

# UPDATE

**Sherwin Belkin,  
Editor**

## **OWNER OCCUPANCY AND THE "20 YEAR RULE" - HELD NOT TO APPLY TO RENT STABILIZED APARTMENTS!**

In 1984, the State legislature amended the law to provide a bar to the owner occupancy remedy where the tenant had been in occupancy for 20 years or more. This amendment applied to rent controlled tenants and to those tenants protected by the ETPA in cities having a population of less than one million. In the past several years, a series of decisions were issued by the Housing Court which extended this protection to New York City's rent stabilized tenants.

The Appellate Term, First Department, in a unanimous decision in *Brusco v. Armstrong*, has unequivocally addressed this issue. The Court stated that the Legislature's population limitation means that the 20-year rule, insofar as it applies to rent stabilization, only applies to "the counties of Nassau, Rockland and Westchester..." The Court contin-

ued by stating that the *exclusion* of the 20-year rule from application to New York City's rent stabilized housing "was intended" and "was not a matter of mere legislative oversight."

As a result, those who own or are considering the purchase of rent stabilized housing in the five boroughs for potential personal use (or that of their families), may presently proceed without asking "how long has the tenant been in occupancy?"

*Please Note: The Appellate Term's decision, while favorable, may not be the final word on this case. The tenant has moved for leave to appeal to a higher court. As of the writing of this edition of our newsletter, that motion remains pending.*

*This article was written by Sherwin Belkin. Owners and prospective owners should consult with counsel to determine if they qualify for "owner occupancy."*

## **IT MAY NOT BE WHAT YOU CHARGE, BUT WHAT YOU COULD CHARGE**

The uncertain real estate market has caused some owners of Rent Stabilized apartments to forego statutorily authorized rent increases in favor of a reduced rent that is more reflective of this difficult economic environment.

However, this causes the question to arise: "If I could legally charge a certain rent, but I

opt to charge less than the full legal regulated rent, am I permanently forfeiting any rights under Rent Stabilization?"

Two recent DHCR decisions, in cases successfully handled by BBW&G, should help assuage those concerns. In both cases, DHCR re-emphasized that the litmus test for the applicabil-

*(Cont. on p. 3)*

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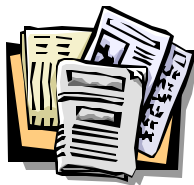
### **Special Points of Interest:**

- Long term rent stabilized tenants not immune from "owner occupancy"
- The Legal Regulated Rent as "litmus test"
- Brokers bear responsibilities under the Property Condition Disclosure Act
- Co-tenant income included as part of household income for Luxury Decontrol verification process

## BBW&G NEWS

We are pleased to announce that **Ronald Lopez** and **S. Stewart Smith** have joined BBW&G as associates in our Litigation and Administrative Law Departments, respectively. In addition, **David Vega** and **Nilda Guzman** have joined our Non-Payment Department as Legal Assistants.

**Edward Baer** was appointed to the New York State Bar Association's Real Property Law Section World Trade Center Subcommittee which will formulate policies and publications addressing the varied legal issues that have arisen as a result of September 11<sup>th</sup>.



### "MAY I QUOTE YOU"



Both the *New York Post* and *The New York Law Journal* had articles detailing the on-going saga in *Chuck Jones v. Marla Maples*. In addition to the Appellate Division dismissing all of Mr. Jones' claims and barring him from commencing new proceedings, the Court of Appeals denied his motion for further leave to appeal. Ms. Maples was represented by BBW&G's **Jeffrey Goldman** and **Magda Cruz**.

**Sherwin Belkin** has prepared a series of Fact Sheets for **Wolf Jakubowski**, townhouse specialist for Brown Harris and publisher of *Townhouse News*, discussing the rights and obligations of owners and would-be owners regarding owner occupancy, primary residence, luxury decontrol and the new property disclosure requirements.

### Who's Representing Whom?

BBW&G need not remind its clients, particularly those owners of residential properties, that Landlord-Tenant law, particularly residential Landlord-Tenant law, is a virtual minefield of hyper-technicalities, endless notices and an amazing amalgam of regulatory obstacles.

As a result, any time that adverse precedent is set regarding such technicalities, notices or regulatory requirements, a residential owner's rights become all the more difficult to enforce as the owner's ability to navigate through the courts and the administrative agencies is impeded.

