

Assessment of Public Comments for MCI Schedule of Reasonable Costs

The Housing Stability and Tenant Protection Act of 2019 or “HSTPA” was enacted on June 14, 2019. Ch. 36 of the Laws of 2019. On June 25, 2019, amendments to HSTPA commonly referred to as the “Clean-up Legislation” were enacted. Part Q, Ch. 39 of the Laws of 2019. HSTPA and the Clean-up Legislation require changes to the Rent and Eviction Regulations, the New York City Rent and Eviction Regulations, the Emergency Tenant Protection Regulations, and the Rent Stabilization Code (hereinafter “the Regulations”). HSTPA, and in particular Section K of the Act, mandate that the Division of Housing and Community Renewal (“DHCR”) promulgate rules and regulations applicable to all rent regulated units that establish a schedule of reasonable costs for major capital improvements (“MCI”). The proposed rules and regulations surrounding the schedule of reasonable costs are the sole focus of this Assessment of Public Comments.

A Notice of Proposed Rule Making was published in the State Register on July 1, 2020. DHCR received both written comments and verbal comments presented at the September 9, 2020 public hearing regarding the proposed changes to the Regulations. Comments were from individual tenants, tenant advocacy organizations or representatives, owners, and owner advocacy organizations, public officials, and other interested members of the public.

Many comments were not related to the promulgation of the MCI Schedule of Reasonable Costs and are, therefore, not discussed in this Assessment.

A synopsis of comments that related to the proposed MCI Schedule of Reasonable Costs and DHCR’s responses is discussed below:

Issue #1: Categories and Price Per-Unit Established in Operational Bulletin

While regulations are being promulgated to establish the MCI Schedule of Reasonable Costs, the detailed itemization of categories, sub-categories, price/unit, and unit definition are embodied in an operational bulletin published to the agency website and otherwise publicly available.

Public comments suggested that the operational bulletin is a legally invalid vehicle for itemization of individual MCI costs and that the allowable cost of each of the numerous potential MCI items must be established and altered only by regulation. Concern was expressed that that the operational bulletin could be subject to change without public input.

DHCR’s Response:

The operational bulletin is designed in accordance with the Regulation to update annually to reflect reasonable costs and changes thereto. The regulation and the accompanying regulatory impact statement (RIS) establish that any annual update to the operational bulletin will be done by DHCR upon public notice and an opportunity to comment.

The operational bulletin is a legally valid method for establishing the reasonable cost schedule. The propriety of the mixture of regulatory standards as fixed principles and the embodiment of fact specific numbers in an operational bulletin has been previously upheld against various challenges in litigation as consistent with the State Administrative Procedure Act. See, [128](#)

Hester LLC v. DHCR, 146 A.D.3d 706 (2nd Dept. 2014), *appeal dismissed/leave to appeal denied*, 30 N.Y.2d 988 (2017); CarBarn Flats Residents Association v. DHCR, 27 A.D.3d 250 (1st Dept. 2006); Robinson v. DHCR, 2010 N.Y. Misc. Lexis 4143 (Sup. Ct. NY Co. 2010).

The RIS establishes that the present economic uncertainty make financial projections difficult. The regulatory process is not designed to adopt, change, and refine those factors to reflect accurate changes on a timely basis. The operational bulletin affords DHCR the ability to respond to market changes.

Issue #2: Transparency in Creation of Schedule

Comments suggested a lack of transparency on the part of DHCR in creating the Schedule. Commenters also suggested DHCR should have included not-for profit organizations in helping to create the Schedule. Additional comments suggested that DHCR published the Schedule without the opportunity for prior public review. Commentators' asked why DHCR chose a specific engineering firm to assist in creating the Schedule.

DHCR's Response:

HSTPA gave DHCR the authority and mandate to create the Reasonable Cost Schedule for MCIs. Additionally, the Clean-up Legislation directed the amendment and/or repeal of any rule or regulation necessary for the implementation of HSTPA, on and after June 14, 2019, to be made immediately and completed on or before June 14, 2020. The Clean-up Legislation further provided that in the absence of such rules and regulations, DHCR shall immediately commence and continue implementation of all provisions of HSTPA.

DHCR complied with the State Administrative Procedure Act and the Rent Stabilization Law requirements on public notice and comment and is analyzing and reacting to those comments as appropriate. All interested individuals and entities were provided the opportunity to provide input regarding the proposed regulation and proposed Schedule.

