To be argued by:
MATTHEW W. GRIECO
20 minutes requested

State of New York
Court of Appeals

APL-2023-00147

In the Matter of the Application of

160 EAST 84TH STREET ASSOCIATES, LLC,

Petitioner-Appellant,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent,

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

Supreme Court, New York County, Index No. 157576/20
First Department No. 2021-00718

(*captions continue inside front cover*)

BRIEF FOR STATE RESPONDENT IN RESPONSE TO AMICUS CURIAE

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Dated: September 26, 2024

(*captions continue from front cover*)

APL-2023-00148

In the Matter of the Application of
160 EAST 84TH STREET ASSOCIATES, LLC,
Petitioner-Appellant,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
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Supreme Court, N.Y. County, Index Nos. 157558/20, 157560/20, 157579/20, 157582/20
First Department Nos. 2021-02603, 2021-02604, 2021-02605, 2021-02606

APL-2023-00149

In the Matter of the Application of
160 EAST 84TH STREET ASSOCIATES, LLC,
Petitioner-Appellant,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Respondent-Respondent,

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

Supreme Court, N.Y. County, Index No. 157557/20
First Department Nos. 2021-02556, 2021-03885, 2021-03891

APL-2023-00150

In the Matter of the Application of
1700 YORK AVENUE ASSOCIATES, LLC,
Petitioner-Appellant,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Respondent-Respondent,

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

Supreme Court, N.Y. County, Index No. 157893/20
First Department No. 2021-03068

APL-2023-00151

In the Matter of the Application of
87TH STREET SHERRY ASSOCIATES, LLC,
Petitioner-Appellant,
v.
NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Respondent-Respondent,
For a Judgment Pursuant to Article 78 of
the Civil Practice Law & Rules.

Supreme Court, N.Y. County, Index Nos. 153992/20, 153997/20, 154002/20
First Department Nos. 2021-02679, 2021-02680, 2021-02681

APL-2023-00152

In the Matter of the Application of
87TH STREET SHERRY ASSOCIATES, LLC,
Petitioner-Appellant,
v.
NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Respondent-Respondent,
For a Judgment Pursuant to Article 78 of
the Civil Practice Law & Rules.

Supreme Court, N.Y. County, Index No. 153995/20
First Department No. 2021-00655

APL-2023-00153

In the Matter of the Application of
87TH STREET SHERRY ASSOCIATES, LLC,
Petitioner-Appellant,
v.
NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Respondent-Respondent,
For a Judgment Pursuant to Article 78 of
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Supreme Court, N.Y. County, Index No. 153999/20
First Department No. 2021-00644

APL-2023-00154

In the Matter of the Application of
CLERMONT YORK ASSOCIATES, LLC,
Petitioner-Appellant,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Respondent-Respondent,

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

Supreme Court, N.Y. County, Index No. 157776/20
First Department No. 2021-03069

APL-2024-00003

In the Matter of the Application of
160 EAST 84TH STREET ASSOCIATES, LLC,
Petitioner-Appellant,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Respondent-Respondent,

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

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PRELIMINARY STATEMENT

The New York State Division of Housing and Community Renewal (DHCR) submits this brief in response to the amicus brief of the New York Apartment Association, Inc.[1] *See* Court of Appeals Rules of Practice (22 N.Y.C.R.R.) § 500.12(f). The Association's arguments provide no reason to disturb the First Department's well-reasoned orders, which this Court should affirm.

The Association's arguments disregard the plain language of the former Rent Stabilization Law (RSL) provisions at issue here, which stated that an order removing an apartment from rent stabilization would become effective only upon the expiration of the current lease. Contrary to the Association's contention, DHCR did not improperly read new deregulation criteria or exceptions into the law; DHCR simply followed the statute's requirements for when a deregulation order takes effect, consistent with history and long-standing practice.

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[1] After moving for amicus curiae relief as the Rent Stabilization Association of New York City, amicus informed the Court that it has changed its corporate name to the New York Apartment Association, Inc. This brief will simply refer to amicus as "the Association."

The Association's reliance on cases about the finality of agency determinations is also misplaced, as the precedents it cites do not involve circumstances where the Legislature changed the statutory scheme before an administrative order took effect.

