To be Argued by:
JILLIAN N. BITTNER
(Time Requested: 30 Minutes)

Court of Appeals

of the

State of New York

In the Matter of the Application of

160 EAST 84TH STREET ASSOCIATES LLC,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2023-00147

AD, 1st Dep't
Case No.
2021-00718

New York Cty.
Clerk's Ind. No.
157576/20

(For Continuation of Caption See Inside Cover)

REPLY BRIEF FOR PETITIONERS-APPELLANTS

HORING WELIKSON ROSEN
& DIGRUGILLIERS PC
Attorneys for Petitioners-Appellants
11 Hillside Avenue
Williston Park, New York 11596
Tel.: (516) 535-1700
Fax: (516) 535-1701
jbittner@hwrpc.com

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In the Matter of the Application of

1700 YORK AVENUE ASSOCIATES, LLC,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2023-00150

AD, 1st Dep’t
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New York Cty.
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In the Matter of the Application of 87TH STREET SHERRY ASSOCIATES, LLC, *Petitioner-Appellant,* For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules – against – NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, *Respondent-Respondent.*	APL-2023-00151 AD, 1st Dep't Case Nos. 2021-02679 2021-02680 2021-02681 New York Cty. Clerk's Ind. Nos. 153992/20 153997/20 154002/20
In the Matter of the Application of 87TH STREET SHERRY ASSOCIATES LLC, *Petitioner-Appellant,* For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules – against – NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, *Respondent-Respondent.*	APL-2023-00152 AD, 1st Dep't Case No. 2021-00655 New York Cty. Clerk's Ind. No. 153995/20
In the Matter of the Application of 87TH STREET SHERRY ASSOCIATES LLC, *Petitioner-Appellant,* For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules – against – NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, *Respondent-Respondent.*	APL-2023-00153 AD, 1st Dep't Case No. 2021-00644 New York Cty. Clerk's Ind. No. 153999/20

In the Matter of the Application of

CLERMONT YORK ASSOCIATES, LLC,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2023-00154

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In the Matter of the Application of

160 EAST 84TH STREET ASSOCIATES LLC,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2024-00003

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PRELIMINARY STATEMENT

This Reply Brief is submitted on behalf of Appellants in reply to Respondent New York State Division of Housing and Community Renewal's ("DHCR") Brief and in further support of Appellants' appeals from the Orders of the Appellate Division, First Department that held DHCR's purported "Explanatory Addenda to Order" (the "Addenda") was rational and proper. (R. 7-9; 12-13; 16-18; 22-23; 26-27; 30-31).[1]

Conspicuously omitted from Respondent's Brief is any reference to language in the Housing Stability and Tenant Protection Act of 2019 (the "HSTPA") (L 2019, Ch 36, Part D), or the Clean Up Bill (L 2019, Ch. 39, Part Q § 10), that authorized DHCR's issuance of the Addenda, which had the effect of retroactively revoking 16 high rent/high income deregulation orders (the "Deregulation Orders"), all of which were final and binding before the enactment of the HSTPA on June 14, 2019. In fact, the Clean Up Bill precludes DHCR from any attempt to claw back final and binding orders authorizing luxury deregulation. The Clean Up Bill provides, "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated." This language suggests the repeal of luxury deregulation was not intended to be retroactive and Part D could not cut off pre-existing rights

[1] Citations to the Record on Appeal in Appellants' Reply Brief appear in the form "(R. ___)."

possessed by Appellants, which vested prior to the enactment of the HSTPA, as deregulation was a right and not (as Respondent erroneously claims), a "regulatory benefit."

Respondent fails to refute Appellants' position that neither the Rent Stabilization Law nor the Code authorized DHCR to issue any document such as the Addenda. While Rent Stabilization Code (9 NYCRR) § 2527.11 ("RSC") permits DHCR to render "advisory opinions" and "interpretative opinions and explanatory statements of general policy," it does not authorize DHCR to issue an appealable order under the misnomer "Addenda," to retroactively nullify final orders of deregulation at a time when no lawful mechanism to do so existed. Additionally, there is no legal basis for DHCR to assert the Addenda was proper as an explanatory statement of general policy authorized by RSC § 2527.11, since that was not the basis articulated in any of DHCR's PAR Orders (*e.g.*, R. 85-92).

Respondent similarly fails to refute that its only authority for changing the terms of an order is derived from RSC § 2529.9, which permits DHCR to modify or annul its orders on the grounds of fraud, illegality or irregularity in a vital matter, none of which DHCR claims is present here; nor is any such authority present once, as in these matters, the order is no longer subject to challenge.

Respondent's position that former Rent Stabilization Law (Administrative Code of the City of NY) § 26-504.3 ("RSL") provided deregulation occurs upon lease expiration, and since the leases herein expired post-HSTPA, retroactive application is not at issue, is pure sophistry. Respondent's description of the Deregulation Orders as "prospective administrative orders that never took effect" is false. (DHCR Br. 2).[2] This mischaracterization ignores the fundamental principles of administrative finality; the 16 Deregulation Orders were final and binding prior to the enactment of the HSTPA. That the official transition in regulatory status occurred at the expiration of the lease (on a date certain and without any action by DHCR) does not undermine the validity or finality of the Deregulation Orders, as evidenced by the fact that the time from which to challenge any such order ran from its issuance date, and not the lease expiration date. *See* RSC § 2529.2.

