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CITY COUNCIL PASSES NEW ANTI-HARASSMENT BILLS: WHAT PURCHASERS OF RESIDENTIAL BUILDINGS SHOULD LOOK FOR DURING DUE DILIGENCE



By Kara I. Rakowski

On November 30, 2017, the City Council passed three bills under the guise of deterring harassment of tenants. While we await the bills' signing by the Mayor (which he is expected to do), and HPD to issue its rules, purchasers of multi-family (especially regulated) buildings in New York City must be aware of how this legislation should impact their due diligence.

One of the bills expands the definition of tenant

harassment to include (1) knowingly providing a lawful occupant with false or misleading information relating to their occupancy; (2) making a false statement or misrepresentation regarding the current occupancy or regulatory status of a building or unit on any application or construction documents for a permit; (3) repeated failure to timely correct hazardous or immediately hazardous violations; (4) repeated false certifications; and (5) repeatedly engaging in work without a permit in the building.

Another bill requires HPD to create and publish
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on its website a speculation Watch List comprised of residential buildings with six or more units based upon a formula to be established by HPD taking into account criteria including but not limited to: (1) owner turnover rate for the building; (2) the number of open hazardous/immediately hazardous violations per number of units; (3) the number of emergency repair charges per number of units; (4) the number of units in the building; and (5) whether a Certificate of No Harassment (“CONH”) has been granted with respect to the building.

Finally, a CONH pilot program has been created which expands the requirement to obtain a CONH to buildings located outside of the existing special anti-harassment districts, as well as buildings that do not have any Class B units. The legislation requires buildings in certain areas to obtain a CONH as a prerequisite to the Department of Buildings issuing a permit for demolition or material alteration/renovation of any residential building that is covered by the pilot program. The pilot program is applicable to buildings that: (1) are located in specific community districts of the Bronx, Brooklyn, Manhattan and Queens; (2) are located in a community district which becomes subject to City-sponsored neighborhood-wide rezoning; (3) are subject to a full vacate order; (4) have been actively participating in the alternative enforcement program for more than four months since February 1, 2016; or (5) have been subject to a final determination by a government agency or court that harassment has occurred in the building within the five year period preceding the application or any time after the effective date of the statute (anticipated to be September, 2018). Notably, the “look-back” period for the CONH is five years from the date of the application.

Moreover, the bill provides that once a CONH application is filed, an investigation will be conducted by HPD and community groups where designated by HPD. If harassment is found by HPD and the CONH is denied, then the current owner or any subsequent owner seeking a permit for a material alteration will

be required to restrict 20-25% of the residential floor area of the building to affordable housing in perpetuity.

When performing a due diligence review of a regulated or formerly regulated residential building, many purchasers do not focus on open violations which do not affect title. This is true especially if the purchaser believes that it is getting a “good deal” and intends to perform alterations/repairs which will ultimately entitle them to remove the violations. Unfortunately, purchasers must now be cognizant of the number and type of open violations on a building when performing their due diligence, since such violations may significantly impact an owner’s future use and value of the building.

Moreover, when a purchaser that is performing a due diligence review on a building is informed that the last regulated tenant has vacated, the purchaser’s inquiry often stops there. However, now more than ever, it is crucial that purchasers obtain further evidence of the circumstances under which regulated tenants have vacated. The fact that the seller has provided purchaser with copies of surrender agreements may be insufficient unless those agreements specifically state the tenant’s regulatory status, or the seller produces some other documentation to substantiate that the tenant was aware of their regulatory status.

With the recent expansion of the definition of harassment--and CONH applicability--to buildings that were not previously included, it is imperative for purchasers to do a thorough due diligence to determine, to the best of their ability, whether there is any evidence to substantiate a claim of harassment having been committed by the seller or a predecessor owner.

Kara I. Rakowski is a partner in BBWG’s Administrative Law Department. For more information regarding due diligence and/or the City’s anti-harassment statutes, please contact Ms. Rakowski at Krakowski@BBWG.com.

TRANSACTIONS OF NOTE

Partners **Daniel T. Altman** and **Lawrence T. Shepps** represented ownership in a \$92 million refinancing of a student dormitory facility with Wells Fargo Bank. Separately, **Messrs. Altman** and **Shepps** also represented the foreign sellers of a boutique designer building in midtown for \$60 million.

Mr. Altman and partner **Stephen M. Tretola**, with associate **Krista L. Patterson**, represented a publicly traded REIT on the purchase of shopping centers in Santa Fe, New Mexico and Hickory, North Carolina in separate transactions totaling \$80 million.