ARGUMENT

DEREGULATION ORDERS, BY LAW AND BY THEIR OWN TERMS, TOOK EFFECT ONLY UPON LEASE EXPIRATION

The Association's principal argument (Amicus Br. at 8-12) is that DHCR improperly added a third "criterion" of lease expiration to the statutory requirements for high-income deregulation, or created a new "exception" to deregulation. The Association is mistaken. As DHCR has explained, the criteria that the Association and appellants portray as criteria for *deregulation* are in fact criteria for *issuance of an order* that would contain specific provisions—and those provisions neither include nor allow for immediate deregulation. See Br. for Resp't (Resp't Br.) at 34.

The former high-income deregulation statute provided that, once the total annual income of the tenant household and the legal regulated rent of the apartment have reached the required thresholds,

DHCR would 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." RSL § 26-504.3(b) (eff. until June 14, 2019). Tracking the statute, DHCR's deregulation orders consistently stated that apartments deregulation would occur "effective upon the expiration of the existing lease." (*See, e.g.*, R. 93.)

Because the statute required the order to specify a future date on which the RSL would cease to apply to the apartments—and because the Legislature abolished deregulation before that future date arrived for the apartments here—the apartments remain subject to the RSL. DHCR thus neither added criteria to the statute nor created an exception, but adhered to the plain language of the statute and its own preexisting orders regarding effective dates.

The Association's counterarguments are not persuasive. The Association invokes the principle that a court or agency may not add words to a plainly worded statute (Amicus Br. at 9), but neither DHCR nor the courts below did any such thing. To the contrary, the Association's interpretation erroneously reads words out of the

statute by ignoring the statute's express statement of the date of prospective deregulation.

To the extent that the Association suggests that DHCR wrongly added to the statutory exceptions to deregulation provided in the former RSL § 26-504.1, it is incorrect.[2] That section pertained to situations where a housing unit might be exempt from the total annual income or legal regulated rent thresholds; by contrast, the timing of when a deregulation order became effective was addressed in a separate section, RSL § 26-504.3, and was a standard rule to apply in all cases, not an exception.

Also unpersuasive is the Association's reliance on historical DHCR documents stating that if rent and income thresholds were met, apartments "'could be deregulated by order of the DHCR.'" Amicus Br. at 9 n.4 (quoting DHCR, Fact Sheet # 36, *Historical Deregulation Rent and Income Thresholds* 1 (Aug. 2024)). Indeed, the source the Association cites provides further confirmation that

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[2] DHCR understands the Association's references to RSL § 26-501.1 (Amicus Br. at 9) to refer to RSL § 26-504.1, as § 26-501.1 does not exist.

deregulation of an occupied apartments would occur prospectively, because the deregulation could only occur according to the terms of a DHCR order. *See* DHCR, *Historical Deregulation Rent and Income Thresholds*. Similarly, it is irrelevant that the Legislature never changed the criteria for deregulation in amendments over the years (*contra* Amicus Br. at 12), because the issue here is when deregulation was to occur, not what criteria would lead to a deregulation order.

Nor is the Association correct to argue (Amicus Br. at 14-16) that when DHCR issued a deregulation order under the former RSL, the apartment was immediately deregulated, with the time remaining on the lease merely a grace period for the tenant's benefit. Deregulation has long been understood as prospective, with a DHCR order setting a date on which deregulation would occur. The prospective nature of deregulation is plain not only from the face of the statute and the text of DHCR's orders, but also from historical evidence. Documentation from many years before the 2019 repeal of deregulation, to say nothing of the administrative determinations challenged here, confirm a longstanding acceptance

that the date of deregulation was the date of lease expiration. For example, in an appellate brief filed in the First Department in 2005, DHCR explained that regardless of how any apartment qualified for high-income deregulation, "in every situation the effective date is upon expiration of the lease in effect when the finding of deregulation is made." Br. for Cross-Resp't DHCR, *Matter of Lacher v. New York State Div. of Hous. & Community Renewal*, 25 A.D.3d 415 (1st Dep't 2006) (No. 7550), 2005 WL 5924398, at *4.

