New York Law Journal
REAL ESTATE TRENDS
Wednesday, April 23 2014

# The First Rent Stabilization Overhaul in 14 Years

**By Adam Leitman Bailey & Dov Treiman**

On Jan. 8, 2014, the Division of Housing and Community Renewal (DHCR) issued the first amendments to the Rent Stabilization Code in some 14 years. The amendments, 27 in all, are a mixed bag of regulatory changes ranging from the mere codification of judicial decisions, to technical fixes affecting few cases, to attempts to make the code more tenant friendly.

The scope of the amendments is extensive and the changes are immense and complex, precluding exhaustive treatment in a single article. As a result, this article will highlight what the authors believe to be some of the more immediately significant amendments.

DHCR also prepared accompanying regulatory impact statements that discuss each of the amendments. These statements will, no doubt, in the coming years, be used as a kind of "legislative history" and are therefore well worth studying.1 Indeed, this article bases itself largely on those impact statements as it is too soon to have any meaningful case law development of the meaning and significance of the changes.

**The Tenant Protection Unit**

As is true with many of these amendments, they move into the Rent Stabilization Code much of what had already existed as office practice at the DHCR—and much of it with judicial imprimatur. This is also true of the "Tenant Protection Unit" (TPU), an already existing sub-agency within the DHCR, that has been around in recent months. Its job is to launch its own investigations. It has too short a track record to determine just how that will play out, but we can assume that it will likely be using its powers to investigate entire enterprises when one branch of that enterprise has done something questionable. Thus, for the TPU, as far as launching an investigation, separate ownership will likely not get in the way of imputing the guilt of one company to another company with the same or similar staffing. That is an operational determination, however, not a legal one.

Adam Leitman Bailey and Dov Treiman

**Amending Registrations**

Under the amendments, the automatic right to amend registrations has been restricted to registrations an owner seeks to amend in the same year when it is due. While the DHCR commentary takes pains in its commentary to point out that there was never an automatic right to amendments going back forever, it also acknowledges that the uniform office practice was to permit such registration amendments prior to the code amendments. Now the amendments require that the landlord seeking to file such an amendment has to start a proceeding before the DHCR. The DHCR writes, "These amendments, if treated similarly to 'late' registrations under the RSL, could carry a substantial penalty, but no penalty has been imposed."

What both the amendments and their commentary make unclear is whether the implied threat of such penalty against the landlord for such amendment proceedings will actually be the DHCR's routine action. This will mean that some landlords are going to have to be the pioneers to find out in this game of "truth or dare" how the new regulation is going to be enforced. Most practitioners will therefore likely switch from advising their clients to filing amendments to advising their clients not to—at least until the consequences are clear.

We note that there has always been a reason not to file registration amendments: that where a registration is four years old or more, it is in many instances, immune from being examined. However, when an amendment is filed, it starts the four-year clock all over again. One benefit of the new procedure should be that anytime the DHCR does authorize an amendment, it will be actually bulletproof as soon as the time for appeals of such an order has expired. This is vastly less than four years.

The amendments also allow for the DHCR to change its registration forms every year. The benefit to the DHCR, according to its commentary, is to increase its ability "to capture data appropriate for the administration and enforcement of the RSL and RSC." The DHCR does not consider the administrative expense to owners having to learn a new set of forms potentially

**Adam Leitman Bailey, P.C.** *is an AV rated law firm and Adam Leitman Bailey was named a New York Super Lawyer in 2007 and can be reached at info@alblawfirmcom or 212-825-0365. Dov Treiman is a managing partner at Adam Leitman Bailey, P.C.*

every year.

**Free Market Rents**

Prior to these amendments, a non-business entity owner could deregulate an apartment by occupying it for four years or more. While we have seen no statistics as to how prevalent a situation this is, we are aware of its fairly standard use with smaller buildings. However, under the new amendments, the rent for such apartments is now calculated on the assumption that all the leases would have been renewed as two-year renewals. This clearly removes all incentives from such owners to choose low rental apartments for their personal use, if the goal is to raise its rent after the four years are up to full market rates. However, what it does do is make such apartments a target if the goal is to maximize the income from the building by allowing the higher rental apartments to simply increase in rent above the deregulation threshold.