Because the Deregulation Orders were final and binding prior to the HSTPA, and before the Addenda issued, Appellants possessed a vested right in the deregulated status of these 16 units. The only way that Appellants' vested rights could be upended was if Part D were applied retroactively, which, although not authorized by statute, is exactly what DHCR did. At a time when no party could

[2] Citations to Respondent's Brief appear in the form "(DHCR Br. __)."

challenge the Deregulation Orders, DHCR carved out an exception (not sanctioned by law) to achieve just that, and labeled it an Addenda.

No language in the HSTPA provides for the right to annul or modify the Deregulation Orders, whether through an Addenda or otherwise. DHCR was not entitled to read language into the statute that is not present to effectively void the Deregulation Orders. DHCR cites to no legislative history in support of its "interpretation" of the HSTPA; no such history exists. Instead, DHCR relies upon the testimony at Senate hearings leading up to the passage of the HSTPA wherein progressive politicians, backed by tenant advocacy groups, argued for the repeal of any basis for deregulation. *See* Luis Ferré-Sadurní, *Tenants May Get More Protections in New York City, After Decades of Battles. Here's Why.*, NY Times (April 17, 2019). Anti-deregulation testimony does not support an expansion of the legislature's repeal of high-income deregulation "effective immediately." As Justice Fahey noted during oral argument on *Matter of Regina Metropolitan Co., LLC v New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332 (2020) ("*Regina*")), "I thought the law changed because the politics changed. …And it seems to be that situation here where a policy choice was made as a result of election results." (*Regina* tr at 27, lines 9-10, 17-19). (*See* RC-56).[3]

[3] Citations to Appellants' Reply Compendium appear in the form "(RC-__)."

As to the 2016 Deregulation Orders, DHCR's blatant deviation from the mandatory processing guidelines that resulted in the leases for those apartments expiring after the HSTPA's enactment, constitutes negligence per se. *See Elliot v City of New York*, 95 N.Y.2d 730 (2002). Compounding DHCR's disregard for the processing timelines, it misprocessed one of the 2016 petitions under the wrong provision of law. Then, instead of articulating a legally cognizable basis for its mishandling of the 2016 matters, DHCR frivolously seeks to shift its burden to comply with the RSL on Appellants.

For the reasons set forth in Appellants' principal Brief and herein, the Orders of the Appellate Division should be reversed, the Addenda set aside and the 16 Deregulation Orders reinstated pursuant to a ruling that they are to be given full force and effect as written.

ARGUMENT

POINT I

RESPONDENT ERRS IN RELYING UPON POLICY ARGUMENTS ADVANCED BY TENANT ADVOCATES TO SUPPORT ITS ERRONEOUS APPLICATION OF THE HSTPA

DHCR misses the mark in advancing a policy argument in support of the retroactive impact of the Addenda, which, contrary to law, nullified 16 final and unchallengeable Deregulation Orders. DHCR fails to cite any legislative history in support of its position, and, instead, argues that public hearing testimony, which favored the HSTPA's elimination of deregulation on any basis, should supersede not only the explicit language of the statute, but final and binding orders.[4] Yet, DHCR fails to cite any authority for relying on testimony of interested groups as a permissible ground for its actions.

Respondent's policy argument is undermined by the fact that permitting tenants with high incomes to occupy rent regulated housing indefinitely (through renewals and succession rights) does not accomplish the legislative "purpose" of providing affordable housing for persons of limited means, to abate the "housing crisis" in NYC. Precluding Appellants from implementing the Deregulation

[4] Courts have rejected physical takings challenges to the RSL, agreeing with the State's position that regulation of the rental relationship does not constitute a taking because owners retained substantial rights to control the use of their property, including the ability to deregulate units. *See Harmon v Markus*, 412 Fed Appx 420 (2d Cir 2011). In enacting the HSTPA, the State argued the opposite, contending deregulation must be permanently eliminated.

Orders will not return these 16 units to the rental market; nor will it reduce the legal rents, which far exceed the last deregulation threshold. (*E.g.,* R. 146, Apt. 12G had a LRR of $7,150.00 per month in 2016 and 2017; R. 436, Apt. 8D had a LRR of $6,832.88 per month in 2016 and 2017). All DHCR has accomplished is to allow wealthy tenants who were never intended beneficiaries of rent regulation to remain in occupancy indefinitely.

DHCR's reliance on policy, instead of law, stands inapposite to this Court's position regarding tenants intended to be protected by rent regulation. *See In re Santiago-Montevarde*, 24 N.Y.3d 283 (2014). In relying on the testimony of progressive lawmakers and tenant advocacy groups, none of which favor anything less than continuous regulation and artificially low rents without regard to the consequence that this position has on the quality of housing, DHCR claims "rent stabilization isn't a subsidy, it's a consumer protection." (DHCR Br. 14). That is untrue according to this Court. *See In re Santiago-Montevarde*, 24 N.Y.3d at 289 ("When the rent-stabilization regulatory scheme is considered against the backdrop of the crucial role that it plays in the lives of New York residents, and the purpose and effect of the program, it is evident that a tenant's rights under a rent-stabilized lease are a local public assistance benefit."); *see also Id.* at 290 ("The rent-stabilization program has all the characteristics of a local public assistance benefit."). The RSL was intended to allow people of low and moderate income to

remain in residence in NYC, when they otherwise might not be able to. *See Cmty. Hous. Improvement Program v City of New York*, 492 F. Supp. 3d 33, 52 (EDNY 2020), *aff'd*, 59 F.4th 540 (2d Cir 2023).

