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RENT REGULATION

Stuyvesant Town Decision Leaves Unanswered Questions

By Warren A. Estis And Jeffrey Turkel

In its Oct. 22, 2009 decision in *Roberts v. Tishman Speyer Properties, L.P.*, the New York State Court of Appeals, by a 4-2 margin, ruled that due to receipt of J-51 tax benefits, the owners of the Stuyvesant Town ("ST") and Peter Cooper Village ("PCV") housing complexes in Manhattan impermissibly decontrolled apartments under the luxury deregulation provisions of the Rent Stabilization Law ("RSL").

The decision has sent shock waves throughout New York City's real estate and financial communities. The primary questions generated by the decision are: what did the Court do, and what does it mean? The answer to the first question is set forth below. The answer to the second question is anyone's guess.

In the interest of full disclosure, Rosenberg & Estis, P.C. submitted an amicus curiae brief in Roberts on behalf of the Rent Stabilization Association of NYC Inc., and represents Tishman Speyer entities in various matters.

The Facts

The ST and PCV housing complexes were built in the 1940s and first became subject to rent stabilization in 1974. In 1992, MetLife (the previous owners) began receiving so called J-51 tax benefits throughout the complex based upon building improvements.

In 1993, pursuant to the Rent Regulation Reform Act (L 1993, ch 253), the Legislature for the first time provided for the luxury deregulation of rent-stabilized apartments. Such deregulation would take place where the legal stabilized rent for the apartment was $2,000 or more per month, *and* (1) the tenant in occupancy earned in excess of the statutory income limit, or (2) the apartment became vacant.

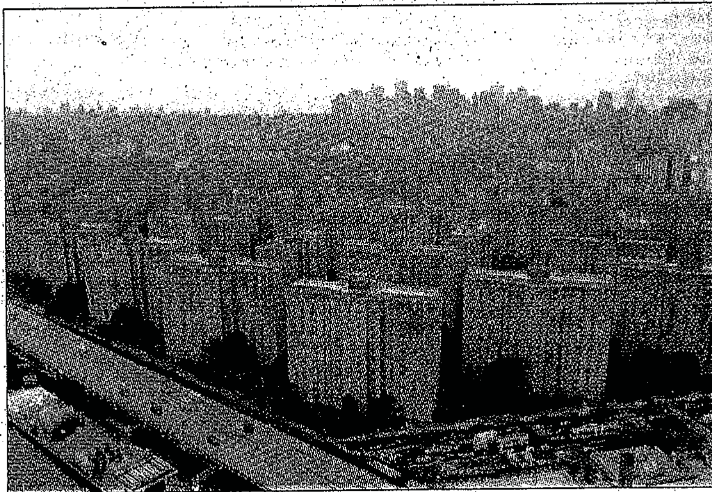
The luxury deregulation language in the RSL contained a caveat providing that owners could *not* use either form of luxury deregulation with respect to:

"housing accommodations which became or become subject to [the RSL]...by virtue of receiving tax benefits pursuant to [the J-51 statute]..." (material in brackets supplied).

Rent-stabilized owners read the luxury deregulation exclusion as only applying to buildings that were otherwise exempt from rent stabilization (such as buildings with fewer than six units or those constructed on or after Jan. 1, 1974), but which first became rent stabilized as a condition of the owner's receipt of J-51 benefits. In contrast, the luxury deregulation exclusion did *not* apply to buildings like those at ST and PCV, where the buildings were initially subject to the RSL by virtue of their construction date, and which thereafter received J-51 benefits. Such buildings did not "become" subject to rent stabilization by virtue of receiving J-51 benefits; they had become stabilized for other reasons years before.

In 1996, in a written opinion letter, DHCR confirmed this reading of the statute. Thereafter, various owners of rent-stabilized apartments, including the owners of ST and PCV, began luxury deregulating apartments where they could. In 2000, DHCR issued a formal regulation codifying its 1996 interpretation of the luxury deregulation statute.

