SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:

X

In the Matter of the Application of

STUYVESANT TOWN-PETER COOPER VILLAGE TENANTS ASSOCIATION, and SUSAN STEINBERG, as President and Tenant Representative,

Petitioners,

for Judgment under Article 78 of the Civil Practice Law and Rules,

- against -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

X

Index No.:

VERIFIED PETITION

Petitioners, THE STUYVESANT TOWN - PETER COOPER VILLAGE TENANTS ASSOCIATION, and SUSAN STEINBERG as President and Tenant Representative, by their attorneys, COLLINS, DOBKIN & MILLER LLP, allege the following as and for their Verified Petition:

THE PARTIES

1. Petitioners are the Tenants Association ("TA" or "Tenants" or "Petitioners"), representing over two thousand rent stabilized tenants at Stuyvesant Town/Peter Cooper Village (the "Apartment Complex"), and SUSAN STEINBERG is the President of the TA and tenant representative.

2. Respondent NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL ("DHCR") is the administrative agency charged with inter alia, the responsibility and

duty of implementing the Rent Stabilization Law (New York City Administrative Code §26-501 et seq.), including by promulgating the regulations that are required under the mandate of the Rent Stabilization Law.

SUMMARY OF THE PETITION

2. This Petition[1] seeks a judgment that DHCR's newly promulgated "Reasonable Cost Schedule" ("RCS") for major capital improvements ("MCIs") that qualify for rent increases, consisting of Rent Stabilization Code (9 NYCRR) §2522.11 together with Operational Bulletins 2020-1 and 2021-1, violates the provisions of the Housing Stability and Tenant Protection Act of 2019 ("HSTPA", L 2019 Ch. 36) and is therefore null and void. The HSTPA required that DHCR replace its system of assessing rent increases for major capital improvements, which had allowed rent increases based on the landlord's actual costs and did not limit the type of work that could potentially qualify as improvements, with a new system that allowed rent increases based only on "a schedule of reasonable costs." As explained in greater detail below, DHCR's new regulation permits rent increases based on costs for items that do not appear on any "schedule of reasonable costs", allows rent increases for costs that are above the amounts on the schedule, and does not ultimately fit the settled definition of "reasonable costs" as that term has been employed in numerous other statutes.

3. Until June 14, 2019, rent increases for major capital improvements made in rent

[1] On authority of *NYC Health and Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194 (1994), Petitioners bring this proceeding under Article 78 of the CPLR. Petitioners believe that *McBarnette* requires that a challenge to a regulation as *ultra vires* must be brought in the form of an Article 78 proceeding. To the extent that prior caselaw, holding that a challenge to a quasi-legislative regulation should be brought by means of a declaratory judgment action, retains any validity since it has not been explicitly overruled (*see, e.g., Bryant Ave. Tenants' Ass'n v. Koch*, 71 N.Y.2d 856 (1988), or to the extent that the Court disagrees with Petitioners' belief about the proper form of this proceeding, they respectfully request that this proceeding be converted to a declaratory judgment action.

stabilized buildings had been based upon the actual cost incurred by the landlord, no matter how high, and were based not only on qualifying improvements (for example, a new stairway), but also on additional work that were deemed to be "related" to the qualifying improvements (for example, painting a new stairway). Those "add-ons" involved items that do not themselves qualify as major capital improvements.

4. The prior system permitted, and indeed incentivized, exorbitant rent increases, without regard to the reasonableness of the cost involved, for unnecessary work undertaken merely as an end-run around the limits on regulated rents. For example, Exhibit A is Respondent DHCR's February 15, 2019 Order, under Docket No. DV-410097-OM, granting the landlord of 215 East 68th Street a rent increase of $200.03 per room, plus retroactive arrears of $7,001.05 per room, based on the owner's expenditure of $56,681,111.53 on adding an entirely new "terra cotta rainscreen system" to a rent stabilized building. As shown below, the example of the fifty-six million dollar terra cotta resurfacing job was part of what motivated the legislature to pass the HSTPA. (*See*, Transcript of Public Hearing on the Reasonable Cost Schedule, Exhibit B, testimony of Senator Gustavo Rivera, p. 26).

