DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-12-30,279

In re: 2727 29th St., N.W., Unit 410

Ward Three (3)

MUNEER A. SHEIKH
Tenant/Appellant

v.

SMITH PROPERTY HOLDINGS THREE (DC) LP
Housing Provider/Appellee

DECISION AND ORDER

July 29, 2015

McKOIN, COMMISSIONER. This case is on appeal to the Rental Housing Commission (Commission) from a final order issued by the Office of Administrative Hearings (OAH), based on a petition filed in the Rental Accommodations Division (RAD) of the District of Columbia Department of Housing and Community Development (DHCD).[1] The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01 -3509.07 (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), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

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

I. PROCEDURAL HISTORY

On August 22, 2012, Tenant/Appellant Muneer A. Sheikh (Tenant), resident of 2727 29th Street NW (Housing Accommodation), Unit 410, filed Tenant Petition RH-TP-12-30,279 (Tenant Petition) with the RAD, against Smith Property Holdings Three (DC) LP (Housing Provider). Record for RH-TP-12-30,279 (R.) at 11-24. Administrative Law Judge Erika Pierson (ALJ) issued an order on November 30, 2012, permitting the Tenant to file an amended petition (Amended Tenant Petition). Sheikh v. Smith Prop. Holdings Three (DC) LP, RH-TP-12-30,279 (OAH Nov. 30, 2012) (Order Granting Amendment); R. at 55-58.[2]

The Amended Tenant Petition asserts the following claims against the Housing Provider:[3]

1. [The Housing Provider] has not filed the required Certificate of Notice of Rent Adjustment for a vacancy increase taken around September 22, 2011.

2. The last legal rent increase was taken August 1, 2011 and set the monthly rent amount at $1,924. However, the [Housing Provider] has required the Tenant to pay $2,500 a month since the September 2011 [sic] based on the illegal vacancy increase taken but never filed with RAD.

3. [The Housing Provider] has since implemented an Increase of General Applicability and has increased the required rent to $2,640 effective October 1, 2012. Because this increase was based off the rent level set by the illegal vacancy increase[,] it is invalid. *See Taylor v. Woodner Apts.*, 2008 DCOAH [sic] at 11 (holding that a housing provider was barred from implementing a subsequent increase based on a prior illegal increase).

4. The comparable unit used to establish the new rent rate is not substantially similar to the Tenant's unit. . . . The unit cited by [the Housing Provider] as the comparable unit for which the vacancy increase was based, is a completely different floor plan from [the] Tenant's unit.

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[2] The ALJ ordered that the Tenant supplement the Amended Tenant Petition "no later than December 21, 2012, by stating with specificity, what services and/or facilities were permanently eliminated" as per the Tenant's claim in the Tenant Petition that "[s]ervices and/or facilities provided as part of rent and/or tenancy ha[d] been permanently eliminated." Order Granting Amendment at 2; R. at 57. The tenant subsequently withdrew that claim. *See* Opp'n to Housing Provider's Mot. To Strike Amendment and Dismiss Petition at 3; R. at 102.

[3] The claims raised in the Amended Tenant Petition are recited here using the language of the Tenant in the Amended Tenant Petition.

5. When a housing provider knowingly received rent above the rent ceiling for the unit in question[,] RAD shall require a rent refund of the overpaid rent, or other applicable relief as stated in the regulation. 14 D.C.M.R. § 4217.1; Taylor, 2008 DCOAH [sic] at 11.

Amended Tenant Petition at 1-2; R. at 46-47.

An evidentiary hearing on this matter were held on July 2, 2013, and a final order was issued on January 29, 2014: Sheikh v. Smith Property Holdings Three (DC) LP, RH-TP-12-30,279 (OAH Jan. 29, 2014) (Final Order); R. at 374-77.

The ALJ made the following findings of fact in the Final Order, in relevant part:[4]

1. Tenant Muneer A. Sheikh has resided in Unit 410 at 2727 29th Street, NW, known as "Cleveland House," (Housing Accommodation) since September 23, 2011. The Housing Accommodation is currently owned by Equity Residential which purchased Smith Property Holdings Three in February 2013.

. . .

Tenant's Rent and the Vacancy Increase

7. When Tenant Sheikh moved into the apartment in September 2011, he signed a lease agreeing to a monthly rent of $2,500, with a rent concession of $500 per month for the first year. RX 218. Therefore, Tenant actually paid $2,000 per month for the first 12 months of tenancy.

8. The previous rent charged for the unit was $1,924, which was filed with the RAD on August 31, 2011 when Housing Provider filed a "Certificate of Notice to the RAD of Adjustments in Rent Charged." PX 6. The Certificate of Notice reflects that the rent was increased for unit 410 from $1,846 to $1,924, effective August 1, 2011. The increase was authorized by the 2011 CPI-W increase of 2.2%.

9. When the previous tenant vacated the apartment, Housing Provider took a vacancy increase of $576 which resulted in Tenant's current rent charged of $2,500. In taking the vacancy increase, Housing Provider increased the rent to that of a comparable unit. Unit 423 was the comparable unit and Housing Provider's rent ledger for that unit reflects the rent charged was $2,500. RX 216.

[4] The findings of fact are recited here using the language and numbering of the ALJ in the Final Order.

10. On September 30, 2011, when Tenant moved into the unit, Housing Provider provided Tenant with a copy of a "Disclosure of Basis of Rent Charged" (Disclosure Form). PX 7. Housing Provider filed the Disclosure Form with the RAD on September 30, 2011. Id. The Disclosure Form states that the current rent charged was $2,500 based on the following increases in the last three years:

a.	08/01/2009	$115 CPI-Based Increase (§ 208)	(Rent $1809)
b.	08/01/2010	$37 CPI-Based Increase (§ 208)	(Rent $1846)
c.	08/01/2011	$78 CPI-Based Increase (§ 208)	(Rent $1924)
d.	09/22/2011	$576 Vacancy High Comp. (§ 213)	(Rent $2500)

. . .

