No. APL-2018-00222

To be argued by:
ESTER MURDUKHAYEVA
15 minutes requested

State of New York
Court of Appeals

Action No. 1

In the Matter of the Application of

REGINA METROPOLITAN CO., LLC,

Petitioner-Respondent,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Appellant,

LESLIE E. CARR and HARRY A. LEVY,

Intervenors-Respondents,

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

(*Caption continues inside front cover.*)

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Dated: August 15, 2019

Supreme Court, New York County, Index No. 101235/15 and 101236/15
First Department No. 5026

(*Caption continues from front cover*)

Action No. 2

In the Matter of the Application of

LESLIE E. CARR and HARRY A. LEVY

Petitioners,

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent,

REGINA METROPOLITAN CO., LLC,

Intervenor-Respondent,

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

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PRELIMINARY STATEMENT

This appeal involves a challenge to the manner in which the New York State Division of Housing and Community Renewal (DHCR) has applied this Court's landmark decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009), in subsequent rent-overcharge proceedings. *Roberts* held that owners (like respondent Regina Metropolitan Co., LLC) that received certain tax benefits had been unlawfully deregulating their apartments for more than a decade based on an erroneous interpretation of the governing statutes and prior agency guidance. As a result of these unlawful deregulations, owners were charging illegal market rents rather than rent-stabilized rents for thousands of units. As explained in DHCR's opening brief, DHCR reasonably implemented *Roberts* in this rent-overcharge proceeding by prohibiting Regina Metropolitan from imposing an improper market rent for an apartment that was unlawfully deregulated more than four years prior to the underlying complaint.

Regina Metropolitan is incorrect in asserting that a set of statutory and regulatory provisions collectively known as the Four-

Year Rule permitted it to charge an unlawful market rent notwithstanding this Court's unambiguous ruling in *Roberts*. In Regina Metropolitan's view, the Four-Year Rule requires that the legal regulated rent for an apartment be based on the rent that was actually charged four years prior to the complaint—even if all parties agree that the rent actually charged on that date was an illegal market rent that was the product of an unlawful deregulation. But, as DHCR has explained, this Court has never sanctioned a mechanical application of the Four-Year Rule that would so eviscerate the rent-stabilization laws—particularly the statutes' core purpose of maintaining rents at legally regulated levels. Consistent with this Court's precedents, DHCR reasonably reconciled the Four-Year Rule with these compelling statutory objectives by prohibiting Regina Metropolitan from benefiting from its concededly unlawful deregulation.

DHCR's calculation of the base date rent did, however, reasonably give Regina Metropolitan credit for rent increases that could have been charged if the owner had not deregulated the unit improperly. The tenants in the underlying rent-overcharge

proceeding have objected to this part of DHCR's methodology, but their arguments are both jurisdictionally barred and meritless. DHCR had broad discretion to determine an equitable rent and overcharge based on the facts and circumstance of this case. In an article 78 proceeding, the relevant question is not whether DHCR could have applied a different methodology, but whether the approach the agency adopted was lawful and reasonable. In this case, DHCR's approach was justified because it permitted Regina Metropolitan to charge a rent that would have been authorized were it not for the owner's unlawful, but reasonably mistaken, deregulation of the subject apartment.

ARGUMENT

POINT I

DHCR'S ORDER IS LAWFUL

A. The Four-Year Rule Does Not Preclude DHCR from Implementing *Roberts*.

1. Review of records older than four years is necessary to give effect to the continuing statutory obligation recognized in *Roberts*.

In *Roberts*, this Court held that the Rent Stabilization Law's luxury deregulation provisions prohibit owners that are receiving tax benefits through New York City's J-51 program from removing their rental units from rent stabilization, notwithstanding prior agency guidance to the contrary.[1] *Roberts*, 13 N.Y.3d at 285-87. As the First Department subsequently recognized, *Roberts* involved pure questions of statutory interpretation and therefore applied retroactively to owners like Regina Metropolitan that had deregulated their rental units prior to this Court's ruling. *Gersten*

[1] In June 2019, the Legislature repealed the provisions permitting luxury deregulation in their entirety. *See* Housing Stability and Tenant Protection Act, Ch. 36, pt. D, § 5, 2019 N.Y. Laws (LRS), p. 6.

v. 56 7th Ave. LLC, 88 A.D.3d 189, 198 (1st Dep't 2011), *appeal withdrawn*, 18 N.Y.3d 954 (2012).

After *Roberts*, many tenants filed rent-overcharge complaints against owners who had unlawfully deregulated their apartments for more than a decade prior to this Court's decision. In adjudicating the rent-overcharge complaint at issue here, DHCR declined to adopt the market rent actually charged on the "base date"—because that rent was the product of an improper regulation—and instead calculated the base date rent by identifying the last lawfully imposed regulated rent prior to deregulation and crediting the owner with increases that could have been charged if the unlawful (but reasonably mistaken) deregulation had not occurred. DHCR's approach was a reasonable one that properly gave effect to *Roberts* and the statutory provisions that *Roberts* interpreted. See Br. for Appellant ("DHCR Br.") at 31-41.

Regina Metropolitan acknowledges that *Roberts* rendered its deregulation of the apartment in this case unlawful, and concedes that, under *Roberts*, the Rent Stabilization Law and the terms of the J-51 program mandated that its "apartments remain rent

regulated during a building's receipt of J-51 tax benefits." Br. for Petitioner-Respondent ("Regina Br.") at 1; *see also* Suppl. Br. for Petitioner-Respondent ("Regina Suppl. Br.") at 3-7. But Regina Metropolitan fundamentally misunderstands the law in arguing (Regina Br. at 22-24; Regina Suppl. Br. at 8-11) that *Roberts* permits an owner to enshrine an unlawful market rent as the legal regulated rent for an apartment simply because that owner fortuitously deregulated the unit more than four years prior to *Roberts*.

"Prevent[ing] speculative, unwarranted and abnormal increases in rents" is the primary purpose of the rent-stabilization statutes. Rent Stabilization Law[2] (RSL) § 26-501. The heart of the Rent Stabilization Law is therefore contained in the statutory provisions that (i) set forth the process for calculating the maximum legal rent, and (ii) prohibit owners from charging more than that maximum legal rent. *Id.* §§ 26-511, 26-512. Nothing in these provisions authorizes an owner to improperly remove a unit from rent

[2] The Rent Stabilization Law (RSL) is printed at McKinney's Unconsol. Laws of N.Y., T. 23, ch. 4, §§ 26-501–26-520.

regulation, charge a market rent, and obtain the benefit of that market rent upon restoring the unit to the stabilized status it was required to maintain all along.[3] "[T]he rent-regulated status of an apartment is a continuous circumstance that remains until different facts or events occur that change the status of the apartment." *Gersten*, 88 A.D.3d at 199.

Here, there is no question that the Rent Stabilization Law and the statutes and regulations governing the J-51 program imposed a continuing obligation on Regina Metropolitan to treat the subject apartment as rent-stabilized starting in 1999 (when Regina Metropolitan began to receive J-51 benefits) and continuing through at least the expiration of those benefits in 2010.[4] Regina Metropolitan does not dispute this point. *See, e.g.*, Regina Br. at 1. Nor could it, as DHCR has explained (DHCR Br. at 7-8, 13-17,

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[3] Regina Metropolitan misses the point in arguing that *Roberts* did not "suggest[] a methodology for calculating rent." Regina Br. at 1. *Roberts* did not need to "suggest" any such methodology, because the Rent Stabilization Law already provides the relevant framework for calculating a legal rent for stabilized apartments.

[4] In this case, the obligation extended beyond 2010 because the current tenants occupied the subject apartment at the time the J-51 benefits expired. See DHCR Br. at 19-21; RSL § 26-504(c).

36-38), given the unambiguous language of the relevant statutory and regulatory provisions. *See* RSL §§ 26-504(c), 26-504.1, 26-504.2(a); *see also* Administrative Code of the City of New York § 11-243(dd)(2), (i)(1), (t); 28 RCNY § 5-03(f). Although Regina Metropolitan now complains that such tax benefits are insufficient to justify the burdens of rent regulation (Regina Br. at 3), it chose to participate in the J-51 program knowing that doing so would subject its housing units to regulatory control.[5]

As explained in DHCR's opening brief (DHCR Br. at 31-34), this case is thus directly analogous to *Matter of Cintron v. Calogero*, in which this Court was asked "to ascertain the consequences on a current rent overcharge claim of two rent-reduction orders issued prior to, but in effect during, the four-year period preceding the

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[5] New York City taxpayers would likely disagree with Regina Metropolitan's characterization of the value of J-51 benefits. According to studies, New York City's Department of Finance has estimated that the J-51 program costs at least $250 million annually. *See* Tom Waters and Victor Bach, *Upgrading Private Property at Public Expense: The Rising Cost of J-51*, Community Service Society (June 2012), at 1, https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/UpgradingPrivatePropertyAtPublicExpenseJ51June2012.pdf.

filing of an overcharge claim." 15 N.Y.3d 347, 351 (2010). This Court held that such rent-reduction orders were properly considered in determining the appropriate base date rent and calculating the subsequent overcharge because they imposed a "continuing duty on the landlord" that affected the legal rent which could be charged during the statute of limitations period for the overcharge claim.[6] *Id.* at 355. Therefore, the Court instructed DHCR to disregard the inflated rent actually charged on the base date, and instead calculate the base date rent (and subsequent overcharge) in a manner that gave effect to the rent-reduction orders, notwithstanding the fact that those orders were issued more than fifteen years prior to the complaint. *See id.* at 356; *see also Scott v. Rockaway Pratt, LLC*, 17 N.Y.3d 739, 739 (2011) (same).

Here too, Regina Metropolitan was subject to a continuing obligation under the governing statutes and the terms of the J-51 program to treat the subject apartment as rent-stabilized, and that

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[6] Overcharges are generally calculated based on the difference between the rent actually collected and the legal regulated rent charged on the base date, with adjustments for certain authorized increases. See DHCR Br. at 6-7, 9-10.

obligation remained in effect throughout the four year period preceding the filing of the overcharge claim at issue in this appeal. See *supra* at 7. "[R]efusing to give effect" to this statutory duty would "thwart the goals of the Legislature" in enacting the various provisions governing rent stabilization and the J-51 program—namely, to require owners receiving valuable public benefits to offer rent-stabilized housing while receiving such benefits. *Matter of Cintron*, 15 N.Y.3d at 355-56.

DHCR's determination to look beyond the market rent illegally charged on the base date was therefore not only a reasonable approach to implementing *Roberts*, but also a necessary measure to give meaning to *Roberts* and the statutory provisions that case interpreted. The legislative intent behind excluding owners receiving J-51 benefits from the luxury deregulation provisions was to ensure that the extraordinary public benefit of luxury deregulation was "unavailable to building owners who 'enjoy[ed] another system of general public assistance'" in the form of tax abatements. *Roberts*, 13 N.Y.3d at 286 (quoting N.Y. Senate Debate on Bill A8859 (July 7, 1993) (reproduced at Addendum

("Add.") 1-10), at 8214). Contrary to Regina Metropolitan's contention (Regina Suppl. Br. at 11), that legislative purpose is not sufficiently advanced by providing tenants with some, but not all, of the benefits of rent stabilization. The Legislature intended for all J-51 units to receive the full panoply of the Rent Stabilization Law's protections. *Roberts*, 13 N.Y.3d at 286-87. There is simply no basis to argue that the Legislature would sanction a carve-out for the most important protection of all: a legal regulated rent free from unwarranted and unlawful increases.

Instead of substantively engaging with *Matter of Cintron*, Regina Metropolitan argues that the case is inapplicable here because "*Roberts* does not involve rent reduction orders."[7] Regina

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[7] In the alternative, Regina Metropolitan contends (Regina Br. at 16; Regina Suppl. Br. at 9) that DHCR arbitrarily departed from its determination not to look at records outside the four-year look-back period in a different *Roberts*-related case, *Matter of the Administrative Appeal of Majestic Properties LLC*, Dkt. No. DR 110015R0 (Aug. 19, 2015) (Record on Appeal (R.) 351-355). There is no merit to this argument. *Majestic Properties* involved an owner seeking to increase the base date rent from the rent actually charged on the base date by applying increases for improvements made prior to the four-year look-back period. (R. 352-353.) DHCR reasonably determined that, under the facts and circumstances presented in *Majestic Properties*, looking at older records would not be consistent

Br. at 16-17. Regina Metropolitan reads *Matter of Cintron* far too narrowly. This Court's decision did not turn on the purportedly unique nature of rent-reduction orders but rather on the broader proposition that owners must comply with their "continuing obligation[s]" under the governing statutes, and that any such obligations, "if still in effect during the four-year [limitations] period, are in fact part of the rental history which DHCR must consider." *Matter of Cintron*, 15 N.Y.3d at 356. Nothing in *Matter of Cintron* suggested that rent-reduction orders were the only way to establish a continuing obligation; to the contrary, the Court made clear that it was obligated to harmonize the evidentiary component

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with the text and purposes of the Rent Stabilization Law. By contrast, DHCR has consistently applied the methodology used in this rent-overcharge proceeding in cases involving similar facts. *See, e.g.*, DHCR, Order & Opinion Denying Petition for Administrative Review, *Matter of Four Thirty Realty LLC*, Dkt. No. EN410001RP (Mar. 31, 2017) (reproduced at Add. 19-24); DHCR, Administrative Order Finding Rent Overcharge, *Matter of Messina* Dkt. No. BU 410078R (May 26, 2016), *aff'd on administrative appeal* Dkt. No. ER410066RT (Dec. 22, 2016) (reproduced at Add. 25-35); DHCR, Administrative Order Finding Rent Overcharge, *Matter of Korn*, Dkt. No. AW 410041R (Oct. 29, 2014), *aff'd on administrative appeal* Dkt. No. CX410046RT (July 28, 2015) (reproduced at Add. 36-46).

of the Four-Year Rule with "*all parts*" of the Rent Stabilization Law. *Id.* at 355 (emphasis added).

Regina Metropolitan also asserts (Regina Br. at 3, Regina Suppl. Br. at 3) that the Legislature did not intend to protect tenants who could afford to pay market rents. This argument is entirely beside the point, because the Legislature never intended for J-51 units to be subject to market rents in the first place. *See* N.Y. Senate Debate on Bill A8859, *supra*, at 8213-16; N.Y. Assembly Debate on Bill A8859 (July 7, 1993) (reproduced at Add. 11-18), at 213. Moreover, the goal of the Rent Stabilization Law is not only to protect tenants but to "preserv[e] a stock of affordable housing." *Thornton v. Baron*, 5 N.Y.3d 175, 181 (2005). DHCR's application of *Roberts* in this case is necessary to ensure that affordable housing remains available to all New Yorkers, even if wealthier tenants will receive some benefit as a consequence.[8]

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[8] The "base date rent" affects not only the calculation of rent overcharges but also the determination of the maximum legal rent going forward. The difference between DHCR's and Regina Metropolitan's calculations of the maximum legal rent going forward is substantial: $ 4,136.32 versus $ 6,634.12. See DHCR Br. at 50.

2. The Four-Year Rule has never served as a categorical barrier to implementation of the substantive provisions of the Rent Stabilization Law.

Regina Metropolitan's chief argument on appeal is that the evidentiary component of the Four-Year Rule is "inviolate" and categorically forbids looking beyond the rent actually charged on the base date, absent cases involving fraud. *See* Regina Br. at 15-20; Regina Suppl. Br. at 9-10. Regina Metropolitan's argument fails for several reasons.

First, this Court has already rejected the argument that the evidentiary Four-Year Rule is "inviolate." Indeed, Regina Metropolitan overlooks the fact that the "fraud exception" it endorses is itself a judicially created exception to the Four-Year Rule that is not expressly provided for in the text of the relevant statutes. (R. 369.) *See Conason v. Megan Holding, LLC,* 25 N.Y.3d 1, 16 (2015); *Matter of Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 N.Y.3d 358, 366-67 (2010); *Thornton*, 5 N.Y.3d at 180-81. More than a decade of this Court's precedents have thus already foreclosed the rigid textual

interpretation of the evidentiary Four-Year Rule that Regina Metropolitan relies on here.

Second, Regina Metropolitan is simply wrong to argue (Regina Br. at 15-20) that this Court and the Appellate Division have permitted review of records outside the four-year period only in cases involving fraud.[9] Among other things, Regina Metropolitan concedes (*id.* at 16-20) that courts have looked beyond four years in a variety of contexts not involving fraud, including rent-reduction orders, longevity increases, and treble damages determinations. *See Scott*, 17 N.Y.3d at 739-40 (rent-reduction orders); *Matter of Cintron*, 15 N.Y.3d at 355 (same); *Matter of H.O. Realty Corp. v. State of N.Y. Div. of Hous. & Community Renewal*, 46 A.D.3d 103,

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[9] Regina Metropolitan is likewise mistaken in its characterization (Regina Br. at 18) of this Court's decision in *Matter of Boyd v. New York State Division of Housing and Community Renewal*, 23 N.Y.3d 999 (2014), *rev'g* 110 A.D.3d 594 (1st Dep't 2013). As explained in DHCR's opening brief (DHCR Br. at 46), *Matter of Boyd* involved only the question of whether the tenant had adduced sufficient evidence of fraud in connection with increases for individual apartment improvements, not whether fraud was the only available exception to the Four-Year Rule. Moreover, although *Boyd* involved a building receiving J-51 benefits, the case did not involve an owner's effort to codify an unlawful market rent as the legal regulated rent.

109 (1st Dep't 2007) (treble damages); *Matter of Ador Realty, LLC v. Division of Hous. & Community Renewal*, 25 A.D.3d 128, 136-39 (2d Dep't 2005) (longevity increases). Regina Metropolitan fails to grapple with the fact that the rationale for these decisions was not fraud (which was absent in each of these cases), but rather competing statutory mandates that the courts were required to harmonize with the evidentiary component of the Four-Year Rule in a manner that would not render meaningless the substantive provisions of the Rent Stabilization Law. See DHCR Br. at 34-36.