5. Effective June 14, 2019, the HSTPA (now codified in pertinent part at NYC Administrative Code (Rent Stabilization Law) §§26-511(c)(6) and 26-511.1) imposed drastic new conditions upon any new rent increases for major capital improvements, only some of which have been the subject of any new regulations by DHCR. Among other things, the legislature prohibited retroactive increases, prohibited rent increases on buildings with 65% or more deregulated units, prohibited rent increases in buildings with hazardous or immediately hazardous violations, and placed a ceiling of 2% of a tenant's rent upon the amount of any approved increase that can be

collected against a tenant in a year, with the remainder rolled over into future years. *See*, RSL §26-511.1 (2) through (8) and §26-511(c)(6). DHCR has not promulgated regulations implementing these significant restrictions.

6. However, the first and most important restriction imposed by the HSTPA on MCI rent increases was the requirement that no rent increase could be based on any improvement not listed, or based on any amount in excess of the amount listed, on a "reasonable cost schedule," to be promulgated by DHCR. DHCR was required to "establish a schedule of reasonable costs for major capital improvements, which shall set a ceiling for what can be recovered through a temporary major capital improvement increase." Reiterating, the statute limited increases to those that are based on " such costs that are actual, reasonable, and verifiable."

7. On January 27, 2021 DHCR published its Notice of Adoption of the regulation and the two Operational Bulletins that constitute the Reasonable Cost Schedule. (Exhibit C is the Notice of Adoption). Where the HSTPA by its plain terms sets a ceiling on MCI rent increases by limiting them to the increases appearing on a finite schedule, the challenged regulation (1) provides that the schedule may be waived, and (2) provides that the list of eligible work on the schedule may be supplemented by additional items not on the schedule. Moreover, the actual costs set forth in the reasonable cost schedule are (3) well above what are the "reasonable costs" of the type of work at issue, using the definition that the legislature has adopted, and the courts have implemented, in other contexts. Specifically, the costs in the Operational Bulletins do not reflect any reasonable industry-wide average costs at all, and are well above the amounts found by Petitioners' expert, whose report is part of the administrative record (Exhibit D), and above the amounts used by the City of New York in the two reasonable cost schedules contained in its J-51 and Loft Law regulations. (See,

Exhibits E and F). Instead, as DHCR admits in its Notice of Adoption, its schedule is designed not to impose any reduction in eligible costs in a majority of cases: the "majority of owners who operate in good faith and who do not attempt to inflate the costs of major capital improvements will be largely unaffected by the regulation."

8. A regulation that has no financial impact on the "majority of owners" cannot be one that implements the traditional definition of "reasonable cost", approved by the courts in the context of J-51 tax abatements (*Friedman-Kien v. City of New York,* 92 A.D.2d 827 (1st Dept., 1983), Medicaid reimbursement rates (*High Point Hospital v. Surles,* 218 A.D.2d 874 (3d Dept., 1995), and nursing home rates (*Sigety v. Ingraham,* 29 N.Y.2d 110 (1971): the legislature uses the phrase to require the establishment of an industry-wide average. Mathematically, DHCR cannot have adopted an industry average if the "majority of owners" incur costs that are below average. If the majority are unaffected by the regulation, then DHCR has not implemented a schedule of "reasonable costs." The phrase "reasonable costs" does not mean, as DHCR would have it, any costs that are "not inflated." [2]

9. These points are made in greater detail, below.

FACTS AND PRIOR PROCEEDINGS

10. Prior to the enactment of the HSTPA, rent increases for MCIs were based upon the

[2] Petitioners reserve the right to supplement and amend this Petition, or to seek Court permission to amend the Petition, once DHCR makes public the underlying data that is the basis for its cost schedule. DHCR has not made public the actual data relied upon in adopting its schedule. The Notice of Adoption describes the RCS as based upon three sources of information: data gathered by an outside expert hired by DHCR, data gleaned from its own MCI database, and "a cost schedule prepared by a professional engineering firm that has done extensive work with CPC, a not-for-profit affordable housing lender." Petitioners have requested this information under the Freedom of Information Law (Exhibit G) and DHCR has acknowledged the request but has not provided the requested information. In this Article 78 proceeding DHCR is under a separate obligation to provide this material pursuant to CPLR 7804(e), since it is part of the administrative record of its rulemaking activities.

