

## OWNERS BEWARE:

### Your “No Pet” Policy May Be Unreasonable

Many owners have implemented “no pet” policies in their residential buildings; specifically, including a “no pet” clause in their leases. While “no pet” clauses are generally enforceable, denial of a disabled tenant’s request to harbor a support animal may constitute an unlawful discriminatory act under the New York State Human Rights Law.

Owners cannot prohibit tenants with physical disabilities from harboring a support animal (such as a Seeing Eye dog for a blind tenant). Even tenants who do not have a visible physical disability may be entitled to harbor a support animal.

The New York State Human Rights Law defines the term “disability” as:

- (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, or

- (b) a record of such impairment, or

- (c) a condition regarded by others as such an impairment.

This definition of the term “disability” is extremely broad. The New York State Commission on Human Rights has interpreted the term “disability” to apply to tenants who are being treated for such common conditions as anxiety, depression, or high blood pressure. This broad interpretation of the term “disability” has provided tenants with an opportunity to claim exemption from the “no pet” clause contained in their lease.

The Commission holds that it is an unlawful discriminatory act to refuse to grant a disabled tenant a reasonable accommodation in the terms and conditions of the tenancy and in rules, policies, practices, or services, when such accommodations may be necessary to afford the tenant with an equal opportunity to use and enjoy the housing accommodation. The term “reasonable accommodation” to a disabled tenant may

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#### Special Points of Interest:

- [Pointers for Minimizing Your ECB penalties.](#)
- [Tenant’s right to install satellite dish is limited to area exclusively within the apartment but not on common elements of the building such as the roof.](#)

### “Beam Me Up Scotty” — A Trek to Stop Satellite Dishes

As broadcasting has changed over the last two decades, options for receiving television and even radio programming have changed. The evolution from television aerials to cable and now satellite dishes has given rental tenants, shareholders and condominium unit owners choices in programming that they never had before. As a result, property owners must confront new issues, such as potential damage to

their buildings and diminished building aesthetics.

In matters that BBW&G has handled for property owners, we have encountered situations where tenants have installed satellite dishes on the building’s façade, on the roof membrane and even on window frames. Tenants do not perceive the installation of the satellite dish as a “big

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**Owner's Beware: . . .** (Cont. from p. 1)

include relieving the tenant from complying with a lease restriction, rule, regulation or policy that generally applies to other tenants in the building. The failure to make a reasonable accommodation constitutes a discriminatory act prohibited by the Human Rights Law. Thus, an owner who refuses to exempt a disabled tenant from a "no pet" clause contained in their lease may be committing a discriminatory act -- even if the landlord was not aware of the tenant's disability.

In a discrimination proceeding, the tenant has the burden of demonstrating that (a) he/she is disabled, and (b) because of the disability, a reasonable accommodation can and must be made to allow the tenant to use and enjoy the housing accommodation.

While the burden to prove the disability and the need for a reasonable accommodation is initially upon the tenant, the Commission on Human Rights has issued findings of probable cause of discrimination based upon evidence as weak as a note from the tenant's physician,

psychologist, or social worker vaguely stating that the tenant is being treated for a disorder and a support animal is necessary for the tenant's enjoyment of the housing accommodation. Then, the owner must prove that either tenant is not disabled or that a support animal is not necessary for the tenant's use and enjoyment of the housing accommodation.

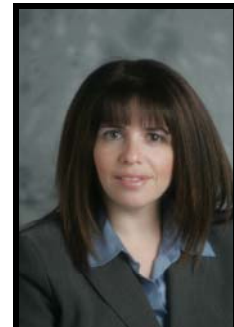
Since it is the tenant and his/her health care professional who have personal knowledge of the tenant's condition, and discovery is limited in an administrative proceeding, the owner's burden is difficult to overcome.

