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

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEALS OF

ADMINISTRATIVE REVIEW
DOCKET NOS.: HX410157RO
HX410158RO
HX410159RO

RENT ADMINISTRATOR'S
DOCKET NOS: DR410657LD
DR410656LD
DR410652LD

W 54-7 LLC

PETITIONER X

ORDER AND OPINION DENYING PETITIONS FOR ADMINISTRATIVE REVIEW

The petitioner-owner timely filed administrative appeals (PARs) against the three above-referenced Orders, each issued on November 13, 2019, by the Rent Administrator (RA), concerning the housing accommodations known as [redacted] at 162 West 54th Street, New York, NY, 10019. Because the RA's Orders at issue, and the PARs against such Orders, concern the same law and facts, they have been consolidated for disposition herein.

The RA's Orders that are the subject of these PARs denied the owner's applications for orders authorizing High-Rent/High-Income deregulation of the apartments at issue in each proceeding. Each Order found that:

> Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019, as amended, repealed the provisions which provided for the issuance of orders authorizing Hight-Rent/High-Income Deregulation pursuant to the RSL, ETPA and Rent Control laws. Therefore, this proceeding initiated by the owner for such an order is dismissed.

In each PAR, the owner alleges that the RA's Order at issue in each proceeding was arbitrary and capricious in denying the application

over four years after the Petitions for deregulation were filed; that the RA failed to issue Orders of deregulation within the calendar year 2015 for each application as required by law; that the Agency exhibited deliberate and negligent delay in processing the Petitions; that the RA arbitrarily and capriciously applied the Housing Stability and Tenant Protection Act of 2019 (HSTPA) to the proceedings at issue; and that the application of HSTPA created undue hardship on the owner.

Two of the tenants answered the PARs, alleging, among other things, that the Supreme Court has determined that the premises and the apartments therein are subject to rent stabilization because of the owner's receipt ofJ-51 benefits; that the apartments remain rent stabilized even if the J-51 benefits have expired because the owner did not include J-51 riders and did not provide rents stabilized leases while receiving J-51 benefits; that the owner is collaterally estopped from pleading that the apartments are not rent stabilized; and that HSTPA was properly applied to these proceedings.

The Commissioner, having reviewed the records herein, finds that the petitions must be denied, and the Rent Administrator's Orders must be affirmed.

On July 31, 2018, the Supreme Court of New York County issued an Order (under Index No. 15708/2014) stating that "a landlord that receives J-51 abatements may not deregulate any apartment under the RSL's luxury decontrol provisions…these principles apply to the entire time period that the building was enrolled in the J-51 program, here, from 2003/2004 to date [internal citations omitted]." This Supreme Court Order was referring to the building at issue herein when it stated that said building was enrolled in the J-51 program "from 2003/2004 to date." It is noted that said Supreme Court Order was not appealed and is therefore final and binding. The Supreme Court has therefore found that the premises, and all apartments therein, were subject to rent stabilization and could not be luxury deregulated, at the least from "2003/2004 to date", which "date" was July 31, 2018, the issuance date of the Supreme Court Order. Accordingly, any application for luxury deregulation of any apartment in the subject premises for the 2015 cycle, which cycle clearly falls within the time that the Supreme Court determined that no apartment could be luxury deregulated, must be denied, which includes the three applications herein.

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

ORDERED, that the petitions are denied, and that the Rent Administrator's Orders are affirmed.

ISSUED:

FEB 21 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given. In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEAL OF

ADMINISTRATIVE REVIEW
DOCKET NO.: HX410150RO

RENT ADMINISTRATOR'S
DOCKET NO.: GN410003LD

MISSIONARY SISTERS INC.,

TENANT: [redacted]

PETITIONER X

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The owner filed a petition for administrative review (PAR) of an Order issued on November 13, 2019, by a Rent Administrator (RA) concerning apartment [redacted] in the premise located at 201 East 19th Street, New York, New York, 10003.

On February 15, 2018, the owner filed a Petition for High-Rent/High-Income deregulation, wherein the owner stated that "the owner requests verification of the household income because the tenant failed to properly return the Income Certification Form (ICF) to the owner."

On November 13, 2019, the RA issued the Order herein under review.

> Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA), as amended, repealed the provisions which provided for the issuance of orders authorizing High-Rent/High-Income Deregulation pursuant to the RSL, ETPA and Rent Control laws. Therefore, this proceeding initiated by the owner for such an order is dismissed.

On PAR, the owner alleges, among other things, that the Petition for High-Rent/High-Income deregulation was for the 2018 filing period; that the statutory High-Rent/High-Income deregulation thresholds would have been met if determined that the total annual household incomes of the occupants of the subject housing accommodation was more than $200,000.00 in each of the two preceding calendar years - 2016 and 2017, and if determined that the legal regulated rent exceeded $2,733.75 per month as of January 1, 2018; that the law in effect at the time petitioner filed the Petition for High-Rent/High-Income deregulation is the applicable law, and not the law in effect at the time of DHCR's determination; that the unit was deregulated because the tenant failed to answer; that the RA erred by retroactively applying HSTPA to the filing date of this Petition for High-Rent/High-Income deregulation; that the law in effect on the filing date of this Petition for High-Rent/High-Income deregulation must be followed in this proceeding; that the law in effect at that time permitted luxury deregulation if the statutory criteria had been met; that the implementation of HSTPA in eliminating High-Rent/High-Income deregulation violates the "Takings Clause" of the U.S. Constitution, as the owner did not receive just compensation for the utilization of his private property for public use; that the Order at issue was based on a law change with no rational basis; that HSTPA results in continued occupancy of tenants least in need of assistance; that the owner was denied due process as the effect of the HSTPA as applied in this matter amounts to a regulatory taking; that the rent agency's delay in processing this proceeding prior to the effective date of HSTPA has caused the owner harm; that, if the rent agency had processed this proceeding in a timely manner, a decision on the merits could have been issued prior to the enactment of HSTPA; and that based upon the above, this proceeding should be reopened for processing on the merits of this Petition for High-Rent/High-Income deregulation.

On April 28, 2020, the owner filed a supplement to the PAR, arguing, among other things, that the date of significance is the date the ICF was served; that DHCR failed to timely process the Deregulation Petition; that retroactive application of HSTPA to this proceeding is contrary to the intent of the Legislature, and such application is thereby unconstitutional; that Part "D" of HSTPA is not retroactive; and that the New York Court of Appeals

invalidated the retroactive portions of HSTPA in Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 35 N.Y.3d, 332 (2020).

After a careful consideration of the evidence of record, the Commissioner finds that the owner's petition should be denied.

On June 14, 2019, the New York State Legislature enacted HSTPA (Chapter 36 of the Laws of 2019) which repealed the provisions of the Rent Stabilization Laws and Regulations which allowed for deregulation of apartments based upon high rent and high income. The statute further provides that the provisions for the repeal of deregulation shall take effect immediately. (*See* HSTPA, Part "D" §8 and Part "Q" §8). The Legislature made a subsequent clarification as to the effect of Part "D" as it made an explicit exception in the "clean up" legislation (Chapter 38 of the Laws of 2019) for units which had been lawfully deregulated prior to the effective date of HSTPA. Pursuant to HSTPA, a lawfully deregulated unit on the effective date of HSTPA remains deregulated. The Commissioner rejects the owner's assertion that HSTPA should not apply to this proceeding. If an apartment remains regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of High-Rent/High-Income deregulation, as those statutes have been repealed by the legislature in passing HSTPA. The Commissioner notes that as of June 14, 2019, no deregulation order had been issued for the subject apartment and the subject apartment was under the jurisdiction of the Rent Stabilization Laws and Regulations.

The Commissioner notes that the owner seeks a revocation of the November 13, 2019, Order and for a determination based upon the merits. The Commissioner finds that HSTPA does not provide any exception to the repeal of High-Rent/High-Income deregulation for an apartment that was rent stabilized as of June 14, 2019 and creates a bright line test for which apartments were deregulated and those that could no longer be deregulated. This determination is on the merits as the rent agency is precluded from determining that the subject apartment is High-Rent/High-Income deregulated as there is no longer any standard under Rent Stabilization that permits the review that petitioner is seeking. See West 79th LLC v. New York State Div. of Housing & Cmty. Renewal, (Index No.:

158833/2020)(Hon. Carol R. Edmead)(Sup. Ct. New York Co. May 19, 2021)(wherein the Court found that "DHCR does not have the statutory authority to process deregulation petitions after June 14, 2019"). See also Matter of 160 E. 84th St. Assocs. LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 2022 NY Slip Op 01229, ¶ 1, 202 A.D.3d 610, 611, 159 N.Y.S.3d 845, 845 (App. Div. 1st Dept.).

The Commissioner rejects petitioner's assertions that the RA's retroactive application of HSTPA was improper. The Commissioner notes that the New York Court of Appeals decision in Matter of Regina does not apply to High-Rent/High-Income deregulation cases. While the Court of Appeals disallowed the retroactive application of certain rent overcharge provisions which created additional liability for owners and eliminated a four-year safe harbor for that liability contained in Part F of the HSTPA, it stated that:

> The question we address here is relatively narrow – we have no occasion to address the prospective application of any portion of the HSTPA, including Part F. We address the new legislation **only to determine whether certain Part F amendments**...must be applied retroactively...We conclude that the **overcharge calculation amendments** cannot be applied...to **overcharges** that occurred prior to their enactment..."

There is no such liability created here and no retroactive liability. See supra Matter of 160 E. 84th St. Assocs. LLC (wherein, the Appellate Division, First Department, stated that "the application of HSTPA Part "D" "affect[ed] only the propriety of prospective relief . . . [and] ha[d] no potentially problematic retroactive effect").

The fact that the 2018 petition would have been determined based on tenant's income in 2016-2017, events that occurred before the passage of HSTPA, is of no matter given that the apartment could not have been deregulated after June 14, 2019, which is a prospective determination. The Legislature had the right to modify the nature and content of deregulation and the fact that such prospective changes may involve review of antecedent events does not make it retroactive. See Pledge v DHCR, 257 A.D.2d 391 (1st

Dept. 1999), *aff'd* 94 N.Y.2d 851 (1999).

There can also be no remedy based on any assertion of denial of due process based on a "delay" in processing the owner's application. While there may be variances in terms of processing, there is no question that DHCR was issuing these deregulation determinations on the merits almost to the exact date of the passage of the HSTPA. Indeed, the various and multiple litigations over the "explanatory addenda" cases where DHCR issued such deregulation orders (but the second prong of that deregulation, that the lease in effect had not expired), themselves demonstrate that DHCR was not withholding its issuance of determinations. See supra Matter of 160 E. 84th St. Assocs. LLC (DHCR's explanatory addenda explained the effect of HSTPA part D which prohibited the deregulation of units with leases expiring after June 14, 2019 and the statute "affected only the propriety of prospective relief . . . and had no potential problematic retroactive effect"). Any delay argument is further upended by the fact that in 2018 a total of 105 apartments of the close to one million units subject to rent regulation were issued deregulating orders and 52 apartments in 2019. It is noteworthy that these numbers were consistent between 2018 and half the year of 2019, further establishing that there was no delay in their issuance in anticipation of the 2019 legislative change.

The Commissioner further notes that, even where there had been delay, the Appellate Court in Matter of Partnership 92 LP and Bldg Mgt Co Inc v NY State Division of Housing and Community Renewal, 46 A.D.3d 425 (1st Dept. 2007) *aff'd* 13 N.Y.3d 859 (2008) has noted that the express and explicit command of the Legislature shall control. Moreover, DHCR could not have predicted the express language of any potential modifications that could be encompassed by HSTPA and how they would impact this application for High-Rent/High-Income deregulation. Significantly, even where remedies based on delay have been made available, such delay must be deliberate or negligent in anticipation of a change of statute. See Matter of IG Second Generation Partners L.P. v N.Y. State Div. of Hous. & Community Renewal, 10 N.Y.3d 474 (2008) (Court of Appeals refused to award remedies for an alleged delay since it was not proven that the delay resulted from DHCR's negligent or deliberate conduct). See also Rudin E. 55th St. LLC v Div. of

Hous. & Community Renewal, 2021 NY Slip Op 31576[U], *15 [Sup Ct, NY County 2021](Supreme Court rejected an owner's assertion that "DHCR committed an unreasonable 16-month delay in issuing a deregulation order . . ."). [1]

The expiration of the time period prescribed by the applicable luxury deregulation Sections of the Code shall not divest the agency of its authority to process this Petition and to issue a determination. See Dworman v NYS Div of Housing and Community Renewal, 94 NY2d 359 (1999). As such, the expiration of the time periods asserted by the petitioner for processing this deregulation Petition did not divest the agency from issuing the November 13, 2019, Order which under the clear direction of the Legislature was now required to be dismissed and, absent evidence of negligence, did not constitute unreasonable delay. See Schutt v NYS Division of Housing and Community Renewal, 278 A.D.2d 58 (1st Dept. 2000).

Petitioner's claim that the unit was deregulated because the tenant failed to answer is inapposite. The New York Supreme Court in 315 E. 72nd St. Owners, Inc. v. N.Y. State Div. of Hous. & Cmty. Renewal, 2012 NY Slip Op 30137(U), ¶ 9 (Sup. Ct.) rejected an owner's assertion that DHCR should have defaulted a tenant pursuant to § 2531.4(b)(3). The Court in 315 E. 72nd St. Owners, Inc., held that DHCR's determination not to issue an order of deregulation based upon the default provisions set forth under § 2531.4(b)(3) was rational, *citing* Dworman.

Contrary to petitioner's claims, the dismissal of its deregulation application pursuant to HSTPA does not constitute a retroactive application of the statute. On June 14, 2019, the law changed so that rent stabilized units could no longer be deregulated based on High-Rent/High-Income. This change precluded DHCR's granting such applications on or after June 14, 2019. As a result, the subject unit remained regulated. The owner's due process argument, which is premised on its claim of retroactivity,

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[1] In *Rudin E. 55th St. LLC*, the Court agreed that the Deputy Commissioner's findings were reasonable because: 1) the text of RSC § 2531.9 plainly states that the agency "shall not [be] divest[ed] . . . of its authority to process petitions," by "[t]he expiration of the time periods prescribed . . . for [agency] action"; and 2) appellate case law clearly provides that a party claiming unreasonable delay bears the burden of demonstrating that it was "the result of DHCR's negligent or deliberate conduct." The Court noted that the evidentiary record was devoid of evidence of negligent or deliberate conduct by DHCR.

is not meritorious and must be denied.

The Commissioner finds that the rent agency does not have jurisdiction to determine the remaining constitutional issues raised by the petitioner. The Commissioner notes, however, that there is a strong presumption of constitutionality of the rent laws as enacted by the New York State Legislature. In Community Hous. Improvement Program v City of NY, 2023 U.S. App. LEXIS 2879, (2d Cir. N.Y. February 6, 2023), the Court dismissed the owner's arguments that the RSL as amended is not rationally related to its legitimate legislative process. See also 74 Pinehurst LLC v. State of NY, 19-CV-6447 (EDNY September 30, 2020) (affirmed 2d Cir. N.Y. 2023 U.S. App. LEXIS 2843 - February 6, 2023). The Court also rejected an argument that HSTPA's amendments "perpetuates New York's housing crisis and fails to target the people it claims to serve" and found that the legislative purposes behind HSTPA were valid. In addition, those changes made by the HSTPA do not render the Rent Stabilization Law unconstitutional. See 335-7 LLC et al. v. City of NY, 20-CV-01063; BRI v. NY, 19-CV-11285 (SDNY) (2021 US Dist. Lexis 174535).

The Commissioner also notes that no party has a vested right to any remedy under the Rent Stabilization Law, thus diminishing the petitioner's claim that the application of HSTPA deprives the petitioner of due process and constitutes a taking of property. The petitioner had no vested right in the continuation of a particular provision of the law or of any policy or procedure followed by DHCR. The New York Court of Appeals in I. L. F. Y. Co. v Temporary State Hous. Rent Com., 10 NY2d 263 (1961), (appeal dismissed), 369 U.S. 795, 82 S.Ct. 1155, 8 L.Ed.2d 285 (1962), held that an owner does not have an interest in any particular rule of the system of rent regulation so vested as to entitle it to keep the rule unchanged. In this matter, the owner cannot identify any vested property interest impaired by HSTPA because the owner did not have a vested right to deregulate the apartment before the enactment of HSTPA.

The Commissioner has considered any remaining claims raised by the petitioner and finds them to be without merit.

THEREFORE, in accordance with the relevant provisions of the Rent Stabilization Laws and Regulations, it is

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

ISSUED:

FEB 23 2023

Woody Pascal
Deputy Commissioner

State of New York
Division of Housing and Community Renewal
Office of Rent Administration
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There is no other method of appeal.

STATE OF NEW YORK
DIVISION OF HOUSING AND COMMUNITY RENEWAL
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IN THE MATTER OF THE ADMINISTRATIVE APPEAL OF	ADMINISTRATIVE REVIEW DOCKET NO.: HX410375RO
	RENT ADMINISTRATOR'S DOCKET NO.: FV410006RK
MISSIONARY SISTERS INC.	TENANT: [redacted]
PETITIONER	

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The owner filed a petition for administrative review (PAR) of an Order issued on November 13, 2019 by the Rent Administrator (RA) concerning the housing accommodation known as Apartment [redacted] located at 201 East 19th Street, New York, New York, 10003.

On February 6, 2017, the owner filed with the rent agency a Petition for High-Income/High-Rent Deregulation of the above-mentioned apartment. On July 14, 2017, the RA issued an Order under Docket Number FN410001LD deregulating the subject apartment based on findings that the tenant's household income for the years 2015 and 2016 exceeded $200,000.00 in each of those years, and that the rent for the apartment exceeded the threshold for deregulation. The tenant subsequently filed a request for reconsideration of Order FN410001LD, alleging that she had incorrectly filled out the Income Certification Form and that her household income was below the threshold in one or both of the years at issue. The tenant's request was granted, the matter was reopened, and the reopened proceeding was given Docket Number FV410006RK which led to the Order under consideration in the instant PAR.

On November 13, 2019, the RA issued the Order herein under review (Order FV410006RK). Said Order denied the owner's Petition for Deregulation, stating:

> Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA), as amended,

repealed the provisions which provided for the issuance of orders authorizing High-Rent/High-Income Deregulation pursuant to the RSL, ETPA and Rent Control laws. Therefore, this proceeding initiated by the owner for such an order is dismissed.

On PAR, the owner alleges, among other things, that the Petition for High-Rent/High-Income Deregulation was for the 2017 filing period; that the statutory High-Rent/High-Income deregulation thresholds would have been met if it was determined that the total annual household incomes of the occupants of the subject housing accommodation was more than $200,000.00 in each of the two preceding calendar years - 2015 and 2016, and if determined that the legal regulated rent exceeded $2,700.00 per month as of January 1, 2017; that the law in effect at the time petitioner filed the Petition for High-Rent/High-Income Deregulation is the applicable law, and not the law in effect at the time of DHCR's determination; that the unit was deregulated because the tenant failed to answer; that the RA erred by retroactively applying HSTPA to the filing date of this Petition for High-Rent/High-Income Deregulation; that the law in effect on the filing date of this Petition for High-Rent/High-Income Deregulation must be followed in this proceeding; that the law in effect at that time permitted luxury deregulation if the statutory criteria had been met; that the implementation of HSTPA in eliminating High-Rent/High-Income deregulation violates the "Takings Clause" of the U.S. Constitution, as the owner did not receive just compensation for the utilization of his private property for public use; that the Order at issue was based on a law change with no rational basis; that HSTPA results in continued occupancy of tenants least in need of assistance; that the owner was denied due process as the effect of HSTPA as applied in this matter amounts to a regulatory taking; that the rent agency's delay in processing this proceeding prior to the effective date of HSTPA has caused the owner harm; that, if the rent agency had processed this proceeding in a timely manner, a decision on the merits could have been issued prior to the enactment of HSTPA; and that based upon the above, this proceeding should be reopened for processing on the merits of this Petition for High-Rent/High-Income Deregulation.

After a careful consideration of the evidence of record, the

Commissioner finds that the owner's petition should be denied.

On June 14, 2019, the New York State Legislature enacted HSTPA (Chapter 36 of the Laws of 2019) which repealed the provisions of the Rent Stabilization Laws and Regulations which allowed for deregulation of apartments based upon high rent and high income. The statute further provides that the provisions for the repeal of deregulation shall take effect immediately. (*See* HSTPA, Part "D" §8 and Part "Q" §8). The Legislature made a subsequent clarification as to the effect of Part "D" as it made an explicit exception in the "clean up" legislation (Chapter 38 of the Laws of 2019) for units which had been lawfully deregulated prior to the effective date of HSTPA. Pursuant to HSTPA, a lawfully deregulated unit on the effective date of HSTPA remains deregulated. The Commissioner rejects the owner's assertion that HSTPA should not apply to this proceeding. If an apartment remains regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of High-Rent/High-Income deregulation, as those statutes have been repealed by the Legislature in passing HSTPA. The Commissioner notes that as of June 14, 2019, no final and effective deregulation order had been issued for the subject apartment and the subject apartment was under the jurisdiction of the Rent Stabilization Laws and Regulations.

The Commissioner notes that the owner seeks a revocation of the November 13, 2019, Order and for a determination based upon the merits. The Commissioner finds that HSTPA does not provide any exception to the repeal of High-Rent/High-Income deregulation for an apartment that was rent stabilized as of June 14, 2019 and creates a bright line test for which apartments were deregulated and those that could no longer be deregulated. This determination is on the merits as the rent agency is precluded from determining that the subject apartment is High-Rent/High-Income deregulated as there is no longer any standard under Rent Stabilization that permits the review that petitioner is seeking. See West 79th LLC v. New York State Div. of Housing & Cmty. Renewal, (Index No.: 158833/2020)(Hon. Carol R. Edmead)(Sup. Ct. New York Co. May 19, 2021)(wherein the Court found that "DHCR does not have the statutory authority to process deregulation petitions after June 14, 2019"). See also Matter of 160 E. 84th St. Assocs. LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 2022 NY Slip Op 01229, ¶ 1,

202 A.D.3d 610, 611, 159 N.Y.S.3d 845, 845 (App. Div. 1st Dept.).

The Commissioner rejects petitioner's assertions that the RA's retroactive application of HSTPA was improper. The Commissioner notes that the New York Court of Appeals decision in Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 35 N.Y.3d, 332 (2020) does not apply to High-Rent/High-Income deregulation cases. While the Court of Appeals disallowed the retroactive application of certain rent overcharge provisions which created additional liability for owners and eliminated a four-year safe harbor for that liability contained in Part F of the HSTPA, it stated that:

> The question we address here is relatively narrow – we have no occasion to address the prospective application of any portion of the HSTPA, including Part F. We address the new legislation **only to determine whether certain Part F amendments**...must be applied retroactively...We conclude that the **overcharge calculation amendments** cannot be applied...to **overcharges** that occurred prior to their enactment..."

There is no such liability created here and no retroactive liability. See supra Matter of 160 E. 84th St. Assocs. LLC (wherein, the Appellate Division, First Department, stated that "the application of HSTPA Part "D" "affect[ed] only the propriety of prospective relief . . . [and] ha[d] no potentially problematic retroactive effect").

The fact that the 2017 Petition would have been determined based on tenant's income in 2015-2016, events that occurred before the passage of HSTPA, is of no matter given that the apartment could not have been deregulated after June 14, 2019, which is a prospective determination. The Legislature had the right to modify the nature and content of deregulation and the fact that such prospective changes may involve review of antecedent events does not make it retroactive. See Pledge v DHCR, 257 A.D.2d 391 (1st Dept. 1999), *aff'd* 94 N.Y.2d 851 (1999).

There can also be no remedy based on any assertion of denial of due process based on a "delay" in processing the owner's

application. While there may be variances in terms of processing, there is no question that DHCR was issuing these deregulation determinations on the merits almost to the exact date of the passage of the HSTPA. Indeed, the various and multiple litigations over the "explanatory addenda" cases where DHCR issued such deregulation orders (but the second prong of that deregulation, that the lease in effect had not expired), themselves demonstrate that DHCR was not withholding its issuance of determinations'. See supra Matter of 160 E. 84th St. Assocs. LLC (DHCR's explanatory addenda explained the effect of HSTPA part D which prohibited the deregulation of units with leases expiring after June 14, 2019 and the statute "affected only the propriety of prospective relief . . . and had no potential problematic retroactive effect"). Any delay argument is further upended by the fact that in 2018 a total of 105 apartments of the close to one million units subject to rent regulation were issued deregulating orders and 52 apartments in 2019. It is noteworthy that these numbers were consistent between 2018 and half the year of 2019, further establishing that there was no delay in their issuance in anticipation of the 2019 legislative change.

The Commissioner further notes that, even where there had been delay, the Appellate Court in Matter of Partnership 92 LP and Bldg Mgt Co Inc v NY State Division of Housing and Community Renewal, 46 A.D.3d 425 (1st Dept. 2007) *aff'd* 13 N.Y.3d 859 (2008) has noted that the express and explicit command of the Legislature shall control. Moreover, DHCR could not have predicted the express language of any potential modifications that could be encompassed by HSTPA and how they would impact this application for High-Rent/High-Income deregulation. Significantly, even where remedies based on delay have been made available, such delay must be deliberate or negligent in anticipation of a change of statute. See Matter of IG Second Generation Partners L.P. v N.Y. State Div. of Hous. & Community Renewal, 10 N.Y.3d 474 (2008) (Court of Appeals refused to award remedies for an alleged delay since it was not proven that the delay resulted from DHCR's negligent or deliberate conduct). See also Rudin E. 55th St. LLC v Div. of Hous. & Community Renewal, 2021 NY Slip Op 31576[U], *15 [Sup Ct, NY County 2021] (Supreme Court rejected an owner's assertion that "DHCR committed an unreasonable 16-month delay in issuing a

deregulation order . . .").[1]

The expiration of the time period prescribed by the applicable luxury deregulation Sections of the Code shall not divest the agency of its authority to process this Petition and to issue a determination. See Dworman v NYS Div of Housing and Community Renewal, 94 NY2d 359 (1999). As such, the expiration of the time periods asserted by the petitioner for processing this deregulation Petition did not divest the agency from issuing the November 13, 2019, Order which under the clear direction of the Legislature was now required to be dismissed and, absent evidence of negligence, did not constitute unreasonable delay. See Schutt v NYS Division of Housing and Community Renewal, 278 A.D.2d 58 (1st Dept. 2000).

Petitioner's claim that the unit was deregulated because the tenant failed to answer is inapposite. The New York Supreme Court in 315 E. 72nd St. Owners, Inc. v. N.Y. State Div. of Hous. & Cmty. Renewal, 2012 NY Slip Op 30137(U), ¶ 9 (Sup. Ct.) rejected an owner's assertion that DHCR should have defaulted a tenant pursuant to §2531.4(b)(3). The Court in 315 E. 72nd St. Owners, Inc., held that DHCR's determination not to issue an order of deregulation based upon the default provisions set forth under § 2531.4(b)(3) was rational, *citing* Dworman.

Contrary to petitioner's claims, the dismissal of its deregulation application pursuant to HSTPA does not constitute a retroactive application of the statute. On June 14, 2019, the law changed so that rent stabilized units could no longer be deregulated based on High-Rent/High-Income. This change precluded DHCR's granting such applications on or after June 14, 2019. As a result, the subject unit remained regulated. The owner's due process argument, which is premised on its claim of retroactivity, is not meritorious and must be denied.

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[1] In *Rudin E. 55th St. LLC*, the Court agreed that the Deputy Commissioner's findings were reasonable because: 1) the text of RSC § 2531.9 plainly states that the agency "shall not [be] divest[ed] . . . of its authority to process petitions," by "[t]he expiration of the time periods prescribed . . . for [agency] action"; and 2) appellate case law clearly provides that a party claiming unreasonable delay bears the burden of demonstrating that it was "the result of DHCR's negligent or deliberate conduct." The Court noted that the evidentiary record was devoid of evidence of negligent or deliberate conduct by DHCR.

The Commissioner finds that the rent agency does not have jurisdiction to determine the remaining constitutional issues raised by the petitioner. The Commissioner notes, however, that there is a strong presumption of constitutionality of the rent laws as enacted by the New York State Legislature. In Community Hous. Improvement Program v City of NY, 2023 U.S. App. LEXIS 2879, (2d Cir. N.Y. February 6, 2023), the Court dismissed the owner's arguments that the RSL as amended is not rationally related to its legitimate legislative process. See also 74 Pinehurst LLC v. State of NY, 19-CV-6447 (EDNY September 30, 2020) (affirmed 2d Cir. N.Y. 2023 U.S. App. LEXIS 2843 - February 6, 2023). The Court also rejected an argument that HSTPA's amendments "perpetuates New York's housing crisis and fails to target the people it claims to serve" and found that the legislative purposes behind HSTPA were valid. In addition, those changes made by the HSTPA do not render the Rent Stabilization Law unconstitutional. See 335-7 LLC et al. v. City of NY, 20-CV-01063; BRI v. NY, 19-CV-11285 (SDNY) (2021 US Dist. Lexis 174535).

The Commissioner also notes that no party has a vested right to any remedy under the Rent Stabilization Law, thus diminishing the petitioner's claim that the application of HSTPA deprives the petitioner of due process and constitutes a taking of property. The petitioner had no vested right in the continuation of a particular provision of the law or of any policy or procedure followed by DHCR. The New York Court of Appeals in I. L. F. Y. Co. v Temporary State Hous. Rent Com., 10 NY2d 263 (1961), (appeal dismissed), 369 U.S. 795, 82 S.Ct. 1155, 8 L.Ed.2d 285 (1962), held that an owner does not have an interest in any particular rule of the system of rent regulation so vested as to entitle it to keep the rule unchanged. In this matter, the owner cannot identify any vested property interest impaired by HSTPA because the owner did not have a vested right to deregulate the apartment before the enactment of HSTPA.

The Commissioner has considered any remaining claims raised by the petitioner and finds them to be without merit.

THEREFORE, in accordance with the relevant provisions of the Rent Stabilization Laws and Regulations, it is

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

ISSUED:

FEB 23 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. *No additional time can or will be given.* In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEALS OF

56 7th AVENUE LLC,

ADMINISTRATIVE REVIEW
DOCKET NOS.: HX410067RO
HX410066RO
HX410064RO
HX410063RO

RENT ADMINISTRATOR'S
DOCKET NOS.: CP410061LD
DP410218LD
EP410154LD
FP410039LD

TENANT: [redacted]

PETITIONER X

ORDER AND OPINION DENYING PETITIONS FOR ADMINISTRATIVE REVIEW

The owner filed respective petitions for administrative review (PARs) of four orders issued on November 13, 2019 by the Rent Administrator (RA) concerning the housing accommodation known as apartment [redacted] in the premises located at 56 7th Avenue, New York, New York.

