

UPDATE

IF IT'S JANUARY, IT MUST BE

January 1st ... a time to pop champagne corks ... make resolutions (that you are not likely to keep) ... and serve Income Certification Forms on your regulated tenants!

Each year, between January 1st and May 31st, Owners can serve Income Certification Forms upon their rent stabilized and rent controlled tenants whose legal rents are \$2000 per month or more. If the aggregate household income for the prior two years has been \$175,000, DHCR can issue an order deregulating the apartment.

It is important to check your rent roll to see if you have had any apartment rents reach \$2000 during this prior year. But remember, it is not the rent that the tenant is paying that must reach the \$2000 level — it is the legal rent. In these difficult economic times, many owners have given rent concessions to their tenants due to present market conditions. Thus, for example, a tenant that may be only paying \$1800 per month on an apartment where the maximum legal rent is \$2000 or more, is subject to being served with an ICF.

In addition, if you have previously lost a decontrol proceeding, that does not mean that you cannot serve an ICF and file with DHCR again. Check which years DHCR



previously determined that the tenant had an income level below the \$175,000 threshold. For example. If you filed in 1999, and DHCR denied your decontrol petition because it determined that in 1998 the tenant earned less than \$175,000, such an adverse determination has no bearing upon a case that you bring now, since the two year income test period will not be the same.

Because this process is now a decade old, some Owners seem to have become weary and decided it is simply not worth the time and effort to pursue. But, we strongly suggest that this is a process that is not costly and can provide a significant economic boon — even if you are successful on a single case.

This Article was written by Sherwin Belkin. To discuss luxury decontrol or other administrative or regulatory proceedings, please call Mr. Belkin,

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Special Points of Interest:

- If a disabled person complains, have your attorney promptly review the building's governing documents and financial ramifications to determine best course of action
- DHCR demands than an executed contract, signed by both parties, be submitted on MCIs.
- When can an Owner deem a renewal lease to be in effect?



Accommodation for the Disabled: What is Reasonable?

The Fair Housing Amendments Act (“FHAA”) and the Americans With Disabilities Act (“ADA”) prohibit housing discrimination on the basis on disability. Both the ADA and FHAA cover private housing as well as government funded housing. The FHAA requires that owners, including coops and condos, make reasonable accommodations to afford people with disabilities equal housing opportunities. This might be something as simple as a Board with a “no pets” rule allowing a blind resident to keep his/her seeing eye dog or relaxing a mandatory carpeting rule that would cause difficulty for someone using a wheelchair.

According to the FHAA it is unlawful to “refuse to make reasonable accommodations in rules, policies, practices or services, when such may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling”.

Who has the financial responsibility? There is language in the law which implies that the Board should pay the cost of reasonable accommodation. However, if an extremely expensive renovation must be made, then the Courts and the various City, State and Federal agencies which administer the rights of the disabled will not order the work

done because it is not a “reasonable accommodation”.

The two most important things a Board can do when a request or complaint about accessibility arises is to have its attorney review the building’s governing documents, as well as the proposed accommodation and advise the Board as to the best course of action. In addition, a prompt response to the complainant could head off costly litigation.

This Article was written by Joseph Burden, who practices in BBW&G’s Litigation Department. To discuss this article, please speak with Mr. Burden. To generally discuss coops and condos, please contact, Errol

MCI UPDATE

Over the past several months, DHCR has seemingly instituted a change in policy regarding the manner in which the Division processes Major Capital Improvement (MCI) rent increase applications.

When filing a MCI application, it is necessary to prove that the work applied for in the application was actually carried out and was performed by a legitimate contractor. One of the clearest indications that the work was performed, is for the Owner to submit a contract, which should indicate what work was done, when it was carried out and how much the work cost.

However, nothing in New York is simple. It is often the case that an Owner does not have a contract - rather, the Owner has invoices, work orders or merely a confirming letter, as well as canceled

checks.

In the past, DHCR seemed to provide greater leeway in terms of the proof which it required be submitted to prove



that the work was done. If an Owner did not have a contract, DHCR would look at the totality of the evidence presented. DHCR would consider whether there were canceled checks, receipts, invoices, work orders, etc. to establish that the capital improvement was carried out.

