New York County Clerk's Index No. 157576/20
Appellate Division–First Department Case No. 2021-00718

# 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.*

## MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS
STATE OF NEW YORK

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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
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Respondent-Respondent.

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**NOTICE OF MOTION**

App. Div. First Dept.
Docket No.: 2021-00718

Supreme Court, NY County
Index No.: 157576/2020

**PLEASE TAKE NOTICE**, that upon the Affirmation of Jillian N. Bittner, Esq., dated May 1, 2023, the exhibits annexed hereto and upon all the pleadings and proceedings heretofore had herein, Petitioner-Appellant 160 East 84th Street Associates LLC will move this Court, at the Courthouse located at 20 Eagle Street, Albany, New York on May 15, 2023 at 9:30 A.M. or as soon thereafter as Counsel may be heard, for an Order pursuant to CPLR 5602(a)(1)(ii) and Rule (9 NYCRR) 500.22 granting Appellant leave to appeal to this Court from the Order of the Appellate Division, First Department, entered February 24, 2022, which affirmed the Order of the Supreme Court of the State of New York, County of New York (Hon. Carol R. Edmead, J.), entered on January 19, 2021, under Index No. 157576/20 that denied Appellant's Article 78 proceeding.

Dated: Williston Park, New York
May 1, 2023

Yours, etc.

HORING WELIKSON ROSEN &
DIGRUGILLIERS PC

By: _____
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TO: New York State Division of
Housing and Community Renewal
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COURT OF APPEALS
STATE OF NEW YORK

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

Petitioner-Appellant,

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NEW YORK STATE DIVISION OF HOUSING
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**AFFIRMATION IN SUPPORT**

App. Div. First Dept.
Docket No.: 2021-00718

Supreme Court, NY County
Index No.: 157576/2020

JILLIAN N. BITTNER, ESQ., an attorney duly licensed to practice law in the State of New York, affirms the following statements to be true under the penalties of perjury:

## PRELIMINARY STATEMENT

1. I am a member of Horing Welikson Rosen & Digrugilliers PC, attorneys for Petitioner-Appellant 160 East 84th Street Associates LLC ("Appellant"). As such, I am fully familiar with the facts and circumstances set forth below.

2. This affirmation is submitted in support of Appellant's motion for an order pursuant to CPLR 5602(a)(1)(ii) and Rule (9 NYCRR) 500.22 granting leave

to appeal to this Court from the Order of the Appellate Division, First Department entered February 24, 2022. *See* Exhibit A.

3. The Appellate Division affirmed the Order of the Supreme Court of the State of New York, County of New York (Hon. Carol R. Edmead, J.), entered on January 19, 2021, assigned Index No. 157576/20, which denied the Article 78 proceeding commenced against New York State Division of Housing and Community Renewal ("DHCR"), to annul DHCR's issuance, *sua sponte*, of a purported "Explanatory Addenda to Order" ("the Addenda"), which nullified the Agency's previously issued, final and binding, deregulation order based upon high rent/high income.

4. The Addenda erroneously retroactively applied Part D of the Housing Stability and Tenant Protection Act of 2019 ("the HSTPA") (L 2019, Ch 36, Part D, § 8) to vitiate the luxury deregulation order, months after it had become final and binding, and was no longer subject to appeal or any other challenge.

5. This motion for leave should be granted not merely because the conclusion of the Appellate Division is not supported by law, namely former Rent Stabilization Law of 1969 (Administrative Code of the City of NY) §§ 26-504.1 and 26-504.3 ("RSL"), in effect at the time Appellant filed and obtained the luxury deregulation order at issue, but because allowing it to stand would sanction DHCR's egregious abuse of authority and blatant retroactive misapplication of Part

D of the HSTPA that repealed the luxury deregulation provisions of the RSL, effective June 14, 2019.

6. There is no language in the repeal of RSL § 26-504.3 to remotely suggest that the Legislature intended Part D to impact, let alone vitiate, a previously issued final and binding order of deregulation that was lawfully issued under that statute and was no longer subject to challenge.

7. Rather, what is clear from the repeal of that section of the RSL is that deregulation may no longer be applied for based upon high rent/high income.

8. The effect of that repeal was limited by Part Q § 10 of Ch. 39 of the Laws of 2019 (colloquially referred to as the "Clean Up Bill"), which amended Part D § 8 of HSTPA to read as follows: "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated; * * *."

9. Yet, DHCR employed this prospective change in the law to unilaterally rescind a final order of luxury deregulation, by contending that the HSTPA's enactment date constitutes the "cut-off" to determine whether an apartment with a final order of luxury deregulation (not challenged by any party), could ultimately and actually be deregulated.

10. DHCR achieved this through issuance of an alleged Addenda, purportedly intended to "explain" the impact of Part D of the HSTPA, and which absent any support from the statute, provides,

> On January 07, 2019, the RA issued an order to [the] above parties with respect to the owner's application for high rent/high income deregulation.
>
> * * *
>
> If the lease in effect on the day the Rent Administrator's deregulation order was issued expired before June 14, 2019 the housing accommodation is deregulated.
>
> If the rent stabilized lease in effect on the day the Rent Administrator's deregulation order was issued expires on or after June 14, 2019, the housing accommodation remains regulated to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated.

(R. 64-66).

11. DHCR's erroneous revocation of a final order of deregulation through this Addenda, was further compounded when the Supreme Court and thereafter, Appellate Division incorrectly adopted DHCR's proposition that lease expiration was a condition precedent for the deregulation of an apartment, despite there never being any such requirement in the law. *See* former RSL § 26-504.3.

12. Accordingly, this case raises crucial issues regarding proper application of the HSTPA, an issue this Court is intimately familiar with and uniquely equipped to address, and which issue not only pertains to Appellant, but

similarly situated landlords who received luxury deregulation orders at a time when the tenant's lease then in effect would expire on or after June 14, 2019, the effective date of the HSTPA's repeal of luxury deregulation.

## PROCEDURAL HISTORY

A. Timeliness of Motion for Permission to Appeal

13. Appellant seeks leave to appeal to this Court from the Order of the Appellate Division, First Department, entered February 24, 2022. *See* Exhibit A.

14. DHCR served Appellant with the Order, with Notice of Entry (via NYSCEF) on April 12, 2023. As such, the within motion is timely.

B. CPLR Article 78 Proceeding

15. On September 17, 2020, Appellant commenced an Article 78 proceeding before the Supreme Court, New York County against DHCR by Notice of Petition and Verified Petition, seeking an order nullifying DHCR's Deputy Commissioner's Order as arbitrary, capricious and contrary to law, and reinstating the luxury deregulation order for the 2018 filing period. (R. 25-97).

16. Appellant is the landlord of the residential apartment building located at 160 East 84th Street, New York, New York (the "Building").

17. Appellant obtained a luxury deregulation order for the 2018 filing period, with respect to Apartment 12G at the Building, pursuant to an Order of

Deregulation based on Tenant Admission issued by the Rent Administrator, dated January 7, 2019 ("the Deregulation Order"). (R. 61-63).

18. Tenants had a rent in excess of the applicable threshold and admitted an income in excess of $200,000 in each of the two preceding calendar years (2016 and 2017). (R. 61-63; 120-125).

19. The Deregulation Order stemmed from a luxury deregulation petition that was filed, granted and became final when high rent/high income deregulation was in full force and effect pursuant to RSL § 26-504.3, specifically – prior to June 14, 2019. *See also* former RSL § 26-504.1; RSC § 2520.11(s).

20. On June 14, 2019, the Legislature enacted the HSTPA.

21. Part D of the HSTPA repealed the luxury deregulation provisions contained in the RSL that authorized deregulation of an apartment based upon high rent/high income.

22. Solely as a result of the HSTPA, but after the Deregulation Order had become final and non-appealable, DHCR issued the Addenda dated September 6, 2019, which purports to "explain" that if the lease in effect on the day the Rent Administrator issued the deregulation order expired on or after June 14, 2019, the enactment date of the HSTPA, such deregulation order was no longer operative and the apartment would remain regulated.

23. Predicated upon the foregoing and since the Tenants' lease herein expired on June 30, 2019, the Addenda nullified the Deregulation Order.

