



Inside
this Issue

Commercial Tenants- Bound by the Words of Their Agreement	2,3
Lead Paint: You've Sent the Notice, But Are You in Compliance?	3
Recent Transactions of Note	4
Co-ops and Condos Beware of Developers Next Door	4
BBWG News	5

Mayor Bloomberg Appoints BBWG Partner to NYC RGB

Mayor Michael R. Bloomberg has appointed BBWG partner, *Magda L. Cruz*, to the New York City Rent Guidelines Board as an Owner Member. Ms. Cruz will serve a two year term, succeeding Harold Lubell, Esq., who was an Owner Member for over twenty years. She will join Steven J. Schleider, MAI, of Metropolitan Valuation Services, Inc., in representing the real estate community on the RGB.



The RGB is comprised of nine members; two of which represent property owners, two of which represent tenants, and five of which represent the general public. The RGB determines the annual rent guidelines for roughly one million apartments and hotel units subject to the Rent Stabilization Law in New York City, and loft units subject to Article 7-C of the Multiple Dwelling Law.

Public hearings are conducted from late March through early June, with a final vote this year on June 22, 2007. The new rent guidelines will become effective on October 1, 2007.

Legal Development

Court Significantly Expands Rights of Tenants in Buildings Undergoing Condo Conversion

By: Aaron Shmulewitz

In *322 W. 57th Owner LLC v. Penhurst Products Inc.* (decided on March 19, 2007), Manhattan Housing Court Judge David B. Cohen ruled that unregulated free-market tenants who were in occupancy on the date a condo conversion offering plan is accepted for filing by the Attorney General's office cannot be evicted even if their leases have expired or have not been renewed.

The Manhattan Housing Court held that any person who is in occupancy on the offering plan's filing date is to be deemed a "non-purchasing tenant" for purposes of the law that protects such tenants in conversions, even if he is a free-market tenant, and even if eviction proceedings are already pending against him, so long as a warrant of eviction has not yet been issued against him by the filing date.

This decision appears to further extend the tenant protections afforded by a 1999 Brooklyn case (*Paikoff v. Harris*), which gave rights to tenants who rented sponsor-held apartments years after a conversion was completed. Significantly, the *Paikoff* ruling was not followed by the appeals court which controls Manhattan and Bronx properties. It is, thus, possible that the decision by Judge Cohen may not survive appellate scrutiny before this appeals court.

The new ruling is significant in several ways.

First, the Manhattan Housing Court held that tenant protections will turn on whether a person is in occupancy on

the date the offering plan is accepted for filing by the Attorney General's office, not the date that the plan is declared effective, which can be as much as a year later. As such, the Housing Court expanded significantly the universe of persons who may now claim such tenant protections.

Second, it held that a person who is in occupancy on the plan's filing date is entitled to all statutory rights, even if his lease has expired, and even if eviction proceedings are actively pending against him. In other words, under the ruling, any person who is in occupancy on the plan's filing date cannot be evicted simply because he doesn't buy his apartment, even if he has no lease (or his lease subsequently expires), even if such eviction proceedings were already pending against him on the plan's filing date.

Third, the case implies strongly that, in addition to being protected from eviction, such persons have the exclusive right for 90 days after the offering plan is accepted for filing to buy their apartments at any discounted insider price, just like rent-regulated tenants (again, even if they have no lease on that date, and even if eviction proceedings are already pending against them).

The Housing Court's decision will potentially have huge practical significance unless it is overturned on appeal.

Initially, it is likely that the Attorney General's office

(Continued on page 2)

Court Significantly Expands Rights . . .
(Continued from page 1)

will require that every pending condo (and co-op) conversion offering plan must be amended to disclose the Court's decision and its impact on all persons in occupancy on the plan's filing date. It is also likely that the Attorney General's office will take an active role in enforcing, on behalf of persons in occupancy, the rights recognized by the decision.

More importantly, the decision will enable many persons with no continued lease rights to remain in occupancy of their apartments, even if they don't purchase their apartments, with their new rentals to be determined based on comparable

market rentals. As such, the decision is very likely to spawn much litigation, particularly with regard to what constitutes comparable rentals.

