

To be Argued by:
DAVID HERSHEY-WEBB, ESQ.

New York County Clerk's Index No. 113148/07

New York Supreme Court

Appellate Division—First Department

COLUMBUS 95TH STREET LLC,

Petitioner-Appellant,

– against –

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent,

– and –

COLUMBUS HOUSE TENANTS ASSOCIATION and
LESLIE BURNS, Individually and as President of the
COLUMBUS HOUSE TENANTS ASSOCIATION,

Intervenors-Respondents-Respondents,

– and –

THE ATTORNEY GENERAL FOR THE STATE OF NEW YORK,

Statutory Intervenor-Respondent-Respondent.

BRIEF FOR INTERVENORS- RESPONDENTS-RESPONDENTS

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I
PRELIMINARY STATEMENT

Intervenors-Respondents-Respondents, Columbus House Tenants Association and Leslie Burns, Individually and as President of the Columbus House Tenants Association, submit this brief in opposition to Petitioner-Appellant Columbus 95th Street, LLC’s appeal from the decision, order and judgment of the Supreme Court (the “IAS Court”) of the State of New York, New York County (Schlesinger, J), issued on November 25, 2009, and filed in the office of the County Clerk, New York County, on December 4, 2009. (“Decision”).

Petitioner-Appellant Columbus 95th Street, LLC (“Appellant”) owns an apartment building and 248 apartments located at 95 West 95th Street, New York, New York. [A. 69-72].¹ The building was originally constructed and financed as a Mitchell-Lama project under Article 2 of the Private Housing Finance Law (“PHFL”). [A. 36].

The purpose of the Mitchell-Lama program is to provide housing for persons of low and moderate income, senior citizens and disabled persons. PHFL § 11. To achieve its purpose, the Mitchell-Lama law offers state and municipal assistance to private developers in the form of long-term, low interest mortgages and real estate tax exemptions. Columbus Park

¹ References herein in the form “A. ___” are to pages in the Appendix.

Corporation v. Department of Housing and Development of the City of New York, et. al., 80 NY2d 19, 598 NE2d 702, 586 NYS2d 554 (1992). In return for these benefits, Mitchell-Lama housing companies are subject to either state or city supervision, including regulations governing rent levels, eligibility and income requirements for tenants, and limits to the return on investment permitted to owners. PHFL §§ 13, 14, 23(4) and 28.

On March 3, 2006, the Mitchell-Lama Housing Company, Columbus House, Inc., voluntarily exited the Mitchell-Lama program, relinquished the attendant mortgage and tax benefits, dissolved, and conveyed title to Appellant. [A. 36]. Upon exit from the Mitchell-Lama program, the apartments in the building became subject to the Rent Stabilization Law (“RSL”) by virtue of the Emergency Tenant Protection Act of 1974, and their initial stabilized rents, pursuant to RSL § 26-512(b)(3), were the rents set forth in the last rental agreements.

Thereafter, on or about April 20, 2006, Appellant filed with the DHCR individual applications to increase the initial stabilized rents of all of the apartments in the subject building, contending solely that its predecessor-in-interest’s voluntary departure from Mitchell-Lama program combined with the expected loss of real property tax exemptions and guaranteed

mortgage financing resulted in “unique and peculiar circumstances” entitling it to relief under RSL § 26-513-a. [A. 37, 83].

RSL § 26-513-a provides in pertinent part:

The tenant or owner of a housing accommodation made subject to this law by the emergency tenant protection act of nineteen seventy-four may, within sixty days of the local effective date of this section or the commencement of the first tenancy thereafter, whichever is later, file with the commissioner an application for adjustment of the initial legal regulated rent for such housing accommodation. The commissioner may adjust such initial legal regulated rent upon a finding that the presence of unique or peculiar circumstances materially affecting the initial legal regulated rent has resulted in a rent which is substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations. [Emphasis supplied.]

In 2007, faced with the prospect of an avalanche of applications to increase initial rents based upon RSL § 26-513-a because of the accelerating pace of Mitchell-Lama rental units withdrawing from the program¹, DHCR amended the Rent Stabilization Code (“RSC”) § 2522.3(f) (“2007 Amendment” or “U/P Regulation”) to provide as follows:

¹ See, Office of the New York City Comptroller, Affordable No More: An Update, New York City’s Mitchell-Lama and Limited Dividend Housing Crisis is Accelerating, May 25, 2006. See also, Scott, Janny, Lower-Priced Housing is Vanishing at a Faster Pace, New York Times, May 27, 2006.

(4) Previous regulation of the rent for the housing accommodation under the PHFL or any other State or Federal law shall not, in and of itself, constitute a unique and peculiar circumstance within the meaning of this subdivision. Any change in economic circumstances arising as a consequence of the termination of such prior regulation of rent may only be addressed in a proceeding for adjustment of the legal regulated rent under paragraphs (b) and (c) of Section 2522.4 of this code. [Emphasis supplied].

[Emphasis added].

In the underlying Article 78 Petition, as amended, Appellant sought (a) to declare the 2007 Amendment unconstitutional and invalid; and/or (b) require DHCR to apply the law or regulations as existed at the time of Appellant filed its applications; and (c) to compel Respondent-Respondent New York State Division of Housing and Community Renewal (“DHCR”) to process and determine Appellant’s applications to increase the rents pursuant to RSL § 26-513-a within 150 days from the date of the court’s determination. [A. 35- 85].

As discussed below, the IAS Court granted the petition to the extent of directing DHCR to proceed forthwith to process Appellant’s applications, and to determine those applications within 150 days of the submission of the final papers, but correctly rejected Appellant’s remaining contentions. [A. 8 – 34]. Briefly, the 2007 Amendment is consistent with the plain language

of the relevant provisions of the RSL; honors both the surrounding statutory context and legislative history of RSL § 26-513-a; furthers the purpose of the RSL and the overall statutory scheme; and is consistent with prior decisions by the various housing agencies and the courts. Moreover, the 2007 Amendment to the RSC neither represents a change in the law nor fails to comply with the State Administrative Procedure Act or other procedures governing the promulgation of administrative regulations. Lastly, any delay in the processing and determination of Appellant's applications is attributable not to DHCR's willfulness or negligence, but rather to the instant litigation and the stay Appellant sought and obtained from Justice Stone below. [A. 33].