In many of these cases, as here, a strict application of the evidentiary Four-Year Rule would have required courts to disregard substantive provisions of the rent-stabilization laws. But a fundamental principle of statutory construction is that "[e]very part of a statute must be given meaning and effect, and the various parts of a statute must be construed so as to harmonize with one another." *Heard v. Cuomo*, 80 N.Y.2d 684, 689 (1993). "[I]n interpreting statutes, the goal is to further the intent, spirit and purpose" of a statutory scheme without unduly elevating one provision over another. *Matter of Cintron*, 15 N.Y.3d at 355.

Accordingly, courts have consistently declined to apply the Four-Year Rule mechanically when doing so would undercut the purposes of the rent-stabilization laws.

For example, *Matter of Ador Realty* involved the application of the Four-Year Rule in an overcharge claim challenging the validity of a longevity increase, which, at the time, could be asserted only when the same tenant had resided in a unit for eight years. *Matter of Ador Realty*, 25 A.D.3d at 133-34. As the Second Department explained, an inflexible application of the Four-Year Rule in such instances would preclude review of records dating back eight years and impermissibly relieve the owner of the "burden of establishing the validity of the rent charged." *Id.* at 137. In such cases, the owner would always be able to claim a longevity increase, notwithstanding the Legislature's intent that such an increase be claimed only after eight years of continuous occupancy. *See id.* The court correctly rejected such a construction as "absurd." *Id.*

Likewise, this Court in *Thornton* stressed that an inflexible application of the Four-Year Rule in cases involving illusory tenancies "would bring about the rapid removal of many apartments from

rent stabilization . . . undermining the statute's very purpose of preserving a stock of affordable housing." *Thornton*, 5 N.Y.3d at 181-82. And in *Matter of Cintron*, this Court concluded that the failure to include older rent-reduction orders in calculating an overcharge "would countenance the landlord's failure to restore required services" and thereby frustrate the legislative goals of requiring those services in the first place. *Matter of Cintron*, 15 N.Y.3d at 356.

Endorsing DHCR's methodology in this case would not undermine the Legislature's intent in promulgating the evidentiary Four-Year Rule. As this Court explained in *Thornton*, the purpose of the rule is "to alleviate the burden on honest landlords to retain rent records indefinitely." *Thornton*, 5 N.Y.3d at 181. Even assuming that such a "burden" could override the Rent Stabilization Law's principal goal of correctly setting a legal regulated rent, this case does not give rise to that burden, for several reasons.

First, there is no dispute that Regina Metropolitan unlawfully deregulated the apartment at issue, so no records were necessary for DHCR to decide that *Roberts* applied here. Second, Regina

Metropolitan was always obligated to maintain records pertaining to the regulatory status of a unit. *See East W. Renovating Co. v. New York State Div. of Hous. & Community Renewal*, 16 A.D.3d 166, 167 (1st Dep't 2005) (review of records outside the four-year look-back period is permissible "to determine whether an apartment is regulated"). Third, this Court has recognized that "DHCR can take notice of . . . the rent registrations it maintains" to ascertain a proper rent without "imposing onerous obligations on landlords." *Matter of Cintron*, 15 N.Y.3d at 355-56. Finally, Regina Metropolitan has never argued that it was missing relevant records because of any lapse in time; to the contrary, Regina Metropolitan provided ample records with which DHCR was able to reconstitute the rent that could have been legally charged if the unit had never been deregulated. See DHCR Br. at 21-23. Under these circumstances, a rigid application of the evidentiary Four-Year Rule would simply bestow an unlawful and unearned benefit on the owner without actually furthering the purposes behind the look-back period.

3. The absence of a directly applicable provision in the Rent Stabilization Code does not preclude DHCR's methodology.

There is also no merit to Regina Metropolitan's argument (Regina Br. at 10-15) that the methodology applied by DHCR in this rent-overcharge proceeding is unlawful because it is not expressly provided for in the Rent Stabilization Code, the collected body of regulations promulgated by DHCR. Regina Metropolitan correctly notes (*id.* at 14-15) that, when DHCR amended its regulations in 2014 to codify several judicially recognized exceptions to the evidentiary Four-Year Rule, it did not add an exception for apartments that were unlawfully deregulated prior to *Roberts*. But Regina Metropolitan is wrong to suggest that the absence of such a provision in DHCR's regulations renders unlawful the methodology used in this case.

As an initial matter, Regina Metropolitan mischaracterizes (*see id.* at 15) DHCR's decision not to include a *Roberts*-related exception in the 2014 amendments as an agency "position" that such an exception is contrary to law. The purpose of the relevant amendments was "to set forth, in one place, a more comprehensive

list of areas where, to date, by statute, case law or regulation, the 'four year rule' that ordinarily governs rent and overcharge review, has been held not to be applicable." DHCR, Notice of Proposed Rulemaking—Consolidated Regulatory Impact Statement (Apr. 24, 2013) (reproduced at Add. 47-68), at 15. Accordingly, DHCR included only those exceptions that had already been recognized at the time of the proposed rule, while acknowledging the pendency of litigation about other possible exceptions. *See id.* at 16. DHCR further explained that "[w]hile there may be case law supporting [a *Roberts*-related exception], there is none as of yet litigated through DHCR's administrative process or by subsequent Article 78 proceeding." *See* DHCR, Notice of Adoption—Assessment of Public Comments for RSC (Dec. 23, 2013) (reproduced at Add. 69-80), at 9. Therefore, DHCR determined that a *Roberts*-related exception was "not sufficiently settled for inclusion as a regulatory standard" at the time of the 2014 amendments. *Id; see also* 36 N.Y. Reg. 35 (Jan. 8, 2014).

DHCR's codification of judicially settled exceptions to the evidentiary Four-Year Rule was in no way intended to preclude

other exceptions from being recognized—either by the agency or the courts. Indeed, none of the exceptions previously recognized by this Court and the Appellate Division had been codified at the time the courts reached their decisions, yet that fact has never precluded courts from finding such exceptions warranted by the Rent Stabilization Law. Moreover, DHCR has never taken the position that the Rent Stabilization Code contains an exclusive list of the exceptions permitted by the governing statutes. To the contrary, the agency stated that the amended regulation was intended only as a "useful guide" to those exceptions that had been previously recognized by the courts. Consolidated Regulatory Impact Statement, *supra*, at 15. Accordingly, DHCR was not foreclosed by its regulations from interpreting the Rent Stabilization Law to permit an exception to the evidentiary component of the Four-Year Rule in this case.

B. The Legislature Has Confirmed DHCR's Approach to Calculating the Base Date Rent.

Regina Metropolitan also contends that DHCR is asking the Court "to amend a statute that is unequivocal on its face" in violation of a purported prohibition against "judicial legislation." Regina Br. at 20-21. DHCR has asked for no such relief. To the contrary, DHCR's position reasonably reconciles the evidentiary Four-Year Rule provisions with the substantive protections of the Rent Stabilization Law and the requirements of the J-51 program. See *supra* at 4-13.

In any event, Regina Metropolitan's concern about "judicial legislation" has been obviated by the Legislature's emphatic confirmation of DHCR's approach to calculating the base date rent in the recently enacted Housing Stability and Tenant Protection Act of 2019 (HSTPA). Specifically, the HSTPA amended the Rent Stabilization Law to expressly endorse DHCR's consideration of *all* relevant rental history—not limited by the Four-Year Rule—to determine the lawful rent of rent-stabilized units, particularly in circumstances where the legality of the rent charged on the base date is concededly unreliable under *Roberts*:

> Nothing contained in this subdivision shall limit the examination of rent history relevant to a determination as to: (i) whether the legality of a rental amount charged or registered is *reliable* in light of all available evidence including but not limited to whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable.

RSL § 26-516(h)(i), *added by* Ch. 36, pt. F, § 5, 2019 N.Y. Laws (LRS), pp. 13-14 (emphasis added). The HSTPA likewise directs DHCR to "consider all available rent history which is reasonably necessary" to determine a rent overcharge. RSL § 26-516(a), *amended by* Ch. 36, pt. F, § 4, 2019 N.Y. Laws (LRS), p. 12. Further, the HSTPA eliminates the statutory language on which the Appellate Division relied in rejecting DHCR's methodology below (R. 368-370)—namely, text that purported to preclude "examination of the rental history of the housing accommodation prior to the four year period preceding the filing of a complaint."[10] RSL § 26-516(b)(i), *amended by* Ch. 36, pt. F, § 1,

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[10] The provisions of the HSTPA described above "take effect immediately and shall apply to any claims pending" on or after the effective date of June 14, 2019. *See* Ch. 36, pt. F, § 7, 2019 N.Y. Laws (LRS), p. 14. If this Court requires further information about the HSTPA, DHCR can provide a supplemental brief to address the applicability of the new law to the issue before the Court.

2019 N.Y. Laws (LRS), p. 9; *see also* RSL § 26-516(a)(2), *amended by* Ch. 36, pt. F, § 4, 2019 N.Y. Laws (LRS), p. 13; C.P.L.R. 213-a, *amended by* Ch. 36, pt. F, § 6, 2019 N.Y. Laws (LRS), p. 14.

The Legislature has therefore confirmed DHCR's view here that it would be inappropriate to temporally limit review of rental history when such constrained review would preclude the agency from determining the legality of the base date rent. While the agency's approach in this case was already lawful before the enactment of the HSTPA, the Legislature's recent enactment has further foreclosed Regina Metropolitan's already unwarranted concern about "judicial legislation."

POINT II

DHCR'S CALCULATION OF THE BASE DATE RENT IS REASONABLE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE

If this Court agrees that DHCR was entitled to disregard the market rent actually charged on the base date, there is no basis to displace DHCR's approach to calculating the correct base date rent—namely, starting with the last stabilized legal rent registered in 2003 and adding more than $1,000 of increases (based on supporting

documentation) to recreate the rent that Regina Metropolitan could lawfully have charged if the apartment had remained rent stabilized as was required.

Both the tenants and Regina Metropolitan ask this Court to alter DHCR's methodology in various respects. As an initial matter, this Court has no jurisdiction to consider the tenants' and Regina Metropolitan's requests to modify the judgment in the way they would prefer. This Court's "review of the Appellate Division order is 'limited to those parts of the judgment that have been appealed and that aggrieve the appealing party.'" *Hain v. Jamison*, 28 N.Y.3d 524, 534 n.3 (2016) (quoting *Hecht v. City of New York*, 60 N.Y.2d 57, 61 (1983).) "An exception exists only for cases where granting relief to a nonappealing party is necessary to give meaningful relief to the appealing party." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151 n.3 (2002). Absent this limited exception, this Court must "deny affirmative relief to a nonmoving party, even where the Appellate Division broadly certifies the propriety of its order for review by this Court." *Id.* (citation omitted); *see also Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 118 & n.2 (1995).

Here, neither the tenants (Leslie E. Carr and Harry A. Levy) nor Regina Metropolitan properly appealed from the Appellate Division's order, which, among other things, rejected their arguments that DHCR was required to adopt the last registered rent as the base date rent, calculate the base date rent by recourse to the default formula, or impose the market rent actually charged on the base date. (R. 366-367, 371-372, 375.) Accordingly, the non-appealing parties cannot seek to obtain such relief from this Court.

In any event, even if this Court were to consider these arguments, it should reject them. The appropriate question in an article 78 proceeding is not whether DHCR could have used a different formula to calculate the base date rent, but whether the formula the agency chose was lawful and reasonable under the facts and circumstances of a particular case.

First, DHCR reasonably rejected Carr and Levy's request to freeze the base date rent at the last registered rent prior to deregulation without crediting the owner for any increases. *See* Br. for Intervenors-Respondents ("Tenants Br.") at 19-20. As the First Department has explained, a rent freeze in cases involving

deregulations prior to *Roberts*, as a general matter, is inappropriately punitive because such deregulations were "taken in good faith" and in reliance on prior agency guidance. *Matter of Park v. New York State Div. of Hous. & Community Renewal*, 150 A.D.3d 105, 113 (1st Dep't). *lv. dismissed*, 30 N.Y.3d 961 (2017); *see also Taylor v. 72A Realty Assoc., L.P.*, 151 A.D.3d 95, 106 (1st Dep't 2017). *Matter of Park* and *Taylor* unequivocally support DHCR's order under the circumstances involved in this case. The record here reflects not only a reasonably mistaken deregulation, but an owner that took timely and reasonable corrective measures to restore the apartment to stabilization after *Roberts*.[11] See DHCR Br. at 19-21.

By contrast, the cases cited by Carr and Levy (*see* Tenants Br. at 19-20) involve fraud or other willful violations of the Rent Stabilization Law. In *Jazilek v. Abart Holdings, LLC*, for example,

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[11] Regina Metropolitan is wrong to suggest (Regina Suppl. Br. at 14-16) that *Matter of Park* and *Taylor* categorically foreclose a rent freeze in all *Roberts*-related cases. Certain circumstances—i.e., where an owner has delayed re-registering its units or notifying tenants of the wrongful deregulation—may warrant such a freeze, but those circumstances are not present here. See also DHCR Br. at 40 n.11, 49 n.12.

the owner attempted to deregulate the apartment by a stipulation that was void as a matter of law and then filed false registrations. 72 A.D.3d 529, 530-31 (1st Dep't 2010). *Matter of Hargrove v. Division of Housing and Community Renewal* likewise involved a willful overcharge based on the owner's misstatements about when its J-51 benefits expired. 244 A.D.2d 241, 242-43 (1st Dep't 1997); *see also Altschuler v. Jobman 478/480, LLC*, 135 A.D.3d 439, 440-41 (1st Dep't 2016) (applying rent freeze where "plaintiff established a colorable claim of fraud" in connection with deregulation). None of these cases support applying a rent freeze under the facts and circumstances presented here.[12]

DHCR likewise reasonably rejected Carr and Levy's suggestion to apply the "default formula," an alternate sampling method, or

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[12] The remaining cases cited by Carr and Levy are inapplicable as well. *See Matter of 215 W 88th St. Holdings LLC v. New York State Div. of Hous. & Community Renewal*, 143 A.D.3d 652, 653 (1st Dep't 2016) (holding that a rent freeze must be imposed when DHCR uses the default formula to calculate an overcharge); *Matter of BN Realty Assoc. v. New York State Div. of Hous. & Community Renewal*, 254 A.D.2d 7, 7 (1st Dep't 1998) (holding that a rent freeze was reasonably imposed when claimed increases were unlawful for reasons unrelated to the failure to file a timely registration).

"the rent of a comparable apartment" in determining the base date rent. *See* Tenants Br. at 17-18, 20. These formulations are typically appropriate when the owner engaged in a fraudulent scheme to deregulate the unit, or otherwise failed to support the rent charged or the increases claimed. *See* 9 N.Y.C.R.R. § 2522.6(b)(2). None of these factors are present here. DHCR reasonably concluded that Regina Metropolitan did not engage in fraud (R. 47, 55), the courts below upheld that determination (R. 12-13, 266-367, 377), and no party has appealed that finding to this Court. And as explained *supra* at 19, Regina Metropolitan provided sufficient records to allow DHCR to meaningfully evaluate the owner's eligibility for various increases (i.e., for longevity, vacancy, and major capital improvements). Under these circumstances, the agency was not required to apply alternate formulas.

For its part, Regina Metropolitan contends (Regina Br. at 22-24) that, if this Court were to affirm the Appellate Division, it should require DHCR to apply the market rent charged on the base date in calculating the overcharge, rather than remanding to the agency for further proceedings as ordered by the First Department (R. 361,

375-376). But Regina Metropolitan fails to identify any legal error in the Appellate Division's determination that, even under a strict application of the Four-Year Rule, DHCR may consider other evidence *within* the four-year period to calculate an alternate base date rent upon remand, rather than mechanically adopt the illegal market rent charged in the operative lease. (R. 375.) No provision of the Rent Stabilization Law precludes DHCR's consideration of such evidence; and, so long as that evidence arose during the four years prior to the overcharge complaint, it would satisfy even Regina Metropolitan's erroneous view of the evidentiary Four-Year Rule.

CONCLUSION

The Court should reverse the Appellate Division's decision and order to the extent it granted Regina Metropolitan's petition to remand to DHCR for recalculation of the base date rent and corresponding overcharge.

Dated: New York, New York
August 15, 2019

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), Ester Murdukhayeva, 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 5,818 words, which complies with the limitations stated in § 500.13(c)(1).

/s/ Ester Murdukhayeva
Ester Murdukhayeva

Addendum

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THE PRESIDENT: Secretary will read, and we'll have order in the chamber.

THE SECRETARY: On Supplemental Calendar Number 2, Calendar Number 1668, substituted earlier, by the Assembly Committee on Rules, Assembly Bill Number 8859, Emergency Housing Rent Control.

VOICE: Explanation.

THE PRESIDENT: Explanation is requested. So, I'm not -- yes, we do. The message has been accepted.

Senator Hannon. Senator Hannon is recognized.

SENATOR HANNON: Mr. President, may I inquire, has the bill been substituted?

THE PRESIDENT: Yes, it was earlier today.

SENATOR HANNON: Yes, it was? Thank you.

THE PRESIDENT: It was substituted, and the message was accepted.

SENATOR HANNON: This bill is entitled the Rent Regulation Reform Act of

1993. It represents a compromise between the two houses in regards to the rent regulation laws in this state. It does a number of things, and in order to make sure the record is clear, I would just like to mention them.

It would provide that apartments which have a legal regulated rent of $2,000 or more per month at any time between the effective date of this act and October 1st, '93, shall be subject to the decontrol provisions of this act.

The bill provides that such deregulation shall either occur upon vacancy of the current occupants or immediately if the apartment is presently vacant. It also provides for a second decontrol mechanism. If the legal rent charged as of October 1st, '93 is equal to or greater than $2,000 per month and the apartment is occupied by a high income household, the apartment may be deregulated prior to vacancy in accordance with the verification and deregulation procedures set forth in the bill.

For the purposes of this mechanism, a high income household is defined as one where the total federal adjusted gross income of all the occupants residing in the apartment as their primary residence is in excess of $250,000 in each of the two preceding years.

In the case of buildings which have received an exemption under Section 421 of the Real Property Tax Law, the decontrol provisions of this bill would apply to high income tenants in those units where rent regulation would otherwise continue upon the expiration of the real property tax benefits provided to the owner.

This bill also amends the ETPA, Emergency Tenant Protection Act to provide that housing accommodations owned as cooperatives or condo units which are vacant or which become vacant after the effective date of this act, shall not be subject to the provisions of this act provided, however, that the existing rights of the non-purchasing tenants will not be

affected by this provision.

