KAUFMAN FRIEDMAN PLOTNICKI & GRUN, LLP

Memorandum on the Tenant Protection Act of 2019

Introduction

This memorandum addresses recent changes to the laws governing real property in New York State which will collectively be referred to herein as the Tenant Protection Act of 2019, or the "TPA". The TPA was signed into law on June 14, 2019. A Chapter Amendment, which made certain technical changes to the TPA, was signed into law on June 25, 2019.

This memorandum is separated into five parts. The first part discusses the effect of the TPA on rent stabilized and rent controlled apartments. The second part discusses the more general effect of the TPA on all apartments, whether rent regulated or fair market. Although, generally speaking, the provisions of the TPA apply to any residential landlord-tenant relationship, whether in a rental building, a co-op or between a condo unit owner and his or her lessee, the third part discusses the effect of the TPA on co-ops and condos in particular. The fourth part discusses the limited effect of the TPA on commercial tenancies. The fifth part discusses other miscellaneous issues arising under the TPA.

This memorandum is meant to provide an overview of the provisions of the TPA that are most commonly encountered by landlords in New York City. However, given the expansive and fundamental nature of the changes brought about by the TPA, it is impossible at this time to know precisely how its multitude of provisions will be interpreted by courts or by the agencies tasked with its implementation.[1] Therefore, particular issues should continue to be considered as they arise on a case by case basis.

This memorandum is also designed to provide you with our insight into particular issues, and it should be treated as a confidential attorney-client communication. Therefore, we ask that you not disseminate this memorandum to third parties.

PART I

Rent Stabilization and Rent Control

The changes wrought by the TPA to the administration of rent regulated tenancies are vast. These changes affect vacancy rent increases, individual apartment improvements, major capital improvements, preferential rents, deregulation, rent overcharge proceedings and owner's use proceedings.

[1] For example, the Chapter Amendment to the TPA directs the Division of Housing and Community Renewal ("DHCR") to adopt new regulations implementing the rent laws, but they will likely not be available until June of 2020.

a. Vacancy Rent Increases

The TPA eliminates all automatic rent increases that were once available to a landlord upon the vacancy of a rent stabilized apartment, including the vacancy bonus and longevity increase. Although the TPA still allows a landlord to collect a Rent Guideline Board ("RGB") increase upon the renewal of a rent stabilized lease, no such increase is provided for in the context of a vacancy lease. As a result, while a landlord is entitled to an RGB renewal increase if a rent stabilized tenant remains in occupancy and renews his or her lease, a landlord is deprived of the same RGB increase if the tenant vacates the apartment at the end of the lease term. The TPA also eliminates the increase that was previously available to a landlord upon each second succession rights claim.

b. Individual Apartment Improvements

The TPA severely curtails rent increases for individual apartment improvements ("IAIs"). Under the TPA, a landlord may only increase an apartment's legal rent by either 1/168, for a building with thirty-five or fewer units, or 1/180, for a building with more than thirty-five units, of the total cost of an IAI. This is down from 1/40 or 1/60 of the cost, respectively, under the previous law.

Additionally, a landlord can only perform three IAIs in any fifteen-year period, beginning with the first IAI after June 14, 2019. The aggregate cost of all IAIs performed during this fifteen-year period cannot exceed $15,000.00. IAI rent increases are also no longer permanent. After thirty years from the date an IAI becomes effective, the full IAI rent increase, including any Rent Guideline Board increases assessed upon the IAI, must be removed from the apartment's legal rent.

The TPA makes IAIs more cumbersome for landlords in other ways. First, The TPA mandates that all IAIs be performed by *licensed* contractors, whereas under the previous law there was no such requirement. Second, the TPA prohibits any degree of common ownership between a landlord and a contractor performing an IAI, whereas under the previous law common ownership was permitted, albeit with heightened scrutiny by DHCR. Third, the TPA prohibits IAIs in apartments subject to outstanding hazardous or immediately hazardous violations, whereas under the previous law there was no such prohibition.

Furthermore, the TPA establishes heightened record-keeping and documentation requirements for IAIs. The TPA requires landlords to maintain itemized records of all renovation work performed as part of an IAI, including photographs that show the condition of the apartment before and after the work is performed. Landlords not only are required to retain this documentation indefinitely, but must also transmit copies to DHCR for storage in a centralized electronic database that can be accessed by a tenant during a proceeding to challenge the IAI. The procedure for transmitting such documentation to DHCR has not yet been established.