The Commissioner notes that these PARs involve common issues of law and fact and is therefore of the opinion that they should be consolidated for disposition. In addition, the Commissioner has reviewed the evidence in the respective records and has considered those portions of the records relevant to the issues raised by the PARs.

On April 4, 2014 (CP410061LD), April 28, 2015 (DP410218LD), April 27, 2016 (EP410154LD), and April 6, 2017 (FP410039LD) the owner filed with the rent agency petitions for high income rent deregulation wherein the owner either contested or requested verification of the household incomes stated by the tenant in the Income Certification Forms.

On November 13, 2019, the RA issued four respective orders each of which found:

> Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA), as amended, repealed the provisions which provided for the issuance of orders authorizing High-Rent/High-Income Deregulation pursuant to the RSL, ETPA and Rent Control laws. Therefore, this proceeding initiated by the owner for such an order is dismissed.

In each PAR, the owner alleges that the Order must be annulled as it is arbitrary, capricious, and illegal; that HSTPA violates the owner's due process rights by retroactively applying newly enacted laws to a proceeding that's essence is predicated on the review of the prior two (2) years of household income; that the respective petitions were for the 2014, 2015, 2016 and 2017 filing periods; that the statutory high-income deregulation threshold has been met if it is determined that the total annual household income of the occupants of the subject housing accommodation is more than $200,000.00 in each of the two preceding calendar years; that the implementation of HSTPA to luxury decontrol proceedings currently pending, where the scope of review is prior to HSTPA, deprives owners of all the rights of ownership, and also eliminates property owner's rights to use their property for anything other than the compelled use of a stabilized rental; that DHCR violated the owner's Due Process rights and condoned a violation of the Takings Clause by applying the act of 2019 to the instant proceedings; that these very substantial restrictions on property owners' rights effect an uncompensated physical taking that is a *per se* violation of the Takings Clause; that owner submits these PARs without prejudice to on-going litigation challenging the validity of HSTPA; and that in the alternative, these proceedings should be held in abeyance until a final order is issued in the on-going litigation challenging the validity of the Housing Stability and Tenant Protection Act of 2019.

After a careful consideration of the evidence of record, the Commissioner finds that the owner's petitions should be denied.

On June 14, 2019, the New York State Legislature enacted HSTPA

(Chapter 36 of the Laws of 2019) which repealed the provisions of the Rent Stabilization Laws and Regulations which allowed for deregulation of apartments based upon high rent and high income. The statute further provides that the provisions for the repeal of deregulation shall take effect immediately. (See HSTPA, Part "D" §8 and Part "Q" §8). The Legislature made a subsequent clarification as to the effect of Part "D" as it made an explicit exception in the "clean up" legislation (Chapter 38 of the Laws of 2019) for units which had been lawfully deregulated prior to the effective date of HSTPA. Pursuant to HSTPA, a lawfully deregulated unit on the effective date of HSTPA remains deregulated. The Commissioner rejects the owner's assertion that HSTPA should not apply to these proceedings. If an apartment remains regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of high income/high rent deregulation, as those statutes have been repealed by the legislature in passing HSTPA. The Commissioner notes that as of June 14, 2019 no deregulation order had been issued for the subject apartment and the subject apartment was under the jurisdiction of the Rent Stabilization Laws and Regulations.[1]

The Commissioner notes that the owner seeks revocation of the respective November 13, 2019 orders and for determinations based upon the merits. The Commissioner finds that HSTPA does not provide any exception to the repeal of high income/high rent deregulation for an apartment that was rent stabilized as of June 14, 2019 and creates a bright line test for which apartments were deregulated and those that could no longer be deregulated. This determination

[1] Agency records indicate that the owner had filed a 2012 petition for deregulation which was docketed under AO410064LD on June 6, 2012, and which was denied on June 19, 2015. However, the owner filed a PAR against said RA determination which was docketed under DS410038RO, and which was granted, resulting in the case being remanded to the RA for reconsideration under docket GT410002RP. The matter was finally decided on January 22, 2019 with a determination that the tenant's income was not in excess of $200,000 in 2010-2011. Given that the owner's 2012 deregulation application was not decided until January 22, 2019, following an appeal and reprocessing in the normal course of agency business, it was reasonable for the RA to place subsequently filed applications, including those that are the subject of these PARs, on hold until the 2012 case reached a final determination. Indeed, agency records establish that the RA started to process the next earliest application (2013 - Docket Number BQ410537LD) and issued an order on that matter on April 5, 2019 and then began to process CP410061LD.

is on the merits as the rent agency is precluded from determining that the subject apartment is high income/high rent deregulated as there is no longer any standard under Rent Stabilization that permits the review that petitioner is seeking. See West 79th LLC v. New York State Div. of Housing & Cmty. Renewal, (Index No.: 158833/2020)(Hon. Carol R. Edmead)(Sup. Ct. New York Co. May 19, 2021)(Wherein the Court found that "DHCR does not have the statutory authority to process deregulation petitions after June 14, 2019"). See also Matter of 160 E. 84th St. Assocs. LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 2022 NY Slip Op 01229, ¶ 1, 202 A.D.3d 610, 611, 159 N.Y.S.3d 845, 845 (App. Div. 1st Dept.).

The Commissioner rejects petitioner's assertions that the RA's retroactive application of HSTPA was improper. The Commissioner notes that the New York Court of Appeals decision in Regina Metropolitan LLC v DHCR, 35 NY3d 332, 130 NYS 3d 759 (2020) does not apply to high rent/high income deregulation cases. While the Court of Appeals disallowed the retroactive application of certain rent overcharge provisions which created additional liability for owners and eliminated a four-year safe harbor for that liability contained in Part F of the HSTPA, it stated that:

> The question we address here is relatively narrow – we have no occasion to address the prospective application of any portion of the HSTPA, including Part F. We address the new legislation **only to determine whether certain Part F amendments**...must be applied retroactively...We conclude that the **overcharge calculation amendments** cannot be applied...to **overcharges** that occurred prior to their enactment..."

There is no such liability created here and no retroactive liability. See Matter of 160 E. 84th St. Assocs. LLC wherein the Appellate Division stated that "the application of HSTPA Part "D" "affect[ed] only the propriety of prospective relief . . . [and] ha[d] no potentially problematic retroactive effect").

The fact that the 2014-2017 petitions would have been determined based on tenant's income in the respective preceding two years, events that occurred before the passage of HSTPA, is of no matter given that the apartment could not have been deregulated

after June 14, 2019, which is a prospective determination. The Legislature had the right to modify the nature and content of deregulation and the fact that such prospective changes may involve review of antecedent events does not make it retroactive. See Pledge v DHCR, 257 A.D.2d 391 (1st Dept. 1999), aff'd 94 N.Y.2d 851 (1999).

Contrary to petitioner's claims, the dismissal of its deregulation applications pursuant to HSTPA does not constitute a retroactive application of the statute. On June 14, 2019, the law changed so that rent stabilized units could no longer be deregulated based on high income/high rent. This change precluded DHCR's granting such applications after June 14, 2019. As a result, the subject unit remained regulated. The owner's due process argument, which is premised on its claim of retroactivity, is not meritorious and must be denied.

The Commissioner notes that the rent agency does not and would not declare acts of state law unconstitutional but does enforce, implement and administer the state laws consistent therewith. The application here is clearly consistent. The owner claims that the repeal of deregulation provisions constitutes a Taking under the US Constitution and that it has suffered harm and that such repeal lacks a rational basis. However, the Commissioner notes that there is a strong presumption of constitutionality of the rent laws as enacted by the New York State Legislature. In Community Hous. Improvement Program v City of NY et al, 2020 US Dist LEXIS 181189, at *34-35 (EDNY Sep. 30, 2020, No. 19-cv-4087)(EK)(RLM)(Appeal pending), the court dismissed an owner's arguments that HSTPA's provisions are facially invalid based on physical and regulatory takings claims. The court also found that claimants who allege an as applied regulatory takings claim face a "heavy burden". It rejected an owner's claim that the effect of HSTPA is not rationally related to increasing the supply of affordable housing, helping low-income New Yorkers, or promoting socio-economic diversity and that HSTPA's amendments "perpetuates New York's housing crisis and fails to target the people it claims to serve". The Court in Community Hous. Improvement Program v City of NY et al, found that the legislative purposes and justifications offered for the regulations were valid.

The Commissioner also notes that no party has a vested right to any remedy under the Rent Stabilization Laws and Regulations, thus diminishing the petitioner's claim that the application of HSTPA deprives the petitioner of due process and constitutes a taking of property. The petitioner had no vested right in the continuation of a particular provision of the law or of any policy or procedure followed by DHCR. The New York Court of Appeals in I. L. F. Y. Co. v Temporary State Hous. Rent Com., 10 NY2d 263 (1961), appeal dismissed 369 U.S. 795 (1962) held that an owner does not have an interest in any particular rule of the system of rent regulation and is not so vested as to entitle it to keep the rule unchanged. In this matter, the owner cannot identify any vested property interest in the continued processing of its applications because the owner did not have a vested right to deregulate the subject apartment before the enactment of HSTPA. See Pledge v DHCR, supra. Accordingly, DHCR finds that the owner has not identified a particular right that vested by virtue of changes in prior processing rules.

The Commissioner also will not honor petitioner's alternative request to hold these proceedings in abeyance "until a final order is issued in the on-going litigation challenging the validity of HSTPA." The Commissioner notes that the Courts in those challenges have not placed any stay on the processing of Luxury Deregulation proceedings nor any other provision of the Rent Stabilization Law, nor have the parties to the above referenced action even requested the relief that the owner seeks by virtue of its administrative litigation.

As indicated above, the United States District Court in Community Hous. Improvement Program v City of NY et al, had dismissed all claims against New York State and DHCR, which sought to challenge the validity of HSTPA's repeal of the luxury and high-income decontrol provisions. District Court Judge, Eric Komitee, stated in his decision that "no precedent binding on this Court has ever found any provision of a rent-stabilization statute to violate the Constitution... rent regulations have now been the subject of almost a hundred years of case law."

The Commissioner accordingly rejects petitioner's statement that these PARs are submitted without prejudice to "on-going

litigation challenging the validity of HSTPA". This generalized reservation is without meaning or substance. Once a final order is issued in these proceedings, any further claims raised by either party will be considered in accordance with the restrictions found in court precedent and in various provisions of the rent laws and regulations. As with any other final order determining a PAR(s), the Commissioner opines that petitioner's challenges to the respective November 13, 2019 Orders are limited to the specific arguments that the petitioner raised in its PAR applications and is subject to the scope of review restrictions set forth in RSC §2529.6.

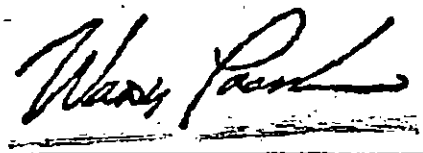
The Commissioner has considered any remaining claims raised by the petitioner and finds them to be without merit.

THEREFORE, in accordance with the relevant provisions of the Rent Stabilization Law and Regulations, it is

ORDERED, that the petitions be, and the same hereby are, denied.

ISSUED:

FEB 28 2020



Woody Pascal
Deputy Commissioner

State of New York
Division of Housing and Community Renewal
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Right to Court Appeal

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There is no other method of appeal.

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 THE
ADMINISTRATIVE APPEALS OF

LICHTER REAL ESTATE
NUMBER ONE LLC

ADMINISTRATIVE REVIEW
DOCKET NOS.: HX410173RO
HX410175RO

RENT ADMINISTRATOR'S
DOCKET NOS.: FR410377LD
EO410012LD

TENANTS: [redacted]

PETITIONER X

ORDER AND OPINION DENYING PETITIONS FOR ADMINISTRATIVE REVIEW

The owner filed petitions for administrative reviews (PARs) against two Orders issued on November 13, 2019 by a Rent Administrator (RA) concerning apartment [redacted] in the premises located at 175 West 76th Street, New York, New York, 10023. Because these PARs involve common issues of law and fact they have been consolidated for disposition herein.

On June 29, 2017 (FR410377LD) and on March 21, 2016 (EO410012LD), the owner filed Petitions for High-Rent/High-Income deregulation, and in each Petition the owner stated that "the owner requests verification of the household income because the tenant failed to properly return the Income Certification Form (ICF) to the owner."

On November 13, 2019, the RA issued the two Orders herein under review. The RA stated the following in each Order:

> Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA), as amended, repealed the provisions which provided for the issuance of orders authorizing High-Rent/High-Income

Deregulation pursuant to the RSL, ETPA and Rent Control laws. Therefore, this proceeding initiated by the owner for such an order is dismissed.

In each of the PARs, the owner asserts, among other things, that the Petitions for High-Rent/High-Income deregulation were filed in 2016 and 2017 respectively; that, as of the respective filing dates, the subject apartment's monthly legal regulated rent exceeded the statutory minimum for a finding of luxury deregulation; that the rent agency was to determine whether the tenants' total annual income exceeded $200,000.00 for the 2014-2015 and for the 2015-2016 years respectively; that the statutory requirements for a finding of luxury deregulation of the subject apartment relate to periods prior to the June 14, 2019 effective date of HSTPA; that the relevant Section of HSTPA relating to the repeal of luxury deregulation stated that "Sections 26-504.1, 26-504.2 and 26-504.3 of the administrative code of the city of New York are REPEALED"; that, unlike other Sections of HSTPA, Part D, which repeals luxury deregulation, does not specify that it relates to pending proceedings; and that said Section does not state that it should be applied retroactively.

The owner further asserts that, as the Petitions for deregulation had been filed prior to the June 14, 2019 effective date of HSTPA, the RA's Orders should not have denied the Petitions for High-Rent/High-Income deregulation; that, contrary to the Rent Administrator's Orders, prospective repeal does not prevent DHCR from issuing orders relating to pending proceedings based on pre-existing facts; that the rent agency must process the Petitions for High-Rent/High-Income deregulation on the merits; that an order deciding the owner's Petition for Deregulation on the merits should have been issued, pursuant to RSL section 504.3(c)(2), on or before March first of 2017; and that Courts have routinely held that, where an administrative agency deliberately or negligently delays processing an application, then there is a right to have the application processed under the previous law (citation omitted).

On August 3, 2020, the owner submitted supplements to the PARs, alleging that, pursuant to the April 2, 2020 decision by the Court of Appeals in Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 35 NY3d 332 [2020], DHCR's denial Order(s) must be rescinded; that the owner's Petition(s) for deregulation should be reopened; that, in Regina, the Court of Appeals held that retroactive application of Part F of HSTPA violates the owner's due process rights under the New York and Federal Constitutions; that, although the Court in Regina

addressed only the retroactive application of the overcharge provisions, the Court's reasoning should also be applied to the instant luxury deregulation proceeding; that the application of Regina to one provision of HSTPA but not others defies reason; that, by denying the owner's Petition(s), DHCR applied HSTPA to conditions that occurred prior to the passage of HSTPA; and that this type of retroactive application unjustly penalizes the owner in the same manner as the Court warned against in Regina.

After a careful consideration of the evidence of record, the Commissioner finds that the owner's petitions should be denied.

On June 14, 2019, the New York State Legislature enacted HSTPA (Chapter 36 of the Laws of 2019) which repealed the provisions of the Rent Stabilization Laws and Regulations which allowed for deregulation of apartments based upon high rent and high income. The statute further provides that the provisions for the repeal of deregulation shall take effect immediately. (*See* HSTPA, Part "D" §8 and Part "Q" §8). The Legislature made a subsequent clarification as to the effect of Part "D" as it made an explicit exception in the "clean up" legislation (Chapter 38 of the Laws of 2019) for units which had been lawfully deregulated prior to the effective date of HSTPA. Pursuant to HSTPA, a lawfully deregulated unit on the effective date of HSTPA remains deregulated. The Commissioner rejects the owner's assertion that HSTPA should not apply to these proceedings. If an apartment remains regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of High-Rent/High-Income deregulation, as those statutes have been repealed by the legislature in passing HSTPA. The Commissioner notes that, as of June 14, 2019, no final or effective deregulation order had been issued for the subject apartment and the subject apartment was under the jurisdiction of the Rent Stabilization Laws and Regulations.

The Commissioner notes that the owner seeks a revocation of the November 13, 2019 Orders and for determinations based upon the merits. The Commissioner finds that HSTPA does not provide any exception to the repeal of High-Rent/High-Income deregulation for an apartment that was rent stabilized as of June 14, 2019 and creates a bright line test for which apartments were deregulated and those that could no longer be deregulated. This determination is on the merits as the rent agency is precluded from determining that the subject apartment is High-Rent/High-Income deregulated as there is no longer any standard under Rent Stabilization that permits the review that petitioner is seeking. See West 79th LLC v. New York State Div. of Housing & Cmty. Renewal, (Index No.: 158833/2020) (Hon. Carol R. Edmead)(Sup. Ct. New York Co. May 19,

2021) (wherein the Court found that "DHCR does not have the statutory authority to process deregulation petitions after June 14, 2019"). See also Matter of 160 E. 84th St. Assocs. LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 2022 NY Slip Op 01229, ¶ 1, 202 A.D.3d 610, 611, 159 N.Y.S.3d 845, 845 (App. Div. 1st Dept.).

The application of HSTPA to these matters is not based upon the independent judgment of DHCR but, rather, is pursuant to the plain text in HSTPA, and DHCR is statutorily obliged to apply HSTPA to these cases. HSTPA specifically stated that the law is to "take effect immediately" and that "if an apartment remains rent regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of high rent/high income deregulation."

The Commissioner rejects petitioner's assertions that the RA's retroactive applications of HSTPA was improper. The Commissioner notes that the New York Court of Appeals decision in Regina does not apply to High-Rent/High-Income deregulation cases. While the Court of Appeals disallowed the retroactive application of certain rent overcharge provisions which created additional liability for owners and eliminated a four-year safe harbor for that liability contained in Part F of HSTPA, it stated that:

> The question we address here is relatively narrow – we have no occasion to address the prospective application of any portion of the HSTPA, including Part F. We address the new legislation **only to determine whether certain Part F amendments**...must be applied retroactively....We conclude that the **overcharge calculation amendments** cannot be applied...to **overcharges** that occurred prior to their enactment..."

There is no such liability created here and no retroactive liability. See supra Matter of 160 E. 84th St. Assocs. LLC (wherein, the Appellate Division, First Department, stated that "the application of HSTPA Part "D" "affect[ed] only the propriety of prospective relief . . . [and] ha[d] no potentially problematic retroactive effect").

The fact that the 2016 and 2017 Petitions would have been determined based on tenants' income in 2014-2015 and 2015-2016 respectively, events that occurred before the passage of HSTPA, is of no matter given that the apartment could not have been deregulated after June 14, 2019, which is a prospective determination. The Legislature had the right to modify the nature and content of deregulation and the fact that such prospective

changes may involve review of antecedent events does not make it retroactive. See Pledge v DHCR, 257 A.D.2d 391 (1st Dept. 1999), *aff'd* 94 N.Y.2d 851 (1999).

There can also be no remedy based on any assertion of denial of due process based on a "delay" in processing the owner's applications. While there may be variances in terms of processing, there is no question that DHCR was issuing these deregulation determinations on the merits almost to the exact date of the passage of the HSTPA. Indeed, the various and multiple litigations over the "explanatory addenda" cases where DHCR issued such deregulation orders (but the second prong of that deregulation, that the lease in effect had not expired), themselves demonstrate that DHCR was not withholding its issuance of determinations. See supra Matter of 160 E. 84th St. Assocs. LLC (DHCR's explanatory addenda explained the effect of HSTPA part D which prohibited the deregulation of units with leases expiring after June 14, 2019 and the statute "affected only the propriety of prospective relief . . . and had no potential problematic retroactive effect"). Any delay argument is further upended by the fact that in 2018 a total of 105 apartments of the close to one million units subject to rent regulation were issued deregulating orders and 52 apartments in 2019. It is noteworthy that these numbers were consistent between 2018 and half the year of 2019, further establishing that there was no delay in their issuance in anticipation of the 2019 legislative change.

The Commissioner further notes that, even where there had been delay, the Appellate Court in Matter of Partnership 92 LP and Bldg Mgt Co Inc v NY State Division of Housing and Community Renewal, 46 A.D.3d 425 (1st Dept. 2007) *aff'd* 13 N.Y.3d 859 (2008) has noted that the express and explicit command of the Legislature shall control. Moreover, DHCR could not have predicted the express language of any potential modifications that could be encompassed by HSTPA and how they would impact these Petitions for High-Rent/High-Income deregulation. Significantly, even where remedies based on delay have been made available, such delay must be deliberate or negligent in anticipation of a change of statute. See Matter of IG Second Generation Partners L.P. v N.Y. State Div. of Hous. & Community Renewal, 10 N.Y.3d 474 (2008) (Court of Appeals refused to award remedies for an alleged delay since it was not proven that the delay resulted from DHCR's negligent or deliberate conduct). See also Rudin E. 55th St. LLC v Div. of Hous. & Community Renewal, 2021 NY Slip Op 31576[U], *15 [Sup Ct, NY County 2021] (Supreme Court rejected an owner's assertion that "DHCR committed an unreasonable 16-month delay in issuing a

deregulation order . . .").[1]

The expiration of the time period prescribed by the applicable luxury deregulation Sections of the Code shall not divest the agency of its authority to process these Petitions and to issue determinations. See Dworman v NYS Div of Housing and Community Renewal, 94 NY2d 359 (1999). As such, the expiration of the time periods asserted by the petitioner for processing these deregulation Petitions did not divest the agency from issuing the November 13, 2019 Orders which under the clear direction of the Legislature were now required to be dismissed and, absent evidence of negligence, did not constitute unreasonable delay. See Schutt v NYS Division of Housing and Community Renewal, 278 A.D.2d 58 (1st Dept. 2000).

Contrary to petitioner's claims, the dismissal of its deregulation applications pursuant to HSTPA does not constitute retroactive applications of the statute. On June 14, 2019, the law changed so that rent stabilized units could no longer be deregulated based on High-Rent/High-Income. This change precluded DHCR's granting such applications on or after June 14, 2019. As a result, the subject unit remained regulated. The owner's due process argument, which is premised on its claim of retroactivity, is not meritorious and must be denied.

The Commissioner notes that the rent agency does not and would not declare acts of state law unconstitutional but does enforce, implement, and administer the State laws consistent therewith. The application here is clearly consistent. The owner claims that HSTPA violates the owner's due process rights under the New York and Federal Constitutions. However, the Commissioner notes that there is a strong presumption of constitutionality of the rent laws as enacted by the New York State Legislature. In Community Hous. Improvement Program v City of NY, 2023 U.S. App. LEXIS 2879, (2d Cir. N.Y. February 6, 2023), the Court dismissed the owner's arguments that the RSL as amended is not rationally related to its legitimate legislative process. The Court dismissed all claims against New York State and DHCR which sought to challenge the validity of HSTPA's repeal of the luxury and high-income decontrol provisions. District Court Judge, Eric Komitee, stated in his decision that "no precedent binding on this Court has ever found any provision of a rent-stabilization statute to violate the

[1] In *Rudin E. 55th St. LLC*, the Court agreed that the Deputy Commissioner's findings were reasonable because: 1) the text of RSC § 2531.9 plainly states that the agency "shall not [be] divest[ed] . . . of its authority to process petitions," by "[t]he expiration of the time periods prescribed . . . for [agency] action"; and 2) appellate case law clearly provides that a party claiming unreasonable delay bears the burden of demonstrating that it was "the result of DHCR's negligent or deliberate conduct." The Court noted that the evidentiary record was devoid of evidence of negligent or deliberate conduct by DHCR.

Constitution...rent regulations have now been the subject of almost a hundred years of case law." Supra Community Hous. Improvement Program v City of NY et al.

The Commissioner also notes that no party has a vested right to any remedy under the Rent Stabilization Laws and Regulations, thus diminishing the petitioner's claim that the application of HSTPA deprives the petitioner of due process. The petitioner had no vested right in the continuation of a particular provision of the law or of any policy or procedure followed by DHCR. The New York Court of Appeals in I. L. F. Y. Co. v Temporary State Hous. Rent Com., 10 NY2d 263 (1961), appeal dismissed 369 U.S. 795 (1962) held that an owner does not have an interest in any particular rule of the system of rent regulation and is not so vested as to entitle it to keep the rule unchanged. In this matter, the owner cannot identify any vested property interest in the continued processing of its application because the owner did not have a vested right to deregulate the subject apartment before the enactment of HSTPA. See Pledge v DHCR, supra. Accordingly, the owner has not identified a particular right that vested by virtue of changes in prior processing rules.

The RA granted a 2015 High-Rent/High-Income deregulation Petition for the subject apartment under Docket Number DP410113LD on June 15, 2018. Said Order stated "that the subject housing accommodation is deregulated, effective upon the expiration of the existing lease". On the June 15, 2018 issuance date of Order DP410113LD, the lease in effect for the subject apartment spanned the period from May 1, 2018, to April 30, 2020. Subsequent to the issuance of Order DP410113LD, on September 20, 2019, the RA sent the owner an Explanatory Addenda to the Rent Administrator's Order informing the owner that, "[i]f the rent stabilized lease in effect on the day the Rent Administrator's deregulation order was issued expires on or after June 14, 2019, the housing accommodation remains regulated pursuant to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated." Therefore, because the lease in effect on the date of issuance of Order DP410113LD expired after June 14, 2019, the effective date of HSTPA, the apartment was not deregulated. The finding that the apartment was not deregulated for this reason was affirmed by PAR Order GS410026RT/ HV410253RO, issued on February 6, 2020, and said PAR Order was not appealed and is therefore a final Order. Accordingly, the owner's 2015 deregulation Petition was not finally decided until February 6, 2020, and it was reasonable for the RA to not have issued determinations regarding subsequently filed Petitions, including those that are the subject of these PARs, until the 2015 Petition

reached a final determination. The denial of the owner's 2016 and 2017 Petitions, at issue herein, was therefore reasonable after the passage of HSTPA, for the reasons set forth above.

The Commissioner has considered any remaining claims raised by the petitioner and finds them to be without merit.

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

ORDERED, that the petitions be, and the same hereby are, denied.

ISSUED:

FEB 28 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given. In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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 APPEALS OF	ADMINISTRATIVE REVIEW DOCKET NOS.: HX410174RO HX410172RO
LICHTER REAL ESTATE NUMBER ONE, LLC.	RENT ADMINISTRATOR'S DOCKET NOS.: FR410376LD ER410575LD
	TENANTS: [redacted]
PETITIONER	

ORDER AND OPINION DENYING PETITIONS FOR ADMINISTRATIVE REVIEW

The owner filed petitions for administrative reviews (PARs) against the above-referenced two Orders issued on November 13, 2019 by the Rent Administrator (RA) concerning apartment [redacted] in the premises located at 175 West 76th Street, New York, New York, 10023. Because these PARs involve common issues of law and fact, they have been consolidated for disposition herein.

On June 29, 2017 (FR410376LD) and on June 29, 2016 (ER410575LD), the owner filed Petitions for High-Rent/High-Income deregulation. On November 13, 2019, the RA issued the two Orders herein under review. The RA stated the following in each Order:

> Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA), as amended, repealed the provisions which provided for the issuance of orders authorizing High-Rent/High-Income Deregulation pursuant to the RSL, ETPA and Rent Control laws. Therefore, this proceeding initiated by the owner for such an order is dismissed.

In each of the PARs, the owner asserts, among other things, that the Petition(s) for High-Rent/High-Income deregulation was filed in 2016 and 2017 respectively; that, as of the respective

filing dates, the subject apartment's monthly legal regulated rent exceeded the statutory minimum for a finding of luxury deregulation; that the rent agency was to determine whether the tenants' total annual household income exceeded $200,000.00 for the 2014-2015 and for the 2015-2016 years respectively; that the above statutory requirements for a finding of luxury deregulation of the subject apartment relate to periods prior to the June 14, 2019 effective date of HSTPA; that the relevant Section of HSTPA relating to the repeal of luxury deregulation stated that "Sections 26-504.1, 26-504.2 and 26-504.3 of the administrative code of the city of New York are REPEALED"; that, unlike other Sections of HSTPA, Part D, which repeals luxury deregulation, does not specify that it relates to pending proceedings; and that said Section does not state that it should be applied retroactively.

The owner further asserts that, as the Petition(s) for deregulation had been filed prior to the June 14, 2019 effective date of HSTPA, the RA's Orders should not have denied the Petitions for High-Rent/High-Income deregulation; that, contrary to the Rent Administrator's Orders, prospective repeals does not prevent DHCR from issuing orders relating to pending proceedings based on pre-existing facts; that the rent agency must process the Petition(s) for High-Rent/High-Income deregulation on the merits; that an order deciding the owner's Petition(s) for Deregulation on the merits should have been issued, pursuant to the RSL section 504.3(c)(2), on or before March first of 2017; and that Courts have routinely held that, where an administrative agency deliberately or negligently delays processing an application, then there is a right to have the application processed under the previous law (citation omitted).

On August 3, 2020, the owner submitted a supplement to the HX410172RO PAR, alleging that, following the April 2, 2020 decision by the Court of Appeals in Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 35 NY3d 332 [2020], DHCR's denial Order must be rescinded; that the owner's Petition for deregulation should be reopened; that, in Regina, the Court of Appeals held that retroactive application of Part F of HSTPA violates the owner's due process rights under the New York and Federal Constitutions; that, although the Court in Regina addressed only the retroactive application of the overcharge provisions, the Court's reasoning should also be applied to the instant luxury deregulation proceeding; that the application of Regina to one provision of HSTPA but not others defies reason; that, by denying the owner's Petition, DHCR applied HSTPA to conditions that occurred prior to the passage of HSTPA; and that this type of retroactive application unjustly penalizes the owner,

in the same manner as the Court warned against in Regina.

After a careful consideration of the evidence of record, the Commissioner finds that the owner's petitions should be denied.

On June 14, 2019, the New York State Legislature enacted HSTPA (Chapter 36 of the Laws of 2019) which repealed the provisions of the Rent Stabilization Laws and Regulations which allowed for deregulation of apartments based upon high rent and high income. The statute further provides that the provisions for the repeal of deregulation shall take effect immediately. (*See* HSTPA, Part "D" §8 and Part "Q" §8). The Legislature made a subsequent clarification as to the effect of Part "D" as it made an explicit exception in the "clean up" legislation (Chapter 38 of the Laws of 2019) for units which had been lawfully deregulated prior to the effective date of HSTPA. Pursuant to HSTPA, a lawfully deregulated unit on the effective date of HSTPA remains deregulated. The Commissioner rejects the owner's assertion that HSTPA should not apply to these proceedings. If an apartment remains regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of High-Rent/High-Income deregulation, as those statutes have been repealed by the legislature in passing HSTPA. The Commissioner notes that, as of June 14, 2019, no deregulation order had been issued for the subject apartment and the subject apartment was under the jurisdiction of the Rent Stabilization Laws and Regulations.

