

# New York Law Journal

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## Rent Stabilization: Owner Can't Give Back J-51 Benefits

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In [Roberts v. Tishman Speyer Props.](#),<sup>1</sup> the Court of Appeals held in 2009 that high-rent and high-income luxury deregulation under the Rent Stabilization Law (RSL) are not available where a rent-stabilized building is receiving J-51 tax benefits. In *Roberts*, the dissenters in the Court of Appeals predicted that "[i]t will take years of litigation over many novel questions to deal with the fallout from today's decision."<sup>2</sup> That prediction, as this article establishes, has proven true.

In the course of litigating *Roberts*, many tenant advocates argued that landlords who were benefiting from luxury deregulation—and who were at the same time enjoying J-51 tax benefits—were in effect "double dipping" at the taxpayers' expense. The Appellate Division in *Roberts* alluded to that argument in its March 5, 2009, opinion:

In 1992, Met Life applied for and began receiving property tax benefits under New York City's J-51 tax abatement program...which provided incentives for owners to rehabilitate and improve their buildings. One of the caveats of the J-51 program was that rent deregulation of residential units and buildings receiving J-51 abatements was prohibited. Met Life, and the successor owners of the Complex, have received approximately \$24.5 million in real estate tax benefits since entering the program and are scheduled to remain in the program, and to continue to receive additional tax benefits, until 2017.

\* \* \*

Administrative Code §11-243(i)(1) provides that the benefits of the J-51 program are limited to the owners of buildings that are subject to rent stabilization, rent control or the PHFL [Private Housing Finance Law]. The Rules of the City of New York likewise require a building receiving J-51 benefits to be subject to rent regulation for the duration of the period in which such benefits are received....<sup>3</sup>

Following the Appellate Division and Court of Appeals rulings in *Roberts*, many owners were seized with the following idea: If obtaining luxury regulation while at the same time enjoying J-51 tax benefits was seen as double dipping, then owners should refund to the city all J-51 benefits received, and forfeit all future benefits, in return for the nunc pro tunc privilege of luxury deregulation. For most owners, this was an easy trade-off: In *Roberts*, for instance, the \$24.5 million in tax benefits the landlord purportedly received no doubt paled in comparison to the value of deregulating apartments.

The concept of giving back J-51 benefits seemingly had much to recommend it. The city would receive tens of millions of dollars in benefits already taken, and would be relieved of the obligation of honoring future benefits. Owners would have their rent rolls restored, the high tax assessments on their buildings would remain intact, and those landlords would pay high property taxes to the city without any corresponding tax benefits.

In fact, in 2010, Senator Pedro Espada introduced legislation (S. 6811) which would have allowed owners to return J-51 benefits, and to waive future benefits, in exchange for the right to utilize luxury deregulation laws. The bill provided that the returned tax benefits would be used to create a program to freeze the out-of-pocket rents paid by low-income and moderate income rent regulated tenants who paid more than one-third of their income for rent and who earned less than \$45,000 per year.

The bill never became law, and owners turned to the courts for relief. However, in [London Terrace Gardens v. City of New York](#), decided by the Appellate Division, First Department, on Oct. 23, 2012, the Appellate Division unanimously ruled that owners could not return J-51 benefits to the city.

### 'London Terrace Gardens'

London Terrace Gardens is a housing complex located in Chelsea, consisting of approximately 1,000 rental units. In 2003, the New York City Department of Housing Preservation and Development (HPD) granted the owner J-51 benefits in the aggregate amount of \$2.2 million, to begin on July 1, 2003. The owner believed,

as almost everybody believed pre-*Roberts*, that the RSL provisions barring luxury deregulation in buildings receiving J-51 benefits applied only to buildings that became subject to the RSL by virtue of receiving such benefits, as opposed to buildings like those at London Terrace Gardens, which were rent-stabilized long before such benefits were obtained.

The owner of London Terrace Gardens had luxury deregulated many apartments before receiving J-51 benefits in 2003, and, consistent with the Division of Housing and Community Renewal's interpretation of the RSL, continued to deregulate apartments thereafter.

After the Court of Appeals ruled in *Roberts*, the owner wrote to HPD seeking to withdraw from the program ab initio and offering to return the benefits it had received to date. HPD denied the owner's request, stating that "[t]he J-51 Program has no provision for voluntary withdrawal."

The owner then commenced two actions. The first was an Article 78 proceeding against the city and HPD whereby the owner sought to rescind its "agreement" with the city as to J-51 benefits. The action alleged rescission, declaratory judgment, agency misconduct, and violation of due process. The second action, which added DHCR as a defendant, sought similar relief.

The owner argued, in sum, that it would not have sought or accepted J-51 benefits had it known that such actions would re-regulate formerly deregulated apartments, and prevent deregulation in the future. The various defendants moved to dismiss the complaints. Both actions were assigned to New York County Supreme Court Justice Judith Gische, who has since been named to the Appellate Division.

Supreme Court rejected the owner's rescission claim, holding that no contract had been entered into between the owner and the city:

At bar, there is no statutory or regulatory language relied upon by London Terrace to demonstrate that when the J-51 Program was enacted, the City intended to create any contractual rights between itself and the participating landlords. There is no language in the State enabling legislation that supports the finding that the permitted tax exemption programs were intended to operate on a contractual basis. Nor has London Terrace referenced any legislative history indicating such intention. The J-51 program is just that, a program, and no contractual rights are created as a result of a landlord's voluntary participation therein.<sup>4</sup>

Supreme Court continued:

Even were rescission available in non-contract matters, and even were the mistake mutual, the court finds, however, that rescission is still not available under the facts alleged in these actions. The mistake here is only a misunderstanding of applicable law. In *Roberts v. Tishman-Speyer*, supra, the Court of Appeals expressly held that its interpretation of the applicable statutory language, precluding luxury decontrol to J-51 program participants, required no particular agency expertise, but flowed from the "natural" reading of the statutory language. This type of mutual misunderstanding regarding the applicable law...does not support the "undoing of the [underlying] transaction" (internal citation omitted, material in brackets in original).<sup>5</sup>

Supreme Court then dismissed both the Article 78 petition and the plenary action.