Finally, the decision is likely to enable the persons in occupancy on the filing date of the plan to claim exclusive discounted insider purchase rights, thereby depriving sponsors of the maximum sale prices to which they thought they were entitled (and, at a minimum, creating delay and confusion). It is also conceivable that some persons in buildings already undergoing conversion may be able to assert claims against their conversion sponsors—retroactively—for failing to afford them such exclusive insider purchase rights when the offering plan was first filed.

In sum, the decision is bad news for conversion sponsors. Given the relatively large amounts at stake in the conversion of many Manhattan rental apartment buildings to co-op and condo ownership, the new decision is likely to prompt much litigation, and to cost conversion sponsors much revenue, added legal expenses, and delay.



Aaron Shmulewitz is a partner in the Firm's Transactional Department, and is Head of the Co-op/Condo Practice.

Litigation Update

Commercial Tenants — Bound by the Words of Their Agreement

By: Lewis A. Lindenberg

Three commercial tenants, unhappy with certain provisions of their leases, commenced an action in the State Supreme Court. They claimed that their landlord had misinterpreted the "electric cost" clause in their lease, and was charging them twice for electricity costs, which were being passed on to them as additional rent.

The leases entitled the landlord to recover, as additional rent, the cost of electricity actually used within each of the tenant's spaces. The leases also contained a second provision requiring the tenants to pay for electricity used in the building's "Common Areas," which covered the entire building. The dispute concerned whether the landlord was correct in including the tenants' consumption of electricity in their individual spaces, within the definition of "common area charges," such that the landlord could recover twice for the electricity used in the tenants' spaces. The tenants claimed that they should not be charged twice for their electrical consumption, and the "Common

Areas" definition did not include their individual spaces. The tenants claimed that the "Common Areas" definition should apply to the elevator, lobby and other portions of the building not directly leased by tenants. The dispute centered around their differing interpretation of the words in the "Common Areas" definition: "Landlord's total cost for electricity consumed at the Building."

The Court concluded that pursuant to the lease, "Common Areas" was broadly defined to include the landlord's total electricity cost consumed in the entire building, including non-public areas and in the premises leased by the tenants. Even though this construction provided the landlord with the right to charge the tenants twice for the electrical consumption in their individual spaces, the Court reiterated that when parties represented by counsel, negotiate and enter into a long-term commercial lease, those parties chart their own course and are bound by the words of their agreement.

The Court dismissed the tenants' equitable claims alleging that the landlord was "double billing." The Court held that the parties had specifically defined the requisite terms to mean what the parties intended. Reinforcing the point, the Court noted:

"Tenants do not explain why a Landlord and a Tenant may not agree that the Tenant shall pay two different electricity charges to the Landlord, where one charge reimburses the Landlord for the cost of the electricity consumed within the Tenant's premises, and the other charge is calculated pursuant to a formula that uses, as one of multiple inputs, the cost of all of the electricity consumed in the entire building."

In reaching this conclusion, the Court followed an important doctrine in commercial law. Sophisticated commercial parties are free to negotiate and reduce to writing any agreement they

(Continued on page 3)

Bound by the Words of their Agreement. . .
(Continued from page 2)

ultimately reach. Provided that the terms are clear and unequivocal, and not unlawful or against public policy, a court will not subsequently intercede to re-write the agreement. A court's role is simply to interpret it, as written. Parties are bound by the plain words of their agreement, even if they subsequently become unhappy with the deal they struck.

This case also illustrates that when a formula is to be used for calculating an additional rent charge to be passed on to the tenant, be it electricity, real estate taxes, union wage increases, etc., a dispute on calculating these charges can easily arise. In order to avoid uncertainty, disputes and litigation, it is advisable for the parties to review how the applicable provisions of the lease will actually operate before they sign the lease so that there are no costly misunderstandings later on.

Lewis A. Lindenberg is a partner in the Litigation Department specializing in the area of commercial lease disputes, and successfully represented the landlord in this case.



Administrative Update

Lead Paint: You've Sent the Notice, But Are You in Compliance?

