BBWG

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UPDATE

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Transactional Update

Keep a Watchful Eye on Your Retaining Wall

By: Craig Ingber

Retaining walls are not at the top of every property owner's maintenance 'to do list' but property owners are required to ensure that retaining walls are safe and free from violations.

Retaining walls are considered permanent structures intended to keep soil from moving and/or shifting in a manner that undermines the stability of a structure or adjacent areas. In instances where retaining walls straddle more than one property, both affected property owners are responsible for the maintenance of any retaining walls. Owners pay more attention to retaining walls when faced with transferring their property because the movement in or shifting of a retaining wall may be documented in a survey of the property when it is in the process of being conveyed.

Overgrown trees, broken or cracked brick, stone and/or concrete may undermine the stability of retaining walls and cause damage to property or individuals and result in the issuance of a violation. The 'freeze and thaw cycle' that causes cracking in sidewalks and potholes in roads also affects the stability of retaining walls. Maintenance of retaining walls gained renewed attention following the collapse of the massive retaining wall bordering the Henry Hudson Parkway near 181st Street in Washington Heights several years ago. Fortunately, despite the scope of the collapse of that retaining wall and the related debris, no injuries were caused by that collapse. However, replacing that failed retaining wall and the insurance and legal issues related to that collapse were very costly and not anticipated by the owner of that property.

The 'amnesty' period afforded to owners pursuant to the Department of Buildings' 'No-Penalty Retaining Wall Inspection Program' expired on June 1, 2009. During that now-expired time period, owners were offered an opportunity to invite DOB inspectors to their property to determine whether or not their retaining walls were safe, free from the threat of the issuance of a violation by DOB if a DOB inspector determined that a retaining wall was, in fact, unsafe or unstable.

While these are challenging times for property owners battling rising costs and expenses, owners of properties with retaining walls are urged to show their retaining walls some 'respect' and perhaps much needed attention, in order to avoid larger, and even more-costly, problems down the road.

Craig Ingber is a partner in the Firm's Transactional Department, experienced in dealing with the issues mentioned in this article, and should be consulted if your property has a retaining wall or if you wish to discuss any other property related concerns you may have.

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Litigation Update

A Brief History of Rent Regulation in New York

By: Matthew S. Brett

2009 marks the 66th year of continuous rent regulation in New York State. On the eve of potentially dramatic legislative changes in Albany in the coming year, it is worth looking back to gain a perspective on the history of rent regulation in New York.

Although some form of government control over housing units may date back hundreds of years, here are some of the major milestones of rent regulation in New York:

1950: Upon the expiration of various Federal Housing price controls enacted as part of the World War II effort, New York State undertook its own rent regulatory scheme by passing the New York State Emergency Hous-

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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.

Condo Purchaser Cannot Sue Sponsor for Common Law Fraud for Mere Failure to Make All Disclosure Required Under Attorney General Regulations

In *Kerusa Co. LLC v. W10Z/515 Real Estate Limited Partnership*, the Court of Appeals—the highest court in the state—held that only the Attorney General could enforce its own regulations, and a purchaser's suit for fraud was, in effect, an attempt to usurp the Attorney General's jurisdiction for an impermissible private cause of action.

COMMENT—This was a big blow to purchasers and condo Boards, by effectively cutting off access to the courts for most sponsor defect claims. While some language in the decision implies that purchasers could still sue sponsors for fraud in cases of active concealment (the court gave as examples the deliberate hiding of water damage or leaks), it would appear that the most effective remedy for most purchasers and Boards is to file a complaint with the Attorney General's office seeking enforcement of offering plan representations and obligations.

Co-op Eviction Will be Upheld Under "Pullman" Doctrine if Co-op Follows its Own Stated Procedures Regarding Behavioral Lease Defaults

Trump Plaza Owners, Inc. v. Weitzner

Eviction for Odor Nuisance Upheld; a Post-Judgment Opportunity to Cure is Not Required Where a Proven Nuisance is Ongoing for Years, With No Sign of Abating

Cabrini Terrace Joint Venture v. O'Brien

Shareholder Warranty of Habitability Defenses Defeated in Non-Payment Proceeding; Heating Deficiencies Are Her Obligation to Address; Roach and Mice Infestation Are Due to Her Denial of Access by Exterminator; Co-op Awarded Attorneys' Fees

930 Fifth Corporation v. Shearman

Co-op Not Liable for Attack on Shareholder by Subtenant, Because Co-op Had No Control Over her, And No Special Duty to Shareholder

Padula v. Kensington Gardens Apt. Corp.

