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

LEGAL SUPPORT UNIT OF LEGAL SERVICES FOR NEW YORK CITY
METROPOLITAN COUNCIL ON HOUSING
MFY LEGAL SERVICES
NYS TENANTS AND NEIGHBORS COALITION
SOUTH BROOKLYN LEGAL SERVICES
THE LEGAL AID SOCIETY

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INTRODUCTION

These preliminary comments are submitted by the Legal Support Unit of Legal Services for New York City, the Metropolitan Council on Housing, MFY Legal Services, the New York State Tenants and Neighbors Coalition, South Brooklyn Legal Services and the Legal Aid Society on an emergency basis, in response to the more than 150 pages of detailed changes to the Rent Stabilization Code, New York City Rent and Eviction Regulations, and New York State Tenant Protection Regulations that we recently received.

On April 5, 2000 DHCR announced to the public that it proposed to make changes to the Rent Stabilization Code, the New York City Rent and Eviction Regulations, and the New York State Tenant Protection Regulations. The stated purpose of the changes is to "conform regulations to statutes, particularly the RRRAs [Rent Regulation Reform Acts] of 1993 and 1997, judicial determinations and incorporate agency practice." The text was not given to the public at that time. The document we have received appears to have nothing to do with its stated purpose. What, in fact, DHCR proposes to do is enact more than 150 pages worth of detailed radical changes to fundamental tenant protections, without giving the public adequate notice, or any adequate opportunity to respond.

DHCR's April 5, 2000 announcement of the proposed changes also announced public hearings to take place exactly 50 days later, and a public comment period that would close 55 days later. The changes proposed are, as explained in more detail below, complex and beyond the understanding of ordinary tenants, who will be robbed of the basic protections that they now enjoy. DHCR's April 5, 2000 notice to the public did not provide the text of the changes. Rather, to obtain copies, the public has had to request copies from DHCR, and await their arrival in the mail. Therefore, the actual length

of time for the public to read, analyze and formulate comments on the proposed regulations turns out to be less than 45 days.

In light of the radical nature of the changes involved, their complexity, and the importance of the interests that will be affected, the period given by DHCR for public comment is unduly short. This foreshortened period is part of a pattern. Although DHCR claims to have complied with the formal requirements of the New York State Administrative Procedure Act ("SAPA"), an examination of the proposed regulations and of DHCR's notice will show that many procedural requirements, and virtually all of the substantive requirements, of SAPA have been either ignored or complied with in way that is so minimal as to demonstrate DHCR's complete disregard for the principle of public participation in the rule making process.

At a minimum, DHCR should publish a new, more comprehensive and forthright, notice of proposed regulations, start the process from scratch, and allow the public to have a minimum of 120 days to comment on the proposed regulations.

The comments that follow are the result of emergency meetings by an *ad hoc* group of tenant advocates, working under emergency conditions, in order to produce at least a sketchy preliminary response to these changes within the short period of time that DHCR has afforded us. We have done so on the theory that some response is better than none at all, despite the plain fact that almost every change, on every one of the more than 150 pages of proposed changes, would require an extensive analysis and presentation of multiple pages of commentary in order to present a proper response to the public policy implications, the legal implications, and to DHCR's noncompliance with the State Administrative Procedure Act, as revealed by these proposed regulations.

The proposed code reads as though the landlords of the State of New York, and their lawyers, were given an opportunity to rewrite every regulation that affects them. It is an attempt to deregulate apartments on a wholesale basis and to transform the Rent Stabilization Code from a system of tenant

protection to a system of rules to be used by landlords as a weapon against regulated tenants. Landlords should not be given the opportunity to write the rules in whatever manner they choose, and yet this is exactly what appears to have happened with this new proposal.

The RSL imposes on DHCR the duty to promulgate a code "not inconsistent with law" and sets forth specific standards, including that "[N]o provision of such code shall impair or diminish any right or remedy granted to any party by this law or any other provision of law." RSL § 26-511 (b). Instead of complying with this mandate, DHCR has drafted a proposed Rent Stabilization Code which guts most of the tenant protections which remained after the Rent Regulatory Reform Act of 1997 (RRRA 1997) . Indeed, DHCR seeks to repeal key provisions of the Rent Stabilization Law which the legislature retained when it amended the RSL in 1997, thereby usurping legislative powers.

The proposed changes serve no valid public policy agenda other than perhaps to provide landlords a windfall at the expense of tenants. They contradict the Courts' settled interpretations of the law that DHCR purports to be interpreting and are therefore, in many respects, substantively illegal.

The proposed Code, moreover, arises from a process that was, in fundamental ways, corrupt, because the language in these proposals is not, contrary to DHCR's claim, the result of an open process of soliciting comments to its "regulatory agenda" but, rather, the result of private contacts between DHCR officials and members of the landlord bar. The promulgation process has been essentially a fraud on the public, because the details of the changes that DHCR intends to make have nothing to do with the stated public purpose, or the summary given to the public, of these changes, as a comparison of the text of the proposal and the "Notice of Proposed Rule Making" given to the public will reveal.

Lastly, and most importantly, the changes proposed by DHCR will inflict needless hardship on millions of tenants in New York City. The proposed changes violate the express purpose of the RSL to

"prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices." See RSL § 501. Indeed, the proposed changes reveal DHCR's willful blindness to the fact that the housing emergency referred to in the RSL is truly an emergency — one that has placed thousands of low income tenants in constant fear of homelessness, and that has driven thousands of middle income tenants out of the City altogether.

The document that follows this introduction is a topic-by-topic analysis of the proposed changes, demonstrating, with respect to every one of the major changes under consideration, that these changes are illegal, much more radical than is disclosed by the innocuous description that DHCR gave to the public when it published notice of these new rules, and disastrous from a public policy standpoint.

1. RENT OVERCHARGES AND REGISTRATION REQUIREMENTS

When the Omnibus Housing Act was enacted in 1983, the Legislature for the first time imposed on owners the duty to initially and annually register the rent in exchange for the imposition of a four-year limitation on overcharge claims, and for relief from the obligation to keep rental records for more than four years. The amendments to the RSL in 1993 and 1997 did not fundamentally alter the balance struck in 1983, and retained all the basic requirements and penalties relating to rent registration that were contained in the OHA.

The 1993 and 1997 amendments preserved the requirement that landlords register initial and annual rents charged to tenants, and continued to mandate a freeze on rents for landlords who failed to register. Under the amended statute, proper and timely registration remains a prerequisite for landlords to assert a statute of limitations defense and to claim exemption from record retention requirements.

The proposed revisions to the Rent Stabilization Code, would if promulgated, completely destroy the regulatory scheme as created by the legislature in 1983 in the Omnibus Housing Act and preserved by the 1997 RRRA. By ignoring and misreading numerous sections of the amended RSL, DHCR seeks to nullify most of the registration requirements contained in the amended RSL, and to expand the protections of the "four year" statute of limitations far beyond anything authorized by the Legislature.

The revised Code effectively excuses landlords from filing registrations for years more than four years in the past, bars challenges to rents for unregistered years, and eliminates the statutory penalties for failure to register — all in violation of the statute. The revised Code also

interprets the statutory ban on "examining" rent histories more than four years old to mean that rents from earlier years may not even be used as a reference point to determine the legality of rents charged within the statute of limitations period, leading to absurd, unjust and unjustifiable results.

1. Elimination of Registration Requirements

Throughout the revised Code, "legal registered rent"is replaced with "legal regulated rent," implying that rents will be considered "legal" even if never registered. See §§ 2520.6(e); 2521.1. "Legal regulated rent" is the rent charged (whether or not registered) on the base date, plus lawful adjustments. § 2520.6(e). The "base date" is the date four years prior to the filing of the complaint. § 2520.6(f).

Such definitions are at odds with the clear language of RSL § 26-512(e):

> Notwithstanding any contrary provisions of this law, on and after July first, nineteen hundred eighty-four, the legal regulated rent authorized for a housing accommodation subject to the provisions of this law shall be the rent registered pursuant to section 26-517 of this chapter subject to any modification imposed pursuant to this law.

The revised Code also violates RSC §§ 26-516(a)(i):

> . . . the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, (or, if more recently filed, the initial registration statement) plus in each case any subsequent lawful increases and adjustments.

Thus the statute clearly provides that no base rent can be established unless such rent has been set forth in a registration statement filed with DHCR. The revised Code violates this mandate.

Similarly, RSL § 26-516(a) provides that:

> Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter. . . . Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter.

The statute thus provides that overcharge complaints must be filed within four years of the filing of the relevant registration statement. The revised Code, however, unlawfully provides that the rental history prior to four year period preceding an overcharge complaint shall not be examined regardless of whether rents for earlier years were ever registered, and improperly precludes examination of registration statement for any year prior to base date regardless of whether the registration was filed before or after the base date. § 2526.1(a)(2)(iii).[1]

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[1] The Appellate Term, in Myers v. Frankel, N.Y.L.J. April 26, 2000, p.29 col.1

(App. Term 2d & 11th Jud. Dists.), recently reaffirmed "that the last properly registered rent remains the authorized rent (RSL §§26-512(e); 26-517(e); RSC §§ 2520.6(f), 2521.2(a), and the amount of the overcharge is, by statutory definition, the amount collected over the authorized rent (RSL § 26-516[a]). The court in Myers made clear that the legislative did not intend to bar the examination of the rental history prior to the base date where owners had failed to register, noting that the "Legislature relieved only those owners who were 'duly registered ' from the keeping of rental records for more than four years (RSL s.26-516(g)." Where an owner, as in Myers, had not registered the rent for several years prior to the "base date," the legal rent was the rent last registered, even if this occurred more than four years prior to the filing of the complaint. Id.

By severing the determination of the "legal" rent from the statutorily required rent registration, DHCR seeks to turn rent registration into a hollow and completely meaningless exercise that no longer serves the regulatory function intended by the legislature.

