COMMENTS ON THE PROPOSED AMENDMENTS TO THE RENT STABILIZATION CODE SUBMITTED ON BEHALF OF

LEGAL SERVICES FOR NYC

THE LEGAL AID SOCIETY

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INTRODUCTION

Legal Services for New York City (LSNYC) is the largest provider of free civil legal services in the country. The nineteen neighborhood offices of LSNYC throughout the City represent thousands of low-income tenants annually in disputes involving tenants' rights to remain in their homes.

The Legal Aid Society is the oldest and largest program in the nation providing direct legal services to low-income families and individuals. The mission of the Society's Civil Practice is to improve the lives of low-income New Yorkers by helping vulnerable families and individuals to obtain and maintain the basic necessities of life—housing, health care, food and subsistence income or self-sufficiency. The Society's legal assistance focuses on enhancing individual, family, and community stability by resolving a full range of legal problems in the areas of housing and public benefits, foreclosure prevention, immigration, domestic violence and family law, employment, elder law, tax law, community economic development, health law and consumer law.

Thank you for the opportunity to submit comments on the Division of Housing and Community Renewal's (DHCR) proposed amendments to the Rent Stabilization Code (RSC) published in the NYS Register on August 16, 2022. We applaud DHCR for taking action to codify the mandates of the 2019 Housing and Stability Tenant Protection Act (HSTPA), and to close several remaining loopholes in the RSC that have encouraged landlord fraud and misconduct, allowed rapid inflation of stabilized rents and the decontrol of thousands of apartments, and contributed to the displacement of low- and moderate-income people from their homes and communities. We particularly appreciate DHCR's action to effectuate the intent of

the HSTPA by revising its "first rent" policy, which has led landlords to withhold tens of thousands of units from the market in hopes of combining them and securing increases far in excess of those contemplated in the statute. We also commend DHCR for codifying the holding of the Appellate Division in *Jourdain v. N.Y. State Div. of Hous. & Cmty. Renewal*, which properly interpreted and applied the remedial intentions of the succession provisions of rent stabilization.

However, as detailed below, the new amendments still contain provisions that are at odds with governing case law and the mandates of the Rent Stabilization Law. These provisions should be revised.

The undersigned organizations also believe that the Code could be strengthened through additional amendments to prevent the evasion of the RSC and resolve ambiguities that harm tenants.

DISCUSSION OF PROPOSED AMENDMENTS

Section 2520.6(f)—Base Date Definition

We urge DHCR to make changes to these proposed amendments, which conflict with Part F of the HSTPA. The HSTPA dramatically changed the method for determining the legal regulated rent for a rent-stabilized unit. Instead of using the rent charged on the date four years prior to the filing of the overcharge complaint (unless there was fraud or no rental history available), the HSTPA established that the legal regulated rent now "shall be deemed to be the rent indicated in the most recent reliable annual registration statement for a rent stabilized tenant filed and served upon the tenant six or more years prior . . . plus in each case any subsequent lawful increases and adjustments." In essence, this amendment eliminated the concept of a base

date, as the date used to determine the legal regulated rent is no longer rigidly fixed. Now, the starting point for determining the legal regulated rent is the result of a fact-sensitive inquiry, depending on the circumstances of the case.

In its proposed regulations implementing changes to the Rent Stabilizations Laws created by Part F of the HSTPA, DHCR has reintroduced the concept of a base date: "[i]n no event shall the base date be prior to June 14, 2015." This regulation appears to be an attempt to comply with the Court of Appeals' holding that Part F could not be applied retroactively. *Matter of Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal,* 35 N.Y.3d 332 (2020). However, this interpretation is not required by *Regina* and is not a reasonable interpretation of the statute.

Part F is part of a comprehensive suite of legislation intended to "address the continuing housing emergency" and "to prevent speculative, unwarranted and abnormal increases in rents." *Regina,* 35 N.Y.3d at 383. One of its central goals, in the words of the sponsor of the bill that served as the foundation for Part F, is to ensure that tenants are "[not] left paying more for their rent stabilized apartments than they rightfully should." Sponsor's Memo., Bill No. S4169.

The Court of Appeals found retroactive application of Part F unconstitutional because making landlords liable for overcharges on rents that they had lawfully collected in the past would not further these legislative goals and would have a significant destabilizing effect. As the Court noted, retroactive imposition of overcharges was different than requiring landlords to "shoulder a new payment obligation going forward." *Regina*, 35 N.Y.3d at 382-84.

Significantly, the Court stated on numerous occasions that it was not ruling on the prospective application of Part F. Indeed, it acknowledged that prospective application could further the HSTPA's legislative goals by deterring overcharges. *Id*. at 383. The constitutional

concerns raised in *Regina* simply do not apply to the prospective application of Part F. As of June 14, 2019, landlords were on notice of the new definition of legal regulated rent, and if they continued to collect higher rents than legally permitted, they did so at their peril.

The legislative intent of Part F is to ensure that tenants are paying legal regulated rents which rest on legally justified rent increases, supported by a reliable rent history. A review of the entire rent history is necessary to make this determination. By rigidly imposing a base date of June 14, 2015, the regulation will allow many unlawful rent increases to evade review and to remain in effect permanently. This is counter to the legislature's intent.