The Commissioner notes that the owner seeks a revocation of the November 13, 2019 Orders and for determinations based upon the merits. The Commissioner finds that HSTPA does not provide any exception to the repeal of High-Rent/High-Income deregulation for an apartment that was rent stabilized as of June 14, 2019 and creates a bright line test for which apartments were deregulated and those that could no longer be deregulated. This determination is on the merits as the rent agency is precluded from determining that the subject apartment is High-Rent/High-Income deregulated as there is no longer any standard under Rent Stabilization that permits the review that petitioner is seeking. See West 79th LLC v. New York State Div. of Housing & Cmty. Renewal, (Index No.: 158833/2020) (Hon. Carol R. Edmead)(Sup. Ct. New York Co. May 19, 2021) (wherein the Court found that "DHCR does not have the statutory authority to process deregulation petitions after June 14, 2019"). See also Matter of 160 E. 84th St. Assocs. LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 2022 NY Slip Op 01229, ¶ 1, 202 A.D.3d 610, 611, 159 N.Y.S.3d 845, 845 (App. Div. 1st Dept.).

The application of HSTPA to these matters is not based upon

the independent judgment of DHCR but, rather, is pursuant to the plain text in HSTPA, and DHCR is statutorily obliged to apply HSTPA to these cases. HSTPA specifically states that the law is to "take effect immediately" and that "if an apartment remains rent regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of high rent/high income deregulation."

The Commissioner rejects petitioner's assertions that the RA's retroactive applications of HSTPA was improper. The Commissioner notes that the New York Court of Appeals decision in Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 35 NY3d 332 [2020] does not apply to High-Rent/High-Income deregulation cases. While the Court of Appeals disallowed the retroactive application of certain rent overcharge provisions which created additional liability for owners and eliminated a four-year safe harbor for that liability contained in Part F of HSTPA, it stated that:

> The question we address here is relatively narrow — we have no occasion to address the prospective application of any portion of the HSTPA, including Part F. We address the new legislation **only to determine whether certain Part F amendments**...must be applied retroactively....We conclude that the **overcharge calculation amendments** cannot be applied...to **overcharges** that occurred prior to their enactment..."

There is no such liability created here and no retroactive liability. See supra Matter of 160 E. 84th St. Assocs. LLC (wherein, the Appellate Division, First Department, stated that "the application of HSTPA Part "D" "affect[ed] only the propriety of prospective relief . . . [and] ha[d] no potentially problematic retroactive effect").

The fact that the 2016 and 2017 Petitions would have been determined based on tenants' income in 2014-2015 and 2015-2016, respectively, events that occurred before the passage of HSTPA, is of no matter given that the apartment could not have been deregulated after June 14, 2019, which is a prospective determination. The Legislature had the right to modify the nature and content of deregulation and the fact that such prospective changes may involve review of antecedent events does not make it retroactive. See Pledge v DHCR, 257 A.D.2d 391 (1st Dept. 1999), *aff'd* 94 N.Y.2d 851 (1999).

There can also be no remedy based on any assertion of denial

of due process based on a "delay" in processing the owner's applications. While there may be variances in terms of processing, there is no question that DHCR was issuing these deregulation determinations on the merits almost to the exact date of the passage of the HSTPA. Indeed, the various and multiple litigations over the "explanatory addenda" cases where DHCR issued such deregulation orders (but the second prong of that deregulation, that the lease in effect had not expired), themselves demonstrate that DHCR was not withholding its issuance of determinations. See supra Matter of 160 E. 84th St. Assocs. LLC (DHCR's explanatory addenda explained the effect of HSTPA part D which prohibited the deregulation of units with leases expiring after June 14, 2019 and the statute "affected only the propriety of prospective relief . . . and had no potential problematic retroactive effect"). Any delay argument is further upended by the fact that in 2018 a total of 105 apartments of the close to one million units subject to rent regulation were issued deregulating orders and 52 apartments in 2019. It is noteworthy that these numbers were consistent between 2018 and half the year of 2019, further establishing that there was no delay in their issuance in anticipation of the 2019 legislative change.

The Commissioner further notes that, even where there had been delay, the Appellate Court in Matter of Partnership 92 LP and Bldg Mgt Co Inc v NY State Division of Housing and Community Renewal, 46 A.D.3d 425 (1st Dept. 2007) *aff'd* 13 N.Y.3d 859 (2008) has noted that the express and explicit command of the legislature shall control. Moreover, DHCR could not have predicted the express language of any potential modifications that could be encompassed by HSTPA and how they would impact these applications for High-Rent/High-Income deregulation. Significantly, even where remedies based on delay have been made available, such delay must be deliberate or negligent in anticipation of a change of statute. See Matter of IG Second Generation Partners L.P. v N.Y. State Div. of Hous. & Community Renewal, 10 N.Y.3d 474 (2008) (Court of Appeals refused to award remedies for an alleged delay since it was not proven that the delay resulted from DHCR's negligent or deliberate conduct). See also Rudin E. 55th St. LLC v Div. of Hous. & Community Renewal, 2021 NY Slip Op 31576[U], *15 [Sup Ct, NY County 2021] (Supreme Court rejected an owner's assertion that "DHCR committed an unreasonable 16-month delay in issuing a deregulation order . . .").[1]

[1] In *Rudin E. 55th St. LLC*, the Court agreed that the Deputy Commissioner's findings were reasonable because: 1) the text of RSC § 2531.9 plainly states that the agency "shall not [be] divest[ed] . . . of its authority to process petitions," by "[t]he expiration of the time periods prescribed . . . for [agency] action"; and 2) appellate case law clearly provides that a party claiming unreasonable delay bears the burden of demonstrating that it was "the result of DHCR's negligent or deliberate conduct." The Court noted that the evidentiary record was devoid of evidence of negligent or deliberate conduct by DHCR.

The expiration of the time period prescribed by the applicable luxury deregulation Sections of the Code shall not divest the agency of its authority to process these Petitions and to issue determinations. See Dworman v NYS Div of Housing and Community Renewal, 94 NY2d 359 (1999). As such, the expiration of the time periods asserted by the petitioner for processing these deregulation Petitions did not divest the agency from issuing the November 13, 2019 Orders which under the clear direction of the Legislature were now required to be dismissed and, absent evidence of negligence, did not constitute unreasonable delay. See Schutt v NYS Division of Housing and Community Renewal, 278 A.D.2d 58 (1st Dept. 2000).

Contrary to petitioner's claims, the dismissal of its deregulation applications pursuant to HSTPA does not constitute retroactive applications of the statute. On June 14, 2019, the law changed so that rent stabilized units could no longer be deregulated based on High-Rent/High-Income. This change precluded DHCR's granting such applications on or after June 14, 2019. As a result, the subject unit remained regulated. The owner's due process argument, which is premised on its claim of retroactivity, is not meritorious and must be denied.

The Commissioner notes that the rent agency does not and would not declare acts of state law unconstitutional but does enforce, implement, and administer the State laws consistent therewith. The application here is clearly consistent. The owner claims that HSTPA violates the owner's due process rights under the New York and Federal Constitutions. However, the Commissioner notes that there is a strong presumption of constitutionality of the rent laws as enacted by the New York State Legislature. In Community Hous. Improvement Program v City of NY, 2023 U.S. App. LEXIS 2879, (2d Cir. N.Y. February 6, 2023), the Court dismissed the owner's arguments that the RSL as amended is not rationally related to its legitimate legislative process. The Court dismissed all claims against New York State and DHCR which sought to challenge the validity of HSTPA's repeal of the luxury and high-income decontrol provisions. District Court Judge, Eric Komitee, stated in his decision that "no precedent binding on this Court has ever found any provision of a rent-stabilization statute to violate the Constitution...rent regulations have now been the subject of almost a hundred years of case law." Supra Community Hous. Improvement Program v City of NY et al.

The Commissioner also notes that no party has a vested right to any remedy under the Rent Stabilization Laws and Regulations, thus diminishing the petitioner's claim that the application of

HSTPA deprives the petitioner of due process. The petitioner had no vested right in the continuation of a particular provision of the law or of any policy or procedure followed by DHCR. The New York Court of Appeals in I. L. F. Y. Co. v Temporary State Hous. Rent Com., 10 NY2d 263 (1961), appeal dismissed 369 U.S. 795 (1962) held that an owner does not have an interest in any particular rule of the system of rent regulation and is not so vested as to entitle it to keep the rule unchanged. In this matter, the owner cannot identify any vested property interest in the continued processing of its application because the owner did not have a vested right to deregulate the subject apartment before the enactment of HSTPA. See Pledge v DHCR, supra. Accordingly, DHCR finds that the owner has not identified a particular right that vested by virtue of changes in prior processing rules.

The Commissioner notes that the tenants filed a case in the Supreme Court of New York County (Index No: 156305/2016) on July 28, 2016, for the subject apartment. One of the issues before the Court in said case was the determination of the correct legal regulated rent for the subject apartment. The Court's determination was required for a proper processing of the pending (2016 Petition) and subsequently filed (2017 Petition) High-Rent/High-Income Petitions herein, as the legal rent is a crucial and substantive matter in these cases. The Court issued its decision on July 29, 2020, and it was therefore reasonable that the RA did not issue any orders regarding the Petitions at issue herein prior to the June 14, 2019 passage of HSTPA, as the Court had not yet, as of that date, ruled on the legal rent of the subject apartment.

The Commissioner has considered any remaining claims raised by the petitioner and finds them to be without merit.

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

ORDERED, that the petitions be, and the same hereby are, denied.

ISSUED:

MAR 07 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given. In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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

X	
IN THE MATTER OF THE ADMINISTRATIVE APPEALS OF	ADMINISTRATIVE REVIEW DOCKET NOS.: HX410292RO; HX410187RO; HX410188RO; HX410186RO; HX410185RO
MAYFLOWER DEVELOPMENT CORP.	RENT ADMINISTRATOR'S DOCKET NOS.: HM410018RP; DR410686LD; EQ410287LD FQ410406LD; GQ410462LD
PETITIONER X	TENANT: [redacted]

ORDER AND OPINION DENYING PETITIONS FOR ADMINISTRATIVE REVIEW

The owner timely filed five petitions for administrative review (PARs) against five respective Rent Administrator's (RA) Orders issued on November 13, 2019, concerning the housing accommodation known as Apartment [redacted] at 425 Riverside Drive, New York, NY 10025.

The Commissioner notes that these PARs involve common issues of law and fact and is therefore of the opinion that they should be consolidated for disposition herein. The Commissioner has reviewed all of the evidence in the record and has carefully considered that portion of the record relevant to the issues raised by these PARs.

On May 28, 2013, June 19, 2015, May 13, 2016, May 22, 2017, and May 24, 2018, the owner filed with DHCR Petitions for High-Rent /High-Income Deregulation for 2013, 2015, 2016, 2017, and 2018 respectively wherein the owner stated that it contested the household income stated by the tenant(s) in the attached Income Certification Form (ICF) and requested verification of that income.

On November 13, 2019, the RA issued five respective Orders stating in each:

> Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA), as amended, repealed the provisions which provided for the issuance of orders authorizing High-Rent/High-Income Deregulation pursuant to the RSL, ETPA and Rent Control laws. Therefore, this proceeding initiated by the owner for such an order is dismissed.

In each PAR and supplement filed, the owner asserts, among other things, that, had DHCR complied with applicable mandatory deadlines, each matter would have been concluded prior to the enactment of HSTPA; that DHCR erred by applying the repeal of the High-Rent/High-Income deregulation provisions retroactively; that HSTPA is inapplicable in each case because the owner's right had already vested; that application of HSTPA to each case was unconstitutional and violated the Takings clause of the Constitution; that the New York Court of Appeals invalidated the retroactive portions of HSTPA in Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,(35 NY3d 332 [2020]); that HSTPA's repeal of High-Rent/High-Income deregulation does not provide for retroactive application; and, that HSTPA does not achieve the Legislature's intended purpose.

After a careful consideration of the evidence in the record, the Commissioner finds that the owner's PARs should be denied.

On June 14, 2019, the New York State Legislature enacted HSTPA (Chapter 36 of the Laws of 2019) which repealed the provisions of the Rent Stabilization Laws and Regulations which allowed for deregulation of apartments based upon high rent and high income. The statute further provides that the provisions for the repeal of deregulation shall take effect immediately. (*See* HSTPA, Part "D" §8 and Part "Q" §8). The Legislature made a subsequent clarification as to the effect of Part "D" as it made an explicit exception in the "clean up" legislation (Chapter 38 of the Laws of 2019) for units which had been lawfully deregulated prior to the effective date of HSTPA. Pursuant to HSTPA, a lawfully deregulated unit on the effective date of HSTPA remains deregulated. The Commissioner rejects the owner's assertion that HSTPA should not apply to these Petitions. If an apartment remains regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of High-Rent/High-Income deregulation, as those statutes have been repealed by the Legislature in passing HSTPA. The Commissioner notes that, as of June 14, 2019, no deregulation order had been issued for the subject apartment and the subject apartment was under the jurisdiction of the Rent Stabilization Laws and Regulations.

The Commissioner notes that the owner seeks a revocation of the November 13, 2019 RA's Orders and for determinations based upon the merits. The Commissioner finds that HSTPA does not provide any exception to the repeal of High-Rent/High-Income deregulation for apartments that were rent stabilized as of June 14, 2019 and creates a bright line test for which apartments were deregulated and those that could no longer be deregulated. This determination is on the merits as the rent agency is precluded from determining that the subject apartment is High-Rent/High-Income deregulated as there is no longer any standard under Rent Stabilization that permits the review that petitioner is seeking. See West 79th LLC v. New York State Div. of Housing & Cmty. Renewal,(Index No.: 158833/2020)(Hon. Carol R. Edmead)(Sup. Ct. New York Co. May 19, 2021)(Wherein the Court found that "DHCR does not have the statutory authority to process deregulation petitions after June 14, 2019"). See also Matter of 160 E. 84th St. Assocs. LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 2022 NY Slip Op 01229, ¶ 1, 202 A.D.3d 610, 611, 159 N.Y.S.3d 845, 845 (App. Div. 1st Dept.).

The Commissioner rejects petitioner's assertions that the RA's retroactive application of HSTPA was improper. The Commissioner notes that the New York Court of Appeals decision in

Matter of Regina does not apply to High-Rent/High-Income Deregulation cases. While the Court of Appeals disallowed the retroactive application of certain rent overcharge provisions which created additional liability for owners and eliminated a four-year safe harbor for that liability contained in Part F of the HSTPA, it stated that:

> The question we address here is relatively narrow — we have no occasion to address the prospective application of any portion of the HSTPA, including Part F. We address the new legislation **only to determine whether certain Part F amendments**...must be applied retroactively...We conclude that the **overcharge calculation amendments** cannot be applied...to **overcharges** that occurred prior to their enactment..."

There is no such liability created here and no retroactive liability. As the Appellate Division, First Department, stated in Matter of 160 E. 84th St. Assocs. LLC, cited above, "the application of HSTPA Part "D" affect[ed] only the propriety of prospective relief... and had no potentially problematic retroactive effect".

The fact that these 2013, 2015, 2016, 2017 and 2018 petitions would have been determined based on the tenant's incomes in 2011, 2012, 2013, 2014, 2015, 2016 and 2017, events that occurred before the passage of HSTPA, is of no matter given that this apartment could not have been deregulated after June 14, 2019, which is a prospective determination. The Legislature had the right to modify the nature and content of deregulation and the fact that such prospective changes may involve review of antecedent events does not make it retroactive. See Pledge v DHCR, 257 A.D.2d 391 (1st Dept. 1999), *aff'd* 94 N.Y.2d 851 (1999)..

There can also be no remedy based on any assertion of denial of due process based on a "delay" in processing the owner's applications. While there may be variances in terms of processing, there is no question that DHCR was issuing these deregulation determinations on the merits almost to the exact date of the passage of the HSTPA. Indeed, the various and multiple litigations over the "explanatory addenda" cases where DHCR issued such deregulation orders (but the second prong of that deregulation, that the lease in effect had not expired), themselves demonstrate that DHCR was not withholding its issuance of determinations. See above Matter of 160 E. 84th St. Assocs. LLC . Any delay argument is further upended by the fact that in 2018 a total of 105 apartments of the close to one million units subject to rent regulation were issued deregulating orders and 52 apartments in 2019. It is noteworthy that these numbers were consistent between 2018 and half the year of 2019, further establishing that there was no delay in their issuance in anticipation of the 2019 legislative change.

The Commissioner further notes that, even where there had been delay, the Appellate Court in Matter of Partnership 92 LP and Bldg Mgt Co Inc v NY State Division of Housing and Community Renewal,46 A.D.3d 425(1st Dept. 2007) *aff'd* 13 N.Y.3d 859 (2008) has noted that the express and explicit command of the Legislature shall control. Moreover, DHCR could not have predicted the express language of any potential modifications that could be encompassed by HSTPA and how they would impact these applications for High-Rent/High-Income deregulation. Significantly, even where remedies based on delay have been made available, such delay must be

deliberate or negligent in anticipation of a change of statute. See Matter of IG Second Generation Partners L.P. v N.Y. State Div. of Hous. & Community Renewal, 10 N.Y.3d 474 (2008) (Court of Appeals refused to award remedies for an alleged delay since it was not proven that the delay resulted from DHCR's negligent or deliberate conduct). See also Rudin E. 55th St. LLC v Div. of Hous. & Community Renewal, 2021 NY Slip Op 31576[U], *15 [Sup Ct, NY County 2021](Supreme Court rejected an owner's assertion that "DHCR committed an unreasonable 16-month delay in issuing a deregulation order . . .").1

The expiration of the time periods prescribed by the applicable luxury deregulation sections of the Code shall not divest the agency of its authority to process these deregulation petitions and to issue the challenged determinations. See Dworman v NYS Div of Housing and Community Renewal, 94 NY2d 359 (1999). As such, the expiration of the time periods asserted by the petitioner for processing these deregulation petitions did not divest the agency from issuing the November 13, 2019 Orders, which, under the clear direction of the Legislature, were now required to be dismissed and, absent evidence of negligence, did not constitute an unreasonable delay. See Schutt v NYS Division of Housing and Community Renewal, 278 A.D.2d 58 (1st Dept. 2000).

Contrary to petitioner's claims, the dismissal of its deregulation applications pursuant to HSTPA does not constitute a retroactive application of the statute. On June 14, 2019, the law changed so that rent stabilized units could no longer be deregulated based on High-Rent/High-Income. This change precluded DHCR's granting such applications on or after June 14, 2019. As a result, the subject unit remained regulated. The owner's due process argument, which is premised on its claim of retroactivity, is not meritorious and must be denied.

The Commissioner notes that the rent agency does not and would not declare acts of state law unconstitutional but does enforce, implement, and administer the State laws consistent therewith. The application here is clearly consistent. The owner claims that the repeal of deregulation provisions constitutes a Taking under the US Constitution, that it has suffered harm, and that such repeal lacks a rational basis. However, the Commissioner notes that there is a strong presumption of constitutionality of the rent laws as enacted by the New York State Legislature. In Community Hous. Improvement Program v City of NY et al, 2020 US Dist LEXIS 181189, at *34-35 (EDNY Sep. 30, 2020, No. 19-cv-4087)(EK)(RLM)(Appeal denied), the Court dismissed an owner's arguments that HSTPA's provisions are facially invalid based on physical and regulatory takings claims. The Court also found that claimants who allege that HSTPA is unconstitutional as applied regulatory takings claim face a "heavy burden".

The Commissioner further rejects petitioner's contentions that HSTPA does not achieve the Legislature's intended purpose. The Court in Community Hous. Improvement Program v City of NY et al, found that the legislative purposes and justifications offered for HSTPA were valid.

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1 In *Rudin E. 55th St. LLC*, the Court agreed that the Deputy Commissioner's findings were reasonable because: 1) the text of RSC § 2531.9 plainly states that the agency "shall not [be] divest[ed] . . . of its authority to process petitions," by "[t]he expiration of the time periods prescribed . . . for [agency] action"; and 2) appellate case law clearly provides that a party claiming unreasonable delay bears the burden of demonstrating that it was "the result of DHCR's negligent or deliberate conduct." The Court noted that the evidentiary record was devoid of evidence of negligent or deliberate conduct by DHCR.

The Commissioner also notes that no party has a vested right to any remedy under the Rent Stabilization Laws and Regulations, thus diminishing the petitioner's claim that the application of HSTPA deprives the petitioner of due process and constitutes a taking of property. The petitioner had no vested right in the continuation of a particular provision of the law or of any policy or procedure followed by DHCR. The New York Court of Appeals in I. L. F. Y. Co. v Temporary State Hous. Rent Com., 10 NY2d 263 (1961), *appeal dismissed* 369 U.S. 795 (1962) held that an owner does not have an interest in any particular rule of the system of rent regulation and is not so vested as to entitle it to keep the rule unchanged. In this matter, the owner cannot identify any vested property interest in the continued processing of its application because the owner did not have a vested right to deregulate the subject apartments before the enactment of HSTPA. See supra Pledge v DHCR. Accordingly, DHCR finds that the owner has not identified a particular right that vested by virtue of changes in prior processing rules.

As indicated above, the United States District Court in Community Hous. Improvement Program v City of NY et al, had dismissed all claims against New York State and DHCR, which sought to challenge the validity of HSTPA's repeal of the luxury and high-income decontrol provisions. District Court Judge, Eric Komitee, stated in his decision that "no precedent binding on this Court has ever found any provision of a rent-stabilization statute to violate the Constitution...rent regulations have now been the subject of almost a hundred years of case law." See Community Hous. Improvement Program v City of NY et al, 2020 US Dist LEXIS 181189, at *34-35 (EDNY Sep. 30, 2020, No. 19-cv-4087)(EK)(RLM).

It is noted that Agency records indicate that the owner filed its 2013 Petition on May 28, 2013, and that said Petition was docketed under BQ410482LD. Said Petition was denied by an RA's Order issued on April 17, 2015. The owner filed a PAR against said Order, which PAR was granted by PAR Order DQ410037RO, issued on January 22, 2019. Said PAR Order remanded the matter to the RA for further processing, and the remanded proceeding was docketed under HM410018RP, one of the Orders at issue herein. The owner's 2013 Petition was therefore being reprocessed as of January 22 of 2019, and, as HSTPA was passed effective June 14, 2019, while HM410008RP was being processed, the RA correctly determined that the owner's 2013 Petition must be denied for the reasons set forth above. Because the owner's 2013 Petition was being reprocessed as of the effective date of HSTPA, and in the ordinary course of Agency business following the remand of the matter by PAR Order DQ410037RO, as explained above, it was reasonable for the RA to have placed subsequently filed Petitions, including the 2015, 2016, 2017, and 2018 Petitions at issue herein, on hold until the 2013 case reached final determination. Because the 2013 Petition was not finally determined before the effective date of HSTPA, it was reasonable that the subsequent Petitions at issue herein were not reached prior to the effective date of HSTPA.

It is also noted that DHCR records indicate that the owner renewed the tenant's lease for the term April 1, 2018 through March 31, 2020. Prior to HSTPA, RSL §26-504.3 conditioned High-Rent/High-Income deregulation on the expiration of an existing lease. The condition was something that existed when the owner filed its 2018 application and was something that the owner was, or should have been, well aware of. Given that any potential grant of the Petition for High-Income/High-Rent deregulation was contingent on the expiration of the lease, any deregulation order issued prior to June 14, 2019, would not have been effective because the current lease in

effect expired after the passage of HSTPA (see supra Matter of 160 E. 84th St. Assocs. LLC).

The Commissioner has considered any remaining claims raised by the petitioner and finds them to be without merit.

THEREFORE, in accordance with the relevant provisions of the Rent Stabilization Laws and Regulations, it is

ORDERED, that these petitions be, and the same hereby are, denied.

ISSUED:

MAR 15 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given. In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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 SP 210 W 70 LLC, PETITIONER	ADMINISTRATIVE REVIEW DOCKET NO.: HU410073RO RENT ADMINISTRATOR'S DOCKET NO.: HR410208LD TENANTS: [redacted]

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The owner filed a petition for administrative review (PAR) of an order issued on August 29, 2019 by the Rent Administrator (RA) concerning apartment [redacted] in the premises located at 210 West 70th Street, New York, New York.

On June 7, 2019, the owner filed a petition for high income/high rent deregulation wherein the owner stated that the owner requests verification of the household income.

On August 29, 2019, the RA issued the order herein under review stating:

> Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA), as amended, repealed the provisions which provided for the issuance of orders authorizing High-Rent/High-Income Deregulation pursuant to the RSL, ETPA and Rent Control laws. Therefore, this proceeding initiated by the owner for such an order is dismissed.

On PAR, the owner alleges that the order must be annulled as arbitrary, capricious, and illegal; that HSTPA violates the owner's due process rights by retroactively applying newly enacted laws to a proceeding which its essence is predicated on the review of the prior two (2) years of household incomes; that the petition was for the 2019 filing period; that the statutory high-income deregulation threshold has been met if it is determined that the

total annual household income of the occupants of the subject housing accommodation is more than $200,000.00 in each of the two preceding calendar years - 2017 and 2018; that the implementation of HSTPA to luxury decontrol proceedings currently pending, where the scope of review is from 2017 and 2018, deprives owners of all the rights of ownership, and also eliminates property owner's rights to use their property for anything other than the compelled use of a stabilized rental; that DHCR violated the owner's Due Process rights and condoned a violation of the Takings Clause by applying the act of 2019 to these instant proceedings; that these very substantial restrictions on property owners' rights effect an uncompensated physical taking that is a *per se* violation of the Takings Clause; that the owner submits the PAR without prejudice to on-going litigation challenging the validity of HSTPA; and that in the alternative, this proceeding should be held in abeyance until a final order is issued in the on-going litigation challenging the validity of HSTPA.

The Commissioner denies the PAR.

On June 14, 2019, the New York State Legislature enacted HSTPA (Chapter 36 of the Laws of 2019) which repealed the provisions of the Rent Stabilization Laws and Regulations which allowed for deregulation of apartments based upon high rent and high income. The statute further provides that the provisions for the repeal of deregulation shall take effect immediately. (See HSTPA, Part "D" §8 and Part "Q" §8). The Legislature made a subsequent clarification as to the effect of Part "D" as it made an explicit exception in the "clean up" legislation (Chapter 38 of the Laws of 2019) for units which had been lawfully deregulated prior to the effective date of HSTPA. Pursuant to HSTPA, a lawfully deregulated unit on the effective date of HSTPA remains deregulated. The Commissioner rejects the owner's assertion that HSTPA should not apply to this proceeding. If an apartment remains regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of high income/high rent deregulation, as those statutes have been repealed by the legislature in passing HSTPA. The Commissioner notes that as of June 14, 2019, no deregulation order had been issued for the subject apartment and the subject apartment was under the jurisdiction of the Rent Stabilization Laws and Regulations.

The Commissioner notes that the owner seeks a revocation of the August 29, 2019 order and for a determination based upon the merits. The Commissioner finds that HSTPA does not provide any exception to the repeal of high income/high rent deregulation for apartments that were rent stabilized as of June 14, 2019 and creates a bright line test for which apartments were deregulated and those that could no longer be deregulated. These determinations are on the merits as the rent agency is precluded from determining that the subject apartment is high income/high rent deregulated as there is no longer any standard under Rent Stabilization that permits the review that petitioner is seeking.

The fact that the 2019 petition for high income rent deregulation would have been determined based on tenant(s) income in 2017-2018, events that occurred before the passage of HSTPA, is of no matter given that the apartment could not have been deregulated after June 14, 2019. The Legislature had the right to modify the nature and content of deregulation and the fact that such prospective changes may involve review of antecedent events does not make it retroactive. See Pledge v DHCR, 257 A.D.2d 391 (1st Dept. 1999), aff'd 94 N.Y.2d 851 (1999).

The Commissioner further points out that agency records indicate that the owner renewed the tenants' lease for the term May 1, 2019 through April 30, 2021. Prior to HSTPA, RSL §26-504.3 conditioned High-Rent/High-Income deregulation on the expiration of an existing lease. The condition was something that existed when the owner filed its application and was something that the owner was, or should have been, well aware of. Given that the granting of the Petition for High-Income/High-Rent deregulation was contingent on the expiration of the lease, any deregulation order issued prior to June 14, 2019, would not have been effective because the current lease in effect expired after the passage of HSTPA. See Matter of 160 E. 84th St. Assocs. LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 2022 NY Slip Op 01229, ¶ 1, 202 A.D.3d 610, 611, 159 N.Y.S.3d 845, 846 (App. Div. 1st Dept.) (DHCR's explanatory addenda explained the effect of HSTPA part D which prohibited the deregulation of units with leases expiring after June 14, 2019 and the statute "affected only the propriety of prospective relief . . . and had no potential problematic retroactive effect").

The Commissioner notes that the dismissal of the owner's application is consistent with the New York Court of Appeals decision in Regina Metropolitan LLC v DHCR, 35 NY3d 332, 130 NYS 3d 759 (2020) in which the court notes that Part "D" is "entirely forward-looking"(35 NY3d at 373). While the Court of Appeals disallowed the retroactive application of certain rent overcharge provisions which created additional liability for owners and eliminated a four-year safe harbor for that liability contained in Part F of the HSTPA, it stated that:

> The question we address here is relatively narrow – we have no occasion to address the prospective application of any portion of the HSTPA, including Part F. We address the new legislation **only to determine whether certain Part F amendments**...must be applied retroactively...We conclude that the **overcharge calculation amendments** cannot be applied...to **overcharges** that occurred prior to their enactment..." (emphasis added).

There is no such liability created here and no retroactive liability. See supra Matter of 160 E. 84th St. Assocs. LLC (wherein, the Appellate Division, First Department, stated that "the application of HSTPA Part "D" "affect[ed] only the propriety of prospective relief . . . [and] ha[d] no potentially problematic retroactive effect").

Contrary to petitioner's claims, the dismissal of its deregulation application pursuant to HSTPA does not constitute a retroactive application of the statute. On June 14, 2019, the law changed so that stabilized units could no longer be deregulated based on high income/high rent. This change precluded DHCR's granting such application on and after June 14, 2019. As a result, the subject unit remained regulated. The owner's due process argument, which is premised on its claim of retroactivity, is not meritorious and must be denied.

