

## *Deeming Leases Renewed: A Solution to Unreturned Renewal Lease*

Owners are required to offer the tenant of a rent-stabilized apartment a renewal lease 90 to 150 days before the expiration of the existing lease. It must be offered by personal delivery or regular mail (we recommend obtaining a postal certificate of mailing if mailed). It must also be on a form approved by the Division of Housing and Community Renewal ("DHCR"). The DHCR form gives Owners the opportunity to include the lawful rent guidelines increases to which the Owner is entitled. The notice requirement and renewal procedures are found in §2523.5 of the Rent Stabilization Code ("RSC").

The Code gives the tenant 60 days from the service of the renewal offer to execute and return the renewal lease. There are times when a tenant fails to return the signed renewal back

to the Owner. In some instances, the tenant may have simply forgotten to return the renewal lease. In contrast, the outright refusal of a tenant to timely return the renewal may indicate a problem, such as the tenant disputing the new rent for the renewal term.

In most scenarios, and certainly before any legal action is taken, we suggest writing the tenant a letter (including a copy of the prior renewal offer), reminding the tenant that he/she must sign the renewal if the tenant wants to continue the tenancy. More often than not, this gentle nudge will result in the renewal offer being executed.

If after sending the "reminder" letter there is still no signed renewal lease returned, the Owner can commence a holdover proceeding for possession of the apartment based on the

*(Cont. on p. 2)*

## *Free Tenant Storage: A Source of Future Revenue*

Rent Stabilization Code, Section 2520.6 generally defines "Required Services" as:

(1) That space and those services which the owner was maintaining or was required to maintain on the applicable base dates set forth below, **and any additional space or services provided** or required to be provided thereafter by applicable law ....

A subset of "Required Services" is "Ancillary Services" which is generally defined as:

That space and those required ser-

vices not contained within the individual housing accommodation which the owner was providing on the applicable base dates set forth below, **and any additional space or services provided** or required to be provided thereafter by applicable law...

Whether or not an ancillary service is a required service is often a question of who has provided the service; that is, the owner of the building or an independent operator. Rent Stabilization Code, Section 2520.6(r)(xi) provides, in relevant part, that:

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### Special Points of Interest:

- **Deem lease renewal and get guideline increase from tenant who refuses to return signed renewal lease.**
- **Methods for recovery of IMD units.**
- **Charging for tenant storage space.**

**Deeming Leases Renewed . . .***(Cont. from p. 1)*

tenant's failure to renew the lease. This type of case is brought pursuant to RSC §2524.3(f). Almost always, the Court will give the tenant the opportunity to execute the renewal lease after the parties have appeared in court. Although RSC §2524.3(f) does not authorize the court to fashion a cure (signing the lease after the tenancy was terminated), the appellate courts for Manhattan and the Bronx have upheld the decisions allowing a cure (the appellate decisions in other boroughs have occasionally been stricter). The Owner can ask the court to award attorneys' fees because it was the tenant who caused the Owner to incur a legal expense. Despite the availability of reimbursement for fees, in most cases it is more practical to utilize the second option described below.

The second option permits the Owner to simply deem the offered lease as having been renewed under RSC §2523.5(c) (2). Under this option, when the tenant's time to return the lease has passed the Owner can charge the tenant for the lawful increases set forth in the renewal lease and enforce the right to collect the rent guideline increases. In deeming the lease renewed, the Owner must select a one or two year term (and its concomitant

Rent Guideline increase). The Owner should select the term that is equal to the term of the expiring lease.

After the Owner deems the lease renewed—which should be confirmed in writing to the tenant so that the tenant is on notice of the deemed renewal and increased rent—some tenants may try to pay the rent under the prior lease; not the higher deemed renewal lease rent. Some tenants simply stop paying the full rent. In either instance, the Owner can bring a non-payment proceeding for the full rent under the deemed renewal lease.

In order for the Owner to make the best case, it is imperative that the Owner be able to prove that it made a timely renewal offer to the tenant; thus, the importance of mailing the renewal lease to the tenant by regular mail **with a certificate of mailing** is good evidence of when the offer was served, and the follow-up letter in which the Owner informs the tenant that the lease has been deemed renewed. If the Owner timely makes a renewal offer and is able to prove it, then the tenant will be required to pay the rent, plus the lawful rent increases to the Owner as of the commencement of the deemed renewal period.

