



Editors
Magda L. Cruz
Aaron Shmulewitz
Edward Baer
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Special points of Interest:

- New BBWG Partners Announced
How to handle issues involving elderly or mentally impaired tenants and unit owners.
It's High Rent Deregulation time again.
Family member succession claims to rent regulated apartments: How to oppose them.

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From the Desk of Our Managing Partner

As managing partner of BBWG, I thought this first issue of our 2007 Update would be a good opportunity to comment upon the events of the past year and what we at BBWG look forward to in 2007.

As you may have noticed, the Update has been reworked and redesigned to reflect our new logo and to make it more reader-friendly and informative. At BBWG, we strive to continue to improve our methods of communication with our clients and view the Update as an important and useful means of keeping our clients abreast of the latest developments in our areas of practice.

In 2006, a significant change that many of our clients saw was the growth and depth of our transaction real estate group. Recently, our transaction group has represented buyers and sellers of real estate in transactions exceeding the \$100 million dollar threshold. With the addition of Aaron Shmulewitz as head of the Co-op/Condo Department, our firm now represents more than 300 co-op/condo boards throughout New York City.

At BBWG, we believe that our expertise in rent regulation is an invaluable resource to our clients in buying and selling residential and commercial real estate. For example, when representing buyers of development sites, clients are able to draw upon our expertise in determining the likelihood of prevailing before the NYS Division of Housing and Community Renewal in demolition applications. When representing buyers of multi-family housing, our clients are able to draw upon our litigation expertise in determining the likelihood of success in proceedings against tenants that may or may not have the right to continued occupancy. Similarly, our clients can draw upon expertise in determining the legality of rents of regulated tenants prior to purchasing, rather than being surprised after the closing.

By drawing upon our litigation and administrative expertise, our clients are frequently in a better position to assess the value of potential properties, either prior to the execution of the contract of sale or before the expiration of due diligence. With the expansion of our transaction group, we assist our clients in making better informed decisions to buy and sell their properties. With the talents of our experienced administrative law department, we increasingly see our clients taking advantage of successful proceedings before DHCR in order to raise rent rolls, rehabilitate or demolish existing structures, and build new housing.

Another significant and positive change is the growth of our litigation department. As our clients continue to show confidence in our firm, we have met this confidence by adding new professionals in our continued attempt to service our clients in all New York state and federal courts, and be responsive to their needs. We are especially encouraged by the confidence shown in BBWG by our new clients, many of whom have purchased properties from owners we previously represented and have agreed to retain BBWG as their new counsel.

As BBWG celebrates its 18th anniversary, we continue to pride ourselves on servicing our clients' needs in the most cost efficient and effective manner. We look forward to continued success and wish the same to all of our clients.

Handwritten signature of Howard Wenig

The Nuts and Bolts of a Succession Claim

By: Jeffrey L. Goldman and Brian Epstein

Property owners expect that when a tenant dies or moves away, the apartment will once again become available for re-rental, sale or the owner's personal use. However, in the world of rent regulated apartments, such an expectation is often frustrated by family members, or persons claiming to be *like* family members, demanding to "step into the shoes" of the former tenant of record. Such demands are known as succession claims.

A person claiming succession has the burden to prove that he or she meets all the legal requirements imposed by the rent laws. This means that the claimant must overcome the presumption that the owner is entitled to recover possession of the apartment when the tenant has permanently departed. In order to do that, the claimant must establish all of the following prerequisites:

- (1) That the claimant is a family member,
- (2) The date that the tenant permanently vacated the apartment;
- (3) That both, the claimant and the tenant, lived together in the apartment as their primary residence for two years immediately prior to the permanent departure by the tenant. This two year lookback is reduced to one year if the claimant is a senior citizen (62 years old or older) or disabled.

A traditional "family member" is defined by the Rent Regulation Reform Act of 1997 as husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother,

brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant of record. Persons falling outside that group may also be entitled to succession, as a "non-traditional family member" if that person can establish financial and emotional interdependence and commitment with the tenant of record for an appropriate length of time.

Some of the factors that a court or DHCR will examine in determining whether a non-traditional family member meets the threshold for succession include, but are not limited to, evidence of the (a) longevity of the relationship, (b) sharing of, or relying upon, each other for payment of household or family expenses, (c) intermingling of finances, (d) engaging in family functions and social and recreational activities, (e) formalizing of legal obligations, (f) holding themselves out as family members, members of the community, or society in general, through their words or actions; (g) caring for each other's extended family members, and/or relying upon each other for daily family services, and (h) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally committed relationship.

Whether the claimant is a traditional or non-traditional family member, the claimant must also prove that he or she lived with the tenant in the regulated apartment

as their primary residence. A tenant who has not maintained the apartment as a primary residence immediately prior to the tenant's permanent vacatur will preclude a claim of succession. Whether a tenant "permanently vacated" is a fact-specific determination that often becomes a major issue in a succession case.