Finally, it may be the case that IAI renovation work was completed prior to enactment of the TPA, but that the ensuing vacancy lease, which sets forth the IAI rent increase, was either entered into or became effective after passage of the TPA. In such a situation, there remains a question as to whether the IAI calculation should be based on the previous law (i.e., 1/40 or 1/60 of the value of the renovation work) or on the TPA (i.e., 1/168 or 1/180 of the value of the renovation work). It is our belief that there exists a strong basis to take the position that an IAI increase becomes effective upon completion of the renovation work, and that the execution or effective date of an ensuing vacancy lease is not relevant to the calculation. However, neither the TPA nor the previous law expressly answer this question, and it is possible that a court or the DHCR will conclude that, in such a circumstance, the IAI is in fact subject to the TPA. Accordingly, in order to avoid any potential liability for a rent overcharge, we advise a landlord in this situation to await further instruction from a court and/or DHCR before making a final determination as to how to proceed.

c. Major Capital Improvements

The TPA also limits rent increases for major capital improvements ("MCIs") in several important ways. First, the TPA reduces the overall value of an MCI by increasing the amortization period for the underlying improvement. In that regard, the TPA directs that the cost of an improvement be amortized over either twelve years, for a building with thirty-five or fewer units, or twelve and a half years, for a building with more than thirty-five units. This is up from an amortization period of 8 or 9 years, respectively, under the previous law. As a result of the longer amortization period, the MCI rent increase for a given improvement will be lower under the TPA than it would have been for the same improvement under the previous law.

Second, the TPA increases the amount of time it takes for a landlord to recoup the value of an MCI, by lowering the maximum allowable rent increase per year. Under the TPA, MCI rent increases can only be added to a tenant's rent in increments equal to or less than 2% of the tenant's base rent per year. This is down from a maximum increment of 6% of the tenant's base rent under the old law. Moreover, the reduction in the maximum increment from 6% to 2% applies retroactively to MCIs approved on or after June 16, 2012, and landlords must recalculate and adjust existing MCIs by September 1, 2019 to account for such retroactive reduction of the maximum increase. As a result of this reduction, it will take significantly longer for a landlord to recoup the full value of an MCI under the TPA than it would have under previous law. The only exception occurs when a tenant vacates an apartment, at which time a landlord can immediately add any remaining balance of an MCI to the next tenant's rent without regard to the maximum increment.

Third, as is the case with IAIs, the TPA makes MCI rent increases temporary rather than permanent. Accordingly, thirty years after an MCI is granted the entire of amount of the MCI, including any Rent Guideline Board increases assessed upon the MCI, must be removed from the apartment's legal rent. At least in the context of MCIs, the DHCR must notify the landlord sixty

days before the end of the thirty-year period of the amount that is to be removed from the tenant's rent.[2]

Fourth, the TPA prohibits MCIs in a building where less than 35% of the units are rent regulated, prohibits MCIs in any building that is subject to any hazardous or immediately hazardous violations, and prohibits MCIs for cosmetic improvements.

Fifth, the TPA requires landlords to produce more detailed documentation in support of their MCI applications, and mandates that DHCR annually audit twenty-five percent of all MCI applications for compliance with the law.

Lastly, the TPA directs DHCR to adopt a schedule of costs for MCIs that will set a ceiling on what can be recovered for a given improvement. The schedule is currently unavailable and will likely be released in June of 2020.

d. Rent Increases Specific to Rent Control Apartments

The TPA imposes new restrictions on rent increases for rent control apartments. First, the TPA reduces the maximum rent increase a landlord can collect from a rent control tenant in a one-year period. Under the previous law, the maximum rent increase in a one-year period was seven and a half percent of the previous rent. Under the TPA, the maximum rent increase in a one-year period is the lesser of seven and a half percent, or the average of the last five RGB one-year renewal increases for rent-stabilized apartments. Since the RGB one-year renewal increase for rent-stabilized apartments has not been as high as seven and half percent since 1981 (the average RGB one-year renewal increase for rent stabilized apartments over the past five years is only 00.75%.), in reality, the TPA significantly reduces the maximum rent increase a landlord can collect from a rent control tenant in a one-year period.

Second, the TPA prohibits a landlord from charging a fuel pass-along or surcharge to a rent control tenant. Finally, the TPA eliminates rent adjustments based on increases in labor costs. These change take effect immediately.

e. Preferential Rents

The TPA eliminates a landlord's ability to limit a preferential to a single lease term. A preferential rent exists when a rent-stabilized tenant is charged a rent that is lower than the actual legal rent during a lease term. Under the previous law, a landlord could treat the preferential rent as temporary so that the rent payable under a renewal lease could be calculated based upon the maximum legal rent and the tenant could be charged the full legal rent for the remainder of the tenancy.