2. Elimination of rent freeze for failure to register

The amended version of RSL Section 517(e) continues to mandate that

> The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect <u>on the date of the last preceding registration statement</u>.

The proposed Code, however, improperly limits this penalty, providing that failure to file a registration only bars collection of rent in excess of <u>the base date rent, plus increases up to the missing year</u>, not rent in excess of that registered prior to the missing year. Thus the proposed Code purports to authorize an automatic lifting of any rent freeze — and a sudden increase in collectible rent — upon the expiration of a four year period, a result nowhere contemplated in the RSL. DHCR's proposed Code rewards landlords who stubbornly flout the RSL's registration requirements, as long as they persist in their illegal conduct for four years or more.

3. <u>Evisceration of record retention requirements</u>

Similarly, RSL § 26-516(g), as amended in 1993 and 1997, provides that "any owner who has <u>duly registered</u> a housing accommodation pursuant to section 26-517 of this chapter shall not be required to maintain or produce any records relating to rentals of such accommodation for

more than four years prior to the most recent registration or annual statement for such accommodation." Yet § 2523.7 (b) of the proposed Code absolves owners from retaining records more than four years old regardless of whether rents for the relevant years were ever registered.

4. Creation of "wall" barring use of older rents as reference points

Perhaps the most dangerous, illogical, and unlawful aspect of the Code new overcharge provisions is its perversion of the RSL's ban on "examination" of rent histories more than four years old. The clear intent of the 1997 RSL amendments was to prevent challenges to rents registered more than four years prior to a complaint. Nothing in the RSL nor its legislative history contemplates a prohibition on referring to older rents for the purpose of determining the legality of rents charged within the four year limitations period. Indeed, DHCR itself acknowledges that events more than four years in the past can and must be used as a basis for establishing recent rents. For example, the proposed Code permits landlords to refer to MCI orders issued more than four years in the past in order to assess eligibility for incremental increases, and allows landlords to look back eight years or more to compute an extra vacancy increase allowance. §§ 2522.8(a).

Yet in an utterly capricious and discriminatory fashion, DHCR allows landlords to refer to prior events in setting rents, while precluding tenants from following a similar procedure. Under the proposed Code tenants who seek not to challenge, but only to refer to older rents, are prohibited from doing so where the result may be an overcharge award against the landlord.

By thus twisting the words of the RSL, the DHCR effectively converts the "four year" limitations period into a three year period, since the legality of the rent charged in the fourth year can necessarily be determined only with reference to the rent charged in the fifth year preceding the complaint.

The absurdity of DHCR's interpretation of the RSL is made most apparent by its new Section 2526.1(a)(3)(iii), which provides that if an apartment is vacant or exempt on the base date, then any subsequent rent charged or registered is legal. DHCR's apparent rationale is that if the apartment is vacant in the "base" year, previous years may not even be examined in order to determine the legality of the rent charged after the vacancy.[2] Thus DHCR has created a new exemption from rent regulation that allows landlords to charge market rents whenever an apartment, by chance or design, was held vacant four years prior to the tenant's complaint. This huge windfall for landlords was clearly not contemplated by the Legislature and finds no support anywhere in the RSL.

This vacancy deregulation provision will have an especially catastrophic effect on tenants of Single Room Occupancy hotels, in which rooms frequently undergo periods of vacancy or exemption from rent stabilization. Under the proposed Code, SRO landlords would be given

[2] An alternative, and equally ridiculous rationale may be that since DHCR's now looks to the rent charged for a given year instead of the rent registered, and since no rent is charged during a vacancy, the vacant year provides no basis for establishing subsequent rents, even though the registered rent for the vacancy is the rent charged in the prior year.

carte blanche to deregulate their buildings, at the cost of a precious housing resource for the poorest and most desperate New Yorkers.

II. FAIR MARKET RENT APPEALS AND INITIAL RENT DETERMINATIONS

DHCR's proposed regulations attempt to eliminate the concept of a Fair Market Rent Appeal, and to allow landlords to set rents in any manner they choose when an apartment first becomes subject to rent stabilization. That is the end result of the numerous complex provisions of DHCR's proposed regulations concerning the determination of initial rents.

The concept of a Fair Market Rent Appeal arose out of the necessity of determining rents in decontrolled apartments, when, in 1974, the New York State Legislature decided to subject those apartments to rent stabilization coverage.

In 1971 the legislature enacted uniform vacancy deregulation and decontrol, decontrolling all Rent Stabilized apartments and Rent Controlled apartments, upon vacancy. The assumption behind vacancy decontrol, at that time, was that decontrol would unleash the forces of the market to create new housing and solve the housing crisis. As a matter of historical fact, however, in the words of the New York State Court of Appeals, the "massive construction which had been envisioned did not materialize." *LaGuardia v. Cavanaugh,* 53 N.Y.2d 67, 440 N.Y.S.2d 586 (1981). Instead, the only thing that occurred was a huge increase in rents to be paid by tenants, and a huge increase in evictions. Id.

As a result, the Legislature enacted the Emergency Tenant Protection Act of 1974, restoring New York City's authority to re-regulate all of the deregulated apartments. Under the ETPA of 1974, the Legislature provided for a system of determining the first rent to be charged in a formerly rent

controlled apartment. Ever since 1974, the mechanism for determining that rent was known as a Fair Market Rent Appeal.

Ever since 1974 the Rent Stabilization Law has provided, without change (RSL §26-513) that a landlord must provide a tenant in a newly rent stabilized apartment with notice of the last rent controlled rent, and notice of the right to file a Fair Market Rent Appeal. It has always been the law that such an appeal may be filed within 90 days after that notice was received, and if the notice was never properly served then the time for filing a Fair Market Rent Appeal would not begin to run. It has always been the law that a Fair Market Rent Appeal, in the words of the Statute "need only allege that such rent is in excess of the Fair Market Rent."

Under Rent Stabilization as it has existed (unamended) since 1974, the determination of any subsequent overcharges is based, initially, in the determination of the Fair Market Rent. It is only where the tenant no longer has the right to challenge the initial Fair Market Rent that the agreed rent becomes the basis of the determination of subsequent rents.

A Fair Market Rent Appeal is not an overcharge proceeding. Since 1974 the determination of initial rents has been based on a "no-fault" rent-setting procedure, that sets the initial rent for a rent-stabilized apartment based on a fixed percentage above the last rent controlled rent, averaged with the rents for substantially similar apartments in the same line of apartments if those rents are no longer themselves subject to a Fair Market Rent Appeal, or, if such rents are not available, rents for substantially similar apartments in the immediate area. There is no treble damages penalty in Fair Market Rent Appeal proceedings, and the procedures, as outlined below, are completely different from the procedures for determining an overcharge.

By contrast, an overcharge proceeding is based on a claim that the landlord is at fault in charging more than an already-established rent. That already-established rent can be traced back, through the mandatory rent registrations that are required by statute to serve as the basis for rent

disputes, ultimately, to an initial rent that is the result of a Fair Market Rent Appeal (or of the tenant no longer being entitled to file a Fair Market Rent Appeal by virtue of not responding to actual notice of the right to file such an appeal). Overcharge proceedings carry the threat of treble damages.

The statute has continued, since 1974, to require that initial Fair Market Rents be made the basis of all subsequent rents.

In 1984 the New York State Legislature passed the Omnibus Housing Act, which superimposed a system of rent registration on the previous method for determining rents, which depended upon the presentation of evidence of leases and of rents paid and accepted. The Omnibus Housing Act, however, did not affect the process of Fair Market Rent Appeals, except to the extent that it required that an initial registration statement be served upon the tenant at the same time as the traditional notice of the right to file a Fair Market Rent Appeal, and separately provided that the failure to register would prevent the deadline for filing a Fair Market Rent Appeal from ever beginning to run.

Under the Omnibus Housing Act the deadline for filing a Fair Market Rent Appeal continued to be 90 days after service of notice of the right to file such an appeal, or of the initial registration, whichever came later. DHCR's regulations, implementing the Omnibus Housing Act, specifically codified this rule.

At the same time as the statute allowed a Fair Market Rent Appeal to be filed at any time unless the landlord proved service on the tenant of notice of the right to file such an appeal, the Omnibus Housing Act strictly limited a tenant's right to file an overcharge complaint to 4 years. This became known as the "Four Year Rule". Under the Four Year Rule, itself unchanged even by the Rent Regulation Reform Act of 1997, an overcharge is determined, in the first instance, by looking at the registration history of an apartment rather than at any evidence of leases or of rents paid. Once an apartment is no longer subject to a Fair Market Rent Appeal, the rent is, by statute, the rent shown in the registration statement filed four years before the most recent registration statement.

Nothing in the 1993 or 1997 Rent Regulation Reform Acts changed these fundamental mechanisms for determining rents. Rather, the Rent Regulation Reform Act of 1997 simply clarified that the registration history does, indeed, substitute for actual evidence of rents paid. Specifically, the rent registration on file at DHCR four years prior to the most recent rent registration is to be used as the basis for calculating the rent, and hard evidence of leases and of rents paid may be introduced to impeach subsequent registrations *only* if that evidence is 4 years old or less. The Rent Regulation Reform Act of 1993 did not have any effect on the calculation of initial rents, and modified the registration system without changing the basic method for calculating rents. The Rent Regulation Reform Act of 1997 preserved the "rent freeze" imposed when a landlord fails to register (*Hargrove v. DHCR,* 244 A.D.2d 241, 664 N.Y.S.2d 767 (1st Dep't 1997)), but allowed landlords to register legal rents late and thereby avoid, prospectively, the penalty for failing to register. The determination of what is a legal rent remained unchanged by both of these statutes.

