

## Assessment of Public Comments for RSC

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

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

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

### **9 NYCRR 2520.5**

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

#### DHCR’s Response:

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

### **9 NYCRR 2520.11**

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

DHCR's Response:

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

**9 NYCRR 2521.2(b)**

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

DHCR's Response:

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

**9 NYCRR 2521.2(c)**

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

DHCR's Response:

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

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

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

DHCR's Response:

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

**9 NYCRR 2522.4(a)(13)**

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

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

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

DHCR's Response:

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

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

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

### **9 NYCRR 2522.5(c)(1)**

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

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

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

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

#### DHCR's Response:

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

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

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

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

### **9 NYCRR 2522.5(c)(3)**

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

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

#### DHCR’s Response:

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

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

### **9 NYCRR 2522.6(b)**

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

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

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

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

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

DHCR’s Response:

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

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

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

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

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

DHCR's Response:

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

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

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

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

DHCR's Response:

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

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

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

### **9 NYCRR 2525.5**

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

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

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

### DHCR’s Response:

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

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

### **9 NYCRR 2526.1(a)(2)**

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

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

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

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

DHCR's Response:

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

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

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

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

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

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

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

DHCR's Response:

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

**9 NYCRR 2526.1(g)**

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

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

DHCR's Response:

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

**9 NYCRR 2528.3(a) and (c)**

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

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

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

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

DHCR's Response:

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

**9 NYCRR 2528.4(a)**

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

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

DHCR's Response:

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

**9 NYCRR 2531.2**

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

DHCR's Response:

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