II

QUESTIONS PRESENTED

1. Where the DHCR had never previously found that a building's participation in the Mitchell Lama program was a "unique or peculiar circumstance" requiring an automatic rent increase to a market rent and no statute authorizes such an increase on that basis, was the DHCR's adoption of Rent Stabilization Code § 2522.3(f)(4) in November 2007, which precluded such an automatic increase, consistent Rent Stabilization Law § 26-513-a?

The IAS Court correctly held “yes” and found the DHCR regulation to be valid.

2. Where the 2007 RSC amendment did not constitute a change in the law and where there was no willful or negligent delay by the DHCR, should the 2007 Amendment be limited to prospective application?

The IAS Court correctly found that the 2007 Amendment could be applied to the Appellant’s pending applications.

III **SUMMARY OF ARGUMENT**

The IAS Court’s Decision should be affirmed. The IAS Court’s correctly found that the 2007 Amendment furthers the purpose of the RSL and the overall statutory scheme. The 2007 Amendment does not prevent owners of buildings previously subject to Mitchell Lama from applying for rent increases under that provision but only precludes such increases on the sole basis of a building’s participation in and exit from the Mitchell Lama program.

Appellant disregards the literal language of the relevant statutes and their history, improperly conflates two different forms of rent regulation (Rent Control and PHFL), misreads the Court of Appeals’ decision in KSLM-Columbus Apartments v. DHCR, 5 NY2d, 801 NYS2d 783 (2005),

and spins a mythical legislative history in seeking to reverse the IAS Court's decision.

Contrary to the Appellant's contentions, the IAS Court did not defer to the DHCR but rather carefully examined the relevant statute and the history of the specific language used by the Legislature rather than speculate as to the Legislature's intentions. Appellant's newly spun legislative history violates basic principles of statutory construction by finding intentions that are contrary to the literal language of the statute and the overall purpose of the rent laws.

In the view of the Appellant, the overall statutory scheme is to set the initial rent stabilized rent for an apartment transitioning out of any form of rent regulation at a market or near market rent. While this view is enticingly simple, it has no support in the language of the statute or the legislative history.

The history of rent regulation has been described as a "patchwork" of legislation responding to decades of social, economic and political pressure, and has also been characterized by the Court of Appeals as an "impenetrable thicket confusing not only to laymen but to lawyers". LaGuardia v. Cavanaugh, 53 NY2d 67, 440 NYS2d 586 (1981).

While rent regulation is not quite the grand design that Appellant suggests, its history does, however, indicate the Legislature's continuing effort to balance several policy concerns, including the need to provide affordable housing in light of the market's failure to do so, the protection of tenants from excessive rent increases, the encouragement of housing construction and the rights of landlord's to obtain a reasonable profit.

In balancing those policy concerns, the Legislature has always limited the imposition of market or near-market rents to vacant apartments except in rare instances, such as, where apartments are occupied by high income tenants, where an owner can show economic hardship or where there is a "unique or peculiar circumstance" warranting an increase. To do otherwise would violate a fundamental purpose of the rent laws: to protect tenants from excessive rent increases that may lead to displacement.

The core of Appellant's argument is that since rent controlled apartments transitioning into rent stabilization are treated a certain way under the ETPA of 1974, the Legislature must have intended apartments exiting the Mitchell-Lama program and entering into rent stabilization protection to be treated the same way. The argument fails for a variety of reasons: 1) it is contrary to the overall statutory scheme which balances the protection of tenants from excessive rent increases and owner's need to

make reasonable profit and therefore limits the sudden imposition of market rents; 2) it is contrary to the literal language of the relevant statutes and basic rules of statutory construction; and 3) the Rent Control Law and the PHFL are two starkly different systems of rent regulation with their own histories and standards.

The Rent Control Law and the PHFL are two very different forms of rent regulation. Rent Control is not a voluntary system, but imposed on a broad category of housing. Participation in the PHFL program, in contrast, is entirely voluntary. Owners participating in the PHFL program are entitled to substantial tax benefits as well as low interest loans to develop and maintain their properties. Most importantly, except in rare cases, owners of rent controlled apartments cannot voluntarily leave the program. When rent controlled apartments exit rent control, it always involves the eviction or permanent vacatur of the existing tenant. Owners of Mitchell Lama developments, on the other hand, choose whether to participate and, once the statutory period expires, when to exit the program by simply pre-paying their mortgage. Thus, when an owner voluntarily leaves the Mitchell Lama program, most, if not all, of the apartments remain occupied. These differences indicate that there is no reason to assume that the Legislature would treat the two programs identically.

Appellant then compounds its already flawed argument by erroneously contending that the Legislature further intended to create “only two categories of apartments for housing emerging from earlier stringent forms of rent regulation”: those that already have market rents; and those that should be adjusted to market rents. As previously noted, Rent Control Law and PHFL are different systems of rent regulations. Further, Appellant’s fabricated categories mistakenly treat vacant and occupied apartments exactly the same when the history of the rent laws demonstrates that market rents are only imposed on vacant apartments, except in very limited instances. Moreover, imputing such categories does not balance the competing interests of protecting tenants from excessive rent increases and protecting owner’s economic interests, since owner’s economic interests are already protected both in their ability to collect regular rent increases under rent stabilization’s lease renewal provisions (see RSC § 2522.5) and the economic hardship provisions (see RSC §§ 2522.4(4) and 2522.4(c)).

The history of the “unique or peculiar” (“U/P”) language, as discussed in greater detail below, does not indicate the Legislature’s intention to apply such language to a statewide program affecting thousands of tenants.

Where, as in the instant case, the language of the statute is clear, “the

Courts are bound to seek for the intention in the words of the act itself” and “are not at liberty to suppose or hold that the Legislature had an intention other than their language imports.” N.Y. Constr. & Interp.. Law § 76.

Oneida Sav. Bank of Oneida v. Tese, 108 AD2d 1042, 485 NYS2d 614 (3rd Dept., 1985). Thus, if the Legislature wanted to require initial rent stabilized rents of formerly PHFL apartments be set at market, as in the case of formerly rent controlled apartments, it would have explicitly provided so.