[2] The DHCR is not similarly required to notify the landlord at the end of the thirty-year IAI period, presumably because most IAIs are performed without DHCR approval.

Under the TPA, a landlord cannot remove a preferential rent so long as the tenant remains in occupancy of the apartment, even if the lease says otherwise. As a result, when there is a preferential rent, all RGB renewal increases must be calculated based on the preferential rent for the entire duration of the tenancy. The only exception is in the case of a building that receives federal project-based Section 8 rental assistance. There, the agency administering Section 8 may set the tenant's rent at a level below the actual legal rent. However, the lower rent set by the agency does not prevent a landlord from charging the full legal rent upon renewal of the lease.

Notwithstanding the foregoing, the TPA does permit a landlord to remove a preferential rent when an apartment becomes vacant. This is a rare instance in which the TPA allows for a rent increase in a rent stabilized apartment upon a vacancy. Therefore, landlords should continue to register, where appropriate, both an apartment's legal and preferential rent, and clearly distinguish between the two on the face of the lease, to preserve the right to remove the preferential rent upon a vacancy.

Note on Rent Increases

Although the TPA eliminates or greatly reduces rent increases available to landlords of rent regulated apartments, there still may be opportunities for significant rent increases to be obtained in certain circumstances. First, as set forth above, the TPA permits landlords to increase rents when a tenant vacates a rent-stabilized apartment by i) immediately adding any unrealized portion of an MCI rent increase to the apartment's legal rent, and ii) removing the preferential rent, if any, charged to the previous tenant.

Second, the TPA does not eliminate or change the Fair Market Rent Appeal ("FMRA") procedure utilized to set a "first rent" upon the vacancy of a rent-controlled apartment. In that regard, when a rent-controlled apartment becomes vacant, a landlord is entitled to a "first rent" which is calculated by using a special RGB guideline along with consideration of comparable regulated and un-regulated apartments in the building. The "first rent" is then subject to challenge in an FMRA, but generally approaches the level of fair market rent. Since the TPA does not alter this procedure, significant rent increases are still available to a landlord when a rent control apartment becomes vacant.

Third, the TPA does not change current DHCR policy which provides that the substantial alteration of an existing apartment, particularly by altering the dimensions of the outer walls of the apartment, breaks the chain of the apartment's rental history and entitles the landlord to set a "first rent". Thus, even under the TPA, the combining or separating of multiple rent-stabilized apartments continues to represent an opportunity for landlords to obtain significant rent increases, albeit with the resulting apartments remaining subject to rent stabilization. However, DHCR may at any time change its policy, particularly considering the large number of landlords that will likely seek rent increases through the use of this procedure in the near future.

f. Deregulation

The TPA eliminates in their entirety all forms of deregulation, including high-rent and high-income deregulation. As a result, any apartment that is currently subject to rent regulation will remain so indefinitely. Notably, the TPA was at first ambiguous as to whether previously fair-marketed apartments would become subject to re-regulation upon passage of the law. However, the Chapter Amendment clarified that any apartment that became deregulated prior to June 14, 2019 would remain deregulated under the TPA.

The only instance in which deregulation can still occur under the TPA is in the context of "421-a" and "J-51" tax benefit programs. In that regard, the Chapter Amendment expressly provides that a building that participates in the "421-a" tax benefit program will continue to be subject to the deregulation provisions as they existed in the law prior to June 14, 2019.

The Chapter Amendment does not expressly exempt "J-51" buildings from the TPA. However, the TPA did not eliminate language already contained in the law previously that permitted deregulation of apartments that were subject to rent regulation *solely as a result* of the building's participation in "J-51". Accordingly, it is our view that apartments currently subject to rent regulation solely as a result of the building's participation in "J-51" will continue to be eligible for deregulation upon expiration of the tax benefit, provided the other conditions for deregulation are met, even under the TPA.

A question remains as to whether the TPA permits deregulation of apartments that were subject to rent regulation *prior* to the building's receipt of "J-51" benefits. Typically, such apartments would, upon expiration of the tax benefit, revert to their previous rent regulated status. However, it may have occurred that, during the "J-51" period, and prior to passage of the TPA, an apartment's legal rent exceeded the threshold for high-rent deregulation. If that were the case, the apartment would arguably then only have been subject to continued rent regulation during benefits period as a result of the building's participation in the "J-51" program. Accordingly, it is possible that such an apartment would, upon expiration of the tax benefit, also be subject to deregulation in the manner described above; however, the TPA does not address this issue.

g. Rent Overcharge

The TPA greatly expands both a tenant's ability to claim that a rent overcharge has occurred and the penalties that can be awarded to a tenant in the event of a successful claim. The TPA also removes virtually every protection previously afforded to a landlord to defend against rent overcharge claims. The TPA is therefore likely to result in a significant increase in the number of rent overcharge complaints brought by tenants, whether meritorious or not.