The bill also codifies existing regulations which allow owners to increase the rent to the stabilized apartment in amounts equal to one-fortieth of the cost of the improvements provided to an apartment when requested by the tenant. If the tenants are in place, obviously then this increase can only take place with the tenants' consent. For vacant apartments no consent is required.

There is also a provision that where an owner failed to file a timely registration under rent stabilization or ETPA, the owner shall not be subject to rent over-charge penalties if the rental increases were otherwise lawful, and the owner files the missing registration, although the owner can be fined or will be fined a 50 percent surcharge for late filing.

There is a study form to be done in conjunction with the Senate and Assembly Housing Committees in regard to a whole host of pressing major problems for the housing in the

metropolitan area, with a report by June 30th, 1995. There is a four-year extender of the ETPA, the state and the New York City rent control condo and could open laws, to June 15th, 1997.

This basically is the outline of the provision that has been a subject of much debate, 22 years of discussion, 22 days of round-the-clock negotiations. We have not allowed for the curtailment or abrogation of any existing rights which are set forth in the bill that would be done prior to any order of decontrol by DHCR.

The idea in all of the proceedings that have been set forth is that they be administratively simple, administratively expeditious. In fact, this act specifically sets forth the timetable for decontrol proceedings so that no other suits or proceedings, motions or actions can act to stop or stay these proceedings.

SENATOR KUHL: Explanation is satisfactory.

that can be done with names and addresses alone and you're dealing with a very small universe.

It provides for an absolutely simple administrative procedure.

THE PRESIDENT: Senator Mendez.

SENATOR MENDEZ: Mr. President, will Senator Hannon yield for a question?

SENATOR HANNON: Yes.

SENATOR MENDEZ: Senator Hannon, your bill will include -- will affect those renters who are in apartments J.51s and 421-As. O.K. Those buildings were constructed with some part of taxpayers' monies, monies from all of us, and all of the people out there in the state of New York to help the developers build those apartments.

My question to you is, once this bill is approved here and it will pass this chamber, will those landlords keep and not get taken away, keep the decontrol of the so-called luxury apartments with the abatements, those tax abatements that they have negotiated, or will they be returned to the taxpayers?

SENATOR HANNON: Well, in answer to your question, Senator, which is an excellent one, we have provided that, because some buildings are enjoying another system of general public assistance, namely the tax exemptions, that to the extent the building is currently receiving a 421 tax exemption, it is not subject to the decontrol provisions here. Should those exemptions end or should the exemptions contained in section 489 end, that's -- those J.51s and 489s end, then they would be subject so that at no point do you have the decontrol provisions applying to the buildings which have received the tax exemptions that I just mentioned.

SENATOR MENDEZ: So as long as the landlord has a building which was occupied with tenants that receive the 421-A tax abatement or the J.51 tax abatement, as long as that building is receiving those benefits, those apartments will not be decontrolled; is that what you're saying?

SENATOR HANNON: Let me repeat

myself: So long as there are tax exemptions or abatements contained in Section 421 or Section 489, then the decontrol provisions would not apply, but once those abatements or exemptions end, and if the rest of the eligibility standards of this statute are present, then they would apply.

SENATOR MENDEZ: So that in the final -- so that then assuming that ten years go by and the tax abatements for the 421-A or J.51 ends, once those apartments are decontrolled, the -- the landlord no longer would probably retain taxes, I want to know, I'm just interested in finding out if in any event there is any possibility that an owner of a building will, in fact, be able to decontrol the rent in his apartment at the same time that he's receiving taxpayers' dollars through tax abatements.

SENATOR HANNON: To the extent there are tax exemptions or abatements as I've previously mentioned.

SENATOR MENDEZ: Yes. They do

not apply.

SENATOR HANNON: And -- they do not apply, but so long as they end and there is otherwise the eligibility, because there's not a general eligibility here, it's specifically designed, and it's specifically designed so DHCR will make it simple and is directed to make it simple, then they would get it, but there is not an overlap.

SENATOR MENDEZ: Thank you. Thank you, Senator.

Mr. President, I am not going to support this bill while the majority of my constituents do not live in apartments that receive tax abatement, 421-As and J.51s. However, I do have a good number of families, constituents of mine, that are living under those conditions.

I think that to think of a family of two children and a couple living in a 421 -- in an apartment paying $2,000 a month thinking of them as wealthy, that -- that is a fantasy, because the -- through the taxes that are paid

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EMERGENCY HOUSING RENT CONTROL

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immediately.

ACTING SPEAKER GRABER: The Clerk will record the vote.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Back to the B Calendar, page 3, Rules Report No. 1201, the Clerk will read.

THE CLERK: Bill No. (H) 8859, Rules Report No. 1201, Committee on Rules (Lasher). An act to amend the Emergency Housing Rent Control Law, the Administrative Code of the city of New York, the Emergency Tenant Protection Act of nineteen seventy-four, the Tax Law and the Real Property Tax Law, in relation to eliminating rent regulation protections for certain high income tenants and high rent apartments and to amend chapter 576 of the laws of 1974, amending the Emergency Housing Rent Control Law relating to the control of and stabilization of rent in certain cases, chapter 329 of the laws of 1963, amending the Emergency Housing Rent Control Law relating to the recontrol of rents in certain cases, the Emergency Housing Rent Control Law, chapter 555 of the laws of 1982, amending the general business

law and the Administrative Code of the city of New York relating to conversion of rental residential property to cooperative or condominium ownership in the city of New York and chapter 402 of the laws of 1983, amending the General Business Law relating to conversion of rental residential property to cooperative or condominium ownership in certain municipalities in the counties of Nassau, Westchester and Rockland, in relation to their periods of effectiveness, the Emergency Tenant Protection Act of nineteen seventy-four, in relation to applicability to cooperative or condominium units, the Administrative Code of the city of New York, and the Emergency Tenant Protection Act of nineteen seventy-four, and the Emergency Housing Rent Control Law, in relation to rent increases for certain improvements and repealing provisions thereof relating thereto, the Administrative Code of the city of New York and the Emergency Tenant Protection Act of nineteen seventy-four, in relation to rent registration and certain penalties.

ACTING SPEAKER GRABER: Message from the Governor, the Clerk will read.

THE CLERK: Pursuant to the provisions of Section 14 of Article III of the Constitution and by virtue of the authority conferred upon me, I do hereby certify to the necessity of an immediate vote on Senate

Bill No. 6198/Assembly Bill No. 8859.

The facts necessitating an immediate vote on this bill are as follows:

The bill extends to June 15, 1997 the provisions for rent regulation which are to expire on July 7, 1993; eliminates rent regulation protections for certain high income tenants and high rent apartments; recontrols certain apartments in buildings converted to condominiums and cooperatives; allows for rent increases for certain apartment improvements; and amends provisions relating to rent registration and certain penalties.

Because this bill has not been on your desks in final form for three calendar legislative days, the leaders of your Honorable Bodies have requested this message to permit its immediate consideration.

ACTING SPEAKER GRABER: Mr. Lasher.

MR. LASHER: Thank you, Mr. Speaker.

There is an expression that, "We thank the Lord for getting to this day." I think it is especially apropos when you deal with the extender of the ETPA, the Emergency Tenant Protection Act, and the protections offered under it to 2.4 million residents of this state. It is probably a bill that will affect more people both positively and negatively in the future days, if it is not passed than if it is passed.

prepared to venture out and thrash rich people because normally, those people are the ones who are held out as the paragons of virtue, the people who have made it and heaven forbid we should ever lean on them.

ACTING SPEAKER GRABER: Mr. Reynolds.

MR. REYNOLDS: Will the gentleman yield?

ACTING SPEAKER GRABER: Mr. Grannis?

MR. GRANNIS: Yes, Mr. Speaker.

ACTING SPEAKER GRABER: The gentleman yields.

MR. REYNOLDS: Peter, Mr. Grannis, as I listened to your comments about the Senate and the Republicans on this thing, if you will, it boils down to the fact that you and many of your colleagues just maybe don't want to see anything about rent control, certainly, at the very least, rent stabilization. The question that I have here, don't you feel you have accomplished that, don't you feel that most everybody in New York City, who lives under rent stabilization is still under rent stabilization for a four-year period?

MR. GRANNIS: Correct.

MR. REYNOLDS: Don't you feel that only 4,000 units in the city of New York seem to be affected, as the sponsor has indicated, that might fit into a situation of $2,000 in rent and $250,000 in salary?

MR. GRANNIS: I don't agree with that figure.

MR. REYNOLDS: You feel it is higher? How high do you think it is?

MR. GRANNIS: There are twelve thousand apartments in the city that rent for over $2,000. Some of those are in buildings that are excluded under this, that are in J-51 and 421. There tax breaks but they are --

MR. REYNOLDS: How many of those, you are the expert?

MR. GRANNIS: Eleven thousand eight hundred some apartments rent for over $2,000.

MR. REYNOLDS: Do you believe that those which do fit into luxury decontrol, the over 4,000 that the assessed valuation of those properties under decontrol would rise so there would be higher taxation for the city of New York?

MR. GRANNIS: Tom, you know that those buildings, these apartments are not in every building, they are not every apartment in a building. There will be random jumps for individual apartments, several thousand under this proposal over a period of time, and I would suggest to you that the change in revenue stream for that building will have virtually no impact

whatsoever on the overall property tax receipts of the city. The numbers are too small. It does not fit in with the Citizen Budget Commission recommendations. They are random, isolated apartments and it will have no impact on the rent receipts on the city.

MR. REYNOLDS: I disagree with you on that.

MR. GRANNIS: There are other problems with this bill, Mr. Speaker.

ACTING SPEAKER GRABER: Mr. Tallon.

MR. TALLON: As you are continuing, before you get to the other problems, there is an immediate meeting of the Committee on Corporations in the Speaker's conference room.

ACTING SPEAKER GRABER: Mr. Grannis.

MR. GRANNIS: There are other problems with this bill. In the event somebody stands to lose his apartment because of meeting these guidelines, there is no requirement in the bill that the family in residence will be offered a renewal lease in the apartment even at the market rent.

The risk under this is that the apartment will be decontrolled, deregulated, and the landlord can throw the individual or family out of the apartment. I think that is a very bad result, a result that was

certainly not intended by anybody negotiating this bill, except for the Senate Republicans who did not want to see even the obligation to keep a tenant in place in the city, in his building, even at a market rent; and I think that that is big mistake.

We have changed the standards on the individual apartment improvement from a standard that is regulated by a rule and regulation within the Division of Housing to a statutory standard.

I know in my district that that happens to be one of the ways that landlords are able to run up rents rapidly, turning over the apartment buildings by turning over the individual apartments with full apartment replacement, with new cabinetry and appliances and running up the rents, and it is one of the areas that poses the greatest risk.

This debate has not been entirely serious, as you know. Those of you who have followed this debate in the papers, there have been references over time to the inability of the State Senators who are most affected by this issue to have their voices heard by their own leadership. There have been references in the papers to some of those members as "wienies", State Senators as "wienies" in one column; as "ineffective wimps" in another column. These are the people most affected,

STATE OF NEW YORK
DIVISION OF HOUSING AND COMMUNITY RENEWAL
OFFICE OF RENT ADMINISTRATION
GERTZ PLAZA
92-31 UNION HALL STREET
JAMAICA, NEW YORK 11433

IN THE MATTER OF THE ADMINISTRATIVE APPEAL OF Four Thirty Realty, LLC., PETITIONER	SJR 15,290 ADMINISTRATIVE REVIEW DOCKET NO. EN410001RP RENT ADMINISTRATOR'S DOCKET NO. XI410093R TENANT: Annette Kamal

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

This petition, filed March 12, 2015, is against the above-referenced Rent Administrator's order of February 13, 2015, pertaining to the housing accommodation known as apartment [redacted] at [redacted] East 86th Street New York, New York, in which order said Administrator determined that the petitioner-owner overcharged the tenant.

The tenant assumed occupancy of the subject apartment on August 1, 2004, under a two-year non-stabilized vacancy lease reserving a monthly rent of $2,700. The tenant filed a rent overcharge complaint on September 22, 2009 asserting that when she moved in the owner improperly treated the apartment as deregulated despite receiving a "J-51" tax abatement.

The Rent Administrator determined that the base date for this proceeding was September 22, 2005, the date four years prior to the filing of the complaint. The Rent Administrator determined that the $2,700.00 per month rent charged on the base date was invalid for the following reason:

> In *72A Realty Associates v. Sandra Lucas,* the Supreme Court . . . , Appellate Division, First Department ruled that in light of the improper deregulation of the apartment and given that the record does not clearly establish the validity of the rent increase that brought the rent stabilized amount above $2,000.00, the [base-date] free market lease amount should not be adopted. Therefore a further review of any available record of rental history necessary to set the proper base date rent is warranted. The base date rent . . . is set at $2,141.96 . . . calculated by applying a 20% vacancy increase and a 5.4% longevity bonus . . . to the last legal regulated rent of $1,708.10.

The Rent Administrator found overcharges of $55,148.54, interest of $25,444.69, plus excessive security deposit, for a total liability of $81,253.52.

In this petition, the owner asserts that the base date rent of $2,700.00 per month was valid and that pre-base date review of the apartment's rental history was impermissible. Petitioner argues that the Rent Stabilization Code (RSC) specifies the situations in which this agency may review an apartment's rental history before the base date and does not mention the instant situation despite the fact that *Lucas supra,* had been decided before the RSC was amended; that because the *Lucas* decision is based in part on the invalidity of "the rent increase that brought the rent stabilized amount above $2,000," and the Administrator has set the base rent over that figure by mere application of vacancy and "longevity" increases, *Lucas* does not here apply; and that *Meyers v. Four Thirty Realty,* 127 A.D.3d 501, 8 N.Y.S.3d 50 (1st Dept. 2015), supports petitioner's argument that "going beyond the base date . . . requires proof of a fraudulent scheme."

The Commissioner previously denied the owner's petition under docket number DO410011RO. The owner sought review of the Commissioner's order from the Supreme Court, New York County, under Article 78 of the Civil Practice Law and Rules. On December 16, 2015, the court issued a Decision and Order remanding the matter to the agency for further consideration.

On February 16, 2016, the agency served the tenant and the owner with Notice of Proceeding to Reconsider Order.

The Commissioner, having reconsidered the evidentiary record, finds that the petition should be denied.

In *72A Realty Associates v. Lucas*, 101 A.D.3d 401, 955 N.Y.S.2d 19 (1st Dept. 2012), the court found that the base date rent may not be relied on when there was an improper deregulation of the apartment while the apartment was receiving J-51 tax benefits. The *Lucas* Court found that the record did not clearly establish the validity of the rent increase that brought the rent-stabilized amount over $2,000.00, and therefore that the free-market lease amount effective on the base date should not be adopted. The court remanded the proceeding to the lower court to determine the base date rent based on the pre-base date rental history of the apartment.

The owner's contention that there is no basis under the 2014 amendments to the RSC to pierce the four-year review period and to calculate the base date legal regulated rent on the facts of this case is incorrect. In order to determine the base date rent under *Lucas*, the Rent Administrator properly used the formula set forth in the RSC. RSC §2526.1(a)(2)(ix) states that, "for the purpose of establishing the legal regulated rent pursuant to Section 2526.1(a)(3)(iii) of this Title where the apartment was vacant or temporarily exempt on the base date, review of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section shall not be precluded." Section 2526.1(a)(3)(iii) of the RSC refers to "a housing accommodation [that] is vacant or temporarily exempt from regulation pursuant to section 2520.11 of this Title on the base date." Here, because the base date rent was unreliable due to an erroneous deregulation of a J-51 apartment prior to the base date, and in view of RSC §2526.1(a)(3)(iii), which sets forth a formula for determining the legal regulated rent on the base date where there is none, the Rent Administrator correctly went back to the last legal regulated rent registered with the agency (which was prior to the base date herein) in order to calculate the subsequent legal regulated rents.

The Commissioner finds that the agency's application of *Lucas* is not limited to cases where the rent increases that brought the

rent over the deregulation threshold are unknown or invalid. Recently, in *Regina Metropolitan Co. v. DHCR,* Index No. 101235/15, the New York Supreme Court affirmed the agency's re-calculation of the base date rent under *Lucas* where the tenants' initial rent on the base date was $5,195.00 per month and the rent increases that brought the rent over the deregulation threshold were valid. The court found that the base date rent of $5,195.00 was unreliable because the apartment was improperly deregulated while the owner was receiving J-51 tax benefits. While no fraud was found, the court affirmed the agency's application of both *Lucas* and RSC §2526.1(a)(2)(ix) to recalculate the base date rent. The Court affirmed the agency's invalidation of the $5,195.00 base rent; the application of increases for vacancy, longevity and "MCI" to the previously registered rent of $2,092.00 to arrive at a base date rent of $3,325.24; and the finding of an overcharge.

In accordance with *Regina Metropolitan Co.*, the Commissioner rejects the owner's assertion that the base date rent should be established at $2,700.00 per month. The fact that the subject apartment was rent stabilized on the base date due to the owner's receipt of J-51 benefits means that the owner had to establish the base date rent under the parameters set forth in the Rent Stabilization Law and Code. The Rent Administrator's method of increasing the previously registered rent of $1,708.10 by applying a 20% vacancy increase and a 5.4% longevity bonus to calculate a base date rent of $2,141.96 was correct. The $2,141.96 per month rent is the rent that the complaining tenant should have been charged in her vacancy lease had the owner complied with the regulations concerning its receipt of J-51 tax benefits and treated the apartment as rent stabilized in 2004.

The owner's reliance on *Meyers, supra* is misplaced. As noted above, the 2014 amendments to the RSC permit the Rent Administrator to investigate the rental history of an apartment prior to the four years for reasons other than fraud. *See* RSC §2526.1(a)(2)(iii-ix). The Commissioner finds that owner's reliance on *Todres v. W7879, LLC,* 137 A.D.3d 597, 26 N.Y.S.3d 698 (1st Dept. 2016) is also misplaced. In *Todres*, the plaintiff-tenant took occupancy subsequent to the vacancy of a rent-controlled tenant. The owner in that case could have charged a market rent regardless of whether there was a J-51 in place or not and the tenant's right to file a Fair Market Rent Appeal to challenge the initial rent was limited to four years

without exception. In contrast, the instant matter does not involve a first stabilized tenant following rent control, but instead the continuance of rent stabilization and the application of a formula to calculate the legal regulated rent in a stabilized apartment re-regulated under *Roberts v. Tishman Speyer Properties,* 13 N.Y.3d 270, 890 N.Y.S.2d 388 (2009) due to the owner's receipt of J-51 tax benefits. As such, the *Todres* holding does not conflict with the Rent Administrator's determination herein.