Therefore, to accord with legislative intent and the *Regina* decision, the regulation should instead state that only overcharge claims related to pre-June 14, 2019 overcharges are subject to the prior "four year rule." The regulations should remove all other references to June 14, 2015 as the "base date."

For challenges to rents collected or charged after June 15, 2019, Part F should be given full effect. This means that the starting point for these claims should be the rent in the last reliable annual registration statement as defined by Part F, without limitation.

This bifurcated analysis sets clear parameters, is administrable, and comports with legal requirements.

Section 2520.11(e)—Substantial Rehabilitation

The RSL's exemption for buildings substantially rehabilitated after 1974 "encourage[s] building owners to substantially rehabilitate commercial, or substandard or deteriorated housing stock by permitting them to recoup their expenses free of rent stabilized rents." *Eastern Pork Prods. Co. v. New York Div. of Hous. & Cmty. Renewal*, 187 AD 2d 320, 324 (1st Dep't 1992).

The goal of the exemption is thus to incentivize redevelopment of blighted, typically vacant, properties that would not otherwise be financially viable if subject to rent stabilization, not to provide subsequent purchasers with a loophole for evading coverage. As such, this "exception to the remedial protections of rent stabilization" has historically been "strictly construed" by DHCR and the courts, which share jurisdiction in reviewing such claims. *Pape v. Doar*, 160 A.D.2d 213, 215 (1st Dep't 1990).

Despite the exemption's limited intended scope, following the HSTPA's elimination of high rent decontrol, we have observed a significant increase in applications by landlords to DHCR seeking to remove their holdings from the RSL based on an alleged substantial rehabilitation. Many of these claims, typically made by a new owner decades after the work was allegedly completed, in no way further the exemption's core purpose of creating additional housing stock and instead only serve to increase profits at the expense of affordable housing. The recent example of the "Putnam Grand" cluster of buildings in Brooklyn is instructive, in which a purchaser of 128 rent-stabilized units sought to deregulate based on work completed by prior owners three decades earlier using millions of dollars in government funds specifically intended to ensure affordability. *See 27 Putnam LP et al., v. Rose Burn et al*, Kings Cty. Index No. 519080/2021, NYSCEF Doc. No. 89 (Sup. Ct. Kings Cnty. 2022). In other instances, we are seeing landlords seek out rent-stabilized buildings for acquisition with the explicit goal of removing the occupants—whether through harassment, deferred maintenance in violation of housing quality enforcement laws, buyouts, or other means –so that they can renovate and obtain a windfall through the substantial rehabilitation exemption.[1] This behavior undermines the RSL's core remedial purpose of "preserv[ing] affordable housing for low-income, working poor and

middle-class residents in New York City." *Matter of Santiago-Monteverde*, 24 N.Y.3d 283, 289 (2014). It also violates the principle established by the courts and DHCR that the Code should not provide an "incentive for unscrupulous owners to permit their properties to decay beyond the point of reasonable rehabilitation, and thus obtain an unwarranted windfall." *Eyedent v. Vickers Mgmt.*, 150 A.D.2d 202, 205 (1st Dep't 1989); *see also 128 Hester LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 146 A.D. 3d 706, 707 (1st Dep't 2017)

With the foregoing concerns in mind, DHCR's proposed amendments to provisions of the Code that implement the RSL's substantial rehabilitation exemption take an important step in the right direction in tightening the exemption, while not going far enough in preventing unscrupulous conduct. Accordingly, we make the following recommendations:

Buildings Rehabilitated with Government Funds or Insurance Proceeds Since the purpose of the substantial rehabilitation exemption is to incentivize private investment, DHCR should add a section to the Code providing that it will deny any substantial rehabilitation claim where the rehabilitation was primarily financed with government funds. Although certain financing under the Private Housing Finance Law subjects buildings to rent stabilization, DHCR should extend this principle to buildings rehabilitated with any government funding.

Section 2520.11(e)(2) We commend DHCR for eliminating the presumption that a building is in substandard condition simply because at least 80% of the housing accommodations were vacant at the time of the rehabilitation. This presumption simply incentivized owners to secure vacancies through unsavory means, and needlessly eliminated a significant burden of proof.

Even where a landlord can establish that a building is in substandard condition at the time of its rehabilitation, the Code should require DHCR and the courts to consider whether the landlord's conduct contributed to the deteriorated condition of the building. Where DHCR or the courts can reasonably conclude that the substandard condition of the building prior to any rehabilitation was caused by the conduct or negligence of the current landlord or a related predecessor, it should bar the owner from using such substandard condition as a basis for seeking exemption.

In addition, DHCR should require the owner to present proof that the rehabilitation was completed in a continuous, expeditious time frame, rather than in piecemeal fashion over an extended period.

Section 2520.11(e)(3) DHCR's proposal to bar substantial rehabilitation claims following a prior finding of harassment by DHCR or another government entity, while commendable, should be expanded. In practice, many harassment claims interposed by tenants, whether before DHCR or in state court, result in settlements without a final determination, and in many cases in agreements in which tenants vacate in exchange for compensation, facilitating the owner's desired gut renovation of the building. Therefore, in order to provide meaningful oversight, the Code should require consideration of any evidence, not merely past findings, that the owner or its predecessors engaged in tenant harassment for purposes of securing vacancies in the ten-year period preceding the rehabilitation of a building. In the event DHCR can reasonably conclude that harassment occurred, it should bar the owner from using such substandard condition as a basis for seeking exemption.

