RSA

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MEMORANDUM IN OPPOSITION
S 2980C / A 6216B

The Rent Stabilization Association of New York City represents approximately 25,000 diverse owners and managers who collectively manage more than one million apartments in every neighborhood and community throughout New York City. We thank the Committee for giving us the opportunity to submit this memorandum in opposition to S2980C/A6216B, which alters rent regulation in the state by imposing more onerous restrictions on what owners can do with their rent regulated properties and which significantly changes the calculation of legal regulated rent in some instances; these proposed changes come at a time when owners are reeling from the economically catastrophic effects of the HSTPA, TSHA, CEEFPA, the ERAP statute, and the overall aftermath of the Covid-19 pandemic and its associated court shutdowns, moratoria, and delays.

S2980C enacts major shifts in the rent regulatory scheme by: (1) restricting the method of setting a new rent when two or more units are combined or when the physical dimensions of a rent stabilized unit are altered; (2) expands succession rights so that occupants may claim succession even when they, together with the tenant of record, have perpetrated a fraud by intentionally continuing to execute fraudulent lease renewals or paying the rent in the name of the tenant of record after that tenant has permanently vacated; (3) restricting the ability of owners to obtain an exemption for substantial rehabilitation, and requiring owners who already are exempt due to substantial rehabilitation to seek approval with DHCR within six months of the effective date of the statute, which may be denied pursuant to additional restrictions imposed by the bill that did not exist and/or apply at the time the exemption occurred by operation of statute; (4) redefines fraud for purposes of utilizing the default formula, in an attempt to reverse the holding in *Matter of Regina Metropolitan Co., LLC v. New York State Div. of Hous. and Community Renewal*, 35 NY3d 332 (2020) and in subsequent cases such as *Casey v. Whitehouse Estates, Inc.*, 2023 NY Slip Op 01351,which currently requires tenants to allege the existence of a fraudulent scheme to deregulate on the part of the landlord, and instead imposes a bright-line *per se* fraud rule by creating a legal presumption that fraud occurred which does not require the allegation or proof of the traditional elements of fraud; and, (5) the imposition of onerous late fees for failing to register rent stabilized apartments, accruing at $500 per apartment per month of lateness.

Addressing each part individually:

(1) With respect to setting a rent for newly created units, the bill specifically targets the last remaining method for rent regulated landlords to make improvements to their buildings and realize a return on their investment for such improvements. Moreover, particularly since buildings subject to rent regulation are in an older condition, the ability to combine studio or one-bedroom apartments to create larger apartments with more bedrooms that can accommodate families is one

that benefits the public generally. Foreclosing on this ability by drastically constraining the rent an owner may charge (and not even permitting owners to apply for an increase based on how much money they spend combining the units) wholly disincentivizes owners from undertaking this work and keeps the supply of larger apartments that can accommodate families artificially low. Finally, while it is clear that the bill is intended to relate to regulated apartments and the combination of regulated units with other units, due to the ambiguous drafting language here is room for this bill to be applied to combinations of free market units, whereby such units would be re-regulated by virtue of their combination; this would be a clear unconstitutional taking as it could impose a restriction on what an owner can do with apartments that have already exited the regulatory scheme pursuant to the rules that were in place at the time. Therefore, the bill's language must be cleaned up to guard against this unintended scenario.

(2) This bill would also relax the legal standard for succession to rent stabilized apartments by permitting succession in situations where the regulated tenant has for years, or perhaps decades, continued to execute lease renewals or pay rent in their name, while living elsewhere. In doing so, the Legislature is directly condoning the ability to bequeath rent regulated tenancies from tenants to would be-successors, regardless of whether the tenant and successor lived together in the unit for the prerequisite time period prior to the assertion of those rights. This would serve to keep regulated apartments off the market, which would instead pass from would-be successor to would-be successor, in perpetuity, in contravention of the purpose of the rent stabilization law which purports to provide affordable housing for New Yorkers and instead creates property rights for an arbitrary class of persons fortunate enough to find themselves in a rent stabilized apartment when this law went into effect.