Thus, owners should be cautioned not to automatically reject a tenant request for permission to have a support animal. Prior to rejecting a request by a tenant for a support animal, an owner should obtain as much information about the reason for the alleged necessity for such animal. An owner confronted with such a request should ask the tenant to provide a letter from his/her health care professional stating the condition the tenant is being treated for, the anticipated duration

of the condition, the prognosis for the condition and how the support animal would affect the treatment. The owner may then want to consult not only with legal counsel, but with a medical expert to evaluate the allegations that have been made in support of the tenant's claim.

By taking all of these steps the owner can then evaluate whether the request has merit. Should the tenant file a complaint alleging discrimination, this letter may be the only discovery the owner gets before a finding of probable cause is issued by the Commission on Human Rights.

*This article was written by Kara I. Rakowski, a partner in BBW&G's Administrative Law Department.*



**Kara I. Rakowski**

## **Practice Before the Environmental Control Board: Controlling the Increasing Cost of Quality of Life**

According to its website, the "Environmental Control Board ("ECB") is an administrative tribunal that provides hearings on notices of violation ("NOV") issued by other City agencies for various "quality of life" infractions of the City's laws and rules." BBW&G's practice before the ECB has significantly expanded in recent years as the City has enhanced its enforcement of regulations, in apparent pursuit of the twin goals of quality of life and quantity of revenue.

Our firm typically defends Owners or Managing Agents ("Respondents") in proceedings

initiated by the Fire Department, as well as the Departments of Buildings, Health, and Environmental Protection.

The ECB hearings are conducted by an Administrative Law Judge ("ALJ") employed by the Department of Environmental Protection. The prosecuting City agency is generally represented by counsel (or its ECB liaison) and the inspector who issued the violation. If the case is not settled by a guilty plea, the ALJ will hear sworn testimony, but the rules of evidence and procedure are far more lax and flexible than those usually found in

court. The ALJ will generally issue a decision in two to three months, either imposing a penalty based upon a range set forth in the Administrative Code or the agency's regulations, or accepting Respondent's showing that the NOV should be dismissed or that only a mitigated fine should be imposed.

This article is intended to provide some practical pointers which may prevent or minimize penalties imposed at ECB proceedings.

Upon being served with an NOV, a Respondent should not only

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***Beam Me Up Scotty . . .****(Cont. from p. 1)*

deal,” because they are generally unaware that the unauthorized installation can cause damage to the building. Moreover, many tenants seem unconcerned that the lease may prohibit such installation.

The law governing the rights of tenants to receive over-the-air reception is found in the Telecommunications Act of 1996. Section 1.4000[a][1] of the Code of Federal Regulations provides, in part, that lease restrictions which limit installation of such devices “on property within the exclusive control of the antenna user” are prohibited; meaning, the tenant is permitted to install a dish on an area exclusively within the apartment – but not on the common elements of the building. The landlord’s right to control what happens to its building and its property is superior to a tenant’s desire to receive television via satellite.

The Appellate Term, First Department has specifically found that although the Federal Communications Commission authorized renters to install reception devices in areas of occupation as defined by the lease, such as balconies, it had not extended this rule to permit placement on common or restricted access property such as outside walls or rooftops (*2682 Kingsbridge Association LLC v. Martinez*). The Court then held that the Telecommunications Act allows the landlord to prohibit the tenant from installing the satellite dish on the exterior window frame and window guard. The Court took into account that the statute did not extend the rule to permit placement of antennas on common or restricted access property such as outside walls or rooftops. The Court reasoned that this result is consistent with prior case law upholding the owner’s right to object to the affixation of traditional television aerials to the exterior window frame.

If you have a tenant who has installed a satellite dish or television aerial without the owner’s permission, what should be done? Take immediate action. However, before commencing formal legal proceedings, we recommend sending a letter to the tenant advising that the lease prohibits the installation of the satellite dish; that the tenant must immediately remove the satellite dish; and that the tenant must give the owner written confirmation that it has been removed within a short finite amount of time. The letter should also state that the tenant will be charged any costs to repair holes, a cracked facade or roof membrane resulting from unauthorized installation of the satellite dish. The letter should also indicate that if the tenant fails to timely remove the satellite dish, the matter will be referred to the owner’s lawyer for eviction proceedings or other court action, and that the tenant will be liable for the attorneys’ fees that are incurred by the owner (the lease must provide for this remedy).

