



August 31, 2021

**VIA OVERNIGHT MAIL AND E-MAIL**

New York State Division of Housing and Community Renewal  
Office of Rent Administration  
Gertz Plaza  
92-31 Union Hall Street  
Jamaica, New York 11433

**Re: Tenants' Answer to Owner's Application for  
Exemption from Rent Stabilization Based on Substantial Rehabilitation  
Docket Number: IN-21003-UC  
Premises: 1646 Union Street, Brooklyn, New York 11213**

Dear Rent Administrator:

Brooklyn Legal Services represents the undersigned Tenants in their individual capacities and as members of the informal 1646 Union Street Tenants Association. Pursuant to the parties' stipulation agreement, attached hereto as **Exhibit A**, we respectfully submit the following opposition to the Owner's Application for Exemption Based on Substantial Rehabilitation, which should be denied for the following reasons:

1. This application is barred by the doctrine of res judicata as the subject building was already determined to be rent-stabilized in numerous prior legal proceedings, including before the Appellate Term.
2. There is evidence the premises became independently rent-stabilized upon completion of a rehabilitation in the 1980s pursuant to Article XV of the Private Housing Finance Law, which would preclude a substantial rehabilitation finding.
3. The Owner has not met its burden of proving substantial rehabilitation, as it did not submit sufficient documentation. Furthermore, there are significant concerns regarding the reliability of the documents submitted by the Owner in support of its application in light of a HUD audit finding and the unity of interest between the prior Owner and the original contractor.
4. Even if the application is approved, all tenants who resided in the premises before the J-51 tax subsidy expired in March 2008 must remain rent-stabilized as there is no meaningful dispute that the prior Owner did not provide the requisite riders in leases notifying the tenants that their rent-stabilization protections would expire.

5. All tenants residing in 12 specifically designated Low Income Units who moved in prior to March 2008 must remain rent-stabilized pursuant to the explicit language of the binding regulatory agreements between the prior Owner and government agencies and a prior court holding.
6. As a matter of equity, DHCR should find that any tenants residing in the premises during the J-51 tax exemption period who switched units after its expiration should remain rent-stabilized given the Owners' repeated representations in leases and litigation that the premises remained rent-stabilized and failure to notify tenants that they could be forfeiting a rent-stabilized tenancy by moving.

The Tenants reserve the right to supplement this response as additional documents may be uncovered relating to the alleged rehabilitation of the premises in the 1980s. We also ask that DHCR allow ample time to complete this necessary investigation given the complex legal and factual issues involved here. Please note: a copy of this opposition and exhibits has been provided to the Owner and DHCR legal counsel by e-mail as agreed upon in the parties' stipulation agreement.

### **PROCEDURAL HISTORY**

The Owner submitted the instant application in or around February 18, 2020.

On January 20, 2021, the Owner filed an Article 78 mandamus action to compel a decision from DHCR in Kings County Supreme Court under Index Number 501487/2021.

DHCR and the Owner entered into a stipulation on March 8, 2021, providing that DHCR would render a decision by May 29, 2021.

The Tenants did not receive the underlying substantial rehabilitation application from DHCR until approximately May 26, 2021, and even then only the initial application without any of the attached exhibits. The Tenants were likewise unaware of the Article 78 action, and requested an initial extension on June 2, 2021 in order to obtain the whole file and other relevant documents. A copy of this letter is attached as **Exhibit B**.

On or around June 14, 2021, the Owner filed an Order to Show Cause in the mandamus action to compel DHCR to render a decision, as a result of which the Tenants were finally notified of the pending Article 78 proceeding.

On July 1, 2021, the Tenants, Owner, and DHCR entered into a Stipulation, attached as **Exhibit A**, whereby Brooklyn Legal Services as attorneys for Cheryl Hyndman acting in her capacity as a member of the informal 1646 Union Tenants Association intervened on behalf of the Tenants and was given until August 31, 2021, to submit initial opposition. As part of this agreement, the Owner agreed to provide the full application inclusive of all exhibits and other submissions by July 8, 2021, which it timely did.

## RELEVANT FACTUAL BACKGROUND

### **Building History**

The subject premises 1646 Union Street is a 23-unit building that was built in or around 1920. See Certificate of Occupancy, attached as **Exhibit C**.

1646 Union Street and nearby 285 Schenectady Avenue, a 38-unit rent-stabilized building (hereinafter collectively the “Buildings”), were unquestionably jointly rehabilitated in the 1980s using a host of city, state, and federal funding including:

- A \$1,800,000 mortgage loan made by the New York City Housing Development Corporation (“HDC”), recorded on October 29, 1987, and attached as **Exhibit D**.
- An insurance policy from the United States Department of Housing and Urban Development (“HUD”) for the above-referenced HDC mortgage, pursuant to which the Owner’s predecessor-in-interest 285 Associates agreed that rents would be subject to approval by the Secretary of HUD. See attached **Exhibit E** at 4(a).
- A \$1,727,343 subordinate mortgage made by the City of New York via the Department of Housing Preservation and Development (“HPD”), recorded on October 29, 1987, using federal funds from the Housing Development Grant program (“HDG”), a copy of which is attached as **Exhibit F**.
- A J-51 NYC tax exemption for the Buildings for a twenty-year period of approximately March 1998 through March 2008.

The government funding resulted in a host of regulations for at least a twenty-year period, including, among others:

- A Declaration of Covenants record on October 29, 1987, attached as **Exhibit G**, designating 12 of the 58 units in the Buildings as Low Income Units and providing for regulatory oversight by HPD. Upon information and belief, the Low Income Units are:
  - 1646 Union Street: 1C, 1E, 2B, 2C, 3B
  - 285 Schenectady: 1E, 2B, 2E, 2H, 3H, 4B, 4H
- A Declaration of Covenants II recorded on October 29, 1987, attached as **Exhibit H**, in which the Owner agreed that certain specifically designated Low Income Units would remain subject to rent stabilization even after the 20-year regulation period in the agreement “at least until such time as the tenant in occupancy” as of the conclusion of the agreements (hereinafter the “Deregulation Date”) vacates.”
- An Owner-Grantee Agreement between the Owner and HPD, attached as **Exhibit I**, pursuant to which in Section B(2) (page 12) the Owner agreed to keep and maintain

adequate books and records relating to the HDG funds and per Section N further agreed (on page 27) to “maintain full and accurate books and records regarding the Rehabilitation...of the Premises.”

