May 15, 2007

HP Proceedings: A Primer

Gerald Lebovits

NEW YORK CITY CIVIL COURT
HOUSING PART

LEGAL UPDATE
FOR
JUDGES & COURT ATTORNEYS

May 15, 2007

HP PROCEEDINGS: A PRIMER

GERALD LEBOVITS
Judge, Housing Part
New York City Civil Court

HOUSING PART PROCEEDINGS: A PRIMER*

By GERALD LEBOVITS

May 2007 Draft

TABLE OF CONTENTS

---

* This article, originally published in 2002, was written by Gerald Lebovits, Peter Shapiro, Laurie Marin, and Jarred I. Kassenoff. *See Housing Part Proceedings: A Primer—Part I*, 3 LANDLORD-TENANT PRAC. REP. 1 (June 2002); *Housing Part Proceedings: A Primer—Part II*, 3 LANDLORD-TENANT PRAC. REP. 1 (July 2002). Gerald Lebovits, a judge since 2001 of the New York City Civil Court, Housing Part, was Manhattan's HP judge from September 2004 until October 2005. An adjunct professor at New York Law School from 1989 to 2007, he will commence service as an adjunct professor at St. John's University School of Law in fall 2007. Peter Shapiro is a principal appellate court attorney at the Appellate Term, Second Department. Laurie Marin is the associate court attorney to Housing Court Judge Bruce E. Scheckowitz in Kings County. Jarred I. Kassenoff is an associate at Cozen O'Connor.

Since the original publication of this article, Judge Lebovits has quintupled its size with additions and revisions. This May 2007 draft revision is a work in progress.

For their suggestions to this 2007 draft revision, Judge Lebovits thanks court attorneys Laurie Marin, Peter Shapiro, and Alexandra Standish; Valentine J. Moretti of the New York City Department of Housing Preservation and Development's Housing Litigation Division; Matthew Chachère of the Northern Manhattan Improvement Corporation Legal Services; Matthew L. Gordon of Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal P.C.; and Andrew E. Lehrer of The Legal Aid Society, Housing Development Unit, Harlem Community Law Office.

THE HOUSING PART OF THE HOUSING PART

Until 1973, New York City housing-code violations were prosecuted in Criminal Court. Burdened with a growing caseload considered more serious than landlord-tenant matters, Criminal Court, which had no lasting involvement with problem buildings, proved ill equipped to

adjudicate housing issues.[2] Criminal Court treated code-enforcement proceedings much as it still treats Building, Fire Safety, and Health Code cases—relegating them to a Summons Appearance Part calendar, as if code enforcement were ancillary to Criminal Court's principal mandate. The criminal sanction, limited mostly to fines in housing-code-violation proceedings, was an inadequate mechanism to protect and maintain housing stock.[3] The high burden of proof and the emphasis on punishment at the expense of effective restorative remedies meant that code enforcement's primary goals remained unfulfilled. The criminal sanction did not preserve housing, vindicate tenants' entitlement to safe and secure accommodations, or promptly ameliorate hazardous and unhealthy conditions.[4]

Largely to remedy the problems caused by litigating landlord-tenant cases in Criminal Court, the New York State Legislature amended the 1962 New York City Civil Court Act effective October 1, 1973.[5] The amended Civil Court Act created the Housing Court, officially called the Housing Part of the New York City Civil Court, for "actions and proceedings

---

2. *See Schanzer v. Vendome*, 33 H.C.R. 513A, 7 Misc. 3d 1018(A), 2005 N.Y. Slip Op. 50658(U), *3, 2005 WL 1035584, at *2, 2005 N.Y. Misc. LEXIS 866, at *7 (Hous. Part Civ. Ct. N.Y. County, Aug. 27, 2005) (Gerald Lebovits, J.) (explaining HP's importance in housing-code enforcement and summarizing history of HP proceedings); Judah Gribetz & Frank P. Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1254–78 (1966) (detailing New York City's housing-code enforcement history); PAULA GALOWITZ, THE HOUSING COURT'S ROLE IN MAINTAINING AFFORDABLE HOUSING IN HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY: FACING THE FUTURE 179 (1999) ("The Legislature created the [Housing] Court in order to remedy a jurisdictional gap that hampered enforcement of the housing maintenance code . . . . The primary mandate of the new court was to address maintenance and repair issues and to create a more flexible mechanism to preserve the city's declining housing stock.") (quoted in Harvey Gee, *Is a "Hearing Officer" Really a Judge?: The Presumed Role of "Judges" in the Unconstitutional New York Housing Court*, 5 N.Y. CITY L. REV. 1, 8 n.37 (2002)).

3. When housing violations were heard in Criminal Court, building owners treated fines as a cost of doing business. Mary Marsh Zulack, *The Housing Court Act (1972) and Computer Technology (2005): How the Ambitious Mission of the Housing Court to Protect the Housing Stock of New York City May Finally be Achieved*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 773, 773 n.2 (2006). In 1970, every multiple dwelling in New York City had at least one violation. *Id.* at 775 n.4. The average fine imposed against owners in 1970 was $11.47. *Id.* In 1965, the average criminal fine was 50 cents per violation. Gribetz & Grad, *supra* note 2, at 1276-78.

4. Gribetz & Grad, *supra* note 2, at 1281–90 (calling for civil remedy for housing-code violations to replace then-existing criminal sanctions).

5. The Legislature established the New York City Civil Court by New York City Civil Court Act § 102, effective September 1, 1962, pursuant to the New York State Constitution. *See* Const. Art. VI, § 15.

involving the enforcement of state and local laws for the establishment and maintenance of housing standards."[6] Housing Court was designed to consolidate housing-related matters into "a single court" and to ensure that the "housing stock was repaired."[7] It gave Housing Court judges, called "hearing officers" until 1978,[8] the "authority to consolidate proceedings arising from the same building, exercise continuing jurisdiction and employ provisional remedies, injunctive relief and appropriately gauged civil penalties to bring about compliance with housing standards."[9]

A court that could compel repairs was important because a landlord's full economic incentive to repair was absent in October 1973, when the Housing Court opened its doors to the public. The law changed only in August 1975, when the warranty-of-habitability doctrine came into formal existence in New York.[10] The warranty of habitability gave tenants the right to seek

---

6. Civ. Ct. Act § 110(a); *see also* HMC (Admin. Code) § 27-2115(h), (i); *Dep't of Hous. Preservation & Dev. v. Living Waters Realty, Inc.*, 14 Misc. 3d 484, 487, 827 N.Y.S.2d 627, 630 (Hous. Part Civ. Ct. N.Y. County 2006) (noting that New York State Legislature created single forum—the New York City Civil Court, Housing Part—to hear all disputes relating to housing standards); *Parkchester Alliance v. Parkchester Apts. Co.*, 180 Misc. 2d 548, 551, 691 N.Y.S.2d 269, 271 (Hous. Part Civ. Ct. Bronx County 1999) (explaining that HP proceedings are designed to ensure "sound enforcement of minimum housing standards").

7. Zulack, *supra* note 3, at 773.

8. *Babigan v. Wachtler*, 133 Misc. 2d 111 *passim*, 506 N.Y.S.2d 506 *passim* (Sup. Ct. N.Y. County 1986) (discussing amendment to Civil Court Act § 110; L. 1978, Chap. 310), *aff'd*, 126 A.D.2d 445, 510 N.Y.S.2d 473 (1st Dep't), *aff'd mem.*, 69 N.Y.2d 1012, 517 N.Y.S.2d 905, 511 N.E.2d 49 (1987).

9. Zulack, *supra* note 3, at 773 n.2.

10. The doctrine of the lease as a mere conveyance of land—caveat lessee—was discarded slowly. One New York County Civil Court judge, Leonard H. Sandler, had been applying the warranty-of-habitability doctrine, with mixed success, since 1971. *See Jackson v. Rivera*, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (Civ. Ct. N.Y. County 1971); *Morbeth Realty Corp. v. Velez*, 73 Misc. 2d 996, 343 N.Y.S.2d 406 (Civ. Ct. N.Y. County 1973); *Steinberg v. Carreras*, 74 Misc. 2d 32, 344 N.Y.S.2d 136 (Civ. Ct. N.Y. County 1973), *rev'd per curiam*, 77 Misc. 2d 774, 357 N.Y.S.2d 369 (App. Term 1st Dep't 1974). But the warranty-of-habitability doctrine received appellate approval only in May 1975, in the Second Department, *see Tonetti v. Penati*, 48 A.D.2d 25, 367 N.Y.S.2d 804 (2d Dep't 1975), and State-wide legislative enactment only in August 1975, *see* RPL 235-b (L. 1975, Chap. 597, § 1). It took until June 1979—more than five years after the New York City Civil Court, Housing Part, opened its doors—for the Court of Appeals finally to recognize the warranty of habitability and to articulate its contours. *See Park W. Mgt. Corp. v. Mitchell*, 47 N.Y.2d 316, 329, 418 N.Y.S.2d 310, 317, 391 N.E.2d 1288, 1295 (1979),

rent abatements if a landlord refused to effect required repairs.

The Civil Court's equity jurisdiction to order repairs has been enlarged over time. As one court explained, "[o]riginally, only those standards set forth in the Multiple Dwelling Law or Housing Maintenance Code were enforceable by Civil Court injunctions, but in 1977 the legislature enlarged the scope of the injunctive power to include other statutes."[11] The Civil Court Act now provides for expanded equity jurisdiction to give litigants a forum in the Housing Court to enforce the housing standards provided in the Multiple Dwelling Law (MDL), the New York City Administrative Code's Housing Maintenance Code (HMC), the Building Code, and "any legislative standard which directly impacts the health and safety of the occupants of buildings."[12]

The Housing Court's original mission was to adjudicate code-violation claims.[13] Before the Civil Court Act was amended effective 1973 to institute the Housing Court, nonpayment,

---

cert. denied, 444 U.S. 992 (1979).

11. *Central Park Gardens, Inc. v. Klein*, 107 Misc. 2d 414, 415, 434 N.Y.S.2d 125, 126 (Hous. Part Civ. Ct. N.Y. County 1980) (citing chap. 849, Laws of 1977; *Lazarus v. David*, N.Y. L.J., Nov. 2, 1977, at 11, col. 1 (Hous. Part Civ. Ct. Bronx County) (noting that effective September 1, 1977, HP judges had jurisdiction to provide injunctive relief to enforce Health and Fire Codes and to direct City agencies to inspect for violations)).

12. *Various Tenants of 515 E. 12th St. v. 515 E. 12th St., Inc.*, 128 Misc. 2d 235, 237, 489 N.Y.S.2d 830, 832 (Hous. Part Civ. Ct. N.Y. County 1985); *accord D'Agostino v. Forty-Three E. Equities Corp.*, 12 Misc. 3d 486, 486, 820 N.Y.S.2d 468, 470 (Hous. Part Civ. Ct. N.Y. County 2006) (noting that Housing Part enforces several laws, including Multiple Dwelling Law, Housing Maintenance Code, Building Code, and Health Code); *Del Gigante v. Danilova*, 29 H.C.R. 191A, N.Y. L.J., Apr. 18, 2001, at 21, col. 2 (Hous. Part Civ. Ct. Bronx County) ("Housing Court is empowered to recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards if the Court believes they will be more effective to accomplish compliance or to protect and promote the public interest.").

13. Articulating Housing Court's mission, Section 1, Chap. 982, Laws of 1972, reads as follows:

> (a) The legislature finds that the effective enforcement of state and local laws for the establishment and maintenance of proper housing standards is essential to the health, safety, welfare and reasonable comfort of the citizens of the state. The legislature further finds that . . . no single court has been able to deal consistently with all of the factual and legal problems presented by the continuing existence of housing violations in any one building . . . . The legislature further finds that the establishment of adequate judicial procedures and machinery to the effective enforcement of building standards in the city of New York is a necessity in the public interest.

holdover, and lockout proceedings were added to the Housing Court's jurisdiction to recognize the mutuality of obligations in landlord-tenant relationships and to promote a unified resolution of landlord-tenant disputes. To reflect the Housing Court's original mission, the Housing Part (HP)[14] refers to the part of the Housing Court devoted almost exclusively to code proceedings.[15] Although nonpayment and holdover proceedings have vastly outnumbered code-violation cases since the Housing Court's inception, HP proceedings remain essential to the Housing Court's mandate: to preserve and maintain safe housing.[16]

This article reviews the contours of HP jurisdiction and practice for the HP practitioner from the perspective of the court, the tenant, the landlord, and the Department of Housing Preservation and Development (DHPD or HPD), the City's Housing Maintenance Code enforcement agency.

WHY BRING AN HP PROCEEDING?

An occupant, a tenant, a group of tenants, or HPD may commence an HP proceeding to compel a property owner to correct housing violations in dwellings.[17] A "property owner" is

---

> (b) The legislature finds that the effective enforcement of proper housing standards in the city of New York will be greatly advanced by the creation of a housing part of the civil court of the city of New York with jurisdiction of sufficient scope (i) to consolidate all actions related to effective building maintenance and operation, (ii) to recommend or employ any and all other remedies, programs, procedures and sanctions authorized by federal, state or local laws for the enforcement of housing standards, regardless of the relief originally sought by the plaintiff, if it believes that such other or additional remedies, programs, procedures or sanctions will be more effective to accomplish and protect and promote the public interest and compliance . . . .

14. Because "HP" stands for "Housing Part," calling the court the "HP Part" is redundant.

15. *See* Mark C. Rutzick & Richard L. Huffman, *The New York City Housing Court: Trial and Error in Housing Code Enforcement*, 50 N.Y.U. L. REV. 738, 749-58 (1975) (examining Housing Court's successes and failures since its creation in 1973).

16. Introductory MDL and HMC sections reveal that underlying concern: To protect housing stock and to assure safe and healthy housing for occupants.

17. Civ. Ct. Act § 110(a)(7) (giving Housing Court jurisdiction to order violations corrected); HMC (Admin. Code) §§ 27-2115(i), (j); *Envoy Towers Tenant's Ass'n v. Envoy Towers Assocs.*, 28 H.C.R. 644A, N.Y. L.J., Oct. 25, 2000, at 29, col. 3 (Sup. Ct. N.Y. County) (holding that Civil Court, not Supreme Court, is proper place to bring landlord-tenant proceeding); ANDREW SCHERER, RESIDENTIAL LANDLORD AND TENANT LAW IN NEW YORK § 19:59, at 987 (2007 ed.)

defined broadly as "the owner or owners of the freehold premises or lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent, or any other person, firm or corporation, directly or indirectly in control of a dwelling."[18] A "dwelling" is defined as "any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings."[19] Under the MDL and the HMC, an owner must maintain the dwelling in good repair and in code compliance.[20]

Every part of the Housing Court, not merely the HP, has code-enforcement jurisdiction under Civil Court Act § 110(c). Indeed, every Housing Court part has continuing jurisdiction over proceedings to ensure that all violations are removed and do not recur.[21] In Housing Court, a tenant-respondent may invoke code violations as a warranty-of-habitability defense to a summary nonpayment proceeding to obtain a rent abatement.[22] The same is true in a holdover proceeding to contest the amount of use and occupancy allegedly due. When a tenant brings an HP

(noting HP's "[b]road jurisdiction to establish and maintain housing standards"). An owner's obligation to assure safe housing also comes from the warranty of habitability. *See* RPL § 235-b(1), which provides that

> [i]n every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.

18. MDL § 4(44). The HMC similarly defines an "owner" as "an agent or any other person, firm or corporation, directly or indirectly in control of a dwelling." HMC (Admin. Code) § 27-2004(45). New York City and any other public entity acting as landlords are also "owners." HMC (Admin. Code) §§ 27-2003, 27-2115(i).

19. MDL § 4(4); HMC (Admin. Code) § 27-2004(3).

20. HMC (Admin. Code) § 27-2005(a) & (b); MDL §§ 4(44), 78(1).

21. Civ. Ct. Act § 110(c); Zulack, *supra* note 3, at 776-77.

22. *See* Civ. Ct. Act § 110(a)(5). If code violations might exist, the tenant should demand an inspection on the first court appearance in response to any action against the tenancy. *See, e.g.*, COMM. ON THE HOUSING CT., ASS'N OF BAR OF CITY OF N.Y., A TENANT'S GUIDE TO HOUSING COURT 15 (June 1999) (unpublished monograph), *available at* http://www.tenant.net/Court/barguide/court.html (last visited Apr. 25, 2007).

proceeding and obtains an order to correct violations, the court will deny a counterclaim under Civil Court Act § 110(d) interposed in a separate summary eviction proceeding for an order to correct.[23] But in any Housing Court proceeding—on any party's motion or on the court's own motion without a tenant's request—any Housing Court part may issue preliminary, temporary, or final orders requiring the property owner or other responsible person or entity to cure housing violations.[24]

Tenants deprived of essential services may also claim an illegal eviction and bring a lock-out proceeding.[25]

In light of these considerations, why should a tenant initiate an HP proceeding rather than withhold rent and raise violations to defend a Housing Court nonpayment proceeding or, if a landlord has terminated the tenancy, a holdover proceeding seeking use and occupancy?

Tenants on public assistance who benefit from a direct-vendor Department of Social Services/Human Resources Administration (DSS-HRA) shelter allowance or who receive a direct government subsidy like tenant- or project-based Housing Choice Voucher Program (formerly called "Section 8") benefits cannot easily arrange to withhold the subsidized portion of their rent, or their share of the rent, or at least enough rent to compel unwilling landlords to make repairs. For these tenants, raising repair issues other than in an HP proceeding might be futile.

The HP, on the other hand, is accessible to indigents, who may apply to proceed as poor persons. Under CPLR 1101, the HP may waive the $45.00 index filing fee and other fees and costs.[26] This waiver applies only to the indigent; when a proceeding is commenced under a free index number, no non-indigent party may join as a petitioner.[27]

An HP proceeding can also aid wealthier tenants, who might prefer not to withhold rent unless they believe they must do so to assure code compliance. An HP proceeding affords them a vehicle to enforce housing standards without risking their credit history and the stigma of

---

23. *See Ali Enters. v. Rabain*, 18 H.C.R. 315A, N.Y. L.J., June 18, 1990, at 28, col. 3 (Hous. Part Civ. Ct. Bronx County) (dismissing counterclaims where actions already pending before D.H.C.R.).

24. HMC (Admin. Code) § 27-2121.

25. N.Y.C. Admin. Code § 26-521(a)(2); *Cora v. Esposito*, 20 H.C.R. 63A, N.Y. L.J., Sept. 25, 1991, at 28, col. 4 (Hous. Part Civ. Ct. Bronx County).

26. Civ. Ct. Act § 1911(b).

27. N.Y.C. Civ. Ct. Directive, *Poor Person Petitions—Free Index Numbers for HP Actions*, DRP-132 (Nov. 16, 1992).

defending a nonpayment case. Also, rent-regulated tenants out of possession under a vacate order need not pay more than $1.00 a month under a Division of Housing and Community Renewal (DHCR) order to preserve their tenancies and thus cannot compel repairs in a nonpayment proceeding. In this situation, a landlord will not bring a nonpayment proceeding on which a tenant may defend by seeking repairs or by claiming an abatement for a warranty-of-habitability violation or for an actual or constructive eviction.

Moreover, the costs to pursue HP proceedings, in which HPD attorneys from the HPD's Housing Litigation Division (HLD) assist self-represented litigants with meritorious cases, are less burdensome than defending nonpayment proceedings for rent or holdover proceedings involving use and occupancy, both of which often require professional representation and extensive motion practice.

Tenants may also use HP proceedings preemptively. A tenant may bring an HP proceeding in anticipation of a rent strike. A tenant anticipating a holdover proceeding may also commence an HP proceeding to assert the retaliatory-eviction defense provided by RPL § 223-b. The defense leads to a rebuttable presumption of retaliation. To raise retaliation, a tenant must make a good-faith health- or safety-violation complaint to a government agency like the HPD, the DHCR, or a Housing Choice Voucher Program public housing agency, called a PHA.[28] The tenant must also establish that the landlord served a predicate notice to recover possession or attempted substantially to alter the tenancy's terms within six months of the tenant's complaint. The presumption does not apply to owner-occupied buildings with fewer than four units.

So long as an HP proceeding for civil penalties is not pending, property owners can bring an HP proceeding to compel HPD to remove building violations.[29] A landlord must still pay the $300 that HPD charges to re-inspect and remove violations as part of a dismissal request made separately from the HP proceeding.

In spite of the benefits of bringing an HP proceeding, tenants sometimes criticize the HP process for, among other things, delays in HPD inspections, numerous court dates, inadequate code-enforcement mechanisms, and not keeping records of violations and repairs.[30] Some, arguing that the HP judges must do more than they do now to enforce housing standards, recommend that "Housing Court judges . . . be evaluated for reappointment, in part, based on

---

28. The PHAs in New York City are the New York City Housing Authority (NYCHA), HPD, and DHCR.

29. Civ. Ct. Act § 110(a)(7).

30. *See, e.g.*, CITY-WIDE TASK FORCE ON HOUSING COURT, NO RAINBOW, NO GOLD: TENANT-INITIATED HP ACTIONS IN THE NEW YORK CITY HOUSING COURT 30 (May 2003), *available at* http://www.gothamgazette.com/graphics/HP_Actions_Report.pdf (last visited Apr. 25, 2007).

their effectiveness in preserving the housing stock."[31] Landlords, in turn, also complain about the HP, a forum they see as favoring tenants and, especially, HPD.

JURISDICTION OVER HP PROCEEDINGS

The Housing Part has subject-matter jurisdiction over cooperative apartments (including the cooperative's common areas), condominium common areas (but not the interiors of individual units unless a problem in the common area caused a violation in the unit's interior or unless the condominium bylaws require the association to correct conditions in individual units), rental apartments of any kind (including condominium rentals), single and multiple dwellings, New York City-owned residential buildings, NYCHA buildings, and owner-abandoned premises.[32]

---

31. N.Y. County Lawyers' Ass'n WORKING GROUP V: PRESERVING THE HOUSING STOCK: ARE THERE NEW WAYS TO APPROACH THIS AND MEASURE RESULTS? *IN* REPORT: THE NEW YORK CITY HOUSING COURT IN THE 21ST CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT? 38, 40, *available at* http://www.nycla.org/siteFiles/Publications/Publications195_0.pdf (last visited Apr. 25, 2007) (quoting report relying on opinion by Columbia University School of Law Professor Mary Marsh Zulack); *accord* Zulack, *supra*, note 3, at 792 (arguing that court should be neutral regarding parties but biased in favor of protecting housing stock and that decision to reappoint housing judges be partly "based on [their] success in preserving the housing stock, since that is the preeminent mission of the court").