First, the TPA eliminates all restrictions on when an overcharge claim can be brought. Under the previous law, a claim of rent overcharge had to be brought within four years of the claimed overcharge. The TPA allows a tenant to bring a rent overcharge claim "at any time."

Second, the TPA expands the period for which a court can award overcharge damages. Under the previous law, even when overcharge was found to have occurred, overcharge damages were limited to the four-year period immediately preceding the tenant's filing of a complaint. The TPA permits overcharge damages to be awarded for as many as six years prior to the tenant's filing of a complaint.

Third, the TPA expands the amount of treble damages that can be awarded in the event of a willful overcharge. Under the previous law, treble damages could only be awarded for willful overcharges occurring two years prior to the tenant's filing of a complaint. Under the TPA, treble damages can be assessed on willful overcharges for the entire six-year period prior to the filing of a complaint. The TPA also eliminates a landlord's ability to establish that an overcharge was not willful by voluntarily refunding any overcharge amount to the tenant after a complaint has been filed and before a determination was made.

Fourth, the TPA also allows a court to examine the rental history of an apartment indefinitely far into the past in order to determine whether an overcharge has occurred. Under the previous law, a court could only examine the rental history of an apartment during the four years prior to the filing of a complaint unless specific facts were alleged that demonstrated a colorable claim of fraudulent conduct by the landlord. If such conduct was established, a court might be permitted to inquire further. However, a mere "bump in rent" was not generally considered to be colorable claim of fraud. The "four-year rule", as it was known, provided a degree of finality to landlords, who were thereby insulated from specious claims of rent overcharge based on rent increases occurring in the distant past for which records might no longer be available.

Under the TPA, however, a court or the DHCR now has virtually unfettered ability to examine the rental history of an apartment, with or without any indication of fraud on the part of the landlord. In that regard, the TPA eliminates the "four-year rule" in its entirety, and mandates that a court consider "all available rent history" that is "reasonably necessary" to determine whether an overcharge has occurred. The TPA specifically includes an "unexplained increase in the registered rent" as a ground for further examination of an apartment's rent history. The TPA also permits examination of the rental history of a previously deregulated apartment at any time in order to determine whether the apartment was deregulated in accordance with law.

Although the TPA provides that a landlord need only maintain records for six years, up from four years under the previous law, based upon the foregoing changes in the law, landlords would be well advised to maintain all records indefinitely so as to be prepared to defend each rent increase in the apartment's rent history in the event of a rent overcharge proceeding. With regard to events in an apartment's rental history, such as IAIs, that occurred in the distant past,

and for which no records are currently available, it remains to be seen whether a court will consider the mere absence of such records to be evidence of a rent overcharge.

Finally, the TPA requires a landlord to pay a tenant's costs and attorney's fees in the event of a successful rent overcharge claim.

These changes affect all future overcharge claims, as well as claims that were already pending on June 14, 2019. The retroactive application of the TPA to pending overcharge claims may well form the basis of a challenge to the constitutionality and propriety of the TPA, for instance, if a tenant were to seek to amend a pending overcharge claim to expand its breadth from four to six years.

h. Owner's Use

The TPA greatly restricts a landlord's ability to recover rent-stabilized and rent controlled apartments for personal use. First, the legal standard applied under the previous law to a landlord's right to recover a rent-stabilized apartment for personal use was one of good faith. However, under the TPA, a landlord must now demonstrate an "immediate and compelling necessity" to recover a rent-stabilized apartment for personal use. The "immediate and compelling necessity" requirement applied only to rent controlled apartments, and not rent-stabilized apartments, under the previous law.

Second, the TPA prohibits the eviction of a rent-stabilized tenant in an owner's use proceeding if the tenant has occupied the apartment for at least fifteen years, suffers from a disability or is a senior citizen. Under the previous law, the exception for a long-term occupant existed only for rent controlled apartments, and the threshold was twenty years of occupancy. The TPA not only reduces the threshold for long term occupancy from twenty to fifteen years, but also expands the long-term occupancy exception to cover rent-stabilized apartments in addition to rent controlled apartments.

