

Preferential Rents

A Fact Sheet for Rent Stabilized Tenants

A change in the rent stabilization law in 2003 has created uncertainty and may make it possible for your landlord to raise your rent to the “legal regulated rent” on renewal of your lease and take away your “preferential rent.” NOTE: THESE ARE COMPLICATED LEGAL ISSUES AND IF THIS AFFECTS YOU, YOU SHOULD DISCUSS YOUR SITUATION WITH A LAWYER OR LAY ADVOCATE

What is a “preferential rent”? Many rent stabilized tenants pay a rent that is less than the rent the landlord is legally permitted to charge – this rent is called a preferential rent. In most cases, this rent was negotiated between the tenant and the landlord when the tenant first moved in. The lower rent was negotiated because the landlord was unable to get the legal rent (because of building conditions, size of apartment or neighborhood reputation) or because the landlord wanted to do a favor for the tenant or in return for something that the tenant was providing (a concession). In other cases, the higher “legal rent” is a fiction and not legal at all, but the landlord simply hoped that the tenant would not challenge it (because she didn’t have to pay it) and that the next tenant would be stuck with it.

Thanks to pro-real estate forces in the state legislature, a change was made to the law in Albany in 2003 saying landlords are now able to move up to what the legal regulated rent would be when the lease is renewed. Prior to the law change in 2003, a preferential rent was the permanent basis for rent increases for the life of the tenancy (with a few exceptions, see below).

In many cases the difference between the two rents, the rent the tenant is paying and the legal regulated rent, is hundreds of dollars and the jump up means that the tenant has to give up the apartment.

What rights do tenants with preferential rents have? Tenants have the right to challenge a higher rent demanded by their landlord, and can do this in a number of ways. While tenants can file a complaint with the NYS Division of Housing & Community Renewal, they are strongly advised **NOT TO FILE WITH DHCR**, which has taken an extreme pro-landlord view of these questions, and recently enacted administrative rules holding that landlords can opt out of preferential rents in all cases and do not even have to have listed both rents on all leases, renewals and rent registrations over the previous 4 years.

Tenants should take steps to preserve their rights and options while these issues are resolved in individual court cases which will set a precedent for everyone else. It is critical to get accurate legal or lay advice before taking any steps that may affect your rights, such as signing or refusing to sign a lease renewal offer ending the preferential rent, or withholding rent to go to housing court. Call Met Council’s hotline for information.

This sounds like there are complicated legal issues. What are they? Prior to the law change in 2003, the preferential rent was acknowledged under the “Collingwood Rule” to be a term and condition of the tenancy, and the basis for all subsequent rent increases for the life of the tenancy (except, under a narrow exception recognized in the 2001 *Missionary Sisters* case, when the original lease specified that the preferential rent was only granted due to a temporary condition, such as the post 9/11 recession, and the court held that in such cases renewals can be based on the higher “legal regulated rent”, if it really is legal). In all cases not covered by the *Missionary* exception, landlords were required to register with the state housing agency both the legal registered rent and the preferential rent; and the landlord must include both

For more detailed information about your rights, or for assistance in organizing a tenants’ association:

METROPOLITAN COUNCIL ON HOUSING

339 Lafayette Street, New York, NY 10012 • www.metcouncil.net

Tenant Hotline: 212-979-0611 (Mondays, Wednesdays and Fridays 1:30-5:00 p.m.)

Free Tenant Clinic: Tuesdays 6:30 p.m., Cooper Square 61 E. 4th Street (between Bowery & 2nd Ave.)

rents with each lease renewal, and all renewals had to be based on the lower rent.

However, the effect of the 2003 change on existing tenancies is unclear because the contract clause of the US constitution, Article I, section 10, clause 1 limits the ability of state legislatures to impinge rights under existing contracts. It will probably take a year or two for state appellate courts to determine whether the 2003 law has no effect on existing preferential rent agreements or whether it does in fact allow landlords to opt out. Early lower court decisions have mostly been encouraging.

What actions can tenants take? Under the new law, tenants are better off raising the issue in Housing Court or by filing an action for “declaratory relief” in state supreme court and in either case may get a more sympathetic forum than DHCR. It can also be discussed informally with the landlord. There are a number of ways the issue can be raised in Housing Court: (a) the tenant can withhold rent and let the landlord start a nonpayment case in housing court; (b) the tenant may not be able to pay the new rent, and the landlord will start a nonpayment case; (c) the tenant might refuse to sign a renewal offer demanding the higher rent, and the landlord can commence a holdover proceeding based on failure to renew the lease [In this case, even if the tenant loses, it is highly likely that the tenant will be given an opportunity to sign the lease at the higher amount, assuming she can pay it, without forfeiting the tenancy, but this is a slight risk]; (d) the landlord could start a holdover on some other grounds (having a dog, for example) and claim in the court papers that the rent is the higher amount. In *any* case started by the landlord in Housing Court (nonpayment or holdover) the tenant can claim that she has a right to continuation of the preferential rent as a term and condition of the tenancy, leaving it for the Court to determine. Tenants may also have other defenses and claims, both technical and substantive (such as hazardous conditions) which should be raised in any court case. Tenants taken to Housing Court for any grounds, or considering action that may land them there, should get legal or lay advice first. (Call Met Council’s hotline for a referral to a private attorney or to get the phone numbers for free legal service providers.) Remember: tenants are advised NOT TO FILE A COMPLAINT WITH THE DHCR.

One preferential rent situation is almost always a winner for tenants: the preferential rent was provided as a concession, or as a return for a favor. For example, a tenant moved into a ground floor apartment paying the legal regulated rent. Two years later, the landlord asked the tenant to move to a different apartment upstairs so that he could expand a store on the ground floor. The tenant agrees and in return, the landlord lowers the new apartment’s rent to match what the tenant was paying for the ground floor apartment. The landlord gives the tenant a written lease ride explaining the swap. In this situation, the preferential rent should last the life of the tenancy. Once the tenant moves out, however, the landlord would have the right to switch to the legal regulated rent.

Most tenants with preferential rents are not in the above situation, and their rights are less clear. Most preferential rent tenants do not have a lease with clear language indicating that the preference lasts for the duration of the tenancy, but have initial leases which are either ambiguous or silent on this issue. *These tenants have a strong argument, if their preferential agreement was already in place when the law was changed in June 2003, that the law did not change their existing contract and that the preferential rent is a term and condition for the duration of the tenancy under the “Collingwood Rule”.* However, the courts will have to determine this question.

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