

Succession Rights

Spouses or family members¹¹⁹ who have resided in the apartment for the qualifying periods provided in the Rent Stabilization Code may remain in the apartment as fully protected rent stabilized tenants. The inclusion of adult lifetime partners within the definition of spouse or family member is recognized by the Division of Housing and Community Renewal and has been upheld by the courts.¹²⁰

Primary Residence

Under §2524.4 of the Rent Stabilization Code an owner may refuse to renew the lease of any tenant who does not occupy his/her apartment as a primary resident. The evidence necessary to establish non-primary residence is left to the discretion of “a court of competent jurisdiction”. Often tax filings, voter registration records, utility bills, drivers licenses and other evidence of a regular presence in the unit are reviewed.

Finally, tenants who refuse to execute properly offered leases are subject to eviction.¹²¹

Roommates

A rent stabilized tenant’s right to have a roommate is secured by Section 235-F of the Real Property Law, which governs additional occupants in all types of housing. Prior to the last revision of the Rent Stabilization Code, a tenant’s right to charge rent to an additional occupant was unlimited. Under § 2525.7 of the new code, rent stabilized tenants may charge roommates no more than a proportionate share of the rent. A proportionate share of the rent is determined by dividing the legal rent by the total number of tenants named on the lease and the total number of occupants in the apartment. However, a tenant’s spouse and family, or an occupant’s dependent child, are not included in the total.

THE ADMINISTRATION OF RENTS UNDER RENT STABILIZATION: THE ROLE OF THE DIVISION OF HOUSING AND COMMUNITY RENEWAL

As discussed in the section dealing with the history of rent stabilization, the State Division of Housing and Community Renewal (“DHCR”), through its Office of Rent Administration

¹¹⁹ “Family member” is defined as a husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant or permanent tenant. See also page 35 for a discussion of changes to the definition of family member under the Rent Regulation Reform Act of 1997.

¹²⁰ This regulation was upheld by the N.Y. State Court of Appeals. See *Lease Succession Regulations Upheld*, N.Y.L.J., 12/22/93, page 1, col. 3, describing the court’s ruling in *RSA v. Higgins*, 164 AD 2d 283 (1st Dept. 1990), Affirmed, 83 N.Y. 2d 156 (1993), *cert denied*, 512 U.S. 1213 (1994).

¹²¹ See RSC §2524.3(f).

("ORA"), is responsible for administering rent stabilization (along with rent control). The DHCR has three major roles within the rent stabilization system: It has the quasi-legislative role of promulgating the Rent Stabilization Code. It has the executive role of administering the various filing, registration and special rent adjustment provisions of the Code, and in prosecuting those who violate any part of it. And finally, it has the quasi-judicial role of judging the merits of claims brought pursuant to the Code between tenants and owners in accordance with the standards applicable to administrative tribunals. If appealed, such determinations are subject to review by the state courts. What follows is a brief discussion of those areas where the decisions of the DHCR may affect rent levels.

Major Capital Improvements and Individual Apartment Improvements

The introductory paragraphs of a June 1989 report entitled Review of the Major Capital Improvement Program prepared for the DHCR by Ernst & Whinney and Speedwell, Inc., outline the issues and objectives related to this program:

In an attempt to maintain and improve the condition of rent regulated housing in New York, owners who undertake building-wide major capital improvements (MCI's) have historically been allowed increases in base rents over and above annual rent guidelines and MBR rent increases to compensate them for such investments. These increases are allowed without the consent of tenants if the improvements are for "the operation, preservation and maintenance of the structure" and are approved by the Division of Housing and Community Renewal (DHCR). In addition, one-fortieth of the cost of improvements made to individual apartments can be added to the monthly base rent with the tenant's consent or if the apartment is vacant.

The concept of rewarding owners by increasing their internal rate of return has always been controversial, since the increase is basically financed by the tenants who occupy the building and do not have a significant role in approving the improvements. Representatives of tenant interests argue that the potential for MCI increases encourages owners to delay maintenance activity, for which no incentive is provided, in order to qualify for the MCI program and its investment incentives. In addition, increases to base rents impact tenant affordability. Representatives of owner interests argue that a rent regulated system removes their ability to recapture replacement costs without special consideration, and that the current incentive levels are not sufficient to attract needed improvements (p.1).

