NYC Attys Dig Into Proposed Regs For Rent-Stabilized Units

By **Emma Whitford**

Law360 (September 6, 2022, 6:40 PM EDT) -- Landlord and tenant attorneys in New York City have begun poring over more than 100 pages of recently proposed amendments to local rent regulations, including new language that could limit rent increases on combined, or "Frankensteined," apartments.

The Aug. 31 document from the state's Department of Housing and Community Renewal, or DHCR, heralds the first update since 2014 to a code governing roughly 1 million rent-stabilized apartments in New York City. In these units, tenants have the right to a lease renewal and landlords must not exceed maximum annual rent adjustments, **which are set** by the Rent Guidelines Board.

The proposed amendments are also poised to codify major changes made under the Housing Stability and Tenant Protection Act of 2019, or HSPTA, which eliminated several avenues for landlords to remove units from rent stabilization. Among them were the ability to increase rent by up to 20% between tenants and a high-rent threshold that removes a unit from stabilization.

"I think overall the changes reflect what the 2019 HSTPA did," said Legal Aid Society staff attorney Ellen Davidson. "On the other hand, it looks like they've attempted to address some of the abuses the agency has seen in order to effectuate the prime purpose of the rent laws, which is preserving units and preventing displacement."

But while tenant attorneys celebrated the state housing department's proposed amendments, landlord attorneys decried them as onerous and, in some instances, agency overreach.

"I don't think it's happenstance that each time DHCR does this it's in a pro-tenant, anti-real estate manner," said Sherwin Belkin, founding partner of Belkin Burden Goldman LLP.

Combining Apartments

Landlord attorneys told Law360 that when their clients demolish walls in order to combine a rent-stabilized apartment with the unit next door, they have historically been able to set a rent of their choosing, known as the first rent.

"Let's say you take apartment A and apartment B and combine them into a new apartment, the rule has been the owner can charge first rent, whatever the market can bear," Belkin said.

"Post-HSTPA it's something owners have thought about because it's one last avenue of a potential rent increase, although subject to rent stabilization thereafter," he added.

The existing code is silent on this practice, according to a regulatory impact statement from the state housing agency. Yet the "general tenor" of the HSTPA encourages "the preservation of units at historically reasonable rents," the agency said.

With that in mind, DHCR is proposing a rule that if two regulated apartments are combined, the legal regulated rent going forward will be the combined rent of the two prior apartments, plus any allowed increases for apartment improvements.

And if a landlord cuts into a regulated apartment to expand an unregulated one, the new, larger apartment would be regulated.

Edward Ratiff, a tenant in a 1960s East Village apartment building, said he hoped the changes would discourage the type of apartment combinations he

endured during the pandemic, yielding dust so thick he was "barely… able to see the other end of the hallway."

He and other tenant advocates use the term "Frankensteining" to describe the practice.

"It would remove the reason for doing it," Ratiff said. "Because if a new unit is still going to be stabilized and still have the last stabilized rents, there's not really much point in spending a lot of money to do this."

Succession Rights

DHCR is also proposing to resolve what it describes as a split between two state appellate courts, the First Department covering Manhattan and the Bronx and the Second Department covering Queens, Brooklyn and Staten Island.

Under the existing code, if family members of a rent-stabilized tenant hope to remain in the apartment after the primary tenant moves out, they must have lived in the apartment alongside them for the two years before the main tenant vacates.

In instances where the primary tenant has moved out but continued to renew their lease, the First Department has held that the two-year look back is measured from the end of the lease in question. The Second Department, meanwhile, has held that the look-back window starts when the primary tenant physically moves out.

In its impact statement, DHCR wrote that it opted for the Second Department's approach because evicting family members when a leaseholder "may have been in the process of moving out during the renewal period" or was "postponing an anticipated problematic and difficult interaction" with the landlord was "too harsh a rule."

The Second Department decision in Jourdain v. DHCR dates to 2018. Before that, the First Department's 2012 decision in Third Lenox Terrace Assoc. v. Edwards had been "knocking succession claims out of the box before they [were] ever litigated at all," said Jason Blumberg, senior staff attorney at Mobilization For Justice.

Yet Belkin of Belkin Burden decried the state housing department's proposal, saying it encourages tenants to "hide what is going on" after a leaseholder moves out, making it more difficult for a landlord to interrogate — and potentially challenge — a succession claim.

Demolition and Rehabilitation

Rent-stabilized buildings can be excluded from rent regulation under the existing code if they undergo a "substantial rehabilitation." But in order to go through this process, a building must be in a "substandard or seriously deteriorated condition."

DHCR's proposed language removes a presumption that a building is deteriorated if it is at least 80% vacant. The agency made this move because the alternative "seemingly rewards keeping units off the market," according to its impact statement.

"Whether by virtue of tenants just leaving the old building or buyouts, or any other way except for harassment, the DHCR would find the building was in substandard condition," said landlord-side attorney James Marino, a partner with Kucker Marino Winiarsky & Bittens LLP. "Now, owners have to prove substandard conditions in other ways."

Another way for a landlord to exit rent stabilization is to demolish the building. Under the proposed code, the entire building structure and foundation must be demolished to qualify. Previously, landlords could preserve the building's

exterior.

The ability to maintain the walls is particularly helpful if a building has a landmark designation, meaning it has to be preserved because of historical significance, landlord attorneys said. "What it's essentially saying is we are going to dramatically hamper an owner's right to demolish a building," said Belkin.

Next Steps

The public has until Nov. 20 to submit comments on DHCR's proposed amendments, including at public hearings scheduled for Nov. 15 in New York City and Nassau and Westchester counties, which also have rent-regulated apartments. From there, DHCR can promulgate final rules, an agency spokesperson said.

"Through these regulatory amendments, HCR has put forth proposals that will better protect New York's approximately two million rent regulated tenants and prevent our current housing stock from unlawful deregulation and disrepair," an agency statement said.

"We encourage the public to continue to be part of this process by reviewing these proposed regulations and submitting their comments before the amendments are finalized," the statement continued.

Once finalized, the rules could face a legal challenge, attorneys predicted, as occurred the last time the code was updated in 2014. The industry plaintiffs were ultimately unsuccessful.

The 2014 case, Portofino Realty Corp. v. NYSHCR, **challenged** the legitimacy of about two dozen amendments to the Rent Stabilization Code, including codification of a so-called Tenant Protection Unit to audit landlords. The landlords argued that the changes violated their due process rights.

"I'm certain there will be legal challenges to a number of these provisions, particularly the ones that go beyond any legislative underpinning," said Belkin, who was co-counsel for Portofino.

But Marino of Kucker Marino said he wasn't sure such a challenge would succeed.

"There is a body of case law ... that states an administrative agency can change their policies as long as they give notice of their intention to do so, and as long as there's a rational basis," he said.

--Editing by Jill Coffey.