SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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WEST 79TH LLC

Plaintiff,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendant.

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INDEX NO. 158833/2020

MOTION DATE 10/20/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 18, 19, 20, 21, 22, 23

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR article 78, of petitioner West 79th LLC (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York State Division of Housing and Community Renewal shall serve a copy of this order along with notice of entry on all parties within ten (10) days.

In this Article 78 proceeding, petitioner West 79th LLC (landlord) seeks a judgment to nullify an "explanatory addendum" that was issued by the respondent New York State Division of Housing and Community Renewal (DHCR) to clarify the terms of a previous rent-deregulation order; and to vacate another previously issued DHCR "petition for administrative review" (PAR) order (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

Landlord is the owner of a residential apartment building located at 230 West 79th Street in the County, City and State of New York. *See* verified petition, ¶ 1. The DHCR is the administrative agency that oversees rent-stabilized buildings located in New York City. *Id.*, ¶ 2. This proceeding concerns apartment 51in the building, whose tenants of record are non-parties Timothy and Amy Clyne (the Clynes), and which landlord had previously registered with the DHCR as a rent-stabilized unit. *Id.*, ¶ 3.

On June 15, 2010, landlord filed a DHCR "petition for high income rent deregulation" of apartment 51 that claimed that the Clynes' total annual household income had exceeded the applicable $175,000.00 deregulation threshold during the two preceding years (i.e., 2008 and 2009). *See* verified petition, ¶ 4. The Clynes filed an answer on February 8, 2011 that admitted that their total annual income had exceeded the deregulation threshold, but averred that they had filed a rent overcharge action in this court to lower apartment 51's legal monthly rent. *See* verified answer, Joseph affirmation, ¶ 7. The Clynes requested that the DHCR's rent administrator (RA) hold landlord's deregulation petition in abeyance until the Supreme Court action was resolved. *Id.*, ¶ 8. The RA afforded the parties several "status update adjournments," but eventually issued a Notice of Proposed Deregulation on January 3, 2018. Subsequently, the

RA issued an Order of Deregulation for apartment 51 on February 9, 2018 (the deregulation order) which found as follows:

> "After consideration of the entire evidence of record the Rent Administrator finds that:
>
> "[T]he housing accommodation is subject to the Rent Stabilization Law of 1969 and/or the Emergency Tenant Protection Act of 1974 and that the legal regulated rent was $2,000.00 or more per month on the applicable date(s). In addition, based on income verification information transmitted by the Division of Housing and Community Renewal, the New York State Department of Taxation and Finance (DTF) has determined that the sum of the annual incomes of the tenant(s) named on the lease who occupied the housing accommodation and of the other persons who occupied this housing accommodation as a primary residence on other than a temporary basis (excluding bona fide employees and bona fide subtenants) was $175,000.00 or more in each of the two preceding calendar years. Accordingly, and upon the grounds stated in the Rent Stabilization Code Section 2520.11 (s) or Emergency Tenant Protection Regulations Section 2500.9 (n), it is
>
> "ORDERED. that the subject bousing accommodation is deregulated, *effective upon the expiration of the existing lease*."

See verified petition, ¶ 5; exhibit A (emphasis added). The Clynes' renewal lease for apartment 51 expired on November 30, 2019. *Id*., exhibit C.

On June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA) became effective, and Part D thereof repealed the provisions of the Rent Stabilization Law (RSL) which had previously permitted "high rent" and "high income" deregulation of rent stabilized apartment units (NY Uncon Laws §§ 26-504.1, 26-504.2, 26-504.3). In a "cleanup bill" enacted several days after the HSTPA's effective date, the New York State Legislature amended Section (i.e., subparagraph) 8 of Part D to provide, in pertinent part, that:

> "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated . . .."

See L 2019, ch 39 Part Q, § 8.

On September 6, 2019, the DHCR sent landlord and the Clynes an "explanatory addenda to order" that was intended to explain the impact of the HSTPA on previously issued

deregulation orders (the explanatory addendum). *See* verified petition, ¶ 6; exhibit B. The relevant portion of the explanatory addendum stated as follows:

