

FOCUS ON: IAI & THE TPU

Individual Apartment Improvements: What's Eligible?

Karen Schwartz-Sidrane, Partner, Sidrane & Schwartz-Sidrane, LLC

There is no official DHCR list of eligible Individual Apartment Improvements ("IAIs"). While DHCR's Fact Sheet #12 does provide some guidance, the lack of an MCI-type list of eligible IAI work has always caused some uncertainty for property owners who have found it necessary to rely upon case-by-case determinations by the agency. This uncertainty has been put into sharper focus in light of the creation of DHCR's Tenant Protection Unit ("TPU") in 2011. Since that time, DHCR has issued hundreds of audit notices to owners, seeking lists of itemized costs of individual apartment improvements with the caveat that any undocumented or unexplained increase at the audit stage could, if not refunded, result in treble damages in the future. As a result, at this critical juncture we have reviewed numerous DHCR administrative decisions and opinion letters to collect the following list of eligible improvements and ineligible repairs.

The key to remembering what kind of work is eligible is to put the project or work to the following test: *Is it a repair? Or is it an improvement?*

Caveats and Case Law

Remember, while the written consent of a stabilized tenant is required if you undertake an IAI while the apartment is occupied, no written consent is required when the work is done on a vacant apartment.

It is important to remember that an owner need not shop for the cheapest price. See *Matter of Englander*, DHCR Admin Rev. Dkt. No. XE-410023-RT (9/3/09). The owner is required to have an invoice and a cancelled check or credit card payment to show proof of payment. Recent case law indicates that it is no longer sufficient to show an invoice marked "paid" despite the language of DHCR Fact Sheet #12.

Sheetrocking must be completed throughout the apartment—"resurfacing, or reconstruction, of all (or a substantial portion) of the walls in the entire apartment," based upon *Matter of Haigler*, DHCR Admin. Rev. Dkt. No. ZJ-210009-RT (dated 4/19/13), except in limited circumstances where the sheet rocking, although piecemeal, is an integral part of a kitchen renovation.

The contractor need not be licensed, pursuant to DHCR case law. *Matter of Dillon*, DHCR Admin. Rev. Dkt. No. ZF-210030-RT (7/19/12).

Permissible IAIs:

- New appliances: e.g., air conditioner, refrigerator, range, dishwasher, sink
- New kitchen cabinets, countertops
- Bathroom improvement: e.g. toilet, sink, tub, shower doors, faucets, medicine cabinet, and new tiling, shower body, vanity
- Lead paint abatement
- Delivery, installation, sales tax in connection with new equipment
- New light fixtures
- New furniture
- Carpeting
- New interior and exterior apartment doors; door frames
- New windows, window blinds, or shades
- Replacement flooring (not repairs)
- Demolition costs
- Painting and plastering IF the work performed was so extensive that painting and plastering was a necessary part of the work
- Painting IF there is a nexus with an eligible improvement
- New suspended plexi-glass kitchen ceiling where none existed before
- Plumbing hardware
- Architect's fee
- Cost of construction manager for substantial IAIs or several apartments being renovated at one time
- Replacement of all old baseboards throughout apartment with new moldings
- Cost of waste containers (dumpsters)
- Labor costs by owner's staff, including superintendent, with additional monies paid for work completed and done outside the scope of normal duties
- Creation of backyard garden

(Continued...)

Individual Apartment Improvements *(Continued...)*

An owner cannot raise the rent for renovation costs after a fire if said work was: (a) paid by insurance proceeds; or (b) was merely a replacement rather than an improvement. See *Nagobich v. NYS DHCR*, 200 A.D.2d 388 (1st Dept.) (1994).

However, an owner can recoup for costs expended beyond the fire insurance proceeds. See, *Matter of 435 East 86 Street*, DHCR Admin. Rev. Dkt.No. BG-410272-RO (9/30/94).

It is important that owners get itemized invoices for IAI work. Even if a contractor objects to the additional paper work, it is critical to insist on itemization and condition payments to the contractor upon receipt of an itemized bill. There is no hard and fast rule as to when the DHCR will require itemization. However, it will be of great value if you are audited by the TPU, which does require itemization of costs. In fact, the TPU requires owners to fill out a detailed "worksheet" of materials and labor costs with a calculation of the tenant's rent.

For the past two years, since September 24, 2011, based upon the Rent Act of 2011, improvements made in apartments in buildings which contain more than 35 apartments, owners have been required to calculate the monthly increase from the cost of improvements by 1/60th. As has long been the case, buildings which contain 35 apartments or less, continue to be allowed to calculate the IAI rent increase based upon 1/40th of the cost.

As is evident, it is more important than ever that owners proceed carefully as they undertake IAI work. Owners must make sure that the work for which IAI rent increases

The following items are not IAIs:

- Refinishing floors (scraping and polyurethaning)
- Re-glazing tubs and tile walls
- Wall tiles unless done in connection with a kitchen or bath renovation
- Partial sheet rocking, spackling, plastering
- Limited rewiring
- Replacing light bulbs, door locks, or window panes
- Replacing cracked or broken tiles
- Painting apartment-generally
- Repairs related to water damage
- Labor costs by owner's staff, including superintendent, with no additional monies paid for work completed and done within the scope of normal duties
- Window guards
- Replacement of window panes
- Expediting services (including by architect)
- New smoke or carbon monoxide detector
- DOB filing and permit fees

are calculated is actually eligible and that detailed records setting forth as specifically as possible the details of the work and the related payments are retained in the event of a TPU audit or a tenant's rent overcharge claim. It is advisable for owners to speak with an attorney experienced in this area prior to undertaking IAI work to protect themselves as best as possible. ■