



UPDATE

A Unique Owner's Remedy: A Peculiar Decision by DHCR

A little known, rarely used, but potentially invaluable section of the Rent and Eviction Regulations, governing rent controlled apartments in New York City, was the subject of an important victory in an Article 78 proceeding recently handled by our firm.

Section 2202.7 of the Regulations authorizes DHCR to grant an appropriate rent increase upon the finding of "unique or peculiar circumstances materially affecting the maximum rent . . . which [rent] is substantially lower than rents generally prevailing in the same area of substantially similar housing accommodation." Although the Section provides owners with a useful vehicle to increase below market rent controlled rents, the Regulation is devoid of standards or guidance. Most importantly, it does not define the pivotal phrase "unique or peculiar circumstances"—leaving it to owners to puzzle over when a "U&P" application can be filed with DHCR.

In *207 Realty Associates v. DHCR*, the New York Supreme Court granted the Owner's Article 78 petition, finding that DHCR's refusal to grant this Owner's U&P application "lacked a rational basis." The factors cited by Owner, and accepted by the court, as constituting unique and peculiar circumstances, included the inappropriate mismanagement by the prior Owner; the appointment of a 7A Administrator whose conduct contributed to keeping the rents depressed; the expulsion of the building from rent stabilization during prior ownership; and conflicting administrative orders by DHCR and its predecessor agencies as to the regulatory status of many of the building's apartments.

DHCR had cited other agency cases where U&P applications had been granted and asserted that these cases required that (a) tenant must agree to be bound by such an increase as a prerequisite to the application and (b) the Owner must exhaust all other remedies before it may seek a U&P increase. The Court disagreed and accepted BBW&G's reading of the earlier DHCR decisions that these were *not* prerequisites of a U&P application. Of course, BBW&G was well versed in the prior DHCR decisions, having successfully obtained rent increases for Owners in those prior U&P cases.

The Court held that these factors reflected unique and peculiar circumstances and remanded the case to DHCR to conduct a comparability study in order to ascertain whether the rent controlled rents were substantially lower than those of similar accommodations in the neighborhood, and to determine the concomitant rent adjustment to be ordered in order to bring the rents up to the neighborhood standard. (DHCR has filed a Notice of Appeal.)

Editor's Note: A U&P provision does exist for rent stabilized apartments. However, unlike the rent control provision, which can be used at any time, the rent stabilized provision only allows Owners to file a U&P application within 60 days of the first apartment in the building entering into coverage by the ETPA.

This article was written by Ori Shapiro who practices in the firm's Administrative Law and Litigation Departments. Mr. Shapiro, along with Kara Rakowski and Sherwin Belkin represented the Owner in this case.

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Special Points of Interest:

- Civil Court's Administrative Judge addresses WTC issues.
- Rent Demand Information.
- Loft Law Deadlines

September 11th: Vast Legal Ramifications

◆ *Effect Upon Transactions*

The World Trade Center disaster has spawned many legal issues which affect our daily lives. There is ample speculation and much has been written about anxious buyers wanting to back out of signed contracts in situations where buyers believe that the property they once coveted may now be less desirable or overpriced due to market conditions.

BBW&G has encountered several situations where buyers have attempted to obtain reductions in purchase prices in signed contracts of sale. It is likely that this issue will persist into the immediately foreseeable future while the contracts that were executed prior to September 11th wend their way through the closing, financing and board approval processes.

The answer as to how to deal with these types of situations varies depending upon whether the type of property involved is a commercial property, condomin-

ium unit, cooperative apartment, or single family home. Invariably, the answer is influenced by the parties' need to complete the transaction.

The first step for the lawyer involves review of the signed contract. Reviewing the contract will address the question of whether the purchaser negotiated a financing contingency in the contract. Believe it or not, there are situations where a buyer of residential property, who has already received a financing commitment, can receive a refund of its down payment and be excused from its default if it fails to close for good faith reasons. This does not mean that a reluctant purchaser can use a financing contingency provision to back out of a contract with impunity. However, it does mean that a purchaser who loses its job and its financing may be able to receive a refund of its down payment and be excused from its default.

The steps which subsequently follow involve a detailed analysis of the facts and circumstances in each case including the location of the property, a review of commitment letters, and a host of other facts particular to each transaction. Suffice to say, the first call from a buyer who is under contract requesting a reduction in the purchase price should be met with caution and used as an opportunity to gain information to assess the request. The next call should be to your attorney to explore all available options.

This article was written by Craig Ingber who practices in the firm's Transactions Department. Please call Mr. Ingber or other Transactions Partners, Howard Wenig, Daniel Altman and Robert Jacobs if you have any questions regarding leasing, sales, purchases or financing. In a related area of practice, for any issues regarding co-ops or condos please call Errol Brett, who heads that Department.