Third, the TPA provides that a landlord seeking to recover a rent-controlled apartment for personal must intend to use the apartment as his or her primary residence, or as the primary residence of an immediate family member. This primary residence requirement applied only to rent-stabilized apartments, and not rent controlled apartments, under the previous law.

Fourth, the TPA allows a landlord to recover only a single apartment by means of an owner's use proceeding, whether that apartment is rent controlled or rent-stabilized.

Finally, the TPA provides that if a landlord makes a fraudulent statement in the course of an owner's use proceeding, a tenant who is evicted in that proceeding then has a cause of action against the landlord for both actual damages and attorney's fees.

PART II

All Residential Apartments

The TPA imposes a variety of new requirements on all residential landlord-tenant relationships, whether rent-regulated or fair market. These requirements affect the procedures employed by landlords at the beginning and at the end of the lease term, as well as in connection with nonpayment and holdover proceedings. The TPA also establishes new restrictions on tenant harassment and illegal lockouts.

a. Beginning of the Lease Term

The TPA imposes several new restrictions on landlords in connection with the beginning of a lease term. First, the TPA limits the information that landlord can use to determine whether to rent an apartment to a prospective tenant. Although a landlord may still run credit and background checks on an individual who applies to rent an apartment, the TPA prohibits a landlord from refusing to offer a lease on the ground that the prospective tenant was involved in a past or pending landlord-tenant proceeding. Moreover, if it is established that the landlord requested information from a tenant screening bureau, or otherwise consulted court records relating to a prospective tenant, and then refused to rent the apartment to that individual, there will be a rebuttable presumption that the landlord did so impermissibly. The TPA authorizes the attorney general to bring an action to enjoin any such refusal to rent and provides for a fine of between five hundred and a thousand dollars for each violation.

The TPA also prohibits a landlord from demanding any fee in connection with a rental application other than a fee to perform a background check and a credit check. However, the fee for a credit and background check is limited to $20.00, and a landlord may not collect the credit check fee unless a copy of the resulting credit report and background report is then provided to the tenant.

Additionally, for any lease entered into on or after July 14, 2019, a landlord may not accept a security deposit *or* advance from a tenant in excess of one month's rent. If a landlord does so, and is shown to have done so willfully, the landlord will be liable to the tenant for punitive damages up to twice the amount of the deposit or advance. A question remains as to whether the TPA prohibits the acceptance of one-month security deposit in addition to one month's advance rent, or whether a landlord can accept both so long as neither exceeds one month's rent under the lease. However, the TPA's use of the word "or" seems to support the conclusion that a landlord may only collect a total of one months' rent, in any form, at the onset of a tenancy. Therefore, the more prudent course of conduct at this time is to accept only one month's security deposit, with no advance rent, and the first month's rent payable as required by the lease.

Note on Security Deposit Procedure

In addition to limiting security deposits to one month's rent, the TPA also imposes new procedures regarding the return of a tenant's security deposits that span the beginning and end of the lease term.

At the beginning of the lease term, a landlord must offer the tenant an opportunity to inspect the apartment and must enter into an agreement with the tenant that lists any defects that exist in the apartment at that time. The landlord may not withhold security at the end of the lease term for any defect noted in the agreement. Additionally, the tenant may request that the landlord inspect the apartment at the end of the lease term, at which time the landlord must provide written notice to the tenant of any new defects for which it intends to withhold any portion of the security deposit.

The landlord must also return any unused portion of the security deposit to the tenant within fourteen days of the tenant's vacating the apartment. If the landlord withholds any amount of the deposit, the landlord must provide the tenant with an itemized list in writing of the reasons for withholding the deposit. Failure to do so could result in punitive damages equal to twice the amount of the deposit.

If we have not already done so, we can provide you with a series of form letters and agreements to assist you in navigating the TPA's security deposit procedures. These procedures will apply to any lease or renewal lease entered into on or after July 14, 2019.

b. End of the Lease Term

The TPA imposes several new requirements on landlords in connection with the end of the lease term. First, the TPA requires that a landlord notify a tenant in writing if the landlord intends to either i) not renew the tenant's lease, or ii) renew the tenant's lease with a rent increase of 5% or more over the current monthly rent. Inasmuch as the TPA does not specify how the notice must be sent, other than that it must be in writing, landlords should follow the notice requirements contained in the lease.