Prior to the creation and submission of its formal proposal DHCR met with both owner and tenant advocacy groups as indicated in the accompanying RIS and as authorized by SAPA.

DHCR also consulted with: DASNY, a state agency with an extensive background in New York State construction, and DHCR engineers who service New York Homes and Community Renewals (HCR) affordable housing programs. DHCR also reviewed a cost schedule prepared by a professional engineering firm that has done extensive work with CPC, a not-for-profit affordable housing lender. A record of the groups DHCR met with in person regarding the Regulations can be found here: <https://projectsunlight.ny.gov>.

DHCR also retained O&S Engineering through a procurement process. In selecting the private consultant, DHCR requested bids from engineers, architects, or any professional company that had specialized knowledge in construction in the New York State area to help assist in the creation of the Schedule. The request for bids was made in accordance with state procedures and was published on DHCR's website at hcr.ny.gov. DHCR received a bid from the subject firm, interviewed that firm and, in compliance with all rules and regulations, retained their assistance.

Issue #3: Alignment of Schedule of Reasonable Costs with the intent of HSPTA

Commenters suggested that the Schedule should be more in line with the intent of HSPTA. Some commenters' concerns implied that allowable MCI improvements should be limited based a perceived difference between market rate and affordable housing preservation standards.

DHCR's Response:

The Regulation and accompanying schedule conform both to the letter and intent of the HSTPA.

HSTPA provides that DHCR approve MCI costs which are reasonable, and actual and verifiable. The law does not allow for variants in reasonable costs based upon the income strata of the recipients that live in the units covered by the MCI.

The concern that the Regulation does not align with HSTPA may in part be prompted by the fact that this Regulatory proposal only addresses the reasonable cost schedule , as explained in the SAPA documents (<https://www.dos.ny.gov/info/register/2020/070120.pdf>), and not all HSTPA changes impacting MCIs.

DHCR will submit for public comment its full regulatory proposal for implementation of all provisions of HSTPA. In the interim, the various other provisions of HSTPA related to capital improvements have been and continue to be implemented on a case by case basis as part of each application and adjudication.

Issue #4: General and Specific Concerns Regarding the Schedule:

Many comments asserted errors and other issues with the proposed Schedule. Commentators suggested that:

- broadly, the costs reflected in the Schedule were excessive;
- the costs reflected in the Schedule could, in some circumstances, be insufficient or too low;
- greater detail or further breakdown of scheduled costs is needed;
- the Schedule did not account for cost variation based on building size, unit size and other factors;
- costs on the Schedule vary from the costs the commenters provided;
- areas outside of New York City should be separately scheduled from the costs for MCI's within New York City; and
- the Schedule should list every type of MCI and their rate of Internal Revenue Service ("IRS") depreciation.

In providing examples of errors or concerns with the Schedule commentators mentioned scheduled items including: (a) apartment doors, (b) apartment door locks, (c) apartment windows, (d) A/C brackets, (e) caulking, (f) bathroom GFI outlets, and (g) child guards.

DHCR's Response:

DHCR relied on expert opinion and professional guidance to create a cost schedule.

No preestablished schedule or array of schedules can fully account for the combination of factors (including building size, building location, building age, building design, variation in labor costs, material supply shortages, weather, logistical challenges, unique factual circumstances, etc.) that can lead to variations in reasonable cost. To address this DHCR is establishing in these regulations the alternative of an individualized process of review where circumstances warrant.

DHCR considered addressing legitimate cost variability using further subcategorization in the schedule. However, this proved impractical and the available data was insufficient to reasonably support any schedule. Instead, any owner seeking unique treatment due to its assertion that there should be a subcategory for its circumstances, has the particularized burden of establishing the reasonableness of its individualized costs and why the maximum ceilings should not apply to it. Conversely, an owner can always be asked for its proof, where appropriate, that the costs are reasonable, actual and verifiable regardless of the maximum ceiling contained in the Schedule.

The costs reflected on the Schedule include installations that are MCI eligible and such related costs that are necessary and required to complete the installation of the eligible MCI item. Maintenance costs or cosmetic costs that are not necessary for the eligible MCI item or costs unrelated to the eligible MCI item are not included in the Schedule. Not every item on the Schedule is considered an eligible MCI item in and of itself, some are for items considered necessary and related expenses to eligible MCI items. Only items that are either MCI eligible or necessary related expenses are included in the approved costs for an MCI rent increase.