> "On February 9, 2018, the RA issued an order to above parties with respect to the owner's application for high rent/high income deregulation. It stated:
>
> "ORDERED that the subject housing accommodation is deregulated effective: **Upon the expiration of the existing lease**, as the subject housing accommodation is subject to the Rent Stabilization Law of 1969 and/or the Emergency Tenant Protection Act of 1974.
>
> "The language, which makes the deregulation contingent upon the expiration of the lease in effect on the day the Rent Administrator's deregulation order was issued, was taken from the applicable ETPA and RSL provisions authorizing such orders. Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA) and its subsequent amendments were enacted. HSTPA repealed the high rent/high income deregulation provisions under which the above order was issued and stated that the law is to 'take effect immediately.' Additionally, HSTPA provides that 'any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated.'
>
> "If the lease in effect on the day the Rent Administrator's deregulation order was issued expired before June 14, 2019 the housing accommodation is deregulated.
>
> "*If the rent stabilized lease in effect on the day the Rent Administrator's deregulation order was issued expires on or after June 14, 2019, the housing accommodation remains regulated to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated.*
>
> "If a rent stabilized lease should have been in effect on the day the Rent Administrator's deregulation order was issued, the housing accommodation remains subject to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated."

Id.; exhibit B (emphasis added).

On October 8, 2019, landlord filed a PAR with the DHCR that claimed that the explanatory addendum sought to improperly change the terms of the deregulation order. *See* verified petition, ¶ 7. On August 21, 2020, the DHCR's Deputy Commissioner issued an order that denied landlord's PAR (the PAR order). *Id.*, ¶ 9; exhibit D. Because the PAR order is lengthy, this decision will not reproduce it in full, but will rather discuss the Deputy Commissioner's findings individually, as appropriate. It is sufficient to observe that the PAR order rejected all of landlord's legal challenges to the explanatory addendum. *Id.*; exhibit D.

Aggrieved, landlord thereafter commenced this Article 78 proceeding on October 21, 2020. *See* verified petition. The DHCR filed an answer on January 4, 2021. *See* verified answer. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

In most cases, the court's role in an Article 78 proceeding is to determine whether, upon the facts before an administrative agency, a challenged agency determination had a "rational basis" in the record or was "arbitrary and capricious." *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). This proceeding purports to challenge the August 21, 2020 PAR order as an arbitrary and capricious ruling; however, landlord's PAR only challenged the analysis set forth in the DHCR's September 6, 2019 explanatory addendum, rather than the RA's findings in the February 9, 2018 deregulation order. *See* verified petition, exhibits A, D. This is anomalous, since the explanatory addendum is not a final agency determination, but is instead an "advisory opinion/operational bulletin," which 9 NYCRR § 2527.11 authorizes the DHCR to issue at its discretion. Since landlord's objections to the explanatory addendum flow from its concerns about its rights as the lessor of apartment 51, it might have been more appropriate for landlord to have proceeded via an action for declaratory judgment. Declaratory judgment is traditionally the vehicle that the courts use to determine the respective rights of all affected parties under a lease. *See e.g., Chekowsky v Windemere Owners, LLC*, 114 AD3d 541 (1st Dept 2014); *Riccio v Windermere Owners LLC*, 58 Misc 3d 1223(A), 2018 NY Slip Op 50230(U), * 4 (Sup Ct NY County 2018), citing *Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 (1926). However, CPLR 7803 (3) also provides that courts may consider

Article 78 petitions which question "whether a[n agency] determination was made in violation of lawful procedure, [or] was affected by an error of law. . . (emphasis added)." *See also, Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142, 146 (2004) ("Our review of an administrative agency's action is limited to 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'" [citation omitted]); *Matter of 107-10 Shorefront Realty, LLC v Division of Hous. & Community Renewal*, 140 AD3d 1071 (2d Dept 2016). Here, to the extent that landlord's petition argues that the explanatory addendum contained errors of law that adversely affected the deregulation order, the court believes that CPLR 7803 (3) permits review the explanatory addendum under the "error of law" standard. *See e.g., Terence Cardinal Cooke Health Ctr. v Commissioner of Health of the State of N.Y.*, 175 AD3d 435, 436 (1st Dept 2019) ("[W]here a quasi-legislative act by an administrative agency . . . is challenged on the ground that it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . ., a proceeding in the form prescribed by article 78 can be maintained." [internal citation and quotation marks omitted]). To the extent that landlord's petition seeks to overturn the August 21, 2020 PAR order, however, CPLR 7803 (3) mandates judicial review under the "arbitrary and capricious" standard. This decision will apply each standard where appropriate, first addressing the explanatory addendum, and then the PAR order.