24. This apartment will remain permanently rent stabilized, not only for the present Tenants, but for those in the future as well.

25. Appellant timely filed a Petition for Administrative Review ("PAR") from the Addenda, which DHCR claimed was not an order, but rather constituted guidance as to the application of Part D; yet the Addenda expressly provided for such challenge.[1]

26. DHCR's Deputy Commissioner denied the PAR pursuant to an Order dated July 23, 2020. (R. 53-60).

27. Appellant then commenced an Article 78 proceeding to annul the denial of its PAR that upheld the Addenda, and reinstate the Deregulation Order.

28. Appellant established that since Apartment 12G was lawfully deregulated before June 14, 2019, with only the effective date being postponed to the expiration date of the lease in effect at the time the Deregulation Order issued, the apartment is and was intended to remain deregulated; a determination that cannot be revoked based upon a subsequent change in the law.

[1] To the extent that the Supreme Court erroneously adopted DHCR's contention that the Addenda was an "advisory opinion/operational bulletin," or anything other than an order, its finding is contradicted by reference to the "Notice of Right to Administrative Review" attached to and made a part of the Addenda. (R. 64-66).

29. Pursuant to an Order entered on January 19, 2021, the Supreme Court dismissed the Article 78 proceeding.

30. Annexed hereto as Exhibit B is a copy of the Order under Index No. 157576/20, with Notice of Entry and Notice of Appeal dated February 1, 2021. (R. 3-24).

C. Timeliness of the Appeal to the Appellate Division

31. As evidenced by the foregoing, a timely appeal was taken from the Order of Hon. Carol R. Edmead entered in the Supreme Court, New York County on January 19, 2021.

32. Appellant filed a Notice of Appeal to the Appellate Division, First Department, dated February 1, 2021. *See* Exhibit B.

33. On appeal, the Appellate Division affirmed the Order of the Supreme Court. *See* Exhibit A.

34. Thereafter, Appellant moved by Notice of Motion dated April 19, 2022, before the Appellate Division for an order granting reargument, or in the event reargument was denied, or reargument was granted but the Appellate Division adhered to its initial determination, for an order granting leave to appeal to the Court of Appeals.

35. By Order of the Appellate Division, entered July 5, 2022, Appellant's motion for reargument, or in the alternative, for leave to appeal to this Court, was denied.[2] *See* Exhibit C.

## ISSUES PRESENTED

36. The primary question is whether DHCR possessed the statutory authority to vitiate a previously issued, final and binding order of luxury deregulation through a device the Agency labeled an "Explanatory Addenda," and which had the effect of an Agency order.

37. Appellant raised this issue, and DHCR's lack of authority to issue any such document before the Supreme Court (R. 28-31; 46-47), and before the Appellate Division (Brief for Appellant, pgs. 16-23).

38. A related question, of equal importance, is whether the HSTPA's repeal of the luxury deregulation provisions, effective June 14, 2019, could be applied to a luxury deregulation order that had become final, and was no longer subject to any challenge before enactment of the HSTPA, regardless of whether such application was denominated as retroactive or otherwise.

39. This issue was raised before the Supreme Court (R. 34-40), and the Appellate Division (Brief for Appellant, pgs. 23-34; 36-39).

[2] The Order on motion, with Notice of Entry was never filed or served.

40. A third related question raised on this application that was raised before Supreme Court and the Appellate Division is whether an order deregulating an apartment, with implementation to occur at the end of the lease then in effect, may be nullified due to the lease expiring after an intervening change in the law.

41. This issue was litigated before the Supreme Court (R. 34-43; 46-47) and the Appellate Division (Brief for Appellant, pgs. 34-35; *see also* Reply Brief for Appellant, pgs. 16-23).

## THE ISSUES PRESENTED TO THIS COURT MERIT REVIEW

42. The questions presented are both novel and of public importance because this Court has yet to rule on what, if any, impact the Legislature intended Part D of the HSTPA (that repealed luxury deregulation provisions first implemented by the Legislature in 1993), to have as to final orders that were issued prior to its enactment and effective date.

A. DHCR did not possess the jurisdictional or statutory authority to issue the Addenda, nor was that authority conveyed upon DHCR by Part D of the HSTPA.

43. Former RSL § 26-504.3, which was in effect from the date that the Deregulation Order issued through the date that it became final and binding, provided that an apartment qualified for luxury deregulation based upon two conditions, (i) the apartment was occupied by persons with a total annual income in excess of the deregulation income threshold for the two preceding calendar

years, and (ii) the legal regulated monthly rent exceeded the applicable deregulation threshold. *See also* former RSL § 26-504.1.

44. Once these conditions were satisfied, DHCR was empowered to do nothing other than issue an order deregulating the apartment.

45. There is no dispute that both statutory criteria were satisfied herein.

46. There is also no dispute that at the time of the enactment of the HSTPA, on June 14, 2019, the Deregulation Order was already final and binding.

47. Yet, on September 6, 2019, and premised exclusively upon the enactment of the HSTPA, DHCR issued the Addenda to purportedly explain the effect of Part D thereof, which it contends prohibits deregulation of units with leases that expired on or after June 14, 2019 in effect on the date the luxury deregulation order issued.

48. Any interpretation of the Addenda as constituting an explanation of Part D requires this Court to insert language into the HSTPA that the Legislature did not include.

49. Luxury deregulation of the apartment at issue was authorized and final by virtue of the Deregulation Order that went unchallenged by the parties and became final before the HSTPA was enacted.

50. DHCR has never had the authority to deny the enforcement of a luxury deregulation order if the conditions for high income deregulation were

triggered. *See e.g. Classic Realty LLC v New York State Div. of Hous. & Cmty. Renewal*, 2 N.Y.3d 142, 146 (2005) (DHCR erroneously considered amended tax returns submitted by the tenant during the comment period, after DTF verified the tenant's income exceeded $175,000. The Court held, "DHCR's ruling cannot stand as it invites abuse of the luxury decontrol procedures which contemplate a single verification, the result of which is binding on all parties unless it can be shown that DTF made an error. No such showing is present here, and deregulation is therefore required.")

51. The Deregulation Order correctly recognized that the criteria for luxury deregulation was satisfied and the apartment would therefore be deregulated at the end of the then current lease term. (R. 61-63).

52. There is nothing in the Deregulation Order, former RSL § 26-504.3 or Part D of the HSTPA that conditions luxury deregulation upon lease expiration, or for that matter, upon anything else.

53. The fact that the official transition in regulatory status of the apartment occurred at the expiration of the lease term does not make the deregulation order anything less than unequivocal and final.

54. The fact that this transition occurred after June 14, 2019, also does not equate to the Addenda, or its "application" of Part D of the HSTPA, having a prospective effect. *See* Exhibit A (Appellate Division held, "DHCR's addenda

explained that the effect of HSTPA part D was to prohibit the deregulation of units with leases expiring after June 14, 2019. That is, they simply noted the prospective effect of the June 14, 2019 statute on subsequently expiring leases.").

55. The expiration of a tenant's lease in effect at the time a deregulation order issued was not a triggering event, as it had zero impact on the finality, effectiveness or validity of the order or the deregulated status of the apartment.

56. Part D does not provide or suggest that it prohibits the deregulation of units with leases expiring on or after June 14, 2019, where an order of luxury deregulation was final and binding prior to its enactment.

57. The Appellate Division's decision overlooks the retroactive consequence of employing the HSTPA enactment date, which is not articulated by the Legislature, as the "cut-off" for luxury deregulation.

58. That is, even if lease expiration was a condition precedent, which it was not, the fact that the lease herein expired subsequent to June 14, 2019 does not make such application of the HSTPA prospective, because this application reaches back to retroactively vitiate the final and binding Deregulation Order, which at the time the HSTPA was enacted, was no longer subject to challenge.

59. The Court must "interpret a statute so as to avoid an unreasonable or absurd application of the law." *Lubonty v U.S. Bank Nat'l Ass'n*, 34 N.Y.3d 250, 255 (2019), quoting *People v Garson*, 6 N.Y.3d 604, 614 (2006).

60. Applying this principle, DHCR's and thereafter the Court's "reading" of Part D as establishing a June 14, 2019 "cut off" date prior to which a lease must expire in order for a luxury deregulation order, which was final and binding prior to June 14, 2019, to be valid, produces an inequitable and absurd result, and must be rejected.