CITY COUNCIL IMPOSES NEW BEDBUG DISCLOSURE AND FILING REQUIREMENTS ON PROPERTY OWNERS



By Phillip Billet

In May, 2017, the City Council enacted Local Law 69 of 2017, which requires owners of multiple dwellings: (a) beginning December 2018, to file yearly “bedbug infestation histories” with HPD, setting forth “infestation histories” of all residential units in their buildings during the prior year; and (b) to provide tenants of their buildings with copies of such infestation histories and with information relating to the prevention, detection and removal of bedbugs.

The following is a summary of the relevant provisions of Local Law 69, with relevant comments.

- Beginning November 6, 2017, a building owner will be required to “attempt to obtain” from each tenant or apartment owner a history of bedbug infestation for each residential unit in the building during the period from November 6, 2017 onward, including information as to whether eradication measures were employed for a bedbug infestation.

Note - neither the law nor the “bedbug page” on HPD’s website advises exactly how such information is to be obtained. Presumably, the owner will be required to search its own records and/or contact the building’s tenants or apartment owners.

- Within the month of December, 2018, and during every December thereafter, the owner will be required to file electronically with HPD on a form which will be promulgated by HPD on HPDONLINE, a “bedbug infestation history,” which will be required to list:
 - The number of units in the building;
 - The number of units, as reported or otherwise known to the owner, that had a bedbug infestation during the previous year;
 - The number of units, as reported or otherwise known to the owner, in which extermination measures were taken during the previous year for a bedbug infestation; and
 - The number of units, as reported or otherwise known to the owner, in which extermination measures were taken during the previous year for a bedbug infestation and which had a bedbug infestation after such extermination measures were taken.

Note - To date, the form which owners will be required to use to file such histories electronically has not yet been released by HPD.

Also, this is in addition to the State requirement enacted by Chapter

477, Laws of 2010, that an owner must attach a “Notice to Tenant/ Disclosure of Bedbug Infestation History” to every vacancy lease.

- Beginning January 1, 2019, a building owner will be required to provide each tenant of the building with a copy of the most recent bedbug history form submitted to HPD, by:
 - Posting such form in a prominent public location within the building; or
 - Providing every tenant with a copy of such form upon the commencement of every vacancy lease or upon each lease renewal.
- HPD will also publish such annual bedbug reports on its website. The published reports will include street addresses but not individual unit numbers.
- A building owner will also be required to provide each tenant of the building with a form promulgated or approved by the New York City Department of Health and Mental Hygiene, which will provide information relating to the prevention, detection and removal of bedbugs, by:
 - Posting such form in a prominent public location within the building; or
 - Providing every tenant with a copy of such form upon the commencement of every vacancy lease or upon each lease renewal.

Note - it is unclear from the text of the law whether an owner must begin to provide the tenants with the prescribed form now, or beginning in January, 2019. An owner may therefore wish to act with caution by posting such form at this time. CHIP has advised that it has contacted HPD in order to obtain clarification.

- Additionally, at the time it files a bedbug history form with HPD, an owner will also be required to certify with HPD that it will either:
 - Post a copy of the form in a prominent location within the building within 60 days of filing and maintain a record that a copy of the form was prominently posted within 60 days of its filing, or
 - Provide a copy of the form to each tenant of its building upon the commencement of a vacancy lease or upon each lease renewal
- A violation of this law will likely be deemed a Class A HPD violation.

This article was written by Phillip Billet of BBWG’s Administrative Law Department. For more information, contact Mr. Billet at pbillet@bbwg.com

NEW GAS LEAK NOTICE REQUIREMENT



By John Roswick

On November 16, 2016, the New York City Council passed Local Law 153 of 2016 amending New York City Administrative Code (“Administrative Code”) § 27-2005, which codifies the duties and obligations of owners arising under the Housing Maintenance Code (“HMC”) with respect to keeping their dwellings in good repair.

Administrative Code § 27-2005(f) requires that owners or managing agents of tenant-occupied dwellings in the City (including one- and two-family private dwellings) provide notice, on a form developed or approved by the New York City Department of Housing Preservation and Development (“HPD”), to tenants of the procedures to be followed in the event a gas leak is suspected in the dwelling.

To satisfy their obligation under Administrative Code § 27-2005(f), owners must satisfy the following two requirements: (1) deliver, or caused to be delivered, to each tenant, or prospective tenant, a notice describing the procedures to be followed if a gas leak is suspected; and (2) post a notice in a common area of the dwelling, on an HPD-approved form, informing the occupants of the same procedures.

