

Luxury Deregulation: 2005 Cycle Begins

High Rent / High Income Deregulation is an administrative procedure that can result in the deregulation of rent regulated apartments if it is determined that the legal regulated rent of the apartment is over \$2,000 and the tenant's household income exceeded \$175,000 for the prior two calendar years.

The 2005 Deregulation Cycle runs from January 1 to May 1, 2005. This means that owners should consider filing for luxury deregulation against all rent regulated apartments (both rent stabilized and rent controlled), with monthly rents of \$2,000 or more during this time frame. Thus, when reviewing rent rolls, it is important that owners not only review their rent rolls on January 1st, but also keep reviewing that rent roll through May 1st, since additional apartments may become eligible for deregulation as the year progresses and rents increase.

In addition, owners should keep in mind that it does not matter if a tenant is actually paying less than \$2,000, as long as the

apartment's legal rent meets the \$2,000 threshold. The deregulation petition is based on the legal maximum rent.

Also, if a tenant rents an additional apartment in the building in order to enlarge his or her living space, but the rent(s) for one or each apartment is less than \$2,000, you may combined the apartments' rents to reach the \$2,000 amount if you can demonstrate that the combined apartments are used as a single integrated living space.

Owners who have already commenced luxury deregulation proceedings in 2004 should review whether the New York State Division of Housing and Community Renewal ("DHCR"), has determined that the tenant's 2003 income met the \$175,000 level. If DHCR has already determined that a tenant's household's 2003 income was below \$175,000, then you will not be able to obtain deregulation during the 2005 cycle, since one of the test years (2003) and is below the income threshold. However, you should calendar to file for luxury deregulation

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Protective Steps for Owners With Properties Adjoining Construction Site

An increase in the development of parking lots and other vacant land in the former manufacturing areas of SOHO and other areas of the City has caused concern among building owners abutting construction sites. The recent issuance of a vacate order by the Department of Buildings for a building on Grand Street adjacent to a construction site has highlighted this concern. Apparently, due to the combined adverse effects of construction, excavation and excessive rains, the Department of Buildings determined that the structural integrity of the building had been so severely compromised as to render it unsafe and in imminent danger of collapse.

This flurry of activity has caused a number of property owners near present or future development sites to seek the advice and analysis of BBW&G to explore their rights and options in such situations.

The Building Code provides various statutory protections for property owners. It also imposes certain obligations on developers with respect to adjoining properties. For instance, where construction is to exceed a height of 100 feet, a developer must erect a sidewalk shed that extends 20 feet from the perimeter of the construction site, which means extending the sidewalk shed over the sidewalk of the adjoining property. Moreover, when excavation exceeds a depth more than 10 feet below the curb level, a developer must protect adjoining structures from injury.

How these steps are to be taken is not set forth in the Building Code. While the law permits a developer to go to court to try to compel access on to an adjoining property for erection of a shed and underpinning in exchange for

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Special Points of Interest:

- **Ways to recover rent regulated apartments: Luxury Deregulation and Demolition Applications.**
- **How construction on adjoining properties may impact on your building.**

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against this tenant in 2006.

On or before May 1, 2005, the owner must also serve tenants eligible for luxury deregulation with an Income Certification Form ("ICF"). The ICF requires tenants to certify whether their household annual income exceeded \$175,000 in 2003 and 2004 (household "annual income" is defined as the federal adjusted gross income as reported on the N.Y.S. income tax return, for all members of the household occupying the apartment as a primary residence, with the exception of *bona fide* subtenants and employees). Because the ICF requires the tenant to reveal the names of all persons in the household, it is also a means to verify who is living in the apartment.

On or before June 30, 2005, owners must then file a "Petition by Owner for High Income Rent Deregulation" with DHCR for each tenant it seeks to deregulate. The Petition must be filed with two copies of the ICF and proof that the ICF was properly served upon the tenants.

The owner's petition will request that DHCR do one of the following:

- ▶ Issue an order deregulating the apartment based upon the tenant's admission in the ICF that the total annual household income exceeded \$175,000 during both test years; or
- ▶ Request that the DHCR verify the tenant's answer in the ICF because the owner contests the tenant's claim of low income; or
- ▶ Request that the DHCR verify the tenant's household income because the tenant failed to properly answer the ICF.

Two interesting side notes: First, no matter how the tenant answers the ICF (or doesn't answer at all); the owner must still file a petition with DHCR in order to deregulate the unit. Second, the owner is not required to know, believe or even suspect that the household income exceeds \$175,000. The only requirement from the owner's perspective is that the legal rent is at \$2,000. The income issue will be addressed by DHCR when it receives verification of the reported household apartment's income from the NYS Department of Taxation and Finance.

DHCR will issue an Order of Deregulation if it is determined that an apartment's household's annual income

is \$175,000 or more in both 2003 and 2004, thereby removing the apartment from rent regulation. The owner will then be required to offer the tenant a market rent lease at the end of the regulated lease. The tenant will only have ten days to accept the offer. If it is not accepted, the owner can seek eviction once the regulated lease has expired.

This article was written by Joshua Losardo, who works in BBW&G's Administrative, Transactional and Bankruptcy Departments. For more information about Luxury Deregulation, please contact Mr. Losardo, Sherwin Belkin, Martin Heistein or Kara Rakowski.



