

## **The New Rent Laws: Confusion and Anger**

**By John Dolgetta, Esq.**

Since the passage of the Statewide Housing Security and Tenant Protection Act of 2019 (the “2019 Act” or “Act”) [*see* <https://bit.ly/2xA6lth>] on June 14, 2019, the Hudson Gateway Association of Realtors, Inc. (“HGAR”) has been receiving many calls from its members and licensees regarding the Act. Among some of the questions asked are: (1) whether additional pet deposits can be collected by a landlord; (2) whether the new rental laws apply only to rent regulated apartments or all apartments; (3) whether the 2019 Act applies only to New York City tenants or tenants statewide; whether the Act applies to one-to-four family residential; (4) whether a landlord is able to request the first and last month’s rent; and (5) whether a landlord is allowed to require a tenant to reimburse for the rental fee.

The 2019 Act is causing widespread confusion amongst real estate professionals throughout the state and even many legal experts are having difficulty interpreting the changes. On July 15<sup>th</sup> several landlords filed a lawsuit claiming that the new legislation is unconstitutional. HGAR and the Bronx-Manhattan Association of Realtors on August 7<sup>th</sup> hosted a panel of real estate experts [*see* <https://bit.ly/2yZ5brL>] who discussed the widespread impacts that the 2019 Act will have on the rental market as well as the sale market for rental and investment properties. Overall, the consensus amongst real estate professionals is that these new laws have caused confusion and angst.

### **Some of New Rental Law Provisions Impact All Property Types and NOT Only Rent Regulated Properties**

As pointed out in the July article in Real Estate In-Depth [*see* <https://bit.ly/2ZWhb9w>], the 2019 makes significant changes with respect to non-rent regulated properties. One of the most common misconceptions is that the new law only affects Rent Controlled or Rent Stabilized apartments. However, while many of the Rent Stabilization laws have been the primary target of the 2019 Act, the Act also makes significant changes to the Real Property Actions and Proceedings Law (“RPAPL”).

One significant change to the RPAPL is that Section 702 was added, which defines “rent” in a residential dwelling as the monthly or weekly amount charged to a tenant. The added definition specifically *excludes* any additional fees. In light of the restricted definition of “rent” many real estate professionals are unsure of whether a landlord is able to charge a tenant a rental fee, collect advance rents (e.g., first and last months’ rent), which is common (especially in circumstances where a landlord would take into consideration credit risk), or even charge an additional fee or deposit where a pet is going to occupy the apartment.

### **Tenant Rental Fees**

As for being able to charge the tenant a rental fee, the Act does not specifically address whether or not a tenant can be required to pay the rental fee or commission on a particular transaction action. If a listing agreement or other commission agreement exists separate and apart from any

lease agreement, it would seem that a tenant can be required to pay a fee related specifically to a rental fee or commission. There is nothing in the Act that seems to have changed in this regard.

Many times, real estate licensees and landlords are looking to obtain quick and specific answers from articles and websites. Unfortunately, it is usually not that easy. As one can see from a quick search on the internet or the New York State website, recommended that

### **Advance Rent and Security Deposits of More Than One Month Are Prohibited**

As for collecting an advance payment of rent for a future month or a security deposit, Section 7-107 of the New York General Obligations Law specifically *prohibits* a landlord from collecting “deposit or advance” for more than one month. The 2019 Act changes the existing law and makes this restriction applicable to *all* rentals (i.e., one-to-four family residences or greater) whether rent regulated or not. Therefore, all landlords should be aware that collecting more than one month’s security deposit or requiring that a tenant pay any advance rent for a future month (e.g., last month’s rent) is strictly prohibited.

In addition, the 2019 Act requires that the landlord return the security deposit to the tenant within fourteen days after a lease terminates or a tenant vacates an apartment. Before any security deposit can be withheld, the landlord must provide the tenant with a *written* statement, which includes an itemized list of any amount that would be withheld. The landlord is required to provide the tenant with a detailed list of the costs of any repairs or expenses incurred as a result of tenant’s occupancy. The statement must be provided to the tenant before expiration of the 14-day period. This process should be clearly spelled out in any lease agreement so that the parties are aware of the requirements.