The unit size is considered in the MCI calculation itself as the MCI rent increase per unit is based on the number of rooms in the unit.

Issue #5: Should Regulations be More Explicit as to the Acceptable Alternative Means to Establish a Waiver

The draft regulatory provisions address an alternative means for owners, in limited situations, to establish the need for a waiver of scheduled MCI costs. A comment suggested that DHCR should be more explicit as to the acceptable alternative means to establish a waiver related to existing (pre-HSTPA) MCI applications or MCI work. It was specifically requested that a certification by an expert should be accepted to support granting such a waiver.

DHCR Response

Each waiver request must be reviewed on a case by case basis, subject to notice to tenants and possible challenge. Given the broad array of factual circumstances that may give rise to significant variations in MCI costs, it would not be appropriate for DHCR to commit to a single methodology justify a waiver from the scheduled reasonable costs. DHCR emphasizes that this alternative means test is intended to apply to pre-HSTPA MCI applications and certain emergency situations. In these limited circumstances, an owner may have reasonably failed to comply with regulatory waiver standards because he/she was not on notice of those standards at the time the work was done or unable to comply due to the emergency nature of the work.

Issue #6: Are Certain Expenses or Items Not Previously Subject to MCI Rent Increases now MCI Eligible?

A comment queried whether the references in various documents to related expenses means that certain expenses not previously subject to MCI compensation may now be MCI eligible by virtue of these articulated DHCR standards. A similar comment suggested several items that do not meet the requirements of an MCI and/or that the costs included in the Schedule do not reflect policy outlined in DHCR's Fact Sheets.

DHCR Response

DHCR is not expanding MCI eligibility to items not previously MCI eligible. The term "related expenses" is used instead to incorporate attendant expenses previously allowed for MCI treatment and not otherwise precluded by HSTPA. Further, an item being listed on the Schedule does not mean it will categorically be eligible for an MCI rent increase.

Issue #7: General Assertions of Economic Inequity based on HSTPA's Changes to MCI Compensation Structure and Potential Impact on Housing Stock.

There were comments suggesting the general unfairness and economic impact surrounding HSTPA's changes would significantly limit an owners' ability to recover money spent on MCI work. Similar comments suggested the fundamental flaws of rent regulation. At least one comment noted that the application of the Schedule of Reasonable Costs to pending matters at the Rent Administrator's level and related to work commenced or financed in anticipation of the MCI rules remaining unchanged raises significant constitutional questions under the *Regina Metropolitan* case..

DHCR Response

Regarding constitutionality and the *Regina Metropolitan* decision, the Court in *Regina Metropolitan* drew a distinction between the retroactive creation of overcharge liability for past behavior, as contrasted with to the prospective application of rent increase formulas to applications like those at issue here. Given the past legislative and regulatory history at the time the MCI at issue work was done, owners did not have any reasonable expectation that law and rules governing MCI eligibility would remain constant and not subject to change.

Issue #8: Does Availability of Waivers in Limited Factual Circumstances Align with directives of HSTPA?

Commenters suggested that any waiver or variation attached to implementation of the MCI Schedule of Reasonable Costs is not aligned with HSPTA. A commentator suggested that owners could forego routine maintenance, allow their building to fall into serious disrepair, and then use the emergency waiver provisions to circumvent the Schedule of Reasonable Costs.

Others suggested that the DHCR should issue an opinion prior to the commencement of work on a request for waiver. Another commenter questioned when a waiver should be submitted for work related to an MCI installation but not on the schedule. Additional comments suggested that the Schedule should include an exhaustive list of MCIs, and therefore no waivers should be allowed for installations not found in the Schedule.

Additional clarification was requested on the waiver application process: whether such requests would be on notice to all tenants and if there would be an opportunity for tenants to be heard as part of the entire MCI application process.

DHCR's Response:

As noted in the RIS, waivers have been a traditional part of MCI processing where schedules are in use, such as with useful life, to create an individualized assessment where necessary.

DHCR has demonstrated the need to reserve the right and ability to make fact-based assessments in limited circumstances.

A requirement that owners obtain prior opinions (pre-work) from DHCR for waivers is not practical. By their very nature, such application and opinion would be based on the estimated cost of work, rather than cost upon completion. It could not include any unanticipated change orders which may be the basis for the waiver itself. The application for a waiver will be made as part of the MCI application process, and therefore available to the tenants. Tenants will be afforded an opportunity to be heard and to contest the waiver request. In the interests of clarity, the requirement is being added specifically to this section, although it is already generally guaranteed by the Rent Stabilization Code with respect to all applications.