It is hereby determined that the owner is liable in the amount of $81,253.52. This Order and Opinion may—after the expiration of the period set forth in Article 78 of the Civil Practice Law and Rules for seeking review of same—be filed and enforced as if it were a judgment; or the tenant may choose to withhold her rent until said $81,253.52 has been thus recovered. Under either mode of collection interest—running from the date of the Rent Administrator's order through the date stamped below—may be added, at the rate payable on a judgment under Section 5004 of said Law and Rules.

THEREFORE, in accordance with the provisions of the applicable statutes and regulations, it is hereby

ORDERED that this petition be, and the same hereby is, denied.

ISSUED:
MAR 3 1 2017

WOODY PASCAL
Deputy Commissioner

Division of Housing and Community Renewal
Office of Rent Administration
Gertz Plaza
92-31 Union Hall Street
Jamaica, N.Y. 111433
Web Site: ww.nyshcr.org

Right to Court Appeal

In order to appeal this Order to the New York Supreme Court, within sixty (60) days of the date this Order is issued, you must serve papers to commence a proceeding under Article 78 of the Civil Practice Law and Rules. No additional time can or will be given.

In preparing your papers, please cite the Administrative Review Docket Number which appears on the first page of the attached Order.

Court appeals from the Commissioner's orders should be served at Counsel's Office, Room 707, 25 Beaver Street, New York, New York 10004. In addition, the Attorney General must be served at 120 Broadway, 24th Floor, New York, New York 10271.

Since Article 78 proceedings take place in the Supreme Court, you may require the professional help of an attorney.

There is no other method of appeal.

	State of New York **Division of Housing and Community Renewal** Office of Rent Administration Web Site: www.nyshcr.org	Gertz Plaza 92-31 Union Hall Street Jamaica, NY 11433 (718) 739-6400	Docket Number **BU 410078 R** Issue Date **05/26/2016**

ORDER FINDING RENT OVERCHARGE

Mailing Address of Tenant:

Rosalba Messina
[redacted]Central Park W
New York NY 10025

Mailing Address of Owner:

Cenpark Realty Co
50 W 17th Street 17th Floor
New York NY 10011

Subject Housing Accommodation:

Apt. No: [redacted]
[redacted]Central Park W
New York NY 10025

The tenant filed a complaint of Rent Overcharge alleging that the rent of $2800.00 charged and collected by the owner on September 30, 2013 constitutes an overcharge.

The base date for this proceeding is September 30, 2009, which is the date four years prior to the filing date of the complaint.

The Rent Administrator finds that subsequent to September 30, 2009 a rent overcharge occurred as shown on the attached Rent Calculation Chart.

As further explained in the attached rent calculation chart, the owner is responsible for:

Interest on the entire overcharge because the owner demonstrated that the overcharge was not willful.

The owner is directed to roll back the rent to the legal regulated rent, to recompute the current rent based thereon, and to make a full refund or credit to the tenant of any rent paid in excess of the legal regulated rent and any security in excess of such rent, as shown on the attached chart. The owner is further directed to refund any excess rent paid by a current occupant if the complainant is no longer in occupancy.

In the event that a Petition for Administrative Review against this Order is not filed within thirty-five (35) days of its issuance and the owner does not refund to the tenant the excess rent and/or security deposit as herein above directed, then the tenant may either:

a. Credit 20% of the overcharge (or in the event that 20% of the overcharge exceeds one month's rent, the tenant shall credit the established rent) each month until the overcharge is fully credited; or

b. File and enforce this Order as a judgement.

To: CENPARK REALTY CO
50 W 17TH STREET 17TH FLOOR
NEW YORK NY 10011

State of New York **Division of Housing and Community Renewal** Office of Rent Administration Web Site: www.nyshcr.org	Gertz Plaza 92-31 Union Hall Street Jamaica, NY 11433 (718) 739-6400	Docket Number **BU 410078 R** Issue Date **05/26/2016**

ORDER FINDING RENT OVERCHARGE

Jerry M. Scher
Rent Administrator Issued: 05/26/2016

Attachment(s): Rent Calculation Chart

cc: HIMMELSTEIN MCCONNELL GRIBBEN
BELKIN BURDEN WENIG & GOLDMAN
ARGO REAL ESTATE LLC

State of New York
Division of Housing and Community Renewal
Office of Rent Administration
Gertz Plaza
92-31 Union Hall Street
Jamaica, NY 11433
Web Site: www.nyshcr.org

Notice of Right to Administrative Review

This Notice explains your right to appeal, seeking review of orders issued by a Rent Administrator. If you believe that an order is based on an error of law and/or fact, as an aggrieved party you have the right to ask the Division of Housing and Community Renewal (DHCR) to review the order based on your claim of error. This request is called a Petition for Administrative Review, and is referred to as a PAR. If you wish to file a PAR, please read the information and instructions below and follow them carefully. Further details may be found in the instructions printed on the reverse side of the form used for filing a PAR.

Who may File a PAR:

An owner, tenant, or other party affected by an order, or an authorized representative of such person(s), may file a PAR. Two or more affected owners or tenants may join in filing a PAR. The DHCR encourages joint filings by affected parties filing on common grounds.

How to File a PAR:

1. Use the correct form. PARs must be filed in duplicate using DHCR form RAR-2, in accordance with the instructions on the form. PARs filed on other forms or by letter will not be accepted.

2. You must attach a complete copy of the order which you are appealing to the original of your PAR.

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DHCR Rent Offices

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5th Floor
New York, NY 10004

Upper Manhattan
163 West 125th St.
5th Floor
New York, NY 10027

Brooklyn
55 Hanson Place
7th Floor
Brooklyn, NY 11217

Bronx
2400 Halsey St.
1st Floor
Bronx, NY 10461

Queens
92-31 Union Hall St.
6th Floor
Jamaica, NY 11433

Westchester County
75 South Broadway
3rd Floor
White Plains, NY 10601

CALCULATION CHART

COMPLAINING TENANT(S): ROSALBA MESSINA
DOCKET NO : BU410078R
SUBJECT PREMISES : [redacted]
NEW YORK, 10025
APARTMENT NUMBER : [redacted]

OVERCHARGE AMOUNT	:	8,356.26
TREBLE DAMAGES AMOUNT	:	0.00
INTEREST AMOUNT	:	3,058.60
EXCESS SECURITY AMOUNT	:	0.00
SUBTOTAL	:	11,414.86

BASE LRR : 2,484.57
BASE CR : 2,484.57

TOTAL AMOUNT DUE TENANT : 11,414.86

LEASE TERM FROM / TO	RENT PAID	RENT CHANGE DATE	LRR	CR	EXPLANATION	OVERCHARGE CALCULATIONS
TENANT NAME(S): ROSALBA MESSINA						
10/01/2009 - 11/30/2010	2,675.00	10/01/2009	2,484.57	2,484.57	BASE DATE RENT <1> <2> <3>	190.43 X 14 MOS.
12/01/2010 - 11/30/2011	2,675.00	12/01/2010	2,540.47	2,540.47	GUIDELINE 42 - (R1) RENT $2484.57 + 2.25% INC	134.53 X 12 MOS.
12/01/2011 - 11/30/2013	2,800.00	12/01/2011	2,724.65	2,724.65	GUIDELINE 43 - (R2) RENT $2540.47 + 7.25% INC	75.35 X 24 MOS.
12/01/2013 - 12/31/2013	2,800.00	12/01/2013	2,724.65	2,724.65	MONTH TO MONTH TENANCY <4>	75.35 X 1 MOS.
01/01/2014 - 12/31/2015	3,017.00	01/01/2014	2,935.81	2,935.81	GUIDELINE 45 - (R2) RENT $2724.65 + 7.75% INC	81.19 X 24 MOS.
01/01/2016 - 12/31/2016	3,017.00	01/01/2016	2,935.81	2,935.81	GUIDELINE 47 - (R1) RENT $2935.81 + 0.00% INC <5>	81.19 X 3 MOS.

ADD28

CALCULATION CHART FOOTNOTES

DOCKET NO : BU410078R

1) ON OCTOBER 22, 2009, THE COURT OF APPEALS ISSUED A DETERMINATION IN THE MATTER OF ROBERTS V. TISHMAN SPEYERS PROPERTIES, L.P., IN WHICH IT HELD THAT WHERE A BUILDING WAS SUBJECT TO THE RENT STABILIZATION LAW PRIOR TO RECEIVING J-51 TAX BENEFITS, HIGH RENT VACANCY DEREGULATION PURSUANT TO SECTION 2420.11(R)(4) OF THE RENT STABILIZATION CODE, IS NOT APPLICABLE TO SUCH BUILDING.

   A REVIEW OF THE RECORD REVEALS THAT THE SUBJECT BUILDING WAS RENT STABILIZED PRIOR TO RECEIVING J-51 BENEFITS. THEREFORE, THE SUBJECT APARTMENT WILL RETAIN RENT STABILIZED STATUS FOR THE DURATION OF TENANCY OF THE COMPLAINANT.

2) IN 72A REALTY ASSOCIATES V. SANDRA LUCAS, THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT RULED THAT IN LIGHT OF THE IMPROPER DEREGULATION OF THE APARTMENT AND GIVEN THAT THE RECORD DOES NOT CLEARLY ESTABLISH THE VALIDITY OF THE RENT INCREASE THAT BROUGHT THE RENT STABILIZED AMOUNT ABOVE $2,000.00, THE FREE MARKET LEASE AMOUNT SHOULD NOT BE ADOPTED, THEREFORE A FURTHER REVIEW OF ANY AVAILABLE RECORD OF RENTAL HISTORY NECESSARY TO SET THE PROPER BASE DATE RENT IS WARRANTED.

3) IN ACCORDANCE WITH THE 72A REALTY ASSOCIATES V. LUCAS DECISION, THE BASE DATE (09/30/09) RENT AMOUNT IS SET AT $2,484.57, WHICH IS CALCULATED BY APPLYING A 20% VACANCY INCREASE ($133.62), A 12% LONGEVITY ($80.17) AND THE IAI INCREASE OF $1,125.50 (1/40TH OF THE CLAIMED $45,000.00).
   PURSUANT TO A LEASE IN EFFECT FROM 12/01/2002 TO 11/30/2004, TO THE LAST STABILIZED RENT AMOUNT OF $666.53 (WHICH INCLUDED MCI INCREASE OF$25.23 ($8.43 X 3 ROOMS) GRANTED UNDER DOCKET NO. KJ4300960M), MINUS $25.23 (PURSUANT TO ORDER QH430016RP REVOKING KJ4300960M, AND WHICH DECISION WAS SUBSEQUENTLY AFFIRMED UNDER DOCKET NO. SE430052RO) PLUS MCI INCREASE OF $26.82 ($8.94 X 3 ROOMS) DIRECTED UNDER DOCKET NO. SF430073RT (RE430085OM). FURTHERMORE, THE APPROPRIATE 2 YEAR GUIDELINE INCREASES BEGINNING 12/2004 TILL THE BASE DATE WERE APPLIED.

4) THE TENANT REMAINED IN OCCUPANCY AS A MONTH TO MONTH TENANT FROM THE PERIOD 12/01/13 TO 12/31/13 WITHOUT A WRITTEN LEASE OR INCREASE IN RENT.

5) THE OWNER IS DIRECTED TO AMEND THE TENANT'S RENEWAL LEASE DATED 08/25/15 TO REFLECT THE CORRECT COMMENCEMENT DATE OF 01/01/16 AND THE TERMINATION DATE OF 12/31/17.

CALCULATION CHART FOOTNOTES

DOCKET NO : BU410078R

*** * * * G E N E R A L N O T E S * * * ***

* THE RENT WAS CALCULATED UP TO 03/31/16 AS PER RENTAL PAYMENT INFORMATION IN THE FILE.

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A REVIEW OF THE RECORD REVEALED THAT THE OVERCHARGE WAS THE RESULT OF THE OWNER'S ASSUMPTION THAT THE APARTMENT WAS DEREGULATED WHILE RECEIVING J-51 BENEFITS. AS A RESULT, TREBLE DAMAGES ARE NOT WARRANTED.

* THE LEGAL REGULATED RENT FOR THE SUBJECT APARTMENT IS ESTABLISHED AT $2,935.81. THE OWNER IS DIRECTED TO BASE FUTURE LEGAL REGULATED RENT INCREASES FOR THE SUBJECT APARTMENT ON THE LEGAL REGULATED RENT ESTABLISHED HEREIN.

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THE OWNER IS DIRECTED TO REFLECT THE FINDINGS AND DETERMINATIONS MADE IN THIS ORDER ON ALL FUTURE REGISTRATION STATEMENTS, CITING THIS ORDER AS THE BASIS FOR THE CHANGE.

STATE OF NEW YORK

DIVISION OF HOUSING AND COMMUNITY RENEWAL
OFFICE OF RENT ADMINISTRATION GERTZ PLAZA
92-31 UNION HALL STREET JAMAICA , NEW YORK 11433

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IN THE MATTER OF ADMINISTRATIVE APPEAL OF:

ADMINISTRATIVE REVIEW DOCKET NO: ER410066RT

Rosalba Messina

RENT ADMINISTRATOR'S DOCKET NO: BU410078R

PETITIONER

--------- X

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The above named Petitioner-tenant filed a timely Petition for Administrative Review (PAR) of an Order issued by the Rent Administrator on May 26 , 2016, concerning the housing accommodations known as [redacted] Central Park West, Apartment [redacted], New York, NY 10025. The Rent Administrator's Order that is the subject of this appeal found that the owner must refund $11,414.86 to the tenant reflecting overcharges of $8 ,356.26 in overcharges plus interest on said overcharges, and that the tenant's legal regulated rent for the subj ect three room apartment is $2,935.81 per month for the period from January 1, 2016 through Decen ±)er 31, 2016.

In the PAR the tenant alleges that treble damages should have been imposed because the owner continued to collect market rents and did not register the apartment for four years after the Roberts decision was issued; that, while courts have held that treble damages should not be imposed for market rents charged prior to the issuance of Roberts, there is no rationale for not imposing treble dam.ages when an owner collects market rents and fails to register the apartment long after Roberts was decided; that the regulatory status of the apartment was clear after Roberts, and the owner nonetheless continued to charge market rents and to not provide rent stabilized leases; that the Gerstein case, relied on by the owner below, was issued in 2011, yet the owner continued to collect a market rent and failed to register the apartment; that the owner failed to rebut the presumption of willfulness of the overcharges when it continued to collect market rents for four years after Roberts

and Gerst ein were issued; that the Appellate Division First Department in Altshculer v. Jobman, 2016 NY Sip Op 00035 (AD 1st 2016}, rejected the owner's claim that it could rely on DHCR and found that the tenant in that c ase could obtain treble damages; and that the Court in Meyers v. Four Thirty Realty, 127 AD3d 501 (AD 1 ^ ^ 2015) , remanded that proceedin g for a consideration of treble damages when the owner deregulat ed the apartment while receiving J-51 tax benefits.

Th e tenant further alleges that Hargrove v DHCR, 244 AD2d 241 (AD ISC 19 97) , found that the owner in that case did not have good faith reliance on the regulatory status of the apartment in that case and imposed treble damages; that the rent should have been frozen at the level of the last legal regulated rent in effect on the date of the last registration (citing Jazilek v Abart Holdings, 72 AD3d 52 9 (1 ^' = Dept 2010), PAR Order WA410021RO, and Hargrove); that the owner only registered in November of 2013 in response to a letter from the tenant's attorney; that said registration listed an unlawful rent of $2,800.00 per month; that, as the owner did not properly file registrations or provide rent stabilized leases for four years after issuance of Roberts, the rent should have been set at $666.53 per month until the owner properly registers the rents and provides the tenant with a rent stabilized lease; and that, in the alternative, the rent should have been frozen at the $2,484 .57 per month base rent until the owner properly registers the apartment.

Finally, the tenant alleges that the owner was incorrectly allowed a rent increase in December of 2011 even though the apartment was not registered and no rent stabilized lease had been provided; that Section 2528.4 of the Rent Stabilization Code (RSC) states that the failure to properly and timely register an apartment bars an owner from collecting rent in excess of the base date rent plus lawful adjustments prior to the failure to register; that there was therefore no basis to permit th e owner to collecc any rent in excess of the base date rent until such time as it registered the apartment; that the RSC precludes a finding of overcharge if increases in the rent were lawful except for the failure to register, which is not the case herein as an overcharge was found based upon the owner's having charged a market rent and not based solely upon the owner's 'failure to register the apartment; and that the Rent Administrator therefore erred in permitting the owner to collect any rent increases for the period when the apartment was not properly registered.

Administrative Review Docket No. ER410066RT

The PAR was served on the owner, and the owner made several requests for extensions of time in which to respond to said PAR. The final request was dated November 21, 2016 and asked for an extension until December 5, 2016 in which to respond to the PAR. As of the issuance date of this Order, the Agency has received no such response from the owner.

The Commissioner is of the opinion that this PAR should be denied and that the Rent Administrator's Order at issue should be affirmed.

The owner legitimately thought that it could properly deregulate the apartment when the subject tenant took occupancy in 2002 based upon the rent for the subject apartment having reached an amount greater than that required for high rent vacancy decontrol at that time, and based upon Agency policy and practice regarding situations such as the one under consideration at that time. It is noted that the owner served the subject tenant with notice that the apartment was no longer subject to rent stabilization and the tenant signed an initial two year lease in October of 2002 at a rent of $2,500.00 per month. Given that the owner had a bona fide belief that the apartment was no longer subj ect to rent regulation based upon this Agency's policy of allowing high rent deregulation of such apartments, even though the owner was receiving J-51 tax benefits at the time, the Rent Administrator was correct to find that the overcharges herein were not willful. Therefore, treble damages were correctly not assessed in this case.