32. *See* HMC (Admin. Code) §§ 27-2003, 27-2004(6), 27-2108 *et seq.*; RPL § 339-ee(1); *Lacks v. City of N.Y.*, 156 Misc. 2d 749, 751, 594 N.Y.S.2d 561, 563 (Sup. Ct. N.Y. County 1992) (noting that HMC holds New York City responsible for its buildings); *Steltzer v. Spesaison*, 161 Misc. 2d 507, 508-09, 614 N.Y.S.2d 488, 489 (Hous. Part Civ. Ct. Kings County 1994) (two-family dwellings); *Odimgbe v. Dockery*, 153 Misc. 2d 584, 590, 582 N.Y.S.2d 909, 914 (Civ. Ct. Kings County 1992) (any building, multiple or not); *Dep't of Hous. Preservation & Dev. v. Metropolitan Ave. Corp.*, 148 Misc. 2d 956, 959-60, 561 N.Y.S.2d 531, 533-34 (Hous. Part Civ. Ct. Kings County 1990) (vacant apartments); *Hous. & Dev. Admin. of N.Y. v. Ruel Realty Co.*, 94 Misc. 2d 43, 50, 404 N.Y.S.2d 941, 946 (Hous. Part Civ. Ct. N.Y. County 1978) (owner-abandoned premises); *Kahn v. 230-79 Equity Inc.*, 32 H.C.R. 233A, 2 Misc. 3d 140(A), 784 N.Y.S.2d 921, 2004 N.Y. Slip Op. 50302(U), *2, 2004 WL 869746, at *2, 2004 N.Y. Misc. LEXIS 409, at *1 (App. Term 1st Dep't, Apr. 8, 2004) (per curiam) (cooperative corporations); *McMunn v. Steppingstone Mgt. Corp.*, 131 Misc. 2d 340, 343, 500 N.Y.S.2d 219, 221 (Hous. Part Civ. Ct. N.Y. County 1986) (same); *Pershad v. Parkchester S. Condo.*, 174 Misc. 2d 92, 94-95, 662 N.Y.S.2d 993, 995-96 (Hous. Part Civ. Ct. Bronx County 1997) (incorrectly noted in Official Reports as New York County) (holding condominium association responsible for repairing code violations extending beyond individual unit), *aff'd per curiam*, 178 Misc. 2d 788, 683 N.Y.S.2d 708 (App. Term 1st Dep't 1998); *Smith v. Parkchester N. Condo.*, 163 Misc. 2d 66, 69, 619 N.Y.S.2d 523, 525 (Hous. Part Civ. Ct. Bronx County 1994) (finding HP proceeding available when violation stems from defective conditions in common area in condominium association's exclusive control); *Gazdo Props. Corp. v. Lava*, 149 Misc. 2d 828, 831-33, 565

The HP's enforcement and remedial powers include injunctions, restraining orders, and other orders to correct and prevent housing-code violations and to compensate aggrieved parties.[33] Regardless of the original relief a litigant seeks, the HP court, under Civil Court Act § 110(c), "may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest."[34] The HP may award restitution and attorney fees and impose civil penalties and sanctions for civil and criminal contempt.[35] The HP also has broad remedial powers. It may award reasonable costs to relocate a tenant while an owner effects repairs and damages if an owner fails to comply with an order to correct and is held in civil contempt.[36] Because rent is not at issue in an HP proceeding, the HP

N.Y.S.2d 964, 966-67 (Hous. Part Civ. Ct. Kings County 1991) (holding condominium managing board or agent responsible for common areas), *appeal dismissed mem.*, 150 Misc. 2d 1019, 579 N.Y.S.2d 305 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1991); *but cf. Frisch v. Bellmarc Mgt., Inc.*, 190 A.D.2d 383, 389, 597 N.Y.S.2d 962, 966 (1st Dep't 1993) (finding warranty of habitability inapplicable to condominiums).

33. *E.g.*, Civ. Ct. Act § 110(a)(4); HMC (Admin. Code) §§ 27-2118(a)(3), 27-2119; *D'Agostino*, 12 Misc. 3d at 486, 820 N.Y.S.2d at 470; *Odimgbe*, 153 Misc. 2d at 588-90, 582 N.Y.S.2d at 912-14.

34. *D'Agostino*, 12 Misc. 3d at 486, 820 N.Y.S.2d at 470.

35. HMC (Admin. Code) § 27-2124; *e.g., Dep't of Hous. Preservation & Dev. v. Deka Realty Corp.*, 208 A.D.2d 37, 39-40, 620 N.Y.S.2d 837, 839-41 (2d Dep't 1994) (discussing differences between civil and criminal contempt and rejecting formula of multiplying number of individual housing violations by maximum statutory fine, because formula "fails to serve either the goals and purposes underlying a criminal contempt or those of a civil contempt."); *Ross v. Cong. B'Nai Abraham Mordechai*, 12 Misc. 3d 559, 572 , 814 N.Y.S.2d 837, 847 (Hous. Part Civ. Ct. NY County 2006) (Gerald Lebovits, J.) (assessing attorney fees in favor of tenant who prevailed on contempt motion in HP proceeding); *Schlueter v. E. 45th Dev. LLC*, 33 H.C.R. 903A, 9 Misc. 3d 1105(A), 2005 N.Y. Slip Op. 51405(U), *6-14, 2005 WL 2171204, at *6-14, 2005 N.Y. Misc. LEXIS 1897, at *13-35 (Hous. Part Civ. Ct. N.Y. County, Sept. 7, 2005) (Gerald Lebovits, J.) (finding respondent corporation and managing agent in civil but not criminal contempt for failing to comply with stipulation); *Dep't of Hous. Preservation & Dev. v. 999 Realty Mgt., Inc.*, 20 H.C.R. 536A, N.Y. L.J., Sept. 9, 1992, at 24, col. 3 (Hous. Part Civ. Ct. Kings County) (finding civil and criminal contempt against managing company for failing to correct violations for over a year). The HP may impose civil penalties against "[a]ny person who violates a law relating to housing standards." HMC (Admin. Code) § 27-2115(a).

36. *Farber v. 535 E. 86th St. Corp.*, 30 H.C.R. 102A, 2002 N.Y. Slip. Op. 50064(U), *1, 2002 WL 317987, at *1, 2002 N.Y. Misc. LEXIS 118, at *1 (App. Term 1st Dep't, Feb. 4, 2002) (per curiam) (allowing for possibility of relocation costs but denying them in that case); *Ross v. Cong.*

may not grant rent abatements or review issues unrelated to repairs unless the parties agree to that as part of a stipulation settling an HP proceeding.

Civil Court Act § 110(a)(4) and (7) also empower the HP to order repairs to property damaged by fire,[37] to correct violations issued by the New York City Department of Buildings (DOB) and other city agencies like the Loft Board,[38] and to enforce "the multiple dwelling law and the housing maintenance code, building code and health code."[39]

The HP has the jurisdiction to order an owner to correct violations only. It may not order the correction of anything but violations.[40]

ACTION OR PROCEEDING?

Because Civil Court Act § 110(a) authorizes a party to bring a plenary civil action or a special proceeding to remove housing violations, the question arises whether an HP case is an "action" or a "proceeding."[41]

B'Nai Abraham Mordechai, 33 H.C.R. 717A, 8 Misc. 3d 136(A), 2005 N.Y. Slip Op. 51224(U), *1, 2005 WL 1819388, at *1, 2005 N.Y. Misc. LEXIS 1605, at *2 (App Term 1st Dep't, Aug. 2, 2005) (per curiam) (affirming contempt finding and civil-penalty award for respondent-owner's violation of so-ordered stipulation).

37. *Chan v. 60 Eldridge Corp.*, 129 Misc. 2d 787, 789, 494 N.Y.S.2d 284, 286 (Hous. Part Civ. Ct. N.Y. County 1985).

38. *Schanzer*, 33 H.C.R. 513A, 7 Misc. 3d 1018(A), 2005 N.Y. Slip Op. 50658(U), *2, 2005 WL 1035584, at *2, 2005 N.Y. Misc. LEXIS 866, at *4-5 (N.Y.C. Dep't of Bldgs.); *Various Tenants of 515 E. 12th St.*, 128 Misc. 2d at 236-37, 489 N.Y.S.2d at 832 (same); *Doukas v. Pravda Brothers Realty Co.*, 23 H.C.R. 463A, N.Y. L.J., July 26, 1995, at 22, col. 4 (Hous. Part Civ. Ct. N.Y. County) (N.Y.C. Loft Board).

39. Civ. Ct. Act § 110(a); *see also Schanzer*, 33 H.C.R. 513A, 7 Misc. 3d 1018(A), 2005 N.Y. Slip Op. 50658(U), *2, 2005 WL 1035584, at *2, 2005 N.Y. Misc. LEXIS 866, at *4-5 (noting HP's jurisdiction over Building Code violations); *Dep't of Hous. Preservation & Dev. v. Nikac*, 29 H.C.R. 299A, N.Y. L.J., June 13, 2001, at 22, col. 3 (Hous. Part Civ. Ct. Bronx County) (noting HP's jurisdiction over "outstanding violations issued by the Department of Health").

40. *Parkchester Preservation Co. v Molina*, 28 H.C.R. 398A, N.Y. L.J., June 14, 2000, at 31, col. 3 (Hous. Part Civ. Ct. Bronx County) (noting that HP may not order owner to repair entire plumbing system).

41. For a good discussion of this issue, see Peter M. Wendt & Sonya Fierro Gladwin, *An Exploration into Judicial Enforcement of Housing Standards* 20-21 (1995) (unpublished outline for judicial training).

One practical distinction is that in an action discovery is available as of right, whereas in a proceeding discovery is available only by leave of court.[42] Another difference concerns when motions are returnable.[43]

A civil case is prosecuted as an action under the CPLR except when a statute authorizes a special proceeding.[44] The CPLR governs in actions and proceedings unless a more specific statute applies.[45] For example, in a summary-eviction proceeding, the RPAPL, a statute more specific than the CPLR, takes precedence over the CPLR. The CPLR governs in HP cases because HP cases encompass no special procedures. HP cases are therefore special proceedings governed by CPLR Article 4. Accordingly, a respondent must interpose a CPLR 3020 verified answer in response to a verified petition.

Most HP cases are treated as special proceedings because they are commenced by service of an order to show cause supported by a verified petition. The HP also allows a case to begin by an affidavit in lieu of a petition.[46] In any event, the HP has subject-matter jurisdiction under CPLR 103(c) whether the case takes the form of an action or a proceeding.

STATUTES REGULATING HP PROCEEDINGS

The principal codes governing HP proceedings are the Civil Court Act, the HMC, and the MDL. The Civil Court Act and the HMC apply only in New York City. The MDL applies in New York City and Buffalo to dwellings with three or more residential rental units built after 1955. The Multiple Residence Law (MRL) applies to dwellings with three or more residential units outside New York City and Buffalo.

New York City Civil Court Act: The Housing Court's code-enforcement mandate permits the HP to "employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, . . . to accomplish compliance or to protect and promote the public interest."[47] On its own motion, or on any litigant's motion, the HP may consolidate "all

---

42. *See* CPLR 408; Civ. Ct. Act § 1101.

43. *Compare* CPLR 406 *with* CPLR 2214-2215.

44. CPLR 103(b).

45. *Id.*; *Nikac*, 29 H.C.R. 299A, N.Y. L.J., June 13, 2001, at 22, col. 1.

46. *See* SCHERER, *supra* note 17, § 19:59, at 987.

47. Civ. Ct. Act § 110(c).

[pending] actions and proceedings . . . as to any building"[48] and join "any other person or city department as a party . . . to effectuate proper housing maintenance standards and to promote the public interest."[49] The court may also issue orders to eliminate nuisances and repair buildings[50] and, in a special proceeding to appoint an administrator under RPAPL Article 7-A, to seize rents to remedy "conditions dangerous to life, health or safety."[51]

Housing Maintenance Code: The HMC, codified in the New York City Administrative Code, "protect[s] the people of the city against the consequences of urban blight" by ensuring "decent housing,@ Aprevent[ing] adequate or salvageable housing from deteriorating," and securing "basic decencies and minimal standards of healthful living in already deteriorated buildings."[52] The HMC gives the HP a "broad range of legal, equitable and administrative powers" to cure violations in all residential dwellings, whether publicly or privately owned.[53]

Multiple Dwelling Law: The MDL sets standards to create and maintain "proper housing" and to guarantee living conditions "essential" to the "safety, morals, welfare and reasonable comfort of the citizens of the state."[54] The MDL complements local laws and regulations. It prevails if a local law is less restrictive and yields if a local law is more stringent.[55]

---

48. *Id.* § 110(b).

49. *Id.* § 110(d).

50. *Id.* § 110(a)(2); HMC (Admin. Code) § 27-2114; MDL § 309.

51. Civ. Ct. Act § 204.

52. HMC (Admin. Code) §§ 27-2002(1), (2); 27-2003; *Metropolitan Ave.*, 148 Misc. 2d at 958, 561 N.Y.S.2d at 532.

53. HMC (Admin. Code) § 27-2002(3); *see also id.* § 27-2121 (authorizing broad exercise of HP's injunctive power and Ato take such other steps as . . . necessary to assure continuing compliance with the requirements of this code"). The HMC also contains prophylactic restraints that provide remedies for an owner's wrongful interference with vital services or other conditions necessary to preserve a tenant's enjoyment of the premises. *See, e.g.*, *id.* § 27-2093 (covering Single Room Occupancy hotels).

54. MDL §§ 2, 78(1), 303.

55. *Id.* § 3(4), (5); *cf. id.* § 303(2) ("Nothing in this chapter shall be construed to abrogate or impair the powers of any department or of the courts to enforce the provisions of any local law, ordinance, rule, regulation or charter not inconsistent with this chapter, or to prevent violations or punish violators thereof."). Unless specifically provided otherwise, HMC provisions must be "construed in a manner consistent with their use in the [MDL]." HMC (Admin. Code) § 27-2004(b).

WHO MAY BRING AN HP PROCEEDING?

The fundamental purpose of an HP proceeding is to ensure that landlords provide safe and habitable housing. To that end, the HMC allows HPD and any individual who occupies or has the right to occupy premises—including tenants, lawful subtenants, and licensees, individually or jointly—to initiate an HP proceeding.[56] An amicus like Legal Aid or Legal Services may commence on behalf of an occupant who has standing.[57] Except for leases for apartments or rooms in one- or two-family homes,[58] any lease provision preventing a lawful occupant from bringing an HP proceeding is void and unenforceable as a matter of public policy.[59] Any lease provision requiring a tenant to arbitrate housing conditions instead of raising them in an HP proceeding violates public policy as well.[60]

---

56. *See* HMC (Admin. Code) § 27-2115(i), (j); *Harrison v. Linus Holding Corp.*, 24 H.C.R. 278A, N.Y. L.J., May 22, 1996, at 26, col. 1 (Hous. Part Civ. Ct. N.Y. County); *Various Tenants of 515 E. 12th St.*, 128 Misc. 2d at 238, 489 N.Y.S.2d at 833 (finding that "tenant" includes any person with a lawful right to the premises). One opinion, contradicting the majority view, holds that a licensee does not have standing to bring an HP proceeding to compel an owner to make repairs. *See Munro v. Prescott*, 30 H.C.R. 398C, 2002 N.Y. Slip Op. 40310(U), *5, 2002 WL 1610505, at *2, 2002 N.Y. Misc. LEXIS 851, at *6-7 (Hous. Part Civ. Ct. Bronx County, June 25, 2002).

57. *Acosta v. Beka*, N.Y. L.J., Oct. 3, 2005, at 19 col. 3 (Hous. Part. Civ. Ct. Kings County).

58. HMC (Admin. Code) § 27-2005(c); *Steltzer*, 161 Misc. 2d at 508-09, 614 N.Y.S.2d at 489; *contra Frankel v. Dep't of Hous. Preservation & Dev.*, 108 Misc. 2d 661, 662-63, 438 N.Y.S.2d 458, 459-60 (Sup. Ct. Queens County 1981) (finding that lease provision holding tenant of single-family dwelling responsible for maintenance does not relieve landlord of statutory duty to keep premises in good repair).

59. *Cf. Blecher v. Colletti*, 154 Misc. 2d 760, 761, 595 N.Y.S.2d 662, 662 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1993) (mem.) (finding in nonpayment proceeding that lease provision forfeiting discounted rent if either party commenced legal action is unconscionable and unenforceable).

60. *In re Goldmar*, 293 A.D. 935, 935, 130 N.Y.S.2d 615, 615 (1st Dep't 1954) (per curiam) (holding that questions about need to remove MDL violations are not arbitrable); *D'Agostino v. Forty-Three E. Equities Corp.*, 12 Misc. 3d 486, 491, 820 N.Y.S.2d 468, 471-72 (Hous. Part Civ. Ct. N.Y. County 2006) (finding that enforcing arbitration agreement is void as against public policy because "responsibility cannot be placed in the hands of an arbitrator who only has a duty to the contracting parties, is not bound by any principles of substantive law, and has no authority to compel HPD into arbitration").

In the HP, when the tenant initiates a proceeding against a property owner and HPD, the tenant is the petitioner and the owner and HPD are the respondents. If HPD initiates the proceeding, it is the petitioner, the owner is the respondent, and the tenant is not a party to the proceeding.

Because rent-regulated tenants retain a possessory interest in their tenancies until a marshal executes a warrant of eviction, they may maintain an HP proceeding until they are evicted.[61]

Squatters and others who have no lawful possessory interest, such as non-rent-regulated tenants against whom an executable final judgment of possession and an eviction warrant have been issued, have no standing to initiate an HP proceeding.[62] Tenants who surrender possession may not initiate or maintain an HP proceeding unless they evacuated the premises under a vacate order, which is issued to protect public safety.[63]

HPD, on the other hand, always has standing to initiate and maintain an HP proceeding, regardless whether the tenant has or had standing to initiate a proceeding and regardless whether the property is ever occupied.

Tenants may commence an HP proceeding jointly as a tenants association, for example, when a violation affects multiple units and tenants. A tenants association is an effective vehicle to address violations that affect multiple apartments and several aggrieved tenants. By maintaining an HP proceeding on its members' behalf, the association consolidates grievances, pools resources, preserves judicial resources, diminishes exposure to retaliation, and saves time by having one person the tenants association elects speak and sign stipulations and consent orders on behalf of all tenants the association represents. A tenants association need not be

---

61. *Shapiro v. Townan Realty Co.*, 162 Misc. 2d 630, 631-35, 618 N.Y.S.2d 490, 491-93 (Hous. Part Civ. Ct. N.Y. County 1994) (explaining that at least rent-regulated tenants have standing to maintain HP until warrant of eviction is executed); *contra Various Tenants of 515 E. 12th St.*, 128 Misc. 2d at 238, 489 N.Y.S.2d at 833 (noting in dictum that tenants against whom warrant of eviction has issued may no longer maintain an HP proceeding). *See* DANIEL FINKELSTEIN & LUCAS A. FERRARA, LANDLORD AND TENANT PRACTICE IN NEW YORK, § 16:234, at 16-93 (2007 ed.) (discussing rent-regulated tenants' standing to maintain HP).

62. *Valentin v. Dep't of Hous. Preservation & Dev.*, 160 Misc. 2d 418, 420, 609 N.Y.S.2d 554, 555 (Hous. Part Civ. Ct. Bronx County 1994).

63. HMC (Admin. Code) § 27-2139 (vacate orders); *Carrasquillo v. 197 Columbia Realty Corp.*, 20 H.C.R. 722A, N.Y. L.J., Dec. 2, 1992, at 25, col. 2 (Hous. Part Civ. Ct. Kings County) (vacate orders); *Harrison*, 24 H.C.R. 278A, N.Y. L.J., May 22, 1996, at 26, col. 1 (denying standing to maintain HP proceeding to those who have surrendered possession).

incorporated; a loose association suffices.[64] Unassociated tenants must file a separate proceeding for each apartment.

If an HP case is pending, the HP may force a tenant to grant access, just as any Housing Court part may compel access during a pending nonpayment, holdover, or lock-out proceeding. The HP may also dismiss an HP proceeding if a tenant does not grant access, and a landlord may bring a holdover proceeding against a tenant who denies access.[65] Owners may not, however, bring an access proceeding in the HP to compel a tenant to provide access for the owner to effect repairs.[66] If a proceeding is not pending, Civil Court has no authority to grant injunctive relief to an owner seeking access to a tenant's apartment to correct violations.[67] The owner must sue in Supreme Court.

An owner may, nevertheless, bring a proceeding to compel HPD to acknowledge that repairs were made,[68] except if a proceeding is pending to secure civil penalties.[69]

CHOOSING THE RESPONDENT IN AN HP PROCEEDING

A petitioner-tenant in an HP proceeding would be wise to name as respondents all persons or entities responsible for correcting violations.[70] The more individuals and institutions

---

64. *See generally* CPLR 1025, which governs suits brought by or against partnerships and other unincorporated associations.

65. HMC (Admin. Code) § 27-2009.

66. *Double A Prop. Assocs. v. Spears*, 144 Misc. 2d 935, 937, 550 N.Y.S.2d 226, 227-28 (App. Term 2d Dep't 2d and 11th Jud. Dists. 1989) (mem.) (holding that Civil Court has no jurisdiction over proceedings initiated to compel tenant to provide access to landlord).

67. *Double A Prop.*, 144 Misc. 2d at 938, 550 N.Y.S.2d at 228; *Jones v. Peterson*, -- H.C.R. --, N.Y. L.J., Jan. 8, 1997, at 28, col. 3 (Sup. Ct. Nassau County) ("[T]here is no statutory authorization for a landlord to commence a special proceeding to gain access to . . . leased premises."); N.Y.C. Civ. Ct. Directive, *Access Orders*, DRP-105 (Oct. 20, 1989) (advising HP clerk not to accept landlord's filing seeking to initiate proceeding for access).

68. Civ. Ct. Act § 110(a)(7).

69. 28 RCNY 9-06(a)(1).

