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Transactional Department

Effects of the Economic Downturn on Co-op and Condo Boards

By: Howard Wenig

As the financial markets continue to deteriorate, an unfortunate by-product is likely to be an increase in mortgage defaults as well as defaults in payments of condominium common charges and co-op maintenance fees.

When faced with such defaults it is imperative for boards to be vigilant in order to protect their interests. Fortunately, both condo and co-op boards have effective tools to deal with unit owner and shareholder defaults.

Condo boards have the ability to file a lien against the owner's unit which may be foreclosed just like a mortgage.

Co-op boards, while unable to file a lien, have the ability to conduct Uniform Commercial Code ("UCC") sales of the shareholder's unit without resort to lengthy

court proceedings.

BBWG's Foreclosure Division has extensive experience in dealing effectively and efficiently with both co-op and condo owner defaults. BBWG is able to advise and counsel both co-op and condo boards in the most effective means to protect their interests in the event they are faced with owner defaults.



Howard Wenig is BBWG's Managing Partner practicing in the Transactional Department.

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License Agreements Gain Acceptance in Real Estate Development in Manhattan

By: Robert Jacobs

The License, Indemnity and Protection Agreement—the so-called LIPA—which was introduced into the New York real estate development scene about two years ago by lawyers at BBWG, has grown in acceptance and use to the point where such agreements have begun to play a major role in dealings between adjoining properties where one of the properties is undergoing substantial development.

Initially, developers were resisting entering into such agreements because they were perceived as overly protective of the property adjoining construction. However, when introduced properly to the benefits of the agreement, developers have come to understand that the advantages of having such agreements in place outweigh the obligations

imposed by such agreements

A substantial portion of development projects in Manhattan is on sites adjoining older rubble foundation buildings. As a result, it is not uncommon, in the course of excavation, foundation work or underpinning, that the adjoining building shifts and sustains damage. Without a LIPA agreement, the adjoining property is forced to make a claim with its insurance carrier and apply to the Department of Building for a stop work order or proceed in court. This results in something that is the bane of every developer's existence – DELAY. On the other hand, with a LIPA, the property owners have an agreed upon procedure to deal with building damage that does not require property owners to go to

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court or apply for a stop work order to be protected. In fact, the LIPA provides for prior review of soil tests as well as excavation, foundation and underpinning plans by the engineer for the adjoining property. Thus, there is a better chance that the ultimate plans and course of construction will prevent damage to the adjoining building and avoid delay to the developer.

While LIPA's cannot prevent

damage to properties adjoining construction, they decrease its likelihood because more professionals are involved in reviewing plans from the outset. Moreover, in the event damage does occur, they allow projects to continue while the damage is addressed within the confines of the procedures set forth in the LIPA. As a result, the adjoining buildings are better protected while construction delay is minimized – a win-win situation for both property owners.

*Robert Jacobs is a partner in the Transactional Department at BBWG. For more information on the sale or purchase of development rights, please contact Mr. Jacobs.*



## Litigation Department

### Unreasonably Withholding Consent to Commercial Lease Assignments

*By: Matthew S. Brett*

Most commercial leases contain a clause, in either the printed form or rider, which requires that the tenant obtain the “prior written consent of the landlord” for any assignment. However, tenants often negotiate the addition: “such consent shall not be unreasonably withheld.” Tenants may also include a remedy in the event that the landlord unreasonably withholds consent (for example, a cancellation of lease, or an action for specific performance to compel the landlord to consent).

But what happens if the lease requires written consent and delineates a remedy for the “unreasonable” withholding of consents, but does not indicate whether or not the landlord is permitted to unreasonably withhold consent? Can the landlord unreasonably withhold consent? Or does a court have the authority to read into the lease a “reasonableness” standard?

The answer, as we recently

learned in a case handled by BBWG, is somewhat surprising: if the lease is silent as to whether the landlord can unreasonably withhold consent, but provides a remedy for such unreasonable behavior, a landlord has the option of refusing to consent to the assignment for any or no reason.

The case we handled involved a lease that required the prior written consent from the landlord for an assignment. The lease further provided that if the landlord unreasonably withholds consent, the tenant may cancel the lease upon notice and not be responsible for the liquidated damages that the tenant would normally be responsible for in the event the lease was prematurely terminated. The lease, however, did not contain the provision: “such consent shall not unreasonably be withheld.”

The landlord rejected the assignment. The tenant claimed that the rejection was unreasonable and sought to compel the landlord to

consent. The tenant argued that since the lease mentioned a remedy for unreasonable withholding of consent, the court should infer that the landlord must act reasonably. To that extent, the tenant argued, the remedy of cancellation of the lease is not the tenant's exclusive remedy under the lease.

The Supreme Court, New York County disagreed with the tenant and determined that based upon decades-old and mostly forgotten case law that we unearthed—specifically construing leases with and without “reasonableness” criteria – a court cannot simply read into a lease, provisions that should have been negotiated and put into the lease explicitly. Very simply, the Court concluded that if the lease does not explicitly prohibit unreasonable behavior, the landlord can reject an assignment for any reason, or no reason at all.

