H O U S I N G I N S I G H T S

Exclusively for the Members of the Small Property Owners of New York

April 2014

MESSAGE FROM THE EDITOR

Dear Fellow SPONY Members: Please note the following important announcements in this edition. In particular, see the Attorney's Advice section a detailed summary of newly issued rules by DHCR which will critically impact rent regulated buildings. Folks, this is serious stuff.

Next SPONY Membership Meeting: May 21st, 2014 – 7PM

Are You Planning to Give Your Building to the Government?

Estate planning is critical if you want to pass your building along to your heirs, rather than to the government. Join us at our next SPONY meeting where David Milner, Esq a partner with Gallet, Dreyer & Berkey, LLP will speak on important techniques we can use to eliminate and save on estate taxes. The federal and state laws are constantly changing. Even if you did estate planning 3 or 4 years ago, your heirs could be hit with a huge estate tax bill if you did not revise your plans to reflect recent changes

Annual SPONY Membership Dues – fiscal year 2015 starts May 1st, 2014: We will be sending out invoices for annual dues. We are a 100% volunteer-run organization and your dues and your support at important events such as the RGB hearings are the only ways we collectively support our organization. If you set up annual dues payment automatically through *PayPal* please adjust the payment date to May 1st each year.

New RPIE Reporting Date is June 1st, 2014: Note, this has been moved up from the old reporting date of September 1st, purportedly to allow more time for Dept. of Finance to scrutinize our filings.

The SPONY Forum: All SPONY Members are invited to join the private Facebook Forum. The SPONY Facebook Forum is a private group only available to SPONY Members and Vendors. It is set up to allow members to share experiences, network with other SPONY members and vendors and to seek referrals. There are two ways to join: 1) Send a request via e-mail with the subject "Facebook Forum" to tim@spony.org 2) Go to https://www.facebook.com/groups/sponymembers/ and click on the link to request to be added to the group. In both instances you will receive a reply once your membership has been approved. Please note you will need to setup a Facebook account in order to join and access the forum. Please contact Tim Piper at tim@spony.org if you have any questions or need assistance to join the forum.

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MANAGING YOUR PROPERTY

RENT GUIDELINES BOARD ENTERS A NEW ERA

Mayor Bill de Blasio has just appointed 4 new members to the Rent Guidelines Board (RGB). We must watch to see how they will operate and we must testify during the RGB hearings to ensure that they understand our issues as building owners.

- The 2 new public members are Cecilia Joza, director at Mutual Housing Assoc of NY, a not-for-profit that owns and manages 1200 affordable rental units, and Steven Flax, a VP at M&TBank where he works in community development lending
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- The new owner representative is Sarah Willard, Sr. Project Manager at Hudson Companies, where she is responsible for managing the company's holdings on Roosevelt Island.
- The new tenant representative is Sheila Garcia, community organizer at CASA New Settlement in the Bronx
- The position of Chairman is still vacant, but should be filled by the end of April

This year's RGB outcome will likely be quite challenging for property owners, as the Mayor has already gone on record during his campaign by stating that there should be a rent freeze. While the board is supposed to make an independent decision, 3 out of the 5 public members will be new and appointed directly by Mr. de Blasio. It appears that politics may play a bigger role in this year's deliberations than ever before. At the first RGB public meeting on 3/27/2014, over 80 tenants showed up to demonstrate and attend the normally sedate session. This means that, more than ever, property owners must show up and provide a counter balance to the tenants' demands for a rent freeze. Think of what it will mean to you to run your building with real estate taxes increasing yearly by at least 7%, water and sewer rates rising yearly in double digits, and getting a 0% increase for the first time in the history of the RGB. The key date to focus on now is Monday, May 5th, when the RGB will vote on a preliminary guideline. That meeting will be held at 5:30 PM at the US Customs House, 1 Bowling Green in lower Manhattan. Please come and help us protect our property rights.

ATTORNEY'S ADVICE

[This important article was brought to us by Adam Leitman Bailey and Dov Treiman of Adam Leitman Bailey, PC. which discusses the important changes and new rules affecting rent regulated units. Collectively, this is predicted to have a profound effect on how these buildings and units will be managed. Mr. Bailey is the founding partner of Adam Leitman Bailey, PC and Mr. Treiman is a partner of the firm. Tel. 212-825-0365, alb@alblawfirm.com]

The First Rent Stabilization Overhaul in 14 Years *By Adam Leitman Bailey and Dov Treiman**

On January 8, 2014, the DHCR issued the first amendments to the Rent Stabilization Code in some 14 years. The amendments, 27 of them, are a mixed bag of mere codification of judicial decisions, moving DHCR office practices actually into the Rent Stabilization Code, technical fixes affecting few cases, attempts to make the Code as a whole more tenant friendly, and, in one particular we found, an unfortunate revision to the Code that is anti-consumer in effect.

