed on May 16, 2003. The Commission determines that the Hearing Examiner therefore erred in concluding that the Tenant's claims in TP 27,838 were barred by the 1986 mortgage

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[27] The corresponding specific Findings of Fact stated as follows:

> . . .
>
> 4. The Housing Provider paid off the mortgage subsidy under the DCHFA Agreement on December 28, 2000.
>
> 5. The restrictive covenant provision of the Financing and Regulatory Agreement survived the payoff of the mortgage subsidy.
>
> 6. The restrictive covenant provision of the Financing and Regulatory Agreement provides that at least 20% of the rental units in the housing accommodation shall rent or be held available for rent to lower-income tenants at a subsidy rent level . . . .

See Final Order at pp.8-9. *See supra* at pp. 7-8.

subsidy exemption. The Commission bases its determination on its review of the record, the relevant text of the Act and its regulations, and the application of relevant case law.

First, as noted *supra* at pp. 2, 24-25 & n.2, the Act places the following three (3) separate and distinct requirements on a housing provider to establish the mortgage subsidy exemption under D.C. OFFICIAL CODE § 42-3502.05(a)(1): (1) a housing accommodation or rental unit is enrolled in a formal program of the federal or District of Columbia government, (2) under which the operating expenses or a mortgage are subsidized, and (3) the rents charged the tenant(s) are determined and regulated by formula. *See* 14 DCMR § 4106.10 (emphasis added).

Upon review of the RACD hearing record, the Commission determines that evidence was uncontested that the Housing Provider's 1986 Registration/Claim of Exemption was solely and exclusively based upon its receipt of mortgage subsidy assistance from the DCHFA under D.C. OFFICIAL CODE § 42-3502.05(a)(1). *See* Final Order at pp. 6, 8. The Commission's review of the record also clearly indicates, as the Final Order asserts a number of times and as both parties stipulated, that there was undisputed evidence that the mortgage subsidy had been "paid off" by the Housing Provider in December 2000 from the proceeds of private financing, reflected in a Deed of Release and other documentation executed by DCHFA and the Housing Provider. *See, e.g.,* Final Order at pp. 5-9.[28] The Commission therefore determines that, there was not substantial evidence in the record to support the second regulatory requirement under 14 DCMR § 4106.10 stated *supra* – namely, that, as of the date of the "pay off" of the DCHFA mortgage financing in December 2000, the Housing Provider's mortgage continued to be subsidized by

[28] The Commission's review of the record and the Final Order also does not disclose substantial evidence that that the Housing Provider sought additional federal or DCHFA mortgage subsidy for the Housing Accommodation following the termination of the DCHFA financing in December 2000. *See, e.g.,* Final Order at pp. 5-9.

DCHFA. Consequently, the Commission is satisfied that substantial evidence in the record failed to support the Hearing Examiner's conclusion of law that the 1986 mortgage subsidy exemption resulting from DCHFA financing was still in effect in compliance with the Act's requirements after the mortgage was "paid off" in December 2000. *See* Horne, TP 24,119 (holding that there must be substantial evidence that a mortgage subsidy "actually existed" in order to establish the exemption under D.C. OFFICIAL CODE § 42-3502.05(a)(1)).

Second, the Commission's review of the record does not support the Hearing Examiner's conclusion that, because the Declaration of Covenants with its set-aside provisions was not terminated at the same time as DCHFA's actual mortgage subsidy assistance to the Housing Provider in December 2000, the 1986 Registration/Claim of Exemption under D.C. OFFICIAL CODE § 42-3502.05(a)(1) also survived. As noted *supra* at p. 26, the provision relied upon for sole and exclusive evidentiary support by the Hearing Examiner from the Declaration of Covenants states as follows:

> Section 10. Covenants Run with the Land;Term.
>
> . . . Except as specifically provided in section 5 hereof, or unless sooner terminated in accordance with section 9 hereof, such covenants, reservations, agreements and restrictions as are contained herein shall continue in full force and effect during the Rental Period, it being expressly agreed and understood that the provisions hereof are intended to survive the expiration of the Financing Agreement and the payment of the loan, if such expiration or payment occurs prior to the termination of the Rental Period.