Basically, the major capital improvement program allows owners to increase monthly rents on a temporary basis by amortizing the cost of the eligible improvements over a period of either 12 years (for buildings with 35 or fewer units) or 11 ½ years (for buildings with more than 35

units). Increases cannot exceed 2% of the tenant's rent each year. MCI increases are prohibited for buildings with 35% or fewer rent regulated units and are prohibited if there are hazardous violations on file with the local municipality in addition to immediately hazardous violations. MCI increases are temporary and must be removed from the rent 30 years after the date the increase became effective inclusive of any increases granted by the local rent guidelines board. MCI increases must be approved by the DHCR before they may be collected. Tenants are notified of the MCI application and given an opportunity to object. Prior to the Rent Laws of 2019, rent increases became a part of the base rent even after the amortization period ended, with increases capped at 6% per year.

Where new appliances or improvements to individual apartments are concerned, 1/168th of the cost is added to the apartment's base rent in buildings with 35 or fewer units and 1/180th the cost in buildings with more than 35 units. The owner is required to obtain permission from the tenant who occupies the unit to qualify for this type of rent increase. If the apartment is vacant, the rent of the subsequent tenant is simply adjusted and no approval is necessary. No more than three IAI increases can be collected in a 15-year period and the total cost of the improvements eligible for a rent increase calculation cannot exceed \$15,000. The IAI rent increase for improvements collected after June 14, 2019 is temporary and must be removed from the rent in 30 years, and the legal rent must be adjusted at that time for guideline increases that were previously compounded on a rent that included the IAI.

Hardship Rent Increases

A rent regulation system that required owners to maintain artificially reduced rents in the face of chronic operating losses would be viewed as confiscatory. Nearly every rent regulation system allows for some type of rent adjustment to remedy such situations.

Under rent stabilization in New York City there are two formulas for determining whether a rent increase is appropriate in hardship cases: the **comparative** method and the **alternative** method. Under the comparative method a rent increase may be granted if the owner has not maintained the same average net income in the current three year period as was maintained for the years 1968-70 (marking the beginning of rent stabilization). If records are unavailable, a more recent three-year period may be substituted, under certain conditions.

The hardship application will not be approved unless the owner can demonstrate that:

- the present rate of return on the owner's equity (fair market value minus the unpaid principal amount of the mortgage indebtedness) is less than 8.5%;
- s/he has owned the building for at least three years;

- no previous hardship application has been granted in the past three years;
- real estate taxes and water and sewer charges have been paid or have been lawfully challenged; and
- all services are being maintained and immediately hazardous violations have been corrected or restoration and correction has been made a condition of granting the increase.

In calculating the rate of return the Code establishes six times the rent roll as the fair market value. Operating expenses, an allowance for management services and “actual annual mortgage debt service” are subtracted from gross rents to determine if the remaining balance falls short of 8.5% of the owners equity in the building. If it does, and all other conditions are satisfied, the owner may obtain rent increases equal to the difference between the average annual net income for the three-year base period and the average annual net income for the current period. Rents may be raised no more than 6% in any one-year period, however, and tenants may cancel their leases if they wish to leave and avoid the increases.¹²²

Under the **Alternative Hardship** formula established by the Omnibus Housing Act of 1983, owners are permitted to receive a rent increase when the building’s annual operating expenses (including mortgage interest) are greater than 95% of the gross rent. To qualify for a hardship increase the owner must:

- have owned the property for at least three years;
- have at least a 5% equity position;
- not have received a hardship increase within the previous three years;
- have paid or have lawfully challenged real estate taxes and water and sewer charges; and
- have maintained all services and corrected all immediately hazardous violations or restoration and correction has been made a condition of granting the increase.

