RENT REGULATION

DHCR Clarifies Ruling; Bill Suggests Relief to Landlords

By **Warren A. Estis** | And **Jeffrey Turkel**

As various commentators have observed, the Court of Appeals' decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 NY 3d 270, 889 N.Y.S.2d 388 (2009), raised more questions than it answered. Indeed, the majority in *Roberts* acknowledged that the decision failed to resolve various issues, "including retroactivity, class certification, statute of limitations and other defenses that may be applicable to particular tenants."

As the dust continues to settle, some of these questions are now being answered. Indeed, the state Division of Housing and Community Renewal (DHCR) has issued two clarifying rulings in recent weeks. In addition, proposed legislation would allow landlords to avoid the consequences of *Roberts* by refunding past J-51 benefits and waiving future benefits.

Of course, there is no guarantee that this legislation will pass, and as *Roberts* proves, courts will not necessarily defer to DHCR's interpretation of the governing statute. But as of now, the picture is becoming slightly clearer.

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.

In *Roberts*, the owner was receiving J-51 benefits at the time the Court of Appeals ruled, and those benefits will not expire for several years. Thus, the Court of Appeals had no occasion to decide whether the prohibition against luxury deregulation ends when J-51 benefits end, or whether—as various tenant attorneys have argued—receipt of J-51 benefits bars an owner from availing itself of luxury deregulation even after benefits expire.

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LANDLORDS CANNOT deregulate rents on units under luxury decontrol provisions of the Rent Stabilization Law while accepting public tax incentive benefits, the Court of Appeals decided last year in a case involving the current and past owners of **Peter Cooper Village and Stuyvesant Town** in Manhattan.

DHCR squarely addressed this issue in *Matter of Schiffren*, DHCR Adm. Rev. Dckt. No. XE-410041-RT, issued Jan. 5, 2010. In *Matter of Schiffren*, the owner of 98 Riverside Drive in Manhattan served an Income Certification Form on tenant Alan Schiffren in early 2008. The building had previously received J-51 benefits, but those benefits had expired on June 30, 2005. The tenant conceded his high-income status, and DHCR issued an order of deregulation on April 6, 2009.

The tenant then filed a Petition for Administrative Review. He alleged that pursuant to RSL §26-504(c), rent regulation in this type of building—one made subject to rent stabilization (like the buildings in *Roberts*) long before the receipt of J-51 benefits—remains stabilized until a vacancy, or upon expiration of the stabilized lease in effect when J-51 benefits expired, provided that said lease contained the requisite "J-51 notice." The tenant asserted that these were the sole avenues for deregulation under the RSL for buildings that had received J-51 benefits, essentially arguing that once an owner received such benefits, luxury deregulation was forever unavailable.

DHCR disagreed, finding that in this type of building (as opposed to newly renovated buildings that originally became stabilized solely by virtue of receiving J-51 benefits) the right to luxury deregulate an apartment revived once the J-51 benefits expired. DHCR's Commissioner wrote:

> According to Section 26-504(c) of the RSL, if the apartment was subject to rent regulation solely as a result of the receipt of tax benefits, then upon the expiration of such tax benefits, the apartment shall remain subject to regulation until the occurrence of the earlier of two expressly specified events; the vacating of the tenant or the expiration of the lease in effect on the date the tax benefits expired, providing that each lease given the tenant provided proper notice of the expiration date of the projected tax benefits. Thus, high income rent deregulation is not available for an apartment that falls into this category, even after the expiration of the J-51 tax benefits. However, if the apartment was subject to rent regulation for a reason(s) in addition to the receipt of these tax benefits, then upon the expiration of the tax benefits, Section 26-504(c) directs that the unit continue to be subject to regulation as if the tax benefits had never been granted. Thus, in that instance, upon the expiration of the tax benefits, the provisions of Sections 26-504.1 and 26-504.3 of the RSL become applicable to the apartment and the apartment is subject to luxury decontrol, and an owner may file the appropriate petition for deregulation.

DHCR's commissioner continued:

> The Commissioner notes that the evidence of record establishes that the applicable J-51 tax benefits received from the subject premises had

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expired prior to the date the Income Certification Form was served on the tenant, which is the relevant time period in this proceeding, and so are no longer in effect. Furthermore, DHCR records also establish that the subject apartment was subject to rent stabilization prior to the time that the J-51 tax benefits were first received, as so was otherwise subject to rent regulation apart from the receipt of those J-51 benefits. Therefore, the high income rent deregulation provisions were applicable after the expiration of the J-51 tax benefits and the subject apartment is eligible for luxury decontrol.