BBW&G wants to assure you that, when you retain our firm to represent you as an owner of residential property, you do not need to be concerned that, while representing your interests, we are also routinely advocating adverse positions by the representation of residential tenants. Unlike many of our competitors, who hold themselves out as "Owner's Attorneys" or "Representatives of the Real Estate Industry," our firm does not regularly represent residential tenants as a part of our practice. In contrast, most of the other "Landlord Law Firms" regularly and as a substantial part of their practices represent residential tenants on a gamut of crucial issues [*e.g.*, succession, services, overcharges, MCI's, owner occupancy etc. – *and that's just on cases where BBW&G represents the owners in opposition to these other "owner's law firms" representing the tenants !* ]

### “What You Could Charge”

(Cont. from p. 1)

ity of an Owner’s rights under Rent Stabilization (under certain circumstances) is *not* the rent actually charged or collected, but the *legal regulated rent* (“... the rent charged on the base date plus any subsequent lawful increases and adjustments”).

In *Matter of the Administrative Appeal of MacCaulay*, DHCR denied a tenant’s PAR and held that the Rent Stabilization Code luxury decontrol exemption applied to a vacant apartment, for which the legal regulated rent, when adjusted for vacancy increases and the amortized cost of apartment improvements, exceeded \$2,000, even though the owner actually collected a rent of less than \$2,000. DHCR held that because the Owner could have lawfully charged a rent in excess of \$2,000, the exemption applied despite a lower rent having been actually paid.

In *Matter of the Administrative Appeal of 7401 Realty Co.*, the new tenant’s lease provided for a rent concession for a specified term and further provided that the rent would revert to the full legal regulated rent thereafter. Further, the Owner based the rent increases for renewal leases upon the legal regulated

rent, rather than the sum actually collected during the rent concession period.

DHCR (at both the Administrator and PAR levels) found the Owner liable for a rent overcharge, contending that renewal increases should have been predicated upon the lower concession rent.

BBW&G was retained to challenge the PAR order via an Article 78 proceeding in Supreme Court (BBW&G had *not* represented the Owner during the prior unsuccessful administrative proceedings). BBW&G asserted that, as a result of the Appellate Division’s decision in *Application of Missionary Sisters of the Sacred Heart, III. v. DHCR and Crosari*, a temporary rent concession, such as the Owner had provided, was distinguished from a preferential rent, which governs throughout the tenancy. Therefore, we argued that the renewal rent was to be based upon the higher legal regulated rent. DHCR asked the Court to allow the agency to revisit the issue.

On remand DHCR reversed its position and held that the reduced rent amount did not become the basis for subsequent rent increases because the agreement specified both the legal regulated and the re-



duced rent, and the finite term for which the temporary rent concession was to apply. Consequently, the Owner was found to have properly computed subsequent rent increases based upon the legal regulated rent and not the rent concession amount.

DHCR now seems to recognize that an Owner may collect a rent which is less than the full legal sum, yet fully preserve its rights. However, in order to fully protect your rights, Owners should carefully apprise the tenant (on leases and renewals) and DHCR (on rent registrations) of the full legal regulated rent because one day that rent may be collectable, not only in theory, but in practice as well.

*This article was written by Orie Shapiro, who practices in the firm’s Administrative Law Section. Mr. Shapiro, along with Sherwin Belkin, represented both Owners in the above-described cases.*

## BROKERS AND THE PROPERTY CONDITION DISCLOSURE ACT

In our last *BBW&G Update*, we advised you that, as of March 1, 2002, the Property Condition Disclosure Act would take effect, requiring sellers of certain real property to disclose the condition of the property to be sold.

Real estate brokers should bear in mind that this new Act affects them too. A real estate agent has a duty to timely inform each seller represented by that agent of the seller's obligations of disclosure under the Act. Also, an agent representing a buyer, or, if a buyer is

not represented by an agent, the seller's agent, has a duty to inform the buyer, prior to the buyer signing a binding contract, of the buyer's rights and obligations under the Act. Once the agent has disclosed the foregoing, he or she has no further obligations under the Act.

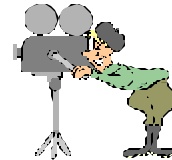
The Act further states that a knowingly false statement may subject the seller to claims by the buyer prior to or after the transfer of title. Notably, the Act does not provide any specific statute of limitations.