Unlicensed Home Improvement Contractor Cannot Recover Unpaid Fees, But Apartment Owner Can Still Sue the Contractor For Damages

Vanguard Construction & Development Co., Inc. v. Polsky

COMMENT—The Court emphasized the public policy behind requiring contractors to comply with licensing requirements, while still remaining exposed to consumer claims for poor performance even if they don't comply.

Co-op Residents Use of Roof Adjacent to Apartment is Pursuant to a License, Not Part of Proprietary Lease, and She Cannot Bar the Co-op From Entering it for Repair and Maintenance Purposes

Prospect Owners Corp. v. Sandmeyer

COMMENT—While based on very specific facts, the decision upholds a co-op's need for access to an arguably-private area in order to perform work that benefits the common good of all shareholders.

Co-op Shareholder Cannot Compel Neighbor to Soundproof Apartment Per Court Stipulation, Since Conditions Precedent in Stipulation Did Not Occur

Bernstein v. Beresford Apartments, Inc

COMMENT—One of the conditions precedent that did not occur was plaintiff's approval of defendant's proposed soundproofing plans. Courts will generally not permit a party to benefit from his own delay or default.

Condo Unit Owner Must Grant Access to Condominium to Replace Terrace Windows, Since Terraces and Windows are Common Elements

Board of Managers of Bond Parc Condominium v. Broxmeyer

COMMENT—This decision, which was based on the definitions in the condominium's governing documents, was important for condominiums, as it upheld a Board's right to compel a single Unit Owner's cooperation with building-wide repairs and replacements that benefit all residents.

Co-op Board Can Force Shareholder to Remove Unauthorized Alterations; Decision is Protected Under Business Judgment Rule; However, Shareholder's Claim Against Board President for Trespass is Not Dismissed

In two companion cases, *Meadow Lane Equities Corp. v. Hill*, the Court held that the shareholder's alterations were clearly unauthorized and the Board had the right to force their removal. However, the

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Court also held that the shareholder may have a sustainable claim against the Board president, who allegedly entered his apartment and took photographs without permission.

COMMENT—Co-op and condo governing documents govern each side's rights ***and*** obligations.

Landlord Entitled to Unpaid Rent From Tenant Who Continued to Reside in Purportedly "Excessively Noisy" Apartment; Tenant's Claims Against Landlord and Broker Dismissed

Yetnikoff v. Mascardo

COMMENT—While not involving a co-op or condo, this rent payment case is instructive, as it emphasizes the disconnect between a constituent who claims entitlement to an abatement for uninhabitable conditions while still living under such conditions.

Court Dismisses Lawsuit By Purchasers of "Intolerably Noisy" Co-op Apartment Against Seller and Broker, Because Purchasers had Actual Knowledge of Noise Prior to Signing Contract

In *Kelley v. Larkin*, the Court held that the purchasers knew of the noise coming from an adjacent nightclub based on an acoustical consultant's report that was shared with the purchasers prior to contract signing, and the purchasers' negotiation of a reduction in the purchase price based on that.

COMMENT—The court relied heavily on the doctrine of caveat emptor, despite what the court called numerous and troubling attempts by the seller and broker to mislead the purchasers regarding the timing and extent of the noise. Purchasers should still beware and be careful of what and where they purchase, as courts may not be willing to help.

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ing Rent Control Act.

In doing so, New York State created the "Temporary State Housing Rent Commission" to administer all of the entire rent regulation system of the State of New York. Upon the enactment of this Act, the New York State Legislature froze the rents for all residential units to the level that was in effect on March 1, 1950.

It was always the understanding and policy of the State that regulation was necessary based upon the shortage of housing caused by World War II. Once that housing shortage abated, the Legislature aimed to gradually decontrol regulated apartments and took various measures, including the exemption of some one or two family housing and by permitting counties and towns outside of New York City the power to decontrol residential units previously subject to rent control.

1962: The New York State Legislature authorized the City of New York to create its own rent control program under what was referred to as the Local Emergency Housing Rent Control Act of 1962. This same statute ultimately led to the creation of the New York City Rent Stabilization Law seven years later in 1969.

In fact, the Local Emergency Housing Rent Control Act, which is referred to as an enabling act, authorizes the City of New York to declare an emergency and enact whatever rent control legislation is desired.

