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NY's New Tenant Safeguards May Stifle Affordable Housing

By **Kaitlin Ugolik**

Law360, New York (February 05, 2014, 7:07 PM ET) -- New York's state Division of Housing and Community Renewal may have derailed efforts to encourage the construction of more affordable housing in the five boroughs by implementing new tenant protections this month that experts say are needlessly harsh for landlords.

The new protections came in the form of 27 amendments to the state's rent stabilization code that include new safeguards to prevent the eviction or change in rental status of senior citizens and people with disabilities as well as the removal of a requirement that tenants provide landlords with prior notice before filing a complaint with the DHCR.

They became effective Jan. 8, after more than a year of comments from the industry, but landlord attorneys say the DHCR's final determinations smack of a completed "shopping list" for tenant advocates, giving little to no consideration to the burdens they will impose on landlords.

"It's absolutely a disincentive" to owning affordable housing, said Eric Sherman, a partner with Pryor Cashman LLP. "These things are going to create a chilling effect on an institutional owner's willingness to dip its toes in the waters here, there's no question about it."

The amendments cover a wide variety of issues, some of which tenant and landlord attorneys agree are fair and necessary, such as the new measure to protect senior citizens and people with disabilities living in rent-stabilized apartments. But others are unproductive, experts say, and may serve to further chill the creation of new affordable housing.

One of the biggest complaints landlords have with the changes is that it will now be easier for tenants to claim they have been overcharged for rent after the landlord makes a single-unit improvement.

Previously, when tenants believed they were being overcharged when a landlord passed down a portion of the costs for updating an apartment, they could ask the landlord for documents related to the work dating up to four years prior and file a complaint with the housing court, notifying the landlord in advance.

Under the new amendments, no prior notice is required, information can be requested dating back further than four years, and most egregiously — according to landlord attorneys — tenants will be allowed to withhold the amount of rent attributed to the improvement increase until the matter is settled.

"That flies in the face of every existing law and regulation on the subject of rent payments in the state of New York," said Mitchell Posilkin, counsel to the Rent Stabilization Association, which represents property owners. "By allowing tenants to withhold rent unilaterally, it really allows tenants to circumvent existing administrative and judicial mechanisms, which are supposed to adjudicate these issues between owners and tenants."

The replacement of the four-year rule is also troubling, experts say. It has been in place since the 1980s, and most landlords do not keep documentation that is more than four years old as a result.

The DHCR noted in the materials it released on Jan. 8 that allowing access to more information "without court or DHCR intercession" would provide a cost-effective alternative to expensive proceedings, but attorneys say it will be a tremendous burden to begin holding onto every piece of documentation going forward, and in the meantime it will be hard for landlords to prove their case.

The amendments "present a variety of different bureaucratic, judicial and statutory hurdles for landlords. They are going to require a lot more paperwork for landlords, and they are going to create opportunities for tenants who are mischievous," Sherman said

Some amendments may even be illegal, some attorneys suggest.

They point to a court case — Grimm v. New York State Division of Housing and Community Renewal — in which the First Department held that the DHCR could go beyond the four-year "look-back" period only when there was "substantial indicia of fraud on the record."

Under the new rules, attorneys say the DHCR appears to be attempting to work around that decision.

A representative for the DHCR did not respond to a request for comment Wednesday, but the agency notes in material accompanying the amendments that "no statutory proscription exists to review [a] higher rent because of the passage of four years."

The DHCR also created a new tenant protection unit in conjunction with its changes to the code, something Gov. Andrew Cuomo had aimed to do through the state Senate on several occasions.

The TPU was created two years ago, when the code amendments were first proposed, and has been operating throughout the comment period, ostensibly helping to allow the creation of 28,000 new rent-regulated units this year, according to a Tuesday announcement from the governor's office.

But attorneys say for all its successes, the TPU serves to intimidate many landlords with nonappealable audits that some argue may present due process issues.

The DHCR's changes may have other constitutional implications as well. Dov Treiman, managing partner of landlord-tenant matters at Adam Leitman Bailey PC, argues that the agency may be overstepping its bounds in burdening the housing industry with its own budget issues.

"The constitution allows governments to burden individuals with public problems when there is a state of emergency. The argument in 1969 [when rent stabilization was created] was that there was a ... housing emergency," Treiman said.

But emergencies are temporary by their nature, he argues, and the DHCR's efforts to save on expensive proceedings by passing costs onto landlords and ultimately tenants may invite litigation.

And attorneys agree that it won't likely further the state's affordable housing goals, despite TPU's recent success.

"Going forward, the people who have good managing agents and who can afford to pay lawyers to advise them every step of the way will be able to figure it out," said Bill Neville of Mitofsky Shapiro Neville & Hazen LLP. "It's really going to hurt the smaller landlords."

--Editing by Jeremy Barker and Katherine Rautenberg.

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