61. Interpretation of Part D to annul the deregulation of Apartment 12G, which deregulation was known to the parties, was uncontested and set to occur on a date certain, results in an outcome antagonistic to the purpose and design of the HSTPA as written by the legislature, especially when the "Clean Up" Bill is taken into consideration. *See Lubonty*, 34 N.Y.3d 250; *see also People v Pabon*, 28 N.Y.3d 147 (2016).

B. DHCR's Addenda, which revoked the final and binding Deregulation Order is contrary to the plain language of Part D of the HSTPA and constitutes an impermissible retroactive application, not authorized by the Legislature.

62. This Court has previously ruled against retroactive application of Part F of the HSTPA in *Regina* and, by extension, should similarly rule as such in this matter.

63. Appellant submits that the Order from which it seeks to appeal violates the principles enunciated in *Regina*, and recently confirmed in *Casey v Whitehouse Estates*, ___ N.Y.3d ___, 2023 NY Slip Op 01351 (2023).

64. Applying the HSTPA to a luxury deregulation order that was final prior to its enactment, is retroactive. *See, e.g., County of St. Lawrence v Daines*, 81 A.D.3d 212, 216 (3d Dept 2011) ("However, where, as here, application of a statute serves to 'impair vested rights or alter past transactions or considerations,' it is retroactive in the true sense (citations omitted)."); *see also Matter of Harris v Israel*, 191 A.D.3d 468 (1st Dept 2021).

65. Language in a statute that it shall "take effect immediately" does not support retroactive application. *See, e.g., Regina*, 35 N.Y.3d at 365 ("A statute has retroactive effect if 'it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed,' thus impacting 'substantive' rights (citation omitted)"); *see also State ex rel. Spitzer v Daicel Chemical Industries, Ltd.*, 42 A.D.3d 301 (1st Dept 2007).

66. This maxim of statutory interpretation was erroneously overlooked by DHCR, the Supreme Court, and the Appellate Division.

67. Moreover, the applicable precedent that this Court should apply, and which should have been applied, in resolving the issues raised herein is *Matter of Shafer v Gabel*, 16 N.Y.2d 513, *decision clarified*, 16 N.Y.2d 1078 (1965).

68. In *Shafer*, this Court addressed whether a subsequent change in the law could be applied retroactively to annul a prior final order of the state local rent

administrator to defeat the reasonable expectations of a property owner who purchased property expecting a 6% rate of return based upon the purchase price under the law in effect at time of purchase. *Shafer*, 16 N.Y.2d at 515-516.

69. This Court held that such retroactive application was improper. *Id*.

70. DHCR's actions further stand in direct contravention of the principle that the law in effect at the time Appellant filed the luxury deregulation petition controls. *See Regina*; *Chatsworth Realty Corp. v New York State Div. of Hous. & Cmty. Renewal*, 2007 WL 6881705 (Sup Ct NY County 2007); *Mengoni v New York State Div. of Hous. & Cmty. Renewal*, 97 N.Y.2d 630 (2001); *Matter of Amsterdam-Manhattan Assoc. v Joy*, 42 N.Y.2d 941 (1977); *AEJ 534 East 88th LLC v New York State Div. of Hous. & Cmty. Renewal*, 194 A.D.3d 464 (1st Dept 2021).

C. DHCR's Addenda, which purports to interpret Part D, is not entitled to deference.

71. The Appellate Division erred in holding, "DHCR's explanatory addenda and orders denying the petitions for administrative review challenging the addenda are not arbitrary and capricious or affected by an error of law (citations omitted)." *See* Exhibit A.

72. The Supreme Court erroneously overlooked the plain wording of the statute and adopted DHCR's misapplication of Part D of the HSTPA to hold, "…[DHCR] could not authorize the deregulation of rent stabilized apartments after

June 14, 2019, even pursuant to previously issued deregulation orders, if such orders provided for the subject apartments to remain subject to stabilization until their pending lease terms expired, and the expiration dates fell after June 14, 2019." *See* Exhibit B. (R. 16).

73. The Supreme Court further erred to the extent that it affirmed the Agency's actions on the grounds that the Addenda did not change the terms of the Deregulation Order, but rather constituted Agency guidance; a finding that is wholly undermined by the "Notice of Right to Administrative Review" attached to the Addenda that provided the parties the right to appeal from the Addenda. *See* Exhibit B. (R. 10; 64-66).

74. DHCR's interpretation of Part D is not entitled to any deference, since the issue is one of pure statutory construction. *Matter of West 58th St. Coalition, Inc. v City of New York*, 188 A.D.3d 1, 8 (1st Dept 2020), *quoting Kurcsics v Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980) ("Where, however, the question is one of purely statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight…"); *see also Dworman v New York State Div. of Hous. & Cmty.*, 94 N.Y.2d 359, 371 (1999).

75. Neither former RSL § 26-504.3(b) nor former RSL § 26-504.3(c) conditioned luxury deregulation on the expiration of the lease in effect at the time the deregulation order issued.

76. Part D of the HSTPA did not condition the effectiveness or finality of a previously issued, final luxury deregulation order on the lease expiration in effect at the time the Rent Administrator issued the deregulation order.

77. DHCR's actions, which are solely based upon the Agency's inclusion of language neither memorialized in former RSL § 26-504.3 nor the HSTPA, was not only beyond its scope of jurisdiction, but simply incorrect.

## CONCLUSION

78. It is respectfully submitted that the questions presented are sufficiently novel and of public importance to warrant review by this Court, especially considering the unquestionably erroneous ruling that is sought to be appealed and its egregious consequences.

79. The issue herein does not only impact Appellant in the context of this proceeding, but a multitude of similarly situated landlords.

80. Accordingly, it is of public importance that examination by, and appropriate guidance from this Court be provided to inform both landlords and tenants what, if any, retroactive application of Part D of the HSTPA is permissible in the wake of this Court's prior holdings restricting any such applicability.

**WHEREFORE**, it is respectfully requested that permission to appeal to this Court be granted and that Appellant be granted such other and further relief as the Court deems just and proper.

Dated: Williston Park, New York
May 1, 2023

By: _____
Jillian N. Bittner, Esq.

COURT OF APPEALS
STATE OF NEW YORK

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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.

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**CORPORATE DISCLOSURE STATEMENT**

App. Div. First Dept.
Docket No.: 2021-00718

Supreme Court, NY County
Index No.: 157576/2020

Pursuant to § 500.1(f) of the Rules of the Court of Appeals, Petitioner-Appellant 160 East 84th Street Associates LLC, a limited liability company, has no parents, subsidiaries and affiliates except its affiliation with Broadwall Management Corp., which manages it, as well as, 87th Street Sherry Associates LLC; 1700 York Avenue Associates; and, Clermont York Associates, LLC.

Dated: Williston Park, New York
May 1, 2023

Yours, etc.
HORING WELIKSON ROSEN &
DIGRUGILLIERS PC

By: _____
Jillian N. Bittner, Esq.
Attorneys for Petitioner-Appellant
11 Hillside Avenue
Williston Park, New York 11596
(516) 535-1700

# EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

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In the Matter of the Application of
**160 E. 84TH STREET ASSOCIATES LLC,**

Petitioner-Appellant,

**INDEX NO. 157576/2020**
**CASE NO. 2021-00718**

**NOTICE OF ENTRY**

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.