Like comparative hardship, rents may be increased no more than 6% per year until the hardship has been remedied and the tenant may avoid the increase by canceling the lease.¹²³

According to a 1989 report on hardship increases prepared by the Policy and Research Bureau of DHCR, “from 1984-1988 inclusive, 128 alternative hardship applications were reviewed. Of these, 92 were denied, 1 was approved, 33 were pending and 2 were withdrawn.” Eleven comparative hardship applications were reviewed. Ten were reported as “denied for being incomplete” and one was pending. The report went on to suggest some of the most likely reasons for the limited number of applications and the extremely low approval rate:

¹²² See RSC §2522.4(b) and RSL 26-511(c)(6).

¹²³ See RSC §2522.4(c) and RSL 26-511(c)(6-a).

- “Owners are not losing money”.
- Because of tenant affordability problems “owners...are not interested in a complicated filing for a rent increase they cannot collect”.
- “The hardship application suffers from ‘bad press’”.
- Many small owners cannot afford the services of an accountant, may not keep good records and may “face language barriers and other handicaps in dealing with the rent regulation structure”.
- “The hardship application process is too complex”.
- Economic conditions including length of ownership, mortgage costs and purchase price have operated to help limit the prevalence of true hardship cases. Yet, “the current low level of applications received, may change radically with the slowdown of New York City’s economic expansion.”

Little has changed in the past 30 years. The approval rate of hardship applications remains almost non-existent and the number of applications received annually continues to be very low. According to testimony from DHCR before the RGB in April of 2019, there were no hardship applications granted in 2018 and there were two cases pending. This is an area of consistent concern to the RGB and the focus of possible legislative reform by DHCR. The return guaranteed by the hardship program was the subject of an unsuccessful constitutional challenge in the U.S. 2d Circuit Court of Appeals.¹²⁴

Fair Market Rent Appeals: (Apartments moving from Rent Control to Rent Stabilization)

As noted in the section concerning the history of rent regulation, most apartments under rent control will become rent stabilized upon vacancy. Over 700,000 formerly rent controlled units have fallen under rent stabilization this way, although only a small fraction of newly stabilized tenants will challenge their rents. Because the relationship of rents in rent controlled units to prevailing market rents varies dramatically from unit to unit, a standard increase upon becoming rent stabilized would result in stabilized rents which themselves are erratic and inconsistent in their relationship to market rents. To avoid this the authors of the ETPA wanted to provide a large degree of flexibility in the setting of rents when rent controlled units become stabilized. They did not, however, want to deprive tenants in newly stabilized units of an opportunity to protest rents that bear no reasonable relationship to a “fair” market amount. Consequently, a system was adopted which allows tenants to challenge newly stabilized rents in formerly rent controlled units through what is known as a “Fair Market Rent Appeal”.

This process begins with the vacancy of a rent controlled tenant. Recall that rent controlled units may be found in any building constructed prior to February 1, 1947, with three or more legal units and occupied by the same tenant since June 30, 1971 or occupied by the

¹²⁴ See case #16, supra at 43-44.

tenant's lawful successor (a spouse, adult lifetime partner or other family member). Rent controlled units that are in 3, 4 or 5 unit buildings do not become stabilized upon vacancy and, consequently, no process for appealing rent levels is available. If the vacated apartment is in a building with 6 or more units, although stabilized, the owner is initially free to advertise the apartment for any amount. The owner must, however, notify any new tenant of his/her right to challenge the rent within 90 days by providing the tenant with an "Initial Legal Regulated Rent Notice". If the tenant decides to challenge the rent, the tenant "need only allege that [the Initial Legal Regulated Rent] is in excess of the fair market rent and ... present such facts which, to the best of his or her information and belief, support such allegation".¹²⁵

Once the appeal is filed, two methods are employed in attempting to determine if the new rent is legally "fair". The DHCR will look to a special guideline promulgated by the Rent Guidelines Board [more will be said about how this guideline is established on pages 85-87].

