

City's New Lead Paint Law Effective August 2, 2004

New York City's new lead paint law, Local Law 1 of 2004 ("Local Law 1"), became effective August 2, 2004. Local Law 1 covers all multiple dwellings constructed prior to 1960, and those constructed between 1960 and 1978 where the Owner has knowledge of the existence of lead based paint.

Local Law 1, and the Rules recently promulgated by the New York City Department of Housing Preservation and Development ("HPD") to implement the law, impose numerous requirements and responsibilities upon Owners. Below is a brief summary of some of the requirements of Local Law 1:

- ▶ No earlier than January 1 of each year (except if included with the December rent bill), but no later

than January 16, Owners are required to serve annual notification to all occupants inquiring if there are children under the age of seven residing in the unit;

- ▶ With each new lease and renewal lease Owners must include a notice about the Owner's responsibilities under Local Law 1 and provide a pamphlet informing occupants about lead;
- ▶ Occupants are required to respond to the inquiry notice by February 15th of the year in which the notice is sent. If the Owner does not receive a written response by February 15th, and

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Owners Must Install Carbon Monoxide Detectors by November 1, 2004

Effective November 1, 2004, owners of all residential dwellings in New York City with a fossil fuel burning furnace or boiler are required to install carbon monoxide detectors in every apartment. The carbon monoxide detector is required to be installed within 15 feet of each bedroom.

In addition to installing carbon monoxide detectors in each apartment, Owners are required to:

- (a) post a notice, using a form proscribed by the New York City Department of Housing

Preservation and Development ("HPD"), in the building's common areas describing the Owner's duty to install the detectors;

- (b) replace any missing or broken detectors in vacant apartments prior to re-renting;
- (c) replace, within 30 days after receipt of written notice, any detector that becomes defective due to a manufacturing defect within one year after installation;

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Special Points of Interest:

- Cosmetic vs. material alterations can alter rights.
- Presence of rent controlled tenants can dramatically affect demolition application.

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does not otherwise have actual notice as to whether a child of applicable age resides in the unit, then the Owner is required at reasonable times and upon reasonable notice to inspect the occupant's dwelling unit to ascertain whether a child of applicable age resides therein. If the Owner has made reasonable attempts between February 16th and March 1st of that year to gain access, but was unable to gain access, then the Owner is required to so notify the Department of Health and Mental Hygiene in writing. The notices are required to be provided in English and Spanish.

- ▶ Owners must physically inspect units where children under seven years of age reside, as well as common areas in the property, to determine if there is peeling paint, chewable surfaces, deteriorated surfaces and friction and impact surfaces, at least annually, or more often if the Owner knows about a condition that may cause a lead hazard, or if the occupant complains about such condition;
- ▶ Owners are required to remediate lead hazards, using safe work practices and trained workers as set forth in § 11-06(g)(3) of HPD's Rules ;
- ▶ All vacant apartments are to be made lead safe, using "safe work practices" prior to re-renting, and the Owner shall certify that it has complied with § 27-2056.8 of Article 14 of the Housing Maintenance Code

and § 11-03 of HPD's Rules by a notice provided to the new occupant upon signing the lease or at the commencement of occupancy if there is no lease.

When defining "safe work practices," Local Law I and its Rules distinguish between (a) procedures for work which disturb more than 100 square feet of painted surface per room where no lead based paint hazard violation has been issued by HPD; (b) procedures where lead based paint violations have been issued by HPD and the work will disturb more than 100 square feet of painted surface per room; (c) work which disturbs less than 100 square feet of painted surface per room where no lead based paint hazard violation has been issued by HPD; and (d) work which disturbs less than 100 square feet of painted surface per room where a lead based paint hazard violation has been issued by HPD. The Rules have different procedures and impose different requirements for each of these four scenarios. Depending upon the circumstances, an Owner may be required to:

- ▶ file a notification of commencement of work with the Department of Health and Mental Hygiene, at least ten days prior to beginning the work;
- ▶ perform pre-work cleaning;
- ▶ follow specific mandates on the methods which must be utilized when performing the remediation;
- ▶ provide temporary relocation for occupants until work is completed;
- ▶ perform post work clean up;
- ▶ arrange for post clean up testing by an independent

third party; and

- ▶ certify to HPD that the work has been completed.

Thus, prior to commencing any work, it is imperative that Owners consult HPD's Rules.

In addition, work must be performed by a firm or personnel certified to perform lead based paint activities in accordance with EPA regulations, and the Owner must retain an independent third party to perform a clearance dust test after completion of the work.