1969: Pursuant to the Local Emergency Housing Rent Control Act, the New York City Council enacted a new type of rent regulation which regulated all New York City housing accommodations with six or more units that were built between February 1, 1947 and 1969. This is the birth of rent stabilization.

Pursuant to the this law, a new set of regulations were promulgated. Specifically, the law vested the Rent Stabilization Association of NYC, Inc. ("RSA") with the authority of adopting a new code of rent regulations subject to the approval of Department of Housing Preservation and Development ("HPD"). A quasi-judicial City body called the Conciliation and Appeals Board ("CAB") was created to enforce the new code. RSA adopted a code which was approved by HPD and in 1969 the Rent Stabilization Code ("RSC") was born.

1971: The New York State Legislature reined in the City and removed the unrestricted right of New York City to enact rent control laws. The newly enacted "Vacancy Decontrol Law of 1971" exempted the regulation of apartments vacated on or after June 30, 1971. This period of time is often referred to as the "Vacancy Decontrol Experiment."

In 1971, the Legislature also enacted what is popularly referred to as the Urstadt Law, which prohibits municipalities from placing greater controls on rents and evictions than those specifically delegated by the State of New York.

1974: The Legislature enacted the Emergency Tenant Protection Act ("ETPA"), another State enabling statute that allowed New York City and certain other municipalities to regulate apartments completed before January 31, 1974.

Pursuant to the ETPA, a local government outside the City of New York with a population of fewer than 1,000,000 may declare that a housing emergency exists and subject all non-exempt housing within the locality to regulation under the ETPA.

The ETPA also brought under New York City's rent stabilization system all housing units in buildings of six or more units that had been decontrolled under the Vacancy Decontrol Law of 1971, or that had been built between March 10, 1969 and January 1, 1974. This ended the Vacancy Decontrol Experiment.

Under the ETPA, a specific stabilization system was designated for Nassau, Rockland and Westchester counties.

However, with respect to New

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York City the ETPA provided that the apartments would be governed by the Rent Stabilization Law.

1983: The New York State Legislature enacted the Omnibus Housing Act of 1983. The 1983 Act was momentous in that it transferred the administration of the rent control and stabilization programs in New York City to the State of New York and created the New York State Division of Housing and Community Renewal ("DHCR").

As a result, the Conciliation and Appeals Board and the New York City Division of Rent Control, which had been administering those acts previously, were abolished and the previous system of RSA administration ended. The rent stabilization code enacted by RSA was scrapped and replaced with a new rent stabilization code ("RSC") promulgated by the DHCR.

1993: With the passage of the 1993 Rent Regulatory Reform Act (the "1993 Act"), deregulated vacant apartments and occupied regulated apartments which became vacant which rented for $2,000 or more per month between July 7, 1993 and October 1, 1993 were deregulated and ultimately switched to a fair market system. Additionally the 1993 Act deregulated rent regulated apartments renting for $2,000 or more per month as of October 1, 1993 which are occupied by tenants with combined household incomes in excess of $250,000 in each of the two immediately preceding years.

The 1993 Act provided that the apartments would be deregulated upon application by the owner at the expiration of the stabilized lease. The application process is administered by the DHCR which receives data from New York State Department of Taxation and Finance as part of an income verification process.

1997: New York State enacted a new rent regulatory reform act (the "1997 Act") in which any apartment with a monthly rental of $2,000 or more after the effective date of the Act became deregulated upon vacancy. The 1997 Act also lowered the income threshold for deregulation from $250,000 to $175,000 per year in each of the two preceding years under the high income deregulation process.

The 1997 Act also included substantially larger vacancy increases and narrowed the list of family members entitled to succession.

Matthew Brett is a partner in the Firm's Litigation Department.

Administrative Update

Who's Your Tenant? Identifying All Occupants in High Income Rent Deregulation Proceedings

By: Diana R. Strasburg

A recent decision by DHCR to reopen a high income rent deregulation proceeding shows the importance of keeping accurate occupant records. In high income rent deregulation proceedings, DHCR verifies the income of the tenants of record and all occupants who utilize the apartment as their primary residence on the date the Income Certification Form is served. If the household income is in excess of $175,000 for the two consecutive years preceding the filing of the high income petition, then DHCR will issue an order deregulating the apartment.

