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TO: Housing Justice for All

FROM: Seth A. Miller

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RE: Draft Comments on the Rent Overcharge Provisions of DHCR's Proposed Amendments to the Rent Stabilization Code

INTRODUCTION

The HSTPA was passed in reaction to the massive levels of deregulation that had taken place since 1997, and was intended to restore unlawfully deregulated apartments to rent stabilization, and to restore rents throughout New York City, long polluted by the tolerance under prior law for rent overcharges that had been in place for over four years, to the legal level that would have been in place if fraudulent rents had not been given legal impunity. As explained in the Sponsor's Memorandum that accompanies Senator Myrie's original version of what became Part F of the HSTPA, (https://www.nysenate.gov/legislation/bills/2019/s4169/amendment/original), the intent of Part F was to enable tenants to obtain adjustments to their prospective rents, without regard to the passage of any statute of limitations:

> Current rules have favored landlords over tenants and accordingly, many tenants are left paying more for their rent stabilized apartments than they rightfully should. Oftentimes, rental apartments experience high turnover rates, making it difficult for tenants to recognize when an overcharge has occurred. Current enforcement practices are reactive and require the submission of a complaint by the tenant of record. It is wrong to penalize tenants who did not realize their rent was too high until after the current 4 year statute of limitations has expired, whether a delay occurred because the tenant did not reside in the apartment when the overcharge occurred or they were previously unaware that they were being overcharged.

DHCR's proposed implementation of the HSTPA will unlawfully continue to shield, from legal scrutiny, the overcharges that are built into the rents of countless thousands of apartments. Landlords will be permitted to continue to collect overcharges even if the proof that the current rent is illegal can be easily obtained and cannot be refuted. DHCR offers no justification for removing, from the operation of the HSTPA, the essential tools that the legislature plainly included: the scrutiny of suspect rents no matter how long ago they began to be collected, the use of the registration system as the ultimate measure of the legality of rents, and the clear statement that rents will be set in accordance with all available records, regardless of whether landlords have chosen (whether legally or not) to dispose of their records.

Neither *Matter of Regina Metro. Co., LLC v. N.Y. State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332 (2020) ("*Regina"*) nor the speculative claims of the tiny number of landlords who may have lawfully disposed of rent records, justify DHCR's proposal to eviscerate Part F of the HSTPA. As detailed below, *Regina* does "not opine" on the application of the HSTPA to overcharges collected after June 14, 2019. For apartments where the records were not permitted under prior law to be destroyed, or where the landlord did not, in fact, destroy their rent records, there is no justification whatsoever for DHCR's refusal to apply HSTPA prospectively, to overcharges taking place after its effective date.

The HSTPA amendments to Rent Stabilization Law §26-516(a) require that the legal rent be set at "the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases and adjustments." This language does *not* set a base date for determining legal rents. Rather, the rent depends upon the reliability of a registration statement filed, at a minimum, between six and seven years prior to the complaint, depending upon how much time has elapsed between "the most recent" statement and the date of the complaint. Ultimately, where an apartment's rent history is in good order, with registrations filed every year, the law looks to a reliable registration statement, not the rent paid on any fixed date, as the source of the base rent.

The HSTPA is plainly intended to extend the lookback period for examining rents when the landlord illegally fails to register, or illegally deregulates the apartment. The legal rent is what appears on a "registration statement filed and served upon the tenant." If the registration history is missing a registration statement six years before the most recent one, then the statute requires looking back to "the most recent reliable" statement before that. Failing to register in a given year adds a year to the lookback period, as the statute clearly says. Failing to register for ten years adds ten years, as the statute says.

Where there is a dispute about the reliability of a registration statement offered to establish the base rent, all relevant rent history, potentially going back to 1969, can be considered: a court or the DHCR "shall consider all available rent history which is reasonably necessary to make such determinations." The statute is clearly intended to minimize if not eliminate the impact of any claim by landlords of having lawfully disposed of rent records: "an owner's election not to maintain

records shall not limit the authority of the [DHCR] and the courts to examine the rental history and determine legal regulated rents."

DHCR's proposal would neutralize these provisions. Where the statute requires that rents be set in accordance with a base rent, proposed RSC §§ 2520.6(f), 2526.1 and 2526.7 resurrect the anachronistic concept of a "base date." Where the statute requires that the full rent history for an apartment be examined, unless the registration history has been consistent and reliable, DHCR's proposal requires that the public once again swallow a system of continued landlord impunity, projecting forever into the future, for any overcharges that were in place as of June 14, 2015. DHCR's proposal is flagrantly illegal.