- A Construction and Permanent Loan Commitment memorializing the HDC loan terms and stating that the project must comply with the Private Housing Finance Law. *See* attached **Exhibit J** at 1.
- A Regulatory Agreement between HDC and the Owner requiring compliance with HDC, HPD and HUD rules and to maintain a J-51 tax abatement on the premises, a copy of which is attached as **Exhibit K**.

The prior owner sold the premises in or around May 1, 2014 to the current owner 1646 Union LLC. Attached as **Exhibit L** is a copy of the deed transfer.

### **Prior Litigation and Conduct Related to Buildings’ Regulatory Status After 2008**

All of the relevant regulatory agreements had 20-year terms and expired in or around March 2008. Thus, on August 19, 2009, HDC recorded a release terminating the Restrictive Covenants, attached hereto as **Exhibit M**.

Despite the expiration of the regulatory period, the prior Owner continued to treat all of the tenants as rent-stabilized and provided rent-stabilized renewal leases. *See* annexed Affidavits of Cheryl Hyndman and Aldena Williams.

Following its acquisition in 2014, the current Owner took the position in litigation that while the Buildings remained rent-stabilized after the expiration of the regulatory agreements in 2008, it was free to revoke the preferential rents charged during the regulatory period, arguing that the rent setting provisions of Rent Stabilization Code (“RSC”) 2521.1(j), were inapplicable as they only apply to properties becoming rent-stabilized for the first time upon expiration of regulatory agreements, not buildings such as 1646 Union that were already rent-stabilized. *See, e.g.*, Owner’s Appellate Brief dated February 20, 2018, attached as **Exhibit N** at 4 and 8: “The Property has been governed by the RSL since in or about March 1988...The unit at issue in this appeal was and remains rent-regulated under the RSL.”

Thus, the Owner offered the existing tenants rent-stabilized renewal leases with substantial increases, many of which were rejected, including by a number of the undersigned Tenants, who took the position in housing court and ultimately in appeals before the Appellate Term that the rent charged upon expiration of the regulatory agreements should be the legal rent arguing:

Nowhere in Section 2521.1(j) of the Rent Stabilization Code does it state that Section 2521.1(j) applies only to properties that were regulated exclusively by the “PHFL, or any other State or Federal law,” and were never rent-stabilized. In fact, the plain meaning of the statute is nearly the converse – the modifier “other than the RSL or City Rent Law” qualifies the phrase “any other State or Federal law” to make clear that if the only State

law by which the premises were regulated was the RSL, Section 2521.1(j) would not apply. However, where, as here, the building is subject to the “PHFL, or any other State or Federal law,” in addition to the RSL, Section 2521.1(j) must apply to give effect to the RSL when such other regulation ends.

Respondent-appellant’s interpretation of Section 2521.1(j) is in harmony with the goal of the Rent Stabilization Law to prevent a “drastic increase in the rents of existing tenants” upon a building’s exit from regulatory regimes other than the RSL itself..

See Tenants’ Appellate Brief at 8-9, attached as **Exhibit O**.

The parties ultimately engaged in extensive litigation, many cases of which were decided on the merits, in which the Owner repeatedly represented to the Tenants and the trial and appellate courts that the Buildings were rent-stabilized, and in reliance upon which judicial findings were rendered that necessitated legal determinations regarding the Buildings’ rent-regulatory status. These cases included, among others:

- *1646 Union v. Turner*, Kings County Housing Court Index No. 106139/2014, attached hereto as **Exhibit P**:

In this proceeding the housing court awarded a judgment to the Owner **after a full trial**, finding the subject unit was rent-stabilized but adopting the Owner’s argument that because the premises were already rent-stabilized when they exited regulation, it was not constrained by RSC 2521.1(j) and could revoke preferential rents. See **Exhibit P** at 5-8. Accordingly, the trial court found that Owner validly revoked the preferential rent in offering a rent-stabilized lease increasing the rent from \$1,200 to \$2,017.51, commencing September 1, 2014. *Id.* at 2. Upon information and belief, this matter was never appealed or reversed and the tenant was evicted.

- *285 Schenectady v. Grisom et al.*, Kings County Housing Court Index No. 75636/2016, attached hereto as **Exhibit Q**:

In this housing court action, also based on a failure to execute a rent-stabilized renewal lease, the court awarded summary judgment to the tenant, finding that rents charged in the Low Income Units, of which this was one, could not be revoked upon expiration of the regulatory period in 2008 and that such tenants remain rent-stabilized. *Id.* at 1-2.

- *285 Schenectady v. Yuderquis Polanco*, Kings County Housing Court Index No. 50543/2015, attached hereto as **Exhibit R**:

In this housing court action, also based on a failure to execute a rent-stabilized renewal lease, the court awarded summary judgment to the tenant, finding that prior to the current Owner’s acquisition of the property, the tenant executed a

two-year rent-stabilized renewal lease in or around June 2013 that precluded the Owner's revocation of the preferential rent until at least September 2015. *Id.* at 4.

- *1646 Union v. Williams et al.* (Index No. 50533/2015), *Polanco et al.* (Index No. 5034/2015), *Hyndman et al.* (Index No. 58392/2015), *Simpson et al.* (Index No. 50537/2015), and *285 Schenectady v. Brown* (Index No. 50535/2015), decided collectively in the decision attached as **Exhibit S**:

In these five informally consolidated cases, Judge Mundy of the Kings County housing court adopted the findings in *1646 Union v. Turner* and awarded summary judgment to the Owner based on the tenants' failure to execute rent-stabilized renewal leases revoking the preferential rents in 2014 at the conclusion of the regulatory period. The respondents included Ms. Williams, who switched apartments in or around 2010 after the expiration of the J-51 tax subsidy in or around March 2008 (*see* annexed Williams Aff. at ¶ 6), and Osvaldo Polanco (a different apartment than Yuderquis Polanco), who moved into the premises in or around 2009.