The notice should typically be sent by the building's registered managing agent, and must be sent either thirty, sixty or ninety days prior to the end of the lease term, depending on the length of time that the tenant has been in occupancy, **and/or** the length of the tenant's lease, as follows:

- If the tenant has **occupied** the unit for less than one year, **and** has a **lease term** of less than one year, the notice must be sent **thirty days** prior to the end of the lease term;

- If the tenant has **occupied** the unit for more than one year but less than two years, **or** has a **lease term** of at least one year but less than two years, the notice must be sent at least **sixty days** prior to the end of the lease term;

- If the tenant has **occupied** the unit two or more years, **or** has a **lease term** of at least two years, the notice must be sent **ninety days** prior to the end of the lease term.

It should be noted that sometimes, tenants are given an incentive in the form of a rent credit that lowers the **net effective rent** during the lease term. In such cases, and to avoid the risk of inadvertently extending the tenant's lease term, it is advisable that the 30-60-90 day notice should be sent to the tenant whenever the rent offered to the tenant is greater by five percent or more than either the **actual rent** or the **net effective rent** in the expiring lease.

If the notice is not sent within the appropriate time frame, the tenant's tenancy will be extended until a proper notice is served and the ensuing notice period expires. For example, if a tenant is entitled to a ninety-day notice, but the notice is not sent until forty-five days prior to expiration of the lease, the tenant's tenancy will automatically extend until the end of the notice period, or forty-five days after the end of the lease period.

This requirement applies to all leases ending on or after October 12, 2019, and for leases ending on October 31, 2019 the notice may need to go out as soon as July 30, 2019. While the end of lease notice requirement applies in both rent-regulated and fair market apartments, the rent stabilization framework already provides for at least ninety-days advance notice for any renewal or non-renewal of lease. The TPA also requires that month to month tenancies must be terminated by notice based on the schedule set forth above. Under the previous law, only thirty days' notice was required to terminate a month to month tenancy regardless of the duration of the tenant's occupancy.

If we have not already done so, we can provide you with a series of forms to assist you in navigating the TPA's end of lease notice requirements.

Second, the TPA imposes an obligation upon a landlord to mitigate damages if a residential tenant vacates an apartment prior to the end of the lease term. Under the previous law, while a few lower court cases had held that a landlord had a duty to mitigate its damages in the event of a premature vacating by a residential tenant that was contrary to the common law rule. The TPA

mandates that a landlord take "reasonable and customary actions" to re-rent the apartment. Moreover, a landlord must try to re-rent the apartment at the lower of i) the apartment's fair market value, or ii) the rent agreed to in the vacating tenant's lease. If the landlord does not do so, it will not be able to recover damages from the former tenant. Moreover, once the apartment is re-rented, the prior tenant's lease is deemed to terminated. Any provision in a lease that purports to exempt a landlord from the duty to mitigate damages is null and void.

c. Nonpayment of Rent

The TPA imposes several new requirements that affect the procedure for commencing a summary non-payment proceeding against a tenant. First, the TPA requires a landlord to send written notice to the tenant *by certified mail* whenever the tenant fails to pay rent within five days of its due date. Failure to provide the tenant with such a notice will constitute an affirmative defense to an eviction proceeding brought against the tenant for non-payment of rent. Therefore, unless a tenant's lease has been terminated due to a tenant's default, a "five-day" letter must be sent before a nonpayment proceeding can be commenced. We recommend that a "five-day" notice be sent for every month that a tenant is at least five-days late in the payment of rent, even if a nonpayment proceeding is ongoing, at least until a court or administrative agency determines otherwise.

If we have not already done so, we can provide you with a series of form letters to assist you in navigating the TPA's "five-day" letter procedure.

Second, the TPA requires that, in addition to the "five-day" letter, a landlord also serve a fourteen-day written rent demand before commencing a summary non-payment proceeding. Under the previous law, a landlord had the option of personally demanding the rent or serving a written three day rent demand. If the tenant still fails to pay the rent, the landlord can then commence a non-payment proceeding, at which time the tenant has ten days to file an answer, up from five days under the previous law. However, if the tenant pays the outstanding rent in full at any time prior to the initial court date, the landlord must accept the payment and the proceeding is rendered moot and subject to dismissal. A question remains as to whether a tenant's payment in full of the amount in the rent demand, which may not cover additional unpaid rent that accrued in the interval between service of the demand and the initial court date, would also render the proceeding moot.

Third, the TPA provides that a landlord may not demand a late fee unless the tenant is at least five days late in the payment of rent. The maximum late fee that can be charged is 5% of the base rent, or $50, whichever is less, regardless of any lease provision to the contrary. Moreover, a landlord cannot seek late fees in a summary non-payment proceeding, as the TPA provides that a landlord may only seek "rent" in such a proceeding, which it defines as "the monthly or weekly amount charged in consideration for the use and occupation of a dwelling". Therefore, a landlord will have to make use of a plenary action in order to recover unpaid late fees.

