

## *Certificates of No Harassment Required in the Special Clinton District*

The Special Clinton District is an area located on the West Side of midtown Manhattan, bounded by 42<sup>nd</sup> Street on its south border, 59<sup>th</sup> Street on its north border, 7<sup>th</sup> Avenue on its east border and 11<sup>th</sup> Avenue on its west border.

Generally, if an owner of property in the Special Clinton District wishes to obtain a demolition permit or a permit for any development, enlargement or extension on any zoning lot containing residential uses from the Department of Buildings, the

Commissioner of the Department of Housing Preservation and Development must first certify to the Department of Buildings (via a Certificate of No Harassment) that there has been no harassment of the building's residential tenants.

HPD is also called upon to issue such Certificates when owners of Single Room Occupancy ("SRO") buildings need DOB permits or approvals. Significantly, the Certificate requirement for Special Clinton District buildings is not limited to SRO's; it applies to all  
*(Cont. on p. 2)*

### What's on the Inside

	Page
<i>Certificates of No Harassment (cont.)</i>	2
<i>Partial Eviction, Full Abatement? (cont.)</i>	4,6
<i>Primary Residence — Has the Meaning Changed?</i>	5,6
<i>BBW&amp;G News</i>	7

## *Partial Eviction, Full Abatement?*

The legal ramifications when a commercial property owner has caused (or permitted) an actual or constructive eviction of one of its tenants has long been the subject of significant concern. Until quite recently, prevailing law provided that if a tenant was actually evicted from any portion of its premises, no matter how small that portion was, the evicted tenant would be entitled to a full abatement of rent. This article will discuss the recent shift toward granting only a partial abatement of rent where a partial eviction is caused by the owner.

Relevant case law has long held that if a tenant was completely deprived of its space by a physical ouster by its owner, the tenant's rent would be abated. Moreover, where the owner did not actually oust the tenant from the space (that is, an actual eviction), but the tenant was in some other manner completely deprived of the use of its space (a constructive eviction resulting, for example, from flooding and the tenant being unable to utilize the entire space and, therefore, a relinquishment of the space); the rent would likewise be abated.  
*(Cont. on p. 4)*

### Special Points of Interest:

- **Extra due diligence is required when purchasing a property in the Special Clinton District.**
- **Commercial tenants are no longer automatically entitled to a full rent abatement when only a portion of their space is impaired.**
- **State's highest court makes unusual ruling affecting rent stabilized apartments.**

*Certificates of No Harassment . . .*  
(Cont. from p. 1)

residential properties.

What is most daunting is that the certification period dates back to **January 1, 1973**. Moreover, this requirement for a Certificate of No Harassment in the Special Clinton District even applies to vacant buildings.

To obtain a Certificate of No Harassment, an application must be filed with HPD which includes detailed information about the ownership and management (such as individual names, social security numbers, telephone numbers, home addresses, etc.) dating back to January 1, 1973. In addition, the owner must submit a rent roll and contact information for all tenants (even for tenants who vacated) dating back to January 1, 1973.

Because the test period now runs for more than three decades, an applicant for such a Certificate often does not have and cannot obtain complete records covering the entire test period. In such instances, the applicant will provide information to the best of its ability; explaining its efforts at exhaustive research and thorough due diligence.

HPD then conducts an investigation to determine if any harassment has occurred during the inquiry period (which is from the date the application is filed with HPD, dating back to January 1, 1973).

As a practical pointer, since the inquiry period dates back to January 1, 1973, prospective purchasers of buildings located in the Special Clinton District should try to provide in a contract for purchase that the seller has an obligation to provide all information necessary to obtain a Certificate of No Harassment, and that the seller has a continuing obligation that survives closing to cooperate in any proceeding for a Certificate.

After an investigation, if HPD determines that no harassment has occurred, a Certificate of No Harassment will be issued. The Certificate of No Harassment issued for a building in the Special Clinton District does not have an expiration date, but may be revoked by HPD at any time due to a subsequent finding of harassment.

If HPD finds harassment and denies the application, a permit may be issued by the Department of Buildings only if the owner "cures" the harassment. The "cure" is an agreement entered into by the owner and HPD, which runs with the land and binds all parties in interest and their successors. The owner must agree to provide low income housing in an amount equal to at least 28% of the total residential floor area of the building to be altered, or in a new building on the same zoning lot. (For buildings that

were vacant on August 17, 1990, there is also a land cure option.)