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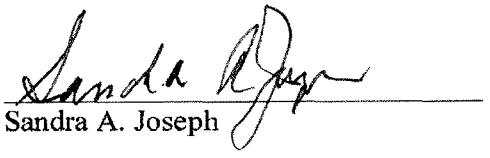
**PLEASE TAKE NOTICE** that the within is a true copy of a **DECISION AND ORDER** duly entered in the office of the clerk of the within named Court on **February 24, 2022.**

Dated: **New York, New York**
**April 12, 2023**

Yours, etc.,
**MARK F. PALOMINO**
**Counsel**
Attorney for Respondent
**New York State Division of Housing and Community Renewal**
641 Lexington Avenue – 6th Floor
New York, New York 10022
(212) 872-0677
Sandra.Joseph@hcr.ny.gov

By: 
Sandra A. Joseph

# Supreme Court of the State of New York

## Appellate Division, First Judicial Department

Webber, J.P., Kern, Moulton, González, Mendez, JJ.

| | | |
|---|---|---|
| 15380-<br>15381-<br>15382 | In the Matter of 160 E. 84TH ST. ASSOCIATES LLC,<br>Petitioner-Appellant,<br><br>-against-<br><br>NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,<br>Respondent-Respondent. | Index Nos. 157576/20<br>153995/20<br>153999/20<br>Case Nos. 2021-00718<br>2021-00655<br>2021-00644 |

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In the Matter of 87TH STREET SHERRY ASSOCIATES LLC,
Petitioner-Appellant,

-against-

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

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In the Matter of 87TH STREET SHERRY ASSOCIATES LLC,
Petitioner-Appellant,

-against-

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

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Horing Welikson Rosen & Digrugilliers PC, Williston Park (Jillian N. Bittner of counsel), for 160 E. 84TH ST. Associates LLC, appellant.

Horing Welikson Rosen & Digrugilliers PC, Williston Park (Randi B. Gilbert of counsel), for 87TH Street Sherry Associates LLC, appellant.

Mark F. Palomino, New York (Sandra A. Joseph of counsel), for respondent.

Judgments, Supreme Court, New York County (Carol R. Edmead, J.), entered December 9, 2020, December 9, 2020, and January 19, 2021, among other things, denying the petitions to annul respondent New York State Division of Housing and Community Renewal's (DHCR) "Explanatory Addenda," dated September 6, 2019, September 20, 2019, and September 6, 2019, to rent deregulation orders dated April 5, 2019, February 27, 2019, and January 7, 2019, explaining the effects of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) on those orders, to annul DHCR's orders, dated March 5, 2020, March 5, 2020, and July 23, 2020, which denied the petitions for administrative review challenging the addenda, and to reinstate the deregulation orders, and dismissing the proceedings brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's explanatory addenda and orders denying the petitions for administrative review challenging the addenda are not arbitrary and capricious or affected by an error of law (*see* CPLR 7803[3]; *see generally New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 204 [1994]). The article 78 court correctly rejected petitioners' argument that DHCR's September 2019 addenda explaining the effect of HSTPA part D on the deregulation orders improperly gave retroactive effect to the statute. Part D repealed certain rent deregulation provisions of the Rent Stabilization Law (L 2019, ch 36, pt D, § 5), effective June 14, 2019, the date of enactment (L 2019, ch 36, pt D, § 8). Later in June 2019, part D was amended to state, in pertinent part: "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated" (L 2019, ch 39, pt Q, § 10).

That exception did not apply to the instant cases, in which the three subject leases expired on June 30, 2019. DHCR's deregulation orders, issued in January, February, and April 2019, stated prospectively that the subject apartment units would become deregulated "[u]pon the expiration of the existing lease[s]."

DHCR's addenda explained that the effect of HSTPA part D was to prohibit the deregulation of units with leases expiring after June 14, 2019. That is, they simply noted the prospective effect of the June 14, 2019 statute on subsequently expiring leases. Thus, in this case, the statute "affect[ed] only the propriety of prospective relief . . . [and] ha[d] no potentially problematic retroactive effect" (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 365 [2020] [internal quotation marks omitted]).

We reject petitioners' argument that the addenda improperly revived time-barred challenges to the deregulation orders (*see id.* at 371).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: February 24, 2022

Susanna Molina Rojas
Clerk of the Court

# EXHIBIT B

# NOTICE OF APPEAL, DATED FEBRUARY 1, 2021 [3 - 4]

FILED: NEW YORK COUNTY CLERK 02/01/2021 03:16 PM INDEX NO. 157576/2020
NYSCEF DOC. NO. 25 RECEIVED NYSCEF: 02/01/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
In the Matter of the Application of
160 EAST 84TH STREET ASSOCIATES LLC,

Petitioner,

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.
----------X

**NOTICE OF APPEAL**

Index No.: 157576/2020

**PLEASE TAKE NOTICE**, that Petitioner, 160 East 84th Street Associates LLC, hereby appeals to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, from the Decision and Order of the Supreme Court of the State of New York, New York County, issued by the Honorable Carol R. Edmead dated January 19, 2021, and entered on January 19, 2021 by the Clerk of this Court, and from each and every part thereof.

Dated: Williston Park, New York
February 1, 2021

Yours, etc.

HORING WELIKSON ROSEN &
DIGRUGILLIERS PC

By: Jillian N. Bittner

Jillian N. Bittner
Attorneys for Petitioner
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(516) 535-1700

FILED: NEW YORK COUNTY CLERK 02/01/2021 03:16 PM INDEX NO. 157576/2020
NYSCEF DOC. NO. 25 RECEIVED NYSCEF: 02/01/2021

To: Mark F. Palomino, Esq.
General Counsel for Respondent
New York State Division of
Housing and Community Renewal
Attn: Sandra A. Joseph, Esq.
641 Lexington Avenue, 6th Floor
New York, New York 10022
(212) 872-0677

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# DECISION AND ORDER OF THE HONORABLE CAROL R. EDMEAD, DATED JANUARY 19, 2021, APPEALED FROM, WITH NOTICE OF ENTRY [5 - 24]

FILED: NEW YORK COUNTY CLERK 02/01/2021 03:06 PM INDEX NO. 157576/2020
NYSCEF DOC. NO. 25 RECEIVED NYSCEF: 02/01/2021

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
In the Matter of the Application of
**160 EAST 84TH STREET ASSOCIATES, LLC,**

**INDEX NO. 157576/2020**

Petitioner,

**NOTICE OF ENTRY**

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.
----------X

**PLEASE TAKE NOTICE** that the within is a true copy of a **DECISION AND ORDER** duly entered in the office of the clerk of the within named Court on **January 19, 2021.**

Dated: **New York, New York**
**January 21, 2021**

Yours, etc.,
**MARK F. PALOMINO**
**Counsel**
Attorney for Respondent
**New York State Division of Housing and Community Renewal**
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New York, New York 10022
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Sandra.Joseph@nyshcr.org

By: Sandra A. Joseph
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FILED: NEW YORK COUNTY CLERK 02/01/2021 03:08 PM INDEX NO. 157576/2020
NYSCEF DOC. NO. 23 RECEIVED NYSCEF: 01/19/2021
FILED: NEW YORK COUNTY CLERK 01/19/2021 12:56 PM INDEX NO. 157576/2020
NYSCEF DOC. NO. 23 RECEIVED NYSCEF: 01/19/2021

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM
*Justice*

---X

160 EAST 84TH STREET ASSOCIATES, LLC

Plaintiff,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendant.

---X

INDEX NO. 157576/2020
MOTION DATE 09/17/2020
MOTION SEQ. NO. 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 22 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR article 78, of petitioner 160 East 84th Street Associates, LLC (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with Notice of Entry, on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner 160 East 84th Street Associates, LLC (landlord) seeks a judgment to nullify an "explanatory addendum" that was issued by the respondent New York State Division of Housing and Community Renewal (DHCR) to clarify the terms of a previously issued rent-deregulation order (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

Landlord is the owner of a residential apartment building located at 160 East 84th Street in the County, City and State of New York (the building). *See* verified petition, ¶ 1. The DHCR is the administrative agency that oversees rent-stabilized buildings located in New York City. *Id.*, ¶ 2. This proceeding concerns apartment 12G in the building, which landlord had previously registered with the DHCR as a rent-stabilized unit. *Id.*; exhibit B.