Section 2520.11(e)(5) DHCR's proposed amendment helpfully clarifies its longstanding policy that rent-regulated tenants in occupancy prior to the substantial rehabilitation of a building will remain subject to pre-existing regulation, even if their units are prospectively exempt. DHCR should, however, remove the word "remainder" from the phrase "*remainder* of the building" to make clear that these protections apply even if the *entire* building, including the units of pre-existing tenants, is deemed prospectively exempt.

Section 2520.11(e)(6) We support DHCR's proposed amendment to the Code providing that, absent an explicit written surrender by a rent-stabilized tenant in occupancy before the issuance of a vacate order, the tenant will be entitled to return on the same terms and conditions, notwithstanding any finding by DHCR that the building or the unit is otherwise prospectively exempt.

DHCR should also clarify that tenants displaced due to vacate orders retain a constructive occupancy during any rehabilitation of the premises *even if they fail to apply to DHCR for a nominal rent*, an administrative process that can easily be overlooked by a person rendered homeless due to a vacate order.

Section 2520.11(e)(7) We support DHCR's proposed amendment to the Code requiring owners to restore vacated buildings to a "substantially similar" layout. However, based on the considerations discussed in our comments on Section 2522.4(d) and (e) below, we urge DHCR to also require landlords to restore each individual unit—as well as the building as a whole—to a substantially similar layout that does not represent a decrease in services.

Section 2520.11(e)(10) Allowing an unlimited lookback period for substantial rehabilitation claims encourages specious applications from speculators that often eliminate

affordable housing that was for decades represented to its occupants as rent-stabilized and in no way serves to incentivize investment in blighted properties. Accordingly, given the narrow purpose behind the substantial rehabilitation exemption, for any substantial rehabilitation completed after the effective date of the amended Code, DHCR should require an owner to seek a finding of exemption before DHCR or the state courts within two years of the completion of the rehabilitation.

Section 2520.11(f) and (j)—Scatter-site housing

Part J of the HSTPA was enacted to ensure that not-for-profit entities leasing rent stabilized apartments for the use of affiliated persons at risk of homelessness, and the occupants themselves, would be entitled to renewal leases notwithstanding the technical failure of the not-for-profit entity to physically "occupy" the unit. This provision will provide essential stability for such not-for-profits and their clients, while assuring landlords of continued receipt of the lawful rents to which they are entitled.

DHCR's amendments to Section 2520.11, however, fail to fully reflect the intent of the statute and conform to pre-existing law. First, DHCR's Regulatory Impact Statement notes on page 22 that Part J "gives residents a continued right of occupancy as rent stabilized tenants in the event the not-for-profit surrenders or loses its tenancy." However, DHCR's amendments to 2520.11 contain no corresponding language, nor does such language appear in the succession provisions of Section 2523.5. We urge DHCR to include clear language establishing the right of both not-for-profit entities *and* their affiliated occupants in both 2520.11 and 2523.5.

Second, RSC § 2520.11(f) has always contained language inconsistent with the ETPA. Where Section 5-a (6) exempted units in "housing accommodations owned or operated by a

hospital, convent, etc.," the RSC interpolated words not in the statute: "housing accommodations owned, operated, *or leased or rented pursuant to governmental funding* …" This unauthorized language has generated considerable confusion, as for-profit building owners have improperly claimed the right to rent to not-for-profit entities at rates exceeding the rent-stabilized rent. The court in *2363 ACP Pineapple, LLC v. Iris House, Inc*., 55 Misc. 3d 7 (App. Term. 1st Dep't 2017) explained that the "exemption was intended to exempt from rent stabilization accommodations run by charitable and educational institutions whose needs were furthered by having access to unregulated housing in order to house staff or students, as long as those tenants' affiliation with those institutions remained in effect … The exemption was not intended to allow a for-profit landlord to evict an educational or charitable institution." The holding of *ACP Pineapple* is not limited to those not-for-profits specifically designated in Part J. DHCR should amend subsection (f) to conform to the ETPA and the applicable appellate case law, as well as to Part J of the HSTPA.

Third, Part J amended subsection (11) of ETPA § 5-a, the provision relating to non-primary residence, so appropriate language should be added to the parallel Code provision on non-primary residence, 2520.11(k), as well as to subsections (f) and (j).

Section 2521.1—Initial legal regulated rents for housing accommodations

Section 2521.1(m) We commend the agency for proposing to close a loophole which allowed landlords to evade the Rent Laws by using a policy created by the agency that allowed landlords to combine apartments and charge a new first rent. This policy was not required by either statute or regulation. Since the HSTPA was enacted in 2019, tenants in New York City have reported that landlords have been holding apartments off the market with the hopes of

combining apartments and setting a first rent. The agency has now properly exercised its statutory authority to protect tenants and the public interest by reconsidering its previous policy and proposing amendments to the Code which would create rules that disincentivizes landlords from holding units off the market. As the agency notes in its Regulatory Impact Statement, HSTPA emphasized "the preservation of units at historically reasonable rents" and the agency's previouis policy is in opposition to this goal.

Under the previous provisions, a landlord could make changes to the layouts of apartments, such as combining two vacant units, with the goal of setting a new "first rent" for the newly converted unit. The "first rent" has no cap, allowing landlords to set an arbitrarily high number to re-rent regulated units. This loophole incentivizes landlords to "warehouse" or keep certain apartments off the market in anticipation of combining them with a neighboring apartment. Targets are also simultaneously placed on the backs of neighboring tenants, as landlords may pursue eviction against these tenants for the purpose of combining the vacant units to charge a higher rent.