If the work cannot be performed safely with occupants in residence, Owners must offer a "suitable, decent, safe and similar accessible dwelling unit" that does not have lead based paint hazards to such occupants for temporary relocation. Relocation is not required provided that (a) the work being performed disturbs less than a 100 square feet of painted surfaces per room and no lead based paint hazard violation has been issued by HPD, or (b) the work could be done safely with occupants in residence and provided that at the end of each work day, the work area is properly cleaned and occupants have safe access to adequate sleeping, bathroom and kitchen facilities, as well as entry and egress pathways.

Finally, Owners are required to maintain all lead paint records for a period of ten years. In addition, purchasers of multiple dwellings which are subject to Local Law I have a duty to obtain all lead paint records from the seller prior to closing.

For more information regarding Local Law I and HPD's Rules, please contact Kara I. Rakowski, a BBW&G partner practicing in the firm's Administrative Law Department.

Tenant Apartment Alterations: What's An Owner to Do?

When can an owner prevent a rent stabilized tenant from making alterations to an apartment without the owner's permission? That question was addressed in *Rutherford Place LLC v. Pande*, where a Housing Court Judge granted a judgment of possession against the tenant who made material alterations to his apartment without the owner's permission. The ruling analyzed the distinction between mere aesthetic or cosmetic changes and material alterations which change the nature and character of the apartment.

In *Rutherford*, the owner leased a duplex apartment to the tenant. The apartment contained a sleeping loft above the entrance area and living room with an 18 foot ceiling. The tenant notified the owner that he wanted to soundproof the apartment and install a room divider. The Owner met with the tenant and advised that no alterations could be undertaken by the tenant without review and approval by the Owner's architect.

Notwithstanding both oral and written statements from the Owner that the tenant could not proceed with the construction, the tenant went ahead and built two free standing rooms in the living room, each about 8'x18', with a 10 foot high ceiling. At trial it was revealed that the tenant (who was married, but had no children) had relatives who "visited." The tenant wanted to build separate bedrooms for his "guests."

When the Owner discovered

the construction, he commenced a holdover proceeding based upon a violation of the lease clause that prohibited alterations without the Owner's prior written consent.

The Court ruled that, although the lease clause may not prohibit mere aesthetic changes, alterations which either materially changed the nature and character of the apartment, or caused permanent or lasting injury to the apartment, violate the "no alterations" clause. The Court also cited other examples of prohibited alterations such as enclosing a terrace, constructing a

properly maintain an apartment may allow the tenant to perform alterations, even without prior Owner consent. For example, one decision held that where an Owner did not properly maintain kitchen cabinets, such that they were "falling apart," and the Owner was on notice of the deteriorated condition, a tenant's replacing the cabinets at the tenant's own expense will not be found to have violated the "no alterations" clause.

A second caveat: An Owner must also be vigilant about acting upon unauthorized alterations. If

the Owner learns about the alterations and does nothing about it for a protracted period of time, the Court may rule that the Owner

has waived any objections as to the alterations. Further, if the superintendent or other Owner employee or agent performed the work or assisted the tenant in doing the work, the Court may impute knowledge by the staff to the Owner, and, again, may rule that the Owner waived any objections to the alterations.

Therefore, if an Owner learns that a tenant is undertaking alterations which are more than mere cosmetic changes, the Owner should immediately consult counsel to determine the rights, remedies and obligations of the parties.

This article was written by Joseph Burden, a BBW&G partner who practices in the firm's Litigation Department and who represented the Owner at trial in the case described in the article.

The decision is important because it reiterates the dichotomy between permitted and prohibited alterations.

deck on an outside patio, installing skylights, installing an air conditioner through the wall with removal of bricks, boarding up windows, moving a toilet, altering an entrance, and replacing windows.

The Court held that the tenant effectively (and improperly) converted his one bedroom apartment into a three bedroom apartment by constructing enclosed interior rooms with self-contained windows and doors.

The Court granted the landlord a judgment of possession, as well as an award of attorneys' fees for the cost of bringing of the proceeding.

The decision is important because it reiterates the dichotomy between permitted and prohibited alterations.

One caveat: The courts have held that an Owner's failure to

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- (d) provide written information about the testing and maintenance of the detectors to each apartment; and
- (e) keep records of the installation and maintenance of the detectors.

tors.

Tenants are required to maintain detectors in good repair and replace any detector that is removed or broken while they are living in the apartment.