DHCR now proposes to gut these mandatory statutory methods for determining initial rents (and determining overcharges, as discussed elsewhere in these comments) and substitute a new and illegal system, in which whatever overcharge a landlord may have charged in the past becomes the basis for establishing the legal rent.

Specifically, proposed Rent Stabilization Codes §2520.6(e) redefines the term "initial regulated rent" so that it no longer works forward from an "initial regulated rent" (i.e., the result of the Fair Market Rent Appeal) but, instead, works forward from a "base date" rent which is nothing more than what the landlord charged the tenant, whether legal or not, at some point in the past. (This "base date" proposal is discussed in more detail elsewhere in these comments).

Proposed Rent Stabilization Code §2520.6(f) introduces the new concept of a "base date" rent, which makes no reference to the mandatory statutory system of rent registration, and makes no reference to the mandatory system of determining the initial rent by means of a Fair Market Rent

Appeal, or at least determining that a Fair Market Rent Appeal would no longer be timely because of the tenant's failure to file such an appeal within 90 days after receiving notice of the right to file such an appeal.

Proposed Rent Stabilization Code §2521.1 eliminates the requirement that a rent be registered in order to be considered a legal "initial rent". In other words, landlords, who have every incentive to keep secret any illegal rent that might be charged, will no longer be required to give notice to the tenant or to the public, of its rent calculation.

DHCR proposes to repeal Rent Stabilization Code §2521.2. That is the section that establishes the basic concept of rent regulation: that the legal regulated rent

> shall be the initial legal registered rent first established pursuant to [law] and thereafter shall be the initial legal registered rent as it may be adjusted . . . or the rent stated in the annual registration statement filed 4 years prior to the most recent registration statement . . . whichever is later.

The existing Rent Stabilization Code uses the term, "whichever is later", to indicate that the statute specifically allows the determination of an initial rent even after an apartment has been registered for more than 4 years, if the landlord never served any tenant with notice of the right to challenge the initial rent. The statutory basis for that regulation remains unchanged.

Rent Stabilization Code §2522.3, the procedural section governing Fair Market Rent Appeals, would be amended to eliminate the requirement that the time for filing such an appeal does not begin to run until the landlord registers the apartment. This is consistent with DHCR's entire approach in its proposal, of covering up landlord fraud by depriving tenants of the meaningful notice of their rights that is provided by the registration system.

That section is also amended to impose an artificial four year Statute of Limitations against the filing of a Fair Market Rent Appeal, running from the date when the tenant first takes occupancy, a limitation period that makes a dead letter out of the statutory right that a tenant has to file a Fair Market Rent Appeal until 90 days after receiving notice of the initial registered rent. Consistent with DHCR's overall approach of allowing landlords to deceive tenants, the Statute of Limitations is not tied to any notice provision, despite the fact that, in the statute, the Statute of Limitations only begins to run where notice is provided.

The proposed amendments to Rent Stabilization Code §2522.3 would also shift the burden of proof, in a Fair Market Rent Appeal. Where the statute says that such an appeal "need only allege that such rent is in excess of the Fair Market Rent," the new code would, without any legal authority, require that "the tenant *must* allege in such appeal . . . that the initial rent is in excess of the Fair Market Rent; and . . . facts which, to the best of his or her information and belief, support such allegation." This proposal contradicts the plain language of the statute.

The proposed changes to Rent Stabilization Code §2522.3(e) would alter the statutory requirements that Fair Market Rent be established by examining "substantially similar" apartments and substitute the weaker idea of using "comparable" housing accommodations. If "comparable" does not mean the same thing as "substantially similar" than it must be concluded that DHCR is attempting to weaken the standard. DHCR proposes to eliminate entirely the requirement that any "comparable" apartment used in calculating an initial rent be itself in an apartment for which an initial rent has been established. DHCR proposes to eliminate entirely the effect of the registration history on a Fair Market Rent, such that unregistered rents will be legalized.

Thus, without any real policy justification for doing so, DHCR proposes to eliminate the current method for determining rents based on the establishment of initial rents, under which initial rents and subsequent registrations are the basis for all rent calculations, and substitute, instead, a system where a

landlord may charge whatever rent it feels like, and the tenant must jump through numerous illegal procedural hoops designed to foreclose any challenge for such rent.

This approach is carried over into the proposals concerning other situations where DHCR must determine an initial rent.

For example, in proposed §2522.6, the section that requires DHCR to determine rents when the rent is in doubt, for example when a purchaser at a judicial sale takes over management of a building without having any records that would establish the rent, DHCR proposes to change the requirement that it establish rent "with due consideration of equities", so that it now considers, not "the equities" but, rather, the rent established by the free market.

Specifically, according to DHCR the rent will be established by performing an analysis of "comparable" rents, including market rents, "submitted by the owner, subject to rebuttal by the tenant." Apparently, DHCR is not even willing to give the tenant the right to submit his or her own set of "comparables". Only if the landlord's submission of market rents does not establish an appropriate rent will DHCR perform an analysis, on its own, "using sampling methods determined by the DHCR," of regulated rents. Of course, in this proposal, those "sampling methods" are undisclosed, despite the fact that this is supposed to be a public process of notice-and-comment rule making. What is most notable about this proposed method of establishing rents when the rent is in doubt is that the tenant has absolutely no right to propose an appropriate legal rent or to introduce arguments and evidence in favor of such rents. It is also noticeable that DHCR proposes to ignore the registration history of the apartment, regardless of how recent such history may be. Simply stated, this proposal substitutes "the market" for the required system of rent regulation, and is therefore illegal.

The public received no adequate notice of these changes. As demonstrated above, these proposals have nothing whatsoever to do with the Rent Regulation Reform Act of 1993 or 1997, and therefore have nothing to do with DHCR's stated purpose in enacting new regulations.

DHCR provided the public with no adequate statement of the substance of these regulations. It merely stated that, with respect to the "Fair Market Rent Appeal" section of the code, it would "implement RRRA-97 and eligibility of appeals, time limitations, and what issues may be raised on appeal." That is a list of topics, but it is not a statement of the "substance of the proposed rule," as required by the New York State Administrative Procedure Act.

DHCR's proposals with respect to the setting of rents are nothing more than an attempt to provide landlords with a windfall at the expense of tenants. Where the law is now clear, DHCR attempts to introduce a level of uncertainty. Where the law was a clear distinction between what is and is not a legal rent, DHCR attempts to eliminate that distinction. Where the law now gives tenants notice of the right to challenge what may be an illegal rent, DHCR has now joined forces with those landlords, the worst of their kind, to assist them in committing fraud upon tenants. The adoption of these proposals would be a gross mistake.

III. REDUCTION IN SERVICES COMPLAINTS

The proposed revisions to Section 2523.4 of the Code have the clear intent of eviscerating the RSL's protections against inadequate maintenance and decreases in services by landlords, which have always constituted an essential ingredient in rent regulation. Copious space has been devoted to a list of supposedly "de minimis" conditions that will no longer justify rent reductions. By adopting this revision, DHCR implies that the most important problem confronting the agency is not owners' failure to keep buildings in repair, but tenant complaints over trivial matters. Such a conclusion finds no justification in the real world of New York City, in which the emergency conditions of the housing market force thousands of tenants to endure seriously substandard conditions, while their landlords violate the laws with impunity.

Most outrageous is DHCR's provision that conditions existing for more than four years are presumed to be de minimis! Again, this provision reveals DHCR's blindness to the realities of the City's housing market, in which intimidated and desperate tenants often put up with serious Code violations for years, until conditions become so unendurable that they are forced to take the risk of filing a complaint. DHCR essentially seeks to enact a provision long sought by landlords, and previously rejected by the agency: a four year statute of limitations on services complaints.

The revised Code sets forth a series of procedural innovations designed to discourage tenant complaints and strengthen landlord defenses. The proposed revisions now require tenants to give 10 days' advance notice of their complaint to potentially hostile or vengeful landlords, giving such landlords the opportunity to intimidate or otherwise dissuade their tenants from complaining. The proposed Code lengthens from 20 days to 45 days the landlords' time to

respond to a complaint, thereby extending the time tenants must live with uninhabitable conditions.

In connection with building-wide tenants complaints, or landlords' applications to restore rents, landlords are permitted to submit expert affidavits, which tenants must rebut — within 30 days — with their own expert, or by affirmation signed by 51 percent of tenants. If not rebutted, the tenants' complaint is denied, or rent restored, without any DHCR inspection. This provision discriminates against low and middle income tenants, who unlike their landlords, cannot afford expensive experts, and will then be denied even a visit from DHCR's inspection staff.

The revised Code also enshrines DHCR's unlawful policy that reduction orders reduce the tenant's rent by the amount of the most recent "guideline increase," rather than to the level in effect prior to the guideline increase as mandated by the RSL. In this way, DHCR seeks to ratify its own practice of allowing landlords to collect increases for capital "improvements" or cosmetic individual apartment improvements, while neglecting the basic maintenance of the building.

IV. MCI INCREASES

The changes to Section 2522.4 parellels rent reduction section in directing that tenant allegations of defective installation, etc., can be rebutted by LL's architect, or by proof that another agency has "signed off" on the work. Tenants must then submit their own expert affidavit, or affidavits from 51 percent of the tenants, merely in order to get a DHCR inspection. This new provision makes it nearly impossible for most tenants to defeat an MCI application. Unless tenants are wealthy enough to hire experts, or have extremely well-organized associations,

they will be denied even the basic opportunity to have DHCR visit their building to determine whether or not their claims are valid.

22. "HIGH RENT" VACANCY DEREGULATION

A. The Changes and Their Impact

DHCR's proposal radically expands landlords' opportunity to commit fraud by claiming that their apartments are exempt from regulation when, in fact, they are not. This type of fraud is now extremely commonplace and DHCR has now made a proposal that will all but guarantee that the practice will become universal.