#### **Appellate Division**

On Oct. 23, in a unanimous opinion authored by Justice Sheila Abdus-Salaam, the First Department affirmed Supreme Court in all respects. The Court first held that the owner's claim for rescission was, in effect, an impermissible application to withdraw from the J-51 program:

There is no provision in the J-51 program for unilateral withdrawal from the program or for repaying the tax benefits in exchange for rescission from the program nunc pro tunc. On the contrary, the Rules of the City of New York provide that "rent regulation [requirements] shall not be terminated by the waiver or revocation of tax benefits. London Terrace asserts that it is not seeking a waiver of previously accepted benefits but instead, a finding that the benefits are deemed void ab initio. Still, in practical effect, under the guise of rescission, London Terrace is seeking a waiver, which is not permitted under the Rules of the City of New York" (internal citations omitted, material in brackets in original).

The Appellate Division, like Supreme Court, rejected the owner's rescission claim on the ground that "[t]he J-51 program is a tax benefit program—there is no contract or agreement to rescind." The Appellate Division also rejected the owner's underlying "mutual mistake" argument, but took pains to elaborate as to what the various parties were mistaken about:

Furthermore, even though DHCR, and perhaps also HPD, were under the same mistaken interpretation of the Rent Stabilization Law as was London Terrace prior to the Court of Appeals decision in *Roberts*, that interpretation is entirely unrelated to HPD's confirmation of London Terrace's eligibility for the J-51 program. As indicated in the J-51 Certificates issued by HPD, the presence of decontrolled units was relevant to HPD in determining *the amount* of J-51 benefits to be provided. Thus, any mistake as to the law by HPD regarding whether units could be decontrolled while receiving J-51 benefits was immaterial to HPD's decision to accept London Terrace into the J-51 program (italics in original).

The foregoing quote reveals yet another irony in the post-*Roberts* world for owners. Prior to *Roberts*, HPD would diminish the amount of J-51 benefits in proportion to the number of apartments that had been luxury deregulated; HPD did this, obviously, while under the impression that J-51 benefits and luxury deregulation could coexist. Thus, owners (like the owner of London Terrace Gardens) who obtained J-51 benefits not only inadvertently destroyed their past and future efforts to deregulate apartments, but received diminished benefits based on the existence of luxury deregulated apartments which, it turns out, were never luxury deregulated in the first place.

Absent Court of Appeals intervention, *London Terrace Gardens* forecloses possibility that owners can regain the benefits of luxury deregulation by refunding benefits ab initio. One suspects that owners may be similarly unsuccessful when they approach HPD for additional J-51 benefits based on the fact that HPD's proportional diminution of benefits, based on the existence of so-called luxury deregulated apartments, was, in fact, in error.

**Warren A. Estis** is a founding partner at *Rosenberg & Estis*, and **Jeffrey Turkel** is a partner at the firm.

**Endnotes:**

1. 62 A.D.3d 71, 874 N.Y.S.2d 97 (1st Dept. 2009), aff'd 13 N.Y.3d 270, 890 N.Y.S.2d 388 (2009).
2. 13 N.Y.3d at 295.
3. 62 A.D.3d at 73-74, 75.
4. 2011 WL 1826851.
5. Id.

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## **Roberts v. Tishman Speyer Properties, L.P.**

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10-23-2009

Judge Ciparick, Smith, Pigott and Jones concur. Judge Read dissents in an opinion in which Judge Graffeo concurs. Chief Judge Lippman took no part.

Decided: Oct. 22, 2009

Jay B. Kasner, for appellants Tishman Speyer Properties, L.P. and PCV ST Owner L.P.

Alan Mansfield, for appellants Metropolitan Insurance and Annuity Company and Metropolitan Tower Life Insurance Company.

Alexander H. Schmidt, for respondents.

The Legal Aid Society; Real Estate Board of New York; New York State Tenants & Neighbors Coalition, Inc. et al.; Community Housing Improvement Program of New York Inc. et al.; Maria del Carmen Arroyo et al.; Rent Stabilization Association of New York City, Inc.; Office of Manhattan Borough President; Urban Justice Center; Mitchell-Lama Residents Coalition, amici curiae.

PER CURIAM—In this lawsuit, nine plaintiff-tenants of Peter Cooper Village and Stuyvesant Town, two adjoining Manhattan apartment complexes comprising 110 buildings and occupying roughly 80 acres between 14th and 23rd Streets along the East River ("the properties" or "the apartment complexes") contend that defendants Tishman Speyer Properties, L.P., and PCV ST Owner LP (collectively, "PCV/ST"), and Metropolitan Insurance and Annuity Company and Metropolitan Tower Life Insurance Company (collectively, "MetLife"), the current and former owners of the properties, respectively, were not entitled to take advantage of the luxury decontrol provisions of the Rent Stabilization Law (RSL)<sup>1</sup> while simultaneously receiving tax incentive benefits under the City of New York's J-51 program. We agree.