"cash purchase price exclusive of interest or service" of the installation of a qualifying building-wide improvement. RSL §26-511(c)(6); *Ansonia Residents Ass'n v. N.Y. State Div. of Hous. & Cmty. Renewal*, 75 N.Y.2d 206 (1989). Under Rent Stabilization Code §2522.4(a)(2), the regulation in effect before the HSTPA, the work was required to meet the following standards:

> (i) There has been a major capital improvement, including an installation, which must meet all of the following criteria:
>
> (a) deemed depreciable under the Internal Revenue Code, other than for ordinary repairs;
>
> (b) is for the operation, preservation and maintenance of the structure;
>
> (c) is an improvement to the building or to the building complex which inures directly or indirectly to the benefit of all tenants, and which includes the same work performed in all similar components of the building or building complex, unless the owner can satisfactorily demonstrate to the DHCR that certain of such similar components did not require improvement; and
>
> (d) the item being replaced meets the requirements set forth on the following useful life schedule, except with DHCR approval of a waiver . . .

11. By regulation, DHCR permitted the cost of "related" and "additional" work to be added to the costs to be passed on to tenants in the form of rent increases, if the work was "other necessary work performed in connection with, and directly related to a major capital improvement." Rent Stabilization Code §2522.4(a)(2)(ii). For example, applying waterproofing material to a building is not by itself an MCI, but if it is done in connection with pointing (filling in the gaps in the mortar on all surfaces of a brick building) or resurfacing work, it became part of the cost that resulted in rent increases under pre-HSTPA law. *See, Admin. Appeal of 413 West 47th St.*, Docket No. WK 410006 RO (2013) (Exhibit H). Painting is not an MCI, since it is ordinary maintenance.

DHCR has permitted painting costs to be included in the basis for a pre-HSTPA rent increase, however, where it was performed on a newly-installed staircase. *Admin. Appeal of 28 Perry Street Condominium*, Docket No. CS430026RO (2018) (Exhibit I).

12. These rules led to abuse. As noted above, DHCR has approved MCI applications without regard to cost, so long as the owner submits evidence acceptable to DHCR that the amount claimed was actually spent on a new installation meeting the "operation, preservation and maintenance" standard quoted above. Exhibit A shows that, in the months leading up to the enactment of the HSTPA, DHCR approved a rent increase of $200.03 per room, with retroactive charges of $7,001.05 per room, based on the installation of a "terra cotta rainscreen system" that had an approved cost of $56,591,304.88.

13. Effective June 14, 2019, the legislature enacted the HSTPA. In pertinent part, the HSTPA enacted Rent Stabilization Law §26-511.1, which now reads:

> a. Notwithstanding any other provision of law to the contrary, the division of housing and community renewal, the 'division', shall promulgate rules and regulations applicable to all rent regulated units that shall:
>
> (1) establish a schedule of reasonable costs for major capital improvements, which shall set a ceiling for what can be recovered through a temporary major capital improvement increase, based on the type of improvement and its rate of depreciation;
>
> (2) establish the criteria for eligibility of a temporary major capital improvement increase including the type of improvement, which shall be essential for the preservation, energy efficiency, functionality or infrastructure of the entire building, including heating, windows, plumbing and roofing, but shall not be for operational costs or unnecessary cosmetic improvements. Allowable improvements must additionally be depreciable pursuant to the Internal Revenue Service, other than for ordinary repairs, that directly or indirectly benefit all tenants; and no increase shall be approved for

> group work done in individual apartments that is otherwise not an improvement to an entire building. Only such costs that are actual, reasonable, and verifiable may be approved as a temporary major capital improvement increase;

The language at issue here is simple and straightforward. There is to be "a schedule of reasonable costs." That schedule is to set "a ceiling for what can be recovered." The schedule is to list "the type of improvement." Unambiguously, any item not on that schedule cannot be counted toward the cost of an MCI. Plainly, any cost above the "ceiling" cannot be permitted to be the basis of a rent increase. MCI increases are to be based on costs that are "actual, reasonable and verifiable." The use of the words "actual" and "reasonable" together in this manner strongly suggests that the reasonableness requirement cannot be met by merely adopting a schedule of actual costs.

14. The sponsor's memo accompanying the HSTPA indicates the broad purpose of this provision: it "limits spending to HCR schedule of reasonable costs for improvements." (Exhibit J). The intent of the legislature was not to permit any other spending, other than for items on the schedule, capped by the cost limits on the schedule.

15. As noted in greater detail below, the phrase "reasonable costs" is one with a settled meaning in New York law. It must be presumed that, in choosing that phrase, the Legislature intended to require DHCR to adopt a schedule that reflects average costs for qualifying improvements, as the City of New York has done with its similar cost schedules in the J-51 program and the Loft Law, and as is the case in the legislation governing Medicaid reimbursement.