Nothing in the language or history of the vacancy "high rent" deregulation provisions of the Rent Stabilization Law supports the changes that DHCR now proposes. A brief discussion of that history illustrates the radical anti-tenant nature of DHCR's proposal.

The Rent Regulation Reform Act of 1994 permitted apartments to be deregulated on vacancy only where the legal regulated rent was $2,000.00 or more per month as of October 1, 1993. Challenges to the rent charged for a supposedly "deregulated" apartment could be filed, like any other overcharge complaint, within four years of the first overcharge alleged, and the rent would be established on the basis of the rent set forth in the registration statement on file four years prior to the most recent registration statement.

In 1994 the City Council passed Local Law 4, expanding the category of apartments that could be deregulated on vacancy, to include any apartment with a legal regulated rent of $2,000.00 or more per month on vacancy. Local Law 4 was misinterpreted by some landlords and their advocates, however, as allowing the deregulation of apartments where the rent, on

vacancy, was *less* than $2,000.00 monthly, so long as the landlord could justify a subsequent rent of $2,000.00 or more per month. This misinterpretation had no support in the language or legislative history of Local Law 4, which required an *actual* rent, paid by a real, live tenant, of $2,000.00 or more per month, before the apartment could be considered deregulated.

Local Law 4 did not change the limitations period for filing overcharge complaints.

In order to prevent the public from misinterpreting the intention behind Local Law 4, the City Council passed the clarifying amendments set forth in Local Law 13 of 1997, which clearly stated that an apartment may only be considered deregulated if the last tenant, prior to vacating the apartment, paid a rent of $2,000.00 per month or more. In order to avoid any further misinterpretation, the Council repealed any language deregulating apartments on the basis of vacancies occurring prior to June 1, 1997, deleting any reference to vacancies occurring after April 1, 1994 (the effective date of Local Law 4) from the statute. Thus, as of the effective date of Local Law 13, for any pending case or dispute involving vacancies taking place between April 1, 1994 and June 1, 1997, there was no longer a legal basis for deregulation.

Local Law 13 did not change the limitations period for filing overcharge complaints.

Then, as part of the Rent Regulation Reform Act of 1997, the New York State Legislature again expanded the category of deregulated apartments by providing that any apartment that became vacant after June 19, 1997 could be considered deregulated if the legal rent would be $2,000.00 or more per month, whether or not such rent could have been collected from the last tenant prior to vacancy. Section 46 of the Rent Regulation Reform Act of 1997 made the Act effective immediately for "housing accommodations vacant on or after" June 19, 1997. For apartments that were vacated before June 19, 1997, the Rent Regulation Reform Act of 1997 says

only the following: "the application of such sections [as are amended here] to housing accommodations vacant prior to such effective date shall be governed by the law in effect on such date." The law in effect "prior to [the] effective date" of Rent Regulation Reform Act of 1997 is, of course, the law as amended by the New York City Council when it passed Local Law 13.

The Rent Regulation Reform Act of 1997 provided for a four year statute of limitations for the filing of overcharge complaints, as extensively discussed elsewhere in these comments. It did not, however, create any shorter limitations period for any category of overcharge complaints.

This year, in connection with the renewal of the rent laws, the City Council passed an additional requirement, that tenants renting purportedly "deregulated" apartments be given notice of the basis for the landlord's claim of deregulation. DHCR's proposed regulations ignore, and undermine, this new statutory requirement.

DHCR's current proposal would vastly expand the number of apartments deregulated under the above provisions, well beyond what the City Council and the New York State Legislature clearly provided for. DHCR's proposal is to enact a new Rent Stabilization Code Section, §2520.11(r), which would deregulate all apartments vacated between April 1, 1994 and April 1, 1997 in which the landlord could justify a post-vacancy rent of $2,000.00 or more per month. This proposal would give no effect to the repeal, from the statute, of any reference to any basis for deregulating apartments vacated between April 1, 1994 and April 1, 1997. Moreover, this proposal would, in effect, interpret Local Law 4 as having had the same effect as the Rent Regulation Reform Act of 1997, despite the Council's clear statements to the contrary, both at the time and when it passed Local Law 13. Put another way, under DHCR's interpretation, Local

Law 13 only applies to apartments vacated during the scant 2 ½ months between April 1, 1997 and June 19, 1997.

This radical expansion of the number of apartments deregulated is accompanied by a radical and illegal restriction on tenants' ability to challenge the rent in apartments that are fraudulently deregulated. Despite the complete lack of statutory authority, DHCR has now proposed to require that any challenge to the rent or status of a fraudulently deregulated apartment must be made within 90 days after the tenant takes occupancy.

Specifically, DHCR proposes to promulgate an amendment to §2526.1(a)(2)(ii) of the Rent Stabilization Code that would require that "an overcharge complaint with respect to a housing accommodation which, at the time of the filing of such complaint, is rented pursuant to an unregulated lease ... may only be filed by the first tenant that takes occupancy upon such renting, and shall be filed within 90 days of such tenant taking occupancy."

In other words, in the face of overwhelming numbers of apartments deregulated on the basis of fraud and nothing more, DHCR is now illegally attempting to hand the landlords a powerful weapon to assist them in committing such fraud. It is now attempting to require those tenants who are least likely to receive any notice whatsoever that they may have a right to challenge their rent — tenants who take occupancy under "unregulated" leases that may be the product of lies and deception — to file any rent challenge within 90 days of taking occupancy. Merely to state the proposal is enough to show how fundamentally biased, corrupt, and destructive it is.

Both of these proposals would represent a huge policy mistake, depriving millions of tenants of badly needed protections at the very moment when they are most in need of such

protection: the moment when they rent a vacant apartment. The elimination of the protections of Local Law 13, for a full three year's worth of vacancies taking place between April 1, 1994 and April 1, 1997, vastly reduces the number of affordable units in New York City. DHCR has articulated no policy reason for doing this, and the proposal serves no apparent public purpose, other than perhaps as a reward to landlords in exchange for some hidden political consideration.

When a tenant rents an apartment after being told that the apartment is "unregulated", that tenant must face considerable risks before making any challenge to the rent. If the tenant is wrong, the landlord may evict the tenant, or raise the rent by an unconscionable amount, in retaliation, without any meaningful sanction being imposed. As a practical matter, a vacant apartment rented in Manhattan or any other neighborhood where "market" rents exceed $2,000.00 per month is presumptively deregulated, and it is only those tenants willing to bear the risks and uncertainties and expenses of litigation who can challenge the deregulation of these apartments. Under these circumstances, there is very little incentive for a landlord to charge only legal rent increases to vacant apartments and to continue to rent, as stabilized, those apartments in which the rent has not yet exceeded the deregulation threshold.

In this context, for DHCR now to curtail tenants' ability to challenge fraudulent claims of deregulation is a formula for rewarding fraud. DHCR's proposal makes the reward even more attractive, by forcing those tenants who take occupancy of a so-called "deregulated" apartment to challenge the rent within 90 days, when these are the very tenants who are least likely to know that they have any rights to challenge the rent at all.

Moreover, it is a formula for deception, because a landlord may simply create a false paper trail showing occupancy by a tenant, even if that tenant is not a real person, or even if that tenant

received money in exchange for silence, and then claim that the 90 days window period has passed while such tenant was in occupancy.

DHCR has a responsibility to enforce the rent laws, and not undermine them by making rules that render the laws unenforceable. For that reason, these proposed changes should not be adopted.

B. These Changes are Illegal.

The 90 day limitation on filing overcharge complaints with respect to fraudulently deregulated apartments has no basis in law. The statute of limitations for filing an overcharge complaint is, and has been, four years. The Rent Regulation Reform Act of 1997 simply required that, for all purposes, the system of rent registration will be used as the means of establishing rents such that, as of the date of any complaint, the rent registration on file four years prior to the most recent rent registration will be used as the basis for establishing the rent. Rent Stabilization Law §26-516 refers, in many places, to this "4 year" rule, but it provides no authority whatsoever for foreshortening the period of time within which to file an overcharge complaint from 4 years to a mere 90 days.

Moreover, the statute deliberately measures the limitations period for filing overcharge complaints from the giving of notice of a rent registration. DHCR's proposal eviscerates that requirement, by requiring a tenant who is completely without notice of any of the tenant's rights with respect to the rent, some how to intuit, within 90 days of moving into a new apartment, that a rent challenge can and must be filed.

This year, when renewing the rent laws, the City Council enacted a notice provision requiring that tenants in "deregulated" apartments be given notice of the basis for the landlord charging a deregulated rent. The current proposal is contrary to that law, and makes no pretense of even attempting to implement or enforce the landlord's obligation under that new law.

DHCR's misinterpretation of the effect of Local Law 4 of 1994 and Local Law 13 of 1997 is illegal as well. It is absolutely crystal clear from the legislative history of Local Law 4 that, in the words of its supporters (for example the testimony of council member Ognibene before the City Council on March 21, 1994), that "for those rents over $2,000.00, they [apartments] will not be destabilized until they are vacant." In 1994 the City Council did *not* intend to deregulate apartments unless the rents were already $2,000.00 before the apartment became vacant. Contemporaneous legislative history, such as Mr. Ognibene's statement, demonstrates this.

Therefore, when the Council passed Local Law 13 in 1997, it did nothing more than clarify its previous intentions. That clarification is entitled to deference. As the Court of Appeals has said, in construing the rent regulations, "when the Legislature does tell us what it meant by a previous act, its subsequent statement of earlier intent is entitled to very great weight." *Chatlos v. McGoldrick*, 302 N.Y.380 (1951) (citations omitted). The 1994 expansion of vacancy deregulation required that the vacant apartment have a "legal regulated rent" of $2,000.00 or more per month, and the legislature's use of the term "legal regulated rent" presumably had its intended meaning, which is that the rent be registered and paid by an actual tenant in occupancy. By giving exactly this interpretation to any ambiguity in its earlier enactment, and by repealing the language that would deregulate apartments vacated from April 1, 1994 forward, the City Council, in 1997, made it absolutely clear that, between April 1, 1994 and June 19, 1997 vacancies cannot

result in deregulation unless the vacant apartment had a regulated rent of $2,000.00 prior to vacancy. DHCR's proposed regulations are therefore illegal to the extent that they contradict this principle.