A judicial inquiry into whether an agency determination was "affected by an error of law," pursuant to CPLR 7803 (3), "is 'limited to the grounds invoked by the agency' in its determination." *Matter of Barry v O'Neill*, 185 AD3d 503, 505 (1st Dept 2020), citing *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74 (2017). Appellate courts have

recognized "errors of law'' to exist in agency determinations that relied on inapplicable case law (*see e.g.*, *Solnick v Whalen*, 49 NY2d 224 [1980]), or misapplied governing statutes. *See e.g.*, *Matter of Rossi v New York City Dept. of Parks & Recreation*, 127 AD3d 463 (1st Dept 2015); *Matter of Nestle Waters N. Am., Inc. v City of New York*, 121 AD3d 124 (1st Dept 2014). On the latter point, the Appellate Division, First Department, recently reiterated the Court of Appeals' long-standing directive that:

> "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld. Where, however, the question is one of pure statutory reading and analysis, 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 are therefore to be accorded much less weight. . . . [I]f the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight."

Matter of West 58th St. Coalition, Inc. v City of New York, 188 AD3d 1, 8 (1st Dept 2020), quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 (1980). Here, the statutes that the DHCR identified in the explanatory addendum were "the applicable ETPA and RSL provisions authorizing [deregulation] orders . . . [and] the [HSTPA]." *See* verified petition, exhibit B. The two RSL provisions mentioned in the order (RSL §§ 26-504.1 and 26-504.3) were both repealed by Part D of the HSTPA. The first governed "high income rent deregulation," and provided, in pertinent part, as follows:

> "Upon the issuance of an order by the [DHCR], 'housing accommodations' shall not include housing accommodations which: (1) are occupied by persons who have a total annual income, as defined in and subject to the limitations and process set forth in section 26-504.3 of this chapter, in excess of the deregulation income threshold, as defined in section 26-504.3 of this chapter, for each of the two preceding calendar years; and (2) have a legal regulated monthly rent that equals or exceeds the deregulation rent threshold, as defined in section 26-504.3 of this chapter."

RSL § 26-504.1. The second defined the "deregulation thresholds" referenced above, and provided, in pertinent part, as follows:

> "2. Deregulation income threshold means total annual income equal to one hundred seventy-five thousand dollars in each of the two preceding calendar years for proceedings commenced before July first, two thousand eleven. For proceedings commenced on or after July first, two thousand eleven, the deregulation income threshold means the total annual income equal to two hundred thousand dollars in each of the two preceding calendar years.
> 3. Deregulation rent threshold means two thousand dollars for proceedings commenced before July first, two thousand eleven. For proceedings commenced on or after July first, two thousand eleven, the deregulation rent threshold means two thousand five hundred dollars. For proceedings commenced on or after July first, two thousand fifteen, the deregulation rent threshold means two thousand seven hundred dollars, provided, however, that on January first, two thousand sixteen, and annually thereafter, such deregulation rent threshold shall be adjusted by the same percentage as the most recent one year renewal adjustment adopted by the relevant guidelines board."

RSL § 26-504.3. The corresponding Rent Stabilization Code (RSC) provision that governed "high income rent deregulation"[1] applications provided, in pertinent part, as follows:

> "This Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL . . ., except the following housing accommodations for so long as they maintain the status indicated below:
> * * *
> "(s) Upon the issuance of an order by the DHCR pursuant to the procedures set forth in Part 2531 of this Title, including orders resulting from default, housing accommodations which:
> > "(1) have a legal regulated rent of $2,000 or more per month as of October 1, 1993, or as of any date on or after April 1, 1994, and which are occupied by persons who had a total annual income in excess of $250,000 per annum for each of the two preceding calendar years, where the first of such two preceding calendar years is 1992 through 1995 inclusive, and in excess of $175,000, where the first of such two preceding calendar years is 1996 through 2009 inclusive, with total annual income being defined in and subject to the limitations and process set forth in Part 2531 of this Title;
> > "(2) have a legal regulated rent of $2,500 or more per month as of July 1, 2011 or after, and which are occupied by persons who had a total annual income in excess of $200,000 per annum for each of the two preceding calendar years, where the first of such two preceding calendar years is 2010 or later, with total annual income being defined in and subject to the limitations and process set forth in Part 2531 of this Title; . . ."

RSC § 2520.11. The relevant portion of RSC § 2531 that is referenced in RSC § 2520.11 (s) provides, in pertinent part, as follows:

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[1] The PAR order noted that the RA specifically relied on RSC § 2520.11 (s) in the February 9, 2018 deregulation order. *See* verified petition, exhibit D.