(emphasis added). Based upon its review of the record, the Commission determines that, when viewed within the context of the overall structure and purposes of DCHFA mortgage subsidy assistance to the Housing Provider as memorialized in the terms of the Financing Agreement and Declaration of Covenants, the Hearing Examiner erred in relying upon the above provision as the

sole, exclusive and sufficient evidence of the continuity of the 1986 exemption following the termination of DCHFA mortgage subsidy assistance to the Housing Provider in December 2000.[29]

Based upon its review of the record, the Commission notes that the purpose of DCHFA's mortgage subsidy to the Housing Provider was to "partially finance the acquisition and rehabilitation" of the Chasleton Apartment Building (the Housing Accommodation). *See* Financing Agreement at p. 1; R. at 120.[30] The Financing Agreement refers to the Declaration of

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[29] The Commission's review of the RACD record indicates that the Hearing Examiner made no attempt to analyze the purposes, terms and provisions of the Declaration of Covenants with respect to the continuation of DCHFA mortgage subsidy assistance to the Housing Provider following the "pay-off" of the mortgage subsidy in December 2002 and the Deed of Release for the Financing Agreement. *See* Final Order at pp. 3-9. The Commission also observes, as discussed *infra,* that substantial evidence in the record in the form of other provisions and terms of the Financing Agreement and the Declaration of Covenants contradicts, if not invalidates, the Hearing Examiner's interpretation of Paragraph 10 of the Declaration of Covenants as support for his Conclusion of Law regarding the continuity of the 1986 exemption under D.C. OFFICIAL CODE § 42-3502.05(a)(1) following the pay-off of the DCHFA mortgage subsidy by the Housing Provider in December 2000.

[30] The Financing and Regulatory Agreement contains the following terms, in relevant part:

> [WHEREAS] in order to further the purpose of the Act the Agency [DCHFA] intends to issue and sell its Multi-Family Housing bonds, 1985 series (FHA Insured Mortgage Loan – Chasleton Development) in an aggregate amount of 15,615,172.90 (the "Bond") and use the proceeds thereof to make a loan (the "Deed of Trust loan") to the owner to partially finance the acquisition and rehabilitation of a housing project located at 1701 16th Street, N.W. in the District of Columbia) (the "Project"); [R. at p. 120] . . .
>
> Section 3.1 Agreement to Make the Deed of Trust Loan and the Letter of Credit Loan, (a) The Agency shall make, but solely from the proceeds of the Bonds, and the Owner shall accept, the Deed of Trust Loan for the acquisition and rehabilitation of the Project. . . The Owner agrees to accept disbursement of the proceeds of the Deed of Trust Loan. . . to acquire, develop and rehabilitate the project in accordance with the provisions hereof and the Building and Loan Agreement . . . [R. at p. 112] . . .
>
> Article V Special Tax Covenants
>
> Section 5.1. Restrictive Covenants. The restrictive covenants attached hereto as Exhibit C are hereby incorporated herein by reference and the Owner hereby covenants and agrees to perform each and every covenant set forth therein. For the purpose of determining the eligibility of tenants in the Project as Lower Income Tenants, as defined in the restrictive covenants, the Owner shall use an income certification substantially in the form attached to the Restrictive Covenants . . . [R. at p. 108]

Covenants in its Article V, entitled "Special Tax Covenants." *Id.* at 13-116; R. at 105-108 (emphasis added). The Commission's review of the terms of the DCHFA resolution approving the mortgage subsidy to the Housing Provider,[31] the Financing Agreement and the Declaration of Covenants reveals that the "special tax covenants" were established in the federal Internal Revenue Code at I.R.C. §§103(a) *et seq.* (1985) (including without limitation I.R.C.

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[31] The DCHFA resolution approving the bond financing and subsidy to the Housing Provider states as follows:

> District of Columbia Housing Finance Agency resolution of the Eligibility of Chasleton for Agency Funding Adopted March 20, 1985 (R. at p. 51)
>
> Whereas, the District of Columbia Housing Finance Agency (the "Agency") has received an application from the sponsor(s) of Chasleton, (the "Project") requesting that the Agency provide Permanent Financing for the Substantial Rehab of the Project; and
>
> Whereas, the Agency has conducted a review of the application for financing for the Project, located at 1701 16th Street, N.W., in order to determine, among other things, that Project and requested financing thereof comply with the requirements of the District of Columbia Housing Agency Act ("Act") as amended, and
>
> Whereas, as a result of Agency financing
>
> - 45 units will be restored and held exclusively for low income households for a minimum of 20 years.
> - . . .
> - The restoration of the Chasleton, a vacant property, as a rental property will be economically feasible and will add 300 rental units to the City's rental stock.- . . .
> - . . .
>
> Now therefore be it resolved by the District of Columbia Housing Finance Agency:
>
> 1. . . .[t]he Board [of the Agency] hereby determines that the Project is eligible for financing by the Agency, and that the Project and its financing by the Agency will meet the requirements of the Act
>
> . . .
>
> 3. This Resolution shall take effect immediately.

R. at pp. 50-51.

§§ 103(b)(4)(A), 103(b)(12), 103(b)(14), 103(b)(17), 103(c), 103(n)) (hereinafter, collectively referred to as "1985 I.R.C. Provisions".)[32] R. at pp. 51-52, 61-72, 105-108. The 1985 I.R.C.

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[32] The Commission's reference to the "1985 I.R.C. Provisions" is to specify those provisions of the I.R.C. in effect in 1985 at the time that the Financing Agreement (and related documents) and Declaration of Covenants were executed by DCHFA and the Housing Provider, as well as to distinguish those I.R.C. provisions from later amendments to the I.R.C.

The text of the 1985I.R.C. Provisions specifically referenced in the Financing Agreement and/or the Declaration of Covenants is as follows:

> Sec. 103. Interest on certain governmental obligations.
>
> (a) General rule.
>
> Gross income does not include interest on—
> . . .
>
> (b) Industrial development bonds.
> . . . .
>
> (4) Certain exempt activities. Paragraph (1) shall not apply to any obligation which is issued as part of an issue substantially all of the proceeds of which are to be used to provide—
>
> (A) projects for residential rental property if at all times during the qualified project period—
>
> (i) 15 percent or more in the case of targeted area projects, or
>
> (ii) 20 percent or more in the case of any other project, of the units in each project are to be occupied by individuals of low or moderate income,
> . . .
>
> (12) Projects for residential rental property. For purposes of paragraph (4)(A)—
>
> (A) Targeted area project. The term 'targeted area project' means—
>
> (i) a project located in a qualified census tract (within the meaning of section 103A(k)(2)), or
>
> (ii) an area of chronic economic distress (within the meaning of section 103A(k)(3)).
>
> (B) Qualified project period. The term 'qualified project period' means the period beginning on the first day on which 10 percent of the units in the project are occupied and ending on the later of—
>
> (i) the date which is 10 years after the date on which 50 percent of the units in the project are occupied.

(ii) the date which is a qualified number of days after the date on which any of the units in the project are occupied, or

(iii) the date on which any assistance provided with respect to the project under section 8 of the United States Housing Act of 1937 terminates.

For purposes of clause (ii), the term 'qualified number' means, with respect to an obligation described in paragraph (4)(A), 50 percent of the number of days which comprise the term of the obligation with the longest maturity.

. . .

(C) Individuals of low and moderate income. Individuals of low and moderate income shall be determined by the Secretary in a manner consistent with determinations of lower income families under section 8 of the United States Housing Act of 1937 (or if such program is terminated, under such program as in effect immediately before such termination), except that the percentage of median gross income which qualifies as low or moderate income shall be 80 percent.

. . .

(14) Maturity may not exceed 120 percent of economic life.

(A) General rule. Paragraphs (4), (5), and (6) shall not apply to any obligation issued as part of an issue if—

(i) the average maturity of the obligations which are part of such issue, exceeds

(ii) 120 percent of the average reasonably expected economic life of the facilities being financed with the proceeds of such issue.

(B) Determination of averages. For purposes of subparagraph (A)—

(i) the average maturity of any issue shall be determined by taking into account the respective issue prices of the obligations which are issued as part of such issue, and

(ii) the average reasonably expected economic life of the facilities being financed with any issue shall be determined by taking into account the respective cost of such facilities.

(C) Special rules.—

(i) Determination of economic life. For purposes of this paragraph, the reasonably expected economic life of any facility shall be determined as of the later of—

(I) the date on which the obligations are issued, or

(II) the date on which the facility is placed in service (or expected to be placed in service).

(ii) Treatment of land.