Joshua Losardo

Let's Get Ready to Rumble! DHCR Grants Demolition Application Without Holding A Hearing

One way for an owner of an occupied rent regulated building to obtain possession of all of its residential apartments is to file an application with New York State Division of Housing and Community Renewal ("DHCR") for permission not to renew the rent stabilized leases, and/or for a Certificate of Eviction for the rent controlled tenants, based upon the owner's intention to demolish the building (a "Demolition Application").

However, because it can take a number of years from the initial filing through completion all of the appeal levels before possession is obtained, many owners are reluctant to file this type of application. The Rent Stabilization Code previously mandated that an adjudicatory hearing be held by

DHCR prior to the issuance of a demolition order. A large part of the delay in processing a Demolition Application at DHCR results from the

The exercise of DHCR's discretion not to hold a hearing in these demolition proceedings shaved years off of the processing time of the applications.

amount of time it takes for the application to be assigned to an available Administrative Law Judge ("ALJ") to convene a hearing. Once a hearing is finally scheduled, tenant attorneys often employ dilatory tactics to further delay the processing of the

Demolition Application. Moreover, once the hearing is concluded, it generally takes the ALJ many months to issue a Report and Recommendation; which is the predicate for the agency's Final Order, thereby further delaying the proceeding.

Thus, DHCR's decision to hold a hearing on a Demolition Application generally adds years to an already lengthy administrative proceeding. With fluctuating real estate markets and interest rates, such a delay can be devastating to the economic viability of a construction project.

However, by Code amendment, the holding of a hearing is now discretionary with DHCR. In a number of applications (involving both

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Protective Steps for Owners . . .*(Cont. from p. 1)*

certain minimal protections, it is far better to coordinate such access and excavation through a written protection and preservation agreement. This avoids litigation costs in exchange for even greater protection than the law might otherwise afford. In addition, the developer benefits by expediting its construction and maintaining good relations with the neighborhood. A qualified structural engineering firm, working in tandem with counsel, is a must in formulating a strategy for an effective project.

In addition, the erection of sidewalk sheds often creates landlord-

tenant issues between the owner and its commercial tenants, who complain that the sheds are impairing the visibility of their storefronts. Many retail tenant attorneys are arguing for the insertion of very sophisticated scaffolding/sidewalk shed clauses in commercial leases which provide for rent abatements in the event sidewalk sheds remain in place for extended periods of time. These clauses can be problematic unless the prospect of development or extensive façade work from an adjoining owner is taken into account, particularly since construction can take many months.

This article was written by Robert A. Jacobs, a member of BBW&G's Transac-

tional Department. For questions on issues relating to construction on adjoining properties, as well as any other Land Use issue, please contact Mr. Jacobs. For questions on commercial leasing, please contact Mr. Jacobs, Daniel Altman or Craig Ingber.



Robert A. Jacobs

BBW&G News

BBW&G sponsored **Daniel Altman's** and **Joshua Losardo's** participation in the **New York City Marathon** as part of "**Jessica's Team**" named after Dan's daughter who is afflicted with Neurofibromatosis. As quoted in *The NF News*, Dan said: "I have tried to find a way to raise public awareness and raise money and find a cure for NF. I thought that by creating "Jessica's Team" it would be a small step toward reaching that goal." Jessica's Team raised over \$100,000 through its participation in the Marathon.

Sherwin Belkin was quoted in Josh Barbanel's article in the *New York Times Sunday Real Estate Section*, "A Landlord's Worst Nightmare." The article detailed the travails of an owner (*not* represented by BBW&G) who had been victimized by a tenant who failed to pay rent and avoided eviction by repeated bankruptcy filings. Mr. Belkin commented "I have come across serial deadbeats, but never serial bankruptcy filers." Mr. Belkin also noted that this owner might have avoided her difficulties had she thoroughly checked out the tenant prior to renting via an exhaustive credit check which would have revealed this tenant's prior disputes with former landlords. Mr. Belkin was also interviewed by *Fox5-NY* for a follow-up story on that particular owner's unfortunate circumstances, as well as the many obstacles and dilatory tactics that owners are often forced to endure simply to have their tenants pay the rent when due. Mr. Belkin was also quoted in Jay Romano's *New York Time's* "Q&A" column regarding an owner's right to impose new rules and regulations under most standard residential leases, as well as the non-binding quality of a rental agent's oral statements when a lease is unambiguous on the topic that may have been discussed. Mr. Belkin also lectured at the Real Estate Board's brokers qualifying course regarding rent regulation and fair housing laws.

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rent stabilized and rent controlled tenants), DHCR has issued orders granting Demolition Applications filed by BBW&G **without holding a hearing**. In fact, in two recent demolition proceedings in which BBW&G represented the owners (where tenants, were represented by counsel, and strongly opposed the applications), submission of approved

architectural plans and proof of financial ability to complete the projects, caused DHCR to grant the applications without a hearing. DHCR's decision not to hold a hearing in these demolition proceedings shaved years off of the processing time of the applications.

Although it is not possible to predict when DHCR will elect to hold a hearing, the fact that hearings are no longer mandated by statute has made

the Demolition Application a more attractive option for owners seeking to recover possession of rent regulated buildings.

This article was written by Kara I. Rakowski, a partner in BBW&G's Administrative Law Department. To discuss demolition applications, please contact Ms. Rakowski or Sherwin Belkin.

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