

Chapter 9

Housing Law

by
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**2011 Update by
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New York Elder Law

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§ 9:1 Introduction

Housing law defines the legal rights and responsibilities that concern the basic and universal need to have a roof over one's head. Because housing and income are so interrelated, housing problems in general, and the housing problems of the elderly in particular, often relate to difficulty in affording decent, safe and habitable housing. As we age, our income is most likely to diminish, so housing problems tend to be more prevalent among the elderly. In New York State, the 2008 poverty rate among the elderly was significantly higher than the national rate, 18.1 % compared to 12.5% nationally.¹ Median income for a single elderly person in New York City was \$16,821 and \$23,388 for an elderly couple.² The *2010 Rent Guidelines Board Income and Affordability Study* shows that in rent-stabilized households the median rent to income ratio in New York City is 31.7% above the federal hardship level—meaning already half of all rent-stabilized households can barely afford to pay their rents.³ In general, housing is considered affordable when a household pays no more

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1. See The New York City Center for Economic Opportunity, *The CEO Poverty Measure*, 62; U.S. Census Bureau, *Income, Poverty and Health Insurance Coverage in the United States: 2007*, 54.
 2. COUNCIL OF SENIOR CTRS. & SERVS. OF NYC, *GROWING OLD IN NEW YORK CITY: AGE REVOLUTION* (Feb. 2006), Council of Senior Centers & Services of NYC, Inc., 49 West 45th Street, Seventh Floor, New York, NY 10036, (212) 398-6565, www.cscs-ny.org.
 3. See RENT GUIDELINES BOARD, *2011 INCOME AND AFFORDABILITY STUDY* 7.

than 30% of its income in rent.⁴ But approximately 29% of New York City households that rent continue to spend over 50% of their income just to cover rent.⁵ There has been a continual decline in affordable housing in New York City. Vacancy rates for apartments renting between \$500 and \$799 a month were 1.50% in 2008.⁶ In 2010 alone, 16,907 rent-stabilized units were lost to deregulation.⁷ The median monthly gross rent (which includes fuel and utilities) increased 14.9% between 2005 and 2008.⁸ Between 2008 and 2009, median contract rents for all apartments in New York City increased 5.1%, and median gross rents increased by 4.0%.⁹ In New York City, the Fair Market Rent for a one-bedroom unit is \$1,117, while an SSI recipient (receiving \$761 a month) can afford a monthly rent of no more than \$228.¹⁰ Therefore, although the housing problems of the elderly may not be unique, they tend to be more pronounced. In light of that fact, federal, state and local governments have developed a variety of programs and statutory protections that apply to the elderly. This chapter addresses those aspects of housing law—particularly issues of affordability and tenure—that are especially relevant to the elderly. While the chapter discusses other aspects of housing law as well in order to provide context and clarity, it is not intended as a general reference on housing law.¹¹

§ 9:2 Overview and Sources of Housing Law in New York

A brief general overview of housing law is necessary in order to understand how particular legal provisions affect the elderly.

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4. The HUD benchmark for housing affordability is a 30% rent-to-income ratio. SUBCOMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT OF THE COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS, BASIC LAWS ON HOUSING AND COMMUNITY DEVELOPMENT, revised through Dec. 31, 1994, § 3(a)(2).
 5. DR. MOON WHA LEE, SELECTED FINDINGS OF THE 2008 NEW YORK CITY HOUSING AND VACANCY SURVEY, Table 15 [hereinafter DR. MOON WHA LEE].
 6. *See id.* at Table 7.
 7. *See* RENT GUIDELINES BOARD, CHANGES TO THE RENT STABILIZED HOUSING STOCK IN NEW YORK CITY IN 2010, at 8.
 8. *See* DR. MOON WHA LEE, *supra* note 5, at Table 11.
 9. *See* RENT GUIDELINES BOARD, 2011 INCOME AND AFFORDABILITY STUDY, at 8.
 10. National Low Income Housing Coalition, OUT OF REACH, 2011.
 11. For a comprehensive resource, see SCHERER, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK (2008–2009).

§ 9:2.1 Landlord-Tenant Law

Federal, state, and local statutes and regulations govern landlord-tenant relations, as does case law at the federal and state level. While state and local agencies handle most administration of landlord-tenant relations, some is handled at the federal level as well. New York has the most extensive and complex body of housing law of any state in the nation, and New York City has an enormous body of statutory and case law that is peculiar to the city.

[A] Article 7 of the New York State Real Property Law

Article 7 of the New York State Real Property Law is the primary source of state law governing the substantive terms of the landlord-tenant relationship. Unless they conflict with some other provision of law or are inapplicable as specified in the Real Property Law, the Real Property Law provisions apply to all rental housing throughout the state. The Real Property Law contains provisions governing, for example, the following:

- the implied warranty of habitability in every lease for residential use,¹²
- the right to sublet and assign,¹³
- rights with respect to additional occupants who are not signatories to a lease,¹⁴
- the right of tenants to form, join, and participate in tenants' groups,¹⁵ and the defense of retaliatory eviction, available when a landlord commences an eviction proceeding in retaliation for a tenant's assertion of those rights,¹⁶
- the termination of residential leases by senior citizens entering health care facilities, adult care facilities, or housing projects,¹⁷
- the rights and responsibilities of mobile home park operators and tenants,¹⁸ and

12. N.Y. REAL PROP. LAW § 235-b.

13. N.Y. REAL PROP. LAW § 226-b.

14. N.Y. REAL PROP. LAW § 235-f.

15. N.Y. REAL PROP. LAW § 230.

16. N.Y. REAL PROP. LAW § 223-b.

17. N.Y. REAL PROP. LAW § 227-a.

18. N.Y. REAL PROP. LAW § 233.

- the rights of tenants to recover attorneys' fees in actions or summary proceedings arising out of leases of residential property.¹⁹

[B] Rent Laws

Tenant protections are relatively strong in New York and housing law is particularly complex because New York State has four systems of rent regulation:

- Rent control within New York City,
- Rent control outside New York City,
- Rent stabilization within New York City, and
- Rent stabilization outside New York City.

The rights and responsibilities of landlords and tenants differ under each of these four systems.

- Rent control within New York City is governed by the ***New York City Rent and Rehabilitation Law***, and the regulations promulgated under that statute, the ***New York City Rent and Eviction Regulations***.
- Outside New York City, rent-controlled apartments are governed by the ***Emergency Housing Rent Control Law*** and the ***State Rent and Eviction Regulations***.
- Rent-stabilized apartments in New York City are governed by the ***Rent Stabilization Law***.
- Rent-stabilized apartments outside New York City are governed by the ***Emergency Tenant Protection Act***.

The regulations promulgated pursuant to statute are:

- ***Emergency Tenant Protection Regulations*** (outside New York City), and
- the New York City ***Rent Stabilization Code*** (inside New York City).

On June 24, 2011, the state legislature passed legislation renewing and strengthening the rent regulation laws, codified as chapter 97 of the Laws of 2011. A list of changes follows:

19. N.Y. REAL PROP. LAW § 234.

- The rent regulation laws were renewed until June 23, 2015.
- The rent threshold for vacancy deregulation was raised from \$2,000 or more per month to \$2,500 or more per month.

§ 2(2)(n) of the Emergency Housing Rent Control Law (EHRCL), § 5(a)(13) of the Emergency Tenant Protection Act (ETPA), § 26-403(e)(k) of the Rent Control Law (RCL), and § 26-504.2 of the Rent Stabilization Law (RSL) were amended to provide for this change.

- The income and rent thresholds for high-income, high-rent deregulation were raised from \$175,000 and \$2,000 in two consecutive years to \$200,000 and \$2,500.

§ 5(a)(12) of the ETPA, § 22(m) of the EHRCL, § 2-a of the EHRCL, § 26-403e(2)(j) of the RCL, and § 26-504(1, 3) of the RSL were amended to provide for this change.

- The collection of the statutory vacancy bonus for rent-stabilized apartments was limited to no more than once per year.

§ 2522.5 of the RSL and § 10(a-1) of the ETPA were amended to provide for this change.

- The amortization period for individual apartment improvement increases in rentstabilized apartments for buildings with more than thirty-five units was increased from forty to sixty months, meaning that rent increases in those apartments will now be 1/60 the cost of the improvements. For buildings with thirty-five units or less, the rent increase will remain 1/40 the cost of improvements.

§ 26-405g (1)(e) of the RCL, § 26-511(c)(13) of the RSL, § 6(d)(1) of the ETPA, and § 4(4)(a)(v)(5) of the EHCRL were amended to provide for this change.

- The Division of Housing and Community Renewal (DHCR) is required to “promulgate rules and regulations to implement and enforce all provisions of this act,” pursuant to § 44 of the Rent Act of 2011, chapter 97 of the Laws of 2011.

The Senior Citizen Rent Increase Exemption, which protects low-income elderly tenants in rent regulated apartments from certain rent increases, is discussed later in this chapter.

§ 9:2.2 Housing Programs

Federal, state, and local housing programs have been developed over the past several decades to provide housing assistance to low and moderate income households. Programs of particular importance for the aging will be addressed in more detail later in this chapter. Under some public subsidy programs, such as Public Housing and city-owned housing, the government is the landlord; under most of these programs, government subsidizes the housing and the landlord is either a nonprofit or for-profit private entity. Each of these programs has some form of statutory or regulatory authority governing its operation. The rights and responsibilities of tenants differ from program to program. Some of the major housing programs that operate in New York State include federally subsidized Public Housing, the federal Section 8 program, the New York State Mitchell-Lama Program, and the New York City *In Rem* Program.

Federally subsidized Public Housing for low-income tenants is owned and operated by Public Housing authorities, which are chartered by the state. Tenants generally pay 30% of their household income for rent. Commonly referred to as “the projects,” Public Housing is governed by federal, state, and, in some cases, local law. The federal Section 8 Program generally provides subsidies to low income tenants to enable them to rent private housing. As in Public Housing, tenants generally pay 30% of their household income for rent and receive subsidies that make up the difference between their contribution and a “fair market rent” or other legally established rent for the unit.

Under the New York State Mitchell-Lama Program, authorized by articles 2 and 4 of the New York State Private Housing Finance Law, state-financed loans are provided for the development of middle income housing. The New York State Division of Housing and Community Renewal regulates the operation of the housing, including such areas as tenant selection, rent levels, and eviction. New York City owns a shrinking number of occupied housing units that were acquired through *in rem* tax foreclosure proceedings when private landlords defaulted on payment of real property taxes. They generally house low-income households. There is no statute governing the operations of these programs, but the City of New York has promulgated regulations to administer the various programs which include the Tenant Interim Lease Program (TIL), Neighborhood Entrepreneurs Program (NEP), and the Neighborhood Redevelopment Program (NRP). The city no longer directly takes ownership of buildings, but

transfers buildings to new owners through the Third Party Transfer program, the operations of which are governed by the City Administrative Code and city rules.

§ 9:2.3 Eviction Procedures

The procedure for eviction proceedings, known as “summary eviction,” is primarily governed by the New York State Real Property Actions and Proceedings Law (RPAPL) Article 7. There are, however, other sources of procedural law as well, including the Civil Practice Law and Rules and the various Court Acts and Rules. Summary eviction proceedings are supposed to operate on an accelerated timetable, and generally run their course in a much shorter time period than a “regular” civil action. RPAPL Article 7 governs the grounds for and procedural requirements for summary proceedings to recover possession of real property, that is, summary eviction proceedings including grounds for an eviction proceeding where there is a landlord-tenant relationship,²⁰ and where no landlord-tenant relationship exists.²¹

Although the majority of eviction proceedings are brought for nonpayment of rent, proceedings are also brought when a tenancy has terminated, or has been terminated by the landlord. Those proceedings based on failure to pay rent are known as “nonpayment” proceedings, and those based on any other reason are generally known as “holdover” proceedings. The term “holdover” refers to the tenant’s holding over after the expiration of the term of the lease. This term is generally used to encompass all eviction proceedings other than those based on nonpayment of rent.

In privately owned rental housing that is not subject to the rent regulation laws and receives no governmental subsidies, a landlord may bring a holdover proceeding to evict a tenant at the end of the term of the tenancy without alleging a reason. However, in rental housing that is owned, operated, subsidized, or regulated by government, the landlord must allege some good cause to be able to maintain a holdover proceeding to evict a tenant. The statutes and regulations governing the specific housing program generally set forth the bases upon which an eviction proceeding may be maintained for premises subject to that program.

20. N.Y. REAL PROP. ACTS. LAW § 711.

21. N.Y. REAL PROP. ACTS. LAW § 713.

§ 9:2.4 Requirement of Notice

Before commencing an eviction proceeding, the landlord is generally required by the lease between the parties or the RPAPL or other governing statute to provide some form of precommencement notice to the tenant. In nonpayment proceedings, the notice is a demand for the rent. The demand can be oral or written. In holdover proceedings, the type of notice required depends on the nature of the proceeding. For example, holdover proceedings against tenants in rent-stabilized housing in New York City that are based on alleged violation of the lease must, in most cases, be preceded by a “notice to cure.”

§ 9:2.5 Eviction Proceedings

The party commencing the eviction proceeding, usually the landlord, is known as the petitioner; the party whose eviction is sought (the tenant) is known as the respondent. The notice of petition is the equivalent of a summons in an action and the petition is the equivalent of the complaint. The petitioner is required to make a “reasonable application” to serve the respondent personally with the notice of petition and the petition.²² This procedure is designed to prevent eviction of people who are temporarily residing elsewhere. Where the petitioner has reason to believe that the respondent is residing elsewhere, the notice of petition and the petition must be served at the actual place of residence as well as the premises sought to be recovered. Thus, a landlord was required to serve the notice of petition and the petition on the respondent at the nursing home where she was residing.²³

The landlord may choose to serve the tenant through a process server. The New York City Administrative Code was amended in 2010 to increase regulation over process servers. Process servers are now required to obtain a license, and process-serving agencies can only hire those who have already obtained a license.²⁴ In order to obtain a license the server must pass an examination that tests familiarity with the proper service of process in New York City and knowledge of all relevant laws.²⁵ A licensed process server during the commission of services has to carry and operate an electronic device

22. N.Y. REAL PROP. ACTS. LAW § 735.

23. *Parras v. Ricciardi*, 185 Misc. 2d 209, 710 N.Y.S.2d 792 (N.Y. Civ. Ct. 2000).

24. N.Y.C. ADMIN. CODE § 20-403(a)(b).

25. N.Y.C. ADMIN. CODE § 20-406(c).

that uses a global positioning system, wi-fi device, or another form of technology prescribed by the Commissioner that will electronically record the date, time, and location of service or attempted service.²⁶ Furthermore, the Department of Consumer Affairs is required to provide all process servers and agencies with educational materials that identify the laws and regulations relating to service of process in New York City.²⁷ Any person who is injured by improper service can bring a cause of action against the process server or agency, and possibly be entitled to compensatory and punitive damages, injunctive relief, and attorney fees.²⁸

The respondent may raise defenses in an answer or in a motion to dismiss. In some cases the court may decide the case based on information in these documents; however, if the court does not rule on these documents and if the parties cannot reach an agreement, a trial must be held. The landlord has the burden of proof in eviction proceedings, and must prove a *prima facie* case by a preponderance of the evidence.

If the tenant fails to appear to answer the petition, or fails to appear at trial, and the court determines that the petitioner has a *bona fide* claim for relief, the court will render a default judgment in favor of the petitioner. If a respondent appears in a matter, a judgment cannot be rendered without a trial or hearing unless the parties agree to a judgment by stipulation.

A judgment in an eviction proceeding will always be possessory, that is, it will determine which party has the right to possess the premises. The judgment may also be for money damages. In a nonpayment proceeding, if a tenant pays the landlord the amount of a money judgment before a warrant of eviction is issued, the possessory judgment cannot be executed.

A large percentage of summary eviction proceedings are settled by stipulation between the parties. The parties may determine the terms of the stipulation. The stipulation need not involve a judgment. The CPLR provides that, to be binding, a stipulation must be in writing and subscribed by the parties or their attorneys or reduced to the form of a court order and entered.²⁹

26. N.Y.C. ADMIN. CODE § 20-410.
27. N.Y.C. ADMIN. CODE § 20-406.4.
28. N.Y.C. ADMIN. CODE § 20-409.2.
29. N.Y. C.P.L.R. § 2104.