(I) Land not taken into account. Except as provided in subclause (II), land shall not be taken into account under subparagraph (A)(ii).

(II) Issues where 25 percent or more of proceeds used to finance land. If 25 percent or more of the proceeds of any issue is used to finance land, such land shall be taken into account under subparagraph (A)(ii) and shall be treated as having an economic life of 50 years.

(17) Acquisition of existing property not permitted.

. . .

(B) Exception for certain rehabilitations. Subparagraph (A) shall not apply with respect to any building (and the equipment therefor) if—

(i) the rehabilitation expenditures with respect to such building equals or exceeds

(ii) 15 percent of the portion of the cost of acquiring such building (and equipment) financed with the proceeds of the issue.

A rule similar to the rule of the preceding sentence shall apply in the case of facilities other than a building except that clause (ii) shall be applied by substituting '100 percent' for '15 percent'.

(C) Rehabilitation expenditures. For purposes of this paragraph—

(i) In general. Except as provided in this subparagraph, the term 'rehabilitation expenditures' means any amount properly chargeable to capital account which is incurred by the person acquiring the building for property (or additions or improvements to property) in connection with the rehabilitation of a building. In the case of an integrated operation contained in a building before its acquisition, such term includes rehabilitating existing equipment in such building or replacing it with equipment having substantially the same function. For purposes of this clause, any amount incurred by a successor to the person acquiring the building or by the seller under a sales contract with such person shall be treated as incurred by such person.

(ii) Certain expenditures not included. The term 'rehabilitation expenditures' does not include any expenditure described in section 48(g)(2)(B) (other than clause (i) thereof).

(iii) Period during which expenditures must be incurred. The term 'rehabilitation expenditures' shall not include any amount which is incurred after the date 2 years after the later of—

(I) the date on which the building was acquired, or

(II) the date on which the obligation was issued.

I.R.C. § 103 (1985).

Provisions mandated the following requirements for the Housing Provider to secure the bond financing underlying DCHFA's mortgage subsidy to the Housing Provider: as a condition of receipt of DCHFA mortgage subsidy assistance for the purchase and rehabilitation of the Housing Accommodation, the Housing Provider was required to "set aside" 20% of the total number of apartments for rent to "Lower Income" tenants for a period of twenty (20) years from the date of the mortgage, thereby allowing the private purchasers of the bonds underlying the DCHFA mortgage subsidy to be exempt from any income tax on the interest income from the bonds for the 20 year period of the "set aside." *See* 1985 I.R.C. Provisions. The Declaration of Covenants establishes the "public purposes" of the "special tax covenants:"

> The benefit of such covenants, reservations agreements and restrictions touches and concerns the Land [Housing Accommodation] by making the project [residential rental] available for use and occupancy by Lower Income Tenants, thereby furthering the public purposes sought to be advanced by the Agency [DCHFA] . . . and further satisfying the Federal policies evidenced by the conditions for use of the Project required under Section 103 of the [Internal Revenue] Code [citation] in order that interest on the Bonds may be exempt from federal income taxes.

See Declaration of Covenants at p. 9; R. at p. 64.

Furthermore, the Commission's review of the Declaration of Covenants indisputably indicates that the "special tax covenants" are an entirely separate and independent legal requirement from the terms and requirements of DCHFA's mortgage subsidy or loan to the Housing Provider. This separation is made clear in the following terms of the Declaration of Covenants:

> Section 13. Remedies; Enforceability.
>
> . . .

> (b) . . . Failure to comply with these covenants will not serve as a basis for default under the Mortgage Note and enforcement of these Restrictive covenants will not result in any claim under the Mortgage Note, or claim against the Project, the revenues derived from the Mortgage Note, . . .or the rent or other income (other than available surplus cash) from the Project. (emphasis added) [R. at 63] . . .
>
> Section 19. Release, Modification or Amendment of These Restrictive Covenants.
>
> These restrictive covenants may be released, modified or amended by the parties hereto but only with the prior written approval of HUD and upon delivery to the Agency and the Trustee of an opinion of nationally recognized bond counsel to the effect that the exemption of interest income on the Bonds from federal income taxation will not be adversely affected by the proposed release, modification, or amendment and that some (sic) proposed release, modification or amendment will not prejudice the rights of the owners of the Bonds then outstanding. . .[R. at 62] . . .