A tenant's failure to timely return the renewal lease should not cause an Owner to be bullied

into accepting less rent than it is entitled to. The law does not give rent stabilized tenants the opportunity to negotiate lower rents upon the expiration of their current leases. If the Owner has timely offered a renewal lease and the tenant is given 60 days to execute and return the offer, the Owner is never compelled to accept a lower rent than it is entitled to. Although the housing market or an Owner's desire to confer an extra benefit upon a tenant may cause an Owner to offer a rent concession, that is in the Owner's sole discretion and is the subject of a different article.

*This article was written by Martin Meltzer and Jordi Fernandez, a partner and an associate in BBW&G's Litigation Department, respectively.*



Martin Meltzer



Jordi Fernandez

**Recovery of IMD Units**

**O**wners of units covered by the Loft Law, known as interim multiple dwellings ("IMD Units") have certain rights to evict tenants and recover possession of IMD Units. However, in certain respects, these rights are more restrictive than those

applicable to either Rent Controlled or Rent Stabilized units.

An IMD Owner is entitled to sue for non-payment of rent only if the Owner is in compliance with the Code Compliance Time Tables set forth in the Loft Law.

These time tables require an Owner to make progress towards obtaining a residential Certificate of Occupancy for the building. If the Owner is not in compliance, then the tenant may assert a defense that the tenant is not obligated to pay any rent as a result

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**Free Tenant Storage . . .***(Cont. from p. 1)*

A service as defined in paragraph (3) of this subdivision (r) [that is, ancillary services] for which there is or was a separate charge, shall not be subject to the provisions of this Code where no common ownership between the operator of such service and the owner exists or existed on the applicable base date, or at any time subsequent thereto, and such service is or was provided on the applicable base date and at all times thereafter by an independent contractor pursuant to a contract or agreement with the owner. Where, however, on the applicable base date or at any time subsequent thereto, there is or was a separate charge [for an ancillary service], and there is or was common ownership, directly or indirectly, between the operator of such service and the owner, or the service was provided by the owner, any increase, other than the charge provided in the initial agreement with a tenant to lease, rent or pay for such service, shall conform to the applicable rent guidelines rate. However, notwithstanding such common ownership, where such service was not provided primarily for the use of tenants in the building . . . on the applicable base date or at any time subsequent thereto, such increases shall not be subject to any guidelines limitations.

An example of a common ancillary service is a parking garage or health club or storage facility that has always been run by an independent operator—not by the

building owner. Such services will not be required services. This means that the owner is not perpetually obligated to continue the service. It also means that the fees imposed by the operator are not subject to the limitations of Rent Stabilization.

Some required services have been determined by DHCR to be of such negligible impact upon the rent stabilized tenancies, that even though they have been provided by the owner, they may be eliminated without penalty. Specifically, the Rent Stabilization Code §2523.4(e) provides, in relevant part, that:

Certain conditions ... may be *de minimis* in nature, and therefore do not rise to the level of a failure to maintain a required service... Such conditions are those that have only a minimal impact on tenants and do not affect the use and enjoyment of the premises ....

DHCR's schedule of *de minimis* "Building-Wide Conditions" includes "Storage Space." The Code declares as being only *de minimis*:

*Storage Space:* Removal or reduction of, unless storage service is provided for in a specific rider to the lease (not a general clause in a standard form residential lease) or unless the owner has provided formal storage boxes or bins to tenants within three years of the filing of a tenant's complaint alleging an elimination or a reduction in storage space service.

Putting all of these concepts together, what does this mean? Many owners have provided an area for general basement storage for tenant use, without charge. Assuming that storage service is not reflected in a specific rider to

the lease or provided by the owner via formal storage boxes or bins, the owner can discontinue this service.

Many owners have notified their rent stabilized tenants that this free service is being ended and have required the removal of possessions. These owners have then put in individual bins for which they require a charge—this will then become a required service. To avoid that, some owners have eliminated the free open storage and have leased out the space to an independent operator to provide storage. This would not be a required service because of the independent operation. Some owners have eliminated the free area, and have created a hybrid—that is, a smaller free general area, and bins for a fee (either independently run or not). This mix sometime avoids tenant dispute in that those who had free storage can continue to receive it, while the owner recoups some of its former free storage space for a new source of revenue production.

No matter which route the owner opts to pursue, the result is that space that was previously given away for free is now transformed into an income generator. This sort of alchemy is certainly a concept worthy of an owner's careful review.

