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Transactional Update

Light and Air Easements — Err on the Side of Caution

By: Robert Jacobs

With development still on the rise in New York City, developers are maximizing the floor area of their buildings by sucking up all the available air rights in their vicinity.

Developers are also seeking light and air easements in unprecedented numbers from neighboring properties in order to maximize the views for their buildings. Owners who agree to grant such light and air easements should make sure to have an elevation survey performed. It is critical to define the height where the light and air easement begins. Light and air easements are perpetual covenants that run with the land. Oftentimes, the light and air easement instruments are worded so as to begin at a certain amount of feet above the level of an existing building. However, buildings may subside, collapse or be demolished. If the height of the easement is not a fixed point independent of the height of the building, the reference in the land records to a point ten feet above a non-existent building will become meaningless.

Elevation surveys use measurements based on the Manhattan Datum, which is a system formally known as the Borough Works Datum of the Borough of Manhattan. The system designates as zero an elevation which is 2.75 feet above the mean sea level at Sandy Hook, New Jersey. Elevation surveys are performed by the type of licensed surveyor

that performs land surveys. The elevation survey establishes a horizontal limiting plane as the starting point of the easement.

Elevation surveys are particularly important in granting cantilevering easements. Cantilevering easements, as opposed to light and air easements, entitle an adjoining property owner to encroach into the granting owner's air space. If the cantilevering easement is geared to the height of an existing building and the easement is not exercised before the existing building is demolished or destroyed, the failure to have an elevation survey is particularly significant.

Buildings that cannot be enlarged due to zoning or building code restrictions are ideal candidates for the sale of light and air easements. Owners or prospective purchasers of properties adjoining such buildings should consider the added value of acquiring such rights.

For more information on the sale or purchase of light and air easements, please contact Mr. Jacobs, a partner of BBWG's Transactional Department.



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Litigation Update

Succession Claim Defeated: Home Health Care Aide Not Considered Family Member

By: Joseph Mitchell

The Appellate Term, First Department, recently considered the issue of whether a home care attendant, who has resided with the tenant of record for approximately two years, can succeed to the rent stabilized tenancy of the tenant after the tenant has died.

In *First Sutton Associates v. Hoffman*, the home care attendant claimed succession rights as a non-traditional family member of the deceased tenant of record, who had been her employer. The home care attendant claimed that she was treated as a family member, was given gifts, and lovingly cared for the elderly tenant until the end of her life. At her deposition, the home care attendant admitted that: (a) she was hired by the deceased tenant of record's son to care for the elderly tenant; (b) she was paid a salary of \$700.00 per week; (c) she was married and her husband lived in Trinidad; (d) she never contributed to any of the tenant's household or family expenses; (e) she never intermingled funds with the tenant. The home care attendant, in fact, testified that the money she made in her employment was sent to Trinidad to care for her husband.

There was no evidence of any formalized personal relationship between the tenant and the home care attendant. Neither one ever

named the other as an executor or beneficiary under wills, or granted each other powers of attorney. The tenant's affairs were handled by her son.

After the deposition, the owner, represented by BBWG partner Joseph Burden, moved for summary judgment. Mr. Burden argued that although the home

No evidence of any formalized personal relationship between the tenant and the home health attendant

care attendant may have been a valuable and treasured employee, her relationship with the tenant never rose to the level of a "non-traditional family member," because there was no proof of financial and emotional commitment and interdependence between the two women.

Judge Laurie Lau agreed, finding that there was no evidence to establish that the relationship between the tenant and the home care attendant was anything more than the type of friendly relationship that would normally be associated with a close domestic employee. Judge Lau found that it was simply an employer and employee relationship, not covered by the rent regulatory laws.

Judge Lau found that there was nothing in the record to establish any of the factors evidencing a non-traditional family member relationship and ruled that the home care attendant was not entitled to succession rights. As a result, the owner was granted a judgment of possession.

The home care attendant appealed Judge Lau's decision to the Appellate Term. The Appellate Term, within three weeks after submission, unanimously affirmed the lower court's decision.

This case demonstrates that succession rights by a would-be non-traditional family member places a burden upon the claimant to establish more than just co-occupancy and a close relationship. The nature of the relationship is subject to scrutiny, and in order for the claimant of succession rights to prevail, there must be proof of *both* financial *and* emotional interdependence. Absent both of those elements being proven, the succession claim must fail.

Joseph Mitchell is an associate of the Firm's Litigation Department.



Sitting On An Unopened Pot of Gold?

By: Kara I. Rakowski

Property owners and managers who have obtained money judgments against former tenants may be sitting on a pot of gold. In many cases, BBWG has obtained judgments of possession, which include money awards, and have successfully converted those judgments into cash for the client. Judgments sitting in your cabinets are non-performing assets. Judgments that are referred for enforcement can become a performing asset after aggressive judgment enforcement proceedings reveal where the tenant's assets are hidden.

Case in point is a matter in which BBWG's litigation partner Joseph Burden recently successfully litigated against a defaulting commercial tenant. The proceeding resulted in both a judgment of possession, and a money judgment, entered against the principal of the commercial tenant. The owner quickly recovered its commercial space, but collecting the monetary debt was more of a challenge, as the only known asset of the tenant was the now defunct commercial lease.

Undeterred, the owner used



the money judgment as the basis for a subpoena to track the tenant's assets in a more comprehensive way. During this process, information was discovered evidencing that the principal of the commercial tenant had moved to Germany. It appeared that the judgment was not collectible in New York. However, by closely scrutinizing copies of each check used by the tenant to pay rent prior to default, it was determined that the individual tenant used a previously unknown company to routinely pay its bills. That company had an office and bank account in New York. The company's bank account in New York was restrained even though it was not a defendant or judgment debtor. The court per-

mitted a turnover of those funds and the owner was paid in full, including an award of attorney's fees and accruing interest.

