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UPDATE

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DECEMBER 2011 | VOLUME 14

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ADMINISTRATIVE LAW UPDATE

FULL REWIRING NOT REQUIRED BY DHCR FOR SUBMETERING MCI INCREASE

By Alyssa D. Sandman

When an owner makes a Major Capital Improvement (MCI) to a building subject to the rent stabilization or rent control laws, it can apply to the Division of Housing and Community Renewal (DHCR) for approval to raise the rents of the regulated tenants based on the actual, verified cost of the improvement or installation.

The Rent Stabilization Code (RSC) explicitly provides that the conversion of a building to an individual electric metering system, such as submetering, falls within the definition of an MCI. However, in the past, DHCR has generally held that conversion to submetering will only qualify for an MCI rent increase where a full rewiring of the building's electrical system has been performed.

In a recent proceeding before DHCR, BBWG successfully argued that a full rewiring of the building's electrical system should not be required

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SORTING THROUGH THE WEB OF NEW YORK CITY'S MIXED INCOME HOUSING PROGRAMS

By Alana Wrublin

Mixed income housing is far from a new phenomenon, especially in New York City where rent regulation has long established low and middle-income tenants living side-by-side free market tenants. However, many developers in New York City are now taking advantage of the variety of tax abatement and exemption programs, and low-interest or no-interest financing programs that New York City's regulatory agencies have to offer to encourage the development and preservation of such forms of housing. Yet given the ever-changing regulatory environment and the numerous requirements of many of these programs, compliance can often prove to be difficult and overwhelming. Good legal counsel and guidance is important for successfully taking advantage of such programs.

One such program is the 80/20 Program, which provides developers with tax-exempt bond financing in exchange for a new or rehabilitated development setting aside at least 20% of the units for low-income

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IT'S FLUE SEASON AGAIN–CHIMNEYS AND ADJACENT BUILDINGS

By Robert Jacobs

The skyline of New York City is forever in flux with the number of high-rise buildings constantly increasing. One of the common side effects of the proliferation of high-rise buildings is the effect on pre-existing shorter neighbors. In particular, the construction of a high-rise building renders chimneys that are in shorter buildings less than 10 feet away illegal under the Building Code.

There are two reasons why such pre-existing chimneys become illegal. The first is that the flues in the chimneys of the shorter building will no longer draw properly due to the proximity of the new, adjacent taller structure. In addition, the smoke from the chimneys will rise along the side of the taller building, entering windows and fresh air intake vents as well as causing discoloration and additional wear to the façade of the new structure.

This problem has been addressed in New York City Building Codes in one form or another since at least 1915. Since the Code section that was in effect when the building was constructed would control, a review of the correct applicable Building Code provision is crucial.

Article 19 of the 1915 New York City Building Code provides that the owner of a parcel that constructs a building that extends above the top of any chimney of an adjoining structure has the obligation, at his own expense, to carry up, either independently or in his own building, wall or structure, all chimneys of such adjoining building that are within 10 feet of any portion of the taller building's wall extending above the shorter building. The construction of such chimney extension is to conform to the requirements of the 1915 Building Code and shall be "so constructed, supported, and braced as to be at all times safe." 1915 Building Code, §392(9)(a).

Similar provisions have been carried forward in the 1938, 1968 and 2008 Building Codes. Thus, Section C26-570 of the 1938 Building Code, Section 27-860 of the 1968 Building Code as well as Section 501.1.1. of the current 2008 Construction Code, all require owners of the later-constructed taller building to extend (or to relocate to a legal location) the chimneys of adjacent shorter buildings.

Notably, the 1968 Building Code specifically provides that, in addition to the obligation to extend the chimney of a smaller pre-existing building, the owner of the taller building shall "provide for the maintenance, repair and/or replacement of such extensions or added equipment." Significantly, there is no time limit stated for the obligation of the owner of the taller building to maintain the chimney of the adjacent shorter building.

However, certain changes in conditions can potentially relieve the owner of the adjacent building of this obligation. Thus, in Lichter v. 349 Amsterdam Avenue Corporation, 8 A.D.3d 212, 780 N.Y.S.2d 4 (1st Dep't 2004), the Appellate Division held that the obligation of the owner of a taller, later-built, building to "maintain" the chimney of the shorter builder was extinguished in or about 1947, when the owner of the shorter building discontinued the use of the chimney, and such responsibility was not reactivated when such use resumed almost 40 years later.