2. The Proposed Regulations Cannot Be Adopted, Because The Public Was Not Properly Notified.

Nothing in DHCR's April 5, 2000 "notice", published in the New York State Register, indicates that DHCR had any intention of expanding the number of deregulated apartments or creating a new, illegal, statute of limitations for challenging the rent charged in apartments that had been fraudulently deregulated.

Neither of these two major radical changes has anything to do with the stated purpose of the new regulations. DHCR's notice to the public, on April 5, 2000, stated that the purpose of the new regulations would be "to conform regulations to statutes." These regulations do nothing of the sort. In fact, they contradict both the purpose and the language of the statues on the subject.

The summary of its proposals provided by DHCR to the public, on April 5, 2000, never disclosed the substance of DHCR's proposal to curtail overcharge challenges in fraudulently deregulated apartments, or to expand the number of deregulated apartments. Rather, DHCR simply stated that §2520.11 of the Rent Stabilization Code would be amended to deal with "luxury decontrol."[3] The two word description, "luxury decontrol", did not provide the public with the information necessary to formulate comments.

[3] The description of vacancy deregulation in high rent apartments as having anything

If anything, DHCR's description of its intentions with respect to the amendments to §2526.1, the section that contained the illegal 90 day limitation on overcharge complaints in fraudulently deregulated apartments, contains even less information. It simply states that its intention was to "implement 4 year rules," making no mention of any 90-day variation on that rule. By proposing a two sentence amendment that imposes a 90 day statute of limitations on overcharge complaints, where the statute was traditionally 4 years, without disclosing that such a radical change would be proposed, and then by burying this proposal in the middle of 150 pages of densely worded proposed regulations, DHCR has committed a fraud on the public.

Because DHCR failed to inform the public in any meaningful way of the substance of these proposals, they cannot be adopted. Rather, if the DHCR is to go forward with the process of making proposals on this subject, it must publish an entirely new set of notices in a New York State Register and begin the process of public comment from scratch.

D. DHCR has Failed to Consider the Obvious Alternatives to its Approach.

Significant alternatives are available to DHCR to implement Local Law 4 and Local Law 13 in a way that is both consistent with the intention Local Law 13 and implements the City Council's most recent command, that landlords notify tenants of the manner by which any deregulated rent has been arrived at. DHCR should begin by stating, in plain terms, that

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to do with "luxury," simply reveals the ideological pro-landlord bias behind DHCR's proposal. "Luxury decontrol" it is not a legal term, but, rather, a political label given by landlords to the process of deregulating formally affordable housing accommodations.

apartments that were vacant between April 1, 1994 and June 19, 1997 are not deregulated unless the outgoing tenant paid a legal regulated rent of $2,000.00 or more per month. With respect to overcharge complaints in apartments that landlords have claimed to have deregulated, the law requires a simple rule, that DHCR should have no problem implementing by means of a simple regulation: a tenant may file an overcharge complaint with respect to an allegedly deregulated apartment any time within 4 years after receiving the notice that the City Council has now required, notifying the tenant of the manner by which the rent was calculated. If that notice was itself a fraud, or if the landlord refuses to serve the tenant with such notice, then the deadline for filing an overcharge complaint should be extended until the landlord takes the steps necessary to start the clock running.

Moreover, by regulation DHCR should require that landlords who claim that apartments are no longer subject to the regulations file a report of deregulation which contains the same information that the City Council has now required to be provided to the tenants, and that such report be a matter of public record forever. These modest and workable proposals will accurately reflect, rather than undermine, the law as it exists.

VI. HIGH INCOME DEREGULATION

A. The Changes and their Impact

Under the Rent Regulation Reform Act of 1993 the Legislature mandated a system under which a tenant's apartment could be deregulated if the tenant's rent were found to be $2,000.00 or more per month, and the tenant's income, for the previous two years, exceeded $250,000.00

per year. The Rent Regulation Reform Act of 1997 made no significant changes to that procedure, except to reduce the income threshold to $175,000.00 per year.

Since the inception of "high income" deregulation DHCR adopted an inflexible policy of deregulating an apartment on "default", regardless of the merits, if any tenant should be as little as one day late in returning its questionnaire. After losing dozens of cases on this issue, most recently *Dworman v. DHCR,* 94 N.Y.2d 359, 704 N.Y.S.2d 192 (1999), in the New York State Court of Appeals, it has now become the uniform law in New York State that DHCR must consider whether a tenant's default in answering a questionnaire in a high income deregulation proceeding is excusable or *de minimis.*

While the courts were dealing with the numerous issues raised by DHCR'S penchant for deregulating apartments, on "default", regardless of the tenants' incomes, DHCR promulgated Operational Bulletin 95-3, which sets forth a rigid and inflexible procedure for processing high income deregulation papers.

Now, despite the Court of Appeals' decision in *Dworman*, DHCR proposes, in many ways, to make its procedures even more stringent. For the most part, the damage is done simply by omitting to provide any mechanism for vacating defaults, as required by the Court of Appeals in *Dworman,* while at the same time requiring the issuance of a deregulation order whenever a tenant's response to one of its questionnaires is late or missing from its files. DHCR also proposes new, stringent, procedural requirements that are nowhere authorized by statute.

DHCR proposes to enact a new subdivision, to be entitled Rent Stabilization Code §2527-A, dealing with high income "deregulation", and amends several other existing parts of the Code

to create exceptions, for "high income" deregulation cases, to general rules that affect every other type of case.

A new section of the Code, §2520.11(s), would define, as exempt from regulation, any apartment in which a deregulation order has been issued, "including orders resulting from default." No provision is made for the *vacatur* of any default, notwithstanding the absolute command of a New York State Court of Appeals concerning this issue.

The new section would exempt any apartment deregulated by means of a deregulation order where the rent is over $2,000.00 per month. Omitted is any clarification concerning whether pending rent challenges must be decided before DHCR can conclude that an apartment may be deregulated.

DHCR proposes to add a new provision, Rent Stabilization Code §2522.5(g), which would serve as an exception to the statutory rule requiring that leases in rent stabilized apartments have either a one year or two year term. This new provision would allow a tenant in a rent stabilized apartment to be evicted before the expiration of his or her lease, by means of a deregulation order, notwithstanding that the statutory one year or two year lease term has not expired.

DHCR proposes to enact a new section of the Rent Stabilization Code, §2527.3(a), which is designed to be read together with the new procedural requirements for high income deregulation petitions. Under DHCR's proposal, unlike tenants in every other kind of proceeding before DHCR, tenants in deregulation proceedings would not be able to use an affidavit to prove mailing of documents. Such proof is often needed to prove that a default did not occur. This proposal demonstrates that DHCR is actively encouraging the erroneous deregulation of

apartments not occupied by "high-income" tenants, by doing everything it can to prevent tenants from vacating a finding of "default." A litigant in every other kind of proceeding before DHCR may prove that a certain document was mailed by simply filing an affidavit of service. Tenants in deregulation proceedings are singled out, and they must retain documentary proof, from the post office, of the mailing of any documents.

Rent Stabilization Code §2527-A would codify DHCR's current practice with regard to deregulation petitions, without so much as the slightest acknowledgment that those procedures have been found invalid by the highest court of the State of New York. In fact, DHCR proposes to make its procedures even more onerous.

Under the Rent Stabilization Law, a landlord may begin the process of attempting to deregulate an apartment by sending an Income Certification Form to a tenant demanding that the tenant inform the landlord whether the income of the members of the household is above or below the threshold for deregulation. Under current law, there is no requirement that a tenant respond to this form. Under DHCR's proposal, a "tenant or tenants *shall* return the completed certification to the owner within 30 days after service." (Emphasis supplied.) DHCR has no authority to mandate a response. The statute allows a landlord to petition for deregulation if there is no response. That is the only legal consequence, and DHCR lacks the authority to add to the list of consequences, either explicitly or by implication.

Under DHCR's current practice, the landlord is theoretically required to retain proof of having served the ICF form on the tenant. DHCR has never, however, required that the landlord produce such proof as a prerequisite for filing a petition for deregulation. That omission is continued in the proposed changes to the Rent Stabilization Code. DHCR also proposes to enact

an Operational Bulletin that would state the manner by which the ICF could be served. DHCR lacks the authority to proceed by Operational Bulletin. If there is to be any rule on the subject, it must be stated explicitly in the Rent Stabilization Code, and must be subjected to the process, mandated by the State Administrative Procedure Act, of adequate notice to the public and an adequate opportunity to comment and propose alternatives.

Under DHCR's current practice, a landlord need not have a good-faith basis for petitioning for the deregulation of an apartment. DHCR's proposal continues that omission, and allows the landlord to petition to deregulate an apartment even if the landlord knows that the tenants' incomes are below the threshold.

Under DHCR's proposed new regulations, the tenants are required not only to provide DHCR with the means necessary to inquire, of the New York State Department of Finance, as to whether the tenants' incomes are above the threshold or not, but DHCR now is asserting that it has the power also to require any tenant who has not filed income tax returns to submit "a written explanation indicating why such income tax returns were not filed for the applicable years." Nothing in the statute allows DHCR to make this inquiry. In fact, the statute is quite clear that it is only the New York State Department of Finance, and not DHCR, who has the authority to pass upon a tenants' income, and a tenant's compliance or non-compliance with the tax laws.