DHCR highlights the legislative finding contained in the RSL, which states the housing shortage is "a serious public emergency," and government intervention is necessary.[5] (DHCR Br. 5). The HSTPA made the rent regulation laws permanent; as such, the requirement that these laws be renewed based upon an evaluation of the vacancy rate, was removed – undermining the need to address any "emergency" and preserve "affordable housing," as the law will continue in perpetuity without any reference to outside factors, including renters' income. *See* HSTPA (L 2019, Ch 36, Part A).

A complete review of the exchange contained in the Senate transcript between Acting President and Senator Kavanagh, who led the Senate's efforts to pass the HSTPA as co-prime sponsor, reveals a misconception by the Senate as to how rent regulation operates. *See* Senate Debate on S. 6458 (June 14, 2019). (RC-18). Based upon the remarks of the Acting President, it appears the Senate believed that the rental of rent regulated units was tied to income, which is not the case. As Senator Kavanaugh clarified, "If a landlord chooses to rent a rent-

[5] Appellant submits DHCR's "policy arguments" are an attempt to detract from its inability to reference any statutory support for its actions.

stabilized apartment to a household with a million-dollar income, and if a household with a million-dollar income that presumably could rent many different kinds of apartments chooses to rent a rent-regulated apartment, that transaction would be valid under this law." *Id.* (*See* RC-19 – RC-20).

While Respondent argues *ad nauseum* the "purpose" of the repeal of luxury deregulation to justify its expansion of the legislature's actions, none of which sanctions the Addenda, it loses sight of the fact that the tenants herein are not those who were intended to benefit from rent regulation. "However, the rent stabilization program is an exceptional regulatory scheme that enables a specifically targeted group of tenants to maintain housing in New York City. This uncommon regulatory program reflects the legislative intent to create a benefit for certain individuals who fall below certain income or rent thresholds…".[6] *In re Santiago-Montevarde*, 24 N.Y.3d at 291; *see also Gersten v 56 7th Ave LLC*, 88 A.D.3d 189, 192 (1st Dept 2011) (plaintiffs were "not the typical tenants intended to be protected by rent regulation***.").

Even if the Court were to accept Senator Kavanaugh's remarks that high-income deregulation takes an apartment out of regulation and makes it available for someone with an even higher income, this argument does not undercut the fact

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[6] The RSL does not target its relief to low-income populations, as there is no financial qualification for retaining or obtaining a rent stabilized unit; they are awarded to those who have stumbled across an available unit or by way of inheritance via succession.

that allowing a high-income renter to remain in a rent-stabilized apartment with a lifetime guarantee of renewals, achieves the identical result. Respondent has unequivocally failed to demonstrate any connection between the repeal of high-income deregulation and the need for the 16 apartments herein to remain stabilized to achieve the legislature's purpose.

The RSL and its limitation on rents was never intended to benefit the tenants impacted by the Deregulation Orders, nor is it logical that they should benefit from the repeal date of June 14, 2019, when others whose leases expired even a day before would not be so blessed. The Rent Regulation Reform Act of 1993 (RRRA–93, L. 1993, ch. 253), which granted owners the right to deregulate apartments under certain conditions,

> was an 'attempt to restore some rationality' to a system which 'provides the bulk of its benefits to high income tenants' (Mem of Sen. Kemp Hannon, 1993 NY Legis Ann, at 175). The Act recognizes that '[t]here is no reason why public and private resources should be expended to subsidize rents for these households' (*id.*). To that end, these rent laws specifically provide for deregulation of high-rent accommodations upon vacancy or when occupied by high-income tenants (*see* Administrative Code §§ 26-504.1, 26-504.2, 26-504.3). Clearly, these laws were not intended to protect a high-income tenant who insists on rent stabilization for an extremely spacious multi-room apartment in the desirable Upper West Side.

Noto v Bedford Apartments Co., 21 A.D.3d 762, 765 (1st Dept 2005).

Respondent's argument that landlords deregulated apartments by seeking out a high-income renter, and then employing luxury deregulation is without basis in fact, law, or logic; it is also irrelevant to this appeal. *See* N.Y. State Assembly Standing Comm. on Hous., *Public Hearing on Rent-Regulated Housing* (May 2, 2019) at 163-164. (*See* RC-14 – RC-15). This scenario requires that a rent stabilized apartment was vacant, meaning the prior stabilized tenant who had the right to continuous renewals, was legally evicted or elected (at their option) to vacate, and the unit had a legal rent close to or above the deregulation threshold, which rent was subject to challenge by the incoming tenant. Therefore, while the Attorney General and Assembly members claim that high-income deregulation incentivized owners to abuse the rent regulatory system, thereby circumventing the protections intended by rent stabilization, there is no claim of that here and such vague allegations have absolutely no bearing on the validity of Deregulation Orders granting Appellants the right to deregulate apartments prior to the HSTPA. *Id.*

POINT II

DHCR'S "APPLICATION" OF PART D TO NULLIFY FINAL DEREGULATION ORDERS REQUIRES THE COURT READ LANGUAGE INTO THE REPEAL OF RSL §§ 26-504.1 AND 26-504.3 THAT IS NOT PRESENT

Absent from Part D of the HSTPA is any language sanctioning DHCR's "interpretation" of the repeal of RSL §§ 26-504.1 and 26-504.3. As DHCR avers, "[W]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *Town of Aurora v Village of E. Aurora*, 32 N.Y.3d 366, 372-73 (2018). What is omitted by Part D and the Clean Up Bill is any text that provides the repeal of luxury deregulation supersedes a final Agency order.