> "In the event that the total annual income as certified is in excess of $250,000, $175,000, or $200,000 in each such year, whichever applies, as provided in section 2531.2 of this Part, the owner may file an owner's petition for deregulation (OPD), accompanied by the ICF, with the DHCR on or before June 30th of such year. The DHCR shall issue within 30 days after the filing of such OPD, an order providing that such housing accommodation shall not be subject to the provisions of the RSL upon the expiration of the existing lease."

RSC § 2531.3 As previously mentioned, Part D, Section 8 of the HSTPA, which codified the repeal of "high income rent deregulation," provides that:

> "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated . . .."

See L 2019, ch 39 Part Q, § 8.

After carefully analyzing all of the above statutes and regulations, the court concludes that the rationale which the DHCR followed in the explanatory addendum did not "run counter to the clear wording of a statutory provision." As of June 15, 2010, when landlord filed its deregulation petition, RSL §§ 26-504.1 and 26-504.3 authorized the "high income rent deregulation" of apartments where: 1) the tenant of record had reported a total income of $175,000.00 or more per year to the New York State taxing authorities for two consecutive years; and 2) the unit's legal regulated rent was $2,000.00 per month or more.[2] Landlord's deregulation petition alleged that tenants' total income exceeded the "deregulation income threshold" in 2008 and 2009. *See* verified petition, exhibit A. It is clear that landlord's deregulation petition facially comported with the requirements of RSL §§ 26-504.1 and 26-504.3. Therefore, it was no "error of law" for the DHCR to process landlord's deregulation petition pursuant to those statutes (or any petition that properly pled the statutory requirements for "high income rent deregulation").

[2] Landlord's petition and reply papers do not discuss either of these criteria. Instead, landlord takes the incorrect position that the deregulation of apartment 51 became effective on the day that the DHCR issued the deregulation order. *See* verified petition; ¶¶ 13-28.

Also as of June 15, 2010, RSC §§ 2520.11 and 2531.3 authorized the DHCR to grant petitions for "high income rent deregulation" when a tenant's total annual income was certified as in excess of the applicable deregulation threshold amount. Here, the RA's deregulation order specifically noted that, pursuant to DTF tax information, "the sum of the annual incomes of the tenant(s) named on the lease . . . was $ 175,000.00 or more in each of the two preceding calendar years." *See* verified petition, exhibit A. Therefore, it was no "error of law" for the RA to have entered a deregulation order against apartment 51, pursuant to RSC §§ 2520.11 and 2531.3 (nor would it have been an "error of law" for the DHCR to enter a deregulation order where any tenant of record's certified annual income exceeded the applicable deregulation threshold amount for two years).

Further, the courts of this state have long and consistently acknowledged that the plain language of RSC § 2531.3 authorizes the DHCR to enter orders terminating an apartment's rent stabilized status "upon the expiration of the current lease," which is usually a different date that falls after the one on which the agency enters a deregulation order. *See e.g.*, *Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142 (2004); *Rose Assoc. v Johnson*, 247 AD2d 222 (1st Dept 1998); *Matter of London Terrace Gardens v New York State Div. of Hous. & Community Renewal*, 6 Misc 3d 1020(A), 2005 NY Slip Op 50132(U) (Sup Ct, NY County, 2005); *see also*, *Matter of Lacher v New York State Div. of Hous. & Community Renewal*, 25 AD3d 415, 417 (1st Dept 2006) ("the language of the rent stabilization system with respect to deregulation is prospective in nature"). Therefore, it was no "error of law" for the RA to have abided by the "lease expiration" instruction set forth in RSC § 2531.3 when he issued the February 9, 2018 deregulation order. *See* verified answer, exhibit H.

Finally, as was previously observed, the "clean up" Section 8 of Part D of the HSTPA provides that "any unit that was lawfully deregulated prior to June 14, 2019 (the HSTPA's effective date) shall remain deregulated," but that as to all other apartments, "this act shall take effect immediately," with the result that "high income rent deregulation" will no longer be available because the statutes that authorized it (i.e., RSL §§ 26-504.1 and 26-504.3) were repealed effective as of that date. *See* L 2019, ch 39 Part Q, § 8; *see also*, *Widsam Realty Corp. v Joyner*, 66 Misc 3d 132(A), 2019 NY Slip Op 52097(U), *2 (App Term, 1st Dept 2019) ("'the so-called "clean up" bill clarified, at Section 8 thereof, that HSTPA did not re-regulate any units lawfully deregulated before HSTPA's June 14, 2019 effective date'" [internal citation omitted). The statute's plain language makes it clear that it was no "error of law" for the DHCR to have concluded that it could not authorize the deregulation of any rent stabilized apartments after the HSTPA's June 14, 2019 effective date.