◆ *Effect Upon Residential Leases*

Since September 11th a legal debate has raged between attorneys representing owners and tenants as to their clients' respective rights and obligations. The Civil Court has now weighed in with its view via a publication entitled "*Owners and Tenants Affected by the World Trade Center Disaster*" (by Hon. Fern Fisher-Brandveen, Administrative Judge of the Civil Court of there City of New York). This 47 page document addresses a wide array of legal

issues. This article touches upon just a few of the questions addressed by Judge Brandveen:

Q. Can a residential Tenant living in the WTC area simply break a lease?

A. "[M]ost residential leases ... have clauses stating that if you move out before the lease expires, you will be responsible to pay the owner the monthly rent as it becomes due until the lease term ends. ... Other lease have clauses permitting tenant permit-

ting the tenant to leave before the term ends if the tenant gives the owner proper notice ... There may be valid reasons for the tenant to leave before the lease ends without penalty. However, generally speaking, emotional distress, inability to pay the rent, inconvenience, and loss of business [for commercial tenants] are not legally valid reasons."

Q: Does a lease terminate upon the death of a tenant?

(Cont. on p. 3)

◆ *Effect Upon Commercial Leases*

Post "9-11" leases, like the rest of the world, have changed. BBW&G has observed some prospective commercial tenants beginning to request "Terrorism" abatement clauses.

The typical (if such term can be used in such a new situation) proposed "Terrorism" clause seeks to have the rent abated in the event a tenant is unable to use or occupy due to acts of war, terror, or national emergency. In addition, such clauses provide for such abatement whether or not the building in question is actually damaged.

Owners can take various positions. Rejecting the clause wholesale can potentially result in the loss of a prospective tenant. Rather than an outright "No Way!", an Owner can insist that

the tenant procure business interruption insurance and be obligated to turn to the insurer in the first instance. The tenant may find the cost of such insurance to be prohibitive. On the other hand, accepting such clauses without modification or protection is overly generous and runs the risk of severe economic loss if a catastrophic situation does arise.

Another solution may be compromise. Some owners are willing to insert the provision, but are also insisting on (1) actual physical damage to the building before the clause can be invoked, or (2) requiring that the act of war or terrorism actually prevent use and occupancy of the space for a minimum number of days, such as thirty. Obviously, there is little precedent to draw upon in

dealing with such matters. Owners are cautioned to consult with an attorney before agreeing to any "Terrorism" abatement clause since the ramifications can be draconian and all alternatives need to be carefully explored and considered before signing on the dotted line.

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(Residential Leases: Cont. from p. 2)

A. No, "it becomes the personal property of the tenant's estate."

Q: What do I do if the tenant has died? Who can surrender the apartment? Who can remove personal possessions?

A: "[The Tenant's] estate is entitled to possession to the apartment... The estate of a deceased tenant is a 'necessary party' to [a legal] proceeding... In the absence of a recognized estate representative, the landlord must petition Surrogate's Court to have an administrator appointed."

Editor's Note: *Many Owners, recognizing the horror and familial trauma suffered by this situation, have tried to work with the victim's families in a less formal manner. For example, because of the delays in the issuance of death certificates and*

estate representation, BBW&G has fashioned documents which allow a family to surrender an apartment, be relieved of the leasehold liability and remove the possessions upon appropriate written representations, assurances and other protections being given to the Owner.

Q. Does a roommate have the right to remain in occupancy in the event of the tenant's death?

A. "Roommates ... are not entitled to a possessory interest in the apartment unless they can demonstrate [succession rights]... If a roommate does not have succession rights or does not live in the type of housing accommodation which recognizes 'succession' rights, and has lived there for more than 30 days, an owner or the estate of the tenant must commence an eviction proceeding

to reclaim possession of the apartment."

Editor's Note: *The above is only a synopsis of certain issues and excerpts from the Judge's text. A full understanding of the complex issues and myriad and subtle shades of legal answers requires a review of the full text of this document.*

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What Do I Do When The Rent is Due?

Many clients, particularly those new to BBW&G, ask “what information do I need to provide to BBW&G to start a non-payment proceeding?” Below is a form that you can use to give us the requisite information so that we can prepare and serve a rent demand; the predicate for bringing a non-payment proceeding.