Whether Units 410 and 423 Are Comparable Units

18. Tenant's apartment (Unit 410) is a one-bedroom apartment that measures 800 square feet. The apartment has two closets and windows on one side, facing west.

19. All one bedroom apartments in the housing accommodation measure 800 square feet, but have different layouts depending on the Tier in which they are located, i.e. apts. 423, 323, 223, etc, are in the same tier and all have similar, if not identical layouts. However, more than one Tier may have the same layout. For example, the floor plans reflect that Tiers 10 and 29 have identical layouts. PX 1.

20. Unit 423, which is in a different Tier than Tenant's unit, is also a one-bedroom apartment measuring 800 square feet. The floor plan for unit 423 reflects it has three closets. PX 2. Unit 423 has windows on two sides with southern and western exposure.

21. Floor plans for the two units reflect that both units have an L-shaped living room/dining area. Because of the position of the "L," unit 410 appears to have more of a defined dining area. PXs 1 and 2. Unit 410 has a pass-through kitchen, meaning that you can enter the kitchen from the dining room and exit into the hallway of the apartment. PX 1. The kitchen in unit 423 is not a pass-through and has only one entrance/exit through the living room/dining area. PX 2.

22. The previous tenants who lived in unit 423, with the permission of Housing Provider, erected a wall in the living room dividing it into two rooms so that they had two bedrooms. PXs 5, 13A. There is no closet in the erected second bedroom. When the tenants moved out of the

apartment, Housing Provider did not remove the wall. Housing Provider considers Unit 423 to still be a one-bedroom apartment.

Final Order at 4-8 (footnotes omitted); R. at 391-95.[5] The ALJ made the following conclusions of law in the Final Order in relevant part:[6]

C. Whether Unit 410 and 423 are Substantially Identical

1. Because all of the one-bedroom units in the building are 800 square feet, they are all deemed comparable.

1. Floor Plans/Layout

2. The definition of "essential" is "Constituting or being part of the essence of something, inherent." *The American Heritage® Dictionary of the English Language*, Fourth Edition copyright ©2000 by Houghton Mifflin Company. "Essence" is defined as the intrinsic or indispensable properties that serve to characterize or identify something. Therefore, having "essentially" the same floor plan means the floor plans are approximately the same in their intrinsic properties.

3. The intrinsic properties of an apartment are not the shape. The intrinsic properties are the number of bedrooms, bathrooms, and features.

4. While certain aspects such as two entrances to a kitchen may affect whether a tenant may select a particular apartment, it is not likely to affect the amount of rent charged. What is important in comparing units for vacancy increase is the fair rental comparison. Even the difference in the number of closets does not make the apartments non-comparable.

5. Tenant appears to be arguing that to be substantially identical, the apartment must be identical, which then gives no meaning to the qualifier "substantially." It is possible for a housing accommodation to have different layouts for all apartments.

2. The Exposure

6. The evidence establishes that Tenant's apartment has windows on one side of the apartment with a western exposure. Unit 423 has windows on two sides of the apartment with southern and western exposures. The definition of substantially identical in the regulations includes that the

[5] The Commission notes that the Final Order begins on an unnumbered page in the record between pages 394 and 395.

[6] The conclusions of law are recited here using the language of the ALJ in the Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

apartments are in "comparable location with respect to exposure and height (if exposure and height have previously determined rent)." The Rental Housing Commission has held "Mere physical comparability is not sufficient to insure [sic] fair rental comparison if there are other, nonphysical factors, affecting the rent of the allegedly comparable unit which are different from those affecting the vacant unit." *Mersha v. Marina View Towers Apts.*, TP 24,302 (RHC July 23, 1999) at 12. . . . Tenant did not establish that apartments with western and southern exposure are charged more rent than apartments with only western exposure, which is necessary to establish exposure as a relevant distinguishing aspect.

3. The Wall

7. The purpose of the vacancy increase provision is to give housing providers an opportunity to raise rents to market value upon a vacancy. This is because an impact of rent control is that rents can remain below market value for long periods of time when there is little turnover. In addition, there are often costs associated with turning over a vacant property for re-rental. The vacancy increase therefore has two purposes: it allows rent to come in line with market value and it provides a mechanism for a housing provider to recoup costs.

8. However, vacancy increases also had the unintended impact of raising rent levels so high that it has significantly reduced the availability of affordable housing in the District of Columbia. It was this erosion in affordable housing that prompted the 2006 amendment to the Act capping vacancy increases at 10% of the current rent charged or equal to a substantially identical unit, capped at 30% of the current rent charged. *See Council of D.C., Committee on Consumer and Regulatory Affairs, Addendum to Committee Report, Bill: 16-109, the "Rent Control Reform Amendment Act of 2006."* However, the underlying purpose of the vacancy increase was unchanged.

9. The requirement to use a substantially identical unit was not established to be a pigeon hole for housing providers. It was meant to keep housing providers from using inappropriate units for comparison – i.e. comparing a one-bedroom unit to a two-bedroom unit, and [sic] unrenovated unit to a renovated unit, a unit with a patio to a unit without a patio – characteristics that genuinely impact the market value of an apartment for fair rental comparison. Because there was no evidence the wall impacted the rental value of the apartment, I find that it is a substantially identical unit that could be used for a vacancy increase.