In addition, when an owner upgrades from oil to gas service, the smoke discharge from the heating system is significantly hotter (since gas burns hotter than oil). As a result, a flue that is legal for an oil burner may have to be re-lined with a metal liner which is more heat resistant than traditional brick. In this type of situation, the owner of the shorter building, in upgrading the system, would most likely be responsible for re-lining the flue. The maintenance obligation for the chimney structure itself, however, would still remain with the owner of the taller building.

BBWG routinely counsels owners in resolving chimney disputes, which are on the rise due to the increase in the construction of high rise buildings.

Robert Jacobs (rjacobs@bbwg.com) is a partner in the Firm's Transactional Department. For more information on disputes or issues involving adjacent buildings, including chimneys, please contact Mr. Jacobs.

STOP ILLEGAL ALTERATIONS BY TENANTS

By Joseph Burden

Rent regulated tenants are generally not permitted to undertake alterations to their apartments without the express written consent of the landlord. Most tenants have leases which prohibit such alterations.

However, under provisions of the Real Property Actions and Proceedings Law, if a tenant has been found, after trial, to have breached the lease, the court is required to grant a 10 day period for the tenant to cure the violation.

When tenants make alterations, some courts have found such alterations to be de minimis and do not require the tenant to cure. Other courts have found that since the tenant has started to cure within the 10 days and is making diligent efforts to continue the cure, the tenant's time to cure will be extended beyond the 10 days.

The Appellate Division, with jurisdiction over properties in Manhattan and the Bronx, has recently clarified these issues and ruled favorably to owners. In 259 West 12th LLC v. Grossberg, a tenant demolished and replaced the bathroom walls without conducting an asbestos test before removing the walls. In addition, the tenant failed to ensure that the new sheetrock that the tenant installed had the proper fire rating. The tenant also failed to secure the necessary permits from the Department of Buildings and subjected the landlord to numerous building code violations and fines.

The Civil Court found that the tenant had substantially violated the lease, but granted the tenant an opportunity to cure and extended her time to cure beyond the 10 days. The Appellate Term modified that judgment by eliminating the right to cure and this decision was affirmed by the Appellate Division.

The Court held that the demolition of the existing bathroom was not capable of meaningful cure, since it caused lasting or permanent injury to the premises. The Appellate Division also held that the 10-day cure period was designed to cover breaches temporary in nature and correctable within the 10 day period. The Court held that "because the tenant in this case caused a lasting or permanent injury to the apartment, she was not entitled to any stay for the purpose of correcting an uncorrectable breach." As a result, the landlord was entitled to evict the tenant.

Based upon this ruling of the Appellate Division, if a tenant does substantial alterations without the owner's permission, and such alterations are not de minimis (such as putting in new kitchen cabinets, which generally does not cause any lasting or permanent harm to the apartment and can be readily removed), then the owner should consider commencing a "breach of lease" holdover proceeding. In order to determine your rights and likelihood of success, experienced counsel in this area should be consulted before commencing such proceedings.

Joseph Burden (jburden@bbwg.com) is a partner in the Firm's Litigation Department.

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FULL REWIRING NOT REQUIRED BY DHCR FOR SUBMETERING MCI INCREASE

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in order for a submetering conversion to qualify for an MCI rent increase. In that case, the building was already adequately wired for the installation of submeters in each apartment, making a full rewiring unnecessary. Still, the owner had spent nearly $80,000 for the purchase and installation of the submeters and the associated painting, plastering and cleanup work.

BBWG argued on behalf of the owner that (1) the submeters alone are equipment that is depreciable under the Internal Revenue Code and satisfy all elements of the RSC's definition of an MCI; and (2) refusing to grant an MCI increase absent a full rewiring of the entire building's electrical system would have a chilling effect on DHCR's and the Public Service Commission's publicly pronounced objective of encouraging owners to convert from master metering to individual/submetering systems for energy conservation purposes.

DHCR's District Rent Administrator accepted the owner's arguments and granted an MCI rent increase even though a full rewiring of the building was not performed. Notably, DHCR's District Rent Administrator properly included the cost of the painting, plastering and cleanup work associated with the submetering installation in the total MCI cost because such work was directly related to, and done in conjunction with, the underlying qualifying MCI.

The owner was represented in the proceeding by Kara I. Rakowski (krakowski@bbwg.com) a partner, and Alyssa Sandman (asandman@bbwg.com) an associate, in the Firm's Administrative Law Department.

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SORTING THROUGH THE WEB OF NEW YORK CITY'S MIXED INCOME HOUSING PROGRAMS

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tenants. The tax-exempt bond financing generates 4% "as of right" Low Income Housing Tax Credits ("LIHTC"), which can be syndicated to generate part of the required equity a borrower must contribute to the financing or be utilized to offset the borrower's tax payments.

LIHTC can also be obtained automatically through the Low-Income Marketplace Program (LAMP), established by the Housing Development Corporation in 2003. Under this initiative, all tax credit eligible units in the housing development must be available to residents earning 60% of the New York City Area Median Income ("AMI") or less. In addition, 20% of the units must be reserved for households earning at or below 40% AMI or for homeless households.

A developer can also receive LIHTC for mixed income housing through the New York City Department of Housing, Preservation and Development ("HPD") where 40% of the units in a development are reserved for households earning at or below 60% of the AMI.

After approval is obtained, all projects are then governed by a Regulatory Agreement. The Regulatory Agreement articulates project specific requirements in addition to income restrictions, including, but not limited to: low income housing tax credit requirements; tenant certification requirements; lease up procedures and benchmarks; restrictions on transfers; inspections; and financial reporting requirements.

As part of these requirements, developers receiving LIHTC must keep records of low-income tenant's annual income certifications and recertifications, which must be made available to the appropriate agency upon request for LIHTC compliance monitoring. Low-income tenants are required to submit annually a certification of Annual Income and Household size to verify such tenant's annual income. Low-income tenants can be denied a renewal lease or have their tenancy terminated for making a false or fraudulent certification with respect to Annual Income or Household size. Additionally, a low-income tenant's tenancy may be terminated for failure to recertify their income.

Thus, although compliance can be demanding, a developer may stand to benefit greatly through the financial benefits these programs are able to provide.

Alana Wrublin (awrublin@bbwg.com) is an associate in the Firm's Administrative Law and Transactional Departments.

BBWG NOTABLE ACHIEVEMENTS

SHERWIN BELKIN, a partner in BBWG's Administrative Law and Appeals Departments, was a panelist at the MASSEY KNAKAL Multi-Family Housing Summit on November 16, 2011. The topic was "Albany and New York City 2011: Rent Stabilization and the Politics of Real Estate."

ROBERT A. JACOBS, a partner in BBWG's Transactional and Appeals Departments, was a panelist in a continuing legal education seminar on Development Rights, webcast live on December 8, 2011 sponsored by the Association of the Bar of the City of New York.

AARON SHMULEWITZ, head of BBWG's co-op/condo practice, responded to an inquiry in the Sunday Real Estate Section of the New York Times on November 13, 2011 regarding the rights and obligations of co-op boards and shareholders with regard to the operation and sealing of fireplaces. MR. SHMULEWITZ was also quoted in the October edition of The Real Deal in an article discussing a pending court decision regarding discrimination in the selection of roommates.

ORIE SHAPIRO, a partner in BBWG's Administrative Law Department, was a panelist in a continuing legal education seminar on October 27, 2011. He spoke about "Procedural Defenses to Building Violations at ECB Hearings", co-sponsored by the New York County Lawyers Association and Community Housing Improvement Program ("CHIP").

Articles written by DANIEL ALTMAN, a partner, and MELANIE A. CAPOBIANCO, an associate, in BBWG's Transactional Department, for the November 2011 BBWG Update, on issues concerning commercial leases and co-op and condo transactions, were published by Real Estate Weekly On-line on December 2, 2011.

Co-op | Condo Corner

By Aaron Shmulewitz

Aaron Shmulewitz heads the Firm's co-op/condo practice, consisting of more than 300 co-op and condo Boards throughout the City, as well as sponsors of condominium conversions, and numerous purchasers and sellers of co-op and condo apartments, buildings, residences and other properties. If you would like to discuss any of the cases in this article or other related matter, you can reach Aaron at 212-867-4466 or (ashmulewitz@bbwg.com).

CO-OP DENIAL OF CONSENT FOR HARBORING OF "COMPANION DOG" BY DEPRESSED SHAREHOLDER VIOLATED OBLIGATION TO MAKE REASONABLE ACCOMMODATION FOR DISABILITY; CO-OP LIABLE FOR $90,000 IN DAMAGES AND PENALTIES

Commission on Human Rights v. Riverbay Corp., New York City Office of Administrative Trials and Hearings

COMMENT | *This long and detailed decision illustrated the potential risks to Boards which fail to take seriously the increasingly frequent requests by constituents for consent to harbor therapeutic "companion dogs" despite pet restrictions. The decision indicates the lengths to which courts and agencies will go to protect the interests of persons making such claims.*

REJECTED PURCHASER CAN SUE CO-OP BOARD FOR DISCRIMINATION AGAINST HIM AS A SINGLE MALE

Lax v. 29 Woodmere Boulevard Owners, Inc., United States District Court, Eastern District of New York

COMMENT | *In denying the co-op's motion to dismiss, the Court rejected the co-op's claim that the turndown was due to too low a price, indicating that there was evidence in the record that the plaintiff's allegations had some merit.*

CO-OP DECISION TO REQUIRE DISABLED RESIDENT TO USE REVAMPED SIDE ENTRANCE DOOR, INSTEAD OF REDOING MAIN ENTRANCE TO ACCOMMODATE HIS DISABILITY, VIOLATED OBLIGATION TO MAKE REASONABLE ACCOMMODATION, CONSTITUTED DISABILITY DISCRIMINATION

Riverbay Corp. v. NYC Commission on Human Rights, Supreme Court, Bronx County

COMMENT | *The co-op was ordered to pay $21,000 in fines and penalties, which would have been the approximate cost of redoing the main entrance. Co-op and condo boards must consider all such requests seriously, and should weigh the potential costs of litigation, fines and penalties against the costs of doing the requested work.*

FORECLOSING BANK'S MISTAKEN PAYMENT TO CONDO OF PRE-FORECLOSURE COMMON CHARGE ARREARS STANDS, WITHOUT REFUND, BECAUSE BANK'S TERMS OF SALE INDICATED MISTAKENLY THAT FORECLOSURE SALE WAS SUBJECT TO CONDO COMMON CHARGES

Deutsche Bank National Trust Co. v. Tabares, Supreme Court, Suffolk County

COMMENT | *This holding is contrary to the generally prevailing law that a foreclosing bank is not liable for pre-foreclosure common charges, and was based solely on the apparent mistake in the bank's own sale document. In general, condos still normally get hurt financially, sometimes significantly, in mortgage foreclosure cases.*

SELLING SHAREHOLDER CAN SUE CO-OP FOR REJECTING PURCHASER DUE TO BELOW-MARKET PRICE

Chappell v. Trump Plaza Owners, Inc., Supreme Court, New York County

COMMENT | *The seller had alleged that the Board engaged in price-fixing intended to boost flip tax revenues, which was conduct not protected under the business judgment rule. This troubling decision represents a break from the recent clear trend of cases which have upheld co-op Boards' rights to reject purchasers based on inadequate price, including at least two appellate decisions which should have been controlling here.*

CO-OP LIABLE FOR INJURY TO EMPLOYEE OF SHAREHOLDER'S CONTRACTOR DUE TO LACK OF REQUIRED SAFETY DEVICES ON POWER SAW

Bajor v. 75 East End Owners Inc., Appellate Division, 1st Dept.

COMMENT | *Ironically, the Court ruled that the co-op could not get indemnification from the contractor because the contractor had no supervision over its own employee's actual work. The co-op—which had even less supervision over the employee—was left holding the bag in a case that illustrates the extent to which Boards can be held liable for events over which they have absolutely no control.*

CONDO UNIT OWNER NOT ENTITLED TO PRELIMINARY INJUNCTION TO COMPEL CONDO TO REPAIR EXTERIOR WALLS TO STOP LEAKS, SINCE SOURCE OF LEAKS IN DISPUTE

Cooper v. Board of White Sands Condominium, Appellate Division, 2nd Dept.

HOA ENTITLED TO JUDGMENT FOR UNPAID COMMON CHARGES, DESPITE UNIT OWNER'S ASSERTION THAT HOA'S NEGLIGENT CONSTRUCTION OF DITCH IN HIS BACKYARD CREATED PRIVATE NUISANCE

Board of Directors of Squire Green at Pawling Homeowners Association Inc. v. Bell, Appellate Division, 2nd Dept.

COMMENT | *The Court allowed the Unit Owner to maintain a separate claim for nuisance, but not as an offset to his obligation to pay common charges to the HOA.*

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