“The entire amount of the deposit or advance shall be refundable to the tenant upon the tenant's vacating of the premises except for an amount lawfully retained for the reasonable and itemized costs due to non-payment of rent, damage caused by the tenant beyond normal wear and tear, non-payment of utility charges payable directly to the landlord under the terms of the lease or tenancy, and moving and storage of the tenant's belongings. The landlord may not retain any amount of the deposit for costs relating to ordinary wear and tear of occupancy or damage caused by a prior tenant.”

While the Act does not specifically provide for how the itemized statement should be provided to the tenant, it is recommended that the lease clearly spell out this procedure. The 2019 Act indicates that written notice is sufficient but the lease should provide that email, facsimile or overnight delivery is acceptable. One issue that could arise if email is not specifically included as a means of delivery, is that if an overnight delivery option is elected, the tenant may have already moved out and the landlord may be in violation of the law. The lease should provide that email notice is acceptable and it should contain the both the tenant’s and landlord’s email addresses. If the landlord fails to deliver the statement to the tenant in a timely manner, the landlord can be assessed

with punitive damages equal to twice the amount of the security deposit, and further, the landlord will forfeit the right to retain any portion of the security deposit.

### **A Pet Deposit**

Another common question relates to whether a landlord is able to collect a security deposit for damage that a pet causes or for charges incurred in connection with the cleaning of an apartment. The costs incurred by landlord's as a result of pets occupying the premises can be extensive. As indicated above, the landlord is strictly prohibited from collecting more than one month's security. Therefore, landlords may elect to prohibit pets altogether, although there may be legal restrictions where emotional support pets are involved.

The Act, however, does not mention or specifically restrict a landlord's right to enter into a separate occupancy agreement for the pet and charge a separate monthly fee to have a pet in the premises. As part of that agreement, the landlord can require that a specified amount or deposit be held in connection with any damage or costs arising from having the pet occupy the premises. Again, while not specifically permitted or discussed in the Act, landlords should explore this alternative with legal counsel.

These are all valid concerns, and the 2019 Act does not specifically address any of these concerns directly. There is also very little made available by New York State as far as an update to "Frequently Asked Questions". The public needs to be made aware of what impacts these changes in the law will have to every citizen and not only to the ones it states it is trying to protect (i.e., the tenants). Landlords, who also include owners of one-to-four family property owners, and who are often unsophisticated in terms of understanding the complicated rental laws, have received no guidance or assistance in terms of the new regulations.

### **Tenant Must Have Opportunity to Conduct an Inspection**

The 2019 Act also requires that a landlord offer a tenant the opportunity to inspect the premises prior to the commencement of the tenancy and conduct a walkthrough inspection of the premises at the end of the lease term and vacatur. As amended, Section 7-108 of the General Obligations Law provides as follows: "[a]fter initial lease signing but before the tenant begins occupancy, the landlord shall offer the tenant the opportunity to inspect the premises with the landlord or the landlord's agent to determine the condition of the property." Real estate licensees, landlords, property management companies and attorneys need to ensure that a tenant is provided with advance notice that he or she has the right to inspect the premises.

It is recommended that specific inspection provisions and reference to the Act be included in lease agreements. It is recommended that landlords should also have a formal disclosure prepared by legal counsel which informs the tenant of this right. Any such form or lease agreement should include detailed waiver language whereby a tenant is able to acknowledge, in writing, that he or she elects not to have an apartment inspected prior to the commencement of any tenancy. Notwithstanding the tenant's right to elect not to inspect the apartment at the commencement of the lease, the walkthrough at the end of the lease term must be conducted in light of the security deposit issues outlined above.

If the tenant elects to have the premises inspected then a detailed form acknowledging the condition of the premises, and itemizing, as clearly and fully as possible, all of the issues that may exist. A landlord should take photos of the premises and incorporate them as a separate exhibit or schedule in any acknowledgement signed by the parties. If the landlord fails to provide the tenant with this inspection opportunity it can be used as a defense by the Tenant in any eviction proceeding. This acknowledgment will provide specific evidence as to the condition of the premises so that if there is any issue at the time the tenant vacates the apartment, it can be used as evidence in a later dispute.