Final Order at 17-21; R. at 378-82.

On May 19, 2014, the Tenant filed a timely Notice of Appeal of the Final Order (Notice of Appeal) with the Commission. The Tenant raises the following issues on appeal:[7]

1. **FLOOR PLANS.** The ALJ erred in concluding that the floor plans of Units 410 and 423 were "essentially the same," for purposes of determining the validity of a vacancy rent increase taken in September 2011. The ALJ erred in concluding that the two units had "essentially the same" floor plan even though she found that the difference in the two units' "layout" were substantial enough that they could cause a reasonable tenant to choose one unit over the other. The ALJ erred in apparently disregarding an extra wall in Unit 423, in determining whether Units 410 and 423 were "substantially identical." The ALJ erred in apparently concluding that differences in "layout" are irrelevant in determining whether two floor plans are "essentially the same." The ALJ erred to the extent she required the tenant to prove that differences in the two units' floor plan affected their fair rental value, to prove that the floor plans were not "essentially the same."

2. **EXPOSURE.** The ALJ erred in concluding that, although the exposures of Units 410 and 423 are different, Mr. Sheikh bore the burden of proving that exposure had been a factor in the amount of rent charged.

Notice of Appeal at 1-2. The Tenant's Brief in Support of the Notice of Appeal (Tenant's Brief) was filed on March 7, 2015, and the Housing Provider's Memorandum in Lieu of Brief of Appellee Smith Property Holdings Three (DC) LP (Housing Provider's Brief) was filed on March 25, 2015. The Commission held its hearing on March 26, 2015. Hearing CD (RHC Mar. 26, 2015).

II. ISSUES ON APPEAL[8]

1. Whether the ALJ erred in concluding that the floor plans of Units 410 and 423 were "essentially the same" for purposes of determining the validity of a vacancy rent increase taken in September 2011.

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[7] The Commission recites the issues in the language of the Tenant in the Notice of Appeal.

[8] The Commission, in its reasonable discretion, has restated the issues on appeal for ease of discussion, and to omit the Tenant's supporting arguments that were included in the statement of the issues on appeal. *See, e.g.*, Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013) at n.11; Ahmed, Inc. v. Avita, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8; Levy v. Carmel Partners Inc., RH-TP-06-28,830, RH-TP-06-28,835 (RHC Mar. 19, 2012) at n.9.

2. Whether the ALJ erred in concluding that, although the exposure of Units 410 and 423 are different, the Tenant bore the burden of proving that exposure had previously been a factor in the amount of rent charged.

III. DISCUSSION

The Commission's standard of review of the Final Order is contained in 14 DCMR § 3807.1 (2004):

> The Commission shall reverse final decisions of the Rent Administrator [or OAH] 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 [or OAH].

Pursuant to the DCAPA, each decision must contain distinct conclusions of law, made with appropriate citation to the relevant statutory provision, regulation, or cases under the Act on which an ALJ bases a decision and which rationally follow from substantial evidence in the record. *See* Perkins v. D.C. Dep't of Emp't Servs., 482 A.2d 401, 402 (D.C. 1984); Carmel Partners, LLC v. Barron, TP 28,510, TP 28,521, & TP 28,526 (RHC Oct. 27, 2014); 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). The Commission has consistently defined substantial evidence as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." *See* Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.10; Bower v. Chastleton Assocs., TP 27,838 (RHC Mar. 27, 2014); Jackson v. Peters, RH-TP-12-28,898 (RHC Feb. 3, 2012); Eastern Savings Bank v. Mitchell, RH-TP-08-29,397 (RHC Oct. 31, 2012); Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012). The Commission will review legal questions raised by an ALJ's interpretation of the Act *de novo* to determine if it is unreasonable or embodies a material misconception of the law. *See* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014);

Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007) (citing Sawyer Prop. Mgmt. of Md. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 102-03 (D.C. 2005)); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Carpenter v. Markswright, RH-TP-10-29,840 (RHC June 5, 2013).

The Commission's review of the record shows that the Tenant challenges a rent adjustment implemented by the Housing Provider pursuant to D.C. OFFICIAL CODE § 42-3502.13. That provision allows a housing provider to raise the rent charged for a vacant unit to match the rent charged for a substantially identical unit in the same housing accommodation. D.C. OFFICIAL CODE § 42-3502.13(a)(2). The Act defines substantially identical using a five-part (5-part) legal test:

> [R]ental units shall be defined to be substantially identical where they contain [1] essentially the same square footage, [2] essentially the same floor plan, [3] comparable amenities and equipment, [4] comparable locations with respect to exposure and height, if exposure and height have previously been factors in the amount of rent charged, [5] and are in comparable physical condition.

D.C. OFFICIAL CODE § 42-3502.13(b). As noted, *supra* at 7, the Tenant argues on appeal that, under the second and fourth enumerated factors in the Act, the ALJ's erred by determining that Unit 410 is substantially identical to Unit 423. Notice of Appeal at 1-3. The Commission addresses each issue in turn.

1. Whether the ALJ erred in concluding that the floor plans of Units 410 and 423 were "essentially the same" for purposes of determining the validity of a vacancy rent increase taken in September 2011.