TO: Martin Meltzer, Esq.
 Belkin Burden Wenig & Goldman, LLP
 Fax: 212-297-1859 Tel: (212) 867-4466;
 E-mail: mmeltzer@bbwg.com

OWNER’S NAME: _____

TENANT(S): _____

STATUS (check one): Commercial Residential

(If Residential, check one) Rent Stabilized Rent Controlled Exempt

ADDRESS: _____ APT. NO. _____

<u>MONTH</u>	<u>AMOUNT OWED</u>
_____	\$ _____
_____	\$ _____
_____	\$ _____
_____	\$ _____
TOTAL DUE:	\$ _____

ADDITIONAL ADDRESS FOR SERVICE: _____

THIS FORM PREPARED BY: _____

MDR#: _____

Managing Agent: _____

Managing Agent Address: _____

Managing Agent Telephone #:(____) _____

Remember to send us a copy of the Tenant’s initial lease and most recent renewal lease. If Tenant is Commercial and there are additional rent charges owed, provide a breakdown of the additional rent.

Please fax the completed form, along with the requisite documents to Martin Meltzer; BBW&G’s partner in charge of our Non-Payment Department. Also, any questions that you have regarding non-payments can be directed to Marty as well.



The Loft Law: A Series of Dilemmas and Deadlines

Article 7-C of the Multiple Dwelling Law (the "Loft Law") was enacted in 1982 to regulate Interim Multiple Dwellings ("IMD's") also known as Loft Buildings. The statute defines the term IMD, sets forth the conditions which must be met to be a residential occupant entitled to Loft Law coverage, and enumerates deadlines for "legalizing" the IMD for residential use.

The Loft Law has been amended on four occasions. Each time the Owner's legalization deadlines have been extended. In June 1999, the Loft Law was amended to provide that an Owner must file an alteration application by September 15, 1999, to complete an Article 7-B fire and safety compliance by March 1, 2001 or within 12 months after obtaining a Building Permit, whichever is later, and take all reasonable and necessary actions to complete an Article 7-B fire and safety compliance by March 1, 2001 or within 12 months after obtaining a Building Permit, whichever is later, and take all reasonable and necessary action to obtain a Certificate of Occupancy by March 31, 2001 or one month after completing the Article 7-B fire and safety

compliance, whichever is later.

This legislation expired on March 31, 2001. A "stop gap" measure was enacted extending the Loft Law through June 30, 2001 and with it the various deadlines. Since June 2001 the legislature has enacted three "stop gap" measures. The last extension was effective in September 2001 and extended the Loft Law through October 15, 2001. The deadlines were also extended, such that Article 7-B compliance was required by September 15, 2001 or within one month after obtaining a Building Permit whichever was later, and the CofO was required by October 15, 2001 or within one month after completing Article 7-B fire and safety standards work.

The Loft Law was recently amended by more than a "stop gap" measure, effective October 29, 2001 and extended through March 31, 2002. The legalization deadlines were also extended such that an Owner must take all reasonable and necessary action to achieve Article 7-B fire and safety compliance by March 1, 2002 or within twelve months of obtaining a Building Permit whichever is later and take all reasonable and necessary action

to obtain a CofO as a Class A multiple dwelling for the residential portions of the building by March 31, 2002.

The significance of an Owner remaining in compliance with the Loft Law is that an Owner who is "out of compliance" (1) may not be entitled to collect rent; and (2) can be subjected to Loft Board, proceedings initiated by tenants or Board, seeking a finding of noncompliance and fines.

An Owner may remain in compliance by seeking extensions from the Loft Board, provided the Owner can show it was unable to meet the deadline for reasons beyond its control. Those Owners who have already filed extension applications anticipating being unable to meet the 10/01 deadlines, will likely find those applications dismissed as moot, since the time as already been extended by the latest legislation.

This article was written by Mary Donovan who practices in the firm's Loft Law Department. For more information on the Loft Law, the filing of extensions and/or the need for filing any retroactive extensions please contact Ms. Donovan, or partners Joseph Burden or Robert Jacobs.

BBW&G NEWS

"MAY I QUOTE YOU?"

The continuing ripple effects of the September 11th disaster remained a focus of the media this past month. **Edward Baer** appeared on both WABC and WNBC regarding the efforts of Rockrose Development to address the concerns of its tenants at Battery Park City. **Joseph Burden** appeared on NY-1 discussing various legal issues confronting the owners and tenants of buildings located in lower Manhattan. **Sherwin Belkin** was quoted in the *San Diego Union-Tribune* regarding the rights of tenants residing in lower Manhattan to cancel their leases.

Craig Ingber was quoted in the *Commercial Lease Law Insider* discussing the advantages of having a prospective basement space user sign a licensee agreement, rather than a lease. **BBW&G** was cited in *Town & Village* as having represented the National Arts Club in the clarification of its regulatory status as exempt from Rent Stabilization.