The Rent Administrator was also correct in his calculation of the initial legal rent in this case, as explained in his Order, and in allowing the owner guideline increases for the leases signed between the parties. This is appropriate as the owner and the tenant signed leases for these years, and the owner did not take such guideline rent increases because of its bona fide belief that the apartment was not subject to rent regulation, as explained above. It is noted that the owner filed all the registrations since the base date prior to the issuance date of the Rent Administrator's Order.

The Commissioner has found that the owner must refund $11,414.86 to the tenant, which includes overcharges collected by the owner plus interest on said overcharges. This Order and Opinion may, after expiration of the period set forth in Article 78 of the Civil Practice Law and Rules for seeking review by the Supreme Court, be filed and enforced as a judgment. The county clerk may add interest, at the rate payable on a judgment under section 5004 of the Civil Practice Law and Rules, for the period after the issuance date of the Rent Administrator's Order.

In the absence, of a clearly defined "grace period" for not requiring an owner to self -apply the Roberts decision, the Commissioner finds that it would be impractical for the Agency to determine on a case -by-case basis when a particular owner should have self-applied Roberts. Furthermore, the Courts may be better equipped to make such findings because they may refer to the oral Court testimony of the litigants. It is noted that this Agency was not a party to the cases cited by the tenant.

THEREFORE, in accordance with the provisions of the Rent Stabilization Code it is

ORDERED, that the Rent Administrator's Order docketed under Docket Number BU410078R is affirmed and that the tenant's PAR is denied.

ISSUED:

DEC 2 2 2016

Woody Pascal Deputy Commissioner

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■. -^.' i-r Office o f Rent
Administration G ertz Pla za
9 2-31 Union K ail Street
Ja maica. N.Y. 111433
Web Si te: ww.nysh er.or g

R i ght to Court . Appeal

I n order to appeal this Order to the New York Supreme Court, within .si. xty (60) days of the date this Order is is sued, you mu st serve papers to commence a proceeding under Aiticle 7 8 of the Civil Practice Law a tid Rules. No a tlditional time can or will be given.

In preparing your papers, please cite thc .Ad ministrative Review Docket Nu tnber which appears on the first pa ge of the attached Order.

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Since Article 73 proceedings take place in the S upreme Court, you may require th e professional help of an attomey.

There is no other method of appeal.

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State of New York **Division of Housing and Community Renewal** Office of Rent Administration Web Site: www.nyshcr.org	Gertz Plaza 92-31 Union Hall Street Jamaica, NY 11433 (718) 739-6400	Docket Number **AW 410041 R** Issue Date **10/29/2014**

ORDER FINDING RENT OVERCHARGE

Mailing Address of Tenant:

Michael & Lynda Korn
Apt [redacted]
[redacted] E 81st St
New York NY 10028

Mailing Address of Owner:

Yorkshire House Associates
33 East 20th Street
Suite #400
New York NY 10003

Subject Housing Accommodation:

Apt. No: [redacted]
[redacted] E 81st St
New York NY 10028

The tenant filed a complaint of Rent Overcharge alleging that the rent of $4000.00 charged and collected by the owner on November 07, 2012 constitutes an overcharge.

The base date for this proceeding is November 07, 2008, which is the date four years prior to the filing date of the complaint.

The Rent Administrator finds that subsequent to November 07, 2008 a rent overcharge occurred as shown on the attached Rent Calculation Chart.

As further explained in the attached rent calculation chart, the owner is responsible for:

Interest on the entire overcharge because the owner demonstrated that the overcharge was not willful.

The owner is directed to roll back the rent to the legal regulated rent, to recompute the current rent based thereon, and to make a full refund or credit to the tenant of any rent paid in excess of the legal regulated rent and any security in excess of such rent, as shown on the attached chart. The owner is further directed to refund any excess rent paid by a current occupant if the complainant is no longer in occupancy.

In the event that a Petition for Administrative Review against this Order is not filed within thirty-five (35) days of its issuance and the owner does not refund to the tenant the excess rent and/or security deposit as herein above directed, then the tenant may either:

a. Credit 20% of the overcharge (or in the event that 20% of the overcharge exceeds one month's rent, the tenant shall credit the established rent) each month until the overcharge is fully credited; or

b. File and enforce this Order as a judgement.

To: YORKSHIRE HOUSE ASSOCIATES
33 EAST 20TH STREET
SUITE #400
NEW YORK NY 10003

State of New York **Division of Housing and Community Renewal** Office of Rent Administration Web Site: www.nyshcr.org	Gertz Plaza 92-31 Union Hall Street Jamaica, NY 11433 (718) 739-6400	Docket Number **AW 410041 R** Issue Date **10/29/2014**

ORDER FINDING RENT OVERCHARGE

Jerry M. Scher
Rent Administrator Issued: 10/29/2014

Attachment(s): Rent Calculation Chart

cc: KUCKER & BRUH, LLP

State of New York
Division of Housing and Community Renewal
Office of Rent Administration
Gertz Plaza
92-31 Union Hall Street
Jamaica, NY 11433
Web Site: www.nyshcr.org

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5th Floor
New York, NY 10027

Brooklyn
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7th Floor
Brooklyn, NY 11217

Bronx
2400 Halsey St.
1st Floor
Bronx, NY 10461

Queens
92-31 Union Hall St.
6th Floor
Jamaica, NY 11433

Westchester County
75 South Broadway
3rd Floor
White Plains, NY 10601

CALCULATION CHART

CHART DESCRIPTION : THIS CHART DETAILS ALL CHANGES THAT OCCURRED IN THE CALCULATION OF THE LEGAL REGULATED RENT AND THE COLLECTIBLE RENT FOR YOUR APARTMENT. THESE CHANGES MAY REFLECT INCREASES SUCH AS GUIDELINE, MAJOR CAPITAL IMPROVEMENTS, INDIVIDUAL APARTMENT IMPROVEMENTS, 421-A, AND OTHER SURCHARGES OR THEY MAY REFLECT DECREASES FOR SERVICE REDUCTION ORDERS OR REGISTRATION FREEZES. IN ADDITION, THE CHART WILL REFLECT THE CALCULATED OVERCHARGE AMOUNTS AND PENALTIES IF APPLICABLE.

DEFINITION OF TERMS :

LRR	- THE LEGAL REGULATED RENT AS ADJUSTED IN ACCORDANCE WITH THE RENT STABILIZATION CODE.
CR	- THE COLLECTIBLE RENT, OR THE AMOUNT OF RENT AN OWNER IS ENTITLED TO COLLECT, MAY BE DIFFERENT FROM THE LRR BECAUSE OF TEMPORARY CHARGES, ADJUSTMENTS AND FREEZES.
BASE LRR	- THE LEGAL REGULATED RENT USED AT THE START OF THE CALCULATIONS.
BASE CR	- THE COLLECTIBLE RENT USED AT THE START OF CALCULATIONS.
GUIDELINE INCREASES	- THE RENT GUIDELINE BOARD'S ANNUAL RATE OF ADJUSTMENTS FOR EACH LEASE TERM IS CALCULATED ABOVE THE LEGAL REGULATED RENT, OR THE GROSS RENT FOR CALCULATION IF AN MCI WAS GRANTED, IN EFFECT ON THE DAY PRIOR TO THE EFFECTIVE DATE OF THE APPLICABLE RENT GUIDELINE BOARD ORDER.
MCI	- MAJOR CAPITAL IMPROVEMENT INCREASES AS GRANTED BY DHCR.
IAI	- INDIVIDUAL APARTMENT IMPROVEMENT INCREASES FOR INCREASED SPACE AND SERVICES, NEW EQUIPMENT, NEW FURNITURE OR FURNISHINGS.
421A	- AN INCREASE AMOUNT WHICH IS 2.2% OF THE INITIAL RENTAL AMOUNT FOR THE APARTMENT. APPLICABLE ONLY TO OWNERS WHO HAVE BEEN GRANTED A PARTIAL TAX EXEMPTION PURSUANT TO SECTION 421-A OF THE REAL PROPERTY TAX LAW.
WAIVER RULE	- WHEN THE OWNER FAILS TO CHARGE A RENT INCREASE, TO WHICH THE OWNER IS ENTITLED, WITHIN A REASONABLE AMOUNT OF TIME, THE OWNER IS DEEMED TO HAVE PERMANENTLY WAIVED THE INCREASE AND MAY NOT LATER COLLECT THAT INCREASE FROM THE TENANT OR ANY SUBSEQUENT TENANT.
OVERCHARGE AMOUNT	- THE EXCESS RENT PAID ABOVE THE COLLECTIBLE RENT. (RENT PAID - COLLECTIBLE RENT = OVERCHARGE). OVERCHARGE AMOUNT IS ONLY CALCULATED FOR THE COMPLAINING TENANT AND DOES NOT INCLUDE ANY PENALTIES AMOUNT.
PENALTIES AMOUNT	- TREBLE DAMAGES AND/OR INTEREST ASSESSED ON OVERCHARGES WHICH OCCURRED ON OR AFTER 4/1/84.

CALCULATION CHART

COMPLAINING TENANT(S): MICHAEL & LYNDA KORN
DOCKET NO : AW410041R
SUBJECT PREMISES : [redacted] E 81ST ST
NEW YORK, 10028
APARTMENT NUMBER : [redacted]

OVERCHARGE AMOUNT	:	123,667.19
TREBLE DAMAGES AMOUNT	:	0.00
INTEREST AMOUNT	:	33,428.79
EXCESS SECURITY AMOUNT	:	1,721.11
SUBTOTAL	:	158,817.09

BASE LRR : 2,170.49
BASE CR : 2,170.49

TOTAL AMOUNT DUE TENANT : 158,817.09

LEASE TERM FROM / TO	RENT PAID	RENT CHANGE DATE	LRR	CR	EXPLANATION	OVERCHARGE CALCULATIONS
TENANT NAME(S): MICHAEL & LYNDA KORN						
12/01/2008 - 09/30/2010	3,925.00	12/01/2008	2,170.49	2,170.49	LEASE IN EFFECT ON THE BASE DATE. <1><2>	1754.51 X 22 MOS.
10/01/2010 - 09/30/2012	4,000.00	10/01/2010	2,268.16	2,268.16	GUIDELINE 42 - (R2) RENT $2170.49 + 4.50% INC	1731.84 X 24 MOS.
10/01/2012 - 07/31/2014	4,000.00	10/01/2012	2,268.16	2,268.16	MONTH TO MONTH TENANCY. <3>	1731.84 X 22 MOS.
08/01/2014 - 07/31/2016	4,160.00	08/01/2014	2,358.89	2,358.89	GUIDELINE 45 - (R2) RENT $2268.16 + 4.00% INC. <3>	1801.11 X 3 MOS.

ADD40

CALCULATION CHART FOOTNOTES

DOCKET NO : AW410041R

1) THE BASE DATE FOR AN OVERCHARGE PROCEEDING IS THE DATE FOUR YEARS PRIOR TO THE FILING DATE OF THE COMPLAINT. IN THE INSTANT PROCEEDING, THE CASE WAS FILED ON 11/07/2012. THE BASE DATE IS 11/07/2008.

2) IN 72A REALTY ASSOCIATES V. SANDRA LUCAS, THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT RULED THAT IN LIGHT OF THE IMPROPER DEREGULATION OF THE APARTMENT AND GIVEN THAT THE RECORD DOES NOT CLEARLY ESTABLISH THE VALIDITY OF THE RENT INCREASE THAT BROUGHT THE RENT STABILIZED AMOUNT ABOVE $2,000.00, THE FREE MARKET LEASE AMOUNT SHOULD NOT BE ADOPTED, THEREFORE A FURTHER REVIEW OF ANY AVAILABLE RECORD OF RENTAL HISTORY NECESSARY TO SET THE PROPER BASE DATE RENT IS WARRANTED.
IN THE INSTANT CASE, THE FREE MARKET RENT OF $3400.00 IS IMPROPER.
THEREFORE, IN ACCORDANCE WITH THE 72A REALTY ASSOCIATES V. LUCAS DECISION, THE BASE DATE RENT IS SET AT $2,170.49.
THE BASE DATE RENT WAS CALCULATED BY USING THE PRIOR TENANT'S LAST RENT + 20% VACANCY + $171.87 IAI = $1685.72 + $40.00 X 4.50% GDL. X 3.50% GDL. X 5.50% GDL. = BASE DATE RENT OF $2170.49.

3) THE TENANTS ALSO FILED A LEASE VIOLATION COMPLAINT UNDER DOCKET NUMBER AW410001RV (CONSOLIDATED HEREIN) ALLEGING THAT THE RENEWAL LEASE WHICH COMMENCED ON 10/01/12 WAS OFFERED UNTIMELY WITH AN ILLEGAL RENT AMOUNT. IN RESPONSE, THE OWNER STATED THAT HE ISSUED A TIMELY AMENDED RENEWAL LEASE TO THE TENANTS AND SUBMITTED A FULLY EXECUTED CURRENT RENEWAL LEASE FOR THE PERIOD 08/01/14 TO 07/31/16. ACCORDINGLY, THE TENANTS REMAINED IN OCCUPANCY AS MONTH TO MONTH TENANTS FROM THE PERIOD 10/01/12 TO 07/31/14 WITHOUT A LEASE. A REVIEW OF THE CURRENT LEASE REVEALS THAT THE LEGAL RENT STATED ON THE LEASE WAS INCORRECT SINCE THE RENT INCREASE WAS BASED ON THE IMPROPER RENT. ACCORDINGLY, THE CURRENT LEASE IS AMENDED TO THE EXTENT OF CORRECTING THE LEGAL RENT TO $2,358.89 FOR THE LEASE PERIOD 08/01/14 TO 07/31/16. THE OWNER IS ALSO DIRECTED TO BASE THE FUTURE RENT INCREASE ON THE LAWFUL RENT AS ESTABLISHED IN THIS ORDER.

*** * * * G E N E R A L N O T E S * * * ***

* THE OWNER IS DIRECTED TO REFLECT THE FINDINGS AND DETERMINATIONS MADE IN THIS ORDER ON ALL FUTURE REGISTRATION STATEMENTS, CITING THIS ORDER AS THE BASIS FOR THE CHANGE. THE OWNER IS ALSO DIRECTED TO AMEND, WITHIN 60 DAYS OF THE ISSUANCE OF THIS ORDER, ALL REGISTRATIONS ALREADY ON FILE FOR THE SUBJECT APARTMENT FOR YEARS COMMENCING AFTER THE BASE DATE FOR THIS PROCEEDING TO REFLECT THE FINDINGS AND DETERMINATIONS MADE IN THIS ORDER. HOWEVER, IN THE EVENT THAT THE OWNER OR TENANT FILES A PETITION FOR ADMINISTRATIVE REVIEW (PAR) AGAINST THIS ORDER, NO AMENDED REGISTRATIONS SHOULD BE FILED UNTIL AN ORDER IS ISSUED DECIDING THE PAR.

issued 7/28/2015 - no Art 78 -

STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL OFFICE OF RENT ADMINISTRATION GERTZ PLAZA 92-31 UNION HALL STREET JAMAICA, NEW YORK 11433

IN THE MATTER OF THE ADMINISTRATIVE APPEAL OF

ADMINISTRATIVE REVIEW DOCKET NOS.: CX410046RT CX410007RO

MICHAEL KORN andLYNDA KORN (Tenants)
YORKSHIRE HOUSE ASSOCIATES (Owner)

PETITIONERS
RENT ADMINISTRATOR'S DOCKET NO.: AW410041R

ORDER AND OPINION DENYING PETITIONS FOR ADMINISTRATIVE REVIEW

The petitioner-owner and the petitioners - tenants timely filed administrative appeals against an order issued on October 2 9, 2 014 by the Rent Administrator concerning the housing accommodation known as Apt. [redacted] located at [redacted] East 81 ^ " ^ Street New York, NY which granted the tenants' rent overcharge complaint. The Rent Administrator determined that the subj ect apartment was improperly deregulated and that the free market rent existing on the apartment' s base date for rent computation could not be used to establish the legal regulated rent. The Rent Administrator established the base rent at $2,170.49 per month; determined that the tenants were owed a refund of $158,817.09 {Gverchargec of $123,G67.19 plus interest of 3 33,428.79 plus excess security of $1,721.11). In addition, the Rent Administrator determined that the rental amount for the tenant's current lease was incorrect and amended the lease to reflect the correct amount.

The Petitioner-owner asserts that the order appealed herein should be modified because the Rent Administrator's determination is based on the following errors: While the Rent Administrator did utili ze a 20% vacancy increase for the complainant's two-year vacancy lease, the petitioner was also entitled to a longevity increase of $234.65, due to the long-term nature of the prior tenancy. The Rent Administrator incorrectly calculated the individual apartment improvement incre ase. The owner sub mitted documen ts demonstrating the installation improvements totaling $10,027.85 thereby warranting a rent increase of $250.70. For a renewal lease, the Rent Administrator awarded an increase of $40.00 per month, but the rent guideline in effect on October 1, 2001, provides for a 6% increase for the two-year renewal lease entered into by the parties. The Rent Administrator failed to give the owner credit for several MCI rent increases.

The Petitioner-tenant asserts that the order appealed herein should be modified because the Rent Administrator's deter mination is based on the follo wing errors: The l andlord failed to register the subject apartment as of the base date and had not registered it at any time since 2000 when it was improperly deregulated. Therefore the rent should have been frozen from the base date November 7, 2008 through December 10, 2012. Treble damages should be imposed because the landlord failed to meet its burden of proof to show that the overcharge was not willful.

Due to the existence of common issues of law and fact in both petitions, the Commissioner has determined that they may be consolidated.

The Commissioner having reviewed the record herein finds that the petitions should be denied.

The Rent Administrator properly determined the owner's and tenant's application.

CX410007RO Lo ngevity

I ncrease:

Based on the court's decision in 72a Realty Associates v. Lucas, 955 N.Y.S. 2d 19 (2012) the legal regulated rent must Id be calculated based upon the prior rent -stabilized rent before the owner wrongfully claimed that the apartment was deregulated. In the instant matter the Rent Administrator went to the last legal regulated rent of $1,261.54 per month to begin his -calculations. Since the owner had not claimed before the Rent Administrator that it was entitled to a longevity increase, the Rent Administrator's examination of the subject apartment's rental history went no further. In any event, in order to determine if the owner was entitled to a longevity increase, the

Rent Administrator was required to conduct an examination of the subjec t apartmen t's rental history prior to the most recent rent -stabilized tenancy. The owner failed to submit.evidence.in the form of executed leases that would have allowed for such an examination. The prior annual rent registrations were ex parte filings by an owner and cannot be used to determine a longevity bonus. Prior ren t registrations may be used for the limited purpose of establishing a pre-base legal rent to comply with the Lucas ruling .