Nonetheless, it should be noted that courts are generally loath to

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prevent assignments, as they often force lease defaults. Moreover, parties do have a basic obligation to act in good faith. Keeping this in mind, the best course of action is to ensure that when rejecting a

commercial lease assignment, the reasons for the rejection should be well documented and made in good faith; notwithstanding the possible license to act as the landlord deems necessary.

*Matthew S. Brett is a partner in the Litigation Department specializing in residential and commercial lease*

*disputes, and successfully represented the landlord in this case.*



## Grandson Can't Reside There Alone, So Either Remove Him, Grandmother, or Move in With Him

*By: Robert T. Holland and Sophie Lambrou*

One of the defining features of being a proprietary lessee and shareholder in a cooperative apartment building is the ability to dictate, to some degree, how other apartments in the building are used and occupied. Unauthorized occupants and subtenants can diminish the congenial nature of a residential co-op building and give rise to security concerns, cause boards and managing agents to devote time and attention to addressing unauthorized occupancies, and can create issues when boards seek to refinance loans or obtain new financing.

Especially difficult to deal with are proprietary lessees who have sublet their apartments or had unauthorized occupants in the past, and who believe that they are free to continue to do so with impunity. Recently, in a proceeding where BBWG represented the cooperative board, a proprietary lessee with a decades-long history of unauthorized occupants was ordered to either remove the latest unauthorized occupant (her grandson) from her cooperative apartment, or to move into the apartment and reside there with him.

The central issue in the proceeding was whether the proprietary lease in question required the proprietary lessee to co-occupy the apartment

with her family member, or whether family members were permitted occupants, regardless of whether or not the proprietary lessee was in occupancy.

The proprietary lease in question contained a standard provision which stated, in relevant part:

*The Lessee shall not, without the written consent of the Lessor, occupy or use the apartment. . . for any purpose other than as a private dwelling apartment for the Lessee and the family of the Lessee.*

The proprietary lessee asserted that she had never resided in the apartment since leasing it in 1968. Over the years, she had permitted various family members to reside in the apartment and she claimed that she maintained the apartment so it would be available for her grandchildren to use. She also claimed that representations had been made to her when she purchased the apartment that family members were able to use it, and that the applicable provision of the proprietary lease should be read to permit its use as a "private family dwelling" for either herself *or* her family members.

Occupancy provisions in proprietary leases usually limit occu-

pancy to lessees *and* others, such as family members, domestic employees, *etc.*, or permit occupancy by lessees *or* others. The exact language of a proprietary lease's occupancy provision will determine whether someone in occupancy of a proprietary lessee's apartment without the cooperative corporation's consent constitutes a breach of the proprietary lease or not.

In the proceeding in which BBWG represented the cooperative board, the Housing Court judge denied the proprietary lessee's motion for summary judgment and awarded judgment in favor of the board. The judge rejected the proprietary lessee's claim that her grandson, as a family member, was permitted to reside in the apartment even if she never resided there.

The judge held that the specific language in a proprietary lease which permits occupancy by the lessee *and* family, as opposed to the lessee *or* others, means just what it says: the lessee's family member can only occupy the apartment if that family member is residing in the apartment "along with" or "together with" with the lessee.

The judge also held that although the cooperative corporation had not objected (over a span of

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nearly four decades) to other family members' unauthorized occupancies, it had not waived its right to object to the most recent unauthorized occupant, the proprietary lessee's grandson. The judge referenced the broad "no-waiver" provision of the proprietary lease, the fact that the grandson's recent entry into occupancy constituted a new default under the proprietary lease, and the fact that the cooperative corporation had put the proprietary lessee on written notice before the grandson entered into occupancy that if she permitted him to do so without complying with her obligations under the proprietary lease, that a default would be declared.

Appellate case law which governs in Manhattan and the Bronx

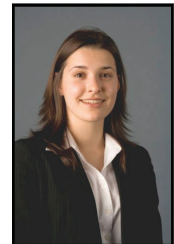
holds that occupancy provisions which use the word "and" in proprietary leases require contemporaneous co-occupancy by the proprietary lessee and any occupant.

However, one Housing Court judge in Queens County embraced a very different interpretation of such a lease provision, holding that the use of the coordinating conjunction "and" in describing who can reside in a cooperative apartment does not necessarily denote that the individuals joined by the word "and" must co-reside in the apartment. However, the appellate courts which govern in Queens County (as well as in Kings, Nassau, Suffolk, Richmond and Westchester Counties) have not ruled on this issue.

Regardless of where your cooperative corporation is located, if you have problems with unauthorized subtenants or occupants, the first step

should be to determine the identity of the unauthorized occupant, and then check the occupancy provision of the governing proprietary lease. A small, seemingly insignificant word the proprietary lease uses, either "and" or "or", may dictate whether a lease default exists.