For pending applications, the Regulations provide a limited period for an owner to make such waiver application. These will be on notice and will be subject to comment and objection.

An exhaustive list of eligible MCIs is not contemplated by the RSC nor by HSTPA. In addition to MCI eligible installations the law establishes statutory standards for such eligibility.

Issue #9: Should Issuance of MCI Rent-Increase Orders be Delayed Until there is a Finalized Schedule?

Comments suggested that issuance of MCI orders rent-increase orders be delayed until there is a finalized schedule: The schedule and procedure it was suggested by other comments are flawed so DHCR must start over. One commenter suggested to stall the issuance of MCI rent increases until a finalized schedule has been published.

DHCR's Response:

HSTPA allows for the issuance of MCI rent increases before the promulgation of the Regulations. As noted in the SAPA documents (<https://www.dos.ny.gov/info/register/2020/070120.pdf>), the adoption by emergency promulgation process allowed DHCR to be compliant with the enacted provisions of HSTPA while still providing affected parties a notice and comment period prior to the final resolution of the rule making process.

The Schedule will be the subject of annual review.

Issue # 10: MCI Installations Should Not Allow for Limitation of Services

Certain comments suggested that MCI installations are an end-run around of the requirement to provide services and the limitation on additional compensation for services that the owner is already under obligation to maintain.

DHCR's Response:

Owners need to apply with DHCR for modifications in services through a separate application process that adheres to the already established methods of DHCR. Additionally, tenants have the right and the ability to contest MCI applications asserting failure to exhaust useful life or failure to reasonably maintain. The assertion that MCI installations are an end-run around of the requirement to provide services is not a position that was created by HSTPA or the proposed regulations that are the subject of these comments.

Issue #11: Licensed professional costs

Commenters raised concerns with the costs to owners to certify costs and the need for licensed professionals and whether these costs should or would be reimbursed to the owners through an MCI rent increase.

DHCR's Response:

DHCR has previously provided guidance on non-construction costs under Policy Statement 2017-1. Incurring licensed professional costs to justify a waiver of the Schedule is not a necessary expense, and will not be reimbursed as part of an MCI process.

Issue #12: Application of Schedule in pending MCI applications before DHCR RA and on PAR

One commenter requested that the Schedule should be applied retroactively to all pending MCI applications as well as to appeals of prior MCI application decisions (also known as a "Petition for Administrative Review" or "PAR") filed against the Rent Administrator's decision relating to an MCI application. The commenter also wanted guidance on pending PAR applications as they relate to prior MCI application decisions.

DHCR's Response:

DHCR has already issued official guidance on the application of the HSTPA to MCI applications under Fact Sheet #24.

DHCR will be applying these standards to pending MCI applications at the Rent Administrator level. It will not be regularly applying the Schedule to pending PAR applications, as pending PAR applications typically address orders issued prior the enactment of the HSTPA and its effective date provisions with respect to MCIs. DHCR will apply these new post-HSTPA standards on PAR only where the facts and equities warrant it. Retroactive application should be used sparingly, in part because creating overcharge liability based on such retroactive application has been determined in certain contexts impermissible by courts in this state.

Generally, HSPTA prohibits the issuance of determinations based on HSTPA's new standards that prohibition is therefore not usually relevant to appeals where the determination was issued

prior to the HSTPA. The sole area of retroactivity with respect to previously approved orders is the limitation on the collectability of formerly approved 6% first line increases for prior approved MCI rent increases. Those MCI rent increases that were affected were those approved on or after June 16, 2012 and before June 16, 2019 and modified prospectively, only as to any renewal lease commencing on or after June 14, 2019.

Issue #13: Comments suggested that the Schedule includes matters which have never been or are no longer MCI eligible under the HSTPA.

Commentators suggested that DHCR included in the Schedule items that are no longer available for MCI rent increases based on various changes to the MCI definition in HSTPA, most specifically that the improvement be essential for preservation, energy, efficiency, functionality or infrastructure of the entire building and that no increase be approved for group work done in individual apartments that is otherwise not an improvement to the entire building.

DHCR Response:

DHCR eliminated building-wide kitchen and bathroom replacement from any consideration in creating its reasonable cost schedule. The rest of the more specific complaints fall within individualized factual assessment under these standards and may also be the subject of additional comment upon the proposal of additional MCI regulations.