Several years ago it was commonplace to have inspection provisions included in a real estate sale contracts, which allowed the parties enter into contract and provided the purchaser an opportunity to inspect the premises within a specified period of time. However, more recently, most sellers, sellers' counsel, and their real estate agents require that all inspections are completed before contracts are drafted and entered into by the parties. Similarly, all real estate licensees, whether a tenant or landlord representative, must now ensure that landlords and tenants are informed about these new inspection requirements and ensure that a tenant is provided with the opportunity to inspect the premises before entering into a lease.

All landlords, whether they are owners of one-to-four family rental properties or multi-family dwellings, should have existing leases and riders reviewed or have entirely new leases prepared by legal counsel with expertise in the new requirements of the Act, to ensure that no provisions are included in the lease that violate the 2019 Act.

In New York City, even prior to the passage of the Act statewide, Section 26-2302 of the Administrative Code limited security deposits to one month's rent and also required that landlords deliver the security deposit within 14 days of the expiration of the lease.

### **The Lawsuit Filed by Landlords**

On July 15<sup>th</sup>, Several landlords filed a lawsuit [*see* <https://bit.ly/2KsEQZK>] on July 15 claiming that they have been "...deprived of their property without due process of law in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution" and have further been "...deprived of their right to possess, use and dispose of their real property without just compensation in violation of the Takings Clause of the Constitution."

The lawsuit claims that the new rental laws do not protect the tenants "Under the Rent Regulation Reform Act of 1993, the state began vacancy deregulation for high-rent apartments (termed "Luxury Decontrol"). See N.Y. REAL PROPERTY LAW Ch. 249-B, § 5(a)(13) (LexisNexis). In 1993, a unit with a legal regulated monthly rent of \$2,000 at the time it became vacant would be excluded from rent stabilization. The Rent Act of 2011 raised the Luxury Decontrol threshold to \$2,500 per month. The Rent Act of 2015 raised the threshold to \$2,700, and provided that the threshold would continue to increase at the same rate as the one-year renewal adjustment adopted by the RGB (thereby making Luxury Decontrol a moving target that could be met only in limited circumstances because both the target and the permissible rent moved at the same rate each year).

The threshold stood at \$2,774.76 before Luxury Decontrol was completely repealed in the 2019 Amendments.”

**“Examples of Misdirected RSL Benefits.** An analysis by the Wall Street Journal recently concluded that the “biggest beneficiaries of rent regulation in New York aren’t low income tenants across New York City, but more affluent, white residents of Manhattan.” The analysis noted that renters in Manhattan received steep rent discounts of \$1,000 to \$2,000 per month, and that in all of Manhattan, median regulated rents were 53% below median market-rate rents.

The Wall Street Journal analysis demonstrated that more affluent renters of regulated units received bigger discounts from market rents. It noted that a typical renter with an income in the top quarter of all New York households paid about \$1,650 in rent for regulated units, compared with \$2,700 in rent for a similar renter paying market rents, a discount of 39%. For a renter in the bottom quarter of income, the difference was 15%.

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For example, one report stated that a polo-playing multimillionaire whose family owned a 300-acre estate in North Salem, NY lived in a rent-stabilized apartment for several years before it was decontrolled. A former Philip Morris executive lived in a rent-stabilized apartment for nearly 20 years, while he and his wife bought a weekend home in the Berkshires. A former magazine editor and her husband who owned a photo agency lived in a rent-stabilized unit in the Upper West Side for 27 years, while at the same time owning a cottage on a 7-acre property in upstate New York.

The New York Times also reported in 2015 about one couple, both college professors who teach in Queens, NY, who each had separate rent-stabilized apartments in New York. Although the couple desired to move in together, neither wanted to give up their separate rent-stabilized apartments, for which they were respectively paying \$2,070 and \$1,500 a month. As one of them, who had been living in his duplex for 22 years, noted “it’s the kind of thing that you don’t give up without a really good reason.” Rather than vacate their rent-stabilized apartments, the couple together bought a \$188,000 vacation home in the Catskills.”

**“Data Confirm the Misallocation of RSL Subsidies.** One study found that in 2010, there were an estimated 22,642 rent-stabilized households that had incomes of more than \$199,000, and 2,300 rent-stabilized households with incomes of more than \$500,000. According to 2017 HVS data, there were 37,177 rent-stabilized units occupied by households with incomes of at least \$200,000 and 6,034 with incomes of at least \$500,000.