On June 29, 2018, landlord filed a "petition for high income rent deregulation" with the DHCR concerning apartment 12G. *See* verified answer, Joseph affirmation, ¶ 5; exhibit C. Apartment 12G's tenants of record, non-parties Scott and Kathryn Griffin (tenants), submitted an answer that admitted that their total annual income was in excess of $200,000.00 in each of the two proceeding calendar years. *Id.*, ¶ 7; exhibit C. On January 7, 2019, a DHCR Rent Administer (RA) issued an "order of deregulation" for apartment 12G (the deregulation order). *Id.*, ¶ 8; exhibit B. The deregulation order found as follows:

> "The housing accommodation is subject to the Rent Stabilization Law [RSL] of 1969 and/or the Emergency Tenant Protection Act of 1974, and that the legal regulated rent was $2,700.00 or more per month on the applicable date(s). In addition, the sum of the annual incomes of the tenant(s) named on the lease who occupied this housing accommodation and of the other persons who occupied this housing accommodation as a primary residence on other than a temporary basis (excluding bona fide employees and bona fide subtenants) was in excess of $200,000.00 in each of the two preceding calendar

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> years. Accordingly, and upon the grounds stated in the Rent Stabilization Code [RSC] Section 2520.11 (s) or Emergency Tenant Protection Regulations Section 2500.9 (n), it is ORDERED, that the subject housing accommodation is deregulated, effective upon the expiration of the existing lease."

*Id.*, exhibit B. The lease for apartment 12G expired on June 30, 2019. *See* verified petition, ¶ 6.

On June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA) became effective, and Part D thereof repealed the provisions of the Rent Stabilization Law (RSL) that had previously permitted "high rent" and "high income" deregulation of rent stabilized apartment units (NY Uncon Laws §§ 26-504.1, 26-504.2, 26-504.3). In a "cleanup bill" enacted several days after the HSTPA's effective date, the New York State Legislature amended Section (i.e., subparagraph) 8 of Part D to provide, in pertinent part, that:

> "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated . . .."

*See* L 2019, ch 39 Part Q, § 8.

On September 6, 2019, the DHCR sent both landlord and tenants an "explanatory addenda to order" that was intended to explain the impact of the HSTPA on previously issued deregulation orders (the explanatory addendum). *See* verified answer, ¶ 12; exhibit B. The relevant portion of the explanatory addendum stated as follows:

> "On November 14, 2018, the RA issued an order to above parties with respect to the owner's application for high rent/high income deregulation. It stated:
>
> "ORDERED that the subject housing accommodation is deregulated effective:
>
> "**Upon the expiration of the existing lease**, as the subject housing accommodation is subject to the Rent Stabilization Law of 1969 and/or the Emergency Tenant Protection Act of 1974.
>
> "The language, which makes the deregulation contingent upon the expiration of the lease in effect on the day the Rent Administrator's deregulation order was issued, was taken from the applicable ETPA and RSL provisions authorizing such orders. Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA) and its subsequent amendments were enacted. HSTPA repealed the high rent/high income deregulation provisions under which the above order was issued and stated that the law is to 'take effect immediately.' Additionally, HSTPA provides that 'any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated.'
>
> "If the lease in effect on the day the Rent Administrator's deregulation order was issued expired before June 14, 2019 the housing accommodation is deregulated.

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> "If the rent stabilized lease in effect on the day the Rent Administrator's deregulation order was issued expires on or after June 14, 2019, the housing accommodation remains regulated to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated.
>
> "If a rent stabilized lease should have been in effect on the day the Rent Administrator's deregulation order was issued, the housing accommodation remains subject to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated."

*Id.*; exhibit B (emphasis in the original).

On October 10, 2019, landlord filed a "petition for administrative review" (PAR) with the DHCR that claimed that the explanatory addendum sought to improperly change the terms of the deregulation order. *Id.*; verified answer, ¶ 15; exhibit D. On July 23, 2020 the DHCR's Deputy Commissioner issued an order that denied landlord's PAR (the PAR order). *Id.*, ¶ 19; exhibit A. Because the PAR order is lengthy, this decision will not reproduce it in full, but will rather discuss the Deputy Commissioner's findings individually, as appropriate. It is sufficient to observe that the PAR order rejected all of landlord's legal challenges to the explanatory addendum. *Id.*; exhibit A.

Aggrieved, landlord thereafter commenced this Article 78 proceeding on September 17, 2020. *See* verified petition. The DHCR filed an answer on November 3, 2020. *See* verified answer. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

In most cases, the court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether a challenged agency determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). In this proceeding, however, only the final portion of

landlord's petition challenges the July 23, 2020 PAR order as an arbitrary and capricious ruling. The bulk of landlord's petition challenges the statutory analysis set forth in the DHCR's September 6, 2019 explanatory addendum, which, landlord claims, the DHCR improperly relied on to abrogate the January 7, 2019 deregulation order. Indeed, landlord's PAR application also purported to challenge the explanatory addendum rather than the deregulation order itself. *See* verified answer, exhibit D. This is anomalous, since the explanatory addendum is not a final agency determination, but is instead an "advisory opinion/operational bulletin," which 9 NYCRR § 2527.11 authorizes the DHCR to issue at its discretion. Since landlord's objections to the explanatory addendum flow from its' concerns about its' rights as the lessor of apartment 12G, it might have been more appropriate for landlord to have proceeded via an action for declaratory judgment. Declaratory judgment is traditionally the vehicle that the courts use to determine the respective rights of all affected parties under a lease. *See e.g. Chekowsky v Windemere Owners, LLC*, 114 AD3d 541 (1st Dept 2014); *Riccio v Windermere Owners LLC*, 58 Misc 3d 1223(A), 2018 NY Slip Op 50230(U), * 4 (Sup Ct NY County 2018), citing *Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 (1926). However, CPLR 7803 (3) also provides that courts may consider Article 78 petitions which question "whether a[n agency] determination was made in violation of lawful procedure, [or] *was affected by an error of law*. . . (emphasis added)." *See also Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142, 146 (2004) ("Our review of an administrative agency's action is limited to 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'" [citation omitted]); *Matter of 107-10 Shorefront Realty, LLC v Division of Hous. & Community Renewal*, 140 AD3d 1071 (1st Dept 2016).

Here, to the extent that landlord's petition argues that the explanatory addendum contained errors of law that adversely affected the deregulation order, the court finds that CPLR 7803 (3) encompasses review the explanatory addendum under the "error of law" standard. *See e.g., Terence Cardinal Cooke Health Ctr. v Commissioner of Health of the State of N.Y.*, 175 AD3d 435, 436 (1st Dept 2019) (""[W]here a quasi-legislative act by an administrative agency . . . is challenged on the ground that it 'was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' . . ., a proceeding in the form prescribed by article 78 can be maintained.'" [internal citation omitted]). To the extent that landlord's petition seeks to overturn the July 23, 2020 PAR order, CPLR 7803 (3) mandates judicial review under the "arbitrary and capricious" standard. This decision will apply each standard where appropriate, first addressing the explanatory addendum, and then the PAR order.

A judicial inquiry into whether an agency determination was "affected by an error of law," pursuant to CPLR 7803 (3), "is 'limited to the grounds invoked by the agency' in its determination." *Matter of Barry v O'Neill*, 185 AD3d 503, 505 (1st Dept 2020), citing *Matter of Madeiros v New York City Educ. Dept.*, 30 NY3d 67, 74 (2017). Appellate courts have recognized "errors of law'' to exist in agency determinations that relied on inapplicable case law (*see e.g. Solnick v Whalen*, 49 NY2d 224 [1980]), or misapplied governing statutes. *See e.g. Matter of Rossi v New York City Dept. of Parks & Recreation*, 127 AD3d 463 (1st Dept 2015); *Matter of Nestle Waters N. Am., Inc. v City of New York*, 121 AD3d 124 (1st Dept 2014). On the latter point, the Appellate Division, First Department, recently reiterated the Court of Appeals' long-standing directive that:

> "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its

> interpretation is not irrational or unreasonable, it will be upheld. Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. . . . [I]f the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight."
> *Matter of West 58th St. Coalition, Inc. v City of New York*, 188 AD3d 1, 8 (1st Dept

2020), quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 (1980). Here, the statutes that the DHCR identified in the explanatory addendum were "the applicable ETPA and RSL provisions authorizing [deregulation] orders . . . [and] the [HSTPA]." *See* verified answer, exhibit B. The two RSL provisions mentioned in the order (§§ 26-504.1 and 26-504.3) were both repealed by Part D of the HSTPA. The first governed "high income rent deregulation," and provided, in pertinent part, as follows:

> "Upon the issuance of an order by the [DHCR], 'housing accommodations' shall not include housing accommodations which: (1) are occupied by persons who have a total annual income, as defined in and subject to the limitations and process set forth in section 26-504.3 of this chapter, in excess of the deregulation income threshold, as defined in section 26-504.3 of this chapter, for each of the two preceding calendar years; and (2) have a legal regulated monthly rent that equals or exceeds the deregulation rent threshold, as defined in section 26-504.3 of this chapter."