§ 9:2.6 Warrant of Eviction

The warrant of eviction is the document that authorizes an eviction. The court issues a warrant of eviction to the county sheriff, a city marshal or a constable, describing the property and directing the officer to remove all persons and put the petitioner in possession of the premises. The sheriff, marshal, or constable is then, and only then, authorized to execute an eviction. When a Notice of Eviction is personally served on a tenant, it may be executed any time after the expiration of seventy-two hours. In serving the Notice of Eviction on the tenant, the marshal, sheriff, or constable must comply with the requirements of the RPAPL for service of process. In New York City, if the respondent is served by any means other than personal service, the warrant of eviction cannot be executed until the sixth business day after the date of the Notice.³⁰ If the warrant of eviction is not executed within thirty days of the original Notice of Eviction, or if there is a stay of eviction that later expires or is vacated, the tenant must be served with a new Notice of Eviction before the eviction can be performed,³¹ in order to ensure that a tenant will have adequate notice of the impending eviction.

In New York City, special provisions also govern the eviction process if an elderly or disabled person is involved in the proceeding. If the tenant or any occupant of the residence is disabled or elderly, the eviction must be postponed for two weeks. During the postponement period, the marshal, sheriff, or constable must notify the Department of Investigation, which will then notify Adult Protective Services of the presence of the disabled or elderly individual on the premises at least twenty-four hours in advance of the new eviction date. Therefore, marshals are required to find out in advance if the premises are occupied by people considered to be at risk. Marshals are required to make a “reasonable effort to obtain this information.”³²

§ 9:2.7 Harassment

Recent amendments to the administrative code of New York City expanded tenant protections by adding (1) an owner’s duty not to

30. NEW YORK CITY MARSHALS HANDBOOK OF REGULATIONS, ch. IV §§ 5-1, 5-2 (effective Oct. 24, 1997), available at www.nyc.gov/html/doi/html/marshals/handbook.shtml.

31. *Id.* at ch. IV § 5-4.

32. *Id.* at ch. IV § 6-6; RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK 15:57.

harass,³³ and (2) a cause of action based on a claim of harassment.³⁴ “Harassment” is defined as any act or omission by the landlord that causes or is intended to cause the tenant to vacate or surrender any rights in relation to occupancy.³⁵ This definition encompasses three categories: (1) violence, threats, and illegal eviction; (2) repeated interruptions or discontinuances of essential services, or failing to correct conditions underlying a vacate order; and (3) commencing repeated baseless or frivolous court proceedings.³⁶ In addition, a catch-all provision provides tenants with protection from all other acts or omissions that “substantially interfere with or disturb the comfort, repose, peace or quiet of the [tenant].”³⁷

As a result of these amendments, tenants are relieved of the burden of showing that the owner’s conduct was intentional if the owner’s conduct causes the tenant to vacate, surrender, or waive any rights. Furthermore, the owner has the burden of establishing as an affirmative defense that the conditions did not result from intentional conduct, that the owner corrected the problem, and that the owner’s corrective actions were “reasonable” and in “good faith.”

§ 9:3 Housing Discrimination and Tenant Screening

Housing discrimination remains a stubborn problem. The legal principle that every human being has a right to be free from discrimination in seeking access to available housing is firmly established, yet housing discrimination against the elderly, members of minority groups, and others remains commonplace. At one time, under common law, an owner of residential real property could rent to or refuse to rent to whomever he or she wished, regardless of the reason. However, local, state, and federal legislation have provided protection from housing discrimination for an increasing number of specified categories of people (protected categories). A landlord cannot refuse to rent to someone, or alter the terms and conditions of a rental agreement, in violation of laws that protect such people against housing discrimination. Moreover, policies that are not discriminatory on their face but have a disparate impact on the elderly or on racial, gender, or ethnic groups can violate fair housing laws. The elderly have significant

33. N.Y.C. ADMIN. CODE § 27-2005.

34. N.Y.C. ADMIN. CODE § 27-2115(h).

35. N.Y.C. ADMIN. CODE § 27-2004.

36. N.Y.C. ADMIN. CODE § 27-2004(48)(a)–(d).

37. N.Y.C. ADMIN. CODE § 27-2004(48)(g).

legal protection against housing discrimination because age is a protected category in city, state, and federal anti-discrimination legislation.

There are local, state, and federal remedies for housing discrimination that a victim of discrimination can pursue. Eviction motivated by discrimination or prejudice against someone in a protected category is prohibited. Pursuing a discrimination complaint in the courts may in some cases make it possible to obtain a stay of eviction proceedings.³⁸

§ 9:3.1 Protections Based on Age

The Age Discrimination Act of 1975³⁹ prohibits recipients of federal financial assistance, such as public housing authorities and private landlords receiving federal housing subsidies, from using age distinctions or taking “any other actions that have the effect, on the basis of age, of excluding individuals from, denying them the benefits of, or subjecting them to discrimination.”⁴⁰

Additional forums for complaint, causes of action, and remedies are found in New York state and city statutes. The New York State Human Rights Law protects people from housing discrimination, which is based on age, as well as on race, creed, color, national origin, sex, disability, familial status, sexual orientation⁴¹ or marital status. The law makes it an unlawful discriminatory practice for anyone who sells, rents, or leases housing accommodations, or for her or his employee, to refuse to sell, rent, or lease; discriminate in the terms of such sale or lease; or to engage in advertising or inquiries which cause

38. *Twenty Seven Naught One Assocs. v. Tirado*, N.Y.L.J., Nov. 29, 1995, 28:5 (Civ. Ct. Bronx County); *Priolo v. St. Mary’s Home for Working Girls, Inc.*, 157 Misc. 2d 494, 616 N.Y.S.2d 36, 597 N.Y.S.2d 890 (Sup. Ct. N.Y. County 1993), *aff’d*, 207 A.D.2d 664 (1st Dep’t 1994) (plaintiff-tenants were granted a preliminary injunction barring eviction from St. Mary’s Home for Working Girls based, in part, on a claim of age discrimination).

39. 42 U.S.C. §§ 6101 *et seq.*; 24 C.F.R. §§ 146.1 *et seq.*

40. 24 C.F.R. § 146.13(a)(2)(i). An exception exists for discriminatory action that “reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity.” 24 C.F.R. § 146.13(b).

41. The Sexual Orientation Non-Discrimination Act (SONDA), Executive Law § 290(3), prohibits discrimination on the basis of actual or perceived sexual orientation in employment, housing, public accommodations, education, credit, and the exercise of civil rights. SONDA became effective on January 16, 2003.

discrimination on the basis of the victim's status in one or more of the protected categories. Note, however, in a recent decision, the State Division of Housing and Community Renewal ruled that a landlord of a rent stabilized apartment is not required to add the name of the tenant's domestic partner to the lease.⁴² This decision was affirmed by the New York State Supreme Court.⁴³ This statute does not apply to religious organizations.⁴⁴ Another recent decision held that a tenant's common law marriage to her elderly, disabled "husband," with whom she lived for over forty years and had two children, did not permit him to stand in place of a legal "spouse" or nontraditional "family member" within the meaning of Rent Stabilization Code §§ 2524.2 and 2524.4, which provide exemptions from owner use holdover proceedings for a tenant or tenant's spouse under a rent-stabilized lease if the tenant is disabled or a senior citizen. Therefore, the landlord was not required to provide equivalent or superior accommodations at the same or lower regulated rent in a closely proximate area.⁴⁵

In New York City, antidiscrimination provisions in the New York City Human Rights Law ban housing discrimination anywhere in New York City based on actual or perceived race, creed, color, national origin, gender, age, disability, sexual orientation, marital status, partnership status, alienage or citizenship status, lawful source of income (including income derived from Social Security or any form of federal, state, or local public assistance or housing assistance, including section 8 vouchers), or because children are, may be, or would be residing with a person.⁴⁶ The statute makes it unlawful for anyone who sells, rents, or leases housing accommodations or for any of her/his employees to refuse to sell, rent or lease; discriminate in the terms of such sale or lease; or to engage in advertising which causes discrimination on the basis of a person's status in one or more of the protected categories. The New York City Human Rights Law covers private as well as government action. Owners of owner-occupied two-family homes and lessors of rooms within the lessor's

42. Zagrosik v. New York State Div. of Hous. & Cmty. Renewal, Docket No. SI 410003 RP, 3/15/2005.

43. Zagrosik v. New York State Div. of Hous. & Cmty. Renewal, 817 N.Y.S.2d 486 (Sup. Ct. N.Y. County 2006).

44. N.Y. EXEC. LAW § 296(11).

45. See Zunce v. Rodriguez, 22 Misc. 3d 265, 871 N.Y.S.2d 828 (N.Y. City Civ. Ct. 2008).

46. N.Y.C. ADMIN. CODE § 8-107(5)(a) (N.Y.C. HUMAN RIGHTS LAW).

apartment are exempt from the statute, unless the owner engages in outreach for tenants other than family members. In addition, dormitory houses or hotels may restrict residents to one sex where residents occupy the premises on a permanent rather than transient basis. Furthermore, the provisions regarding discriminatory practices on the basis of lawful source of income do not apply to housing accommodations that contain five or fewer housing units, except when tenants are subject to rent control laws; however, the provisions do apply to persons who have the right to sell, rent, or lease, or approve the sale, rental, or lease of at least one housing accommodation that contains six or more housing units.⁴⁷ The statute also does not apply to religious organizations. Damages for violation of the New York City Human Rights Law can be substantial. In one case, a tenant was awarded \$100,000 for mental anguish, and civil penalties of \$25,000 were assessed against the landlord, as a result of the landlord's harassment of the tenant based on his sexual orientation and HIV status.⁴⁸

§ 9:3.2 **Protections Based on Disability**

Elderly persons with disabilities (whether or not the disabilities are related to age) also have federal statutory protection from housing discrimination under several federal laws. The purpose of the Americans with Disabilities Act (ADA) of 1990 is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities [and] . . . to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities.”⁴⁹ Section 504 of the Rehabilitation Act of 1973 provides: “No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁵⁰ Title VIII of the Civil Rights Act of 1968 (“Fair Housing Act”) forbids housing discrimination because of disability as well as because of race, color,

47. *Id.*

48. 119–121 E. 97th St. Corp. v. N.Y. City Comm’n on Human Rights, 220 A.D.2d 79, 642 N.Y.S.2d 638 (1st Dep’t 1996).

49. 42 U.S.C. § 12101(b).

50. 29 U.S.C. § 794.

religion, sex, national origin, or familial status. The statute covers private as well as government action.⁵¹

The Fair Housing Act and the Americans with Disabilities Act both define “handicap” as “a physical or mental impairment which substantially limits one or more major life activities . . . a record of such an impairment; or being regarded as having such an impairment.”⁵² Under both the New York State Civil Rights Law and the New York State Human Rights Law, “disability” is defined as:

a physical, mental, or medical impairment resulting from anatomical, physiological genetic or neurological conditions, which prevents the exercise of a normal bodily function, or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, or a record of such impairment, or a condition regarded by others as such an impairment.⁵³

The New York City Human Rights Law defines “disability” as “any physical, medical, mental, or psychological impairment, or a history or record of such impairment.”⁵⁴

§ 9:3.3 Protections Based on Source of Income

In 2008, New York City’s Human Rights Law was amended to add Administrative Code of the City of New York, §§ 8-101 *et seq.*, which prohibits landlords from rejecting or discriminating against otherwise eligible tenants or applicants based on any “lawful source of income.”⁵⁵ Under the amendment, known as Local Law 10 of 2008, lawful sources of income include “income derived from social security or any form of federal, state or local public assistance or housing assistance including Section 8 vouchers.”⁵⁶ Denial of sale, rental, or leasing of any housing accommodation on the basis of lawful income constitutes unlawful discrimination, as does advertising or listing housing units as unavailable to recipients of public assistance. The statute is applicable to tenants in residence, as well as potential

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51. 42 U.S.C. §§ 3601 *et seq.*, as amended by Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–20, 3631; 24 C.F.R. §§ 100–125.
 52. 42 U.S.C. §§ 12102, 3602(a); 24 C.F.R. § 100.201.
 53. N.Y. EXEC. LAW § 292(21).
 54. N.Y.C. ADMIN. CODE § 8-102(16)(a) [N.Y.C. HUMAN RIGHTS LAW].
 55. N.Y.C. ADMIN. CODE § 8-101.
 56. N.Y.C. ADMIN. CODE § 8-102(25).

tenants.⁵⁷ The statute does not apply to housing accommodations that contain five or fewer housing units, except for units that are subject to rent control.

The courts have been enforcing the amendment. In *Kosoglyadov v. 3130 Brighton Seventh, LLC*,⁵⁸ the Appellate Division held that J-51 landlords must accept vouchers from their tenants. Under *Timkovsky v. 56 Bennett, LLC*,⁵⁹ the court held that the landlord's refusal to accept Section 8 vouchers constitutes unlawful discrimination, and thus violates the city's human rights law. Landlords refusing to accept Section 8 may be subject to discrimination complaints before the New York City Commission on Human Rights. Additionally, such landlords may be estopped from demanding the full lease rent in Housing Court when rent arrears were due to the landlord's illegally refusing to accept a Section 8 voucher.⁶⁰ A recent decision required a landlord to accept a tenant's Section 8 voucher for her current two-bedroom apartment, even though the landlord claimed the voucher was only for a studio apartment.⁶¹

§ 9:3.4 Construction Standards

The Fair Housing Amendments Act of 1988⁶² requires certain construction standards for multifamily dwellings (four or more dwelling units) built for occupancy after March 1, 1991.⁶³ The New York State Human Rights Law also requires certain construction standards for multifamily dwellings built for occupancy after March 13, 1991.⁶⁴ Dwellings that are covered by these laws must be both accessible and adaptable to disabled people. The New York City Human Rights Law also requires certain alterations, additions, repairs, and changes for people with disabilities.⁶⁵

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57. See *Matter of Rizzutti v. Hazel Towers*, N.Y.L.J. Apr. 4, 2008, 27:1 (Sup. Ct. N.Y. County).
 58. *Kosoglyadov v. 3130 Brighton Seventh, LLC*, 54 A.D.3d 822, 863 N.Y.S.2d 777 (N.Y. App. Div. 2d Dep't 2008).
 59. *Timkovsky v. 56 Bennett, LLC*, 23 Misc. 3d 997, 881 N.Y.S.2d 823 (Sup. Ct. N.Y. County 2009).
 60. *667 East 187th St. LLC v. Walker*, 23 Misc. 3d 1118(A) (N.Y. City Civ. Ct. 2009).
 61. See *Florentino v. Nokit Realty Corp.*, 29 Misc. 3d 190, 906 N.Y.S.2d 689 (N.Y. Sup. 2010).
 62. 42 U.S.C. §§ 3601–3620.3631.
 63. 42 U.S.C. § 3604(f)(3)(C).
 64. N.Y. EXEC. LAW § 296(2-a)(d)(1-3).
 65. N.Y.C. ADMIN. CODE § 27-123.1.