The Commissioner notes that the rent agency does not and would not declare acts of state law unconstitutional but does enforce, implement, and administer the state laws consistent therewith. The application here is clearly consistent. The owner claims that the repeal of deregulation provisions constitutes a Taking under the US Constitution and that it has suffered harm and that such repeal

lacks a rational basis. However, the Commissioner notes that there is a strong presumption of constitutionality of the rent laws as enacted by the New York State Legislature. In Community Hous. Improvement Program v City of NY et al, 2020 US Dist LEXIS 181189, at *34-35 (EDNY Sep. 30, 2020, No. 19-cv-4087)(EK)(RLM)(Appeal pending), the court dismissed an owner's arguments that HSTPA's provisions are facially invalid based on physical and regulatory takings claims. The court also found that claimants who allege an as applied regulatory takings claim face a "heavy burden". It rejected an owner's claim that the effect of HSTPA is not rationally related to increasing the supply of affordable housing, helping low-income New Yorkers, or promoting socio-economic diversity and that HSTPA's amendments "perpetuates New York's housing crisis and fails to target the people it claims to serve" and it found that the legislative purposes and justifications offered for the regulations were valid.

The Commissioner also notes that no party has a vested right to any remedy under the Rent Stabilization Laws and Regulations, thus diminishing the petitioner's claim that the application of HSTPA deprives the petitioner of due process and constitutes a taking of property. The petitioner had no vested right in the continuation of a particular provision of the law or of any policy or procedure followed by DHCR. The New York Court of Appeals in I. L. F. Y. Co. v Temporary State Hous. Rent Com., 10 NY2d 263 (1961), appeal dismissed 369 U.S. 795 (1962) held that an owner does not have an interest in any particular rule of the system of rent regulation and is not so vested as to entitle it to keep the rule unchanged. In this matter, the owner cannot identify any vested property interest in the continued processing of its application because the owner did not have a vested right to deregulate the subject apartment before the enactment of HSTPA. See Pledge v DHCR, supra. Accordingly, DHCR finds that the owner has not identified a particular right that vested by virtue of changes in prior processing rules.

The Commissioner also will not honor petitioner's alternative request to hold this proceeding in abeyance "until a final order is issued in the on-going litigation challenging the validity of HSTPA." The Commissioner notes that the Courts in those challenges have not placed any stay on the processing of Luxury Deregulation proceedings nor any other provision of the Rent Stabilization Law,

nor have the parties to the above referenced action even requested the relief that the owner seeks by virtue of its administrative litigation. As indicated above, the United States District Court in Community Hous. Improvement Program v City of NY et al, had dismissed all claims against New York State and DHCR, which sought to challenge the validity of HSTPA's repeal of the luxury and high-income decontrol provisions. District Court Judge, Eric Komitee, stated in his decision that "no precedent binding on this Court has ever found any provision of a rent-stabilization statute to violate the Constitution... rent regulations have now been the subject of almost a hundred years of case law." See Community Hous. Improvement Program v City of NY et al. *34-35.

The Commissioner accordingly rejects petitioner's statement that the PAR is submitted without prejudice to "on-going litigation challenging the validity of HSTPA". These generalized reservations are without meaning or substance. Once final orders are issued in these proceedings, any further claims raised by either party will be considered in accordance with the restrictions found in court precedent and in various provisions of the rent laws and regulations. As with any other final orders determining PARs, the Commissioner opines that petitioner's challenge to the August 29, 2019 Order is limited to the specific arguments that the petitioner raised in its PAR application and is subject to the scope of review restrictions set forth in RSC §2529.6.

The Commissioner has considered any remaining claims raised by the petitioner and finds them to be without merit.

THEREFORE, in accordance with the relevant provisions of the Rent Stabilization Laws and Regulations, it is

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

ISSUED:

MAR 20 2020

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given. In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEALS OF

SP 210 W 70 LLC,

ADMINISTRATIVE REVIEW
DOCKET NOS.: HX410296RO
HX410129RO
HX410121RO

RENT ADMINISTRATOR'S
DOCKET NOS.: GR410557LD
FQ410281LD
ER410255LD

TENANTS: [redacted]

PETITIONER X

ORDER AND OPINION DENYING PETITIONS FOR ADMINISTRATIVE REVIEW

The owner filed petitions for administrative review (PARs) of respective orders issued on November 13, 2019 by the Rent Administrator (RA) concerning apartment [redacted] in the premises located at 210 West 70th Street, New York, New York.

On June 14, 2016, May 15, 2017 and June 26, 2018, the owner filed respective petitions for high income/high rent deregulation wherein the owner requested verification of the household incomes.

On November 13, 2019, the RA issued three respective orders stating the following:

> Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA), as amended, repealed the provisions which provided for the issuance of orders authorizing High-Rent/High-Income Deregulation pursuant to the RSL, ETPA and Rent Control laws. Therefore, this proceeding initiated by the owner for such an order is dismissed.

In each PAR, the owner alleges that the RA order must be annulled as it is arbitrary, capricious, and illegal; that HSTPA

violates the owner's due process rights by retroactively applying newly enacted laws to a proceeding that's essence is predicated on the review of the prior two (2) years of household income; that the statutory high-income deregulation threshold has been met if it is determined that the total annual household income of the occupants of the subject housing accommodation is more than $200,000.00 in each of the two preceding calendar years; that the implementation of HSTPA to luxury decontrol proceedings currently pending, where the scope of review is from 2014-2017, deprives owners of all the rights of ownership, and also eliminates property owner's rights to use their property for anything other than the compelled use of a stabilized rental; that DHCR violated the owner's Due Process rights and condoned a violation of the Takings Clause by applying the act of 2019 to the instant proceeding; that these very substantial restrictions on property owners' rights effect an uncompensated physical taking that is a *per se* violation of the Takings Clause; that owner submits this PAR without prejudice to on-going litigation challenging the validity of HSTPA; and that in the alternative, this proceeding should be held in abeyance until a final order is issued in the on-going litigation challenging the validity of the Housing Stability and Tenant Protection Act of 2019."

The Commissioner notes that these PARs involve common issues of law and fact and is therefore of the opinion that they should be consolidated for disposition. In addition, the Commissioner has reviewed the evidence in the respective records and has considered those portions of the records relevant to the issues raised by the PARs.

After a careful consideration of the evidence, the Commissioner finds that the owner's PARs should be denied.

On June 14, 2019, the New York State Legislature enacted HSTPA (Chapter 36 of the Laws of 2019) which repealed the provisions of the Rent Stabilization Laws and Regulations which allowed for deregulation of apartments based upon high rent and high income. The statute further provides that the provisions for the repeal of deregulation shall take effect immediately. (*See* HSTPA, Part "D" §8 and Part "Q" §8). The Legislature made a subsequent clarification as to the effect of Part "D" as it made an explicit exception in the "clean up" legislation (Chapter 38 of the Laws of

2019) for units which had been lawfully deregulated prior to the effective date of HSTPA. Pursuant to HSTPA, a lawfully deregulated unit on the effective date of HSTPA remains deregulated. The Commissioner rejects the owner's assertion that HSTPA should not apply to these proceedings. If an apartment remains regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of high income/high rent deregulation, as those statutes have been repealed by the legislature in passing HSTPA. The Commissioner notes that as of June 14, 2019, no deregulation order had been issued for the subject apartment and the subject apartment was under the jurisdiction of the Rent Stabilization Laws and Regulations.

The Commissioner notes that the owner seeks a revocation of the respective November 13, 2019 orders and for determinations based upon the merits. The Commissioner finds that HSTPA does not provide any exception to the repeal of high income/high rent deregulation for an apartment that was rent stabilized as of June 14, 2019 and creates a bright line test for which apartments were deregulated and those that could no longer be deregulated. This determination is on the merits as the rent agency is precluded from determining that the subject apartment is high income/high rent deregulated as there is no longer any standard under Rent Stabilization that permits the review that petitioner is seeking. *See West 79th LLC v. New York State Div. of Housing & Cmty. Renewal*, (Index No.: 158833/2020) (Hon. Carol R. Edmead) (Sup. Ct. New York Co. May 19, 2021) (Court found that "DHCR does not have the statutory authority to process deregulation petitions after June 14, 2019"). *See also Matter of 160 E. 84th St. Assocs. LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 2022 NY Slip Op 01229, ¶ 1, 202 A.D.3d 610, 611, 159 N.Y.S.3d 845, 845 (App. Div. 1st Dept.).

The Commissioner rejects petitioner's assertions that the RA's retroactive application of HSTPA was improper. The Commissioner notes that the New York Court of Appeals decision in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* 35 N.Y.3d 332 (2020), does not apply to high rent/high income deregulation cases. While the Court of Appeals disallowed the retroactive application of certain rent overcharge provisions which created additional liability for owners and eliminated a four-year safe harbor for that liability contained in Part F of the HSTPA, it stated that:

> The question we address here is relatively narrow – we have no occasion to address the prospective application of any portion of the HSTPA, including Part F. We address the new legislation **only to determine whether certain Part F amendments**...must be applied retroactively...We conclude that the **overcharge calculation amendments** cannot be applied...to **overcharges** that occurred prior to their enactment..."

There is no such liability created here and no retroactive liability. *See Matter of 160 E. 84th St. Assocs. LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 2022 NY Slip Op 01229, ¶ 1, 202 A.D.3d 610, 611, 159 N.Y.S.3d 845, 846 (App. Div. 1st Dept.) (First Department stated that "the application of HSTPA Part "D" "affect[ed] only the propriety of prospective relief . . . [and] ha[d] no potentially problematic retroactive effect").

The fact that the 2016 - 2018 petitions would have been determined based on tenant's income in 2014-2015, 2015-2016 and 2016-2017, events that occurred before the passage of HSTPA, is of no matter given that the apartment could not have been deregulated after June 14, 2019, which is a prospective determination. The Legislature had the right to modify the nature and content of deregulation and the fact that such prospective changes may involve review of antecedent events does not make it retroactive. *See Pledge v DHCR*, 257 A.D.2d 391 (1st Dept. 1999), *aff'd* 94 N.Y.2d 851 (1999).

Contrary to petitioner's claims, the dismissal of its deregulation applications pursuant to HSTPA does not constitute a retroactive application of the statute. On June 14, 2019, the law changed so that rent stabilized units could no longer be deregulated based on high income/high rent. This change precluded DHCR's granting such applications after June 14, 2019. As a result, the subject unit remained regulated. The owner's due process argument, which is premised on its claim of retroactivity, is not meritorious and must be denied.

The Commissioner notes that the rent agency does not and would not declare acts of state law unconstitutional but does enforce, implement and administer the state laws consistent therewith. The

application here is clearly consistent. The owner claims that the repeal of deregulation provisions constitutes a Taking under the US Constitution and that it has suffered harm and that such repeal lacks a rational basis. However, the Commissioner notes that there is a strong presumption of constitutionality of the rent laws as enacted by the New York State Legislature. In *Community Hous. Improvement Program v City of NY et al*, 2020 US Dist LEXIS 181189, at *34-35 (EDNY Sep. 30, 2020, No. 19-cv-4087)(EK)(RLM)(Appeal pending), the court dismissed an owner's arguments that HSTPA's provisions are facially invalid based on physical and regulatory takings claims. The court also found that claimants who allege an as applied regulatory takings claim face a "heavy burden". It rejected an owner's claim that the effect of HSTPA is not rationally related to increasing the supply of affordable housing, helping low-income New Yorkers, or promoting socio-economic diversity and that HSTPA's amendments "perpetuates New York's housing crisis and fails to target the people it claims to serve". The Court in *Community Hous. Improvement Program v City of NY et al*, found that the legislative purposes and justifications offered for the regulations were valid.

The Commissioner also notes that no party has a vested right to any remedy under the Rent Stabilization Laws and Regulations, thus diminishing the petitioner's claim that the application of HSTPA deprives the petitioner of due process and constitutes a taking of property. The petitioner had no vested right in the continuation of a particular provision of the law or of any policy or procedure followed by DHCR. The New York Court of Appeals in *I. L. F. Y. Co. v Temporary State Hous. Rent Com.*, 10 NY2d 263 (1961), *appeal dismissed* 369 U.S. 795 (1962) held that an owner does not have an interest in any particular rule of the system of rent regulation and is not so vested as to entitle it to keep the rule unchanged. In this matter, the owner cannot identify any vested property interest in the continued processing of its application because the owner did not have a vested right to deregulate the subject apartment before the enactment of HSTPA. *See Pledge v DHCR, supra*. Accordingly, DHCR finds that the owner has not identified a particular right that vested by virtue of changes in prior processing rules.

The Commissioner also will not honor petitioner's alternative request to hold the proceedings in abeyance "until a final order

is issued in the on-going litigation challenging the validity of HSTPA." The Commissioner notes that the Courts in those challenges have not placed any stay on the processing of Luxury Deregulation proceedings nor any other provision of the Rent Stabilization Law, nor have the parties to the above referenced action even requested the relief that the owner seeks by virtue of its administrative litigation.

As indicated above, the United States District Court in *Community Hous. Improvement Program v City of NY et al*, had dismissed all claims against New York State and DHCR, which sought to challenge the validity of HSTPA's repeal of the luxury and high-income decontrol provisions. District Court Judge, Eric Komitee, stated in his decision that "no precedent binding on this Court has ever found any provision of a rent-stabilization statute to violate the Constitution... rent regulations have now been the subject of almost a hundred years of case law." *See Community Hous. Improvement Program v City of NY et al*, 2020 US Dist LEXIS 181189, at *34-35 (EDNY Sep. 30, 2020, No. 19-cv-4087)(EK)(RLM).

The Commissioner accordingly rejects petitioner's statement that these PARs are submitted without prejudice to "on-going litigation challenging the validity of HSTPA". This generalized reservation is without meaning or substance. Once a final order is issued in this proceeding, any further claims raised by either party will be considered in accordance with the restrictions found in court precedent and in various provisions of the rent laws and regulations. As with any other final order determining a PAR, the Commissioner opines that petitioner's challenge to the November 13, 2019 Orders is limited to the specific arguments that the petitioner raised in its respective PAR applications and is subject to the scope of review restrictions set forth in RSC §2529.6.

The Commissioner has considered any remaining claims raised by the petitioner and finds them to be without merit.

THEREFORE, in accordance with the relevant provisions of the Rent Stabilization Law and Regulations, it is

ORDERED, that the petitions be, and the same hereby are, denied.

ISSUED:
MAR 28 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given. In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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 THE ADMINISTRATIVE APPEAL OF

[redacted]

PETITIONER

ADMINISTRATIVE REVIEW DOCKET NO.: KM210022RT

RENT ADMINISTRATOR'S DOCKET NO.: HQ210005OD

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ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The Petitioner-tenant timely filed an administrative appeal against an order issued on December 7, 2021 by the Rent Administrator concerning the housing accommodations known as 315 Ocean Parkway, Brooklyn, New York which granted the owner's application for a modification of services, to wit: substitution of a lobby attendant who works 30 hours per week with thirty (30) security cameras and a monitoring system.

The Petitioner requests a reversal of the Rent Administrator's order and alleges, in substance, that the order was not rational as the "written determination negates itself". The tenant questions the owner's replacement of the lobby attendant with security cameras, and the tenant re-submitted the objections he raised in the underlying proceeding, including the contention that the owner had already installed 27 security cameras in the building in the areas the owner references in their application.

The Commissioner having reviewed the Petitioner's appeal and any and all supporting documentation, any and all statements made by the affected parties, the underlying case file and all relevant Rent Regulatory Laws and Regulations finds that the Petitioner's appeal does not have merit and should be denied.

Section 2520.6(r) of the Rent Stabilization Code ("RSC" or "the Code") defines required services as those services which the owner maintained or was required to maintain on the applicable base date. Under the RSC Section 2520.6(r)(3), required services also include "ancillary services" which are defined as those required services not contained within the individual housing

accommodation, including, but not limited to, garage facilities, laundry facilities, recreational facilities, and security. Section 2522.4(d) and Section 2522.4(e) of the Code require the owner to file an application with DHCR for permission to decrease a required service, or for any modification or substitution of required services. Accordingly, no modification or substitution of required services may take place prior to the approval of the owner's application by DHCR, unless it is required for the operation of the building in accordance with specific requirements of law.

In accordance with the above rent regulatory provisions, in order to determine whether such an application should be granted, DHCR is compelled to examine all aspects of the proposed change to ensure that the results of the proposed modification are not inconsistent with the Rent Stabilization Law or Code.

According to the record, the proceeding below was commenced on May 1, 2019, by the owner's filing of an Owner's Application For Modification of Services with this Agency. The owner's Application sought permission to substitute the lobby attendant for a "state-of-the-art, monitored, security system" that would monitor the common areas of the building, including the interior of the lobby, rear service door, the service corridor, the elevator area, and the exterior of the main entrance. The owner, by their representative, asserted that they sought to eliminate thirty-hours a week of lobby attendant service, and in exchange, they would install thirty security cameras and a monitoring station wherein the on-site superintendent will make periodic viewings and will be connected to the management company's central office, and recordings will exist and can be viewed in the event a criminal act takes place.

Various tenants objected to the owner's Application, asserting security concerns; however, other tenants did not object to the owner's Application.

The Rent Administrator granted the owner permission to substitute the thirty hour a week lobby attendant with thirty security cameras and a monitoring system that must comply with all other local rules and regulations for the jurisdiction within which the property is located, with the Administrator noting on page two of the order, that if the owner failed to meet the requirements provided for in the order, the tenants may file applications for rent reductions, if the facts so warrant.

Foremost, the Commissioner finds that the Rent Administrator properly granted permission to modify services in this case. It has been long-standing DHCR policy that an application for modification of services may be granted when it is determined that the proposed modification is an adequate substitute for the existing service. DHCR has granted permission in the past to substitute live doormen or lobby attendants with video surveillance systems which offered an equivalent level of building security. In this case, the Petitioner-tenant does not dispute the fact that the current lobby attendant is only on duty part-time, and there is no attendant present at the building for more than half the hours of each week. Moreover, the proposed video surveillance system will monitor areas in and around the building which the lobby attendant cannot observe. The surveillance will be monitored on-site by the building's superintendent as well as be connected to the management company's central office, located off premises, and recordings of the camera footage will exist for future viewing. In view of these facts, the Commissioner finds

that the proposed video surveillance system will offer an equivalent level of security as the existing part-time lobby attendant, and there was thus no error by the Administrator in determining that the proposed surveillance system is an adequate substitute for the existing lobby attendant service.

Based on the foregoing, the Commissioner finds that the Rent Administrator correctly granted the owner's application, and the tenant's PAR has not established any basis to modify or revoke the Rent Administrator's determination.

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

ORDERED, that this petition is denied and that the Rent Administrator's order is affirmed.

ISSUED: JAN 6 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

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There is no other method of appeal.

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 THE ADMINISTRATIVE APPEAL OF

ADMINISTRATIVE REVIEW DOCKET NO.: KT410005RT

[redacted] AND [redacted]

PETITIONERS

RENT ADMINISTRATOR'S DOCKET NO.: IV410022OD

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ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

On August 3, 2022, the above-named petitioner-tenants filed a Petition for Administrative Review ("PAR") against an order the Rent Administrator issued on June 30, 2022 (the "order"), concerning the housing accommodation known as 19 West 55th Street, New York, New York, wherein the Rent Administrator granted the Owner's Application for Modification of Services: to wit substituting the steam radiator/pipe heating system with an electrical heating system that is powered by owner supplied electricity.

The Commissioner having reviewed the Petitioners' appeal and any and all supporting documentation, any and all statements made by the affected parties, the underlying case file and all relevant Rent Regulatory Laws and Regulations finds that the Petitioners' appeal does not have merit and should be denied.

In the PAR, the tenants, by counsel, request a reversal of the Rent Administrator's order and asserts the Rent Administrator "completely disregarded and overlooked the well-known adverse health and indoor air effects of electric heat" claims raised by the tenants' in the proceeding below and that the installation of electric heat is "highly likely to adversely affect the Tenants' health." The tenants resubmit the evidence submitted below to the Rent Administrator in support of their claims, including news articles such as *Negative Side Effects of Electric Heating Systems,* by contractor and builder Chris Deziel.

The owner did not oppose the PAR.

Section 2520.6 (r)(l) of the Rent Stabilization Code ("RSC" or the "Code") defines required services as those services which the owner maintained or was required to maintain on the applicable base date. Section 2522.4 (d) and Section 2522.4 (e) of the RSC require the owner to file an application with DHCR for permission to decrease a required service, or for any modification or substitution of required services. Accordingly, no modification or substitution of required services may take place prior to the approval of the owner's application by DHCR, unless it is required for the operation of the building in accordance with specific requirements of law. It is the Division's established position that replacing a steam pipe/radiator heating system with an electrical heating system that operates via individual HVAC units powered by owner supplied electricity, constitutes an adequate substitution of service consistent with the Rent Stabilization Law and Code.

The owner commenced the proceeding below on October 13, 2020, by filing an Application for Modification of Services based on the owner's plans to replace old steam radiators by installing electric split HVAC units in each apartment which will be wired to the building's electrical panel to ensure that the tenants bear no additional cost for heating on the tenants' electric bill.

According to the record, on January 8, 2021, the owner's application was served on the tenants. On March 15, 2021, the tenants of apartment numbers [redacted] and [redacted], by counsel, responded and filed their objections to the owner's application. The tenants contended that the installation of electric heat would adversely affect the tenants' health. The tenant of apartment number [redacted] also submitted their objections alleging, *inter alia*, that the electric service to the building is not reliable.

The tenants' objections were provided to the owner, and on October 26, 2021, the owner responded, claiming that a gas heating system is equivalent to an electrical heating system for the purposes of maintaining the minimum temperatures required by law; that the Agency has permitted owners to convert their buildings from gas heating systems to electric heating systems in the past; and that the tenants failed to "provide any credible evidence" showing that electrical heating systems cause adverse health and indoor environmental effects.

The tenants were provided with the owner's response, and further objected to the owner's claims.

On June 30, 2022, based on the entirety of the evidence in the record, the Rent Administrator granted the owner's application to modify the service of providing heat to the subject apartments from steam radiators to a heating system (electric split HVAC units in each apartment) powered by owner supplied electricity. The Administrator determined that the substitution was not inconsistent with the provisions of the RSC and granted the application without any change in the legal rent. Furthermore, the Administrator noted on page two of the order that if the owner failed to meet the requirements provided in the order, the tenants may file an application for a rent reduction if the facts so warrant.

Based on a review of the Rent Administrator's proceeding, the Commissioner finds that the tenant's PAR does not establish any basis to modify or reverse the Rent Administrator's

determination. Foremost, the Commissioner rejects the tenants' claim that the Rent Administrator's order was issued in error as the Rent Administrator disregarded the tenants' assertions regarding the negative health effects of apartment electric heaters. The record below establishes that the Rent Administrator properly took into account the entire record when granting the owner's application, including taking into account all tenant responses, and was correct in the allowing the modification requested by the owner. As noted above, it is the Agency's position that replacing a steam pipe/radiator heating system with an electrical heating system operating via individual HVAC units that are powered by the owner's electricity supply constitutes an adequate substitution of service. In this case, the owner had been paying for the oil for heating, and upon converting the steam heating system to the electrical heating system, the owner will be responsible for paying for the electricity used.

The Commissioner notes that if the owner fails to meet the requirements as noted in the subject Rent Administrator's order, Docket No. IV410022OD, the tenants may file a service complaint with this Agency, should the facts warrant.

The tenants are not precluded from filing complaints with the appropriate municipal agency(s) for any environmental and/or air quality concerns, should the facts warrant.

Accordingly, the Commissioner finds that the Rent Administrator did not err in granting the modification requested by the owner in this case.

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

ORDERED, that this petition is denied and that the Rent Administrator's order is affirmed.

ISSUED: JAN 13 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

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There is no other method of appeal.

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 THE ADMINISTRATIVE APPEAL OF

[redacted]

PETITIONER

ADMINISTRATIVE REVIEW DOCKET NO.: JP210045RT

RENT ADMINISTRATOR'S DOCKET NO.: IV210018OD

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ORDER AND OPINION GRANTING PETITION FOR ADMINISTRATIVE REVIEW

The petitioner timely filed a Petition for Administrative Review (PAR) against an order issued on January 21, 2021 by the Rent Administrator concerning the housing accommodations known as 1451 52nd Street, Brooklyn, New York, which granted the owner's application for modification of services to replace gas cooking stoves with electric cooking stoves in the rent regulated apartments of the subject premises.

The Commissioner having reviewed the petitioner's appeal and any and all supporting documentation, any and all statements made by the affected parties, the underlying case file and all relevant Rent Regulatory Laws and Regulations finds that the petitioner's appeal has merit and should be granted.

The tenant-petitioner requests a reversal of the order and asserts on appeal, in substance, that because the owner currently pays for cooking gas and gas heat, this modification will pass the expense of cooking facilities onto the tenants. The tenant also claims that the building has no gas meters and that the tenant-petitioner received permission from the owner, prior to the grant of the modification, to operate a gas dryer in their apartment.

The owner responded on appeal, confirming that the owner currently pays for the cooking gas and heating gas in the building. The owner also stated that it will only be installing electric stoves in currently vacant apartments, and for the other apartments as they become vacant; and the owner will continue to provide and pay for cooking gas and heating gas in the subject premises. As for the tenant-petitioner's claim that they have permission to have a gas dryer in their apartment, the owner asserts that it never gave permission to the tenant-petitioner to do so.

Pursuant to the Rent Stabilization Code, an owner may apply for, and the Division may grant, an application to substitute required services, at no change in the legal regulated rent, provided such substitution is not inconsistent with the Rent Stabilization Law (RSL) or the Code. It is the established position of the Division that the modification of services by conversion from gas cooking stoves to electric cooking stoves constitutes an adequate substitution of services. In cases where a building's tenants pay for cooking fuel separate from the rent, no permanent rent decrease

is warranted. In such instances, the provided service in question is the apartment's cooking facilities, not cooking fuel, and therefore no decrease in services occurs when an owner replaces gas-burning stoves with electric stoves. *See* Admin. Rev. Docket No. HQ410021RT. However, in cases where the owner has been paying for gas cooking fuel (or gas cooking fuel costs are "included in the rent") a permanent rent reduction is appropriate. *See* Admin. Rev. Docket No. IX110007RO.

During the proceeding below the Rent Administrator determined there would be no decrease in services as a result of the switch from gas to electric stoves since "the tenants have been paying for [gas] cooking fuel separate from the rent" and therefore "the service which the owner is required to provide is cooking facilities for the tenants, not the fuel, and in replacing gas-burning stoves with electric stoves, the owner is still providing the required cooking facilities." No permanent rent reduction was ordered.

However, a review of the case record shows that the owner in fact pays for gas cooking fuel at the subject premises while the tenants pay for electricity. Accordingly, the tenant-petitioner's claim that the modification order allows the owner to pass on the expense of cooking fuel to the tenants has merit and should be granted.

A rent reduction is, therefore, warranted in the instant proceeding. However, in light of the owner's statement that it will "only be removing the existing gas stoves and installing electric stoves for current vacant apartments, and for the other apartments as they become vacant" and will otherwise "continue to furnish and pay for the [cooking and heating] gas," said rent reduction shall take effect only as necessary rather than immediately. Specifically, those rent-regulated apartments of the subject premises receiving the service of gas "cooking fuel" from the owner shall be compensated with a permanent rent reduction if and when the unit undergoes the gas to electric stove conversion approved by the Rent Administrator in the order below. Said rent reduction shall be based on the appropriate Housing Preservation and Development (HPD) "Cooking Gas Utility Allowance" in effect at the time such conversion occurs.

Regarding the tenant-petitioner's claim of operating a gas dryer in their unit, the Commissioner notes that this complaint is a matter outside of the purview of this appeal proceeding against the Rent Administrator's order.

This order and opinion is issued without prejudice to the tenant's right to file with this Division an application for rent reduction based on the owner's failure to maintain building-wide and/or individual apartment services if the facts so warrant.

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

ORDERED, that this petition be denied and that the Rent Administrator's order be affirmed.

ISSUED: FEB 2 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

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There is no other method of appeal.

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 THE ADMINISTRATIVE APPEAL OF

[redacted]

PETITIONER

ADMINISTRATIVE REVIEW DOCKET NO.: JT410014RT

RENT ADMINISTRATOR'S DOCKET NO.: IN410004OD

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ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The petitioner timely filed an administrative appeal against an order issued on July 14, 2021 by the Rent Administrator (the Order) concerning the housing accommodations known as 253 East 77th Street, New York, NY, which granted the owner's application for a reduction of services to seal the kitchen window of the subject apartment with an exhaust system vent. The Order required that the owner install and operate the exhaust system 24 hours, 7 days a week at the owner's sole cost and the tenant-petitioner's monthly rent be reduced by 20%.

The Commissioner having reviewed the petitioner's appeal and any and all supporting documentation, any and all statements made by the affected parties, the underlying case file and all relevant Rent Regulatory Laws and Regulations finds that the petitioner's appeal does not have merit and should be denied.

The petitioner, by counsel, requests a reversal of the Order and claims in substance that the Rent Administrator improperly deferred to the New York City Department of Buildings' (DOB) approval of the owner's construction plan; that the owner's application was not based on the 1938 Building code or applicable NYC Building Code or statute; that the owner mischaracterized the subject kitchen as a "kitchenette"; that the DOB withheld formal approval of the owner's plans and has also barred the owner from obtaining a permit to perform the work; that the Order incorrectly states that the petitioner did not raise any objection to having an exhaust system installed; and that the petitioner was not provided with an opportunity to rebut the owner's submission of DOB approval.

Section 2522.4(d) of the Rent Stabilization Code provides that an owner may file an application to eliminate apartment space or essential services in exchange for a reduction in the legal regulated rent as long as such elimination is not inconsistent with the Rent Stabilization Code (RSC) and Rent Stabilization Law (RSL).

The petitioner's claim that the Rent Administrator improperly deferred to the DOB's approval of the owner's construction plan in granting the owner's application is without merit. The DHCR will only grant an application such as the one herein if the work at issue is in compliance with all applicable codes and laws, and if the owner has obtained the necessary approvals, permits, and sign-offs from the agencies overseeing such codes and laws. Accord: Docket No. ZH430058RO. The Commissioner finds that the DHCR may rely upon the expertise of other agencies in making such determinations, since the DHCR does not have the authority or expertise to enforce the building code or work permit laws. Accord: Docket No. UE410057RT.

Next, the petitioner claims in essence that the owner's application below was not based on the 1938 Building Code, NYC Building Code, or any other appropriate law or code. As stated in the Order, the DOB has jurisdiction over the Building Code and as noted above, the DHCR may grant an application such as the one herein if the owner has obtained the necessary approvals from the appropriate agencies and/or municipalities. In the present case, it is within the DOB's jurisdiction to determine if the owner is in compliance with the applicable codes or laws. The record below reflects that the owner obtained DOB approval for the owner's plan and the Rent Administrator correctly relied on the DOB's determination approving to seal the kitchen window and replace it with an exhaust system.