The Tenant argues that the floor plans of Units 410 (the Tenant's unit) and 423 (the claimed comparable unit) are not "essentially the same," pursuant to D.C. OFFICIAL CODE § 42-3502.13(b), because they have different layouts, meaning that there are variances in their designs, including: an additional closet in Unit 410; a walk-in closet in Unit 423 and not in 410;

forty-five (45) degree-angled walls in Unit 423; all right-angled walls in Unit 410; two (2) windows in Unit 423 providing cross ventilation; and only one (1) window and one (1) exposure in Unit 410. Tenant's Brief 2-3; Hearing CD (OAH July 2, 2013) at 12:30:10. The Tenant further asserts that the erection of a wall in Unit 423 created an additional room within that unit and that units with differing amounts of rooms cannot have essentially the same floor plan. Tenant's Brief 4-5. The Tenant maintains that, given that the wall in Unit 423 was still in place at the time the Housing Provider took the vacancy increase in September 2011, Unit 423 is either a "1-bedroom + den" unit or a two-bedroom (2-bedroom) unit. Tenant's Brief at 4.

Because the Act requires a substantially identical unit to have "essentially the same" floorplan, the ALJ relied on the dictionary to define "essentially." Final Order at 19; R. at 380. The ALJ found that essentially is synonymous with "basically, approximately, fundamentally, characteristically, and substantially." *Id.* The ALJ also found that "essential" means "[c]onstiuting or being part of the essence of something, inherent[;]" and that "essence" is defined as the "intrinsic or indispensable properties that serve to characterize or identify something." *Id.* Given these definitions, the ALJ concluded that "having 'essentially' the same floor plan means the floor plans are approximately the same in their intrinsic properties." *Id.*

The ALJ further reasoned that the purpose of the vacancy rent increase provision was to permit Housing Providers to raise rents to market value during a vacancy and that the language should therefore be read broadly. Final Order at 20-21; R. at 378-79. The ALJ reasoned that a narrow reading of the vacancy adjustment provision would exclude housing accommodations that have different layouts for all of their apartments. Final Order at 19; R. at 380. As a result, the ALJ determined that the essence of a floor plan is the properties of the unit that affect the rent charged for each unit. *Id.* The ALJ was persuaded that the intrinsic properties of a unit are the

square footage, amenities and "the number of bedrooms, bathrooms, and features" within the unit, *id.* at 18-20; R. at 379-81, and not the arrangement or positioning of the unit's rooms, the shape of the unit, dividing walls, nor the number of closets. *Id.* at 18-20; R. at 379-81.

The ALJ noted in a footnote that, in Unit 423, because there was no closet in the enclosed space created by the wall, "it is not likely that this room could be marketed as a two-bedroom apartment or would be considered two-bedrooms under the construction code." Final Order at 20; R. at 379. However, the ALJ did not point to any evidence used to determine that the lack of a closet would have such effects. *Id.* at 1-23; R. at 376-397. The ALJ disregarded the wall as part of the floor plan pursuant to the determination that the wall was not drawn on the original floor plan of Unit 423 and that the wall had not impacted the previous rent charged. Moreover, the ALJ noted that the Housing Provider considers Unit 423 to be a one-bedroom (1-bedroom) apartment. Final Order at 8; R. at 391. The ALJ ultimately reached the conclusion of law that all one-bedroom units in the Housing Accommodation are "deemed comparable" because they have the same square footage. Final Order at 18; R. at 381.

As noted, the Act provides that a housing provider may increase the rent charged for a vacant unit to match the rent charged of a substantially identical unit, based on a five-part (5-part) test. D.C. OFFICIAL CODE § 42-3502.13(b).

The literal and ordinary meaning of the plain language of the statute controls its interpretation.[9] Carillon House, LP v. Carillon House Tenants Ass'n., CI 20,666 and CI 20,686 (RHC June 16, 2000) at 7 (citing Guerra v. District of Columbia, 501 A.2d 786, 789 (D.C. 1985)). Hence, an interpretation of a statutory provision cannot erode or distort the plain meaning of its text. *See* N St. Follies, LLP v. Lewis, TP 21,759 (RHC Dec. 4, 1991)

[9] "The Commission is guided by well-established rules of statutory construction[.]" Bower, TP 27,838 at 23 (citing District of Columbia v. Edison Place, LLC, 892 A.2d 1108, 1111 (D.C. 2006)).

(determining that hearing examiner erred in interpreting the Act to mean "since" May 20, 1980, when the plain language of the statute stated "as of" May 20, 1980); James Parreco & Son v. D.C. Rental Hous. Comm'n, 567 A.2d 43, 46 (D.C. 1989). Furthermore "each provision of [a] statute should be construed so as to give effect to all of the statute's provisions, not rendering any provision superfluous" or redundant. Tangoren v. Stephenson, 977 A.2d 357, 360 n.12 (D.C. 2009) (citing Thomas v. D.C. Dep't of Emp't Servs, 547 A.2d 1034, 1037 (D.C. 1988)); Feaster v. Vance, 832 A.2d 1277, 1283 (D.C. 2003); Council of the District of Columbia v. Clay, 683 A.2d 1385, 1392 (D.C. 1996). Accordingly, every word in D.C. OFFICIAL CODE § 42-3502.13(b) must be given effect. N St. Follies, TP 21,759 at 7. Thompson v. District of Columbia, 863 A.2d 814, 818 (D.C. 2004) (observing that where a provision in a statute stated that services should be filed upon the Corporation Counsel "and" the Mayor, failure to serve them *both* could not be justified by the overall purpose of the rule).