RSL § 26-504.1. The second defined the "deregulation thresholds" referenced above, and provided, in pertinent part, as follows:

> "2. Deregulation income threshold means total annual income equal to one hundred seventy-five thousand dollars in each of the two preceding calendar years for proceedings commenced before July first, two thousand eleven. For proceedings commenced on or after July first, two thousand eleven, the deregulation income threshold means the total annual income equal to two hundred thousand dollars in each of the two preceding calendar years.
> 3. Deregulation rent threshold means two thousand dollars for proceedings commenced before July first, two thousand eleven. For proceedings commenced on or after July first, two thousand eleven, the deregulation rent threshold means two thousand five hundred dollars. For proceedings commenced on or after July first, two thousand fifteen, the deregulation rent threshold means two thousand seven hundred dollars, provided, however, that on January first, two thousand sixteen, and annually thereafter, such deregulation rent threshold shall be adjusted by the same percentage as the most recent one year renewal adjustment adopted by the relevant guidelines board."

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RSL § 26-504.3. The corresponding Rent Stabilization Code (RSC) provision that governed "high income rent deregulation"[1] applications provided, in pertinent part, as follows:

> "This Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL . . ., except the following housing accommodations for so long as they maintain the status indicated below:
>
> * * *
>
> "(s) Upon the issuance of an order by the DHCR pursuant to the procedures set forth in Part 2531 of this Title, including orders resulting from default, housing accommodations which:
>
> > "(1) have a legal regulated rent of $2,000 or more per month as of October 1, 1993, or as of any date on or after April 1, 1994, and which are occupied by persons who had a total annual income in excess of $250,000 per annum for each of the two preceding calendar years, where the first of such two preceding calendar years is 1992 through 1995 inclusive, and in excess of $175,000, where the first of such two preceding calendar years is 1996 through 2009 inclusive, with total annual income being defined in and subject to the limitations and process set forth in Part 2531 of this Title;
> >
> > "(2) have a legal regulated rent of $2,500 or more per month as of July 1, 2011 or after, and which are occupied by persons who had a total annual income in excess of $200,000 per annum for each of the two preceding calendar years, where the first of such two preceding calendar years is 2010 or later, with total annual income being defined in and subject to the limitations and process set forth in Part 2531 of this Title; . . ."

RSC § 2520.11. The relevant portion of RSC § 2531 that is referenced in RSC § 2520.11 (s) provides, in pertinent part, as follows:

> "In the event that the total annual income as certified is in excess of $250,000, $175,000, or $200,000 in each such year, whichever applies, as provided in section 2531.2 of this Part, the owner may file an owner's petition for deregulation (OPD), accompanied by the ICF [i.e., income certification form], with the DHCR on or before June 30th of such year. The DHCR shall issue within 30 days after the filing of such OPD, an order providing that such housing accommodation shall not be subject to the provisions of the RSL *upon the expiration of the existing lease*."

RSC § 2531.3 (emphasis added). As previously mentioned, Part D, Section 8 of the HSTPA, which codified the repeal of "high income rent deregulation," provides that:

> "This act shall take effect immediately; provided however, that (i) any unit that was *lawfully deregulated prior to June 14, 2019* shall remain deregulated . . .."

---

[1] The PAR order noted that the RA specifically relied on RSC § 2520.11 (s) in the January 7, 2019 deregulation order. *See* verified petition, exhibit A.

*See* L 2019, ch 39 Part Q, § 8 (emphasis added).

After carefully analyzing all the above statutes and regulations, the court concludes that the rationale which the DHCR followed in the explanatory addendum did not "run counter to the clear wording of a statutory provision." As of June 29, 2018, when landlord filed its deregulation petition, RSL §§ 26-504.1 and 26-504.3 authorized the "high income rent deregulation" of apartments where: 1) the tenant of record had reported a total income of $200,000.00 or more per year to the New York State taxing authorities for two consecutive years; and 2) the unit's legal regulated rent was $2,700.00 per month or more.[2] That deregulation petition alleged that tenants' total income exceeded the "deregulation income threshold" during the two tax years prior to June 29, 2018, and that apartment 12G's legal regulated rent exceeded the $2,700.00 "deregulation rent threshold" as of June 29, 2018. *See* verified answer, exhibit C. It is clear that landlord's deregulation petition facially comported with the requirements of RSL §§ 26-504.1 and 26-504.3. Therefore, it was no "error of law" for the DHCR to process landlord's deregulation petition pursuant to those statutes (or any petition that properly pled the statutory requirements for "high income rent deregulation").

Additionally, as of June 29, 2018, RSC §§ 2520.11 and 2531.3 authorized the DHCR to grant petitions for "high income rent deregulation" when a tenant's total annual income was certified as in excess of the applicable deregulation threshold amount. Here, the RA's deregulation order specifically noted that "the annual incomes of the tenant(s) named on the lease who occupied this housing accommodation . . . was in excess of $200,000.00 in each of the

[2] Landlord's reply papers acknowledge that these two criteria must be met in order for the DHCR to issue a deregulation order. *See* Bittner reply affirmation, ¶¶ 18-46. However, as will be discussed, landlord's assertion that the deregulation became effective on the day that the DHCR issued the order was incorrect.

two preceding calendar years." *See* verified petition, exhibit B. Therefore, it was no "error of law" for the RA to have entered a deregulation order against tenants, pursuant to RSC §§ 2520.11 and 2531.3 (nor would it have been an "error of law" for the DHCR to enter a deregulation order against any tenant of record whose certified annual income had exceeded the applicable deregulation threshold amount for two years).

Further, the courts of this state have long and consistently acknowledged that the plain language of RSC § 2531.3 authorizes the DHCR to enter orders terminating an apartment's rent stabilized status "*upon the expiration of the current lease,*" which is usually a different date that falls after the one on which the agency enters a deregulation order. *See e.g. Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142 (2004); *Rose Assoc. v Johnson*, 247 AD2d 222 (1st Dept 1998); *Matter of London Terrace Gardens v New York State Div. of Hous. & Community Renewal*, 6 Misc 3d 1020(A), 2005 NY Slip Op 50132(U) (Sup Ct, NY County, 2005); *see also Matter of Lacher v New York State Div. of Hous. & Community Renewal*, 25 AD3d 415, 417 (1st Dept 2006) ("the language of the rent stabilization system with respect to deregulation is prospective in nature"). Therefore, it was no "error of law" for the RA to have abided by the "lease expiration" instruction set forth in RSC § 2531.3 when he issued the February 27, 2019 deregulation order. *See* verified answer, exhibit B.

Finally, as the court previously observed, the "cleaned up" Section 8 of Part D of the HSTPA provides that "any unit that was lawfully deregulated prior to June 14, 2019 (the HSTPA's effective date) shall remain deregulated," but that as to all other apartments, "this act shall take effect immediately," with the result that "high income rent deregulation" will no longer be available because the statutes that authorized it (i.e., RSL §§ 26-504.1 and 26-504.3) were repealed effective as of that date. *See* L 2019, ch 39 Part Q, § 8; *see also Widsam Realty*

*Corp. v Joyner*, 66 Misc 3d 132(A), 2019 NY Slip Op 52097(U), *2 (App Term, 1st Dept 2019) ("'the so-called "clean up" bill clarified, at Section 8 thereof, that HSTPA did not re-regulate any units lawfully deregulated before HSTPA's June 14, 2019 effective date'" [internal citation omitted). The statute's plain language makes it clear that it was no "error of law" for the DHCR to have concluded that it could not authorize the deregulation of any rent stabilized apartments after the HSTPA's June 14, 2019 effective date.