Declaration of Covenants at pp. 10-11; R. at pp. 62-63.

The Commission interprets Section 13(b) above as indicating that a default under the Declaration of Covenants does not constitute a default under the Financing Agreement and its security documents (i.e., Deed of Trust). The above text from the Declaration of Covenants indicates that the legal obligations of the Housing Provider to DCHFA under the Financing Agreement and its security documents (i.e., Deed of Trust) are deemed entirely separate and independent legal obligations from the requirements under the "special tax covenants" in the Declaration of Covenants. Furthermore, the Commission interprets Section 19 above as indicating that the release of the Housing Provider from the obligations under the Financing Agreement and its security documents (i.e., Deed of Trust) is separate and distinct from the release of the obligations of the Housing Provider under the Declaration of Covenants. In this case, the Hearing Examiner even determined that the Deed of Release of December 2000 did not release the Housing Provider from his legal obligations under the Declaration of Covenants. *See* Final Order at pp. 5, 6.

The Commission notes that the separate and distinct legal obligations reflected in the Financing Agreement and the Declaration of Covenants correspond precisely to the Act's requirements in 14 DCMR § 4106.10 for entitlement to an exemption under D.C. OFFICIAL CODE § 42-3502.05(a)(1). Two of the three requirements for exemption in 14 DCMR § 4106.10 are the following: the operating expenses or a mortgage are subsidized, and the rents charged the tenant(s) are determined and regulated by formula. *See* 14 DCMR § 4106.10.

The Financing Agreement reflects and formalizes the requirement that the mortgage for the Housing Accommodation is subsidized by DCHFA. *Id.* In the set-aside obligation for lower- income tenants under the 1985 I.R.C. Provisions in which rents are established by HUD and the DCHFA, the Declaration of Covenants reflects and formalizes the requirement that "the rents charged the tenant(s) are determined and regulated by formula." *Id.* In this case, the mortgage subsidy requirement was terminated by DCHFA through the Deed of Release in December 2000 when the Housing Provider paid off its bond-funded financial obligation to DCHFA. The set-aside requirement and its resulting regulation of the rents for lower-income tenants in the set-aside units was unaffected by the Deed of Release in December 2000 and was required to remain in place until the expiration of the 20 year term for the set-aside established by DCHFA in 2005 as required by the 1985 I.R.C. Provisions to secure the income tax exemption for the investors in the bonds financing the DCHFA subsidy. *See supra* pp. 31-32 at nn. 31-32.

In sum, the Commission's review of Declaration of Covenants does not support the Hearing Examiner's interpretation of its Section 10 as the appropriate evidentiary source for the

continuation of the DCHFA's mortgage subsidy to the Housing Provider after the release of the Financing Agreement and its security documents (i.e., Deed of Trust) in December 2000. The Commission's review of both the record of this case and applicable provisions of the Act and its regulations in D.C. OFFICIAL CODE § 42-3502.05(a)(1) and 14 DCMR § 4106.10 indicate the following: (1) the mortgage subsidy obligation between DCHFA and the Housing Provider contained in the Financing Agreement and security documents (i.e., Deed of Trust) was terminated in December 2000 and was reflected in the Deed of Release; (2) the Declaration of Covenants was unaffected by the Deed of Release, and contained obligations on the Housing Provider regarding the provision of set-aside units for lower income individuals for a 20-year term to expire in 2005, at rents established by HUD and DCHFA, to meet requirements under the 1985 I.R.C. Provisions for exemption from income-tax for investors in the bonds underlying the DCHFA subsidy, *see supra* at pp. 29-36; (3) the 1986 exemption from the Act approved for the Housing Provider under D.C. OFFICIAL CODE § 42-3502.05(a)(1) and 14 DCMR § 4106.10 on the basis of DCHFA subsidy to the Housing Provider for the purchase and rehabilitation of the Housing Accommodation was terminated in December 2000 when DCHFA's mortgage subsidy was paid off and satisfied by the Housing Provider and was memorialized in a Deed of Release between DCHFA and the Housing Provider; and (4) the 1986 exemption from the Act failed to serve as an adequate defense to the Tenant's claims in TP 27,838. *See supra* at pp. 29-36.