'Denza'

The case of *Denza v. Independence Plaza Associates, LLC*, concerns the rent regulated status of the Independence Plaza North housing complex located in Tribeca. The complex was constructed after Jan. 1, 1974 pursuant to Article II of the Private Housing Finance Law, i.e., the so-called Mitchell-Lama program.

In 2004, the complex owner exercised its right to pay off the Mitchell-Lama mortgage and dissolve the housing company. Because the buildings were constructed after Jan. 1, 1974, they would ordinarily be exempt from rent stabilization. See, Emergency Tenant Protection Act §5(a)(5). However, one of the buildings was receiving J-51 benefits at the time of dissolution, and continued to receive those benefits (approximately $7,550 per year) for almost two years thereafter.

In 2005, the New York City Department of Housing Preservation and Development ("HPD") became aware that the complex was still receiving J-51 benefits. On March 23, 2006, HPD wrote to the New York City Department of Finance ("DOF") stating that "HPD has determined that the J-51 Abatement should have been terminated, and the property should have been restored to full tax paying status, on the dissolution date." HPD went on to ask DOF to adjust its records accordingly, which DOF thereafter did.

The tenants argued before Justice Marcy Friedman that the owner's post-dissolution receipt of J-51 benefits made the building subject to rent stabilization. The owner argued that the building was exempt from rent stabilization because (1) it was constructed after Jan. 1, 1974; (2) DOF had retroactively extinguished any J-51 benefits received after the dissolution date; and (3) the owner had paid back to DOF the tax benefits it had received after exiting the Mitchell-Lama program.

Justice Friedman remanded the jurisdictional issue to DHCR, and DHCR issued a ruling in favor of the owner on March 5, 2010. DHCR ruled that benefits erroneously received (and thereafter rescinded) following Mitchell-Lama dissolution did not subject the complex to rent stabilization:

> In view of the fact that HPD terminated the J-51 tax abatement effective as of the dissolution date as part of the dissolution, the complex was not effectively receiving benefits subsequent to leaving Mitchell-Lama regulation, and, therefore, RSL 26-504(c) would not be applicable. Thus, Independence Plaza North is not subject to the Rent Stabilization Law and Code. Since Independence Plaza North did not become subject to rent stabilization in the first place, 28 RCNY 5.03(f)(3), the provision of HPD's J-51 regulation that mandates continued rent regulation when J-51 benefits are revoked or waived would accordingly not be applicable to this matter, since according to HPD the benefits never attached after dissolution.

As of this writing, Justice Friedman has yet to issue a decision either accepting or rejecting DHCR's ruling.

A Legislative Solution?

In February of 2010, State Senator Pedro Espada, Jr. introduced legislation (S. 6811) that would allow landlords to return J-51 tax benefits they had received, and waive all future benefits, in exchange for the right to utilize luxury deregulation. Sections 12 and 13 of the bill would add the following language to RSL §§26-504.1 and 26-504.2, which govern, respectively, high income luxury deregulation and vacancy luxury deregulation:

> Housing accommodations which were subject to this law immediately prior to the commencement of the receipt of tax benefits pursuant to section four hundred eighty-nine of the real property tax law shall not be deemed to be housing accommodations which became or become subject to this law by virtue of receiving tax benefits pursuant to such section four hundred eighty-nine, provided, however, that the exclusion set forth in this section shall be applicable to such housing accommodations only where the recipient of tax benefits pursuant to such section has acted in accordance with the provisions of subdivision seventeen of section four hundred eighty-nine of the real property tax law and subdivision ee of section 11-243 of this code.

The provision applies retroactively, such that the owner of any apartment "illegally" deregulated (according to *Roberts*) during the receipt of J-51 benefits can legalize such deregulation nunc pro tunc by refunding and/or waiving J-51 benefits on or before June 30, 2012. The bill further provides that these monies will be used to create a program to freeze out-of-pocket rents paid by low-income and moderate income rent-regulated tenants who pay more than one-third of their income for rent and who earned less than $45,000 per year.

It remains to be seen whether S.6811 will become law. But given New York City's looming budget crises, the prospect of landlords paying hundreds of millions of dollars back to the city may prove highly tempting.