Owners of buildings in the Special Clinton District are well advised to keep good records of all communications with their tenants and logs of all complaints and how they were addressed. In addition, copies of all service contracts and invoices for work in the building should be maintained. Buyers of buildings in the Special Clinton District should be cautioned to obtain as much information as possible about the building prior to closing.

*This article was written by Kara Rakowski, a partner practicing in the BBW&G Administrative Law Department. For more information about obtaining a Certificate of No Harassment in the Special Clinton District or in other locations throughout the City (for SRO's), please contact Ms. Rakowski or other BBW&G Administrative Law Department partners Sherwin Belkin or Martin J. Heistein.*



Kara Rakowski

## *Primary Residence — Has the Meaning Changed?*

**T**he Rent Stabilization Code allows an owner to recover possession when “the housing accommodation is not occupied by the tenant . . . as his or her primary residence . . .”

An October 2005 decision by the Court of Appeals threatens to throw the concept of what constitutes a “primary residence” into a state of flux and uncertainty for owners of rent stabilized apartments. In *Glenbriar, Co. v. Lipsman*, two elderly “snowbird” tenants, husband and wife, pulled off the ultimate juggling act — claiming two different apartments in two different states as their primary residence and winning.

The Court of Appeals acknowledged that the husband (now deceased) maintained his primary residence in Florida, where he claimed a homestead exemption in order to obtain real estate tax benefits from the local county and state. The Court also noted that the husband and wife maintained a conventional marriage, where both lived together and were “rarely physically separated.” Nonetheless, the Court held that the wife maintained the New York rent stabilized apartment as her primary residence.

How is this possible? “Primary” generally equals “one.” In accordance with the

standard established by New York courts, a tenant’s primary residence must be proven by demonstrable, objective, empirical evidence of “an ongoing, substantial, physical nexus with the controlled premises for actual living purposes.”

Rent Stabilization Code Section 2520.6(u) provides the following non-exhaustive list of factors to be used in determining whether a housing accommodation subject to the Code is occupied as a primary residence:

(1) Specification by an occupant of an address other than such housing accommodation as a place of residence on any tax return, motor vehicle registration, driver’s license or other document filed with a public agency;

(2) Use by an occupant of an address other than such housing accommodation as a voting address;

(3) Occupancy of the housing accommodation for an aggregate of less than 183 days in the most recent calendar year, except for temporary periods of relocation (e.g., military service, attending college, hospitalization, short term incarceration);

(4) Subletting of the housing accommodation.

Yet, when one applies the above factors to the *Glenbriar* case, the decision by the Court



of Appeals is disconcerting, because the following evidence submitted at trial seems to establish that both the husband and wife maintained their primary residence in Florida:

- The tenants jointly owned the Florida apartment;
- The tenants claimed the Florida apartment as their primary residence for purposes of receiving the Florida homestead exemption;
- The husband had a Florida driver’s license;
- The wife signed joint tax returns that were filed from the Florida residence;
- The couple did not file New York State income tax returns; and
- The couple alleged that they split their time approximately equally between the New York

*(Cont. on p. 5)*

*Partial Eviction, Full Abatement?...*  
(Cont. from p. 1)

Where a tenant is only deprived of the use of a portion of its space, an “actual partial eviction” is said to have occurred. The law had previously been that the tenant had to abandon its “entire premises” in order to claim an entitlement to a full rent abatement. However, in 1988 the Appellate Division relaxed this requirement; no longer mandating abandonment of the entire premises in order to claim an abatement.

A relevant related principle is referred to as the “election of remedies.” This principle holds that a tenant, if evicted by circumstances constituting an actual or constructive eviction, may elect either to withhold rent and seek a rent abatement or to pay the rent and then pursue a claim against its owner for damages resulting from the eviction. However, the tenant cannot assert a claim for damages and also seek an abatement of the rent.

Typically, what occurs is that a commercial owner will receive a call from a tenant if, for example, a flood has occurred, and will be informed by the tenant that the tenant’s equipment (such as computers) has been damaged, service personnel have been required to enter the premises to perform repairs, the tenant has lost a certain amount of busi-

ness during this period, and that the tenant wants to be compensated for all those damages, including having its rent abated. Unfortunately for the tenant, it is not entitled to both compensation for damages and a rent abatement. The tenant must choose between the compensation it could receive for alleged damages or seek an abatement of the rent.