70. *See* HMC (Admin. Code) § 27-2004(a)(5), (45); *Dep't of Hous. Preservation & Dev. v. Chana Realty Corp.*, 21 H.C.R. 297C, N.Y. L.J., June 7, 1993, at 29, col. 1 (App. Term 1st Dep't) (per curiam); *Dep't of Hous. Preservation & Dev. v. Cupid, Inc.*, 25 H.C.R. 153A, N.Y. L.J., Mar. 19, 1997, at 28, col. 2 (Hous. Part Civ. Ct. Bronx County).

the petitioner-tenant can name as respondents—called "owners" in this article—the more likely that someone or some entity will comply or can be compelled to comply with an HP order to correct violations.

Proper respondents include the following:

1. The owner or owners of the premises' freehold or lesser estate;

2. A mortgagee or vendee in possession;[71]

3. An assignee of rent;

4. An agent;

5. A receiver, lessee, executor, or trustee;

6. Any person, firm, or corporation that controls the premises directly or indirectly;[72]

7. A person who signs a property-registration form, called a Multiple Dwelling Registration (MRD) statement, as the managing agent;[73]

8. Any New York City department or agency (which may be represented by its departmental counsel or by Corporation Counsel[74]) that has jurisdiction over the condition or violation;

9. Any person whose activities, such as collecting rent, making repairs, or signing leases, demonstrate a significant degree of control over the premises' physical or fiscal management.[75]

---

71. *Dep't of Hous. Preservation & Dev. v. Greenpoint Sav. Bank*, 169 Misc. 2d 61, 65, 646 N.Y.S.2d 601, 604 (Hous. Part Civ. Ct. Queens County 1995) (noting that foreclosing bank may be held responsible).

72. HMC (Admin. Code) § 27-2004(a)(5).

73. *Dep't of Hous. Preservation & Dev. v. Livingston*, 169 Misc. 2d 660, 661, 652 N.Y.S.2d 196, 196-97 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1996) (mem.); *Dep't of Hous. Preservation & Dev. v. Bryant Westchester Realty Corp.*, 90 Misc. 2d 816, 818, 369 N.Y.S.2d 569, 570 (App. Term 1st Dep't 1977) (per curiam); *Dep't of Hous. Preservation & Dev. v. Chestnut*, 119 Misc. 2d 865, 866, 465 N.Y.S.2d 398, 399 (Hous. Part Civ. Ct. Bronx County 1983).

74. Civ. Ct. Act § 110(*l*) (providing that any city department "may be represented in the housing part by its department counsel in any action or proceeding in which it is a party").

A condominium unit owner may name a condominium association as a respondent in an HP proceeding.[76]

To obtain the names of the building's owner and managing agent and their addresses listed in an MDR statement, visit http://www.tenant.net/Rights/CTRC/tresourc.html (last visited Apr. 25, 2007). HPD's online database is available at http://167.153.4.71/hpdonline/provide_address.aspx (last visited Apr. 25, 2007). From there, input the building's address.

The Building Registration Summary Reports for multiple dwellings available on HPD's Web site do not list "responsible persons." These persons are listed, instead, in a column entitled "owner," with titles like "head officer," "corporation," and "managing agent," and each is identified in other columns. The Property Registration Form filed with HPD identifies who the "responsible persons" are. One of them signs the form over a statement that reads: "I am a person with direct or indirect control over this property." For important proceedings, therefore, experts recommend that a tenant secure building ownership records from HPD's Division of Code Enforcement rather than from HPD's Web site.[77] Call (212) 487-4545 for the borough addresses.[78]

Litigants have other ways to get information. To search a building's property-ownership records, access New York City's Department of Finance's ACRIS Web site: http://www.nyc.gov/html/dof/html/jump/acris.shtml (last visited Apr. 25, 2007). Tenants may also find building owners through tax records in the City Collector's office; the borough address

---

75. HMC (Admin. Code) § 27-2004(a)(45); CPLR 5228(a-b) (providing that court may authorize receiver to collect rent, lease, repair, or sell real property).

76. *Pershad*, 174 Misc. 2d at 94-95, 662 N.Y.S.2d at 995-96 (holding condominium association responsible for repairing code violations extending beyond individual unit), *aff'd per curiam*, 178 Misc. 2d 788, 683 N.Y.S.2d 708 (App. Term 1st Dep't 1998); *Smith*, 163 Misc. 2d at 69, 619 N.Y.S.2d at 524-25 (finding HP proceeding available when violation stems from defective conditions in common area in condominium association's exclusive control); *Gazdo Props. Corp.*, 149 Misc. 2d at 831-33, 565 N.Y.S.2d at 966-67 (holding condominium managing board or agent responsible for common areas), *appeal dismissed mem.*, 150 Misc. 2d 1019, 579 N.Y.S.2d 305 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1991).

77. *E.g.*, ANDREW E. LEHRER, ENFORCING AN ORDER TO CORRECT IN AN HP ACTION 6 *in* OBTAINING REPAIRS IN HOUSING COURT: AN ADVOCATE'S GUIDE TO HP PROCEEDINGS—2006 UPDATE, PART 2 (unpublished manuscript for Legal Servs. N.Y. Legal Support Unit & Volunteers of Legal Service) (Oct. 30, 2006).

78. The addresses are listed below in a table in the Trials, Inquests, and Defaults subsection.

can be found by calling (718) 935-6000. Tenants and others can get the names and addresses of agents listed for service of process (if one has been designated) at the New York State Secretary of State's online database: http://appsext5.dos.state.ny.us/corp_public/corpsearch.entity_search_entry (last visited Apr. 25, 2007). A building's owner, title history, tax records, outstanding violations, and permits can be found on one subscription-required Web site: http://www.propertyshark.com (last visited Apr. 25, 2007). Names and addresses may also be determined from rent bills, leases, board information, or other reliable source.

New York City in its capacity as a landlord, cooperative and condominium managing boards, general partners in an LLC, or even corporate stockholders (if the shareholder owns 10 percent or more of the corporation) and officers may be an "owner" and named as a respondent.[79] A subtenant or roommate may sue a tenant, who in turn may implead the owner or initiate a separate proceeding against the owner.[80]

HPD will not issue violations against a City-owned building. When the New York City Housing Authority (NYCHA) is a respondent, the HP proceeding is commenced in the HP but, in New York County, is then transferred to the Housing Court's Housing Authority Part on the return date. Cases involving HPD-managed city buildings remain in the HP. The Federal Government's Department of Housing and Urban Development (HUD) can also be a respondent in an HP proceeding. HPD's attorneys will not participate in tenant-initiated HP proceedings when HUD is a respondent or when the HPD manages the building.

If the tenant establishes that a corporate officer, whether or not listed on an MDR, controls a dwelling directly or indirectly, the HP may require the officer to cure violations if the

---

79. MDL § 78; HMC (Admin. Code) §§ 27-2005, 27-2114(d); *Lacks*, 156 Misc. 2d at 752, 594 N.Y.S.2d at 564 (noting that HMC holds New York City responsible for its buildings); *Parkchester N. Condo*, 163 Misc. 2d at 68, 619 N.Y.S.2d at 524; *Johnson v. Atop Roofing & Siding Corp.*, 135 Misc. 2d 746, 747, 516 N.Y.S.2d 408, 409 (Hous. Part Civ. Ct. Kings County 1987) (holding that petitioner may inquire at hearing who true owner is). Although no notice of claim is necessary to bring an HP proceeding against the City, tenants who sue the City must file with the New York City Comptroller a 30-day demand for an adjustment. *City of N.Y. v. Brill*, 19 H.C.R. 83A, N.Y. L.J., Feb. 14, 1991, at 23, col. 1 (Hous. Part Civ. Ct. N.Y. County). Occupants of public or city-owned housing may bring HP proceedings, but the exemption of NYCHA and HPD buildings from MDR requirements under HMC (Admin. Code) § 27-2108 means that code violations in NYCHA and HPD buildings are not recorded. *See* SCHERER, *supra* note 17, § 19:56, at 986.

80. *Cf. Davis v. Bonds*, 61 Misc. 2d 917, 917, 307 N.Y.S.2d 392, 393 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1969) (per curiam) (advising sublessee to implead landlord in sublessee's nonpayment proceeding against prime tenant-sublessor).

officer is named as a respondent.[81] Unlike non-HP cases, a corporate respondent in an HP proceeding may be represented by a corporate officer, director, principal stockholder, or managing agent, and need not have an attorney.[82]

Tenants must name HPD as a respondent and may also name other city agencies like the DOB as respondents.[83] Notice of the proceeding enables HPD to assert the City's rights and obligations, to invoke its authority to take unilateral action to inspect premises and cure violations,[84] and to establish HP jurisdiction over the agency to facilitate court-ordered remedial action. In this sense, a tenant-initiated proceeding is a derivative or quasi-derivative proceeding. The HMC is premised on the understanding that HPD does not have the resources to bring proceedings to correct all violations and thus that individuals may do so on their own. But a violation against a dwelling affects the City. Accordingly, an individual must name HPD as respondent and serve it so that the City can protect its interests.[85]

Either side, HPD, or the court sua sponte may move to join another party, such as an upstairs neighbor responsible for a violation.[86] Cooperatives and condominiums may also be impleaded or may implead other parties to help the HP enforce housing standards. Joinder in the

---

81. *See Atop Roofing & Siding*, 135 Misc. 2d at 747, 516 N.Y.S.2d at 409. Whether a corporate officer may be personally liable for repairs depends on the degree of control the officer exercised over the premises, a factual determination normally made after a hearing. *Hous. & Dev. Admin. of N.Y. v. Johan Realty Co., Inc.*, 93 Misc. 2d 698, 700-01, 403 N.Y.S.2d 835, 837 (App. Term 1st Dep't 1978) (per curiam); *Dep't of Hous. Preservation & Dev. v. 351 E. 152nd St. Co.*, 20 H.C.R. 607B, N.Y. L.J., Oct. 6, 1992, at 25, col. 6 (Hous. Part Civ. Ct. Bronx County).

82. Civ. Ct. Act § 110(*l*); *Ross*, 12 Misc. 3d at 563, 814 N.Y.S.2d at 841 ("Unlike the rule in non-HP cases, a corporate respondent in an HP proceeding may be represented by corporate officers, directors, principal stockholders, or managing agents, and need not have an attorney.") (citing Civ. Ct. Act § 110(*l*)).

83. *See Schanzer*, 33 H.C.R. 513A, 7 Misc. 3d 1018(A), 2005 N.Y. Slip Op. 50658(U), *5-6, 2005 WL 1035584, at *5-6, 2005 N.Y. Misc. LEXIS 866, at *14 (holding that petitioner-tenant properly named DOB as respondent).

84. *Id.*, 2005 WL 1035584, at *5-6, 2005 N.Y. Misc. LEXIS 866, at *14.

85. *Shapiro*, 162 Misc. 2d at 634, 618 N.Y.S.2d at 493; *Amsterdam v. Goldstick*, 136 Misc. 2d 831, 833, 519 N.Y.S.2d 334, 336 (Hous. Part Civ. Ct. N.Y. County 1987), *aff'd on other grounds per curiam*, 136 Misc. 2d 946, 521 N.Y.S.2d 203 (App. Term 1st Dep't 1987).

86. Civ. Ct. Act § 110(d).

HP is authorized "'on the most liberal of terms, enhancing the court's potential as a source of novel and wide-ranging solutions to problems of housing maintenance.'"[87]

THE GROUNDS FOR AN HP PROCEEDING

The HMC, the MDL, and other codes establish minimum standards for health, safety, fire protection, light, ventilation, cleanliness, maintenance, and occupancy in New York City residential premises.

The HMC requires owners to comply with the following obligations, among others:

1. "[K]eep the roof, yard, courts and other open spaces clean and free from dirt, filth, garbage or other offensive material";[88]

2. Maintain multiple dwellings' public areas in a Aclean and sanitary condition";[89]

3. Paint or wallpaper multiple dwellings' public areas;[90]

4. "Keep the premises free from rodents, and from infestations of insects and other pests";[91]

5. "[P]rovide and maintain metal cans, or other receptacles," to contain waste accumulated in any 72-hour period;[92]

---

87. *Schanzer*, 33 H.C.R. 513A, 7 Misc. 3d 1018(A), 2005 N.Y. Slip Op. 50658(U), *6, 2005 WL 1035584, at *6, 2005 N.Y. Misc. LEXIS 866, at *15 (quoting Rutzick & Huffman, *supra* note 15, at 765–66); *accord Bridgett v. N.Y.C. Hous. Auth.*, 30 H.C.R. 485A, N.Y. L.J., Aug. 21, 2002, at 19, col. 2 (Hous. Part Civ. Ct. Bronx County) (joining party when leak in tenant's apartment caused damage to petitioner's apartment and absent party refused to give access).

88. HMC (Admin. Code) § 27-2010; MDL § 80(1).

89. HMC (Admin. Code) §§ 27-2011, 27-2022; MDL § 80(2), (3).

90. HMC (Admin. Code) § 27-2013(a)-(c); MDL § 80(4).

91. HMC (Admin. Code) § 27-2018; MDL § 80(1); *see, e.g.*, *313 W. 100th St. Tenants Ass'n v. Kepasi Realty Corp.*, 139 Misc. 2d 57, 60, 526 N.Y.S.2d 748, 750 (Hous. Part Civ. Ct. N.Y. County 1988), *modified on other grounds per curiam*, 143 Misc. 2d 566, 545 N.Y.S.2d 54 (App. Term 1st Dep't 1989).

92. HMC (Admin. Code) § 27-2021(a); *accord* MDL § 81.

6. "Provide proper appliances . . . to receive and distribute an adequate supply of water during all hours";[93]

7. Grade and maintain "all roofs, terraces, shafts, courts, yards, and other open spaces";[94]

8. Provide "heat from a central heating system."[95] (From October 1 through May 31, between 6:00 a.m. and 10:00 p.m., the internal temperature must be at least 68 degrees Fahrenheit when the outside temperature falls below 55 degrees. From 10:00 p.m. to 6:00 a.m., the internal heat must be at least 55 degrees Fahrenheit when the outside temperature falls below 40 degrees[96]);

9. Provide hot water.[97] (In multiple dwellings, hot water at a tap temperature of 120 Fahrenheit minimum must be provided 24 hours a day; in tenant-occupied one- or two-family dwellings, hot water must be provided at a "constant minimum temperature" of 120 degrees Fahrenheit between 6:00 a.m. and midnight.[98] For baths and showers equipped with thermostatic mixing valves, the water temperature must be a minimum of 110 degrees Fahrenheit between 6:00 a.m. and midnight.[99])

10. "Provide adequate janitorial services";[100]

---

93. MDL § 75(2), 76-77; HMC (Admin. Code) §§ 27-2025.

94. HMC (Admin. Code) § 27-2027(a); *accord* MDL § 77.

95. HMC (Admin. Code) § 27-2028 (requiring building owners to obtain HPD or DOB permission before installing gas or electric heating instead of central heating system).

96. HMC (Admin. Code) § 27-2029(a), (b); MDL § 79; *Doukas*, 23 H.C.R. 463A, N.Y. L.J., July 26, 1995, at 22, col. 4 (requiring landlord to provide heat to tenants as required under HMC and MDL).

97. HMC (Admin. Code) § 27-2031; MDL § 75.

98. HMC (Admin. Code) § 27-2031; MDL § 75.

99. HMC (Admin. Code) § 27-2031.

100. HMC (Admin. Code) § 2053(a), (b); MDL § 83 ("Whenever there are thirteen or more families occupying any multiple dwelling and the owner does not reside therein, there shall be a janitor, housekeeper or some other person responsible on behalf of the owner who shall reside in said dwelling or within a dwelling located within a distance of two hundred feet from said dwelling, and have charge of such dwelling . . . ."); *see also Park W. Mgt.*, 47 N.Y.2d at 329, 418

11. "Provide every kitchen and kitchenette . . . with gas or electricity . . . for cooking";[101] and

12. "[C]orrect all lead-based paint hazards."[102]

The HMC also provides detailed minimum standards for living conditions, including lighting and ventilation,[103] sanitary facilities,[104] and space.[105]

In addition to the HMC and the MDL, state and local health, building, and housing codes provide enforcement mechanisms to ensure safe and comfortable housing. HPD also has its own regulations.[106] These additional laws require owners to comply with standards related to window guards,[107] sprinkler systems,[108] noise,[109] lead abatement, and carbon-monoxide-detecting

---

N.Y.S.2d at 317, 391 N.E.2d at 1295 (finding that landlord breached warranty of habitability by failing "to provide adequate sanitation removal, janitorial and maintenance services [, a failure that] materially impacted upon the health and safety of the tenants"), *cert. denied*, 444 U.S. 992 (1979); *Hatcher v. Bd. of Managers of 420 W. 23 St. Condo.*, -- A.D.3d --, -- N.Y.S.2d --, 2007 N.Y. Slip Op. 03750, at *1, 2007 WL 1217884, at *1, 2007 N.Y. App. Div. LEXIS 5144, at *1 (1st Dep't, Apr. 26, 2007) (mem.) (holding that condominium, which contained about 40 residential units, need not employ resident janitor because condominium's board of managers qualifies as a resident owner under MDL § 83).

101. HMC (Admin. Code) §§ 27-2070(a), 27-2053. The court may not prevent a utility company from terminating service if the owner fails to pay utility bills. *Ford v. Tower W. Assocs.*, 120 Misc. 2d 240, 240-41, 467 N.Y.S.2d 476, 476-77 (App. Term 1st Dep't 1983) (per curiam).

102. HMC (Admin. Code) § 27-2056.2 *et seq.*; *see also Baptiste v. N.Y.C. Hous. Auth.*, 177 Misc. 2d 51, 53, 675 N.Y.S.2d 802, 804-05 (Sup. Ct. Kings County 1998) (finding that landlord placed on constructive notice about lead-paint hazard remains on notice until hazard is abated).

103. HMC (Admin. Code) § 27-2057 *et seq.*

104. *Id.* § 27-2063 *et seq.*

105. *E.g.*, *id.* §§ 27-2074, 27-2082.

106. HMC (Admin. Code) § 27-2090 (empowering HPD "to promulgate such regulations as it may consider necessary or convenient to interpret or carry out any [HMC] . . . provision").

107. Health & Mental Hygiene Code (Admin. Code) § 17-123.

108. Building Code (Admin. Code) § 27-123.2.

devices.[110] The New York City Health Code, the New York City Fire Safety Code, and New York City Local Law 1 of 2004 (formerly Local Law 38 of 1999), are examples of these laws and will be discussed below. Housing Court, with its specialized HP, and Supreme Court are the only two courts with the equitable jurisdiction to enforce all housing-related codes and laws.[111]

CURRENT HP ISSUES

Mold

Mold, a type of fungus,[112] needs only undisturbed water or moisture and a readily available food source like wood, paper, mattresses, stuffed animals, upholstered furniture, or sheetrock to germinate and grow. The three main causes of mold in dwellings are rain-water infiltration, condensation on cold surfaces, and defective plumbing. Residents of newer buildings are more likely to be affected than those who live in older buildings. Newer buildings are often airtight, with central-heating and air-conditioning systems (heating, ventilation, and air conditioning, or HVAC) that can spread mold spores and interior walls constructed with sheetrock, a moisture-absorbing material, rather than lath and plaster.

Depending on the person's sensitivity and the level of exposure, all molds are potentially dangerous to health.[113] In a decision currently on appeal, one court found no causative link

---

109. *See Nostrand Gardens Co-Op v. Howard*, 221 A.D.2d 637, 638, 634 N.Y.S.2d 505, 506 (2d Dep't 1995) (mem.) (affirming abatement award for extensive noise emanating from neighbor's apartment); *River Terrace Apts., Inc. v. Robinson*, 26 H.C.R. 314A, N.Y. L.J., May 27, 1998, at 27, col. 3 (Hous. Part Civ. Ct. Bronx County) (awarding abatement because of noise emanating from adjacent laundry room); *Locker v. 670 Apts. Corp.*, 23 H.C.R. 121A, N.Y. L.J., Feb. 28, 1995, at 29, col. 6 (Hous. Part Civ. Ct. N.Y. County) (ordering respondent-owner to install adequate sound-proofing to correct excessive noise and vibration in petitioner-occupant's apartment) (discussed in Richard Siegler, Cooperatives & Condominiums, *An Update of the Warranty of Habitability*, N.Y. L.J., July 1, 1998, at 3, col. 1); Richard Siegler & Eva Talel, Cooperatives & Condominiums, *Noise and the Warranty of Habitability*, N.Y. L.J., Mar. 1, 2006, at 3, col. 1.

110. *See* 1 RCNY 28-02 (establishing owner's obligations to install carbon-monoxide detecting devices).

111. *Schanzer*, 33 H.C.R. 513A, 7 Misc. 3d 1018(A), 2005 N.Y. Slip Op. 50658(U), *4, 2005 WL 1035584, at *4, 2005 N.Y. Misc. LEXIS 866, at *9.

112. TIMMIE E. ELSNER & JOHN S. LANSDEN, *MOLD: A GROWING PROBLEM*, LANDLORD/TENANT PRACTICE: JACK NEWTON LERNER LECTURE SERIES 2 (Apr. 8, 2003) (unpublished monograph for N.Y. County Lawyers' Ass'n CLE).

113. *See, e.g., 360 W. 51st St. v. Cornell*, 33 H.C.R. 775A, N.Y. L.J., Sept. 6, 2005, at 18, col. 1

between mold and health problems sufficient to support a personal-injury action.[114] HPD continues to issue class "B" and "C" violations for any visible mold according to the extent of the area affected. Large areas affected by mold warrant a class "C" violation; a smaller area is a class "B" violation. Some toxic molds produce mycotoxins, which are capable of initiating a toxic response in vertebrates and have been linked to severely adverse health effects in humans after significant exposure.

Stachybotrys Chartarum (SC), also known as black mold, is a highly toxic greenish-black mold that thrives on material with high cellulose content like wallpaper and sheetrock. Individuals with chronic exposure to SC's toxins have reported cold and flu symptoms, sore throats, diarrhea, headaches, fatigue, dermatitis, hair loss, allergic respiratory disease, and a malaise sometimes called "sick building syndrome."

Mold type cannot be distinguished by sight. Most kinds of mold, including several non-toxic molds, are also greenish-black. Just because mold is greenish-black does not mean that an exposed person's health will be affected.

It is important first to identify and remedy the mold's causes (leaking pipes, flooding, improper ventilation) and then to remove the mold in accordance with the Environmental Protection Agency's (EPA) approved steps for the amount and type of mold. Cleaning the affected area's surface will not eradicate toxic mold. Mold is resilient; it can permeate porous materials beneath the surface. One tenant's failure to cooperate with mold remediation might place other tenants in the building at risk, as can a tenant's failure to report the condition.