If the tenant, shareholder or condo unit owner does not remove the unauthorized satellite dish, then we advise the owner to go to court. Whether a building contains residential rental units, co-operative apartments or condominium units, the landlord, cooperative corporation or board of managers has a remedy. With a rental tenant or cooperative shareholder, a holdover proceeding can be commenced based upon a violation of the lease and the owner may seek an order of eviction in housing court. With a condominium unit owner, the condo’s by-laws would permit the board of managers to commence a declaratory judgment action in State Supreme Court for a court order to remove the dish and for damages. An alternative remedy available to the cooperative corporation is to terminate the offending shareholder’s proprietary lease. It is the lease, proprietary lease, house rules and by-laws that give property owners the ammunition to go to court to seek

relief that the owner is entitled to. First, however, the owner must examine, in each instance, what “cure” periods may be applicable.

Tenants and condominium unit owners who have challenged the owner’s right to enforce the building’s rules—to prohibit the installation of satellite dishes—have been unsuccessful. Federal law prevents the landlords from having a blanket restriction on the tenants’ receipt of broadcast signals. However, landlords, cooperative corporations and condominium boards are permitted to enforce their rights when devices such as satellite dishes are installed on rooftops and outside walls. Since the landlord owns these common areas, the tenant’s right to receive broadcast signals does not extend to the landlord’s property or common elements which are not part of the leased unit.

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***Practice Before the ECB. . .****(Cont. from p. 2)*

note the hearing date, but also the “certification date”, if applicable. For example, the Department of Buildings (the “DOB”) and Fire Department will, in some instances, set a “certification date”, i.e., a date prior to the hearing date by which Respondent can correct violations and file a certificate of correction to avoid a hearing. Indeed, even if Respondent cannot certify correction in a timely fashion, if it can show (by documentary evidence or sworn testimony) at the hearing that repairs were completed, it may receive a reduced fine.

Respondent should also discern whether the NOV properly identified the ownership entity and the property address. In certain instances, the ECB may dismiss a NOV if the Owner or premises is not properly listed.

The ECB does not require that a Respondent be represented by an attorney at hearings. However, there are a number of potential defenses (some procedural and others substantive) which may best be developed through consultation with counsel. For example, if the NOV does not include the correct statute or regulation, or was not served on the correct party, or within the proper timeframe; it may be grounds for dismissal.

Similarly, there may be defenses based upon the location or history of the premises. For example, we successfully defended an NOV in which the DOB alleged use of premises as a restaurant violated a certificate of occupancy which listed the use as a store. We submitted an architect’s affidavit stating that based upon the facts before the agency (including the length of time of the non-conforming use and the age of the certificate of occupancy), transformation of the space from a store to a restaurant would not

have required an amended certificate of occupancy. As a result, the NOV was dismissed.

Each case should be evaluated on its own merits to determine whether there are mitigating circumstances that could be cited to defeat or limit any penalties. For example, in another instance, we successfully defended a noise violation issued by the Department of Environmental Protection by demonstrating that the subject premises was situated on a block where the decibel level cited by the inspector was, in fact, permitted.

Respondent may also be able to avoid liability or secure a reduction in the fine if it can show that the condition arose due to emergency exigencies or that the violation overlaps other pending proceedings.

Of course, a Respondent may also be able to prevail at the hearing by demonstrating that the City has failed to prove its case. For example, it could be shown that the inspector did not personally observe the purported condition, or did not use proper methodology in conducting the tests (such as a noise meter reading) which were the predicate for the violation.

