

## NY Broker Fee Guidance Has Unintended Consequences

By **Luise Barrack** (February 11, 2020, 5:41 PM EST)

Last week, after all of the other recent blows to New York owners and developers, the New York Department of State issued its interpretation of a portion of the Housing Stability and Tenant Protection Act legislation which was passed in June 2019.

The interpretation of the provision in question, which provides that, at the initial lease up of an apartment, there will be no charges to tenants, with the sole exception of a \$20 fee to pay for a portion of the cost for a credit report to ascertain whether that tenant is credit-worthy.



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The argument in support of the interpretation is that the provision was intended to limit all costs passed on to tenants to that \$20. The argument against that interpretation is that there was no reference whatsoever to brokerage fees contained in the legislation and no legal basis for the Department of State to issue same.

The question presented by this new interpretation is: What are the unintended consequences of this interpretation of the law especially in the aftermath of what has been viewed as the decimation of the real estate industry in New York? The view of tenants' advocates and others who support this legislation along with the recent Department of State interpretation — that brokers can only be paid by owners — is that the only impact will be on owners who can sustain the cost.

First, it bears noting that real estate owners are comprised of both large public companies, smaller companies, all the way down to individuals who own one small building. In fact, each and every one of these legislative actions will necessarily negatively impact not only real estate owners and developers but other industries and the people who are employed in those industries as well.

After the effective elimination of individual apartment improvements and major capital improvements, it was evident that one unintended consequence of the legislation was to severely negatively impact the New York construction industry and workers employed in the construction industry.

As costs increase — via taxes, etc. — and the ways in which owners can increase the value of their real estate increase by increasing rents are capped, it is abundantly clear that owners will, of necessity, not be able to put more economic resources into their real estate. Hence, construction workers will have less work and another unintended consequence of the legislation will be the deterioration of New York housing stock.

This new interpretation extends the harmful aspects of the HSTPA, now imposing its detrimental provisions upon the brokerage industry and brokers. Here, again, these laws impose costs and impairs owners' ability to make their real estate profitable, it is reasonable to expect that, to the extent that there is a cost impacting profitability, the practice will be examined for the need to continue to incur the cost.

Therefore, it is likely that the Department of State's recent interpretation of the Housing Stability and Tenant Protection Act will result in real estate owners ceasing to use brokers to market their properties or, to the extent the apartments are fair market and not subject to rent regulation, the cost of the brokers' fees will be passed on to prospective tenants in their rent. Clearly, small owners of rent regulated property will immediately stop using brokers.

Moreover, it is beyond question that this interpretation by the Department of State will likely open the floodgates of litigation regarding broker fees. The Department of State issued guidance saying the interpretation would not apply retroactively.

An Article 78 proceeding has already been commenced by, inter alia, the Real Estate Board of New York, other real estate associations and real estate brokerage against the Department of State to permanently enjoin the Department of State's interpretation and challenging the legal propriety of its interpretation as in violation of law without challenges have been mounted to the Housing Stability and Tenant Protection Act.

In the proceeding, the petitioners note that the Department of State's website provides guidance that is directly in conflict with its interpretation of the law relative to brokerage fees.

Judge Michael Mackey of the New York Supreme Court in Albany County granted the petitioner's order to show cause resulting in a temporary reprieve to brokers and temporary cessation of the interpretation.

However, whether or not this legal challenge is ultimately sustained, considering the consequence of willfully violating the reading of the statute, many owners will likely hold off utilizing brokers or will try to pass the cost of same to prospective fair market tenants in the form of monthly rent charges. Every owner who has paid a brokerage fee and every broker who has collected a brokerage fee since this pronouncement may be impacted and the fees that were paid will be in jeopardy until this interpretation is finally adjudicated.

The real estate and brokerage industries will await the ultimate outcome of the proceeding. The next court date for the proceeding is in mid-March. In the interim, it will be far from business as usual for everyone who is impacted.

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