This proposed amendment significantly clarifies both the rent regulation status for altered apartments as well as the rents that can be collected for such units. The provision regarding the regulation status of the apartment should disincentivize landlords from targeting and evicting rent regulated tenants specifically if they cannot deregulate the apartment. This also provides fewer financial incentives for landlords to withhold renting vacant units and altering layouts, as they may only collect the sum of the two apartment rents plus any applicable increases. The amendment also laudably provides a narrow category of increases a landlord may take on top of the new unit's rent due to both proportional changes in size as well as any allowable individual

apartment increase (IAI) allowances, limiting opportunities to significantly increase the rents.

Section 2521.1(n) This amendment clarifies the "initial rent" for stabilized tenants moving into apartments previously occupied by covered institutions such as nonprofits to reflect the last rent charged to the stabilized tenant who occupied the unit immediately prior to the institution. However, this proposed amendment seems to condone landlords who continue to charge illegal rents in contradiction to *2363 ACP Pineapple LLC v. Iris House, Inc*. 55 Misc. 3d 7 (2017), and the plain language of HSTPA itself. The HSTPA requires these apartments remain rent regulated, and therefore the rents should be set based on the previous tenants' rent plus any applicable rent increases. The language in the proposed amendment suggests that landlords can continue to charge unregulated rents to the institutions covered by 9 NYCRR 2520.11(f) and (j). This would contradict the plain language of the statute.

Section 2522.4(a)—Individual Apartment Improvements

Section 2522.4(a)(2) The proposed provision notably omits the requirement in the RSL that such modifications must also be "substantial." RSL 26-511(c)(13). This omission would potentially allow owners to seek IAIs for a collection of *de minimis* modifications. The proposed provision also does not capture the exclusion from IAIs of "any costs that exceed reasonable costs established by rules and regulations promulgated by [DHCR]." RSL 26-511(c)(13). The HSTPA requires that IAI be reasonable and requires that DHCR establish rules and regulations that define what reasonable costs are. Thus, DHCR must promulgate a schedule of reasonable costs for IAIs. Additionally, DHCR should require bids from three licensed contractors prior to commencement of the work underlying the IAI. The failure to include this mechanism would leave this provision ripe for abuse, potentially allowing owners to argue that they have satisfied

this provision simply by producing barebones, self-serving statements that costs are reasonable.

Sections 2522.4(a)(2)(i)(a) & 2522(a)(2)(vi) The RSL requires DHCR to "establish a form in the top six languages other than English spoken in the state according to the latest available date from the U.S. Bureau of Census for a temporary individual apartment improvement" and that the owner obtain "written informed consent" from the tenant. RSL 511.1(12). Furthermore, written informed consent can only be obtained from a tenant if the form is in that tenant's primary language. Consistent with this, the HSTPA requires that such form be "executed in the tenant's primary language." L. 2019, ch 36, pt. K, Sect. 4(12). The new Code provision should clarify that DHCR will translate this form into the top six languages other than English spoken in the state according to the latest available data from the U.S. Bureau of Census. The new Code provision should also provide that the owner must obtain written consent from the tenant using the form in the tenant's primary language, require the landlord to use DHCR's translation of this form if the tenant's primary language is one of the aforementioned six languages other than English, and require the landlord to translate the form into the tenant's primary language if that tenant's primary language is not English or any of the other aforementioned languages for which DHCR has prepared translations. Such revisions would reduce fraud and more closely comport with the intent of the HSTPA, which is to require that tenant consent be "informed."

Section 2522.4(a)(2)(i)(d) The new Code provision should require owners to use a licensed contractor for all work for which they are seeking an IAI, without exception. Such a revised provision would comport with the amended RSL, which requires that work be done by licensed contractors. RSL-511(c)(13). Requiring the use of a licensed contractor would make it

more difficult to submit a fraudulent IAI or seek an IAI for substandard work. Furthermore, such a revised provision would not prohibit owners from using unlicensed contractors but would simply bar them from collecting an IAI for work performed by unlicensed contractors.

Section 2522.4(a)(2)(ii) The standard set forth in this proposed Code provision is ripe for abuse, allowing owners to claim that even *de minimis* actions (e.g., hammering a single nail into the wall) constituted "commencement" of work before June 14, 2019. It would be almost impossible for tenants to challenge whether such *de minimis* actions occurred. Notably, this standard is not mandated by either the HSTPA (which is silent on when this restriction becomes effective) or the RSL (which simply require that the new limits on recoverable costs for IAI's should apply starting with the "first [IAI] on or after [June 14, 2019]"). *See* L. 2019, ch 36, pt. K, Sect. 1(1); RSL 26-511(c)(13). The new Code provision should instead apply the limit on recoverable costs over a fifteen-year period to "work completed on or after June 14, 2019," which would be more easily verifiable and equally comport with the HSTPA and the RSL.

Section 2522.4(a)(2)(vii) We agree that new limits on the increases in legal rents that an owner may obtain as a result of an IAI, are applicable only to "rent increases … effective as of or after June 14, 2019 … ." This provision should clarify that, for the purposes of this provision, rent increases during a vacancy become effective only upon the first lease after completion of the work underlying the IAI.