DHCR's proposed new regulations continue the current practice of requiring deregulation petitions to be served only upon one of what could be several tenants and/or legal occupants of an apartment. This practice has the potential of depriving legitimate tenants of due process of law in deregulation proceedings, because, in instances where the tenants have a conflict of interest among themselves concerning occupancy of an apartment, or otherwise cannot adequately

represent themselves before DHCR (such as estranged spouses, illusory tenants and subtenants, and successor tenants where the prime tenant is infirm or temporarily away from the premises) one tenant may not adequately represent the interests of the remaining tenants in a deregulation proceeding.

Proposed Rent Stabilization Code §2527-A.6 continues the current illegal practice, found to be illegal by the New York State Court of Appeals, of strictly requiring the issuance of a deregulation order upon a default by the tenant in responding to a questionnaire. The Court of Appeals' decision in *Dworman v. DHCR,* can only be read as requiring DHCR to adopt a policy that sets forth standards to determine whether a default in a deregulation proceeding was for "good cause" or was *de minimis.*

For example, proposed Rent Stabilization Code §2527-A.4(b)(3) requires that a tenant "shall provide the information [*i.e.,* a response to DHCR's questionnaire] to the DHCR within 60 days of service of the notice." Proposed §2527-A.7 states that any submission "must be postmarked no later than such deadline." Proposed §2527-A.6 states that if the tenant or tenants "fail to provide the information required pursuant to" that section, "the DHCR shall . . . issue an order" of deregulation. No provision is made for the tenant to come forward with any excuse if he or she has a reason for submitting a late response (*i.e.,* illness, fire, war, *etc.*). No procedure is set forth for the tenant to prove mailing, in the event that DHCR, by mistake, finds that there was a "default" where there was no default. No provision is made for determining the merits before issuing a default deregulation order, thus ensuring that apartments will be deregulated regardless of the lack of any evidence concerning the incomes of the tenants.

This proposal indicates that DHCR is attempting to resist the mandate of the New York State Court of Appeals to vacate excusable defaults in deregulations proceedings.

Taken together, these changes implement the higher income deregulations statute in the harshest possible manner for tenants. DHCR defiantly refuses to gear its procedures toward a fair determination of the merits, and instead appears determined to erect every possible procedural trap in order to maximize the number of apartment deregulated by default, regardless of the incomes of the tenants, regardless of the lack of good faith of the landlords, and regardless of the impact that this kind of procedure has on affordable housing in New York City. There is no reason, other than perhaps private political reasons, why DHCR should reward landlords with the windfall of deregulation where a tenant, with a middle-class income or less, excusably defaults in a proceeding. DHCR proposes to continue to deregulate apartments occupied by elderly, frail, or incompetent tenants who may be unable to respond to its questionnaire within its strict 60-day deadline. There is no reason, other than perhaps ideological bias, why a tenant, known to a landlord and living in an apartment, should not receive notice of a deregulation proceeding. There is no reason why a tenant who is statutorily entitled to a 2 year lease, should have to vacate an apartment on 60 days notice because of the issuance of a deregulation order, even though that order is subject to judicial appeal. There is no reason why a tenant should not have the right to prove, by means of an affidavit of mailing, the mailing of deregulation documents to DHCR, just as every other litigant has in every other type of proceeding heard by the DHCR.

B: The Proposed Changes Are Illegal.

Rent Stabilization Law §26-511(c)(4) mandates that any Rent Stabilization Code contain a provision "requiring owners to grant a one or two year vacancy or renewal lease at the option of the tenant." There is no statutory authority that allows DHCR to get around this mandate by providing landlords with the option of offering shorter leases, in those cases where DHCR finds it politically convenient to do so.

Under the *Dworman* case, it is absolutely illegal for DHCR, either through omission or through resistance, to promulgate changes to the Rent Stabilization Code that do not provide for the *vacatur* of defaults by tenants where the default was either excusable or of a *de minimis* nature. There is simply no way to reconcile the *Dworman* decision with the apparently mandatory default provisions that DHCR now seeks to promulgate.

The lack of any adequate provision protecting tenants from deregulation where they have either not received notice or have ongoing disputes about whether the rent is, in fact, over $2,000.00 per month, renders the procedures proposed by DHCR constitutionally suspect. DHCR has done nothing to protect the due process rights of tenants in deregulation proceedings. There is, simply speaking, no governmental interest to be served in deregulating tenants without giving them notice, or in deregulating tenants whose incomes are above the threshold by the enactment of harsh procedures that are full of traps for the unwary.

C. DHCR Has Failed to Consider the Numerous Better Alternatives That Exist.

A list of the numerous alternatives available to DHCR that have been overlooked, or rejected, is the clearest possible evidence of DHCR's unseemly frenzy to deregulate apartments occupied by tenants whose incomes are well below the threshold.

Nothing in the proposed regulations provides defaulting tenants with any notice of a final opportunity to vacate a default. Nothing in the regulations requires DHCR to attempt to verify the tenant's income before issuing a deregulation order. Nothing in the proposed regulations requires DHCR to give notice to those tenants who do not appear on the lease, even if they are spouses or relatives of the named tenant, or otherwise are people entitled by due process to notice of the proceeding and an opportunity to participate. Nothing in DHCR's proposal requires that a landlord proceed in good faith when filing a deregulation petition. Under DHCR's proposal landlords can continue to file repeated deregulation petitions for apartments that the landlord knows to be occupied by tenants whose incomes are below the threshold, merely in the hope of inconveniencing the tenants and brining about a default. This statutes was not designed to be a trap for the unwary. If DHCR is to administer the high income deregulation statute with any pretense of fairness, it will consider these alternatives and, hopefully, adopt them.

D. The Public has had No Notice of the Substance of these Proposals.

The stated purpose of these changes to the rent regulations was, according to the Notice that DHCR published in the New York State Register, "to conform regulations to statutes, particularly the RRRAs of 1993 and 1997, judicial determinations and incorporate agency practice." Here, however, DHCR's proposals stand in direct contrast to judicial determinations, as handed down by the New York State Court of Appeals. Here, DHCR's proposals do not "conform to statutes," but, rather, contradict those statutes as those statutes have been authoritatively interpreted by the highest court of the state. On that basis alone, the notice given to the public of these regulations was inadequate, and the regulations may not be adopted.

DHCR's summary of its new Part 2527-A, as published on April 5, 2000 in the New York State Register, gives no notice to the public whatsoever of the substance of the provisions DHCR seeks to promulgate. All DHCR has told the public is that it intends to "implement fully" the Rent Regulation Reform Act, with regard to "procedures for luxury decontrol."[4] Other than telling the public that it intended to make regulations concerning "luxury decontrol", DHCR has given the public no inkling of the substance of the regulations at issue. The State Administrative Procedure Act requires publication, in the State Register, of the substance of the proposed regulations. Since DHCR has failed to publish any indication of the substance of its proposed regulations, its process is fundamentally flawed. At a minimum, DHCR would have to publish a new notice of proposed rule making, and schedule new hearings from scratch, if it is to be in minimal literal compliance with the provisions of the State Administrative Procedure Act. As it stands, the regulations proposed are procedurally invalid.

[4] Of course, there is no such thing as "luxury decontrol." That is an ideological term utilized by landlords who seek to portray, as "luxury", the housing accommodations in which hundreds of thousands of middle class tenants are living, sometimes doubling up and tripling up, often paying illegal rents, and in all cases paying rents that have increased at a rate that is well beyond the increase in costs that have been borne by the landlords over the lifetime of rent regulations. There is no "luxury" involved in this regulatory scheme, except for the luxury, perhaps, that landlords now enjoy, of receiving something for nothing, a luxury that DHCR seeks to extend to every landlord under its jurisdiction.

VII. ELECTRICAL INCLUSION ADJUSTMENTS

From 1974 through 1996 DHCR applied a uniform formula for determining the amount by which a tenant's rent should be decreased when the landlord converts the building from owner-supplied electrical services to a system of individual metering. The system accounted for the amount of rent increases that the landlord would have obtained, over the years, under Rent Guidelines Board orders that gave landlords special rent increases in "electrical inclusion" buildings, buildings in which the landlords supplied the electricity. The system was to reduce the rent by approximately 6.6%, to offset the past rent increases received by the landlord, plus a "stage 1" rent reduction representing a rough estimate of the additional payments that would have to be made by the tenant, who would now have to pay for his or her own electricity. Then, DHCR would adjust the "stage 1" decrease in a "stage 2" process of assessing the actual savings in electricity costs to the owner, looking at the landlord's actual records.

In 1996 DHCR unilaterally promulgated Operational Bulletin 96-2, which eliminated the 6.6 percent decrease and eliminated all consideration of the actual savings to landlords who convert from owner supplied electricity to individual metering.

Operational Bulletin 96-2 was found to be illegal, as a violation of the agency's obligation to follow its practices and precedents and to go through the process of promulgating regulations if those practices are to be changed. *Car Barn Flats Residents' Assoc. v. DHCR,* N.Y.L.J. Feb. 23, 2000. p.28, col.5 (Sup. Ct. N.Y. Co.).

DHCR now proposes to promulgate a new section of the Rent Stabilization Code, to be numbered §2522.4(3), that adopts a position of total defiance in the face of the Court's decision in the *Car Barn* case. DHCR has *not* attempted to subject its policy reversal to the scrutiny of the

public, or to justify handing the landlords the huge windfall represented by Operational Bulletin 96-2. Instead, DHCR proposes only to allow electrical inclusion adjustments to be "based upon an Operational Bulletin." In other words, DHCR is now seeking to enact a regulation that will allow DHCR to adopt a secret policy concerning electrical inclusion adjustments, by fiat.

Obviously, DHCR's proposal attempts to legalize the provisions of Operational Bulletin 96-2, without even supplying the public with any justification for adopting that Operational Bulletin in the first place, and without providing the public with any meaningful notice of its provisions or any meaningful opportunity to comment. The proposed regulation is therefore bad policy, illegal, and procedurally flawed.

