

## COUNSEL'S CORNER

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# The ETPA Deemed Renewal—Darned If Landlord Deems, Darned If Landlord Does Not!

WHITE PLAINS—In *Samson Management LLC v. Hubert*, the tenant failed to sign and return the renewal lease tendered as required by the Rent Stabilization Code.

The landlord notified the tenant that if not signed and returned the landlord would deem the lease renewed as permitted under the Rent Stabilization Code and that the increased rent would be due and owing on a monthly basis thereafter.

The tenant wrote the landlord that he would not be renewing and would be vacating the Premises. The tenant then remained in occupancy after the expiration of the written lease and paid the increased rent for six months. Ultimately the tenant vacated the premises and stopped paying rent prior to the expiration of the deemed renewal lease year.

The landlord sued for rents due pursuant to the deemed renewal lease for the balance of the deemed lease term. The trial court agreed with the landlord on a motion for summary judgment and issued a judgment in favor of the landlord and awarded the landlord judgment in the amount of \$6,817.81.

### The Appeal

The tenant appealed and the Appellate Term 2nd, 11th and 13th Judicial Districts held that the issue of whether the landlord successfully deemed the lease renewed was an issue of fact and reversed the decision and remitted the matter to the trial court for a trial on whether there was an "implied agreement" for a one-year lease extension.

The concept of an "implied agreement" seems to be somewhat different from the regulatory structure, which allows the landlord to "deem" the lease renewed without agreement by the tenant who fails to return the lease.

However, that disparity became moot when the case was appealed to the Appellate Division.

The Appellate Division Second Department then held that

at Rent Stabilization Law language indicating that nothing contained therein should impair or diminish any rights under law. The assumption with reference thereto was that being held to the term of a renewal lease tendered under the Rent Stabilization Law and Rent Stabilization Code was an impairment of a right.

Generally, Rent Stabilized Leases are considered valuable and the extension or re-

the rights of a month-to-month tenant." In that case the landlord wanted to utilize the alternative right to commence a holdover proceeding but was stymied. In the *Samson v. Hubert* case the landlord wanted to deem the lease renewed. In both cases the landlord's efforts were frustrated.

Interestingly the decision in *Samson v. Hubert* seems to hold that in the event of a non-renewal of a lease, where the tenant pays rent, even at the increased rent that would have been due under the renewal lease if accepted, the tenant becomes a month-to-month tenant.

A month-to-month can be terminated by either party by providing a full month's notice of such termination. In such event, presumably, the landlord would not be required to provide a reason for the termination and the issue of the renewal lease would be subsidiary. This is important because many cases have found the tenant's failure to return a renewal lease in a timely fashion is an excusable default.

### A Negative Position for Landlords

In finding the tenant's failure to renew excusable, Courts have permitted tenants to be-

lately renew their leases after the expiration of the lease, after the commencement of the holdover proceeding, and even after judgment. These findings tend to place landlords in a disadvantageous position because the regulations allow them to commence holdover proceedings while the courts then negate that right by allowing the tenants to renew thereafter. The *Samson v. Hubert* decision negates the landlord's ability to deem the lease renewed.

Although the excusable nature of the failure to renew the lease is a fact-specific determination relative to each case, the risk of losing such a case is substantial enough to deter landlords from proceeding in that manner though it must be considered. Nor, under *Samson v. Hubert* can the landlord deem the lease renewed as permitted under the regulations.

Therefore, the most realistic option for landlords where the tenant fails to renew the lease, is to permit the tenant to pay rent, become a month-to-month tenant, then terminate the month-to-month tenancy.

Under *Samson v. Hubert* the tenant who fails to renew becomes a month-to-month tenant, and under such circum-

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not only was it not an issue of fact as to whether there was an implied agreement, but that the landlord could not deem the lease renewed.

In other words, the Appellate Division held that the Rent Stabilization Code provision permitting the landlord to deem the lease renewed upon the failure of the tenant to return the legal required lease renewal document was without meaning. The Appellate Division concluded that, because the Real Property Law Section 232-c states that a tenant remaining in possession after the expiration of a lease but paying rent becomes a month-to-month tenant, that the tenant in this situation was only a "month-to-month" tenant, not a "deemed" tenant for one year.

In addition the Court looked

newal a benefit, not an impairment of a right. In this case, the Court found otherwise.

### Additional History

Contrariwise, in *Martine v. Donahoe*, the Appellate Term held that where the landlord accepted rent following the expiration of the lease term, the tenant was vested with "new tenancy rights – at a minimum,

## NYS DEC Proposed Wastewater System Design Standards Pose New Peril

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ment has serious implications for any kind of housing and commercial construction in Westchester County, especially in the northern NYC watershed part," said Albert Annunziata, executive director of The Builders Institute.