The petitioner claims in substance that the owner falsely stated that the subject apartment's cooking area is a kitchenette and that under the New York State Multiple Dwelling Law, it is a kitchen which must have a window. The Commissioner finds this claim without merit as the room's status as a kitchen or kitchenette was not a factor in the Rent Administrator's decision.

As to the assertion that the DOB withheld formal approval of the owner's plans and has also barred the owner from obtaining a permit to perform the work, the Commissioner finds this claim without merit. A review of the record below indicates that the owner submitted documentation that the DOB approved of the owner's plans in relation to job no. 123746759 and the owner was not barred from obtaining a permit to perform the work at issue.

With regards to the allegation that the Order incorrectly states that the tenant did not raise any objection to having an exhaust system installed, a review of the record shows that the tenant objected to the removal of the window, however, did not make any objection to the installation of the exhaust system nor the 20% rent reduction offered to the tenant.

The Commissioner also finds no merit in the petitioner's due process claim. The Rent Administrator has the discretion to serve an owner's submission upon tenants. Here, the petitioner was served with the owner's application and meaningfully participated in the underlying proceeding, as evidence by their answer. The petitioner was not prejudiced by not being served with the owner's submission of the DOB's approval of the audit relating to job no. 123746759. The owner's submission was not an ex-parte communication that violated section 2527.3(a)(1) of the RSC. The Rent Administrator determined, based on the record of evidence, that the issues raised by the parties could be adjudicated upon without the need for further documentation. The record of this proceeding reflects that the Rent Administrator's decision was based on the Division's policies, which allow for the substitution at issue. Furthermore, the Commissioner finds that any failure of due process which may have occurred during the

proceeding below by virtue of the fact that the owner's reply was not served on the tenant for further comment has been rectified on appeal, as the tenant has been given the opportunity to address the owner's statements in this appeal proceeding.

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

ORDERED, that this petition be denied and that the Rent Administrator's order be affirmed.

ISSUED: FEB 7 2023

Woody Pascal
Deputy Commissioner

State of New York
Division of Housing and Community Renewal
Office of Rent Administration
Gertz Plaza, 92-31 Union Hall Street
Jamaica, NY 11433
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There is no other method of appeal.

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

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEALS OF

ADMINISTRATIVE REVIEW
DOCKET NOS.: KQ410028RO
KQ410027RO

RENT ADMINISTRATOR'S
DOCKET NOS.: HR410002OE
HR410001OE

58E83 REALTY, LLC.

[redacted]

PETITIONER X

ORDER AND OPINION DENYING PETITIONS FOR ADMINISTRATIVE REVIEW

The above-named petitioner-owner timely filed administrative appeals (PARs) against above-referenced Orders issued on April 14, 2022, by the Rent Administrator (RA) concerning the housing accommodations known as [redacted] located at 58 East 83rd Street New York, New York 10028. Said Orders denied the owner's applications seeking orders to refuse renewal of leases and to proceed for eviction of the subject tenants pursuant to Rent Stabilization Code (RSC) §2524.5(a)(2) and DHCR Operation Bulletin 2009-1 (OB 2009-1). The Commissioner notes that the PARs involve common issues of law and fact, and these PARs are therefore consolidated for disposition herein pursuant to Rent Stabilization Code (RSC) §2529.1(c).

The RA's Orders at issue determined that the owner has not submitted a firm commitment letter from a financial institution or a bank statement showing a segregated account with sufficient funds to complete the demolition project as required by OB 2009-1; that the Fidelity Investment account statements submitted by the owner do not indicate any actual commitment to use the funds therein for the demolition and do not guarantee that the funds would remain available and marked for said demolition project; and that, as a result, the owner has not provided sufficient "proof of its financial ability to complete" the demolition under RSC §2524.5(a)(2).

In both PARs, the owner contends that the RA erroneously determined that a segregated Fidelity account containing approximately $4,000,000.00 in cash-equivalent stock was insufficient to complete a gut-renovation, which work was estimated to cost approximately $1,011,000.00; that the RA disregarded and misapplied the plain language of OB 2009-1 when he determined that the owner's proof does not "indicate actual commitment" to use such funds and does not guarantee that the funds would remain available for this specific project; that a commitment letter from a

bank is not possible in this case; that a "letter of intent," or a "commitment letter," from a financial institution may be an appropriate means of establishing financial ability when a building owner is obtaining a loan or other financing to fund a demolition, which is not the case here; that banking institutions do not provide such letters when the funds are simply coming from a segregated bank account, which is the case here; that the RA should have requested additional information and given the owner notice and an opportunity to submit supplemental evidence to satisfy the alleged deficiency upon which the RA based his denial before issuing an Order three years later; that the facts here are analogous to Matter of Peckham v. Calogero, 12 N.Y.3d 424, [2009], wherein the Court of Appeals determined that documentation of a bank account holding $4,800,000.00 was sufficient to demonstrate financial ability for a demolition costing much less; that the funds need not be held in an account in the name of the owner if there is a nexus between the account holder, the owner, and the demolition project; that the tenant's "expert", [redacted] who is not a licensed construction professional, grossly overestimated the demolition costs; that the only reliable estimate of such costs was provided by the owner's experts, Ida Galea, a licensed architect, and Fortunato Diagas, a licensed general contractor, and these experts estimated $1,011,000.00 as the cost for the demolition at issue; and that, in the event that the Commissioner finds any deficiency in the petitioner's evidence to prove financial ability to complete the demolition project, a hearing should be conducted at the PAR level, or alternatively the Commissioner should admit supplemental evidence into the RA's record.

In answer to the owner's PAR, the tenant of apartment [redacted] asserts that, under OB 2009-1, it was not irrational to for the RA to have found that the owner did not prove financial ability to perform the demolition; that Peckham does not support the owner's claim because an account holding "public traded, liquid securities" simply does not equate with cash deposited in a "bank account"; that the owner's cost estimates were fanciful; that the analysis of tenant's two experts, one a licensed architect, show the adequacy of the DOB plans and the owner's lack of financial ability to perform the demolition; that the owner's failure to provide a cost breakdown for the project shows that the owner does not intended to construct a new building or even to renovate the building; that a complete removal of the roof is necessary, and a demolition application may not be granted if such work is not proposed, while that the owner's architect affirmed that less than the full roof would be replaced; that the owner had three years to submit sufficient evidence of financial ability to perform the demolition to the RA and failed to do so; and that reopening the case would serve no purpose because the owner already asserted that it is impossible to obtain a commitment letter from Fidelity.

The owner replied to said tenant's answer, alleging that the RA exceeded the scope of his discretion in making it impossible for the owner to demonstrate "financial ability" to perform the demolition by a showing of adequate resources placed in its own fund; that securities held in its Fidelity Account exceeded by three times the credible estimated costs of the demolition; that historically marketable securities are a sufficiently stable investment to support the financial ability of the owner to complete the project; that the owner's cost estimate was submitted in the PW3, and the Department of Buildings (DOB) application was in fact approved by DOB, which makes such estimate realistic; that the project qualifies as a demolition under RSC §2524.5(a)(2), and as analogously found in Peckham; and that the Galea's Affidavit attests that: "13. In fact, after the demolition you would be able to stand in the Building's cellar and look straight up into the sky – or look from the neighboring's building's rooftop and see all the way to the Building's foundation."

In answer to the owner's PAR, the tenant of apartment [redacted] asserts that there is no nexus between the D2A2 Fidelity fund and Diana Milich's affidavit to commit such fund to the demolition project because such affidavit is from a person presenting herself as a member of 58E83, LLC., the owner of the subject premises, while the alleged demolition fund is held by "D2A2 Investment Group, LLC." and the only member of 58E83, LLC is D2A2; that the operating agreement of D2A2 does not indicate who is control of the Fidelity fund; that there is no letter of intent from D2A2 indicating that the Fidelity account is segregated, or that it is committed to the project; that the owner's architect affirmed that financing will be obtained when actual construction is imminent; that a commitment letter from a financial institution is required; that there was no due process violation here because the RA forwarded the tenant's responses in the underlying cases (HR410001OE), and such responses repeatedly questioned the owner's financial ability to complete the demolition project; and that the owner failed to respond to such tenant allegations before the RA.

The owner replied to said tenant's answer, asserting that the Diana Milich affidavit affirmed that she a member and general manager of D2A2; and that the D2A2 operating agreement Section 6.2 (c) states that the "...general manager shall have the exclusive power with sole and absolute discretion over the management of the Company... and any investment decision concerning property of the company...."

The Commissioner, having reviewed the entire evidentiary record, finds that the PARs should be denied, and the RA's order should be affirmed.

Pursuant to OB 2009-1 "no demolition application will be accepted by DHCR unless the owner has submitted proof to the DHCR of **financial ability to complete such undertaking**... **Evidence of financial ability to complete the project may include a Letter of Intent or a Commitment Letter from a financial institution, or such other evidence as DHCR may deem appropriate under the circumstances** [emphasis added]." Here, the owner was not able to demonstrate that it has the financial ability to complete the demolition project because a stock brokage statement without a commitment letter, a letter of intent, or other acceptable evidence from the financial institution holding the fund, is not sufficient evidence under OB 2009-1. As correctly stated by the RA's Orders at issue, the "owner has not submitted a firm commitment letter from a financial institution or a bank statement showing a segregated account with sufficient funds to complete the project...[and the Fidelity documents submitted by the owner] do not indicate actual commitment to use such funds nor guarantee the funds would remain available and marked for this specific project." OB 2009-1 requires a letter "from a financial institution" (or other equivalent and acceptable evidence), and an affidavit from the owner, which the owner alleges to have provided and further alleges should be sufficient, is not in fact sufficient. Therefore, it was reasonable for the RA to determine that the owner has not demonstrated the necessary good faith intent to carry out the demolition as required by RSC § 2524.5(a)(2).

It is noted that other owners (who have the necessary funds) are in fact able to submit a commitment letter from a financial institution to support their successful demolition applications. The owner in the Peckham case, cited by the owner, did in fact submit a letter from the bank holding its funds in that case "indicating that these funds were to be applied towards Owner's demolition/construction project" *See* Peckham at page 431). *See also* Matter of 118 Duane LLC v. New York State Div. of Hous. & Community Renewal, index Number158893/2018 (affirmed App Div 1st Dept 2023), in the which the Court affirmed DHCR's denial of a demolition

application because, although the owner in that case showed that it had $4,850.007.00 in a bank account (and the proposed demolition was to cost $1,200,000.00), the owner in that case "...failed to provide the DHCR with bank statements indicating liquid funds were segregated for the sole purpose of the demolition."

There was no due process violation in this case because Agency promulgated OB 2009-1 gives owners clear and sufficient notice that financial ability to perform a demolition is required in these cases, and clear and sufficient notice of the requirements to prove such financial ability. The owner may not now argue that it was denied due process because it was not so notified.

Regarding the owner's and tenant's requests for a hearing, hearings in cases such as this one are discretionary. The Commissioner finds that the record is sufficiently and clearly developed and supports the RA's determination, for the reasons set forth above, and that a hearing is therefore not required or appropriate in this case.

Because the owner's application herein was properly denied by the RA based only on the owner's failure to provide required proof of financial ability to carry out the demolition project, as explained above, the issue of the cost of the demolition, as raised by the owner's PAR, will not be addressed. Other issues raised by the tenants may not be addressed as they were not within the scope of the owner's PARs and the tenants did not file their own PARs.

THEREFORE, in accordance with the applicable sections of the Rent Stabilization Law and Code, it is

ORDERED, that the petitions are denied.

ISSUED:

MAR 2 4 2023

WOODY PASCAL
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given. In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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 THE ADMINISTRATIVE APPEALS OF

ADMINISTRATIVE REVIEW DOCKET NO.: UE420053RT

[redacted]

PETITIONERS

RENT ADMINISTRATOR'S DOCKET NO.: IL420011OH

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ORDER AND OPINION GRANTING IN PART PETITIONS FOR ADMINISTRATIVE REVIEW

The above-named tenants filed petitions for administrative review ("PARs") against orders issued by the Rent Administrator on April 26, 2006 concerning the housing accommodations known as 333 W. 56th St., 353 W. 56th St., 340 W. 57th St., and 350 W. 57th St., New York, NY (also known as the "Parc Vendome Condominium" housing complex).

The landlord, the owner of various apartments in the subject condominium complex, filed a "hardship" rent increase application with the Division pursuant to Section 2202.8 of the NYC Rent and Eviction Regulations per Local Law 30 of 1970 and the City Rent and Rehabilitation Law, seeking increases in the maximum rents of multiple rent controlled apartments in order to obtain an 8 ½ percent return on capital value. The above-named tenant-petitioners resided in rent controlled apartments [redacted] and [redacted] at 353 West 56th Street.

In Rent Administrator's order Docket No. IL420011OH, the Administrator compared the adjusted total complex-wide expenses from all four buildings ($2,835,189.11 in adjusted fuel, utility, payroll, repair and maintenance, replacement and improvement, insurance, and other miscellaneous costs) with the landlord's claimed income from the buildings ($86,895 in miscellaneous income) in order to determine whether a hardship rent increase was warranted. The Rent Administrator's calculation determined that the buildings had experienced a net operating loss of -$2,748,294.11 in the test year of 1993.

The Rent Administrator then determined the return on capital value the owner was entitled to on a per-apartment basis, as each condominium apartment at the subject premises had a distinct tax lot and therefore a unique equalized assessed value. For apartment [redacted] at 353 West 56th Street, the Rent Administrator determined that the owner was entitled to an annual return on capital value of $19,060.97, or 8 ½ percent of the unit's equalized assessed value of $224,246.68 in the filing year, pursuant to article 12-A of the Real Property Tax Law ("RPTL"). For apartment [redacted] at 353 West 56th Street, the Rent Administrator determined that the owner was entitled to an annual return on capital value of $38,850.48, or 8 ½ percent of the unit's equalized assessed value of $457,064.51 in the filing year, as established by RPTL article 12-A. Finally, the Rent

Administrator factored in each apartment's monthly rent and individual expenses and the portion of complex-wide income and expenses attributable to each apartment to determine that a hardship rent increase was warranted for both [redacted] and [redacted], among other units in the complex.

Accordingly, the Rent Administrator issued rent increase orders to each of the subject rent controlled apartments on April 26, 2006, under Docket No. IL420011OH. The orders granted the owner's application for hardship rent increases and raised the maximum rents for the subject apartments to levels that would yield the owner an 8 ½ percent return. The subject tenant-petitioner from apartment [redacted] at 353 West 56th Street received a hardship rent increase effective from 2005 to 2017 at a rate of 7 ½ percent per year, with the exception of the final year in which a remaining increase of only 0.9 percent was necessary for the annual rent to net the pro-rated equivalent of an 8 ½ percent return. The subject tenant-petitioner from apartment [redacted] at 353 West 56th Street received a hardship rent increase effective from 2005 to 2022. However, unlike the tenant-petitioner from [redacted] in the first year of the tenant from [redacted]'s hardship rent increase a "break even waiver" was deemed necessary and an increase of approximately 21.4 percent was issued for 2005. Thereafter, the tenant from [redacted] received annual 7 ½ percent increases until the final year, 2022, in which a remaining increase of only 4 percent was necessary for the annual rent to net the pro-rated equivalent of an 8 ½ percent return.

On appeal, the tenant-petitioners request a reversal of the orders and claim, in substance, that the Rent Administrator should have denied the landlord's hardship application since the property is a condominium, and as such the landlord-applicant is not the owner of the rent controlled apartments in question; that the landlord should have included, as income from the buildings, profits received as sponsor from the sale of 40 other apartments in the subject buildings; that the landlord failed to demonstrate that it used generally accepted accounting principles in calculating income and expenses; that the landlord either failed to submit documentation or submitted false, unsubstantiated, or improperly calculated financial documentation regarding several complex-wide expenses; that the landlord failed to establish that it was unable to maintain the same average net income in a current three-year period when compared with the average net income during the lease period; failed to demonstrate that the annual gross rental income did not exceed operating expenses by a sum equal to 5% of the gross rent; and that the rent increases are excessive and the Rent Administrator should not have waived the cap on collectability for the first-year rent increase for apartment [redacted].

The Commissioner, having reviewed the petitioners' appeals and any and all supporting documentation, any and all statements made by the affected parties, the underlying case file, and all relevant Rent Regulatory Laws and Regulations, finds that the petitioners' appeals have merit and should be granted in part.

The tenant-petitioners' assertion that the subject hardship calculation was performed incorrectly and that the Rent Administrator should not have waived the cap on collectability for the first-year rent increase for apartment [redacted] has merit, as the Commissioner notes that while the subject hardship application was pending before the Rent Administrator the method of calculating hardships was modified by the 2002 decision of *Hertz Co. R.E. Inc. v. DHCR*, 295 A.D.2d 179, 743 N.Y.S.2d 707 (1st Dept 2002). In *Hertz*, the Appellate Division found that common charges paid to a cooperative corporation in the form of maintenance fees should be considered part of

the building's income in order to obtain a more realistic assessment of the actual income and economic health of the property. Subsequently, the Division's hardship calculation method was further modified in DHCR Administrative Review Docket No. XL430004RP, issued February 10, 2011, upheld by the court in *Mtr. of London Terrace Assoc. L.P. v. DHCR*, 35 Misc. 3d 525, 937 N.Y.S.2d 567 (Sup. Ct. NY Co. 2012), wherein it was determined that Article 12 of the Real Property Tax Law (RPTL) should be utilized to determine the equalized assessed value of the property to obtain a more accurate measure of capital value.

In the proceeding below, the Rent Administrator did not consider income the complex derived from $3,762,203 paid in common area charges—a condominium fee analogous to cooperative maintenance fees—in the test year, contrary to the 2002 *Hertz* decision. As a result, the order provided an inaccurate measurement of the complex's true financial health. "[I]n a healthy building, the maintenance fees in the aggregate will always meet or exceed expenses." *Matter of Hertz Co. R.E. Inc. v. DHCR*, Sup Ct, New York County, Nov. 9, 2001, Yates, J., index No. 125696/00, *aff'd* 295 A.D.2d 179 (1st Dept 2002). Such was the case at the subject premises in the test year: the complex's total expenses were exceeded by the condominium's common area charges and, overall, the building earned a net profit of $820,353.59 in the test year ($3,849,098 in total test year income minus $3,028,744.41 in total test year expenses). The Commissioner notes that the total complex-wide test year expense for the line item "management allowance" was increased to $51,943.30, as this expense is based on a percentage of the building's revised total income which has been increased by the addition of common area charges. A line item expense of $141,612 for real estate taxes was also added to the complex-wide calculation of total expenses (in the proceeding below said item was calculated on a "per unit" basis rather than complex-wide). The sum total of building-wide expenses in the test year was adjusted accordingly, from $2,835,189.11 to $3,028,744.41.

The Commissioner notes that despite operating at a net return of $820,353.59 in the test year, the owner-applicant may still be eligible to receive a hardship rent increase if said net return does not rise to the allowable level of an 8 ½ percent return on capital value. In the hardship proceeding below, the Rent Administrator found in pertinent part that the owner-applicant was entitled to an annual 8 ½ return on capital value of $19,060.97 for apartment [redacted] at 353 West 56th Street and $38,850.48 for apartment [redacted] (8 ½ percent of the units' equalized assessed values according to article 12-A of the RPTL).

However, the Supreme Court of New York made clear that the Article 12 equalization rate is appropriate for DHCR to utilize in hardship proceedings in *Mtr. of London Terrace Assoc. L.P. v. DHCR*, 35 Misc. 3d 525, 937 N.Y.S.2d 567 (Sup. Ct. NY Co. 2012). In the DHCR order underlying the court's opinion in *London Terrace* (Docket No. XL430004RP, issued February 10, 2011) the Division "examine[d] whether article 12 or article 12-A of the RPTL is more appropriate to determine equalized assessed value in hardship applications" and found that "article 12 is a more accurate measure of equalized assessed value for Class 2 properties (multiple dwellings of four units or more)." Upon review of Docket No. XL430004RP, the *London Terrace* court agreed and noted, in contrast, that "the article 12-A equalization ratio, which is determined without differentiation of real property classes, has produced a less accurate measurement of value resulting in an 'overvaluation.'" *London Terrace*, 35 Misc. 3d at 533, 937 N.Y.S.2d at 575 (citing *City of New York v. DHCR*, 97 N.Y.2d 216, 765 N.E.2d 829 (2001),

wherein the Court of Appeals upheld DHCR's use of Article 12 to determine equalized assessed value in a separate type of rent control calculation known as the Maximum Base Rent formula. The court further determined that "computing the equalized assessed value pursuant to RPTL article 12-A for hardship rent increases would run counter to and frustrate the clear legislative intent of the rent control statute." *Id.* The court in *London Terrace* further found that article 12-A had been incorrectly applied by the Division to hardship applications since the City of New York issued Local Law 73 of 1997, which amended the Division's method of determining equalized assessed value in certain proceedings. *Id.* The court stated that the use article 12-A in hardship proceedings had been "properly applied *until 1997*, when the New York City Council evidenced its preference by changing the MBR equalized assessed value from RPTL article 12-A to the current article 12 valuation." *Id.* (emphasis added).

Therefore, since the subject hardship order calculated the property's equalized assessed value using article 12-A—a method later deemed incorrectly applied in DHCR hardship proceedings since 1997— it is appropriate to use the article 12 equalized assessment rate to calculate the equalized assessed value. Furthermore, the Rent Administrator's reliance on article 12-A during the proceeding below has likely resulted in an overvaluation of the subject premises and therefore runs counter to the stated purpose of the rent laws and regulations.

Accordingly, the subject hardship rent increase order shall be revised to reflect the appropriate equalized assessed value of the subject premises under article 12 and, as such, shall be amended to show that the owner is entitled to a return on capital value of $4,959.63 for apartment [redacted] at 353 West 56th Street, or 8 ½ percent of the unit's article 12 equalized assessed value of $58,348.64 in the filing year, and a return on capital value of $10,108.84 for apartment [redacted] at 353 West 56th Street, or 8 ½ percent of the unit's article 12 equalized assessed value of $118,927.48 in the filing year. On a monthly basis, the owner was therefore entitled to an 8 ½ percent return on capital value of $413.30 from apartment [redacted]; $842.40 from apartment [redacted]. The Commissioner notes that each tenant-petitioner's monthly rent payment alone was sufficient to provide the owner with these "allowable" 8 ½ return on capital value levels in the test year. Additional returns derived from apartments [redacted] and [redacted] in the form of prorated portions of the above-mentioned complex-wide net return (apportioned per-unit using percentage of common interest data provided by the owner below) further indicate that the owner received more than an 8 ½ percent return on capital value from the subject apartments in the test year. A hardship increase was therefore unwarranted for apartments [redacted] and [redacted].

As such, the Commissioner finds that the subject hardship orders herein under review should be revoked. The Commissioner now turns to the issue of any annual rent increases which may have been collected from the tenant-petitioners pursuant to the subject revoked hardship orders.

For apartment [redacted] the Commissioner notes that Docket No. IL420011OH limited the owner's collection of the approved hardship rent increase to no more than 7 ½ percent per year.[1] The order also explicitly advised that:

[1] Section 2202.3 of the New York City Rent and Eviction Regulations allows for the waiver of the 7 ½ percent collectability limit on hardship increases in certain circumstances, permitting an owner to collect a higher rent increase in the first year of a hardship order. However, such waiver was not granted in the subject hardship proceeding for apartment [redacted].

> Section 2201.6 of the Regulations provides that rent adjustments ordered pursuant to Section 2202.8, together with those received under the Maximum Base Rent Program, may not exceed 7½ percent in any calendar year. The rent increases being ordered above, under Section 2202.8, considered such limitation. Accordingly, on the effective date(s) prescribed, the tenant is required to pay the increase indicated or such collectible rent(s), if any, that may have been ordered under the Maximum Base Rent Program, whichever is greater.

The Division's Maximum Base Rent ("MBR") Program authorized by Section 2201.5 permits qualifying owners to collect an annual rent increase from New York City-based rent-controlled tenants. During the years in which the subject hardship rent increase was in effect, the collectable portions of any MBR increases for which an owner qualified were similarly limited to 7 ½ percent. However, as seen in the above-quoted notice from Docket No. IL420011OH, owners who receive a hardship rent increase are barred from collecting both types of increases at once: a qualifying owner collects either a 7 ½ percent hardship increase or an MBR increase in any given year, depending on which was greater.[2] This policy reflects the express language of Section 2201.6 (a)(1) of the NYC Rent and Eviction Regulations, which states that "No new maximum rent established pursuant to. . . section 2201.5. . .2202.8, or any combination thereof, shall increase the rent collectible from a tenant in occupancy by more than 7 ½ percent in any one calendar year. . . ." 9 NYCRR § 2201.6.

Therefore, although the Division erred in approving a hardship rent increase for the tenant of apartment [redacted] in the proceeding below, the Commissioner in recognition of the above collectability restrictions finds that the owner in this instant case is not required to refund to the tenant-petitioner of apartment [redacted] any rent increase amounts which were properly collected pursuant to the subject hardship order. Specifically, since the subject orders were collected at the 7 ½ percent cap on annual hardship increases and a waiver of the 7 ½ percent limit for a one time break-even increase was not required, the hardship increase as granted effectively prevented the owner from collecting a separate full 7 ½ percent annual increase under the MBR Program until 2017. In other words, had the owner not received the subject hardship increase under Docket No. IL420011OH (herein revoked per this Order) the owner could potentially have instead collected the same proportion of annual rent increases under the MBR program. A review of agency records shows that the owner did, in fact, apply for and receive multiple MBR increases in several of the years in which the subject hardship order was in effect, including MBR increases applicable to apartment [redacted] and [redacted] at 353 West 56th Street. The owner has therefore already demonstrated its ability to qualify for such MBR increases during the years in question. However, Docket No. IL420011OH, now revoked, barred the owner from collecting such increases. Therefore, in consideration of the equities involved, the Commissioner finds it proper to maintain the annual rent increase levels established by the hardship order in question for apartment [redacted] at 353 West 56th Street.

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[2] The Commissioner notes that pursuant to the Housing Stability and Tenant Protection Act (HSTPA) of 2019, the collectability of an MBR increase is currently capped at 7.5% per year or the average of the previous five-year Rent Guidelines Board increases, whichever is less.

As for the tenant-petitioner from apartment [redacted], for the reasons described above the Commissioner finds that although the Division erred in approving a hardship rent increase for the tenant of apartment [redacted] in the proceeding below, the owner is not required to refund to the tenant-petitioner of [redacted] the full amount of the hardship rent increases approved in Docket No. IL420011OH. Said hardship order, now revoked, for reasons stated above prevented the owner from collecting annual 7 ½ percent rent increases under the MBR program and the hardship increase.

However, the Commissioner notes that unlike hardship increases granted for apartment [redacted], for apartment [redacted] the owner received a first-year "break even waiver" of the annual 7 ½ percent collectability cap; an actual increase of 21.4 percent of the 2005 rent; and then subsequent annual increases of 7 ½ percent "spread forward accordingly" from this disproportionate first year hardship increase of 21.4 percent. As a result, the owner had the option of collecting more rent from apartment [redacted] under the now-revoked hardship order (Docket No. IL420011OH) than would have been possible under the MBR program, wherein no first-year break even waiver is available. Furthermore, because the corrected hardship re-calculation performed herein (utilizing common charges and RPTL article 12) demonstrates that a hardship rent increase was unwarranted for apartment [redacted], a first-year "break even waiver" was also unwarranted.

Therefore, although the hardship rent increases approved for the tenant of [redacted] are revoked, for reasons stated above, in this instant case the owner will be required to only to refund increase above 7 ½ precent of the original (current) rent which began to be collected in 2005. The recalculated allowable monthly increase for [redacted] reflects amounts that could have possibly been collected under the MBR program. These new rates replace the "break even waiver" and 21.4 percent increase approved in the first year (2005) with a revised allowable 7 ½ percent rent increase, with remaining 7 ½ percent annual increases spread forward accordingly:

353 West 56th Street, [redacted]

Effective Date	*Original Monthly Hardship Increase*	**Revised Monthly Allowable Increase**
Oct. 1, 2005	*$ 247.51*	**$ 86.64**
Oct. 1, 2006	*$ 105.21*	**$ 93.14**
Oct. 1, 2007	*$ 113.10*	**$ 100.13**
Oct. 1, 2008	*$ 121.58*	**$ 107.64**
Oct. 1, 2009	*$ 130.70*	**$ 115.71**
Oct. 1, 2010	*$ 140.50*	**$ 124.39**
Oct. 1, 2011	*$ 151.04*	**$ 133.72**
Oct. 1, 2012	*$ 162.37*	**$ 143.75**
Oct. 1, 2013	*$ 174.54*	**$ 154.53**
Oct. 1, 2014	*$ 187.63*	**$ 166.12**
Oct. 1, 2015	*$ 201.71*	**$ 178.58**
Oct. 1, 2016	*$ 216.83*	**$ 191.97**

Oct. 1, 2017	*$ 233.10*	**$ 206.37**
Oct. 1, 2018	*$ 250.58*	**$ 221.84**
Oct. 1, 2019	*$ 269.37*	**$ 238.48**
Oct. 1, 2020	*$ 289.58*	**$ 256.37**
Oct. 1, 2021	*$ 311.29*	**$ 275.60**
Oct. 1, 2022	*$ 178.42*	**$ 296.27**

The owner shall refund any excess rent which may have been collected from the tenant-petitioner of apartment [redacted] as described herein within one hundred eighty (180) days of the date of this order.

The Commissioner notes that the tenant-petitioners' remaining claims are moot in light of the opinion herein.

THEREFORE, in accordance with the Rent and Eviction Regulations, it is

ORDERED, that this petition be granted in part; and that the Rent Administrator's order is revoked; and it is further,

ORDERED, that the owner refund any excess rent which may have been collected as described herein within one hundred eighty (180) days of the date of this order and opinion.

ISSUED: JAN 10 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

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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 THE ADMINISTRATIVE APPEAL OF

GEORGE DOUKAS

PETITIONER

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ADMINISTRATIVE REVIEW DOCKET NO.: UJ910057RO

RENT ADMINISTRATOR'S DOCKET NO.: UF910002OH

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The above-named owner filed a petition for administrative review (PAR) against an order issued on September 7, 2006, by the Rent Administrator, concerning the housing accommodation known as 220 Pelham Road, New Rochelle, New York, Apt. [redacted] wherein the Administrator denied the owner's application for rent increases for a rent stabilized apartment based upon the comparative hardship provisions of the Emergency Tenant Protection Act of 1974 (ETPA) and Section 2502.4(c) of the Tenant Protection Regulations (TPR).

The Rent Administrator denied the owner's comparative hardship application on the basis that the application was not filed by the managing agent on behalf of the Cooperative Corporation and all proprietary lessees, including the Sponsor; and that the petitioner had failed to file the appropriate DHCR comparative hardship application forms for housing accommodations located outside of New York City, and subject to ETPA and Regulations.