§ 9:3.5 Reasonable Accommodation

Under federal, state, and New York City antidiscrimination laws, persons who are prohibited from discriminating are also required to make “reasonable accommodation” for people with disabilities.⁶⁶ A “reasonable accommodation” within the meaning of the Fair Housing Amendments Act is any modification that would not impose undue hardship or burden on the entity making the accommodation, and that would not undermine the basic purpose that the requirement seeks to achieve.⁶⁷ For example, discharging from employment and evicting an otherwise qualified individual employee with AIDS, rather than attempting to make reasonable accommodations for the individual’s illness, may violate section 202 of the Americans with Disabilities Act.⁶⁸ In other examples: a court held that acceptance of a section 8 voucher was a reasonable accommodation for the tenant’s disability;⁶⁹ a court dismissed a holdover proceeding against a tenant who had installed a freezer in violation of the landlord’s house rules where the tenant showed that the freezer was necessary for her family to use and enjoy the apartment because she suffered from a “panic disorder” that prevented her from leaving her home to shop for food for her family;⁷⁰ and a court required a landlord to reserve a parking place for a mobility-impaired tenant closer to her unit notwithstanding a policy to allow tenants to choose parking spaces on a “first come, first-served” basis as this constituted a “reasonable accommodation.”⁷¹ Additionally, a tenant’s request to move from the fourth floor of a rent-stabilized walk-up apartment to a vacant first floor apartment was within the scope of “reasonable accommodation” under the Fair Housing Act.⁷²

In a Housing Court case where the respondent asserted the defense of constructive eviction resulting from petitioner’s failure to make reasonable accommodation for her disability by installing a ramp to

66. N.Y.C. ADMIN. CODE § 8-102(18).

67. *Id.*

68. N.Y. Infirmary-Beekman Downtown Hosp. v. Sarris, 154 Misc. 2d 798, 588 N.Y.S.2d 748 (Civ. Ct. N.Y. County 1992).

69. Freeland v. Sisao LLC, N.Y.L.J., Apr. 10, 2008, 24:3 (Dist. Ct. E.D.).

70. Starret City, Inc. v. Adamson, N.Y.L.J., Apr. 12, 1995, 30:5 (Civ. Ct. Kings County).

71. Shapiro v. Cadman Towers, Inc., 51 F.3d 328 (2d Cir. 1995); see 24 C.F.R. §§ 100.1 *et seq.*

72. Bentley v. Peace and Quiet Realty 2 LLC, 367 F. Supp. 2d 341 (E.D.N.Y. 2005).

the building, the court ruled that it had jurisdiction to entertain any equitable defense or counterclaim and that the issues raised did not fall under the exclusive authority of the New York City Commission on Human Rights.⁷³

While landlords are required to make reasonable accommodations for disabled tenants, they do not necessarily have to bear the cost of these measures. In a recent opinion letter, New York State's Division of Housing and Community Renewal (DHCR) found that a landlord was entitled to a 1/40th increase in rent for accommodations made for a disabled tenant.⁷⁴ The agency also found that while such rent increases cannot be made without the occupying tenant's written consent, a tenant's written request for an ADA accommodation was considered written consent to the rent increase.

Making "reasonable accommodations" may also mean that an owner is required to allow a mentally disabled tenant to keep a pet in spite of a "no-pet" rule, where the pet assists the tenant in coping with her/his mental illness. Thus, a landlord in a federally assisted apartment complex was subject to the "reasonable accommodations" requirement of the Fair Housing Amendments Act, and a mentally disabled tenant who claimed he needed a cat to cope with his mental illness was entitled to keep the cat if at trial he proved that he was disabled, that he was otherwise qualified for the tenancy, that because of his disability it was necessary for him to keep the pet in order for him to use and enjoy the apartment, and that reasonable accommodations could be made to allow him to keep the pet.⁷⁵ In addition to these reasonable accommodation requirements, federally subsidized housing projects for the elderly or disabled must develop rules that permit tenants, with certain constraints, to have "common household pets."⁷⁶

73. *Brussels Leasing LP v. Young*, N.Y.L.J., June 14, 2000, 34:1 (Civ. Ct. Queens County).

74. *Tenant Requests Accommodation Under ADA, #16334*, DHCR Opin. Ltr. By Charles Goldstein (Nov. 12, 2002).

75. *Crossroads Apts. Assocs. v. LeBoo*, 152 Misc. 2d 830, 578 N.Y.S.2d 1004 (City Ct. Rochester 1991); *see also Prewitt v. U.S. Postal Serv.*, 662 F.2d 292 (5th Cir. 1981); *Majors v. Housing Auth. of DeKalb County Ga.*, 652 F.2d 454 (5th Cir. 1981); *Whittier Terrace Assoc. v. Hampshire*, 26 Mass. App. Ct. 1020, 532 N.E.2d 712 (1989).

76. 24 C.F.R. § 5.315; 12 U.S.C. § 1701r-1.

§ 9:3.6 Exemptions for Housing for Elderly

Housing that is developed and designed for use by the elderly is, as a general rule, exempt from laws prohibiting discrimination based on age or familial status. Thus, housing developments for the elderly can refuse to sell or rent to persons below a certain age and can refuse to rent or sell to families with children. Federal, state, and local fair housing laws all contain exemptions for housing specifically designed to accommodate the elderly. Under the Federal Fair Housing Act, protections regarding familial status do not apply to housing for older persons.⁷⁷ There are several types of housing provided under government programs that may be defined as “housing for older persons” and thus are exempt from antidiscrimination statutes.⁷⁸ In addition, certain other types of housing developments are exempt. Included in “housing for older persons” is housing provided under any federal or state program that is specifically designed and operated to assist persons, as defined in the state or federal program.⁷⁹ Moreover, housing that is intended for, and solely occupied by, persons sixty-two years of age or older is exempt from the “familial status” antidiscrimination provisions of the Fair Housing Act.⁸⁰

Housing intended and operated for persons fifty-five years of age or older may also qualify for exemption from “familial status” protections if it meets the following criteria:

- at least 80% of the units in the housing facility are occupied by at least one person fifty-five years of age or older,⁸¹ *and*
- there are policies and procedures that demonstrate an intent by the owner or manager to provide housing for persons of fifty-five years of age or older, and these policies and procedures are adhered to,⁸² *and*
- the housing facility or community complies with rules issued by the Secretary for verification of occupancy, including verification by reliable surveys and affidavits which shall be

77. 42 U.S.C. § 3607(b)(1); 24 C.F.R. § 100.302.

78. 42 U.S.C. § 3607(b)(2).

79. 42 U.S.C. § 3607(b)(2)(A).

80. 42 U.S.C. § 3607(b)(2)(B).

81. 42 U.S.C. § 3607(b)(2)(C)(i).

82. 42 U.S.C. § 3607(b)(2)(C)(ii).

admissible in administrative and judicial proceedings for the purposes of such verification.⁸³

The exemption for housing intended for the elderly has been held not to violate equal protection or due process.⁸⁴

Under New York State fair housing laws, publicly assisted housing can be granted exemptions to provide housing for a particular age group if there is no intent to prejudice other age groups.⁸⁵ The New York City Administrative Code also provides exemptions from familial status protections that are tied to the state and federal exemptions. It specifically exempts housing for “older persons” from familial status protections as defined in 42 U.S.C. § 3607 and regulations promulgated thereunder.⁸⁶

§ 9:3.7 Remedies for Discriminatory Housing Practices

Federal, state, and local laws provide remedies for discriminatory housing practices. Under federal law, an aggrieved party may file a complaint with the United States Department of Housing and Urban Development (HUD) within one year after the alleged discriminatory housing practice occurs or ceases.⁸⁷ Alternatively, an aggrieved party may choose to file a civil action in federal court without having exhausted administrative remedies.⁸⁸ The statute of limitations for filing a complaint or commencing an action is two years from the occurrence or termination of the allegedly discriminatory practice.⁸⁹

Under New York State law, a person claiming to be aggrieved by an unlawful discriminatory practice may file a complaint with the New York State Division of Human Rights within one year of the

83. 42 U.S.C. § 3607(b)(2)(C)(iii).

84. *Mt. Vernon Hous. Auth. v. Jordan*, 120 Misc. 2d 670, 466 N.Y.S.2d 546 (City Ct. Mount Vernon 1982), *aff'd*, 124 Misc. 2d 886, 480 N.Y.S.2d 72 (App. Term 2d Dep’t 1984) (housing authority policy barring single-person occupancy of two-bedroom units in Public Housing unless the occupant is fifty years of age or older did not constitute prohibited age discrimination as applied to a twenty-eight-year-old sole tenant of a four-and-one-half-room apartment).

85. N.Y. EXEC. LAW § 296(2-a)(e).

86. N.Y.C. ADMIN. CODE § 8-107(5)(h) (N.Y.C. HUMAN RIGHTS LAW).

87. 42 U.S.C. § 3610(a)(1)(A)(i).

88. 42 U.S.C. § 3613(a)(2); *Royster v. Martin*, 562 F. Supp. 623 (S.D. Ohio 1983).

89. 42 U.S.C. § 3613(a)(1)(A).

discriminatory act and seek injunctive relief and damages.⁹⁰ Under the New York State Executive Law an aggrieved person also has a private right of action for damages and other remedies unless the person has already filed an administrative complaint. Such actions are governed by the three-year statute of limitations.

Under the New York City Human Rights Law, a person claiming to be aggrieved by an unlawful discriminatory practice may file a complaint with the Law Enforcement Bureau of the New York City Commission on Human Rights any time within one year of the date on which the discriminatory act occurred, or the complainant may file an action directly in New York State Supreme Court.⁹¹ A complainant may be entitled to injunctive relief against eviction while a discrimination complaint is pending.

§ 9:3.8 Tenant-Screening Reports

In 2010 the New York City Administrative Code was amended to include legislation that allows prospective tenants to receive basic information about the existence of tenant-screening reports and the tenant's right to challenge them. The legislation was necessary because tenant-screening companies purchase data concerning cases brought by landlords in New York City Housing Court to evict tenants. These companies then sell tenant-screening reports to landlords. Landlords use these reports to evaluate prospective tenants and often reject tenants who have been sued by a prior landlord. The existence of these reports makes tenants reluctant to enforce their rights to decent housing by withholding rent since, once they are sued by a landlord, the case appears on the tenant-screening reports without any indication of the reason for the commencement of the non-payment proceeding. Furthermore, the tenant-screening reports do not take into account that tenants are taken to court through no fault of their own.

The 2010 legislation requires any user of tenant-screening reports to disclose to a prospective tenant who is the subject of such a report that any information submitted in the application can be used in a tenant-screening report and the name and address of the consumer

90. N.Y. EXEC. LAW § 297(5). Prescribed in N.Y. C.P.L.R. § 214(2), which is applicable to "an action to recover upon a liability, penalty or forfeiture created or imposed by statute."

91. N.Y.C. ADMIN. CODE § 8-109(a) (N.Y.C. HUMAN RIGHTS LAW).

reporting agency used.⁹² Furthermore, any user who takes adverse action against a prospective tenant on the basis of information contained in a tenant-screening report, must notify the tenant of their right (1) to inspect and receive a free copy of the report by contacting the consumer reporting agency; and (2) to dispute inaccurate or incorrect information contained in the report.⁹³ Lastly, users of tenant-screening reports have to post a sign in any location at which the principle purpose is conducting business transactions pertaining to the rental of residential real estate properties. The sign needs to include the names and addresses of all consumer-reporting agencies used, and inform the tenant of his or her rights in relation to such reports.⁹⁴

§ 9:4 Rights of Elderly Tenants

§ 9:4.1 SCRIE: Senior Citizen Rent Increase Exemption

The Senior Citizen Rent Increase Exemption Program (SCRIE) provides exemptions from all or part of certain rent increases for low-income senior citizens who live in various types of privately owned, government regulated housing. Housing in which tenants are eligible for SCRIE includes: rent-regulated, Mitchell-Lama, and other state-subsidized housing. Households with senior citizens that have income below the program's statutory limits are exempt from increases that bring their rent to over one-third of their household income. If the rent is already at or over one-third of household income, eligible senior citizens are exempt from any further rent increase, but rents are not rolled back. The SCRIE Program is authorized by state enabling legislation under the Real Property Tax Law⁹⁵ and implemented through local legislation.⁹⁶ For rent-stabilized and rent-controlled apartments, the SCRIE program is administered by the New York City Department of Finance.⁹⁷ Mitchell-Lama is administered by the Department of Housing Preservation and Development (HPD). In

92. N.Y.C. ADMIN. CODE § 20-808(a).

93. N.Y.C. ADMIN. CODE § 20-8-8(b).

94. N.Y.C. ADMIN. CODE § 20-809.

95. N.Y. REAL PROP. TAX LAW § 467-B.

96. N.Y.C. ADMIN. CODE § 26-406 (N.Y.C. RENT CONTROL LAW); N.Y.C. ADMIN. CODE § 26-509 (N.Y.C. RENT STABILIZATION LAW).

97. See New York City Department for the Aging Home Page, *available at* www.nyc.gov/html/dof/html/property/property_tax_reduc_drie.shtml.

New York City the SCRIE program can be reached by dialing 311 (or 212-NEW-YORK outside the five boroughs).

In addition to New York City, the following localities have adopted the SCRIE Program for units that are subject to the Emergency Tenant Protection Act:

- Nassau County: city of Glen Cove, town of North Hempstead, village of Great Neck, village of Great Neck Plaza, and village of Thomaston; and
- Westchester County: the cities of Mount Vernon, New Rochelle, White Plains, and Yonkers, the towns of Greenburgh and Mamaroneck, and the villages of Mamaroneck, Tarrytown, Pleasantville, Larchmont, Hastings-on-Hudson, and Irvington.

To be covered by the SCRIE Program, a household must be living in one of the following:

- rent-controlled apartment,
- rent-stabilized apartment or hotel unit,
- Mitchell-Lama apartment,
- apartment subject to the provisions of Private Housing Finance Law Article II, IV, V, or XI, or
- apartment in a building subject to a mortgage insured by the federal government pursuant to section 213 of the National Housing Act.

The New York City Administrative Code provides that a landlord may only charge a SCRIE-eligible tenant the greater of one-third of the aggregate disposable income of his or her household, or the “rent in effect immediately preceding the eligibility date.”⁹⁸ The Administrative Code further provides that a tenant household is eligible for SCRIE if:

- the head of the household is sixty-two or older, and entitled to possession or to the use or occupancy of the dwelling unit,
- the aggregate household income does not exceed the statutory limit, or
- the maximum rent for the dwelling unit exceeds one-third of the household income.⁹⁹

98. N.Y.C. ADMIN. CODE § 26-509(b)(3)(i).

99. N.Y.C. ADMIN. CODE § 26-509(b)(2).

“Head of household” is defined differently for families and nonfamilies. For families, the “head of household” is the person responsible for paying the rent, or the older spouse. For nonfamilies, the “head of household” is the oldest person who is a recognized tenant. In Mitchell-Lama housing, the “head of household” is the prime tenant. For a household to be eligible for the SCRIE Program in New York City, the combined annual disposable income, after deductions, of all members of the household must not total more than \$29,000, calculated as follows:

- Add together gross household income of all household members for the prior year. “Gross income” includes unearned income and earned income. Unearned income includes government benefits such as public assistance, supplemental security income (SSI), social security (SSA), pensions and interest from savings and investments. Earned income includes wages, salaries, net income from self-employment and business.
- Subtract deductions, which include federal, state, local and Social Security taxes of all household members, union dues, and court ordered support payments. A head of household who will have reduced income because of retirement may include this lesser amount in presenting the amount of household income for eligibility purposes. Carryover long-term capital losses, which are deductible for federal income tax purposes, are not deductible for purposes of SCRIE eligibility.¹⁰⁰

The SCRIE Program allows a tenant who later suffers a permanent decrease in income to apply for a re-determination of the amount of the SCRIE benefit. The City’s Department of Finance (DOF) will recalculate the frozen rent the tenant must pay so that the ratio of frozen income is the same as when the tenant first became subject to the SCRIE program. In the past, tenants could only apply for a re-determination either when it was time to renew SCRIE benefits or one year after the renewal date. Currently, state law (Chap. 594, Laws of New York, 2002) allows tenants to apply for the recalculation of their SCRIE benefits at any time.

It should be noted that the annual household income limitation has increased frequently over the years. It is \$29,000, effective July 1,

100. Coccaro v. Stupp, 170 Misc. 2d 196, 650 N.Y.S.2d 500 (1996).

2009. When evaluating if a person is eligible for SCRIE benefits, the effective income limitation should always be double-checked.¹⁰¹

Eligible tenants are exempt from that portion of covered rent increases which cause the rent to exceed one-third of the household's disposable income. The landlord is able to deduct the amount of the exemption from her or his real estate taxes. The exemption is calculated as follows:

- Divide the household's annual disposable income by twelve; divide further by three. The resulting amount is one-third of monthly disposable income.
- Compare the household's current rent or the rent as increased by an eligible rent increase with this amount. If the rent before the increase is greater than one-third of disposable income, the tenant is exempt from the entire increase. If the rent increase brings the rent over one-third of the household income, the tenant is exempt from the portion of the rent increase that exceeds one-third of the household income.

A household can be qualified for SCRIE even though it may not be aware of the program or not have applied for the benefit. However, a tenant who becomes aware of SCRIE at some time after the eligibility date is only entitled to have the benefit calculated as of the date of application and not as of the date of eligibility.¹⁰² *Nunez v. Dinkins*¹⁰³ was a class action on behalf of SCRIE-eligible individuals who had failed to file applications because they were unaware of the program.¹⁰⁴ The trial court decided in favor of the plaintiffs in 1996, holding that such persons were entitled to SCRIE benefits from the time they qualified for benefits, not from when they applied. However, in 1997, the Appellate Division, First Department reversed the trial court, holding that, "since [the Department of the Aging's] interpretation is rational and consistent with the statute's language and intent, we see no reason to disturb it."¹⁰⁵ The Court of Appeals subsequently affirmed.¹⁰⁶

101. See N.Y.C. ADMIN. CODE § 26-601(d).

102. *Nunez v. Giuliani*, 91 N.Y.2d 935 (1998).