It has been reported that rent-stabilized households that earn more than \$200,000 and live in below market-rate units pay a total of \$271 million less annually than the average cost of an unregulated unit of the same size in a similarly priced neighborhood, an average savings of \$13,764 per household per year.

The 2019 Amendments only exacerbate that problem by eliminating the High Income Decontrol provision, with the result that households earning more than \$200,000 per year will be able to continue to enjoy rent-stabilized rates. Further, by eliminating the Luxury Decontrol provision, units with rents exceeding \$2,774 per month will remain stabilized, even though (according to the Wall Street Journal) the median household income of tenants in such units was \$150,000 per year, and the average household income was around \$210,000 per year.”

**“2017 HVS Data Confirms that RSL Fails to Target Households in Need.** Plaintiffs have examined the 2017 HVS data (the most recent HVS data available) to compare the characteristics of tenants in stabilized and unstabilized units to the characteristics of the population of severely cost-burdened renters in New York City. This examination produced to several conclusions.

First, tenants in rent-stabilized units have much higher incomes than the population of severely cost burdened renters. While almost 90% of severely cost-burdened renters have incomes less than \$35,000, only 37.7% of stabilized tenants have incomes below \$35,000. Thus the RSL does a particularly poor job at connecting the lowest-income renters (incomes below \$35,000) with affordable housing.

Second, rent-stabilized units also do not do a significantly better job of serving lower-income tenants than do unregulated units. For example, 12% of residents of unregulated units have incomes between \$20,000 and \$34,999 compared to 16.5% of stabilized tenants. The RSL similarly fails to target moderate-income tenants at a rate substantially greater than unregulated units. 78% of stabilized units are rented by households with incomes under \$100,000, but so are 64% of unregulated units.

Third, the RSL distributes a significant portion of its benefits to higher-income renters. For example, over one third (34.2%) of stabilized units (and half of post-1947 stabilized units) in Manhattan are occupied by tenants with incomes of \$100,000 or more. Twenty-two percent of all stabilized units, over 200,000 units, are rented to households with a family income of \$100,000 or more.

Fourth, the RSL does not target the households most likely to face cost burdens due to rent. Married couples without children constitute the household type least likely to face a severe rental-cost burden—yet they are overrepresented among stabilized renters. Underrepresented among stabilized renters are single-parent households. Indeed, the average regulated tenant is only 34 years old, three years older than the average market-rate tenant.

The RSL therefore cannot be justified on the ground that it is rationally related to (much less narrowly tailored to) the goal of ameliorating a lack of affordable housing for low-income individuals and families. It simply bears no rational relationship to achieving that goal because it does not match below-market-rent units with rent-burdened/low-income individuals nor does it help create a single new unit of housing.

Under Section 8623(b), a municipality that has declared a housing emergency may declare that the regulation of rents does not serve to abate the emergency, and in that way may remove one or more

(or all) classes of accommodations from rent regulation. Yet, Defendants have failed to exercise that authority to determine whether rent regulation serves to abate any purported emergency.

The Council’s repetitive declaration of a housing emergency across the entire city, despite the lack of data to support a housing emergency for apartments renting at \$2,000 or more per month, exacerbates the poor targeting of households. According to the 2017 NYC HVS, apartments renting between \$2,000 and \$2,499 per month have a vacancy rate of 5.2%. Apartments renting at \$2,500 or more per month have a vacancy rate of 8.74%. By declaring a city-wide housing emergency despite evidence that only certain segments of housing have a sub-5% vacancy rate, the Council ensures that the RSL will apply to broad swaths of rental housing for which there is no emergency.”

The RSL, as amended, permits but does not compel the New York City Council to declare a housing emergency when there is a vacancy rate of 5% or less. It provides that “[a]ny such determination” is to be made not just “on the basis of the supply of housing accommodations within such city,” but also based on “the condition of such accommodations and the need for regulating and controlling residential rents within such city. . .” N.Y. UNCONSOL. LAW § 8623.a (McKinney).”

Each individual provision of the Rent Stabilization Laws (including those from the 2019 Amendments), and the combined effect of all the provisions, constitutes a per se taking.