As the court below correctly found, Appellant’s reliance on KSLM is misplaced. In KSLM, *supra*, the Court of Appeals held only that the owner of former Mitchell-Lama development, like any other owner, may apply for rent increases under the U/P provision for those housing accommodations that were subject to stabilization by virtue of the ETPA. The Court of Appeals did not find that the KSLM owner was entitled to U/P increases solely on the basis of a building’s participation in the Mitchell Lama program because that issue was not before the Court.

Appellant’s argument that the 2007 Amendment may only be applied prospectively lacks merit because it did not represent a change in law and the DHCR did not engage in willfully or negligent delay.

Therefore, the decision below must be affirmed.

IV
STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

1. Rent Regulation in New York City

Since 1946, the Legislature has repeatedly renewed the rent laws recognizing the continuing housing emergency in certain parts of the State and the continuing failure of the private housing market to provide an adequate supply of affordable housing.

Rent regulation does not represent a grand master plan, but rather a patchwork” of legislation responding to decades of social, economic and political pressure. LaGuardia, *supra*.

While rent regulation has never had a grand design, it has always been informed by certain policy considerations including first and foremost, the prevention of “speculative, unwarranted and abnormal increases in rent...to prevent uncertainty, hardship and dislocation...” Local Emergency Housing Rent Control Act §1(2); City Rent and Rehabilitation Law §26-401; Rent Stabilization Law of 1969 §26-501; Emergency Tenant Protection Act of 1974 §2.

Among the other policy considerations reflected in the long history of rent regulation are encouragement of construction of new housing and the right of landlords to earn a reasonable return. The Legislature has always

recognized, however, that the “transition from regulation to a normal housing market of free bargaining between landlord and tenant, while still the objective of state policy, must be administered with due regard for such emergency..” *Ibid.* [emphasis added]

Given the above considerations, rent increases from regulated to market or near market rents, have only been authorized in very limited instances, for example, where a rent controlled apartment has become vacant (RSL § 26-512), where there are “unique or peculiar circumstances” (RSL §26-513-a) or where there is economic hardship (RSL § 26-511(c)(6)).

2. Rent Control

Rent Control was initially enacted by the Federal Government due to the failure of the private housing market to produce an adequate supply of affordable housing during and in the aftermath of World War II, resulting in a housing emergency which the New York State Legislature has found continues today. 50 U.S.C.A. §1892(c)(3). Rent Control was adopted by the New York State Legislature in 1950 and 1962. See Emergency Housing Rent Control Law, §§8581 to 8597 and Local Emergency Housing Rent Control Act, §§8601 to 8617.

Unlike the subsequent Private Housing Finance Law (“PHFL”), Rent Control was not a voluntary program but was imposed on all buildings

completed or converted to residential use on or before 1947. The Rent Control program while substantially limiting rent increases, allowed landlords to increase rents where they could show economic hardship. New York City Rent and Evictions Regulations (“RER”) § 2202.8. The Rent Control program, consistent with the overall purpose of avoiding displacement, also allowed for succession of family members. Braschi v. Stahl Associates Co., 74 NY2d 201, 544 NYS2d 784, 543 NE2d 44 (1989).

3. The Mitchell-Lama Program

The Mitchell-Lama Housing Program (PHFL Article 2) was enacted in 1955 for the purpose of encouraging owners to build affordable housing for low and middle income residents, since the market alone was not providing sufficient affordable housing, even though post-1947 construction was not subject to rent regulation. See 1955 NY Laws 407. Unlike Rent Control, the Mitchell Lama program is one of voluntary participation. Unlike Rent Control, developers participating in the Mitchell-Lama program are offered low interest loans from either the State or the City of New York. Projects receiving City-financed mortgages are under the supervision of New York City Department of Housing Preservation and Development; and those receiving State-financed mortgages are under the supervision of the New York State Division of Housing and Community Renewal. Mitchell-

Lama projects also receive abatements of municipal real property tax. In exchange for these benefits, developers are subject to government regulations regarding rents charged, tenant selection, and profits earned. PHFL §§20-23, 33. Unlike Rent Control, owners can voluntarily withdraw from the program.

Originally Mitchell Lama developers were required to remain in the program for 35 years, but in 1960, to encourage more participation by developers, the Legislature amended the law to permit withdrawal 20-year after the building's occupancy upon full payment of the remaining principal and interest and termination of the tax abatement. PHFL § 35(2) – (3); see also, Real Estate Board of New York vs. City Council of New York, 16 Misc.3d 530, 842 N.Y.S.2d 218 (Sup Ct, NY Co 2007).

4. Rent Stabilization Law of 1969

Recognizing the continued housing emergency and inability of the private housing market to provide sufficient affordable housing, the Rent Stabilization Law of 1969 was adopted to “prevent speculative, unwarranted and abnormal increases in rents” so as to secure tenants in their homes. RSL 26-501.

The laissez-faire rationale for leaving this newer stock [post-1947] of housing uncontrolled was that “the market, governed by supply and demand,

would work reasonably and controls would be unnecessary” (8200 Realty Corp. v Lindsay, 27 NY2d 124, 136 (1970)). But this expectation proved to be unfounded. An inflationary spiral in the late 1960's operated on a contracting housing supply to enable landlords of many post-1947 buildings to demand large rent increases LaGuardia v. Cavanaugh, *supra* 53 NY2d at 71.

The RSL greatly expanded the scope of rent regulation, imposing rent regulation on all class “A” multiple dwellings with a sufficient number of units constructed between February 1, 1947 and March 10, 1969, with certain exemptions. RSL § 26-504.

The RSL struck a balance between insuring landlords a reasonable return on their investment and protecting tenants from onerous rent increases and displacement. The RSL provides landlords with both regular rent increases set by the Rent Guidelines Board and increases of 17% to 20% when an apartment becomes vacant. RSL §26-511(5)(A). The RSL also provides for rent increases on the basis of major capital improvements. RSL §26-511(c)(6)(b). The cap on the collectibility of MCI increases is a policy consistent with the overall purpose to avoid excessive rent increases. *Ibid*.

Like the RCL, the RSL also provides for increases based upon economic hardship. RSC §2522.4(b)(1) and (c). The economic hardship

provision is consistent with striking the proper balance between avoiding excessive and unwarranted rent increases and insuring owners a reasonable return on their investment.