103. *Nunez v. Dinkins*, 168 Misc. 2d 684, 641 N.Y.S.2d 983 (Sup. Ct. N.Y. County 1996).

104. *Id.*

105. *Nunez v. Giuliani*, 657 N.Y.S.2d 168 (1997).

106. *Nunez v. Giuliani*, 91 N.Y.2d 935 (1998).

Most, but not all, rent increases are covered by the SCRIE Program. Rent increases that are eligible for exemption under the SCRIE Program include all renewal increases and across-the-board increases, as well as:

- annual MBR increases for rent-controlled apartments;
- RGB increases for rent-stabilized apartments;
- hardship increases;
- fuel and labor cost pass-alongs; and
- MCI rent increases.

Rent increases that are not exempt under the SCRIE Program include individual apartment increases for new services or equipment where the tenant has expressly consented to the improvements.¹⁰⁷ Occasionally, a tenant's eligibility for SCRIE lapses and neither the tenant nor the landlord realize this has happened and both continue to behave as if the benefit is in place. When this happens, the landlord is not entitled to a tax abatement.¹⁰⁸ Nor can the landlord maintain an eviction proceeding against the tenant for rental arrears for the period both parties believed the SCRIE benefit to be in place; the landlord is instead relegated to an action for monetary damages, since "the program is structured so that a larger element of responsibility is entrusted to the landlord who would be in a better position to exercise business judgment that a senior citizen subsisting largely on a small fixed income."¹⁰⁹ When SCRIE benefits are provided by mistake, they cannot be recouped from the tenant.¹¹⁰

A senior citizen who is otherwise eligible for rent increase exemption and has received an exemption order while occupying a rent-controlled, rent-stabilized, or Mitchell-Lama apartment on or after March 28, 1977, may continue to benefit from the exemption if he or she moves to a housing unit similarly covered by SCRIE.¹¹¹

107. N.Y.C. ADMIN. CODE § 26-405(g)(1)(h); *see* *Ironton Realty v. Lagrulle*, 150 Misc. 2d 973, 571 N.Y.S.2d 181 (Civ. Ct. N.Y. County 1991).

108. *Levine v. Fannelli*, N.Y.L.J., Apr. 1, 1998, 28:5 (Civ. Ct. N.Y. County).

109. *Hoxha Assocs. v. Cannata*, N.Y.L.J., Nov. 13, 1996, 28:5 (Civ. Ct. Bronx County); quoting *1840 Realty Co. v. Shuven*, N.Y.L.J., Aug. 12, 1992, 25:2 (Civ. Ct. Kings County).

110. *Coccaro v. Stupp*, 170 Misc. 2d 196, 650 N.Y.S.2d 500 (1996).

111. *See, e.g.*, N.Y.C. ADMIN. CODE § 26-509(b)(7) (N.Y.C. RENT STABILIZATION LAW); N.Y. COMP. CODES R. & REGS. tit. 9 § 2202.20(j) (N.Y.C. RENT & EVICTION REGS.).

A landlord who collects rent in excess of the amount set forth in a SCRIE order may be subject to a rent overcharge under the applicable rent control or rent regulation law.¹¹² A tenant's violation of the provisions of the SCRIE Program is not grounds for termination of tenancy or eviction. Rather, the tenant is subject to liability for back rent and other penalties when, for example, a materially false statement is submitted on an application.¹¹³

§ 9:4.2 DRIE: Disability Rent Increase Exemption Program

In July of 2005, the New York State Legislature passed legislation amending the various laws enabling the SCRIE program (see above, section 9:4.1) to expand the class of heads of households eligible to participate in the rent increase exemption and tax abatement programs. The program went into effect October 10, 2005. To be eligible, a head of household must submit proof to the agency administering the program (the NYC Department of Finance) that he or she is receiving either (1) Social Security Disability Insurance (SSDI); (2) Supplemental Security Income (SSI) benefits; (3) U.S. Department of Veterans Affairs disability pension or compensation (must be military service-related); or (4) Disability-related Medicaid (if the applicant has received SSI or SSDI in the past).

[A] Income Limit

Unlike the SCRIE program, which uses an income limit that does not vary with household size, the DRIE income limit varies by household composition and living circumstances. It is pegged to the SSI "wage out" limit—the point at which, after allowable deductions, if the head of household were an SSI recipient, the head of household would no longer receive one dollar of SSI because of earned income. For 2010, in order for a single-person household to be income eligible for DRIE, the applicant's 2009 income must have been less than or equal to \$19,284. For households with two or more members, the income of all household members must be less than or equal to \$27,780.¹¹⁴

112. N.Y. REAL PROP. TAX LAW § 467-b(8); N.Y.C. ADMIN. CODE § 26-608.

113. *Levine v. Costanzo*, N.Y.L.J., Feb. 17, 1994, 24:3 (App. Term 1st Dep't).

114. See www.nyc.gov/html/dof/html/property/property_tax_reduc_drie.shtml.

[B] Criteria

The Department of Finance uses five criteria to determine eligibility:

- (1) Does the applicant rent an eligible apartment?
- (2) Is the applicant named on the lease or rent order, the tenant of record, or the spouse with a disability of either of the above?
- (3) Does the applicant receive eligible state or federal disability-related financial assistance?
- (4) Does the applicant meet the program's income eligibility requirement?
- (5) Does the applicant pay more than one-third of his or her household's aggregate disposable income on rent?¹¹⁵

§ 9:4.3 Eviction Protections

Senior citizen tenants have certain protections against eviction that are not enjoyed by other tenants.

[A] Cooperative and Condominium Conversions

Elderly tenants have special protection from eviction when housing is converted from rental to cooperative or condominium ownership. Units owned as cooperatives or condominiums are generally exempt from rent stabilization coverage.¹¹⁶ Thus, a tenant who rents a cooperative or condominium apartment from the owner of the unit is not subject to rent stabilization. However, nonpurchasing tenants who remain in a building that has been converted to condominium or cooperative ownership are treated differently under the law from newly renting tenants and will, either in the short or long term,

115. The NYC DRIE website contains more information and application instructions, *available at* www.nyc.gov/html/dof/html/property/property_tax_reduc_drie.shtml.

116. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.11(1) (N.Y.C. RENT STABILIZATION CODE); N.Y.C. ADMIN. CODE § 26-504 (Rent Stabilization Law applies to Class-A multiple dwellings "not owned as a cooperative or condominium").

retain rent stabilization protections. As a general rule, elderly tenants retain their rent-stabilized status, and cannot be evicted. Moreover, new tenants who rent from the sponsor of the conversion have been held to be covered by rent stabilization as well.¹¹⁷

There are two methods for conversion to cooperative or condominium ownership—noneviction plans and eviction plans. The rights of tenants who remain after conversion will depend on the method of conversion. Noneviction conversion plans, which require that purchase agreements be executed by a minimum of 15% of all dwelling units, are far more prevalent than eviction plans. Where the conversion is undertaken under a noneviction plan, rent-stabilized and rent-controlled units where nonpurchasing tenants reside remain subject to rent regulation.¹¹⁸

Under an eviction plan, which requires purchase agreements for 51% of the dwelling units, units occupied by nonpurchasing tenants that were rent-stabilized remain rent-stabilized until the end of the current lease term or three years after the date on which the plan is declared effective, whichever is later.¹¹⁹ However, nonpurchasing tenants in cooperatives and condominiums who are sixty-two years of age or older, and nonpurchasing tenants who are disabled, and the spouses of such tenants, are not subject to eviction based on the conversion and their units retain their rent-regulated status.¹²⁰ To assert this right they must file a form, which is to be provided by the housing converter, within sixty days of the date the plan is accepted for filing by the Office of the Attorney General indicating that they elect not to purchase.¹²¹

Such tenants can be evicted only for the reasons set forth in the General Business Law, which include

- nonpayment of rent;
- illegal use or occupancy of the premises; and

117. Paikoff v. Harris, 178 Misc. 2d 366, 679 N.Y.S.2d 251 (Civ. Ct. Kings County 1998).

118. N.Y. GEN. BUS. LAW § 352-eeee(2)(c)(iii); see 224 E. 18th St. Assocs. v. Sijacki, 138 Misc. 2d 494, 524 N.Y.S.2d 964 (Civ. Ct. N.Y. County 1987), *aff'd*, 143 Misc. 2d 565 (App. Term 1st Dep't 1989).

119. N.Y. GEN. BUS. LAW § 352-eeee(2)(d)(ii).

120. N.Y. GEN. BUS. LAW § 352-eeee(1)(f), (g); N.Y. GEN. BUS. LAW § 352-eeee(2)(d)(iv).

121. N.Y. GEN. BUS. LAW § 352-eeee(1)(f).

- refusal of reasonable access to the owner or a similar breach by the tenant of her/his obligations to the owner of the dwelling unit or the shares allocated thereto.¹²²

A “disabled person” for the purposes of this protection is a person with

an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment on the date the attorney general has accepted the plan for filing . . .¹²³

The spouses of disabled tenants are covered as well.¹²⁴

Once a remaining senior or disabled tenant vacates the rental unit, the unit is no longer rent-stabilized. As a general rule, if a tenant switches apartments in the same building for the convenience of the landlord, that tenant is entitled to continued rent-stabilization coverage in the new unit. However, in one case, when a tenant voluntarily relocated and received \$10,000 from the landlord to relocate, the apartment was deregulated.¹²⁵

[B] Personal Use Evictions

One of the grounds upon which a landlord can seek to evict a tenant who is subject to the rent regulation laws is for the owner’s personal use or for the use of his or her “immediate family,” including a spouse, child or stepchild, parent or stepparent, sibling, grandparent, grandchild, parent-in-law, or child-in-law of the owner.¹²⁶ However, senior citizens, as well as disabled persons, are exempt from personal use evictions unless the landlord offers equivalent or superior housing at the same or lower regulated rent in a closely proximate

122. N.Y. GEN. BUS. LAW § 352-eee(2)(d)(iii); *see* Valley Park Assocs. v. Sontag, 155 Misc. 2d 584, 588 N.Y.S.2d 762 (Dist. Ct. Nassau County 1992).

123. N.Y. GEN. BUS. LAW § 352-eeee(1)(g).

124. *Id.*

125. Coleman v. Klitzberg, N.Y.L.J., May 19, 1993, 29:4 (App. Term 2d Dep’t).

126. N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.5(a) (N.Y.C. RENT & EVICTION REGS.), §2520.6(n) (N.Y.C. RENT STABILIZATION CODE).

area.¹²⁷ The provisions and substantive law underlying eviction proceedings brought by a landlord to recover possession of a unit for “personal use and occupancy” (also referred to as “owner occupancy proceedings”) can differ depending on whether the tenancy is subject to rent stabilization or rent control. Under both systems, the petitioner-landlord must be a natural person, not a corporation or partnership.¹²⁸

Personal use evictions of rent-controlled tenants are governed by the New York City Administrative Code section 26-408(b)(1) and the Official Compilation of Codes, Rules and Regulations of the State of New York, Title 9, section 2204.5.

The owner must obtain a certificate of eviction from the state Division of Housing and Community Renewal (DHCR) to evict a rent-controlled tenant for personal use. Once the certificate has been obtained at DHCR, the owner must bring a proceeding in Housing Court, seeking a judgment and warrant of eviction. The standard for recovering possession of a rent-controlled unit is rigorous. The landlord must show an immediate and compelling need for the unit, that is, that he or she “seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his or her own personal use and occupancy, or for the use and occupancy of his or her immediate family.”¹²⁹

Personal use evictions of rent-stabilized tenants are governed by the New York City Administrative Code section 26-511(c)(9)(b) and the Official Compilation of Codes, Rules and Regulations of the State of New York, Title 9, section 2524.4(a). It is not necessary for an owner to obtain approval of DHCR for a personal use eviction of a rent-stabilized tenant. The landlord must notify the tenant during the appropriate “window period”—the period during which a renewal

127. N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.5(a) (N.Y.C. RENT & EVICTION REGS.); N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.4(a)(2) (N.Y.C. RENT STABILIZATION CODE).

128. *See* Fanelli v. New York City Conciliation & Appeals Bd., 90 A.D.2d 756, 455 N.Y.S.2d 814 (1st Dep’t 1982), *aff’d*, 58 N.Y.2d 952, 460 N.Y.S.2d 534 (1983); *Henrock Realty v. Tuck*, 52 A.D.2d 871, 383 N.Y.S.2d 47 (2d Dep’t 1976).

129. N.Y.C. ADMIN. CODE § 26-408(b)(1) (N.Y.C. RENT CONTROL LAW); N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.5(a) (N.Y.C. RENT & EVICTION REGS.); *see, e.g.*, *Jackson v. Biderman*, 151 A.D.2d 400, 543 N.Y.S.2d 433 (1st Dep’t 1989).

must be offered—of the intent not to renew.¹³⁰ If the tenant does not move out, the landlord can proceed directly in Housing Court, but only after the expiration of the lease.¹³¹ The application for recovery for personal use must be made in “good faith,” requiring a showing that the landlord or a member of his/her family have actual intent to take occupancy of the unit.¹³² This standard is less onerous than the “immediate and compelling need” standard of rent-controlled units.

For senior citizen or disabled tenants, a personal use eviction proceeding may not be maintained unless the landlord offers equivalent or superior housing at the same or lower regulated rent in a closely proximate area.¹³³ This provision was held to apply to gay life partners by the Civil Court,¹³⁴ but that application was subsequently disregarded by the Supreme Court.¹³⁵ For the purposes of this protection, a senior citizen is a person sixty-two years of age or older. Senior citizens who turn sixty-two before the eviction proceedings are “finally determined” can also claim the protections.¹³⁶ The definition of “disabled person” that applies is discussed above.¹³⁷

[C] Succession Rights

Because rent regulation has served to insulate apartments from the full pressure of the private housing market, rent regulated apartments are generally more affordable than unregulated units. People are also naturally inclined to want to remain in their homes and not be subjected to the dislocation, adjustments, and potential inability to find replacement housing that could be caused by a forced move. In light of this, household members who remain after the tenant of

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130. N.Y. COMP. CODES R. & REGS. tit. 9, § 2524.4 (N.Y.C. RENT STABILIZATION CODE).
131. *Id.*
132. *Dusza v. Rela*, N.Y.L.J., Nov. 8, 1991, 26:3 (App. Term 2d & 11th Jud. Dists.); *Fazio v. Joy*, 89 A.D.2d 604, 452 N.Y.S.2d 461 (2d Dep’t 1982), *aff’d*, 58 N.Y.2d 674, 458 N.Y.S.2d 526 (1982).
133. N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.5 (N.Y.C. RENT & EVICTION REGS.), § 2524.4(a)(2) (N.Y.C. RENT STABILIZATION CODE).
134. *Mandell v. Cummins*, 2001 N.Y. Slip Op. 40103(u), 2001 WL 968362 (N.Y. City Civ. Ct.).
135. *Zagrosik v. New York State Div. of Hous. and Cmty. Renewal*, 12 Misc. 3d 1076, 817 N.Y.S.2d 486 (N.Y. County 2006).
136. *Blane v. Isles*, 142 Misc. 2d 1, 539 N.Y.S.2d 608 (App. Term 1st Dep’t 1988).
137. *See supra* section 9:4.3[A]. *See also* N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.6(q) (N.Y.C. RENT STABILIZATION CODE).

record leaves or dies will often seek to succeed to the tenancy rights of the departed leaseholder. Landlords, on the other hand, are able to obtain significant financial advantages when rent regulated apartments are vacated, either through rent increases or through conversion to cooperatives or condominiums. As a result, rents for regulated units with continuous tenancies are lower than rents for units with high turnover. The tension between these conflicting interests has made the right of remaining household members to retain rent regulated housing units one of the most hotly contested areas of landlord-tenant law.

The succession rights of tenants in all forms of rent regulated apartments throughout New York State are now identical.¹³⁸ The Rent and Eviction Regulations (for rent-controlled housing) and the Rent Stabilization Code (for rent-stabilized housing) provide that

any member of the tenant's family . . . [if the tenant] has permanently vacated the housing accommodation, any member of such tenant's family . . . who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two (2) years, or where such person is a "senior citizen," or a "disabled person" . . . , for a period of no less than one (1) year, immediately prior to the permanent vacating of the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease.¹³⁹

The succession requirements for the aging are easier to meet than for other tenants.