As noted *supra* at p. 11, the Commission will uphold decisions of a hearing examiner so long as they are in accordance with the provisions of the Act, and are supported by substantial evidence in the record. *See* 14 DCMR § 3807.1. *See, e.g.,* Jackson, RH-TP-12-28,898; Barac

Co., VA 02-107; Carpenter, RH-TP-10-29,840; United Dominion Mgmt., RH-TP-06-258,728. For the foregoing reasons, the Commission determines that the Hearing Examiner's conclusion of law in the Final Order that the 1986 exemption barred the Tenant's claims in TP 27,838 was not in accordance with the provisions of D.C. OFFICIAL CODE § 42-3502.05(a)(1) and 14 DCMR § 4106.10 and was not supported by substantial evidence in the record. *See supra* at pp. 29-36.[33]

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[33] The Commission's decision in this case does not require it to address legal issues arising from the Amended Registration filed in May 2001. However the Commission notes, without deciding, that its review of the record seemingly supports the Tenant's contention that, even if there were substantial evidence in the record to support the claimed exemptions in the Amended Registration/Claim of Exemption, the Housing Provider failed to comply with the filing and/or notice requirements under the Act contained in 14 DCMR §§ 4103.1, 4101.6. *See supra* p. 21 & n.25. These requirements are triggered either by the termination of an exempt status, *see*14 DCMR § 4103.1, or the filing of an Amended Registration/Claim of Exemption. *See* 14 DCMR § 4101.6. *See supra* at pp. 19-20.

The Commission also notes that the record is devoid of any reference to a statutory or regulatory requirement regarding, or any testimonial or other evidence in the record explaining or supporting, the Housing Provider's filing of an Amended Registration/Claim of Exemption under the factual circumstances of this case. The Commission notes an apparent contradiction in the claims of the Housing Provider both to the Hearing Examiner and on appeal: if, as the Housing Provider maintains in this appeal, the continuity of the DCHFA mortgage subsidy in the 1986 Registration/Claim of Exemption had remained entirely unaffected by the pay-off of the DCHFA mortgage subsidy in December 2000, there would appear to have been no discernible reason for the Housing Provider to file an Amended Registration/Claim of Exemption (since the 1986 Registration/Claim of Exemption would have remained in place and operational under the Act.)

Finally, the DCCA has stated its standard of review of agency action as follows:

> The United States Supreme Court has repeatedly held that the function of the court in reviewing administrative action is to assure that the agency has given full and reasoned consideration to all material facts and issues. The court can only perform this function when the agency discloses the basis of its order by an articulation with reasonable clarity of its reasons for the decision. There must be a demonstration of a 'rational connection between the facts found and the choice made.' Burlington Truck Lines, Inc. v. United States, 371 U.S.156, 167-68, 9 L. Ed 2d 207, 83 S. Ct. 239 (1962)

Dietrich v. D.C. Bd. of Zoning Adjustment, 293 A.2d 470, 473 (D.C. 1972). *See also* Hamilton v. Hojeij Branded Food, Inc., 41 A.3d 464, 472 (D.C. 2012); Foggy Bottom Ass'n v. D.C. Zoning Comm'n, 979 A.2d 1160, 1173 (D.C. 2009) ; Stancil v. D.C. Rental Hous. Comm'n, 806 A.2d 622, 623-24 (D.C. 2002). The Commission's decision in this case reflects its determination that, on the basis of its review of the Findings of Fact and Conclusions of Law, the Hearing examiner failed to give "full and reasoned consideration to all material facts and issues" in this case, failed to articulate with reasonable clarity of [his] reasons for the decision, and thus failed to show a "rational connection between the facts found and the choice made." *See* Dietrich, 293 A.2d at 473; Hamilton., 41 A.3d at 472; Foggy Bottom Ass'n, 979 A.2d at 1173; Stancil, 806 A.2d at 623-24.

VI. CONCLUSION

For the foregoing reasons, the Commission reverses and vacates the Final Order and orders a new hearing on the Tenant's claims in TP 27,838.

SO ORDERED.

PETER SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

CLAUDIA L. McKOIN, COMMISSIONER

MOTIONS FOR RECONSIDERATION

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

JUDICIAL REVIEW

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

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Decision and Order** in TP 27,838 was mailed by priority mail, with confirmation of delivery, postage prepaid this **27th** day of **March, 2014** to:

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