The court also finds that it is reasonable for the DHCR to read the plain language of HSTPA, Part D, Section 8, in conjunction with RSC § 2531.3 (and the case law that interprets those provisions), and to conclude that it could not authorize the deregulation of rent stabilized apartments after June 14, 2019, even pursuant to previously issued deregulation orders, if such orders provided for the apartments to remain subject to rent stabilization until their pending lease terms expired, and the expiration dates fell after June 14, 2019. The court makes this finding fully cognizant of the Court of Appeals' directive that it, and not the DHCR, is the proper tribunal to resolve "question[s] . . . of pure statutory reading and analysis . . .." *Matter of West 58th St. Coalition, Inc. v City of New York*, 188 AD3d at 8, quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d at 459. In this instance, however, the court finds that the DHCR's interpretation of the statutes (i.e., that the applicable RSL and RSC provisions did not authorize

apartment 51's deregulation, despite the agency's previous approval of landlord's deregulation petition) did not "run counter to the clear wording of a statutory provision." Instead, the court finds that it was reasonable for the DHCR to read the plain language of the RSL and RSC provisions in conjunction with the HSTPA, and the court adopts that reading. As a result, the court concludes that the DHCR's explanatory addendum did not contain an "error of law" that would adversely affect the February 9, 2018 deregulation order, in violation of CPLR 7803 (3). Consequently, the court finds that, to the extent that this Article 78 petition challenges the explanatory addendum, it lacks merit and should be denied. However, as was previously observed, landlord's petition also purports to challenge the August 21, 2020 PAR order pursuant to CPLR Article 78.

At the beginning of this decision, the court noted that its role in an Article 78 proceeding is to determine whether, upon the facts before the DHCR, a challenged determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 230-231; *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d at 302. A determination will only be found "arbitrary and capricious" if it is "without sound basis in reason, and in disregard of the . . . facts . . .." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if a rational basis for the agency's determination can be drawn from the administrative record, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34

NY2d at 231-232. Here, landlord raises two arguments alleging that the PAR order was an arbitrary and capricious ruling. The court finds that neither of them is persuasive.

First, landlord argues that "the HSTPA is not the applicable law under the circumstances and it is a violation of constitutional due process to retroactively apply the HSTPA to the within matter." *See* verified petition, ¶¶ 13-28. Landlord contends that "in issuing the [PAR] Order in accordance with the HSTPA, the [DHCR] Commissioner has re-regulated the subject apartment and mandated that the apartment remain subject to rent stabilization for an indefinite period of time." *Id.*, ¶ 18. Landlord particularly objects that the Court of Appeals recent decision in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020]) "held that it was a violation of constitutional due process to retroactively apply the HSTPA to a matter which related to conduct that occurred well before the June 14, 2019 enactment of the HSTPA." *Id.*, ¶ 17. Having itself reviewed the entirety of the *Regina Metropolitan* holding, the court finds that landlord has interpreted it erroneously, and that the DHCR Deputy Commissioner's interpretation of it was rational.

The relevant portions of the PAR order found as follows:

> "The Commissioner finds that the petitioner's contentions that the EA impermissibly re-regulates the subject apartment and applies HSTPA retroactively, is misplaced. The EA was not based upon any new findings or determinations by the rent agency. The EA merely informed the parties of the applicability of HSTPA and clarified three instances that may affect the order of deregulation, i.e. that the subject apartment remains rent regulated if the lease in effect at the time the February 9, 2018 order was issued expired on or after June 14, 2019; if the lease in effect on the day the Rent Administrator's deregulation order was issued expired before June 14, 2019, the housing accommodation is deregulated; and if a rent stabilized lease should have been in effect on the day the Rent Administrator's deregulation order was issued, the housing accommodation remains regulated. The EA was not a superseding order modifying or revoking the previously issued order and therefore no jurisdictional predicate was needed under the rent laws to issue it. The Commissioner also rejects the petitioner's argument that the agency used HSTPA to change the terms of a final, non-challengeable order. As stated above, the EA did not change the terms of the February 9, 2018 Order which conditioned deregulation on the expiration of a current lease.

* * *

> "The Commissioner rejects the petitioner's argument that *Matter of Regina* applies to this high rent/high income deregulation case. While the Court of Appeals disallowed the retroactive application of certain rent overcharge provisions contained in Part F of the HSTPA, it stated that:
>
> > "The question we address here is relatively narrow - we have no occasion to address the prospective application of any portion of the HSTPA, including Part F. We address the new legislation only to determine whether certain Part F amendments . . . must be applied retroactively . . . We conclude that the overcharge calculation amendments cannot be applied...to overcharges that occurred prior to their enactment . . ."