The New York City Department of Health and Mental Hygiene (DOHMH) has enacted recommended guidelines for mold removal.[115] The DOHMH guidelines recognize five levels of mold contamination based on the affected area's size and location:

1. Level I includes moldy areas on walls, floors, and ceilings 10 square feet or smaller;

2. Level II includes moldy areas on walls, floors, and ceilings larger than 10 square

---

(Hous. Part Civ. Ct. N.Y. County).

114. *See Fraser v 301-52 Townhouse Corp.*, 3 Misc. 3d 1217(A), 831 N.Y.S.2d 347, 2006 N.Y. Slip Op. 51855(U), 2006 WL 2828595 (Sup. Ct. N.Y. County, Sept. 27, 2006) (making conclusions after *Frye* hearing). The *Fraser* court nevertheless allowed the plaintiff's warranty-of-habitability claim to go forward to trial. *Id.*, 2006 N.Y. Slip Op. 51855(U), at *26, 2006 WL 2828595, at *26, 2006 N.Y. Misc. LEXIS 2704, at 74.

115. *Remediation*, http://www.nyc.gov/html/doh/html/epi/moldrpt1.shtml#remed (last visited Apr. 25, 2007).

feet but less than or equal to 30 square feet;

3. Level III includes moldy areas on walls, floors, and ceilings larger than 30 square feet but less than 100 square feet;

4. Level IV includes moldy areas on walls, floors, and ceilings larger than 100 square feet; and

5. Level V is limited to any amount of mold found in heating, ventilation, and air-conditioning (HVAC) systems.[116]

The DOHMH guidelines recommend the methods and equipment to remove mold based on the level number. A building's regular maintenance staff can remove moldy areas designated as Levels I, II, and V. But Levels III and IV remediation must be performed by "[p]ersonnel trained in the handling of hazardous materials."[117] The higher the level, the greater the precautions the owner must take to protect the occupants' and workers' health and safety. Often the work area must be sealed and workers given appropriate respiration equipment.

Despite a rise in public awareness of the problem of toxic mold and an increase in mold-related litigation, no New York City or New York State statute or regulation, other than the DOHMH guidelines, relates to assessing and eliminating mold in residential dwellings.[118] The New York State Toxic Mold Protection Act, introduced in the 224th Legislative Session but not yet enacted into law, would establish a task force to assist DOHMH to develop safe mold-level standards and to determine the potential health risks posed by mold.

Bedbugs

Another issue likely to cause extensive litigation is bedbugs. Once thought eradicated in New York City, bedbugs have made a comeback[119] due to the absence of outlawed chemicals

---

116. *Id.*

117. *Id.*; *see, e.g., Dole v. 106-108 W. 87th St. Owners Inc.*, 34 H.C.R. 1096A, 13 Misc. 3d 1241(A), 2006 N.Y. Slip Op. 52208(U), *7-9, 2006 WL 3410144, at *7-8, 2006 N.Y. Misc. LEXIS 3421, at *21-25 (Hous. Part Civ. Ct. N.Y. County, Nov. 22, 2006) (finding respondent-owners in civil contempt for disobeying lawful court order because repairs, which required Level III or IV remediation, were done neither according to DOH Guidelines nor with appropriate mold remediation safeguards).

118. *In re Garcia*, 30 H.C.R. 636B, 2002 N.Y. Slip Op. 50497(U), *17, 2002 WL 31885716, at *17, 2002 N.Y. Misc. LEXIS 1625, at *24 (Hous. Part Civ. Ct. Kings County, Aug. 29, 2002).

119. *See Ludlow Props., LLC v. Young*, 4 Misc. 3d 515, 519, 780 N.Y.S.2d 853, 856 (Hous. Part Civ. Ct. N.Y. County 2004).

like DDT, an increase in international tourism and travel, and the pests' ability to live undetected for up to a year before beginning to feed on human flesh. Besides being irritating and making their victims prone to secondary infection, bedbug bites can cause anemia, especially in small children.

Rarely can bedbugs be exterminated by treating only the affected tenant's apartment. Due to the bugs' adaptability and tenacity, they can live between floorboards and in tiny cracks, and they travel easily between apartments in the building. Entire buildings must be treated for bedbug infestations. All mattresses and infested materials (clothing, linen, couches, chairs, and cushions) must be removed from affected areas.

Brown Water

Brown water is commonly associated with pipe corrosion and rusting hot-water heaters. If a water line has not been used for a while, New York City's Department of Environmental Protection (DEP) recommends running the cold-water tap for two to three minutes to flush the line.

Brown water can also result from street construction or water-main work in the area. Any disturbance to the water main, including opening a fire hydrant, can cause pipe sediment to shift, resulting in brown water. The settling time depends on the water main's size.

New York City residents with a brown-water problem should call 311 to consult a DEP specialist to register a brown-water complaint or go to the DEP Web site at http://www.nyc.gov/html/dep/home.html (last visited Apr. 25, 2007) or call (718) DEP-HELP (337-4357). Curiously, the DEP's Customer Service Center for water issues is located in Flushing, New York. The DEP will determine whether construction in the area disturbed the water main. If no construction had been scheduled in the area, a DEP inspector will investigate whether an external factor caused the brown water or whether the problem is internal to the building. If the problem appears to be inside the building, the DEP will not test the water inside the building. The inspector will also test water running from the tap to determine what contaminants are causing the coloration.

The Environmental Control Board (ECB) hears DEP violations. The ECB has the authority to issue fines but cannot order owners to correct violations. The HP has the jurisdiction to issue an order to correct violations of "any legislative standard which directly impacts" occupants' health and safety, including violations heard by ECB.[120]

Lead-Based Paint

---

120. *Various Tenants of 515 E. 12th St.*, 128 Misc. 2d at 236-37, 489 N.Y.S.2d at 832.

Exposure to lead-based paint poses a serious health problem to children in New York City. Because lead does not break down naturally, it remains a problem until removed or permanently contained. The greatest threat to occupants is breathing or ingesting dust from lead-based paint as it wears and disintegrates over time. Even at low levels, lead-paint poisoning can harm the central nervous system, damage children's developing neurological systems, impair growth, cause hearing loss, and limit attention span,[121] all permanent all irreparable injuries. Children under seven are at an especially high risk for lead exposure and its effects, given their normal hand-to-mouth activity, which includes ingesting lead-paint dust and chips.

Before lead's harmful effects were known, lead was used in paint, gasoline, water pipes, pottery, and other products. Lead-based paints were used and marketed long after their harmful effects on children were known.

New York City banned lead-based paint from interior building surfaces in 1960. Removing existing lead paint proved a huge undertaking. Over half the City's housing units were built before 1960. Most of the affected units were in low-income neighborhoods[122] that could ill afford lead-paint remediation.

Effective August 2, 2004, New York City Local Law 1 requires removing lead-paint hazards in day-care facilities and residential housing. New York City enacted a new law after the New York Court of Appeals found the earlier lead-law legislation—Local Law 38 of 1999—unconstitutional.[123]

The new local law uses a "lead safe" approach rather than the former "lead free" approach, thereby eliminating the requirement that owners completely remove lead-contaminated paint. Complete removal, unless performed properly, was found to increase children's exposure to lead dust, and, while costing billions of dollars, offers no statistically significant health benefit.

A lead hazard is any condition that creates exposure to lead-contaminated dust from peeling lead-based paint, deteriorated sub-surfaces, friction surfaces, impact surfaces, and chewable surfaces—those accessible to children, who might handle or chew contaminated dust or chips.[124]

---

121. *In re N.Y.C. Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 763 N.Y.S.2d 530, 794 N.E.2d 672 (2003). For an excellent review of federal, New York State, and New York City lead laws, see MATTHEW CHACHÈRE, LEAD LAWS AND REGULATIONS (unpublished monograph issued by Northern Manhattan Improvement Corp. Legal Services) (Jan. 1, 2006).

122. 100 N.Y.2d at 343, 763 N.Y.S.2d at 532, 794 N.E.2d at 674.

123. *Id.* at 343, 763 N.Y.S.2d at 532, 794 N.E.2d at 674.

124. Local Law 1 of City of New York, HMC (Admin. Code) § 27-2056.4; Inspectors, Admin.

It is first the owner's responsibility to remove lead-paint hazards. Owners must prevent the reasonably foreseeable occurrence of lead hazards, remediate underlying defects that may cause lead hazards, and remove hazards.[125] Regardless whether an owner intends to remediate lead hazards or merely repair, remodel, renovate, or redecorate, an owner must use safe work and clean-up practices and properly trained personnel in any work that disturbs lead-based paint or paint of unknown lead content. An owner must investigate for lead-based paint in dwellings built before January 1, 1960, where a child under seven resides, or in a dwelling built after January 1, 1960, and before January 1, 1978, where a child under seven resides and the owner knows or should know that the dwelling has lead paint.[126]

Using what HPD calls the "Barney the Dinosaur test," HPD inspectors will find that children "reside" in the dwelling if they leave toys in the dwelling and regularly visit or sleep there.[127] Owners must investigate dwelling units in which children under seven reside and all common areas for peeling paint, chewable surfaces, and deteriorated sub-surfaces. The owner must investigate annually, and more often if the owner knows or has reason to know that a hazardous condition exists or if an occupant complains about a hazardous condition.[128] At lease expiration and renewal periods, owners must inquire whether children under seven reside in the subject dwelling. The owner must send a notice to continuing tenants between January 1 and January 16 each year inquiring about the presence of a child in the premises.[129] The tenant must respond to this notice by February 15. An owner that receives no response must inspect between February 16 and March 1 to determine whether a child is present.[130] If the tenant does not provide access, the owner must notify DOHMH.[131] If DOHMH's inspection reveals that a child resides in

---

Code § 67-2.8.

125. HMC (Admin. Code) § 27-2056.4(a); *Dep't of Hous. Preservation & Dev. v. 712 Realty LLC*, -- H.C.R. --, 14 Misc. 3d 1240(A), 2007 N.Y. Slip Op. 50455(U), *3, 2007 WL 703116, at *2, 2007 N.Y. Misc. LEXIS 815, at *5 (Hous. Part Civ. Ct. Kings County, Feb. 27, 2007) (finding that respondent's contractor complied with EPA and HMC, which require trained, certified, and qualified firms and workers to abate lead).

126. HMC (Admin. Code) § 27-2056.4(a).

127. Lecture for the judges and court attorneys of the New York City Civil Court, Housing Part, Jan. 24, 2006, by Harold Schultz, Esq., Special Counsel to HPD, and Deborah Rand, Esq., HPD's Assistant Commissioner for Housing Litigation.

128. HMC (Admin. Code) § 27-2056.4(d)(2).

129. *Id.* § 27-2056.4(e)(4).

130. *Id.* § 27-2056.4(e)(3)(i).

the dwelling, an HPD inspection of lead hazards must ensue. The owner must then inform the tenants about HPD's investigative results.

Owners must also give new tenants and renewing tenants a pamphlet on lead-paint hazards and offer a lease that notifies the tenant of the owner's responsibilities with respect to lead-paint remediation.[132]

HPD may issue a violation for lead-based paint after an HPD inspection if the paint's lead content is 1.0 milligram or greater of lead per square centimeter.[133] HPD may also issue a violation based on a statutory presumption that applies to apartments in residential buildings built before 1960 in which children under seven years old live. A tenant- or Lead Paint Litigation Unit-initiated HP proceeding may ensue. The building's owner can remove the presumptive violation by hiring an EPA-certified firm to test for lead paint.[134] Testing for lead dust is done with an x-ray fluorescence (XRF) machine.[135] The owner and the person who performed the tests must then submit to HPD sworn statements and supporting documentation that no lead paint was found, if none was found.[136] The sworn statements and the owner's application to remove the violation must be given to HPD at least six days before the NOV's correction date.

When tenants complain about lead paint, HPD must inspect the premises within 10 days of a complaint.[137] For lead-inspection purposes, HPD will issue a class "C" violation for peeling paint or paint on a deteriorated sub-surface in a unit of a multiple dwelling where a child under seven resides or visits.[138] HPD will not write violations for common areas and intact window sills, even though these are defined as lead hazards.[139] Co-operative corporations and condominium boards of managers against which HPD places a violation in a shareholder's (co-

---

131. *Id.*

132. *Id.* § 27-2056.4(d)(1).

133. *Id.* § 27-2056.11(1).

134. *Id.* § 27-2056.5(a).

135. *Checking Your Family and Home for Lead, available at* http://www.epa.gov/lead/pubs/leadinfo.htm#checking (last visited May 3, 2007).

136. HMC (Admin. Code) § 27-2056.4(f).

137. *Id.* § 27-2056.9(b).

138. *Id.* § 27-2056.6.

139. *Id.*

operative) or an owner's (condominium) unit may defend on the ground that the co-operative's proprietary lease or the condominium's by-laws make shareholders or unit owners responsible for conditions inside their apartments.[140]

Blood level is irrelevant to an owner's obligation to inspect and HPD's issuance of violations. But under New York State regulations, health-care providers must notify the DHMH if they find that a child's blood is 10 micrograms per deciliter (• g/dL).[141] If children have a blood level of 15 • g/dL or higher, the DHMH must inspect and issue an order to abate under Health Code § 173.13(d). If that happens, the owner must correct within five days. If it does not do so within 16 days of the DHMH's learning about the child's poisoning, HPD, under HMC § 27-2056.14, must correct within the following 18 days.

In all cases of remediation, owners must submit completion certificates to HPD within five days of correction, and HPD must then re-inspect all violations within 14 days of the correction date. If the owner does not correct violations within the specified times or when an emergency exists, HPD's Emergency Repair Program (ERP) must correct within 45 days of the complaint.

In every HP case involving lead violations, HPD will attach an addendum to the court's order to correct. The addendum explains the methods a respondent-owner must use to remediate lead hazards. The addendum states that the owners must:

1. Correct lead hazards using an EPA-certified firm to perform the work. For a listing of EPA-certified abatement firms, go to http://www.nyc.gov/html/hpd/downloads/pdf/epa-lead-abatement-firms.pdf (last visited Apr. 25, 2007);

2. Correct lead hazards in accordance with safe work practices described in HMC (Admin. Code) § 27-2056.11 and 1 RCNY 11-06;

3. Use an EPA-certified independent third party to evaluate for lead dust after the work has been completed. That evaluation, a clearance dust test, begins with a dust swipe (from a baby wipe) to assure that the area was cleaned up properly. For a listing of EPA-certified evaluation firms, see http://www.nyc.gov/html/hpd/downloads/pdf/epa-lead-evaluation-firms.pdf (last visited Apr. 25, 2007);

4. Correct lead hazards the sooner of either 21 days from the court order to correct or the correction date in the NOV; and

140. *Id.* § 27-2056.15 (i) & (ii).

141. 10 NYCRR 67-1.1(d) (defining elevated lead levels in blood).

5. Pay $250 a day per violation from the sooner of the NOV's correction date or 21 days from the court's order to correct until the violation is corrected;

The addendum further states that if the owner requires an extension to correct, HPD can give the owner an additional 14 days to correct upon application. HPD must receive the extension application five days before the correction date. The owner must show HPD that it has taken prompt steps to correct but failed because the owner:

1. Experienced serious technical difficulties;

2. Could not get the necessary materials, funds, or labor; or

3. Could not gain access to the dwelling unit.

A second 14-day extension is available to owners upon application if they satisfy the same criteria for the first extension and also show that the lead-paint conditions have stabilized. A further extension is available if the owner can show that the corrections will be made as part of a substantial capital improvement.

Much HP litigation arises over who—the owner or the ERP (or an HPD subcontractor)—will correct lead-paint violations. If the ERP corrects, HPD will bill the owner. If the owner does not pay the ERP bill, HPD will place a lien on the building. This HP case begins when HPD brings an order to show cause seeking an access warrant to correct when HPD alleges that the ERP or an HPD subcontractor tried to effect repairs but was denied access. Sometimes the owner's strategy in access-warrant cases is to buy time through adjournments in the HP so that it can begin remediation before the ERP does so. This strategy often works because HPD's policy is not to interfere with remediation already in progress.

HPD may not remove any lead-paint violations from its records until it has conducted a final inspection verifying remediation and obtains copies of relevant dust tests.[142] A copy of the final inspection must be mailed to the occupant and the owner. Penalties for falsely certifying that lead-paint violations were corrected include $1000-$3000 in civil penalties (in the HP judge's discretion) and possible misdemeanor charges.[143] For a failure to correct, the penalty is

---

142. HMC (Admin. Code) § 27-2115(l)(4).

143. *Id.* § 27-2115(l)(5). According to one opinion, the penalty for falsely certifying a violation may not be less than $1000; that is, no mitigation is possible, even if the respondent did not know that the EPA-certified lead-abatement firm it hired erred in conducting the remediation. *See Dep't of Hous. Preservation & Dev. v. 537 Clinton LLC*, 34 H.C.R. 51A, 11 Misc. 3d 327, 331, 809 N.Y.S. 2d 430, 433 (Hous. Part Civ. Ct. Kings County 2005) (citing *Dep't of Hous. Preservation & Dev. v. Fersedy*, 15 H.C.R. 100B, N.Y. L.J., Apr. 2, 1987, at 16, col. 3 (App Term 2d Dept 2d & 11th Jud. Dists.) (mem.), for proposition that "penalty less than a statutory

$250 a day until the lead-paint violations are removed.[144]

Carbon Monoxide

Carbon monoxide is a highly toxic gas produced by incompletely combusted fossil fuels like oil, natural gas, gasoline, wood, and coal used in boilers, engines, oil burners, gas fires, water heaters, and appliances. Dangerous amounts of carbon monoxide can accumulate due to poorly installed, maintained, or damaged appliances that allow fuel to be burned improperly or when poorly ventilated rooms prevent carbon monoxide from escaping. Carbon monoxide has no taste, odor, or color, making it undetectable and deadly to potential victims.[145]

Local Law 7 of 2004 required owners of multiple dwellings and one- and two-family homes to install at least one approved carbon-monoxide alarm in each dwelling unit by November 1, 2004.[146] Failure to install the alarm is a class "B" hazardous HMC violation. The alarm must be installed within 15 feet of the primary entrance to each sleeping room. It can also be installed at other room locations and at heights the manufacturer recommends. To ensure proper operation, carbon-monoxide alarms should not be installed near a bathroom, which is a source of humidity, or near gas stoves and gas dryers.[147]

Within 10 days of the installation date, owners of multiple dwellings must file, in person or by mail, a Certificate of Satisfactory Installation with HPD's Borough Code Enforcement Office in the borough in which the dwelling is located. Tenants are required to keep the alarms in good repair and reimburse the owner $25 for each newly installed carbon-monoxide alarm or to replace an alarm that the occupant has lost or damaged. Owners must preserve all carbon-monoxide alarm installation and maintenance records and make them available on request to HPD, DOB, the Fire Department, or DOHMH. For more information, consult the DOB's Web site at http://www.nyc.gov/buildings (last visited Apr. 25, 2007).

Hazardous Material

---

minimum m[ay] not be imposed").

144. *Id.* § 27-2115(l)(6); MARY ANN HALLENBORG, NEW YORK TENANTS' RIGHTS 9/15 (2002) [hereinafter "TENANTS' RIGHTS"].

145. *Frequently Asked Questions on N.Y.C.'s New Carbon Monoxide Law, available at* http://www.nyc.gov/html/hpd/html/homeowners/carbon_monoxide.shtml (last visited Apr. 25, 2007).

146. *Id.*

147. *Id.*

Hazardous wastes come in many shapes and forms. Biohazardous waste can come from human or animal remains. Waste in dwellings might affect the offending occupant's neighbors or the entire building. Title 6 NYCRR 211.2 prohibits an owner from releasing into the atmosphere hazardous materials "injurious to human, plant or animal life or to property or which unreasonably interfere with the comfortable enjoyment of life or property."

Upon encountering hazardous waste, one should leave the area and immediately contact the Environmental Protection Agency (EPA), the federal agency designated to deal with hazardous waste, at (202) 272-0167. For answers and information about hazardous waste, New Yorkers can also call 311 or the New York State Department of Environmental Conservation (DEC) at (718) 482-4900. The HP has the jurisdiction to order a respondent-owner to correct an EPA violation that directly impacts an occupant's health and safety.

Sound

Noise is New York City's number one quality-of-life complaint. The City's 311 operators receive an average of 1000 noise complaints daily. To prepare for litigation, an occupant may hire an expert to identify the source of the noise, measure noise volume, and determine the medium of transmission between the source and the listener. The expert will take objective decibel readings and testify in court. The expert can also recreate the sound in court at the level and frequency heard at the listener's location in the building.

The New York City Administrative Code contains two sets of rules dealing with noise. The first is the New York City Noise Control Code (NCC), which the DEP enforces by investigating complains and issuing violations.[148] The HP has the jurisdiction to enforce the Noise Control Code.[149]

The NCC sets maximum sound levels for sound-reproduction devices, construction activities, container transport, exhausts, motor vehicles, paving breakers, and commercial music,

---

148. *See* Noise Control Code (Admin. Code) § 24-202 *et seq.*; *Locker*, 23 H.C.R. 121A, N.Y. L.J., Feb. 28, 1995, at 29, col. 5 (directing cooperative to abate "unceasing" noise and vibrations emanating from building's boiler and other mechanical equipment). For a good discussion of the differences between the Noise Code and the Building Code, see Siegler & Talel, *supra* note 109.

149. "[T]he Noise Control Code section of the Administrative Code of the City of New York which prohibits . . . unnecessary noise . . . . is subject to the injunctive power authorized by section 110 (subd [a], par [4]) of the New York City Civil Court Act." *Central Park Gardens*, 107 Misc. 2d at 415, 434 N.Y.S.2d at 126; *accord Paul v. Rokosz*, 35 H.C.R. 69A, 13 Misc. 3d 1233(A), 2006 N.Y. Slip Op. 52104(U), *2, 2006 WL 3228399, at *1, 2006 N.Y. Misc. LEXIS 3210, at *3 (Hous. Part Civ. Ct. N.Y. County, Oct. 31, 2006) (finding in HP proceeding that building owners violated Noise Control and Building Codes because they failed to reduce excess noise from air-conditioning unit located at ground-floor restaurant).

and generally prohibits "unreasonable noise." The NCC primarily measures average noise levels; however, the maximum noise levels for commercial music in a tenant's apartment may also be measured by decibel-level testing in each of eight octave bands. "Unreasonable noise" is defined as "any excessive or unusually loud sound that disturbs the peace, comfort or repose of a reasonable person of normal sensitivities or injures or endangers the health or safety of a reasonable person of normal sensitivities, or which causes injury to plant or animal life, or damage to property or business."[150] Under NCC § 24-218,

> [n]o person shall make, continue or cause or permit to be made or continued any unreasonable noise, except that this section shall not apply to any sound from any source where the decibel level of such sound is within the limits prescribed by another section of this title and where there is compliance with all other applicable requirements of law with respect to such sound.

