BBWG

Belkin Burden Wenig & Goldman, LLP

UPDATE

April 2009

J-51 and Luxury Deregulation

In last month's issue, the Appellate Division, First Department's decision in *Roberts, et al. v. Tishman Speyer Properties, LP, et al.,* was featured for the impact it has made upon the New York City regulated rental housing market and the potential consequences on the City's real estate tax base.

On April 7, 2009, the Appellate Division granted the Owners' motion for leave to appeal the decision to the Court of Appeals—New York State's highest court. In addition, the implementation of the decision has been stayed pending the Court of Appeal's determination on the next appeal. The Court also granted *amicus curiae* status to The Rent Stabilization Association of New York City, Inc. (RSA), the Community Housing Improvement Program, Inc. (CHIP), and The Real Estate Board of New York (REBNY).

The Owners intend to ask the Court of Appeals to schedule oral argument on an expedited basis. The Owners, which own the Stuyvesant Town and Peter Cooper Village housing complexes are represented by Belkin Burden Wenig & Goldman, LLP and its co-counsel, Skadden, Arps.

Inside this Issue

Administrative Update

Long Term Solution to Short Term SRO Leasing?

By: Martin Heistein and Orie Shapiro

In recent years, the Department of Buildings ("DOB") has expanded enforcement efforts designed to prevent Single Room Occupancy ("SRO") hotels in general residence districts from leasing rooms to tourists or others for transient or short term occupancy.

The DOB maintains that transient use contravenes the certificate of occupancy ("C of O") used in "Class A" residential buildings, and that the Zoning Resolution bars transient occupancy in "general residence districts." The DOB has pursued these claims in a variety of venues including the Environmental Control Board, Criminal Court (Summons Part), and the Supreme Court.

In City of New York v. 330 Continental LLC, 3423, ("Continental") a Supreme Court justice temporarily enjoined three apartment hotels from renting certain rooms on a transient basis, pending resolution of the litigation in question. The City argued, and the Supreme Court found that any occupancy of less than thirty days was transient and violative of the Building's C of O and the Zoning Resolution.

This injunction was vacated in an important cant decision recently issued by the Appellate Division, First Department.

The Appellate Division noted that a significant number of rooms were leased on a short term basis, but held that neither the Multiple Dwelling Law, nor the Zoning Resolution, require that the building be used exclusively for permanent occupancy. The Appellate Division expressly found that secondary use of renting rooms on a short term basis is permitted under both the MDL and the Zoning Resolution. Section 4(8)(A) of the Multiple Dwelling Law defines "Class A" buildings as a multiple dwelling "occupied as a rule for permanent resident purposes." Moreover, hotels permissible in residential districts

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Long Term Solution. . .
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are "apartment hotels," which are defined in the Zoning Resolution as hotels "used primarily for permanent occupancy."

The Court inferred that the MDL standard "occupied as a rule for permanent resident purposes" connotes that a portion of the rooms can be leased on a short term basis. Similarly, if the Zoning Resolution requires that rooms be used primarily for permanent occupancy, the Court deduced that a portion of such rooms may be leased on a temporary basis. Thus, the appellate court concluded that "it follows that no violation either of the Zoning Resolution or the Certificate of Occupancy would result from the use of the minority of the units in one of the buildings for nonpermanent or transient occupancy."

The appellate decision in Continental appears well reasoned and convincing, but left a number of issues unresolved. The Court concluded that the injunction was improvidently issued, based upon principles of statutory construction and application of the rigid standards used in reviewing motions for preliminary injunctive relief. It is not clear to what extent future cases will distinguish Continental as predicated upon the burden of proof associated with injunctive relief.

More importantly, although the Court expressly approved the leasing of a portion of the hotel rooms on a short term basis, irrespective of a building's Class A status, and regardless of the Zoning Resolution, it did not define the percentage of rooms which must be reserved for long term occupancy to satisfy the MDL and the Zoning Resolution. The Continental decision may well stand for the proposition that as long as a slight majority of the rooms are occupied in accordance with the MDL and Zoning Resolution, the statutory standards are satisfied. Finally, although the Court recognized certain ambiguities and deficiencies in current regulations, it did not define the point in time when transient occupancy evolves into a permanent stay.

Ironically, the policy considerations which led to the DOB enforcement blitz may have changed significantly, not only by the Appellate Division's decision, but because of the rapidly deteriorating economic base in the City. The need to provide tourists and other short term occupants with affordable lodging so that the critical revenue stream is maintained in an era of shrinking City coffers, may ultimately assure that legislators and regulators ratify transient occupancy in SRO buildings despite tenant and zoning concerns. Our elected officials may well recognize that the Continental approach provides the long term resolution to the short term leasing conundrum.

Martin Heistein is a partner, and Orie Shapiro is an associate, in the Firm's Administrative Law Department.