5. The Vacancy Decontrol Law

In 1971 the Legislature, reacting to sluggish housing construction and dilapidated housing conditions, enacted the Vacancy Decontrol Law providing that apartments vacated after June 30, 1971 would not be subject to any form of rent regulation. Act of June 1, 1971, ch. 371, " 3, 6, 1971 NY Laws 1159, 1160.

Under the Vacancy Decontrol Law, as its name indicates, only vacant apartments were subject to market rents, not apartments occupied by tenants paying regulated, below-market rents.

The VDL was subsequently vilified in a State Assembly debate as having caused "outrageous damage," and resulting in excessive and unwarranted rents without the expected increases in housing construction or improvement of housing conditions. Assembly Debate Transcripts 1974 Chapter 576.

6. The Emergency Tenant Protection Act of 1974

After the failed experiment with vacancy decontrol, the Legislature enacted the Emergency Tenant Protection Act (ETPA) of 1974. The ETPA

was based on findings that “a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York” requiring government intervention “to prevent speculative, unwarranted and abnormal increases in rents,” and because tenants were “being charged excessive and unwarranted rents and rent increases,” necessitating action “in order to prevent exaction of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare.” *See McKinney’s Unconsolidated Laws* § 8602. [emphasis added]

In addition to seeking to preserve an existing stock of affordable housing, *see* ETPA § 8622 *et seq.*, the ETPA recaptured certain housing accommodations back into the rent stabilization system. Thus the ETPA sought to expand, rather than contract as Appellant would, the supply of affordable housing. The ETPA placed under the statute’s protections apartments previously subject to rent regulation that were deregulated pursuant to the VDL. The ETPA also extended regulation for the first time to apartments that were constructed after March 10, 1969 and before December 31, 1973. *See Cornerstone Baptist Church v. Rent Stabilization Ass’n*, 55 AD2d 952, 391 NYS2d 150 (2nd Dep’t 1977) [ETPA “merely adds classes of

accommodations to the coverage of the Rent Stabilization Law”]; Perth Realty Co. v. Dovoll, 358 N.Y.S.2d 619, 79 Misc. 2d 514 (N.Y. City Civ. Ct. 1974) [ETPA covers all units vacancy decontrolled and all units that were never previously controlled by reason of having been completed subsequent to March 10, 1969]; LaGuardia v. Cavanaugh, 53 N.Y.2d 67, 440 N.Y.S.2d 586 (1981).

Rent Stabilization Law §26-512 set forth the method by which rents of apartments first made subject to rent stabilization pursuant to the ETPA would be set. The relevant portions provide:

b. The initial regulated rent for housing accommodations subject to this law on the local effective date of the emergency tenant protection act of nineteen seventy-four or which become subject to this law thereafter, pursuant to such act, shall be:

(1) For housing accommodations which were regulated pursuant to this law or the city rent and rehabilitation law prior to July first, nineteen hundred seventy-one, and which became vacant on or after such date and prior to the local effective date of the emergency tenant protection act of nineteen seventy-four, the rent reserved in the last effective lease or other rental agreement; provided that such initial rent may be adjusted on application of the tenant pursuant to subdivision b of section 26-513 of this chapter.

(2) For housing accommodations which were regulated pursuant to the city rent and rehabilitation law on the local effective date of the emergency tenant protection act of nineteen seventy-four, and thereafter become vacant, the

rent agreed to by the landlord and the tenant and reserved in a lease or provided for in a rental agreement; provided that such initial rent may be adjusted on application of the tenant pursuant to subdivision b of section 26-513 of this chapter.

(3) For housing accommodations other than those described in paragraphs one and two of this subdivision, the rent reserved in the last effective lease or other rental agreement.

[emphasis added]

By its express terms RSL §26-512(b)(1) and (2) cover rent controlled apartments and indicate the Legislature's intention that vacant rent controlled apartments be subject to market rents limited by the first tenant's right of appeal under the Fair Market Rent Appeal formula.

RSL §26-512(3), referred to by Appellant as the "catch-all" provision, covers all other apartments that become subject to rent stabilization under the ETPA. Under that provision tenants residing in apartments when those apartments became subject to rent stabilization by the ETPA, would continue to pay the rents they were paying, either a "market" rent or a rent set under the PHFL or other government program. The "catch-all" provision is consistent with the overall statutory purpose of the ETPA of avoiding abnormal rent increases which would lead to displacement of tenants from occupied apartments.

Recognizing that the VDL had resulted in certain unique anomalies in the setting of rents, the legislature also enacted Rent Stabilization Law §26-513-a which reads, in relevant part:

The tenant or owner of a housing accommodation made subject to this law by the emergency tenant protection act of nineteen seventy-four may, within sixty days of the local effective date of this section or the commencement of the first tenancy thereafter, whichever is later, file with the commissioner an application for adjustment of the initial legal regulated rent for such housing accommodation. The rent commissioner may adjust such initial legal regulated rent *upon a finding that the presence of unique or peculiar circumstances* materially affecting the initial legal regulated rent has resulted in a rent which is substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations.

[Emphasis added].

RSL §26-513-a was designed to act as a limited (in time and scope) safety valve for apartments made subject to the RSL by the ETPA. In 1974, when the ETPA extended rent stabilization to housing accommodations constructed between 1969 and 1974, and those previously deregulated through vacancy under the VDL, the Legislature obviously could not predict the potential impact of the change in every individual circumstance. To

address this concern for unforeseen and highly inequitable anomalies caused by recapturing apartments back into the rent stabilization system, the Legislature enacted RSL § 26-513-a.

The narrow exception embodied in RSL § 26-513-a provided a necessary flexibility for DHCR to ensure that the ETPA's sweep did not freeze into place any idiosyncratic or unintended rental arrangements. RSL § 26-513-a was designed to address "situations in which the normal rent formulas do not make sense when applied to an individual apartment. For example, an apartment previously occupied by a relative of the owner or by a building employee might be totally or nearly rent-free. Basing all future adjustments on this "rent", would be irrational." "Mitchell-Lama Buyouts: Policy Issues and Alternatives," David J. Sweet and John D. Hack, 17 *Fordham Urban Law Journal*, 117, 133 (1989).