Mayor Bloomberg has proposed to overhaul the NCC. The proposal, which refers to offending auditory stimulation as "sound" violations rather than as the less-objective term "noise," affects five areas of sound regulation: (1) reducing sound from construction in residential areas, (2) regulating sound from commercial music sources like bars, clubs, and cabarets, (3) regulating air conditioners, (4) simplifying enforcement by using a "plainly audible" standard, not a handheld decibel meter, for regulated areas, and (5) prohibiting raising ambient noise in otherwise-unregulated residential neighborhoods by 10 dB during the day and 7 dB at night.

To report a noise violation, a tenant should telephone the DEP's 24-hour Help Center at (718) DEP-HELP (337-4357) or access http://www.nyc.gov/html/dep/home.html (last visited Apr. 25, 2007).

The second statutory scheme dealing with noise is laid out in the New York City Building Code requirements for Noise Control in Multiple Dwellings, which the DOB enforces.[151] The Building Code delineates the maximum permissible sound levels generated by mechanical equipment within a residential dwelling. The Building Code limits the sound-power levels for equipment installed contiguous to a residence, the sound transmission capacities of common walls and floor or ceiling partitions, and vibration-isolation requirements for pumps, fans, compressors, and elevators. The Building Code also limits noise-transmission levels, measured by decibel-level testing in each of eight octave bands, within an occupant's apartment.[152]

Smell

---

150. Noise Control Code (Admin. Code) § 24-203(ccc).

151. *See* Building Code (Admin. Code) § 27-768 *et seq.*

152. *See id*. § 27-770.

Offensive smells often accompany other residential housing problems like mold, hazardous materials, or brown water. New York City has enacted comprehensive legislation to improve air quality. The legislation focuses on reducing second-hand smoke and atmospheric carbon-monoxide, coal, oil, and automobile emissions. No current legislation addresses offensive smells in residential housing. Nevertheless, DOHMH regulates air quality and may issue a violation to an owner that violates the Air Code. The HP has the jurisdiction to order a respondent-owner to correct an Air Code violation that affects an occupant's health and safety.

To report an intrusive odor or offensive smell, contact the DOHMH by dialing 311 or going online at http://www.nyc.gov/html/doh/html/home/home.shtml (last visited Apr. 25, 2007).

TENANT'S OBLIGATIONS

The HMC imposes on tenants a duty to comply with applicable HMC and MDL provisions.[153] A tenant's liability for code violations does not relieve owners of their obligation to keep the premises, and every part thereof, in good repair.[154] But a tenant's failure to comply with the HMC and the MDL might subject the tenant to civil or criminal penalties[155] or to termination of the tenancy.[156] The penalties might apply even if the tenant successfully pleads warranty-of-habitability or actual or constructive eviction defenses to a nonpayment proceeding.[157]

Under HMC (Admin. Code) § 27-2006(a)(1)-(2), tenants are responsible for violations in dwelling units and in the public parts of the building when the violations are:

1. Caused by the willful act of the tenant, a guest, or a member of the tenant's family or household; or

2. The result of the gross negligence, neglect, or abuse of the tenant, a guest, or a member of the tenant's family or household.

Under HMC (Admin. Code) § 27-2007, tenants shall not:

---

153. For a tenant's obligations under the HMC, see §§ 27-2006(a)(1)-(2), 27-2007.

154. *Id.* § 27-2006(c).

155. *Id.*

156. *See also Sorensen v. Ramon*, 28 H.C.R. 325A, N.Y. L.J., May 17, 2000, at 34, col. 1 (Civ. Ct. Richmond County).

157. HMC (Admin. Code) § 27-2009.

1. "Remove or render inoperative any self-closing device on any door which is required by any provision of law to be self-closing, or cause or permit such door to be held open by any device";

2. "Use, or cause or permit to be installed, a lowered door or screen door in addition to or in place of any required self-closing door to a public hall";

3. "Place any encumbrance before or upon, or cause access to be obstructed to, any fire escape, or obstruct by a baby carriage or any encumbrance the public halls or any required means of egress";

4. "Take down, alter, destroy, or in any way deface any sign required by this code to be displayed"; or

5. "Remove or render inoperative any shower head installed by the owner . . . ."

Landlords may institute summary holdover proceedings to evict tenants based on a violation of HMC (Admin. Code) § 27-2009 that:

1. "Results from willful or grossly negligent conduct and causes substantial damage to the dwelling units";

2. "Results from repeated or continued conduct which causes damage to the dwelling unit or substantially interferes with the comfort or safety of another person"; or

3. "Consists of an unreasonable refusal to afford access to the dwelling unit to the owner or his or her agent or employee for the purpose of making repairs or improvements required by" the HMC.[158]

A lease may require tenants to maintain common areas that they are not statutorily obligated to maintain.[159] But tenants are not obligated to pay to repair common areas unless they specifically agree in the lease to assume those costs.[160]

---

158. *Bridgett*, 30 H.C.R. 485A, N.Y. L.J., Aug. 21, 2002, at 19, col. 2 ("[E]viction proceedings can be instituted to terminate a tenancy where a tenant unreasonably refuses to provide access to do repairs.") (citing HMC (Admin. Code) §§ 27-2008, 27-2009(3)).

159. *Chamberlain v. W. 24th Tenant's Corp.*, 30 H.C.R. 631A, 2002 N.Y. Slip. Op. 50441(U), *4, 2002 WL 31520427, at *1, 2002 N.Y. Misc. LEXIS 1463, at *2-3 (App. Term 1st Dep't, Nov. 7, 2002) (per curiam).

160. *Id.*, 2002 WL 31520427, at *1, 2002 N.Y. Misc. LEXIS 1463, at *2-3.

Tenants must provide access to the owner and the owner's agents and employees to inspect and repair the tenant's dwelling unit.[161] An owner may exercise its right of entry only at a reasonable time and in a reasonable manner. A landlord must give written notice of its intent to exercise its right of entry.[162] If repairs are urgently needed to prevent damage to persons or property, the owner, agent, contractor, or worker need not give the tenant advance notice.[163] Otherwise, "where an owner or its agent seeks access to make improvements or non-emergency repairs, a tenant need only be given one week's advance notice."[164] If a tenant persistently refuses access and if emergency repairs need to be completed, the HP may, if a proceeding is pending, authorize the New York City Police Department to use force to allow the owner into the apartment to effect the repairs.[165]

In addition to an occupant's obligations listed above, occupants are responsible for the following:

1. Occupancy limitations and using premises lawfully;

2. Maintaining premises in a clean, safe, and sanitary condition;

3. Maintaining refrigerators (the owner is responsible for the refrigerator's outside, its motor, and its mechanisms; the tenant is responsible for keeping its insides sanitary), plumbing and cooking equipment, appliances, fixtures, and facilities in a clean and sanitary condition and providing reasonable care in their operation and use;

4. Keeping exits free and clear of clutter and debris; and

5. Disposing of garbage and refuse in a sanitary manner.

PRECURSORS TO AN HP PROCEEDING

161. HMC (Admin. Code) § 27-2008.

162. 28 RCNY 25-101(b).

163. *Id.* 25-101(a).

164. *Zaccaro v. Freidenbergs*, 34 H.C.R. 95A, 2006 N.Y. Slip Op. 50096(U), * 2, 2006 WL 211717, at *2, 2006 N.Y. Misc. LEXIS 123, at *2 (App. Term 1st Dep't, Jan. 27, 2006) (per curiam) (citing 28 RCNY 25-101).

165. *Bridgett*, 30 H.C.R. 485A, N.Y. L.J., Aug. 21, 2002, at 19, col. 6.

The HMC requires HPD to enforce the Code and any other housing standards by all "legal, equitable and administrative" means,[166] including an HP proceeding. A tenant may therefore notify HPD of a possible code violation before initiating an HP proceeding. Once notified of a possible violation, HPD must investigate the complaint as part of its responsibility to enforce the HMC.[167]

The easiest way for a tenant to notify HPD is to telephone New York City's Citizen Service Center at 311 or, from outside the City, by dialing (212) NEW-YORK. A complaint can also be made by calling HPD's Central Complaint Bureau hotline, staffed 24 hours a day, seven days a week, with services in over 170 languages, at (212) 639-9675. For the hearing impaired, the Touchtone Device for the Deaf (TDD) telephone number is (212) 504-4115. HPD's general number is (212) 863-8000. HPD is located behind Pace University's Manhattan campus at 100 Gold Street, New York, New York 10038. HPD can also be contacted through New York City's Web site: http://www.nyc.gov/html/hpd (last visited Apr. 25, 2007).

For gas leaks or electrical emergencies, occupants should call 311 and Con Edison toll-free at 1-800-752-6633 (1-800-CON-ED) in the Bronx, Manhattan, and Queens (Long Island City, Floral Park, Flushing, Bayside, Sunnyside, the Rockaways, and some parts of Jamaica). For gas leaks or electrical emergencies in Brooklyn, the remaining areas in Queens, and Staten Island, occupants should call 311 and KeySpan at (718) 643-4050. In the case of gas leaks and electrical emergencies, an HP proceeding should be commenced or a Housing Court HPD or Resource Center inspection requested only after—never before—calling 311 and Con Edison or KeySpan. Immediately dangerous conditions cannot await the natural delays associated with HPD or Resource Center inspections.

HPD takes more calls than 911. In 2003-2004, HPD received more than 450,000 calls. During the 2003-2004 heat season, HPD received 215,385 heat and hot-water complaints.[168] The number dipped slightly during the 2004-2005 heat season, when 203,737 heat and hot-water problems were called in to the City.[169] The number of complaints decreased dramatically during

---

166. HMC (Admin. Code) §§ 27-2002(3), 27-2090, 27-2091(a), (b).

167. *D'Agostino*, 12 Misc. 3d at 489, 820 N.Y.S.2d at 470 (noting that in enforcing HMC, HPD will investigate complaints and issue violations).

168. *2004/2005 Heat Season Begins: HPD to Enforce Laws Requiring Building Owners to Provide Heat, available at* http://www.nyc.gov/html/hpd/html/pr2004/release-17-2004-pr.shtml (last visited Apr. 25, 2007).

169. *Dep't of Hous. Preservation & Dev.* Press Release No. 1-05, *2005/2006 "Heat Season" Begins: HPD to Enforce Laws Requiring Building Owners to Provide Heat* (Oct. 1, 2005), *available at* http://www.nyc.gov/html/hpd/html/pr2005/pr-10-01-05.shtml (last visited Apr. 25, 2007).

the 2005-2006 heat season, however, when the city received only 117,790 heat and hot-water complaints.[170]

The specifics of a complaint are entered into HPD's central-complaints computer system, which generates a written notice to the owner and managing agent that the complaint was received. After evaluating the nature and extent of the condition, HPD may also call the building's owner and managing agent to resolve the complaint.[171] About a third of the complaints are resolved this way.

If HPD's call does not resolve a complaint or if an emergency condition exists, HPD will send an inspector to the premises. In emergency situations, HPD will expedite an inspection to occur within 24 to 72 hours, depending on the condition. HPD currently employs about 280 inspectors. They gain access approximately 75 percent of the time and issue about 300,000 violations a year.[172] HPD inspectors inspect the premises for violations based on the complaint received and are authorized to issue violations for lead-paint hazards (searching each room in pre-1960 buildings when children under seven reside in the subject premises) and any condition in the inspector's line of sight, regardless of the original complaint. Except for lead-paint hazards, inspectors will not look for violations not complained of or which are outside their line of sight.

If HPD does not issue a NOV at the request of a tenant or tenants within 30 days, the tenant or tenants may apply to the HP for an order directing the owner and HPD to appear.[173] If the court determines that a violation exists, the court may order the owner to correct the violation.[174]

If HPD determines that a Code violation renders a dwelling or any part of it "dangerous to human life and safety or detrimental to health," it may act summarily to correct the violation or order the owner or other responsible party to correct the violation.[175] If the owner fails to respond

---

170. *2006/2007 "Heat Season" Begins: HPD Enforces Laws Requiring Building Owners to Provide Heat, available at* http://home2.nyc.gov/html/hpd/html/pr2006/pr-10-01-06.shtml (last visited May 1, 2007).

171. *Id.*

172. Lecture before the N.Y. County Lawyers= Ass'n, Civ. Ct. Prac. Sect., Mar. 15, 2001, by Harold Schultz, Esq., Special Counsel to HPD.

173. HMC (Admin. Code) § 27-2115(h).

174. *Id.*

175. HMC (Admin. Code) § 27-2125(a), (b), the AEmergency Repair Program." HMC (Admin. Code) § 27-2144(b) permits HPD to recover expenses "for the repair or elimination of any

to an HPD order to repair violations, HPD may apply to an HP judge for an access warrant directing the landlord to allow HPD's ERP to repair.[176] Owners that do not wish to be billed for HPD's emergency repairs often deny the ERP unit access to the building.[177] After two unsuccessful attempts to gain entry, the ERP unit can ask HPD's Housing Litigation Division (HLD) to seek an access warrant in the HP. In heat and hot-water emergencies, if the outside temperature is below freezing, HPD staff or contractors are authorized to "break and enter" the building, if necessary, and bill the owner for emergency repairs. If payment is not forthcoming, HPD will place a lien on the building.[178]

HPD has the sole discretion to effect repairs under its ERP. For the ERP to repair, no outstanding court order or proceeding need be in effect.[179] Some courts do not allow the HP to direct HPD to effect repairs,[180] but at least one court has held that the Civil Court may order the DOB or HPD to correct violations because of what that court called the "extraordinary circumstances" in that case.[181] An HP judge considering ordering the ERP unit to make repairs

---

dangerous or unlawful conditions." For a good explanation of the legal issues associated with HPD's Emergency Repair Program, see *Dep't of Hous. Preservation & Dev. v. 849 St. Nicholas Equities*, 141 Misc. 2d 258, 261-67, 532 N.Y.S.2d 674, 676-80 (Hous. Part Civ. Ct. N.Y. County 1988).

176. HMC (Admin. Code) § 27-2127 *et seq.* In practice, HPD rarely seeks this remedy.

177. *CTRC Fact Sheets*, *available at* http://www.tenant.net/Rights/CTRC/ctrcf201.html (last visited Apr. 25, 2007).

178. *Id.*

179. *Lane v. City of Mt. Vernon*, 38 N.Y.2d 344, 349, 379 N.Y.S.2d 798, 802 (1976) (holding that New York City has power summarily to abate public nuisances and compel property owner to bear costs); *Dep't of Hous. Preservation & Dev. v. Cohen*, 128 Misc. 2d 351, 354, 489 N.Y.S.2d 979, 982 (Hous. Part Civ. Ct. N.Y. County 1985).

180. *E.g.*, *Perazzo v. Lindsay*, 30 A.D.2d 179, 180, 290 N.Y.S.2d 971, 973 (1st Dep't 1968) (per curiam), *aff'd*, 23 N.Y.2d 764, 296 N.Y.S.2d 957 (1968); *Rubin v. Hevro Realty Corp.*, 84 Misc. 2d 1074, 1077, 376 N.Y.S.2d 834, 838 (Sup. Ct. N.Y. County 1975), *aff'd mem.*, 55 A.D.2d 536, 389 N.Y.S.2d 1021 (1st Dep't 1976).

181. *Aybar v. Tsionkas*, 29 H.C.R. 501A, N.Y. L.J., Oct. 24, 2001, at 23, col. 1 (Hous. Part Civ. Ct. Kings County) (holding that HP may order HPD to correct immediately hazardous violations if respondent-owner is unwilling or unable to do so); *accord See Berman v. Zaki*, -- H.C.R. --, N.Y. L.J., Feb. 23, 2001, at 22, col. 6 (Civ. Ct. Richmond County) (holding that court may compel HPD and DOB to remove violations); Serge Joseph, *Housing Part ("HP") Actions* in *The ABC's of Landlord/Tenant Law* 3 (Dec. 13, 2004) (unpublished manuscript for Brooklyn Bar Ass'n CLE) (same).

must give HPD 15 days' notice in which to issue a written reply advising the court why an ERP order should not issue.[182] HLD will then likely advise the HP judge that it will not effect a court-ordered ERP repair.

Sometimes ERP will begin repairs before the date by which an owner-respondent must complete repairs in a tenant- or HPD-initiated proceeding resolved by a stipulation or an order to correct. This might happen because HLD and ERP do not always communicate—HPD is a large agency. Even when an HLD attorney signs off on a stipulation giving the owner-respondent time to correct a violation, the HP has no jurisdiction to stop ERP from initiating repairs. An owner-respondent may seek relief, including a stay, only in Supreme Court.

Like HPD, the DOB or "any other agency of the City of New York designated by it as its agent" may enter buildings without judicial permission to repair any condition that constitutes "an immediate danger to the life or health of occupants of dwellings."[183] The DOB may act to correct a condition if the Department of Health (DOH) determines that the condition is a public nuisance, defined as a condition that threatens occupants' life or health.[184] After the City abates the nuisance, the DOH may sue any party responsible for causing the condition to recover expenses for removing the condition.[185]

To place a lien on the building to satisfy HPD's ERP bill, HMC (Admin. Code) § 27-2127(b) provides that HPD's application for a lien must:

1. Identify the dwelling;

2. Describe the violations;

3. Describe the work required and the estimated repair costs; and

4. Prove service of the repair order.

---

182. Civil Court Act §§ 110(c) & 110(d); *Llorente v. Espinal*, 19 H.C.R. 108, N.Y. L.J., Feb. 27, 1991, at 22, col. 4 (Hous. Part Civ. Ct. N.Y. County).

183. *300 W. 154th St. Realty Co. v. Dep't of Bldgs.*, 30 A.D.2d 351, 354, 292 N.Y.S.2d 25, 27 (1st Dep't 1968), *modified on other grounds*, 26 N.Y.2d 538, 311 N.Y.S.2d 899 (1970).

184. *Id.* at 353-54, 292 N.Y.S.2d at 27-28.

185. *Id.* at 355, 292 N.Y.S.2d at 28.

In all other cases, at the tenant's request or on its own, HPD will issue and mail a notice of violation (NOV) informing the owner, or any other person or entity responsible for correcting housing violations, of the following:

1. The condition that constitutes the violation;

2. The HPD order number or the applicable HMC section violated, or both;

3. The degree of hazard;

4. The time to correct the violation and to certify the correction to HPD;

5. HPD's availability to review the scope and costs of repairs; and

6. The penalties for failing to correct the violation.[186]

HPD inspectors write order numbers on their NOVs instead of HMC sections. Each HPD order number on an NOV corresponds to a section of HPD's Division of Code Enforcement's Order Book. The Order Book contains all the order numbers included in an NOV and the corresponding HMC section allegedly violated. Even if the HPD inspector does not state in the NOV the HMC section allegedly violated, HPD satisfies due process and the HMC § 27-2115(b) requirements by including in the NOV the order number for the owner to cross reference in the Order Book.[187]

In an NOV, HPD may notify the owner that it has violated HMC § 27-2005—a catch-all section for any otherwise-unspecified nuisance. For example, the HMC requires owners to provide hot water at a minimum temperature of 120º Fahrenheit, but no HMC section sets a maximum water temperature. To issue a violation for scalding water, HPD cites HMC § 27-2005 in the NOV.

Once a violation is placed, HPD might place a notice of pendency, or lis pendens, on the real property. This notice does not create an encumbrance or lien. Rather, it alerts third parties that a pending proceeding might affect title to the property.[188] This gives constructive notice to

---

186. HMC (Admin. Code) § 27-2115(b)-(c), (f)(1), (h).

187. *See Dep't of Hous. Preservation & Dev. v. 528-538 W. 159th St. LLC*, 7 Misc. 3d 660, 662-63, 791 N.Y.S.2d 917, 919-20 (Hous. Part Civ. Ct. N.Y. County 2005) (Gerald Lebovits, J.) (denying respondent-owner's motion to dismiss for failure to comply with HMC § 27-2115(b) and finding that respondent-owner could use Order Book to cross-reference order numbers with HMC sections violated).

188. CPLR 6501; *see also Martin v. 352 Cathedral Equities, Inc.*, 140 Misc. 2d 386, 388, 530 N.Y.S.2d 504, 505 (Hous. Part Civ. Ct. N.Y. County 1988) (permitting lis pendens for HP

all subsequent purchasers and prevents registered owners from selling property with a pending or impending judgment to unsuspecting or unaware buyers.[189] Once an HP proceeding is settled, discontinued, or abated, the HP judge must cancel the lis pendens.[190] A case is not "settled" merely by stipulation or order to correct. To secure an order canceling a lis pendens, the respondent-owner must comply with the stipulation or order to correct or tell HPD, the HP, or Supreme Court why the corrections were not made. While a proceeding is pending or before corrections are made under a stipulation or order to correct, the court has the discretion to cancel a lis pendens if an owner pays an undertaking.[191]

A tenant may lodge a complaint with agencies in addition to HPD, depending on the problem. For example, Pest Control Services (PCS), a DOHMH division, is responsible for eliminating rodents, usually rats, on private property. Telephone PCS at (212) 442-9666. In the event of noncompliance after notification, PCS will clean, repair, and exterminate—and bill the owner.

At a hearing before the ECB, an owner can be subjected to fines for violations of the Building Code, Fire Code, and Health Code that are dangerous to public health or safety. Tenants can complain about alleged Building Code, Fire Code, and Health Code violations by calling 311. The appropriate City agency will then inspect and issue violations. HPD has jurisdiction over HMC violations only, but the HP has the power to order an owner to correct any violation of any code that governs housing standards. Building Code and ECB violations are available to the public at the DOB's Web site at http://www.nyc.gov/html/dob/html/home/home.shtml (last visited Apr. 25, 2007) and at the subscription-based http://www.propertyshark.com (last visited Apr. 25, 2007). The Web user should go to the top left of the DOB site and enter the building's address. That will lead to a wealth of information, including complaints, certificates of occupancy, and pending actions.