In 1989, a landmark decision by the New York State Court of Appeals expanded the concept of family for the purposes of rent regulation succession rights to include nontraditional as well as traditional family units.¹⁴⁰ In *Braschi*, the Court of Appeals held that a homosexual couple was a family for the purpose of succession rights to a rent-controlled apartment. A remaining family member (traditional or non-traditional) is entitled to be named as a tenant on a renewal lease for a rent-stabilized unit, or to assume the rights of a statutory rent-controlled tenant, if the remaining household member meets the

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138. See N.Y. COMP. CODES R. & REGS. tit. 9, § 2104.6 (N.Y.S. RENT & EVICTION REGS.), § 2204.6 (N.Y.C. RENT & EVICTION REGS.); N.Y. COMP. CODES R. & REGS. tit. 9, § 2523.5 (N.Y.C. RENT STABILIZATION CODE).
 139. N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d) (N.Y.C. RENT & EVICTION REGS.), § 2523.5(b) (N.Y.C. RENT STABILIZATION CODE).
 140. *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 544 N.Y.S.2d 784 (1989).

criteria set forth in the regulations. A remaining household member may only succeed to tenancy rights where the tenant of record has permanently vacated the apartment by death or voluntary departure.¹⁴¹ A traditional family member is defined in the regulations 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.¹⁴²

A nontraditional family member is defined in the regulations as

Any other person residing with the tenant . . . as a primary [resident] . . . who can prove emotional and financial commitment[] and interdependence between such person and the tenant. . . .¹⁴³

This definition embraces a broad cross-section of households which had previously not been recognized as able to pass on the right to retain a rent-regulated home. To establish succession rights as a nontraditional family member, the remaining household member must display some of the characteristics set forth in the regulations.¹⁴⁴ Evidence of a relationship that is akin to that of a parent and an “adult child” is sufficient to establish a nontraditional family member’s succession rights.¹⁴⁵ Evidence of the following, without more, has not been sufficient to defeat a claim for succession

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141. N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d)(1) (N.Y.C. RENT & EVICTION REGS.), § 2523.5(b)(1) (N.Y.C. RENT STABILIZATION CODE).
 142. N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.6(o)(1) (N.Y.C. RENT STABILIZATION CODE), § 2204.6(d)(3)(i) (N.Y.C. RENT & EVICTION REGS.).
 143. N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.6(o)(2) (N.Y.C. RENT STABILIZATION CODE), § 2204.6(D)(3)(i) (N.Y.C. RENT & EVICTION REGS.).
 144. *Ramirez v. Lewis*, 177 A.D.2d 296, 575 N.Y.S.2d 868 (App. Div. 1st Dep’t 1991) (court refused to find a family relationship of a heterosexual life partner where there was no showing of shared expenses, shared bank accounts or credit cards, formalized legal obligations, or attendance at family functions). *See also* *Westprop Corp. v. Smythe*, N.Y.L.J. July 27, 2009, 27:1 (App. Term 1st Dep’t).
 145. *In re Davidson*, 28 Misc. 3d 536, 903 N.Y.S.2d 685 (Sup. Ct. Kings Cnty. 2010) (respondent, niece of the deceased, had cared for, lived with, and had an extremely close personal relationship with the deceased for thirty years until the deceased’s death).

rights: an existing marriage of the tenant or remaining household member;¹⁴⁶ an affair of the remaining household member during the period of cohabitation;¹⁴⁷ and the failure of the tenant to list the remaining household member on annual Senior Citizen Rent Increase Exemption statements.¹⁴⁸ The fact that the remaining household member was employed as a caretaker or live-in-attendant is insufficient to defeat a succession claim, if indications of a non-business, family relationship predominate.¹⁴⁹ In addition, the Court of Appeals, in *Levin v. Yeshiva University*, has found that denying surviving life-partners the same succession rights afforded married couples violates New York City's prohibition against discrimination based on marital status.¹⁵⁰ Lastly, there is no "hierarchy of succession rights." Traditional and nontraditional family members have equal succession rights.¹⁵¹

The person seeking to assert succession rights must also show that he/she has used the apartment as a primary residence and that

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146. Estate of Smith v. Attwood, N.Y.L.J., May 18, 1990, 21:6 (App. Term 1st Dep't) (the existing legal marriage of the deceased tenant did not defeat the remaining household member's claim to have been the heterosexual life partner of the deceased tenant). *Lepar Realty Corp. v. Griffen*, 151 Misc. 2d 579, 581 N.Y.S.2d 521 (App. Term 1st Dep't 1991) (the fact that tenant was married to, but not residing with, another was not dispositive).
147. *Picon v. O.D.C. Assocs.*, No. 86-22894 (Sup. Ct. N.Y. Co. Jan. 28, 1991) (the fact that the remaining household member may have had an affair does not necessarily mean that he lived elsewhere or that he and the deceased tenant were not life partners).
148. *Levine v. Costanzo*, N.Y.L.J., Feb. 17, 1994, 24:3 (App. Term 1st Dep't) (failure by the deceased tenant to list the remaining household member on the annual Senior Citizen Rent Increase Exemption statements was a factor to be considered, but not dispositive).
149. *Classic Props., L.P. v. Martinez*, 168 Misc. 2d 514, 646 N.Y.S.2d 755 (App. Term 1st Dep't 1996). See also *Uptown Realty Grp., L.P. v. Buffalo*, 5 Misc. 3d 430, 784 N.Y.S.2d 309, 2004 N.Y. Slip Op. 24313 (Civil Ct. 2004). But see, *Stux 520 Grp. v. Herard*, N.Y.L.J., Sept. 12, 1991, 22:1 (App. Div. 1st Dep't) (the close relationship between the tenant and a live-in-attendant was still found to be primarily an employer/employee relationship).
150. *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 730 N.Y.2d 15 (2001). See also *Kirkpatrick v. 60 Sutton Corp.*, N.Y.C. COMM. ON HUMAN RIGHTS Complaint No. FH164032991DN (Dec. 21, 1992) (refusal to transfer cooperative shares and occupancy agreement to surviving partner found discriminating because of sexual orientation and marital status).
151. *Fleishman Realty Corp. v. Garrison*, 2010 WL 1254541, 27 Misc. 3d 1202(A) (Civ. Ct. Bronx County Mar. 25, 2010).

the durational requirements of the regulations have been met. Determining the commencement of a nontraditional relationship is crucial to meeting the durational requirements and should be done by considering the factors set forth in the regulations.¹⁵² For the senior citizen or disabled person, the remaining household member must have resided in the apartment for no less than one year before the tenant vacated, or from the inception of the tenancy or the commencement of the relationship.¹⁵³ A disabled person is “a person with an impairment that results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which is expected to be permanent and which prevents such person from engaging in any substantial gainful employment.”¹⁵⁴ A “senior citizen” is defined as a person sixty-two years of age or older.¹⁵⁵

The durational requirement is not considered interrupted by any period during which a family member temporarily relocates because he or she

- is incarcerated;¹⁵⁶
- is engaged in active military duty;
- is enrolled as a full-time student;
- is not present due to a court order unrelated to the lease or the RPAPL;
- is engaged in employment requiring temporary relocation;
- is hospitalized;

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152. *Rent Stabilization Ass’n v. Higgins*, 562 N.Y.S.2d 962, 969–70 (App. Div. 1st Dep’t) (determination of the time of commencement of the family relationship can be made by considering “aspects of the relationship, from the date of intermingling and joint ownership of assets . . . to when the two individuals began a close relationship with each other’s relatives”).
153. N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d)(1) (N.Y.C. RENT & EVICTION REGS.), § 2523.5(b)(1) (N.Y.C. RENT STABILIZATION CODE).
154. N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.6(q) (N.Y.C. RENT STABILIZATION CODE), § 2204.6(d)(3)(iii) (N.Y.C. RENT & EVICTION REGS.).
155. N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.6(p) (N.Y.C. RENT STABILIZATION CODE); N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d)(3)(ii) (N.Y.C. RENT & EVICTION REGS.).
156. *Kelly Mgmt. LLC v. Soltero*, 898 N.Y.S.2d 415 (Civ. Ct. Bronx County 2010).

- has other reasonable grounds for absence as determined by DHCR.¹⁵⁷

However, two First Department cases have created a major barrier to otherwise legitimate succession claims where the tenant of record did not give the landlord formal notice immediately upon departure from the apartment.¹⁵⁸ These cases held that the two year co-occupancy period is calculated from the date that the tenant notifies the landlord, not the date he or she physically vacated the apartment. As a result, the successor could not prove actual co-occupancy for the required period.

The succession rights provisions of the rent regulation laws do not apply to tenants who remain as rent regulated tenants because they are “eligible senior citizens” or “eligible disabled persons” protected from eviction when buildings are converted to cooperative or condominium ownership pursuant to an eviction plan. “The broad provisions for family member succession applicable generally under rent stabilization are not implicated in the specific instance of cooperative eviction plans, where the Legislature has expressly limited rental occupancy of nonpurchasers to senior citizen tenants, disabled persons, and their spouses.”¹⁵⁹

[D] Right to Share Apartment with Roommates

As rents rise and there is a growing population of senior citizens living on fixed incomes, many tenants would be unable to remain in their apartments if they did not have the right to share their living expenses with a roommate.

In 1983, the state legislature enacted legislation prohibiting landlords from restricting occupancy of residential rental premises. Commonly known, as the “roommate law,” tenants in New York are entitled to share their apartments with roommates. Prior to its passage, only persons named on the lease and their immediate family members could occupy an apartment together.

157. N.Y. COMP. CODES R. & REGS. tit. 9, § 2523.5(b)(2) [N.Y.C. RENT STABILIZATION CODE].

158. East 96th St. Co. LLC v. Santos, 13 Misc. 3d 133(A) (App. Term 1st Dep’t 2006); 360 West 55th St. v. Anvar, 13 Misc. 3d 7, 822 N.Y.D.2d 353 (App. Term 1st Dep’t 2006); *see also* Third Lenox Terrace Assoc. v. Edwards, 23 Misc. 3d 126(A), 2009 WL 806812 (App. Term 1st Dep’t 2009); 354 E. 66th Street Realty Corp. v. Curry, 2010 WL 118213, 26 Misc. 3d 130(A) (App. Term 1st Dep’t Jan. 13, 2010).

159. Gordon v. Mellinger, N.Y.L.J., Mar. 18, 1994, 21:1 (App. Term 1st Dep’t).

Under the “roommate law” if only one tenant has signed the lease, the tenant is entitled to share the rental premises with one roommate (and the dependent children of the roommate) who is not a member of the tenant’s immediate family.¹⁶⁰ If two or more tenants have signed the lease and they all live in the premises, then they are not entitled to take in a roommate. But if one or more of the named tenants on the lease moves out, the departing tenant or tenants can be replaced by the same number of roommates.¹⁶¹ The tenant is required to inform the landlord of the name of the roommate within thirty days after the roommate moves in, or within thirty days after the landlord requests this information from the tenant.¹⁶²

It is important to note that there are restrictions that apply to rent-stabilized tenants on what they may charge a roommate.¹⁶³ Rent-stabilized tenants can only charge a roommate their “proportionate share” of the rent.¹⁶⁴ The “proportionate share” is the legal regulated rent divided by the total number of occupants and tenants residing in the apartment.¹⁶⁵

In actions by landlords to evict rent-stabilized tenants, the courts have shown increasing flexibility in determining what is a “proportionate share,” by allowing tenants to charge greater than the formulaic portion of the rent and include the cost of utilities, and other non-quantifiable shared items such as food preparation and the use of bed linens and towels.¹⁶⁶ The tenant is entitled to a post-judgment cure depending on the nature of the overcharge.¹⁶⁷

160. N.Y. REAL PROP. LAW § 235-f(3).

161. N.Y. REAL PROP. LAW § 235-f(4).

162. N.Y. REAL PROP. LAW § 235-f(5).

163. N.Y. COMP. CODES R. & REGS. tit. 9 § 2525.7(b) (N.Y.C. RENT STABILIZATION CODE).

164. *Id.*

165. *Id.* See also 365 W. End v. Kristaponis, N.Y.L.J., May 14, 2003, 21:4 (Civ. Ct. N.Y. County) (calculating the proportionate share by including only occupants and tenants who actually reside in the premises, not those named on the lease who reside elsewhere).

166. 719 W. 180th St. LLC v. Gonzalez, 752 N.Y.S.2d 214, 193 Misc. 2d 736 (N.Y. Civ. Ct. Oct. 23, 2002). See First Hudson Capital, LLC v. Seaborn, 54 A.D.3d 251, 862 N.Y.S.2d 501 (1st Dep’t. 2008).

167. 156-158 Second Ave., LLC v. Delfino, 18 Misc. 3d 1144(A), 2008 WL 623036, at *3 (Civ. Ct. N.Y. County) (affirming that tenant charging roommate a greater portion of the rent in consideration for occupying two of the three bedrooms in the apartment violated § 2525.7 (N.Y.C. RENT STABILIZATION CODE)).

If the overcharge is done in bad faith, with intent to profiteer and with intent to commercially exploit, a post-judgment cure is unavailable.¹⁶⁸ For example, a tenant was deemed properly evicted where the tenant was held to have engaged in “commercial exploitation” by advertising the apartment as a Bed and Breakfast. She rented her apartment out to guests, described in the opinion as “roommates,” at almost double the stabilized rent, and thus did not abide by the “proportionate share” requirement.¹⁶⁹ However, most recently, the Appellate Division expressly held that a roommate overcharge is not grounds for eviction.¹⁷⁰ At the same time, a tenant charging three roommates a total of \$2,100 per month when the legal regulated rent was \$1,954 per month did not rise to the level of profiteering, according to the court, because the tenant mistakenly believed that he was providing extra services and amenities.¹⁷¹ Moreover, a roommate, not just a landlord, has a cause of action to recover damages from a tenant charging more than a proportionate share of the rent.¹⁷² Where roommates have sought damages from the tenant for rent overcharges, courts determine the “proportionate share” as a rigid formulaic portion imposed in the provision.¹⁷³

[E] Right to Terminate Leases

Under New York State Law, senior citizens have the right to terminate leases if they are entering certain health care facilities, adult care facilities, or housing projects.¹⁷⁴ This provision covers households in which the lessee or the lessee’s spouse is sixty-two years of age or older, and the tenant or tenants are going to:

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168. *Delfino*, 2008 WL 623036, at *4.
 169. *West 148 LLC v. Yonke*, 11 Misc. 3d 40, 812 N.Y.S.2d 735 (App. Term 1st Dep’t 2006).
 170. *First Hudson Capital, LLC v. Seaborn*, 54 A.D.3d 251, 862 N.Y.S.2d 501 (App. Div. 1st Dep’t 2008).
 171. *Roxborough v. Becker*, 11 Misc. 3d 99 (App. Term 1st Dep’t 2006).
 172. *Bryant v. Carey*, N.Y.L.J. Apr. 9, 2003, 22:6 (Civ. Ct. N.Y. County). A roommate, not just a landlord, has a cause of action to recover damages from a tenant charging more than a proportionate share of the rent. In this case, the court determined, since the tenant did not face eviction for violating this section of the Code, the “proportionate share” should be calculated according to the rigid formula, with no account for other service provided by the tenant to the roommate.
 173. *Id.*
 174. N.Y. REAL PROP. LAW § 227-a.

- an adult care facility under Social Services Law section 2(21);
- a residential health care facility under Public Health Law section 2801;
- a housing unit that receives substantial assistance through grants, loans, or subsidies from any federal, state, or local program, or any nonprofit agency;
- a less expensive unit in a housing project or complex erected for the specific purpose of housing senior citizens.

The tenant who seeks to take advantage of Real Property Law section 227-a must send notice to the owner or the owner's agent accompanied by documentation of admission or pending admission to a covered facility, effective no earlier than thirty days after the date on which the next rental payment is due.¹⁷⁵

[F] Guardian Ad Litem in a Summary Proceeding

Article 12 of the Civil Practice Law and Rules authorizes the court in an action or proceeding to appoint a guardian *ad litem* for a party who is incapable of adequately defending his or her interests due to mental or physical incapacity. The decision-making ability of the guardian *ad litem* is limited to the legal proceeding in which the guardian is appointed.¹⁷⁶ Under the recently revised rules in New York City, a guardian *ad litem* must be appointed from a list of persons trained and certified by the courts. However, the new rules do not apply to appropriately trained professionals, associated with social service agencies, appointed without compensation.¹⁷⁷ Therefore, *pro bono* attorneys serving as guardians *ad litem* through social service organizations are not required to take a certification course in order to be appointed.