- *1646 Union v. Simpson et al.*, 2019 NY Slip Op 50089(U) (App. Term. 2d Dep't 2019), attached as **Exhibit T**:

All five of the above-referenced consolidated cases decided by Judge Mundy were ultimately stayed on appeal and heard by the Appellate Term in 2019 and decided under the Appellate Term Index Number for *1646 v. Simpson* but applicable to all five apartments<sup>1</sup>. The Appellate Term reversed and dismissed all five cases. Rather than render a decision on rent setting pursuant to RSC 2521.1(j), the Appellate Term made a summary determination equivalent to a summary judgment finding pursuant to CPLR 409(b) after reviewing the record and concluding that the landlord had not served the requisite 15-day termination notice required for termination of a rent-stabilized tenancy pursuant to RSC 2524.2(b). This finding was predicated on a factual predicate finding that the units in question were in fact rent-stabilized based on the representations of the Owner who chose to chart this course in litigation.

Prior to the instant application, none of the Tenants ever received any notice or indication from the Owners that it intended to claim exemption on the basis of substantial rehabilitation. *See* Williams and Hyndman Affs. at ¶¶ 11-13 and ¶¶ 3-5 respectively and above-referenced court decisions. Nor did any of the Tenants ever receive J-51 riders notifying them that at the conclusion of the tax exemption period they would lose their rent-stabilization status. *Id.* at ¶ 4 and ¶¶ 3-4. As a result, some Tenants, such as Ms. Williams, switched units after the J-51 tax

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<sup>1</sup> The related decisions relying on *Simpson* are available at: 2019 NY Slip Op. 50090 (Williams), 2019 NY Slip Op. 50091 (Hyndman), 2019 NY Slip Op. 50092 (Polanco), and 2019 NY Slip Op. 50093 (Brown).

exemption period expired, thus potentially forfeiting rent-stabilized tenancies in the event this application is approved.

## ARGUMENT

### **I. THIS APPLICATION IS BARRED BY THE DOCTRINE OF RES JUDICATA AS THE BUILDINGS WERE ALREADY DETERMINED TO BE RENT-STABILIZED IN LITIGATION**

DHCR should deny this application based on the judicial doctrine of res judicata, as the regulatory status of the subject premises has already been decided by the housing and appellate courts in the over five years of extensive litigation between the parties from 2014-2020. In these legal actions, many of which were fully adjudicated on the merits and in which the Owner was a party, the Owner took the position the Buildings were rent-stabilized but subject to a resetting of rents from preferential to legal rent levels following the conclusion of regulatory agreements in 2008. The courts in turn issued final decisions relying on the Owner's litigation course of conduct and necessarily concluding that the Buildings were rent-stabilized. These judicial determinations can no longer be undone.

#### **A. Applicable Legal Standard and Relevant Case Law**

“Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again” 861-871 *Knickerbocker v. Poli*, 117 N.Y.S.3d 799 (App. Term. 2d Dep't 2019), quoting *Matter of Hunter*, 794 N.Y.S.2d 286 (2005).

“New York has adopted a ‘transactional analysis approach’ in deciding res judicata issues, whereby once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.” *Id.* (internal citation omitted). “Where the same foundational facts serve as a predicate for each proceeding, differences in legal theory or relief sought do not create a separate cause of action.” *Greaves v. Ortiz*, 65 A.D.3d 1085 (2d Dep't 2009).

In 867-871 *Knickerbocker* the landlord initially commenced a holdover terminating a tenancy based on a claim of deregulation due to substantial rehabilitation. After the landlord did not prevail on that action it filed a new action alleging deregulation based on high-rent vacancy decontrol. The Appellate court rejected this action finding that the variance in legal theories did not create a different cause of action for res judicata purposes, noting: “As landlord was given a full and fair opportunity to litigate its claim in the prior proceeding, res judicata bars landlord's current claim.” 117 N.Y.S.3d 799 (App. Term. 2d Dep't 2019)

Similarly, in *Chelsea 23<sup>rd</sup> St. v. Cheng*, 2006 NYLJ Lexis 4257 (Sup Ct. NY Cty. 2006) a landlord was barred by *res judicata* from re-litigating the issue of the regulatory status of the premises where in a prior holdover between the parties the trial court had granted a motion to dismiss the proceeding due to defective predicate notices that failed to comport with the Rent Stabilization Code. Four years later the landlord argued in a subsequent holdover that it had not been offered a full and fair opportunity to litigate the regulatory status of the premises and that in any event a rent-stabilized tenancy cannot be created by estoppel. The trial court rejected these arguments given the unity of the parties in the prior action and noting that case law regarding creation of a rent regulated action by estoppel has no bearing on the principle of *res judicata* “because court orders do not create rent regulated premises but merely adjudicate their existence.” *Id.* at \*5.

Once a judicial finding on an issue or claim against a party has been made warranting invocation of *res judicata*, it is immaterial what the merits of the claim or issue might have been had different evidence been presented. Thus, in *Meyers v. Four Thirty Realty*, 173 A.D.3d 543 (1st Dep’t 2019) the Appellate Division reversed a trial court grant of summary judgment in a rent overcharge action based on the principle of claim preclusion. In a prior appeal in the same action the appellate court had held that the tenant was rent-stabilized because the building was receiving J-51 tax benefits during the tenancy and the tenant had not received the requisite riders. Subsequently the landlord produced a 1995 DHCR order allowing for deregulation upon expiration of the lease then in effect. Rejecting the lower court’s holding, the Appellate Division held that the landlord “had a full and fair opportunity to litigate whether the apartment was properly deregulated, and elected to concede that it was subject to rent stabilization,” notwithstanding possible evidence that might have resulted in a different finding if properly presented earlier. *Id.* at 612.