The Scope of the Amendments

The Amendments cover: Institutionalization of the Tenant Protection Unit (TPU); setting the rents in buildings entering rent regulation after having been New York City sponsored cooperatives; a new requirement that preferential rents and the claimed legal rent both be set forth in all leases and lease

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renewals where there is a preferential rent and a procedure for the DHCR to examine the preferential rent; an exclusion of sub-metering from MCI eligibility; a broadening of "C" violations that disqualify MCI increases and who could investigate them, exemption of disabled persons from sub-metering, exemption of qualified senior citizens and disabled persons from luxury decontrol, expanded mandatory lease riders setting forth more information about how the rent was calculated and the right of the tenant to demand back up documentation for these calculations; an expansion of the advisories to tenants in languages other than English, institutionalization of the so-called "default formula" for calculating rents, including institutionalization of DHCR's ability to set such rents on a manner completely opaque to both landlords and tenants, codification of case law exceptions to the four year look back rule and expanded vitiation of the rule, new rules for reduction of service complaints, removing prerequisites for their filing; restrictions on vacancy increases and longevity increases where there is an outstanding rent reduction order; codification of holdings that deemed leases do not hold the tenant for a new lease term; codification of the requirement to register an apartment as leaving rent regulation and codification and expansion of the requirement to send a first unregulated tenant a so-called "exit notice," setting forth the basis of the deregulation; codification of the "add five days for mailing" rule, but explicitly limiting it to notices to cure, access notices, and certain notices in rent stabilized hotels; expansion of the definition of "harassment" to include false filings; creation of a new formula for calculating rent on a long term exempt apartment without taking it out of regulation; a new requirement for starting a proceeding to amend any but the current year's registration statement; codification of disqualification for an MCI or a vacancy increase when the apartment is not properly registered; clarification of the filing deadlines for an Article 78 proceeding; prohibition of luxury decontrol for qualifying seniors and disabled persons.

Analysis

Obviously these changes are immense, complex, and preclude exhaustive treatment in a single article. Thus, this article will only highlight the most immediately significant of them.

In preparing these Amendments, DHCR also prepared 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. Indeed, this article bases itself largely on those statements as it is simply too soon to have any meaningful case law development of the meaning and significance of the amendments.

Impact on Small Business

While there are small non-industrial landlords in Manhattan, they make up a much larger component of the other boroughs' ownership. The impact statements the DHCR released discuss this disparity and simply dismiss the disparate impact as unimportant. With the kind of callousness with regard to small owner interests we have seen as typical of the DHCR, its statement in this regard writes, "While these businesses may need to retain proof of the legality of rent for a longer period and produce such to DHCR, a prudent business owner would already have retained that information for these purposes already based on existing case law." And later in the same memo, DHCR writes, "Compliance costs are already a generally-accepted expense of owning regulated housing."

This clearly begs the question, "Accepted by whom?"

Given the number of these owners we have seen who are limited in their English speaking proficiency, limited in their awareness that rental properties really are heavily regulated in New York City, and limited in their awareness that their general practitioner attorneys have no idea what they are getting into, DHCR's assumption that if they were legitimate, they would already be doing the right thing, is simply unfounded. DHCR is quick to find a scoundrel in a landlord who is simply ill-informed, uneducated, or naïve.

However, in a flash of candor, DHCR provides the missing piece, writing, "However, since the purpose of this is to cut down on rent overcharge proceedings before DHCR and the court, it may be ultimately more cost effective than waiting on administrative or judicial proceedings to supply the information." To translate, this sentence means, "Since the government is strapped for cash, we are going to find a way to pass the cost to the industry and reduce our caseloads."

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The Tenant Protection Unit (TPU)

As is true of much of these Amendments, they move into the Rent Stabilization Code itself much of what had already existed as office practice at the DHCR, much of it with judicial imprimatur. This is also true of the "Tenant Protection Unit," 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.

Expanded Lease Riders

Since early in the history of Rent Stabilization, the Codes have required that tenants be provided with various informational riders. Depending on the building and the exact set of programs that apply to the building, these riders can run to many pages. The Amendments that we here discuss increases the amount of information that these riders must provide. This includes requirements that the lease rider sets forth the details of IAI (Individual Apartment Improvement) increases and that where there is a preferential rent, both it and the legal rent be set forth both in the original lease and in all the lease renewals.