This was a case where at first glance it appeared that the owner's money judgment was not enforceable, and, therefore, worthless. However, after a targeted and aggressive approach to the matter, the owner was able to turn a non-performing asset into a real winner.

If you have any questions regarding enforcement of money judgments, please contact Kara I. Rakowski or Joseph Burden, BBWG partners specializing in these types of matters.



Administrative Update

Regulatory Issues Affecting the Development of Hotel Properties

By: Kara I. Rakowski and Stewart Smith

Converting hotels to luxury apartments, condominium or cooperative ownership, or upgrading mid-and low level hotels to upscale accommodations, are current trends in the New York City real estate development world. While these projects can be quite lucrative, there are several regulatory issues which should be explored prior to purchasing such real estate or embarking on an extensive development plan.

As in most real estate matters, due diligence is required prior to either purchasing property or undertaking a conversion project. When it comes to hotels, it is imperative that a thorough investigation take place.

One issue which should be explored is whether the building has any “long term” tenants or “guests” residing in the hotel. If so, a further investigation is warranted as to whether such individuals are subject to the protections of the City Rent and Rehabilitation Law and the New York City Rent and Eviction Regulations (“hotel rent control”) or the Rent Stabilization Law and Code (“hotel stabilization”).

In order for a hotel occupant to be covered by hotel rent control, the occupant must have been

in occupancy since December 2, 1949.

Hotels built on or before July 1, 1969, that contain 6 or more units, and the amount charged for such accommodations was no more than \$88.00 per

to obtain a Certificate of No Harassment from the Department of Housing Preservation and Development of the City of New York before the New York City Department of Buildings will issue a work permit to alter the building.

Each of the above issues requires an in-depth analysis during the due diligence process, which may result in further issues that impact on the economic viability of the purchase or development plan. We will address those issues in upcoming editions of BBWG’s Update. One should be mindful, however, that while it is im-

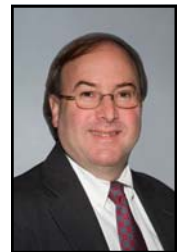
portant in any real estate transaction to conduct a proper due diligence investigation, when a hotel property is involved, an even more thorough examination of the history of the building is essential.

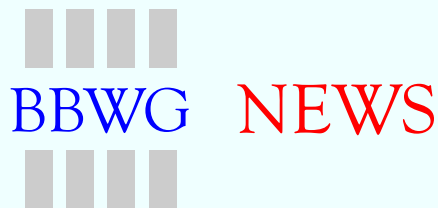
Kara I. Rakowski is a partner and Stewart Smith is an associate of BBWG’s Administrative Law Department.

When it comes to hotels, it is imperative that a thorough investigation take place.

week, or \$350.00 per month, on May 31, 1968, are subject to hotel stabilization. Hotels which charged in excess of the rates detailed above on May 31, 1968 are considered “luxury” hotels and are exempt from rent regulation.

Another issue which must be explored is whether the hotel is: (a) classified as a class “B” multiple dwelling; (b) contains units which may be classified as single room occupancy units (“SROs”); or (c) is located in one of the special zoning districts, such as the Special Clinton District or the Special Hudson Yards District on the West Side of Manhattan. In such event, the owner is required



The logo for BBWG NEWS features the text "BBWG" in blue and "NEWS" in red, centered between two sets of four vertical grey bars.

Edward Baer was the co-chair for the New York County Lawyers' Association, Civil Court Practice Section, Women's History Month luncheon honoring Acting Justice Juanita Bing Newton, administrative judge of the New York City Criminal Court. The luncheon was held on March 21, 2007, and a photograph of Mr. Baer and Justice Newton appeared in the *New York Law Journal* on March 23, 2007.

Magda Cruz was quoted in the *New York Times* on April 13, 2007 concerning her role as an owner's representative on the New York City Rent Guidelines Board. Ms. Cruz commented on data presented to the Board by members of the professional staff.

Andrew Georgakopoulos' article entitled "Great Balls of Fire," originally published in the December 2006 BBWG Update, was reprinted by the *New York Association of Realty Managers* in its magazine published in April 2007.

Kara Rakowski was quoted in the *Apartment Law Insider* for April 2007. Ms. Rakowski's opinion was sought on the issue of building demolition cases. The article noted Ms. Rakowski's broad experience in representing building owners in demolition cases.

Aaron Shmulewitz was the weekly expert for the *New York Times* in its real estate Q&A on April 8, 2007. Mr. Shmulewitz's expertise was sought on a co-op governance issue.

Craig Price will be speaking on May 17th and June 14th at the Real Estate Institute. The seminar topic is: "The Purchase and Sale of Residential Real Estate from All Angles."

Recent Transactions of Note

BBWG's Transactional Department highlights some of the significant deals which they have closed recently:

- ◆ Robert Jacobs, Denise DeNicola and Nadia Hutchinson represented the sponsor of a new construction condominium offering in lower midtown in the sale of ten apartments to date, having a value in excess of \$15 million.
- ◆ Aaron Shmulewitz, Denise DeNicola and Rosa Lombardo represented the successor sponsor of a condominium conversion in the sale of 35 units to date, with a value in excess of \$17 million.
- ◆ Aaron Shmulewitz, Edward Baer and Seth Liebenstein represented the seller of a block of 33 unsold apartments in a Forest Hills cooperative.
- ◆ Dan Altman and Seth Liebenstein represented the purchaser of a building in lower Manhattan, involving an air rights transfer.

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