By: Kara I. Rakowski and Vladimir Favilukis

Many multi-family buildings in New York City are subject to Local Law 1, also known as the New York City Childhood Lead Poisoning Prevention Act.

Local Law 1 applies if your building has three or more units and was constructed prior to 1960. The Law also applies to buildings with three or more units which were constructed between 1960 and 1978, and the owner has knowledge that the building contains lead-based paint.

A major component of the Law requires owners to inquire if a child under six years of age resides in the apartment (*the applicable age of a child was changed from under age seven to under age six, effective October 1, 2006*).

Additionally, the owner must provide the tenant with a notice (*in English and Spanish*) upon an initial leasing and any renewals thereon, advising the tenant of the owner's obligations with regard to lead-based paint, as well as a pamphlet published by the New York City Department of Health and Mental Hygiene. (*The owner is required to provide the notice and pamphlet even if occupancy has commenced without a written lease.*)

For buildings erected prior to 1960, owners must also send an annual

notice to all tenants between January 1 and January 16, inquiring whether a child under the age of six resides in the unit.

However, the owner's duty to investigate does not cease after serving the notice. Although the Law states that no tenant "shall refuse or unreasonably fail to provide accurate and truthful information regarding the residency of a child of applicable age [in the apartment]," the owner is not released from liability in the event that the tenant fails to provide such information. An owner who does not receive a response by February 15, must physically inspect the apartment to determine whether a child of applicable age resides in the unit.

If, between February 15 and March 1, the owner has employed such efforts but was unable to gain access to the apartment, the owner must then notify the DHMH that the tenant has denied access to the owner for the purposes of making an inspection.

In the event that a child under the age of six comes to reside in the apartment after the tenant has already replied in the negative to the owner's inquiry, the tenant has the responsibility to inform the owner of the change. If the tenant fails to do so, the owner is only absolved of presumptive liability

if there was no actual knowledge on the owner's part of the change in circumstances.

It is also worth noting, that any owner who violates the provisions set forth above, may be guilty of a misdemeanor punishable by a fine of up to \$500 or imprisonment, or both. In addition, any such violation may subject the owner to a civil penalty of up to \$1,000 per violation.

If you are an owner of a building subject to Local Law 1, you must ensure that all of your obligations have been met, both before and after providing the lead paint notice to the tenant. All forms, notices and pamphlets are available at BBWG.

Kara I. Rakowski is a partner, and Vladimir Favilukis is a legal assistant in the Firm's Administrative Department. Mr. Favilukis has recently passed the New York State Bar Exam and is awaiting admission to become an associate of the Firm.



Transactional Update

Co-ops and Condos Beware of Developers Next Door

By: Daniel T. Altman

In a rapidly expanding development environment in New York City, cooperative and condominium boards must know their rights with respect to construction projects taking place on neighboring lots.

Under the New York City Building Code, owners that are adjacent to development sites are obligated to provide access to their properties for certain construction-related activities. Developers may require access for the purpose, among things, to perform foundation underpinning, roof protection

to the condo or co-op, sidewalk protection and installation of seismic and crack monitoring to determine if the coop or condo's

foundation shifts or cracks during construction. Many cooperatives and condominiums do not know their rights with respect to a developer that approaches them requesting access to their property for construction-related purposes.

Our firm has counseled many cooperatives and condominiums in negotiating agreements with neighboring development projects. These agreements are typically called License, Indemnity and Protection Agreements ("LIPA's"). LIPA's require developers to abide by certain rules when performing construction on adjacent properties in exchange for the cooperative or condominium granting access and

cooperating with reasonable developer requests. They typically include provisions protecting the cooperative or condominium against liability and damages incurred on account of the developer's project, engineering safeguards, license fees, insurance requirements, timeframes, and enforcement procedures.

LIPA's are important tools in protecting cooperative and condominium interests in the current climate of booming development. The New York City Building Code requires building owners to provide

access to developers, but does not set forth a mechanism for the granting and supervision of such access. Cooperative boards of directors and condominium board of man-

agers are well-advised to exercise caution before granting an adjacent developer access to its property without having a LIPA in place.