Section 2522.4(b)—Major Capital Improvements

Section 2522.4(b)(1) We agree that that an MCI application must include an itemized list of work performed and a description or explanation of the reason or purpose for such work (RSL 26-511.1(9)). However, the new Code provision should clarify that absent such an itemized list

and description or explanation, an MCI cannot be granted. The agency and tenants must be able to verify that the costs are *actual and verifiable* as required by the RSL. RSL 26-511.1(2).

The new Code provision should clarify that the description or explanation of the MCI must explain under which grounds the owner seeks a temporary increase (i.e., 2522.4(b)(1)(i); (ii); (iii); or (iv)) and why the work performed meets the specific criteria necessary for the claimed ground(s) (i.e., how is the work essential for the preservation, energy efficiency, functionality or infrastructure of the entire building, etc.).

Section 2522.4(b)(1)(i)(c) We agree that an MCI must inure to the direct or indirect benefit of all the tenants. However, the RSL in 26-511.1(2) does not provide for any exception. DHCR should not permit owners to "satisfactorily demonstrate" that certain components did not require repair. DHCR's proposed exception to this basic requirement nullifies the mandate under the RSL that an MCI must directly or indirectly benefit all tenants, without exception.

Section 2522.4(b)(1)(i)(d) & (e) We suggest that DHCR will amend the proposed Code provision to deny a useful life waiver when an owner cannot sufficiently demonstrate that they have properly maintained the item or equipment and to mandate that owners submit proof of such maintenance, such as receipts for repairs and parts or maintenance logs.

2522.4(b)1(i)(e)(3)(i) DHCR should amend the Code to limit a useful life waiver for fire, vandalism, or other emergency to those that are not caused by intentional or negligent acts of the owner. The Code should not permit landlords to intentionally or negligently engage in acts or omissions that then permit them to take advantage of the MCI rent increase scheme without an expiration of the useful life.

2522.4(b)1(i)(e)(3)(ii) DHCR should amend the proposed Code provision to require

proof that the item or equipment was properly maintained, by submission of receipts for repairs and parts or maintenance logs. An owner who fails to properly maintain its equipment should not be permitted a useful life waiver.

Section 2522.4(b)(1)(i)(f) DHCR should clarify what type of work done in individual apartments cannot be considered an improvement to an entire building. Specifically, we recommend specifying that individual kitchen or bathroom upgrades cannot be considered a building wide improvement – even if completed in each building unit.

Section 2522.4(b)(1)(ii), (iii) & (iv) To ensure compliance with the Rent Stabilization Law, DHCR should specify that any application under section (ii); (iii); & (iv) must meet all requirements under (i)(a) through (i)(f) to qualify for an increase.

Further, DHCR should specify that 2522.4(b)(1)(iii) does not include any upgrade to individual apartments.

Section 2522.4(b)(2)

2522.4(b)(2)(vii) DHCR should withdraw 2522.4(b)(2)(vii)(a)(1), which permits a granting of costs for "related expenses." It attempts to permit costs that exceed the reasonable cost as "related expenses," and therefore fails to comply with the RSL sections 26-511(2) and 26-511.1, which solely permit the agency to approve reasonable costs and instructs the agency to only establish a reasonable cost schedule. This violates the clear mandate of the RSL that only reasonable costs may be granted.

Further, DHCR should amend the proposed 2522.4(b)(2)(vii)(a)(3) to remove the provision that allows an MCI award of costs that include "such other additional items that are eligible as major capital improvements but not listed as part of the Reasonable Cost schedule."

As discussed, the RSL provides that landlords may only receive an award of reasonable costs, and any indication that costs for additional items may be awarded must be removed.

2522.4(b)(2)(viii) The Waiver Procedure is an improper extension of DHCR's authority and violates the clear statutory language, statutory intent and underlying policy of the HSTPA. DHCR should remove the waiver process entirely, because it is an improper extension of its authority under the RSL. The Code provision, as written, lays out a broad waiver procedure, of which most, if not all landlords, will avail themselves of. The Code adds a rule where none exists in the statute and extends that rule far beyond any reasonable interpretation of the RSL.

RSL section 26-511.1 authorizes DHCR to promulgate a reasonable costs schedule for major capital improvements that sets a ceiling for what can be recovered. The plain language of the HSTPA amendment is clear. It does not permit DHCR to establish a reasonable cost schedule with broad exceptions in the form of a waiver. The statutory language does not mention any exception or waiver.

Moreover, the Legislative Memorandum on the HSTPA is explicit that the amendments to RSL were intended to "limit spending" to reasonable costs for improvements. Senator Kavanagh repeatedly clarified during the Senate debate on the HSTPA in 2019 that the amendments to the RSL relating to MCIs were intended to provide a reasonable compensation to landlords when the spend money to improve their investments while specifically intending to end huge windfalls and excessive rent increases allowed prior to the passage of the HSTPA.

The proposed waiver procedure will nullify any reasonable cost schedule and permit the pre-HSTPA status quo that the legislature specifically intended to dismantle. Landlords will undoubtedly avail themselves of the broad exceptions laid out in the waiver requirement to

consistently recoup costs that extend beyond any reasonable cost schedule promulgated. Effectively, by including any waiver requirement, DHCR is not actually promulgating a reasonable cost schedule as required by the legislature and statute, but rather, promulgating a set of additional requirements that landlords must follow in order to recoup the entirety of the cost of their work beyond any reasonable measure.