When a statute states that a requirement is applicable to one (1) specific situation, yet does not mention whether that requirement should or should not be applied to a different situation, that requirement must apply to the particular situation articulated in the statute, but does not apply to situations for which the requirement is not specified. *See* School St. Assocs. v. District of Columbia, 764 A.2d 798, 807-08 (D.C. 2001) (finding that, pursuant to common rules of statutory construction, "inclusion of [a specific clause] was deliberate and meaningful . . . just as . . . exclusion of [said clause] was likewise intentional."); Howard Univ. Hosp. v. D.C. Dep't of Emp't Servs., 952 A.2d 168, 174 (D.C. 2008) (noting, "[w]here a statute, with reference to one subject, contains a given provision, the omission of such [a] provision from a similar statute concerning a related subject . . . is significant to show [that] a different intention existed."). Furthermore, conflating two (2) separate directives within a statute subverts the distinction made

by the statutory language and belies the meaning of the language. *See* Tenants of N Street N.W. v. N St. Follies, LLP, HP 20,746 (RHC June 21, 2000) at 17; *see also* Tangoren, 977 A.2d at 360 (finding that neither courts nor administrative agencies "may interpret the statute in such a manner so as to treat distinctions made in the statutory language as surplusage.").

Based on the plain language and structure of D.C. OFFICIAL CODE § 42-3502.13(b), the Commission determines that all five (5) requirements must be given effect in order for a pair of units to be considered substantially identical. *See, e.g.*, Horning Bros. v. Mayers, TP 5,008 (RHC Aug. 25, 1982) at 2 (finding units not substantially identical based solely on the fact that the number of rooms was different). Thus, the Commission notes that a tenant need only prove that any one (1) of the five (5) requirements outlined in D.C. OFFICIAL CODE § 42-3502.13(b) in order to establish that two units are not substantially identical.

In the Final Order, the ALJ used the square footage factor to determine whether the two units satisfied the separate factor of the floor plan, circumventing the Act's requirement that all five (5) elements be compared. Final Order at 18; R. at 381; D.C. OFFICIAL CODE § 42-3502.13(b). Pursuant to the Act's construction of the definition of substantially identical, the Commission notes that the fact that two units have essentially the same square footage or comparable amenities cannot be used to determine whether the units' floor plans are essentially the same. *See id.*; School St. Assocs., 764 A.2d at 807-08; N St. Follies, HP 20,746. Accordingly, the Commission determines that the ALJ erred in comparing square footage and amenities when determining whether Units 410 and 423 had essentially the same floor plan. *See* Final Order at 18; R. at 381.

The ALJ also determined, in the Final Order, that the comparison of two units' floor plans should be done in consideration of whether the differences are "likely to affect the amount

of rent charged." Final Order at 19; R. at 380. The Act provides that two (2) units have comparable locations with respect to exposure and height, only if exposure and height have previously been factors in the amount of rent charged. D.C. OFFICIAL CODE § 42-3502.13(b). However, the Act does not provide that two (2) units have essentially the same floor plan *only* if the differences between the floor plan of each unit have previously been factors in the amount of rent charged. *Id.* In fact, the Act does not require an assessment of how floor plan, square footage, amenities, or physical condition have been factors in the rental value. *Id.* Thus the Commission is satisfied that, pursuant to the Act, when determining that two (2) units are "substantially identical," an assessment of the impact on rental value is only *required* when determining whether the units have "comparable locations with respect to exposure or height." Thus the ALJ erred in concluding that a comparison of the effect each floor plan had on the rent of its respective unit was dispositive in determining whether the two (2) floor plans are essentially the same. *See, e.g.*, Horning Bros., TP 5,008 at 1-3 (noting that units were not substantially identical for purposes of a vacancy rent increase because of a floor plan comparison that did not include a rental value analysis); Final Order at 19; R. at 380.

Under the Act, D.C. OFFICIAL CODE § 42-3502.13(b) does not provide a bright-line rule articulating how to determine whether two floor plans are essentially the same. However, applying the ordinary meaning of "floor plan" to this section of the Act, the Commission determines that the number, shape, size, and arrangement of rooms and other spaces within a unit are *some* of the properties that serve to characterize a floor plan and should be considered along with other elements of a floor plan, including the number of bedrooms and bathrooms, when determining whether two (2) units have essentially the same floor plan. *See* Cambridge Dictionaries Online, http://dictionary.cambridge.org/us/dictionary/american-english/floor-plan

(last visited July 27, 2015) (defining "floor plan" as "a drawing that shows the *shape, size, and arrangement* of rooms in a building as viewed from above[.]" (emphasis added)); WEBSTER'S NEW COLLEGE DICTIONARY 438 (3d ed. 2008) (defining "floor plan" as "a drawing to scale of the *arrangement of rooms* on one floor of a building" (emphasis added)). Furthermore, the Commission is satisfied that the plain meaning of the phrase "essentially the same floor plan" does not require analysis of the intrinsic properties of a unit as a whole, but only of those aspects that relate to the floor plan, as that term is ordinarily used. *See* D.C. OFFICIAL CODE § 42-3502.13(b); WEBSTER'S NEW COLLEGE DICTIONARY 438 (3d ed. 2008). Thus, the Commission observes that the ALJ's analysis of the intrinsic properties of Units 410 and 423 *overall*, the result of a broad reading of the vacancy rent-increase provision, does not rationally support the ALJ's conclusion that the *floorplans* of Units 410 and 423 are essentially the same.

The Commission cautions that its decision in this case does not suggest that the vacancy rent increase provision should be read so narrowly that *any* variation between two floor plans prevents the floor plans from being essentially the same. *See e.g.*, Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sep. 25, 2014) at 45 (finding that a microwave was not significant enough to prevent a pair of units from being considered substantially identical). Instead, the Commission notes that all characteristics of a floor plan are relevant to a conclusion about whether two (2) floor plans are essentially the same. When determining whether two (2) floor plans are essentially the same, the amount of differences between the floor plans should be taken into account as well as the extent of those differences are.