As a cautionary note, some Owners have an unfortunate tendency to ignore NOV’s where they believe that the underlying condition was caused by a third party. Generally, even if Owner could demonstrate that a tenant was the sole cause of the violation, this would be insufficient basis for Owner to prevail before the ECB. The ALJ is generally concerned with statutory compliance, rather than the source of the non-compliance. Although an Owner may have a remedy under its lease to recoup fines issued by ECB from the offending tenant, and in certain instances may be able to evict the tenant based on such violation, an Owner should not sit idly by and assume that the tenant will correct



the condition and appear at the hearing. At a minimum, the Owner should place the tenant on notice of the hearing and demand that tenant promptly correct the condition in question. The tenant should be further notified (assuming the lease so provides) that it will be billed for any penalties assessed and legal fees incurred by the Owner in defending this violation.

Respondent must be sure not to default at the hearing. ECB will impose a default penalty far in excess of the statutory face value of the fine, irrespective of the seriousness of the violation or the merits of the proceeding.

Although the focus of this article is on the ECB, we would be remiss if we did not discuss another emerging forum for enforcing “quality of life” regulations—the Summons Part of Criminal Court. The proceedings brought in Criminal Court are generally initiated by the DOB, Fire Department or a special enforcement agency known as the Mayor’s Task Force, often when ECB proceedings did not result in correction of the purported violation. The fact that a violation resulted in an ECB fine will not insulate Respondent (technically referred to as defendant) from liability for similar conditions in Criminal Court.

Unlike the ECB, where informality and flexibility reigns, the procedures in Criminal Court are

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***Practice Before the ECB . . .****(Cont. from p. 4)*

somewhat more structured. Failure to appear at a Criminal Court hearing could result in the issuance of not only a default order, but an arrest warrant. Although a Respondent may defend itself without counsel before the ECB, if it is a corporate or partnership entity, it must be represented by counsel in Criminal Court.

The City is represented by an attorney from the corporation counsel who will attempt to negotiate a resolution of the case (often a guilty plea to a lesser charge in return for certification of

correction and a reduced fine) before the matter is referred to the judge. Of course, defendants may raise procedural and substantive arguments similar to those discussed above.

A successful outcome at either ECB or Criminal Court Summons Part often requires some combination of quick correction of conditions and innovative legal theory. Prompt repairs and consultation with counsel may not only enhance the City's quality of life, but an Owner's bottom line as well.

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## BBW&G NEWS

### MAY I QUOTE YOU?



**Sherwin Belkin** was prominently featured in two lead articles in *The New York Times'* Sunday Real Estate Section. In the August 28<sup>th</sup> article, "The Art of Persuading Tenants To Move," by Patrick O'Gilfoil Healy, Mr. Belkin was described (with photo) as one of "A small group of experts [who] figure out deals so appealing that tenants want to give up the rights to regulated apartments." Two weeks later, Dennis Hevisi wrote an article about first-time owners—"Buying Is Easy; Owning is Hard." Mr. Belkin noted that "Too often, I find that first time landlords look only at the building's location, value, structural soundness and the ability to obtain clean title." But he said, "They should also thoroughly investigate who their current tenants are" (particularly whether they are rent regulated) and if they are habitually delinquent in paying rent or are litigious, or if there are overcharges in rent since the new owner "becomes liable for any rent overcharges during the previous four years, even though the monies were paid to the prior landlord."



**Aaron Shmulewitz** addressed a query in Jay Romano's "Q&A" column in *The New York Times'* Sunday Real Estate Section concerning the obligations of a condo's superintendent to non-purchasing rent regulated tenants. Mr. Shmulewitz noted that the super must provide the same level of service to regulated tenants as they had pre-conversion; although the condo could assess the unit owners with charges for the repairs (or elect to provide such repairs free of charge to all unit owners). Replying to a question as to the requirement that the super be a union member, Mr. Shmulewitz noted that there is no such requirement, but that once a union superintendent was so employed, any attempt at termination could result in vigorous union opposition.

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