First, the RSL mandates the continued occupation of rental properties by tenants, and owners cannot refuse to renew leases to those tenants except under the narrowest of circumstances. Not only do owners have no way to remove the original tenant in the property, but they must suffer the intrusion of strangers—sub-lessors and successors of the tenant—the selection and admission of whom the owner is given no right to oppose. The “right to exclude others” from “one’s property” is “‘one of the most essential sticks in the bundle of rights’” that characterize property. *Dolan*, 512 U.S. at 393 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). That the Rent Stabilization Laws deprive property owners of that “essential stick” demonstrates that the laws effect a per se taking of the owner’s property.

Second, the Rent Stabilization Laws complete their physical occupation of New York City property by taking from the property owners the right to possess, use, and dispose of property. “Property rights in a physical thing have been described as the rights ‘to possess, use and dispose of it.’ To the extent that the government permanently occupies physical property, it effectively destroys each of these rights.” *Loretto*, 458 U.S. at 435 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)). The RSL not only denies property owners the fundamental right to exclude others, but also denies them the rights of use, possession, and disposal, leaving property owners with only the shell of ownership.

Third, the RSL also dramatically limits the property owner’s ability to dispose of his or her own property. Tenants may not be denied a lease renewal even if the owner wants to repurpose the building to non-housing rental purposes. See 9 NYCRR § 2524.5. If an owner wanted to cease

offering the property for rent entirely—if the owner effectively wanted to go out of business and not use the property for any purpose—the RSL denies the owner the right to not renew his tenants’ leases in all but the most extreme circumstances. See 9 NYCRR § 2524.5. If prior to the 2019 Amendments, the owner wanted to convert a building to cooperatives or condominiums, the owner could do so as long as he obtained purchase agreements from 15% of tenants or bona fide purchasers, and tenants did not have to give up any rights. The 2019 Amendments now give the right to decide on a condominium conversion to the tenants, 51% of whom must enter into purchase agreements. And even if the owner wanted to demolish his building, the owner cannot do so unless he relocates his tenants and potentially pays them a stipend for six years.

By denying property owners their right to exclude others, and stripping them of their right to possess, use and dispose of their own property, the RSL effects a physical taking of their property. This physical invasion of property is not a temporary action needed to address some fleeting emergency, but rather is a rule of indefinite duration. Indeed, after 50 years in existence, and with ritualistic renewal every three years during that period, the RSL has become a permanent fixture of New York City real estate. To underscore that point, in passing the Housing Stability and Tenant Protection Act of 2019, New York has eliminated almost every avenue that allowed a transition from regulation to free market, eliminated any sunset period for the law, and imposed obligations on owners that extend more than thirty years into the future. See Thomas W. Merrill, *The Character of the Governmental Action*, 36 Vt. L. Rev. 649, 658 (2012) (“Very little in property law is ‘permanent’ in the sense of lasting forever”; Loretto instead had in mind as a permanent physical invasion “governmental action that amounts to the imposition of an easement of indefinite duration”).”

The RSL does not only significantly limit the owner’s right not to renew a tenant’s lease; it also substantially eliminates the owner’s ability to evict a tenant. Even before the 2019 Amendments, the property owner could only evict a tenant for failing to pay rent, creating a nuisance, or for violating the law—conduct that is solely within the tenant’s control.

As a result of the 2019 Amendments, the property owner’s ability to evict a tenant is even more significantly constrained. For example, Chapter 36 of the Laws of 2019, Part M, Section 21 permits a stay of execution of eviction for a period of one year if the tenant can demonstrate an inability to obtain other housing or to prevent hardship. Thus, even tenants who are breaking the law or failing to pay the lease on time may be entitled to a year of tenancy upon a showing of “hardship.”

Not only do the 2019 Amendments make it more difficult to evict a tenant, but they also make it more difficult to select tenants in the first place. For example, the 2019 Amendment precludes property owners from refusing to lease to a tenant due to the tenant’s past or pending landlord/tenant action, seals records of evictions, and precludes the sale of data regarding judicial proceedings related to residential tenancy. By precluding owners from refusing to offer leases to tenants with prior rental violations, the 2019 Amendments turn tenants with bad rental backgrounds into “protected classes,” and preclude owners from excluding such tenants from their units. Through these revisions, the 2019 Amendments dramatically reduce the ability of owners to exercise their right to exclude through due diligence, making all the more significant the RSL’s near-mandatory obligation to renew such tenants’ leases.