

## Happy New Year! 2004 High Income/High Rent Deregulation Period Starts January 1st

**DHCR** is authorized to deregulate apartments with legal rents of \$2,000 or more when the combined income of all persons occupying the apartment is \$175,000 or more, as reported on the occupants' New York State Income Tax Returns as federal adjusted gross income for the prior two calendar years.

We recommend reviewing your rent rolls to determine which apartments are renting at \$2,000 per month or more, as well as those apartments that will hit the \$2,000 rent level on or before May

1, 2004. These apartments may be petitioned for high income high rent deregulation as long as an Income Certification Form ("ICF") is timely served upon the tenant. It does not matter if a tenant is actually paying a lesser rent, as long as the apartment's legal rent meets the \$2,000 threshold.

If a tenant rented an additional apartment in your building last year in order to enlarge his living space, under certain circumstances, you may ask DHCR to combine the two apartment rents in order to meet the \$2,000 amount.

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## When is a Building "Demolished"?

**T**he options available to Owners or recovery of possession of their rent regulated apartments are few and far between. One option available to Owners is the filing of a "demolition application" with the New York State Division of Housing and Community Renewal ("DHCR").

Pursuant to the Rent Stabilization Code and the New York City Rent and Eviction Regulations, an Owner may file an application with DHCR for an order granting permission not to renew a rent stabilized lease, or to proceed

for eviction against a rent controlled tenant, predicated upon the Owner's good faith intent to demolish the building.

Many Owners are unaware that demolition may be a viable option for them because they assume that "demolition" means that they must raze or level the building. However, the courts and DHCR have interpreted the term "demolition" (in this context) as meaning a substantial alteration or gutting of the building. Under this

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### Special Points of Interest:

- A building may be considered demolished although not razed to the ground.
- Liability risks and insurance obligations placed on owners regarding abutting sidewalks.
- Advantage to tying commercial lease renewal rights to absence of tenant default.

**High Income Decontrol Period . . .**  
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The ICF form must be served upon tenants on or before May 1<sup>st</sup>, but it can only be served on or after such time as the tenant's legal rent is \$2,000 or more. The ICF form directs tenants to state whether or not their household income exceeded \$175,000 during the last two years. If the tenant denies earning that income, or fails to answer the ICF within 60

days, the owner may file a Petition for High Income Rent Deregulation with DHCR on or before June 30<sup>th</sup>. Thereafter, DHCR, acting in conjunction with the New York State Department of Taxation and Finance, will determine if the income threshold has been met.

Owners who filed luxury deregulation petitions in 2003 should review if DHCR has already determined if a tenant's 2002 income met the

\$175,000 level. If you already know that it did not, a luxury deregulation petition should not be filed regarding that tenant until 2005.

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

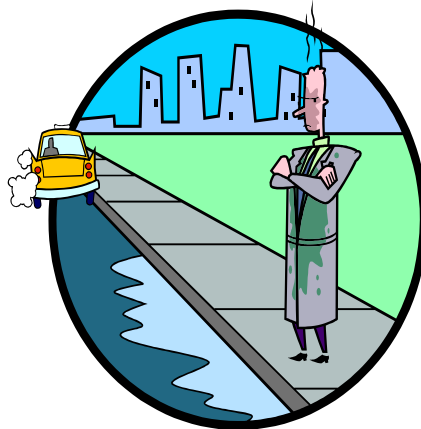
## ON THE SIDEWALKS OF NEW YORK: New Laws Make Owners Primarily Liable for Sidewalk Injuries and Repairs

**T**he New York City Council has enacted two new laws that impose liability for sidewalk injuries and repairs on property owners.

Under the first law, an Owner of real property is liable for failure to maintain the sidewalk abutting the owner's property in a reasonably safe condition. The Owner of any property abutting a sidewalk, including the "intersection quadrant" for corner property, is liable for the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove, snow, ice, dirt or other material. The City's Department of Transportation, defines the "intersection quadrant", which is also known as the "corner quad-

rant," as the rectangular area of the sidewalk bounded and formed by the extension of the property lines and the corner curbs.