◆◆

IN NEW YORK City, multiple dwellings may qualify for tax incentives designed to encourage rehabilitation and improvements (see Administrative Code of City of NY §11-243 [previously §J51-2.5]). Specifically, the City's J-51 program, authorized by Real Property Tax Law §489, allows property owners who complete eligible projects to receive tax exemptions and/or abatements that continue for a period of years. Eligible projects include moderate and gut rehabilitations; major capital improvements (for example, asbestos abatement or boiler replacement); and conversions of lofts and other non-residential buildings into multiple dwellings (see Administrative Code §§11-243 [b] [2], [3], [8]; 28 RCNY 5-03 [a]). Rental units in buildings receiving these exemptions and/or abatements must be registered with the State Division of Housing and Community Renewal (DHCR), and are generally subject to rent stabilization for at least as long as the J-51 benefits are in force (see 28 RCNY at 5-03 [f]). The Department Of Housing Preservation and Development (HPD) administers the J-51 program in the City of New York.

MetLife apparently first applied for and received J-51 benefits for the properties in 1992. At the time, the apartment complexes, which MetLife built in the 1940s, had already been rent-stabilized since at least 1974.

In 1993, the Legislature enacted the Rent Regulation Reform Act (RRRA) (L 1993, ch 253), which provided for the luxury decontrol or deregulation of certain rent-stabilized apartments. The RRRA identified two circumstances in which deregulation was warranted: (1) in vacant apartments where the legal regulated rent was \$2,000 per month or more; and (2) in occupied apartments where the legal regulated rent was \$2,000 per month or more and the combined annual income of all occupants exceeded \$250,000 per year (RSL §§26-504.1, 26-504.2). The RRRA carved out an exception to luxury decontrol, which stated:

"this exclusion [i.e., luxury decontrol] shall not apply to housing accommodations which became or become subject to this law [i.e., the RSL] (a) by virtue of receiving tax benefits pursuant to section...four hundred eighty-nine of the real property tax law [J-51 benefits]"

(RSL §§26-504.1, 26-504.2). The Legislature subsequently expanded the scope of luxury decontrol by lowering the income threshold for defining high-income households to \$175,000 and allowing post-vacancy improvements to count toward the \$2,000 per month rent threshold (L 1997, ch 116); and permitting deregulated units to remain deregulated even if an owner subsequently charges less than the \$2,000 per month threshold (L 2003, ch 82).

On January 16, 1996—prior to the 1997 amendments to the RRRA—DHCR issued an advisory opinion, which stated that participation in the J-51 program only precluded luxury decontrol "where the receipt of such benefits is the *sole reason* for the accommodation being subject to rent regulation" (emphasis added). On its face, the DHCR advisory opinion relies exclusively on a textual interpretation of the RRRA's relevant provisions. Further, DHCR took the position that

"where Luxury Decontrol is applied before the 'J-51' tax benefit period has expired, the abatement should be reduced proportionately. That the Legislature recognized the inherent inequity of an owner's continuing to enjoy tax benefits after decontrol is apparent from RPTL Section 489 (7) (b) (1), which provides that...[a]ny multiple dwelling building or structure which is decontrolled subsequent to the granting of such benefits, the local legislative body or other governing agency may withdraw such benefits from such dwelling."

In April 2000, DHCR proposed changes to the Rent Stabilization Code (RSC) in order to "conform regulations to statutes, particularly in the RRRAs of 1993 and 1997, judicial determinations and...agency practice" (22 NY State Reg 17 [Apr 5, 2000]). After public hearing and comment, DHCR adopted these changes, which became effective on December 20, 2000 (see 22 NY State Reg 18, 18-20 [Dec 20, 2000] [Notice of Adoption]). As relevant to this appeal, DHCR amended section 2520.11 of the RSC, titled "Applicability," to provide that

"[luxury decontrol] shall not apply to housing accommodations which became or become subject to the RSL and this Code:

"(i) *solely* by virtue of the receipt of tax benefits pursuant to...section 11-243 (formerly J51-2.5) or section 11-244 (formerly J51-5) of the Administrative Code of the city of New York, as amended"

(RSC §2520.11 [r] [5], [s] [2] [emphasis added]). And in February 2004, DHCR issued (and subsequently reissued in January 2007) Fact Sheet #36, entitled "High-Rent Vacancy Decontrol and High-Rent High-Income Decontrol," which similarly specified that "[a]partments that are subject to rent regulation *only because of* the receipt [of J-51 benefits] do not qualify for high-rent vacancy decontrol" (emphasis added).

At some point after the RRRRA was enacted, MetLife, with DHCR's approval (see RSL §26-504.3 [b]), began charging market-rate rents for those rental units in the properties where the conditions for high rent/high income luxury decontrol were met. In late 2006, MetLife sold the properties to PCV/ST for \$5.4 billion.

Three months after the sale, in January 2007, plaintiffs—nine individuals who reside in seven apartments in the apartment complex—sued MetLife and PCV/ST on behalf of a putative class of all current and former tenants who allegedly were, or will be, charged rents that exceed rent stabilization levels for any period during which the landlord receives real estate tax benefits under the J-51 program. Specifically, plaintiffs claimed that "in or about 2001 or 2002, and continuing through the present time," defendants have "improperly and unlawfully charged thousands of tenants market rents, even as [defendants] have collected...tax benefits under the J-51 program," amounting to "nearly \$25 million"; they alleged that about one-quarter of the 11,200 apartments in the apartment complex had been luxury decontrolled. Plaintiffs sought a declaration that units in the properties would remain rent-stabilized "until the last applicable J-51 tax benefits period [...in or about 2017 or 2018]," and that defendants would "comply with all appropriate legal requirements to deregulate the units." Plaintiffs also sought relief in the form of rental overcharges totaling \$215 million and attorneys' fees.