Note on Attorney's Fees

In addition to prohibiting the collection of late fees in a non-payment proceeding, the TPA's narrow definition of "rent" also excludes other fees that may be due under a lease, such as attorney's fees. Accordingly, a landlord can no longer expect to recover attorney's fees in a summary non-payment proceeding, or for that matter in a summary holdover proceeding.

Ironically, inasmuch as a tenant's right to seek attorney's fees is typically asserted based on reciprocity, it appears that the TPA may also have eliminated a tenant's right to assert a counterclaim for attorney's fees in a summary proceeding.

The TPA also prohibits a landlord from receiving an award of attorney's fees in connection with a default judgment, whereas no such limitation existed under the previous law.

Lastly, the TPA eliminates a procedure which had allowed a landlord to bring a nonpayment proceeding against a deceased tenant's next-of-kin where no estate had been formed.

These changes apply to all proceedings commenced on or after June 14, 2019.

d. Holdovers

The TPA changes the procedure for summary holdover proceedings in several important ways. First, the TPA requires that a holdover petition be served between ten and seventeen days prior to the hearing date, up from five to twelve days under the previous law. Additionally, there is no provision in the TPA that would require a tenant to answer a holdover petition before the return date of the proceeding. Under the previous law, if the petition was served at least eight days before the hearing date, the tenant was required to answer at least three days before the hearing date. Under the TPA, a tenant may in every case answer on the hearing date, regardless of when the petition was served. However, the practical effect of this change is minimal, as tenants rarely answered in advance of the hearing date, even when they were required to under the previous law.

Second, the TPA restricts a landlord's ability to receive an award of interim use and occupancy during a holdover proceeding. The TPA provides that a court may only award use and occupancy upon motion by the landlord, and only where there have been two adjournments at the request of the tenant, not counting an initial request by the tenant for an adjournment to seek counsel. The TPA further provides that use and occupancy can only be ordered prospectively, and that use and occupancy shall not be ordered if the tenant has asserted a colorable claim of rent overcharge or a breach of the warranty of habitability. Finally, the TPA provides that the sole remedy for a tenant's failure to pay use and occupancy is an immediate trial, and that in no circumstances can a court dismiss a tenant's defenses or counterclaims based on the tenant's failure to pay use and occupancy.

The restrictions placed on use and occupancy by the TPA, while extreme, already existed in a somewhat similar fashion under previous caselaw. For that reason, most motions made by landlords for use and occupancy under the previous law did not rely on statutory grounds, but rather on the equitable argument that a person should not be entitled to reside in an apartment free of charge while a holdover proceeding is being litigated. Some courts were amenable to this argument, while others were not. Landlords can continue to present this equitable argument to courts under, but passage of the TPA will likely lessen even further the chance that a court will award use and occupancy to a landlord on any basis.

Third, the TPA provides that in the event a judgment is entered against a tenant based on the breach of a lease agreement, the court must stay the issuance of the warrant of eviction for thirty days, during which time the tenant may cure the breach and vitiate the judgment. This is up from ten days to cure a breach under the previous law, a significant change.

The TPA also provides the Court with discretion to stay execution on a warrant of eviction for up to a year for good cause. This is up from six months under the previous law. The TPA directs the court, in determining whether to grant a stay, to take into consideration any hardship that would be effectuated upon the tenant by an immediate eviction. However, the TPA retains the requirement in the previous law that the tenant must pay use and occupancy in order to get the benefit of a stay. The TPA also preserves the exception in the previous law that allowed a landlord to oppose a stay in the case of an objectionable tenant.

e. <u>Evictions</u>

The TPA mandates that an eviction notice be served fourteen days before a scheduled eviction. This is up from a mere seventy-two hours under the previous statute.

The TPA also makes it a class A misdemeanor for a landlord to evict a tenant or occupant by extra-judicial means, including by threatening or intimidating conduct. Such conduct also gives rise to civil penalties between one and ten thousand dollars for each offense, and/or one hundred dollars per day in the event of an unlawful lockout.

f. Harassment/Retaliation

The TPA makes it easier for a tenant to assert a claim of unlawful harassment or retaliation against a landlord. First, under the previous law, a rebuttable presumption of unlawful retaliation was created if a landlord brought an eviction proceeding against a tenant within six months after the tenant's good-faith complaint or attempt to enforce its rights against the landlord. Under the TPA, this period of time has been increased to one year. Additionally, a tenant's assertion of a breach of the warranty of habitability has been expressly added under the TPA as the kind of assertion of rights that can trigger a presumption of retaliation.