In his PAR the petitioner claims, in substance, that he is the holder of unsold shares for one apartment subject to rent stabilization in a cooperative building; that it would be impossible to force the managing agent to file the application; that there is no reason to file on behalf of an entire building when the owner only owns one unit in the cooperative building; that the owner will file another application in correct forms but using the wrong forms is *de minimus* and not a basis to deny the application.

After careful consideration of the entire record, the Commissioner is of the opinion that this petition should be denied.

In accordance with the TPR, the owner's comparative hardship application for rent increases in excess of the rent adjustments authorized by the Rent Guidelines Board must establish a hardship

and the Division must determine that the said rent adjustments are not sufficient to enable the owner to maintain approximately the same ratio between operating expenses (including taxes and labor costs, but excluding debt service, financing cost and management fees) and gross rent which prevailed on the average over the immediate preceding five-year period, or for the entire life of the building if less than five years.

In a cooperative owned building, the Division requires that a comparative hardship application be filed by a managing agent on behalf of the cooperative building corporation and all proprietary lessees with financial information submitted for the entire building.

The records shows that the application was not filed by the managing agent but by a the holder of shares for one apartment. The application excluded relevant financial information including building-wide operating expenses incurred by the cooperative corporation for a five-year period. The record also shows that application was filed on comparative hardship forms that were applicable only to housing accommodations located within New York City. The Commissioner notes, that the petitioner did file another comparative hardship application with the EPTA forms under Docket No. VA910001OH.

Therefore, the Commissioner, based on these factors finds that Rent Administrator's order is correct, and that the owner failed to properly file a comparative hardship application.

THEREFORE, in accordance with the Emergency Tenant Protection Act and Regulations, it is

ORDERED, that this petition is denied, and the Rent Administrator's order is affirmed.

ISSUED: JAN 10 2023

WOODY PASCAL
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given. In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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

----------X

IN THE MATTER OF THE ADMINISTRATIVE APPEAL OF

LES ROSEN

PETITIONER

ADMINISTRATIVE REVIEW DOCKET NO.: YL110029RO

ADMINISTRATOR'S DOCKET NO.: YA110001OH

----------X

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The above-named petitioner-owner filed a petition for administrative review (PAR) against an order issued on November 5, 2010, by the Rent Administrator, concerning the housing accommodations known as 10 Holder Place, Forest Hills, New York, Apt. [redacted] wherein the Administrator denied the owner's application for a comparative hardship rent increase for a rent stabilized apartment under the Section 26-511c(6) of the Rent Stabilization Law and Section 2522.4(b) of the Rent Stabilization Code on the basis that the application was not filed by the management agent on behalf of the corporation and all proprietary lessees including the Sponsor.

The petitioner claims, in substance, that as the owner of unsold shares of one rent stabilized apartment in a cooperatively owned building he requests a waiver of filing a building-wide application through the management agent; that it makes no sense for the management agent to file the application because the coop board has no benefit from filing a hardship application on his behalf; that he is the only one experiencing hardship through rent stabilization; and that the comparative hardship application doesn't state that as owner he cannot file the application on his own behalf.

After careful consideration of the entire record, the Commissioner is of the opinion that this petition should be denied.

Section 2522.4(b) of the Rent Stabilization Code provides owners may be able to collect a comparative hardship rent increase if the owner has not been able to maintain the same average annual net income in a current three-year period when compared with the average annual net income during a three-year base period.

In a cooperative owned building, the Division requires that a comparative hardship application be filed by a managing agent on behalf of the cooperative building corporation and all proprietary

lessees with financial information submitted for the entire building.

The record shows that the application was not filed by the managing agent and was incorrectly based on data related to only one apartment. The subject application failed to include relevant financial information including building-wide operating expenses incurred by the cooperative corporation.

Therefore, the Commissioner finds that Rent Administrator's order is correct, and that the comparative hardship application was not properly filed.

THEREFORE, in accordance with the Rent Stabilization Law and Code, it is

ORDERED, that this petition is denied, and the Rent Administrator's order is affirmed.

ISSUED: JAN 10 2023

WOODY PASCAL
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

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There is no other method of appeal.

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

----------x

IN THE MATTER OF THE ADMINISTRATIVE APPEALS OF

[redacted]; [redacted]; [redacted]; **POMANDER ASSOCIATES LLC**

PETITIONERS

ADMINISTRATIVE REVIEW DOCKET NO.: RB420050RT; RB420034RO

RENT ADMINISTRATOR'S DOCKET NO.: NG420001OH

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ORDER AND OPINION GRANTING IN PART TENANTS' PETITIONS FOR ADMINISTRATIVE REVIEW AND DENYING OWNER'S PETITION FOR ADMINISTRATIVE REVIEW

The above-named parties filed petitions for administrative review ("PARs") against orders issued by the Rent Administrator on January 17, 2003 concerning the housing accommodations known as 265 West 94th Street and 3 to 15 Pomander Walk, New York, NY, various apartments.

The landlord, the owner of the unsold shares of multiple rent controlled apartments located in the subject cooperatively-owned residential buildings, filed a "hardship" rent increase application with the Division on July 14, 1999 pursuant to Section 2202.8 of the NYC Rent and Eviction Regulations per Local Law 30 of 1970 and the City Rent and Rehabilitation Law, seeking increases in the maximum rents of said rent control apartments in order to obtain an 8 ½ percent return in capital value.

In Rent Administrator's order Docket No. NG420001OH, the Administrator used the buildings' adjusted total expenses ($275,653.64 in fuel, utility, payroll, real estate taxes, insurance, repair and maintenance, and other miscellaneous costs) minus the landlord's claimed income from the property ($21,809 in miscellaneous income) to determine the buildings' net operating expenses of -$253,844.64 in the test year of 1998. The Rent Administrator also determined the buildings allowable 8 ½ percent return on capital value to be $317,309.89 based upon 8 ½ percent of the buildings' equalized assessed value of $3,733,057.51, pursuant to article 12-A of the Real Property Tax Law ("RPTL").

The Rent Administrator issued individualized rent increase orders for the abovementioned apartments on January 17, 2003, under Docket No. NG420001OH. The orders granted the owner's application for hardship rent increases and increased the maximum rents for the subject apartments to a level that would yield the owner an 8 ½ percent return.

The tenant-petitioner from apt. [redacted] at 265 W. 94th St. received a hardship rent increase effective from 2003 to 2015 at a rate of 7 ½ percent per year, with the exceptions of the first year in which

a "break even waiver"[1] of the annual 7 ½ percent limit and an increase of approximately 158 percent was found to be warranted, and the final year in which a remaining increase of only 0.16 percent was necessary for the annual rent to net the pro-rated equivalent of an 8 ½ percent return.

The tenant-petitioner from apt. [redacted] at 6 Pomander Walk received a hardship rent increase effective from 2003 to 2015 at a rate of 7 ½ percent per year, with the exceptions of the first year in which a "break even waiver" of the annual 7 ½ percent limit and an increase of approximately 145 percent was found to be warranted, and the final year in which a remaining increase of only 0.16 percent was necessary for the annual rent to net the pro-rated equivalent of an 8 ½ percent return.

The tenant-petitioner from apt. [redacted] at 9 Pomander Walk received a hardship rent increase effective from 2003 to 2015 at a rate of 7 ½ percent per year, with the exceptions of the first year in which a "break even waiver" of the annual 7 ½ percent limit and an increase of approximately 148 percent was found to be warranted, and the final year in which a remaining increase of only 0.16 percent was necessary for the annual rent to net the pro-rated equivalent of an 8 ½ percent return.

On appeal, the tenant-petitioners from apartments [redacted] at 265 West 94th Street, [redacted] at 6 Pomander Walk, and [redacted] at 9 Pomander Walk request a reversal of the rent increase orders and claim, in substance, that the Rent Administrator incorrectly calculated both: (1) the net earned income and (2) the equalized assessed value of the property. Regarding the earned income calculation for the subject premises, the petitioners argue that the Rent Administrator failed to consider shareholder maintenance fees paid to the cooperative as earned income. As for the equalized assessed value of the property, the petitioners claim that the Rent Administrator applied the incorrect equalization rate during the proceeding below; that the hardship order utilizes an inflated equalization rate based on article 12-A instead of the correct article 12 equalization rate. In support of these claims, the petitioner cites *Hertz Co. R.E. Inc. v. DHCR*, 295 A.D.2d 179, 743 N.Y.S.2d 707 (1st Dept 2002); *Mtr. of London Terrace Assoc. L.P. v. DHCR*, 35 Misc. 3d 525, 937 N.Y.S.2d 567 (Sup. Ct. NY Co. 2012); and *City of New York v. DHCR*, 97 N.Y.2d 216, 739 N.Y.S.2d 333 (Court of Appeals 2001). The tenant-petitioners further contend that the first year increases imposed in the subject hardship orders went beyond the Division's collectability limitations for rent controlled tenants. The tenants also allege that the owner's hardship application contained several flaws not addressed by the Rent Administrator below, including a claim that the owner had not acquired the property at least 36 months prior to the date of the hardship application as required; that the owner purchased the apartments in October 1998 and therefore did not own the apartments for the entire test year; that fuel costs should not have been included in the increase, since the rent controlled tenants already pay a monthly fuel surcharge; that the owner misrepresented its true rental income of one apartment; that the owner was not a "landlord" within the meaning of section 2202.8; and that the rent increases should not have been pro-rated by share. In addition, the tenant-petitioners claim that the owner created its own

[1] Section 2202.3 of the New York City Rent and Eviction Regulations allows for the waiver of the 7 ½ percent collectability limit on hardship increases in certain circumstances, permitting an owner to collect a higher rent increase in the first year of a hardship order.

financial losses, leading to the need for the subject hardship increases, by failing to receive Maximum Base Rent ("MBR") increases.

The owner-petitioner, meanwhile, disputes a note in the subject hardship order that limits the owner's collection of the hardship increases "together with those received under the Maximum Base Rent Program" to 7 ½ percent in any calendar year. The owner also claims that the building-wide miscellaneous income amount should not have been attributed to the owner-applicant below, as "the miscellaneous income did not assist [the owner] at all in the operation of the subject unit[s]." Finally, the owner contends that the Rent Administrator erred by deducting certain insurance costs, repair costs, and management allowance costs from the final tally of the owner's expenses during the proceeding below.

The Commissioner, having reviewed the petitioners' appeals and any and all supporting documentation, any and all statements made by the affected parties, the underlying case file, and all relevant Rent Regulatory Laws and Regulations, finds that the tenant-petitioners' appeal has merit and should be granted in part while the owner-petitioner's appeal does not have merit and should be denied.

The Commissioner agrees with the tenant-petitioners' assertion that the subject hardship calculation was performed incorrectly, and notes that while the subject hardship application was pending before the Rent Administrator the method of calculating hardships was modified in the 2002 decision of *Hertz Co. R.E. Inc. v. DHCR*, 295 A.D.2d 179, 743 N.Y.S.2d 707 (1st Dept 2002). In *Hertz*, the Appellate Division found that maintenance fees paid to the cooperative corporation should be considered part of the buildings' income in order to obtain a more realistic assessment of the actual income and economic health of the property. Subsequently, the Division's hardship calculation method was further modified in DHCR Administrative Review Docket No. XL430004RP, issued February 10, 2011, upheld by the court in *Mtr. of London Terrace Assoc. L.P. v. DHCR*, 35 Misc. 3d 525, 937 N.Y.S.2d 567 (Sup. Ct. NY Co. 2012), wherein it was determined that Article 12 of the Real Property Tax Law (RPTL) should be utilized to determine the equalized assessed value of the property to obtain a more accurate measure of capital value.

In the proceeding below, the Rent Administrator failed to consider $423,729 in maintenance fees paid to the cooperative during the test year as earned income, contrary to the 2002 *Hertz* decision. As a result, the order provided an inaccurate measurement of the buildings' true financial health. "[I]n a healthy building, the maintenance fees in the aggregate will always meet or exceed expenses." *Matter of Hertz Co. R.E. Inc. v. DHCR*, Sup Ct, New York County, Nov. 9, 2001, Yates, J., index No. 125696/00, *aff'd* 295 A.D.2d 179 (1st Dept 2002). Such was the case in the subject premises in the test year: the buildings' total expenses were exceeded by the maintenance fees paid to the buildings' cooperative and, overall, the buildings earned a net profit of $156,363.17 in the test year ($445,538.00 in total test year income minus $289,174.83 in total test year expenses). The Commissioner notes that the total building-wide test year expense for the line item "management allowance" was increased to $13,521.19, as this expense is based on a percentage of the buildings' revised total income which has been increased by the addition of maintenance fees. The sum total of building-wide expenses in the test year was adjusted accordingly, from $275,653.64 to $289,174.83.

The Commissioner notes that despite operating at a net profit of $156,363.17 in the test year, the owner-applicant may still be eligible to receive a hardship rent increase if said profit does not rise to the allowable level of an 8 ½ percent return on capital value. In the hardship proceeding below, the Rent Administrator found that the owner-applicant was entitled to an 8 ½ return on capital value of $317,309.89 (8 ½ percent of the buildings' equalized assessed value of $3,733,057.51 according to article 12-A of the RPTL). However, the Commissioner notes that article 12-A was incorrectly used to calculate the buildings' equalized assessed value, and that article 12 should instead be utilized.

The Supreme Court of New York made clear which equalization rate is appropriate for DHCR to utilize in hardship proceedings in *Mtr. of London Terrace Assoc. L.P. v. DHCR*, 35 Misc. 3d 525, 937 N.Y.S.2d 567 (Sup. Ct. NY Co. 2012). In the DHCR order underlying the court's opinion in *London Terrace* (Docket No. XL430004RP, issued February 10, 2011) the Division "examine[d] whether article 12 or article 12-A of the RPTL is more appropriate to determine equalized assessed value in hardship applications" and found that "article 12 is a more accurate measure of equalized assessed value for Class 2 properties (multiple dwellings of four units or more)." Upon review of Docket No. XL430004RP, the *London Terrace* court agreed and noted, in contrast, that "the article 12-A equalization ratio, which is determined without differentiation of real property classes, has produced a less accurate measurement of value resulting in an 'overvaluation.'" *London Terrace*, 35 Misc. 3d at 533, 937 N.Y.S.2d at 575 (citing *City of New York v. DHCR*, 97 N.Y.2d 216, 765 N.E.2d 829 (2001), wherein the Court of Appeals upheld DHCR's use of Article 12 to determine equalized assessed value in a separate type of rent control calculation known as the Maximum Base Rent formula). The court further determined that "computing the equalized assessed value pursuant to RPTL article 12-A for hardship rent increases would run counter to and frustrate the clear legislative intent of the rent control statute." *Id.*

According to the court in *London Terrace,* article 12-A had been incorrectly applied by the Division to hardship applications since the City of New York issued Local Law 73 of 1997, which amended the Division's method of determining equalized assessed value in certain proceedings. *Id.* The court stated that a section of the rent regulations which directed DHCR to use article 12-A in hardship proceedings had been "properly applied *until 1997*, when the New York City Council evidenced its preference by changing the MBR equalized assessed value from RPTL article 12-A to the current article 12 valuation." *Id.* (emphasis added).

Because the subject hardship orders calculated the property's equalized assessed value using article 12-A—a method later deemed incorrectly applied in DHCR hardship proceedings since 1997—such calculation is now deemed to have been made in error. Furthermore, the Rent Administrator's reliance on article 12-A during the proceeding below has likely resulted in an overvaluation of the subject premises and therefore runs counter to the stated purpose of the rent laws and regulations.

Accordingly, the subject hardship rent increase orders shall be revised to reflect the appropriate equalized assessed value of the subject premises under article 12 and, as such, shall be amended

to show that the owner is entitled to a return on capital value of $177,945.50, or 8 ½ percent of the buildings' article 12 equalized assessed value of $2,093,476.42 in the filing year. Notably, the above-performed revisions to the net earned income and equalized assessed value figures utilized in the subject hardship calculation demonstrate that hardship rent increases are still warranted in the instant proceeding, although at different rates and without the first-year "break even waivers" initially approved by the Rent Administrator below. The above-stated adjusted net return of $156,363.17 for the buildings in the test year of 1998 remains lower than the "allowable" 8 ½ percent return on capital value of $177,945.50, revised herein pursuant to article 12. As such, the Commissioner finds that the hardship orders issued below should not be revoked but recalculated to reflect the following reduced monthly rent increase rates for the subject tenant-petitioners:

265 W. 94th St.

Effective Date	**Revised Monthly Hardship Increase**
Feb. 1, 2003	**$ 8.16**
Feb. 1, 2004	**$ 8.77**
Feb. 1, 2005	**$ 6.10**

6 Pomander Walk

Effective Date	**Revised Monthly Hardship Increase**
Feb. 1, 2003	**$ 12.59**
Feb. 1, 2004	**$ 13.54**
Feb. 1, 2005	**$ 7.68**

9 Pomander Walk

Effective Date	**Revised Monthly Hardship Increase**
Feb. 1, 2003	**$ 12.44**
Feb. 1, 2004	**$ 13.37**
Feb. 1, 2005	**$ 8.00**

The owner shall refund any excess rent which may have been collected from the tenant-petitioners in accordance with the original hardship order issued under Rent Administrator's Docket No. NG420001OH, which has been herein revised under Administrative Review Docket Nos. RB420050RT; RB420034RO to reflect reduced hardship rent increases for the tenant-petitioners, as shown above. The owner should refund such excess rent within 6 months of the date of this order.

The tenant-petitioners' remaining claims are without merit. Regarding the tenant-petitioners' claim that the owner created its own financial losses due to its failure to receive MBR increases, the Commissioner notes that a landlord is not barred from applying for a hardship rent increase if MBR increases have not been obtained in prior years. It is noted, however, that Local Law 30 of 1970 and the Rent Regulations promulgated thereunder provided for a system for periodic (annual) rent increases normally sufficient for the owner to maintain their property, contingent upon maintaining essential services.

The claim that the hardship increase should have been denied because the owner was not a "landlord" within the meaning of section 2202.8 is also without merit. The Commissioner notes that Section 2202.8 of the Rent and Eviction Regulations allows a "landlord" to file a hardship application. The Regulations define "landlord" as a person receiving or entitled to receive rent for the use and occupancy of any housing accommodation. 9 NYCRR 2200.2(h). It is therefore the position of the Division, and the courts have also recognized, that a rent controlled "hardship" application filed pursuant to Section 2202.8 may be entertained with respect to buildings which have been converted to co-operative status. *See* Docket No. GL420075RT; *Application of Tager*, 320 N.Y.S. 2d 947 (Sup. Ct. NY Co. 1971).

Regarding the tenants' additional claim that the landlord had not acquired the property at least 36 months prior to the date of the hardship application, the Commissioner notes that this argument refers to DHCR's "Alternative Hardship" process, wherein the regulations require that an owner or an entity related to the owner must have acquired the building at least 36 months prior to the date of the application in order for an owner to be eligible for an Alternative Hardship adjustment. *See* DHCR Fact Sheet #39. No such requirement exists for the separate "Return on Capital Value" hardship process which the subject owner applied for in the proceeding below.

As for the claim that the rent increases should not have been pro-rated by share, the Commissioner notes that the allocation of the hardship increases among the subject rent controlled apartments on a per-share basis instead of a per-room basis was in conformance with Division procedure and is the most equitable allocation method.

The tenants' allegation that the rent collected from one of the owner-petitioner's non-rent controlled apartments was incorrect is unsubstantiated.

Regarding the tenants' claim that the landlord did not own the rent controlled apartments for the entire test year, the Commissioner notes that Section 2202.8(e) of the Regulations only limits the time frame the hardship application can be filed when a prior hardship increase has been granted or when the application is based upon the sales price of the property. Neither circumstance exists in this case.

Finally, the tenant-petitioners' contention that the first year increases issued below went beyond the Division's collectability limitations is deemed moot, as the recalculated hardship increases contained herein do not contain "break even waivers" and are limited to no more than 7 ½ percent per year.

As for the owner-petitioner's claim that it should be entitled to collect an MBR increase *in addition* to the 7 ½ percent hardship increase, the Commissioner notes that 2201.6 (a)(1) of the Rent and Eviction Regulations provides that "No new maximum rent established pursuant to

section 2201.4 of this Part, or adjustment pursuant to section 2201.5, 2202.7, 2202.8, 2202.9 or 2202.10 of this Title, or any combination thereof, shall increase the rent collectible from a tenant in occupancy by more than 7 ½ percent in any one calendar year [...]." Accordingly, it has been longstanding Division policy to require that the collection of Section 2202.8 hardship increases together with any received under the Maximum Base Rent Program (Section 2201.5), may not exceed 7 ½ percent in any calendar year. The owner's claim is without merit.

Regarding the owner-petitioner's claim that the Rent Administrator erred in deducting certain insurance costs, repair costs, and management allowance costs, a review of the record shows that the Rent Administrator properly deducted all non-substantiated expenses during the proceeding below and correctly calculated the management allowance costs for the subject premises.

Finally, the Commissioner also finds no error in the Rent Administrator's consideration of the buildings' total miscellaneous income during the proceeding below, rather than just that portion which assisted the owner-petitioner "in the operation of the subject units." *See Hertz Co. R.E. Inc.*, 295 A.D.2d at 180 (1st Dept 2002) (in which the court stated that it "is not irrational for [DHCR] to base hardship increases in favor of owners of cooperative shares on the income and expenses not of the particular shareholder seeking such an increase but rather of the entire building.").

THEREFORE, in accordance with the Rent and Eviction Regulations, it is

ORDERED, that this petition be granted in part for the tenant-petitioners; denied for the owner-petitioner; and that the Rent Administrator's order the be modified to amend the tenant-petitioners' monthly hardship rent increase amounts as described above; and it is further,

ORDERED, that the owner refund any excess rent which may have been collected as described herein within 6 months from of the date of this order and opinion.

ISSUED:

JAN 20 2023

Woody Pascal
Deputy Commissioner

State of New York
Division of Housing and Community Renewal
Office of Rent Administration
Gertz Plaza, 92-31 Union Hall Street
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There is no other method of appeal.

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

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEAL OF

[redacted] (Apt [redacted])

ADMINISTRATIVE REVIEW
DOCKET NO.: KP410050RT

RENT ADMINISTRATOR'S
DOCKET NO.: GQ410004UC

OWNER: Wadsworth
Terrace, LLC

PETITIONER X

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The above-referenced tenant of Apartment [redacted] filed a timely petition for administrative review (PAR) of an Order issued on March 31, 2021, by a Rent Administrator (RA) concerning 64 Wadsworth Terrace, New York, New York, 10040. The RA's Order that is the subject of this PAR found that the premises are exempt from rent regulation because the subject building was gut-renovated between November of 2013 and September of 2014.

On PAR, the tenant alleges that he began occupancy of apartment [redacted] at the subject premises on June 1, 2020 pursuant to a non-stabilized lease and remains in occupancy of said apartment to the present day, also pursuant to a non-stabilized lease; that he did not receive notice of the owner's substantial rehabilitation Application (the "Application") or of the RA's Order until March 22, 2022; that a review of the owner's Application shows that it is inaccurate, misleading and fraudulent; that the RA's Order should accordingly be reversed; that the building has 15 open Housing Preservation and Development (HPD) Violations, including one Class A, eleven Class B, and three Class C Violations; that the owner's Application included inaccuracies and omissions intended to mislead the RA regarding the extent of the rehabilitation; that the owner's Application was based on fraud and illegality, and may accordingly be challenged at any time; that the instant PAR is timely because the tenant only received a

copy of the RA's Order on March 22 of 2022 and the instant PAR was filed within 35 days of that date; and that the Commissioner has authority to reverse and remand an RA's order, and should do so in this case (citation omitted).

The tenant further alleges that, pursuant to Operational Bulletin 95-2 (OB 95-2), for work to qualify as a substantial rehabilitation 75% of building-wide and apartment systems must be completely replaced; that, further, ceilings, floors and wall surfaces must be completely replaced in common areas and completely replaced or made like new within each apartment; that the owner must also show that the building was in substandard or seriously deteriorated condition; that all new building systems must comply with applicable codes; that the owner must submit copies of the building's certificate of occupancy (C of O) before and after the rehabilitation; that the burden of showing substantial rehabilitation based on the totality of the circumstances is on the owner; that the owner has failed to demonstrate that at least 75% of the building-wide systems have been replaced, and has also failed to submit a valid C of O for the subject building; that the RA was therefore in error to find that the building was substantially rehabilitated; that, while the owner claimed that 100% of building services were repaired, its own evidence shows that this is not the case because blueprints it submitted state that pre-existing stairs and fire escapes would remain, because the contract states that no exterior work was to be performed, and because there is no place in any documentation referring to work on the roof; and that, as the building does not have an elevator or trash compactor/incinerator, the owner has only claimed replacement of 11 of the remaining 15 systems, which is less than the 75% replacement required by OB 92-5 for a substantial rehabilitation.

The tenant also alleges that no photographs were submitted of the condition of the building prior to the work at issue; that no invoices were submitted except for one invoice for consulting services; that the PW2 work permit forms for the DOB job pertaining to the supposed substantial rehabilitation state that work was not being performed in 50% or more of the building area, which conflicts with the owner's claim of substantial rehabilitation of the entire building; that the architect's affidavit of July 22,

2019, is from Mr. Hershkowitz, an architect who claims to have been retained by the owner beginning in 2013, while the blueprints submitted, as well as the PW1 forms, list Mr. Weiss as the job applicant; that, only in 2014 did Mr. Hershkowitz replace Mr. Weiss as the applicant of record; that there is an identity of interest between the owner and the contractors who allegedly did the work at issue; and that the PW1, PW3 and other DOB forms are signed by Tiny Nussbaum for owner, who also signed the construction contract on behalf of Platinum Renovations in his capacity as a partner of Platinum TNT, and who also countersigned the canceled checks on behalf of Platinum and Platinum TNT LLC.

Finally, the tenant alleges that the owner provided 23 checks totaling $1,884,175.00, none of which correspond to payments specified in the contract, only six of which refer to any invoices (none of these invoices were provided), many of which appear to be duplicates that were deposited into separate bank accounts, and at least six of which were countersigned by Tiny Nussbaum on behalf of Platinum TNT, who also has an ownership interest in the building; that the owner filed a PW1 form claiming that the owner is a non-profit, which is not true, and estimates cost of $200,00.00 for general construction; that the PW3 form claims "General Construction" with a sub-category of "Legalization" work costing $1,927,700.00; that these discrepancies warranted additional scrutiny; that the owner claims that when it bought the building it was vacant, even though two apartments were supposedly occupied by a former owner and family member, and even though there was a tenant in apartment [redacted] who had a lease spanning October 1, 2012 through September 30, 2013, a time that includes the time that the owners bought the building; that, again, Mr. Hershkowitz, the architect who affirmed the affidavit, was not even associated with the DOB job until 2014, after the work commenced, so he could not have inspected the building at the time that the owner purchased the building or before the work commenced; that the owner did not apply for a new C of O, rather relying on a Letter of Completion; that said Letter cannot substitute for a C of O because the Letter only states that, based on the nature of the work, a new C of O is not required; and that, without submitting a C of O, the Agency could not determine if a new C of O was required or if a substantial rehabilitation actually occurred.

The owner answered the tenant's PAR, alleging that, pursuant to Rent Stabilization Code (RSC) Section 2529.6, the scope of review on PAR is limited to facts and evidence submitted to the RA, and to new facts and evidence if the petitioner can establish that he or she could not reasonably have submitted such facts or evidence below; that the tenant's allegations are not within such scope of review; and that the PAR was untimely filed and should therefore be rejected on that basis.

The tenant then made two submissions, in which he repeated previous allegations and additionally alleges that the PAR was timely because the RA's Order was not served on him and because he filed his PAR within 35 days of receipt of the RA's Order that is the subject of the PAR; that he first received a copy of the RA's Order at issue on March 22, 2022, so his PAR, filed on April 21, 2022, was timely; that the owner does not address any of his substantive allegations; that the Agency is empowered to modify or revoke any order it has issued if such order was the result of illegality, irregularity in vital matters, or fraud (citations omitted); that a claim that an order is based on fraud or illegality is not time bound, and the tenant has shown that the owner perpetrated fraud by submitting contradictory and misleading statements and evidence; that the tenant has also shown irregularity, which is not time bound if the requestor can show why it did not timely make a claim based on such irregularity(ies), which is the case herein because the tenant was not served with the RA's Order until March of 2022; that PAR Order JN210030RO found that PW2 filings in that case, showing that work was performed in less than 50% of the building, combined with insufficient detail in PW3 filings, was sufficient in that case to deny the owner's substantial rehabilitation Application; that, in the instant case, DHCR never requested the PW2 permit filings and overlooked the lack of detail in the PW3 filings, which was an irregularity in a vital matter requiring correction; that the owner is attempting to correct its fraudulent substantial rehabilitation Application by inspecting all apartments; and that the owner only has the right to inspect apartments to correct violations, which only applies to three apartments in the building and cannot be accepted as justification for inspecting the remaining 28 apartments.

The tenant further alleges that all ceilings, flooring, plasterboard, and wall surfaces in common areas of the building do not appear to have been replaced; that conditions in these areas have resulted in three Housing Preservation and Development (HPD) violations, one of which is a Class A violation and the other two of which are Class B violations; that photographs included with his submission show that the surfaces in these areas were not completely replaced or rehabilitated even though the owner claimed that they were; that the building cannot, therefore, be considered to have been substantially rehabilitated; that there is damage resulting from leaks in the roof, which were the subject of the aforementioned HPD violations; that reinspection is pending for these violations, which were issued last year; that the owner claimed that the building was completely vacant for more than 60 days during the renovation; that a new C of O is therefore required under the Housing Maintenance Code of NYC (HMC); and that there cannot be a substantial rehabilitation under Section I. D. of OB 95-2 because of the violation of the HMC in not having a new C of O.

The tenant then made another submission, repeating prior allegations, and additionally alleging that the intercom system could not have been replaced as part of the supposed substantial rehabilitation at issue, which took place in 2013 or 2014, because the tenant of [redacted] went to court in 2010 regarding the intercom system, and that proceeding was discontinued under a stipulation in which the tenant acknowledged that all alleged violations had been corrected; that an HPD inspection requested pursuant to the aforementioned court proceeding resulted in a violation issued because the door to apartment [redacted] was not self-closing; that said violation was not corrected until 2020; that many other apartments still have outstanding violations for this same issue, and the owner knows that not all the doors in the building are up to Code; that the owner put a notice up in the building in May of 2022 asking tenants to notify the owner if their doors were not self-closing; that there are two outstanding violations for this issue, and there are also other apartments with the same problem but no violation issued for it; that it is therefore impossible that the doors and frames were substantially rehabilitated; that HPD inspections of July 23, 2013 resulted in 16 violations, one Class A, 14 Class B Hazardous, and one Class C Immediately Hazardous,

and two of these were the same as violations placed pursuant to an earlier HPD inspection of March 16, 2013; that many of these issues still exist, which shows that the building was not substantially rehabilitated, and also suggests that the owner harassed the tenants as a means to vacate their apartments and to conceal its fraudulent scheme to remove the building from rent stabilization; and that the owners are again trying to get access to the apartments to inspect, for the same issues as their previous request in July of 2022, which is intrusive and unjustified.