Although DHCR's proposed regulation does not say whether its policy on electrical exclusion will be "based upon an Operational Bulletin" now in existence, or rather some future operational bulletin, the only thing we know, from bitter past experience, is that DHCR is committed, under the current administration, to ignore its past practice of adjusting rents, in electrical inclusion buildings, by something approaching the exact amount by which the landlord benefits and the tenant is prejudiced. If Operational Bulletin 96-2 is any indication of what DHCR hopes to accomplish, the only purpose served by the regulation is to benefit landlords at the expense of tenants, by allowing them to hold on to approximately 6.6 percent rent increases, obtained in the past, that are now part of the base rent, as compensation for services that will no longer be provided to the tenants. These 6.6 percent rent increases, of course, increase exponentially over the years.

DHCR's proposed regulation is illegal. The court has specifically held, in the *Car Barn* case, that the substantive standards for determining any rent decrease when a building is converted to individual metering, must be the subject of regulations. The court specifically rejected the

"Operational Bulletin" approach that is at the center of DHCR's proposed regulation. The court has held, in advance, that this regulation, as now proposed, is illegal.

DHCR published no notice of this proposed change in the State Register. In fact, DHCR deceptively has informed the public that it is attempting, by these proposed regulations, to codify "judicial determinations." This proposal does not codify any judicial determination, but rather represents DHCR's arrogant contempt of the determinations of the courts. It is illegal and should not be adopted.

VIII. LEASE RENEWALS AND ASSOCIATED INCREASES

The proposed amendments change the rules regarding the procedures for lease renewals in ways that are harmful to tenants and unsupported by the law. See proposed RSC §2523.5.

First, § 2523.5(a) widens the "window" period during which the landlord must notify the tenant of her right to a lease renewal, from between 150 days and 120 days to between 150 days and 90 days. The proposed Code concomitantly reduces the amount of notice landlords must give tenants of their intention not to renew the lease from a minimum of 120 days to only 90 days. This change substantially decreases the amount of time that a tenant has to prepare for a holdover proceeding based upon non-primary residence or the owner's desire to occupy the unit. Where the landlord offers to renew the lease, the tenant has less time to adjust to the prospect of the rent increase occasioned by a lease renewal. In either case, tenants are given sharply less time to seek new accommodations if they cannot afford the increase, or do not wish to contest a threatened holdover proceeding. Given the emergency conditions in New York's housing market, such a reduction in time to relocate will inevitably lead to increased homelessness.

Second, § 2523.5(c) changes the date that a lease term commences, in the event that the landlord fails to timely offer a lease, from the first rent payment date occurring no less than 120 days after the date that the owner does offer the lease to the tenant to the first rent payment date occurring no less than 90 days after the date that the owner offers the lease to the tenant. This provision has the effect of reducing the penalty imposed on the owner for failing to provide a lease in a timely manner.

In addition, the proposed amended Code adds two new sections to sub-section 2523.5(c). The first new section (§ 2523.5(c)(2)) provides that where the tenant fails to timely renew a lease and remains in occupancy after expiration of the lease, the lease is "deemed" to have been renewed upon the same terms and conditions at the legal regulated rent, together with any guidelines increases. It further provides that the effective date of the rent adjustment under the "deemed" renewal lease shall commence on the first rent payment date occurring no less than 90 days after the renewal lease offer is made by the landlord.

The second new section (§ 2523.5(c)(3)) provides that notwithstanding the provisions of § 2523.5(c)(2) (discussed above), an owner may elect to commence a proceeding to recover possession of a housing accommodation where the tenant fails to timely renew his lease.

The first problem with these new provisions is that by allowing the rent increase to commence 90 days after the renewal lease is made, the possibility that a rent increase would take effect before the expiration of the prior lease is left open. Thus, § 2523.5(a) requires the renewal lease offer to be made as much as 150 days before a prior lease expires. If a tenant does not respond to that renewal offer within 30 days of receiving the lease renewal offer, under the language of the proposed amendment, the landlord can charge an increase rent as soon as 90 days after the offer was made or as much as 60 days before the lease expire. There is no basis in law for such a result.

More fundamentally, the new sections allow an owner to both increase the rent without the agreement of the tenant, and to then seek to evict the tenant for failure to renew his lease. This even though the tenant never agreed to the renewal. The provision has the effect of binding the tenant to a new lease without binding the landlord.

The proposed amendment to Section 2523.5(e) allows an owner to request from the tenant the names of all persons other than the tenant who are residing in the housing accommodation once every twelve months instead of only at the time a renewal lease is offered. This puts an undue burden on the tenant to provide the landlord with information on a yearly basis even if the tenant's lease is only renewed once every two years. This change serves no purpose other than to harass the tenant and open pitfalls for him if he fails to properly complete the paperwork.

The proposed amendments also completely change Subdivision (f) of Section 2523.5. The current subdivision (f) allows the DHCR to determine with due consideration of the equities, that there are reasonable grounds pursuant to which a family member who is made known to DHCR pursuant to subdivision (e) of this section, may be entitled to a renewal lease. The proposed amendments completely eliminates this protection for family members who may be equitably entitled to a renewal lease.

The new subdivision (f) requires that a landlord notify DHCR when a family member succeeds to a lease pursuant to Section 2523.5(b), for the purpose of determining whether whether an owner is entitled to obtain a vacancy increase pursuant to Section 26-512(f) of the RSL, (vacancy increase for second successor tenant), and provides that such notice creates a rebuttable presumption that the owner is entitled to the vacancy increase. This provision allows the landlord to communicate with DHCR without notifying the tenant. There is no provision for a tenant to challenge the notice. In addition, it completely turns the intent of the Rent Stabilization Law on its head. The RSL was enacted in order to protect tenants from unreasonable rent increases, and places the burden of proof that a landlord is entitled to an increase on the landlord..

Nothing in the 1997 amendment to the RSL shifted the burden of proof, or provided that the landlord should be entitled to any presumptions regarding rent increases. Rather to be consistent with the purpose of the RSL, there should be a presumption that the landlord is not entitled to the increase unless the landlord provides competent evidence that the tenant succeeded to a lease

Finally, the current Code § 2522.5(f) prevents landlords from reaping windfalls from multiple vacancies occurring within the same guidelines period. Under the current provisions, the rent of the second new tenant in a guidelines year is based on the rent of the original tenant, not that of the fly-by-night intervening tenant. The new Code now allows landlords to compound increases, encouraging landlords to increase turnover, harass tenants, and invent illusory tenants in order to increase the rents.

IX. ROOMMATES

The proposed amendments create a new section of the Code, § 2524.7, entitled "Occupancy by persons other than the tenant of record of tenant's immediate family." This section reiterates the right of tenants to have roommates pursuant to Real Property Law, § 235-f. The section then goes on to state as follows:

> The rental which a tenant may charge a person in occupancy pursuant to section 235-f shall not exceed such occupant's proportionate share of the legal regulated rent. . . The charging of a rental to such occupant that exceeds that amount shall be deemed to constitute profiteering in violation of section 2520.3 of this Title."

This proposed new section has no basis in the law. § 235-f of the Real Property Law was enacted to protect the rights of tenants. The statute expressly makes it unlawful for landlords to

restrict occupancy of residential premises to tenants and their families and further makes any lease which attempts such restriction to be void against public policy. RPL § 235-f(2). In enacting this statute, the Legislature found that "unless corrective action is taken . . . thousands of households throughout this state composed of unrelated persons who live together for reasons of economy, safety and companionship may be placed in jeopardy." (L. 1983, ch. 403, § 1). Thus, "it is undeniable that this section was passed to protect tenants and occupants, not landlords." Capitol Holding Co. v. Stravrolakes, 242 A.D.2d 240, 662 N.Y.S.2d 14 (lst Dept. 1997), *affirmed* 92 N.Y. 2d 1009, 684 N.Y.S.2d 477, 707 N.E.2d 432 (1998). Nothing in this statute provides a basis to inquire into the private decisions of roommates as to how to set the rent between them.

By contrast, the Rent Stabilization Law (RSL) specifically limits the amount of rent which a tenant may charge a sub-tenant. Thus, Section 26-511(c)(12) of the RSL provides that "the rental charged to the subtenant does not exceed the stabilized rent plus a ten percent surcharge payable to the tenant if the unit sublet was furnished with the tenant's furniture." The Legislature had the option of adopting limits on charges to roommates as well as subtenants, but it elected not to do so. The proposed amendment to the code is therefore wholly without authority.

The proposed amendment, moreover, would be devastating to many low-income tenants who rely on the income of roommates to retain their shelter and would result in the loss of housing for such low-income tenants. Numerous senior citizens, disabled persons or recipients of public assistance, whose income is less than the rent, can retain their homes only by having roommates and charging more than a proportional share of the rent. The decision of how to split the rent between roommates should be a private decision between the parties, which may be

affected by numerous factors, such as the roommates' respective income, the size of their families, and the amount of space they each occupy, none of which are any business of their landlord.

It is, of course, ironic, that the tightened restrictions on overcharges by tenants have been adopted just as DHCR seeks to dramatically loosen the restrictions on charges by landlords. Like all of the new amendments, the roommate overcharge provisions clearly reveal DHCR's partiality to the real estate industry and its abdication of its role as a neutral arbiter of landlord-tenant disputes.