Individual Apart ment Improvements (lAI 's)

In proving the right to collect an lAI rent increase in response to a tenant complaint, an owner bears the burden of proof and must show

that t he submitted costs arise directly from work that qualifies as an improvement to the unit, and/or creates new services or inst alls new furnishings, that the work did not constitute a rep air or normal maintenance and that the work was actually complet ed in the tenant's apartment RSC §2522.4(a)(1) and (4) .

The owner submit ted invoices and cancelled checks as proof of its claim that it: had performed $10,027.85 in improvements to the subject apartment. A review of the record reveals that the Rent Administrator disallowed $3,117.56 in claimed costs because it was determined that the following items were for repairs or maintenance and did not qualify as improvements:

1	Perfect contoured deco strip	$370 ,
2	Perfect cabinet	$111, ,
3	Fred Smith Plumbing	$175 ,5
4	Veteran Pipe Covering	$514 .1
5	Tri State Flooring	$903 ,
6	Tsigonia Paint	$961 ,8
7	Armory Gla s s	$ 81. ,1

The Rent Administrator determined that the owner had proved the cost of $6,910.20 in improvements and qualified for a 1/40 " ^ ^ rent increase of $171.87. Based upon this record, the Commissioner finds that the Rent Administrator determinbed the proper lAI rent increase.

Base Date Rent Calculation

A review of the record reveals that due to a typographical error the guideline increase in effect October 1, 2001 is listed as $40.00 when in actuality it should have been listed as 6.0% for

a two year lease. However, the Rent Administrator calculation properly was based on the 6% increase.

MCI ^ 3

As the subject apartment was never joined in any of the MCI proceedings based upon the owner's mistaken belief that the apartment was deregulated, those orders by their explicit terms cannot serve to increase the rent for the apartment by those MCI granted the other rent-stabilized apartments. Furthermore, the tenants were not afforded an opportunity to challenge the MCI applications. Finally, as the Lucas decision granted the agency the authority to determine the legal regulated rent, the agency need not reward the owner for its mistaken belief and its failure to join the subject apartment to the MCI proceedings.

thereof, be filed and enforced as a judgment. The county clerk may add interest at the rate payable on a judgment under Section 5004 of the CPLR, from the date of the Rent Administrator's order.

THEREFORE, in accordance with the relevant Rent Regulatory Laws and Regulations, it is

ORDERED, that these petitions be, and the same hereby are, denied, and that the Rent Administrator's order be, and the same hereby is, affirmed.

ISSUED:

Woody Pascal
Deputy Commissioner

^ Division of Hous ing and Community Renewal
V v / ^ * / ^. Office of Rent Administration
Gertz Plaza C i f i V j H
' 92 -31 Union Hall Street
Jamaica, N.Y. 111433
Web Site: ww.nyshcr.org

Right to Court . Appeal

In order to appeal this Order to the New York Supreme Court, within sixty (60) days of the date this Order is issued, you must serve papers to commence a proceeding under Article 78 of the Civil Practice Law and Rules. No additional time can or will be given.

In preparing your papers, please cite the Administrative Review Docket Number which appears on the f irst page of the attached Order.

Court appeals from the Commissioner 's orders should be served at Counsel's Office, Room 707, 25 Beaver Street , New York, New York 10004. In addition, the Attomey General must be served at 120 Broadway, 24' ' ' Floor, New York, New Y'ork 10271.

Since Article 78 proceedings take place in the Supreme Court, you may require the professional help of an attomey.

There is no other method of appeal.

CONSOLIDATED - REGULATORY IMPACT STATEMENT

1. STATUTORY AUTHORITY:

Section 26-511(b) of the Administrative Code of the City of New York, (also known as "the Rent Stabilization Law") (RSL) and RSL section 26-518(a) provide authority to the Division of Housing and Community Renewal ("DHCR") to amend the implementing regulations (also known as "the Rent Stabilization Code") ("RSC"); Section 44 of Chap. 97, Part B of the Laws of 2011 ("the Rent Law of 2011") further empowers DHCR to promulgate rules and regulations to implement and enforce all provisions of the Rent Law of 2011 and any law renewed or continued by the Rent Law of 2011 which includes the RSL.

The RSL also provides specific statutory authority governing the subject matter of many of the proposed amendments: RSL §26-504.2(b) provides for notice and information to tenants upon deregulation and service of an "exit" rent registration identifying such apartments as now exempt from regulation. RSL §26-517 provides for rent registration generally. RSL §26-511(c)14 provides for "preferential rents" and the subsequent charging of a legal rent, tied also to its use to meet deregulation rent thresholds. RSL §26-511(c)(2) mandates promulgation of a code that requires owners not to exceed the level of lawful rents. RSL §26-511(c)14 requires owners at the option of the tenant to grant one or two year vacancy and renewal increases. RSL §26-511(c)(5) allows the RSC to include guidelines to assure that the levels for rent increase will not be subverted or made ineffective. RSL §26-511(c)(6)(b) provides that DHCR may establish criteria whereby it may act upon major capital improvement ("MCI") applications. RSL §26-511(d) provides for a rent stabilized lease rider in a form promulgated by DHCR. RSL §26-516(b) empowers DHCR to enforce the RSL and the RSC by issuance of appropriate orders, issuance of overcharge

determinations, and to establish treble damages. RSL §26-516 provides that in addition to any other remedy provided by law, any tenant may apply to DHCR for a reduction of the rent in effect prior its most recent adjustment and an order requiring such services to be maintained; that DHCR shall reduce the rent to such level where an owner has failed to maintain such services; that such owner "shall also be barred from applying for or collecting any further rent increases"; and that the restoration of such services shall result in the prospective elimination of such sanctions.

2. LEGISLATIVE OBJECTIVES

The overall legislative objectives are contained in Sections 26-501 and 26-502 of the RSL and Section 2 of the Emergency Tenant Protection Act ("ETPA"). The Legislature has determined that, because of a serious public emergency, the regulation of residential rents and evictions is necessary to prevent the exaction of unreasonable rents and rent increases and to forestall other disruptive practices that would produce threats to public health, safety and general welfare. The legislation also has an objective to assure that any transition from regulation to normal market bargaining with respect to such landlords and tenants is administered with due regard to these emergency conditions.

DHCR is specifically authorized by RSL §26-511(c)(1) to promulgate regulations to protect tenants and the public interest, and is empowered by the Rent Law of 2011 to promulgate regulations to implement and enforce new provisions added by the Rent Law of 2011 as well as any law continued or renewed by the Rent Law of 2011. These laws include the ETPA, the RSL, and the City and State Rent Control Laws.

3. NEEDS AND BENEFITS

DHCR has not engaged in an extensive amendment process with respect to these regulations since 2000. Since that time there has been significant litigation interpreting, not only these regulations, but the laws they implement. In addition, DHCR has had twelve years of experience in administration which informs this process, as does its continuing dialogue during this period with owners, tenants, and their respective advocates.

DHCR personnel within its Office of Rent Administration (ORA) engages in close to one hundred forums and meetings on an annual basis where the administration and implementation of these laws are discussed.

In the last year this information gathering process has been enhanced through several additional actions taken by DHCR.

First, DHCR created the Tenant Protection Unit (TPU), a unit designated by the Commissioner to investigate and prosecute violations of the ETPA, the RSL and the City and State Rent Laws. TPU, itself, has met with the various stakeholders in an effort to ascertain what issues and concerns impinge on the owner and tenant community affected by these regulations.

Second, DHCR underwent the regulatory process for the promulgation of amendments expressly required by the Rent Law of 2011. That process generated significant comments on other issues relating to the Rent Stabilization Code.

Third, this specific promulgation process was preceded by a mass email outreach to known stakeholders in the field to solicit even further comments and suggestions.
The needs and benefits of some of the specific modifications proposed are highlighted below.

a. Addition of TPU.

Although the existing regulations already provide for delegation of functions under RSL, the inclusion of TPU as a specific term within the regulations, demonstrates DHCR's commitment to the TPU and proactive enforcement of the RSL.

b. Codification of "Exit Registrations."

This new provision in the regulation is taken almost verbatim from RSL §26-504.2(b), a provision of the RSL added by the New York City Council pursuant to Local Law No. 12 of 2000. It provides for the service of appropriate notices on a tenant who resides in an apartment that an owner asserts is no longer subject to the RSL because of high rent vacancy deregulation. The enforcement of this section without a corresponding regulatory provision has been inconsistent and problematic. Although Courts have denied increases without compliance with its provisions because of its initial enactment by the City Council, there was some question as to the ability to integrate it into a DHCR enforcement paradigm as a portion of the Rent Laws. With the passage of the Rent Law of 2011 which expressly gave DHCR authorization to enforce any such law, the state legislature resolved this matter, making its inclusion of this provision in the regulations appropriate.

This greater oversight is long overdue. In New York City in 2011, 14,175 exit registrations were filed; in 2010, 16,907 units; and in 2009, 18,617. Those owners listing high rent vacancy deregulation as the reason was a lesser subset; on an annual basis: 11,364 units in 2011, 12,911 units in 2010 and 13,557 units in 2009. However, the number of units leaving the system (and without explanation) seems to be higher. In 2009, annual registrations (without initial registrations) were filed for 865,374 apartments. In 2011, 771,648 were filed, demonstrating that 93,726 units left the registration system. TPU and

ORA have an ongoing program to ascertain why apartments are not being registered. This program's inquires have resulted in the re-registration of 1,688 buildings with 16,969 apartments as of March 2013, all leaving a significant gap. Obviously there needs to be a more regularized reporting requirement with consequences rather than the present system which has no enforcement mechanism.

Tying compliance into the current registration system will provide an enforcement mechanism subject to the same curative provisions used in the applicable registration provisions in the RSL. The exit registrations, themselves, give owners a contemporaneous benchmark which will aid them in legitimate efforts to contemporaneously establish the propriety of high rent/vacancy deregulation and help them defend against claims by tenants that such deregulations are part of a fraudulent scheme as defined by the Court of Appeals in Grimm v DHCR, 15 N.Y.3d 358, 912 N.Y.S.2d 491 (1st Dept. 2010). Conversely, tenants will have greater awareness of their rights and be able to more accurately ascertain whether their apartment was properly deregulated.

c. Preferential Rent Review

Courts have ruled that the present regulations are incorrect to the extent that they assume that the preferential rent may be preserved exclusively by the filing of a registration or that the passage of more than four years precludes review as to whether there is a truly preferential rent.

Courts have also acknowledged that the "4 year rule" gives way in areas where there is a continuing obligation to conform one's conduct to standards created by other provisions of the Rent Stabilization Law.

Preferential rent is one of those areas. There exists a compelling need to adopt a new regulation which requires owners, in situations where a tenant is initially charged a preferential lesser rent and then charged a higher rent, to demonstrate the legitimacy of that higher rent.

Clearly there can be no conceivable way to check whether that "previously established" higher rent was proper without first examining the lease preceding it, and any other increases that went into creating that higher rent, even if such increases are more than four years before a complaint is filed. No statutory proscription exists to review that higher rent because of the passage of four years.

Time-limiting that review to four years regardless of when the higher rent was theoretically assumed to be proper, but never really established, places tenants in an untenable situation that discourages the exercise of their right to obtain a proper rent history. A tenant would need to decide, if the tenant is not paying this higher rent, whether to seek an immediate review of the higher rent or to hold off on seeking a rental review and let the time period for review run out and risk paying that higher rent at a later date without review. Alternatively, in seeking that review, the tenant would risk no longer being treated as a "preferred" by the owner upon lease renewal. Filing now may be a "lose" situation; failure to file may be a "lose" situation later.

As for owners, the actual benefits inuring to them that have been advanced as rationales behind these preferences are questionable when weighted against the actual data. Either owners, it is explained, are providing discounts to those they perceive will be good tenants; or in that certain boroughs, the rent stabilized rents will actually exceed market rents.

Neither explanation comes close to explaining the scope and prevalence of such preferential rents, given the legislature's findings that government intervention is necessary to prevent the exaction of even higher rents and rent increases, and that owner advocacy groups routinely assert that the legal rents under this system deprive owners of an appropriate return. On the other hand, in Grimm v. DHCR, supra, the Court of Appeals indicated that such claims of a discount may well be part of a fraudulent scheme to deregulate an apartment.

Close to twenty-five percent of the rents, 203,408 apartments in New York City, according to DHCR registration data-base, are listed as of May 2012 as having preferential rents (814,500 were registered), and there is no discernable pattern to support the rationale that these are simply lower rents in less "hot" boroughs. These preferential rents are equally prevalent in each of the four boroughs of New York City which have the majority of rent regulated units, with the largest number of preferential rents in Manhattan, cutting against the proffered explanation that preferential rents are an out-of-Manhattan phenomenon. As reported by DHCR to the NYC Rent Guidelines Board, as of May 16, 2012, there are 42,537 preferential rents registered in the Bronx, 50,406 in Brooklyn, 47,669 in Queens and 60,778 in Manhattan.

d. Submetering costs and MCI eligibility

This new provision properly recalibrates what equipment is MCI eligible with respect to submetering so that tenants are not charged for that part of a submetering installation that primarily benefits owners.

Submetering promotes energy efficiency by placing the costs of electrical usage as well as its future fluctuations directly on the tenants rather than filtering those increases through

the RSL system of controlling rent increases. Thus, "market risks" related to energy costs are essentially shifted from the owners to their tenants with the goal of making tenants more likely to conserve and budget their electrical usage. Tenants do receive a corresponding decrease from their legal rent when DHCR approves submetering, based on a formula that will reflect the estimated current cost of such electrical usage. However, allowing an MCI rent increase based on the installation of the device that enables such submetering, immediately results in less of a rent decrease than that formula provides. Other possible alternatives, such as barring submetering or continuing the present formulation, are not as appropriate. The regulatory amendment still promotes the energy conservation consistent with what DHCR and its predecessor rent agencies have done for forty years, but more appropriately apportions some of the costs between owner and tenant. Accordingly, DHCR will still allow increases for rewiring and electrical upgrades, but not for the submetering equipment itself.

e. "C" violations and MCI's

The presence of an immediately hazardous "C" violation leads to the denial of an MCI. Weinreb Management v. DHCR, 295 A.D.2d 232, 744 N.Y.S.2d 321 (1st Dept. 2002); 370 Manhattan Avenue Co., LLC v. DHCR, 11 A.D.3d 370, 783 N.Y.S.2d 38 (1st Dept. 2004); 251 West 98th Street Owners LLC v. DHCR, 276 A.D.2d 265, 713 N.Y.S.2d 729 (1st Dept. 2000)

Although not so limited by its regulations, as a matter of practice, DHCR was not conducting any independent review of the New York City's Violation Database, but only reviewed such violations where they were otherwise brought to DHCR's attention.

This practice, itself, has already been mitigated by subsequent case law, where the Appellate Division noted that others than the affected tenant themselves could legitimately bring such violations to DHCR's attention. Fieldbridge Associates LLC v. DHCR, 87 A.D.3d 598, 927 N.Y.S.2d 918 (1st Dept. 2011)

Since the promulgation of this Code provision in 1987, the New York City Violation database has become readily available online, and New York City has implemented numerous efficiencies to assure its data is current.

This new codification benefits owners and tenants. Tenants will obtain uniform and consistent enforcement of the already existing regulatory standards governing MCI's. For both owners and tenants, the modification in procedure to be applied after the effective date of the regulatory change is further coupled with a specific test period which provides all parties going forward with greater certainty as to whether specific violations will impinge on the grant of the MCI itself, or instead be the subject of a subsequent rent decrease application.

f. Enhanced DRIE and SCRIE Protections

Since the last code review, the State of New York adopted a Disability Rent Increase Exemption (DRIE) for eligible low income disabled tenants similar to the existing Senior Citizen Rent Increase Exemption (SCRIE) available to the low income elderly.

DHCR regulations, which already prohibit the implementation of electrical submetering for SCRIE recipients, will be extended to disabled tenants receiving DRIE.

DHCR also is amending its regulations to exempt both SCRIE and DRIE tenants from the high income/high rent deregulation procedures set forth in the RSL. As those tenancies have already been vetted through other government programs to have income far below that

required for deregulation, the procedure, if invoked by the owners, cannot obtain any meaningful result. It simply creates unneeded stress on these vulnerable populations. Even worse, it may result in the inappropriate loss of apartments through these senior or disabled tenants failing to adequately respond to mechanically generated notices as part of the process.

g. Lease Rider Requirements and Enforcement

DHCR data and experience shows that Individual Apartment Improvement (IAI) increases upon vacancy make up one of the largest components of increases under the Rent Stabilization Law. Paradoxically, because the improvements do not require tenant consent, they are among the least regulated. A tenant may only secure meaningful information or review of the propriety of these increases by filing an overcharge complaint before DHCR or a Court. This is a somewhat cumbersome and costly process for both owners and tenants. Providing more information in the vacancy lease rider itself, as well as affording tenants the ability to demand supporting documentation directly from the owners without Court or DHCR intercession, will provide a cost effective alternative to such proceedings. Greater transparency in how vacancy rents are set, will allow greater self-policing and encourage voluntary compliance with the Rent Stabilization Law. The change, itself, is not a significantly increased burden on owners as owners are already required to retain this information and make it available to DHCR, or face severe penalties.

The Rent Stabilization Code, itself, used to contain severe penalties for failing to provide such lease riders and Courts have denied increases that an owner seeks to secure without an appropriate lease. DHCR designed the consequences for non-compliance to be similar to those for failing to register, which contains ways to recognize a variety of mitigating circumstances, and also time-limits the period for these direct demands for information.

h. Codification of the overcharge "default formula"

DHCR and its predecessor agency have used this type of formula for setting rents where an owner fails to provide appropriate documentation to establish the legal rent in an overcharge proceeding. The same test is also used where there was an illusory prime tenancy or a fraudulent scheme to deregulate the housing accommodation.