The owner then filed a response, in which it alleges that the PAR was untimely, should not have been docketed, should not have been served on the owner, and should have been dismissed as untimely; that the RA found that there had been a substantial rehabilitation based on architectural plans, an architect's affidavit, a new C of O/Letter of Completion, construction contracts, invoices and cancelled checks, photographs, DOB approval of the owner's application and plans for renovation on September 3, 2013, a Letter of Completion stating that work related to said application was competed and signed off on September 12, 2014, and on the fact that the scope of work described in the aforementioned architect's affidavit indicates that at least 75% of building-wide and individual apartment systems, including common areas, were replaced; that evidence of HPD violations nearly 10 years after completion of the substantial rehabilitation has no bearing on the facts, or upon the proper determination that the substantial rehabilitation was completed as found by the RA; and that the PAR should be denied on the merits as the tenant has raised no issue or problem with the RA's Order or with his determination.

The tenant made a final submission in which he alleges that the owner filed two non-payment eviction lawsuits against two separate tenants of the subject premises; that the petition in each lawsuit contains language stating that the premises are subject to rent stabilization; that the apartments at issue have been registered with DHCR, and that the rents demanded do not exceed the registered or legal stabilized rents; that the owner has admitted through these pleadings that apartments within the subject building are subject to rent stabilized and has thereby conceded that the building-wide substantial rehabilitation at

issue, which would have removed all apartments from rent stabilization, did not take place; and that, because the owner has not contested any of the facts or law presented by the tenant, and because the owner has admitted that the finding of substantial rehabilitation was in error, the PAR should be granted.

The Commissioner, after careful review of the record, finds that the PAR must be denied.

First, regarding the timeliness of the PAR, a review of the record reveals that the tenant herein was not served with the underlying RA's Order GQ410004UC, issued on March 31, 2021. The tenant herein submits proof, in the form of a lease, that he was in fact the legal tenant in occupancy of apartment [redacted] at the subject premises on March 31, 2021. The tenant herein filed a Freedom Of Information Law (FOIL) request to gain access to the RA's file and Order, and these documents were served on him on April 5, 2022, at the earliest. The tenant admits, however, that he received a copy of the RA's Order at issue on March 22, 2022. Accordingly, pursuant to Section 2529.2 of the RSC, the tenant herein was permitted 35 days from the day that he actually received the RA's Order that is the subject of his PAR (which date was March 22, 2022 as explained above) to file a timely PAR against said Order. The tenant's PAR was filed on April 22, 2022, which was within those 35 days. Said PAR is therefore timely and is accordingly properly considered and determined by the instant PAR proceeding/Order. It is noted that, as the tenant was not included in the RA's proceeding, all of his allegations and evidence are not beyond the scope of review on PAR and will be considered herein. It is also noted that, while the tenant references requests for reconsideration of Agency Orders, such requests may not be entertained in the context of the instant PAR proceeding.

Regarding the substantial rehabilitation at issue, a review of the record reveals that the owner did show that the premises were substandard or seriously deteriorated prior to the commencement of the rehabilitation, that more than 75% of the building-wide and apartment systems were replaced, and that the work at issue was paid for and conducted in compliance with applicable building codes and requirements.

The owner submitted an affidavit from its architect stating that "prior to commencement of the renovation work [he] inspected the subject building as well as the vacant apartments. There are 31 apartments in the subject building, of which 29 were vacant at the time of inspection. [His] inspection revealed that the vacant apartments were exceptionally deteriorated and uninhabitable." OB 95-2 states that rehabilitation "in a building that was at least 80% vacant of residential tenants" creates "a presumption that the building was substandard or seriously deteriorated at that time." The architect's affidavit is therefore sufficient under OB 95-2 to show that the building was in a substandard or seriously deteriorated condition prior to the rehabilitation at issue. Further, it is noted that the architect's affidavit agrees with the tenant's allegation that there were two apartments that were not vacant just prior to commencement of the rehabilitation. It is also noted that, even if there was a lease in effect for one of the apartments from October 1, 2012 through September 30, 2013, as alleged by the tenant, said lease expired before the commencement of the rehabilitation at issue. It is further noted that, although Mr. Hershkowitz did not sign some of the original project documentation, there is a DOB summary stating that the Application at issue was approved on 9/3/13 and that both Mr. Hershkowitz, as an architect, and Mr. Weiss, as an engineer, were applicants of record at that time; in other words, the fact that Mr. Weiss signed some of the original documentation does not mean that Mr. Hershkowitz was not involved from before initiation of the rehabilitation, and he has professionally and personally attested to such involvement. This is sufficient for this Agency to rely on his affirmations regarding all aspects of the rehabilitation at issue.

A review of documentation in the record reveals that all of the interior of the premises, including all existing building systems as well as individual apartments were renovated. This is supported by the contract which calls for replacement of all ceilings flooring and walls, the reframing of all apartments, electric and plumbing work, installation of new windows, doors, moldings, flooring and tiles, as well as general labor and "Rubbish Removal & Demolition". The extent of the work is also supported by DOB filings, and by other contracts for windows, for a new burner/boiler, and for consulting on the project. Photographs

provided by the owner show that the entire interior of the building was essentially gutted, reframed, and all interior systems were replaced, and that all apartment spaces and systems were also replaced. On September 15, 2014, DOB issued a Letter of Completion stating that the project was completed, while the scope of the project was delineated by the owner's architect who stated that "100% of all building systems as well as individual apartments were completely renovated. The interior of the subject building was demolished to the extent that only the outer shell remained, prior to renovation" by the owner. This statement by the architect is not inconsistent with the tenant's allegations that the roof and the fire escapes were not replaced, as these are exterior systems. While there is no evidence showing that the fire escapes and roof were replaced, there is evidence showing that the plumbing, heating, gas supply, electrical wiring, windows, interior stairways, kitchens, bathrooms, floors, ceilings and wall surfaces, and door frames were replaced building wide. Contrary to the tenant's allegations, the photographs and contract and other above-referenced documentation does support a finding that the interior stairways were replaced. There is no evidence in the record regarding intercoms. From the photographs and other evidence it is determined that pointing or exterior surface repair was not necessary. Given the lack of elevators or incinerators/trash compactors in the building, and that pointing was not necessary, and further that the roof, fire escapes, and intercoms were not replaced, 11 of 14 systems in the building were replaced, which means that 78.6% of the relevant systems were replaced. Because OB 95-2 requires replacement of 75% or more of building-wide and apartment systems in order for a rehabilitation to qualify as a substantial rehabilitation, and because the owner has shown replacement of 78.6% of such systems, the rehabilitation at issue is sufficient to qualify as a substantial rehabilitation.

The tenant refers to PW2 Work Permit Application Forms, alleging that said documents state that less than 50% of the building will be worked on. However, the record contains four PW2s, one dealing with "Plumbing", and the other three dealing with "Alteration". While each Permit Application states that the work at issue in said Application will be performed in less than 50% of the premises, and while all four PW2s reference the same Job Number, each Application references a different "Code". These

PW2s therefore pertained to different portions of the overall rehabilitation, and while each state that it refers to work in less than 50% of the building, together it can be determined that they support the other above-referenced evidence in the record showing that far more than 50% of the building was worked on pursuant to the totality of the project.

The evidence also supports a finding that the owner paid for the project at issue. The record contains a contract for $1,800,000.00, a PW3 Cost Affidavit showing costs of $2,702,700.00, and cancelled checks made out to the contractor and contemporaneous with the work at issue totaling $1,884,175.00. While these numbers are not perfectly consistent, it is not uncommon for estimates and payments to change as a project progresses and it is clearly evidenced, as outlined above, that the owner contracted for and paid in excess of $1,800,000.00 for the rehabilitation at issue. It is noted that, contrary to the tenant's allegations, none of the checks are duplicates.

The project received a Letter of Completion from the DOB dated 9/15/2015 and said Letter states that "a new certificate of occupancy is not required." The tenant's allegations that there is some irregularity in the owner's failure to obtain a new C of O is therefore not persuasive. Said Letter is also supportive of the finding that the work at issue was properly and acceptably completed. It is noted that the Letter of Completion shows that DOB found that the rehabilitation at issue was up to code, and the agency has accepted such Letters of Completion as evidence of substantial rehabilitations in the past.

Contrary to the tenant's allegations, there are no documents from the contractor or signed on behalf of the contractor by any member of the owner's organization. Specifically, contrary to the tenant's allegation, nowhere on the contractor's documents is the name Tiny Nussbaum set forth.

Other allegations made by the tenant, regarding alleged inspections of apartments by the owner, regarding alleged HPD violations placed before the rehabilitation (some of which are allegedly still pending), regarding HPD violations placed after the rehabilitation, regarding conditions with the walls, stairways

and railings some seven to eight-plus years after the rehabilitation, or regarding the intercom, do not render the findings of the RA, namely that there was in fact a substantial rehabilitation of the premises in 2013-14, incorrect. The rehabilitation was performed, as outlined by, and supported by, the evidence, as referenced above. While there may have been, and may still be, some HPD Violations (including some violations that were not formally removed from HPD records), and some present issues occurring several years after the rehabilitation, these issues do not render the RA's determination that there was in fact a substantial rehabilitation in 2013-14 incorrect, which is based on the evidence in the record as set forth in his Order and in the instant Order. Nor do such issues show owner fraud, again, in light of the facts and evidence presented.

Finally, the owner may not confer rent stabilization status on a given apartment by stating that said apartment is rent stabilized in a court pleading. A building or apartment is rent stabilized by operation of law, and stabilization status may not be conferred or relinquished by pleading or statement of an owner or a tenant. Accordingly, the Commissioner finds that, contrary to the tenant's allegations, statements by the owner's attorney, on what appear to be (at least partially) boilerplate pleadings in court cases, do not amount to admissions by the owner that the premises were not substantially rehabilitated and that the premises are therefore subject to rent stabilization.

THEREFORE, in accordance with the relevant provisions of the Rent Stabilization Laws and Regulations, it is

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

ISSUED:

JAN 05 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given. In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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 W 36th Villa, LLC., **PETITIONER**	: : :	ADMINISTRATIVE REVIEW DOCKET NO. KV210022RO RENT ADMINISTRATOR'S DOCKET NO. JW210003UC

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The above-referenced owner has filed this administrative appeal (PAR) against an order issued on September 15, 2022 by a Rent Administrator concerning the six housing accommodations in the premises known as 2846 West 36th Street, Brooklyn, NY which denied the owner's application for exemption of those premises from rent regulation based on the "substantial rehabilitation" thereof.

The order states: that as to rehabilitation the owner failed to submit ". . . evidence for . . . a DHCR determination, such as . . . cancelled checks, work contracts, invoices, the initial and final cost affidavit (PW3) and a current tenant list"; that the evidence thus "does not substantiate the owner's claim that 75% of building-wide and individual apartment systems . . . were replaced"; and that the application is therefore denied, the owner having "failed to prove that the building has been substantially rehabilitated within the meaning of Section 2520.11(e) of the Rent Stabilization Code."

On PAR, petitioner asserts that the evidence submitted was sufficient to prove that 75% of the building-wide and apartment systems were replaced; and that the Administrator erred in denying the owner's request for additional time to submit documentation and in denying the application with prejudice.

The owner quotes this agency's Operational Bulletin 95-2 to the effect that required documentation of "the scope of work actually performed" for substantial rehabilitation "**may include**" contractors' statements and contracts for work and that "[p]roof of payment by

the owner **may be required**" (emphasis by petitioner), arguing that "may be required" indicates that "an exemption application will [not] be categorically denied if an owner fails to provide said documentation." The owner argus that its evidence, including copies of approved plans related to Job #B00492395 from the Department of Buildings (DOB), sworn affidavits from the owner and architect and before and after photographs was sufficient to prove the substantial rehabilitation.

The owner asserts that following a Request for Additional Information (RFAI) issued by the Administrator on March 4, 2022, it asked for multiple extensions of time and that the Administrator "without warning" issued the decision denying the application. The owner includes a DOB Letter of Completion issued September 27, 2022, related to Job #B00492395.

The PAR is denied.

The Commissioner rejects petitioner's contention that the Administrator should have held the proceeding in abeyance. The owner decided to file its application on November 5, 2021 and would be expected at that time to submit sufficient evidence to prove a substantial rehabilitation. See Matter of Underhill-Washington Equities LLC v Div. of House. & Community Renewal, 47 Misc. 3d 1215[A], 1215A, 2015 NY Slip Op 50632[U], *3 [Sup Ct, Kings County 2015)(agency did not abuse its discretion when it determined to move forward with a proceeding). Indeed, the Administrator gave the owner ample opportunity to produce necessary evidence to support a finding of substantial rehabilitation and the Administrator is not required to keep the owner's application open for an indefinite period while the owner searches for evidence to support the claim.

The record is devoid of contractor invoices, cancelled checks and work contracts. The Commissioner finds that the owner should have been in possession of such documents given that the work was recently done in 2021 and therefore it was reasonable, under such circumstances, for the Administrator to require the owner to produce such evidence in this case. These documents were necessary to supplement the affidavits and establish the scope of the work and to prove that the costs were paid by the owner as claimed in his affidavit.

The Commissioner need not consider the new evidence (DOB Letter

of Completion) submitted for the first time on appeal. *See* Rent Stabilization Code §2529.6. However, even if considered, the Letter of Completion does not itself prove the substantial rehabilitation given the lack of the other evidence as discussed above. Moreover, even on PAR the owner offers that 75% of the required systems were not replaced. Indeed, the owner argues that while two of the listed 17 systems in Operational Bulletin 95-2 did not exist, only 11 of the remaining 15 systems were actually replaced. The owner states that the roof, elevator, fire escapes and interior stairways were "repaired" so that they were made structurally sound and therefore are an exception and do not require replacement. The Commissioner finds no such exception exists. Under Operational Bulletin 95-2, an owner must demonstrate that a system was "recently installed or upgraded" so that it is structurally sound and therefore need not be replaced as part of the substantial rehabilitation. There is no such proof in this case with regard to the roof, elevator, fire escapes and interior stairways, and therefore they are not exempted from the required percentage.

The owner having in sum shown no error by the Rent Administrator, it is

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

ISSUED:

JAN 24 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022

There is no other method of appeal.

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

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEALS OF

ADMINISTRATIVE REVIEW
DOCKET NOS.: KU210009RO
KU210010RO
KU210011RO
KU210012RO
KU210013RO

5523-WASHINGTON AVE AND
SAINT JAMES BROOKLYN, LLC.

RENT ADMINISTRATOR'S
DOCKET NOS.: JS210008UC
JS210009UC
JS210010UC
JS210011UC
JS210007UC

PETITIONER X

ORDER AND OPINION DENYING PETITIONS FOR ADMINISTRATIVE REVIEW

The above-named petitioner-owner timely filed administrative appeals (PARs) against the above-referenced Orders, each of which were issued on August 17 or August 18 of 2022, by the Rent Administrator (RA), concerning premises located at 379 Washington Avenue, 76 Saint James Place, 80 Saint James Place, 84 Saint James Place, and 369-373 Washington Avenue in Brooklyn, New York, 11238, which Orders found that the buildings at issue cannot be exempted from rent regulation pursuant to Rent Stabilization Code (RSC) §2520.11 (e) based on a substantial rehabilitation allegedly completed circa 1985-1987. The Commissioner notes that the PARs at issue are against RA's Orders that involve common issues of law and fact, and these PARs are therefore consolidated for disposition herein.

The owner commenced these proceeding on July 29, 2021, by filing five applications to determine whether buildings that are part of the subject premises are exempt from rent regulation due to substantial rehabilitation completed after January 1, 1974.

The RA's Orders determined that the subject buildings were rehabilitated under a NYC Urban Development Action Area Project (UDAAP), that the work was done on vacant City-owned Buildings, and that the rehabilitations were accomplished by means of government loans made pursuant to the City's Participation Loan Program (PLP) and under agreements with NYC that the Disposition Area would be used to house persons and families of low income which precluded the

deregulation of the buildings based on the alleged renovation. As a result, the RA determined that the subject buildings remain subject to rent regulations.

On PAR, the owner contends, among other things, that, if the RA failed to forward any tenants' submission to the owner, then the RA's Orders should be vacated, or at least the proceedings should be remanded to the RA so the owner can respond thereto; that the issue of UDAAP was not raised before the RA and the owner therefore did not have an opportunity before the RA to address this issue; that the rehabilitation was not accomplished by means of a participation loan; that there was no evidence that any conditional finance such as UDAAP was ever provided or used in the rehabilitation; that there is no regulatory agreement with the City; that, although the prior owner, Mohawk Housing Association (MHA), signed the original Land Disposition Agreement (LDA), which included a participation loan, the amendment to the LDA altered the structure of the transaction, increased the price of the purchase from $405,000.00 to $1.8 million, required the owner to obtain funding from private sources, absolved the City of any loan obligation for the rehabilitation, and allowed MHA to convert the buildings into condominium or co-ops without any restrictions as to the income or asset level of any future purchasers of units; that said amendment to the LDA states that the City would take back a $1.4 million market rate purchase money mortgage; that MHA obtained private financing from Reilly Mortgage Group, Inc.; that MHA gave the purchase money mortgage and second mortgage back to the City of New York; that a search of the Automated City Register Information System (ACRIS) shows no regulatory agreement of any kind between MHA and any City agency; that none of the agreements at issue included any restrictions on rent or on tenant selection, or any other covenants involving affordable housing or rent stabilization; that §§691-698 of the Urban Development Action Area Act (UDAAA) do not require rent stabilization coverage, and, in any event, there was no UDAAA financing of the rehabilitation; and that the record makes clear that neither MHA nor the City itself treated the premises as a low-income housing facility, which is reflected by the amendment to the LDA, by the absence of any regulatory agreement, and by the high rents charged in 1987.

The tenants answered the Owner's PAR, alleging that the owner received a purchase money mortgage of $1.4 million from the City of New York, which in fact functioned as a loan pursuant to NY General Municipal Law (GML) Chapter 24 Article 16, §696-a (2); that receipt of such mortgage/loan required that, upon completion of the rehabilitations of the subject buildings under UDAAP, facilitated by such mortgage/loan from New York City, all residential units in the rehabilitated buildings became subject to rent regulation; and that the original sponsor-owner (MHA), and its successors (including petitioner), are bound by these terms and the buildings and apartments at issue may not, therefore, be deregulated.

The owner responded to the tenants' answer, conceding that the City did provide a purchase money mortgage to MHA, but alleging that said mortgage was at a market rate of interest. The owner also alleged that UDAAA, §696-a (2) does not apply because it was not enacted until 1986, which was the year after MHA obtained its purchase money mortgage in 1985.

The Commissioner has reviewed the evidence in the respective records relevant to the issues raised by the PARs. The Commissioner, having reviewed the records herein, finds that the PARs should be denied.

Contrary to the owner's allegations, the RA did not fail to forward any tenant's answer to the owner because there were no such answers submitted to the RA by any tenant. Also, contrary to the owner's allegations, the UDAAP was in fact properly mentioned by the RA because it is mentioned by the 1985 deed and by the LDA, both of which documents were submitted by the owner itself to the RA. It is noted that the UDAAP document itself was not submitted by the owner, although, again, it seems that it was intimately related to the deed and to the LDA submitted by the owner. It is further noted that, although the United States Department of Housing and Urban Development (HUD) regulatory agreement, discussed below, was submitted by the owner, it is almost totally illegible.

The Commissioner finds that the former owner (MHA) took a $1.4 million purchase money mortgage from HPD/NYC to purchase the premises in 1985. This loan is recorded in ACRIS. It is noted that ACRIS shows this loan was taken by MHA in November 1985, the same month as MHA purchased the premises, and that said loan was not fully repaid until 2016. It is further noted that the owner concedes that said purchase money mortgage was provided to purchase the subject premises. It is also noted that HUD insured the private loan that MHA took out to effectuate the alleged rehabilitation at issue ($6.15 million) under a Federal Housing Administration (FHA) program, and that there was a HUD regulatory agreement executed contemporaneous with such transaction; again, as stated above, said agreement was submitted by the owner but is almost totally illegible.

Section 403 of the LDA states that the owner "...agrees that its purchase of the Disposition Area, ...will be used, for...**housing of persons and families of low income and not for speculation in the land holding**.... [emphasis added]." Further, Section 511 of the LDA states that "...the grantee, its **successor and assigns to the land conveyed**...shall devote such land to the uses specified in the UDAAP.... [emphasis added]." Accordingly, the use of the property for persons and families of low income is established, and such restriction binds not only MHA but all subsequent owners for the duration of the LDA. It is noted that the LDA is still in effect to this day. It is further noted that, even if the prior owner obtained private loans for the rehabilitation at issue, this does not absolve said owner, and subsequent owners, from obligations incurred pursuant to the LDA agreement with HPD.

Regarding the Amendatory Agreement, said Agreement specifically only amends Section 102 of the LDA, changing the purchase price and allowing for the establishment of "a regime of condominium ownership" pursuant to the Real Property Law or for the creation of "a cooperative housing corporation" pursuant to General Business Law. However, the above-referenced Section 403 of the LDA, requiring that the premises be used, for...housing of persons and families of low income and not for speculation in the land holding...", and the above-referenced Section 511 of the LDA, specifying that "...the grantee, its successor and assigns to the land conveyed...shall devote such land to the uses specified in the UDAAP...", were not in any way modified by said Amendatory Agreement. Accordingly, the Amendatory Agreement did not in change the owner's obligation to use the premises for low-income housing, or the fact that future purchasers, such as the owner herein, are bound by said obligation for the duration of the LDA, which, again, remains in full force and effect to this day.

While it is uncertain whether PLP funds were used in purchasing the premises, it is clearly established that $1.4 million was provided to MHA by HPD as a purchase money mortgage, that a private rehabilitation loan of $6.15 million to MHA was insured by HUD, that the LDA requires

that the housing units in the subject buildings be used for low-income persons or families, that there was no amendment to such requirement, that MHA and subsequent owners (including the current owner) are bound by these requirements at the least for the duration of the LDA, and that the LDA remains in effect. Accordingly, the RA correctly determined that the subject premises are precluded from deregulation. It is noted that, while UDAAA §696-a (2) does not apply because there is no evidence that the kind of loan set forth by such Section was taken by MHA for the rehabilitation at issue, and because the loan was received prior to passage of said Section, UDAAA §691 (enacted in 1979), which is the authority for the UDAAP herein, states that the policy and purpose of a rehabilitation of an area such as the one at issue, is to create (in the instant case) residential use, which "is a public use and public purpose essential to the public interest, and for which public funds [such as the HPD and HUD-backed funds] may be expended." Therefore, deregulating the subject premises would also be contrary to the purpose and policy of the UDAAA and of the UDAAP herein.

THEREFORE, in accordance with the applicable sections of the Rent Stabilization Law and Code, it is

ORDERED, that the petitions are denied, and the Rent Administrator's Orders are affirmed.

ISSUED:

JAN 26 2023

WOODY PASCAL
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given. In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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 NO.: KV410016RO
8TH AVENUE HOLDINGS LLC	RENT ADMINISTRATOR'S DOCKET NO.: FR410002UC
PETITIONER	TENANT(S): VARIOUS

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The petitioner timely filed an administrative appeal (PAR) against an Order issued on September 14, 2022, by the Rent Administrator (RA) concerning the building located at 2807 Eighth Avenue, New York, NY, 10039. Said Order denied the petitioner's application to exempt the subject building from rent regulation based on a substantial rehabilitation. The RA's Order found that, on May 5, 2022, the petitioner was requested to provide leases, lease renewals, and preferential lease riders for all tenants currently residing in the subject building since the building had been registered with DHCR from 2012 to 2021, and such registrations indicated that the tenants were issued rent stabilized leases with preferential rents; that the petitioner refused to provide the requested leases, lease renewals, and preferential lease riders; and that, rather, the petitioner submitted a response dated June 22, 2022, which response included only leases issued to tenants in 2011.

On PAR, the petitioner asserts that it replaced the plumbing, heating, boiler, gas supply, electrical wiring, windows, roof, kitchens, bathrooms, floors, ceilings and wall surfaces as needed, and all doors and frames, and restored the fire escapes and interior stairways; that the subject premises was in severe disrepair and was completely vacant at the time of the renovation; that the petitioner retained an engineer to prepare plans for a

complete substantial rehabilitation; that it provided complete and approved DOB architectural plans; that the main job number was 102545195 for renovation of floors two through five; that work was also done under job number 120363221 for the basement and commercial space; that the owner hired a master plumber, a registered general contractor, a window installer, electrical contractors, and all necessary professionals, to complete this project; that the project cost in excess of $232,000.00; that the petitioner submitted the affidavit of Bahram Tehrani, a professional engineer, which affidavit fully set forth the scope of work performed; and that petitioner has shown that the building has been substantially rehabilitated pursuant to RSC §2520.11(e).

The petitioner also alleges that the RA's decision to deny the application was not based on whether or not the renovations were completed and was therefore arbitrary and capricious; that the petitioner produced leases from the first tenants who moved into the building after the renovations were completed; that DHCR has no basis to request leases for current tenants since the petitioner produced all of the leases for tenants who moved into the building after the renovations and none of those tenants are still in occupancy; that, if DHCR thought that there was a different date that the renovations were completed, it could have issued a decision stating that "any tenants who moved in after that certain date would be stabilized until they vacated"; that the RA made no analysis of the renovations that were completed, and does not state that the renovations were not completed, rather denying the application because the petitioner did not produce current leases, despite the petitioner having proved that a substantial rehabilitation was in fact completed; that the petitioner was under a mistaken belief that it needed to file DHCR registrations until DHCR issued a decision on the application; that rent regulatory status is based on the law and cannot be created by waiver or estoppel (citation omitted); that waiver is the voluntary and intentional relinquishment of a known existing legal right and should not be lightly assumed (citation omitted); and that the petitioner has completed a substantial rehabilitation and the entire building should therefore be found to be exempt from rent stabilization (citing RSC §2520.11(e)).

Upon review of the record, the Commissioner finds that the evidence supports the RA's determination that the owner is not entitled to deregulate the building based upon substantial rehabilitation, and that the PAR must therefore be denied.

The RA was correct to find that the petitioner should have produced the requested leases and riders for review. The subject premises has been occupied subject to rent stabilized leases since at least 2011. In addition, the premises was subsequently registered up to 2021, and preferential rents were registered during those years. The leases from 2012 to 2021 were requested by the RA but were not provided for review by the petitioner because petitioner claimed that such review was irrelevant. It is noted that the DOB plans provided as evidence for the rehabilitation show approvals, preliminary plans, and examinations, that began in 2010 or 2011 but that ended in 2019.

The Commissioner agrees with the RA's finding that the petitioner's application may not be granted because the requested leases and lease riders were not submitted as requested by the RA. Said leases and riders should have been submitted, and examination of these documents was essential in this case, for the following reasons as set forth by the RA's Order:

1. The requested leases and riders may provide information as to the status of the work over the period of 2011 to 2021 if a reason is given to explain the preferential rents;

2. Given that the owner has treated residents from 2011 through 2021 as rent stabilized, the leases and riders requested may give additional information as to why the owner has treated and represented such tenants as rent stabilized, and they should be examined;

3. The requested leases and riders may help ascertain the actual date of completion of the alleged substantial rehabilitation, which is important:

(a) to determine whether the work was a part of a single action or plan rather than a series of upgrades,

(b) to determine whether residents in occupancy before the completion of the substantial rehabilitation are entitled to continued rent stabilization protection. Although, the petitioner claims that future tenant status is not relevant, such status is central to the application herein, which is an application to determine whether the building and apartments are subject to or exempt from rent regulation. Given the ambiguity and lack of clarity created by the petitioner, the RA was correct to require production of leases and riders that would clarify the situation.

Further, as stated by the RA's Order, the residents are entitled to know the impact of the Agency's determination upon them.

The Commissioner accordingly finds that the RA's Order was correct, and that the subject building is not exempt from regulation. The petitioner must therefore comply with the directives of the RA's Order at issue and file annual registrations with DHCR and offer regulated leases to all affected tenants in accordance with the Rent Stabilization Law and Code.

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

ORDERED, that the owner's petition is denied, and that the Rent Administrator's Order is affirmed.

ISSUED:

JAN 31 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

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There is no other method of appeal.

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

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEAL OF

Melrose 250 LLC

ADMINISTRATIVE REVIEW
DOCKET NO.: KV210009RO

RENT ADMINISTRATOR'S
DOCKET NO.: GX210004UC

TENANTS: Various

PETITIONER X

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The owner filed a timely petition for administrative review (PAR) of an Order issued on September 8, 2022, by a Rent Administrator (RA) concerning 250 Melrose Street, Brooklyn, NY 11206. The RA's Order that is the subject of this PAR found that the owner's renovation of the premises did not qualify the premises for exemption from rent regulation; that the subject building is therefore still subject to rent regulation; and that the owner must file annual registrations and offer regulated leases to all affected tenants.

On PAR, the owner alleges that the RA incorrectly found that 1 the renovation under NYC Department of Buildings (DOB) Job #320971677 (Job #677) does not qualify the premises for exemption under Rent Stabilization Code (RSC) Section 2520.11(e), 2 the owner did not show that 75% of building-wide and individual apartment systems were replaced, 3 architectural plans submitted by the owner did not include the DOB Approved Job Number, when DOB Approved Job Numbers were in fact on every page of said plans, 4 Job #677 and the architectural plans filed by owner did not show 75% of building systems were replaced; that the RA's Order incorrectly diverged from prior precedent; that the RA's Order failed to consider and weigh all evidence submitted; and that the owner submitted more than enough evidence to show that the building was substantially

rehabilitated and should therefore be exempt from rent regulation pursuant to RSC Section 2520.11(e) and Operational Bulletin 95-2 (OB 95-2).

The owner further alleges that the affidavit of the owner's architect, and the architectural plans filed with DOB, show that the owner completely replaced the plumbing, heating system, gas supply, electrical wiring, windows, roof, interior stairways, kitchens, bathrooms, floors, ceilings and wall surfaces, and all doors and frames; that the renovation included pointing and exterior surface repairs as needed, installation of a new intercom system, and repair of those portions of the fire escapes that were not structurally sound; that, as the building does not have elevators or incinerators/waste compactors, the owner replaced 14 of the 15 systems in the building, which is 93.3% of said systems, thereby satisfying the 75% replacement requirement for a qualifying rehabilitation; that photographs submitted by the owner show the building after completion of the substantial rehabilitation; and that the RA's determination that the owner failed to replace at least 75% of the building-wide and apartment systems in the building was incorrect and must be reversed.

