



# UPDATE

## ***Under-Utilization of Rent Controlled Housing: A Blast From the Past***

**F**or the first time in nearly two decades, DHCR has issued an Order granting an owner's application for permission to evict rent controlled tenants from under-occupied apartments to permit the owner to create new market rent apartments. The owner was represented by BBW&G's Kara Rakowski.

Pursuant to section 2204.7 of the New York City Rent and Eviction Regulations, upon application to DHCR, an owner of a rent controlled apartment may be eligible for an order granting permission to subdivide the apartment for the purpose of creating an additional market rent dwelling unit.

In order to be eligible for an order authorizing sub-division, an owner must prove that:

- It seeks to recover possession of the housing accommodation for the immediate purpose of substantially altering or remodeling it,
- The housing accommodation sought to be altered contains six or more rooms, exclusive of bathrooms and kitchen, and is under-occupied: meaning there is less than one occupant for each room, exclusive of the bathrooms, kitchen and three additional rooms,
- The owner intends to subdivide the apartment into a greater number of housing accommodations consisting of self-contained family units, and
- The owner did not and could not have made an annual (*cont. p. 2*)

## ***Chronic Non-Payment Holdover Revived?***

**I**n years past, many owners commenced holdover eviction proceedings based upon a tenant's chronic non-payment or late payment of rent. The basis of these proceedings was that the tenant was committing a nuisance.

Unfor-tunately, in 1997, the Court of Appeals, in *Sharp v. Norwood*, ruled that a chronic non-payment/nuisance case could not be brought unless the owner was able to show "aggravating circumstances." This heightened standard

of injury seemed to be the death-knell for chronic non-payment holdovers.

The Appellate Term, First Department, recently seemed to open a potential loophole in that roadblock. In *Adams Tower, LLP v. Richter*, the (*cont. p. 2*)

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

- Subdivision of rent controlled apartments as an owner's tool.
- Holdover without serving a notice to cure; is it possible?
- Unique approach to MCI's and J-51's enhances capital improvement program and owner's potential profitability

## ***Under-Utilization for Rent Controlled Housing*** (cont.)

8½% return on the assessed value of the building during the tax year immediately preceding the filing of the owner's application.

In *Matter of Crespin*, an owner of a small building filed an application for permission to subdivide two rent controlled apartments, each comprised of six rooms, (exclusive of the kitchen and bathroom). Each was occupied by one tenant. After a hearing, DHCR's Rent Administrator

determined that (a) the owner had a good faith intention to subdivide the two rent controlled apartments, creating two smaller rent controlled apartments to house the current occupants, and a third new duplex apartment, and (b) that the owner met the economic hardship test.

Based upon these findings, the Rent Administrator issued an Order granting the owner permission to subdivide the two rent controlled apar-

ments, and to create a third new deregulated/market apartment.

The under-utilization application is a viable method for some owners to obtain, at least, a partial recovery of their large rent controlled apartments, which will enable them to create new deregulated units at market rents.

*If you would like to discuss under-utilization, please contact Sherwin Belkin or Kara*

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## ***Chronic Non-Payment Holdover Revived?*** (cont.)

tenant was consistently late in paying the rent over a number of years, such that the owner was required to commence nine nonpayment proceedings were settled without any abatement being granted to the tenant and with an agreement by the tenant to pay all of the arrears.

The Appellate Term held that the tenant's long-term "unjustified and persistent failure" to pay rent was a breach of the lease which was not cur-

able. Therefore, the Court in *Adams* held that a Notice to Cure was not required, thereby precluding the tenant from curing at the end of the proceeding. In *Adams* the owner simply terminated the tenancy, without the prior service of a Notice to Cure.

The *Adams* decision has spurred much discussion in the L&T bar, so it must be expected that future litigation will determine the answers to the

questions that *Adams* seems to raise. But, as of now, *Adams* is the law in Manhattan and the Bronx, such that owners may wish to reconsider the chronic non-payment holdover as, once again, being a viable proceeding.

*If you wish to discuss chronic non-payments or any other litigation issue, please contact Joseph Burden, Jeffrey Goldman, David Skaller, Martin Meltzer or Robert Holland.*

### **E-MAIL ADDRESSES: First . . . then last**

Clients have been increasingly contacting us by e-mail. If you wish to contact anyone at our firm, each person's individual e-mail address is quite simple to remember;

**First initial last name@bbwg.com [no spaces in the actual address]**

(e.g., hwenig@bbwg.com)

**Feel free to give us a cyber-hello!**

## Belkin's Bar



## BBW&amp;G NEWS

### Joshua Losardo Administrative Law and Government Relations

As the former Chief of Staff to New York State Assemblywoman Lena Cymbrowitz, Josh has a unique insider's view on government and the legislative process. Josh will be working with Partners Sherwin Belkin, Martin Heistein, Robert Jacobs and Kara Rakowski in the areas of administrative law and governmental relations.

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### Ann Ryan Real Estate Transactions

Starting after her second year in Fordham Law School, Ann Ryan interned with our firm during the Summer of '99 and then part time this past year. Ann has now graduated, and will be working with Partners Craig Ingber and Daniel Altman, in the areas of commercial leasing, conveying and other real estate transactions.

### Paul Kazanecki — MCI's / J-51's

We are pleased to announce the addition of Paul Kazanecki as a Legal Assistant. Paul is a "familiar face" to many of our clients having specialized in the preparation and filing of Major Capital Improvement Rent Increase (MCI) applications with DHCR and J-51 tax abatement filings with HPD over the past 15 years. Paul will be working closely with partner Martin Heistein and the rest of our Administrative Law Section.

BBW&G is unique in our approach to assisting our clients in maximizing profits on their buildings. Rather than merely filing applications "after the fact", we encourage our clients to meet with us **prior** to the formulation of plans or the signing of contracts. This allows us, working with our client, to develop and implement a comprehensive capital improvement program that is uniquely suited to each situation.

*If you are contemplating carrying out a major upgrade to your building or to any building component, we encourage you to contact Martin Heistein or Paul Kazanecki.*