Usually, the criteria necessary to sustain a succession claim will be fleshed out during pre-trial discovery proceedings. Document production and depositions are critical in determining whether there was a "permanent vacatur" and whether the "family member" and tenant co-occupied the apartment as a primary residence. In deciding the succession issue, a court (and DHCR) will look to the totality of the circumstances supporting the purported succession claim.

The key to successfully defend such claims is to thoroughly examine the veracity and relevancy of the claimant's evidence, and insist that the claimant establish all of the numerous statutory factors.

Jeffrey L. Goldman is a partner and Brian Epstein is an associate in the firm's Litigation Department.



Jeffrey L. Goldman



Brian Epstein

Dealing With Elderly and Mentally Disabled Occupants

By: Martin Meltzer and Jordi Fernandez

Whether a building is occupied by rental tenants or cooperative or condominium unit owners, a common problem faced by landlords and boards is how to handle issues involving elderly and/or mentally impaired occupants. Often, a simple dispute over payment of rent/maintenance or common charges can appear irresolvable because of the occupant's inability to understand the circumstances.

Fortunately, the City of New York has created an agency to assist elderly and disabled occupants in these circumstances. Adult Protective Services ("APS"), a branch of the City's Human Resources, Medical Insurance and Community Services Administration, provides assistance to adults, without regard to income, who have mental and/or physical impairments and are unable to manage their affairs and have no one available who is willing or able to assist them.

However, because the need is so great for these services, the City is often backlogged in appointing a qualified person to assist these occupants. If you have a situation like this in your building, we recommend reporting the situation to the APS as soon as possible. It is not uncommon for the appointment of a guardian to be time consuming because APS must conduct an investigation to determine if the tenant or unit owner has a condition which prevents the tenant or unit

owner from protecting his or her own rights.

If rent/maintenance/common charges are accruing, a recommended way to get the City involved to assist the tenant or unit owner to pay the debt is to inform APS simultaneously with the commencement of a nonpayment proceeding. Our firm does this by writing a letter to APS and serving the occupant with a rent demand and notice of petition and petition.

If you have a situation like this in your building, we recommend reporting the situation to the APS as soon as possible.

Courtesy copies of the rent demand and notice of petition and petition should also be sent to APS. The City is more likely to act promptly in the face of an eviction proceeding.

If APS has conducted an investigation and determined that the individual requires their assistance, they will move as a "friend of the court" to have a temporary guardian appointed. Once a temporary guardian is appointed, that guardian has the authority to sign an agreement requiring the occupant to pay the overdue charges and can address other issues that arise in the context of the nonpayment litigation.

If the disability is so severe that the tenant/unit owner is totally

incompetent and unable to assist in his or her own defense, a permanent guardian may have to be appointed. The City will move in Supreme Court for the appointment of a permanent guardian known as an Article 81 guardian. In some cases the permanent guardian will agree to surrender the premises in order to move the occupant to a full care facility. Other times, the permanent guardian will try to assist occupant by marshalling his/her assets and setting up health care aides, so the tenant/unit owner can remain in the apartment. If you have a situation that seems intractable with an elderly or disabled occupant, we can help you take the appropriate steps to resolve the problem effectively and with deference to the sensitive issues that arise.

Martin Meltzer is a partner and Jordi Fernandez is an associate in the firm's Litigation Department.



Martin Meltzer



Jordi Fernandez

Air Rights From Thin Air

By: Robert Jacobs

There is no disputing the fact that the value of air rights has skyrocketed over the past year, reaching heights of over \$400 a square foot. While this price may start to level off or even decline if the market changes, the value of excess floor area will remain at a premium for years to come.

As a result, a client of BBW&G thought it had struck gold when it discovered an original Inclusionary Housing Bonus Certificate (“Certificate”) tucked away in a ten year old file in its office. These Certificates entitle a developer to add floor area to its project in excess of that permitted under the Zoning Resolution in an amount equal to the face value of the Certificate.

After pondering its find, the owner ascertained that of the 26,000 square feet of bonus floor area in the Certificate, only a little more than 22,000 square feet of bonus floor area was actually used in the housing project. This meant that the Certificate contained potentially 3,500 square feet of valuable excess floor area. The problem was unlocking the unused gold in the fallow Certificate.

For this task, the owner turned to the Land Use attorneys at BBW&G. Fortunately, the owner still had the original Certificate. Had it not, it would have been dif-

ficult for the air rights to be used. The city agency in charge of issuing Certificates, the Department of Housing Preservation and Development (“HPD”), was reluctant to re-issue a Certificate for the unused floor area ten years after the fact.

HPD first required production of the original Certificate. The agency was surprised to learn that the owner still had it. After reviewing the Certificate, the staff at DHPD caucused to determine the

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At first, the person handling the project at HPD merely requested an architect’s certification of the unused floor area. When that was produced, HPD, after considering the matter for months, decided that it was not satisfied with the architect’s certification as it lacked any independent governmental verification. This is proof that nothing is ever as simple as it



first appears. HPD then required that building plans for the project be re-filed with the Department of

Buildings and reviewed by a plans examiner to verify the actual amount of square footage already used in the project. After twelve months of back-and-forth with HPD, the agency finally re-issued the Certificate for the unused floor area! The new Certificate is fully negotiable, and the unused floor area can be conveyed to any developer with a project in the same Community Board or within one-half mile of the

client’s project.