In addition, the City is not liable for any injury to property or person, proximately caused by the failure of an Owner to maintain sidewalks in a reasonably safe condition. The new law does not apply to injuries on sidewalks abut-



ting one, two or three-family residential properties that are Owner occupied and used exclusively for residential purposes.

Under the second law, affected Owners are required to have a policy of personal injury and property damage liability insurance for its property to cover injury or damage caused by the failure of such owner to maintain the sidewalk in a reasonably safe condition. The law reiterates that the City is not liable for any injury to property or person as a result of the failure to an Owner to comply with this requirement.

However, the second law provides that, where a judgment for injury to person or property is obtained against

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## Three Strikes and You're Out! Commercial Tenant Loses Appeal, Loses Injunction, Loses Renewal Option

When a commercial tenant defaults under the terms of its lease, the owner usually has the right to serve a notice of default requiring the tenant to cure within the time frame set forth in the lease. Tenants then have the opportunity to commence an action in Supreme Court under the doctrine of *First National Stores v. Yellowstone Shopping Center*, which tolls the time within which to cure and keep the status quo while the parties litigate.

The intention of the Yellowstone doctrine was to preserve the tenancy rights while the court determined whether the tenant was in default and if the tenant would have the opportunity to correct the default at the end of the litigation. In recent years, the Yellowstone injunction has become such a common practice that the standards for obtaining such an injunction have become somewhat lax.

However, in a recent decision entitled *Nobu Next Door LLC v. Fine Arts Housing*, the Appellate Division, First Department held against the tenant, not only finding that it was in default in the lease, but that because of the default, it could not exercise its option

to renew the lease.

In *Nobu*, the restaurant tenant had an exhaust stack that leaked grease and odors and presented a fire hazard to the building. It was not a newly discovered problem, but had been ongoing for years. The Owner served a Notice to Cure as a result of the tenant's failure to replace the exhaust stack and the resultant accumulation of food waste. The Tenant commenced the Yellowstone action which was granted by the Supreme Court Justice. The Tenant also sent a letter purporting to exercise its option to renew the lease.

The Appellate Division reversed finding that the Tenant's failure to replace the exhaust stack was not due to inadvertence or oversight, but was a business judgment to defer the performance of repairs. Further, the Court ruled that to the because the Tenant's failure to effect repairs under its lease was not met (because of the Tenant's business judgment rather than surprise, inadvertence or circumstances beyond its control), the Court denied the Tenant the right to exercise the option agreement.

The result of this decision is that the Tenant not only



may lose its lease, but also its valuable option to renew. This is encouraging to Owners who have Tenants who are recalcitrant in making repairs and then think they can rely on the Yellowstone doctrine to drag things out for years. Moreover, it is a signal to the Owners that in preparing commercial leases, they should include a provision that mandates that the tenant not be in default of the lease as a pre-condition to any right to exercise an option to renew.

*This article was written by Joseph Burden, who practices in BBW&G's Litigation Department.*

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definition, an Owner is not required to raze the building to the ground. Instead, DHCR and the courts have held that the agency may grant a demolition application where the outer walls and structural supports of the building remain in- tact, with only the entire interior being gutted and at least eighty (80) percent of the building systems being replaced.

Thus, demolition may even be an option available to those Owners who are legally prohibited from, or do not want to level their building, but intend to gut the interior to create new dwelling units.

Moreover, Owners are often reluctant to file a demolition application where

they have occupied ground floor commercial space, because either they do not want to lose the income generated by the commercial tenant, or they have long term leases with no demolition clause. However, according to DHCR, Owners may file an application based on demolition, while leaving their commercial occupied space undisturbed. In response to a request from BBW&G, DHCR issued an opinion letter in which it stated:

... Where the first floor of the subject building is occupied by a commercial tenant, because such tenants (and the space they occupy) are exempt from rent stabilization, it

does not appear that RSC § 2524.5(a) (2) would require the demolition of such an area, including its cement slab floors.