A. The Deregulation Orders "officially authorized" deregulation of the apartments when they became final.

Respondent claims that as of the date the HSTPA took effect, there ceased to be any provision of law for an apartment to be deregulated based upon a tenant's income. (DHCR Br. 31). Prospectively, that is true. No application for deregulation could be made effective June 14, 2019. The 16 apartments herein were not deregulated based upon any tenant's income post-HSTPA; the Deregulation Orders issued and became final prior to June 14, 2019. The deregulation of the apartments was therefore accomplished "through regular,

officially authorized means." *See Draper v Georgia Props.*, 94 N.Y.2d 809, 811 (1999). In the absence of any language even hinting at the repeal's applicability to previously issued, final orders, DHCR had no right to deem such language to be present.

The Deregulation Orders did not "appear[] to grant deregulation" of an apartment "contingent upon the expiration of the lease in effect." (DHCR Br. 31). A "contingency" is "[a]n event that may or may not occur in the future; a possibility." *See* Black's Law Dictionary (12th ed. 2024) (Westlaw). The expiration of the leases would occur with complete certainty; no contingency existed. The tenants of the 16 apartments had executed either one- or two-year renewal leases, at their option. *See* RSC § 2522.5(b)(1). Thus, there was absolute certainty that the tenants' leases would expire on a date certain, which date was known to tenants and Appellants.

There was no longer any action for DHCR to take, or any authority to exert upon lease expiration; the orders were self-operative. Without any support, DHCR argues the legal effect of the Deregulation Orders changed when the legislature "stripped" its authority to remove any apartment from regulation based on a tenant's income after June 14, 2019. (DHCR Br. 35). However, DHCR's authority was no longer necessary.

The claim that the Clean Up Bill "reinforced DHCR's interpretation" of Part D and precludes deregulation, is not credible. (DHCR Br. 32). The Clean Up Bill signifies an intention to avoid impacting prior orders of deregulation, as it amended Part D § 8 to read: "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated; * * *." The units herein had lawful, unequivocal Deregulation Orders that were final prior to June 14, 2019.

POINT III

THAT THE TRANSITION IN STATUS TOOK EFFECT AT THE EXPIRATION OF THE LEASES DID NOT UNDERMINE THE VALIDITY OR FINALITY OF THE DEREGULATION ORDERS

DHCR focuses singularly on the language in the Deregulation Orders and RSL § 26-504.3 that provides, "the housing accommodation is deregulated, effective upon expiration of the existing lease," (*e.g.* R. 93). This position fails to account for the fact that the Deregulation Orders issued prior to the HSTPA, and became unchallengeable prior to its enactment. This argument also ignores the fact that the time to challenge an order of luxury deregulation ran from its issuance date, and not the expiration of the lease then in effect. *See* RSC § 2529.2. The expiration of the time to challenge the Deregulation Orders is the critical "temporal scope;" the interplay of lease expiration and the HSTPA is immaterial. Absent any authority, DHCR alleges, "it is irrelevant whether, at the time DHCR issued the

explanatory addenda, the tenants could have challenged the original deregulation orders." (DHCR Br. 36). This remark lacks merit and fails to address DHCR's improper revival of time-barred claims.

The plain language of former RSL §§ 26-504.1 and 26-504.3 did not condition the "effectiveness" of an order of luxury deregulation on the expiration of the lease in effect at the time the order issued. Lease expiration was never a condition precedent. *See* former RSL §§ 26-504.1 and 26-504.3. DHCR's insinuation that the Deregulation Orders were still pending or not fully "effective" as of June 14, 2019 because Tenants' leases had not yet expired is false. The statutory timeframe to challenge the orders was 35-days from the date of the order, not the expiration of the lease in effect at the time. *See* RSC § 2529.2. That time elapsed prior to June 14, 2019. Once the time to appeal expired there was no remaining action that any party could lawfully take to upend the Deregulation Orders.

The Deregulation Orders did not "legally authorize deregulation" at the expiration of the lease. Appellants received the requisite "legal authorization" to deregulate the apartments when the Deregulation Orders became final and binding, pre-HSTPA. Thus, Respondent's contention that the Addenda "did not represent a modification or revocation of a prior order," but rather, "stated the effect of a new statute," is an erroneous legal fiction. (DHCR Br. 18).