**Harassment Redefined**

The amendments redefine harassment for purposes of rent stabilization to include "filing of false documents with or making false statements to DHCR." We note that this is a different standard from the rest of the section it amends: "unwarranted or baseless." And there is a problem with that differentiation. To understand the difference, one could look to the law that has evolved around the sanctions that can be awarded against a litigant for frivolous litigation. Under the sanctions rules, the rule has evolved that sanctions should not be awarded merely because the litigant is wrong.2 The litigant who is sanctioned must demonstrably be making knowingly false statements or making palpably ridiculous arguments.

That same kind of standard would seem to be present in "unwarranted or baseless." However, that does not appear to be the standard in "false." Now, it may be that a common law develops under this new provision requiring as an antecedent to a finding of harassment that the maker of the statement knew or should have known that the statement is false. This would be an appropriate and welcome common law development.

We note that while the DHCR does most of its work on paper only, it can hold hearings and the phrase "making false statements" would include false testimony at such a hearing—even if not criminally false. There is no corresponding sanction for a tenant making a false statement.

**Reduced Service Complaints**

Under the previous code provisions, an owner had a blanket 45 days to respond to a complaint of lack of services. No such complaint could be filed prior to 10 days after giving the landlord a written notice. While the code went on to speak of the landlord having 45 days after receipt of notice from the DHCR, it gave no method of calculating that. The "receipt" standard is still in place. Now, however, the scheduling is much more complicated. If the tenant notifies the landlord, the landlord has 20 days from the DHCR notification; if the tenant does not notify the landlord, the landlord has 60 days from DHCR notification. However, regardless of whether there is previous notice to the landlord, under the amendments, "If the tenant's complaint indicates that the tenant has been forced to vacate the premises, the owner shall have 5 days to respond."

We note that the complaint need only "indicate" that the tenant is forced out of his apartment. There is no clarification of the word "indicate" and DHCR presumably selected it in order to be as expansive as possible without requiring any specific language. However, DHCR also provides no checking if the "indication" was fraudulent and no consequences if it is.

**Mailings**

The amendments provide something of a mixed bag for landlords and tenants in their clarification of the rules regarding mailing. While the amendments codify the requirement found in ATM One v. Landaverde3 that mailed notices to cure require an additional five days if they are mailed,4 it also removed all arguments that anything else requires an additional five days if mailed.5 While the decisions have been uniform that there is no such requirement for termination notices, lease offers, Golub notices, pleadings and all the other various documents in rent stabilization, stabilizing the non-applicability with a code amendment is a healthy development.

However, the amendments also add five days if the landlord mails a notice to the tenant demanding access. Since the notice, hand-delivered, already called for five days, this makes for 10 days notice to demand access. Since experience has taught that few judges have any interest in entertaining a no-access holdover proceeding on fewer than three demands for access, realistically speaking, even a relatively urgent repair situation can take the landlord two months before being able to get to court. Obviously, during those two months, the tenant will have had the opportunity to call the city with complaints on essentially a daily basis. Thus, the new rule encourages gamesmanship except in those relatively rare situations where the landlord can reliably personally serve the tenant with the notice demanding access.

**Exiting the System**

The amendments codify into the Rent Stabilization Code both locally enacted requirements to the rent stabilization system and case law that, taken together, require that as an apartment leaves the rent stabilization system for having a legal rent above $2,500, the owner must both register the apartment as deregulated and provide a notice to the tenant setting forth both the deregulation and the justification for it.6 While the amendment does not require on its face the use of any particular form for the purpose, DHCR has promulgated one and an owner would be ill advised not to use it.