DEGREES OF HAZARD AND THE TIME TO CORRECT VIOLATIONS

After HPD issues an NOV, the owner or other responsible parties must correct class "A" nonhazardous violations within 90 days[192] and class "B" hazardous violations within 30 days from the date HPD mails the NOV.[193] Class "C" immediately hazardous violations must be

---

proceeding).

189. CPLR 6501.

190. *Id.* 6514(a).

191. *Id.* 6515; MDL § 360.

192. HMC (Admin. Code) § 27-2115(c).

193. *Id.*

corrected within 24 hours of the date the NOV is served either personally or by registered or certified mail, return receipt requested, "to the person in charge of the premises or to the person last registered with HPD as the owner or agent."[194]

HPD may grant an extension of time to an owner that cannot correct the violation in the required period. To receive an extension, the owner must demonstrate to HPD before the time to correct expires that despite prompt action, the repairs could not be completed because of:

1. Technical difficulties;

2. Unavailable materials, funds, or labor; or

3. An inability to gain access to the premises where the violation exists.[195]

For immediately hazardous class "C" violations, the owner must prove the impediment to correction by "the close of business on the next full day [HPD] is open following the period set for correction."[196] Before it extends the correction deadline, HPD may impose conditions to ensure HMC compliance.[197] HPD has the broad discretion to specify a short repair deadline if the violation is dangerous to life or detrimental to health.[198] No extension may exceed 45 days from the correction date set in the NOV.[199] The NOV itself does not impose a penalty or initiate a court proceeding. Owners may obtain technical advice about violation correction from inspectors in HPD's Borough Code Enforcement offices or from the Division of Neighborhood Preservation, which is part of HPD's Office of Preservation Services.

IF CORRECTIONS ARE MADE

HPD depends largely on "owner compliance" as its preferred system to ensure that repairs are completed. Compliance means that the owner must complete the repair and certify to HPD that a violation is cured. The owner must send the complainant a copy of the certification to

---

194. *Id.*

195. *Id.* §§ 27-2115(c), 27-2008.

196. *Id.* § 27-2115(c).

197. *Id.*

198. *Id.*

199. *Id.* § 27-2115(l)(3).

enable the complainant to contest it. HPD includes certification instructions on the back of the NOV. According to HMC (Admin. Code) § 27-2115(f)(1), the certification must be

1. In a writing affirmed by the registered owner, registered officer, managing agent, director, or corporate owner;

2. Supported by a sworn statement by the person who performed the work if performed by the owner's employee or agent; and

3. Delivered to HPD by certified or registered mail, return receipt requested, no later than 14 days from the date set to correct nonhazardous and hazardous violations and no later than five days from the date set to correct immediately hazardous violations.

Once HPD receives the owner's certification, HPD must notify the complainant within 12 days that the owner has alleged that it corrected the violation.[200] The violation will be deemed corrected 70 days after HPD receives the certification.[201] If the complainant notifies HPD that the violation was not removed within that 70-day period, HPD must reinspect to determine whether the owner removed the violation.[202] If HPD does not reinspect within 30 days of the tenant's request, the tenant may restore the case and ask the court to place a violation. If HPD or the court determines that the owner falsely certified that the violation was removed, the owner's certification will be set aside, and the complainant may move for civil penalties and contempt.[203] If HPD sets the certification aside, HPD must notify the owner,[204] who may bring an HP proceeding for a determination that the owner removed the violation.[205]

In about 10 percent of the cases, HPD unilaterally reinspects the premises within 45 days of receiving the owner's certification—the Certificate of Code Compliance—that the violations were corrected.[206] Through 1995, about 40,000 of the nearly 100,000 cure certifications filed

---

200. *Id.* § 27-2115(f)(2).

201. *Id.* § 27-2115(f)(3).

202. *Id.* § 27-2115(f)(4) & (h).

203. *Id.* § 27-2115(f)(4).

204. *Id.* § 27-2115(f)(5).

205. *Id.*

206. *Landlords Falsified 40,000 Corrections of Housing Code Violations*, News Release of June 26, 1995, Office of N.Y.C. Comptroller, at http://tenant.net/Oversight/Codeenf/news.html (last visited Apr. 25, 2007).

with HPD proved false.[207] The HPD inspector prepares a reinspection report indicating either that the violations were corrected (indicated by the letter "C"), that the violations were not corrected (indicated by the letter "N"), that the inspector did not gain access to the premises to inspect (indicated by the letter "A" or the acronym "N/A"), that a lead-paint violation has been converted to a violation for paint and plaster (indicated by the letter "D"), that the complainant no longer cares about the violation or does not want the owner to repair it (indicated by the letter "W," for "waived"), or that the violation will be deleted because it is either duplicative or no longer exists (indicated by the letter "L").

A respondent-owner who willfully files a false certification of correction in an HPD-initiated proceeding faces a civil penalty of between $50 and $250, in the HP's discretion, for each falsely certified violation.[208] A false certification of correction of a lead paint violation has a penalty of between $1000 and $3000, in the HP's discretion.[209] For a false lead-paint certification, it is irrelevant that the owner did not know that the certification was false; strict liability attaches to a false certification.[210] If HPD does not re-inspect and the tenant does not tell HPD that repairs were not made, the violation is deemed corrected 70 days after HPD receives the owner's repair certification.[211]

A lead-paint violation will not be presumed corrected if it is based on an actual—not presumed—violation. The violation will remain outstanding until it is abated and certified as removed.[212] If a violation is corrected after the deadline passes to certify a correction, the owner may file a Dismissal Request Form to obtain HPD's reinspection and to remove the violation from HPD's records, for which HPD charges a $300 fee, payable to the New York City Commissioner of Finance.[213] HPD's permission to conduct a reinspection is required if the

---

207. *Id.*

208. HMC (Admin. Code) § 27-2115(a).

209. *Id.* § 27-2115(l)(5).

210. *537 Clinton*, 34 H.C.R. 51A, 11 Misc. 3d at 329, 809 N.Y.S.2d at 432 (rejecting owner's argument under HMC § 27-2115(l)(5) that certification was "not false" "because HPD did not show that respondents' knew or should have known that the certification was not accurate" and finding that this "defense is not cognizable").

211. HMC (Admin. Code) § 27-2115(f)(3).

212. *Nikac*, 29 H.C.R. 299A, N.Y. L.J., June13, 2001, at 22, col. 3.

213. For a useful review of an owner's options to challenge violation reports and certification requirements, see *Kraebel v. Michetti*, Dkt. No. 93 Civ. 4596 (JSM), 1994 WL 455468, at *4-7, 1994 U.S. Dist. LEXIS 11796, at *14–17 (S.D.N.Y. 1994), *aff'd*, 57 F.3d 1063 (2d Cir.)

building is in HP litigation. An owner-respondent that corrects within the time allotted in a consent order or an HPD-approved stipulation may file a Certificate of Compliance even if the date given for certification in an NOV has passed.

IF CORRECTIONS ARE NOT MADE

HPD may make repairs without commencing an HP proceeding, typically under its ERP. For lead-paint violations, for example, HPD must conduct a final inspection within 14 days from the correction date. If the owner did not correct, the ERP unit must repair the violations within 45 days of the final inspection.[214]

HPD's repair expenses, whether or not conducted under its ERP,[215] "constitute a debt recoverable from the owner and a lien upon the building and lot, and upon the rents and other income."[216] Repair liens are also classified as tax liens against the premises' block and lot. To enforce the lien, HPD must:

1. "[F]ile in the office of the department a record of all work caused to be performed by or on behalf of the department";[217]

2. Compute the expenses "as a statement of account [that HPD] shall cause to be filed in the office of the city collector";[218]

3. Within five days of filing the statement of account, mail "[a] notice thereof, stating the amount due and the nature of the charge . . . to the last known address of the person whose name appears on the records in the office of the city collector as being the owner or agent or as the person designated by the owner to receive tax bills or, where no name appears, to the premises, addressed to either the owner or the agent";[219] and

---

(unpublished), *cert. denied*, 516 U.S. 931 (1995).

214. HMC (Admin. Code) § 27-2115(*l*)(3).

215. *Id.* § 27-2143 *et seq.* (Emergency Repair Program); *300 W. 154th St. Realty Co. v. Dep't of Bldgs.*, 30 A.D.2d at 354-355, 292 N.Y.S.2d at 28-29.

216. HMC (Admin. Code) § 27-2128; *see also* HMC (Admin. Code) § 27-2143; *849 St. Nicholas Equities*, 141 Misc. 2d at 264-65, 532 N.Y.S.2d at 678-79.

217. HMC (Admin. Code) § 27-2144(a).

218. *Id.* § 27-2144(b).

219. *Id.* § 27-2144(c).

4. "[F]ile . . . a certificate setting forth the work done and the expenses incurred and certifying that such expense were necessary and proper in the exercise of its lawful powers."[220]

An owner failing to contest HPD's expense statement in writing within 30 days of service waives the right to do so in any future judicial or administrative proceeding.[221] An owner that wishes to protest charges or has questions about the charges must submit a written protest to HPD within 30 days of the initial billing. Interest charges do not accrue while the protest is under review.[222] HPD may also collect rent due the owner to recover its repair expenses.[223]

The owner, mortgagee, or lienor whose mortgage or lien would have priority over HPD's lien but for the HMC's priority rules may challenge the lien on the following grounds:

1. The lawfulness of the repair "or other work done"; or

2. Improprieties or inaccuracies in the account statement.[224]

VACATE ORDERS

The commissioners of DOB,[225] FDNY,[226] or DHPD[227] may issue a vacate order, which is an order to seal, secure, and close a building, or a part of a building (called a "partial peremptory

---

220. *Id.* § 27-2145.

221. *Id.* § 27-2129. Unless paid within 30 days, a bill sent to a property owner becomes a lien even if the owner protests the lien's validity. *Powazka v. Dep't of Hous. Preservation & Dev.*, 25 H.C.R. 410B, N.Y. L.J., July 29, 1997, at 22, col. 4 (Sup. Ct. N.Y. County).

222. *Procedure for Protesting Emergency Repairs, available at http://www.nyc.gov/html/hpd/html/tenants/erp.shtml* (last visited Apr. 25, 2007).

223. HMC (Admin. Code) §§ 27-2128, 27-2147; *see also* Civ. Ct. Act § 204; RPAPL Article 7-A.

224. HMC (Admin. Code) § 27-2146(a)(1), (2).

225. Bldg. Code (Admin. Code) § 26-127.

226. *Id.* § 15-227.

227. HMC (Admin. Code) § 27-2139.

vacate order"), when necessary to preserve the lives and safety of the occupants, neighbors, and passers-by. A vacate order results from an inspector's determination that a dwelling is unfit for human habitation under the conditions listed in HMC (Admin. Code) § 27-2139, one of which is that the building is in imminent danger of collapse.

A vacate order must notify the owner of its right to a hearing before the commissioner of the issuing department to determine whether the order issued properly. The hearing must be held within three business days after the department receives the owner's written request for a hearing. The commissioner will render a decision within three business days after the hearing is concluded. The commissioner may rescind (or, colloquially, "lift") the vacate order if the owner, lessor, lessee, or mortgagee establishes that the violations were corrected and will not recur.

To challenge the commissioner's decision to uphold a vacate order, an owner must bring an Article 78 petition in Supreme Court. Supreme Court will not overturn a vacate order unless an owner proves it was issued arbitrarily, capriciously, or irrationally.[228]

The HP may issue an order to correct the violations underlying a vacate order.[229] The HP will not do so if the owner obtains DHCR permission to withdraw the unit from the rental market[230] or if the DOB issues a demolition permit to the owner.[231] Tenants who abandoned the subject premises may bring an HP proceeding only if they did so under a vacate order.[232] One way for rent-regulated tenants to maintain their tenancies is to register with the DHCR and pay a nominal monthly rent of $1.00 while out of possession under a vacate order or because of fire damage. Were the rule otherwise, an unscrupulous landlord could allow a building to deteriorate to clear it of rent-regulated tenants.

COMMENCING THE HP PROCEEDING

HP cases are important. On the HP's return date, the court's "determination thereof shall have precedence over every other business of the court [absent another] pending proceeding,

---

228. CPLR 7803.

229. *Allen v. Rosenblatt*, 33 H.C.R. 13A, 5 Misc. 3d 1032(A), 2004 N.Y. Slip Op. 51666(U), *4, 2004 WL 2963907, at *5, 2004 N.Y. Misc. LEXIS 2770, at *13 (Hous. Part Civ. Ct. N.Y. County, Dec. 22, 2004) (Gerald Lebovits, J.) (enforcing prior HP order to remove violations underlying vacate order).

230. Rent Stabilization Code (9 NYCRR) § 2524.5.

231. HMC (Admin. Code) § 27-198.

232. *Id.* § 27-2139 (vacate orders); *Carrasquillo*, 20 H.C.R. 722A, N.Y. L.J., Dec. 2, 1992, at 25, col. 5 (holding that tenant who abandons under vacate orders has standing).

having similar statutory preference."[233] Decisions must also be rendered quickly. As explained in an article about judicial-writing ethics, in the "New York City Civil Court's Housing Part, judges must resolve within 30 days after final submission cases involving nonhazardous or hazardous violations and within 15 days after final submission cases involving immediately hazardous violations or injunctions."[234]

HPD-Initiated HP Proceedings

HPD may commence its own HP proceeding to compel NOV compliance, to recover costs, to seek civil penalties, and to secure sanctions for civil and criminal contempt.[235]

HPD does not initiate a proceeding to compel the correction of every violation it issues. It selects certain violations like lead-paint and heat and hot-water conditions as a basis to bring an HP case. HPD can also initiate a "comprehensive case" regarding an entire building based on community input and computer analyses of violation patterns and complaint histories. HPD's current practice is that it will not bring a comprehensive case, or if it brings one it will not seek civil penalties or contempt, if the owner cures all "C" violations and 80 percent of the "B" and "A" violations within the time period HPD and the owner negotiate. The 80-percent rule is called "substantial compliance."

A new owner of a building with HMC violations can apply to HPD's Agreements and Compliance Unit to stay an HPD-initiated HP proceeding and to keep civil penalties from accruing.[236] The new owner must show that (1) it has owned the building for less than 60 days from the time the application is made, (2) it has filed a MDR statement, and (3) it will correct HMC violations during the requested stay.[237] If HPD grants the stay, the owner will sign an

---

233. HMC (Admin. Code) § 27-2127(d).

234. Gerald Lebovits, *The Legal Writer, Ethical Judicial Writing—Part I*, 78 N.Y. ST. B. J., Nov./Dec. 2006, at 64, 51 (citing 22 N.Y.C.R.R. 208.43 (Rules of the Civil Court)). That article also notes that "New York City Civil Court judges in the plenary and Housing Parts [must] submit reports every 30, 60, and 90 days informing administrators of any undecided case." *Id.* at 51 n.21.

235. HMC (Admin. Code) §§ 27-2116, 27-2127, 27-2120 *et seq.*; *see generally Schlueter*, 33 H.C.R. 903A, 9 Misc. 3d 1105(A), 2005 N.Y. Slip Op. 51405(U), *6-14, 2005 WL 2171204, at *6-14, 2005 N.Y. Misc. LEXIS 1897, at *13-35 (discussing civil and criminal penalties).

236. 28 RCNY 13-03 (HPD regulations).

237. *Id.* §§ 13-02, 13-03, 13-06.

agreement, prepared by HPD, with a violation-removal schedule.[238] The stay should give a new owner a reasonable period to correct the violations, but the stay cannot be longer than the statutory time periods to correct violations: 24 hours for class "C" violations, 30 days for class "B" violations, and 90 days for class "A" violations. HPD may revoke a stay granted a new owner that made misrepresentations in the application or failed to comply with the violation-removal schedule.239 If the stay is revoked, the civil penalties become due in full.[240] If the new owner complies with the violation-removal schedule, HPD will recommend that the Office of the Comptroller agree to waive whatever civil penalties have accrued for the HMC violations.[241] All HLD-obtained civil penalties are subject to the Comptroller's approval.

Tenant-Initiated HP Proceedings

The HMC allows a tenant to commence an HP proceeding when, after the tenant files an HPD complaint:

1. HPD fails to issue an NOV within 30 days of the tenant's complaint,[242] although the HMC waives the 30-day requirement for class "B" hazardous or class "C" immediately hazardous conditions;[243]

2. The owner failed to correct a violation in the time period provided in the NOV;[244] or

3. The owner incorrectly certified that all violations were corrected and HPD failed to reinspect the premises within 70 days of the certification.[245]

These provisions do not mean that an HPD complaint is a condition precedent to an HP proceeding over a class "A" violation, or even that once HPD begins its investigation an

238. *Id.* § 13-06.

239. *Id.* § 13-08(a)(1) & (2).

240. *Id.* § 13-08(b)(1).

241. *Id.* § 13-09.

242. HMC (Admin. Code) § 27-2115(h).

243. *Id.* § 27-2115(i).

244. *Id.* § 27-2115(h).

245. *Id.* § 27-2115(f)(3) & (4).

occupant must await one of these events to commence a proceeding. In a directive dated February 11, 1977, Daniel W. Joy, then-Commissioner of the Department of Rent and Housing Maintenance, HPD's predecessor, waived the HMC's 30-day waiting period condition-precedent provision for a tenant to seek relief when the tenant alleges an emergency or a danger to an occupant's life, health, or safety.

A question arises whether a class "A" violation can ever constitute an emergency or a danger to life, health, or safety. At least one court has held that, based on Commissioner Joy's directive, owners lack standing to raise the 30-day period as a defense in a tenant-initiated proceeding.[246] Absent satisfying the HMC's conditions precedent, some tenants might nevertheless wish to await the outcome of an HPD inspection before initiating an HP proceeding. Doing so will also mean that the HP can accelerate the return date; the tenant will already have a violation report and will not have to await an inspection. Doing so might also lead to fewer animosities with an honest owner, which will prefer to effect repairs once notified of a problem than to litigate in court.

Despite the above, tenants may and often do initiate a proceeding before they complain to HPD. Doing so assures an inspection and HP supervision. If an owner commences a summary proceeding following a tenant's complaint to HPD, the tenant may interpose any defense based on code violations or the warranty of habitability.[247] If the owner commences a holdover proceeding following a complaint to HPD, the tenant may raise the RPL § 223-b retaliatory-eviction defense, if applicable. A tenant may, but need not, begin an HP proceeding while litigating a nonpayment or holdover proceeding. If a tenant does so, the HP or the non-HP Housing Court may entertain a consolidation motion or a motion to transfer.[248] The HP or non-HP Housing Court may also consolidate or transfer sua sponte.[249]

An occupant usually begins an HP proceeding by order to show cause supported by a verified petition.[250] The Housing Court's clerk's office provides simplified forms for the self-represented. The order to show cause is submitted ex parte to an HP judge for signature. If the HP judge signs the order—and the judge usually does because an order to show cause almost always raises code issues—the proceeding is returnable in a minimum of five days. When commencing HP proceedings by order to show cause, occupants should request an HPD

---

246. *60 Eldridge St. Tenants Ass'n*, 129 Misc. 2d at 788-89, 494 N.Y.S.2d at 286.

247. *See* RPL § 235-b (warranty of habitability).

248. Civ. Ct. Act § 110(b).

249. *Id.*

250. *See id.* § 110(a)(9), which applies to HP proceedings that HPD commences.

inspection of their homes. The occupant should fill out the inspection- request form in black ink. Occupants are assigned an HPD inspection date in the clerk's office before they go to the HP judge to have their orders to show cause signed.

Unless the occupant alleges an emergency, the court will set a return date 10 business days after the HPD inspection to insure that the inspector's report is available on the return date. Some emergencies cannot await an inspection; for gas leaks or electrical emergencies, an occupant should call 311 and Con Edison (Manhattan, the Bronx, and Queens, including Long Island City, Floral Park, Flushing, Bayside, Sunnyside, the Rockaways, and some parts of Jamaica) toll-free at 1-800-752-6633 (1-800-CON-ED) or 311 and KeySpan (Brooklyn, the remaining areas of Queens, and Staten Island) at (718) 643-4050.

Whether or not the occupant requests an inspection, the order to show cause directs the owner and HPD to appear before the HP judge. The order to show cause also states that the occupant will seek an order requiring the respondent-owner to correct the violations listed in the inspection report, if available, and in the affidavit that must accompany every order to show cause. Every occupant who claims a violation and every respondent from whom relief is sought, including HPD, must be named in the caption.

If the petitioner-occupant proceeds by a petition, the HP clerk must sign and verify the petition and should list each violation on a separate line. If the tenant proceeds by affidavit in lieu of petition, all named petitioner-occupants must submit an affidavit notarized on every page.

Each petitioner-occupant must complete a separate inspection request form and prepare a separate petition for each apartment unless the occupants join to litigate building-wide issues. The occupant should submit that inspection request listing alleged violations to the Housing Court clerk's office, which will forward the request to HPD. If an inspection is requested, a petitioner-occupant should describe the violations in all possible detail to assist the HPD inspector.[251] As noted earlier, the HPD inspector is empowered to investigate only those violations the occupant specifically alleged in the inspection request, although the inspector may report additional violations within the line of sight when inspecting the premises and will investigate room-by-room for lead paint in a pre-1960 building in which children under seven reside in the subject apartment. In most cases, HPD inspectors will conduct an inspection and report any violations to the HP judge before the order's initial return date. In non-HP proceedings, inspections are frequently not completed by the first return date. In non-HP proceedings, the tenant-respondent must ask the court for an inspection.

After getting the petitioner-occupant's housing-inspection request, the inspector will arrive at the subject premises on the inspection date. When the inspector observes a condition

---

251. BOB KALIN, HP ACTIONS: THE BASICS FROM FILLING OUT THE PAPERS TO MONITORING COMPLIANCE WITH AN HP ORDER 6 *in* OBTAINING REPAIRS IN HOUSING COURT: AN ADVOCATE'S GUIDE TO HP PROCEEDINGS—2006 UPDATE (unpublished manuscript for Legal Servs. N.Y. Legal Support Unit & Volunteers of Legal Service) (Oct. 30, 2006).

that the petitioner-occupant alleged in the inspection request constitutes a violation, the inspector will determine whether the condition is a violation and write either "VR" or "NVR" on the inspection request next to the petitioner-tenant's allegations. The letters "VR" and "NVR" represent "violation reported" and "no violation reported." The inspector's hand-written inspection report and HPD's computer-generated violation report will be in the court's file on the return date. If the HPD inspector's report and the computer-generated violation report are not in the court file on the return date, to save time and avoid an adjournment to await a violation report, the parties or the HP judge may go online at http://167.153.4.71/hpdonline/provide_address.aspx (last visited Apr. 25, 2007) and enter the subject address to determine whether a violation was placed against the premises. The parties may also go to http://www.propertyshark.com (last visited Apr. 25, 2007), but that subscription-based Web site does not enjoy an MDL § 328(3) presumption of admissibility into evidence.