16. According to the legislators who testified at DHCR's public hearing on the RCS, the purpose of these changes was to "end the rampant abuse of the MCI program by unscrupulous landlords" (Exhibit B, testimony of Senator Gustavo Rivera, p. 23), by closing what the legislature

treated as loopholes. As Senator Brian Kavanagh described it (*Id*, p. 36):

> we passed HSTPA to begin addressing a very longstanding housing crisis in part by closing decades old loopholes that permitted deregulation and displaced thousands -- hundreds of thousands of tenants of apartments and fostered some destructive and sometimes predatory behavior by some landlords. There were many components of that, but one of the major components of that was very rapid increases in rents that were fostered by MCIs that were very frequently seemed to be beyond the reasonable costs, and of course that created many incentives for landlords to do work that may be unnecessary simply for the benefit of -- of increasing rents very rapidly.
>
> So the MCI provisions -- and there were a variety of them -- were intended to rein in those practices and have a level playing field for tenants and diminish the kind of economic harm that came from the loopholes.

As it turns out, in the RCS the very things that the legislators testified, at DHCR's only public hearing on the RCS, were "loopholes" – waivers of any cost limitations, the ability to add the costs of "related" items that themselves do not qualify as MCIs – are treated in the RCS as traditional parts of DHCR's methods for processing MCI applications, and they are preserved, in violation of the HSTPA.

17. The legislature directed that the regulations required by the HSTPA be "made immediately" and directed DHCR to "immediately commence and continue implementation of all provisions of this act [the HSTPA]." L 2019, ch. 39, §29.

18. DHCR then treated the legislature's directive as authorizing the adoption of earlier temporary versions of the RCS on an emergency basis. DHCR adopted Operational Bulletin 2020-1 on June 16, 2020. At that time, it had not adopted any final regulation as contemplated by the HSTPA. DHCR published a Notice of Emergency Rule Making on July 1, 2020, with an emergency

version of the RCS. It published another Notice of Emergency Rule Making on November 13, 2020.

19. Notwithstanding the series of emergency measures, DHCR held only one public hearing on the RCS, on September 9, 2020, after it had already been adopted on an emergency basis without any public input. There was only one round of public comment, considering only submissions made on or before the hearing.

20. Among the evidence submitted to DHCR, Petitioners submitted a study they commissioned from Lewis Finkel, F.C.P.E. (a Fellow Certified Professional Estimator), of the amounts he would estimate, in his professional practice, would be the reasonable cost of the MCIs listed in Operational Bulletin 2020-1. His report is Exhibit D. Mr. Finkel persuasively estimates that the actual reasonable costs of the listed work are between 51% and 98% of the amounts adopted by DHCR. For example, a 3-ply roof should cost $38 per square foot, according to Mr. Finkel. DHCR has listed this item as $72 per square foot.

21. DHCR was also aware of the Schedule of Reasonable Costs used by the New York City Department of Housing, Preservation and Development ("HPD") in assessing the amount of the tax benefits to be awarded to landlords, under the J-51 program, for major capital improvements. (Exhibit E). Although DHCR argues in its Notice of Adoption (Exhibit C) that HPD's schedule is "prone to inaccuracies" and outdated, neither the correction of inaccuracies nor the need to update data can explain the size of the discrepancies between the two schedules. For example, according to HPD, a new roof should cost $1.25 per square foot, not $72.00.

22. DHCR apparently did not consider the cost schedule used by the Loft Board to assess the rent increase to be passed on to tenants of commercial lofts that are legalized for use as rent stabilized apartments (Exhibit F). Although that list includes work that is not typical of MCIs (for

example, legalization often requires the installation or removal of partitions, to allow for the lawful relationship between the living space and the available windows), and does not include some typical MCI work, there is enough overlap to make a useful comparison. According to the Loft Board, a new double hung window should cost $321.76. DHCR has set the "reasonable" cost at $650.00.

23. On January 27, 2021 DHCR adopted the final version of the RCS, publishing a formal Notice of Adoption in the State Register. (Exhibit C). This proceeding, commenced within four months thereafter, is timely.

24. On information and belief, after speaking to members of the tenant community who have filed Freedom of Information Law requests with the agency, DHCR has never released the underlying data produced by its staff and its expert contractors in formulating the cost schedule.