Litigation Update

Defending the "New" Harassment Claims in Housing Court — Some Jurisdictional Issues to Consider

By: Ally Hack

On March 13, 2008, the City Council enacted the Tenant Protection Act ("TPA") (also known as "Local Law 7 of 2008"). The supporters of the TPA maintained that the main purpose underlying the new law was two-fold: i) to give tenants yet another avenue to pursue "landlord harassment" claims, and ii) to create additional remedies for tenants. Owners have challenged this legislation as redundant and unnecessary, as well as impermissibly subjective and not properly part of the city's code enforcement scheme.

Harassment is defined by the TPA to mean any action, or failure to act, by or on behalf of an owner that (i) causes any person lawfully entitled to occupancy of a dwelling to vacate such dwelling, or to surrender or waive any rights in relation to such occupancy; (ii) includes using force, or making threats of force, against any person lawfully entitled to occupancy of the subject dwelling; interruptions or discontinuances of essential services, which impair the habitability of such dwelling; (iii) commencing baseless or frivolous court proceedings against any person lawfully entitled to occupancy of such dwelling unit; (iv) removing, tampering with or changing the locks for the door (or even the door itself) of the subject dwelling; and (v) any other repeated acts that substantially interfere with or disturb the comfort, peace or quiet of any person lawfully entitled to occupancy of such dwelling.

In defending against such claims brought in Housing Court proceedings, owners should consider the potential

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Defending the "New" Harassment Claims...

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jurisdictional issues which could result in the automatic dismissal of a tenant's case. They include arguments that such claims are beyond the authority of the Housing Court to determine.

Under the New York City Civil Court Act § 110, the Legislature created the Housing Part for the purpose of enforcing state and local laws establishing and maintaining "housing standards." Such standards are delineated in the Multiple Dwelling Law, the Housing Maintenance Code, the Building Code and the Health Code. Whether "harassment" constitutes a "housing standard" analogous to the standards under these laws and codes is not clear. Arguably "harassment" may involve conduct that *impacts* housing standards, rather than actually *constituting* a housing standard *per se*. "Harassment," if proven, may thus diminish some housing standards and, as such, may be more appropriately considered a factor in assessing penalties for the actual deprivation of services to the adversely impacted tenants.

However, if harassment does not properly constitute a housing standard, then the claim is not properly adjudicated before the Housing Court. The TPA would be pre-empted by the New York Civil Court Act, which by its very terms limits the Civil Court's jurisdiction solely to "housing standards." The New York State Court of Appeals has held that under certain circumstances, state law (like the Civil Court Act) trumps local law.

The courts have not yet issued any definitive ruling on these issues surrounding the new law. Some claims have been dismissed for lack of merit, and others are simply pending with no active prosecution by the claimant. It appears that despite the professed need for the TPA by tenant activists, relatively few claims are actually being brought to fruition.

Ally Hack is an associate in the Firm's Litigation Department.

Transactional Update

When Sellers Become Lenders

By: Craig Ingber

A once popular financing mechanism that has been rarely employed recently may make a comeback. The coming months may see a resurgence of the "purchase money mortgage" where a seller agrees to "take back paper" (i.e., in effect, make a loan to the purchaser to finance the purchase of its property).

In today's financing market, a seller should consider anticipating a request that he "take back paper" as part of the sale, since many purchasers are having difficulty obtaining financing from conventional sources, and sellers eager to sell may be a relatively easy option of not-so-last resort.

All that purchase money financing means is that the seller agrees to extend financing to the buyer by accepting a mortgage from the buyer for a portion of the purchase price, instead of receiving cash for the total purchase price. While the act of "taking back paper" is relatively straightforward, the seller's decision to do so must take into consideration many factors such as whether he: (i) wants to be a lender and assume the risk of having to collect payments on a monthly basis from the buyer-turned- borrower; (ii) wants to have to make sure that payments of taxes and insurance are kept current to avoid the imposition of a tax lien that will have priority over the seller's purchase money mortgage; and (iii) is comfortable having to monitor the property to preserve the seller's interest in proceeds from any casualty.

Sellers who consider "taking back paper" also have to negotiate with the buyer-turned-borrower an interest rate, amortization terms and prepayment terms, to list just a few of the relevant terms that should be contained in a purchase money mortgage.

A seller who enters into a purchase money mortgage should be intimately familiar with the collateral and should familiarize himself with the financial status of the buyer, the buyer's track record on adhering to payment obligations, and the buyer's experience (if any) in the management of property.

A seller's awareness of the option to offer a purchase money mortgage is important for sellers in today's market; frankly, it might make the only difference between a deal closing, or not closing. Careful consideration should be given to all of the relevant factors when agreeing to extend a purchase money mortgage, and all of those factors should be discussed with counsel as early as possible to determine whether or not such a financing mechanism would work for the seller.