Thus, the fact that an Owner has occupied income producing commercial space on the ground floor of a building does not prohibit, nor should it deter an Owner from filing an application based on demolition.

Although the demolition application may not be a viable option in many situations, it should be considered by Owners when seeking recovery of their rent regulated housing accommodations.

*This article was written by Kara I. Rakowski, who practices*

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an Owner, and such Owner is uninsured and the judgment remains unsatisfied for at least one year despite efforts to collect on same, the damaged party may file a petition with the City comptroller for compensation for such injury. Payments by the City will be made in the discretion of the comptroller and not as a matter of right. Payments cannot exceed the amount of uncompensated medical expenses and cannot be more than \$50,000. The petitions must be filed with the comptroller not less than one and no more than three years follow-

ing entry of such judgment in the country where the property is located. Each petition has to include evidence demonstrating that efforts to collect the judgment have been pursued and that the judgment debtor has no policy of liability insurance or other assets to satisfy the judgment.

As a condition of receiving payment, the petitioner must assign the judgment to the City. After such assignment, the City is then entitled to enforce the judgment against the Owner. To the extent the City collects money on the judgment in excess of the money paid by the City to the injured party, the

excess, after deducting the City's expenses, is to be paid to the injured party.

Procedures for filing such petition are being established by the City comptroller's office but have not been promulgated yet. No payments will be made if it is determined that the unsatisfied judgment was obtained by fraud, or by collusion of the injured party and of any defendant.

The new laws took effect September 2003.

*This article was written by Robert Jacobs, who heads BBW&G's Land Use Department.*

## BBW&G NEWS

### New Partner Named

**Stacey Bender**, who joined BBW&G right out of law school, and has practiced as an associate in our Litigation Department, has become a partner in the firm. Congratulations to Stacey!

### “MAY I QUOTE YOU?”

**Martin J. Heistein**, who practices in the firm’s Administrative Law Department, was quoted in *The New York Times*’s Real Estate Section “Q & A” column regarding the criteria for qualification as a major capital improvement (“MCI”) under Rent Stabilization. Mr. Heistein detailed the various requirements for MCI eligibility, the rules pertaining to the “useful life” of the building component being replaced, the approval process before DHCR, and the formula for calculating the MCI rent increase.

*The New York Sun* described the on-going hearings at DHCR, concerning the application by the **Donald Zucker Company** to obtain a certificate of eviction against the last two remaining rent controlled tenants so that the owner may demolish the buildings on the former East End Temple site and create a new “80/20” building. BBW&G’s **Jeffrey L. Goldman**, who is representing owner at the hearings, along with **Kara I. Rakowski**, described the on-going hearings and the anticipated date of construction when the owner prevails.

*The New York Times* Real Estate Section featured the dedication and opening of Furman Hall at the **New York University School of Law**. This new building, which doubles the Law School’s space, was facilitated by the vacating of the building that formerly stood on the site by BBW&G’s **Sherwin Belkin** and **Kara I. Rakowski**.

**Robert Jacobs** discussed the issue of requiring a guarantor for a rent stabilized renewal lease in the *Apartment Law Insider*.

**BELKIN BURDEN WENIG & GOLDMAN, LLP**  
**Website: [bbwg.com](http://bbwg.com)**

*New York Office*

270 Madison Avenue  
New York, New York 10016  
(Tel): (212) 867-4466  
(Fax): (212) 867-0709

*Connecticut Office:*

125 Main Street  
Westport, Connecticut 06880  
(Tel): (203) 227-1534  
(Fax): (203) 227-6044

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**Belkin Burden Wenig & Goldman, LLP**  
**270 Madison Avenue**  
**New York, New York 10016**

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