Robert Jacobs is a partner in the firm’s Administrative, Transactional and Bankruptcy Departments.



Deregulate Rent Regulated Apartments Through High Income High Rent Deregulation in 2007

By: Joshua G. Losardo

Owners of rent regulated apartments with legal rents of \$2,000 or more per month may petition the NYS Division of Housing and Community Renewal (“DHCR”) for luxury deregulation, *i.e.*, high income, high rent deregulation.

Luxury deregulation is an administrative procedure resulting in the deregulation of rent regulated apartments if the legal regulated rent is over \$2,000 per month and a tenant’s household (*i.e.*, all adults who occupy the apartment as their primary residence on other than a temporary basis) income exceeded \$175,000 in the two years preceding the date the petition is filed with DHCR. In 2007, a tenant’s 2005 and 2006 household income is considered.

BBW&G recommends that owners 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, 2007. Also note that 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 1st. 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 filed luxury de-

regulation proceedings in 2006 should review whether DHCR has already determined that a tenant’s household’s 2005 income met the \$175,000 level. If DHCR has determined that a tenant’s household’s 2005 income was below \$175,000, calendar to file for luxury deregulation against this tenant again in 2008.

Timing is important when preparing luxury deregulation petitions.

On or before May 1, 2007, 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 annual 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 2005 and 2006. The ICF also requests that the tenants identify all persons occupying their apartment.

On or before June 30, 2007, owners must file a “Petition by Owner for High Income Rent Deregulation” with DHCR for each apartment 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 High 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 the \$175,000 threshold; or

- ◆ *Request that DHCR verify the tenant’s answer in the ICF because the owner contests it; or*

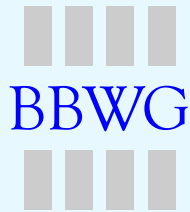
- ◆ *Request that the DHCR verify the tenant’s household income because the tenant failed to properly answer the ICF.*

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 2005 and 2006, 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.

Joshua G. Losardo is an associate in the firm’s Administrative, Transactional and Bankruptcy Departments.

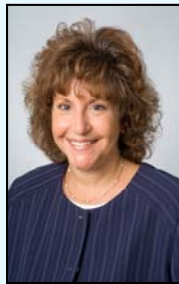




We are pleased to announce that four of our associates have become members of the firm.



Matthew Brett



Denise DeNicola



Craig L. Price



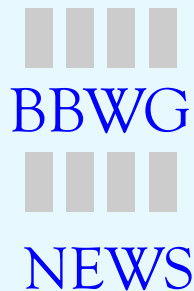
William Rifkin

***Matthew Brett** will be a partner in the Litigation Department, concentrating on Supreme Court and Civil Court matters.*

***Denise DeNicola** will continue her work in the Transactional Department, specializing in co-op and condominium matters.*

***Craig L. Price** will also continue his work in our Transactional Department, representing buyers and sellers of real estate, and handling commercial leasing and financing matters.*

***William Rifkin** will continue his work in our Litigation Department, specializing in complex real estate disputes.*



MAY I QUOTE YOU?

Craig Ingber, a partner in the Transactional Department, **Edward Baer**, a partner in the Litigation Department, and **Seth Liebenstein**, an associate in our Transactional Department, were all mentioned in the *New York Law Journal* for their representation of the owner of 375 Broadway in the lease transaction involving "Ricky's NYC." It was noted in the article that Ricky's has 15 New York City retail establishments, totaling 600,000 square feet, and also runs 3 stores in Florida and one in Easthampton.

Sherwin Belkin and **Aaron Shmulewitz** were each quoted, separately, in the *New York Times Real Estate* section "Q & A" feature on December 24, 2006. Mr. Belkin addressed an inquiry regarding rent overcharges in a rent-stabilized apartment, and noted that the base rent for computing an overcharge is the rent that was in effect four years before the overcharge complaint was filed. Mr. Shmulewitz responded to a question regarding noise being transmitted through the renovated wall of a co-op apartment due to the removal of soundproofing, and advised that the cooperative and the prior shareholder who effected the renovations could both be potentially liable for violation of the New York City Administrative Code.

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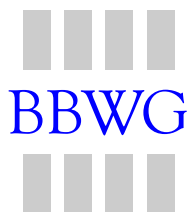
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PLEASE NOTE: This newsletter is intended for informational purposes only and should not be construed as providing legal advice. This newsletter provides only a brief summary of complex legal issues. The applicability of all or any of the issues described in this newsletter is dependent upon your particular facts and circumstances. Accordingly, it is suggested that prior to attempting to utilize or implement any of the suggestions provided in this newsletter, you should make sure to consult with your attorney.



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***Legal Update
January 2007***