

Owner Occupancy and Lofts

Many owners have purchased townhouses with the intention of recovering one or more apartments in the building for their own use. The Rent Stabilization Law specifically permits an owner to do so.

What about buildings covered by the Loft Law? These are often small buildings which are ideal for owner occupancy. Unfortunately, there is no provision under the Loft Law which allows an owner to recover possession of a loft for personal use.

However, all is not lost. When a building covered by the Loft Law is legalized and a Certificate of Occupancy is issued, the building enters Rent Stabilization. Under Rent Stabilization,

an owner can recover possession of one or more apartments for personal use. BBW&G has represented owners who have recovered as many as three lofts in a building for their own use so that the entire building was occupied by the owner and his/her immediate family.

If you are an owner who is interested in recovering space for your own residential use or for use by members of your immediate family, a loft building may be appropriate, if time is not essential. It will take a number of years to finish legalizing the building; getting it into Rent Stabilization; giving the tenant a lease; and proceeding (after the expiration of the lease) to recover possession for the owner's own use.

Noise Code Violations Successfully Challenged

Section 24-220(b) of the Administrative Code makes it illegal to project sound, through use of a sound reproduction device, into the public street for the purpose of commercial or business advertising. According to the draft of the Noise Code, this provision was designed to prevent sellers from hawking their goods by the use of sound reproduction devices projecting sound onto a public street.

This Section has been used by the DEP (Bureau of Air Resources) to issue violations to owners of bars and restaurants for excessive noise where the sound therefrom can be heard upon a public street, even if this establishment is not projecting the sound into the street for commercial or business advertising purposes and even if the sound is not in excess of any specific decibel level set by other sections of the Noise

Code.

BBW&G has repeatedly argued in front of the ECB that this Section should not apply where it cannot be established that the sound is being projected for commercial or business advertising purposes, is not in excess of any particular decibel level and is the product of incidental sound leaking into the street from the commercial use. BBW&G has three appeals pending before the ECB on this issue.

Finally, BBW&G prevailed in this argument before one administrative law judge. It is likely that this decision will be appealed by the DEP. However, that this argument was accepted by one ALJ is a hopeful sign that the intention of this Section may finally be implemented.

This article was written by Robert Jacobs. For further information about the Noise code or ECB or other land use issues,

What's on the Inside

	Page
<i>Tenant's Non-Conforming Use Held Not A Defense to Non-Payment</i>	2
<i>Court Enjoins Tax Commission's Requirement</i>	2,3
<i>DHCR Advises That Owners May Eliminate Certain Tenant Storage Facilities Without Reducing Required Services</i>	4
<i>BBW&G News May I Quote You?</i>	4
<i>Some Building Owners Are Now Subject to Janitor Protection Act</i>	5

Special Points of Interest:

- Affidavit for tax assessments enjoined.
- Storage facilities can be altered and even made profitable.
- Janitor Protection Act may limit staffing flexibility.



Tenant's Non-Conforming Use Held Not A Defense to Non-Payment

Judge Peter Wendt recently rendered a decision in *Broadway 169th LLC, Laconia Avenue Associates LP and Hudson Associates LLC v. John Olsson*, after a three day non payment trial. The tenant had alleged that the landlord's technical departure from the certificate of occupancy (the C/O permitted class B use, but the building was altered to a class A use by our client's predecessor-in-interest without any approvals and without amending the C/O) triggered the rent forfeiture provisions of Multiple Dwelling Law §302. The tenant alleged that there were structural defects in the building and other conditions in the apartment that impacted on his life, safety and health. The tenant also counterclaimed for an order directing correction of the conditions alleged.

Judge Wendt held that the technical departure of the current use of the building (Class A) from the use permitted in the C/O was not, in and of itself, a basis to implicate the rent forfeiture provisions of the Multiple Dwelling Law.

Judge Wendt held that in order to invoke rent forfeiture, the tenant was required to prove that the structural or other conditions alleged negatively affected the tenant's life, health or safety.

The tenant did not call an expert witness to prove that the alterations, which made the building a class A multiple dwelling, caused structural defects which harmed the tenant's life, health or safety. The tenant did not permit the landlord to repair conditions that were brought to the land-

lord's agent's attention. The tenant also conceded that he did not notify the landlord's agent of one of two of the alleged conditions.

BBW&G called two expert witnesses — an engineer and architect. Judge Wendt gave their testimony great weight. Ultimately, the landlord was awarded a judgment of possession for the entire thirteen months of rent (\$8,846.76). The tenant did not get any abatement. Judge Wendt dismissed all the tenant's defenses and counterclaims and did not issue any order to correct the alleged conditions. A legal fee hearing is now scheduled.