Notably, a tenant’s filing of a claim with its own insurance carrier would constitute an “election” of a damage remedy, and would effectively preclude the tenant from also recovering a rent abatement for an actual or constructive eviction.

Interestingly, with regard to constructive eviction, courts have, in recent years, become more flexible to both tenants and owners so that if a tenant became unable to utilize only a “portion” of the premises as a result of actions by its owner, a portion of the rent would be abated. Prior to that change, a tenant had to be constructively evicted and unable to use its entire leased premises in order to be entitled to a rent abatement, and such abatement would apply to the full rent paid. This principle that owners would only be subject to a partial rent abatement had not been extended to circumstances where actual partial eviction occurred and, consequently, if the owner’s actions resulted in only a limited portion of the tenant’s space



being taken, the tenant would be entitled to a full rent abatement.

Recently, in the case of *East Side Exhibition Corp. v. 210 East 86th Street Corp.*, the Appellate Division decided that a taking of a portion of the tenant’s space would not result in the entire rent being abated, but instead, would apportion a rent reduction.

In the *Eastman* case, the tenant operated a movie theatre located on the street level and second floor of the owner’s building. The owner installed certain steel floor-to-ceiling cross-bracing between existing steel columns on the street and second floors without obtaining the tenant’s permission. On the street level, the columns were situated midway between a concession stand and a staircase on one side of the 15-foot wide lobby and the projection booth wall on the other side. On the second floor, the cross-bracing displaced a portion of an informal seating area.

(Cont. on p. 6)

***Primary Residence—Has the Meaning Changed? . . .***  
*(Cont. from p. 3)*

and Florida apartments, but there were discrepancies as to the exact dates that the wife traveled to and from Florida each year.

The Court of Appeals' decision seems to turn the primary residence requirement on its head. The overriding purpose of the primary residence requirement is to ensure that only those New Yorkers who actually use their rent regulated apartment as their primary residence can reap the benefits of the protections of rent regulation. Is it fair, then, to allow a married couple not only the privileges arising from their rent regulated apartment in New York City, but also the privileges extended by maintaining a residence in another state – in this case, the Florida homestead exemption?

The answer might be found in the Appellate Division's earlier decision in *Glenbriar*, which hints that interests beyond the scope of law played a part in the court's decision: "It is uncontested that the Lipsmans have lived in the Bronx apartment for over 45 years, and that they raised their children in that apart-

ment . . . . Denial of a renewal lease would undeniably have devastating impacts not only for Mrs. Lipsman, but also for her family, whose lives are rooted there, and who still come back to their childhood home to visit."

Preservation of a rent regulated apartment for a tenant's family legacy was never a goal of the rent laws, but the Appellate Division's dicta in *Glenbriar* seems to

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***Preservation of a rent regulated apartment for a tenant's family legacy was never a goal of the rent laws . . .***

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indicate that the age of the tenants or familial longevity weighed upon the Court in making its determination.

Perhaps the unusual *Glenbriar* holding is explained by the limited nature of the Court of Appeals' review. The High Court is a court of law, not of fact. As such, the Court stated that it was constrained to hold as it did, given the factual analysis below. Thus, it is possible that the sweep of *Glenbriar* may not be as broad as it seemed and may be limited to the procedural

posture encountered by the Court of Appeals.

Nonetheless, *Glenbriar* seems to have opened up a possible Pandora's Box of uncertainty where tenants have second homes and/or vacation homes. Just eleven days after the *Glenbriar* was decided, the Appellate Term, First Department affirmed a decision by the Civil Court in *Carmin Ltd. v. Gordon*, holding that an estranged married couple maintained separate primary residences in two different Manhattan apartments, despite the facts that: both the husband and the wife signed leases and renewal leases for both apartments; the wife signed a joint application for the husband's apartment where she stated that she was to

be an "occupant"; joint income tax returns listed the husband's apartment's address; their joint bank account, joint credit card and bills listed the husband's apartment's address; records from Con Ed showed that there was barely any electrical usage at the wife's rent stabilized apartment for an extended period of time; and the wife admitted that she spent "considerable time" at her estranged husband's apartment and often slept on the couch there.

