

UPDATE

**Sherwin Belkin,
Editor**

DELAYED MCI's: RELIEF AVAILABLE VIA THE COURTS

One of the best methods to increase the rent roll of a building is to file a Major Capital Improvement Rent Increase Application ("MCI") with DHCR. However, how quickly the agency processes your application affects how quickly you will receive permission to increase your rents.

In 1984, after DHCR assumed the administration of the rent regulatory system, it was very common for Owners to wait 2, 3 or even 4 years, prior to receiving a final MCI decision from DHCR. It was also common, back in the 80's and early 90's, for property owners to be forced to file mandamus proceedings in Supreme Court in order to compel the Division to process these MCI applications in a

quicker time period.

DHCR subsequently began to process MCI applications in a far more efficient manner. It became quite common for Owners to receive an Order granting the MCI rent increase in less than a year, sometimes even after 3-4 months of review by the Division. Unfortunately, the pendulum has begun to swing back and it is increasingly taking longer for Owners to obtain MCI relief.

To try to expedite the processing at DHCR, it is crucial that all potential discrepancies be resolved as quickly as possible, preferably before the application is filed with the Division.

However, even after responding

(Cont. on p. 3)

A PICTURE TELLS A THOUSAND WORDS

As non-primary resident tenants become more and more sophisticated, covering their out-of-occupancy tracks via a "paper trail" leading to their rent regulated apartments, Owners also need to become more sophisticated and vigilant in investigating the tenant's primary residence. An Owner's strenuous efforts recently resulted in victory in *Emel v. Young*.

In *Emel*, all of the tenant's documents recited her rent stabilized apartment as her home address, but the Owner's daughter, who lived across the hall, knew that the tenant was not residing in the apartment. BBW&G suggested that the Owner consider installing a hidden camera to film the tenant's apartment door.

Despite her mountain of paper

(Cont. on p. 2)

What's on the Inside

	<i>Page</i>
<i>BBW&G News</i>	2
<i>BBW&G Prevails on Adverse Possession</i>	2,3
<i>'Tis the MBR Season</i>	4,6,7
<i>L&The Goes to the Movies and Broadway</i>	4
<i>New York City Lead Paint Law Upheld</i>	5,6,7

Special Points of Interest:

- Rare case of adverse possession on water front property recently won by BBW&G
- Owners can re-enter the MBR Program
- New York City's lead paint law (Local Law 38) reinstated via dismissal of lawsuit by the New York City Coalition to end Lead Poisoning, Inc.

BBW&G NEWS

Jay H. Berg, who practices in the firm's Litigation and Appeals Departments, has authored the article "Habitability Issues at Ground Zero: Reconsidering Real Property Law §235-b in the Wake of September 11th." Mr. Berg's article will be published in the Spring 2002 Edition of *The St. John's Real Property Law Journal*.

A Picture Tells a Thousand Words (Cont. from p. 1)

evidence listing the apartment as her home address, which the tenant submitted at trial, once the video tapes were entered into evidence, along with a log book which summarized all of the comings and goings of the tenant, the Owner's proof, showing the tenant to be an infrequent visitor to her own apartment, could not be rebutted by mere self-serving documents.

BBW&G suggests that Owners consider the installation of hidden cameras to video tape the comings and goings of certain tenants believed to be primarily residing elsewhere. It is an especially useful tool where the tenant has cleverly placed all documentary evidence at the apartment address, but the Owner knows the tenant is rarely home. But, the Owner must prove what he or she knows to be true. The video evidence is

likely to trump any misleading paper trail that the tenant has created in order to throw the owner off his/her tracks.

This article was written by David Skaller who practices in the firm's Litigation Department and handled the trial in Emel. Please call Mr. Skaller or the firm's other Litigation Partners, Joseph Burden, Jeffrey Goldman, Edward Baer or Martin Meltzer, to discuss any litigation strategies or techniques.

BBW&G PREVAILS ON ADVERSE POSSESSION CASE

BBBW&G recently won a rare case of adverse possession on water front property in College Point, Queens. The firm's client had bought land adjacent to an abandoned road in the 1940's. When the road continued in its undeveloped state, BBW&G's client purchased a lot directly across the street on or near the high water line of Powell's Cove. Based on the fact that the deed gave the purchaser rights to the center line of the road, the

purchaser fenced off and made a yard out of both lots and the intervening road.

Possession remained undisturbed for half a century until the abandoned road was bought at foreclosure by a developer. The developer planned to build a long narrow condominium development along the road. This would have cut the firm's client's yard in half.