In 2007, nine tenants at ST and PCV commenced a declaratory judgment action in Supreme Court, arguing that luxury deregulation was not available in *any* building where the owner took J-51 benefits. Justice Richard B. Lowe, III disagreed, and dismissed the tenants' complaint.[1] The Appellate Division, First Department unanimously reversed and reinstated the complaint on March 5, 2009.[2]


AP/MARY ALTAFFER

The Peter Cooper Village and Stuyvesant Town apartment complex

The Court of Appeals Majority

In a per curiam opinion joined by Judges Carmen B. Ciparick, Robert S. Smith, Eugene S. Pigott, Jr. and Theodore T. Jones, the majority held that the luxury deregulation exclusion applied to all buildings receiving J-51 benefits, even those that first "became" rent-stabilized for reasons other than receiving such benefits. Focusing on the critical "became or become" language, the majority wrote:

> Here, we conclude that defendants' interpretation of the exemption to luxury control [sic] 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-benefited 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.

The majority also held that DHCR's 1996 interpretation of the statute was not entitled to deference, and that the Legislature's failure to amend the statute following DHCR's promulgation of its 2000 regulation could not be interpreted as legislative acquiescence to the agency's interpretation. The majority concluded:

> Defendants predict dire financial consequences from our ruling, for themselves and the New York 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

> The viability of the plaintiffs' claims, as the majority observed, depends upon such issues as "retroactivity, class certification, the statute of limitations, and other defenses that may be applicable to particular tenants."

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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....

The Court of Appeals Dissent

Judge Susan P. Read, in an opinion joined by Judge Victoria A. Graffeo, also began by interpreting the words "became or become," but arrived at a different conclusion:

> 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." The definition of "subject" is "one placed under the authority, dominion, control or influence of;" 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 (internal citations omitted, material in brackets and underscoring in original).

The dissent next considered the effect of DHCR's 1996 and 2000 interpretations of the luxury deregulation exclusion, not from the standpoint of deference, but from the standpoint of a long-standing interpretation that had not been challenged until many years later:

> 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 submitted over 50 pages of comments objecting to many aspects of DHCR's proposed amendments to the Code in 2000, but they never mentioned, must less complained about, the proposed rules codifying the word "solely" (citations omitted).

Finally, Judge Read addressed the consequences of the majority's decision:

> 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.
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> 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.

What Happens Next?

The procedural effect of the Court of Appeals decision is that the plaintiffs' complaint—which Justice Lowe had dismissed—has now been reinstated and must be answered. The viability of the plaintiffs' claims, as the majority observed, depends on such issues as "retroactivity, class certification, the statute of limitations, and other defenses that may be applicable to particular tenants."

Both the majority and the dissent seem to agree that the decision answers one question and leaves dozens unanswered. Some of the most pressing questions to be determined in the future are as follows:

- Should the decision be given retroactive or prospective effect? If prospective, is it prospective as to overcharge liability only, or as to rent regulatory status?
- When determining legal rents and overcharge liability, how will the four year overcharge statute of limitations be applied, especially in light of the Appellate Division, First Department's recent decision in *Grimm v. DHCR*,[3] wherein the four-year rule appears to have been substantially weakened?[4]
- Under what circumstances might owners be liable for treble damages based on a willful overcharge?
- Can owners "opt-out" of the J-51 program, or pay back J-51 benefits, in order to reclaim the right to deregulate apartments?
- Where DHCR has issued an order determining that an apartment has been luxury deregulated (such an order granting a high income luxury deregulation application), if such order is now final and binding, is the apartment exempt from stabilization notwithstanding the *Roberts* ruling?

These questions and many others will be determined in the coming months and years, both in the *Roberts* litigation and, absent consolidation of some kind, in hundreds, if not thousands, of individual DHCR, Civil Court and Supreme Court proceedings.

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1. *Roberts v. Tishman Properties, L.P.*, 2007 WL 2815093 (Sup. Ct., N.Y. Co.)
2. *Roberts v. Tishman Properties, L.P.*, 62 AD 3rd 71, 874 N.Y.S. 2d 97 (1st Dept. 2009).
3. *Grimm v. DHCR*, ___AD3d___, ___N.Y.S. 2d ___, 2009 WL 3030206 (1st Dept. 2009).
4. Both DHCR and the owner in *Grimm* are appealing this 3-2 decision to the Court of Appeals.