The vulnerability of the elderly population to an increased risk of mental incapacity may in some cases warrant the appointment of a

175. *Id.* at § 227-a(2).

176. N.Y. C.P.L.R. 1201 *et seq.*; Application of Ciena, 8 A.D.2d 877, 187 N.Y.S.2d 59 (3d Dep't 1959), *aff'd*, 7 N.Y.2d 939, 197 N.Y.S.2d 740 (1960); Anonymous v. Anonymous, 3 A.D.2d 590, 162 N.Y.S.2d 984 (2d Dep't 1957); Barone v. Cox, 51 A.D.2d 115, 379 N.Y.S.2d 881 (4th Dep't 1976); *see also* 466 Assocs. v. Murray, 151 Misc. 2d 472, 573 N.Y.S.2d 360 (Civ. Ct. N.Y. County 1991); Soybel v. Gruber, 132 Misc. 2d 343, 504 N.Y.S.2d 354 (Civ. Ct. N.Y. County 1986); Sabol v. Rosen, N.Y.L.J., Nov. 20, 1991, 24:2 (Sup. Ct. Kings County).

177. 22 N.Y.C.R.R. 36.1(b)(3).

guardian *ad litem* to ensure that an individual's rights are adequately protected in a summary eviction proceeding. A guardian *ad litem* can be appointed on motion by a friend of the respondent, a relative, respondent's attorney or other interested person, to make litigation decisions for the incapable party.¹⁷⁸ Furthermore, a guardian *ad litem* "need not be an attorney."¹⁷⁹ Moreover, under C.P.L.R. 1202(a), the court has the power to appoint a guardian *ad litem* "upon its own initiative based on information provided by a social service agency."¹⁸⁰ The Court also "has a duty to remove a guardian *ad litem* whose acts or omissions prejudice his or her ward."¹⁸¹

The relation of the guardian *ad litem* to his or her ward differs from that in an attorney-client relationship, as the attorney in the latter relationship should follow his or her client's subjective wishes whether or not they are in the client's best interests. Because a guardian *ad litem* is appointed only for the limited purpose of appearing for a party during the particular litigation at hand, he or she does not possess broader guardianship powers over her client's personal choices and property.¹⁸² When the question arises of a party's competency to represent her affairs in a summary eviction proceeding, the court must hold a hearing to decide whether a guardian *ad litem* should be appointed for a tenant.¹⁸³ The failure of a court to appoint a guardian *ad litem* for a tenant who is incapable of understanding the proceedings is a basis to vacate a judgment.¹⁸⁴

Guardians *ad litem* are routinely appointed in Housing Court proceedings. The standard for a Housing Court judge to appoint a guardian *ad litem* is not incompetency, but rather that the party appears unable to understand the nature of the proceedings or is incapable of adequately protecting and asserting his or her rights in the proceeding before the Housing Court.¹⁸⁵ Under this lower

178. N.Y. C.P.L.R. 1202(a).

179. *Bolsinger v. Bolsinger*, 144 A.D.2d 320 (2d Dep't 1988).

180. *New York Life Ins. Co. v. V.K.*, N.Y.L.J., Mar. 3, 1999, 27:5 (N.Y. Civ. Ct.).

181. *New York City Hous. Auth. v. Maldonado*, N.Y.L.J., Apr. 13, 2005, 19:3 (Bx. Co. Housing Court).

182. For more on guardianship and other protective services, see *supra* chapter 8. See also N.Y. MENTAL HYG. LAW art. 81.

183. *Silver & Junger v. Miklos*, N.Y.L.J., Aug. 24, 1994, 23:4 (Civ. Ct. Bronx County).

184. *Perrotty v. Shor*, N.Y.L.J., Apr. 22, 1999, 28:2 (App. Term 1st Dep't).

185. *Kings 28 Assocs. v. Raff*, 167 Misc. 2d 351, 354, 636 N.Y.S.2d 257, 259 (Civ. Ct. Kings County 1995); see GM-3742, available at www.probono.net/ny/housing/library/folder.38813-NYCHA_General_Memoranda.

standard, the court's authority falls squarely within the C.P.L.R. § 1201 provision that a court shall appoint a guardian *ad litem* for an individual adult incapable of adequately prosecuting or defending his [or her] rights. One court, for example, appointed a guardian *ad litem* "in the interests of justice" where the court was not "in a position to state categorically that the respondent's mental condition did not impede his ability to defend against the landlord's allegations."¹⁸⁶ In another case, a guardian *ad litem* was appointed where a psychiatric evaluation found that the tenant was "unable to address a particular topic without going off on a tangent," "disorganized," and otherwise unable to adequately defend her rights.¹⁸⁷ In a case in which the landlord knew or had reason to know of the tenant's mental incapacity, the court vacated a default judgment for the tenant guardian *ad litem*.¹⁸⁸ In a similar case, the court vacated a default judgment, finding that the landlord had a duty to disclose to the court whatever information it may have about a respondent's mental condition, and substituted a social service agency in the proceeding in place of the respondent.¹⁸⁹

Failure to appoint a guardian *ad litem* is curable and does not warrant dismissal.¹⁹⁰ If the party is incapable of adequately defending against a proceeding, the court should appoint a guardian *ad litem*, and any default judgment entered prior to the appointment should be vacated.¹⁹¹ Failure to vacate the default judgment may be reversible.¹⁹² Subsequent to the appointment of a guardian *ad litem*, a default judgment cannot be entered until twenty days after the

186. Jennie Realty v. Sandberg, N.Y.L.J., July 21, 1993, 23:5 (1993).

187. Deepdale Gardens Third Corp. v. Knox, N.Y.L.J., Oct. 1, 1996, 26:1 (Sup. Ct. Queens County).

188. Hotel Preservation v. Byrne, N.Y.L.J., Mar. 12, 1999, 26:1 (App. Term 1st Dep't); see also Parras v. Ricciardi, 185 Misc. 2d 209, 710 N.Y.S.2d 792 (Civ. Ct. Kings County 2000) ("A default judgment entered against a party incapable of protecting her interests is invalid and unenforceable unless a guardian *ad litem* is appointed.").

189. Surrey Hotel Assocs., LLC v. Sabin, N.Y.L.J., June 29, 2000, 28:4 (Civ. Ct. N.Y. County).

190. Depalois v. Pellegrino, 16 Misc. 3d 1133(A), 851 N.Y.S.2d 57 (N.Y. Civ. Ct. Kings County 2007).

191. N.Y.C. Civ. Ct. Advisory Notice, Default Judgments in GAL Cases (eff. Mar. 8, 2007) [hereinafter N.Y.C. Civ. Ct. Advisory Notice], available at nycourts.gov/courts/nyc/housing/directives.shtml.

192. *Id.*; Oneida v. Unczur, 37 A.D.2d 480, 326 N.Y.S.2d 458 (4th Dep't 1971); Sarfaty v. Sarfaty, 83 A.D.2d 748, 443 N.Y.S.2d 506 (4th Dep't 1981); Barone v. Cox, 51 A.D.2d 115, 379 N.Y.S.2d 881 (4th Dep't 1976).

appointment of the guardian.¹⁹³ If twenty days have elapsed and neither the guardian nor the party has appeared on the court date, then all efforts should be made to discover the cause of the default.¹⁹⁴ If the guardian *ad litem* has defaulted as a result of dereliction of responsibilities, a new guardian should be appointed.¹⁹⁵

When there is a stipulation settling the case of a person who has been appointed a guardian *ad litem*, the judge ordering the stipulation has the responsibility of ensuring that it is appropriate.¹⁹⁶ Prior to approving the stipulation recommended by a guardian *ad litem*, judges must ascertain if the guardian has at a minimum:

- Met with the party and attempted to make a home visit;
- Determined what the party desires as an outcome of the case;
- Investigated and weighed all factors in the case, and is recommending a settlement that is in the best interests of the party and that also takes into account the party's desires, if feasible;
- Developed a plan to assist the party in obtaining repairs, monies, or other assistance needed to comply with the proposed stipulation;
- Taken all steps to follow through with the plan to assist the party;
- Informed the court if the party agrees or disagrees with the proposed settlement; and
- Taken all steps to get the party to come to court or to locate the party if the party is missing.¹⁹⁷

[G] Preexisting Tenancy in a Foreclosed Property

The Protecting Tenants at Foreclosure Act of 2009,¹⁹⁸ effective May 20, 2009, protects tenants from being evicted by persons or entities who obtained the residential property through foreclosure.¹⁹⁹

193. N.Y.C. Civ. Ct. Advisory Notice, *supra* note 191.

194. *Id.*

195. *Id.*

196. BML Realty Grp. v. Samuels, 15 Misc. 3d 30, 833 N.Y.S.2d 348 (App. Term 1st Dep't 2007).

197. N.Y.C. Civ. Ct. Advisory Notice, *supra* note 191.

198. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22 (May 20, 2009).

199. *Id.* § 702 (a).

Tenants are entitled to occupy the property until the end of their lease terms, except when the new owner will occupy the property as a primary residence.²⁰⁰ At the very least, tenants must be provided with a notice to vacate ninety days before eviction.²⁰¹ In order to receive these protections, the tenant must not be the mortgagor, the tenancy must be the result of an arm's-length transaction, and the rent must not be substantially less than fair market rent.²⁰² Rent reductions and subsidies through federal, state, or local sources, including rent-stabilized and section 8 tenancies, are excepted from the fair market rent requirement.²⁰³

Similarly, in 2010 the New York City legislature amended the Real Property Actions and Proceedings Law (RPAPL) to provide tenants residing in a residential real property that is subject to foreclosure with a separate notice alerting them of their right to remain in their apartments under the original agreed-upon terms of the lease until the end of their lease term. A tenant who does not have a written lease can stay in the apartment for ninety days after receiving the notice. The notice also has to provide the tenant with the name and contact information of the new owner.²⁰⁴ Tenants in one-to-four-unit buildings must be sent the notice individually; for larger apartment buildings, the notice must be posted outside each exit and entrance.²⁰⁵

RPAPL § 1307 addresses the new duties of a plaintiff judgment holder in a foreclosure action involving residential property that is vacant or abandoned by a mortgagor. The plaintiff now has the obligation to maintain the property (even if the property is occupied by a tenant) consistent with the New York housing maintenance code until the property is sold. Furthermore, if a tenant is occupying the property, the plaintiff must give the tenant seven days' notice of plans to enter the property to make repairs or an inspection, unless it is necessary to make emergency repairs. In such a case the plaintiff has to give reasonable notice to the tenant. Municipalities, tenants, and condominium boards have the right to enforce this provision against a plaintiff.²⁰⁶

200. *Id.* § 702 (a)(2)(A).

201. *Id.* § 702 (a)(1).

202. *Id.* § 702 (b).

203. *Id.* § 702 (b)(3).

204. N.Y. REAL PROP. ACTS. LAW § 1303(5); N.Y. REAL PROP. ACTS. LAW § 1305.

205. N.Y. REAL PROP. ACTS. LAW § 1303(4).

206. N.Y. REAL PROP. ACTS. LAW § 1307.

§ 9:5 Section 202 Housing Program

The Section 202 Elderly and Handicapped Program was created by the Housing Act of 1959 and is administered by HUD to develop housing for the elderly.²⁰⁷ The program provides direct loans at below market rates to not-for-profit organizations and local governments for the construction of housing for elderly and disabled persons. The Section 202 program differs from most low-income development projects in that it involves new construction rather than focusing primarily on the rehabilitation of existing buildings. In 1990, the Section 202 program was bifurcated into the Section 202 program for the elderly and the Section 811 program for disabled persons.

The rents in a building that is subsidized pursuant to Section 202 must fall within HUD's Section 8 guidelines²⁰⁸ (that is, rent may constitute no more than 30% of the tenant's income). Furthermore, rent subsidies are provided for all Section 202 units, mostly under the Section 8 program. Unfortunately for the elderly, this program has been the victim of federal budget cuts during the last decade-and-a-half. The number of Section 202 projects decreased over 200% between 1979 and 1989. In addition, beginning in 1991, HUD ended its practice of making separate allocations to its major field offices, which means that projects in New York City, for example, must compete with projects throughout the country, rather than simply within the region.

§ 9:5.1 Protections from Termination in a Section 202 Tenancy

Section 202 tenants are protected from arbitrary termination of their tenancies by section 247 of title 24 of the Code of Federal regulations, which dictates that tenancies may be terminated only for cause. The tenant must receive prior notice that her or his conduct will constitute a basis for terminating the tenancy. Moreover, a notice terminating the tenancy of a tenant whose apartment is subsidized through a federal housing program must specify good cause for the termination. For termination to qualify as for "good cause," it must be predicated on one of three grounds: material noncompliance with the rental agreement, material failure to fulfill obligations under any state landlord and tenant legislation, criminal activity and "other

207. 42 U.S.C. §§ 1437a *et seq.*

208. 42 U.S.C. § 1437a(a)(1).

good cause.²⁰⁹ For tenant conduct to be deemed other good cause for termination purposes, the tenant must first have been served notice that her or his conduct would thereafter constitute a basis for termination of occupancy. Furthermore, termination for other good cause may be made only at the end of a rental term.²¹⁰

§ 9:5.2 80/20 Rental Housing Tax-Exempt Finance Program

The New York City Housing Development Corporation (HDC) administers the federally authorized 80/20 program in New York City.²¹¹ Traditionally, housing for low-income tenants was often only available in neighborhoods that were removed from the city's business and commercial district, making it difficult for residents to commute to work and obtain the resources they needed. Through the tax-exempt 80/20 Program, the HDC creates affordable housing for low-income tenants in some of the most desirable locations in the city.

Under the 80/20 Program, tax-exempt bond proceeds are used to finance below-market-rate construction loans and multi-family rental housing.²¹² By using tax-exempt bonds to finance the construction of large residential buildings in New York City, the costs are greatly reduced. In exchange for low-cost financing, the program guidelines require property developers to reserve a specified share of rental units for low-income tenants. These units may not be physically segregated from the other housing units. There are two options by which developers can satisfy the program requirements:

- at least 20% of the completed units in the development project must be occupied or available for occupancy by families or individuals whose incomes do not exceed 50% of the area median income; or
- at least 40% of the completed units must be occupied or available for occupancy by families or individuals whose incomes do not exceed 60% of the area median income.²¹³

209. 24 C.F.R. § 247.3.

210. 24 C.F.R. § 247.4(c).

211. The New York City Housing Development Corporation is located at 110 William St., New York, NY 10038 and can be reached at (212) 227-5500.

212. See New York City Housing Development Corporation website at <http://www.nychdc.com>.

213. 26 U.S.C. § 42(g)(1).

While the tax-exempt 80/20 Program has been successful in creating units affordable to low-income tenants in otherwise high-cost areas, it is limited by the availability of tax-exempt bond allocations made each year. Therefore, HDC for New York City created a taxable 80/20 Program. To balance the higher cost of financing due to the use of taxable bonds, HDC offers a subsidy of \$20,000 per low-income unit, in the form of a second mortgage at 1% for twenty years. This enables the building owner to keep 20% of the units reserved for moderate- and middle-income tenants earning no more than 80% of area median income.²¹⁴

Developers are responsible for maintaining a specified low-income housing ratio on a continuous basis in order to comply with 80/20 requirements. Because developers and owners, not the Housing Development Corporation, are responsible for tenant selection, a rejected applicant must appeal directly to the owner within two weeks of rejection. The applicant must state the reasons why he or she disagrees with the rejection, and if the owner still believes that he or she was in the right for rejecting the applicant, the applicant can appeal to the Housing Development Corporation. However, the Housing Development Corporation will only review the file to see whether or not the applicant falls within the bounds of the project; there are no legal appeals available through this process.

One cannot relocate to a different 80/20 building except under extraordinary circumstances because each 80/20 building has a separate waiting list, and usually different owners. In one exception, after September 11, 2001, a tenant was able to move from a lower-Manhattan 80/20 building to another further uptown, but only because both buildings were owned by the same entity.