### **B. Application of Res Judicata to Instant Proceeding**

Here, the *res judicata* concepts of both issue and claim preclusion require a denial of the Owner’s application. The current Owner has already litigated a number of housing court cases to their conclusion based on its repeated representations that the Buildings remained rent-stabilized following expiration of the regulatory agreements but subject to a revocation of preferential rents. These representations were not limited to tenants in occupancy prior to the expiration of the regulations and J-51 tax exemption, as the Owner obtained summary judgment against the undersigned Tenants Osvaldo Polanco and Aldena Williams, who both moved to their current units after 2008. See **Exhibit S** awarding summary judgment for failure to sign rent-stabilized renewal lease.

Ultimately, the five consolidated cases against Mr. Polanco, Ms. Williams and three other tenants, including the undersigned Cheryl Hyndman were dismissed on appeal by the Appellate Term pursuant to CPLR 409(b), which provides that:

The court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any



orders permitted on a motion for summary judgment.

CPLR 409(b); *see also* Decision at **Exhibit T**. The Appellate Court thus issued a finding equivalent to a summary judgment determination on the merits after reviewing the records and concluding that the Owner did not serve the respondents with the 15-day termination notice required for termination of a rent-stabilized tenancy pursuant to RSC 2524.2(b). In order to reach this conclusion it was necessary for the Appellate Court to first conclude that the apartments in the Buildings were indeed rent-stabilized. Such a finding therefore invokes *res judicata* and the related sub-concept of issue preclusion just as in *Chelsea 23<sup>rd</sup> St. v. Cheng* in which the supreme court found preclusive effect to a prior motion to dismiss based on the rent regulatory status of the premises. Nor can the Owner claim that such a result is rent-stabilization by estoppel as opposed to an adjudication as to the regulatory status. As was the case in *Meyers v. Four Thirty Realty*, the landlord “had a full and fair opportunity to litigate whether the apartment was properly deregulated, and “elected to concede that it was subject to rent stabilization.” 173 A.D.3d 543, 543 (1st Dep’t 2019).

Likely thousands of nonprofit and judicial hours have already been expended litigating the numerous prior cases in which the Owner argued that the Buildings remain rent-stabilized. In some cases, tenants were evicted following a judgment of possession on such grounds, such as the tenant in *1646 Union v. Turner*, in which a final determination on the merits was rendered *after trial*. The Owner could have terminated the tenancies based on the expiration of rent-stabilization protections without cause and litigated that issue simultaneous with any claim for use and occupancy for failure to sign free market leases for those tenants who moved into the premises after 2008. Instead, having charted this litigation course and having had a full and fair opportunity to litigate its claims, like in *867-871 Knickerbocker*, the Owner cannot now seek another bite at the apple. The variance in legal theories simply does not create a different cause of action for *res judicata* purposes. *867-871 Knickerbocker*, 117 N.Y.S.3d 799 (App. Term. 2d Dep’t 2019).

## **II. DHCR SHOULD DENY THE APPLICATION UNLESS THE OWNER CAN DEMONSTRATE THE BUILDING DID NOT RECEIVE FUNDING PURSUANT TO ARTICLE XV OF THE PHFL**

Even if DHCR considers this application, it should be denied or at a minimum held in abeyance until the Owner produces evidence establishing that the Buildings were not aided by Article XV of the Private Housing Finance Law (“PHFL”) through the Participation Loan Program, as this would create an independent basis for making the Buildings rent-stabilized upon completion of any PHFL-funded rehabilitation.

### **A. Legal Standard**

It is well established that a property that is rendered rent-stabilized for a reason independent from the J-51 program does not lose its Rent Stabilization status when the tax benefit expires. *See* Real Property Tax Law § 489(7)(b)(2).

One such independent reason for Rent Stabilization is based on financing under Article XV of the Private Housing Finance Law, Section 804, pursuant to the Participation Loan Program (“PLP”), which states:

“...**upon completion of the rehabilitation of an existing multiple dwelling...aided by a participation loan** made pursuant to this article, the agency [HPD] shall establish the initial rent for each dwelling unit within the rehabilitated...multiple dwelling. Where the city of New York or the New York city housing development corporation has participated or invested in a loan pursuant to this article, **all dwelling units within the multiple dwelling subsequent to the establishment of initial rents by the agency shall be subject to the rent stabilization law** of nineteen hundred sixty-nine provided, that the occupant in possession of a dwelling unit when the multiple dwelling is made subject to the rent stabilization law of nineteen hundred sixty-nine shall be offered a two year lease notwithstanding any contrary provisions of, or regulations adopted pursuant to, the rent stabilization law of nineteen hundred sixty-nine at such initial rent set for such dwelling unit by the agency.” PHFL § 804 (emphasis added).

Nothing in this law limits the rent stabilization coverage as a result of the PHFL PLP program to a temporary period. If the legislature had intended to do that, it would have done so explicitly, as it did in PHFL § 405(1)(2) (“...upon payment of the loan or the expiration of the said tax exemption and tax abatement or of the said ten year period, whichever is later, housing accommodations in any such multiple dwelling shall, upon application, be decontrolled...”).

Where the phrase “shall be subject to the rent stabilization law” is used without qualification, it is not meant to be temporary. This was illustrated in *Manhattan Valley Realty v. Div. of Hous. and Community Renewal*, LT-100473-14 (N.Y. Sup. Ct. 2015) (annexed hereto as **Exhibit U**), which deals with nearly identical language in PHFL § 608(1):

“...upon completion of rehabilitation...which is aided by a mortgage loan entered into in conjunction with a housing assistance payments contract in connection with moderate rehabilitation...[HPD] shall establish the initial rent...After the agency has set the initial rents, all rental dwelling units within such rehabilitated...dwellings **shall become subject to the rent stabilization law** of nineteen hundred sixty-nine.” PHFL § 608(1) (emphasis added).