PCV/ST and MetLife moved to dismiss the complaint for failure to state a cause of action, arguing that the RRRRA's exception to deregulation for apartments that "became or become" subject to the RSL "by virtue of" receiving J-51 tax benefits did not apply to the properties because they did not "become subject to" the RSL "by virtue" of the receipt of J-51 tax benefits. Rather, the apartment complex "became subject to rent stabilization in or prior to 1974," nearly two decades before MetLife first received J-51 benefits.

In a decision dated August 16, 2007, Supreme Court dismissed the complaint, reasoning that "the clear and unambiguous language of the RSL states that the luxury decontrol 'exclusion shall not apply to housing accommodations which became or become subject to this law (a) by virtue of receiving [J-51] tax benefits'" (quoting RSL §§26-504.1 and 26-504.2 [a]). Because the properties became subject to the RSL "18 years before applying for J-51 tax benefits," the court concluded that "defendants did not become subject to rent stabilization by virtue of receiving" these benefits.

Supreme Court further noted that this interpretation, adopted by DHCR, was consistent with the luxury decontrol laws, which were intended to "restore some rationality to a system which provides the bulk of its benefits to high income tenants" (quoting *Noto v. Bedford Apts. Co.*, 21 AD3d 762, 765 [1st Dept 2005] [internal quotation marks and citations omitted]); that DHCR's interpretation of the statute, if not unreasonable or irrational, was entitled to deference; and that the Legislature's failure to amend the RSL in response to DHCR's interpretation when subsequently amending the luxury decontrol provisions showed that it acquiesced in this construction. Plaintiffs appealed.

The Appellate Division unanimously reversed Supreme Court's decision and order, and reinstated the complaint. The court concluded that building owners who receive J-51 benefits forfeit their rights under the luxury decontrol provisions even if their buildings were already subject to the RSL. According to the Appellate Division, the words "by virtue of" did not confine the exclusion from luxury deregulation to buildings that became subject to the RSL only because they received J-51 benefits; DHCR's interpretation of this provision was not entitled to deference because a pure issue of statutory reading and analysis was involved; if the Legislature had intended the provision to mean "solely by virtue of," as DHCR concluded, it would have used the word "solely"; its interpretation was "more consistent with the overall statutory scheme," which made no overt distinction between properties "subject to" the RSL solely as a result of its receipt of J-51 benefits and those "subject to" the RSL before receiving such benefits; and Supreme Court's reading "invite[d] absurd and irrational results" (*Roberts v. Tishman Speyer Props., L.P.*, 62 AD3d 71, 83 [1st Dept 2009]).

The Appellate Division subsequently granted defendants' motion for leave to appeal, certifying the following question: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?" For the reasons that follow, we answer affirmatively.

◆◆◆

PCV/ST AND METLIFE argue principally that the relevant exception to luxury decontrol applies only to accommodations that "became or become" subject to the RSL "by virtue of receiving tax benefits pursuant to section... four hundred eighty-nine of the real property tax law [J-51 benefits]" (RSL §§26-504.1, 26-504.2). And since the word "become" means to "pass from a previous state or condition" or to "take on a new role, essence, or nature" (Webster's Third New International Dictionary of the English Language 195 [1963]), a rental unit can "become" subject to the RSL only when it passes from being unregulated to being regulated—i.e., when its status changes on account of the owner's receipt of J-51 benefits. By contrast, a rental unit does not "become" subject to the RSL by virtue of receiving J-51 benefits if it was already subject to rent stabilization. According to PCV/ST and MetLife, if the Legislature had intended to preclude luxury deregulation for all rent-stabilized apartments receiving J-51 benefits, it would have omitted the phrases "became or become" and "by virtue of" from the statute, and simply written that the exception did not apply to

accommodations "receiving" such tax benefits. They note that the Legislature used this latter phraseology in RSL §504 (c) (referring to "Dwelling units in a building or structure receiving the benefits of [J-51]").<sup>2</sup>

◆III◆

PCV/ST AND METLIFE emphasize that since 1996 DHCR—the State agency entrusted with administering rent stabilization—has interpreted the luxury decontrol provisions in the manner they advocate. This is not, however, entirely correct; DHCR's interpretation and the one PCV/ST and MetLife now offer are different. DHCR has interpreted "by virtue of" to mean "solely by virtue of," while PCV/ST and MetLife rely on the "became or become" language of the statute. The two interpretations would lead to the same result in this case, but not in every case. For example, under DHCR's interpretation, a building that first became subject to the RSL due to receipt of J-51 benefits—but is also subject to the provisions of the RSL for some other reason (see RSL §26-504)—would be subject to luxury decontrol because it would not be stabilized "solely" because of J-51 benefits. On the other hand, under the argument made by PCV/ST and MetLife, the same building would be exempt from luxury decontrol because it "became" subject to stabilization when the first triggering event—receipt of the J-51 benefits—occurred.

It is understandable that PCV/ST and MetLife prefer not to defend DHCR's reading, because it is contrary to the plain text of the statute. "By virtue of" and "solely by virtue of" simply do not mean the same thing. Nor do we owe deference to DHCR's reading, for this appeal does not call upon us to interpret a statute where "specialized knowledge and understanding of underlying operational practices or...an evaluation of factual data and inferences to be drawn therefrom" is at stake such that we should "defer to the administrative agency's interpretation unless irrational or unreasonable" (*Matter of KSLM-Columbus Apts., Inc. v. New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005], quoting *Kurcsics v. Merchant Mut. Ins. Co.*, 49 NY2d 451, 459 [1980] (internal quotation marks omitted)). Rather, where

"the question is one of pure statutory interpretation dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations... And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight" (*id.*).