7. Rent Stabilization Code

In 1987, anticipating that many Mitchell-Lama buildings would reach the twenty-year period after which they would be withdrawn from the Mitchell-Lama program, the RSC was amended to address how these former Mitchell-Lama buildings would be treated and, in accordance with RSL § 26-512 (3), how the initial rents would be determined.

RSC § 2520.11(c) provides in pertinent part:

... housing accommodations in buildings completed or substantially rehabilitated prior to January 1, 1974, and whose rentals were previously regulated under the PHFL or any other State or Federal law, other than the RSL or the City Rent Law, shall become subject to the ETPA, the RSL and this Code, upon termination of such regulation.

RSC § 2521.1(j) provides in relevant part:

For housing accommodations whose rentals were previously regulated under the PHFL, or any other State or Federal Law, other than the RSL or the City Rent Law, upon the termination of such regulation, the initial legal regulated rent shall be the rent charged to and paid by the tenant in occupancy on the date such regulation ends.

[Emphasis added]

In 2007, the DHCR adopted the challenged regulation. RSC §2522.3(f) reads in relevant part as follows:

(4) Previous regulation of the rent for the housing accommodation under the PHFL or any other State or Federal law shall not, in and of itself, constitute a unique and peculiar circumstance within the meaning of this subdivision. Any change in economic circumstances arising as a consequence of the termination of such prior regulation of rent may only be addressed in a proceeding for adjustment of the legal regulated rent under paragraphs (b) and (c) of Section 2522.4 of this code.

[Emphasis added]

By its explicit terms the 2007 Amendment in no way precludes owners of former Mitchell Lama projects from applying for initial rent adjustments, but simply precludes them from automatically obtaining increases solely on the basis of participation in that program.

B. The Present Action

On or about April 20, 2006, Appellant filed with the DHCR individual applications to increase the initial stabilized rents of all of the apartments in the subject building, contending solely that its predecessor-in-interest's voluntary departure from Mitchell-Lama program combined with the expected loss of real property tax exemptions and guaranteed mortgage financing resulted in "unique and peculiar circumstances" entitling it to relief under RSL § 26-513-a. [A. 37, 83].

On May 25, 2006, Intervenor-Respondent-Respondent, Columbus House Tenants Association ("Tenants Association") filed a Notice of Appearance and request for an extension. [A.116]. On that same date, the Tenants Association filed a Freedom of Information Law request for data on comparable rent-stabilized rents in the subject zip code and adjacent zip codes. Additional extension requests were filed on August 29, 2006, November 28, 2006, February 2, 2007 and May 2, 2007. [A. 125-135].

On June 8, 2006 Appellant, Tenants Association and representatives of DHCR met at the offices of the DHCR to discuss a possible settlement of the Appellant's application. [A. 108].

Over the next year and a half, Appellant and Tenant Association continued settlement discussions. Representatives of Appellant and Tenant Association met at least seven times during this period to discuss settlement options. Numerous e-mail correspondences were exchanged between September 2006 and August 2007. [A. 138-158].

On or about August 1, 2007 the DHCR issued proposed new regulations regarding RSL § 26-513-a. On November 21, 2007, after public hearings, the Code Amendments adopted. [A. 620].

On September 28, 2007, Appellant commenced the instant Article 78 mandamus proceeding seeking to compel the DHCR to process its applications and to issue separate docket numbers. [A. 12].

By Order to Show Cause signed January 24, 2008, Appellant sought leave to amend the petition to include allegations that the 2007 Amendment is arbitrary, unconstitutional and *ultra vires*. Appellant also sought and secured a temporary injunction, staying DHCR from processing any of its application applications. By interim order dated March 11, 2008, the court granted petitioner's motion for leave to amend and continued the stay. [A.

167]. On or about March 3, 2008 Respondent Attorney General and the DHCR filed motions to dismiss the amended petition. [A. 774].

C. The IAS Court Decision

In her well-reasoned and amply supported decision, the IAS Court found that the 2007 Amendment furthers the purpose of the RSL:

Adopting the owner's arguments in this case would permit a wholesale increase in rents on a building-wide basis in excess of 200% per tenant as soon as the building becomes rent stabilized. Such a result would be at odds with the existing statutory and regulatory scheme and the overall policy behind the rent laws to prevent excessive rent increases.

In finding that the DHCR did not exceed its authority in promulgating the 2007 Amendment, the IAS Court did not speculate as to the Legislature's intent or defer to the DHCR but rather examined the actual language of the 2007 Amendment and the relevant statutes, as well as past decisions by the DHCR and its predecessor agency relating specifically to U/P rent increases. Noting that the term "unique or peculiar" had a long history, the IAS Court cited an Advisory Bulletin issued by a predecessor rent agency that gave guidance as to its meaning:

In Advisory Bulletin No. 8 (rev. March 15, 1951), entitled 'Section 33(4), Unique and Peculiar Circumstances,' the Rent Commissioner provided further confirmation of the limited types of circumstances intended to qualify as unique or

peculiar.[FN7] Included were circumstances such as unusual pressure or necessity affecting the rental of a single housing accommodation at an unusually low rent; rent established by a prior owner who was mentally impaired or suffering from a condition rendering him incapable of normal business judgment; a building in receivership where the receiver set the initial maximum rents substantially below prevailing rents for comparable accommodations; or where a prior owner was renting at below-market rates to a family member.

Significantly, the Bulletin also gave examples of circumstances not intended to constitute ‘unique or peculiar circumstances’. For example, the Bulletin specifically states that: ‘This section does not permit adjustments solely because there are variations in rents for similar housing accommodations.’

As particularly relevant here, the Bulletin also excluded circumstances where the maximum rents had been reduced by Federal authorities based on a concession during a period of Federal regulation before the building became subject to the New York State regulatory jurisdiction. The Commissioner opined that, since the rents had been set pursuant to Federal laws then in effect, the circumstances cannot be considered ‘unique or peculiar’ so as to warrant a rent increase upon the building’s entry into the State regulatory system. This situation is analogous to the case at bar; the rents were previously set pursuant to the Mitchell-Lama law, and the owner is now seeking to restructure those rents claiming that the building’s departure from Mitchell-Lama and entry into the Rent Stabilization system constitutes a ‘unique or peculiar circumstance’, even though RSL §512 includes a specific methodology for setting the rent-stabilized rents in those cases.