The court also finds that it is reasonable for the DHCR to read the plain language of HSTPA, Part D, Section 8, in conjunction with RSC § 2531.3 (and the case law that interprets those provisions), and to conclude that it could not authorize the deregulation of rent stabilized apartments after June 14, 2019, even pursuant to previously issued deregulation orders, if such orders provided for the subject apartments to remain subject to stabilization until their pending lease terms expired, and the expiration dates fell after June 14, 2019. The court makes this finding fully cognizant of the Court of Appeals' directive that it, and not the DHCR, is the proper tribunal to resolve "question[s] . . . of pure statutory reading and analysis . . .." *Matter of West 58th St. Coalition, Inc. v City of New York*, 188 AD3d at 8, quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d at 459. In this instance, however, the court finds that the DHCR's interpretation of the statutes (i.e., that the applicable RSL and RSC provisions did not authorize apartment 12G's deregulation, despite the agency's previous approval of landlord's deregulation petition) did not "run counter to the clear wording of a statutory provision." Instead, the court finds that it was reasonable for the DHCR to read the plain language of the RSL and RSC provisions in conjunction with the HSTPA, and the court adopts that reading. As a result, the court concludes that the DHCR's explanatory addendum did not contain an "error of law" that would adversely affect the January 7, 2019 deregulation order, in violation of CPLR 7803 (3).

Consequently, the court finds that the portion of landlord's Article 78 petition that challenges the explanatory addendum lacks merit and should be dismissed. Landlord's petition nevertheless asserts four arguments that the explanatory addendum should be annulled, each of which the court shall consider.[3]

First, landlord argues that "[the] DHCR erroneously applied the HSTPA retroactively." *See* verified petition, ¶¶ 41-72. Landlord specifically avers that "DHCR erred by retroactively applying the HSTPA to the Deregulation Order which issued before the HSTPA, and failed to heed Part Q, §10 of Ch. 36, Laws of 2019." *Id.*, ¶ 47. However, this argument is based on a fallacy. The DHCR did *not* retroactively apply the deregulation repeal set forth in Part D of the HSTPA. Instead, the agency found that Part D of the HSTPA caused a supervening change in the law of "high income rent deregulation" on June 14, 2019 which precluded the instant deregulation order from taking effect when tenants' lease for apartment 8G expired two weeks later on June 30, 2019. Had the Legislature given Part D of the HSTPA an effective date that fell after the lease's June 30, 2019 expiration date, then apartment 8G might have been deregulated pursuant to the January 7, 2019 order. However, the repeal of "high income rent deregulation" took place on June 14, 2019, before tenants' lease for apartment 12G expired. Thus, when that lease did end on June 30, 2019, New York law no longer permitted deregulation, and the unit remained subject to the RSL.

The court is not persuaded by Landlord's argument that the explanatory addendum enunciated a new DHCR policy to apply Part D of the HSTPA retroactively. Instead, that document clearly stated that: 1) if a rent-stabilized lease in effect when the DHCR issued a

[3] At the end of this decision, the court will also address landlord's fifth argument, which asserts that the March 5, 2020 PAR order should be vacated on the ground that it was an "arbitrary and capricious" ruling.

deregulation order expired before the HSTPA's June 14, 2019 effective date, then the subject apartment would be deregulated; but that 2) if the lease instead expired on or after June 14, 2019, then the apartment would not become deregulated, but would instead remain rent-stabilized. *See* verified petition, exhibit C. This reading of HSTPA Part D in the explanatory addendum accords with the Court of Appeals' holding in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332, 372-373 [2020]), which found that Part D is "entirely forward-looking," and "take[s] effect immediately." 35 NY3d at 373. Landlord's petition and reply papers both devote a great deal of discussion to the portion of the *Regina Metropolitan* holding that dealt with the DHCR's improper retroactive application of Part F of the HSTPA. *See* verified petition, ¶¶ 55-62; Bittner reply affirmation, ¶¶ 5-17. However, that discussion is plainly inapposite to Part D, which contains no language that might suggest retroactive application, as Part F does. Landlord's "retroactive application" argument attempts to cite *Regina Metropolitan* for the erroneous proposition that rent deregulation orders are effective as of the day that the DHCR issues them. However, as was previously discussed, that is not always the case. RSC § 2531.3 formerly authorized the DHCR to issue "high income rent deregulation" orders which would take effect after the expiration of an existing rent-stabilized lease term, and New York's courts routinely acknowledged that regulatory authority. *See e.g.*, *Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d at 142; *Rose Assoc. v Johnson*, 247 AD2d at 222; *Matter of London Terrace Gardens v New York State Div. of Hous. & Community Renewal*, 6 Misc 3d 1020(A), 2005 NY Slip Op 50132(U); *see also Matter of Lacher v New York State Div. of Hous. & Community Renewal*, 25 AD3d at 417. Landlord's copious legal arguments do not cite any precedent upholding a statutory interpretation which measured the effective date of an apartment deregulation from the date that

a DHCR deregulation order was issued, rather than the lease expiration date specified in such order. The reason for landlord's lack of citations is that no such precedent exists. The court concludes that landlord's characterization of the explanatory addendum is inaccurate, that its assumption about the effective date of rent deregulations pursuant to RSC § 2531.3 is incorrect, and that the case law which landlord cited is inapposite. Therefore, the court rejects landlord's "retroactive application" argument against the explanatory addendum as unsupported.

Next, landlord argues that the "DHCR improperly revived a time-barred claim." *See* verified petition, ¶¶ 73-92. This argument, too, proceeds from a fallacy. Landlord asserts that tenants' right to challenge the deregulation order expired 35 days after the DHCR issued it on January 7, 2019, at which time it acquired a vested "right" in apartment 12G's deregulation that could not be challenged. *Id.*, ¶¶ 74, 89-90. Landlord then refers to the portion of the *Regina Metropolitan* holding which, in turn, cited the United States Supreme Court's decision in *Landgraf v USI Film Products* (511 US 244 [1994]), to support the proposition that "[b]y eliminating the constitutionally protected economic benefits that [landlord] would have realized by virtue of the deregulation, and to which [landlord] was entitled as of the date of the Deregulation Order, the Explanatory Addenda violated *Landgraf* and *Regina Metropolitan*," and should therefore be deemed a nullity. *See* verified petition, ¶ 90. However, it is apparent that the *Landgraf* holding does not support landlord's position. In *Landgraf*, the U.S. Supreme Court held that "[w]hen the intervening statute authorizes or affects *the propriety of prospective relief*, application of the new provision is not retroactive." 511 US at 273 (emphasis added). In *Regina Metropolitan*, the Court of Appeals interpreted *Landgraf* to hold that "a statute that affects only 'the propriety of prospective relief" . . . has no potentially problematic retroactive effect even when the liability arises from past conduct." 35 NY3d at 365-366. Applying the Court of

Appeals' reasoning to the facts of this case indicates that the "past conduct" which the explanatory addendum affected was the January 7, 2019 deregulation order, while the "prospective relief" that the explanatory addendum also affected was the pending deregulation of apartment 12G after the June 30, 2019 lease expiration date. Applying the holdings of *Regina Metropolitan* and *Landgraf* to the facts of this case shows that landlord incorrectly claims that the deregulation order created "an existing legal or property right," because the RSL and RSC make it clear that the deregulation order merely created "a right to prospective relief." Those cases further mandate that "rights to prospective relief" do not entitle the parties who hold them to raise retroactive application challenges against intervening statutes that alter or abrogate said "rights to prospective relief."[4] Under this analysis, the deregulation order did not bestow a vested "right" on landlord to deregulate apartment 12G. Instead, it only accorded landlord a "right to prospective relief" in such deregulation, which right was extinguished when Part D of the HSTPA became effective on June 14, 2019, and before the apartment was due to exit rent stabilization on June 30, 2019.[5] The court concludes that *Regina Metropolitan* and *Landgraf* mandate that landlord's "retroactive application" challenge to Part D of the HSTPA is improper, and the court should not consider it. For that reason, the court also finds that landlord's "time-

[4] By way of example, the Supreme Court noted that, because "relief by injunction operates *in futuro*," a plaintiff is deemed to have no "vested right" created by the trial court decree that entered the injunction. *Landgraf v USI Film Products*, 511 US at 273-274, quoting *American Steel Foundries v. Tri-City Central Trades Council*, 4257 US 184, 201 (1921).