The ALJ erred in failing to consider whether the erection of the wall in Unit 423 created an additional room, even if that room was not a bedroom. Final Order at 20; R. at 379. Evidence on the record reveals that, prior to the 2011 rent adjustment, the tenants of Unit 423 were

permitted by the Housing Provider to hire a contractor to construct a wall to create an enclosed space, PX 5, First Amendment to the Lease Agreement, at 2; R. at 494, for one of the tenants to use as a bedroom. Final Order at 8; R. at 391. The amendment stipulated that the wall would be part of the Housing Accommodation's premises, denied the tenant any right to ownership of the wall, and prohibited the Tenant from removing the wall without the Housing Provider's permission. PX 5, First Amendment to the Lease Agreement, at 2; R. at 494. The Commission is satisfied that these factors should be considered in determining whether the wall created an additional room.

The Commission has recognized that a one-bedroom (1-bedroom) apartment cannot be used as a comparable to a one-bedroom (1-bedroom) apartment with a den for purposes of D.C. OFFICIAL CODE § 42-3502.13(a)(2). Horning Bros., TP 5,008 at 2. The Commission's interpretation of provisions of the Act is given considerable deference even if another interpretation is supportable. United Dominion Mgmt., 101 A.3d at 429 (citing Sawyer Prop. Mgmt., 877 A.2d at 102); Jerome Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 682 A.2d 178, 182 (D.C. 1996); Winchester Van Buren Tenants Ass'n v. D.C. Rental Hous. Comm'n, 550 A.2d 51, 55 (D.C. 1988); Charles E. Smith Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 492 A.2d 875, 877 (D.C. 1985). Accordingly, the Commission is satisfied that whether two (2) units have the same number of rooms is dispositive of the Act's requirement that substantially identical units have essentially the same floorplan. *See* Horning Bros., TP 5,008 at 2. The ALJ therefore failed to apply the correct legal analysis, which was to evaluate relevant evidence in order to determine whether the enclosed space created by the wall constituted an additional room, in order to reach a determination as to whether the floor plan of Unit 423 depicts a one-bedroom (1-bedroom) apartment or a one-bedroom (1-bedroom) apartment plus an additional room, such as a den.

Furthermore, even though the ALJ noted that the enclosed space created by the wall was used as a bedroom by the former tenants of Unit 423, the ALJ concluded that the enclosed space did not constitute a bedroom because it lacked a closet, without pointing to any source or evidence to support the conclusion that a room must have a closet to be considered a bedroom. Final Order at 20; R. at 379. he ALJ also stated that, because the enclosed space did not have a closet, it would likely not be marketed as a two-bedroom (2-bedroom), despite the fact that the Housing Provider re-rented the room with the wall still in place. Final Order at 20; R. at 379.

The Commission notes that the Housing Provider asserted and the ALJ concluded that the purpose of the vacancy adjustment provision of the Act is to allow housing providers to raise rents to market rates. *See* Housing Provider's Brief at 2-3; Final Order at 19-21; R. at 378-80. However, the Commission observes that neither the Housing Provider nor the ALJ provided any citation or authority to support that conclusion.[10]

Based on its review of the Act's language, structure, and legislative history, the Commission is not persuaded that market value is relevant to a housing provider's ability to increase rents charged when a rental unit becomes vacant. The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language used in the statute. District of Columbia v. D.C. Office of Emp. Appeals, 883 A.2d 124, 127 (D.C. 2005). A court interpreting a statute will look to the plain meaning of the statute and interpret the words according to their ordinary meaning. Columbia Plaza Tenants' Ass'n v. Columbia Plaza, L.P., 869 A.2d 329, 332 (D.C. 2005). The Commission notes that "market value" has been defined as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in

[10] The ALJ states in the Final Order that the purpose of the vacancy increase provision is to allow housing providers to raise rents to market rates "because an impact of rent control is that rents can remain below market value for long periods of time when there is little turnover." Final Order at 20-21; R. at 378-79. However, the ALJ does not make any citations as to where that the purpose of the vacancy increase provision is stated. *See id.*

an arm's-length transaction; the point at which supply and demand intersect." BLACK'S LAW DICTIONARY 991 (8th ed. 1999). The "open market" has similarly been defined as "a market in which any buyer or seller may trade and in which prices and product availability are determined by free competition." *Id.* at 989.

The Act provides that covered rental units may not be offered for rent or rented for more than the maximum rent charged established by law. *See* D.C. OFFICIAL CODE § 42-3502.06(a).[11] When a vacancy occurs, the Act permits a housing provider to increase the maximum rent, up to thirty percent (30%) of the prior rent charged, based on the rent charged for a comparable unit that is also subject to the rent stabilization provisions of the Act. D.C. OFFICIAL CODE § 42-3502.13(a)(2);[12] *see also* Final Order at 20, R. at 379 (noting that "the only increases in rent that could be made to unit 423 were those permissible under the [Act]"). The Commission observes that nothing in the vacancy adjustment provisions of the Act refers to market-rate transactions or permits an adjustment to lawful, maximum rents charged based on open market rates.

The Commission observes that a nearly identical provision for vacancy adjustments has existed since the Rental Accommodations Act of 1975 (1975 Act), D.C. Law 1-33. The

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[11] D.C. Official Code § 42-3502.06(a) provides in relevant part:

> Except to the extent provided in subsections (b) and (c) of this section, no housing provider of any rental unit subject to this chapter may charge or collect rent for the rental unit in excess of the amount computed by adding to the base rent not more than all rent increases authorized after April 30, 1985, for the rental unit by this chapter, by prior rent control laws and any administrative decision under those laws, and by a court of competent jurisdiction.