25. The final version of Rent Stabilization Code §2522.11 violates the HSTPA in three fundamental ways: (1) it provides for waivers of the reasonable cost schedule; (2) it permits landlords to obtain rent increases for "related" work that is not listed on the reasonable cost schedule and does not independently qualify as an MCI; and (3) it permits increases based on costs that are not "reasonable costs" but, instead, costs that it admits are the same costs as what a majority of owners were permitted to use before the law was amended.

26. Pursuant to State Administrative Procedure Act §205, Petitioners sent notice to DHCR on April 25, 2021 that the RCS regulation conflicts with the HSTPA and of their intention to bring this proceeding. (Exhibit K).

27. On May 13, 2021 Petitioners filed a Freedom of Information Law Request for the underlying data and documentation referred to by DHCR, in its Notice of Adoption, as forming the basis for the RCS. DHCR has acknowledged the request, but has not furnished the requested

documents.

28. As argued below, the RCS is contrary to the provisions of the HSTPA, and should accordingly be held to be null and void.

THE APPLICABLE LAW

A: Regulations Must be Consistent With Statute

29. As the Court of Appeals has repeatedly said, "'[a]dministrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute' (*Matter of Jones v Berman*, 37 NY2d 42, 53 [citations omitted])" *Seittelman v. Sabol*, 91 N.Y.2d 618, 626 (1998). The HSTPA has imposed a rule that, in all cases, limits the items eligible for an MCI rent increase to those on a "reasonable cost schedule," and limits the costs to the amounts on that schedule. DHCR has no authority to add exceptions to that rule.

30. The issue of whether a regulation is consistent with statute or not is an issue of law for the Court to determine. *Ansonia Residents Ass'n, supra,* 75 N.Y.2d at 214. Courts "need not and do not defer to the agency in construing the statute [citation omitted]." *Id.* Here, the issue is the meaning of the simple language requiring DHCR to "establish a schedule of reasonable costs for major capital improvements, which shall set a ceiling for what can be recovered through a temporary major capital improvement increase, based on the type of improvement and its rate of depreciation." This language is unambiguous. There is to be "a schedule" and that schedule is to set "a ceiling for what can be recovered." Obviously, the amounts on the schedule are required to be under that ceiling, and the items to be eligible are required to be on the schedule. Obviously, the costs

embodied in the schedule are to be "reasonable costs."

31. Rent Stabilization Code §2522.11 cannot be squared with this language.

B: The Statute Forbids MCI Increases for Ineligible Work Related to MCI-Eligible Work

32. Specifically, newly-promulgated Rent Stabilization Code §2522.11(b) provides that rent increases will be based not only upon the expense of making improvements specified on the schedule, but can also include "additional cost that can be associated with the type of improvements listed." This regulation does the opposite of implementing a list of permitted improvements. It instead permits rent increases for any work that "can be associated" with a listed improvement, creating an incentive for landlords to proffer all manner of reasons why work that is clearly *not* on the schedule, and that *cannot* stand on its own as a qualified improvement, nevertheless "can be associated" with a scheduled improvement. The legislature commanded that there be a simple list. Instead, we are given a game of six degrees of association with items on a list.

33. Similarly, newly promulgated Rent Stabilization Code §2522.11(f)(1) permits rent increases for "related expenses that are not specified in the actual schedule." Evidently, DHCR intends by its regulation to continue to permit rent increases for work performed in connection with MCI work even if that work does not qualify on its own. For example, DHCR apparently intends to continue to allow increases for painting, even though painting is mere maintenance, so long as the paint job involves a new installation such as a stairway. Every legislator who testified at DHCR's public hearing objected to this, and stated forthrightly that non-MCI work should not be permitted to count toward rent increases. If they are not specified in the legislatively-mandated schedule, then they necessarily are exactly the kind of expenses that the legislature decided to prohibit. There is

no clearer example of the RSC directly undermining the mandate of the HSTPA.

34. The language in Rent Stabilization Code §2522.11(f)(1) limiting such unscheduled "related expenses" to those that are "necessary for the claimed improvement" and "eligible for reimbursement as an MCI" does not make this provision consistent with the statute. Since the statute requires that only the expenses for scheduled items be eligible for reimbursement as an MCI, there can be no such thing as an item "not specified in the actual schedule" and nevertheless "eligible for reimbursement as an MCI." The new language flatly contradicts the statute.

