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RENT STABILIZATION

Demolition Applications

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RSL §26-511(c)(9)(a) allows a landlord to refuse to renew a rent stabilized lease "where he or she intends in good faith to demolish the building and has obtained a permit therefor from the department of buildings." In *First NY, LLC v. New York State Div. of Hous. & Community Renewal*, 2021 WL 5206279 (Sup Ct, NY County), Justice Carol Edmead affirmed a DHCR order that denied the landlord's demolition application on the ground that the landlord had failed to provide documentation as to its plans for the site following the demolition.

This article will examine *First NY, LLC*, as well as an earlier decision by Justice Debra A. James in *118 Duane LLC v. New York State Div. of Homes & Community Renewal*, 2020 WL 1811319 (Sup Ct, NY County).

RSC §2524.4(a)(2) implements the statute, allowing a landlord to recover an apartment where the "owner seeks to demolish the building." The regulation goes on to provide that DHCR shall not approve any demolition application "[u]ntil the owner has submitted proof of its financial ability to complete *such undertaking* to the DHCR, and plans for *the undertaking* have been approved by the appropriate city agency" (emphasis supplied). As will be seen, the definition of the word "undertaking" will figure largely in the decisions discussed herein.

> These two decisions, coupled with DHCR's policy that the landlord's "undertaking" also relates to post-demolition plans, means that landlords are advised to comply with DHCR's requirements until the First Department rules otherwise.

The statute and regulations are silent as to what, if anything, the landlord must do with the site if the demolition application is approved. For example, can the landlord allow the land to lay fallow until market conditions are ripe for construction? Can the landlord use the space for an interim non-housing use, such as a parking lot? How do such uses accord with the RSL's overarching goal of alleviating a chronic housing shortage?

Notably, a prior version of RSC section 2524.5(a)(2) provided that a demolition application would be granted where the landlord establishes that "he or she seeks in good faith to recover possession of the housing accommodations for the purpose of demolishing them *and constructing a new building*" (emphasis supplied).

Similarly, section 26-408(b)(1) of the City Rent Law (rent control) currently provides that a landlord may apply to DHCR for a certificate of eviction where the landlord "seeks in good faith to recover possession of housing accommodations for the immediate purpose of demolishing them, and the city rent agency determines that such demolition is to be effected for the purpose of constructing a new building."

Section 2204.8(a)(1) of the Rent and Eviction Regulations further

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provides that the new building must contain "at least 20 percent more housing accommodations, consisting of self-contained family units…than there are apartments contained in the structure being demolished."

'118 Duane LLC'

In 2015 the landlord in *118 Duane LLC* filed five demolition applications with DHCR. The landlord proposed to leave only a "sliver" of 120 Duane Street, which would provide emergency egress for a next-door building. The landlord took the position that it merely had to establish that DOB had approved the demolition plan, and that the landlord had sufficient financial means to demolish.

DHCR's Rent Administrator denied the applications, and DHCR's Commissioner thereafter affirmed. As is relevant herein, DHCR held that the landlord's obligation to prove its financial ability to complete such "undertaking" includes the landlord's post-demolition plans for the site, which the landlord had not provided:

> The Commissioner finds that 'such undertaking' as noted in the Operational Bulletin includes any new construction or other project that is planned for the site. The term 'such undertaking' is not limited to the demolition itself.
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> In the present case, the Rent Administrator noted that petitioner did not present any rational or objective plan other than the demolition of all regulated apartments in the building. The Commissioner finds that petitioner's refusal to state any future plans for the site was a further basis to deny the application. The agency does have a legitimate interest in what an owner will do with the site after the demolition in order to determine whether or not to grant the owner's application. The agency seeks to prevent a situation whereby the agency would grant such application only to have an owner not go forward with the demolition. It is also puzzling why petitioner would not simply identify its future plans for the site given that it would be extremely unlikely that the property would be left vacant.