POINT IV

DHCR'S RELIANCE ON A PRIOR REGULATION AUTHORIZING MID-LEASE CANCELLATION ASSUMES APPELLANTS SHOULD HAVE PROPHESIZED THE ENACTMENT OF THE HSTPA AND DHCR'S ATTEMPT AT RETROACTIVELY APPLYING IT

Prior to November 7, 2023, RSC § 2522.5(g)(2) authorized an owner to terminate a rent stabilized lease, mid-lease, based upon an order of luxury deregulation, illustrating DHCR's acute awareness that lease expiration never had any bearing on the validity of a deregulation order. DHCR concedes that had Appellants included a cancellation clause in Tenants' leases – which rider would not have altered the substance of the Deregulation Orders – that the same apartments DHCR contends must remain subject to regulation due to lease expiration post-HSTPA, would have unquestionably been deregulated. (DHCR Br. 12; 38).

Respondent argues, albeit illogically, that it was incumbent upon Appellants to have the foresight to include a cancellation clause in the leases once the deregulation petitions were filed with DHCR. (DHCR Br. 38). Appellants had no reason to anticipate the RSL would be amended to eliminate high-income deregulation when they petitioned for it, nor could they have known that DHCR would attempt to annul final and binding Deregulation Orders via an Addenda, months, and in some instances more than a year, after they issued.

The Rent Regulation Reform Act of 1993 added sections 26-504.1 and 26-504.3 to the RSL. Former RSC § 2522.5(g)(2) and DHCR Operational Bulletin 95-3, issued in December 1995, contained changes to the way DHCR interpreted high income deregulation, including authorizing a cancellation clause to be included in the renewal offer that permitted cancellation of the lease 60-days after a deregulation order was issued. (*See* RC-1).

In rent stabilized units, where there was a deregulation petition pending during the renewal "window period,"[7] DHCR authorized a cancellation clause to be included in the renewal offer that provided for the cancellation of the lease 60-days after a deregulation order was issued. *See* former RSC § 2522.5(g)(2); *see also Trumps CPS LLC v Bousquette*, 1998 WL 35427357 (Civ Ct New York County 1998) ("DHCR's recently promulgated Operational Bulletin 95-3, provides that said renewal shall, *inter alia*, no longer be in effect sixty (60) days after the issuance by DHCR of an order of deregulation. The effect of such order would mean that the annexed renewal lease would be revoked, null, void, and of no effect in the event DHCR denies the tenant's PAR. The Operational Bulletin also permits the inclusion of a Rider setting forth these provisions."). In the event a PAR was filed against such order (*i.e.*, a tenant challenged the order), the renewal lease

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[7] The "window period" refers to RSC § 2523.5(a), which governs the notice and procedure for renewal leases and requires an owner to notify the tenant not more than 150 and not less than 90 days prior to the end of the lease term, of the expiration of the lease, and offer to renew.

would terminate 60-days after issuance of an order dismissing or denying the PAR. *See* former RSC § 2522.5(g)(2).

This policy permitted the owner, at its exclusive option, to offer a separate rider that provided for the substitution of an unregulated lease upon the issuance of an order of deregulation, which rider would not be subject to approval by DHCR. *See* Operational Bulletin 95-3. (RC-8). Where the tenant accepted such lease, the unregulated lease would become effective on the first rent payment date occurring 60-days after the issuance of the deregulation order, or after 60-days from the issuance of an order dismissing or denying a PAR filed against such order. *Id.*

Thus, even if DHCR's theory that the Addenda constituted a general statement of guidance was accurate, which it is not, RSC § 2522.5(g)(2) and prior guidance, reveals no lease expiration "contingency" ever existed.

POINT V

RESPONDENT FAILED TO REFUTE THE RETROACTIVE IMPACT OF ITS ADDENDA

The matters before the Court do not involve prospective claims; rather, the relief was already granted by the Deregulation Orders, effective as of a date certain, that being upon lease expiration. Appellants have not asserted any future claims, since all that is involved is a past claim, namely, entitlement to 16 deregulated apartments pursuant to the law in effect at the time Appellants acted and received self-operative Deregulation Orders.

As to retroactivity, DHCR aptly quotes *Regina*, which provides that a statute is retroactive only if "it would impair rights a party possessed when he acted…". *Regina*, 35 N.Y.3d at 365, quoting *Landgraf v USI Film Prods*., 511 U.S. 244, 273 (1994). When Appellants acted, meaning, when the petitions were filed, and the 16 Deregulation Orders issued and became final, Appellants possessed the right to treat the apartments as deregulated upon lease expiration. As DHCR concedes, the orders were lawful at the time each issued. (DHCR Br. 35). The HSTPA eliminated a landlord's right to petition for high-income deregulation prospectively from its effective date. Yet the Addenda, having annulled the Deregulation Orders in whole, had the same effect as if Appellants lacked the right to apply for luxury deregulation prior to the enactment of the HSTPA.

DHCR falsely claims "application" of Part D through issuance of the Addenda was "purely prospective." (DHCR Br. 39). DHCR's focus on the fact that the Tenants' leases expired after the enactment of the HSTPA on June 14, 2019, does not make the Addenda or its impact prospective. The repeal of RSL § 26-504.3, as "applied" through the Addenda, clearly affects previously granted relief, and thus, did have a "problematic retroactive effect."