HPD and the Department of Buildings will be issuing rules implementing the new law, which

should be consulted by Owners prior to installing any new detectors.

This article was written by Kara I. Rakowski, a BBW&G partner who practices in the firm's Administrative Law Department. If you have any questions concerning carbon monoxide, lead paint or ADA compliance issues, please contact Ms. Rakowski.

Stays Pending Appeal: How to Use Them; How to Overcome Them

When an order or judgment is issued by a court—whether deciding a motion, or deciding the entire case after trial—an appeal is not the only step that can follow. The party who is aggrieved can try to temporarily stop the order or judgment from going into effect until the appeal is decided. That temporary respite is called a “stay pending appeal.”

Depending on whether you are the winner or the loser of the ruling, you will have a different view as to whether you want the stay to be imposed.

If you are an Owner who has been granted a possessory judgment, the first question usually asked is “when can I get my property back?” The answer usually depends on how quickly the marshal can schedule an eviction. But, if the tenant files a notice of appeal and then moves for a stay of the judgment pending appeal, the answer to “when can I get my property back?” can mean months, or even more than a year.

The appellate courts tend to grant stays to tenants pending appeal, particularly when an eviction is involved, because if the appealing party is evicted before the appeal is heard, the appeal, in effect,

becomes moot. However, a stay pending appeal is not automatic, and the appellate courts do consider the harm that is caused by the requested stay, and the merits of the appeal.

Where the winning party can demonstrate it will suffer harm by the delay in obtaining its property back, and/or can show that the appealing party has very little chance of success on the appeal, opposing the motion for a stay can sometimes result in a quick recovery of the property; or at the very least, an order directing the appealing party to file its appeal by a shortened date certain, and pay use and occupancy pending the appeal, or post a bond (if a money judgment is involved).

Opposing the motion for a stay, thus, enables the winning party to possibly speed its recovery of the property, or speed the filing of the appeal, and limits the financial harm that the delay an appeal causes by requiring the appealing party to make some payment to maintain the status quo pending the appeal, or to ensure that the winning party will be able to recover its money judgment if the judgment is upheld.

The benefits of opposing a motion for a stay pending appeal are illustrated by a recent case

where the Housing Court awarded an Owner a judgment of possession following a trial, which found that the tenant had illegally overcharged her roommates in violation of the anti-profiteering provisions of the Rent Stabilization Code. The Housing Court also awarded the Owner a substantial money judgment for unpaid use and occupancy assessed at a fair market amount.

When the tenant tried to stop her eviction, and tried to put a hold on paying the money judgment, by filing a motion for a stay pending appeal, one justice of the appellate court gave her a temporary stay on condition she pay a percentage of the money judgment, until the full appellate court could decide the motion.

In opposition to the motion, the Owner emphasized the egregious nature of the tenant's illegal profiteering and other misconduct. The Owner demonstrated that the Housing Court had ruled correctly based on the evidence presented at trial. The full appellate court decided that under these circumstances, it was not appropriate to grant a stay pending appeal. The tenant was evicted. The Owner recovered its property.

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Sometimes, however, it is the Owner who is aggrieved by an order of the Housing Court, such that it is the Owner who requires the stay pending appeal. A recent case shows that obtaining such a stay can mean the difference between possibly winning or losing at trial.

The Housing Court issued an order that severely handicapped the Owner in its ability to rebut a succession claim by a daughter of a rent stabilized tenant who had died in 1994, but whose death was not revealed to the Owner until 2002. The order held that the only relevant time frame for the succession claim was the two year period prior to the tenant's death – more than a decade earlier. By limiting the time frame to only the pre-death period, the Owner was effectively barred from presenting evidence concerning the daughter having fraudulently concealed the tenant's death for almost a decade by submitting renewal leases and occupancy questionnaires bearing

the putative signature of the deceased tenant. The Housing Court order prevented the evidence of the daughter's fraud from being presented at trial because this evidence concerned a time period after the tenant's death. The Housing Court disregarded the fact that the evidence of fraud directly impugned the daughter's credibility, and therefore, was highly relevant to the succession claim.

Believing that without the post-death evidence the Owner would be severely prejudiced in its rebuttal of the daughter's succession claim, the Owner moved to stay the trial pending its appeal of the Housing Court order. The Owner demonstrated how significantly the order harmed its ability to present a proper rebuttal case. The Owner demonstrated how the daughter had obtained an unfair advantage despite her wrongdoing.