The proposed waiver procedure violates the broad intent of the RSL and HSTPA amendments, which are remedial statutes intended to prevent the speculative, unwarranted, and abnormal increases in rent. The proposed rule explicitly allows for abnormal increases in rent beyond the reasonable cost schedule in violation of the RSL. Given that any "normal" work should fall within the guidelines of the reasonable cost schedule, any waiver procedure explicitly permits the recoupment of "abnormal" costs through MCIs.

The proposed waiver procedure creates uncertainty in the MCI process, which will disadvantage tenants. The HSTPA was passed amid an ongoing affordability crisis in New York City, which has only been worsened by the Covid-19 pandemic. The reasonable reforms intended by the HSTPA to curb excessive costs pushed onto tenants require a ceiling of reasonable costs. A waiver as a matter of public policy creates an incentive for owners to inflate costs of improvements to increase rent rolls and cause more regulated tenants to suffer a rent burden and ultimately displacement. Further, the waiver process makes it unfairly difficult for tenants to properly contest MCI applications. Expert engineers and architects for landlords will have the opportunity to survey the property prior to, during, and after the completion of the project and have unfettered access to the building. Experts hired by tenants will have their hands tied, as they will only be able to see the cost and work after the completion of the project,

making it difficult to accurately contest the landlord's application. This is if they can even gain access to non-public parts of the building, which landlords often prohibit. The proposed rule also implements a complex review process that further creates uncertainty. Each application will result in extensive review, delay to the parties, inter-agency appeals, and appeals to the Supreme Court. This will create uncertainty, frustration, and likely enormous additional costs to DHCR and the judicial system to determine waivers, a provision in this proposed rule which does not appear anywhere in the HSTPA and was never contemplated by the legislature.

As such, DHCR must remove its proposed waiver rule.

Section 2522.4(b)(4) The RSL provides the calculation for any temporary MCI increase as either 1/144th the total cost for a building with 35 or fewer housing accommodations, or 1/150th the total cost for a building with more than 35 housing accommodations. Despite the unambiguous calculation mandate from the RSL, DHCR proposes to grant itself discretion to determine increases pursuant to 2522.4(b)(1)(iii) & (iv) when such charges are insignificant or inappropriate. This proposal would circumvent and defeat the purpose of the RSL. DHCR must withdraw its proposed discretion, because it violates the unambiguous calculation mandate from the RSL.

Section 2522.4(b)(13)(i) We agree with DHCR's proposal requiring the agency to reject applications involving buildings with hazardous or immediately hazardous violations. However, DHCR must amend the proposed regulation to reject any application for an MCI increase when, at the time of the application, violations remain unresolved in the building, without providing the landlord further opportunity for correction or opportunity to re-apply.

We agree that a landlord should have two years from the completion of the project to

apply for an MCI increase. We believe that this two-year deadline provides ample opportunity for a landlord to correct any violations in the building before submitting an MCI application with no violations of record present. Notably, two years is far more time than HPD requires for correction of any violation (usually, 24 hours to 90 days depending on severity).

As such, the process proposed by DHCR to allow landlords additional time to correct violations, when they have already had two years to do so, must be removed. Landlords should not have the opportunity to refile an application after a denial.

The process proposed by DHCR should apply only when a violation is recorded after an application is properly filed (i.e., when there are no violations of record) and a violation is recorded during the interim period while the agency is reviewing the application and parties' submissions.

As such, DHCR must amend the proposal to provide for an unquestionable denial when landlords submit an application when violations of record exist; prohibit a landlord from re-filing after a denial; and solely allow for a process for the correction of violations that are recorded after submission of an application but prior to the agency's decision thereof.

Section 2522.6 and 2526.1(g)—Default formula

The amended Code inexplicably excises language currently set forth in Section 2522.6(b)(2)(ii), stating that the default formula will be used to determine the base date rent when "a full rental history from the base date is not provided." This missing language should be restored.

Subsection 2522.6(b)(2)(iv) continues to contain confusing language stating that where other branches of the default formula are inapplicable, the rent will be established at "an amount

based on data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations." Since this language was added to the RSC in 2014, DHCR has failed to make public any of its sampling methods. As a result, in buildings where the owner has evaded the Code's requirements for all apartments in the building, courts are at a loss for how to determine the legal rents. Such ambiguity causes delay and confusion in attempting to resolve rent overcharge disputes and can only lead to an increase in remands and referrals to DHCR, which is already struggling to cope with its existing caseload. HCR should either spell out the nature of the sampling methods in the RSC or issue a publicly available directive explaining how rents are determined under subsection (iv). Parallel amendments should be made to Section 2526.1(g).

Section 2523.5(b)(2)—Succession

We commend DHCR for amending the RSC's succession provisions to codify the holding in *Jourdain v. N.Y. State Div. of Hous. & Cmty. Renewal*, 159 A.D.3d 41 (2d Dep't 2018), which resolves a split in the Departments, *see Third Lenox Terrace Associates v. Edwards*, 92 A.D.3d 532 (1st Dep't 2012), and properly realigns the Code with the original remedial goals of protecting affordable housing for families of tenants who would otherwise be subject to the grievous harm of being evicted from their long-term residence. DHCR's action is consistent with its power to interpret and enforce the Rent Stabilization Law and with the intention of the HSTPA to prevent displacement of long-term tenant families.

