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Administrative Rulemaking and DHCR's Proposed Amendments to the Rent Stabilization Code

By Gary M. Rosenberg, And Zachary J. Rothken

On Aug. 31, 2022, the New York State Division of Housing and Community Renewal (DHCR) issued proposed amendments to the Rent Stabilization Code (the proposed amendments). A formal public comment period followed as required by the State Administrative Procedure Act (SAPA). On Nov. 15, 2022, DHCR held a public hearing to consider the public's comments and testimony on the proposed amendments.

The proposed amendments address various aspects of rent stabilization. This column focuses on two specific parts of the proposed amendments, which DHCR says are intended to address changes wrought by the Housing Stability and Tenant Protection Act of 2019 (HSTPA) and court decisions issued since the most recent Rent Stabilization Code (RSC) amendments in 2014.

By **Gary M. Rosenberg** And **Zachary J. Rothken**

Administrative Rulemaking: Generally

A state administrative agency such as DHCR is a division of the state's executive branch and lacks legislative power. Administrative agencies are authorized to issue regulations solely to carry out the administration of statutes enacted by the Legislature and as interpreted by the courts. Thus, in the absence of legislation or controlling court decisions interpreting existing laws, administrative agencies may not "legislate" by regulation (*see New York City Campaign Finance Board v. Ortiz,* 38 AD3d 75 [1st Dept 2006]). An established application of a governing statute by the agency and courts may only be altered by the Legislature's amendment of that statute, not via regulation. Any attempt by an agency to legislate constitutes an *ultra vires* act.

SAPA rulemaking power does not give an agency "license to correct whatever societal evils it perceives" (*Boreali v. Axelrod*, 71 NY2d 1 [1987]). The test is whether a regulation is authorized by the enabling statute and consistent with the substantive rules and governing judicial interpretations of the statute. It is axiomatic that an administrative agency "may not promulgate

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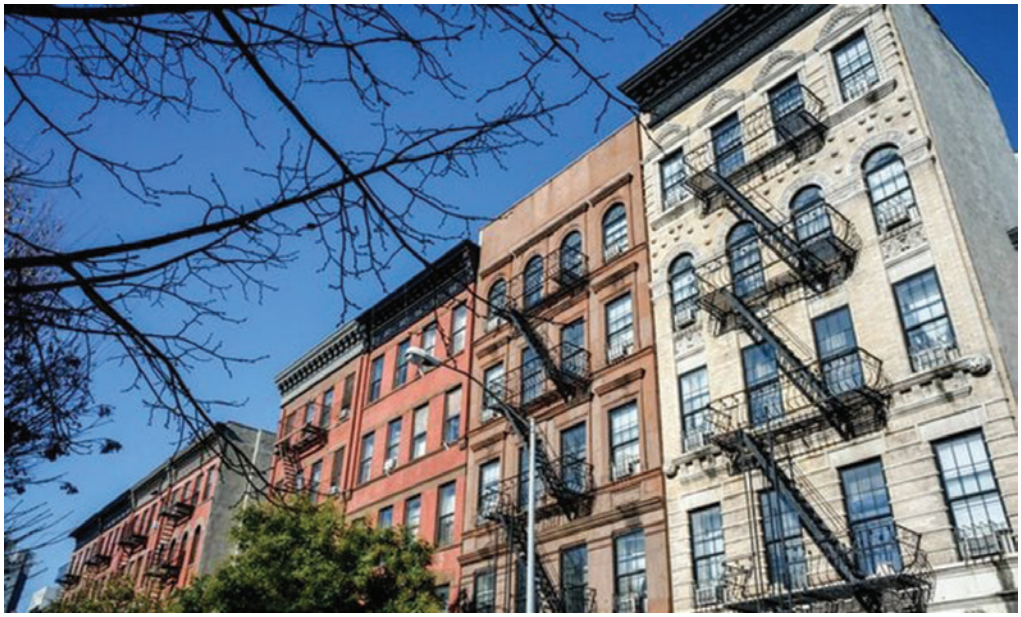
a regulation that adds a requirement that does not exist under the statute" (*Kahal Bnei Emunium & Talmud Torah Bnei Simon Israel v. Town of Fallsburg*, 78 NY2d 194 [1991]).

Courts have repeatedly invalidated regulatory agency attempts to substantively amend settled law in the absence of legislation. For example, in *New York City Campaign Finance Board v. Ortiz*, the Appellate Division, First Department invalidated the board's attempt to impose substantive rules not contained in the governing statute: "However, the City Council, in adopting Local Law No. 58 of 2004, adopted many other amendments to the Act proposed by the board, but omitted such proposed amendment" (38 AD3d 75).

Like the Appellate Division, the Court of Appeals has rejected an agency regulation where the Legislature excluded a substantive provision in the statute but the agency sought to include it via regulation: "[T]he failure of the legislature to include a matter within a particular statute is an indication that its exclusion was intended" (*Pajak v. Pajak*, 56 NY 2d 394 [1982]).

Newly Created Apartments

In Part 20 of the proposed amendments, DHCR proposes a new RSC section 2521.1(m)(1)-(7), which seeks to end DHCR's long-established "first rent" policy for newly created apartments and to instead regulate new units' initial rents. In lieu of setting market first rents, Part 20 proposes a number of formulae to establish regulated first rents which have not heretofore existed in the Rent Stabilization Law (RSL) or in any court or DHCR rulings.



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The RSL's application to first rents has been settled law at DHCR and in the courts for decades. DHCR's predecessor agency interpreted the RSL as requiring an unchallengeable market first rent, and DHCR continued that interpretation and application in light of the RSL's silence on the issue—and for decades, appellate courts have considered and validated the agency's approach.

For example, in *300 W. 49th St., Assocs. v. New York State Division of Housing and Community Renewal*, the court affirmed the agency "first rent rule" and considered the rationale underlying the policy, confirming that it was a proper application of the relevant statutes:

However, in those cases where the prior rent history of the apartment can no longer be utilized because that prior apartment no longer exists, the DHCR has adopted a rational policy under which a "first rent" may then be charged. It must be noted that the DHCR's policy of allowing a first market rent has been implemented by both the Conciliation and Appeals Board and the DHCR on numerous occasions, over many years, and has recently been cited with approval by this Court (212 AD 2d 250 [1st Dept 1995] [citations omitted]).

In the decades since *300 W. 49th St. Assocs.*, the Legislature has not amended the RSL to address first rents in newly created apartments. Since that time, Appellate Division decisions have reaffirmed DHCR's first rent policy and articulated clear substantive rules governing the charging of first rents (*see, e.g.*, *Dixon v. 105 W. 75th St. LLC*, 148 AD3d 623 [1st Dept 2017]; *Velasquez v. New York State Division of Housing and Community Renewal*, 138 AD3d 1045 [1st Dept 2015]; *Devlin v. New York State Division of Housing and Community Renewal*, 309 AD 2d 191 [1st Dept 2003]). Moreover, the HSTPA—notwithstanding its sweeping amendments to rent stabilization and landlord-tenant law more generally—did not address first rents for newly created units.

Nevertheless, DHCR entitled the proposed amendments "Rent Stabilization Code Amendments—HSTPA Revisions." DHCR's "Regulatory Impact Statement" in support of the proposed amendments also asserts that "the general tenor of HSTPA with its emphasis on the preservation of units at historically reasonable rent militates against creating or continuing regulations that provide for unreviewable rents."

Based on the absence of any amendments to the RSL concerning first rents and DHCR's apparent intent to substantively alter well-settled first rent policy via regulation, it certainly appears that the proposed amendments are vulnerable to legal challenge.

Demolition Applications

The proposed amendments also seek to substantively transform well-established policy concerning demolition applications.

RSL §26-511(c)(9)(a) and RSC §2524.5(a)(2) permit an owner to refuse to renew a rent stabilized tenant's lease "where he or she intends in good faith to demolish the building and has obtained a permit therefor from the department of buildings." For decades, DHCR and its predecessors have defined a qualifying demolition as one which leaves the foundation in place, but allows one to "stand in the cellar and see the sky."

In *Peckham v. Calogero*, the Court of Appeals affirmed this longstanding application of the RSL and held that a qualifying demolition does not require the owner to "raze the structure to the ground…an intent to gut the interior of the building, while leaving the walls intact, has been held as sufficient" (12 NY3d 424 [2009]). The Court of Appeals has not reversed itself on this issue since *Peckham*, nor has the Legislature amended the RSL to address the definition of a qualifying demolition thereunder.

Notwithstanding the foregoing, Part 51 of the proposed amendments seeks to redefine a qualifying demolition as "the removal of the entire building including the foundation"—directly contradicting *Peckham* and the longstanding DHCR application of the RSL that it affirmed. Here again, the proposed amendments appear to be susceptible to legal challenge in that DHCR is arguably legislating instead of administering the RSL and the judicial decisions interpreting the RSL.

We will be closely monitoring the proposed amendments as they make their way through the SAPA process and will provide an update in a future column.