While the appellate courts, generally, do not stay a trial (or other lower court proceedings) for purposes of an appeal from a "non-final" order, an exception

was made in this case. The Owner successfully convinced the appellate court that it had a meritorious appeal, and that without a stay, it would suffer a significant deprivation of its right to present an effective defense to a central claim in the case. As a result, the Owner will be able to present the issue to the appellate court on its appeal from the Housing Court's ruling, rather than being forced to proceed to trial under what the Owner believed to be a severe evidentiary handicap.

Stays pending appeal – whether one is opposing them or seeking them – are important tools in litigation strategy that should not be overlooked or treated lightly. They can often result in a significant benefit if creatively utilized.

This article was written by Magda Cruz, a BBW&G partner who practices in the firm's Appeals Department. Stacey Bender and Matthew Brett, a partner and associate, respectively, practicing in the BBW&G's Litigation Department, represented the Owners in the cases described in this article

The DHCR "Demolition Application" : An Overview

Owners of buildings with rent regulated apartments are often unaware as to all of the tools at their disposal to maximize profit. One such tool is the application that an Owner may file with the State of New York seeking Certificates of Eviction against its rent controlled tenant and/or Permission to Refuse to Renew Leases against its rent stabilized tenants where the Owner's intention is to demolish the building. This article will briefly address some of the issues that an Owner

wishing to make use of this tool may confront.

DEMOLITION RULES AND REGULATIONS

Before outlining the administrative/litigation process itself, below follows a brief summary of the applicable rules and regulations pertaining to rent controlled and rent stabilized tenants.

A. Rent Controlled Tenants

Rent controlled tenants are governed by the NYC Rent and

Eviction Regulations. Former §50 (since renumbered as §2203.10) requires service of a Certification of Intent to Alter or Demolish where rent controlled tenants are in occupancy of the building. Various time-frames triggering the requirement of service and filing of the Certification are set forth; the earliest of which is, generally, thirty days after the first communication to any tenant of an intention to alter or demolish.

By "demolition" both the ad-

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ministrative agency (the New York State Division of Housing & Community Renewal; “DHCR”) and the courts have held that the total razing to the ground of the building is *not* required. Rather, if a building is gutted, such that the exterior shell remains, it has been held that this qualifies as “demolition” under the applicable regulations.

The proceedings pertaining to demolition involving rent controlled tenants are, generally, set forth at former § 58 (now § 2204.7) of the regulations. The proceedings involve the filing of an application for the issuance of a Certificate of Eviction with DHCR. The regulations have requirements regarding relocation and/or stipends to affected rent controlled tenants (if the Owner receives a Certificate of Eviction from DHCR). A recent DHCR Operational Bulletin, now referenced by regulation itself, addresses the stipend and relocation requirements for rent stabilized tenants. By recent legislative enactment, these provisions now apply to rent controlled tenants as well.

Also impacting upon an Owner’s right to proceed is the Sound Housing Act, which provides that a Certificate of Eviction may not be issued against rent controlled tenants unless DHCR “finds that there is no reasonable possibility that the landlord can make a net annual return of eight and one-half per centum of the assessed value of the subject property.” This can present an enormous obstacle to a project’s viability. In response to an Owner applying for a Certificate of Eviction based upon demolition, DHCR will conduct an

“Economic Viability” study. In addition, where rent controlled tenants are involved, if the new building is to be residential, the Owner must build a new building with 20% more units than the building that was demolished.

By a change in law, Owners who file for demolition with DHCR, with rent controlled tenants on site, will neither be faced with a requirement as to the number of residential units that will be created in the new building, nor will they be required to undergo an Economic Viability test if:

- ❑ there are three or fewer occupied apartments, and the number of occupied apartments is 10% or less of the total number of apartments in the building; *or*
- ❑ there is one occupied apartment and the building contains ten or fewer apartments; *and*
- ❑ the tenant(s) is/are provided with the relocation, moving expenses, stipend and other benefits provided under rent stabilization.

B. Rent Stabilized Tenants

Rent stabilization is a bit more lenient than rent control regarding demolition. Unlike rent controlled tenants, who occupy pursuant to statute, rent stabilized tenants occupy pursuant to lease. Thus, the application against rent stabilized tenants is not for a Certificate of Eviction, but for permission not to renew a lease. Section 2524.5 of the Rent Stabilization Code governs.

Please Note: Neither the Sound Housing Act’s 8½% rule

nor the 20% more housing rule, which can stand as an enormous impediment to demolition where rent controlled tenants are present, apply to rent stabilized tenants.