Among the major, critical points that came out of that public hearing:

- Gary Naderman, engineer, noted that "Design Standards" like these have been used as if they were law. Whichever way they are used, they would be very devastating to the development potential of the entire county, he said.
- Affordable housing advocates like Joan Arnold, executive director of the not-for-profit A-Home, were very critical, saying these regulations make it very difficult to build affordable housing in the very northern Westchester areas targeted by the HUD-Housing Discrimination lawsuit settlement.
- Richard Lyman, town councilman of Pound Ridge, denounced the entire document: "The promulgation of these regulations without

due consideration of the economic consequences to local communities is sheer folly... It is about time that state agencies work and communicate with all stakeholders from the grass-roots before coming out with these very damaging, blanket standards."

• Jeff Osterman, planning director of Bedford, questioned the actual purpose of the draft document. "Nobody knows who is responsible for the content of this report... there are disclaimers galore within it... we aren't exactly sure where this report came from and who in DEC authored it."

Gus T. Boniello, a builder-developer in northern Westchester and a past president of The Builders Institute, was highly critical of the lack of communication between agencies and the failure of the state to recognize and take advantage of new septic and related construction technologies. In particular, he warned of the ever-broadening and deepening influence of DEP in the northern part of the county. "DEP takes every opportunity to shut this part of the county down...

I can't stress enough that our northern towns and villages and hamlet areas will be shut down economically," he said.

As of late April, Consultants and Legal Staff for The Builders Institute were endeavoring to draft a meaningful critique of this DEC draft report before the Apr. 30 deadline imposed by DEC, although most experts agree that it would take several months to properly critique the voluminous material in the entire document.

Westchester County Legislator Peter Harckham (D-Bedford), chairman of the Septic Subcommittee of the County's Board of Legislators, has reportedly asked the DEC for more time for comment.

"In order for there to be meaningful, affordable residential development in Westchester, and especially in the mostly northern areas of the county targeted by HUD based on the housing lawsuit settlement, the regulatory environment has got to permit a higher density of development for affordability. These new standards make that harder than ever to do," Annunziata said.

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# AHRC New York City Moving its Bronx Day Habilitation Center to New Building to Be Designed and Built by Simone Development

## *New Center to be Located Opposite Westchester Square Station*

NEW YORK—AHRC New York City will have a new home for one of its programs in the Bronx, thanks to the efforts of Simone Development Companies.

AHRC is moving its Bronx Day Habilitation Center from Pelham Parkway to a new 15,195-square-foot building that Simone Development is constructing on a vacant parcel at 1420 Ferris Place, across the street from the Westchester Square Station.

The new building, which will be owned and managed by Simone Development, will feature physical and occupational therapy areas, sensory stimulation rooms, specially designed bathrooms and will be fully accessible for people with physical disabilities. Completion is scheduled for late summer, officials said.

AHRC is relocating its Day Habilitation Center from its current location in the Bronx because of a change in ownership of the building. AHRC is a 63-year-old not-for-profit or-

ganization which serves more than 15,000 individuals with intellectual and developmental disabilities throughout the five boroughs. AHRC operates 18 locations in the Bronx, spokesmen said.

Barbara Kaplan, director of AHRC's office of real property, said the new building's location in the Westchester Square District will provide an ideal environment for the adults served by AHRC's center.

"By being exposed to experiences in the surrounding community, they will learn valuable skills to use in their daily lives. The location opposite the Westchester Square station is also very convenient for our employees, many of whom rely on public transportation," Kaplan said. "It was vitally important that we remain in this area of the Bronx. We are glad to be working with a development company that is able to facilitate this important move for us and create a first-class facility designed to meet our unique requirements."

"We are delighted to be able to accommodate the space requirements for AHRC so that they can continue to provide their valuable services to the Bronx community," said Joseph Simone, president of Simone Development Companies.

James MacDonald, director of leasing for Simone Development, said: "As the leading developer and owner of commercial space in the Bronx, Simone Development is able to satisfy AHRC's requirements with a built-to-suit, free-standing building that is not far from their current location. At the same time, we were able to add value to our portfolio with the development of a high quality commercial

building on what is now a vacant lot."

Simone Development Companies is a full service real estate investment company spe-

cializing in the acquisition and development of office, retail, industrial and residential properties in the tri-state area. The privately held company owns and manages an extensive range of commercial projects, from multi-building office parks to retail and industrial space in the Bronx, Westchester County, Queens, Long Island and Connecticut, company officials said.