When the developer appeared at the property with a

backhoe poised to demolish the fence and an above ground pool that sat in the fenced-in portion of the abandoned road, BBW&G's Land Use and Litigation Departments joined forces to obtain an injunction preventing the developer from moving in. Thereafter, BBW&G won summary judgment for its client whereby the Court ruled that title to the fenced-in portion of the abandoned road had vested in the purchaser under

(Cont. on p. 3)

BBW&G Prevails on Adverse Possession Case
(Cont. from p. 2)

the doctrine of adverse possession.

The Court ruled that the purchaser had not only demonstrated open, notorious, hostile and uninterrupted possession of the abandoned road for a period in excess of ten years, but that it came into possession under a claim of right by virtue of its deeds.

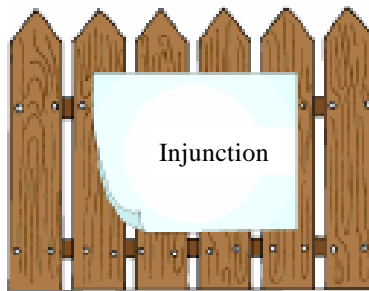
This case highlights one of the little understood components of adverse possession; namely, a “claim of right.” The doctrine of adverse possession not only requires possession that is hostile and open, but also requires that the possession be under a claim of right.

“Relief Available Via The Courts”
(Cont. from p. 1)



to all of DHCR's inquiries, we have found that it is beginning,

In other words, coming onto someone else's land knowing it is not yours and then fencing it in will not vest title since the possession is not under some



claim of right to the land. Notably, the claim does not, ultimately, need to be valid, but it must be *bona fide*. In short, adverse possession is not designed to reward a party for stealing land that it knows belongs to someone else.

to take an inordinate amount of time for DHCR to process these cases to finality. As a result, we are, once again, commencing Article 78 mandamus proceedings in Supreme Court against DHCR, seeking to have a Court to compel DHCR to process these applications in a more timely and finite fashion.

If you have filed your application with the Division many months ago and have not received a final Order from DHCR, it may be time for you

The critical time period for an adverse possession claim is a decade, *i.e.*, the open, hostile and notorious possession must be for ten or more years. The only way of preventing the ten year time period from running is to commence a court action.

Owners seeking to defeat an adverse possession claim who wait too long to start a court action could be jeopardizing their ability to defend their ownership of their land.

This article was written by Robert Jacobs who heads BBW&G's Land Use Department and represented the successful owner in the above-described case. If you have any questions or concerns about adverse possession or other Land Use issues, please contact Mr. Jacobs.

to consult with your attorney to seek some relief. Remember - the quicker that your MCI application is processed and granted, the quicker you can increase your rent roll.

This article was written by Martin J. Heistein, who practices in BBW&G's Administrative Law Department and is in charge of all MCI's (as well as J-51's) filed by BBW&G. Under Mr. Heistein's supervision, BBW&G has applied for and been granted hundreds of millions of dollars in MCI rent increases for property owners

'TIS THE MBR SEASON

For New York City's residential property owners, who have timely filed both their Violation Certification and Operation and Maintenance of Essential Services Certification, "'tis the season to be merry", as they anxiously await the issuance of their Maximum Base Rent (MBR) Orders of Eligibility from the New York State Division of Housing and Community Renewal (DHCR).

While many owners frown upon their rent controlled tenancies, for the last thirty

years, the qualifying rent increase for a rent controlled apartment has been a statutory 7.5% per annum. In contrast, the Rent Guidelines Board has not issued an increase as high as 7.5% for the one year renewal of a rent stabilized apartment in over 20 years.

Yet, many owners throughout the city do not take advantage of the MBR Program. They do not view the time and effort as a cost effective way to collect an increase, since the collectible rent for a

majority of rent controlled apartments is very low to begin with. BBW&G suggests that re-entry into the MBR Program can, indeed, be a cost effective way to increase the rent roll, as well as increase the value of a building.

The MBR program began in 1972 and has been administered by DHCR since 1984. It is a biennial program, with Orders issued in even years (1972-1973, 1974-1975, etc.)

There are two dollar figures that govern a rent con-

(Cont. on p. 6)



L&T GOES TO THE MOVIES AND TO BROADWAY



Landlords singing! Tenants dancing! Roommates emoting!
Can you name these Landlord - Tenant / Real Estate dispute centered productions?