24. PRIMARY RESIDENCE

The Legislature made no changes in the Rent Regulation and Reform Act of 1997 affecting the issue of primary residence that would justify the addition of subsection (u). Though it is the landlord's burden to establish that a tenant does not occupy the subject premises as his or her primary residence, this addition to the Rent Stabilization Code would shift that burden to the tenant. [See, Scherer, Residential Landlord-Tenant Law in New York §8:199 (1999)]

The proposed language in (1) of this subsection sets forth limited types of evidence that may be considered in determining primary residency such as "specification by an occupant " (emphasis added to highlight that this subsection does not restrict itself to the prime tenant) "of an address other than such housing accommodation as a place of residence on any tax return, motor vehicle registration, driver's license or other document filed with a public agency." This provision is unlawful and contrary to public policy for several reasons. First, premises subject to this Code must be the primary residence of the tenant and any evidence pertaining to any other occupant is

irrelevant in establishing that fact. Secondly, providing a limited list of documents that can be used to determine primary residency, impermissibly shifts the burden of proof to the tenant to overcome the presumption of nonprimary residence based upon these documents. There are a variety of reasons why such documents could have no value in determining primary residence. For example, a tenant may register a car and obtain a driver's license at an address other than his or her primary residence because that is where the car is primarily used and parked. There are numerous scenarios where tenants may file certain tax returns indicating an address other than their primary residence, i.e; ownership of property elsewhere, employment at another location, partnership or business registered elsewhere, etc.

The proposed language in (2) of this subsection again referring only to "an occupant" who uses another address for voting purposes must be deleted as this information has no bearing on the tenant's primary residence.

The proposed language in (3) of this subsection is unnecessary. Cases of alleged nonprimary residence are fact-specific and temporary absences cannot be limited to those enumerated in § 2523.5(b)(2) which applies to remaining family members. If this proposed amendment to the Code remains, in addition to those grounds listed in § 2523.5(b)(2), it should be expanded to include temporary relocation due to caring for an aging or ill relative or friend, travel related to work or study, incarceration, and time spent in a nursing home or long-term rehabilitative care facility. It is the tenant's intention and eventual ability to return to the premises that must guide the determination of primary residency.

Lastly, number (4) of this proposed subsection would allow subletting of the premises to be considered evidence of nonprimary residence. This is in contradiction to Real Property Law

§226-b, which grants tenants, including those subject to the Rent Stabilization Code, the right to sublet their residences, assuming they follow proper notification procedures. If the proposed language is referring to an illegal sublet, it should also be noted that an alleged illegal sublet can be cured, but nonprimary residence cannot. This proposed amendment to the Code would permit a landlord to bring a nonprimary residence case against a tenant where there is only the claim of illegal sublet, thereby circumventing the tenant's right to cure.

XI. WAIVER OF RIGHTS

The proposed amendment to Section 2520.13 of the Rent Stabilization Code ("RSC") dangerously increases the probability that tenants will waive their rights under the Rent Stabilization Law ("RSL") and the RSC under circumstances in which those rights should be enforced and protected, and compounds that injustice by making such waivers binding upon subsequent tenants. It represents an unwarranted and unjustified diminution of tenants' rights under the RSL and subverts the RSL's stated policy of providing safeguards against unreasonably high rent increases and protecting tenants and the public interest.

1. Current Section 2520.13 of the RSC

Recognizing the unequal bargaining power between landlords and tenants, current Section 2520.13 of the RSC provides that an agreement by a tenant to waive the benefit of any provision of the RSL or RSC is void. However, it permits a tenant to withdraw with prejudice any complaint pending before DHCR, as part of a negotiated settlement, provided two conditions are

met. First, the tenant must be represented by counsel; and second, the settlement must be approved by DHCR or a court of competent jurisdiction.

The current section also recognizes that the RSL and RSC seek to preserve housing at affordable rents not only for current tenants, but for future tenants as well. Consequently, Section 2520.13 provides that any settlement made to withdraw a complaint at DHCR *shall not be binding upon any subsequent tenant* (except to the extent that the complaint being settled is subject to the statute of limitations provided in the RSL and RSC).

2. The Proposed Amendment

The proposed amendment to Section 2520.13 dramatically increases the probability that tenants will waive their rights under the RSL and RSC by permitting them to withdraw with prejudice any complaint pending before DHCR as part of a negotiated settlement, with the approval of DHCR or a court of competent jurisdiction, *even if the tenant is not represented by counsel*; and *even without the approval of DHCR or a court* if the tenant *is* represented by counsel. Most dangerous, however, is that portion of the proposed amendment which provides that such settlements *shall be binding upon subsequent tenants* (unless the settlement encompasses a surrender of occupancy by the tenant or if the tenant is not in possession of the apartment on the date of the settlement).

3. <u>Comments</u>

Permitting tenants to withdraw their complaints with prejudice even when they are not represented by counsel will make it all too easy for *pro se* tenants to be taken advantage of, even if DHCR or court approval is required. DHCR has no mechanism for assuring that a tenant who

has filed a complaint understands the strength of the claims she has raised and the advantages and disadvantages of entering into a proposed settlement, and the proposed amendment to the Code does not provide for such a mechanism. Indeed, advising a tenant about her legal options is not, and should not be, DHCR's role. That would be the role of the tenant's attorney, if she had one.

Similarly, overtaxed and overcrowded courts lack the time and resources to assure that tenants understand the strength of their claims and the advantages and disadvantages of their proposed settlements. Because most tenants are unaware of their rights, they simply should not be allowed to withdraw any complaints before DHCR unless they are represented by counsel.

Even if represented by counsel, however, tenants should not be permitted to withdraw their complaints with prejudice without the approval of DHCR or the courts. Requiring DHCR or court approval is necessary, not only to protect the interests of the tenant whose claim is being withdrawn, but also to assure that the negotiated agreement does not violate public policy by legitimizing an illegal rent or legalizing an improper reduction in services. The role played by DHCR and the courts in protecting the public and enforcing the public policy underlying the RSL and RSC will become even more critical if, as proposed, a tenant's waiver of rights will bind subsequent tenants.

While tenants should be protected against improvident waivers of their rights under the RSL and RSC, there may be circumstances in which a tenant may in fact wish to withdraw a complaint before DHCR in exchange for some benefit. Such waiver, however, should not bind subsequent tenants, who will not derive any benefit from the negotiated settlement and should not have to suffer the consequences of the prior tenant's waiver.

As an example, assume that a landlord is illegally charging a tenant a rent of $1,500 per month and that the legal rent is $500 per month. Assume further that the tenant has a pending rent overcharge complaint at DHCR; that she owes four months' rent; that she does not have any money saved; and that the landlord has commenced a nonpayment proceeding in Housing Court. Under these facts, the tenant might well wish to withdraw her rent overcharge complaint in exchange for the landlord's agreement to waive all arrears.

Under the proposed amendment to Section 2520.13, the tenant's agreement to withdraw her rent overcharge complaint would bind all future tenants, even though they would derive no benefit from the tenant's settlement, and, in effect, would legalize a palpably illegal rent. Clearly, this would be at odds with the public policy underlying the RSL and RSC, and should not be permitted.

Because the proposed amendment to Section 2520.13 of the RSC will result in an unwarranted diminution in the rights of both current and future tenants, and will undermine the stated policies of both the RSL and RSC, DHCR should reject it in its entirety.

XII. EXHAUSTION OF REMEDIES

By adding the language “unless such order remands the proceeding for further consideration,” to Section 2520.6 (t), the DHCR is making it impossible to appeal any order which remands a proceeding back to the Administrator. Since the Commissioner is presently in the habit of remanding almost any order rather than simply ruling that the order is improper, this language might make it impossible to obtain proper judicial review of DHCR action.

On numerous occasions tenants are forced to give up valid claims because of the DHCR's inability to render a final decision, which needlessly prolongs administrative matters and makes it economically impossible for the tenant to continue the fight. Where the remand and failure to make a final decision is based on clear error, there is no excuse for placing parties in a position where they have to basically start a proceeding all over again. To do so renders pursuit of their remedies futile.

Further, such a additional language violates basic principals of Administrative law. In Watergate II Apartments v. Buffalo Sewer Authority, 46 N.Y.2d 52, 412 N.Y.S.2d 821 (1978), the Court of Appeals reviewed the "exhaustion rule". After setting forth all of the reasons, in general, why the exhaustion rule was a good one, the court held that the exhaustion rule was "subject to important qualifications" and :

> ... need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power ... or when resort to an administrative remedy would be futile ... or when its pursuit would cause irreparable injury." 412 N.Y.S.2d at 824.

The rule of exhaustion of administrative remedies also need not be followed when an agency's action is challenged as being wholly beyond its grant of power (Milburn v. McNiff, 81 A.D.2d 587, 437 N.Y.S.2d 445 1981) or where there exists a question of discriminatory application of a rule by an administrative agency (Figari v. New York Telephone Co., 32 A.D.2d 434, 303 N.Y.S.2d 245). 601 N.Y.S.2d at 670.

With this new proposed language to be added to the Code, DHCR is taking the position that it is irrelevant if the remand Order is based on obvious factual or legal errors. Because the Order remands the proceeding, the parties are forced to re- process their claims through the same two administrative levels, and hope that at some point in their lifetimes the DHCR issues a "final order," so they can go to a court and seek review of the obvious factual mistakes which the DHCR made in the first place.

Obviously, the exhaustion rule, when applied correctly, conserves scarce administrative and judicial resources, i.e., it conserves our tax dollar. But, applying this policy blindly and precluding judicial review of all remand orders achieves just the opposite result; it wastes tax dollars. Forcing the parties to "do it all over again" without considering the correctness of the remand is just an absurd waste of money and governmental resources, and just the opposite of what the exhaustion rule was meant to prevent.

CONCLUSION

As set forth above, the revised Rent Stabilization Code proposed by DHCR is riddled with violations of the authorizing statute, and places a commitment expanding loopholes for landlords above DHCR's mandate to protect New York City's tenants from the ravages of the ever worsening housing emergency that has already consigned thousands to the shelters and the streets. The revised Code, a deeply flawed product of a fundamentally flawed procedure, should be scrapped, and a new Code developed through a truly open process.

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Respectfully submitted,

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