New York State
Division of Housing and Community Renewal
Office of Rent Administration

Operational Bulletin 95-2 (December 15, 1995)

Substantial Rehabilitation

This Operational Bulletin is issued pursuant to the Emergency Tenant Protection Regulations (TPR) adopted under the Emergency Tenant Protection Act (ETPA) section 10, and section 2527.11 of the Rent Stabilization Code (RSC). It sets forth the position of the Division of Housing and Community Renewal (DHCR) regarding the circumstances under which the agency will find that a building has been substantially rehabilitated within the meaning of TPR section 2500.9(e) and RSC section 2520.11(e).

It is being issued at this time to clarify the procedures the agency will use to determine issues of exemption from rent regulation due to substantial rehabilitation. The agency has not previously issued any formal directive or clarification on this subject and the lack of such guidance has made it difficult for applicants to have an understanding of how an application for exemption will be treated. Also, potential applicants have indicated that uncertainty about our procedures could contribute to an unwillingness to undertake substantial rehabilitation projects in deteriorated buildings. Accordingly, lack of clear procedures works to prevent use of this mechanism as intended in law and regulation.

Also, this Operational Bulletin takes into account court decisions related to substantial rehabilitation exemptions. In particular, it recognizes a recent court decision wherein it was found that a building did not have to be completely vacant to qualify for the exemption, and wherein it was ruled that the agency could not interpret "substantial" to mean total reconstruction of the building.

ETPA section 5(a) (5) provides as follows:

Housing Accommodations Subject to Regulation

A. A declaration of emergency may be made pursuant to section three as to all or any class or classes of housing accommodations in a municipality, except:

(5) housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January first, nineteen hundred seventy-four;

These provisions of section 5(a) (5) were incorporated into both TPR section 2500.9(e) and RSC section 2520.1l(e).

This document is being reissued for informational purposes only.

The original document which contains signatures of authorization is on file at DHCR's Office of Rent Administration.

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I. Criteria

DHCR will find that a building has been substantially rehabilitated within the meaning of TPR section 2500.9(e) and RSC section 2520.1l(e), and is therefore exempt from coverage under the ETPA or the RSL, for rent stabilized properties where the owner demonstrates, based upon the totality of the circumstances, that the following criteria have been met:

A. At least 75% of the building-wide and apartment systems contained on the following list must each have been completely replaced with new systems. Additionally, all ceilings, flooring and plasterboard or wall surfaces in common areas must have been replaced; and ceiling, wall, and floor surfaces in apartments, if not replaced, must have been made as new as determined by DHCR.

List of Building-wide and Apartment Systems:

1. Plumbing
2. Heating
3. Gas supply
4. Electrical wiring
5. Intercoms
6. Windows
7. Roof
8. Elevators
9. Incinerators or waste compactors
10. Fire escapes
11. Interior stairways
12. Kitchens
13. Bathrooms
14. Floors
15. Ceilings and wall surfaces
16. Pointing or exterior surface repair as needed
17. All doors and frames including the replacement of non-fire-rated items with fire-rated ones

However, for good cause shown, on a case-by-case basis, limited exceptions to the stated criteria regarding the extent of the rehabilitation work to be effectuated building-wide or as to individual housing accommodations may be granted where the owner demonstrates that a particular component of the building or system has recently been installed or upgraded so that it is structurally sound and does not require replacement, or that the preservation of a particular component is desirable or required by law due to its aesthetic or historic merit.

B. The rehabilitation was commenced in a building that was in a substandard or seriously deteriorated condition. The extent to which the building was vacant of residential tenants when the rehabilitation was commenced shall, in addition to the items described in III "Documentation", constitute evidence of whether the building was in fact in such condition. Where the rehabilitation was commenced in a building that was at least 80% vacant of residential tenants, there shall be a presumption that the building was substandard or seriously deteriorated at that time.

Space converted from nonresidential use to residential use need not meet this standard.

C. DHCR will not find the building to have been substantially rehabilitated if it can be established that the owner has attempted to secure a vacancy by an act of arson resulting in criminal conviction of the owner or the owner's agent, and/or DHCR has made an outstanding finding of harassment, as defined pursuant to any applicable rent regulatory law, code or regulation.

D. All building systems comply with all applicable building codes and requirements, and the owner has submitted copies of the building's certificate of occupancy before and after the rehabilitation.

E. The Substantial Rehabilitation provision is intended to encourage the creation of new or rehabilitated housing. Accordingly, in making a determination as to the eligibility of a building for this exemption, DHCR will consider all facts that support this policy.