The decisions in *Glenbriar*

*(Cont. on p. 6)*

***Partial Eviction, Full Abatement? . . .***  
*(Cont. from p. 4)*

The tenant's total space in the *Eastman* case was between 15,000 and 19,000 square feet, and the owner's cross bracing deprived the tenant of merely 12 square feet of space. Prior to the *Eastman* decision, owner's installation of the bracing could have entitled the tenant to a full abatement of rent. The *Eastman* case carved out an exception to that full abatement rule for a partial taking of tenant's space.

Although the Appellate Division in *Eastman* agreed with the lower court's novel award of only a partial rent abatement, it disagreed with the lower court's rationale for the partial rent abatement. Specifically, the lower court found that the partial rent abatement was appropriate

because the portion of the tenant's space taken by the owner was not essential to the tenant's operation of its theatre and determined that the small amount of space taken was *de minimis*. However, the Appellate Division found that the partial rent abatement was appropriate because the tenant had been partially evicted from the leased premises and was entitled to compensation for the injury it had suffered and would continue to suffer as a consequence.

Even though the *Eastman* court awarded the tenant only a partial abatement for an actual partial eviction, the court was very careful to state that *Eastman* was based upon the specific facts and circumstances of that case. Unquestionably, rather than automatically impose a harsh

remedy against a commercial owner (i.e., the complete abatement of rent for only a partial eviction); the *Eastman* case has opened the door to considerations as to the significance and size of the space taken.

*This article was written by Lewis A. Lindenberg, a partner practicing in BBW&G's Litigation Department.*



Lewis A. Lindenberg

***Primary Residence—Has the Meaning Changed? . . .***

*(Cont. from p. 5)*

and *Gordon* demonstrate that the meaning of "primary residence" may be in a state of flux, particularly in instances where married tenants own or rent two residences simultaneously. Depending on the circumstances in each case, these recent decisions may

make it more difficult for owners to evict such rent stabilized tenants on the grounds of non-primary residence. Thorough factual investigation, artful legal presentation and cogent analysis will all be required in order to fully protect and preserve an owner's rights and remedies.

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Kristine L. Grinberg

## BBW&G NEWS

### MAY I QUOTE YOU?



BBW&G Litigation Partner, **Joseph Burden** was quoted in the *New York Law Journal* regarding the proposal by the New York County Lawyers' Association that counsel should be provided to low income tenants in Housing Court proceedings. Mr. Burden suggested that the public would be better served by targeting certain types of complex cases for legal assistance, rather than every Housing Court case.



**Craig Price**, an associate in BBW&G's Transactional Department, lectured at **Warburg Realty's** new broker training course on "The Purchase and Sale of Residential Real Estate in New York."



**Aaron Shmulewitz**, who heads the firm's Co-op and Condo Practice, responded to an inquiry by a highly allergic co-op shareholder in *The New York Times'* Sunday Real Estate Section "Q & A" column regarding his co-op's requirement that 80% of the floors be carpeted. Mr. Shmulewitz noted that although the disability laws can sometimes create exemptions for a disabled shareholder from complying with a house rule (such as a blind shareholder having a seeing eye dog even where the co-op prohibits pets), in this case "it is not likely that such an exemption would be granted....[because] [p]reventing noise to the neighbor below is a reasonable objective of the house rules...[a]nd the letter writer can clean the carpet to remove the dust just as frequently as he now wet-mops his floors for the same purpose."



**Sherwin Belkin**, a partner practicing in BBW&G's Administrative Law Department, was quoted in Dennis Hevesi's feature article "When Disaster Strikes" in *The New York Times'* Sunday Real Estate Section. Others quoted in the article described various remedies that rent regulated tenants have when their apartments are severely damaged. But Mr. Belkin was asked to address the situation where "disasters are so severe that tenants can never return." Mr. Belkin noted that even where rent regulated tenants have received orders from DHCR reducing their rents to \$1 per month they may not necessarily have the right to return. Mr. Belkin cited DHCR Advisory Opinions stating that an owner may not be obligated to rebuild a severely damaged building, and a that "the tenant's payment of \$1 would not give the tenant the right to occupy a new apartment" where the owner re-built the building with distinctly different apartments than existed before. Mr. Belkin also cited appellate decisions holding that an owner could not be directed to rebuild where the cost to make the building habitable would substantially exceed the value of the re-built building.

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