This article was written by Martin Meltzer who handled this trial. To discuss litigation issues, please contact Mr. Meltzer or Joseph Burden, Jeffrey Goldman, David Skaller, Ed-

Court Enjoins Tax Commission's Requirement That Owners Provide Affidavit of Non-Affiliation With Indicted Individuals As a Prerequisite to a Merit's Review of Tax Assessments

While expressing sympathy for New York City's plight in dealing with corruption uncovered in the tax assessor's office, the New York State Supreme Court in *Matter of 439 East 88 Owners Corporation v. The Tax Commission of the City of New York* (New York Law Journal, Dec. 9, 2002, p. 23, cl. 2 (Sup.Ct., N.Y. Co., Schoenfeld, J.)) preliminarily enjoined the Tax Commissioner from requiring property owners to provide an affidavit of non-affiliation with certain indicted individuals as a prerequisite to a merits review of tax assessment

challenges.

On February 25, 2002, the United States Attorney for the Southern District of New York announced the arrests of 18 persons charged in a bribery scheme to reduce real property taxes in the City of New York. The indictment charged that two former New York City tax assessors named Albert Schussler and Alan G. Edelstein systematically gave bribes, on behalf of clients, to 16 then-current City assessors to reduce assessments on Manhattan properties. In response to the indictments, the Tax Commis-

sioner instituted a procedure whereby, as a prerequisite to a merit's review of tax assessment challenges, owners were required to provide an affidavit of non-affiliation with Schussler and/or Edelstein. Specifically, the form (TC-152) required owners to disclose under oath whether they had engaged the services of Schussler or Edelstein regarding the property's tax assessment and whether Schussler or Edelstein, on behalf of the owners, had contacted any members of the tax assessor's office of the City of

(Cont. on p. 3)

Court Enjoins Tax Commission's Requirement

(Cont. from p. 2)

New York in connection with the tax assessment of the owners' properties.

Real property taxes are computed by multiplying the current tax rate for a particular class of building (sometimes called the "effective mill rate") by the amount of a property's tax assessment. A reduction in the tax assessment will result in lower property taxes. Tax assessments are made by the City's assessor's office. Under the New York City Administrative Code, property assessments are subject to administrative review by the Tax Commissioner's office. Under the Tax Commission's new procedure, the failure to complete form TC-152 resulted in a denial of a merits review of the property's assessment and confirmation by the Tax Commissioner of the assessor's determination. As a result, such property owners were deprived of any further administrative remedy and forced, if they wanted to challenge the assessment, to proceed in court under Article 78 of the Civil Practice Law and Rules.

On or about August 13, 2002, the Tax Commission mailed the petitioner in *Matter of 439 East 88 Owners Corporation v. The Tax Commission of the City of New York*, a notice that petitioner was eligible for review of its property assessment by the Tax Commission but only if it completed Form TC-152. Petitioner elected not to complete Form TC-152 and commenced a proceeding in the Supreme Court.

The Court's decision came in

the context of the petitioner's motion for a preliminary injunction pursuant to CPLR 6301 restraining the Tax Commission from summarily confirming the owner's tax assessment because of its refusal to complete form TC-152.

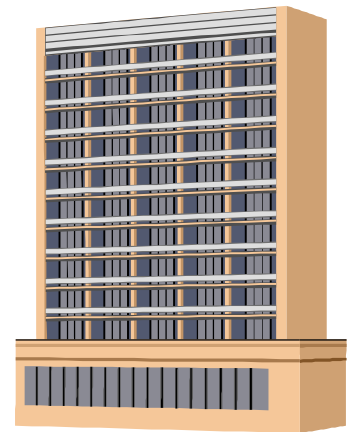
The City moved, pursuant to CPLR 3211(a)(7) and 7804(f), to dismiss so much of the petition as sought to enjoin the mandated disclosure.

The Court noted, in making its decision, that the City did not deny that an affirmative response to any of the requested disclosure in Form TC-152 would result in summary confirmation of the tax assessment.

In granting the petitioner's motion for an injunction and denying the City's motion to dismiss, the Court, in a lengthy and well-reasoned decision, sustained four of petitioner's arguments.

First, the court held that the process of requiring the completion of form TC-152 as a precondition of a merits review required information that had no relation to the statutory criteria for reviewing a tax assessment. Such criteria could only be expanded by the legislature and, thus, the process of requiring such disclosure was beyond the authority of the Tax Commissioner.

Second, the Court noted that, as an adjudicatory agency, the Tax Commission was subject to the strictures of the New York City Administrative Procedure Act ("CAPA"). Since the Tax Commission's process was not adopted in compliance with CAPA, it was illegally promulgated.



Third, the Court held that the process was illegal because it deprived the petitioner of a merits review hearing based on guilt by association in violation of its constitutional rights to due process.

Finally, the Court held that the requirement of the completion of Form TC-152 as a condition of a merits review violated the privilege against self-incrimination. The Court noted that owners were entitled to a merits review as a matter of statute and, that to deprive such review based on an owner's failure to disclose potentially self-incrimination information, violated petitioner's privilege against self-incrimination.