In the subsequent Article 78 proceeding, Justice James affirmed DHCR's denial of the landlord's demolition applications, as follows:

> The Commissioner determined that petitioner failed to proceed in good faith in its application for demolition because he failed to include evidence of its future plans for the demolition site… While the legislature did not explicitly provide such requirement under the RSL, petitioner's refusal to divulge its plans post-demolition, and the DHCR's inability to fairly and reasonably determine a cost estimate of the project and/or if the petitioner had the financial ability to complete its undertaking, provide(s) a rational basis for the denial of petitioner's application. In the instant case, the DHCR cited to its own Operational Bulletin 2009-1 to establish that 'such undertaking' is not limited to the demolition itself.

'First NY, LLC'

The landlord in *First NY, LLC*, filed a demolition application with DHCR in 2019. The application alleged that DOB had approved the demolition of the building, and that the landlord had the funds to demolish. DHCR's Rent Administrator denied the application on the following grounds:

> The Rent Administrator determined that the owner failed to prove its good faith in seeking the eviction of the tenant as required by the DHCR Operational Bulletin 2009-1 and under RSC § 2524.5 in that the owner has not presented any rational objective for demolishing the building. The RA found that the owner conceded in a statement dated November 5, 2019 that no immediate hazards or structural defects exist which constitute danger or conditions detrimental to life or health of tenants.

> Further, the petitioner does not assert any planned projects for the site with approved architectural plans, scope of work, and a cost estimate based on a technical analysis of the plans and specifications, such that DHCR may evaluate the feasibility and the owner's financial ability to complete such project. The RA determined the owner has not presented any credible reason for demolishing the occupied regulated housing.

DHCR's Commissioner affirmed the Rent Administrator's order on *118 Duane LLC*:

> The Commissioner finds the petitioner's demolition plan is insufficient in terms of the scope of the 'undertaking' and financial ability to complete same. The efforts to distinguish the clear holding of *118 Duane LLC*, and prior similar determinations is not persuasive. Any reasonable interpretation of the term 'undertaking' as it pertains to a demolition which would evict a rent-regulated tenant includes post-demolition plans. This is true even though the term '… and constructing a new building' was removed from the RSC. As noted by the courts, 'financial ability to complete such **undertaking**' inherently implies more than just demolition. (boldface in original)

Supreme Court affirmed DHCR's order in the subsequent Article 78 proceeding, albeit on somewhat narrower grounds:

> Judge James upheld the DHCR denial of the landlord's application for certificates of eviction in *118 Duane LLC* because there was a rational basis to support the Deputy Commissioner's finding that the landlord had failed to satisfy the second requirement set forth in Operational Bulletin 2009-1; i.e., evidence of funds placed into a segregated bank account that were to be used for the sole purpose of completing demolition work. By failing to present such documents, the landlord failed to demonstrate its financial ability to complete the demolition, and thereby fell afoul of RSC § 2524.5(a)(2)(i), which justified the PAR's denial and the landlord's request for certificates of conviction. In the current case too, the PAR Order found that First NY's 'failure to provide approved post-demolition planning for the site *and segregation of the funding for same* warranted denial of its application.' (emphasis in original)

Lessons Learned

118 Duane LLC was not appealed to the First Department, and to date, there has been no appeal from Justice Edmead's order in *First NY, LLC*. These two decisions, coupled with DHCR's policy that the landlord's "undertaking" also relates to post-demolition plans, means that landlords are advised to comply with DHCR's requirements until the First Department rules otherwise.

Accordingly: (1) any demolition application must set forth the landlord's post-demolition plans for the site; (2) the landlord must establish that DOB has approved both the demolition plans and the post-demolition plans; and (3) the landlord must establish that it has the financial ability to fund both the demolition and the post-demolition new construction. Although leaving the land vacant will apparently result in the denial of a demolition application, it remains to be seen whether a low-cost interim plan—such as parking lot or an outdoor antiques market, might suffice.