Sometimes the HPD inspector will be unable to gain access into the building or the subject apartment. In that event, the inspector will write "N/A Building" or "N/A Apartment," and on the return date, the HP will likely direct the occupant to prepare another inspection request and adjourn the proceeding for the inspection results.

A petitioner-occupant may also bring an HP proceeding against a receiver appointed as an officer of the court to protect and preserve the property. The proper forum to commence a proceeding against a receiver is Supreme Court rather than Civil Court because Supreme Court, as the appointing court, has the sole authority to oversee a receiver's actions.[252] Supreme Court may, however, grant Civil Court the permission to resolve cases involving receiverships and their compliance with housing standards.[253] The occupant in that event should move for leave to commence an HP proceeding in Civil Court and to allow the receiver to be named a respondent in that HP proceeding. Without Supreme Court approval, the HP has no jurisdiction over a receiver.

Service of Process

If the proceeding was commenced by an order to show cause, the petitioner-occupant must serve a copy on all the respondents, including HPD, according to the order's terms. Civil Court Act § 110(m) outlines service requirements for HP proceedings. Service under § 110(m)

---

252. *See 103rd Funding Assocs. v. Salinas Realty Corp.*, 276 A.D.2d 340, 341, 714 N.Y.S.2d 47, 49 (1st Dep't 2000) (mem.) (noting that because Supreme Court has sole responsibility to oversee receiverships, Supreme Court, not Civil Court, is preferred forum when tenants' claims are brought against receivers).

253. *See Indep. Sav. Bank v. Triz Realty Corp.*, 100 A.D.2d 613, 615, 473 N.Y.S.2d 568, 570 (2d Dep't 1984) (mem.) ("[A] receiver may not sue or be sued without the express permission of the court that appointed him.").

may be effected by certified or registered mail, return receipt requested.[254] Proof of service of the order to show cause must be filed with the Housing Court clerk before the order's return date or with the HP clerk on the return date.[255] If personal service under CPLR 308 for service on individuals is required, the petitioner must use due diligence before resorting to conspicuous-place service.[256]

HPD and petitioner-occupants may serve respondent-owners at the addresses listed in the MDR statement, which is found online by entering an address at http://167.153.4.71/hpdonline/provide_address.aspx (last visited Apr. 25, 2007) or at any other legitimate address.

MDL § 325 and HMC § 27-2097 require every owner of a building containing three or more dwelling units to file annually a Multiple Dwelling Registration statement (MDR). The failure timely to file the MDR or to amend it as necessary is an HMC violation that may subject the owner to a civil penalty of $250 to $500, at the HP judge's discretion.

It is the owner's duty to file a complete and accurate MDR. The HP court will overrule traverse and deny a motion to dismiss an HP proceeding for process served on an incorrect address in the MDR that the respondent-owner filed with HPD.[257] If the person to be served has not registered as required, the order to show cause may be served at an address registered in the last MDR statement filed or at any other address calculated to effect valid service, such as the

---

254. HMC (Admin. Code) § 27-2115(j). Although no opinion has been published on the subject, some judges believe that the court may exercise its inherent authority to allow first-class mailing with a certificate of mailing or overnight mail. Other judges construe § 110(m) as it is written and forbid first-class or overnight mailing except if the petitioner has attempted without success to effect certified or registered mail, return receipt requested.

255. Civ. Ct. Act § 110(m)(6).

256. *See Dep't of Hous. Preservation & Dev. v. Music & Art Realty Partners*, 23 H.C.R. 224A, N.Y. L.J., Apr. 26, 1995, at 28, col. 6 (Hous. Part Civ. Ct. N.Y. County) (holding two attempts at personal service insufficient if both attempts are made just before service deadline).

257. *See Dep't of Hous. Preservation & Dev. v. 532-536 W. 143 St. Realty Corp.*, 33 H.C.R.729A, 8 Misc. 3d 136(A), 2005 N.Y. Slip Op. 51246(U), *2, 2005 WL 1862720, at *1, 2005 N.Y. Misc. LEXIS 1637, at * 2 (App. Term 1st Dep't, Aug. 5, 2005) (per curiam); *Dep't of Hous. Preservation & Dev. v. 2515 LLC*, 33 H.C.R. 277B, 6 Misc. 3d 1039(A), 2005 N.Y. Slip Op. 50347(U), *5-6, 2005 WL 654137, at *5-6, 2005 N.Y. Misc. LEXIS 479, at *6-7 (Hous. Part Civ. Ct. N.Y. County, Mar. 18, 2005) (Gerald Lebovits, J.) (denying respondent's motion to vacate default judgment and dismiss because managing agent's failed for four years to update address on property registration statement she filed with DHPD).

address where a tenant mails a rent check.[258]

A managing agent must actually reside or customarily and regularly use a business office at the address listed in the MDR. Additionally, the managing agent must live or work in New York City. Some smaller owners legitimately conduct business from their residential addresses. If a court finds insufficient evidence that the managing agent had a bona fide business or residence at the address listed in the registration statement, the landlord is not complying with the MDR requirements and might be unable to maintain a summary nonpayment proceeding against the tenant. [259]

The HP must presume that HPD followed a regular and systematic mailing procedure for mailing violation notices if HPD introduces into evidence "the statement of any officer, clerk, or agent, or of anyone authorized . . . [by HPD] to mail a notice of violation, subscribed and affirmed by such person as true under the penalties of perjury, which describes the mailing procedure used by the department, or by the department's mailing vendor, or which states that these procedures were in operation during the course of mailing a particular cycle of notices of violation."[260] If HPD introduces into evidence "business records which correspond to the various stages of the mailing of a particular cycle of notices of violation . . . [under CPLR 4518(c)], then a presumption shall have been established that the mailing procedure was followed in the case of such cycle, and that such notice of violation has been duly served."[261]

ELEMENTS OF AN HP PROCEEDING FOR AN ORDER TO CORRECT

Pre-Trial

Parties appearing in the HP court often try to resolve their dispute by a consent order—an HPD form prepared by an attorney from HPD's HLD—or by a stipulation of settlement. In a

---

258. *532-536 W. 143 St. Realty*, 33 H.C.R.729A, 8 Misc. 3d 136(A), 2005 N.Y. Slip Op. 51246(U), *2, 2005 WL 1862720, at *1, 2005 N.Y. Misc. LEXIS 1637, at *2; *Various Tenants v. Jasper Holding LLC*, -- H.C.R. --, 10 Misc. 3d 1065(A), 814 N.Y.S.2d 565, 2005 N.Y. Slip Op. 52153(U), 2005 WL 3542399, 2005 N.Y. Misc. LEXIS 2940 (Hous. Part Civ. Ct. Kings County, Dec. 5, 2005) (finding respondent corporation's proof that it changed its address on multiple dwelling registration insufficient to rebut presumption that it received petitioner's mailings containing order to correct violations, notice of violation, order to show cause for civil penalties, and HP petition).

259. *L.E. Tillett & Assocs. v. Williams*, 28 H.C.R. 660A, N.Y. L.J., Nov. 1, 2000, at 29, col. 6 (Hous. Part Civ. Ct. Kings County).

260. HMC (Admin. Code) § 27-2115(b).

261. *Id.*

stipulation of settlement, the respondent-owner agrees to correct violations within the statutory time required by each violation's degree of hazard.[262] Although many respondent-owners happily sign consent orders agreeing to correct violations, some that wish to settle prefer stipulations because they rarely contain a civil-penalties provision. No published opinion explains the law, but a stipulation that contains a provision providing for "appropriate relief," if violated, is likely insufficient to allow for civil penalties, which are quasi-criminal remedies[263] and thus must, as a matter of due process, be contemplated explicitly in the stipulation before they may be imposed.[264] Nevertheless, a petitioner-occupant might agree to a stipulation without a civil-penalties provision if the occupant secures other benefits like short completion dates or obtaining repairs for which no violation exists.

If a respondent-owner violates a stipulation that has no civil-penalties clause, the petitioner occupant can still seek an order holding the owner in contempt. The occupant might indeed be indifferent to a civil-penalties sanction, which in any event is paid to HPD, not the occupant. For example, when a respondent-owner has limited financial resources, the occupant might prefer that the entire pot go to settle the contempt motion than to let some of it go to HPD, unless the occupant wants civil penalties to punish an owner or coerce compliance. On the other hand, from time to time HPD will initiate its own proceeding for civil penalties if violations are not corrected timely, regardless what the parties in a tenant-initiated proceeding might have consented to or whether the tenant seeks to impose civil penalties against an owner that fails to effect repairs timely.

Only occasionally does it matter whether a case is resolved by a stipulation or a consent order. If the parties cannot decide whether to resolve the proceeding by a stipulation or a consent order, the court after trial, if a respondent-owner does not prevail, will likely issue a judgment containing an order to correct that resembles a consent order, with a few modifications at most. An HP judge who issues an order to correct after a trial in a tenant- or HPD-initiated proceeding will typically ask an HLD attorney to prepare a trial order. The HLD attorney will use one of HPD's forms.

---

262. *See* HMC (Admin. Code) § 27-2115(c).

263. *Dep't of Hous. Preservation & Dev. v. Maccarone*, 30 H.C.R.584A, N.Y. L.J., Oct. 16, 2002, at 24, col. 1 (Hous. Part Civ. Ct. Richmond County) (Gerald Lebovits, J.), *rev'd on other grounds mem.*, 33 H.C.R. 405A, N.Y. L.J., May 25, 2005, at 19, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.).

264. This was HPD's position during 2004-2005, when this author served in New York County's HP. HPD stands to gain if civil penalties are imposed. When HPD tells the court that it may not impose penalties absent a consent order, the court understandably pays attention.

HPD's attorneys sign stipulations in tenant-initiated HP proceedings because they are named respondents. HPD will not consent to a stipulation as opposed to a consent order if its inspectors found any class "C" immediately hazardous violation.

The parties may stipulate to shorten or lengthen the correction periods provided for in the HMC: 24 hours for class "C" violations, 30 days for class "B" violations, and 90 days for class "A" violations. In return for the petitioner-occupant's or HPD's agreement to correct a class "C" violation later than 24 hours, a respondent-owner might agree to correct class "A" and "B" violations sooner than the 90 or 30 days the HMC provides for. Owners often agree to this compromise because it can be a significant hardship to have only 24 hours to correct a class "C" violation. Occupants, too, often agree to this compromise because the owner can effect all the work at once: The occupant need not remain at home repeatedly to provide access, and all the work will be completed sooner than the maximum 90-day period.

Both the consent order and the stipulation of settlement should set specific dates and times when the petitioner-occupant will provide access to the respondent-owner or its agents to effect repairs (*e.g.*, workers to arrive by 11:00 a.m. or noon and that if they fail to do so, the tenant may leave the premises for the day). If the parties stipulate that the respondent-owner will correct the violations by X date, called a "completion date," and the respondent fails to do so, the petitioner-occupant may seek a contempt order—even if the stipulation lacks a specific provision providing for contempt[265]—or an order assessing civil penalties, if the stipulation or consent order allows for civil penalties. HPD violation reports should be appended to consent orders and stipulations.

If the litigants do not agree to shorten or lengthen the HMC's correction periods, the court must hold a trial. The parties may also agree to have a hearing limited to that one issue. At trial, the court may also shorten or lengthen repair periods by converting a class "A" violation to a class "B" violation or a class "B" violation to a class "C" violation. The court may also convert a class "C" violation to a class "B" violation and a class "B" violation to a class "A" violation.

The date for correction in an NOV is always longer than a court-imposed date for correction, assuming that a proceeding is brought soon after HPD places a violation. The date to

---

265. *See, e.g.*, *Ross*, 33 H.C.R. 717A, 8 Misc. 3d 136(A), 2005 N.Y. Slip Op. 51224(U), *1, 2005 WL 1819388, at *1, 2005 N.Y. Misc. LEXIS 1605, at * 2 (affirming contempt finding for respondent-owner's violation of so-ordered HP stipulation); *Various Tenants of 446-448 W. 167th St. v. Dep't of Hous. Preservation & Dev.*, 153 Misc. 2d 221, 222, 588 N.Y.S.2d 840, 841 (App. Term 1st Dep't 1992) (per curiam) (holding respondent-owner in civil contempt for failure to comply with so-ordered stipulation), *aff'd per curiam*, 194 A.D.2d 311, 603 N.Y.S.2d 718 (1st Dep't 1993); *Bill Hotel v. Little*, 12 H.C.R. 225E, N.Y.L. J. Oct. 15, 1984, at 15, col. 3 (App. Term 1st Dep't) (per curiam) (holding that so-ordered stipulation is court mandate that may be enforced through civil contempt); *Schlueter*, 33 H.C.R. 903A, 9 Misc. 3d 1105(A), 2005 N.Y. Slip Op. 51405(U), *6-14, 2005 WL 2171204, at *6-14, 2005 N.Y. Misc. LEXIS 1897, at *13-35 (holding respondent-owner in contempt for violating so-ordered stipulation).

give HPD a Certificate of Code Compliance noting correction is indicated at the far right of each violation on a violation report. The correction date in the NOV starts the clock to complete repairs long before the clock might start at trial. Thus, the HP judge has considerable discretion at trial to shorten the correction date provided in a consent order: 24 hours, 30 days, or 90 days respectively for class "C," "B," and "A" violations starting from the time the litigants sign the consent order. An HP judge often exercise discretion to shorten time periods if the judge believes that an owner has delayed adjudication by securing unwarranted or overly lengthy adjournments before the order to correct issues.

Conversely, many repairs will take longer than the time provided for in the HMC, such as those necessitated by a fire, to restore gas services, to carry out significant structural renovations, and repairs affected by weather conditions like roof repairs. The HP judge may extend statutory time periods after a trial.

The litigants may agree to start dates for work to begin and for end dates when work must be completed. The court may rule only on when the work must be completed; the court may not direct when an owner must begin work. If the litigants do not agree on completion dates in a consent order or stipulation, and the HP judge must hold a trial to decide when repairs must be completed, the court will exercise its discretion and consider these factors, among many others:

1. The nature and degree of the repairs;

2. The nature and number of the violations;

3. How long ago the violations were placed or the conditions have existed;

4. Whether any litigant delayed the proceedings;

5. Whether the owner has been conducting repairs during the proceeding;

6. For how long the owner had notice of work required to be done;

7. Whether the occupant refused access in the past;

8. When the occupant will give access in the future;

9. Whether the occupant caused the violation for which the tenant now seeks correction;

10. Whether the owner is known to have many HP cases or whether the owner is a responsible landlord;

11. The owner's resources to effect repairs;

12. Whether the building will undergo substantial rehabilitation;

13. Whether a vacate order is in effect;

14. Whether the element of weather might affect repairs (such as roof repairs that can be done in warm weather only);

15. Whether effecting the repairs is beyond the owner's control, such as when DOB sign-offs are required or when Con Edison or KeySpan can restore gas; and

16. Whether the occupant is suffering a particular hardship.

No single factor is determinative. All factors must be considered in combination.

If the owner cannot comply with the date set for correction, whether that date is set at trial or agreed to in a consent order or stipulation, the owner should not await a petitioner-occupant's or HPD's motion for compliance, civil penalties, or contempt. Instead, the owner should move by order to show cause to obtain more time to correct. The order to show cause should explain in affidavits and attachments (architectural and engineering plans, contracts for work, DOB work permits, etc.) that the owner is working expeditiously, that the owner is not at fault for the delays, and that the work is expected to be completed by a date certain.

A consent order is a court order. Most consent orders are stronger enforcement tools than most stipulations, and the court enforces them according to their terms.[266] The standard consent order is drafted by HPD and, as explained above, differs principally from a stipulation in that the order contains a provision imposing civil penalties if the order is violated. HLD attorneys also have a standard HLD stipulation that lacks a civil-penalty provision. As explained above, petitioner-occupants who enter into stipulations without a civil-penalty provision are left with compliance hearings or contempt motions as their only remedy if the respondent-owner fails to correct the violations within the times set forth in a stipulation. As a result, the HP will often issue a default order with a civil-penalties provision if the respondent-owner fails to comply with the stipulation and defaults at a hearing brought to secure only compliance and civil penalties. Similarly, if an occupant signs a stipulation without a civil-penalty provision and thus restores the proceeding for only compliance and civil penalties, and not for contempt, the occupant on the return date can seek an order to correct or return with a new order to show cause, this time for contempt.

---

266. *Hallock v. State*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 512 (1984) (discussing enforceability of stipulation).

If the proceeding is resolved by stipulation, the occupant's attorney might consider including the following provisions to clarify the parties' relationship and reduce ambiguity about the respondent-owner's obligations:[267]

1. The respondent-owner consents to the court's jurisdiction and admits proper service (although a party that signs a stipulation resolving a proceeding waives any personal-jurisdiction defense);

2. The respondent-owner's failure to correct violations listed in the stipulation may subject the respondent to civil penalties and contempt of court; and

3. The respondent-owner's failure to comply with the stipulation will result in the case's restoration to the calendar for appropriate relief.

Calendar pressures permitting, the HP judge will review the provisions of a consent order or stipulation with non-represented owners to ensure that they understand the consequences of failing to adhere to the terms of the order or stipulation. Time permitting, the HP judge will also allocute non-represented occupants in tenant-initiated proceedings to ensure that the order or stipulation addresses their repair issues and access dates and to inform them how to bring an order to show cause for compliance, civil penalties, and contempt if the owner does not do the work in full and on time.

Respondents and petitioners often have competing considerations when entering into stipulations. For example, consenting to the court's jurisdiction might deprive the respondent-owners of their only defense to an HP proceeding. Service of the order to show cause must always be scrutinized, and respondents must make a strategic decision whether to contest service. Respondent-owners' practitioners should carefully review all the facts underlying the proceeding before they consent to any provision in a stipulation or a consent order waiving jurisdiction-based defenses.

Owners and occupants often disagree about what causes delays in correcting violations. Owners might claim that the occupant is not permitting access to the apartment to effect repairs, while occupants might claim that the owner does not show up to do the repairs. As a compromise, the court can send a Housing Court Resource Assistant to the premises on specific access dates to which the parties agree. The resource assistant—a court employee—will document in a report whether the owner's workers showed up to do the work, whether the occupant is providing access, and what work has been done or has yet to be done.[268] Resource

267. *See* KALIN, *supra* note 251, at 11.

268. 22 NYCRR 100.3(B)(6)(c) & (e) (allowing judges to consult ex parte with court personnel to aid court in carrying out its duties).

assistants cannot issue violations[269] or remove them. For that, the HP should order an HPD reinspection, not a resource-assistant visit. Cases are often adjourned for an HPD reinspection when the court is uncertain whether a violation has been corrected. An HPD reinspection report simplifies fact finding at hearing and often obviates the need for a hearing. Conversely, HPD will not issue violations for City-owned buildings; resource assistants are especially helpful in objectively documenting problems in City-owned buildings.

Reports from the Resource Center currently provide, in a box at the top of the report, as follows: "This is a confidential report intended for the requesting judge. Possession of this report by anyone else is contrary to established policy. All information contained herein cannot be used as evidence except upon agreement by all parties to accept the information without contest." Based on that sentiment, some judges forbid the litigants to review resource reports.[270] Some judges allow the litigants see the reports but not copy them. Some judges will read the reports into the record but not permit the litigants to see or copy the reports. Other judges allow the litigants to see and copy the reports. Still other judges place the reports into the court file and even photocopy the reports for the litigants.

Because legitimate Civil Court policy prohibits resource assistants from being called to testify and because their reports cannot be entered into evidence to resolve a contested issue, resource assistants prefer that their reports not be put in the court's file. But judges who insist on putting the reports in the file for all to see and copy do so because they believe they have an ethical obligation fully to disclose any ex parte communication with a resource assistant regarding the case.[271] These judges believe that judicial compliance with the Resource Center's statement that its reports remain "confidential" will cause Housing Court judges to violate the Rules Governing Judicial Conduct prohibiting undisclosed ex parte conversations and that no written policy supports the view that "[p]ossession of this report by anyone else [than the judge] is contrary to established policy."

The HP court cannot base an order on a resource assistant's report.[272] An HP judge may, however, allow a resource assistant to inspect and prepare a report if the parties agree to be

---

269. *See* JAYA K. MADHAVAN, SELECTED TOPICS IN HOUSING COURT 6 *in* 2006-2007 LEGAL UPDATE FOR COURT ATTORNEYS (unpublished manuscript for N.Y. St. Judicial Institute) (discussing role of resource assistants).

270. *Cf.* Advisory Comm. on Jud. Ethics Op. 04-88, N.Y. L.J., May 20, 2005, at 7, col. 1 (requiring Drug Courts to inform parties of contents of ex parte communications from court personnel), *also reported at* Advisory Committee On Judicial Ethics Opinions Search, http://www.nycourts.gov/ip/judicialethics/opinions/04-88.htm (last visited May 13, 2007).

271. *Id.*

272. *See, e.g.*, *Czerwinski v. Hayes*, 8 Misc. 3d 89, 95, 799 N.Y.S.2d 349, 353 (App. Term 2d

bound by what the assistant writes. If that happens, the resource report substitutes for a judge's inspection of the premises, and the HP judge will base an order on that consent report. Judges too busy to conduct home visits like that option, which also averts trials and hearings.

Respondent-owners often ask the HP judge to order a reinspection. They argue that many or all the violations have been corrected and that a reinspection would prove that an occupant's or HPD's case lacks merit. If HPD consents, the court will order the reinspection. No court has found in a published opinion that it is empowered or not empowered to order a reinspection without HPD's consent, although many judges have issued unpublished orders directing reinspections without HPD's consent. It appears that without HPD's consent, the court should order a reinspection only if the respondent-owner comes forward with proof that the violations no longer exist or that a reinspection is necessary to determine which violations are outstanding. Requiring proof reduces the possibility that a respondent-owner will ask for a reinspection to buy time to complete the repairs and lessens the inconvenience of ordering an HPD inspector to reinspect a dwelling the inspector had only recently inspected.