However, the regulations, themselves, did not incorporate the formula. Instead, a modified formula was included in the RSL by the 2000 amendments that is available only in very limited circumstances, largely for buyers in foreclosure proceedings. The inclusion of this limited formula but not the actual rule itself has caused confusion.

i. Strengthening the process for service complaints

The present regulation provides that tenants are required, as a precondition to filing a service complaint with DHCR, to send a certified letter to the owner 10 to 60 days prior to filing a complaint regarding the service deficiency. A failure to append the letter to the DHCR complaint, results in dismissal of the application.

This rule, enacted as part of the Code in 2000, had, as its goal, fostering voluntary compliance by owners to provide required services.

More than a decade of implementation has led DHCR to the conclusion that, while positive interaction between owners and tenants regarding repairs without DHCR's intervention needs to be encouraged, the dismissal of meritorious service complaints on this basis is an even greater problem. The rule has often become a hurdle that suppresses the filing of complaints by the most vulnerable tenants.

DHCR, as part of its service reduction procedures, already recognizes and gives owners notice and an opportunity to cure service complaints prior to the issuance of rent reduction

orders. Even after such reductions, DHCR has a process to restore the rents. Nonetheless, extensive numbers of rent reduction cases are granted and applications for rent (service) restoration need to be filed.

For calendar year 2009, there were 2,469 rent reduction applications properly filed based on failure to provide services and 1,013 rent reductions orders issued. For the calendar year 2010, there were 2,432 applications filed and 1,048 rent reduction orders issued. For the calendar year 2011 there were 2,342 applications filed and 1,156 rent reduction orders issued.

Rent restoration applications, after some lag time, eventually roughly match rent reductions ordered. For the calendar year 2009, there were 1,165 restoration applications filed. For the calendar year 2010, there were 1,146 applications filed. For the calendar year 2011, there were 1,141 applications filed. (Significantly, over the three year period, more than 25% of the rent (service) restoration orders found services not restored.)

DHCR has recently implemented its "code red" processing whereby DHCR, on the most egregious service issues notifies owners of the service reduction complaint and through the inspection process will assist owners in getting access to apartments, if necessary. The experience in this type of case processing is similar to that of filings where owners receive written notification of a service reduction by the tenant, in that in over 40% of the cases, rent reduction orders are issued due to the failure of owners to make repairs. The difference in code red case processing is that because no initial notice is required as a pre-requisite to filing with DHCR, action is taken much more quickly (orders are generally issued within 61 days of filing) when compared to standard processing which requires that the case may only be filed within a time period of 10 to 60 days after a tenant notifies an owner.

On the other hand, staff analysis shows that based on this pre-letter request, over sixteen percent of the service complaints that tenants try to file are rejected in whole based on the failure to send a "pre-letter" with another fifteen percent rejected in part where that letter does not raise each service problem upon which a DHCR complaint is then filed or there was another defect with the filing. Approximately seventy-five percent of rejected complaints are never re-filed. While a portion of these cases may have been addressed by the owners, the large percentage of cases granted after owners have been given notice suggests that is not the situation. Staff review of a significant sampling of the rejected complaints has also led to the conclusion that the effect of this rule falls disproportionately on complainants with limited English language proficiency as well as those identified as elderly and infirm. This disproportionate impact unfortunately makes sense, as such tenants are being called upon to navigate a technically dense requirement without the aid and/or intervention of the government as a precondition to obtaining actual government help.

Even where such notice is, in DHCR's opinion, appropriately given, there has been some owner movement in actual practice to turn the notice into a strict pleading requirement, to defeat service complaints, on the basis of" improper service", or that the tenant failed to use the appropriate legal name for the owner.

The proposed DHCR modification still encourages direct owner and tenant interaction to secure repairs and will recognize, as part of its case-by-case processing, that time, if reasonable under the circumstances, may be afforded to owners to provide necessary repairs.

However, the continuation of the regulation in its present form is untenable and unconscionable.

The DHCR amendments also bar those parts of MCI increases that have a future effective date, where there is a subsequently issued service reduction order with an effective date which is prior to the date slated for MCI increase collection. Precluding the collection of these future 6% MCI increments until an outstanding service deficiency is cured, is consistent with the plain language of the RSL, which bars collection of increases where there is a failure to provide services and will aid DHCR in incentivizing prompt restoration of services.

Similarly vacancy and longevity increases will no longer be allowed where there is an outstanding service reduction. DHCR's prior position to the opposite effect was consistent with its understanding that a failure to otherwise comply with the RSL did not affect the ability to collect these increases. However, the Appellate Division has now ruled otherwise. See, Bradbury v. 342 West 30th Street Corporation, 84 A.D.3d 681, 924 N.Y.S.2d 349 (1st Dept. 2011).

j. Deemed Leases

The use of "deemed leases" has an extensive history in overcharge cases and has been used in the past to shield owners from unwarranted overcharge awards where a tenant may not have executed a renewal lease, but remained for the entire term of such lease without eviction and paid the increase attendant on renewal. However, the 2000 codification of the deemed lease rule instead allowed owners to claim that the rule could be used as a sword, to extract the full rent from tenants for a complete lease term where a tenant may have remained only for a short period prior to moving out. The Appellate Division, 2nd Department, in Samson Mgt. v. Hubert, 92 A.D.3d 932, 939 N.Y.S.2d 138 (2nd Dept. 2012), found that the 2000 regulatory provision, if it was indeed seeking to give a legal gloss to such behavior,

would be contrary to law. Hence, DHCR is amending its regulation to conform to the Court's decision in Samson Mgt. v. Hubert and return to the traditional usage of "deemed leases."

k. Harassment Definition

This regulation expands the definition of "harassment" to reflect some of the more up-to-date schemes to deprive tenants of their legitimate rights as rent stabilized tenants. Not every harassing act is designed to create a vacancy, but can include intimidating the tenant in place to preclude the legitimate exercise of such rights. These actions can include false and illegitimate filings before DHCR

l. Codification of Certain Four Year Rule Exceptions

These provisions seeks to set forth, in one place, a more comprehensive list of areas where, to date, by statute, case law or regulation, the "four year rule" that ordinarily governs rent and overcharge review, has been held not to be applicable. The list should serve as a useful guide to owners and tenants. The list contains two areas expressly modified by these regulations: preferential rents and vacancy on the base date cases.

The needs and benefits for the change with respect to preferential rents have already been explained.

As to vacancies, DHCR, prior to this amendment, took the position that if an apartment was vacant or exempt (usually by owner occupancy) on the base date (four years prior to the filing of an overcharge complaint), DHCR was precluded from determining whether the present tenant's rent was legal. Rather than finding the correct rent by calculating what would have been the proper increase for that period, as it would have if the vacancy or exemption was within four years, DHCR would dismiss the complaint. Although this prior

policy was upheld, experience has demonstrated that this is an area where it is more appropriate to test the validity of a present rent against these usual standards, even if these standards required rental information that occurred before the base date, rather than simply rubber-stamping any rent that is collected.

The lack of a proper base date lease (which is what the owner would be asserting) is the identical lack of proof that could otherwise lead to use of the default method in setting the rent. In fact, there have been owners who have inappropriately used the "vacancy on base date" defense in an effort to defeat such legitimate review.

The present rule is not required by statute as the Appellate Division, First Department, has already reviewed information before the base date where there was such a vacancy, but because the owner claimed the rent was now also unregulated, it did not fall within the parameters of what had been the existing regulation. Gordon v. 305 Riverside Corp., 93 A.D.3d 596, 941 N.Y.S.2d 93 (1st Dept. 2012). There is ongoing litigation over the applicability of the four year rule to Roberts litigation; given that such litigation is still ongoing and not finally determined, it is not contained in this regulation.

m. Amended registration and registration requirements

Although not provided for by regulation, through its own inaction by not rejecting them, DHCR had allowed owners to file "amended" registrations at any time for any year. These amendments, if treated similarly to "late" registrations under the RSL, could carry a substantial penalty, but no penalty has been imposed.

The number of such amendments is significant. In 2009, amended registrations for 1,129 buildings representing 5,958 apartments were filed; in 2010, amended registrations for 1,259 buildings representing 8,597 apartments were filed; in 2011, amended registrations for 402

buildings representing 4,579 apartments were filed. The unsupervised inclusion of amendments in the registration system has the effect of corrupting the purpose of DHCR's registration data base as a contemporaneously created history of rents. An amended registration was cited by the Court of Appeals in Grimm v. DHCR, supra, as one of the indicia of a fraudulent scheme to deregulate a housing accommodation.

The new DHCR rule would still allow for such amendments, where appropriate, but would ensure that the process was regulated by itself or another governmental agency, and where appropriate, assure there was also notice to the present tenant, who could comment on the owner's rationale for seeking such amendment.

DHCR is also amending the registration provisions to appropriately reflect DHCR's authority and ability to change the registration forms themselves each year to capture data appropriate for the administration and enforcement of the RSL and RSC.

n. Freeze of Vacancy Bonuses based on Failure to Register

This change will conform DHCR's practice to the Court's interpretation of this statutory penalty for failing to properly register.

o. Housing Development Fund Companies

This provision provides an appropriate rent-setting mechanism for Housing Development Fund Companies upon a foreclosure which are not presently covered by DHCR's deconversion regulations and balances the need for an economic rent with the low income nature of these tenancies.

4. COSTS

The regulated parties are residential tenants and the owners of the rent stabilized housing accommodations in which such tenants reside. There are no additional direct costs imposed

on tenants or owners by these amendments as owner direct costs are capped at $10 per unit per year. The amended regulations do not impose any new program, service, duty or responsibility upon any state agency or instrumentality thereof, or local government. Owners of regulated housing accommodations will need to be initially more vigilant to assure their compliance with these changes. Compliance costs are already a generally-accepted expense of owning regulated housing. There are increased penalties in some instances if the regulations are violated, but the costs of conforming present business practices to the change in standards is not substantial. In addition, these consequences are largely consistent with existing case law or otherwise necessary to secure compliance. DHCR has made a significant effort to assure a safe harbor or alternatives from the more dire consequences for owners who are operating in good faith and in substantial compliance. Tenants will not incur any additional costs through implementation of the proposed regulations.

The additional costs need to be weighed against the actual outlay by owners leading to what DHCR is seeking to supervise, monitor, and make more transparent by many of these changes: increases leading to the possible deregulation of units. Imposing rents that approach deregulation thresholds requires a significant outlay of funds on the part of owners. The median rent stabilized rent is $1,107 per month. The median stay of a rent stabilized tenant is 7 to 8 years, based on DHCR's review of turn-over from its registration database. Thus, adding the vacancy bonus and longevity increase to the median rent will result in a rent of $1,288 per month while the amount to deregulate an apartment is a rent of $2,500. This means an owner must increase the rent through the installation of individual apartment improvements costing either $72,880 or $42,420, depending on the number of units in the building. This financial outlay stands in contrast to the median family income of a rent

stabilized tenancy of $37,000 per year and mean family income of $51,357 per year as reported by NYC Rent Guidelines Board.

5. LOCAL GOVERNMENT MANDATES

The proposed rule making will not impose any new program, service, duty or responsibility upon any level of local government.

6. PAPERWORK

The amendments may, in a limited fashion, increase the paperwork burden. There will be additional costs associated with filings and the need for additional record retention, but it is relatively minimal. The filing of exit notices and registrations and the use of proper lease riders are already part of the RSL. Serving final registrations is an extremely limited cost and registration has otherwise been an annual owner cost since 1984 for these housing accommodations.

There may be more instances where an owner may need to retain proof of the legality of rent for a longer period, but a prudent owner would already retain that information for other purposes, such as assuring that an increase was not part of a fraudulent scheme to deregulate an apartment, making sure leases were offered on the same terms and conditions, assuring that a preferential rent was correct, and to resolve possible jurisdictional disputes. Any particularized specific claims that a changed regulation may create hardship or inequity can and will be best handled in the context of the administrative applications, themselves, where such factual claims can be assessed. IG Second Generation Partners, L.P. v. DHCR, 10 N.Y.3d 474, 859 N.Y.S.2d 598 (2008)

7. DUPLICATION

The amendments do not add any provisions that duplicate any known State or Federal requirements except to the extent required by law. There are instances where a rent stabilized property participates in another State, city or Federal housing program. In those instances, there may be a need to comply with the RSC requirements as well as the mandates of that city, State or Federal program.

8. ALTERNATIVES

DHCR considered a variety of alternatives to many of these new rules. As set forth in part in the Needs and Benefits section, the alternatives of continuing the rule presently in place for all of these changes were considered and rejected.

There were other alternatives suggested as part of DHCR's outreach that were reviewed initially as part of DHCR's initial deliberative process, but were rejected.

For example:

DHCR considered treating any attempt to amend registrations as the equivalent of late registration, since it nullifies the previous timely filing. However, this blanket penalty gave way to a more nuanced procedure to allow review of the reasons for amendments and to make amendments subject to review and supervision.

DHCR considered creating more stringent pre-requirements for MCI filings with respect to violation clearance. However, in leaving those other building violations to service reductions, while tightening up procedures to assure the clearance of immediately hazardous violations, DHCR sought to strike a balance between the need to assure owner compensation for building improvements and the maintenance of already existing services.

DHCR considered the implementation of more severe penalties for notice violations with respect to exit registrations and the provision of the lease rider. Rather than create a blanket denial of increases, DHCR made the consequences act in lock step with regular registration penalties to assure that a paperwork failure, in and of itself, would not lead to an excessive penalty, if the rent was otherwise legal and proper. However, continuation of the present rule, which required as a precondition to any penalty for failing to provide a rider that the tenant obtain an order from DHCR directing that such a rider be provided, was not a real option. The purpose of the rider is to advise tenants of their rent stabilized rights and to allow them to make an informed decision as to whether the invocation of DHCR's intercession to obtain those rights is necessary. This precondition, by definition, limits penalties for failing to provide a rider only to those tenants already sufficiently savvy about their rights to already know them. It also effectively limits an owner's necessary compliance with lease rider requirements to the same subset of knowledgeable tenants, thus assuring that the purpose of the rider is effectively gutted by regulation.

9. FEDERAL STANDARDS

The proposed amendments do not exceed any known minimum Federal standards.

10. COMPLIANCE SCHEDULE

It is not anticipated that regulated parties will require any significant additional time to comply with the proposed rules.

CONSOLIDATED - RURAL AREA FLEXIBILITY ANALYSIS

The Rent Stabilization Code applies exclusively to New York City, and therefore, the proposed rules will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities located in any rural area pursuant to Subdivision 10 of SAPA Section 102.

Assessment of Public Comments for RSC

A Notice of Proposed Rule Making was published in the State Register on April 24, 2013. The Division of Housing and Community Renewal ("DHCR") received comments submitted to it and/or presented at the public hearing held on the proposed changes to the Rent Stabilization Code ("RSC") on June 10, 2013. The comments were from individual tenants, tenant advocacy organizations or representatives, owners, and owner advocacy organizations, public officials and other interested members of the public.

A vast majority of the comments received on the proposed changes were positive and expressed support for the proposed rules. In addition, there were numerous suggestions that were not specifically related to the proposed amendments which DHCR will take into consideration for any future amendments.

A synopsis of major comments that related to sections of the proposed rules and DHCR's responses is discussed below:

9 NYCRR 2520.5

Several commenters stated that the Tenant Protection Unit ("TPU") has no basis in law and that the codification of TPU is unprecedented for an entity without a specific budget allocation.

DHCR's Response:

As noted in the Regulatory Impact Statement ("RIS"), the inclusion of this regulation demonstrates DHCR's commitment to the TPU and proactive enforcement. The RSC vests the Commissioner with authority to delegate any of his duties granted to him by Rent Stabilization Law ("RSL"), Emergency Tenant Protection Act ("ETPA") or RSC, including to TPU as a stand alone enforcement entity within DHCR. As part of DHCR, the lack of funding specifically directed to TPU is not relevant to TPU's authority to act as part of DHCR.

9 NYCRR 2520.11

Several commenters stated that without a statutory authorization, there is no legal basis for this regulation and the requirement adds to the paperwork already burdening owners. Another commenter stated that the provision should be further amended so that the owner must notify all subsequent tenants.

DHCR's Response:

The express statutory basis for this regulation is referenced in the RIS. Its text is taken essentially from the existing provision of the Rent Stabilization Law. Additional modification is therefore not appropriate as part of this specific regulatory process.

9 NYCRR 2521.2(b)

One commenter stated that this provision creates an extra burden by requiring both legal and preferential rent be set forth in leases in order to claim that a rent being charged is a preferential rent that can be ended upon renewal. Another commenter stated that DHCR should require a notification in the lease of a tenant receiving a preferential rent that upon any renewal a landlord is allowed to increase the rent to the maximum legal rent.

DHCR's Response:

As noted in the RIS, the present RSC provision has, in effect, been stricken by the courts which the commenters, who are seeking to maintain preservation of preferential rent solely through the registration system, ignore. Additional warnings to the tenants as to the consequences of a preferential rent will be considered as a possible addition to the standard form lease rider which DHCR promulgates pursuant to RSL 26-511(d).

9 NYCRR 2521.2(c)

Two commenters stated that the proposed regulation would contradict the four-year rule set forth in the RSL and it goes beyond the authority found in case law on the subject and it is, therefore, invalid.

DHCR's Response:

As noted in the RIS, case law has held that the four-year period of review does not prevent review as to the existence of a preferential rent. Courts have acknowledged in a variety of circumstances that the more general four-year period of review (and with the undefined nature of what constitutes "rent history") must be interpreted in a manner consistent with other, often continuing obligations under the Rent Stabilization Law, to assure that the goals of the RSL are not thwarted. Once an owner claims an increase, basing that entitlement on something that predates the four-year period, but was not previously used, the owner should not be able to claim that the passage of a four-year period prevents review of its propriety.

9 NYCRR 2522.4(a)(3)(22)

Several commenters stated that the provision contradicts longstanding public policy to make tenants more accountable for their energy consumption. Another commenter stated that the proposed regulation should be modified to prohibit MCIs for the re-wiring of the building undertaken in order to directly meter apartments.