**The Default Formula**

Made infamous by the signature case of Thornton v. Baron,7 DHCR's unfortunately named "default formula" was a mere office practice bearing the approval of the Court of Appeals itself. Because it was deeply shrouded in mystery, it is unclear

whether the new amendments8 merely codify what was already there or to some extent create new standards. The DHCR implies in its commentary to this "formula" that it only applies to cases of owner wrongdoing, writing that it applies, "where an owner fails to provide appropriate documentation to establish the legal rent in an overcharge proceeding or where there was an illusory prime tenancy or a fraudulent scheme to deregulate the housing accommodation."

However, "fail[ing] to provide appropriate documentation" can arise in perfectly innocent circumstances, such as, for example, if there is a fire in the management office. The most common circumstance for lack of appropriate documentation is when a new legitimate businessperson purchases a building from one who is either less legitimate or, most commonly, simply less meticulous.

In those cases, as well as the fraud cases, the DHCR can set the rent based on the lowest rent of a comparable apartment in the same building, the complaining tenant's initial rent without the increases allowed during the vacancy, or the last registered rent. All these are relatively easy for an owner to ascertain. However, if the DHCR, for reasons left unarticulated by the amendments, determines these to be inappropriate, it can set the rent based on "data compiled by the DHCR, using sampling methods determined by the DHCR."

Thus, where an owner is asking a practitioner the standard question, "What is my exposure?" the only possible answer is, "That's impossible to determine." Thus, the "default formula" removes in this instance the stability and predictability that is supposed to be the hallmark of real estate transactions.9 Indeed, transactional practice is hit particularly hard in this regard as the amendments specify, "This subdivision shall also apply where the owner purchases the housing accommodations subsequent to such judicial or other sale."

**Conclusion**

While the new amendments do have the virtue of making the applicable law easier to find by gathering it all into one place, for the most part, these amendments will simply increase the cost of doing business, without necessarily providing the tenants a corresponding benefit. In some instances, the amendments are commonplace and sensible; in others, there is a certain air of seeking to punish landlords for simply being landlords.

In February 2014, a number of property owners and real estate trade groups filed a lawsuit against the State Division of Housing and Community Renewal in Supreme Court, Kings County titled Portofino Realty Corp v. New York State Dept. of Housing and Community Renewal (N.Y. Sup. Ct.) (Action Filed on Feb. 24, 2014). This lawsuit seeks to have the amendments adopted by the agency declared invalid and unenforceable. The lawsuit claims that there is no legal basis for establishing the DHCR's Tenant Protection Unit without a law passed by the state Legislature.

Secondly, the lawsuit argues that many of DHCR's 27 amendments to the regulations conflict with state rent laws or violates the separation of powers alleging that the governor grabbed more power than entitled to under our state constitution. The state Supreme Court denied the application for a temporary restraining order and a decision whether a preliminary injunction will be granted is pending as of the date of this article. No matter what the final decision—which may take years for a resolution—the only guarantee includes expansive litigation for both landlords and tenants as well as an incredible number of new powers given to rent-regulated tenants.

ENDNOTES:

1. http://www.nyshcr.org/Rent/RentCodeAmendments/.
2. See, for example, Bailey v. 800 Grand Concourse Owners, Inc., 199 AD2d 1, 604 NYS2d 562
3. 2 NY3d 472, 812 NE2d 298, 779 NYS2d 808.
4. Rendering academic the argument that the Landaverde decision should only apply to the suburban counties where Rent Stabilization's kissing cousin, The Emergency Tenant Protection Act of 1974 is effective in certain localities.
5. Amendment to RSC §2527.9.
6. Amendment to RSC §2520.11(u).
7. 5 NY3d 175, 833 NE2d 261, 800 NYS2d 118.
8. Amendment to RSC §2526.1.
9. Holy Properties Ltd. v. Kenneth Cole Productions, 87 NY2d 130, 661 NE2d 694, 637 NYS2d 964.