DHCR has promulgated an Operational Bulletin (and has amended its Code) which sets out the scope of the proceedings as well as the relocation and stipend requirements. The Bulletin also sets forth many of the documents that an Owner must submit with its application.

C. The Application Process

Following service of the Certification form upon rent controlled tenants, if any, a simple form is filed with DHCR that commences the “demolition process” against both rent controlled and rent stabilized tenants. If rent controlled tenants are present, DHCR will require the completion of the Economic Viability statement unless you can demonstrate that the Sound Housing Act does not apply (*see above*). In addition, whether rent controlled and/or rent stabilized tenants are present, DHCR will request further information pertaining to the application (plans, financing etc).

Most proceedings before DHCR are conducted via written submissions only. However, where demolition is the basis of the Owner’s application, statute previously mandated that an adjudicatory hearing be held. By Code amendment, the holding of a hearing is now discretionary with DHCR; that is, the agency may or may not hold a hearing. One of DHCR’s Administrative Law Judges (“ALJ”) will preside if a hearing is convened. Following the conclusion of the hearing, the ALJ will make a recommendation

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DHCR “Demolition Applicant” Overview . . . (Cont. from p. 6)

of findings of fact and law to the Rent Administrator. The Rent Administrator will thereafter promulgate a decision. But, it often takes DHCR one to two years or more before the Rent Administrator’s proceeding is completed. Thus, the process is a lengthy one.

D. Subsequent Administrative and Judicial Steps

Following the issuance of an order by the Rent Administrator, the following steps are possible:

1. Within 35 days after the Rent Administrator issues a decision, that decision may be challenged via a Petition

for Administrative Review (“PAR”) to DHCR’s Commissioner.

2. Within 60 days after the Commissioner rules on the PAR, the Commissioner’s decision may be challenged in NYS Supreme Court via an Article 78 proceeding seeking Judicial Review.
3. Within 30 days of the Supreme Court decision, a Notice of Appeal may be filed noticing an appeal to the Appellate Division.
4. Within 9 months after the filing of the Notice of Appeal, the briefs and record must be filed with the Appellate Division.

5. After the Appellate Division rules, leave for appeal to the Court of Appeals may be sought; first from the Appellate Division and then from the Court of Appeals itself.

Thus, from beginning to end, the process can take a number of years. However, in BBW&G’s experience, the administrative process can not only result in the vacating of a building as a result of a DHCR order, but it also frequently serves as the trigger event for bringing tenants to the bargaining table.

This article was written by Sherwin Belkin, a BBW&G partner who practices in the firm’s Administrative Law Department. If you have any questions concerning demolition proceedings please contact Mr. Belkin.

BBW&G News

“May I Quote You?”

Robert A. Jacobs, who practices in the firm’s Transaction Department, was noted in both *The New York Post* and *The New York Law Journal*, as having led a team of BBW&G attorneys in representing **RTR Funding Group** in its purchase of the landmark **Russian Tea Room**.

Daniel T. Altman, who practices in the firm’s Transaction Department, was quoted in *The Cooperator* regarding the import of bylaws and house rules upon those residing in a cooperative or condominium, as well as persons considering the purchase of an apartment.

Sherwin Belkin, who practices in BBW&G’s Administrative Law Department, was quoted in *The New York Times* “For Rent” column, in its Sunday Real Estate Section, regarding the impact of low interest rates upon an owner’s entitlement to a one per cent administrative fee for maintaining security deposits. Mr. Belkin cautioned against an Owner invading the principle if the accrued interest was inadequate to pay the administrative fee.

Edward G. Baer, who practices in BBW&G’s Litigation Department, will chair the October 1, 2004 New York State Bar Association program “Hot Topics in Landlord and Tenant Practice.” **Magda Cruz**, who practices in the firm’s Appeals Department, will make a presentation on “Sweetheart and Non-Primary Residence Leases.” **Sherwin Belkin** will also speak at this program on “Luxury Deregulation.”

Kara I. Rakowski, who practices in BBW&G’s Administrative Department was recently quoted in *The New York Times* regarding a demolition proceeding pending before DHCR in which the firm represents the Owner.

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PLEASE NOTE: This newsletter is intended for informational purposes only and should not be construed as providing legal advice. This newsletter provides only a brief summary of complex legal issues. The applicability of all or any of the issues described in this newsletter is dependent upon your particular facts and circumstances. Accordingly, it is suggested that prior to attempting to utilize or implement any of the suggestions provided in this newsletter, you should make sure to consult with your attorney.

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