DHCR's Response:

The opposing commenters fail to demonstrate how an owner shouldering the one time upfront cost of conversion (but not associated rewiring) makes tenants less accountable for their own energy costs. On the other hand, adding the costs of such conversion forever into tenants' rents, like a major capital improvement ("MCI"), skews the propriety of what is otherwise a carefully calibrated and corresponding rent reduction afforded to tenants. The modification still allows for submetering and direct metering; maintains the MCI increases for the associated rewiring of the building; but removes the cost directly attributable to the metering itself. The amendment strikes a more appropriate balance between the energy conservation goals and tenant protection.

9 NYCRR 2522.4(a)(13)

Opposing commenters stated that: 1) this change is not authorized by law and violates procedural requirements and due process; 2) the language is vague and fails to specify whether it refers to violations of the City's Housing Maintenance Code (which uses the immediately hazardous violation terminology) or violations of other State and local codes; 3) by its terms the proposed regulation includes violations not only in common areas, but in apartments; 4) the provision conflicts with HPD's current J-51 program policy; and 5) fails to define "remedied." The comments also stated that a correction of a violation can take more than 60 days and suggested that the two-year filing requirement should be automatically stayed from the date the application is filed, therefore providing the owner with the time remaining in the two year filing period as measured from the time the application was filed, plus an additional 60 days to refile.

Many commenters expressed that the proposed rule should be further modified to automatically deny an MCI where there are hazardous violations of record in addition to immediately hazardous violations.

One commenter suggested that the following language should be added to this provision: "In reviewing such application, DHCR shall consider all information that is reasonably available on such electronic databases of code violations that are maintained by any state or local agency."

DHCR's Response:

The substantive standards for MCI denial (based on the presence of immediately hazardous violations and what constitutes proof of remediation) have not been modified by these amendments. As a procedural matter, DHCR still retains discretion to act without dismissal of the application if necessary.

As to the sixty day period to clear violations, it is the owner who selects the filing date which can be any date within two years of an MCI's completion which also provides a date certain for violation clearance. This two year period gives owners an extended time to clear violations prior

to DHCR's review. In addition, the RSC's more general procedural provisions do allow DHCR to extend the sixty day refiling provision for "good cause shown." See 9 NYCRR 2527.5(d).

9 NYCRR 2522.5(c)(1)

Several commenters stated that "detailed description" should be defined. One commenter stated that the mention of the "prior lease" in the proposed regulation is unclear and questioned whether this requires the owner to provide a copy of the prior lease to an incoming tenant, which, according to the commenter, raises significant privacy issues. Further, several commenters noted that allowing tenants to request supporting documentation of IAIs is a clear violation of DHCR's authority and one commenter noted that the process is likely to lead to litigation.

Several commenters stated that the format prescribed by DHCR should enable tenants to understand each item of work alleged to support a claimed IAI and whether the work constituted an actual improvement over the former state of the apartment, or instead was a cosmetic repair.

Another commenter suggested that the regulation be amended to state that the documentation must be automatically provided to tenants instead of requiring tenants to request the information.

A further comment suggested that the regulation include a mandate that a landlord ascertain whether the tenant is capable of reading English and then provide the rider in the appropriate language, and that the sixty day limit on the right of a tenant to request the documentation should be changed to 4 years.

DHCR's Response:

DHCR is preparing the changes to the form lease and will give interested parties an opportunity to comment prior to its issuance of a new form. The requirement of its use in accordance with RSC 2520.7 will be postponed until its promulgation. The lease form will require disclosure of the nature of any claimed IAI's and their cost, as well as other increases above the prior rent. The regulation added language with respect to this "prior lease" as the present regulation requests information dating back to the most recently filed annual registration which does not account for the possibility that such registration may not have been filed.

The requested modification to require owners who can ascertain the non-English speaking language of their tenants to automatically provide the lease rider in another language would add too much uncertainty. However, form notices in a variety of languages will be part of the rider advising of the rider's availability in such languages as identified in DHCR's language access plan.

The sixty day time period for direct demand of documentation gives tenants the opportunity, as contemporaneously as possible to the execution of their lease, to make inquiries without jeopardizing their right of occupancy, but when documentation should still be readily and easily

available to any reputable owner who is already required to retain and produce them, as the commenters note, for a much more extensive period.

9 NYCRR 2522.5(c)(3)

Several commenters stated that the proposed change is not authorized by statute. The commenters claim that the removal of the phrase "upon complaint of the tenant" from the regulation places tenants in the unprecedented position to unilaterally assess owner compliance without a DHCR order. Further, removing the cure period before penalizing the owner raises a significant due process issue.

Several commenters object to the language: "unless the owner can establish that the rent collected was otherwise legal" and state that it makes the amended section lose its force. The comments state that landlords will continue to omit riders unless they face a certain penalty for that omission.

DHCR's Response:

As with any other case, DHCR will be issuing orders. This provision is not a DHCR invitation for unilateral action by a tenant to implement this provision. The removal of the introductory phrase "upon complaint of the tenant" is in recognition of DHCR's ability through ORA and TPU to investigate and commence proceedings on DHCR's own initiative where there are violations of this provision.

With respect to the non imposition of the penalty where the rent would otherwise be legal, as noted in the RIS, DHCR patterned the provision on registration in an effort to strike a balance on securing compliance without undue penalization.

9 NYCRR 2522.6(b)

Several commenters stated that a default formula that treats cases where an owner fails to provide evidence in the same manner as cases where there is fraud or other prohibited activities is in conflict with the RSL and case law. These commenters assert that there is nothing in the RSL which requires or authorizes the use of such a formula in instances where there is a default. The commenters also state that the elimination of the language concerning four years of registration precluding registration challenges or retaining other record keeping requirements is a violation of RSL 26-516.

Another commenter stated that the phrase "fraudulent scheme" should be defined.

One commenter suggested that the regulation make clear that DHCR's "sampling methods" will use only regulated apartments as comparables in the setting of rents of regulated tenants and Section 2522.6(b)(3) requires the rent to be set at the lowest rent registered for a comparable apartment, rather than the lowest rent charged. The commenter noted that unless this provision

is changed, DHCR may end up setting rents based on fraudulent registrations that exceed the actual rent.

Another commenter suggested that DHCR change the word "registered" to "charged" in the first prong of the default formula and remove the language "if within the four year period of review" in the third prong.

DHCR's Response:

A default formula is legal and of long standing; its use where there is a default in failing to provide the required rental history has met with judicial approval. Its more recent application where there are illusory prime tenancies and other fraudulent schemes, build on that usage. Schemes involving such "agreements" are void as against public policy and are tantamount to failing to provide an appropriate history. The elimination of language complained about by the commenters does not preclude its applicability where appropriate, as it still remains in the RSL. However, its out of context placement in this regulation can lead to the mistaken impression that registration is a substitute for the production of rental history or that the period of overcharge review is dependent on registrations.

DHCR, by establishing "fraudulent scheme to deregulate an apartment" as an exception to the four-year period of review, uses the standard articulated by the Court of Appeals. The comment that the default formula should use the term "regulated" rather than "registered" rents in order to avoid using falsely registered rents has merit; however, DHCR believes it has the inherent authority to reject falsely registered rents as dispositive. Since the default method is used in the absence of submitted evidence, information from DHCR's registration data will in most cases be the data of choice, if not the only data available. Similarly, sampling methods will most likely mean the use of apartments subject to the Rent Stabilization Law, as one commenter suggested, but DHCR reserves the right to do what samples are appropriate based on the facts of a specific case. DHCR does note that in using "registered" rents, DHCR will not use higher rents even if registered where a legal rent is one of two rents registered but not the one in actual use.

9 NYCRR 2523.4(a)(1), (a)(2), (c) and (d)(2)

Several commenters expressed the opinion that the common experience of housing-related enforcement agencies is that owners will make repairs upon being notified by tenants and DHCR is discouraging tenants from communicating with owners. Further, the commenter stated that the amendment takes away due process protections afforded the owner by allowing them to be subject to administrative proceedings for a reduction of services of which they have no knowledge. The commenters also question the justification for reducing the owner's time to respond to a complaint from 45 days to 20 days if the tenant does notify the owner prior to filing a complaint.

Further, several commenters alleged that the bar to MCI and vacancy rent increases based upon a service decrease are beyond the realm of DHCR's authority and is in conflict with RSL 26-514 which permits a vacancy increase in these situations (where a DHCR order is in effect which has found a decrease in services). The commenters also stated that it is a violation of the RSL to prevent the collection of an approved MCI increase where the full amount of the increase has not yet been implemented and where the temporary retroactive amounts have not yet been fully collected due to the 6% cap on a MCI increase.

DHCR's Response:

In the RIS, DHCR has already explained the legal underpinnings and policy rationale for the changes which are the subject of this regulation. The changes are neither illegal nor improvident. Additional time as well as extensions of such time can still be provided to owners as appropriate pursuant to RSC 2527.4 and 2527.5 within the context of the administrative proceeding itself. Elimination of the "pre-notice" as a proscription against filing service complaints does not deprive owners of due process as notice and opportunity to respond to the complaints is provided as part of the administrative proceeding itself. DHCR itself is not precluded from affording such notices to owners by this regulation. The regulation still encourages such notice, but without making it one more procedural hurdle to filing.

9 NYCRR 2523.5(c)(2) and (3)

Several commenters stated that this amendment eliminates the ability of owners to deem leases as renewed, which has been used for the benefit of both owners and tenants for many years. The commenters argue that by using deemed leases, owners have been able to collect renewal rent increases without the cost and inconvenience of litigation to all parties. Some commenters assert that DHCR should have defined what factors could be taken into account under Real Property Law section 232-c.

Tenant commenters were supportive but some suggested DHCR should amend the RSC section providing for termination of tenancy for failing to execute a renewal lease to require the service of a notice to cure.

DHCR's Response:

The modification of this regulation is required by case law and statute. Neither Samson v. Hubert nor the regulation prevent "deemed leases" but instead requires a fact based resolution concerning the conduct of both parties rather than rely on the unilateral actions of an owner to ascertain whether a rental agreement exists. The regulation itself places DHCR back in its more traditional role of determining (just as with Real Property Law section 232-c) whether the conduct of both parties should shield an owner from overcharges. The regulation had been used according to the industry interpretation of the prior regulatory language to condone preemptive conduct to extract additional "rent" from tenants no longer in occupancy.

The assertion that the elimination of that rule hurts tenants as much as owners is not, to date, borne out by subsequent case law.

The request of other commenters that DHCR impose a notice to cure is beyond the scope of this regulatory proposal. DHCR is not ruling out further regulations at a later date, but conforming its code to existing court decisions is clearly the most appropriate alternative.

9 NYCRR 2525.5

Several commenters stated that the amendment does not take into account whether the erroneous information is intentional or material, that the term "false document" needs to be defined, and that the amendment is without legal authority.

One commenter suggested that the current definition of harassment, in particular the "course of conduct" requirement, may result in a finding from DHCR that just one or two acts of harassment, even if egregious, do not fall within DHCR's definition of harassment. DHCR should adopt a definition of harassment that mirrors the definition used in New York City's Tenant Protection Act implemented in 2008.

Another commenter suggested that the definition of harassment include: "any non-payment proceeding brought against a tenant with a SCRIE where the only amounts in controversy are tax abatement credits owed by the SCRIE program and no rent is owed by the tenant."

DHCR's Response:

"False document" does not need a definition. DHCR cannot, nor should it, attempt by regulation to limit itself by anticipating the facts relating to every potential improper action or every permutation of false or illegal schemes that will result in harassment. As this provision is enforced by DHCR itself through its existing anti-harassment, enforcement framework, assessments are made through investigations and then administrative proceedings that provide owners with significant opportunities to present their position. The rule does take into account intentionality and materiality in that the conduct must otherwise interfere with tenants' rights under the RSL and RSC or be intended to do so.

The other commenters request that specific instances of harassment be included within the definition is not within the purview of this regulatory initiative, but DHCR believes that the present definition in the appropriate circumstances could encompass these violations.

9 NYCRR 2526.1(a)(2)

Several commenters stated that the proposed regulation expands the exception to the four-year rule for fraudulent schemes set forth in Grimm v. DHCR, by failing to reference the prerequisite

that the tenant must first meet a threshold burden of proof regarding a fraudulent scheme before DHCR has the authority to examine the rental history beyond the base date.

Another commenter stated that the proposed amendment which provides an exception to the four-year rule to determine the willfulness of an owner in overcharging a tenant for the purposes of deciding whether treble damages should apply is contradictory to the language of the RSL and there is no authoritative case law on the issue that would support this part of the proposed amendment. Further, the commenter stated that the section of the proposed amendment which allows DHCR to go beyond the four-year look back period to determine the propriety of a rent increase based on the longevity of a prior tenancy is invalid because it violates the RSL. The commenter also stated that the provision for going beyond the four year look back period in situations involving preferential rent is invalid.

One commenter alleged that the amended provision perpetuates DHCR's erroneous policy that allows examination of records prior to the base date to determine the rent stabilized status of an apartment except in cases of decontrol under RSL 504.2. The new amendments fail to reflect the numerous court decisions rendered subsequent to the 2000 code in which appellate courts have allowed examination of records beyond four years in disputes over the propriety of decontrol.

DHCR's Response:

The RIS and previous sections of this analysis respond to the above comments concerning Grimm,supra which these provisions will codify. There is no need or ability to promulgate a regulation anticipating every possible fraudulent scheme, nor to articulate every possible defense or burden shifting analysis which is implicated in the Grimm decision.

Review of the preceding four years to establish treble damages or to establish the propriety of a longevity increase has already met with court approval. While establishing the propriety of a longevity increase does not necessarily require every increase during that period to be examined, obviously indicia that may predate the four year period such as leases or contemporaneously filed registrations are needed to ascertain the vacancy prior to the tenant now in occupancy.

DHCR will not presently accede to the request to expand the list of exceptions to all apartments that have been deregulated pursuant to high rent vacancy deregulation. While there may be case law supporting that position, there is none as of yet litigated through DHCR's administrative process or by subsequent Article 78 proceeding. The issue is not sufficiently settled for inclusion as a regulatory standard.

9 NYCRR 2526.1(a)(3)(iii)

Several commenters stated that the proposed amendment is beyond anything authorized by the RSL and is beyond any case law interpreting the issue. The commenter noted that the opportunity to charge a first rent after a long term vacancy or temporary exemption is a method

of bringing an apartment that has been off the market for valid reasons back into the market at an amount determined by the market itself and then subjecting that rent and apartment to the RSL.

Another commenter stated that the imputation of guideline increases during a vacancy rewards landlords for keeping apartments off the market for prolonged periods of time in the midst of a housing emergency and that this is inconsistent with public policy and the purposes of the RSL.

DHCR's Response:

The needs and benefits are discussed in the RIS and generally outweigh the concerns noted by the commenters. In extreme circumstances such as where for explainable reasons no prior rent stabilized rent can be ascertained, DHCR, as always, reserves the right to consider appropriate equities in determining the proper rent. Moreover, as explained in section 6 of the RIS, the newly applicable rule could create an undue hardship - which an owner can seek to establish in such a proceeding before DHCR that the equities should permit DHCR to use the rule that was in effect prior to these amendments.

9 NYCRR 2526.1(g)

One commenter suggested that DHCR should remove the provision stating that the rents of tenants residing in buildings that are purchased at a judicial sale may be determined by comparison to unregulated apartment rents submitted by the owner. The commenter noted that a provision is especially needless now that DHCR will be creating "sampling methods" to address situations where no comparable base date rents can be determined within the building.

Another commenter suggested that DHCR should change the word "registered" to "charged" in the first prong of the default formula and should remove the language "if within the four year period of review" in the third prong. Also, with respect to properties purchased at judicial sale, examination of the comparable should be limited to regulated apartments.

DHCR's Response:

Changing the modified default method used for judicial sale purchasers is beyond the scope of the regulatory proposal. DHCR will not be changing the word registered to charged, but notes its response to the comments with respect to 9 NYCRR 2522.6(b).

9 NYCRR 2528.3(a) and (c)

Several commenters stated that the amendment is unnecessary, redundant and a misuse of resources. One commenter also states that the proposed amendment appears invalid under the RSL and argues that the authorization of DHCR to determine legal rents is based upon the filing of a complaint.

One commenter stated that although it is implicit that the tenants in occupancy will be given notice of proceeding to amend registration statements, the code should say so explicitly.

Another commenter stated that DHCR should implement a strict penalty for owners who fraudulently list units in registrations. Further, amended registrations are the same and should be subject to the same penalties as failing to previously register the unit altogether or filing late.

Another commenter suggested that DHCR should also require owners who file late registrations to follow the procedures for amended registrations.

DHCR's Response:

The RIS explains the basis, needs and benefits of this amendment and why this specific option was selected although other alternatives such as those suggested by the comments were considered. There is nothing in the RSL that requires a position that registrations can be amended at any time without proper regulatory oversight or without application. Tenants will be given notice and an opportunity to comment as part of any application to amend registrations or finalize the propriety of any such amendment.

9 NYCRR 2528.4(a)

Several commenters state that DHCR is seeking to expand by regulatory action the realm of sanctions it can impose and argue that there is no basis in the statute for this provision and it is not authorized by law.

Several commenters state that the amended provision needs to eliminate the bar on looking beyond the base date where an owner has failed to file a registration and not to do so is inconsistent with the holding in Cintron v. Calogero that a statutory freeze on rent increases cannot be evaded by resort to the four-year rule.

DHCR's Response:

The RIS sets forth the basis, needs and benefits of this amendment. The comments with respect to treating the failure to register as a continuing obligation that subjects the apartment to a rent freeze for registrations preceding the four-year period have been dealt with elsewhere in the RIS in the discussion regarding the industry comments under 9 NYCRR 2522.6(b).

9 NYCRR 2531.2

One commenter stated that this change is based on the assumption that NYC, via the SCRIE and DRIE exemption, has already determined that the income level of the apartment is too low for deregulation. However, the commenter asserts, many tenants do not divulge who is actually occupying their apartments to Department of Finance ("DOF"), so having the exemption is not a full finding that the income for the apartment is less than $200,000.

DHCR's Response:

The basis, needs and benefits are explained in the RIS. DHCR will not modify the amendment based on an allegation that New York City improperly administers DRIE and SCRIE. The benefits of this change far outweigh such speculative concerns for which owners have other remedies.