In 2008, a client acquired a building where the former owner filed a High Income Rent Deregulation Petition against the tenant of record and tenant's spouse. No additional occupants were listed. The 2008 petition was denied because the household income was verified as below $175,000.

After the change of ownership in August 2008, the new owner discovered an additional occupant, and that the tenant of record had failed to disclose this occupant in all prior deregulation proceedings, including 2008.

Days after the 2008 petition was denied, the owner filed Requests for Reconsideration for the 2005, 2006 and 2007 closed proceedings. DHCR responded by reopening the 2008 proceeding based on irregularity in a vital matter because of the evidence of the additional person residing in the unit.

Diana R. Strasburg is an associate in the Firm's Administrative Law Department.

Notable Achievements

Daniel T. Altman, head of BBWG's Transactional Department, represented the owner of a 224-unit garden apartment complex in Brooklyn in refinancing its $21 million debt. The deal involved the outgoing lender taking a significant equity stake in the ownership entity, which enabled the mortgage to be refinanced with a local lender at a favorable interest rate. The deal was featured in *Real Estate Weekly* on July 22. Mr. Altman was also featured prominently in the *Real Estate BisNow* blog on August 6, emphasizing the need to help clients adapt to changing market situations in order to thrive in challenging times.

Dan Altman, Howard Wenig, Craig Price and **Allan Gosdin** of BBWG's Transactional Department also represented the seller of the commercial building at 488 Seventh Avenue in Manhattan. The $45.3 million deal was featured in the July 27, 2009 issue of *Crain's New York Business* as the 6th largest New York City commercial real estate transaction in the first-half of 2009, ranked by price.

Sherwin Belkin, a partner in BBWG's Administrative and Appeals Departments, and Alyssa Sandman, an associate in the Administrative Department, represented the owner of a Brooklyn Heights townhouse at the DHCR in successfully recovering possession of a rent-controlled apartment that had been occupied under improper circumstances for more than 25 years. The achievement was featured in *The New York Times* Sunday Real Estate section on August 2, and in *The Real Deal* on August 4.

Magda L. Cruz, a partner in BBWG's Litigation and Appeals Departments, was quoted in *The Daily News* on June 23 with regard to the deliberations of the New York City Rent Guidelines Board. Ms. Cruz decried the raucous nature of the public sessions, noting that such behavior does not occur in the City Council chambers, or in a courtroom, and defeats the participatory objectives of the rent-setting process for over a million apartments throughout New York City. Ms. Cruz has been an owner's representative on the Rent Guidelines Board since 2006.

Jeffrey L. Goldman, co-head of BBWG's Litigation Department, responded to an inquiry in *The New York Times* Sunday Real Estate section's Q&A feature on June 14 regarding a rent-stabilized tenant's desire to extend his lease for one month, noting that the minimum renewal term is one year, but that the landlord and the tenant could voluntarily agree to end the lease earlier.

Aaron Shmulewitz, a partner in BBWG's Transactional Department, was quoted in *The New York Times* Sunday Real Estate section's Q&A feature on July 19, discussing the rights of a co-op shareholder dissatisfied with her co-op Board's decision to not compensate her for loss of use of her terrace. Mr. Shmulewitz was also quoted in the *brickunderground.com* blog on August 12 on the topic of the appropriate response by boards to sexual relationships between building employees and residents, noting that in most cases such affairs resulted in termination of employment.

Kara Rakowski, a partner in BBWG's Administrative Department, was quoted in *The New York Times* Sunday Real Estate section on August 16 regarding an owner's efforts to recover possession of an apartment in a gentrifying area of the Lower East Side.

Matthew S. Brett, a partner in BBWG's Litigation Department, was quoted in *The New York Times* online edition on July 26 about the legal and evidentiary effect, as well as practical concerns, relating to paperless or electronic leasing. Mr. Brett explained that, from a legal or evidentiary point of view, "e-Leases" may not be treated differently than traditional paper documents, but that from a practical standpoint in legal proceedings, without an actual recognizable signature, courts will still have to look to extrinsic indicia of identity.

Denise DeNicola, a partner in BBWG's Transactional Department, was quoted in the June edition of *The Cooperator* on the rights of a condominium to charge unit owners for the use of storage space in a common area, noting that the Board had the authority to charge unit owners for the use of such space.

Martin Heistein, head of BBWG's Administrative Department, has been elected president of The Frisch School in Paramus, New Jersey, one of the largest Jewish day schools in the metropolitan area.

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