35. Similarly, if there are items that are "necessary for the claimed improvement" but not on the schedule, then there is a problem with how the schedule has been drafted, and the agency should start over from scratch. The point of the schedule is to provide the public with a list of the items that will be eligible, and to exclude everything else.

36. This is the context for DHCR's otherwise inexplicable inclusion, in Operational Bulletins 2020-1 and 2021-1 (Exhibit L), of items that clearly are not eligible on their own for MCI rent increases. The the agency has included, on its schedule, work that is not depreciable as a capital improvement under Federal tax law, and that cannot be described as a major capital improvement. These items include but are not limited to:

a. Cornice Repairs. Repairs are not eligible for rent increases, because they are not an "improvement."

b. Masonry Pointing. According to the Internal Revenue Service, pointing is generally not depreciable, unless the work is actually performed on the whole building. *Bank of Houston v. Commissioner*, 19 T.C.M. 589 (1960).

c. Pressure Washing. This item is maintenance, and not an improvement.

d. Waterproofing. DHCR's own precedents hold that this item is not a major capital improvement.

e. Window Caulking. This item is maintenance, and not an improvement.

f. Asbestos Abatement. This item is a repair, not an improvement.

g. Skylight Repair. Skylights are only a capital improvement when they are an entirely new, first time installation. Repairing or replacing existing skylights is maintenance.

h. Sidewalk sheds and Scaffolding. These items are depreciable only to the contractor who owns the equipment, not the building owner.

By including these items, DHCR means to preserve the pre-HSTPA regime whereby expenses for work related to a qualifying MCI becomes part of the total rent increase. The HSTPA does not allow such items to be included. The schedule is required to consist of "major capital improvements." DHCR lacks authority to include any other items, regardless of whether, under pre-HSTPA law, they had once been permitted to be included alongside eligible items.

37. There is nothing unfair or unreasonable about this legislative choice. MCI rent increases provide an incentive for landlords to make improvements voluntarily that they otherwise would not make, so that buildings do not fall into disrepair. *Ansonia Residents' Ass'n, supra,* 75 N.Y.2d at 216. After years of experience with a system that incentivized unnecessary expenditures, however, it is reasonable for the legislature to preserve the main part of the incentive while cutting away the wasteful add-ons. It is not, for example, unreasonable to provide rent increases for a stairway without allowing the inclusion of the cost of painting it. After all, the former is depreciable under the IRS Code, and the latter is not, and depreciability continues to be a criteria for eligibility. *Compare, Bank of Houston v. Commissioner*, 19 T.C.M. 589 (1960).

38. Striking the balance between what expenditures should continue to be incentivized and what expenditures should not be passed on to the tenants, is the job of the legislature, not the agency. *Boreali v. Axelrod,* 71 N.Y.2d 1, 11-13 (1987) (it is not the job of an administrative agency

to create a "regulatory scheme laden with exceptions based solely upon economic and social concerns"); *Matter of NY Statewide Coalition v. NYC Dep't of Health,* 23 N.Y.3d 681 (2014) (striking down portion controls on sugary drinks, as encroaching on the prerogatives of the legislature). For purposes of reviewing DHCR's new regulation, it should suffice to say that there is no statutory language that permits the agency to make the policy choice to allow "add on" costs to the costs of eligible MCI work.

C: The Statute Forbids Waivers of the Reasonable Cost Schedule

39. The procedure, under newly promulgated Rent Stabilization Code §2522.11(g), whereby a landlord can obtain a "waiver" of the schedule, is an unlawful exception that is so vast and unlimited that it potentially makes the schedule meaningless. The legislature commanded that DHCR compile an exhaustive list of items for which a rent increase can be granted. Despite the clear mandate, DHCR has now promulgated a regulation that posits that there are items "not identified in the reasonable cost schedule" or that are "appropriately priced higher" than the schedule allows. The legislature forbade rent increases in both of these scenarios. The fact that a landlord claims that some item of work is "not identified in the reasonable cost schedule" means that it should not be eligible for a rent increase. *Compare,* RSC §2522.11(g)(a)(i). There is no statutory basis for allowing it. There is no longer a statute that would define, as an eligible improvement warranting an increase, some new and creative "improvement" that DHCR has not placed on the schedule.