In *Manhattan Valley Realty*, as in this case, the owner had attempted to deregulate the premises after the expiration of a J-51 tax credit. However, DHCR determined that the owner’s “assertion that rent regulation ended when the J-51 tax benefits expired was unsupported, because the terms of the public financing pursuant to Public Housing Finance Law (PHFL) § 608(1), controlled...[.]” The court found that “DHCR did not err on the law” based on “the plain language” of the statute.

Beyond the plain language of the Private Housing Finance Law, evidence that PLP financing confers Rent Stabilization can be found in a “PLP Term Sheet” from HPD’s “Participation Loan Program (PLP)” web page, which states, “All units must be registered with DHCR and are

subject to the New York State Rent Stabilization system...Vacancy and luxury decontrol are not permitted for the duration of the HPD restriction period.” *PLP Term Sheet*, NYC HOUSING PRESERVATION AND DEVELOPMENT, available at <https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/participation-loan-program-term-sheet.pdf> (current as of July 6, 2021). The implication is that, after the term (or “restriction period”) of the regulatory agreement ends, Rent Stabilization persists, and the owner may avail themselves, of vacancy and luxury decontrol as provided by law.

The fact that PHFL § 804 confers permanent Rent Stabilization is in harmony with the purpose of the Emergency Tenant Protection Act’s substantial rehabilitation exception, which was to incentivize owners to invest their own capital into their buildings. See *Wilson v. One Ten Duane St. Realty Co.*, 123 A.D.2d 198, 201 (1987). See also *Eastern Pork v. New York Div. of Housing & Community Renewal*, 187 AD2d 320, 324 (1<sup>st</sup> Dept. 1992) (holding that the legislative intent underlying the substantial rehabilitation provision is “to increase the number of habitable family units available” and to “encourage building owners to substantially rehabilitate commercial or substandard or deteriorated housing stock by permitting them to recoup their expenses free of rent stabilized rents.”). That purpose does not apply when owners have used government funds instead.

**B. There is Evidence the Buildings Were Funded by Article XV of the PHFL, which the Owner Must Rebut**

Here, there are significant indicia that the Buildings may have received funding pursuant to PHFL Article XV, which warrant a denial of the Owner’s application, or at a minimum further investigation by DHCR. Specifically, the prior Owner received a Construction and Permanent Loan Commitment memorializing the HDC loan terms and stating that the project must comply with the Private Housing Finance Law. See **Exhibit J** at 1. This document implies that the project received at some least some type of PHFL funding. In addition, an HPD mortgage schedule for the HPD subordinate mortgage, a copy of which is attached as **Exhibit V** describes the loan as being part of the “Participation Loan Program.”

Beyond the references in the documents to PLP and the PHFL, the HPD/HDC loans also meet all the criteria for a PLP loan under Article XV of the PHFL. PHFL § 804 specifically envisions joint partnerships between HDC and the City of New York in lieu of private investors to fund the rehabilitation of blighted properties “by utilizing funds, which are available from the federal government through specific or discretionary grants.” That is exactly what appears to have occurred here, in which HDC and HPD jointly lent money to rehabilitate a property in disrepair by taking advantage of federal HDG funds via HUD.

Since the documents presently in the Tenants’ possession provide strong indicia the rehabilitation of the Buildings was potentially funded by Article XV of the PHFL, DHCR should place the burden on the Owner to demonstrate otherwise. In the event it cannot do so, DHCR should deny this application as Article XV of the PHFL clearly makes a building subject to the RSL upon completion of the government funded rehabilitation and bars a finding of substantial rehabilitation. This burden of proof is consistent with established law holding that the substantial

rehabilitation exemption from the protections of the Rent Stabilization laws “is to be strictly construed.” *Pape v. Doar*, 160 A.D.2d 213, 215 (App. Div. 1st Dep’t 1990). This is particularly the case whereas here the prior Owner was obliged to maintain adequate books and records.

**III. EVEN IF THE APPLICATION IS CONSIDERED, IT SHOULD BE DENIED BECAUSE THE OWNER HAS NOT MET ITS BURDEN OF PROVING SUBSTANTIAL REHABILITATION**

To the extent DHCR considers the Owner’s application it must be denied as the Owner has not met the strict documentary requirements established by DHCR. In particular, the Owner has not submitted final receipts showing the work was completed or invoices for the work performed by the original architect and contractors. The Owner was obliged to retain these documents as a condition of the extensive government funding it received. Moreover, HUD audit documents illustrate that there are concerns regarding the scope of the work claimed and that there was a unity of interest between the contractor completing the rehabilitation and the prior Owner.

**A. Legal Standard**

It is well established that the burden is on the owner to prove substantial rehabilitation. *See Pavia v. New York State Div. of Hous. & Cmty. Renewal*, 22 A.D.3d 393, 802 N.Y.S.2d 361 (2005); *867-871 Knickerbocker, LLC v. Poli*, 117 N.Y.S.3d 799 (App. Term. 2d Dep’t 2019); *Cassorla v. Foster*, 2 Misc. 3d 65 (Sup. Ct. App. Term 1st Dep’t 2004); *446 Realty Co. v. Higbie*, 186 Misc.2d 632, 637 (Civ. Ct. N.Y. Cty 2000); *Copeland v. New York State Div. of Housing and Community Renewal*, 164 Misc. 2d 42, 48 (Sup. Ct. N.Y. Cty. 1994); *Jordan Mfg. Corp. v. Lledos*, 153 Misc.2d 296, 299 (Sup. Ct. Kings Cty. 1992).

To demonstrate that a building was substantially rehabilitated in accordance with the Rent Stabilization Code Section 2520.11(e), an owner must prove that the requirements of DHCR Operational Bulletin 95-2 (December 15, 1995) (hereinafter “OB 95-2”), have been met. The owner must demonstrate based upon the totality of the circumstances, the following criteria:

- A. At least 75% of the building-wide and apartment systems have been replaced as per the Rent Stabilization Code. Additionally, all ceilings, flooring and plasterboard or wall surfaces in common areas must have been replaced; and ceiling, wall and floor surfaces in apartments, if not replaced, must have been made as new as determined by DHCR.
- B. The rehabilitation was commenced in a building that was in substandard or seriously deteriorated condition. Where the rehabilitation was commenced in a building that was at least 80% vacant of residential tenants, there shall be a presumption that the building was substandard or seriously deteriorated at that time.
- ...
- D. All building systems comply with all applicable building codes and requirements,

and the owner has submitted copies of the building's certificate of occupancy before and after rehabilitation.