As detailed in Appellants' principal Brief, this Court, in *Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Cmty. Renewal*, 10 N.Y.3d 474 (2008), could never have envisioned that DHCR would use it as a

sword, not a shield, to rescind Appellants' vested rights. Respondent misconstrues Appellants' position, as Appellants have never argued any legal entitlement to the continuation of the RSL as written; rather, Appellants have a vested right that stems directly from final and binding Deregulation Orders.[8] The issue addressed in *IG Second Generation Partners L.P.* varied vastly from that herein. There, this Court held DHCR does not have the authority to forgive rent arrears that accrued during the pendency of an unusually protracted fair market rent appeal ("FMRA"). The Court further determined that DHCR's application of RSC § 2522.3, as amended, and although potentially prejudicial to the tenant, was proper. Markedly, when RSC § 2522.3 was amended to permit DHCR to use a broader comparability standard for FMRAs, the proceeding was still actively pending as it was on remand from an article 78. This supports Appellants' position that the repeal of the luxury deregulation provisions, which occurred after the Deregulation Orders were final and unappealable, cannot be applied here.

As DHCR acknowledged, this Court held that most parts of the HSTPA, unlike Part F (which this Court held could not be applied retroactively), would not

[8] DHCR's reliance on *I.L.F.Y. Co. v City Rent & Rehabilitation Admin*., 11 N.Y.2d 480, 490-91 (1962), is misguided, as this Court held, "Appellants' assertion that the application of the city law to their pending applications is unconstitutional was conclusively answered in the first *I.L.F.Y. Co.* appeal (10 NY2d 263, 270, supra): 'appellant did not have in any particular rule an interest so vested as to entitle it to keep the rule unchanged' (internal citations omitted)." The Deregulation Orders herein were not "pending applications" when the law changed, but final orders.

be subject to a retroactive challenge because the plain text of those provisions were purely prospective and thus, the temporal reach was clear. *See Regina*, 35 N.Y.3d at 373 ("The legislation is almost entirely forward-looking – only Part F's effective date provision contains language referring to prior claims."). "Forward-looking" does not equate to granting DHCR permission to revoke rights previously granted. By annulling the right to seek high-income deregulation effect immediately, the HSTPA removed the device whereby such relief could be sought. Reading anything further into Part D is impermissible, and not "forward-looking."

Respondent makes the curious claim that, "unlike in *Regina*, the application of the HSTPA at issue here is cabined to a finite universe of cases in which existing leases had not yet run on the HSTPA's effective date." (DHCR Br. 45). Respondent continues, "In assessing whether a statute's application is improperly retroactive, 'the relationship between the length of the retroactivity period and its purpose is critical.'" *See Regina*, 35 N.Y.3d at 376. (DHCR Br. 45).

First, it makes no difference how "finite" the "universe of cases" is; whether only a certain number of matters may be similarly affected does not entitle DHCR to pervert the RSL, or apply a statute retroactively to destroy vested rights. Second, to the extent DHCR argues the length of the retroactivity period is pertinent, it contradicts all prior claims that the Addenda did not involve retroactivity. DHCR asserts, even if its application of Part D were viewed as

retroactive, "it would be at most a brief period of retroactivity that served the purposes of the HSTPA and the overall statutory scheme." (DHCR Br. 45). Appellants submit this is patently absurd. In fact, despite DHCR's argument that its actions did not amount to retroactive application of the repeal of luxury deregulation, Respondent nevertheless goes to great lengths to argue that, under the circumstances, retroactivity is permissible.

Respondent mistakenly attempts to distinguish precedent issued by this Court, and relied upon by Appellants, which establishes that the law in effect at the time Appellants acted must be applied. *See Matter of Shafer v Gabel*, 16 N.Y.2d 513, *decision clarified*, 16 N.Y.2d 1078 (1965). Respondent contends there is no hard-and-fast rule as to when the legislature intends a newly enacted statute to apply to a pending proceeding. The glaring error with DHCR's rationale is that none of the Deregulation Orders were pending at the time the HSTPA was enacted; rather, there is no dispute the orders were final and non-challengeable. DHCR impermissibly re-opened the proceedings through the Addenda, revived time-barred claims, and then applied a new statute to prior transactions completed, despite the absence of any language in the statute (or suggestion by the legislature) authorizing this action; this unequivocally implicates the harms of impermissible, retroactive application and is prohibited. *See Regina; see also Landgraf*, 511 U.S. 244; *Matter of County of St. Lawrence v Daines*, 81 A.D.3d 212 (3d Dept 2011).

Ironically, Respondent directs the Court to *Matter of Partnership 92 LP v State of N.Y. Div. of Hous. & Cmty. Renewal*, 11 N.Y.3d 859, 860 (2008), wherein the Court held, "the Rent Regulation Reform Act of 1997 (L 1997, ch 116) applies to any proceeding that was pending before the New York State Division of Housing and Community Renewal at the time of its enactment." This holding directly supports Appellants' position, since again the deregulation proceedings were not pending when the HSTPA was enacted.

Respondent's reliance on *Landgraf*, 511 U.S. 244, for the proposition that a court reviewing a retroactivity challenge should apply ordinary judicial principles concerning the application of new rules to pending cases and pre-enactment conduct, is similarly misplaced. In relying on these criteria, DHCR ignores the fact that its actions did not involve "pending cases," but rather was an attempt to uproot final orders for which no challenge remained. As to "pre-enactment conduct," DHCR does not and cannot argue that Part D is applicable to anything that occurred prior to June 14, 2019, since the statute states it is effective "immediately."