See verified petition, exhibit D. The Court of Appeals took great pains to limit its holding in *Regina Metropolitan* to the question of "whether certain Part F amendments [of the HSTPA] . . . must be applied retroactively." *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 363. However, the Court recognized that the repeal of high income deregulation was governed by the amendments set forth in Part D of the HSTPA. 35 NY3d at 362, 373. The Court also expressly limited its "retroactive effect" analysis to HSTPA Part F, and quite clearly stated that "we have no occasion to address the prospective application of any portion of the HSTPA," including Part D. *Id*., at 352, 363. In light of the Court's clear explanation, there is no basis for landlord's contention that the "retroactive effect" analysis set forth in *Regina Metropolitan* should apply to high income deregulation cases governed by HSTPA Part D. Therefore, the court concludes that it was rational for the DHCR Deputy Commissioner to reject landlord's "retroactive re-regulation" argument, and finds no merit in landlord's contention that the Deputy Commissioner acted arbitrarily and capriciously by so rejecting it.

Next, landlord argues that "the [explanatory addendum's] conclusion that the effective date of the deregulation coincides with the expiration of the lease in effect on the date of issuance of the [RA's] Order of Deregulation is not supported by the applicable provisions of the Rent Stabilization Law." *See* verified petition, ¶¶ 29-40. This argument particularly contends

that "[t]he portion of the Addenda tying the date of deregulation to the expiration date of the lease is ultra vires." *Id.*, ¶ 29. The relevant portion of the PAR order resolved this argument as follows:

> "The Commissioner rejects the petitioner's argument that 'the portion of the addenda tying the date of deregulation to the expiration date of the lease is ultra vires.' The February 9, 2018 order specifically conditioned deregulation upon 'the expiration of an existing lease.' In other words, the order did not say that the subject apartment was immediately deregulated. On June 14, 2019, HSTPA repealed the high rent/high income deregulation provisions under which the above order was issued. The EA merely explained how HSTPA applied to three specific scenarios that may have existed at the time the February 9, 2018 order was issued. Two such scenarios (an existing lease expiring after June 14, 2019 or no current lease in effect) would result in the apartment remaining regulated. Indeed, as of the effective date of HSTPA, the existence of either of the above two scenarios meant that the subject apartment was not deregulated and therefore is not encompassed by the phrase in HSTPA that apartments legally deregulated prior to June 14, 2019 shall remain deregulated.
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> "HSTPA specifically stated that 'if an apartment remains rent regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of high rent/high income deregulation.' Here, if the apartment remained rent regulated because the qualifying event for the deregulation (i.e. a current lease expiration) had not yet taken place as of June 14, 2019, it could not be deregulated thereafter. The Commissioner notes that the legislature drew its own bright line test of deregulation as to those orders at the RA level where the order was not yet effective. The contingency of deregulation on the expiration of a current lease was something that was already written into the Rent Stabilization Law and Code when the petitioner filed its luxury deregulation application and was something that the petitioner was well aware of."

See verified petition, exhibit D. Pursuant to CPLR 7803 (2), an agency decision that is made in excess of its statutory authority is ultra vires, infected by an error of law, and cannot stand. The first portion of this decision found that statutory analysis which the DHCR expressed in the explanatory addendum was in accord with the RSL provisions cited therein, and with the case law which interprets them. As a result, the court now also finds that the portion of the PAR order that upheld that analysis, and found that the DHCR had not acted in an "ultra vires" manner by applying it, was rationally based. As a result, the court concludes that the DHCR Deputy Commissioner was correct to reject landlord's "ultra vires" argument, and finds no merit in landlord's contention that he acted arbitrarily and capriciously in doing so.

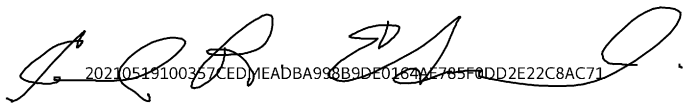
As a result, the court concludes that the August 21, 2020 PAR order had a rational basis, and consequently finds that so much of landlord's petition as challenged the PAR order as arbitrary and capricious lacks merit and should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR article 78, of petitioner West 79th LLC (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York State Division of Housing and Community Renewal shall serve a copy of this order along with notice of entry on all parties within ten (10) days.



5/19/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE