BBWG

Belkin Burden Wenig & Goldman, LLP

UPDATE

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Special Legislative Bulletin

Below is a very brief summary of the bills passed by the New York State Assembly on February 2, 2009. These bills are **not** *law. In order to become law, bills must be passed by the State Senate and signed by the Governor, as well. At this time, it is not known if some, any, or all of these bills will become law, or if these bills will undergo any substantive change during the legislative process. This is only a brief summary and is for informational purposes only. It is not intended as an exhaustive analysis and should not be relied upon as a replacement for the review and careful analysis of the text of each bill.*

1. **Repeals the Urstadt Law thereby allowing cities to strengthen rent regulations beyond State law. This would place rent regulation in NYC under the jurisdiction of the City Council.**
2. **Eliminates luxury deregulation by vacancy.**
3. **Changes the thresholds on high income deregulation to a rent of $2,700 and income of $240,000, with subsequent annual increases.**
4. **Reduces rent stabilized vacancy increase from 20% to 10%.**
5. **Re-stabilizes certain previously deregulated apartments renting for less than $5,000.**
6. **Makes MCIs a surcharge rather than a permanent rent increase.**
7. **Increases civil penalties for certain acts of owners.**
8. **Allows preferential rents to be ended only on vacancy, not on renewal.**
9. **Sets last rent paid before dissolution of Mitchell-Lama developments as the initial legal regulated rent.**
10. **Subjects former Section 8 projects completed after 1974 to rent regulation.**
11. **Limits owner occupancy proceedings for multiple units; changes the "good faith" standard to "immediate and compelling necessity"; and gives long term tenants relocation rights.**

If you have questions about these bills or wish to discuss further potential ramifications of this proposed legislation on your residential properties, please contact Sherwin Belkin (sbelkin@bbwg.com). Mr. Belkin is a partner in the firm's Administrative and Appeals departments.

Sherwin Belkin

Co-Op / Condo Corner

By: Aaron Shmulewitz

Aaron Shmulewitz heads the Firm's Co-op/Condo practice. Aaron represents more than 300 cooperative and condominium boards throughout the City, as well as sponsors of cooperative and condominium conversions, and numerous purchasers and sellers of cooperative and condominium apartments, buildings, residences and other properties. Some recent noteworthy court decisions in this practice area are discussed below.

Co-op Shareholders Are Holders of Unsold Shares Because They Never Occupied Apartment

In *Mittman v. Netherland Gardens Corp.* (NYLJ November 3, 2008 page 27 column 4), the Appellate Division held that "unsold shares" status is determined by the definitions contained in the co-op's governing documents and offering plan, and that non-compliance with Attorney General requirements for holders of unsold shares was irrelevant because neither the co-op's governing documents nor offering plan required it.

COMMENT—This case continued the recent trend, where courts look solely to the operative documents to determine unsold shares status. As a result, it has become easier to retain status as a holder of unsold shares, which carries with it valuable privileges.

Rent Abatement Awarded for Landlord's Inadequate Efforts to Remedy Bedbug Infestation

While *Grand Review LLC v. Moore* (NYLJ November 19, 2008 page 27 column 1) dealt with a rental apartment, its holding could be extended to co-ops.

COMMENT—While the issue of a co-op's legal responsibility to remedy bedbug complaints is somewhat in flux, this case illustrates that a Board must at least attempt diligently to address complaints of such infestation, or risk a court awarding a maintenance abatement to the affected shareholder.

Purchaser of Unsold Shares is Bound by Sponsor Obligations, Including Implicit Duty to Sell Apartments as they Become Vacant

Cole v. 1015 Concourse Owners Corp. (NYLJ December 1, 2008 page 19 column 2) held that, while a purchaser of co-op unsold shares enjoys the privileges attendant to that status--even without being formally designated by the sponsor—it also assumes all sponsor obligations under the offering plan, including the obligation to sell apartments as they become vacant, and to cede control of the Board to residents.

COMMENT—This case is potentially very significant, in that it recognizes an affirmative obligation to sell unsold apartments as they become vacant, a goal that often creates conflict between Boards and sponsors.

Homeowners Association Lien for Arrears Cannot Include Assessment for Costs to Repair Damage Caused by Unit Owner, Without a By-Law Provision

While *Board of Directors of Hunt Club at Coram Homeowners Association, Inc. v. Hebb* (NYLJ December 3, 2008 page 30 column 3) dealt with a homeowners association, its holding would likely extend to condos, which often seek to pass such repair costs back to the Unit Owner who caused the damage.

COMMENT—This case points up yet again the importance of following a condo's governing documents; courts will generally bar a Board from asserting a claim or right if not permitted in the governing documents.

Condo Board Has No Authority to Lease Space For Cell tower Usage

In *Kaung v. Board of Managers, Biltmore Towers Condominium* (NYLJ December 19, 2008 page 33 column 3), the court held that cell towers are not incidental to the residents' use of the condo's common elements, so such a lease was not permitted by the condo's bylaws. The court invalidated the lease, holding that, since the Board had no authority to enter into such an agreement, the business judgment rule did not protect the Board's decision.

COMMENT—This somewhat surprising decision bucked the recent trend of recognizing Boards' expansive discretion. Appellate review and reconciliation is necessary.

Condo Owner Has Exclusive Roof Rights; Board Sanctioned

In *Weiss v. Board of Managers of 58 Walker Street Condominium* (NYLJ January 2, 2009 page 28 column 1), the court ruled that a prior court decision had clearly determined that the Unit Owner had exclusive roof rights, and that the Board's failure to adhere to that prior decision warranted the Board paying the Unit Owner's legal fees.

COMMENT—This case illustrates once again how Boards can easily create problems for themselves by refusing to follow legal and judicial requirements to govern their actions.

Administrative Update

High Income High Rent Deregulation

By: Joshua G. Losardo

As noted in the Special Legislative Bulletin in this Update, there is proposed legislation that would significantly affect deregulation of apartments based on high income and/or high rent. However, because it is uncertain whether any of the proposed changes will be enacted into law (or when any changes will actually take effect), owners should continue to exercise their existing rights to apply to the New York State Division of Housing and Community Renewal ("DHCR") for deregulation orders in appropriate cases.

The law currently provides that DHCR will issue an order of deregulation if it is determined that the combined income of all persons residing in an apartment as a primary residence was at least $175,000 in the two years preceding the year that the owner's petition is filed. (In 2009, an apartment's primary residents' 2007 and 2008 income would be relevant.)

An order of deregulation may also be issued if a tenant ignores service of the deregulation petition and fails to contest the income and rent statements in the petition.

Service of the Income Certification Form

The first step in the process is for the owner to serve an Income Certification Form ("ICF") on the tenant after an apartment's monthly legal or maximum rent reaches $2,000 or more. Service of the ICF must be completed by May 1st, so rents increasing on May 1st or earlier pursuant to the commencement of renewal leases may be included this year.

The Rent Stabilization Law requires tenants to answer ICFs by stating whether their household's annual income ***(defined by the Rent Stabilization Code as the federal adjusted gross income as reported on a N.Y.S. income tax return)***, exceeded $175,000 in either of the past two years. The ICF also requires tenants to identify all persons occupying an apartment.

Service of the High Income Rent Deregulation Petition

After proper service of the ICF, an owner may file a "Petition by Owner for High Income Rent Deregulation" with DHCR. Petitions must be filed on or before June 30, 2009, and seek one of the following remedies:

An order deregulating an apartment based upon a tenant's admission that the household income thresholds were met; or

Verification of a tenant's answer in the ICF because the owner contests it; or

Verification of a tenant's household income because a tenant failed to answer the ICF.

DHCR will verify an apartment's household income with the cooperation of the N.Y.S. Department of Taxation and Finance.

DHCR will issue an order of deregulation if the agency determines that a household's annual income is more than $175,000 in both years preceding the year that the owner's petition is filed, and the apartment's legal regulated rent is over $2,000.

Orders of Deregulation

If an Order of Deregulation is issued by DHCR, the owner must offer a tenant the right of first refusal to rent the apartment pursuant to a new, non-regulated lease, at a rent "not in excess of the market rent." Market rent is defined as a "rent obtainable in an arm's length transaction."

Owners must offer tenants the right of first refusal in writing by certified and regular mail and shall inform the tenant that the offer must be accepted in writing within ten days of receipt.

For rent controlled tenants, orders of deregulation become effective on March 1st in the year following the filing the owner's petition.

For rent stabilized tenants, the non-regulated lease may commence immediately following the expiration of the tenant's rent stabilized lease. The non-regulated lease may commence earlier if a special renewal lease rider was properly attached to the tenant's renewal lease in effect when the order of deregulation issued.

Renewal Lease Riders

DHCR has promulgated a special renewal lease rider that advises the tenant of the pendency of a deregulation proceeding, and that the "offered renewal lease, if accepted, will nevertheless no longer be in effect after 60 days from the issuance by the DHCR of an order of decontrol." This rider should be attached to every renewal lease in order to enable an owner to enforce an order of deregulation as quickly as possible.

Try, Try Again

In the event that DHCR issues an order denying deregulation, an owner may re-file against the tenants the following year, as tenants' income levels may increase.

Joshua G. Losardo is a partner in BBW&G's Administrative and Bankruptcy Departments.

Litigation Update

New Law Makes Adverse Possession Claims Tougher

In reaction to a 2006 Court of Appeals decision that held that an adverse possessor's knowledge that it might not own disputed land had no bearing on its right to still obtain title to such land by adverse possession, the State legislature has substantially revamped the adverse possession statute.

Although not a favored method of obtaining title, the adverse possession statute (Article 5 of the New York Real Property Actions and Proceedings Law) has been recognized as a necessary means of clearing disputed claims to real property. The courts have adopted it and enforced it when adverse possession is proven by clear and convincing evidence. However, when the Court of Appeals stated that a party's actual knowledge that property belongs to another is irrelevant and that conduct will prevail over knowledge, the legislature perceived this as unjust and quickly tried to reverse this ruling by legislation. The legislature's first attempt was vetoed by then Governor Pataki. However, in 2008 the legislature succeeded in enacting a statute that was signed into law but has received relatively little notice.

The law has been changed in several material respects.

The preamble to the adverse possession law has been renamed from "Action after entry" to "Adverse possession: defined", which de-emphasizes actions in favor of other criteria. Specifically, "claim of right" has been introduced into the statute as a defined term. Under the new law, a "claim of right" is a "reasonable basis for the belief that the property belongs to the adverse possessor." This is in direct response to the Court of Appeals' 2006 pronouncement that actual knowledge by the possessor was irrelevant.

Under the old law, one of the criteria for claiming adverse possession under an unwritten claim was the usual cultivation or improvement of the disputed land. This specific criterion has been eliminated and replaced with a generic reference to "acts sufficiently open to put a reasonably diligent owner on notice." Cultivation of the land itself is no longer a stated basis for a claim of adverse possession.

In addition, and most important, a new section has been added to the statute specifying that de minimis "non-structural encroachments" such as fences, hedges, shrubbery, plantings, sheds and non-structural walls are deemed permissive and non-hostile. Moreover, the new section goes on to state that acts of lawn mowing or similar maintenance across boundary lines is likewise considered permissive and non-hostile. Consequently, such actions can no longer serve as the basis of an adversarial claim.

As a result of the new law, parties asserting title by adverse possession will have a significantly greater burden in establishing their claim. How the courts will ultimately interpret the new law remains to be seen.

Robert A. Jacobs is a partner in the firm's Transactional Department.

Fire Damage and Economic Infeasibility

By: Brian Clark Haberly and Jamie Lee

Occasionally a landlord will find itself with a building which has been badly damaged (or completely destroyed) by a fire. When this happens, the City will often bring a proceeding to attempt to compel the landlord to repair the fire damage (or completely rebuild the building). In this type of proceeding, one of the defenses which is sometimes available to a landlord is the defense of economic infeasibility.

Although not expressed in any statute or regulation, the appellate courts have held that where the cost of repairing (or rebuilding) a building exceeds the value of the building when the repairs are complete, the decision of whether to rebuild lies within the sole discretion of the owner. This defense is referred to as "economic infeasibility."

The main case on point is *Bernard v. Scharf*, 246 A.D.2d. 171, 675 N.Y.S.2d 64 (1st Dep't 1998). Although the case was subsequently remitted to the Civil Court for dismissal on the basis of mootness (because the building was repaired while the appeals were pending) [93 N.Y.2d 842 (1999)], the reasoning of the Appellate Division is often turned to for guidance on what elements constitute a viable "economic infeasibility" defense.

In *Scharf*, the Appellate Division stated that if a landlord was compelled to spend more on repairs than the restored building would be worth, the landlord would be denied a reasonable return on its investment. The Court went on to find that forcing the landlord to do the repairs would be a violation of the takings clause of the United States Constitution.

In order for a landlord to use the defense of economic infeasibility, the landlord must establish the lack of economic viability of the building. Some of the relevant factors include: (i) proof of the actual or assessed value and market value of the building; (ii) any offers to purchase the property; and (iii) the net operating costs of the building (including the rent roll).

Expert testimony describing the condition of the building after the fire should be provided. The landlord must also be able to show through expert testimony the current condition of the building and what it will cost to

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Fire Damage . . .

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rebuild or repair the building.

In addition, the landlord should be prepared to establish that the economic hardship to rebuild is not a result of the landlord's prior negligence or neglect of the building. The courts will not allow a landlord to use the defense of economic infeasibility if the landlord was responsible for the damage to (or the destruction of) the building.

If the landlord can show that the cost of repairing the building exceeds the value of the restored building, then the landlord has a viable defense to a case by the City seeking to force the landlord to do the repairs.

However, the defense of economic infeasibility is difficult to prove and requires the testimony of multiple expert witnesses. Moreover, the Housing Court may be reluctant to find that a landlord is not required to restore a building, thereby often forcing the landlord to exercise appellate remedies.

Brian Clark Haberly is a partner and Jamie Lee is an associate in the firm's Litigation Department.

Brian Clark Haberly

Jamie Lee

BBWG NEWS

Matthew Brett, a partner in BBWG's Litigation Department, was appointed by the New York State Chief Administrative Judge (Hon. Ann Pfau) to serve a three-year term as an owner representative on the Advisory Council for the Housing Part of the Civil Court of the City of New York. The Advisory Council is charged with reviewing and making recommendations to the Chief Administrative Judge for the appointment and reappointment of New York City Housing Court judges.

Aaron Shmulewitz, a partner in BBWG's Transactional Department, answered a question in *The New York Times* Sunday Real Estate section on January 11 on the rights of an absent cooperative shareholder of record vis-à-vis its occupant, noting that while the shareholder still retains all ownership rights, he also retains all loan obligations. ***Recent Transactions of Note:*** Mr. Shmulewitz represented the purchaser of an Upper East Side townhouse in an all-cash $25 million transaction; the purchaser was a foreign investor. Mr. Shmulewitz also represented an Upper West Side co-op on the leasing of store space to a restaurant in a lease valued in excess of $6 million over 15 years.

Craig Ingber, a partner in BBWG's Transactional Department, was a contributor to the January, 2009 edition of *The Commercial Lease Law Insider,* on using a radius clause and percentage rent to maximize income.

A treatise on disclosure in Housing Court proceedings authored by **David M. Skaller**, a partner in BBWG's Litigation Department, was cited in an article entitled *Disclosure and Disclosure-Like Devices in The New York City Housing Court* that appeared in the August/September issue of *Landlord-Tenant* Monthly, which is authored by Housing Court Judge Gerald Lebovits.

On January 21, 2009, the *New York Law Journal* featured a case successfully handled by partner **Sherwin Belkin** and associate **Orie Shapiro.** The case, entitled *Sherwood Associates v. DHCR,* concerned a protracted litigation involving the regulatory status of buildings that tenants sought to have deemed subject to rent stabilization as a "horizontal multiple dwelling." Messrs. Belkin and Shapiro had DHCR's ruling that has found the buildings subject to rent stabilization set aside by the Supreme Court due to irregularities surrounding a DHCR inspection, and the agency's overt bias against the owner's evidence.

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Legal Update
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