Required Services

When Is a Discontinued Service De Minimis?

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Generally, under rent regulation, an owner must provide and continue to provide "required" or "essential" building-wide and apartment services to the tenants. If the owner fails to do so, the state Division of Housing and Community Renewal (DHCR) will order the owner to restore the service in question, and will reduce the rents of the complaining tenants until such restoration takes place.

But what if the service at issue is inconsequential or otherwise "de minimis?" In the recent case of *Goldman v. New York State Division of Housing and Community Renewal*, __A.D.3d__, 817 N.Y.S.2d 498 (1st Dep't 2006), the Court agreed with DHCR that the "service" of allowing tenants on the building's roof for "recreational" purposes was de minimis, such that the owner could discontinue the service without a rent reduction. While the *Goldman* case itself is unremarkable, it does provide us with an opportunity to explore the issue of what is, and what is not, a required or essential service.

RENT REGULATION

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Rent Control

Under rent control, the services an owner must provide are known as "essential services." Section 2200.3(b) of the Rent and Eviction Regulations defines "essential services" as follows:

> Those essential services which the landlord furnished, or which he was obliged to furnish, on April 30, 1962, and which were included in the maximum rent for the housing accommodation on that date. These may include, but are not limited to, the following: repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, telephone, elevator service, kitchen, bath and laundry facilities and privileges, maid service, linen service, janitor service, and removal of refuse.

The regulation does not specify when a service is so inconsequential that it is no longer "essential." The Appellate Division, First Department attempted to clarify this issue in *Stratford Leasing Corp. v. Gabel*, 17 A.D.2d 332, 235 N.Y.S.2d 143 (1st Dep't 1962). In *Stratford*, the issue arose as to whether a lobby bell buzzer system, which the landlord had unilaterally discontinued, qualified as an essential service. The First Department held that it was, stating:

> In the field of rent control certain criteria have been applied to determine what constitutes essential services. Among other things, the general usefulness of the service as to the everyday living or occupancy of the tenant is considered. The particular or unique use to which the tenant avails himself of a provided service is relevant, as is the question of whether the elimination of the service materially reduces the value of the demised premise. Finally, whether the service was actually contemplated or bargained for at the time of entering the premise or signing the lease is often determinative.[1]

The Court went on to observe that based on existing case law, all of the following services were deemed "essential:" doorman, awnings and window screens, spraying of venetian blinds, clothes lines, and terraces.[2] It is difficult, however, to understand how some of these services qualify as "essential" under the *Stratford* test. Doorman service is obviously "essential," but one could argue that providing a clothes line, or spraying a venetian blind, was probably not contemplated at the time of the original lease, and, if eliminated, would not materially diminish the value of the apartment.

The Court of Appeals thereafter affirmed the First Department in *Stratford*, without opinion. 13 N.Y.2d 607, 240 N.Y.S.2d 363 (1963).

DHCR clarified matters somewhat when it issued Policy Statement 90-1 on Feb. 8, 1990. DHCR noted that because Maximum Base Rent ("MBR") increases cannot be granted if the owner is not providing essential services, DHCR rent reduction orders would henceforth have to indicate whether the decreased service in question was "essential." As a guide, the policy statement provided:

> Under the MBR system, owners must certify that they are maintaining all essential services, These are defined as heat during the part of the year when required by law, hot water, cold water, superintendent services, maintenance of front or entrance door security (including, but not limited to, lock and buzzer), garbage collection, elevator service, gas, electricity and other utility services to both public and required private areas and 'such other services when failure to provide and/or maintain such would constitute a danger to the life or safety of, or would be detrimental to the health of the tenant or tenants.'

Rent Stabilization

Section 2(m) of the original Rent Stabilization Code eschewed the term "essential services" in favor of "required services." Required services were defined, in relevant part, as:

> That space and those services which were furnished or were required to be furnished for the dwelling unit on May 31, 1968, and all other additional services provided or required to be provided thereafter or with respect to the building subject to the RSL ....

Like the definition of "essential services" under rent control, the definition of "required services" does not clarify when a service is so inconsequential that a rent reduction is not warranted even if the service is discontinued outright.