DHCR's attempt to distinguish *Matter of Harris v Israel*, 191 A.D.3d 468 (1st Dept), *lv. dismissed*, 37 N.Y.3d 1011 (2021), further exposes the flaws in its position. Respondent relies on the fact that the owner in *Harris* had obtained a final judgment of possession before the enactment of Part I of the HSTPA, and a

warrant of eviction that terminated the tenancy; thus, the HSTPA was inapplicable. By way of analogy, if that matter had been before DHCR and the Agency chose to act as it has herein, it would have annulled the judgment as it has the Deregulation Orders, and there would have been no basis for the warrant of eviction. DHCR relies upon a distinction without a difference.

POINT VI

DHCR FAILED TO REFUTE THE FACT THAT IT NEVER POSSESSED THE REQUISITE AUTHORITY TO ISSUE THE ADDENDA

Nothing contained in Part D of the HSTPA confers upon DHCR the right to annul previously issued, final orders of deregulation. As such, and contrary to Respondent's claim, DHCR did not "enforce the plain text of [the] statute directly." (DHCR Br. 48).

Reference to RSC § 2527.11(b), which permits DHCR to render "advisory opinions" and "interpretative opinions and explanatory statements of general policy of the Commissioner, including Operational Bulletins, with respect to the RSL and this Code," is irrelevant, as the Addenda fails to fall within any such criteria. In attempting to circumvent this fact, DHCR argues the Addenda falls "comfortably within that authority, as it informed relevant stake-holders of the effect of the HSTPA's immediate repeal of high-income deregulation." (DHCR Br. 49). This Code provision does not authorize issuance of an appealable order by DHCR labeled an "Addenda," which operated as a superseding order to negate

previously issued, final Deregulation Orders at a time when no lawful mechanism to do so was available. Unlike the opinions and explanatory statements authorized by RSC § 2527.11(b), the Addenda were appealable. Mere opinions and statements authorized by this Code section are not.

Respondent similarly fails to refute that its only authority for changing the terms of an order is governed by RSC § 2529.9, which provides DHCR's Commissioner "may, prior to the date that a proceeding for judicial review has been commenced in the supreme court pursuant to Article 78 of the Civil Practice Law and Rules, issue a superseding order modifying or revoking any order issued by him under this or any previous code where he finds such order was the result of illegality, irregularity in vital matters or fraud." DHCR has never claimed the Addenda is grounded in the criteria provided by RSC § 2529.9 (none of which apply), or that it retained any authority pursuant thereto, since at the time the Addenda was issued, the time to commence an article 78 proceeding had expired.

A. A subsequent amendment to the RSC that "authorized" the Addenda substantiates the lack of authority DHCR possessed at the time it acted.

DHCR misapprehends Appellants' argument with respect to the November 8, 2023 amendments to the RSC. *See* RSC §§ 2520.11(s)(1) and (2). Appellants have not argued that DHCR was required to amend the Code before it issued the Addenda. What Appellants have asserted is threefold, that being, (i) there was no authority to issue the Addenda at the time it issued; (ii) DHCR's enactment of the

amendments to the Code is an acknowledgment that it had no authority to issue the Addenda at the time it did, and thus, the subsequent Code amendments cannot retroactively cure that omission; and (iii) the Code amendments are invalid as they cannot right the wrong of DHCR's attempt to vitiate final Deregulation Orders that issued before the enactment of the HSTPA.

The question remains as to why DHCR needed to amend the RSC after it had already acted if it truly believed it possessed the authority to issue the Addenda. Assuming the amendment was proper (which is not the case), it cannot be applied retroactively to conduct that occurred prior to its passage. DHCR attempts to set an exceedingly dangerous precedent in acting first and seeking a Code amendment authorizing that action later. An amendment to the RSC requires compliance with the New York State Administrative Procedure Act ("SAPA"). Any finding that sanctions DHCR to act beyond its authority to destroy rights previously granted, without first going through the lawful process, simply makes no sense, especially considering there is never a guaranty that an amendment will satisfy SAPA or be adopted.

RSL § 26-511(b) provides for DHCR's right to promulgate Code amendments provided, "No provision of such code shall impair or diminish any right or remedy granted to any party by this law or any other provision of law." Thus, the belated code amendment could not affect the previously issued

Deregulation Orders, even if the amendment had been in effect at the time the Addenda issued.

POINT VII

DHCR'S ADMITTED FAILURE TO ADHERE TO THE STATUTE GOVERNING THE PROCESSING OF THE 2016 DEREGULATION PETITIONS CONSTITUTES NEGLIGENCE PER SE

DHCR's unilateral decision not to comply with the mandatory statutory timeline constitutes negligence per se. As this Court recognized in *Elliot*, 95 N.Y. 2d at 734, "[a]s a rule, violation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability."