Seller's should consider negotiating for a specific time period in the contract in which the Buyer may sue for an improper disclosure.

*This article was written by Robert Jacobs who practices in BBW&G's Transactions Department. Please call Mr. Jacobs, or Howard Wenig, Daniel Altman or Craig Ingber, who also practice in the firm's Transactions Department to discuss the PCDA, or any other issues relating to buying, selling, leasing or financing.*



### L&T GOES TO THE MOVIES



No, it's not just boy-wizards (such as *Harry Potter*), or schizophrenic Nobel Prize winners (as in *A Beautiful Mind*), or former heavyweight champs (like *Ali*), that Hollywood looks to for inspiration. Yes, the cinema loves L&T. Can you name these movies?

1. Roman Polanski directed this piercing analysis of a man that is gradually driven insane when he moves into an apartment where the previous inhabitant had jumped out of the window.
2. Beau Bridges purchases a building and decides to run it himself.
3. Jack Lemmon lets his boss, Fred MacMurray, use his home for trysts with Shirley MacLaine in this Billy Wilder directed film.
4. Joe Pesci, as the son of a landlord, Vincent Gardenia, is ordered to live in one of pop's buildings.
5. Tenant Michael Keaton terrorizes townhouse fixer uppers Matthew Modine and Melanie Griffith.

#### Answers

1. The Tenant; 2. The Landlord; 3. The Apartment; 4. The Super; 5. Pacific Heights

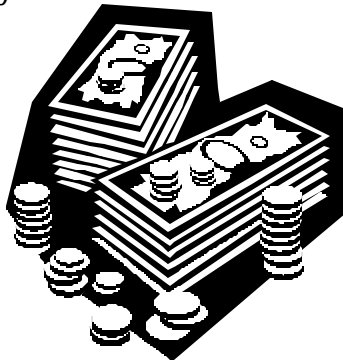


## LUXURY DECONTROL: DHCR INCLUDES "ROLLED OVER" FUNDS AND CO-TENANT'S INCOME

**D**HCR recently agreed with BBW&G and affirmed the Rent Administrator's Order of Deregulation by ruling that the income of a co-tenant occupying an apartment on the date that the Owner served the tenant with an Income Certification Form (ICF) must be included as part of the total household income for the purpose of verifying if the luxury decontrol income threshold was exceeded. In addition, the Commissioner agreed with BBW&G that the tenant's one time conversion of an IRA to a Roth IRA must also be included as part of her household income.

DHCR submitted both of the tenants' names to the NYS Department of Taxation and Finance to verify whether their incomes were collectively more than \$175,000 in the two test years (in this case, 1998 and 1999). The DTF confirmed that the household income exceeded this amount and DHCR's Rent Administrator issued an Order of Deregulation. The tenant filed a Petition for Administrative Review, arguing that her co-tenant's income should not be included as part of the household income because the co-tenant had only moved into the apartment in

June 1999, thus residing there for only a portion of the luxury decontrol threshold period (1998 and 1999). The tenant also argued that the DHCR should not have included distributions resulting from the conversion of a traditional IRA account to a Roth IRA as part of her "adjusted gross income." The tenant claimed that, although the rolled over funds were taxable for income tax purposes, since the tenant could not use the money as disposable income, the distributions should not be considered as income for purposes of luxury decontrol.



The Owner opposed the tenant's PAR by arguing that §2531.1(a) of the Rent Stabilization Code requires that the DHCR include as part of the household income the income of any person occupying the apartment on the date that the Owner serves the ICF. BBW&G also argued that

DHCR must include the rolled over monies as part of the income for luxury decontrol purposes since the Code does not provide any exceptions to the definition of annual income, nor does it make an exception for funds which a person may or may not have actual access to. Instead, the Code defines annual income as the "federal adjusted gross income as reported on the New York income tax return." Moreover, BBW&G noted that DHCR has previously ruled that, pursuant to the language of the statute, the agency must rely upon the Federal Adjusted Gross Income as reported, such that DHCR will not examine the source or nature of income as reported on tax returns. In *Matter of the Administrative Appeal of Sughrue*, DHCR's Commissioner agreed with the Owner's positions and affirmed the Order of Deregulation.

*This article was written by Joshua Losardo, who works in BBW&G's Administrative Law and Bankruptcy Departments. This case was handled by Mr. Losardo, along with Sherwin Belkin.*