The IAS Court also analyzed the actual language of the KSLM decision, finding that while it authorized owners of post-1974 Mitchell Lamas to apply for rent increases based upon RSL § 26-513-a it did not mandate that such owners were automatically entitled to such increases solely on the basis of having been in the Mitchell Lama program. The IAS Court rejected the Appellant's reliance upon certain DHCR Opinion Letters:

Similarly unavailing is the owner's claim that the Appellate Division's discussion of certain DHCR letters constitutes a determination that a building's former Mitchell-Lama status, standing alone, automatically entitles the owner to a U/P rent increase. See 6 AD3d at 38. First, the Court of Appeals made no mention of the letters, and it thus cannot be said that our highest court agreed with that part of the Appellate Division's decision, which it modified significantly. Moreover, the letters cannot be construed as binding policy or precedent that a building's former Mitchell-Lama status, standing alone, automatically entitles an owner to a U/P rent increase..... In no way can these letters be construed as a definitive policy statement that an owner is automatically entitled to a U/P increase when the building exits Mitchell-Lama, particularly because the HUD requests are missing, allowing only speculation based on an incomplete record. And again, our highest court neither cites to them nor relies on them in any way.

Finally, the IAS court properly held that there was no basis to limit the 2007 Amendment to prospective application where there had been no change in the law, or willful or negligent delay by DHCR.

This appeal followed. [A. 4-5].

IV **ARGUMENT**

A. THE IAS COURT CORRECTLY HELD THAT THE 2007 AMENDMENT IS CONSISTENT WITH THE STATUTE AND THE INTENTION OF THE LEGISLATURE

1. The Literal Language and History of the RSL § 26-513-a Does Not Encompass Statewide Rent Regulation Programs Affecting Thousands of Tenants

The court below correctly found that the 2007 Amendment is consistent with the RSL §26-513-a and the overall statutory scheme.

Appellant overlooks basic rules of statutory construction and creates a mythical legislative history to impose upon the Legislature an intent that is not found in the language of the statute, the history of the statute or the statutory scheme.

As the Court of Appeals observed in Roberts v. Tishman Speyer Properties, LP, 13 NY3d 270 (2009):

When construing a statute, we seek to discern and give effect to the Legislature's intent (*Carney v. Philippone*, 1 N.Y.3d 333, 339, 774 N.Y.S.2d 106, 806 N.E.2d 131 [2004]), and the starting point for accomplishing this is the statute's language (*Matter of DaimlerChrysler Corp.*

v. Spitzer, 7 N.Y.3d 653, 660, 827 N.Y.S.2d 88, 860 N.E.2d 705 [2006]). If the language is ambiguous, we may examine the statute's legislative history (*Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998]).

The IAS Court correctly found that neither the literal language of the RSL § 26-513-a nor its history indicates an intent by the Legislature that voluntary departure from the Mitchell Lama program and its expected loss of tax benefits entitle an owner to a rent increase based upon “unique or peculiar circumstances.”

The courts long ago established that common words are to be given their ordinary and usual meaning. See, e.g., Steinbeck v. Gerosa, 4 NY2d 302, 175 NYS2d 1 (1958) (“ [c]ommon words are to be given their commonly understood meaning unless another meaning is obviously intended...”) (citations omitted.) See also, Manhattan Pizza Hut v. New York State Human Rights Appeal Board, 51 NY2d 506, 415 NE2d 950, 434 NYS2d 961 (1980) (“... we now call upon the obvious and fundamental rule of construction that words of common usage are to be given their ordinary meaning...”).

The IAS Court properly found that the plain and ordinary meaning of “unique” is “being the only one; or being without a like or alone.” Webster’s Third New International Dictionary, (Merriam-Webster, Inc., 1993). Unique

is also defined as “highly unusual, extraordinary, rare, and having no like or equal.” Webster’s New World College Dictionary, Third Edition (MacMillan, 1996).

The term “peculiar” has a similar meaning. It is defined as “different from the usual or normal” or “distinctive, singular, or particular” Webster’s Third New International Dictionary, (Merriam-Webster, Inc., 1993). It is also defined as “out of the ordinary”, “odd” and “strange.” Webster’s New World College Dictionary, Third Edition (MacMillan, 1996).

The IAS Court also correctly looked to the history of the term “unique or peculiar”, citing to both prior decisions and a predecessor agency Advisory Bulletin:

Included were circumstances such as unusual pressure or necessity affecting the rental of a single housing accommodation at an unusually low rent; rent established by a prior owner who was mentally impaired or suffering from a condition rendering him incapable of normal business judgment; a building in receivership where the receiver set the initial maximum rents substantially below prevailing rents for comparable accommodations; or where a prior owner was renting at below-market rates to a family member.

Given the plain meaning of the words, their historical context, and the legislative history, the IAS Court properly found that the Mitchell Lama

program which affects tens of thousands of housing units state-wide does not fit this description.

Avoiding the “unique or peculiar” language, Appellant relies solely on the subsequent language: “a rent which is substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations.” Appellant contends that only the latter is relevant and that therefore whenever rents are below market they must be adjusted.

Appellant improperly reads the words “unique or peculiar” out of the statute altogether. To read the statute in isolation, as Appellant urges this Court to do, rather than in context with the whole statutory scheme, would violate another fundamental rule of statutory construction requiring that “a statute or legislative act is to be construed as a whole, and that all parts of an act are to be read and construed together to determine the legislative intent.” N.Y.

Constr. & Interp. Law § 97.

2. The 2007 Amendment is Consistent with the Overall Statutory Scheme

Finding no support in the literal language or history of the RSL § 26-513-a, Appellant resorts instead to speculation as to the Legislature’s intent. Thus, Appellant contends that the overall purpose of the statutory scheme is to transition apartments to market rents, regardless of what type of rent regulation they fall under or whether they are occupied or not. The rent laws

were enacted and are maintained, however, because the market fails to provide for sufficient affordable housing. The purpose of the overall statutory scheme is to “prevent speculative, unwarranted and abnormal increases in rents” so as to secure tenants in their homes. RSL §26-501.