Second, under the previous law, a landlord's refusal to renew the lease of a tenant who had asserted rights against the landlord for more than one additional lease term was not considered a form of retaliation. Under the TPA, a landlord's refusal to extend a tenant's lease beyond the first lease term following assertion of rights by the tenant can be considered a form or retaliation. The TPA also expressly makes the offering of a renewal lease to the tenant with an "unreasonable rent increase" a form of retaliation.

Third, the TPA makes it harder for a landlord to establish that it was not acting out of a retaliatory motive. Under the previous law, no presumption of retaliation would arise in a proceeding based on the violation of a lease term or nonpayment of rent by the tenant. This is no longer the case under the TPA. Additionally, once a presumption of retaliation arises, the TPA requires a landlord to establish, by a preponderance of the evidence, the existence of a non-retaliatory motive for commencing a proceeding against a tenant who previously asserted rights against the landlord. Under the previous law, it was not the landlord's burden, but the tenant's burden to establish a retaliatory motive, so long as the landlord could provide a "credible explanation" for having brought the proceeding against the complaining tenant.

Finally, the TPA imposes liability for attorney's fees and costs on any landlord found to have impermissibly retaliated against a tenant.

PART III

Co-ops and Condos

The TPA makes it substantially more difficult for landlords to convert their rental buildings into cooperatives and condominiums. First, the TPA requires written purchase agreements with respect to at least fifty-one percent of all apartments in the building before a non-eviction conversion plan will be accepted. Under the previous law, purchase agreements were only required with respect to fifteen percent of apartments in the building for non-eviction plans.

Second, the TPA only counts purchase agreements entered into by bona fide tenants who were in occupancy on the date the conversion plan was filed towards achieving the fifty-one

percent threshold. The TPA prohibits counting purchase agreements entered into by outsiders towards meeting the fifty-one percent threshold under any circumstances. Under the previous law, purchase agreements entered into by outsiders could be counted towards meeting the threshold so long as the purchaser, or the purchaser's immediate family, intended to reside in the apartment once it became vacant.

Third, the TPA eliminates the use of "eviction plans" in connection with cooperative and condominium conversions.

See our attached newsletter for additional details on how the TPA affects cooperative boards and their shareholders, as well as condominium boards and unit owners.

PART IV

Commercial Tenancies

The TPA has virtually no direct effect on commercial tenancies, with two notable exceptions. First, the TPA's requirement that a landlord send a "five-day" letter to a tenant who is late in the payment of rent can be read to apply to commercial as well as residential tenancies. In that regard, while the "five-day" letter requirement is contained within a section of the law that deals primarily with residential tenancies, the language of the "five-day" letter requirement itself does not expressly limit its application to residential tenancies. Therefore, until a court determines that the "five-day" letter is not required in the commercial context, we suggest that commercial landlords send the "five-day" letter, by *certified mail*, to any tenant who is late in the payment of rent by at least five days.

If we have not already done so, we can provide you with a series of form letters to assist you in navigating the TPA's "five-day" letter procedure for commercial tenancies.

Second, the changes made by the TPA to the procedure for commencing a summary nonpayment proceeding apply with equal force to residential and commercial tenancies. In particular, the fourteen-day rent demand and expanded time for a tenant to answer a nonpayment petition will both increase the duration of nonpayment proceedings brought against commercial tenants.

PART V

Other Issues

In addition to the provisions of the TPA addressed in this memorandum, the TPA also includes provisions relating to manufactured home parks, dwelling units rented to non-profits for the purpose of housing the homeless, and the statewide expansion of rent regulation. If you have question about these topics feel free to contact us for further information.

Please also note that several landlords and landlord groups, including the Rent Stabilization Association and the Community Housing Improvement Program, recently filed a lawsuit in the Federal District Court of the Eastern District of New York alleging that the TPA, as well as rent regulation as a whole, are illegal and, among other things, constitute an unlawful taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution. However, the outcome of that lawsuit is likely several years away, and in the meantime the TPA remains in full force and effect.

Conclusion

This memorandum was intended to provide an overview of the provisions of the TPA that are most likely to be encountered by landlords in New York City. However, this memorandum does not address every possible issue affecting landlords under the TPA, and the final resolution of many issues will require further guidance from courts and city agencies. Our firm is available to assist you with any questions or concerns you may have regarding individual issues that arise under the TPA in the future.