[12] D.C. Official Code § 42-3502.13(a) provides in relevant part:

> (a) When a tenant vacates a rental unit . . . the amount of rent charged may, at the election of the housing provider, be increased: . . .
>
> (2) To the amount of rent charged for a substantially identical rental unit in the same housing accommodation; provided, that the increase shall not exceed 30% of the current lawful amount of rent charged for the vacant unit, except that no increase under this section shall be permitted unless the housing accommodation has been registered under § 42-3502.05(d).

Commission's review of the legislative history of the 1975 Act reveals that the provision was, at one point, referred to by the Council as "vacancy decontrol." Council of the District of Columbia, Housing and Urban Development Committee, Report on Bill 1-157, "Rental Accommodations Act of 1975," (July 31, 1975) at 10. Although the vacancy provisions may have, in the past, permitted extraordinarily large increases in rents charged, *see* Council of the District of Columbia, Committee on Consumer Regulatory Affairs, Addendum to Committee Report on Bill 16-109, "Rent Control Reform Amendment Act of 2006," (June 8, 2006) at 7-10, the Commission's review of the plain language and overall structure of the Act shows that nothing in the vacancy adjustment provisions of the 1975 Act or the current Act actually permits a housing provider to charge or rely on open market rents, if greater than otherwise permitted. Following the ordinary rules of statutory construction, the Commission is satisfied that the plain language of the Act is unambiguous and that a vague reference to "decontrol" in the legislative history of the Act's predecessor does not require or permit an ALJ or the Commission to construe D.C. OFFICIAL CODE § 42-3502.13 in a manner that relies on market-rate rents. *See* D.C. Office of Emp. Appeals, 883 A.2d at 127; Columbia Plaza Tenants' Ass'n, 869 A.2d at 332.

For these reasons, the Commission determines that the ALJ erred by failing to compare the essential elements of the floor plans of Units 410 and 423 and instead considering the floor plans' effect, if any, on the rental units' market value. Final Order at 18-19; R. at 379-80. The ALJ's error ignores the plan text of the Act by blending and blurring the statutory requirement that floor plans be "essentially the same" with the other, distinct requirements of D.C. OFFICIAL CODE § 42-3502.13(b), particularly the square footage. Moreover, the Commission's review of the record shows that ALJ failed to consider whether the installation of a wall in Unit 423

converted the apartment from a one-bedroom (1-bedroom) to a one-bedroom (1-bedroom) plus den or two-bedroom (2-bedroom) apartment, *see* Horning Bros., TP 5,008, and instead relied entirely on the Housing Provider's representation that the unit is marketed as a one-bedroom (1-bedroom).

Accordingly, the Commission remands the Tenant Petition to the ALJ. The ALJ is instructed, on remand, to make findings of fact and conclusions of law that apply the Act's requirement that a comparable unit have "essentially the same floor plan" as a distinct legal test, in consideration of the factors identified in this decision and order.

2. Whether the ALJ erred in concluding that, although the exposure of Units 410 and 423 are different, the Tenant bore the burden of proving that exposure had previously been a factor in the amount of rent charged.

The Tenant maintains that the vacancy increase should be disallowed under D.C. OFFICIAL CODE § 42-3502.13(b) because the locations of Units 410 and 423 with respect to exposure are not comparable and that the burden of proof to establish that different exposures have not affected the rent charged should fall on the Housing Provider because only the Housing Provider would have had access to the evidence necessary to prove that fact.[13] Tenant's Brief 6-10. The Tenant argues that, the Commission's decision and order in Marshall v. William J. Davis Realty, Inc., TP 10,185 (RHC May 21,1986), indicates that the Commission should shift the burden of proving that the exposures of two units have previously affected the rents charged. D.C. OFFICIAL CODE § 42-3502.13(b).[14] Tenant's Brief at 7-10.

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[13] Although D.C. OFFICIAL CODE § 42-3502.13(b) states that a unit's location may be comparable to that of another with respect to both height and exposure, the Tenant does not raise any issues regarding location with respect to height in this case. Notice of Appeal 1-3. Accordingly, location with respect to height will not be discussed in this Decision and Order.

[14] D.C. OFFICIAL CODE § 42-3502.13(b) provides, in relevant part:

The DCAPA states that "the proponent of a rule or order shall have the burden of proof[.]" D.C. OFFICIAL CODE § 2-509(b);[15] *see, e.g.*, Gatewood v. D.C. Water & Sewer Auth., 82 A.3d 41, 51-52 (D.C. 2013); Hampton Courts Tenants Ass'n v. William C. Smith Co., CI 20,176 (RHC May 20, 1988) at 6-7 (finding that the housing provider bore the burden of proof because it filed the petition to initiate the case). Thus, the ALJ concluded that, pursuant to the DCAPA, the Tenant failed to meet his burden to prove that the locations of Units 410 and 423, with respect to exposure, have ever affected the units' rental values. Final Order at 19-20; R. at 379-80; *see also* D.C. OFFICIAL CODE § 2-509(b).

In Marshall, the Commission determined that, under the Act, an exception exists to the general rule in the DCAPA, stating that the burden shifts to the housing provider to prove that two (2) separate buildings are part of the same housing accommodation under D.C. OFFICIAL CODE § 42-3502.13(a)(2).[16] Marshall, TP 10,185 (RHC May 21, 1986) at 17-18. The Commission determines that this case is distinguishable from Marshall on two (2) grounds.