Consistent with the overall statutory scheme, the Legislature has always sought to protect existing tenants from sudden leaps to market rents except in the most narrow of circumstances – where there is economic hardship or where the tenants are high income.² RSC §§ 2522.4(4) and 2522.4(c)); or §26-504.1, §26-504.2, and §26-504.3, respectively. In all of the other instances where an apartment is suddenly subject to a market or near market rent, the apartment is vacant.

For instance, even at the height of deregulatory fervor, the VDL applied only to vacant apartments, not to occupied apartments. When the Legislature enacted the ETPA of 1974 it included RSL §26-512 which applies to vacant rent controlled apartments. The deregulation provisions of the Rent Reform Act of 1997 apply to vacant apartments and the apartments of high income tenants. Appellant’s speculation that the Legislature decided that the ETPA of 1974 created only two broad categories of

² This is not to say that regulated rents may not over time approach or surpass market rents. However, gradually increasing to a market rent as a result of regular rent increases is a very different matter than the sudden imposition of market rent on tenants in regulated apartments.

apartments, market apartments in newer buildings and all others where initial rents are set at market, has no merit.

**B. APPELLANT’S TEXTUAL ARGUMENT VIOLATES
FUNDAMENTAL RULES OF STATUTORY CONSTRUCTION**

The core of Appellant’s argument is that when it enacted the ETPA the Legislature must have intended to treat PHFL apartments transitioning into rent stabilization the same way it treated previously rent controlled apartments entering into the rent stabilization scheme. This argument fails for a variety of reasons.

Had the legislature intended for PHFL apartments to be treated identically to rent controlled apartments, it could have and would have made this explicit. The “Legislature is presumed to mean what it says and when the language of a statute is unambiguous, it is to be construed ‘according to its natural and most obvious sense, without resorting to an artificial or forced construction.’” Matter of Schmidt v. Roberts, 74 NY2d 513, 520 (1989).

“[T]he courts are not at liberty to hold that the Legislature had an intention other than its language imports,” Estate of Agioritis, 52 AD2d 128, 135 (1st Dept 1976), and “new language cannot be imported into a statute to give it a meaning not otherwise found therein,” Raritan Dev. Corp. v. Silva, 91 NY2d 98, 104-05 (1997) (quoting McKinney’s Cons. Laws of NY, Book 1, Statutes § 94). H&H Reinsurance Brokers Ltd. v. Hermitage Ins. Co., 678

NYS2d 651, 254 AD2d 328 (AD 2nd 1998)(Failure to include a matter within a particular statute is an indication that its exclusion was intended.)
People v. Jackson, 642 NYS2d 602, 87 NY2d 782, 665 NE2d 172 (1996)(where a statute describes particular situations in which it is to apply and no qualifying exception is added, irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.)

The statutory provisions regulating the transitioning of apartments from rent control to rent stabilization are very specific. The Legislature provided that the initial rent for such apartments should be set based upon “fair market” rents subject to an appeal process. RSL § 26-512(b)(2). Had the Legislature intended for such a procedure to be followed by apartments emerging from the PHFL it could have and would have adopted such specific language.

The most obvious place for the legislature to have stated that the initial rents of PHFL apartments covered by the ETPTA would be treated the same way as those of rent controlled apartments would have been RSL §26-512, the statute that addresses initial rents. The actual statute reads, in relevant part:

- b. The initial regulated rent for housing accommodations subject to this law on the local effective date of the emergency tenant protection act of nineteen seventy-four or which become subject to this law thereafter,

pursuant to such act, shall be:

(1) For housing accommodations which were regulated pursuant to this law or the city rent and rehabilitation law prior to July first, nineteen hundred seventy-one, and which became vacant on or after such date and prior to the local effective date of the emergency tenant protection act of nineteen seventy-four, the rent reserved in the last effective lease or other rental agreement; provided that such initial rent may be adjusted on application of the tenant pursuant to subdivision b of section 26-513 of this chapter.

(2) For housing accommodations which were regulated pursuant to the city rent and rehabilitation law on the local effective date of the emergency tenant protection act of nineteen seventy-four, and thereafter become vacant, the rent agreed to by the landlord and the tenant and reserved in a lease or provided for in a rental agreement; provided that such initial rent may be adjusted on application of the tenant pursuant to subdivision b of section 26-513 of this chapter.

(3) For housing accommodations other than those described in paragraphs one and two of this subdivision, the rent reserved in the last effective lease or other rental agreement.

[emphasis added]

Appellant makes a convoluted argument that what RSL § 26-512(b)(3) really means is that all such rents must be set at a market rent. But the Legislature did not provide for this, and instead clearly requires that initial rent be the rent reserved in the last effective lease or other rental agreement.

The courts do not lightly add words to statutes that the Legislature knows how to use but chose not to. Schultz Management, v. Board of Standard and Appeals of the City of New York, 1984,103 AD2d 687, 477 NYS2d 351, aff'd 64 NY2d 1057, 489 NYS2d 902, 479 NE2d 247; Eaton v. New York City Conciliation and Appeals Board, 56 NY2d 340, 346 (1982).

Appellant contends that rather than define initial rents for former Mitchell Lama apartments entering rent stabilization in the very statute where such initial rents are defined (RSL § 26-512 (b)(3)), the Legislature adopted a separate statute which makes no mention of the PHLF program or any other state or federal housing program, but instead uses the term “unique or peculiar circumstances” which has a plain meaning and history at odds with Appellant’s interpretation.

Appellant’s tortured interpretation is without merit in law or fact.

C. APPELLANT’S CONSTRUCTION OF RSL §26-512(b)(3) IS CONTRARY TO THE LITERAL LANGUAG OF THAT PROVISION

Appellant imaginatively construes the “catch-all” provision to indicate the Legislature’s intent that the initial rents of all apartments emerging from any form of rent regulation must be set at market, despite the literal language of the statute which expressly and unequivocally states that the rents are set at the rent reserved in the last lease, and not at market.

The catch-all provision furthers the legislative purpose of avoiding abnormal rent increases. Under its terms, tenants who resided in “market” apartments during the VDL period would continue to pay the rents they were paying, now subject to rent stabilization. Tenants who resided in PHFL apartments during that period who then became subject to rent stabilization would also continue to pay the rents that they were paying, ensuring that they would not be subject to excessive rent increases leading to displacement.