Succession rights speak to the heart of housing affordability, intergenerational stability and the health, welfare and vibrancy of neighborhoods and communities. Both DHCR and the courts have recognized the centrality of succession rights of family members to achieving the

goals of the Rent Stabilization Laws. As with all affirmative rights, succession claims can succeed only to the extent that the rules are clear, widely understood, and are in tune with the way most lives are lived. The proposed language amending § 2523.5(b) makes an important clarification and realigns the Code with the original purpose of rent stabilization law.

However, we recommend adding the bolded language to the proposed paragraph 2:

> (2) A tenant shall be considered to have permanently vacated the subject housing accommodation when the tenant has permanently ceased residing in the housing accommodation **or has established a primary residence in another housing accommodation**. The continued payment of rent by the tenant or the signing of Renewal leases shall not preclude a claim by a family member as defined in section 2520.6(o) of this Title in seeking tenancy.

This added phrase will make clear that once the tenant of record has established a new primary residence, their vacating will not be called into question based on their temporary occupancy of their original apartment, as it is common, for example, for parents and grandparents to spend substantial amounts of time with their children and grandchildren while maintaining their primary residence elsewhere.

Section 2524.5(a)—Demolition

The proposed amendment simplifies the language of the section, makes minor grammatical edits, and provides a definition of what DHCR means by "demolition." DHCR's proposed amendment that "demolition shall mean the removal of the entire building including the foundation" will help prevent landlords from disguising a substantial rehabilitation of their building as a "demolition," and thereby obtaining permission to displace their stabilized tenants who could not be removed based on rehabilitation of a structure that remained in existence.

However, since the promulgation of this amendment, the Appellate Division ruled that owners do not have to provide plans or secure approvals for the new construction that will occur *after* the demolition. In *Matter of First NY LLC v. New York State Div. of Hous. & Cmty. Renewal*, No. 2022-00687, 2022 N.Y. App. Div. LEXIS 5180* (1st Dep't, Sept. 27, 2022), DHCR had denied the owner's application for demolition based on the owner's failure to provide post-demolition plans or evidence of funding for such plans. In its decision, the Court held that the RSC as currently written does not allow the DHCR to require an owner to submit plans and secure approvals for subsequent *new* construction in order to approve a demolition plan. More specifically, the Court stated:

> …more than 20 years ago, an amendment to the Rent Stabilization Code specifically deleted the very requirement that DHCR imposed on petitioner here. Prior to the amendment, former Rent Stabilization Code § 2524.5(a)(2) required an owner intending to demolish its building to demonstrate that it "has obtained approved plans for the new building or the DHCR has determined that plans have been submitted to the city agency having jurisdiction over the demolition and *new* construction," and to prove further "that all necessary funding for the proposed construction has been secured" (emphasis added).In 2000, DHCR amended section 2524.5 to remove all reference to new building or construction plans.

In order to address the Court's reasoning on this issue, we propose adding a version of the previous language back into the regulation. By way of example, we propose that the regulation be amended to read as follows:

> 2. Demolition
> i. The owner seeks in good faith to demolish the building. As part of the application the owner shall submit proof of its financial ability to complete **the demolition and the subsequent new construction** to the DHCR, and that the plans for **the demolition and subsequent new construction** have been approved by the appropriate city agency. Demolition shall mean the removal of the entire building including the foundation.

The changes would allow this section of the RSC to function as intended and ensure that rent-stabilized housing is not prematurely demolished without plans in place for continued productive use of the lot at issue. Without these changes to the regulation, building owners can move forward with demolishing buildings, dislocating rent-stabilized tenants, and reducing the affordable housing supply without having demonstrated the good faith ability and intent to return the land to productive use. In addition, the absence of bona fide redevelopment plans casts doubt on the owner's intention to demolish the property at all, as opposed to using demolition as a ruse to displace regulated tenants.

Lastly, as an alternative to the permanent relocation stipends provided by DHCR, which are often insufficient to allow rent-regulated tenants to remain in the New York City rental housing market, owners should be obliged to offer pre-existing tenants in a demolished building a comparable or superior unit in the new structure on the same terms and conditions as their prior tenancies, along with temporary relocation stipends during the pendency of the demolition and construction of the new building.

Section 2526.1—Lookback for improper deregulation

The current version of the RSC correctly allows for the examination of the rental history of a dwelling unit beyond the six-year statute of limitations in the case of an inquiry into its regulatory status, as opposed to calculating an overcharge claim:

> (iii) except in the case of decontrol pursuant to section 2520.11(r) or (s) of this Title, nothing contained in this section shall limit a determination as to whether a housing accommodation is subject to the RSL and this Code, nor shall there be a limit on the continuing eligibility of an owner to collect rent increases pursuant to section 2522.4 of this Title, which may have been subject to deferred implementation, pursuant to section 2522.4(a)(8) of this Title in order to protect tenants from excessive rent increases;

However, as it is currently written, this exception does not apply to inquiries into the regulatory status of apartments that were deregulated due to high-rent vacancy (Section 2520.11(r)) or high income (Section 2520.11(s)). This means that, as written, the "decontrol exception" to the statute of limitations applies only to apartments that were deregulated for another reason, such as the expiration of a tax credit or substantial rehabilitation. However, no such distinction has ever been adopted by the courts. Accordingly, this provision should be amended by deleting the first clause of the first sentence.