The DHCR will also consider "rents generally prevailing in the same area for substantially similar housing accommodations". This is known as the "comparability" standard. The owner may submit evidence of rents for comparable units rented to tenants up to four years prior to or one year subsequent to the commencement of the complaining tenant's initial lease. Leases ending more than one year prior to the commencement of the complaining tenant's lease are updated by guideline amounts. Alternatively, "[a]t the owner's option, market rents in effect for other comparable housing accommodations on the date the tenant filing the appeal took occupancy" may be considered.¹²⁶

The Office of Rent Administration will average the rent adjusted pursuant to the Special Guideline with any qualified comparable rents in reaching a final rent determination in a Fair Market Rent Appeal. Thus, the comparability standard does not operate in a manner that is wholly independent of the Special Guideline. Notably, unlike other rent overcharges, rents paid in excess of the Fair Market Rent determined by the DHCR are not subject to treble damages.

It is critical to note that rent controlled apartments transitioning to rent stabilization on or after June 14, 2019 can no longer be deregulated, in accordance with the Housing Stability and Tenant Protection Act of 2019.

Overcharge Proceedings

The Rent Stabilization Code clearly prohibits charging rent in excess of the legal regulated rent and this includes a prohibition against demanding "key money" or any other special

¹²⁵ See RSL §26-513(b), included in Appendix O.

¹²⁶ RSC 2522.3(e)(2).

charge not specifically authorized by the Code.¹²⁷ The amount of the security deposit and the distribution of interest from such deposits is also regulated by the Code.¹²⁸ Willful rent overcharges may result in a penalty to be paid to the tenant equal to three times the overcharge. Treble damages for willful overcharge claims may be collected for up to six years prior to the filing of the complaint. An overcharge which the owner demonstrates not to have been willful will result in a straight repayment of the overcharge to the tenant plus interest. Damages for non-willful overcharge claims may be had for up to six years prior to filing the overcharge claim.¹²⁹ Both the Rent Stabilization Code and Section 213-a of the State's Civil Practice Law and Rules prohibit consideration of evidence of a rent overcharge occurring more than six years prior to the filing of the complaint. It is important to note that certain courts (most notably the Housing part of the Civil Court of the City of New York) have concurrent jurisdiction with the DHCR over rent overcharge claims.

Other Adjustments in Rent: air conditioners, failure to maintain services, failure to register

Air Conditioners

In buildings where the owner provides electricity to individual tenants as part of the services covered by the base rent [approximately 10% of stabilized units], the owner may add a special separate charge for air conditioner usage when a new air conditioner is installed. If the air conditioner is installed by the tenant the owner may charge the monthly amount permitted by the DHCR in accordance with its most recent operational bulletin update on air conditioner rates. (See DHCR's 34th annual update of section B of supplement No. 1 to operational bulletin 84-4. For the period from 10/1/19 through 9/30/20 - permitting a \$24.94 per month charge per air conditioner if electricity costs are included in the rent). If installed by the owner with the tenant's permission, the same amount may be collected and, in addition, the owner may collect 1/168th or 1/180th (depending on building size) of the cost of the air conditioner as permitted by §2522.4(a)(1) of the Code.

Failure to Maintain Services

As noted in the discussion concerning habitability (*supra*, at pages 65-66), failure to maintain the services required under §2520.6(r) of the Rent Stabilization Code could result in a rent reduction equal to the last guideline increase. The DHCR is responsible for reviewing these applications.¹³⁰ Most of the services covered are protected by the warranty of habitability,

¹²⁷ See RSC §2525.1 et seq.

¹²⁸ See RSC §2525.4; see also General Obligations Law, Article 7 - The security deposit laws are enforced by the State Attorney General's Office.

¹²⁹ See generally RSC §2526.1.

¹³⁰ See RSC §2523.4

however, and it is often the case that tenants will resolve service complaints in a housing court proceeding - most typically in response to an owner's action for non-payment of rent. Notably, new amendments to the Rent Stabilization Code have classified a number of service reductions as "de minimus" and therefore not substantial enough to result in a DHCR ordered rent reduction (RSC 2523.4(e)).