Appellant repeatedly argues that this could not have been the Legislature’s intention because it would result in economic hardship for Mitchell Lama landlords whose buildings were built prior to 1974. The Legislature wisely sought to balance the economic hardship of imposing onerous rent increases on tenants against the economic interests of landlords. Like any other landlord, former Mitchell Lama landlords have the ability to seek rent increases under the hardship provisions and therefore avoid any purported economic hardship. In addition, under rent stabilization, landlords are entitled to regular RGB rent increases as well as increases for Major Capital Improvements.

D CONTRARY TO APPELLANT, THE LANGUAGE OF RSL §§ 26-513-a AND 26-513(b)(1) IS NOT IDENTICAL

Appellant further contends that the language of RSL § 26-513-a and 26-513(b)(1) are “identical” because they both refer to “rents generally prevailing in the same area for substantially similar housing accommodations” and that therefore Mitchell Lama apartments must be treated the same as RCL apartments. The language, however, is far from identical.

RSL § 26-513-a provides for a rent adjustment only where there are “unique or peculiar circumstances.” Even the Appellant recognizes that the phrase means “some quirk or happenstance [which] causes initial rents to be substantially below market.” Appellant Brief at p. 29. It strains credulity that a statewide program affecting tens of thousands of tenants was considered by the legislature to be a “quirk or happenstance.” Appellant’s argument only works words “unique or peculiar” are read out of the statute. “Courts must, where possible, give effect to every word of a statute.” Matter of Yolanda D., 88 NY2d 790, 795 (1996).

The language of the RSL § 26-513(b)(1) relating to formerly Rent Controlled apartments also differs from the RSL § 26-513(a) – that is, U/P provision - in that the former provision applies explicitly to vacant apartments. RSL § 26-513(b)(1) is applicable to an apartment “that became

vacant after January first, nineteen hundred seventy-four.” RSL § 26-513-a on the contrary does not reference a vacancy.³

Given the overall statutory purpose of avoiding onerous rent increases and displacement, it is not unreasonable that a first rent negotiated by a new tenant and the landlord be a “market” rent subject to a Fair Market Rent Appeal when an apartment leaves rent control. A new tenant has the option or renting that apartment or not. An initial rent, however high, is not the same as exacting a substantial rent increase upon an existing tenant. On the other hand, suddenly imposing a substantial rent increase on an existing Mitchell-Lama tenant, in the absence of any economic hardship suffered by the owner, is contrary to the overall statutory purpose of the rent laws.

E. APPELLANT’S CONTORTED INTERPRETATION OF RSL § 26-513-a WOULD LEAD TO ABSURD RESULTS

Appellant argues that IAS Court’s interpretation of RSL § 26-513-a leads to absurd results. One alleged absurd result is that only the owners of pre-1974 Mitchell Lamas are “saddled” with below-market rents while owners of other non-RCL buildings and owners of post-1974 Mitchell-Lamas are not. (Appellant Brief in chief at p. 30). There is nothing absurd

³ To the extent that the words “first tenancy thereafter” may be read to mean the first vacancy, it further supports the argument that the legislature’s concern was not with insuring that all initial rents were set at market but only that the initial rents of vacant apartments should be set at market.

in the division between pre-1974 and post-1973 Mitchell-Lamas. Under that argument the ETPA itself, not to mention all legislation with an effective date, is absurd in creating any division between pre-1974 and post-1973 buildings. All owners of pre-1974 buildings, with six or more units, are unfairly subject to rent regulation while post-1973 owners enjoy the benefits of market rents. As for “other non-RCL buildings”, the statute simply provides that those tenants continue to pay what they were paying just as Mitchell Lama tenants continue to pay what they were paying. That result is consistent with preventing “uncertainty, hardship and dislocation” resulting from “excessive and unwarranted rents and rent increases.” ETPA §2.

Appellant’s claim that that former Mitchell Lamas (built before 1974) have somehow been singled out could not be further from the truth. RSL § 26-513-a is available to all owners equally. It is Appellant that is seeking special treatment by construing RSL § 26-513(a) to grant an automatic rent increase based solely on its voluntarily participation in and departure from the Mitchell Lama program.

Moreover, it is Appellant’s interpretation of RSL § 26-513-a which leads to absurd results. Under Appellant’s argument, as previously noted, existing tenants would be straddled with extreme rent increases, a prospect which is contrary to the overall statutory purpose of the rent laws.

Appellant's claims of financial hardship are without merit for two reasons. First of all, there is no evidence in the record to support the claim of economic hardship. Second, Appellant is entitled to apply for rent increases based upon economic hardship. See Roberts v. Tishman Speyer Properties, L.P., 13 NY3d 270, 918 NE2d 900, 890 NYS2d 388 (2009)(potential burden on litigant is no reason to eschew correct interpretation of a statute).

F. THERE IS NO BASIS TO ONLY APPLY THE REGULATION PROSPECTIVELY

The IAS Court below correctly found that there is no basis to process the Appellant's applications under what it perceives to be the prior law. As the court correctly noted, the Regulation did not represent a change in the law. See also Roberts v. Tishman Speyer Properties, August 6, 2010, NYLJ, p. 43, co. 1 (Sup Ct, NY Co).

Furthermore, the IAS Court correctly found that there was no inordinate delay in the DHCR's processing of the Appellant's applications. Much of the delay was the result of attempts by the parties to reach a settlement and Appellant's own litigation strategy which resulted in a stay of the applications being processed. [A-167-173].

V
CONCLUSION

For the reasons stated above, this Court should affirm the IAS Court's
Decision in all respects.

Dated: New York, New York
 September 8, 2010

Respectfully submitted,

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Dated: New York, New York
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Respectfully submitted,

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**AFFIDAVIT OF
PERSONAL SERVICE**

I, _____, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On September 8, 2010

deponent served the within: **Brief for Intervenors-Respondents-Respondents**

upon:

See Attached Service List

the attorney(s) in this action by delivering **2** true copy(ies) thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein, also by electronic service via email.

Sworn to before me on September 8, 2010

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