Craig Ingber is a partner in the Firm's Transactional Department and can counsel you on this and other transactional matters in the current market place.

Transactional Update

Selling Property in a Declining Market

By: Seth A. Liebenstein

Selling property in a declining real estate market can certainly be a challenge. In the not too distant past, sellers were getting multiple offers at or above asking price. However, today offers trickle in and at prices well below levels sought by sellers. This is mostly due to a decrease in the pool of willing and qualified buyers as well as in the number of banks willing to finance these transactions. However, there are certain actions that sellers can take to maximize the chances of a timely sale at an acceptable price

Use a Broker

In a challenged market, the guidance of a good broker, experienced in marketing comparable property, can be valuable. Brokers are out in the market every day and can help you establish the proper price for your property. Finding the right price point is crucial as over-aggressive pricing can cause a property to languish on the market, while qualified purchasers look elsewhere. Experienced brokers can take proactive marketing and negotiating measures in order to close deals in a timely manner. Brokers can also be useful in weeding out unqualified buyers who might not be able to obtain sufficient financing (especially true in the current cautious lending environment) or to facilitate approval of a purchaser of a cooperative unit. (Of course, when engaging the services of a broker, always make sure you have a comprehensive brokerage agreement (see "The Need to Review Brokerage Agreements in Advance of Engaging a Broker to Market Your Property" in the June 2007 BBWG Update).)

Be Flexible

Now, more than ever, sellers must recognize the realities of the market and be proactive in granting purchasers

appropriate concessions necessary to get deals done. For example, it has become commonplace in the current market to grant purchasers mortgage contingencies. However, many purchasers are seeking to take mortgage contingencies even further by having the prospective loan be contingent on the lender actually funding the loan, as opposed to what used to be the norm--simply the issuance of a loan commitment. Purchasers may be concerned that a lender will withdraw its commitment before closing. Having the loan contingent upon actual funding will alleviate that concern. Also, sellers should be flexible in allowing purchasers more time to obtain loan commitments. Lenders are not granting commitments as often, or as quickly, as in the past. Moreover, commitments now typically have more conditions attached. Sellers need to be aware of this and adjust their expectations accordingly. Another example of seller flexibility is making the purchaser's obligation to close contingent on the purchaser closing on the sale of his current apartment or home.

Enter into a Lease

Sometimes, an unfavorable selling environment causes a seller to consider leasing its home or apartment in the interim. If you are not under any compulsion to sell in this environment, the best solution may be not selling at all. Leasing your property is a good solution to get some cash flow from the property and to make your property available to a pool of users that may not be interested or capable of purchasing it. Even many cooperative boards are becoming more amenable now to shareholders renting their units, to help ensure that shareholders' maintenance payments remain current.

Be Creative

Anything that you can do to make the property more attractive to purchasers or lenders will help. Consider including some furniture, TV's or audio equipment in the sale. Have a great living room set that is ideal for the room? Include it in the sale. Have a room that is particularly dark or cluttered? Knock down a wall and open it up. Also, if your buyer does not qualify for enough financing, consider doing a purchase-money mortgage and finance all or part of the sale yourself.

This is not meant to be an exhaustive list, and these examples don't always work for every property, but they illustrate a point. Be proactive in your marketing and listen to what the market is telling you and you should get the result you are looking for.

Seth A. Liebenstein is an associate in the Firm's Transactional Department.

BBWG NEWS

Daniel T. Altman *and* ***Allan L. Gosdin*** of BBWG's Transactional Department completed the negotiation of a client's lease of space in the West Village to a national internet-based medical services provider. The tenant provides personal physician services to its members by establishing and operating local physicians' offices. This space is the tenant's second in New York City.

Denise DeNicola, a partner in BBWG's Transactional Department, represented four Manhattan cooperatives on the refinancing of underlying mortgages, and the acquisition of unsecured financing, from various lenders.

Seth A. Liebenstein, an associate in BBWG's Transactional Department, represented the purchaser of multiple condominium units in an Upper East Side building for a total purchase price of $4.5 million.

Aaron Shmulewitz**,** a partner in BBWG's Transactional Department, was quoted in *The New York Times* Real Estate Q&A blog on March 4, on the relative benefits of purchasing a co-op or a condominium apartment.

Craig L. Price, a partner in BBWG's Transactional Department, spoke at the New York office of MLB Kaye International Realty on the topic of "Negotiating Transactions in the Current Market".

Matthew Brett, a partner in BBWG's Litigation Department, lectured on the basics of rent regulation at a seminar entitled "Future Perspectives on Affordable Housing and Economic Development in New York City: Stimulus and Beyond", sponsored by the Association of the Bar of the City of New York, on March 27.

Magda L. Cruz, a partner in BBWG's Litigation and Appeals Departments, argued before the NYS Court of Appeals a case involving standards for demolition applications issued by the New York State Division of Housing and Community Renewal.

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