The owner submitted a supplement to the PAR, alleging that the RA was incorrect to find that, because the application for exemption from regulation based on substantial rehabilitation was denied, the building is subject to rent stabilization; that this is incorrect because, even if the application at issue were properly denied, there are many other ways in which the building could be, or could have become, deregulated; that, at a minimum, the RA's Order must be modified to stated that, while the application at issue is denied, the building is not necessarily subject to rent stabilization as a result; that, prior to the rehabilitation at issue, which was completed on or about April of 2015, the building was not subject to rent stabilization as it contained less than six residential units; that, as part of the rehabilitation at issue, the owner reconfigured the original five apartments and created a sixth additional apartment that did not previously exist; that it is well settled that, when an owner repurposes an existing space to create a new apartment that did not previously exist, the owner is entitled to charge a first rent pursuant to RSC Section 2520(11)(r)(12); and that the Appellate

Division of the First Department held that, if there is no rental history due to the creation of a new unit with completely different parameters, there is no rational basis for calculation of a legal rent because such calculation must be based on a continuous chain of rental history (citing Matter of 300 W. 49th St Assoc. v DHCR, 212 AD2d 250 (1st Dept 1995).

The owner further alleges that, prior to passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA), when a first rent agreed to between an owner and a tenant was over the threshold for deregulation, said apartment became exempt from deregulation; that, pursuant to the rehabilitation at issue, the owner created six completely new apartments with completely new parameters, and was therefore entitled to charge a first rent for each of these apartments; that the first rents charged by the owner after such reconfiguration/rehabilitation were all well above the high rent vacancy deregulation threshold and the apartments were thereby deregulated; that, therefore, even if the application herein is properly denied, the apartments at issue are not subject to rent regulation and the RA's Order was incorrect to state that denial of such application means that the subject apartments are rent stabilized; and that, nonetheless, the PAR clearly showed that the premises were substantially rehabilitated and are accordingly exempt from rent regulation.

The Commissioner, after careful review of the record, finds that the PAR must be denied.

The RA was correct to find that the DOB documentation for Job #677 does not show 75% of the building systems were replaced. The Application for Job #677 states that it is for plumbing and general construction. The Job description in said document is, as stated by the RA, "renovate existing mixed use building, relocate bathrooms and kitchens, no change to use, egress or occupancy." The Commissioner finds that, not only does this description fall short of the replacement of 75% of building systems required under OB 95-2 for a qualifying rehabilitation, it also belies the owner's allegation that the work at issue changed the number of apartments from five to six (as such a change would in fact have been a change in "occupancy"). The Job #677 Work Permit states that the owner will not be "performing work in 50% or more of area of the building"

and will not be "demolishing 50% or more of the area of the building". The Commissioner finds that if the work were to replace more than 75% of building systems, it would have to involve work in more than 50% of the building. Job #677 Schedule B states that the work involves kitchens and bathrooms, ranges, dryer, hot water heater, furnaces, and gas piping, while the Job #677 Electrical Application states that it involves rehabilitation including general wiring and HVAC wiring. In total, therefore, the DOB documentation submitted by the owner shows that far less than 75% of building systems were replaced, and that less than 50% of the building was to be worked on and/or demolished. Said documentation also belies the owner's allegation that there was a change in occupancy pursuant to the work at issue, as outlined above.

While the affidavit of the owner's architect states that extensive work was done in the subject premises, such work does not agree with the work done pursuant to Job #677, as outlined above. Further, while said affidavit refers to work done in "5 apartments", the owner alleges that there were six apartments created pursuant to the work at issue, and the certificate of occupancy (CO) effective 8/20/20 also states that there are six dwelling units. It is noted that the Property Tax benefit Information printouts submitted by the owner state that there are four units in the subject premises for the tax year from 7/1/18 to 6/30/19. It is also noted that, on the Job #677 Electrical Application, the owner stated that the work is not related to a new or amended CO. Consideration of all of the above-outlined evidence together renders the owner's statements regarding the scope of the work and the nature of the renovation unreliable.

Finally, contrary to the owner's allegation, and as correctly stated by the RA's Order at issue, the plans submitted to the RA did not in fact included the DOB Approved Job Number. While, on PAR, the owner submits photographs of such plans which photographs do include the DOB Job Number (#677) and a Scan Code on each page of the plans, the original full plans submitted to the RA do not include such Number or Code on any page of said plans. The RA, therefore, correctly found that such Job Number was not included on the DOB approved plans. RSC Section 2529.6 prohibits consideration of new evidence on PAR that was not submitted to the RA, unless it can be established that it could not have been

submitted to the RA. There is no reason why the plans that seemingly include the DOB Job Number, which plans were stamped October 20, 2014, could not have been submitted to the RA, and they cannot, therefore, be considered now for the first time on PAR.

Regarding the rent regulated status of the subject building, the RA simply and correctly stated that the building is not exempt from rent regulation due to the application at issue. Pursuant to RSC Section 2520.11(e) and to OB 95-2, the subject premises are not deregulated under the facts as outlined by the RA and in this Order. While the RA correctly stated that the premises are therefore rent stabilized and ordered the owner to fulfil its responsibilities under rent stabilization, she did not opine on the possibilities that the premises, or any specific apartment, might not be subject to rent stabilization for reasons other than the substantial rehabilitation at issue. The instant proceeding is confined to a determination of the owner's application to determine whether the subject building is exempt from regulation based on substantial rehabilitation. Other possible grounds for exemption from regulation are not at issue and have not been addressed in the instant proceeding.

THEREFORE, in accordance with the relevant provisions of the Rent Stabilization Laws and Regulations, it is

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

ISSUED:

FEB 10 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

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There is no other method of appeal.

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

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEAL OF

ADMINISTRATIVE REVIEW
DOCKET NUMBER KX210010RO

973 MET, LLC

RENT ADMINISTRATOR'S
DOCKET NO.: JW210002UC

PETITIONER X

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

Petitioner timely filed an administrative appeal (PAR) against an order issued on November 4, 2022 by the Rent Administrator (RA) concerning all building-wide housing accommodations in the premises located at 973 Metropolitan Avenue, Brooklyn, NY 11211, which denied the petitioner's application for exemption from rent regulation by virtue of substantial rehabilitation.

Petitioner commenced this proceeding on November 18, 2021 by filing an application to exempt the premises from rent regulation due to substantial rehabilitation in accordance with Rent Stabilization Code (RSC) §2520.11(e) and DHCR Operational Bulletin 95-2 (OB 95-2).

Petitioner alleged that it purchased the subject premises on May 7, 2021; that the subject premises was entirely vacant on or before April 10, 2021 by virtue of a series of Surrender Agreements signed by former tenants; that the renovations commenced in July 2021 under Department of Buildings (DOB) Job No. B00528190-11; that the entire building was gut-renovated and demolished inside; that all new building systems were installed including a new roof and that it spent approximately $100,000 to gut-renovate the subject premises, which includes payments to the contractor ($75,000), the architect ($20, 000) and other permits and fees.

In support of the application, petitioner submitted: an affidavit from Architect Philip Toscano, who supervised the work and made all relevant filings with the DOB; a signed proposal and an affidavit from the contractor Boxwood Contractor, LLC; DOB Work Permits B00326760-11-LA (basement), B00542718-11-EL (service work, utility and general wiring), B00528190-11-GC (cellar, all apartments, kitchens and bathrooms, and storage), and B00528190-S1-PL (all plumbing work); various architect diagrams of Plan/Work stamped "accepted" by DOB; copies of canceled

checks; copy of the owner's registry of the deed of the subject building; numerous photographs of interior work and the exterior of the premises. The owner asserted that more than 75% of the building systems and the common areas were replaced.

On June 13, 2022, the agency requested that petitioner provide the following additional information/evidence within 21-days:

1. Submit a copy of the deed of purchase.
2. What caused the tenants to vacate the building? Is there a vacate order? Submit a copy of the vacate order.
3. The dates when renovation commenced and when completed.
4. Provide a copy of the DOB Job Application Detail.
5. The total cost of the renovation;
6. A copy of detailed work contract for the renovation and systems replaced as well as corresponding proof of payment.
7. An affidavit or sworn statement from the architect/engineer who filed the job at the DOB. The affidavit must describe in detail the specific building-wide and individual apartment systems replaced and the nature of the work done in common areas pursuant to DHCR OB 95-2 (copy enclosed). The copy you submitted was insufficient.
8. The initial and final PW3 (Cost Affidavit) which the architect certified to the DOB.
9. A full-scale copy of the architectural plans for the project approved by DOB.
10. A copy of the DOB Letter of Completion and/or New Certificate of Occupancy.
11. Did any of the previous tenants reoccupy their apartments?
12. Did the owner file for and/or receive any government financing or tax abatement for the project?
13. Submit a list of all current tenants and provide two sets of mailing labels for each.

On August 18, 2022, DHCR served the owner a Final Notice to submit information/evidence on the following:

1. Surrender Agreements were provided only for four units. How did the remaining units in the building become vacant?
2. The dates when renovation commenced and when completed.
3. Provide a copy of the DOB Job Application Detail.
4. Total cost of the renovation.
5. A copy of detailed work contract for the renovation and systems replaced as well as corresponding proof of payment.
6. An affidavit or sworn statement from the architect/engineer who filed the job at the DOB. The affidavit must describe in detail the specific building-wide and individual apartment systems replaced and the nature of the work done in common areas pursuant to DHCR OB 95-2 (copy enclosed). The copy submitted was insufficient.
7. The initial and final PW3 (Cost Affidavit) which the architect certified to the DOB.

8. A full-scale copy of the architectural plans for the project approved by DOB.
9. Did any of the previous tenants reoccupy their apartments?
10. Did the owner file for and/or receive any government financing or tax abatement for the project?
11. Submit a list of all current tenants and provide two sets of mailing labels for each.

On November 4, 2022, the RA issued an order denying petitioner's application for substantial rehabilitation. The RA stated, amongst other things, that the petitioner failed to submit the necessary evidence (such as DOB Job Application Detail, work contracts, invoices, proper proof of payment, Architect/Engineer Affidavit, full scale plans as requested on June 13, 2022 and August 18, 2022) for proper DHCR examination and determination. Accordingly, the RA found that the owner failed to prove substantial rehabilitation within the meaning of RSC §2520.11(e).

On PAR, petitioner contends that a request for extension was sent to the RA on September 6, 2022 to deal with a DOB audit and additional time needed to resolve that issue. A copy of a letter from Boss Property Advisors to DHCR, purportedly hand-delivered to DHCR offices in Jamaica, Queens, was annexed to the PAR. The letter requests more time to respond to DHCR requests because the DOB application has been placed on hold and cannot be signed off on until various objections are resolved (a list of audit objections from DOB to petitioner was also attached). Petitioner contends that it needs an "open extension" to resolve the matter.

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

As a first matter, a review of the RA file does not reveal the petitioner's September 6, 2022 letter for an extension. However, even assuming such letter was sent and had been considered, the Commissioner denies petitioner's request for an open extension of time to resolve DOB issues. This matter was pending before DHCR for approximately one year before an order was issued and the record demonstrates that the RA gave petitioner ample opportunity to produce necessary evidence to support a finding of substantial rehabilitation. The RA is not required to keep the owner's application open for an indefinite period while the owner gathers evidence or resolves DOB issues in support of its application. The owner decided to file its application on November 18, 2021 and would be expected at that time to submit sufficient evidence. See Matter of Underhill-Washington Equities LLC v Div. of House. & Community Renewal, 47 Misc. 3d 1215[A], 1215A, 2015 NY Slip Op 50632[U], *3 [Sup Ct, Kings County 2015)(agency did not abuse its discretion when it determined to move forward with a proceeding, instead of continuing to hold the proceeding in abeyance).

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

ORDERED, that this petition be, and the same hereby is, denied, and that the Rent Administrator's order be, and the same hereby is, affirmed.

ISSUED:

FEB 21 2023

Woody Pascal
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

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There is no other method of appeal.

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

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEAL OF

602 44 REALTY, LLC.

ADMINISTRATIVE REVIEW
DOCKET NO.: KT210018RO

RENT ADMINISTRATOR'S
DOCKET NO.: JO210003RP

TENANTS: VARIOUS

PETITIONER X

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

The above-named petitioner-owner timely filed an administrative appeal (PAR) against the above-referenced Order, issued on July 27, 2022, by the Rent Administrator (RA) concerning the premises located at 602 44th Street, Brooklyn, NY 11220, which Order found that the premises at issue cannot be exempted from rent regulation pursuant to Rent Stabilization Code (RSC) §2520.11(e) based on a substantial rehabilitation allegedly completed circa 1978-1981. Said Order, issued pursuant to remand, determined that the premises are not exempt from regulation because the work performed in 1981 was done under provision of Article 5 of the PHFL which placed the premises under a Regulatory Agreement supervised by HPD and therefore precluded said premises from deregulation, and because the owner did not submit requested information even after having been granted several extensions of time in which to do so.

On PAR, the owner contends that DHCR made requests for documentation that is difficult to procure; that the owner asked HPD for the letter requested by the RA but HPD did not respond; that the Regulatory Agreement ended on March 7, 2006 when the mortgage was paid off; that the RA's request for documentation was superfluous as the renovation was clearly performed as shown by the Regulatory Agreement; that said Agreement was subject to HPD supervision; that the RA's Order, without stating any basis in law, claims that Article 5 of the PHFL precludes deregulation; that said Article 5 does not preclude deregulation; that Operational Bulletin 95-2 (OB 95-2) mirrors RSC §2520.11(e) in some respects; that OB 95-2 is not, however, a regulation; that the RA's request for DOB records fails to take into account the fact that such records were created more than 40 years ago; that DHCR cannot require that the renovation comply with guidelines stated in OB 95-2, which was promulgated in 1995, when such Bulletin did not exist at the time of renovation in 1981; that, even if DHCR has a basis to request DOB records, the owner should have been provided with as much time as needed to locate and provide such records; that no party raised the issue of deregulation preclusion under Article 5 of the PHFL; and that the owner was denied

due process because, while the RA based her decision on said Article 5, the owner was not given an opportunity to address this issue.

The tenant answered the PAR, asserting that the owner had a total of 18 months to furnish the documents requested by the RA, which was more than enough time; that, in July of 2021, the owner admitted that DOB's offsite facility had reopened after the pandemic, yet the owner did not submit the requested DOB documentations even though it had at least 15 months to do so; that PAR Order IX210019RO, issued in another proceeding, found that, while documents such as contractor invoices, works records, and proof of payments are needed to support a substantial rehabilitation finding, they are not the only documents needed; that PAR Order IX210031RT, the Order of remand leading to the RA's Order at issue herein, states that "the genesis of a substantial rehabilitation begins with DOB filings concerning the work."; and that the need for and retrieval of DOB records is routine and commonplace in cases of this nature.

The owner replied to the tenant's answer, asserting that Order IX210019RO has no precedential value because it was appealed to the Supreme Court; and that DOB documentation is often relied upon by DHCR in cases such as this one, but such documentation is not an absolute requirement.

The Commissioner, having reviewed the entire evidentiary record, finds that the PAR should be denied, and that the RA's order should be affirmed.

The owner's application for a substantial rehabilitation exemption was correctly denied by the RA because the owner failed to provide any of the documents requested by the RA, despite having 18 months to do so. The RA specifically requested 1) a clear copy of the Deed which transferred the property to the initial developer, 2) a letter from HPD explaining when, why, and how HPD regulation ended, 3) a list of buildings and units involved in the rehabilitation (including complete building addresses and any a/k/a/'s), 4) complete DOB job file, including a full-scale copy of the approved architectural plan, and all certifications of the building systems replaced in the rehabilitation, and 5) an affidavit from a licensed architect or engineer who has reviewed the plans/DOB Job file and inspected the building, describing the specific building-wide and individual apartment systems replaced and the nature of work done. The owner made several requests for extensions of time to provide this documentation, all of which were granted by the RA. While, on January 12, 2022, the owner made its last request for 33 days, until February 14, 2022, to provide some of the requested documentation, the owner made no further submissions, and as of July 27, 2022, the issuance date of the RA's Order under consideration, the owner had not submitted any of the requested documentation. The RA therefore gave the owner ample time to produce the necessary documents or to provide a reasonable explanation as to why the requested documents could not be obtained, and was correct to issue her Order more than six months after the owner's last communication. Further, the RA was correct to deny the owner's application given that the owner failed to provide any of the requested documentation or to provide any explanation as to why such documentation was not provided.

The Commissioner does not agree with the owner's assertion that the description of the proposed rehabilitation as set forth in the Regulatory Agreement is, by itself, enough to demonstrate the sufficiency of the substantial rehabilitation. Said Agreement merely set forth the work that the owner proposed to, and agreed to, perform. In order to approve an application to deregulate a premises based on substantial rehabilitation, such as the application at issue herein, an owner is required to provide proof that the necessary work was in fact performed, not that it

was agreed to and/or proposed. In the instant case, there is no evidence in the record to corroborate the owner's allegations that sufficient work was performed to qualify as a substantial rehabilitation that would justify the granting of the owner's Application herein. Again, as discussed above, the owner did not submit any of the documentation requested by the RA, and the RA therefore properly based her decision on the record before her, which did not contain enough documentation to support the owner's contentions of a qualifying substantial rehabilitation.

Although Article 5 of the PHFL was relied upon by the RA, and the owner has not hitherto had the opportunity to address this issue, the owner's concerns in this regard are considered now in the instant Order. Said Article 5, §101 ("Policy of state and purpose of act") states that the areas developed under such Article are to be "regulated by law as to profit" and are for "public use...in the public interest". In addition, page 21 of the Regulatory Agreement provides that the inhabitants of the premises are to be "Lower Income" or "Very Low Income" tenants. While the owner alleges that Article 5 of the PHFL does not provide for regulation of the premises, the above referenced Article 5 Section 101, the Regulatory agreement, and the fact that HPD was involved, support the RA's finding that deregulation of the premises is precluded.

It is noted that, while the owner alleges that the premises may be deregulated because the Regulatory Agreement has expired, there is nothing in said Agreement stating any expiration date. Although the mortgage seems to have been paid off in 2006, there is nothing in the Agreement, or anywhere in the record, showing or stating any date of expiration of the Regulatory Agreement. Accordingly, the argument that the premises may be deregulated based upon an alleged expiration of the Regulatory Agreement is not persuasive.

Moreover, the developer received a mortgage loan of $1,200,000.00 that that was backed by United States Department of Housing and Urban Development (HUD) mortgage insurance and, later on March 7, 1996, almost all of said loan ($1,160,200.00) was assigned to HUD. Further, Page 5 of the Regulatory Agreement states that rents "for residential apartments in the Project" will not be "at rates in excess of those authorized by HUD". HUD also set the rents for the premises in the Project Mortgage Insurance Application that was part of the Regulatory Agreement. HUD was, therefore, involved in the financing of the project, and in the setting of the rents. Pursuant to PHFL Article 13 §608, when rehabilitation of a premises such as the work at issue is aided by HUD financing and HUD is involved in the setting of rents, "all rental dwelling units within such rehabilitated or converted multiple dwelling shall become subject to the rent stabilization law...." Accordingly, the premises are rent regulated.

THEREFORE, in accordance with the applicable sections of the Rent Stabilization Law and Code, it is

ORDERED, that the petition is denied, and the Rent Administrator's Order is affirmed.

ISSUED:
FEB 24 2009

WOODY PASCAL
Deputy Commissioner

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.hcr.ny.gov

Right to Court Appeal

This Deputy Commissioner's order can be further appealed by either party, only by filing a proceeding in court under Article 78 of the Civil Practice Law and Rules seeking judicial review. The deadline for filing this "Article 78 proceeding" with the courts is within 60 days of the issuance date of the Deputy Commissioner's order. This 60-day deadline for appeal may be extended by executive orders at https://governor.ny.gov/executiveorders. No additional time can or will be given. In preparing your papers, please cite the Administrative Review Docket Number which appears on the front page of the attached order. If you file an Article 78 appeal, the law requires that a full copy of your appeal papers be served on each party including the Division of Housing and Community Renewal (DHCR). With respect to DHCR, your appeal must be served on DHCR Counsel's office at 641 Lexington Ave, New York, NY 10022.

There is no other method of appeal.

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

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEAL OF

ADMINISTRATIVE REVIEW
DOCKET NUMBER KX910023RO

Gorjer and Company, LLC

RENT ADMINISTRATOR'S
DOCKET NO.: HS910003UC

PETITIONER X

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

Petitioner timely filed an administrative appeal (PAR) against an order issued on December 9, 2022 by the Rent Administrator (RA) concerning all housing accommodations in the premises located 8 North High Street, Mount Vernon, NY, which denied an application for exemption from rent regulation by virtue of substantial rehabilitation.

The Commissioner has reviewed all of the evidence in the record and has carefully considered that portion of the record relevant to the issues raised by the appealed order.

The former owner commenced this proceeding on July 15, 2019 by filing an application to determine whether the subject building was exempt from rent regulation due to substantial rehabilitation in accordance with the Emergency Tenant Protection Regulations (TPR) adopted under the Emergency Tenant Protection Act (ETPA). The petitioner, who purchased the building on November 25, 2019, participated in the agency action.

The prior owner and the petitioner alleged that the subject premises was vacant because of a fire; that the rehabilitation of the six apartments and repointing of the brick façade began in 2006 and was completed in June 2, 2014 under the City of Mount Vernon Department of Buildings's Permit # BP-860A-20132014; that two prior tenants returned to their apartment after the renovation; and that the cost of the work was $241,000. The former owner and the petitioner submitted an affidavit from Architect Gabriel Salman, who states that he worked on the project from 2006; DOB Work Permits BP-860-2009 and BP-860-2009A and Certificates of Occupancy 13951-19 and 13830-19; photographs of interior and exterior work; DOB Letter of Completion; and 8 architect diagrams of floor plans, foyer, front and rear elevations and other work done.

On May 18, 2022, DHCR served the owner with a Request for Additional Information/Evidence (RAIE) for various items necessary to process the application.

On May 31, 2022, the owner responded by submitting a copy of the deed; evidence of the fire; that the work commenced in 2009 and ended in 2015; and that two of the tenants returned to their apartments, two have passed away and that the other two found other apartments. The owner stated that it spent $241,000 for the work; that its application included the contract and the DOB job file as well as the architect's affidavit, photographs, tax abatement response and the list of current tenants.

On August 5, 2022, DHCR served the owner with a Final Notice RAIE, asking the owner to submit within 21 days the following specified items:

1. Proof of payment, such as invoices or canceled checks;
2. Copy of the job file from the county's DOB;
3. Full-scale copy of the architectural plans for the renovation approved by the county's DOB;
4. Affidavit from the architect who worked on the job describing the specific building-wide and individual apartment systems replaced, and the nature of work done in common areas pursuant to [DHCR] Operational Bulletin 95-2;
5. Before, during and after photographs of the renovation;
6. Documents, if any, of the owner's filing for and/or receiving tax abatement or government financing for this project.

On August 31, 2022, the petitioner responded that the prior owner is 97 years old and cannot find cancelled checks and that there was no tax abatement associated with the work.

On December 9, 2022, the RA issued an order denying the application for exemption. The RA stated that the owner was duly notified by RAIEs on May 18, 2022 and August 5, 2022, however, the petitioner failed to submit the necessary evidence, including proof of payment for the work.

On PAR, the owner contends that it purchased the building in 2019; that the previous owner is 98 years old and hearing impaired; that the previous owner has the cancelled checks; that the documents need to be sorted out; and that additional time is requested.

The Commissioner denies this PAR.

Based on the owner's submissions, the RA correctly determined that the application could not be granted based on the missing information, including an affidavit from the architect setting forth the scope of the project and stating that 75% of the building-wide systems and all common areas were replaced in accordance with DHCR Operational Bulletin 95-2 as well as proof of payment of the work. The Commissioner notes that proof of payment of the work is particularly

important where, as here, the work resulted from a fire and the agency does not grant substantial rehabilitation applications where the work was funded by insurance proceeds.

The Commissioner rejects petitioner's contention that the RA should have held the proceeding in abeyance. The record demonstrates that the RA gave petitioner ample opportunity to produce necessary evidence to support a finding of substantial rehabilitation in the over 36 months that the case was pending before DHCR. The RA is not required to keep the owner's application open for an indefinite period while the owner searches for evidence to support the application. The former owner decided to file his application on July 15, 2019, and the petitioner joined the proceeding some four months later, and both would be expected to submit sufficient evidence. See Matter of Underhill-Washington Equities LLC v Div. of House. & Community Renewal, 47 Misc. 3d 1215[A], 1215A, 2015 NY Slip Op 50632[U], *3 [Sup Ct, Kings County 2015)(agency did not abuse its discretion when it determined to move forward with a proceeding, instead of continuing to hold the proceeding in abeyance).

The Commissioner finds that the petitioner may file an application in its own name once it has all of the relevant information.

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

ORDERED, that this petition be, and the same hereby is, denied, and that the Rent Administrator's order be, and the same hereby is, affirmed.

ISSUED:

MAR 09 2023

Woody Pascal
Deputy Commissioner

State of New York
Division of Housing and Community Renewal
Office of Rent Administration
Gertz Plaza, 92-31 Union Hall Street
Jamaica, NY 11433
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STATE OF NEW YORK
DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR)
OFFICE OF RENT ADMINISTRATION
GERTZ PLAZA
92-31 UNION HALL STREET
JAMAICA, NEW YORK 11433

X

IN THE MATTER OF THE
ADMINISTRATIVE APPEAL OF

[redacted]

PETITIONER

X

ADMINISTRATIVE REVIEW
DOCKET NUMBER .: LM210025RT

RENT ADMINISTRATOR'S
DOCKET NOS.: KS210003RP

OWNER: Union Housing, LLC

ORDER AND OPINION GRANTING PETITION FOR ADMINISTRATIVE REVIEW

The tenant filed an administrative appeal (PAR) against an Order Pursuant to Remand (Remand Order) issued on December 16, 2022 by the Rent Administrator (RA) concerning all housing accommodations at 108 Cooper Street, Brooklyn, NY 11207. The petitioner resides in apartment [redacted] therein.

The Commissioner has reviewed all of the evidence in the record and has carefully considered that portion of the record relevant to the issues raised by this PAR.

Procedural History

In 2019, the owner filed an application under Docket Number HW210001UC for a determination that the building is exempt from rent stabilization based on a substantial rehabilitation completed in 2011. The RA issued an order denying said application based on an earlier agency order under Docket Number XA230003RP which found that the premises was rent stabilized because it contained six or more apartments. The owner filed a PAR under Docket Number KP210032RO, wherein the Commissioner remanded the proceeding to the RA to determine the substantial rehabilitation on the merits. The Commissioner found that order XA230003RP determined the rent regulated status of the building based solely on the number of units but made no finding as to whether the premises had undergone a substantial rehabilitation.

On September 2, 2022, the RA mailed a Notice to Reconsider Order Pursuant to Remand (Remand Notice) to the tenants in the building and the owner. The RA issued the Remand Order on December 16, 2022. which states that the previous determination under Docket Number HW210001UC issued on March 25, 2022 is modified to show that the subject building is exempt from regulation under Section 2520.11(e) of the Rent Stabilization Code (RSC).

The Commissioner notes that the RA based her decision on the original application filed by the owner under Docket Number HW210001UC and the documents submitted in support thereof, including construction records, Department of Building (DOB) filings, expert affidavits and a Certificate of Occupancy issued January 19, 2011.

Current PAR

On PAR, petitioner now contends that her apartment was found to be (and still is) rent stabilized based on an agency order issued on May 3, 2019 under Docket Number DR210035AD which order directed the owner to offer petitioner a rent-stabilized lease and to register said apartment with DHCR. The petitioner annexed a copy of the order under Docket Number DR210035AD, which relied on the previous determination of XA230003RP which found that the premises was rent stabilized. The tenant also argues that she moved into the subject apartment on October 1, 2008 and that she is therefore rent stabilized despite any substantial rehabilitation completed after her tenancy. She states that when she moved into the apartment, the other five apartments were occupied as well, and that she should remain rent stabilized. Petitioner also annexes DOB violations issued to the owner in 2009 based on illegal occupancy in the cellar and working without a permit.

The owner opposed the PAR arguing that it should be dismissed as untimely because the date stamp on the PAR indicates January 23, 2023 which is more than 35 days after the December 16, 2022 issuance of the Remand Order; that the "AD" order relied on by the tenant is based on XA230003RP which did not address the substantial rehabilitation of the building, and therefore does not negate the fact that the building is no longer under the RSC; and despite having more than one opportunity to do so, the tenant did not answer or oppose the exemption application while it is was pending before the RA.

Commissioner's Determination

Having reviewed all submissions, the Commissioner grants the PAR.

As a first matter, the Commissioner finds that the PAR was timely filed. Although DHCR date-stamped the tenant's PAR as received on January 23, 2023, the mailing envelope of the PAR indicates a USPS date-stamped January 20, 2023 which is within the 35 days after the Remand Order was issued on December 16, 2022. Under Rent Stabilization Code §2529.2, the PAR is therefore timely and should be addressed herein.

Secondly, the Commissioner finds that the agency order issued under Docket Number DR210035AD in May 2019 has no bearing on the substantial rehabilitation. Indeed, this AD order relied on the previous determination (XA230003RP) which had nothing to do with whether the premises was substantially rehabilitated and neither order acts as a bar to finding the premises is exempt from rent regulation based on a substantial rehabilitation.

Lastly, while the Commissioner notes that evidence supports a substantial rehabilitation completed by the owner in 2011, petitioner moved into apartment [redacted] as of October 1, 2008 according to registration records filed by the owner. Given that she moved into the apartment before completion of the substantial rehabilitation, petitioner is indeed a rent-stabilized tenant. The Commissioner notes that several DOB documents submitted by the owner, including applications and work permits, were approved by DOB after the tenant moved in. The work was signed off by DOB as January 19, 2011, which again is after the tenant had moved in. Therefore, she, and any other tenant that resided prior to January 19, 2011, remains rent-stabilized despite the building having been substantially rehabilitated.

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

ORDERED, that this petition be, and the same hereby is, granted, and that the Rent Administrator's order be, and the same hereby is, modified to state that any tenants, including petitioner herein, that were in occupancy before the completion of the substantial rehabilitation on January 19, 2011, remain rent-stabilized and must be offered renewal leases.

ISSUED:
MAR 22 2023

Woody Pascal
Deputy Commissioner

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