With respect to the two 2016 Deregulation Orders, DHCR admittedly failed to act timely. DHCR points out that the governing statute provided it "shall, within thirty days after the filing, issue an order providing that such housing accommodation shall not be subject to the provisions of [the RSL] upon the expiration of the existing lease." *See* former RSL § 26-504.3. (DHCR Br. 10). The ordinary meaning of the word "shall," denotes "a duty" or more broadly "a requirement." *See* Black's Law Dictionary (11th ed. 2019) (Westlaw). This is the mandatory sense that drafters typically intend and that courts uphold. *Id.*

DHCR's claim that its overt disregard of the statutory timeline in processing the 2016 luxury deregulation petitions does not constitute a negligent or willful delay is belied by its reliance on case law interpreting time limits contained in

statutory provisions that are directory. (DHCR Br. 59). The statute at issue, former RSL § 26-504.3, employs the word "shall," denoting a mandatory – not discretionary, duty. Accordingly, DHCR's reliance on case law that provides, "[t]he ordinary and default rule is that statutory time limits for the conduct of government business are directory, not mandatory," when the plain text of the statute is non-discretionary, is incorrect and inapplicable. *See* former RSL § 26-504.3. (DHCR Br. 59).

Appellants never argued that Respondent's non-compliance with the statutory timeline memorialized in former RSL § 26-504.3 divested DHCR of its jurisdiction to adjudicate luxury deregulation petitions. (DHCR Br. 59). This statement by DHCR is illogical; Appellants are not challenging the issuance of final orders that granted the relief they sought. The fact that DHCR had jurisdiction to grant the requested relief, despite blatantly failing to comply with the statutory time limits is not at issue; the effect of its failure is.

A. DHCR misprocessed the 2016 petition for Apt. 5C, having processed it under the wrong provision of law.

DHCR did not just inordinately delay the 2016 petition with respect to Apt. 5C; DHCR misprocessed the petition under an incorrect provision of law. DHCR adjudicated the 2016 petition pursuant to former RSL § 26-504.3(c), instead of RSL § 26-504.3(b), despite the fact that the Tenant admitted an income in excess of the deregulation threshold in the two preceding calendar years (2014 and 2015),

which mandated a deregulation order issue by June 5, 2016. (R. 809-812). In defense of its actions, DHCR asserts that Appellant should now lose out on the proper deregulation of this apartment because it elected to deviate from explicit statutory provision that it was required to implement. This does not warrant the Court to infer negligence, it is a clear-cut example of negligence.

Appellant also had no notice of DHCR's mishandling of this petition, having first learned of DHCR's purported Requests for Information with mailing dates of January 16, 2017, March 1, 2017, and June 16, 2017 when the PAR Order issued. (R. 766; 791).

B. An objection to an issue of law may be raised on appeal.

Clermont York is not procedurally barred from challenging DHCR's failure to comply with former RSL § 26-504.3 in the context of Index No. 157776/20, involving Apt. 30G. "An issue may be raised for the first time on appeal [where] it is one of law appearing on the face of the record…could not have been avoided had it been raised at the proper juncture." *See Opalinski v City of New York*, 110 A.D.3d 694, 696 (2d Dept 2013), citing *Matter of Bayley Seton Hosp. v New York City Water Bd.*, 66 A.D.3d 270 (2d Dept 2009). DHCR's position regarding the Addenda is purely a legal argument, pursuant to which DHCR erroneously contends the HSTPA "stripped" it of the ability to deregulate the apartments. Unfortunately for Respondent, that language does not exist in Part D. Further, and

as acknowledged by DHCR, both the Supreme Court and the Appellate Division reached this issue on the merits. (R. 27; 2115).

C. Respondent's defense to misprocessing the 2016 petitions is a frivolous attempt to shift blame to Appellants for not policing its actions.

Instead of articulating a legally cognizable basis upon which the Court may sustain DHCR's mishandling of the 2016 luxury deregulation petitions, DHCR seeks to shift its burden to comply with the RSL on Appellants. Respondent's argument that Appellants failed to challenge the Agency's misprocessing of the petitions under the wrong provision of the law and/or the processing delays while the proceedings were before the Rent Administrator, seeks to penalize Appellants for DHCR's misconduct and a lack of hindsight.

DHCR's argument that Appellant did not challenge its misprocessing is nonsensical, since the ultimate result of the 2016 proceedings – the deregulation of Apts. 5C and 30G – were proper. When the 2016 Deregulation Orders issued on May 23, 2018 and April 5, 2019, respectively, although admittedly late, there was no way Appellants could have anticipated that these orders would be retroactively rescinded by DHCR's "application" of the HSTPA, in one instance, over a year later. (R. 896; 2158).

CONCLUSION

The Orders of the Appellate Division, First Department should be reversed with the Addenda at issue being declared a nullity.

Dated: Williston Park, New York
July 3, 2024

HORING WELIKSON ROSEN &
DIGRUGILLIERS PC

By: Jillian N. Bittner, Esq.
Attorneys for Petitioners-Appellants
11 Hillside Avenue
Williston Park, NY 11596
(516) 535-1700

NEW YORK STATE COURT OF APPEALS
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, 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.

On July 5, 2024

deponent served the within: **Reply Brief for Petitioners-Appellants**

upon:

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
Attorneys for Respondent-Respondent
28 Liberty Street, 23rd Floor
New York, New York 10005
Tel.: (212) 416-8014
Fax: (212) 416-8962
matthew.grieco@ag.ny.gov

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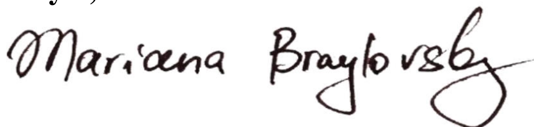

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