Preferential Rent

The Amendments crack down on preferential rents. The reason the DHCR gives for this is "Close to twenty-five percent of the rents in New York City are listed in DHCR's registration data-base as having preferential rents." This is a quixotic complaint. In essence, it says that landlords are charging too little for rent, that they are undercharging. As these authors point out in Rent Stabilization Constitutional? Not Now, the constitutionality of Rent Stabilization is dependent on the existence of a "housing emergency" and that, in turn, depends upon a shortage of affordable housing. But the only possible interpretation of "preferential rents" is that legally permissible rents under rent stabilization are above actual market rents. And the tenant is not, under the amendment limited to challenging the preferential rent when the rent goes up to the fully legal rate. No. The tenant can challenge it at any time. DHCR evidently did not consider that such a provision could discourage landlords from giving the preference. Further, it should be noted that the new regulation requires the landlord now to have records in its possession that it may not have because it recently bought the building, without giving it an excuse for not having these records. Canny tenants will challenge all preferential rents in buildings that recently changed hands, regardless of their landlords' evident ethics. After all, there is no penalty for filing a false complaint.

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 therefore 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 probably 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.

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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 every year.

Elimination of Some 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 in 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 indeed 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. The litigant who is sanctioned has to be demonstrably making knowing 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 state 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 papers 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 ten 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, LLC v. Landaverde that mailed notices to cure require an additional five days if they are mailed, it also removed

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all arguments that anything else requires an additional five days if mailed. 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 ten 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.

The Default Formula

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

MCI's and "C" Violations

The DHCR has been erratic in granting or denying major capital improvement (MCI) increases in buildings where the provision of services to the tenant has been iffy. District Rent Offices have been ruling that, in spite of Code language to the contrary, in order for a failure to maintain services to disqualify the increase, the services inadequately maintained must be directly connected to the services purportedly improved. The amendments do not directly address that situation. However, if there is a "C" violation (one that is deemed immediately hazardous by the Housing Maintenance Code), then under the Code prior to the amendments, the MCI increase could be denied. The amendments shift the period of examination for "C" violations from "prior to granting the approval" to "as of the date of (the) application (for an MCI increase."

The consequence of the presence of such a "C" violation is the dismissal of the petition for the increase, with leave to refile within sixty days. Presumably the purpose of the sixty days is to cure the "C" violations. However, actually physically curing the violation and getting the violation cured as of record during those sixty days may prove extremely difficult. The Amendments specifically state that if there is

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such a refiling within sixty days, the landlord will be exempt from the two year from date of improvement to application for MCI increase requirement. However, if the sixty days are missed, that is cold comfort. The overwhelming bulk of MCI applications have historically taken far more than two years to process—in some reported instances running 14 years or more.

The DHCR's commentary focuses on the fact that under the amendments, the DHCR will now be doing its own inquiry of the on-line data base to check for such violations. Typically, for someone other than a civil servant, such an inquiry takes about five minutes. According to the DHCR's commentary, "This new codification benefits owners and tenants." The benefit to owners apparently consists of savings in hiring professionals to process these applications when the owner can predict under the amendments that the application will definitely fail.

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. 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 Four Year Look Back

In spite of increasingly strident attempts by the Legislature to bar examination of rent records more than four years old, the common law has developed exceptions to the rule, most stridently set forth in *Thornton v. Baron* and now to a large extent codified into these new amendments.

DHCR broadly explains this codification, writing, "These provisions seeks to set forth, in one place, a more comprehensive list of areas where, to date, by statute, case law or regulation, the 'four year rule' that ordinarily governs rent and overcharge review, has been held not to be applicable. The list should serve as a useful guide to owners and tenants. The list contains two areas expressly modified by these regulations: preferential rents and vacancy on the base date cases."

Given the express wording of the statutes prohibiting the four year look back, these two new areas that have not seen that kind of common law development may open up areas in which these amendments could be vulnerable to attack. However, given *Thornton v. Baron's* own sidestepping of the statute, such attacks will likely have an uphill climb.

