

Avoid Five Mistakes When Collecting Improvements Increase from Rent-Stabilized Tenant

You probably know that you're entitled to collect an improvements rent increase from tenants when you do certain work in their rent-stabilized apartments. Although the rules for these rent increases may seem simple enough, many owners make mistakes when collecting them. If the tenant complains to the Division of Housing and Community Renewal (DHCR) and the DHCR finds that the owner improperly collected these rent increases, it could find a rent overcharge and order triple damages.

To help you prevent this result, we'll point out five mistakes owners have made when collecting improvements rent increases and tell you what to do to avoid those mistakes.

But first, here's a quick reminder of the key rules for collecting improvement rent increases. Rent Stabilization Code section 2522.4 (a) (1) allows you to collect a rent increase for the "installation of new equipment or improvements, or new furniture or furnishings." If the apartment is occupied, you need the tenant's written consent to collect the increase. For a vacant apartment, no written consent is required. The rent increase you can collect is equal to 1/40th of the cost of the equipment or improvements.

Mistake #1: Including Cost of Removing Prior Tenant's Furniture

If the prior tenant has left furniture in the apartment, some owners mistakenly include the cost of removing the furniture in their calculations of the rent increase for improvements made to the vacant apartment. This isn't allowed. For example, one owner made improvements to a vacant apartment, including the installation of a new stove, cabinets, electrical outlets, and kitchen floor. In calculating the 1/40th rent increase, the owner included the \$1,000 it spent removing the prior tenant's furniture. The new tenant complained to the DHCR, which ruled that the owner couldn't include the \$1,000 cost of removing the prior tenant's furniture. It noted that this was mere maintenance to restore the apartment to the condition in which the prior tenant should have left it before the owner could start making the improvements. This was different from removing materials related to the improvement (such as the demolition of walls or cabinets), the cost of which can be included in the rent increase [Upwest Company LLC: DHCR Adm. Rev. Dckt. No. UL410043RO (5/4/07)].

To avoid this mistake, don't include the cost of removing any furniture the prior tenant has left in an apartment when calculating your rent increase for improvements made to the apartment.

Mistake #2: Failing to Get Tenant's Consent to Improvements Ordered by DOB or HPD

You may think that if a government agency like the Department of Buildings (DOB) or the Department of Housing Preservation and Development (HPD) orders you to make certain improvements to an occupied rent-stabilized apartment, you don't need to get the tenant's written consent to collect a rent increase for the improvements. But in an opinion letter dated March 9, 2007, and signed by Gregory Fewer, the DHCR has indicated that you still must get the tenant's written consent. The owner who requested the opinion letter had received directives from DOB and HPD to make many individual apartment improvements. The owner asked the DHCR if those directives served as a basis for getting the rent increase, in lieu of written tenant consent. The DHCR said the written tenant consent was still required.

To avoid this mistake, make sure you get the tenant's written consent to a rent increase, even if a government agency ordered you to make the improvements. If the tenant refuses to give you the written consent, don't collect the rent increase.

Mistake #3: Submitting Insufficient Proof of Improvement/Equipment Costs

If a tenant files a complaint with the DHCR challenging your right to collect a rent increase for improvements or new equipment, you must be able to prove the costs of those improvements. The DHCR details the types of proof it will consider in Policy Statement 90-10. That Policy Statement says that you must submit at least one of the following:

- Canceled check(s) contemporaneous with the completion of the work;
- Invoice(s) or receipt(s) marked paid in full contemporaneous with the completion of the work;
- Signed contract agreement(s); or
- Contractor's affidavit(s) indicating that the installation was completed and paid in full.

If you don't submit one of the above types of documentation, you'll probably lose your rent increase. For example, the DHCR found that an owner wasn't entitled to a rent increase for improvements because it didn't submit proper documentation of the cost of the improvements. The DHCR noted that the owner hadn't submitted any of the types of documentation specified in Policy Statement 90-10. The owner had submitted no canceled checks, claiming the work was paid for in cash. The invoices the owner submitted weren't dated or marked paid in full. The owner didn't submit contract agreements or affidavits [Komi Realty LLC: DHCR Adm. Rev. Dckt. No. VD110048RO (6/22/07)].

To avoid this mistake, make sure you get the required proof from the contractor at the time you make the improvements. Also, here are four suggestions from Great Neck attorney Kim Winn on what you can do to ensure that the DHCR accepts your documentation:

1. If you're getting an invoice, make sure that it's clear, lists the address and apartment number and specifically lists all the work involved and the cost of each item of work. That way, if the DHCR decides that some of the work listed doesn't qualify (that is, because it's considered repair or maintenance work), you'll still have proof of the cost of the qualifying items.
2. If you submit invoices and canceled checks as proof, make sure both list the apartment number and make sure the total amount of the check matches the total cost of the work. If the totals don't match, the DHCR will look into why there are discrepancies and may end up denying all your costs.
3. If there's any kind of connection or common ownership between you and the contractor you're using to do the work, the DHCR will scrutinize your documentation more carefully and hold you to a higher standard. So make sure to submit more than one form of proof.
4. If there is any connection or common ownership between you and the contractor, get copies of the contractor's invoices or materials because it is very likely that the DHCR will ask for them.