When construing a statute, we seek to discern and give effect to the Legislature's intent (*Carney v. Philippone*, 1 NY3d 333, 339 [2004]), and the starting point for accomplishing this is the statute's language (*Daimler Chrysler Corp. v. Spitzer*, 7 NY3d 653, 660 [2006]). If the language is ambiguous, we may examine the statute's legislative history (*Majewski v. Broadalbin-Perth Central School District*, 91 NY2d 577, 583 [1998]).

Here, we conclude that defendants' interpretation of the exception to luxury control for units that "became or become" subject to rent stabilization "by virtue of receiving" J-51 benefits conflicts with the most natural reading of the statute's language. Defendants essentially read these words as recognizing two categories of J-51-benefitted buildings—those, like the properties, that were rent-stabilized prior to receiving J-51 benefits, for which luxury decontrol became available in 1993; and those that only became rent-stabilized as a condition of receiving J-51 benefits, for which luxury decontrol is unavailable (at least during the benefit period). But there is no language anywhere in the statute delineating these two supposed categories, and we see no indication that the Legislature ever intended such a distinction—one that never occurred to anyone, so far as this record shows, until after the present lawsuit was brought. Contrary to PCV/ST's and MetLife's argument, there is nothing impossible, or even strained, about reading the verb 'become' to refer to achieving, for a second time, a status already attained.

Even assuming that the reading given to 'became or become' by PCV/ST and MetLife is a possible one, the RRRRA's legislative history better supports our interpretation of the statute. The RRRRA's sponsor stated that luxury decontrol was unavailable to building owners who "enjoy[ed] another system of general public assistance" such as J-51 benefits. Although the dissent accuses us of "pluck[ing] a snippet" of the sponsor's words to support our conclusion (dissenting op. at 7), in response to a question posed by a colleague exploring the very issue presented here, he said that

"should the exemptions contained in section 489 end, that—those J.51s and 489s end, then they would be subject so that at no point do you have the [luxury] decontrol provisions applying to the buildings which have received the tax exemptions that I just mentioned" (Senate Debate on Assembly Bill 8859, July 7, 1993, at 8213-8216).

The dissent's attempt to selectively highlight portions of the question does not diminish the force of the sponsor's answer, which plainly indicates that "at no point" would the luxury decontrol provisions apply to buildings which "received" tax exemptions being discussed, including J-51 benefits. Certainly it cannot be argued that the thrust of that statement indicates otherwise.

Nor will we infer, as defendants suggest, that the Legislature's inactivity in the face of DHCR's interpretation of the statute constitutes its acquiescence thereto. Legislative inactivity is inherently ambiguous and "affords the most dubious foundation for drawing positive inference" (*Clark v. Cuomo*, 66 NY2d 185, 190-191 [1985], quoting *United States v. Price*, 361 US 304, 310-311 [1960]). It is true that, where the practical construction of a statute is well known, the Legislature may be charged with knowledge of that construction and its failure to act may be deemed an acceptance (*Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 NY2d 84, 90 [1976]). However, at the time the Legislature most recently considered the statute, there is no indication that the specific question presented here—that DHCR's interpretation is improper and conflicts with the plain language of the statute—had been brought to the Legislature's attention (see *Kurcsics*, 49 NY2d at 459 n 4).

◆IV◆

DEFENDANTS predict dire financial consequences from our ruling, for themselves and the New York City real estate industry generally. These predictions may not come true; they depend, among other things, on issues yet to be decided, including retroactivity, class certification, the statute of limitations, and other defenses that may be applicable to particular tenants. If the statute imposes unacceptable burdens, defendants' remedy is to seek legislative relief. Moreover, the dissent predicts that our decision will cause "years of litigation over many novel questions to deal with the fallout from today's decision" (dissenting op. at 13). That the courts and litigants may experience some additional burden, however, is no reason to eschew what we view as the only correct interpretation of the statute (*cf. Matter of Gross v. Perales*, 72 NY2d 231, 237 [1988]).

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

1. The RSL is codified at Administrative Code of City of NY §§26-501 to 26-520.

2. PCV/ST and MetLife also suggest that if we affirm the Appellate Division's decision and order, we should apply the statute prospectively rather than retroactively because they reasonably relied on DHCR's unambiguous and longstanding interpretation of the RSL's luxury decontrol provisions. Because the lower courts did not consider this issue—as defendants acknowledge—we do not consider it at this time.

READ, J. (Dissenting)—This appeal calls upon the Court to interpret an exception to the luxury decontrol mandated by the Legislature when it enacted the Rent Regulation Reform Act in 1993 (RRRA), "a first attempt to restore some rationality" to the then current rent regulation system by paring back the benefits conferred on "those not in economic need of protection" (1993 NY Legis Ann, at 175). The exception reads as follows:

"Provided, however, that this exclusion [for luxury decontrol] shall not apply to housing accommodations which became or become subject to [the Rent Stabilization Law (RSL)] (a) by virtue of receiving tax benefits pursuant to section [421-a] or [489] of the real property tax law..., 1 or (b) by virtue of article seven-C of the multiple dwelling law" (RSL §§26-504.1, 26-504.2).