First, the relevant provisions of the Act in each case are different. In Marshall, the Commission discussed whether the unit selected for a vacancy increase was in a different housing accommodation from the allegedly substantially identical unit, and thus in violation of D.C. OFFICIAL CODE § 42-3502.13(a)(2). Marshall, TP 10,185 at 9-18 ("[W]e treat the question

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> [R]ental units shall be defined to be substantially identical where they contain . . . comparable locations with respect to exposure and height, if exposure and height have previously been factors in the amount of rent charged[.]

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

> In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof.

[16] D.C. OFFICIAL CODE § 42-3502.13(a)(2) provides, in relevant part (emphasis added):

> (a) When a tenant vacates a rental unit . . . the amount of rent charged may, at the election of the housing provider, be increased: . . . (2) To the amount of rent charged for a substantially identical rental unit *in the same housing accommodation*[.]

of establishing single housing accommodation status as an affirmative defense to be proven by the respondent."). On the contrary, the Tenant in this case does not dispute that Units 410 and 423 are part of the same housing accommodation. *See* Notice of Appeal at 1-3; Tenant's Brief 1-10. Instead, the Tenant's issue in this appeal arises under D.C. OFFICIAL CODE § 42-3502.13(b) and relates to the rents charged for two (2) units, specifically whether the rents charged have been affected by the units' height or exposure, not commonalities in the operation of different buildings. Final Order at 19-20; R. at 379-80.

Second, the Commission is not satisfied that the reasons for burden-shifting, as identified in the decision and order in Marshall, TP 10,185, are applicable to the Tenant's claims under D.C. OFFICIAL CODE § 42-3502.13(b). The Tenant notes that the Commission in Marshall concluded that the burden should be shifted to the housing provider out of concern that a tenant would not have access to the necessary evidence to prove his or her case. *See* Tenant's Brief at 8-10; Marshall, TP 10,185 (RHC May 21, 1986) at 18. The Commission determined in Marshall that to establish that two (2) different buildings are part of the same housing accommodation, a party would need to present evidence that the buildings were integrated "under the same ownership[,] control . . . [and] managerial scheme so that control of the movements of rents in the two units [would be] related[,]" all of which is information that a tenant would not have access to. Marshall, TP 10,185 (RHC May 21, 1986) at 10-18.

In this case, under D.C. OFFICIAL CODE § 42-3502.13(b), in order to conclude that units 410 and 423 are not substantially identical, the ALJ will need substantial evidence that the units' locations with respect to exposure have previously affected the rent charged. The Tenant asserts that, like the Commission's conclusion in Marshall, TP 10,185, the Tenant does not have access to the information necessary to meet that burden of proof. Tenant's Brief at 9-10. However, by

the Tenant's own admission, the Tenant could have called a real estate agent to testify as to whether and which of the apartments' characteristics likely affected rental value. Tenant's Brief 6-7 ("[P]resumably, expert testimony would be required: a real estate agent could testify that the rental value of a unit is affected by such things as number of windows, or by whether the windows are on one side or on two sides of an apartment[.]"). The Commission is satisfied that the testimony of an expert such as a real estate agent is a viable source for the evidence the Tenant maintains he does not have access to. In addition, the rules of OAH permit discovery for good cause, which may enable a tenant to compel a housing provider to disclose relevant facts. *See* 1 DCMR § 2825.1.[17]

Because the Commission is satisfied that the Marshall case is distinguishable from this case, and that the Tenant could have produced evidence necessary to meet his burden of proof, the Commission determines that the burden of proof in this case remains on the Tenant, pursuant to the general rule of the DCAPA. D.C. OFFICIAL CODE § 2-509(b); *see* Marshall, TP 10,185. Therefore, the Commission affirms the Final Order on this issue.

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[17] 1 DCMR § 2825 provides, in relevant part:

> 2825.1 Discovery is generally not permitted. An Administrative Law Judge may authorize discovery for good cause shown, but interrogatories and depositions are disfavored.
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> 2825.2 A party may move for an Administrative Law Judge to issue a subpoena to require any non-party to provide documents prior to the hearing.
>
> 2825.3 Any motion for discovery shall explain the relevance of the information that is sought and shall describe all attempts to obtain consent from the opposing party, including a description of all discovery to which the opposing party has agreed.
>
> . . .
>
> 2825.5 An Administrative Law Judge may impose appropriate sanctions if a party fails to comply with a discovery request, including prohibiting the party from offering evidence and ordering that specific facts are established.

IV. CONCLUSION

For the reasons stated *supra* at 9-20, the Commission determines that the ALJ erred by failing to compare the essential elements of the floor plans of Units 410 and 423, including the number of rooms in each unit, in light of the installation of the wall in Unit 423, and the shape and layout of the rooms in each unit, and by considering rental value where not called for by the statute. *See* Final Order at 18-19; R. at 379-80. Accordingly, the Commission remands this case to the ALJ with instructions to make findings of fact and conclusions of law on whether the floor plans are essentially the same, as required by D.C. OFFICIAL CODE § 42-3502.13(b), consistent with this Decision and Order. If the ALJ determines that the installation of the wall creates an additional room in Unit 423, the ALJ will be required to conclude as a matter of law that the floor plans are not essentially the same. *See* Horning Bros., TP 5,008 at 2. If the ALJ determines that the units have the same number of rooms, the ALJ will still be required to analyze whether the other elements of the floor plans are essentially the same, in consideration of the ordinary meaning of "floor plan," as described in this decision and order. *See supra* at 12-14.

For the reasons stated *supra* at 20-24, the Commission affirms the ALJ's determination that the burden of proving each element of D.C. OFFICIAL CODE § 42-3502.13(b) was on the Tenant.

SO ORDERED

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
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 RH-TP-12-30,279 was mailed, postage prepaid, by first class U.S. mail on this 29th **day** of **July, 2015,** to:

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