Mistake #4: Submitting Canceled Checks that Don't Reference Apartment Number

Owners sometimes use canceled checks to prove the cost of the work, but the checks don't include the tenant's apartment number. The DHCR won't consider canceled checks like this as proof of the cost of the work if they are the only proof submitted. That's because there's no proof that the checks submitted relate to work done in the tenant's apartment. For example, the DHCR didn't allow an owner to collect an improvements rent increase for various types of work done in a vacant apartment because the canceled checks the owner submitted to prove the cost of the work didn't reference the tenant's apartment [Empire Management: DHCR Adm. Rev. Dckt. No. UG710010RO (3/16/07)].

In another case, a court ruled that an owner hadn't established the existence of an improvement justifying a rent increase. The court noted that the canceled check submitted by the owner didn't indicate on its face that it was issued in connection with the apartment in question. The owner also hadn't submitted an invoice from a contractor to connect the improvements with the apartment [Lirakis v. 180 Seventh Avenue Associates, LLC: 836 NYS2d 500 (App. Term 1st Dept. 2007)].

To avoid this mistake, put the tenant's apartment number on the checks you use to pay for the work done in that tenant's apartment, says Winn. This is especially important if the canceled check is the only form of proof you'll submit. This also applies to invoices you submit, notes Karen Schwartz Sidrane of the Hewlett law firm of Sidrane and Schwartz-Sidrane LLP. Make sure the contractor puts the tenant's apartment number on the invoice. If the contractor is doing work on several apartments referenced in the invoice, the contractor must list all the apartments he worked on and the work related to each apartment.

Mistake #5: Not Getting Tenant's Consent to Equipment Bought or Ordered After Tenant Moves In

You normally don't need a new tenant's written consent to get a rent increase if you install new equipment in an apartment while the apartment is vacant (before the tenant actually moves in). But that's not the case if, for some reason, you delay and don't order or buy the equipment for the apartment until after the new tenant moves in. In those circumstances, you can't treat the new equipment as if you installed it while the apartment was vacant. The DHCR has consistently ruled that if you buy or order new equipment after the tenant has moved in, you must get the tenant's written consent for the installation. While some owners mistakenly think they have a grace period when a new tenant moves in and try to collect the rent increase for equipment they order or buy soon after the new tenant moves in, that's not the case.

For example, one tenant complained that the owner had improperly collected a 1/40th rent increase from her for the installation of a new refrigerator. She moved in when her lease began on July 16, 2003, but the owner didn't buy the refrigerator until July 23. The DHCR ruled that the owner improperly collected the rent increase for the new refrigerator because it was bought after the lease began but the owner didn't get the tenant's written consent to the increase [Nahornaya: DHCR Adm. Rev. Dckt. No. UJ210053RT (1/22/07)].

In another case, a tenant challenged an owner's right to collect a 1/40th rent increase for a new stove and refrigerator that the owner installed in her apartment. The DHCR ruled that the owner wasn't entitled to collect the rent increase because the owner ordered the items more than two weeks after the tenant moved in and installed them about four weeks after the tenant moved in [Smith/Kizner Associates: DHCR Adm. Rev. Dckt. No. UI410038RO (12/07/06)].

To avoid this mistake, be sure to buy or order equipment before the new tenant moves in, especially if you don't think you'll be able to get the new tenant's written consent to the increase. If you stick to this schedule, you should be able to collect a rent increase even if you end up installing the equipment shortly after the tenant moves in. For example, one owner ordered a refrigerator before the tenant moved in, but didn't install it until six weeks later. The DHCR ruled that the owner could collect a 1/40th rent increase from the tenant for the new refrigerator [Fiorini: DHCR Adm. Rev. Dckt. No. EG120308RT (3/19/96)].

DHCR Looking into Alternative for Encoded Canceled Checks

To avoid fraudulent checks, the DHCR has always required that the canceled checks submitted by owners be encoded by the bank (computerized numbers on the face of the check that represent the amount paid to the payee). If a check isn't encoded, the DHCR won't accept it as proof of payment. But, notes Schwartz-Sidrane, most banks no longer encode their checks—they now use electronic imaging. CHIP[®] recently pointed out this problem to officials at the DHCR, who are now looking into alternative forms of proof that owners can submit. We'll keep you posted on any new developments.

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