*Any questions regarding use and occupancy of cooperative apartments should be directed to Aaron Shumulewitz of BBWG's Co-op/Condo Practice, or to Robert T. Holland and Sophie Lambrou of BBWG's Litigation Department.*



## Administrative Department

### Deregulate Your Rent Regulated Apartments through High Income High Rent Deregulation in 2008

*By: Joshua G. Losardo*

Tenants whose rent regulated apartments have a legal or maximum monthly rent of \$2,000 or more may be petitioned for High Income Rent Deregulation ("Luxury Deregulation") every year. Luxury Deregulation is an administrative procedure resulting in the deregulation of a rent regulated apartment if a tenant's **household** (*i.e.*, the income of all persons occupying an apartment as a primary residence on other than a temporary basis), income exceeded \$175,000 in the two years preceding the date a Petition for High Income Rent Deregulation is filed with DHCR. In 2008, a tenant's household's 2006 and 2007 income is considered.

BBW&G recommends that own-

ers file for Luxury Deregulation against all rent regulated apartments (both rent stabilized **and** rent controlled), if the apartment's legal or maximum rent is \$2,000 or more. When reviewing your rent rolls, also consider those apartments which will reach the \$2,000 monthly rent level for the first time on or before May 1, 2008. (It does not matter if a tenant is paying a preferential rent of less than \$2,000, as long as the apartment's legal rent is \$2,000 or more on or before May 1<sup>st</sup>. An owner may also combine the legal rent of different apartments rented by the same family in order to reach the \$2,000 threshold.)

Owners who have previously filed Luxury Deregulation proceed-

ings should review whether the New York State Division of Housing and Community Renewal ("DHCR"), has already determined if a tenant's household's 2006 income met the \$175,000 level. If DHCR has already determined that a tenant's household's 2006 income was below \$175,000, calendar to file for Luxury Deregulation against this tenant again in 2009.

Timing is important when preparing Luxury Deregulation petitions.

On or before May 1, 2008, tenants with legal or maximum rents of \$2,000 or more, must be served with an Income Certification Form ("ICF"). The ICF requires tenants to answer whether their household's

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nual income (*defined by the Rent Stabilization Code as the federal adjusted gross income as reported on a N.Y.S. income tax return*), exceeded \$175,000 in 2006 and 2007. The ICF also requests that the tenants identify all persons occupying their apartment.

On or before June 30, 2008, owners must file a "Petition by Owner for High Income Rent Deregulation" with DHCR for each tenant the owner seeks to deregulate. The Petition must be filed with two copies of the ICF, as well as proof that the ICF was properly served upon the tenant.

The owner's High Income Rent Deregulation Petition requests that DHCR do one of the following:

- ◆ Issue an Order deregulating the subject apartment based upon a tenant's admission in the ICF that the total annual household income exceeded \$175,000; or
- ◆ Request that DHCR verify the tenant's answer in the ICF because the owner contests it; or
- ◆ Request that the DHCR verify the tenant's household income because the tenant failed to properly answer the ICF.

After filing a petition, DHCR, with the cooperation of the New York State Department of Taxation and Finance, will issue an Order of Deregulation if it is determined that an apartment's household's annual income was \$175,000 or more in both 2006 and 2007, thereby removing the apartment from rent regulation.

Orders of Deregulation may also be issued based upon a tenant's failure to answer a Luxury Deregulation petition.

Generally, the entire process takes about one year from filing the petition to receiving an Order from DHCR.

*This article was written by Joshua G. Losardo, a partner in BBW&G's Administrative and Bankruptcy Departments. For more information about Luxury Deregulation, please contact Mr. Losardo.*



## BBWG NEWS

**Sherwin Belkin** answered questions in the December 30, 2007 and February 3, 2008 Real Estate Q&A section of The New York Times. Mr. Belkin addressed questions concerning the tax years considered in luxury deregulation petitions and the length of time for rent stabilized renewal lease terms.

An article by **Jeffrey L. Goldman**, on the right of co-op shareholders to not be bound by the acts or omissions of co-op employees and contractors, was reprinted in December 2007/January 2008 edition of the New York Association of Realty Managers ("NYARM") Honors magazine.

**Magda L. Cruz** was quoted in the January 2008 CHIP (Community Housing Improvement Program) New York Housing Journal regarding recent legal developments affecting owners receiving J-51 tax incentives. The article discusses a ruling by the Supreme Court in Brooklyn, which will be reviewed by the Appellate Division this year, limiting the rights of owners to refuse to accept Section 8 rent subsidies from existing rent stabilized tenants. Ms. Cruz will be arguing this appeal.

**Aaron Shmulewitz** was quoted in the December 14, 2007 edition of the New York Sun. Mr. Shmulewitz commented approvingly on a legislative proposal initiated by State Attorney General Cuomo to increase staffing in the Real Estate Financing Bureau.

**Craig Ingber** moderated a CLE seminar given by Lorman on Basic Commercial Leasing on Wednesday, January 30, 2008 at the Tudor Hotel.

**Edward Baer** was elected to the position of Secretary of the Real Property Law Section of the New York State Bar Association. This election puts Mr. Baer in position to be Chair of the Section in 2011.

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