The majority interprets the portion of the exception dealing with Real Property Tax Law §489 (which authorizes New York City's J-51 program) to exclude from luxury decontrol all buildings receiving J-51 tax benefits. Defendants, who point to DHCR's longstanding interpretation of the statute, read it to exempt only those buildings subject to the RSL solely because of the receipt of J-51 tax benefits. The majority takes the position that defendants' view is "contrary to the plain text of the statute" (majority op at 10), and "conflicts with the most natural reading of the statute's language" (id. at 11). I respectfully dissent.

#### The Statutory Language

The majority's interpretation necessarily supposes that the Legislature inserted pointless words into the statute. That is, if the Legislature had intended for all buildings receiving J-51 tax benefits to be exempt from luxury deregulation, it could have easily said just that. Instead, the exception includes ten additional words—excluding from luxury decontrol those buildings that "became or become subject to this law [the RSL] (a) by virtue of" receiving J-51 benefits. We generally assume that every word in a statute contributes something to its meaning (see e.g. *People v. Finley*, 10 NY3d 647, 655 [2008] [citing *People v. Giordano*, 87 NY2d 441, 448 [1995], quoting *Sanders v. Winship*, 57 NY2d 391, 396 [1982]] ["Under well-established principles of interpretation, effect and meaning should be given to the entire statute and every part and word thereof" (internal quotation marks omitted)]).

Defendants' interpretation of the exception, unlike the majority's, gives meaning to all of its operative language. As defendants point out, the words "became" or "become" mean to "pass from a previous state or condition and come to be" or to "take on a new role, essence, or nature" (see Webster's Third New Intl. Dictionary 195 [1986]). The definition of "subject" is "one placed under the authority, dominion, control or influence of" (id. at 2275); and the parties do not dispute that "by virtue of" means "because of" or "by reason of." Thus, buildings that "became or become subject to [the RSL] by virtue of" receiving J-51 tax benefits passed from their former state (unregulated) into a new state (rent-stabilized) because of their owners' receipt of these benefits. That did not happen here since the apartment buildings comprising Peter Cooper Village and Stuyvesant Town have been rent-regulated since at least 1974, 18 years before any building in either complex is alleged to have received J-51 benefits. They did not "become" rent-stabilized by virtue of receiving J-51 benefits; they already were rent-stabilized (see *Matter of KSLM-Columbus Apts., Inc. v. New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 311-312 [2005] [once a building became rent-stabilized, later, redundant statutory routes "would not have [been] needed" to make the building subject to the RSL]).

The majority resists the logic of this reading on several bases; first, that "there is nothing impossible, or even strained, about reading the verb 'become' to refer to achieving, for a second time, a status already attained" (majority op at 12). While "become" may be used colloquially in this imprecise sense, we usually—in the absence of statutory definitions—look to dictionary definitions when trying to figure out the meaning of a word or phrase used in a statute (see e.g. *Rosner v. Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479-480 [2001]). Even accepting the majority's point, all this means is that defendants' reading of "become" is not clearly correct—i.e., the usage is ambiguous—not that it is clearly wrong, although this seems to be the majority's implicit conclusion.

The majority also takes issue with defendants' emphasis on the State Division of Housing and Community Renewal (DHCR)'s reading of the statute, stating that "DHCR's interpretation and the one [defendants] now offer are different" because "DHCR has interpreted 'by virtue of' to mean 'solely by virtue of,' while [defendants] rely on the 'became or become' language" (majority op at 10).<sup>3</sup> Further, the majority adds, "[b]y virtue of' and 'solely by virtue of' simply do not mean the same thing" (id.).

In fact, what defendants argue is that the words "became or become subject to," read according to their dictionary meaning, modify the subsequent phrase "by virtue of" so as to create "no less a narrowing effect...than would 'solely.'" In short, by inserting "solely" before the phrase "by virtue of," DHCR simply created a redundancy in its regulations (see RSC §2520.11 [r] [5], [s] [2]); it did not change the statute's meaning.

Finally, the majority objects that defendants' reading of the statute implicitly creates two categories of J-51-benefitted properties—i.e., "those...that were rent-stabilized prior to receiving J-51 benefits, for which luxury decontrol became available in 1993; and those that only became rent-stabilized as a condition of receiving J-51 benefits, for which luxury decontrol is unavailable (at least during the benefit period)"; and that there is "no indication that the Legislature ever intended such a distinction," or that it ever "occurred to anyone...until after the present lawsuit was brought" (majority op at 11-12).

Addressing the latter point first, it is not at all obvious that this distinction occurred to no one until this lawsuit.<sup>4</sup> Contrariwise, it is apparent (as discussed later) that, until this lawsuit, no one thought to argue that already rent-stabilized buildings subsequently receiving J-51 tax benefits were excluded from luxury decontrol.

As for what the Legislature intended, the distinction complained about by the majority flows naturally from the legislative language chosen (i.e., "become or became" and "by virtue of"), given the nature of the J-51 program. Two general categories of buildings are eligible for J-51 tax benefits. First, there are existing, already rent-stabilized apartment buildings (like those in the Peter Cooper Village and Stuyvesant Town apartment complexes), which receive J-51 benefits in connection with capital improvements or repairs, such as a new boiler (see e.g. NY City Admin Code §11-243 [b] [4], [5], [6]; Rules of City of NY Housing Preservation and Development [28 RCNY] §§5-03 [b], [c]). The second category includes buildings that are substantially rehabilitated to create new family units and receive benefits on account of those conversions or rehabilitations (see e.g. NY City Admin Code §11-243 [b] [2], [3], [8]; 28 RCNY §§5-03 [a] [1], [2], [3], [4], [6], [7]). Buildings within the second category become rent-stabilized as a condition of receipt of J-51 benefits,<sup>5</sup> and enter the rent-stabilization regime at existing market rates (see Rent Stabilization Code [RSC] §2521.1

[h]). Again, if the Legislature had intended to exclude all buildings receiving J-51 tax benefits from luxury decontrol—i.e., those in both categories—it should have, and presumably would have, specified in the statute that housing accommodations receiving J-51 benefits were excluded, not just those that "became or become subject to [the RSL] by virtue of" receiving J-51 benefits.