Decades of appellate case law—including decisions rendered before and after *Regina*, stand for the principle that a court is not bound by the four- or six-year statute of limitations if the purpose of the inquiry is to determine the regulatory status of the apartment. This includes apartments deregulated pursuant to high-income or high-rent vacancies. See *150 E. Third LLC v. Ryan*, 201 A.D.3d 582 (1st Dep't 2022); *Highline 22 LLC v. Lawler*, 74 Misc. 3d 130(A) (App Term, 1st Dep't 2022); *Fuentes v. Kwik Realty LLC*, 186 A.D.3d 435 (1st Dep't 2020); *Bazan v. N.Y. State Div of Hous & Cmty. Renewal*, 189 A.D.3d 495 (1st Dep't 2020); *Diagonal Realty, LLC v. Linares*, 70 Misc. 3d 133(A) (App Term, 1st Dep't 2020); *Gersten v. 56 7th Ave LLC*, 88 A.D.3d 189, 199 (1st Dep't 2011); *East W. Renovating Co v. New York State Div of Hous. & Cmty Renewal*, 16 A.D.3d 166 (1st Dep't 2005).

In applying this well-established exception to the statute of limitations, courts have never distinguished between the decontrol of an apartment due to high-rent vacancy or high-income deregulation and decontrol pursuant to some other mechanism, like a tax credit expiration. The RSC should reflect this and should be amended to bring it into compliance with the authoritative line of cases which establishes that there is no such distinction.

Section 2526.7—Determination of legal regulated rents . . . where proceeding is commenced on or after June 14, 2019

See comments under Section 2520.6(f) above.

NEED FOR ADDITIONAL AMENDMENTS

Apartment Reconfiguration

Section 2522.4(d) and (e). Building owners take advantage of the issuance of vacate orders to reconfigure apartments in ways that may constitute a decrease or modification of services to the tenants who are temporarily out of possession. Such owners apply to the NYC Department of Buildings for construction permits without first securing DHCR's approval as required by RSC § 2522.4(d)(iv) and (e)(3). DHCR should amend Section 2522.4 to make clear that owners may not apply for construction permits based on work that may constitute a decrease or modification of services without first obtaining DHCR approval. However, because applications under Sections 2522.4(d) and (e) may substantially delay the repair of vacated buildings and consign the tenants to prolonged periods of homelessness, DHCR should also state that reconfiguration of apartments will be entirely prohibited during the pendency of any vacate order, unless specifically required by the Building Code or other applicable law.

Preferential Rents—Treble Damages

Section 2526.1(a)(1) DHCR's longstanding policy, in harmony with appellate case law, is to award treble damages for charges in excess of the legal regulated rent, but only single damages for charges that exceed the preferential rent set forth in the tenant's lease. The rationale, as articulated by the court in *Aijaz v. Hillside Place, LLC*, 8 Misc.3d 73 (App. Term 2d, 11th and

13th Jud. Dists 2005), *aff'd in part, rev'd in part*, 37 A.D.3d 501 (2nd Dep't 2007), was that preferential rents were in essence voluntary contractual concessions on the part of the landlord, rather than mandates of the RSL itself, and excess charges were therefore recoverable only as simple contract damages ("a collection of rent in excess of the preferential rent constitutes only a breach of the agreement of the parties and not an offense against the rent-overcharge statutes.")

However, Part E of the HSTPA, amending Section 511(c) of the RSL, now prohibits owners from charging tenants more than the rent actually "charged and paid" on or after the enactment date of the statute where that amount is less than the "legal regulated rent." Tenants' right to the continuation of a "preferential rent" is therefore now statutory, and no longer purely a matter of contract. There is no reason why a landlord collecting rent in excess of the amount permitted under Part E should be treated differently than landlords violating any other statutory rent limitation. Section 2526.1 should be revised to provide for imposition of treble damages based on charges in violation of the provisions of Part E.

Late Registrations

Section 2528.4. In 2014, DHCR added a salutary provision to subsection (c) of Section 2528.3, requiring owners to file applications for permission to amend rent registrations and to establish the propriety of such amendment. This provision addressed a longstanding loophole in the rent regulation system, which allowed landlords to replace contemporaneously filed rent registrations with new "amended" registrations, often completely rewriting the rent history for the apartments. The amendment process operated wholly without DHCR oversight, leaving landlords free to substitute higher fraudulent rents for the prior registered amounts without

supplying any proof that the new amounts were correct or providing any explanation of why the amendments were necessary.

However, the 2014 amendments did not address the parallel problem of landlords filling in missing registrations long after the years in question, raising similar concerns about accuracy and truthfulness. DHCR should add a provision to Section 2528.4 tracking the language of 2528.3(c) and requiring landlords to seek permission to file late registrations while establishing the accuracy of the information contained in the late-filed documents.

Both 2528.3 and 2528.4 should be amended to state explicitly that tenants must be given notice of any applications to amend or file late registrations.

CONCLUSION

Thank you for the opportunity to comment on these proposed amendments to the Code. We applaud the agency for taking these important steps to implement the remedial purposes of the HSTPA, and we stand ready to continue to work with this Administration and the DHCR to address these urgent matters.

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Respectfully submitted,

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