1. Bridget Fonda is allowed to bring Jennifer Jason Leigh into this Upper West Side apartment under The Roommate Law; but she needs more than a statute to protect her when her roommate goes wild.
2. Neil Simon wrote the book and Burt Bachrach the music for this musical based upon Billy Wilder's film, *The Apartment*.
3. Based upon the opera *La Boheme*, this Broadway rocker is named after what every owner expects to receive at the beginning of each month.
4. When the prime tenant leaves Marsha Mason behind, but also sublets the apartment to Richard Dreyfuss, roommates learn not only to co-exist, but to fall in love (this film was later made into a much criticized Marvin Hamlisch musical starring Martin Short and Bernadette Peters).
5. Alan Alda and Carol Burnett each have eyes on renting the same apartment in this "broker-eeze" named production.

Answers

1. Single White Female; 2. Promises, Promises; 3. Rent; 4. The Goodbye Girl; 5. Six Rms Riv Vu



NEW YORK CITY LEAD PAINT LAW UPHeld

The Appellate Division, First Department, recently unanimously reinstated New York City's lead paint law (Local Law 38) and dismissed a lawsuit by the New York City Coalition to End Lead Poisoning, Inc.

In October 2000, New York County Supreme Court Justice Louis B. York, ruled that, when enacting Local Law 38 in 1999, the City Counsel had failed to adhere to the required legislative review process, and nullified Local Law 38. Since the October 2000 ruling, New York City's owners have been left in a state of limbo as to their obligations (regarding lead paint) to tenants that reside in multiple dwellings constructed prior to January 1, 1960. However, on March 26, 2002, the Appellate Division reinstated New York City's Local Law 38.

Local Law 38 was passed in 1999 (effective November 12, 1999) after Justice York ruled that the City was in contempt of court for not enforcing New York City's Local Law 1 (the City's former lead paint law), which required landlords to remove (i.e., abate) lead paint from pre-1960 multiple dwellings. After research determined that the removal of lead paint often resulted in an

increase in lead paint contamination (by releasing harmful dust and thereby increasing the health risk), the focus shifted from lead abatement to lead containment. Notably, the Federal lead paint statute, which requires lead paint disclosure in target housing, places an emphasis on obtaining a lead safe environment, as opposed to lead free.

In 1999, the City Counsel passed Local Law 38, which focuses on lead containment rather than lead abatement. In addition to the barring of dry scraping or dry sanding of lead based paint or paint where the lead content is unknown in apartments in buildings of any size, Local Law 38 also imposes additional requirements on owners of buildings built before January 1, 1960, that had three or more apartments. Some of the additional requirements imposed upon owners by this law include, but are not limited to:

- Between January 1 and January 16 of each year, owners must serve the occupants of each apartment with a notice inquiring as to whether a child under age six resides in the apartment and advising the occupant that he or she must notify the owner if a child under



- six moves into the apartment during the year;
- Owners must give occupants under a new/vacancy lease a notice inquiring as to whether a child under age six will live in the apartment and a lead paint pamphlet issued by the New York City Department of Health;
- Owners must conduct an annual inspection for lead based paint hazards in those apartments in which children under six reside;
- Owners must correct all lead paint hazards, including those discovered in vacant apartments; and
- If HPD conducts an inspection and discovers a lead based paint hazard in an apartment, the owner will be served with a violation notice for a Class C immediate hazardous violation, which the owner must correct within a specified period of time after HPD delivers the violation notice. Under certain circum-

(Cont. on p. 7)

Tis the MBR Season*(Con. from p. 4)*

trolled unit. The first, the Maximum Base Rent (MBR) was established in 1972. The second, and most important figure, is the Maximum Collectible Rent (MCR), which is what the rent controlled tenant actually pays.

Since the inception of the MBR Program in January 1972, an owner that filed and qualified, received an MBR Order of Eligibility. Specifically, owners are permitted to collect a 7.5% increase above the MCR for the first year of the cycle, and another 7.5% for the second year of the cycle. The sole caveat is that the MCR, can be equal to, but never exceed, the MBR figure.

An owner may qualify to collect the full 15% increase in the MCR over the term of the two year cycle provided that the MBR figure is high enough. The MBR factor is a percentage increase that changes every two years, as opposed to the MCR adjustment, which as is a statutory 7.5%. In determining the MBR factor, DHCR considers the following cost trends: actual expenses, real estate taxes, water and sewer charges and assessed value.

Can an owner still qualify for an Order of Eligibility even if he has missed past cycles or has never filed for an MBR Order in the past? The answer is YES! Re-entry into the MBR

Program is actually rather simple.

