New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 265—NO. 3
WEDNESDAY, JANUARY 6, 2021

RENT STABILIZATION

When Does a Building Have Six or More Units?


By **Warren A. Estis** | And **Jeffrey Turkel**

RSL §26-504(a) states that the RSL shall only apply to buildings "containing six or more units." ETPA 5§(a)(4) similarly states that no declaration of emergency can be declared with respect to "a building containing fewer than six dwelling units."

It would seem that counting the number of units in a building would be an easy task, but it is not. The number of apartments in a building can increase or decrease over time. "Residential" units can be legal or illegal. Residential space counts toward the six units, but commercial space does not.

A body of law has developed over the years to determine whether a building is subject to rent stabilization by virtue of the number of housing accommodations therein. This article will summarize that case law.

Number of Units On the Base Date

Generally—and there is a major exception—the number of units in a building on the date the building first became stabilized will determine stabilization status. The base date for ETPA buildings is July 1, 1974. *See Brown v. Roldan*, 307 AD2d 208, 209 (1st Dept. 2004). The base date for RSL-69 buildings is May 12, 1969. *See McAvity v. Mirabel*, 136 Misc 2d 823 (Sup Ct, NY County 1987).

Notably, the landlord has the burden of proving that a building is exempt from rent stabilization. *See 124 Meserole LLC v. Recko*, 55 Misc 3d 146(A) (App Term, 2d Dept. 2017); *Pineda v. Irvin*, 40 Misc 3d 5 (App Term, 1st Dept. 2013). Where there is insufficient proof as to the number of units on the base date, the landlord loses. *See Brown v. Roldan*, *supra*.

Types of Proof

Courts will generally look at a building's Certificate of Occupancy to determine the number of units on the base date. *See, e.g., Fleur v. Croy*, 137 Misc 2d 628 (Civ Ct, NY County 1987). As discussed *infra*, the Certificate of Occupancy is not necessarily dispositive, as it only recites legal uses, and does not reflect illegal residential use or apartments added or subtracted without the knowledge of the Department of Buildings. Courts will also look at DOB inspection reports, *see Loventhal Mgt. v. New York State Div. of Hous. & Community Renewal*, 183 AD2d 415 (1st Dept. 1992), DOB violations, *see Rivas v. Conty*, 57 Misc 3d 986 (Civ Ct, Queens County 2017), and "I-Cards," *see Lloyd v. Williams*, 57 Misc 3d 1224(A) (Civ Ct, Kings County 2017). The number of units can also be established through testimony. *See e.g.*, *Joe Lebnan, LLC v. Oliva*, 39 Misc 3d 31 (App Term, 1st Dept. 2013).

Post-Base Date Reductions Won't Work

Many landlords believe that reducing the number of units below six after the base date will somehow free a building from rent stabilization coverage. It will not. *See, Shubert v. New York State Div. of Hous. & Community Renewal*, 162 AD2d 261 (1st Dept. 1990) ("Petitioner's unilateral action in combining apartments, thereby reducing the number of residential units from seven to five subsequent to the base date …

A body of law has developed over the years to determine whether a building is subject to rent stabilization by virtue of the number of housing accommodations therein. This article will summarize that case law.

WARREN A. ESTIS *is a founding member of Rosenberg & Estis.* JEFFREY TURKEL *is a member of the firm.*

cannot effect an exemption"); *Golden Horse Realty, Inc. v. New York State Div. of Hous. & Community Renewal*, 173 AD3d 612 (1st Dept. 2019).

The rationale for this rule is that it would be contrary to public policy to encourage landlords to reduce the number of units for purposes of deregulating a previously stabilized building. If a landlord wants to combine units to obtain a first rent it may do so, but such combination will not affect the stabilized status of the building.

One exception to the rule is *Loventhal v. New York State Div. of Hous. & Community Renewal, supra*. There, landlord – prior to the base date – illegally combined two apartments, reducing the number of units from six to five. Because the combination was illegal, the building remained stabilized.

Addition of Units

What happens if the building is increased to six or more units after the base date? Nothing good, at least for the landlord. The addition of the sixth unit after the base date will make the building subject to rent stabilization. *See*, *Gandler v. Halperin*, 232 AD2d 637 (1st Dept. 1996); *246 Leonard Realty LLC v. Phoa*, 65 Misc 3d 145 (A) (App Term, 2d Dept. 2019). Notably, it is not only the sixth apartment that becomes rent stabilized; it is all apartments in the building. Any landlord thinking about adding a unit should make sure that he or she will not increase the number to at least six.

Note the inconsistency in the rules regarding increasing or reducing the number of apartments. As to the latter, the number of apartments on the base date governs, no matter what happens thereafter. As to the former, the status on the base date is meaningless if the number is later increased to six or more.

Legal? Who Cares?

The illegality of a putative sixth unit is no impediment to a declaration that a building is stabilized. In *Rubrish v. Watson*, 48 Misc 3d 143(A) (App Term, 2d Dept. 2015), for example, the owner illegally converted a two family house into a 10 unit rooming house. Notwithstanding such illegal conduct, the Court found that the building was covered by the RSL. *See also Rashid v. Cancel*, 9 Misc 3d 130(A) (App Term, 2d Dept. 2005) (illegal use of basement for residential purposes confers stabilization status, even if DOB directs the removal of the illegal unit); *Joe Lebnan, LLC*, *supra*.

Housing Accommodation

What counts as a housing accommodation? The answer appears to be any space sufficient to bring the building to six or more units. For example, in *White Knight Ltd. v. Shea*, 10 AD3d 567 (1st Dept. 2004), the building in question was owned by a theater company. The company allowed persons connected with the theater to live in windowless dressing rooms and storage rooms. The First Department held that these windowless rooms counted toward the magic number of six, writing that "the fact that these rooms do not resemble traditional apartments does not warrant a different conclusion."

In *Gogarnow v. Silvia*, 60 Misc 3d 337 (Civ Ct, NY County 2018), the landlord partially constructed a sixth apartment in the building, which the Court found "was not ready to be occupied." Notwithstanding, the Court ruled that the building was stabilized:

> This court can reach no other conclusion than that there is a sixth space, known as '1R' that is 'intended to be occupied' residentially. That said space is not currently occupied or that Respondent is unable to demonstrate occupancy, does not appear to be the standard given the amount of work performed on '1R' to make it ready for residential use.

In *128 Cent. Park So. Assoc. v. Cooney*, 119 Misc 2d 1045 (Civ Ct, NY County 1983), the court held that a maid's room, with no bathroom or kitchen, counted as a unit.

Certainly, there is no requirement that the six units be rent-stabilized. In *Rosenberg v. Gettes*, 187 Misc 2d 790 (App Term, 1st Dept. 2000), there were five units plus a cellar apartment that was to be used by the superintendent. It was undisputed that the unit, prior to its demolition, was solely occupied by the superintendent and was thus exempt from rent regulation. Notwithstanding, the Court held that the unit comprised the critical sixth apartment.

Ultimately, determining whether a building is stabilized based on the number of units is a game of arithmetic. As the case law, rules, and exceptions outlined above establish, it is a game where the landlord will lose almost every time.