Deemed Leases

When the tenant fails to renew the lease when offered, the landlord has, under the Code, the option to "deem" the lease renewed. The amendments now specifically limit so-called "deemed leases" to "determining the rent in an overcharge proceeding." With this kind of language, perhaps intended to be more generous to landlords, the provision is open to an interpretation that the "deemed lease" is still not a lease, but is a month-to-month tenancy upon which a nonpayment proceeding cannot be brought. Thus, if the tenant pays the deemed renewal rent, the landlord is not liable for damages, but if the tenant does not pay the rent, the landlord has only the longer slower remedy of a holdover proceeding—one in which the tenant can cure the default by renewing the lease eventually. Thus, a landlord will have paid out for such a proceeding only to put itself back to where it should have been, with, at most, the cold comfort that the tenant might be held liable for attorneys' fees.

Conclusion

While the new amendments do have the virtue of making the applicable law easier to find, 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, but in others, there is a certain air of seeking to punish landlords for simply being landlords.

PROPERTY OWNERS' STUMP

[This letter was written by a SPONY member regarding the new NYC Council Speaker, who is in political alignment with the Mayor to organize passage of legislation through the City Council. She will have an important impact on landlords during her tenure, so we should be aware of background. We encourage SPONY members to contribute thoughts on important issues or thoughts for property owners, especially, if they are rallying calls general awareness or for the property owners to take action. So send us your letters to sponyinc@aol.com – your letter may be selected to appear in future newsletter editions.]

New York City Council Speaker-Melissa Mark-Viverito

By Lisa Partmentillo

Who is she? Where does she come from? What can Small Property Owners expect? How will the empowered "progressives" govern?

By unanimously choosing Melissa Mark-Viverito as City Council speaker the second most important post in our city government the chamber broke ground in more ways than one. It is not simply that Ms. Mark Viverito, the Puerto Rican- born councilwoman becomes the first Hispanic to hold citywide office. But the Council accomplished something bigger. It sent a clear signal, especially to our business and real estate owners that all branches of city government are now lined up behind Mayor de Blasio's promise to end the so-called "tale of two cities". Ms. Mark-Viverito emerged from the start as one of the most liberal of the candidates and as de Blasio's choice. Ms. Mark-Viverito was arrested for sitting at the entrance of the Brooklyn Bridge during Occupy Wall Street protests. The Mayor took the unusual step of lobbying council members to choose her. She will undoubtedly be a vocal partner for many of the progressive, pro-labor policies that Mayor de Blasio will seek to pass in the years to come. Speaker MarkViverito leads a Council that largely shares Mayor de Blasio's beliefs and appears poised to rubber stamp much of his agenda, a sharp contrast between the council and the previous mayor, Bloomberg.

The first legislative accomplishment and a muscular example of the left-leaning government is NYC's expansion of the Paid Sick Leave Law which was fast-tracked through the City Council. Mayor de Blasio said this City Hall will be on the side of working families all over the city to create one city where everyone can rise together. Ms. Mark-Viverito vowed to put their self-described progressive values into action. One of her priorities is lowering housing costs and she has been a loud voice for tenant's rights. It cannot be good for the real estate industry that the Land Use Committee chairmanship went to Brooklyn Councilman David Greenfield who has not had much experience in development projects. His district is Borough Park and he assumed office in 2010. Mayor de Blasio and Speaker Mark-Viverito are promising big changes in development policy, most notably the implementation of a mandate forcing developers to build affordable housing in areas of the city that are rezoned.

Ms. Melissa Mark-Viverito was a powerful two-term incumbent Councilwoman from East Harlem who faced weak opposition yet she scored a huge taxpayer-funded bonanza. The city Campaign Finance Board paid her $87,780 in matching campaign funds for her six-way council race. She spent as much on her race for speaker. She did so by opening a new 2017 city campaign account something her opponents did not appear to do. Ms. Mark-Viverito raised more than $100,000 with the help of liaison and campaign compliance attorney Vito Pitta's lobbying firm, which was paid $17,000, and she gave a total of nearly $19,000 to the Working Families Party and New York Communities for Change. Ms. Mark –Viverito knew what she wanted and, as always, how to use the system to get it.

The future looks tough when it comes to rent guideline increases and new regulations affecting small property owners. Here are some things to watch out for during her tenure:

- Push for zero-dollar increases on rent regulated units
- More tenant rights-protection, and more enforceable tenant-led actions against building owners
- More worker rights and benefits, such as vacation, more sick or family leave, medical benefits, etc.. As small property owners, we are also small business owners and thus, this conceivably could target us as well.
- Selection of even more tenant-leaning judges in Housing Court

Thus, as both small property and small business owners, this is why you must make our interests known to our respective City Council representatives so that we maintain a voice in this dialogue as well.