The first step for re-entry into the MBR program is to file a Violation Certification. The owner must certify that all rent impairing violations on record with Housing Preservation and Development (HPD) have been cured and/or removed. In addition, at least 80% of the non-rent impairing violations on record have also been removed. HPD uses a coded system to distinguish the severity of



the violations on a building. HPD classifies violations as either "A," "B" or "C." Violations designated as "A" are classified as non-rent impairing. The "B" violations, depending on the nature of the violation, can be either rent impairing or non-rent impairing. Lastly, "C" Violations usually always requires immediate curative action.

After filing of the Violation Certification, the next step is to submit to DHCR an Operation and Maintenance of Essential Services Certification. This

form requires a certification that the owner is and will continue to maintain all essential services and that it has incurred costs and made payments for at least 90% of the operation and maintenance expense allowance for the building. DHCR utilizes a formula whereby it takes a percentage of the rent roll, which will change from cycle to cycle (normally around 50%) and compares that to the qualifying costs to maintain the building. In the likely event the operating expenses exceed the established percentage of the rent roll, the owner will qualify and DHCR will issue an Order of Eligibility. It is rare to find a building that is so self-sufficient that it does not qualify under the O&M Certification formula.

DHCR sets deadlines for the filing of both Violation Certification and the O&M Certification in order to be deemed timely. While the deadline to timely file both applications for the current 2002-2003 MBR cycle has passed, the agency will still accept a Violation Certification, up to and including May 31, 2003, and the O&M Certification through and including August 31, 2003. The penalty for a late filing is a prospective effective date six months from the date of filing the Violation Certification or three months from the date of filing the Operation

(Cont. on p. 7)

'Tis the MBR Season

(Cont. from p. 6)

and Maintenance and Essential Services Certification, whichever is later.

Upon the filing of the Violation Certification and Operation and Maintenance and Essential Services Certification, the Screening and Docketing Unit of the DHCR will send a "Docketing Acknowledgment Notice" confirming receipt of your MBR application and your assigned docket number for processing.

Thereafter, your applications will go to the MBR Unit for processing. If all documentation is submitted and the application is complete, DHCR will issue an MBR Fee Payment Notice setting forth the amount payable to the State for the processing of your application. The State charges a fee of \$30.00 per rent controlled apartment. If the owner resides in the subject building this fee will be waived. The

owner will need to submit to DHCR a utility bill evidencing his or her residence.

If you are seeking re-entry into the MBR program, it would be wise to file an application pursuant to the Freedom of Information Law (FOIL) with DHCR, requesting that it provide you with all the rent controlled records on file for your building. Do not just request records for specific rent controlled apartments in your building -- request them for the entire building. The records you will receive from the DHCR, at a cost of \$.25 per page, can include the Registration Cards, MBR Profile, Fuel Cost Adjustments and Labor Cost Adjustments which have been previously filed with the DHCR. Receipt of the rent controlled records on file will assist you in the preparation of notice forms which need to be served upon the rent controlled tenants subsequent to the issuance of the MBR Order

of Eligibility.

Upon the issuance of your Order of Eligibility, you will have sixty (60) from the issuance date to prepare the appropriate notice forms (Notice form RN-26 or RN-26S), serve each rent controlled tenant and then prepare and file with the DHCR the Master Building Rent Schedule (Form RMB). The Master Building Rent Schedule is a summary of each rent controlled unit in the building setting forth the newly adjusted MBR, the prior MCR and the new MCR as increased. Remember, it is a biennial cycle -- so the service upon the tenants and filing with the DHCR must be repeated for both years of the cycle.

This article was written by Thomas J. Bannon, Legal Assistant in BBW&G's Administrative Law Department. To discuss re-entry into the MBR Program, please contact Administrative Law Department Partner Martin Heistein

New York City Lead Paint Law Upheld

(Cont. from p. 5)

stances, an owner may apply for a 45 day extension of the correction deadline to correct the violation. Such a request will only be considered by HPD if it is made before the deadline period specified in the notice expires.

Local Law 38 also directs the manner in which owners correct lead paint hazards, via a set of specified interim controls, and imposes fines of up to \$10,000.00 per day, per violation, if the violation is not properly corrected, and up to \$25,000.00 for each false certification made to HPD. In addition, owners are required to keep records of all annual lead

paint inspections conducted and work performed to correct any lead paint hazard found during such inspection for a period of three (3) years.

This article was written by Kara Rakowski, who practices in BBW&G's Administrative Law Department. If you have any questions or concerns pertaining to lead paint, please contact Ms.