The substantial rehabilitation exemption from the protections of the Rent Stabilization laws "is to be **strictly construed**." *Pape v. Doar*, 160 A.D.2d 213, 215 (App. Div. 1st Dep't 1990); *see also Matter of the Administrative Appeal of Jeanette Colon*, Docket No. IX210031RT, issued March 26, 2021.

Operational Bulletin 95-2 provides that owners must provide "documentation...in support of a claim of substantial rehabilitation" – specifically, "[r]ecords demonstrating the scope of the work actually performed in the building." These may include:

- "an itemized description of replacements and installations";
- "copies of approved building plans";
- "architect's or general contractor's statements";
- "contracts for work performed";
- "appropriate government approvals"; and
- "photographs of conditions before, during, and after the work was performed."

The owner may also be required to provide "[p]roof of payment by the owner for the rehabilitation work," and owners are advised to maintain records related to the rehabilitation.<sup>2</sup>

DHCR routinely enforces these documentation requirements strictly. For example, in the *Matter of the Administrative Appeal of Ruben Pena*, the Commissioner upheld the Rent Administrator's finding that the owner was not entitled to deregulate the building due to substantial rehabilitation, where the owner did not submit documentation showing that the DOB approved plans by an engineer or architect. *See Pena*, Docket No. FW210052RO, issued Aug. 1, 2018. In the *Matter of the Administrative Appeal of Jack Cheng*, the Commissioner upheld the Rent Administrator's finding that the owner had not satisfied the requirements of OB 95-2 where the owner did not submit the architect's affidavit, letter of completion, or the certificate of occupancy, even though the owner had submitted the deed, an old certificate of occupancy, various photos, canceled checks, invoices, DOB work permit data and inspection reports, letters from an electrician and an engineer and DOB electrical application details, and a DOB boiler inspection certificate. *See Matter of the Administrative Appeal of Jack Cheng*, Docket No. EP210017RO, issued Sept. 20, 2016.

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<sup>2</sup> While OB 95-2 states that "consideration" will be given to owners who completed their rehabilitation prior to 1995, the standards of OB 95-2 do apply to alleged rehabilitations completed before it was issued. *See Woodcrest Mgt. Corp. v. N.Y.S. Dep't of Hous. & Comm. Renewal*, 2 AD3d 172 (App. Div. 1st Dep't 2003); *H.M. Village Realty v. N.Y.S. Dep't of Hous. & Comm. Renewal*, 304 AD2d 346, 347 (App. Div. 1st Dep't 2003).

**B. Many of the Important Forms of Evidence Are Entirely Missing or Deficient Because of the Prior Owner's Failure to Maintain Documents**

Here, while the Owner has produced a new certificate of occupancy and a number of other documents reflecting tax credits it received for the alleged work, it has failed to comply with the strict documentation requirements for demonstrating a substantial rehabilitation. In particular, the Owner has not submitted final receipts, contracts for the work, purchase orders, or invoices for the work performed by the original architects and contractors. The Owner was obligated to maintain all of these documents pursuant to an Owner-Grantee Agreement between the Owner and HPD, attached as **Exhibit I**, pursuant to which it agreed to "maintain full and accurate books and records regarding the Rehabilitation...of the Premises." See page 27.

These documents are necessary in this case in light of the attached audit report generated by the HUD Office of Inspector General, dated October 23, 1989, which found as follows:

"Our review disclosed that the Mortgagor did not maintain adequate books and records to support construction and certain Mortgagor soft costs, as required by the HUD Grant Agreement and the Owner-Grantee Agreement. We attribute this deficiency to the Mortgagor's customary practice of dealing with subcontractors and vendors on a **verbal basis without formal written contracts, purchase orders or invoices.**

...

Contracts were made verbally usually based on a **"handshake", and requests for payments were based on conversations** by the subcontractors with the Mortgagor/Contractor.

We found that two of the five subcontractors interviewed worked on another project for the Mortgagor during the same time period, and they were not certain how costs were assigned or ascertained for each project. Consequently, without written contracts, invoices, delivery reports, etc. **there is no assurance that costs charged to 285 Development were related solely to this project.**

See **Exhibit W** at 5 and 7. Consequently, the audit recommended that an excess of \$1,553,612 of HDG payments be returned to HUD and to reduce the maximum insurable mortgage to \$256,949. *Id.* at 7.

As the audit report makes clear, there are concerns about the alleged rehabilitation and the scope of the work that was actually performed by the prior Owner in the Buildings in the 1980s. The audit found that the original accountant's audit working papers supporting the Mortgagor's cost certification submitted to HUD were "not prepared in accordance with the American Institute of Certified Public Accountants (AICPA) Statements on Auditing Standards and Generally

Accepted Governmental Audit Standards (GAGAS).” *Id.* at 5.<sup>3</sup> Upon information and belief, the original accountant referenced in the HUD audit report as not meeting the standard of the AICPA was Shimshon Bier, the same accountant who has submitted an affidavit in support of the Owner’s current application. *See* Owner’s Application for Exemption and annexed affidavit of Mr. Brier.

Adding to the concerns regarding the reliability of the documentation submitted, it appears that there was a unity of interest between the prior Owner and the contractor. *See Exhibit Y* at 2 (“The mortgagor, 285 Associates, whose principals are Naftali Frankel and Rose Frankel, has an identity-of-interest relationship with the general contractor, 285 Construction Corp.”).

Finally, it appears that not just HUD, but HPD found significant concerns regarding the scope of the alleged work and costs claimed. In an April 1990 letter from HPD to the Department of Finance, HPD states that the Owner “failed to submit documentation of proof of payment for the rehabilitation items for which tax benefits were granted” and thus requests that the Owner’s tax benefit be revoked by \$428,1110. *See Exhibit Z*.