40. There is no statutory authority for permitting a landlord to request a rent increase for items that are "necessarily and appropriately priced higher" than the scheduled cost. *Compare,* RSC §2522.11(g)(a)(ii). If the promulgation of the schedule is to have any credibility, it must necessarily

have been based on a finding that the amount listed is the reasonable cost of a particular item of work, and that any expenditure above that amount is unreasonable. The legislature mandated that spending more than the schedule cannot result in a rent increase.

41. The notorious fifty-six million dollar MCI approved by DHCR for a "terra cotta rainscreen system" (Exhibit A) illustrates why DHCR's waiver rule will render any cost schedule useless. The schedule does not contain any line item for a "terra cotta rainscreen system." On that basis it is "not identified in the reasonable cost schedule." Nobody doubts that the landlord actually spent more than the approved fifty-six million dollars. In that sense, the "costs are accurate" within the meaning of the new regulation. A landlord seeking a waiver would certainly argue that those costs are "reasonable under the circumstances," since that is what a terra cotta rainscreen system costs, and since such a system is a unique and very nice improvement to the building. Since the waiver regulation does not specifically equate "reasonable under the circumstances" to "affordable" it provides DHCR with an unlawful degree of unbridled discretion to approve the entirety of such a system. (*Compare, Nicholas v. Kahn*, 47 N.Y.2d 24, 416 N.Y.S.2d 565 (1979) ("an administrative agency is forbidden from exercising its discretionary power without standards or guidelines to govern the exercise of that discretion")). Before the HSTPA, DHCR thought it was reasonable under the circumstances to increase rents by $200 per room because of the installation of a fifty-six million dollar terra cotta rainscreen system. Who is to say that DHCR does not continue to believe such increases are reasonable?

42. The portion of the RSC that posits that the denial of a rent increase for work not listed on a reasonable cost schedule can be an "undue hardship" to a landlord, twists the meaning of "hardship" beyond recognition. The use of this phrase is the strongest possible evidence that DHCR

has engaged in policymaking rather than policy implementation, in violation of *Boreali v. Axelrod, supra.* It is for the legislature, not DHCR, to pass upon the issue of whether a landlord who spends money on an improvement but never gets a rent increase for it, has suffered a "hardship." Notably, nothing in the regulation makes any provision to *decrease* the approved cost, on the basis of hardship to tenants.

43. Moreover, the word "hardship" has a fixed statutory definition. If a landlord is suffering "hardship" it can file a hardship application. The statute defines hardship as the inability to recover, by means of annual increases, "an annual gross rent income for such building which exceeds the annual operating expenses of such building by a sum equal to at least five percent of such gross rent." *See,* Rent Stabilization Law §26-511(c)(6-a). By statute, any individual unreimbursed expenditure, whether for claimed "improvements" or anything else, cannot be described as a "hardship."

44. DHCR cannot square its decision to allow waivers of the reasonable cost schedule, with any language in the HSTPA. It does not even attempt to do so. Instead, its justification for allowing waivers makes reference only to *pre*-HSTPA law, the very law that the legislature sought to override by requiring that the reasonable cost schedule be a "ceiling for what can be recovered."

45. Specifically, in its Notice of Adoption (Exhibit C) DHCR justifies its waiver rule as follows: "waivers have been a traditional part of MCI processing where schedules are in use, such as with useful life, to create an individualized assessment where necessary." It should go without saying that, in passing the HSTPA, the Legislature did not wish to have DHCR continue to adhere to its "traditional" method of "MCI processing." Any authorization to waive the schedule must come, not from pre-HSTPA law, but from language in the HSTPA itself. There is no such language.

46. Therefore, the portion of the regulation permitting waivers of the reasonable cost schedule is ultra vires and void.

D: The Costs in DHCR's Schedule are Far Higher Than "Reasonable Costs"

47. Although a high degree of deference is given to rate-setting decisions by agencies, those decisions will be held to be invalid if they do not comport with statutory criteria. *United Home for Aged Hebrews v. Axelrod,* 201 A.D.2d 656 (2d Dept., 1994).

48. In this case, DHCR has attempted to shield its reasonable cost schedule from scrutiny, by failing to make its underlying data public, and by failing to adopt any definition of what it means by "reasonable cost." The available data show that DHCR's approved costs are well above the costs set forth in similar schedules in use under the J-51 program and under the Loft Law, and beyond what Petitioners' expert has found to be the average costs for the exact items on the schedule. DHCR has admitted, in adopting the schedules (Exhibit C), that "[t]he majority of owners who operate in good faith and who do not attempt to inflate the costs of major capital improvements will be largely unaffected by the regulation."