Under the 80/20 Program, the tenants' incomes must be recertified annually. As long as tenants remain eligible for the program, they should be offered leases of at least a year.

Housing Development Corporation 80/20 developments that receive benefits from J-51 (N.Y.C. Admin Code § 11-243), 421-a tax exemption, and/or an abatement program are subject to rent stabilization. The low-income component of the program is subject to rent stabilization regardless of whether or not the previous project receives J-51 or 421-a tax relief. Therefore, rent increases for these units will be subject to the allowable increases issued by the Rent Guidelines Board.

214. See New York City, Housing Development Corp., Financing Program Term Sheets Page, available at www.nychdc.com/developers/developer_page.htm.

§ 9:6 Adult Care Facilities

An “adult care facility” is a general term that applies to an establishment that provides long-term residential care and services to people unable to live independently.²¹⁵ An example of such a facility is an adult home, which is defined as a not-for-profit adult care facility providing room, board, housekeeping, personal care, and supervision to five or more adults unrelated to the operator.²¹⁶

The Real Property Actions and Proceedings Law (RPAPL) provides that nothing in Social Service Law section 461-h “shall be construed to create a relationship of landlord and tenant between the operator of an adult home or residence for adults and a resident thereof.”²¹⁷ However, residents of adult homes and nursing homes cannot be evicted without due process of law and without resort to an eviction proceeding.²¹⁸ The RPAPL provides that a special proceeding to terminate the admission agreement and assisted living residence residency agreement of a resident of an adult home or residence for adults, or the residency agreement of a resident of an assisted living residence, and to discharge a resident from that facility, may be maintained pursuant to the provisions of section 461-h of the Social Services law. Grounds for termination include:

- necessary medical care that is not available at the facility;
- behavior that poses imminent risk of death or serious injury;
- nonpayment of any legitimate charges, but if nonpayment is due to loss of public benefits, the operator of the facility must help resident attempt to obtain benefits;
- objectionable conduct by the resident; and
- a lack of a certificate for the facility.²¹⁹

For example, an adult care facility that no longer had a certificate, was entitled to summary judgment against the residents, since decertification had already been upheld in a separate proceeding. The fact that the facility had accepted payments from a government

215. N.Y. COMP. CODES R. & REGS. tit. 18, § 487.2(a).

216. *Id.*

217. N.Y. REAL PROP. ACTS. LAW § 713-a.

218. *Id.*; N.Y. SOC. SERV. LAW § 461-g, § 461-h; *Daniels v. Christofolletti*, 143 Misc. 2d 857, 542 N.Y.S.2d 482 (Civ. Ct. Queens County 1989).

219. N.Y. SOC. SERV. LAW § 461-g.

entity on behalf of the residents did not constitute a waiver of the right to evict as it does in the landlord-tenant relationship.²²⁰

Before an eviction proceeding can be commenced against a resident of an adult care facility, a thirty-day notice must be given to the resident and a next-of-kin or other designated responsible party on a prescribed form. The notice must state the reason for the proposed termination, the date of termination, and that the operator must go to court if the resident does not leave voluntarily. Papers must be personally served on the resident.²²¹ Under the Social Services Law, there is no right to a jury in such a proceeding to evict an adult home resident,²²² although it would appear that depriving adult home residents of a trial by jury may be a violation of their constitutional rights to equal protection and due process of law.

In proceedings seeking to evict the resident of the adult care facility for nonpayment of legitimate charges, the court must wait for ten days from the date of judgment before issuing a warrant of eviction. The court must refrain from issuing a warrant of eviction for up to ninety days if nonpayment was due to the loss of public benefits. If a successful eviction proceeding is based on an allegation that the resident is objectionable, the court may grant a stay of up to thirty days.²²³

§ 9:7 Elderly Homeowners

New York State has developed a number of programs to assist elderly homeowners with the expenses entailed in remaining in their homes as they age. These homeowner assistance programs offer relief to elderly real property owners in the form of real property tax abatements and credits, low-interest home repair loans, “reverse mortgages,” and assistance with utility payments.

§ 9:7.1 Real Property Tax Exemption

Section 467 of the New York State Real Property Tax Law (RPTL) authorizes municipalities within the state to enact local legislation to grant a partial tax exemption to homeowners age sixty-five and older

220. *Salvation Army v. Alverson*, 157 Misc. 2d 416, 597 N.Y.S.2d 545 (Civ. Ct. N.Y. County 1992).

221. N.Y. SOC. SERV. LAW § 461-h(5)(a).

222. N.Y. SOC. SERV. LAW § 461-h(9)(b).

223. N.Y. SOC. SERV. LAW § 461-h(12).

and sets forth the requirements that must be met by the homeowner to be eligible for the program.²²⁴ As of 1996, a similar exemption is also authorized for owners of cooperatives in cities with populations of 1,000,000 or more.²²⁵ This exemption allows seniors to pay real property tax on their homes based on up to 50% of the assessed valuation on the property based on their federal adjusted gross income. The local authority for the Real Property Tax Exemption in New York City is found at section 11-245.3 *et seq.* of title 11 of the N.Y.C. Administrative Code and Charter.

To be eligible for the exemption, state legislation requires that the owner of the property (or one of the owners, if there are multiple owners) must have had title to the property for the twenty-four months immediately preceding the date of application. To meet this time requirement, a senior may piggyback the time of ownership by one spouse onto the time of ownership of the other spouse. In New York City, title must have been held for twelve months to be eligible for the exemption.²²⁶

There are special allowances made for property acquired as replacement for property taken by the government in an eminent domain proceeding or other involuntary proceedings (except tax sales).²²⁷

Under New York City's legislation, the exemption is available to a household in which all co-owners are sixty-five or over, unless the owners are husband and wife, or siblings, in which case only one of the owners must be sixty-five or over.²²⁸ In addition, under the New York City law, seniors can qualify if they turn sixty-five by December 31 of the calendar year in which the application is made,²²⁹ if a spouse who is sixty-five or over dies, the surviving spouse can continue to claim the benefit if he or she is at least sixty-two.²³⁰ Households are ineligible for the exemption for that portion of the real property tax attributable to school purposes if a child who attends public elementary or secondary school resides in the household.²³¹

224. N.Y. REAL PROP. TAX LAW § 467.
 225. N.Y. REAL PROP. TAX LAW § 467(3)(3-a)(b).
 226. N.Y.C. ADMIN. CODE § 11-245.3(3)(b).
 227. N.Y. REAL PROP. TAX LAW § 467(3)(b).
 228. N.Y.C. ADMIN. CODE § 11-245.3(1).
 229. N.Y.C. ADMIN. CODE § 11-245.3(4).
 230. N.Y.C. ADMIN. CODE § 11-245.3(9).
 231. N.Y.C. ADMIN. CODE § 11-245.3(2).

Other eligibility requirements include that the property is used exclusively for residential use, and is the primary residence of the owner(s) of the property. If the property is used only partially for residential purposes, the exemption may be granted proportionately for that percentage that is used as a residence.²³² Under the New York City statute, a senior does not lose primary residence status if absence from the household is for receipt of health-related care, and the cost of care can be deducted from income.²³³

The final eligibility requirement under the state statute is that the owner's income (or aggregate income in the case of multiple owners) cannot exceed a statutory maximum for the tax year immediately preceding the date of application. Under state law, the 50% exemption is available to households with a maximum income between \$3,000 and \$29,000.²³⁴ The exact parameters of the program are set by local law. In 2009, for New York City, the maximum household income that qualifies for benefits under the program is \$37,400.²³⁵ Under the New York City law, the husband and wife's combined income is considered, unless one of the spouses does not actually live in the property because of divorce, separation, or abandonment.²³⁶ The exemption under this statute is granted on a sliding scale tied to the gross income of the homeowner. In New York City, the amount of the exemption is determined according to the table in Appendix 9A.²³⁷

Income is defined as the federal gross adjusted income. Excluded from the definition of income are gifts, inheritance, and return of capital, as well as money earned from employment in the federal foster grandparent program.²³⁸ In addition, New York Real Property Law section 467(3)(a) permits local governments to adopt into local law provisions offsetting income by the cost of medical and prescription drug expenses that are not covered by insurance.

232. N.Y. REAL PROP. TAX LAW § 467(3)(c).

233. N.Y.C. ADMIN. CODE § 11-245.3(3)(d).

234. Board of Real Property Services, New York State, Instructions for the Application for the Partial Real Property Tax Exemption for Senior Citizens Exemption (and for Enhanced School Tax Relief [STAR] Exemption), *available at* www.orps.state.ny.us/ref/forms/pdf/rp467ins.pdf.

235. N.Y.C. ADMIN. CODE § 11-245.3(7).

236. N.Y.C. ADMIN. CODE §§ 11-245.3(3)(a), 11-245.3(3)(d).

237. N.Y.C. ADMIN. CODE § 11-245.3(7).

238. N.Y. REAL PROP. TAX LAW § 467(3)(a).

It is the responsibility of the municipality to notify each person within the municipality of the exemption available to taxpayers aged sixty-five and over.²³⁹ Such notice should be included with the homeowner's real property tax bill each year. In New York City, the Department of Finance must send applications to previous grantees at least sixty days before January 15 of each year.²⁴⁰ An applicant in New York City who is denied an exemption, is entitled to notice of denial stating the reasons for the denial, and an opportunity for review.²⁴¹

Once the exemption is obtained, the homeowner must refile an application regularly to retain the exemption. The exempt senior must refile every two years in New York City and other municipalities, which have populations in excess of one million persons, and every year in other localities. The dates for filing and the application may differ in each municipality and should be verified in each locality. In New York City, seniors must file with the New York City Department of Finance in the borough where the property is located, between January 15 and March 15 of each year.²⁴² Parties who believe they may be eligible should contact the local tax assessor's office.

§ 9:7.2 Real Property Tax Credit Program

Another program available to senior homeowners is the Real Property Tax Credit program. This program is known as the "circuit breaker" because it attempts to alleviate the financial overload effect that real property taxes can have on senior citizen homeowners. This program provides a tax rebate to senior-citizen homeowners who meet the following eligibility criteria:

- household gross income is \$18,000 or less;
- occupied the same New York residence for six months or more;
- a New York State resident for all of 2009;
- could not be claimed as a dependent on another taxpayer's federal income tax return;
- residence was not completely exempted from real property taxes;

239. N.Y. REAL PROP. TAX LAW § 467(4).

240. N.Y.C. ADMIN. CODE § 11-245.3(5).

241. *Id.*

242. *Id.* § 11-245.3(4).

- the current market value of all real property owned, such as houses, garages, and land, was \$85,000 or less;
- paid real property taxes; and
- rent received for nonresidential use was 20% or less of the total rent received.²⁴³

To qualify for the rebate, seniors must file an annual Claim for Real Property Tax Credit (New York State Form IT-214) and attach it to their New York State income tax return.²⁴⁴

§ 9:7.3 Reverse Mortgages

Reverse mortgages, or home equity conversion programs, can provide senior-citizen homeowners with an opportunity to convert the financial equity that they have accrued in their homes to cash, without having to sell their homes. A reverse mortgage is a first mortgage loan in which loan proceeds are either advanced to the mortgagor or mortgagors in installments, or are advanced in a lump sum for the purpose of the purchase of an annuity based on the value of the real property securing the mortgage.²⁴⁵ The terms of repayment can be set for a fixed period of time, or to allow the borrower to remain in his or her home for life or until he or she chooses to move. At the specified time, the house may have to be sold to repay the loan. The terms of the loan may permit the addition of accrued but unpaid interest to the principal, which means that it is possible to structure the loan without monthly payments.²⁴⁶

In New York, two types of reverse mortgages are offered pursuant to the Real Property Law, a section 280 loan, and a section 280-a loan. A 280 loan may be made to a person sixty-two years or older, and a 280-a loan may be made to a person seventy years or older who is in a low income bracket, defined as income of 80% or less of median income.²⁴⁷ A “reverse mortgage loan” is defined as a 280 or 280-a loan secured by a first mortgage on real property improved by a one-to-four

243. IT-214, Claim for Real Property Tax Credit for Homeowners and Renters (2010), *available at* www.tax.ny.gov/pdf/2010/killin/inc/it214_2010_fill_in.pdf.

244. New York State Department of Taxation and Finance, *available at* www.tax.ny.gov/pdf/2010/inc/it214i_2010.pdf.

245. N.Y. REAL PROP. LAW § 280.

246. N.Y. COMP. CODES R. & REGS. tit. 3, § 79.5(n).

247. N.Y. REAL PROP. LAW § 280-a(1)(e).

family residence or condominium that is the residence of the mortgagor(s), the proceeds of which are advanced to the mortgagor(s) during the life of the loan in equal installments, in advances through a line of credit or otherwise, in lump sums, or through a combination thereof. A reverse mortgage loan may provide for the purchase of and annuity by the mortgagor(s) or the lender.²⁴⁸ The interest rate for the loan may be either fixed or variable.²⁴⁹ Regulations governing reverse mortgages are found at Part 79 of Title 3 of the Codes, Rules, and Regulations of New York State. New York's several variations of reverse mortgages all involve some risk to the homeowner; therefore, all aspects and consequences of the program should be carefully considered before going forward.

The banks which offer reverse mortgages must observe very strict restrictions under the statute and regulations, although 280 loans have fewer statutory restrictions than 280-a loans. Each reverse mortgage must have the following limitations:

- the maximum amount of the loan may not exceed a loan to value ratio that is set by the regulations;²⁵⁰
- upon sale or transfer of the property securing the loan to anyone other than the original mortgagor(s), the loan must terminate;²⁵¹
- the loan must provide for prepayment without penalty;²⁵²
- lenders must be approved to make reverse mortgage loans by the New York State Superintendent of Banks;²⁵³
- lenders may not attach any property or asset of the mortgagor, except the real property securing the loan;²⁵⁴ and

248. N.Y. REAL PROP. LAW § 280(1)(a), § 280-a(1)(a); N.Y. COMP. CODES R. & REGS. tit. 3, § 79.2(d).

249. N.Y. REAL PROP. LAW § 280(2)(i), § 280-a(2)(l).

250. Under the regulations, the loan amount may be calculated in two different ways. Under N.Y. COMP. CODES R. & REGS. tit. 3, § 79.5(d), the maximum loan to value ratio may not exceed 80% of the anticipated value of the property at anticipated loan maturity. Under § 79.5(e), the parties may agree that the total obligation of the mortgagor shall be no greater than 80% of the actual value of the property at maturity or the amount of the original loan principal, whichever is greater.

251. N.Y. REAL PROP. LAW §§ 280(7), 280-a(7).

252. N.Y. REAL PROP. LAW §§ 280(2)(c), 280-a(2)(h).

253. N.Y. REAL PROP. LAW §§ 280(1)(d), 280-a(1)(d).

254. N.Y. REAL PROP. LAW §§ 280(2)(d), 280-a(2)(i).

- the mortgagor may designate a third party to be notified in the event of foreclosure. If no third party is designated, the lender must notify the local Office of the Aging.²⁵⁵

Closing costs, including loan fees, insurance premiums, repairs, legal fees, cost of an annuity, and other appropriate costs, may be included in the principal of the loan and disbursed out of the loan proceeds at closing.²⁵⁶

If, at the end of the original loan term, a new appraisal evidences that the property has appreciated, the loan may be extended and a new advance made. The new advance cannot exceed such amount or loan-to-value ratio as may be determined by the banking board.²⁵⁷

The bank (or other lender) must provide the borrower/homeowner with full disclosure information about the loan, including the following:

- a schedule of payments to be made from the lender to the borrower;
- a schedule of repayment from the borrower to the lender;
- a statement, prominently displayed, that advises the borrower to consult with the appropriate professionals concerning the tax and estate consequences of a reverse mortgage;
- the prepayment and refinancing features of the loan; and
- the interest rate charged and the total amount of interest to be collected over the term of the loan.²⁵⁸

These loans allow the borrowers to stay in their own homes while using the equity in what is often their largest asset as collateral to obtain cash for immediate needs. The risks, however, are great. There are many different types of home equity loans offered, each with different benefits and drawbacks. Many of the elderly are preyed upon by unscrupulous second mortgage lenders and are enticed to mortgage their homes for quick cash, only to find that they are unable to make what are often high interest payments when due, resulting in foreclosure of their homes. Any attorney with a client who is considering such a loan should take into consideration the tax

255. N.Y. REAL PROP LAW §§ 280(2)(f), 280-a(2)(m).

256. N.Y. REAL PROP LAW §§ 280(3)(a), 280-a(3)(b).

257. N.Y. REAL PROP LAW §§ 280(8), 280-a(8).

258. N.Y. REAL PROP LAW §§ 280(2)(e), 280-a(2)(g).

benefits and liabilities to the client, the client's ability to repay the loan, the estate plans of the client, any effect the added income may have on the recipient's SSI benefits,²⁵⁹ and the risk that the client could lose his or her home.