For many years, moreover, an owner with a pending deregulation petition who wished to be able to quickly obtain a new tenant after deregulation was permitted to insert a rider into the tenant's lease stating that the lease, if accepted, would expire 60 days after an order of deregulation (or 60 days after an administrative appeal determination, if any). 9 N.Y.C.R.R. § 2522.5(g)(2) (eff. until Nov. 7, 2023); see Resp't Br. at 12 (discussing regulation). The rider regulation, too, reflected a historical understanding that deregulation would occur on the date of lease expiration—because it provided an owner with a means to secure that expiration

quickly, should a deregulation petition prevail.[3] Although the Association argues that a lease typically dictates possessory rights rather than regulatory rights (Amicus Br. at 16), the Legislature has the authority to enact a statute that ties a regulatory outcome to a contractual term such as lease duration—and the Legislature did so in the former RSL provisions at issue here.

The Association also incorrectly focuses on the asserted administrative finality of the deregulation orders, rather than the actual content of the orders or the statute. As DHCR explained below and as the First Department correctly understood (*see* R. 8-9, 88-89), the explanatory addenda were an informational statement about the effect of a new statute on orders that had not yet reached their effective dates. Moreover, DHCR did not reopen its own proceedings or exercise discretion in issuing the explanatory

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[3] Indeed, that is exactly what happened in *Lacher*. Agreeing with DHCR that "deregulation is prospective in nature," the First Department concluded that because a sixty-day rider had been placed in the most recent offered lease, "the effective date of deregulation" was sixty days after DHCR decided the parties' administrative appeals—in other words, when the rider caused the lease to expire. *Matter of Lacher v. New York State Div. of Hous. & Community Renewal*, 25 A.D.3d 415, 417 (1st Dep't 2006).

addenda—rather, DHCR responsibly notified stakeholders of a change already effected by the Legislature. (*See* R. 88-89.)

The Association argues (Amicus Br. at 10-11) that the explanatory addenda violated principles of administrative finality because the tenants of the apartments at issue could no longer have challenged the deregulation orders at the time DHCR issued the explanatory addenda, and the owners are therefore entitled to deregulation. This argument fails because, as DHCR has explained (Resp't Br. at 36), it was the Legislature that made the deregulation orders inoperative by abolishing deregulation. No tenant action was necessary to make DHCR's original orders ineffective following the Legislature's abolition of deregulation, because deregulation of a rent-stabilized apartment may occur only where the Legislature has provided for deregulation by statute. *See Draper v. Georgia Props.*, 94 N.Y.2d 809, 811 (1999). After the 2019 amendments, deregulation was unavailable independent of any administrative act or omission by DHCR.

The finality precedents cited by the Association (Amicus Br. at 10) do not help the Association here because none deals with a

circumstance where the Legislature amended or abolished the statute that would previously have authorized a challenged agency order. At most, the Association's cases pertain to when a party to a particular case may appeal or challenge an agency order. *See Matter of Essex County v. Zagata*, 91 N.Y.2d 447, 452-55 (1998); *Matter of Rosado-Ciriello v. Board of Educ. of the Yonkers City Sch. Dist.*, 219 A.D.3d 839, 840-41 (2d Dep't 2023); *Matter of Guido v. Town of Ulster Town Bd.*, 74 A.D.3d 1536, 1537 (3d Dep't 2010). But when the legislative branch passes new legislation that makes a substantive change to an entire statutory scheme, the agency may and should notify affected persons of the new enactment's effect on their interests. *See Atkins v. Parker*, 472 U.S. 115, 129-30 (1985).

CONCLUSION

This Court should affirm the First Department's decisions and orders in these consolidated appeals.

Dated: New York, New York
September 26, 2024

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Matthew W. Grieco, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 1,619 words, which complies with the limitations stated in § 500.13(c)(1).

Matthew W. Grieco
Matthew W. Grieco

AFFIRMATION OF SERVICE

Ava L. Mortier, affirms upon penalty of perjury in New York, which may include a fine or imprisonment, that the following is true:

I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the Respondent herein.

On September 26, 2024, I served by U.S. Postal Service first-class/priority mail three copies of the accompanying Brief for Respondent upon the following named person(s):

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