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Administrative Law—Regulation of Unprofessional Conduct

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to decontrol of rent under it. The statute empowers the commission to abolish rent control within a "particular class of housing accommodations" when it finds a five per centum vacancy existing within such class. Since the statute does not define what is meant by a "particular class of housing accommodations," it follows that the commission must make such determination. The determination must not be arbitrary and capricious, and if it is not, the courts may not interfere.[7] The commission defined the phrase as referring to a particular rental level for accommodations rather than to a particular type of accommodation, and ruled that a showing by petitioner that a five per centum vacancy existed among hotels did not satisfy the statute since they did not show a five per centum vacancy existing within a particular rental level. The problem then is whether or not the commission's determination of the definition of the phrase was arbitrary and capricious.

The declared legislative purpose of the act is to prevent the "exactions of unjust, unreasonable and oppressive rents and rental agreements."[8] It is logical to assume that when a prospective tenant considers renting a particular accommodation price is a determining factor. Tenants within a particular price range, therefore, compete against each other. In a particular type of housing accommodation, such as hotels, there might be vacancies in the higher price ranges while there were shortages in the lower price ranges. To allow decontrol on the basis of an overall showing within a particular type of housing accommodation of a five per centum vacancy might cause such a great degree of competition among the tenants of the lower priced accommodations as to promote the very hazards this Act was intended to prevent. The commission's basis of what constitutes a particular class of housing accommodation, which is rental level, is not susceptible to the above danger and works to promote the purposes of the statute. Therefore it can not be said that the commission acted in an arbitrary and capricious manner when it made its ruling. Since the commission did not act in such a manner the Court here refused to interfere with the commission's ruling.

Regulation Of Unprofessional Conduct

In *Strauss v. University of State of New York,*[9] a last minute amendment to a questionable regulation enabled the Court of Appeals to avoid an interesting problem dealing with the validity of administrative rules regulating the conduct of the optometry profession. The Board of Regents had adopted a rule which proscribed as unprofessional conduct "Advertising by means of large display, glaring, illuminated or flickering signs."[10] An illuminated sign is defined as "a sign lighted or self-luminous by any means whatever, or giving the outward

7. Park East Land Corp. v. Finkelstein, 299 N.Y. 70, 85 N.E.2d 869 (1949).
8. N.Y. EMERGENCY HOUSING RENT CONTROL LAW §1.
9. 2 N.Y.2d 464, 161 N.Y.S.2d 97 (1957).
10. Regulations of the Commissioner of Education, §70(1)(g), as amended January 25, 1957.

appearance of same." Five registered optometrists brought a declaratory judgment action to have the above rule invalidated on the principle ground that the prohibition of the use of any illuminated signs was arbitrary and unreasonable since not every such sign could be said to constitute unprofessional advertising.

Admitting that the rule forbade the use of any illuminated sign advertising, the majority of the Appellate Division,[11] affirming a referee's decision for the defendants, held there was adequate proof that it was the will of the majority of the optometry profession that such advertising be forbidden and therefore it was not for the court to rewrite or strike down the rule. Justice Halpern, dissenting in part, felt that a construction of the rule was possible whereby the word "illuminated" could derive its meaning from the words accompanying it. Thus only large, glaring and/or flickering illuminated signs were forbidden. If, however, the reach of the regulation precluded the use of any illuminated signs, then his position was that the Board had exceeded its authority since there is no question that the Board's rule-making power is limited to the prevention of unprofessional conduct and it may not ban proper and improper conduct indiscriminately.[12] Certainly not every illuminated sign was necesarily improper.

While the appeal was pending in the Court of Appeals, the aforementioned rule was amended to permit the use of an illuminated sign setting forth the name of the individual and accompanied by the word "optometrist." Because it is established that the law as it exists at the time of the decision controls,[13] the issue raised by Justice Halpern was rendered moot and the Court had no difficulty holding the amended rule reasonable and valid.

Retroactive Application Of Administrative Order

A landlord undertook and completed a capital improvement pursuant to and in reliance upon a Rent Administrator's Schedule of Rental Values. By it he was entitled to, and was granted, a flat sum per unit rent increase. A subsequent revision of the schedule provided for a new basis of increase "In the future . . . ." The Rent Administrator modified the prior rent increase to conform with the subsequent schedule.

In *Alamac Estates v. McGoldrick*,[14] the Court of Appeals reversed the order

11. 2 A.D.2d 179, 153 N.Y.S.2d 397 (3rd Dep't 1956).
12. Dubin v. Board of Regents of University of State of New York, 1 N.Y.2d 58, 150 N.Y.S.2d 183 (1956); Cherry v. Board of Regents of University of State of New York, 289 N.Y. 148, 44 N.E.2d 405 (1942).
13. Black River Regulating District v. Adirondack League Club, 307 N.Y. 475, 121 N.E.2d 428 (1954); Gallewski v. Hentz & Co., 301 N.Y. 164, 93 N.E.2d 620 (1950); Boardwalk & Seashore Corp. v. Murdock, 286 N.Y. 494, 36 N.E.2d 678 (1941).
14. 2 N.Y.2d 87, 156 N.Y.S.2d 853 (1956).