49. This available data, and DHCR's admission, show that DHCR's reasonable cost schedule does not comport with the mandate of the HSTPA. Specifically, by using the phrase "reasonable cost", the legislature required the adoption of an industry average cost for each item, since that is how the phrase is used in other statutes and how it has been authoritatively interpreted by the courts. By contrast, by adopting a schedule that, for the majority of owners, will have no impact on the amount to be approved for MCI increases, DHCR must mean something different by "reasonable cost" than the traditional understanding that it involves an industry average.

Mathematically, the schedule cannot be an industry average if a majority of owners's costs are below that average. Rather, DHCR appears to have taken the phrase "reasonable cost" to mean "any costs that are not inflated."

50. In *Friedman-Kien v. City of New York,* 92 A.D.2d 827 (1st Dept., 1983), HPD's disallowance of the actual cost of a major capital improvement as part of calculating J-51 tax benefits was upheld. The Court held that the agency's schedule was intended as a substitute for the use of actual costs in calculating tax benefits.

51. In *High Point Hospital v. Surles*, 218 A.D.2d 874 (3d Dept., 1995) the Medicaid reimbursement rate for a psychiatric hospital, required by statute to be "reasonable costs", were upheld where they were based on an industry average.

52. In *Sigety v. Ingraham,* 29 N.Y.2d 110 (1971), the Court upheld Medicaid reimbursement rates to be paid to a nursing home. The statute required that costs be reasonable. The Commissioner of Health took that to mean that an average cost was to be used. The Court of Appeals upheld the use of such average.

53. The use of the phrase "reasonable cost" in the HSTPA, therefore, must be interpreted in a way that is consistent with its use in other, similar rate-setting contexts. Actual costs are to be excluded, where they exceed a standard, industry-wide average. Here, DHCR has enacted a cost schedule under which the actual costs of a majority of owners will qualify for rent increases, just as they did before the enactment of the HSTPA. That is not what the legislature meant. Therefore, the RCS should be found to be invalid.

AS AND FOR A FIRST CAUSE OF ACTION

54. Pursuant to CPLR Article 78, the RCS was adopted in violation of lawful procedure, was affected by numerous errors of law, and is arbitrary and capricious and an abuse of discretion.

55. Pursuant to Article 78 of the CPLR, the RCS was adopted in excess of the jurisdiction granted to the DHCR.

56. Pursuant to Article 78 of the CPLR, DHCR, in adopting the RSC, failed to perform its duty to determine the reasonable costs of MCIs, and to "establish a schedule of reasonable costs for major capital improvements, which shall set a ceiling for what can be recovered through a temporary major capital improvement increase, based on the type of improvement and its rate of depreciation."

57. The RCS must therefore be vacated, annulled and reversed.

AS AND FOR A SECOND CAUSE OF ACTION

58. The agency's position is not substantially justified.

59. Therefore, pursuant to CPLR Article 86, Petitioners are entitled to recover their attorneys' fees.

WHEREFORE, Petitioners respectfully request that this Court render judgment as follows: (a) on Petitioners' First Cause of Action, determining that the RCS is null and void in its entirety and annulling and vacating the component regulation and Operational Bulletins: (b) on Petitioners' Second Cause of Action, awarding legal fees to Petitioners; and (c) granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York
May 27, 2021

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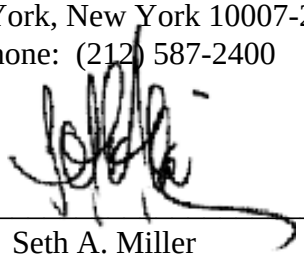

By: Seth A. Miller

VERIFICATION

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

SETH A. MILLER, being duly sworn, deposes and says:

I am one of the attorneys for Petitioners THE STUYVESANT TOWN - PETER COOPER VILLAGE TENANTS ASSOCIATION, and SUSAN STEINBERG ("Petitioners") and I have read the annexed Verified Petition and know the contents thereof. The information stated in the annexed Verified Petition is from public documents, which I know to be authentic. This verification is therefore made with the requisite degree of personal knowledge required by CPLR 3020.

SETH A. MILLER

Sworn to before me this 27
day of May, 2021

NOTARY PUBLIC

MICHELE MCGUINNESS
Notary Public, State of New York
No. 02MC6282633
Qualified in New York County
Commission Expires 08/10/2021