Administrative Code § 27-2005(f) further provides that the gas leak notice “may be combined with any existing required notices, and shall instruct tenants to first call 911 and then call the relevant gas service provider, whose name and emergency phone number shall be set forth on such notice, before contacting such owner or an agent thereof when a gas leak is suspected.”

In addition to Administrative Code § 27-2005(f), HPD has adopted new regulations

pertaining to the gas leak notice requirement under Title 28 of the Rules of the City of New York (“RCNY”) at RCNY §12-11, which is aptly titled “Owner Responsibilities for Notices of Suspected Gas Leak Procedures.”

RCNY §12-11(a) sets forth the requirement with respect to delivering, or causing to be delivered, a notice on an HPD-approved form to every tenant and prospective tenant advising them of the actions to take if they suspect a gas leak in the dwelling.

RCNY §12-11(b) elaborates on the requirements for posting a sign in the dwelling’s common area. Now, owners must ensure that the posted notice is “readily visible” and conforms with the following requirements:

the notice shall have letters not less than three-sixteenths of an inch in height;

the lettering of the notice shall be of bold type face and shall be properly spaced to provide good legibility and the background shall be of contrasting colors;

the notice shall be durable and shall be substantially secured to the common area when posted;

the notice shall be of metal, plastic, or decal; and

the lighting shall be sufficient to make the notice easily legible.

In addition to elaborating on the visibility requirements, the relevant regulations help to further clarify owners’ obligations under Local Law 153 with respect to properly describing the gas leak protocol.

The requisite notice must instruct the tenants to first leave the dwelling and then call 911.

After calling 911, the tenants should then contact the dwelling’s gas service provider whose name and emergency phone number should be identified on the notice.

HPD notes that if an owner designates Con Edison as the service provider, then any notice must instruct the tenants to call the company at 1-800-752-6633 before contacting 911. In the event that 1-800-752-6633 is no longer the number used to report suspected gas leaks to Con Edison, the current emergency phone number used by Con Edison shall be used instead. See 28 RCNY §12-11(c) (1).

If National Grid is designated as the service provider, any notice must instruct the tenants to call the company at 718-643-4050 before calling 911. In the event that 718-643-4050 is no longer the current number used to report gas leaks to National Grid, the current emergency phone number used by National Grid for New York City will be used instead. See 28 RCNY §12-11(c) (2).

HPD §12-11(d) provides that an owner may choose to create a single notice that incorporates and complies with the notice requirements set forth under Chapter 12 of the RCNY with respect to an owner’s responsibility for posting notices about smoke detecting devices and carbon monoxide alarms.

Finally, the failure to deliver or post the requisite gas leak notice may result in a HPD violation, which risk further underlines the need for owners and managing agents to comply with the requirements set forth under the new law.

John Roswick (jroswick@bbwg.com) is an associate in BBWG’s Administrative Law Department. Please contact Mr. Roswick if you have any questions about the legislation pertaining to gas leak notices.

TIME FOR RESIDENTS TO BUTT OUT



By Orie Shapiro

In August, 2017, the New York City Council adopted Local Law 147 which requires every residential building, including coops and condominiums, to establish a written policy identifying where smoking is permitted or prohibited inside, and in common areas of, the building. The written policy must be established by August, 2018. The law requires that the smoking policy be provided to all tenants/apartment owners and be publicly displayed in the building.

Owners of co-op and condominium units are required to incorporate the building's written smoking policy into any agreement made to rent or sell an apartment and Boards must incorporate that policy into the building's by-laws or house rules.

The new law does not require inclusion of any specific prohibition in a building's smoking policy.

However, in another significant change, the City Council also adopted Local Law 141, which extends the current prohibition of smoking in building "common areas" to residential buildings (including coops and condominiums) with as few as three units. Previously, smoking was prohibited in common areas of buildings that contained more than ten units. This change goes into effect in February, 2018.

Common indoor areas of multiple



dwelling buildings include hallways, stairwells, lobbies, laundry rooms, and other work areas of the building used by the tenants or by the maintenance and building personnel.

"No smoking" signs or the international symbol for "no smoking" must be displayed in all common indoor areas of buildings containing three or more units.

The law does not prohibit smoking inside apartments and other private residences except in areas where child day care centers or health care facilities are being operated, are open, or employees are working.