Any number of simple examples will illustrate the point. For example, assume that a landlord unlawfully deregulates an apartment in 2011, thinking mistakenly that the threshold was $2,000.00 when in fact it was increased to $2,500.00, and never registers again. Under DHCR's proposal, the tenant's 2015 rent would be the base rent, even if it is double or triple the amount that the easily-retrievable documentation (such as when the complaining tenant was in occupancy since 2011) will show to be the maximum that could be charged. In this way, DHCR's proposal would render every apartment for which an illegal and unaffordable rent was charged as of June 14, 2015, permanently unaffordable.

Regina does not require this result. *Regina* held only that the overcharge provisions of the HSTPA could not be applied retroactively to overcharges taking place prior to it enactment, since as to those overcharges prior law created property interests that could not be deprived without due process.

As to any rent collected after June 14, 2019, *Regina* clearly recognizes that the HSTPA applies. The opinion opens (35 NY3d at 350) with the Court's description of its intent:

> As to the HSTPA, today we fulfill this quintessential judicial function in holding that a limited suite of enforcement provisions may not be applied retroactively and *opine in no way on the vast majority of that legislation or its prospective application.*

(Emphasis supplied). After a discussion of how each of the four cases at bar should be decided under pre-HSTPA law, the Decision returns to the subject of retroactive application of the HSTPA, and again says (35 NY3d at 362):

> In the context of legislation as significant as the HSTPA, the question we address here is relatively narrow – *we have no occasion to address the prospective application of any portion of the HSTPA*, including Part F.

(Emphasis supplied). As part of its discussion of the problems with retroactive application of the HSTPA, the Court recognized that prospective application does not suffer from those same infirmities (35 NY3d at 383):

> While *prospective application of part F to overcharges occurring after the effective date may serve legitimate and laudable policy goals*, no explanation has been offered, much less a rational one, for retroactive application of the amendments to increase or create liability for rent overcharges that occurred years—even decades—in the past.
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> . . .
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> Likewise, *to the degree that prospective application of certain provisions of the HSTPA is justified because the Legislature has concluded that those provisions will act to preserve the stock of stabilized housing or moderate rents going forward, retroactive application of the amendments to increase the amount of an overcharge judgment (or create overcharge liability where none existed) does not return apartments to rent stabilization or ensure the propriety of rents collected in the future*.

(Emphasis supplied).

This language makes it clear that prospective application of the HSTPA has not been curtailed, and that "prospective" means the setting of any rent collected after June 14, 2019.

By disallowing the application of the HSTPA to any case *filed* prior to the HSTPA, regardless of whether it involves rents *collected* after the HSTPA, DHCR has proposed disregarding the very principle that it claims is the guiding principle behind its proposed regulation. *Regina* repeatedly states that "prospective" application of the HSTPA to *rents collected* after June 14, 2019 is not affected by the Court's decision. DHCR has no authority to prohibit tenants with prior pending overcharge cases from seeking and obtaining an adjustment of their post HSTPA rents.

Limiting the application of the HSTPA to cases *filed* after its enactment leads to absurd results, where the legal rent for the same apartment for the same month and the same year can be different depending on when the complaint is filed. By making the legal rent dependent upon the date a complaint was filed, DHCR is substituting new and equally vexing due process problems for the ones that the *Regina* court attempted to put to bed. *Compare, Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (administrative agency may not deprive a litigant of a valid cause of action based on arbitrary procedural requirements).

Similarly, the potential existence of a tiny number of landlords who are in a position to say that they lawfully disposed of rent records that would, if they were available, indubitably provide them with a complete defense to an overcharge claim, does not require that DHCR jettison the rent setting mechanisms required by the HSTPA.

Firstly, it should be obvious that there is no constitutional problem with applying the HSTPA as written to any overcharge case where either all the relevant rent records *are* available or where the disposal of any rent records was not permitted by law. A facial constitutional challenge is simply not available where there is a conceivable set of cases in which the statute could be applied constitutionally. *Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003] ("A party mounting a facial constitutional challenge bears the substantial burden of demonstrating 'that 'in any degree and in every conceivable application,' the law suffers wholesale constitutional impairment" [citation omitted]").

As DHCR is likely aware, there has never been a reported case in which a landlord has been found to have lawfully disposed of records that were found to have been potentially dispositive in an overcharge case. For example, in each one of the four cases decided in the *Regina* opinion, the landlord had kept a complete set of rent records. The plain fact is that in most cases, the records are available, either because the landlords were required to keep them or because the landlord chose to keep them.

There is no reason to think that there is a large number of apartments for which rent records have been lawfully disposed of. Contrary to popular belief, it has never been lawful to dispose of records on deregulated apartments. Under prior law, the disposal of records was only allowed on registered apartments, and only those records from four years prior to the most recent registration. The regulation also allowed the disposal of records from prior to the "base date" as defined under former law, so that a landlord could get rid of records when an overcharge complaint was filed. The definition of "base date," however, was tied to the filing of an overcharge complaint, so that under former law there was no right on the part of landlords to simply throw out records where there had never been an overcharge complaint.