In making its ruling, the Court expressed sympathy for the City's situation. However, the Court did note, in enjoining the implementation of Form TC-152 with respect to the petitioner and similarly situated owners, that the "despicable acts" out of which this case arose "were not done to the City so much as by the City" as it appeared that rank corruption had existed in the City for years, if not decades, whereby former City employees passed bribes to

DHCR Advises that Owners May Eliminate Certain Tenant Storage Facilities Without Reducing Required Services

DHCR's amended Code seems to make it clear that an Owner may, if it wished to do so, totally eliminate certain storage areas, without providing any storage thereafter.

Specifically, DHCR's Rent Stabilization Code, as amended, provides, at RSC §2523.4(e), 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. do not affect the use and enjoyment of the premises ..."

DHCR's codified schedule of *de minimis* "Building-Wide Conditions" includes "Storage Space." More specifically, the Code declares the following to be 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

(Cont. on p. 5)

BBW&G NEWS

MAY I QUOTE YOU?

Sherwin Belkin was quoted in the *New York Times*' recent article on the "four year rule" and the calculation of legal regulated rents under Rent Stabilization.

Martin Meltzer was quoted in the *Apartment Law Insider's* article on steps that may be taken to effect compliance with the non-military affidavit required in landlord-tenant proceedings.

The Apartment Law Insider also quoted **David Skaller** in its article on legal proceedings pertaining to a tenant having illegally sublet.

Various **BBW&G** clients were also featured in various news articles. **Waterside Plaza** and its general partner **Richard Ravitch** were quoted in *The New York Times*' feature Real Estate Section article "Tenants Adjust to Life after Mitchell-Lama." **BBW&G** represented Waterside Plaza in its successful efforts to leave Mitchell Lama without being made subject to rent stabilization, and now represents that housing complex in its post Mitchell Lama era.

The Times also discussed various new West Side buildings that have come onto the rental market (developed by various **BBW&G** clients), such as **The Victory, The Penmark and The New Gotham.**



Owner May Eliminate Certain Tenant Storage Facilities
(Cont. from p. 4)

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.

BBW&G requested that DHCR issue an Advisory Opinion

on this issue. DHCR has confirmed that an open and free-of-charge storage area is only a *de minimis* service, not required.

General storage area falls squarely within the *de minimis* definition, such that it can be eliminated without a required service being diminished. DHCR also opined that the Owner could, if it chose to, completely **eliminate** the prior general storage area, **without** reducing required services, and **without** being obligated

to provide any storage area thereafter. DHCR also opined that it necessarily follows that the Owner could replace the unlimited storage area with a free limited storage area or even provide individual storage bins, for which a charge could be imposed. The decision would rest solely with the Owner. **Please Note: As yet, BBW&G is not aware of this opinion having been tested in the Courts.**

Some Building Owners Are Now Subject to "Janitor Protection Act"

The end of any calendar year always yields some legislation that passes almost unnoticed until it is too late. 2002 was no exception to this principle.

What some are euphemistically calling the "Janitor Protection Act," Local Law 39 of 2002, amends New York City's Administrative Code to offer protection to certain persons who are employed at buildings within New York City. Residential buildings with more than 50 units and commercial office, institutional or retail buildings containing more than 100,000 square feet are covered by the Janitor Protection Act.

Under the terms of the Janitor Protection Act, owners of covered properties are required to notify prospective purchasers of their properties that there are restrictions regarding the termination of the sellers' employees which will be binding upon the sellers' and purchasers. The Janitor Protection Act contains what can be characterized as a 'grace

period' for existing employees because it requires purchasers of buildings to retain the employees of the seller for a period of at least ninety (90) days to determine if their services are needed before such employees can be terminated by the purchaser of any covered property. The Janitor Protection Act also covers a successor building manager or contractor.

While the Janitor Protection Act does not prohibit new owners from terminating employees, it does impose a protocol upon owners at covered properties to determine how employees must be evaluated to determine if they should be terminated. As is the case anytime employment issues are involved, there may be Labor Law concerns involved too.

The so called 'opt out' provision of the Janitor Protection Acts permits existing and future owners to agree to be bound by the terms of a collective bargaining agreement in lieu of subjecting

themselves to the provision of the Janitor Protection Act. This option, if one can call it that, is intended to steer owners towards unionization.

The future of the Janitor Protection Act is not certain. Since the Janitor Protection Act is still new, it is likely that it will be challenged sooner or later. The influence of local 32BJ, the Service Employees International Union is clear. No doubt, the joint goals of Local 32BJ, the desire to expand its influence and union membership and of the City Counsel, and of Mayor Bloomberg to preserve jobs within New York City during difficult economic times, combined to result in the Janitor Protection Act's swift passage in November, 2002 and signing by the Mayor on November 27, 2002 (ironically for owners, the day before Thanksgiving).

This article was written by Craig Ingber. For further information about the Janitor Protection Act, please contact Mr. Ingber.