In the analogous context of Major Capital Improvements (“MCIs”), DHCR and courts have recognized the inherent lack of reliability in evidence where the owner and the contractors or workers share interests, and higher scrutiny of MCI applications is therefore required. *See* DHCR Operational Bulletin No.2017-1 (Revised January 8, 2020) (“The costs for an MCI paid to a person or organization sharing an identity of interest with the owner or managing agent may require additional evidence relating to cost and payment.”); *Artha Management, Inc. v. New York State Div. of Housing and Community Renewal*, 143 Misc.2d 717, 720 (Sup Ct N.Y. Cty. 1989) (“The court agrees with DHCR, that where the contractor or supplier [or their principals] of the improvements have an equity interest in the owner, the figures must be extremely carefully scrutinized.”).

Here, the evidence submitted by the prior and current Owner’s accountant Mr. Brier and its contractor, who shared a unity of interest with the prior Owner, is inherently unreliable, as evidenced by the HUD and HPD findings. DHCR should therefore find it insufficient to meet the high evidentiary standard for demonstrating substantial rehabilitation.

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<sup>3</sup> It appears that December 18, 1989, the prior Owner hired a new accountant, Hyman, Karlin & Company, to review the construction records, who submitted a letter attached as **Exhibit X** deeming the records submitted sufficient while also noting the unity of interest between the contractor and prior Owner. It is unclear if HUD deemed this certification satisfactory, nor does it resolve the underlying concerns for purposes of a strictly construed substantial rehabilitation application.

**IV. THE TENANTS WHO MOVED IN DURING THE J-51 PERIOD MUST REMAIN RENT-STABILIZED FOR THE DURATION OF THEIR TENANCIES**

Real Property Tax Law Section 489 allows any dwelling unit subject to rent regulation as a result of receiving a tax exemption or abatement, such as J-51 tax benefits, to be subject to rent regulation until the occurrence of the first vacancy of such unit after such benefits are no longer being received. The only exception is that the owner holds the burden to provide *every* lease and renewal to each tenant until the expiration of the tax benefit period with a prominent notice informing them that their unit will become subject to deregulation when the tax benefit period expires and the approximate date when it is scheduled to expire. RPTL § 489(7)(b)(2), as amended by L. 1985, ch. 289, § 2.

Consistent with the RPTL, under Rent Stabilization Law Section 26-504(c) **tenants in occupancy during the J-51 period will continue to be covered by rent stabilization for the life of their tenancies unless “each lease and renewal thereof for such unit for the tenant in residence at the time of the expiration of the tax benefit period has included a notice** in at least twelve point type informing such tenant that the unit shall become subject to deregulation upon the expiration of such tax benefit period and states the approximate date on which such tax benefit period is scheduled to expire...[.]” RSL § 26-504(c); *see also* Rent Stabilization Code (“RSC”) § 2520.11(o).

It is clear here that none of the Tenants in the Buildings received a proper J-51 notice in any of their leases. *See Hyndman and Williams Affs.* and attached leases. As a result, DHCR should hold that all tenants in occupancy prior to the expiration of the J-51 tax benefits remain rent-stabilized.

**V. ALL TENANTS IN LOW INCOME UNITS WHO MOVED IN PRIOR TO MARCH 2008 MUST REMAIN RENT STABILIZED**

The binding HDG restrictions imposed on the Owner set forth in the Declaration of Covenants II state that “[e]ach Lower Income Unit shall remain subject to Rent Stabilization at least until such time as the tenant in occupancy of the unit on the Deregulation Date vacates such unit.” *See Exhibit H*. Based on this clear language, the housing court has already ruled that tenants in low income units remain rent-stabilized. *See 285 Schenectady v. Grison et al.*, Kings County Housing Court Index No. 75636/2016, attached hereto as **Exhibit Q**. Thus, to the extent DHCR concludes that the Buildings are otherwise exempt from rent-stabilization, any such finding must exclude tenants in Low Income Units, who were in occupancy prior to the expiration of the agreements.



## VI. TENANTS WHO MOVED IN DURING THE J-51 PERIOD AND LATER SWITCHED UNITS SHOULD REMAIN RENT REGULATED

As previously discussed above, the prior and current Owners represented for many years after the expiration of the regulatory period in 2008 that all tenants remained rent-stabilized, provided rent-stabilized leases, and never gave any indication that it would seek to deregulate the Buildings due to alleged rehabilitation in the 1980s. As a result, any tenants who moved in before 2008 but switched apartments after the expiration of the regulatory period were **effectively deceived by the representations from the Owners into forfeiting their rent stabilization status.** See, e.g., annexed Williams Aff. at ¶ 6. Under these circumstances, DHCR should hold that as a matter of precedent and equity any tenants in occupancy prior to the expiration of the J-51 tax benefit, remain rent-stabilized regardless of whether they have switched apartments.

The controlling precedent holds that a tenant who exchanges his or her apartment for the benefit and convenience of the landlord retains his controlled status in the new apartment. *Capone v. Weaver*, 6 N.Y.2d 307, 310, 189 N.Y.S.2d 833 (1959). In addition, the Court of Appeals in *Capone* found that where the exchange of apartments is not “wholly voluntary,” exemption from rent control will not apply. See *id.*

Courts have uniformly followed *Capone* in extending the protections of rent regulation to tenants whose change of apartments was of benefit to their landlord. As such, in *Widerker v. Castro*, the Court recognized that where “rent controlled tenants relocate ‘at the request and for the convenience’ of a landlord, they retain the protections of the rent control laws.” See 188 Misc. 2d 571 (Civ. Ct. Kings Co. 2001). If a tenant surrenders possession of a rent regulated apartment in exchange for an otherwise unregulated apartment “at the landlord’s instance and for his convenience,” then the unregulated apartment remains subject to the regulation during the tenant’s occupancy. See *Manno v. Berman*, 289 N.Y.S.2d 578, 579 (Sup. Ct. Queens Co. 1958).

The *Capone* decision extends to rent-stabilized apartments. In following *Capone*, the courts have found no reason to distinguish between rent controlled or rent-stabilized in recognizing a tenant’s continued statutory protection after relocating from a regulated to an unregulated apartment for the benefit of the landlord. The Court in *91 Real Estate Associates LLC v. Eskin* “discern[ed] no significant distinction between the two regulatory schemes that would justify eschewing this sound precedent here, when to do so would result in the type of ‘disruptive practices’ that both sets of rent laws were designed to avoid.” 2014 NY Slip Op 24366 (App. Term. 1st Dep’t 2014). Therefore, if a rent-stabilized tenant relocates at the request and for the convenience of a landlord they should continue to be recognized as a rent-stabilized tenant.

*In the Matter of Administrative Appeal of 2342 Atlantic Partners LLC*, Admin. Review Docket No. GP210008RO, August 7, 2019, DHCR held that a tenant’s rent stabilization status followed her after she relocated to another apartment at the prior owner’s request even though the premises were substantially rehabilitated. In that case, the prior owner asked the tenant to move so that they could renovate the premises and, in fact, offered the tenant a rent-stabilized lease

when she moved into the apartment. *Id.* Therefore, the tenant’s apartment remains rent-stabilized, and she was entitled to a lease renewal. *Id.*

Here, the Owner’s conduct in holding the entire Buildings out as continuing to be rent-stabilized after the expiration of the J-51 tax exemption period worked to mislead tenants into unwittingly forfeiting rent stabilization protections in the event the substantial rehabilitation application is approved. For example, Aldena Williams first moved into 1646 Union Street, Brooklyn, NY 11213, Apt. 3D in 2000. *See Williams Aff.* at ¶ 3. She lived in Apt. 3D for approximately 10 years. *Id.* at ¶ 5. In 2010, the prior Owner **offered** to relocate Ms. Williams to Apt. 1D, a more accessible unit. *Id.* at ¶ 6. Ms. Williams states in her sworn affidavit that she would have never moved if she knew these risks and the potential to lose her rent stabilization status. *Id.* at ¶ 12. Consistent with Ms. Williams’s understanding, the prior and current Owners continued to repeatedly represent to her, like they did with other tenants, that she was rent-stabilized by giving her a rent-stabilized vacancy lease and renewals, and during the extensive litigation on rent setting discussed above. In addition, after Ms. Williams changed apartments, the Owner obtained possession of Apt. 3D and upon information and belief deregulated the unit through high rent decontrol, gaining a substantial benefit. Under these circumstances, DHCR should therefore hold consistent with *Capone* that Ms. Williams’s rent stabilization status traveled with her to unit 1D.

In similar contexts the courts have strongly rejected the unjust divestment of rent stabilization rights when the surrender of such rights was not wholly voluntary, even when the tenant receives some benefit as a result of their move. In *Fuentes v. Morningside Twin Co.*, N.Y.L.J. April 12, 2000 (Sup. Ct. N.Y. Co.), the tenant relocated from a rent-stabilized basement apartment to a larger apartment on the ground floor that would otherwise have been unregulated due to a co-op conversion. The Court found that although the tenant benefited from a move to a higher floor and from the additional space, these benefits “came at a great price—the potential loss of Ms. Fuentes’ rent stabilization rights.” Since the co-op also benefited from obtaining possession of the super’s apartment in the basement, the Court concluded that the tenant’s move was not “wholly voluntary” and did not divest her of her rent-stabilized status.

Similarly, in *Dimou v. Cusanelli*, 69 Misc.2d 592, 330 N.Y.S.2d 484 (Civ. Ct. Queens Co. 1972), the Court held that where the landlord merely “offered” the tenant an opportunity to move to a lower floor, but without disclosing the possibility of decontrol, the tenant did not lose his rent control rights. The court found that the “convenience of a first floor apartment is minimal when weighted against the protection against termination of tenancy afforded a tenant in a rent controlled status.” The Court explained that it is: “inconceivable that any tenant would [knowingly] exchange one apartment protected by rent control for an identical apartment unprotected by rent control.” *Id.* And in *Coleman v. Klitzberg*, N.Y.L.J. April 8, 1992, p.32 c. 2 (Civ. Ct. Queens Co.) where the regulated tenant’s discussion with his landlord did not “include the possibility of a forfeiture of any of his [rent-stabilized] rights” his move to an otherwise unregulated unit did not divest him of his statutory rights, even though he received a monetary payment for the surrender of his first apartment.

Here, the facts pertaining to Ms. Williams are similar to the above holdings. Ms. Williams moved to Apt. 1D from Apt. 3D based on the prior Owner’s offer. Any benefit that Ms. Williams

receives is ultimately outweighed by the grave possibility that she would lose her rent stabilization status *unknowingly* as a result of her move. There was never any discussion between the Owner and Ms. Williams as to the possibility of the forfeiture of any rights and consequently she did not know that the apartment might be unprotected in the future. As mentioned above, she would not have moved to Apt. 1D if she knew that she would be at risk of losing her rent stabilization status. *See Williams Aff.* at ¶ 12. If the Owner succeeds in their application, Ms. Williams, as well as other tenants, will suffer the substantial consequences of homelessness and imminent housing instability.

Therefore, DHCR should find that Ms. Williams and any similarly situated tenants in the Buildings should carry their rent stabilization status and remain rent regulated even after the change of apartments in the event the substantial rehabilitation application is approved.

### CONCLUSION

For the foregoing reasons, the Tenants ask that the Owner's application be denied in whole or in part.

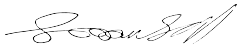
Submitted on behalf of:

1646 Union Tenants Association

and

Oswaldo Polanco, Apt. 1C  
Aldena Williams, Apt. 1D  
Cheryl Hyndman, Apt. 2D  
Charmaine Antoine, Apt. 3C  
Juan H. Polanco, Apt. 3D  
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Respectfully submitted,



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