The records disposal rules under prior law were subject to a large number of exceptions. Because under prior law there was no limitation on the records that could be used to determine the status of an apartment, landlords never had the right to dispose of records for deregulated apartments. Landlords never had the right to dispose of records showing the useful life of improvements. Many landlords were required under statutory schemes that overlap with rent stabilization to keep records for a greater period of time than was strictly required under the pre-HSTPA version of RSL §26-516(g). For example, under both the 421-a and the J-51 program, records must be kept for six years, not four. See, 28 RCNY §39-06(a). For apartments subsidized by a Low Income Housing Tax Credit, records pertaining to the first year of participation must be kept for six years after the last year of participation, and all other records must be kept for six years. See, 26 CFR §1.42-5(b).

Moreover, rent records are often saved by landlords for very practical reasons. For tax purposes, prudent landlords are advised to keep records of improvements that are subject to depreciation schedules. The Internal Revenue Service website advises the following:

> Generally, keep records relating to property until the period of limitations expires for the year in which you dispose of the property. You must keep these records to figure any depreciation, amortization, or depletion deduction and to figure the gain or loss when you sell or otherwise dispose of the property.

https://www.irs.gov/businesses/small-businesses-self-employed/how-long-should-i-keep-records.

In the vast majority of cases, therefore, there should be no controversy about using the HSTPA to determine tenants' post-HSTPA rents. DHCR's regulations should provide for a rent calculation, for rents collected after June 14, 2019, that tracks the statute. As DHCR has recognized with other parts of its 2022 proposed revisions to the RSC, it is often appropriate simply to track the statutory language.

Secondly, even in those cases where there could be a claim concerning the disposal of rent records, the HSTPA is required to be applied as written. If DHCR decides that landlords in this narrow category should be given some equitable accommodation, that accommodation should be made as narrow as possible, with the understanding that no law and no constitutional provision requires it. This is because landlords who dispose of rent records have no viable claim of constitutional injury, and because the HSTPA specifically requires the use of all available records in cases where landlords have disposed of rent records.

Landlords who dispose of relevant rent records have no constitutional claim to make. A landlord who is telling the truth about having lawfully disposed of rent records before June 14, 2015 is nevertheless in the unenviable position of being unable to prove its defense to an overcharge proceeding using the missing records. In fact, that inability to defend the proceeding is the entirety of the landlord's claim of prejudice.

A landlord who is unable to prove that, but for missing records, it would be in a position to defend an overcharge claim, cannot prove it has a property interest that has been taken without due process. *Am. Economy Ins. Co. v State of NY*, 30 NY3d 136, 140-41 (2017). Absent proof of entitlement to the rent increase that would supposedly have been collectible but for the destruction of records, there is no claim that pre-HSTPA records retention provisions created any vested property interest. The HSTPA must therefore apply in every case.

Although a landlord who can prove it lawfully disposed of records may be entitled to sympathy, therefore, it is not entitled to an exception to the clear mandate of the HSTPA: "an owner's election not to maintain records shall not limit the authority of the [DHCR] and the courts to examine the rental history and determine legal regulated rents."

DHCR may only accommodate such landlords to the extent that the language of the HSTPA is open to interpretation. There are few open questions under the HSTPA. However, there has never been a settled definition of the term "reliable registration." On the issue of reliability, the HSTPA is silent as to how the burden of proof is to be allocated. These two issues are the only ones where DHCR has any statutory room to make adjustments to the statutory rent calculation rules, to accommodate the claims of landlords who can prove that they lawfully disposed of records. Without violating the statute, for example, DHCR could adopt a regulation that says that a landlord who demonstrates the lawful disposal of rent records for an apartment that has no gaps in its history of annual registrations, may on a case-by-case basis be entitled to either a presumption that satisfies the burden of proving reliability, or entitled to have the burden of proof shifted altogether. The HSTPA provides no more room than this to accommodate the record disposal claims of landlords.

On the other hand, landlords who make a false claim of having disposed of records, or who have disposed of them illegally, should be found to have triggered application of the default formula, under the traditional principles articulated in DHCR's proposed amendments to RSC 2522.6.

In 1997, DHCR adopted regulations that gave the "four year rule" such an aggressive interpretation that the law remained unsettled for decades. Few issues have been reviewed by the Court of Appeals more often than the four year rule. Where the RSL supposedly aims to enable the public to ascertain legal rents with ease, and to avoid paying or collecting overcharges without having to engage in years of litigation, the result was instead a disastrous morass.

The HSTPA was intended to clear up that morass. In implementing it, DHCR should not enact regulations that will turn every overcharge claim into major constitutional litigation. Tenants will undoubtedly challenge DHCR's proposed regulations as illegal, in the vast majority of cases that may arise under them. In order to fulfill the mandate of the HSTPA, DHCR must change course, and implement the statute as written.