In addition to the New York City regulations discussed above, another significant limitation on smoking in residential buildings has been initiated by the federal government.

In December, 2016, the Department of Housing and Urban Development ("HUD") published a rule requiring Public Housing Authorities ("PHA's") nationwide, including NYCHA, to adopt

strict smoke free policies by mid-2018. The rule requires that PHA's prohibit smoking inside public housing apartments, indoor common areas, administrative office buildings, community rooms, and in outdoor areas within 25 feet of the housing and administrative office buildings. PHA's would be permitted to establish outdoor designated smoking locations outside of the 25-foot perimeter which may include a partially enclosed structure to accommodate smokers. In promulgating the rule, HUD opined that there is no right to smoke, and that smokers are not a protected class.

This rule went into effect in February, 2017, but the rule provides an 18-month implementation period, which means that all PHA's must have a smoke-free policy in effect by July 31, 2018. Given the change in Administration, it is possible that the rule could be changed or eliminated, but it is still prominently displayed on the HUD website as of this writing.

Finally, it should also be noted that various building owners, have, of their own volition, banned smoking throughout their residential buildings, including in apartments. Although these restrictions may be subject to some legal challenge, it is unclear whether any federal or other legal authority would bar apartment building owners from adopting smoke free policies. This issue has not been resolved definitively.

This article was written by Orie Shapiro, a partner in BBWG's Administrative Law Department. For more information, Mr. Shapiro can be reached at oshapiro@bbwg.com.

IS USE OF A TERRACE IN A CO-OP AN AMENITY OR AN ESSENTIAL SERVICE?



By **Joseph Burden**

Thousands of co-op apartments in New York City have terraces; their shareholders enjoy the views and outdoor air that enhance the value of these apartments.

However, terraces are often unavailable for use because of renovation or repairs being done to the building including waterproofing, pointing, replacement of brick and Local Law 11 work. When a shareholder is temporarily deprived of the use of the terrace, is that a breach of the warranty of habitability entitling the shareholder to a maintenance abatement, or a temporary elimination of an amenity that does not entitle the shareholder to damages or other remedies?

Prior case law appeared to hold that if the co-op's governing documents provided for use of a terrace, then the co-op had an obligation to maintain and restore the use of the terrace. In other words, the terrace was an essential service that had to be provided by the co-op.

However, the Appellate Division, First Department recently ruled that, while the implied warranty of habitability applies to shareholders of co-op apartments, a terrace that is safe and suitable for the shareholder's own exclusive outdoor use is an amenity, not an essential function. In other words, the co-op can deprive the shareholder the use of the terrace if in the business judgment of the co-op it must do so in order to effect necessary repairs or replacement, such as to the roof or the façade.

In the recent case, the shareholder purchased a penthouse

apartment which included a terrace appurtenant to the unit. The shareholder was unable to inspect the terrace prior to purchase because part of the building's roof, including the terrace, was undergoing extensive renovation or repair. The shareholder sued for a declaration that the house rules regarding the use of the roof were contrary to the proprietary lease and were therefore null and void. He also sought damages for breach of contract based upon allegations that the house rules violated the warranty of habitability because the roof/terrace was not habitable in its current condition.

The lower Court and the Appellate Division rejected the shareholder's claims and dismissed the breach of warranty of habitability claims and denied damages to the shareholder.

It would appear that the bright line standard and purpose of the use of the terrace were the reasons for the denial. If the loss of use is temporary and related to necessary building renovations, then the shareholder likely has no remedy. But, if a co-op would attempt to permanently deprive a shareholder from using the terrace with no valid reason, then a Court would likely deem that to be a breach of the lease, entitling the shareholder to relief including an injunction and damages.

Shareholders who have terraces and/or roof decks should carefully examine the proprietary lease, conversion plan, by-laws and house rules to determine their rights regarding use of such outdoor space.

Joseph Burden (jburden@bbwg.com), is a founding member of BBWG and co-heads the Litigation Department.

NEW PARTNERS



The Firm is pleased to announce that **Scott Loffredo** of our Litigation Department, and **Diana Strasburg** of our Administrative Law Department, have been named partners effective January 1, 2018.



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).

COMMERCIAL CONDO UNIT OWNER AND ITS BOARD REPRESENTATIVE ENTITLED TO REVIEW SETTLEMENT AGREEMENT AND ENGINEERING REPORT IN BOARD'S DEFECTS SUIT AGAINST SPONSOR

GDLC, LLC v. Toren Condominium Supreme Court, New York County

COMMENT | The Court held that, besides the Board member being absolutely entitled, the Commercial Unit Owner was entitled because it could be affected by the terms of the settlement, and how it would relate to defects being cured. A potentially very impactful decision.