Daniel T. Altman is a partner in the Firm's Transactional Department, and counsels many clients on LIPA's and other real estate agreements.



Many cooperatives and condominiums do not know their rights with respect to a developer that approaches them requesting access to their property for construction-related purposes.



Recent Transactions of Note

BBWG's Transactional Department highlights some of the significant deals which they have closed in the last month:

- ◆ *Craig Ingber* represented a large East Side cooperative in the negotiation of a 20-year lease with a major national apparel retailer to open its flagship store in Manhattan. The aggregate value of the lease is \$50 million.
- ◆ *Howard Wenig, Craig Ingber, Craig Price and David Esses* represented the seller of a medical office building in Manhattan in a \$14.6 million dollar transaction.
- ◆ *Howard Wenig and Craig Price* represented the purchaser of three mixed-use properties on Lexington Avenue as part of a section 1031 exchange transaction.
- ◆ *Howard Wenig and Craig Price* represented the seller in the sale of a townhouse in Manhattan that was the first part of a section 1031 exchange transaction.
- ◆ *Aaron Shmulewitz and Denise DeNicola* represented the successor sponsor of a condominium conversion in the sale of 25 units, with a value in excess of \$10 million.
- ◆ *Aaron Shmulewitz* represented a large midtown cooperative in the negotiation of a 15-year showroom lease with a furniture manufacturer, with an aggregate value of more than \$8 million.
- ◆ *Seth Liebenstein, with Daniel Altman and Edward Baer,* represented the owner of a commercial building on Ninth Avenue on the execution of a net lease valued at more than \$4 million.

The logo for BBWG NEWS features the letters 'BBWG' in a blue serif font and 'NEWS' in a red serif font. Above and below the text are two rows of four vertical grey bars of varying heights, resembling a stylized barcode or a decorative element.

BBWG NEWS



Sherwin Belkin, was quoted in *The New York Times* Real Estate “Q&A” column on March 18, 2007 regarding lease rights under High Rent / High Income Deregulation. Mr. Belkin explained that if an owner renews a lease while a luxury deregulation petition is pending, and attaches a notice to the renewal lease informing the tenant of the pending petition, the renewal lease may be terminated 60 days after an order of deregulation is issued by the New York State Division of Housing and Community Renewal.



Joseph Burden, was quoted in an article in the *Brooklyn Daily Eagle* (March 2007), concerning a rent strike in Williamsburg by tenants obstructing a development project. Mr. Burden commented on the tenants’ refusal to provide access to the owner, who seeks to make improvements and repairs.



Jeffrey L. Goldman, was quoted in an article in *The Brooklyn Paper* (March 2007), concerning a family who purchased a Prospect Heights property for their home, and face a costly litigation from rent regulated tenants who refuse to leave, notwithstanding the family’s entitlement to recover their property for personal use.



Aaron Shmulewitz, will be on a distinguished panel of real estate experts on May 16, 2007 discussing “Real Estate Closings in New York: From the Residential Home to the Multi-Unit Dwelling” for a continuing legal education seminar sponsored by Lorman Education Services, a major provider of professional development courses throughout the United States.

BELKIN BURDEN WENIG & GOLDMAN, LLP

www.bbwg.com

New York Office

**270 Madison Avenue
New York, NY 10016
(Tel) (212) 867-4466
(Fax) (212) 867-0709**

Connecticut Office

**125 Main Street
Westport, CT 06880
(Tel) (203) 227-1534
(Fax) (203) 227-6044**

PLEASE NOTE: This newsletter is intended for informational purposes only and should not be construed as providing legal advice. This newsletter provides only a brief summary of complex legal issues. The applicability of any or all of the issues described in this newsletter is dependent upon your particular facts and circumstances. Prior results do not guarantee a similar outcome. Accordingly, prior to attempting to utilize or implement any of the suggestions provided in this newsletter, you should consult with your attorney. This newsletter is considered "Attorney Advertising" under New York State court rules.



Belkin Burden Wenig & Goldman, LLP

270 Madison Avenue

New York, NY 10016

***Legal Update
April 2007***