[5] This is the reasoning that the DHCR's Deputy Commissioner employed in the portion of the explanatory addendum which stated that "the application of HSTPA to pending matters is not based upon the independent judgement of the rent agency, but, rather, it is pursuant to the plain text in HSTPA." *See* verified petition, exhibit A.

bar" argument, which incorrectly presumes that its "retroactive application" analysis is proper, fails with respect to the explanatory addendum.[6]

Next, landlord argues that "retroactive application of the HSTPA is a denial of due process." *See* verified petition, ¶¶ 93-110. This argument cites the portion of the *Regina Metropolitan* holding that used *Landgraf* and other U.S. Supreme Court decisions as authority to invalidate the DHCR's retroactive application of Part F of the HSTPA on due process grounds. *Id.* However, that portion of the *Regina Metropolitan* holding was premised on the finding that the DHCR *had* applied Part F of the HSTPA retroactively. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 374-388. Here, as the court has repeatedly made clear, the DHCR did *not* apply Part D of the HSTPA retroactively. As a result, the due process analysis that landlord seeks to import from *Landgraf* and its progeny to dispute said retroactive application is inapposite.[7] The court therefore discounts landlord's "due process" argument.[8]

Finally, landlord argues that the "DHCR lacked jurisdiction to issue the explanatory addenda." *See* verified petition, ¶¶ 111-123. However, landlord cites no case law, statutes or regulations to support its' claim that the DHCR acted in excess of its authority in issuing the

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[6] The court here notes that landlord's reply papers appear to abandon the "time-bar" argument. *See* Bittner reply affirmation.

[7] The court here notes with landlord's memorandum misrepresented the court's own holding in *Matter of AEJ 534 East 88th v DHCR* (Index Number 157908/18, motion sequence number 001, July 1, 2019). That decision did *not* "revoke[] DHCR's retroactive application of amended RSC §2526.1 (a) (3) (iii)." *See* verified petition, ¶ 88. The decision *upheld* the DHCR's decision to employ the newly amended version of that regulation which became effective during the pendency of the administrative proceeding.

[8] The court notes that neither the explanatory addendum nor the PAR order discussed the issue of due process, although they both asserted the correct premise that the DHCR had not applied Part D of the HSTPA retroactively.

explanatory memorandum.[9] *Id.* In the PAR order, the DHCR's Deputy Commissioner asserted that "the EA [i.e., explanatory addendum] was not a superseding order modifying or revoking the previously issued order and therefore no jurisdictional predicate was needed under the rent laws to issue it." *See* verified petition, exhibit A. The court noted earlier that RSC § 2527.11 authorizes the DHCR to issue "advisory opinions and operational bulletins," on its own initiative, which "may include the issuance and updating of schedules, forms, instructions, and the official interpretative opinions and explanatory statements of general policy of the commissioner, including operational bulletins, with respect to the RSL and this Code." The court finds that the September 6, 2019 explanatory addendum at issue in this case is an "explanatory statements of general policy" authorized by 9 NYCRR § 2527.11. Therefore, the court rejects landlord's "no jurisdiction" argument because it is belied by that RSC regulation.

As was mentioned at the beginning of this decision, the last argument in landlord's petition is not directed at the explanatory addendum, but at the July 23, 2020 PAR order, which landlord claims "is arbitrary, capricious and contrary to law." *See* verified petition, ¶¶ 124-140. The DHCR responds that the PAR order should be sustained because it was rationally based on the administrative record. *See* respondent's mem of law at 13-14. An agency's determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the . . . facts . . .." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, where a rational basis for the agency's determination can be discerned in the administrative record, there

[9] Landlord's reply memorandum does not contain any such citations either; and, indeed, does not mention this argument at all. It thus appears that landlord may have abandoned it.

can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232. Here, landlord specifically asserts that the PAR order was an arbitrary and capricious ruling because it: "(1) seeks to distinguish *Regina Metropolitan* to support its retroactive application of the HSTPA; (2) incorrectly applied the HSTPA retroactively to alter a final and binding, unchallenged, order; and (3) incorrectly held no party has a vested right to any remedy under the RSL." *See* verified petition, ¶ 125. The court has already rejected landlord's second and third assertions for the reasons stated earlier in this decision. With respect to the first assertion, the court finds that the deputy commissioner's decision to reject landlord's reliance on the holding of *Regina Metropolitan* was correct. It is true that the Court of Appeals held in *Regina Metropolitan* that it was improper for the DHCR to apply Part F of the HSTPA retroactively. However, the Court of Appeals also confirmed that Part D of the HSTPA repealed "high income rent deregulation" prospectively. 35 NY3d at 373. Because this case involves a prospective deregulation, *Regina Metropolitan* does not aid landlord's position. Therefore, the court rejects landlord's assertion that the PAR order improperly distinguished *Regina Metropolitan*. Because landlord raises no other arguments as to how the PAR order might have been an "arbitrary and capricious" ruling, the court finds that so much of landlord's petition as challenged the PAR order directly under that standard should be denied.

Accordingly, having concluded that landlord's challenge to both the explanatory addendum and the PAR order lack merit, the court finds that landlord's article 78 petition should be denied, and that this proceeding should be dismissed.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR article 78, of petitioner 160 East 84th Street Associates, LLC (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with Notice of Entry, on all parties within twenty (20) days.

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1/19/2021
DATE

CAROL R. EDMEAD, J.S.C.

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|---|---|---|---|---|---|---|---|
| CHECK ONE: | X | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
| | | GRANTED | X | DENIED | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |

# EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL DEPARTMENT

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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.

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NOTICE OF MOTION

Supreme Court Index No.
157576/2020

Docket No. 2021-00718

**PLEASE TAKE NOTICE**, that upon the annexed affirmation of Jillian N. Bittner, Esq., dated April 19, 2022, as well as the exhibits annexed thereto, Petitioner-Appellant will move this Court at a motion part at the Courthouse located at 27 Madison Avenue, New York, New York on the 16th day of May, 2022, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order granting Petitioner-Appellant reargument of this Court's Decision and Order dated February 24, 2022 and upon reargument, reversing the Order of Hon. Carol R. Edmead of the Supreme Court entered on January 19, 2021 and assigned Index No. 157576/2020, or if this Court denies reargument or, grants reargument but adheres to its original determination, Petitioner-Appellant requests that this Court grant leave to appeal to the Court of Appeals, in addition to granting such other and further relief as the Court may deem just and proper.

**PLEASE TAKE FURTHER NOTICE** pursuant to CPLR 2214(b) that answering papers, if any, must be served in a manner in which they will be received by the undersigned no later than seven (7) days prior to the return date of this motion.

Dated: Williston Park, New York
April 19, 2022

Yours, etc.,

HORING WELIKSON ROSEN &
DIGRUGILLIERS, PC

By: _____
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# Supreme Court of the State of New York
## Appellate Division, First Judicial Department

Present – Hon. Troy K. Webber, Justice Presiding,
Cynthia S. Kern
Peter H. Moulton
Lizbeth González
Manuel J. Mendez, Justices.

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| In the Matter of 160 E. 84th St. Associates LLC,<br>Petitioner-Appellant,<br><br>-against-<br><br>New York State Division of Housing and Community Renewal,<br>Respondent-Respondent. | Motion No.<br>Index No.<br>Case No. | **2022-01633**<br>157576/20<br>2021-00718 |
| In the Matter of 87th Street Sherry Associates LLC,<br>Petitioner-Appellant,<br><br>-against-<br><br>New York State Division of Housing and Community Renewal,<br>Respondent-Respondent. | Motion No.<br>Index No.<br>Case No. | **2022-01729**<br>153999/20<br>2021-00644 |
| In the Matter of 87th Street Sherry Associates LLC,<br>Petitioner-Appellant,<br><br>-against-<br><br>New York State Division of Housing and Community Renewal,<br>Respondent-Respondent. | Motion No.<br>Index No.<br>Case No. | **2022-01730**<br>153995/20<br>2021-00655 |

Petitioner-appellant in each proceeding having moved by separate motions for reargument of, or in the alternative, for leave to appeal to the Court of Appeals, from the

decision and order of this Court, entered on February 24, 2022 (Appeal Nos. 15380-15381-15382),

Now, upon reading and filing the papers with respect to the motions, and due deliberation having been had thereon,

It is ordered that the motions are denied in all respects, (M-2022-01633 & M-2022-01729 & M-2022-01730).

ENTERED: July 5, 2022

Susanna Molina Rojas
Clerk of the Court