In 1987, DHCR promulgated a new Rent Stabilization Code,[3] which provided a somewhat more helpful definition of "required services:"

> That space and those services which the owner was maintaining or was required to maintain on the applicable base dates set forth below, and any additional space or services provided or required to be provided thereafter by applicable law. These may include, but are not limited to, the following: repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, elevator services, janitorial services and removal of refuse.[4]

Because the definition encompassed those services which the owner was providing as of the base date, or voluntarily provided thereafter, even the most de minimis service could be deemed "required."

The landscape changed dramatically in 1988 with the Second Department's ruling in *Hyde Park Gardens v. New York State Division of Housing and Community Renewal,* 148 A.D.2d 351, 527 N.Y.S.2d 841 (2d Dep't 1988). In *Hyde Park*, DHCR found that the owner had reduced a required service by implementing a new overall security system. The agency, however, in its discretion, declined to order a rent reduction. The Second Department, affirming Supreme Court, held that the RSL demanded that rents be reduced:

> The agency's determination not to order a rent reduction constituted an exercise of discretion which that agency did not possess based upon the mandatory nature of the language in the Rent Stabilization Law of 1969 (Administrative Code §26-514). When the agency determines that there has been a diminution of a 'required service,' 'the

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commissioner shall so reduce the rent' (Administrative Code §26-514 [emphasis supplied]).[5]

The Court of Appeals thereafter affirmed the Second Department's order for the reasons stated therein. 73 N.Y.2d 998, 541 N.Y.S.2d 345 (1989).

The *Hyde Park* decision, which provided that DHCR was required to reduce rents anytime it found that required services had been reduced, brought forth a flood of service complaints. In response, DHCR created a new policy whereby certain enumerated services would no longer be deemed "required." A Nov. 10, 1995 internal memorandum issued by DHCR states in relevant parts:

> DHCR's experience in processing tenants' complaints of decreases in service has shown that some conditions complained of, although they may be found to exist, are 'de minimis' in nature and do not rise to the level of decreases in service.
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> In the past, the agency has found that certain conditions complained of by a tenant may be only minor changes, technical violations of local codes, or represent normal wear and tear that is corrected with regular building maintenance. Such conditions may not represent an actual decrease in services provided to tenants; their existence may only have a minimal impact on tenants and not affect use and enjoyment of the premises; and they may exist even though an owner is regularly maintaining all services.

The memorandum then listed 24 building-wide conditions and seven apartment conditions that qualified as de minimis. For example, owners could no longer suffer rent reductions for removing a clothes line, or for failing to "retape or record venetian blinds."

In December of 2000, DHCR codified its list of de minimis services in Section 2523.4(e) of the Rent Stabilization Code. DHCR added a twist by also promulgating Section 2523.4(f)(1), which stated:

> [F]or purposes of this subdivision the passage of four years or more shall be considered presumptive evidence that the condition is de minimis, with such four-year period to be measured without reference to any changes in building ownership or the tenancy of the subject housing accommodation.

Thus, DHCR added an element of laches to the mix; if a tenant did not see fit to complain within four years, there was a presumption that the service was not "required."

'Goldman'

In *Goldman*, supra, the tenants of One University Place in Manhattan complained that the owner had discontinued its prior practice of allowing tenants to use the building roof for recreational purposes. At issue was Section 2523.4(e)(19) of the Rent Stabilization Code, which states that discontinuance of recreational use (such as sunbathing) on a roof shall be deemed de minimis "unless a lease clause provides for such service, or formal facilities (e.g. solarium) are provided by the owner . . ." After finding that no "formal facilities" had ever been provided, DHCR found the discontinued service to be de minimis. In a decision issued on July 6, 2006, the First Department affirmed, implicitly upholding the validity of DHCR's "de minimis" policy.

Niles Welikson, the prevailing attorney in *Goldman*, advises that tenants therein have sought leave to appeal to the Court of Appeals.

1.17 A.D.2d at 333-34.
2. Id. at 334.
3. 9 NYCRR 2520.1 et seq.
4. 9 NYCRR 2520.6(r).
5. 140 A.D.2d at 843.