CONDO ORDERED TO COMPLETE WATER DAMAGE REPAIRS TO UNIT WITHIN 60 DAYS, DESPITE TENANT'S PRIOR REFUSAL OF ACCESS

Rabice v. Board of Managers of Green Mansions Country Club Estates Supreme Court, Warren County

COMMENT | Query how the Board is to comply with the order if the tenant continues to deny access.

HOA CAN IMPOSE FINES ON UNIT OWNER FOR SPREAD OF BAMBOO INFESTATION INTO COMMON AREAS

Tucciarone v. Hamlet on Olde Oyster Bay Homeowners Association, Inc. Appellate Division, 2nd Department

COMMENT | The Court held that the HOA was authorized to fine under its bylaws, and that the business judgment rule allowed the HOA to fine instead of itself remedying the Unit Owner's failing.

SHAREHOLDER SUIT AGAINST CO-OP BOARD DISMISSED, OVER CREDITING TAX ABATEMENT BENEFITS AGAINST MAINTENANCE IN LIEU OF ISSUING REFUND CHECKS

Pettus v. Board of Directors Appellate Division, 1st Department

COMMENT | This pro se plaintiff challenged a nearly-universal practice among City co-ops. Such challenges arise occasionally from co-op gadflies. Imagine the legal fees the co-op was forced to incur in defending an effectively immaterial claim.

CONDO BOARD DECISION TO NOT REQUIRE UNIT OWNER TO RESTORE DEMOLISHED INTERIOR WALL FOLLOWING RECEIPT OF NOISE COMPLAINTS PROTECTED BY BUSINESS JUDGMENT RULE

Fernholz v. Hart Appellate Division, 1st Department

COMMENT | The Board submitted expert testimony that the removed wall was not the cause of the complained-of noise transmission; the Unit Owner failed to counter with expert testimony of his own.

APPROVED CO-OP BUYER CAN COMPEL CO-OP TO ALLOW CLOSING TO OCCUR, AFTER BOARD MEMBER'S ERRONEOUS REPORT PROMPTED BOARD TO RESCIND APPROVAL

Kallop v. Board of Directors for Edgewater Park Owners' Cooperative Inc. Appellate Division, 1st Department

COMMENT | The Board member had reported that the buyer had allegedly indicated that he did not intend to reside in the apartment.

Gratuitous interjection of gossip by a yenta on a Board is not-uncommon, and often leads to problems.

CO-OP EVICTS HABITUAL NOISE-MAKING SHAREHOLDER IN SUCCESSFUL PULLMAN PROCEEDING

Fleetwood Commons, Inc. v. Fredericks City Court, Mount Vernon

COMMENT | The Court held that the Board acted within the scope of its authority, and its actions were protected under the business judgment rule. Interestingly, the Court held that the co-op's inadvertent acceptance of maintenance after serving the notice of termination did not vitiate the termination and revive the tenancy.

BBWG IN THE NEWS

Co-op/condo practice leader **Aaron Shmulewitz** was quoted in realtor.com on [October 27](#) regarding potential risks from the proposed new amazon.

Kara Rakowski, a partner in the Firm's Administrative Law Department, was named to the 2018 Legal List/Leading Women Lawyers in NYC by [Crain's New York Business](#).

Craig L. Price, a partner in the Firm's Transactional Department, and **Ms. Rakowski**, participated in the REBNY Residential Real Estate Roundup on December 13. **Mr. Price** spoke on the topic of "Assignment and Assumptions of Mortgages in NYC and other Transfer Tax Consideration on Residential Transactions", while **Ms. Rakowski** spoke on the topic of "Do the Tenants Have to Stay? Understanding Rent Stabilization".

Litigation partner **Matthew Brett** was quoted in [Real Estate Weekly](#) on November 22 on the potentially disastrous impact on owners of an adverse appellate decision in the Altman case, in a lecture he gave at a property management specialist event hosted by Wayfinder PM:

Mr. Brett was also quoted in the December edition of [The Real Deal](#) on "What They're Reading Now":

Litigation partner **Scott Loffredo** spoke at the Kings County Housing Court Bar Association on November 9 on the topic of improper deregulation of rent stabilized apartments, which was reported in [The Brooklyn Eagle](#).



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