Recently however, DHCR has, apparently, altered its policy and is insisting that an exe-

cuted contract, signed by both parties, be submitted to the Division. BBW&G has cases pending where the Owner presented invoices, work orders, a complete set of canceled checks and all required permits...and DHCR is still requiring an executed contract.

BBW&G is challenging this change in policy and is attempting to clarify whether the production of an executed contract is required to be produced in all instances.

However, at the present time, for all work which is still in the planning stages, it is strongly urged that Owners require that contracts be executed with all of their contractors, even those contractors who perform small components of a project. Obtaining a contract, although seemingly not required under the Law, may result in a speedier and more

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expeditious treatment of your MCI rent increase application by DHCR.

(2) The useful life schedule: An exception to the rule

In order to obtain a rent increase for Major Capital Improvements, the work must generally be carried out on a building wide basis; must be depreciable under the Internal Revenue Code; and must be required for the operation, preservation and maintenance of the building structure. In addition, the capital improvement must replace an item whose useful life has expired.

However, a good argument can be made that the useful life requirement only comes into play where an owner previously received an MCI rent increase for the same item.

Where an Owner did not apply for or receive an MCI rent increase for a particular item, the useful life is "immaterial".

As a matter of illustration, BBW&G recently filed an MCI application, based upon the installation of new windows and intercom system. The tenants' committee opposed the application and argued that the intercom system should not be approved because the intercom was only four (4) years old at the time it was replaced (the useful life for an intercom system is

currently 15 years).

DHCR held in favor of the Owner, finding that "the fact the said intercom was only four years old is immaterial as the owner did not apply for or receive an MCI rent increase for the previous intercom system."

This argument should be kept in mind when determining what capital improvements to make and when to file your application. When tenants argue that a particular item was replaced before the end of its useful life, this argument may save your MCI application.

This Article was written by Martin Heistein, who supervises all of BBW&G's MCI filings. To discuss MCI's, call Mr. Heistein or Paul

The Deemed Renewal Lease: DHCR Clarifies Its Meaning

When DHCR amended its Code in December 2000, it modified RSC § 2523.5(c)(5) to address the situation where an Owner offers the tenant a renewal lease and the tenant does not respond, but remains in possession after the lease expires. What is the Owner to do?

The amended Code provides that after the expiration of the lease, the Owner could bring an eviction proceeding against a tenant that continues to hold over in the apartment. The amended Code also provides that the Owner may deem a renewal lease to be in effect. But what did this "deemed renewal lease" mean?

BBW&G requested that DHCR issue an Advisory Opinion to clarify this Code provi-

sion. DHCR has advised BBW&G that if the tenant does not respond to the renewal offer, but following the lease expiration, the tenant remains in the apartment and pays the rent at the one or two year renewal increase amount, then the Owner can deem the lease renewed for the term that reflects the one or two year increase paid by the tenant.

But what if the tenant does not pay an increase? Can the Owner still deem a renewal lease to be in effect? DHCR has said "YES." The Owner can deem the lease renewed for the term of the previously expired lease. Thus, if the prior lease was for two years, the owner can deem that lease renewed for a two year term at the Rent Guideline increment that relates to the

two years. In fact, DHCR has opined that after the Owner deems such a renewal to be in effect, if the tenant does not pay the increase, the owner can commence a non-payment proceeding.

The deemed lease concept, as codified in 2000 and now recently interpreted by DHCR, has not yet been tested in the Courts. So, this Advisory Opinion must be read in that context. However, if DHCR's interpretation is ultimately upheld, it provides Owners with a valuable alternative to the bringing of eviction proceedings against a non-responsive tenant.

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CORRECTION: The changes to the New York State Building Code (see *BBW&G Update, December 2002*) regarding the installation and maintenance of carbon monoxide detectors do not presently apply to New York City since such buildings are governed by its Administrative Code. However, Real Estate Industry sources have indicated that they expect New York City to similarly amend its Administrative Code in the