The company's largest and most successful development is the 42-acre Hutchinson Metro Center office complex directly off the Hutchinson River Parkway in the Pelham Bay section of the Bronx. The first two phases of the complex, which comprise nearly 750,000 square feet of Class A office and medical space, are fully leased. A third building of 280,000 square feet is scheduled to break ground this summer. Headquartered in the Bronx, the company's portfolio of more than 100 real estate properties totals more than five million square feet of development space, spokesmen said.

**The new building, which will be owned and managed by Simone Development, will feature physical and occupational therapy areas, sensory stimulation rooms, specially designed bathrooms and will be fully accessible for people with physical disabilities. Completion is scheduled for late summer, officials said.**

# HGAR Announces Its Support of the Current Plans For The Construction of a New Tappan Zee Bridge

WHITE PLAINS—The Hudson Gateway Association of Realtors (HGAR), a trade organization representing more than 9,000 real estate professionals in Westchester, Put-

The current bridge has been cited for insufficient capacity, less-than-modern structural and highway design standards, escalating maintenance costs and the inability to accept

bridge has the design features to accommodate the later addition of a mass transit system."

HGAR officials added that the organization believes that delaying bridge construction for mass transit to be fully designed would probably add several years more of analysis and environmental review.

"Anyone who participated in the former Tappan Zee Bridge / I-287 Corridor project is aware of the extraordinary depth of planning it entailed, not just on what mode—rail or bus—is best, but also the configuration of 30 or so miles of dedicated right of way in the I-287 corridor," added Haggerty. "This

includes stations and station parking, signalization, precise route alignments, connections with other systems, takings of some properties, repurposing of others, and so on."

A Top Priority Construction of a new Tappan Zee Bridge has received the highest infrastructure priorities at both the federal and state levels, HGAR officials said.

"It does not make sense to risk all that by tacking on an untold number of years to plan and review the transit options. Our preference as an organization is that the project stays on its current fast track and in transit-capable mode," Haggerty said.

HGAR added that it strongly supports mass transit and is urging that planning for it begin now so that a final configuration could be in place when the bridge construction is completed.

HGAR is a not-for-profit trade association covering more than 9,000 real estate professionals doing business in Westchester, Putnam, Rockland, and Orange counties. The association is comprised of the former Westchester Putnam Association of Realtors (WPAR), the Rockland County Board of Realtors (RCBR) and the Orange County Association of Realtors (OCAR).

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—Richard Haggerty, chief executive officer of HGAR.

nam, Rockland and Orange counties, is lending its support to the current plans for the construction of a new Tappan Zee Bridge.

The organization announced its support in a formal statement during the first week of March.

"The Tappan Zee Bridge knits our region together and we are all aware of the growing list of deficiencies of the present bridge," said Richard Haggerty, chief executive officer of HGAR. "There is an urgency for action to replace the bridge before any hazardous conditions create an emergency that leaves us no options at all."

meaningful mass transit improvements, among other issues, HGAR officials said.

"We are mindful of one of the principal criticisms of this project—that it does not include a defined mass transit component—and our organization fully agrees that the inclusion of significant mass transit via the bridge is vital to the region for traffic capacity and environmental reasons," Haggerty said. "However, we don't think that the mass transit component needs to be fully designed and ready for construction on day one of bridge construction. It is sufficient that the new

## ***Darned If Landlord Deems, Darned If Landlord Does Not!***

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stance, as explained, it would appear that the landlord can then end the tenancy of the ETPA tenant who failed to renew the lease by the service of a notice of termination of month-to-month tenancy. This has not yet been attempted by any landlord to our knowledge as the decision in *Samson v. Hubert* was rendered in February, 2012 and is apparently being appealed.

### **Options**

The bottom line at this point

seems to be that the landlord presently has two basic options: tacitly assent to the month-to-month tenancy and subsequently terminate the month-to-month tenancy, or commence the holdover proceeding immediately at the expiration of the lease and litigate the excusable nature, or lack thereof, of the failure to renew the lease.

If, in fact, the termination of the month-to-month tenancy becomes an easier course,

as the technical legal requirements would seem to indicate it must, the defeat of the landlord in the above cases may ultimately prove to be a substantial victory.

**Editor's Note: The authors are attorneys with Finger and Finger, A Professional Corporation. The firm, based in White Plains, serves as Chief Counsel to the Building and Realty Institute of Westchester and the Mid-Hudson Region (BRI).**

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