New York State banking law also authorizes banking institutions to make loans to homeowners for the purpose of paying real property taxes, levies and special assessments.²⁶⁰ The principal amount of the loan may not exceed the aggregate amount of such payments owed by the borrower for current and prior years, but may be modified to include additional amounts of such payments as they are incurred. The loan is secured by a first or second mortgage on the home of the borrower. The bank may, if the loan agreement specifies, make direct payments to the local taxing district. Although the loan may be prepaid at any time, it becomes due only upon the sale or other transfer of the house. Because of the expense and paperwork required for any mortgage loan, the fact that these loans are for relatively small sums of money, and the fact that they would only solve the homeowner's financial problems on a year-to-year basis, the program has not been very popular.

In addition, many financial institutions have special home equity loans for those over sixty-two years of age. These loans often afford the borrower lower interest rates (interest is usually tax deductible) and the loan is frequently offered without closing costs, but these still entail many of the same risks and the attorney should consider the factors noted above.

§ 9:7.4 *Fraudulent Mortgage Practices*

Abusive or predatory lenders have decimated low and moderate income neighborhoods by aggressively targeting cash-poor, equity-rich homeowners and inducing them to enter into high-cost loans that they are often unable to repay. Common predatory practices include home improvement fraud; loan "flipping," or frequent refinancing by which lenders repeatedly charge high closing fees without benefiting the borrower; kickbacks to brokers; other exorbitant fees, including excessive charges for credit insurance premiums; and consolidation of unsecured debt into an unaffordable mortgage. Elderly homeowners are particularly vulnerable to these practices.

259. 20 C.F.R. § 416.1103(f).

260. N.Y. BANKING LAW § 6-a.

Homeowners who have been defrauded can commence litigation to rescind the loan, or defend against foreclosure under a variety of federal and state statutes. The federal Truth in Lending Act (TILA)²⁶¹ allows the borrower to rescind the loan up to three years if the finance charges on the loan have been underdisclosed; if the borrower did not receive required disclosures at closing; or, in a home improvement fraud case, if the contractor began work on the home before the closing of the loan, with the implicit knowledge of the lender.²⁶² The TILA also provides for damages and attorney's fees. The federal Home Ownership Equity Protection Act (HOEPA) governs high-cost home loans, and prohibits lenders from such practices as charging increased interest after default, inserting unlawful prepayment penalties, and making loans based on the borrower's equity rather than on the borrower's ability to repay the loan.²⁶³ HOEPA also provides the borrower with a right to rescind the loan, damages, and attorney's fees.

The federal Real Estate Settlement Procedures Act (RESPA)²⁶⁴ prohibits lenders from paying kickbacks to brokers by prohibiting payments that exceed the value of services performed. Although RESPA has a one-year statute of limitations, it can be raised by way of recoupment in a foreclosure action and provides for treble damages. The federal Equal Credit Opportunity Act (ECOA) is useful in defending foreclosures by predatory lenders because it requires lenders to notify an applicant in writing of any counter-offer within thirty days after receiving a completed loan application.²⁶⁵ This is useful in addressing the abusive "bait and switch" practice, whereby lenders and brokers promise certain terms to a borrower and then raise the cost of the loan substantially at closing. ECOA also prohibits creditors from discriminating against applicants for credit on the basis of race, sex, or other protected classes. ECOA provides for actual and punitive damages, and attorney's fees.

One of the most effective New York State statutes for defending foreclosures by abusive lenders is the Deceptive Practices Act.²⁶⁶ This statute is useful because it is general enough to include the entire laundry list of deceptive practices used by lenders and brokers to lure

261. 15 U.S.C. §§ 1601 *et seq.*

262. 15 U.S.C. § 1602 (aa).

263. 15 U.S.C. § 1639.

264. 12 U.S.C. § 2605.

265. 15 U.S.C. § 1691.

266. N.Y. GEN. BUS. LAW § 349.

borrowers into high cost loans. One can also “bootstrap” violations of other statutes and regulations into GBL § 349, including violations of the Part 41 regulations, which were recently introduced by the State Banking Department to regulate high-cost lenders and brokers. Although GBL § 349 does not specifically provide for rescission, it does provide for injunctive relief, through which one can request that the court enjoin enforcement of the mortgage and the note. The Act also provides for actual damages and attorney’s fees. In addition, state common law claims, such as fraud, unconscionability, and civil conspiracy, can also be very effective in defending foreclosures by abusive lenders.

In October 2001, New York State passed one of the strongest anti-predatory mortgage lending laws in the country.²⁶⁷ The New York law is similar to the federal HOEPA, but defines “high cost” home loans more broadly than the federal law, covering mortgages with a high annual percentage rate (APR) or where certain closing costs exceed 5% of the loan amount. The New York law prohibits additional abusive lending practices, including loan “flipping” that fails to provide a tangible net benefit to the borrower. Homeowners can raise violations of the New York law either affirmatively within the six-year statute of limitations or at any time as a defense to foreclosure, even if the predatory mortgage loan was sold by the original lender to a subsequent assignee. The law applies to loans closed after April 1, 2003.

In addition to litigation or other foreclosure prevention options, the homeowner might be eligible for a no- or low-cost refinance at a market interest rate through remediation or rescue loan programs. These programs assist victims of predatory lending who need to get out of the loan. This can be particularly helpful if the interest rate on the predatory loan is exorbitantly high because, of course, a reduction of the interest rate means that the monthly payments are lower and affordable. These programs are also helpful if the predatory lending case is being litigated because it allows the homeowner to offer as settlement a pay-off of the predatory loan, albeit at a reduced amount. There are several rescue loan programs, both locally and nationally. In New York City the Parodneck Foundation offers such a program.

267. New York’s anti-predatory lending law added three sections to various existing state laws: BANKING LAW § 6-1, GENERAL BUSINESS LAW § 771-a, and REAL PROPERTY ACTIONS AND PROCEEDINGS LAW § 1302 (from www.public.leginfo.state.ny.us/menuf.cgi, go to “Laws of New York” link).

There is also a national program run by the National Community Reinvestment Coalition.

Another loan product that can be used to refinance the homeowner out of a bad loan and provide a short payoff to a predatory lender is a reverse mortgage (see *supra* section 9:7.3).

§ 9:7.5 Home Repair Assistance

Several municipalities, including New York City, provide low interest loans for home repairs in an attempt to reverse the recent trend of abandonment of privately owned homes by senior citizens. This trend is due, in some cases, to the elderly homeowners' lack of funds needed for repair and maintenance of their homes and, in other cases, to their physical limitations, which prevent them from maintaining the homes themselves. One program, administered by the New York City Department of Housing Preservation and Development (HPD) through its Senior Citizen Home Assistance Program, offers loans to homeowners ages sixty or older.²⁶⁸ The loans may be used for emergency repairs to heating systems, roofs, electrical systems, plumbing, and masonry. The loans are offered at very low interest (usually about 3%) with no repayment until the sale or transfer of the house. The eligibility requirements include a maximum income restriction (approximately 80% of the area median). In addition, the homeowners must have owned the home for at least two years and may not be more than two years delinquent in their real estate taxes (unless they have entered into an installment agreement with the city). This program is funded in part by the City of New York, and run by the Parodneck Foundation in New York City. The Foundation's phone number is: (212) 431-9700.

The New York City Department for the Aging has also created a program to assist elderly homeowners in maintaining and repairing their homes. Under this program, funds are allocated to local senior citizen agencies which then arrange for minor home repair assistance to elderly clients.

268. See New York City Senior Citizen Home Assistance Program (SCHAP) Home Page, available at www.nyc.gov/html/hpd/html/owners/senior-home-assist.shtml.

[A] RESTORE (Residential Emergency Services to Offer Repairs to the Elderly)

The New York State Division of Housing and Community Renewal is in charge of the RESTORE emergency home repair program, which allows the state agency to enter into contracts with non-profit corporations or municipalities to provide emergency home repair programs for low income elderly homeowners throughout the state.²⁶⁹ The RESTORE program has four primary objectives: to respond quickly to housing-related emergencies, to target very low-income homeowners (with income falling within 80% of the area median income), to address the wide range of substandard housing conditions affecting older homeowners, and to allow older homeowners to retain their homes. This state-backed initiative complements other programs that aim to help the elderly homeowner by providing grants or loans for repairs.

To be eligible for RESTORE aid, individuals must be New York State homeowners in dwellings of one to four units. At least one member of the household must be sixty years of age or older and the household income must be at or below 80% of its area's median family income. The situation must be an emergency, in that the defect must threaten the life, health, or safety of the older residents. Emergency home repairs include, but are not limited to conditions such as: roof damaged to the extent that rain and the elements can enter into the house; inoperative water, sewer/septic, heating or electrical systems; broken windows or steps; and conditions that violate a state or local ordinance.²⁷⁰ Emergency repairs do not include improvements, cosmetic repairs, or substantial rehabilitation of the dwelling.

The program allows a maximum of \$5,000 in aid per recipient, but the average cost spent on repairs per unit is only \$2,300.²⁷¹ To ensure that the funds benefit their target population, a resident utilizing RESTORE funds must remain at her residence for three years from date of receipt of funds or she must return the funds to the local

269. See N.Y.S. Division of Housing and Community Renewal RESTORE website at www.dhcr.state.ny.us/Programs/RESTORE/.

270. The section of the DHCR Capital Programs Manual describing the RESTORE program can be found at www.dhcr.state.ny.us/Publications/CapitalProgramsManual/cpmDec09.pdf.

271. DIVISION OF HOUSING AND COMMUNITY RENEWAL, NEW YORK STATE, RESTORE PROGRAM BRIEFING REPORT 2 (1996).

program, unless the home is sold to another low-income elderly household.²⁷² This three-year enforcement period is included in a written agreement between the local program and the eligible homeowner. Enforcement is the responsibility of the local program. Emergency repairs must commence within seven days after the initial inspection, and they should be completed within thirty days thereafter.

Further information can be obtained from regional DHCR offices.²⁷³

§ 9:7.6 Utility Assistance

[A] Home Energy Assistance Program

Another concern for elderly homeowners is the ability to meet the ever-increasing costs of utilities. To help alleviate this problem, Congress enacted the Low Income Energy Assistance Program in 1981.²⁷⁴ This program provides funds to the states to develop utility assistance programs for the elderly. To make use of these funds, each state is required to submit a plan to the Department of Health and Human Services.

In New York, the program funded by the Low Income Energy Assistance Program is the Home Energy Assistance Program (HEAP).²⁷⁵ Administered by local social service departments (in New York City, the Family Services Office of the Human Resources Administration), HEAP provides grants or stipends to low income seniors who need assistance in paying their utility bills. New York does not limit the use of this grant to heating bills; therefore, electric and cooking costs may also be covered. The funds are made available through an application process. The application should be made to the local social service agency²⁷⁶ on a form that it has provided and that is approved by New York State. The program has limited funds, and applications are approved on a first-come, first-served basis. The assistance is available beginning November 1st of each year and the

272. *Id.*

273. DHCR's phone number is: 1-866-275-3427; the N.Y.C. office phone number is: (212) 480-6700. DHCR maintains a website, *available at* www.dhcr.state.ny.us.

274. 42 U.S.C. §§ 8621 *et seq.*

275. N.Y. COMP. CODE R. & REGS. tit. 18, ch. 2, subch. B, art. 4, pt. 393.1.

276. *See* Appendix 9B.

program runs through March 15th. If any funds remain available on March 30, the local department may extend the program for that year. If the applicant is housebound, some local agencies will send a caseworker to the house and assist the senior citizen in completing the application.²⁷⁷

To be eligible to apply for participation in the program, the individual must be:

- sixty years of age or older;
- a Supplemental Security Income (SSI) recipient who is the head of a household; or
- a head of household who is in receipt of (or determined eligible for) Retirement, Survivors or Disability Insurance benefits under Title II of the Social Security Act.²⁷⁸

In addition, there are restrictions based on income, which vary according to the size of the household.²⁷⁹ Eligibility may also depend upon the type of housing and the type of energy used. Residents of government-subsidized housing whose rent includes heat are ineligible, as are residents in congregate-care facilities. Eligibility for assistance must be established each year.

HEAP also provides for emergency payments to protect homeowners against loss of utility services.²⁸⁰ To be eligible for these emergency payments, the applicant must meet the eligibility requirements for regular HEAP benefits and:

- be currently without heating fuel; or
- have heating fuel supply which will last less than seven calendar days; or
- have had heat-related utility service disconnected; or
- have heat-related utility service scheduled for disconnection; or

277. This is not required by the regulations but is discretionary with the local administrative agency.

278. N.Y. COMP CODE R. & REGS. tit. 18, § 393.4(d).

279. The formula used is very detailed and can be found in N.Y. COMP CODE R. & REGS. tit. 18, § 393.4; *see* Appendix 9C.

280. N.Y. COMP CODE R. & REGS. tit. 18, § 393.4(d).

- have essential applicant-owned heating equipment that is inoperable or unsafe or in need of repair and the cost does not exceed \$2,500;²⁸¹ or
- be in an emergency home heating situation which the local social services agency deems to be detrimental to the health or safety of the household; or
- be in a situation in which regular HEAP assistance is insufficient or unavailable to aid the applicant; or
- be in a temporary emergency shelter or relocation where the maximum total benefit may not exceed \$500 during the HEAP season.²⁸²

If the benefits are denied to an applicant, or benefits are granted in an amount below the applicant's need, the applicant may request a fair hearing within sixty days of receiving the written determination of benefits. As funds for this program are limited and the winter season can be over before the appeal process is completed, it is wise to apply as early as possible.

[B] Home Energy Fair Practices Act

As an added protection to ensure that senior citizens have continued access to utilities, the New York State legislature has enacted the Home Energy Fair Practices Act (HEFPA).²⁸³ This act has several components; all designed to provide additional consumer protection for the elderly.

The first component involves utility deposits. Under HEFPA, any customer who is at least sixty-two years of age is entitled to have the deposit required by gas or electric companies waived.²⁸⁴ This waiver will not apply to existing customers who have had service shut off within the previous six months due to nonpayment of bills. Should the deposit be required because of the customer's nonpayment record, this deposit may be made in twelve monthly installments. If the customer thereafter makes timely payments for one year, the utility company is required to return the deposit with interest.

281. HEAP will also fund the replacement of essential heating equipment through the Weatherization Assistance Program; *see* www.dhcr.state.ny.us/programs/weatherizationassistance/index.htm.

282. N.Y. COMP. CODE R. & REGS. tit. 18, § 393.4(d).

283. N.Y. PUB. SERV. LAW §§ 30 *et seq.*

284. N.Y. PUB. SERV. LAW § 36(3).

Should the customer not make the required payments of utility bills, and the customer is at least sixty-two years of age, the utility company may not shut off the utilities without giving advance notice of the date the shutoff will occur. If the shutoff is scheduled to take place between November 1 and April 15, the utility company must attempt personal contact with the customer, by phone or by visiting the home, at least seventy-two hours prior to the time shutoff is scheduled. At that time, the company representative must give an explanation for the shutoff and offer the customer an opportunity to avoid the shutoff by entering into an installment agreement for payment of the amounts due. The company representative may also assist the customer in applying for emergency benefits, such as those offered through HEAP.

If the company representative makes a reasonable determination that the customer's mental or physical health would be jeopardized by the shutoff, the representative has an obligation to inform the local social service department. If an actual medical emergency would be caused by the shutoff (because a life-support system or other medical equipment is involved) and that is certified in writing by a physician, the shutoff must be postponed for at least thirty days.

The utility companies are also required to offer customers who are sixty-two years of age and older an alternative payment procedure.²⁸⁵ Under this option any customer who is at least sixty-two and whose annual utility bill does not exceed \$150 must be offered the option of quarterly bills, rather than a monthly bill. This option applies to both gas and electric bills.²⁸⁶

285. *Id.* §§ 32(3)(b) & 38(2).

286. *Id.* § 38(2).