*This article was written by Sherwin Belkin, a partner practicing in BBW&G's Administrative Law Department.*



Sherwin Belkin

*Recovery of IMD Units . . .*  
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of the Owner's failure to have a certificate of occupancy for residential use.

The IMD Owner can bring a non-primary residence proceeding on thirty days notice. Under Rent Stabilization, an Owner can bring a non-primary residence proceeding only after the expiration of the lease after serving a Notice of Non-Renewal between 90 and 150 days prior to the expiration of the lease. Under the Loft Law, there are no leases in effect. The IMD Tenant is, in essence, a statutory month-to-month tenant. That tenancy can be terminated on thirty (30) days notice if the tenant is not a primary resident.

The IMD Tenant also can be evicted if the tenant is a nuisance, or is interfering with the Owner's operation of the building, or interrupting the quiet enjoyment of the other occupants in the building. Examples of an actionable nuisance include the tenant playing loud music, over occupying the premises with junk, causing noxious fumes to escape, etc. Again, a thirty day notice terminating the tenancy would precede the commencement of the eviction proceeding.

If the IMD Tenant has violated the regulations regarding subletting (e.g., subletting without the prior permission of the Owner), then an eviction proceeding can be commenced based upon provisions that are similar to those contained in the Rent Stabilization Law. Further, if the IMD Tenant is charging the subtenant more than the legal regulated rent, then the tenant can be evicted with no opportunity to

cure the breach of the tenancy. In other words, if the IMD Tenant merely improperly sublets, but does not overcharge the subtenant, then the IMD Tenant has the right to cure the breach of the tenancy. However, if the IMD Tenant has "rent gouged," then the IMD Tenant does not have the opportunity to cure the violative conduct.

A proceeding can also be brought if the IMD Tenant undertakes illegal alterations to the premises. Under the Loft Law, the Owner is obligated to secure a residential certificate of occupancy and must undertake the work within the IMD Unit to correct alterations (that may have been done by the IMD Tenant many years before). Any subsequent alterations by the IMD Tenant, made without the Owner's permission, are prohibited and are a basis for terminating the tenancy.

Unlike Rent Stabilization, an IMD Owner cannot bring a proceeding to recover possession of an IMD Unit for the Owner's personal use. The Owner must first legalize the building, secure a certificate of occupancy and obtain an order from the Loft Board that the Owner has completed all of the requirements. The building will then fall under the Rent Stabilization Law. The Owner is then required to give a one or two year lease to the tenant (at the tenant's option). It is only at the end of that first rent stabilized lease that the Owner can then bring an owner occupancy proceeding.

An IMD Owner also cannot bring an application seeking to demolish the building. The Owner must first legalize the building,

often spending tens or hundreds of thousands of dollars, obtain a certificate of occupancy and then enter into the Rent Stabilization system. Only at that point can the Owner petition DHCR for permission to refuse to renew leases so the Owner can demolish the building.

There is no provision under the Loft Law regarding the renewal of leases, since there are no leases under the Loft Law. It is only when the Owner has secured a certificate of occupancy that a rent stabilized lease can be offered to the Tenant.

An Owner or a prospective purchaser of an IMD building must recognize certain limitations on the recovery of units that do not exist under Rent Control or Rent Stabilization. Accordingly, the prudent IMD Owner or potential IMD Owner would be wise to consult with counsel regarding the rights, obligations and restrictions that will be encountered when dealing with a building governed by the Loft Law.

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Joseph Burden

## BBW&G NEWS

### MAY I QUOTE YOU?



**Sherwin Belkin's** lecture on Succession to Regulated Tenancies at CHIP's recent seminar program was noted in *New York Magazine's* "Eviction Boot Camp." The article noted that, although Mr. Belkin made reference to the horror story of the granddaughter who forged the tenant's signature on leases, but was still granted succession rights, a "ripple of excitement went through the audience" when he told of a recent case handled by BBW&G where a rent controlled apartment renting for \$300 had been recovered, which would now rent for thousands.



**Massay Knakel's** Townhouse Division newsletter re-printed BBW&G associate **Joshua Losardo's** January 2006 *Update* article "It's Luxury Deregulation Time Again!" Mr. Losardo's article details the procedure and potential for permanent exemption from rent regulation based upon High Rent/High Income deregulation at DHCR.

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