F. Where occupied, rent regulated units have not been rehabilitated, such units shall remain regulated for the duration of occupancy by the regulated tenants, notwithstanding a finding that the remainder of the building has been substantially rehabilitated and qualifies for exemption from regulation.

II. Prior Opinion

DHCR recognizes the very significant financial commitment that a substantial rehabilitation necessitates. Accordingly, an owner may apply to DHCR for an advisory prior opinion that the building qualifies for the exemption, based upon the owner's rehabilitation plan, which as evidenced by contracts, applications for building permits, blueprints, etc., meets the scope of work necessary to constitute substantial rehabilitation. Although they may do so at any time prior to commencement of the rehabilitation, owners are encouraged to apply for an advisory prior opinion at or about the time that they seek appropriate governmental approval for the rehabilitation work.

III. Documentation

The following documentation will be required from owners in support of a claim of substantial rehabilitation.

Records demonstrating the scope of the work actually performed in the building. These may include an itemized description of replacements and installations, copies of approved building plans, architect's or general contractor's statements, contracts for work performed, appropriate government approvals, and photographs of conditions before, during, and after the work was performed. Proof of payment by the owner for the rehabilitation work may be required; owners are advised to maintain records related to the rehabilitation. For rehabilitation projects completed before issuance of the Operational Bulletin, where undue hardship or prejudice would otherwise result, consideration will be given to the documentation which may be required.

IV. "Constructive Occupancy" by Rent Stabilized Tenants in Substantially Rehabilitated Buildings

In certain cases, because of the existence of hazardous conditions in their rent stabilized housing accommodations, e.g., fire damage, some rent stabilized tenants may be ordered by a governmental agency to vacate the housing accommodation. Such vacate order may create a "constructive occupancy," providing for payment by the tenant of a nominal rental amount such as $1.00 per month, while the vacate order is in effect, and permitting the tenant to resume occupancy without interruption of his or her rent stabilized status, upon restoration of the housing accommodation to a habitable condition. Where the building has been substantially rehabilitated, constructive occupancy will have the effect of excepting the housing accommodation from exemption from rent regulation based upon such rehabilitation.

However, the exemption from rent regulation based upon substantial rehabilitation will apply to all housing accommodations in the building which are not "constructively occupied" or actually occupied by a previously rent regulated tenant. In addition, the exemption will also apply to a constructively occupied housing accommodation if the returning tenant subsequently vacates, or if the tenant who is entitled to return pursuant to court or DHCR order chooses not to do so.

V. Individual Apartment Improvements, Major Capital Improvements, and First Rents Distinguished from Substantial Rehabilitation

Where the work performed fails to meet the criteria set forth above for exemption from coverage under the ETPA or RSL on the basis of substantial rehabilitation, the owner may still qualify for rent increases based upon work performed on building-wide systems or in individual apartments.

In the event a substantial rehabilitation exemption is not found, the improvements will be considered for an MCI order provided the substantial rehabilitation application was made within two years of the completion of the work, and all MCI filing criteria are met.

It should be noted that the term "substantial rehabilitation" as utilized in TPR sections 2502.4(a) (1) and 2502.(a) (2) (ii), refers to work that is in the nature of an individual apartment improvement or a major capital improvement, which are discussed below, and not to that type of substantial rehabilitation which results in the exemption of an entire building from rent stabilization. It is the latter which is the subject of this Operational Bulletin.

Individual Apartment Improvements: TPR section 2502.4(a) and RSC section 2522.4(a)(1) provide for an increase in the rent of an individual housing accommodation where there has been a substantial increase in dwelling space, or an increase in the services, or the installation of new equipment or improvements, or new furniture or furnishings provided in or to such individual housing accommodation.

Major Capital Improvements: TPR section 2502.4(a) and RSC section 2522.4(a) (2) permit owners to apply for an increase in legal regulated rents, based upon the proven costs of building-wide major capital improvements.

First Rents: Where an owner significantly changes the perimeter and dimensions of an existing housing accommodation, or creates a housing accommodation in space previously used for nonresidential purposes, the DHCR may find that the resultant housing accommodation was not in existence on the applicable base date. Such a finding may entitle the owner to charge a market or "first rent," subject to guidelines limitations for future rent adjustments.

VI. Binding Determination

Where, after completion of the work, DHCR issues a final order determining that the building is exempt from rent regulation on the basis of substantial rehabilitation, that order will be a binding determination on a building-wide basis, not withstanding occupancy by subsequent tenants. DHCR will not thereafter entertain challenges by subsequent tenants except upon showing that the determination was obtained as a result of fraud by the owner or the owner's agent.

Paul A. Roldan
Deputy Commissioner
for Rent Administration

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