Appliance Surcharges (Dishwasher, Washing Machine, Dryer)

Effective with Operational Bulletin 2005-1, in March of 2005, the DHCR began allowing landlords to charge a surcharge to tenants with tenant-installed dishwashers, washing machines, and dryers. While landlords are not required to allow tenants to install their own dishwashers, washing machines, or dryers, where the landlord does consent the surcharge compensates the landlord for the extra water and electricity used by such appliances. Rates differ based on whether electricity is or is not included in the rent of the apartment. For washing machines, in electrical exclusion buildings the monthly surcharge is \$16.08 per month, and is \$17.23 for electrical inclusion buildings. For dryers, the rates are \$0.00 per month for exclusion buildings and \$6.92 for inclusion buildings (\$4.24 for gas powered dryers in electrical inclusion buildings). For dishwashers the rates are \$5.91 and \$8.99 respectively. The surcharge is not part of the permanent rent and can be reviewed annually by DHCR.

Failure to Register

The Rent Stabilization Code requires owners to register all rent stabilized units.¹³¹ Failure to register will bar an owner from collecting any rent increase for the period during which the apartment was required to be registered but was not. Once a late registration is properly filed the owner may collect these increases on a prospective basis only. Thus, the tenant is not obligated to pay any rent increase until the unit is properly registered and the owner may not recoup his/her losses by registering late. The Rent Regulation Reform Act of 1993 added that if rents collected on unregistered units "were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of a late registration. If such late registration is filed subsequent to the filing of an overcharge complaint, the owner shall be assessed a late filing surcharge for each late registration in an amount equal to fifty percent of the timely rent registration fee."¹³²

High Rent Vacancy Deregulation

Between July 7, 1993 and June 13, 2019, rent stabilized apartments could be deregulated once the monthly rent of a vacant apartment surpassed a specified limit (this limit varied depending on the various Rent Acts in effect at the time of deregulation). Such deregulation

¹³¹ See RSC §2528.

¹³² Rent Stabilization Law §26-517(e).

is now prohibited, effective with the passage of the Housing Stability and Tenant Protection Act of 2019 on June 14, 2019.

High Income Deregulation

Between July 7, 1993 and June 13, 2019, rent stabilized apartments could be deregulated once both the monthly rent of an occupied apartment, as well as the household income of the current tenant, surpassed a specified limit (this limit varied depending on the various Rent Acts in effect at the time of deregulation). Such deregulation is now prohibited, effective with the passage of the Housing Stability and Tenant Protection Act of 2019 on June 14, 2019.

DUTIES OF THE RENT GUIDELINES BOARD

Establishment of basic rent adjustments for renewal leases: Apartments, Hotels and Lofts

The one decision of the Rent Guidelines Board that has, by far, the greatest impact on owners and tenants is the annual establishment of lease renewal guidelines. These guidelines traditionally include a percentage increase in the monthly contract rent. For example a 2% increase in the monthly rent for a one-year lease renewal. In some years, the Board has also included a minimum rent increase in the form of a fixed dollar adjustment. For example, a 2% increase or \$20, whichever is greater, for a one-year lease renewal. Historically, past boards have included other forms of increase, i.e. a supplemental rental adjustment and minimum rents. These increases are discussed in detail below.

Since 1983 tenants have had the option of choosing between one- and two-year renewal leases.¹³³ An estimated 90% of all stabilized tenants have a renewal lease, and 10% move or 'turn over,' each year. Just over 50% of all stabilized tenants with leases regularly sign one-year leases, leaving just under 50% of tenants who sign two-year leases. Approximately half of those choosing two-year leases remain unaffected by any given guideline - being in the second year of a two-year lease signed under the previous guideline.¹³⁴ Consequently, about 68% of the approximately one million rent stabilized households are directly affected by the adoption of any single set of annual renewal guidelines.

The economic impact of these guidelines on the City's housing stock is significant. Given 2017 rent levels (as estimated by the last HVS survey), any 1% increase in average

¹³³ Prior to the enactment of the Omnibus Housing Act of 1983 tenants were given the additional option of choosing three year leases.

¹³⁴ See note 17 following Table 7 in the Explanatory Statement for Apartments (Appendix N1) for further explanation of these estimates.