(3) With respect to the changes made regarding the exemption for substantial rehabilitation and the new requirement that owners must apply to DHCR for this exemption, these changes are particularly egregious and problematic as the bill requires owners who have already claimed such exemption under the law as it has existed for decades, and which was triggered by operation of statute, to now apply for such approval retroactively within six months of the enactment of the law. This retroactive application is unconstitutional. It also serves to thwart investment by owners into buildings that are at least fifty years, and in most cases almost a century old, with the end result that the building remains regulated, but building system upgrades cannot be made as there is no financial incentive, or ability, on the part of the owner to undertake such work.

(4) The portion of the bill that would invalidate the Court of Appeals' ruling in *Regina* and its progeny in order to redefine the definition of fraud is clearly an onerous penalty on property owners who were rent stabilized and obtained a J51 tax abatement on their building, which potentially encompasses thousands of building owners in New York City. Rather than requiring a tenant to allege that the elements of fraud are met by a landlord who deregulated during the J51 tax abatement period, this bill would establish a *per se* fraud presumption, meaning that just by virtue of having received a J51 tax abatement and deregulating an apartment once the rent reached over the threshold at that time that permitted for luxury/high rent deregulation, an owner would be presumed guilty of fraud, which would result in a recalculation of the legal regulated rent under the default formula provided by the RSC; this usually results in rolling back the rent significantly, in some instances to the lowest legal regulated rent in the building, and imposing treble damage

liability for rent overcharge that can bankrupt a building owner. Until 2009, when the Court of Appeals issued its decision in *Roberts v. Tishman Speyer Props. LP*, 13 NY3d 270 (2009), the DHCR and courts permitted deregulation during the J-51 tax abatement period. However, as the Court of Appeals did not provide guidance as to how to calculate the legal regulated rents for apartments that had been deregulated under the law as it existed prior to the issuance of its decision in *Roberts*, the question of how to calculate the legal regulated rents for those apartments has never been well-settled; DHCR issued guidelines in 2016 directing landlords how to calculate the legal regulated rents, and in 2020 *Regina* issued a decision invalidating that 2016 guidance. There are landlords who, since *Roberts* was decided, have registered their legal regulated rents only to be told that their calculations were incorrect and that their incorrect calculations are an indicia of fraud (see, e.g., *Casey*). Now, this bill would impose a *per se* fraud presumption that if a landlord has failed to register the legal regulated rent for an apartment that was impermissibly deregulated during the J-51 period, such failure is automatically fraud, regardless if the elements of fraud (such as a material factual misrepresentation, scienter, reliance, and injury) are met, punishing these owners who, as a Supreme Court judge in Queens County has characterized, "have [been] made…[to] go running from a room ripping their hair out" as a result of "the vicissitudes and seemingly mysterious intricacies and requirements of DHCR…" *Gomes v. Vermyck LLC*, 2022 WL 3356278 at 3.

(5) The imposition, for the first time ever, of a monetary fee associated with the late filing of annual registrations, on rent regulated owners, who overwhelmingly are unsophisticated, individual property owners, especially one that is so onerous, is extremely alarming. These owners already struggle with the labyrinthine requirements imposed upon them by statute with respect to their properties. A fee of $500 per month per apartment that has been registered late would result in a $3,000 monthly fee for a small property owner of a six-unit building, an amount of money that would bankrupt such an owner within a year. In some instances, this late fee exceeds the legal regulated rent an owner may charge the tenant of a rent stabilized apartment. The notice requirements for DHCR to notify the owner are extremely lax and predestined for failure. In many instances DHCR owner records have not been updated in years, especially where the ownership of the building is in a trust or owned by two or more family members, a common occurrence among RSA members. Moreover, where proceedings in Housing Court, Supreme Court, or DHCR are pending for years and the issue of whether the registered rent is the correct rent cannot be determined during that time, it would be wholly unfair to penalize a property owner for legitimately not knowing what rent to register until such time as DHCR or a Court can make such a determination (for example, where there was a deregulation during the J-51 tax abatement period and, though the owner concedes the apartment should be re-regulated, is not aware of which method DHCR will utilize to set the legal regulated rent.) As DHCR's current practice prohibits owners from amending rent registrations as of right, forcing property owners to file registrations under the fear of a draconian late fee will result in rent histories that will be unreliable, a detriment to both owners and tenants of rent regulated housing.

Accordingly, the RSA opposes this bill.