#### Legislative Intent

To bolster its textual analysis, the majority plucks a snippet from a floor exchange during the Senate debate on the bill that became the RRRRA. We have always treated this species of legislative history "cautiously" (see *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 586-587 [1998]). In any event, the full text of this question-and-answer dialogue (which follows) does not appear to support the meaning teased out of it by the majority:

"SENATOR MENDEZ: Senator Hannon, your bill will include—will affect those renters who are in apartments J.51s and 421-As. O.K. Those *buildings were constructed* with some part of taxpayers' monies, monies from all of us, and all of the people out there in the state of New York to help the *developers build those apartments*.

"My question to you is, once this bill is approved here and it will pass this chamber, will *those landlords* keep and not get taken away, keep the decontrol of the so-called luxury apartments with the abatements, those tax abatements that they have negotiated, or will they be returned to the taxpayers?"

"SENATOR HANNON: Well, *in answer to your question*, Senator, which is an excellent one, we have provided that, because some buildings are enjoying another system of general public assistance, namely the tax exemptions, that to the extent the building is currently enjoying a 421 tax exemption, it is not subject to the decontrol provisions here. Should those exemptions end or should the exemptions contained in section 489 end, that's—those J.51s and 489s end, then they would be subject so that at no point do you have the decontrol provisions applying to the buildings which have received the tax exemptions that I just mentioned" (Senate Debate on Assembly Bill 8859, July 7, 1993, at 8213-8216) (emphasis added).

By referring to buildings that were constructed and to developers who build with tax benefits, Senator Mendez's question was directed at buildings entering the rent-stabilization regime for the first time as a condition of receiving J-51 tax benefits (i.e., the second category of J-51-benefitted properties, previously discussed), or section 421-a tax benefits (i.e., new construction). In short, Senator Hannon's response to Senator Mendez was limited by her question to developers of new construction projects.

Critically, the majority does not even mention the most important gauge of statutory meaning in this case, apart from the actual words the Legislature chose. The RRRRA has a sunset clause, which forces the Legislature to reconsider its terms periodically. This has happened twice since 1996, when DHCR issued its advisory opinion—in 1997 and in 2003.<sup>6</sup> While otherwise amending the RRRRA in both 1997 and 2003, the Legislature left the language central to this appeal ("become or become subject to [the RSL] by virtue of") intact.

As plaintiffs themselves put it, "[b]attles over rent stabilization are among the fiercest in Albany." It is therefore doubtful that the Legislature was unaware in 1997 of DHCR's advisory opinion, especially in light of the existence of DHCR decontrol orders premised on it, and the New York City Department of Housing Preservation and Development (HPD)'s issuance of prorated J-51 tax benefits to buildings with luxury-decontrolled apartments. And it is inconceivable that the Legislature did not know what was afoot six years later in 2003. This is especially so because DHCR in the meantime revised the Rent Stabilization Code ("RSC" or "the Code") for the express purpose of incorporating regulations implementing its interpretation of the substantive changes wrought by "the RRRAs of 1993 and 1997" (New York State Reg., Dec. 20, 2000, at 18).

After receiving and evaluating an "extensive volume and scope of comments," DHCR adopted the revised RSC, effective December 20, 2000 (id. at 19). The Code made DHCR's interpretation of RSL §§26-504.1 and 26-504.2 unmistakably clear: the exception from luxury decontrol for buildings receiving J-51 tax benefits covered only those buildings rent-stabilized solely on this basis (see RSC §2520.11 [r] [5], 2520.11 [s] [2]). Yet, the Legislature in 2003 did not amend the RRRRA to adopt the interpretation favored by plaintiffs, although it otherwise modified the statute.

As we have observed,

"[q]uestionable as may be any reliance on legislative inactivity, we would distinguish instances in which the legislative inactivity has continued in the face of a prevailing statutory construction. Thus, "[w]here the practical construction of a statute is well known, the Legislature is charged with knowledge and its failure to interfere indicates acquiescence" (*Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 NY2d 84, 90 [1976], quoting *Engle v. Talarico*, 33 NY2d 237 [1973]).

We were faced with a fact pattern comparable to this case in *Matter of Ansonia Residents Assn. v. New York State Div. of Hous. & Community Renewal* (75 NY2d 206 [1989]). There—as here—the tenants argued that the plain wording of a provision in the RSL conflicted with the way in which DHCR interpreted and implemented it. We observed that DHCR and its predecessor agencies had construed the statute consistently, however, and that "the local legislature, in never choosing to amend the statute to provide otherwise, has acquiesced in [DHCR's] construction" (id. at 216; see also *Rent Stabilization Assn. of N.Y. City v. Higgins*, 83 NY2d 156, 170 [1993] [when concluding that DHCR was authorized to adopt challenged regulations, Court considered it significant that Legislature had not sought to undo DHCR's interpretation at a time when it was substantially reforming rent regulation]).

#### Regulatory Interpretation and Implementation

The majority gives no weight whatsoever to DHCR's interpretation of the exception. DHCR is vested with a "broad mandate to promulgate regulations in furtherance of the rent control and rent stabilization laws" (*Higgins*, 83 NY2d at 168), and is steeped in the history and lore of rent regulation. While we may not owe deference to the administrative agency, it should count for something that DHCR adopted its interpretation as a formal regulation after a notice-and-comment rulemaking enjoying wide participation by both landlord and tenant advocacy groups and interests. If DHCR's interpretation were as wide of the mark as the majority claims, it is odd that this infirmity was not discovered then. In this regard, defendants point out that two of the amici supporting plaintiffs on this appeal<sup>7</sup> submitted over 50 pages of comments objecting to many aspects of DHCR's proposed amendments to the Code in 2000, but they never mentioned, much less complained about, the proposed rules codifying the word "solely" (see [http://www.tenant.net/DHCR\\_info/newcode/legserv-RSC.pdf](http://www.tenant.net/DHCR_info/newcode/legserv-RSC.pdf)).

Further, the majority ignores the manner in which HPD actually administers the J-51 program. HPD's J-51 application form requires the building owner to identify the number of both "exempt" and rent-stabilized apartments (see <http://www.nyc.gov/html/hpd/html/home/home.shtml>). The record on appeal includes a Certificate of Eligibility issued by

HPD on July 28, 2003, awarding J-51 tax benefits to 350 First Avenue, a building in the Peter Cooper Village complex. This Certificate shows that HPD reduced the J-51 benefit in proportion to the number of luxury-decontrolled units in the building, consistent with DHCR's interpretation and regulation.

## Conclusion

The majority downplays the risk of "dire financial consequences from [this] ruling[] for [defendants] and the New York City real estate industry" (majority op at 14). While it is true that dire predictions often prove to be mistaken, this is not always the case just because it usually is. After all, the Trojans would have done well to heed Cassandra. And you do not have to be gifted with her powers of prophecy to foresee significant, if not severe, dislocations in the New York City residential real estate industry as a result of today's decision. This is inevitable because the Court has upended an understanding of the law upon which numerous and substantial business transactions and dealings have been predicated for over a decade. On the other side of the equation, since at least 2000 no tenant residing in Stuyvesant Town or Peter Cooper Village has had any reason to expect immunity from the RSL's luxury-decontrol provisions.

The majority's observation that the extent of defendants' losses ultimately will turn on legal issues and defenses yet to be resolved is cold comfort. It will take years of litigation over many novel questions to deal with the fallout from today's decision. In the absence of meaningful legislative action, uncertainty will reign in an industry already rocked by the bursting of the great residential real estate bubble. And as one amicus reminded us, many of those at risk are "Mom and Pop" owners of a single building, and owners with mid-sized portfolios, mostly located outside Manhattan. For some of these entities, a prolonged summary proceeding with even a few tenants may threaten financial viability, even in the best of times.

Of course, I do not suggest that the Court shirk from its responsibility to interpret statutes because of untoward or uneven consequences for the parties. In every decision we make, one side loses. But the Court does not, in my view, fulfill its duty to safeguard the stability of the laws when it tosses out a reasonable and longstanding statutory interpretation made by a specialized agency, as it does today.

Thirty-five years ago we described the rent laws as "an impenetrable thicket, confusing not only to laymen but to lawyers" (Matter of 89 Christopher v. Joy, 35 NY2d 213, 220 [1974]), and the thicket has only grown denser since then. While the majority confidently proclaims that DHCR's and defendants' reading of the statute is plainly wrong, and its contrary interpretation is plainly correct, the opacity of the thicket guarantees that neither proposition is true. Accordingly, I respectfully dissent.

1. The deleted language relates only to buildings receiving real property tax abatements under section 421-a of the Real Property Tax Law, and is not relevant to this case.

2. Hereafter, these provisions are referred to collectively as "the exception" or "the statute."

3. The majority also opines that these two purportedly divergent interpretations "would lead to the same result in this case, but not in every case," and then poses a hypothetical example to illustrate this point (majority op at 10). It is not evident that, in the real world (as opposed to the hypothetical one), the different results theorized would ever occur, absent changes in the current rent regulation/tax benefit regimes.

4. Amicus Rent Stabilization Association of NYC, Inc. provided us with a detailed history of the J-51 statute and rent regulation over several decades. The gist of this presentation (although disputed) is that by law and practice the New York City rent laws have long distinguished between apartments that became subject to rent regulation by virtue of receiving J-51 tax benefits, and apartments that were already rent-regulated for other reasons (like those in the Peter Cooper Village and Stuyvesant Town apartment complexes) at the time they received J-51 benefits.

5. Defendants point out that J-51-benefitted buildings within this second category are therefore akin to the other two kinds of buildings within the exception—those covered by Real Property Tax Law §421-a (new construction) and article 7C of the Multiple Dwelling Law (the 1982 Loft Law, which governs commercial loft buildings converted into residential housing)—which likewise are not otherwise rent-stabilized.

6. The statute is next due for renewal in 2011 (see L 2003, ch 82, §§7, 8 and 9).

7. There were six amicus briefs filed on behalf of plaintiffs. (Three amicus briefs were filed on behalf of defendants.)

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Order affirmed, with costs, and certified question answered in the affirmative. Opinion Per Curiam. Judges Ciparick, Smith, Pigott and Jones concur. Judge Read dissents in an opinion in which Judge Graffeo concurs. Chief Judge Lippman took no part.

Decision of the Day

Landlord/Tenant Law

Roberts v. Tishman Speyer Properties, L.P.

No. 131

New York State Court of Appeals

Judge Ciparick, Smith, Pigott and Jones concur. Judge Read dissents in an opinion in which Judge Graffeo concurs. Chief Judge Lippman took no part.

Decided: Oct. 22, 2009

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