Respondent-owners often ask the court for permission to be present during an HPD inspection or reinspection. They argue that a petitioner-occupant can influence an inspector to issue a violation or state that a violation was not corrected, and that they have a right to see for themselves whether a violation exists so they can contest it if they disagree with the inspector's conclusion. HP judges will usually deny that request. Experience shows that owners are more likely than occupants to influence HPD inspectors. The presence of an owner at an inspection or reinspection makes it less likely that an occupant will speak to the inspector freely.

Because the respondent-owner is rarely present during an inspection or reinspection, the owner will find it difficult to mount a defense at trial that the violation does not exist—that the inspector erred. For that reason, occasionally an owner will move for leave to inspect the premises and even take photographs in anticipation of trial. An HP judge will grant that motion only on a strong showing of proof; disclosure in an HP proceeding is not of right. The HP judge who grants an inspection will limit it to a fixed time period and location. But a respondent-owner can protect itself as follows. On the first appearance date, a respondent-owner can stipulate with the petitioner-tenant to complete some repairs, preceded by the owner's inspection at which the owner takes photographs. Similarly, a respondent-owner can consent to an order to correct conditions conditioned on the owner's photographing the conditions before and after repairs are effected. If the photographs prove that repairs are unnecessary, the owner may move to vacate the

---

Dep't 2d & 11th Jud. Dists. 2005) (mem.) (reversing HP court, which dismissed proceeding on basis that building was unregistered "de facto" multiple dwelling because resource assistant's report noted that building contained third, unoccupied apartment in basement). Before the *Czerwinski* court made it clear that judges may not rely on an unsworn-to resource report, some courts had based their rulings on them. *See, e.g.*, *Fantauzzi v. Tadros*, N.Y. L.J., Feb. 27, 2002, at 24, col. 5 (Civ. Ct. Richmond County) (relying in Small Claims Part action on resource assistant's report to confirm that dwelling was occupied by two families).

stipulation or order to correct. If post-work photographs prove that the owner corrected the violations, a petitioner-occupant's later motion for civil penalties or contempt will be denied.

Respondents and petitioners often stipulate that the respondent will inspect and repair the alleged conditions as required by law. Litigants use the phrase "inspect and repair as required by law" to settle cases by stipulation when they disagree about whether a condition is a violation.[273] When an HPD inspector does not issue a violation for a condition, an inspect-and-repair stipulation obviates the need for a trial to ascertain whether the condition constitutes a code violation. Rather than delay the case for a reinspection or a trial solely to determine whether the HP should place a violation, the parties can agree that the respondent-owner will "inspect and repair as required by law." The result is that the petitioner-occupant will provide access and the respondent-owner will examine the condition to determine whether repairs are necessary.[274]

The question arises what happens if the respondent violates an "inspect and repair" stipulation by not inspecting the premises or correcting the alleged condition. According to one HP opinion, the petitioner-occupant can obtain a contempt adjudication by establishing at a hearing that the condition was a violation and that the respondent failed to inspect and correct.[275] The Appellate Term, Second Department, however, has held that the language "inspect and repair as required by law" is not "sufficiently specific and unequivocal to support a finding of contempt."[276]

Both sides can benefit from inspect-and-repair language. In addition to saving time and expense, an occupant might secure repairs for conditions that were never violations, and owners, while possibly subject to contempt as explained above, will avoid civil penalties. Inspect-and-repair language also obviates the need for either party to litigate a motion to amend to add new conditions or violations to a petition for an order to correct. Otherwise, the petitioner-occupant

---

273. *Schlueter*, 33 H.C.R. 903A, 9 Misc. 3d 1105(A), 2005 N.Y. Slip Op. 51405(U), *6, 2005 WL 2171204, at *5, 2005 N.Y. Misc. LEXIS 1897, at *14-16 (discussing meaning of inspect-and-repair language).

274. *Id.*, 9 Misc. 3d 1105(A), 2005 N.Y. Slip Op. 51405(U), *6, 2005 WL 2171204, at *6, 2005 N.Y. Misc. LEXIS 1897, at *13-16.

275. *Id.*, 2005 N.Y. Slip Op. 51405(U), *6, 2005 WL 2171204, at *6, 2005 N.Y. Misc. LEXIS 1897, at *13-16.; *see also 450 W. 14th St. Corp. v 40-56 Tenth Ave., LLC*, 15 A.D.2d 166, 166, 789 N.Y.S.2d 25, 26 (1st Dep't 2005) (mem.) (finding defendant in contempt for violating court order requiring it to maintain easement "in proper condition and repair").

276. *See Michetti v. Wilson*, 33 H.C.R. 1050C, 9 Misc. 3d 138(A), 2005 N.Y. Slip. Op. 51800(U), *1, 2005 WL 2937290, at *1, 2005 N.Y. Misc. LEXIS 2457, at *1-2 (App. Term 2d Dep't 2d & 11th Jud. Dists., Nov. 7, 2005) (mem.).

must move to amend the petition to include conditions that arose, or violations placed, after the proceeding began.

Although HPD must insure that violations are corrected, HPD appears in the HP by attorneys from its HLD solely to represent the City's interests. Depending on the case, an HPD attorney may assist an occupant at a tenant-initiated trial or inquest. HPD attorneys in tenant-initiated proceedings are critical to resolving cases fairly and play a strong role in settling cases.

HPD's interests and an occupant's interests, although often aligned, do not always coincide. An occupant might want anything from a customized floor refinishing to a new apartment. But if a perceived problem is not a violation, it is not a form of relief the HP is empowered to grant, and HPD will not help a tenant resolve a problem that is not a violation. Conversely, some tenant-initiated HP proceedings are settled without HPD's consent. Owners and occupants sometimes settle for rent abatements or on terms, like buy-outs,[277] that do not involve correcting violations. HPD may not settle a tenant-initiated HP proceeding for an order to correct without the petitioner-tenant's consent.

The HP's and HPD's authority to remedy violations ends when the dwelling conforms to code.[278] Thus, HPD's attorneys will not sign settlement stipulations for anything other than to correct violations. Orders to correct will not include non-code matters unless the order contains additional language to which both sides consent or if the HP judge is called upon to enforce a stipulation requiring a landlord to make non-code repairs. Unless the parties stipulate that a petitioner-occupant will pay for repairs the respondent-owner will make, the HP has no jurisdiction to compel a petitioner to pay for repairs. Accordingly, the HP must dismiss a respondent-owner's counterclaim for money damages.

An HP judge has no authority to order a respondent-owner to hire any particular person or business to correct violations or to prohibit someone, such as a superintendent or contractor the tenant dislikes, from effecting a repair. A respondent-owner, moreover, is "not required to adopt the most costly or extensive mode of repair where more feasible means [are] available to remedy the condition."[279] Nor can the HP judge direct how the repairs must be done or dictate which repairs must be done first—even something as basic as fixing a leak before painting, plastering, or remediating mold—unless, perhaps, the leak is itself a violation. All the HP judge may do is order the owner to correct all violations by the date set for corrections, although in doing so the

---

277. HP judges should not allow an unrepresented petitioner-occupant to convert an HP to a holdover.

278. *E.g.*, *Parkchester Alliance*, 180 Misc. 2d at 551, 691 N.Y.S.2d at 271.

279. *Chamberlain*, 30 H.C.R. 631A, 2002 N.Y. Slip. Op. 50441(U), *3, 2002 WL 31520427, at *3, 2002 N.Y. Misc. LEXIS 1463, at *2.

judge will sign an order to show cause for compliance, civil penalties, or contempt, or all three, if the owner does not show up to effect repairs on the date set for access.

The HP judge can also issue an interim order while the case is being adjudicated to compel a respondent-owner to remove a violation. HPD seeks interim orders when the violation is immediately hazardous—a heat problem in winter, for example—and the HP court is granting a lengthy adjournment for trial at the respondent-owner's request.

The HP has no jurisdiction to order a respondent-owner to correct conditions that an occupant contends will arise in the future.[280] But once HPD or a tenant brings an HP action and new conditions arise, the HP "retain[s] continuing jurisdiction of any action or proceeding relating to a building until all violations of law have been removed."[281] HPD or the occupant may move to amend the petition to include any violation arising after the HPD proceeding is initiated. The court will grant the motion to amend if the proceeding is not too old and if the owner will not suffer undue prejudice. Although an incorrect address in a nonpayment or holdover petition can be a fatal defect, a petitioner-occupant may move to amend the caption in an HP proceeding to correct a mistaken address.[282] If a respondent-owner makes a motion based on the incorrect address in the petition, the court will dismiss the petition without prejudice subject to the petitioner's motion to amend to correct the address.[283]

Trials, Inquests, and Defaults

Absent a respondent-owner's agreement to correct violations within a specified time under a consent order, or unless the litigants enter into a stipulation or the proceeding is dismissed on a pretrial motion, the proceeding will culminate in a trial or inquest. The petitioner's goal—whether the petitioner is the occupant or HPD—at a trial or inquest is for the court to issue an order to correct or, in an HPD-initiated proceeding, for the court to order correction or to award civil penalties, or both, or to grant specific relief like an access order to compel the respondent-owner to allow the ERP to effect repairs or appoint an Article 7-A administrator to provide head and hot water. The court must hold a trial or an inquest to add a violation not included in the HPD's inspector's report or to upgrade a violation from an "A" to a "B" or a "B" to a "C." The new or upgraded violation will be added in "Schedule A" to the order to correct.

---

280. *Parkchester Preservation*, 28 H.C.R. 398A, N.Y. L.J., June 14, 2000, at 31, col. 3; TENANTS' RIGHTS, *supra* note 144, at 9/29.

281. Civ. Ct. Act § 110(c).

282. *Nikac*, 29 H.C.R. 299A, N.Y. L.J., June 13, 2001, at 22, col. 3 (allowing petitioner-occupant to amend petition when proper address is listed on inspection request).

283. *Id.*

At trial or inquest, the petitioner—the occupant or HPD, depending on who initiated the proceeding—need prove as its prima facie case only what a respondent-owner has denied in its answer. If it was denied, the petitioner must prove the following to establish a prima facie case for an order to correct:

1. That the order to show cause and verified petition or affidavit in lieu of petition was served properly on the respondents (required at an inquest or, at trial, if the respondent-owner raised a personal-jurisdiction defense in its answer and has not waived it);

2. That the respondent is the owner or a party responsible for the building's maintenance or repair;[284]

3. That the occupant in a tenant-initiated proceeding has standing, as explained earlier,[285] to bring the proceeding;[286] and

4. That the conditions alleged in the verified petition or in the affidavit in lieu of petition currently exist and that the conditions constitute violations of the HMC or other housing standards.

A petitioner-occupant may prove the respondent's ownership of or responsibility for the building through a certified copy of the deed, the MDR statement (which can be accessed on the court's computer and is admissible under MDL § 328(3)), or testimony. Petitioner-occupants prove standing through rent receipts, leases, DHCR records, records of prior Housing Court proceedings initiated by the owner, or testimony.

The petitioner-tenant or HPD typically proves code violations through testimony and documentary evidence, including photographs, or through DOB and HPD inspection or violation reports, which are prima facie but rebuttable proof of the violation's existence.[287] Conversely, the

---

284. *See generally* HMC (Admin. Code) § 27.

285. *See supra* section entitled "Who May Bring an HP Proceeding?"

286. *Various Tenants of 515 E. 12th St.*, 128 Misc. 2d at 239, 489 N.Y.S.2d at 834 (denying building owner standing to raise possible violation of DHPD's rights).

287. *See* MDL § 328(3)(b); *Hoya Saxa, Inc. v. Gowan*, 149 Misc. 2d 191, 192, 571 N.Y.S.2d 179, 182 (App. Term 1st Dep't 1991) (per curiam); Elizabeth Donoghue, *Tenant-Initiated Proceedings*, 87 PRAC. L. INST. 219, 228 (Nov. 15, 2000) (noting that petitioner-occupants can use DOB inspection reports as evidence that violations exist).

absence of a violation is prima facie but rebuttable evidence that no violation exists. The MDL provides that "printed computerized violation files and all other computerized data as shall be relevant to the enforcement of state and local laws for the establishment and maintenance of housing standards . . . shall be prima facie evidence of any matter stated therein and the courts shall take judicial notice thereof."[288] Note that non-governmental sources that list violations, like http://www.propertyshark.com (last visited Apr. 25, 2007), have no MDL-based rebuttable presumption.

Proof of the respondent-owner's failure to file a Certificate of Code Compliance also establishes a violation prima facie.[289] A presumption exists that a violation for lack of heat or hot water continues from the time that HPD affixes a violation notice at the subject building until the respondent-owner files a Certificate of Code Compliance.[290]

On testimony alone, the HP judge may place a violation and order repairs even absent an HPD inspection report.[291] At trial, the HP judge may also upgrade or downgrade a violation to allow an owner more or less time to correct than otherwise specified according to its classification in the inspection report.

Every part of the Housing Court, including the HP, has a computer on the judge's bench to access HPD violation records in New York City by street address and by block and lot number. Visit HPD's Web site, "HPDonline," at http://167.153.4.71/hpdonline/provide_address.aspx (last visited Apr. 25, 2007). The site maintains violation and building data and other information, including records from 1960 to date. Violations that no longer exist will remain until an HPD reinspection or a building owner timely certifies that it corrected them. The Web site does not contain information for violations placed before November 13, 1999, with respect to one- or two-family dwellings. For that information, or for a certified printout of any violation (if computer access is unavailable), inquire at an HPD Borough Code Enforcement Office:

Manhattan	560 W. 133rd St.	(212) 234-2541

288. MDL § 328(3)(b); *accord Dep't of Hous. Preservation & Dev. v. Knoll*, 120 Misc. 2d 813, 813-14, 467 N.Y.S.2d 468, 468 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1983) (mem.).

289. HMC (Admin. Code) § 27-2115(f)(7).

290. *Id.* § 27-2115(k)(1) ("There shall be a presumption that the condition constituting a violation continues after the affixing of the notice.").

291. *Mite v. Pipe Dreams Realty*, 190 Misc. 2d 543, 544, 740 N.Y.S.2d 564, 566 (Hous. Part Civ. Ct. Bronx County 2002) (noting that testimony and photographs may demonstrate immediately hazardous condition sufficient to permit HP to order repairs without inspection report).

Bronx	1932 Arthur Ave.	(718) 579-6772
Brooklyn	701 Euclid Ave. (Code Enforcement) 210 Joralemon St., 7th Floor (Housing Court Inspection Squad)	(718) 827-1921 (718) 802-3662
Queens	126-06 Queens Blvd.	(718) 520-3424
Staten Island	Staten Island Borough Hall	(718) 816-2340
SRO Compliance Unit	100 Gold Street, Manhattan	(212) 863-5656

Building Code and ECB violations are also available on the DOB's Web site, http://www.nyc.gov/html/dob/html/home/home.shtml (last visited Apr. 25, 2007), and at the subscription-based http://www.propertyshark.com (last visited Apr. 25, 2007).

One unresolved question is whether a handwritten inspection report or a computer-generated violation report prevails in the event of a discrepancy. Under one view, the computer-generated report prevails because it is the final version, approved by an HPD supervisor. Another view is that the handwritten report prevails because it is more reliable than a computer report, whose data from the handwritten report might have been inputted incorrectly. No published opinion has resolved this question, perhaps because the HP judge will typically order a reinspection in case of doubt.

Another unresolved question is how much, if any, hearsay from HPD reports is admissible at some kinds of HPD-initiated trials. For example, what happens in an access-warrant case if HPD introduces only an affidavit from an ERP subcontractor, who is not an HPD employee, stating that an owner refused to provide access? Is that affidavit admissible? Is it admissible if the subcontractor does not testify? If the subcontractor testifies but does not recall what the owner said, does the affidavit, if admissible, establish HPD's prima facie case and create a rebuttable presumption of reliability like a violation report does? The likely answer is that the record is admissible as a business record under CPLR 4518(c), and no one from HPD need offer foundational testimony, but only if the certification contains all the foundational prerequisites in CPLR 4518(a). If the certification is complete, the record is prima facie evidence of the facts contained therein.[292]

Heat-deprivation cases are proven by certified National Weather Bureau charts, which document outside temperatures. HPD tests the accuracy of thermometers that measure indoor air and hot-water temperatures and relies on its Certificate of Accurate Thermometers to establish its prima facie case. Tenants may conduct their own tests by photographing their thermometer readings and by documenting outside temperatures. A respondent-occupant's testimony about touching a cold radiator or feeling cold running water might suffice if credible.

---

292. *Barcher v Radovich*, 183 A.D.2d 689, 690-91, 583 N.Y.S.2d 276, 278 (2d Dep't 1992 (mem.); *Dep't of Hous. Preservation & Dev. v. Gottlieb*, 136 Misc. 2d 370, 377, 518 N.Y.S.2d 575, 581 (Hous. Part Civ. Ct. N.Y. County 1987).

Once the petitioner-occupant or HPD proves the prima facie case, the burden shifts to the respondent-owner to establish that the violations have been corrected or to raise any other defense. An owner's uncorroborated testimony, even if the court believes it, is inadequate to rebut the petitioner's prima facie case.[293] An affirmative defense not raised in the respondent-owner's answer may not be asserted at trial. A respondent that does not answer has defaulted.

If the respondent-owner fails to appear, some HP judges will hold an inquest. If the occupant sustains the burden at the inquest, the court will enter a default order and judgment requiring the respondent-owner to correct the condition and, if appropriate, a judgment for money and costs as well. Sometimes—depending on the HP judge—the court may hold a non-appearing respondent-owner in default (after verifying that service by mail was proper) without holding an inquest. HP judges who hold properly served owner-respondents in default without an inquest do so because the petitioner together with a violation report already establish a prima facie case that remains unrebutted because the respondent did not answer the petition or appear.

HPD's Judgment Enforcement Unit enforces default judgments and appears when HPD wants to enforce a default money judgment. If a respondent-owner promptly moves to vacate a default, HLD, not the Judgment Enforcement Unit, will handle the case.

The law is unclear whether a petitioner-occupant or HPD must file an affidavit of nonmilitary service before it may obtain a default judgment. On the theory that an HP proceeding is different from a nonpayment or holdover proceeding, most HP judges do not require a nonmilitary affidavit before they enter a default judgment. The court might void the judgment under CPLR 317 and 5015(a) if the petitioner-occupant or HPD violated the federal Servicemembers' Civil Relief Act of 2003 and the New York Military Law on the ground that they neglected to file an affidavit attesting to having conducted an investigation into an individual (non-corporate) respondent-owner's military status before the default was entered. To void a default on that ground, the respondent-owner must allege that active military service prevented the respondent from appearing in court.[294]

---

293. *Knoll*, 120 Misc. 2d at 813-14, 467 N.Y.S.2d at 468; *Dep't of Hous. Preservation & Dev. v. Commonwealth & E. Tremont Realty Corp.*, 18 H.C.R. 403B, N.Y. L.J., Aug. 10, 1990, at 19, col. 2 (Hous. Part Civ. Ct. Bronx County).

294. N.Y. Military Law § 303(2); *Dep't of Hous. Preservation & Dev. v. W. 129 St. Realty Corp.*, 9 Misc. 3d 61, 62, 802 N.Y.S.2d 826, 827 (App. Term 1st Dep't 2005) (per curiam); *see generally* Gerald Lebovits, *Military Law in New York Landlord-Tenant Actions and Proceedings*, 33 N.Y. REAL PROP. L.J. 145 (2005), *reprinted in* FINKELSTEIN, FERRARA, & TREIMAN'S LANDLORD-TENANT MONTHLY (Part I, Nov. 2005, at 1; Part II, Dec. 2005, at 1).

Upon the respondent-owner's default, the petitioner-tenant must show proper service. If the petitioner-occupant does not have proof of proper service, the HP court may dismiss, adjourn, or take testimony about service.[295] If an order to correct is issued on default, the order will shorten the time to correct for class "A" and "B" violations. This prevents owners from gaining an advantage by defaulting intentionally. Similarly, the HP judge will issue a default when the proceeding is restored for civil penalties and the owner does not appear, and will issue a judgment for penalties.

If, as is usually the case, HPD issued an NOV before the proceeding began, the HP court may, after a trial, direct an owner to correct the violation in less than the 30 and 90 days provided for in HMC (Admin. Code) § 27-2115(c) and may also impose civil penalties.[296] Otherwise, owners would have an incentive to ignore notices of violation and delay HP trials as long as possible.

An HP judge who sustains the inquest or does not even hold one will direct HPD to prepare a default judgment. If a respondent-owner fails to appear when the proceeding is restored for contempt, the HP judge may conduct an inquest and hold the respondent-owner in contempt. Although, as explained below, the HP judge may hold a defaulting owner in contempt even without a contempt inquest, some judges prefer not to hold an inquest because, by its nature, it is held in absentia. In that event, and on the HP judge's orders, HPD will submit to the court an order to produce and arrest a respondent-owner who fails to appear on a motion for contempt. Once this order is issued, a sheriff will arrest the respondent-owner and bring the accused contemnor before the HP judge, who can then release the owner with or without bail.

Much of the work in the HP is handling motions to vacate defaults. Most motions to vacate defaults are settled on the return date by the petitioner-occupant's agreeing to grant the respondent-owner more time to correct in return for keeping the default order to correct in force in every other respect.

DEFENSES TO AN HP PROCEEDING FOR AN ORDER TO CORRECT

---

295. *Dep't of Hous. Preservation & Dev. v. 988 E. Parkway Corp.*, -- H.C.R. --, 13 Misc. 3d 1236(A), 2006 N.Y. Slip Op. 52138(U), *2, 2006 WL 3298298, at *2, 2006 N.Y. Misc. LEXIS 3292, at * 5 (Hous. Part Civ. Ct. Kings County, Nov. 1, 2006) (granting traverse hearing because questions of fact existed: affidavits of service were unclear about which door petition and notice of petition were posted).

296. *See id.*§ 27-2115(i), which provides that if an NOV has already been issued and certain other criteria have been satisfied, the court "shall direct the owner to correct the violation and shall assess penalties."

An HP respondent-owner may assert the following affirmative defenses to a petitioner-occupant's attempt to secure an order to correct:

1. Lack of subject-matter or personal jurisdiction;

2. Completed repairs;[297]

3. The petitioner-occupant lacks standing;

4. The conditions complained of are not code violations;

5. The NOV, which is attached to an HPD-initiated petition, is facially insufficient;

6. The respondent is no longer an owner (such as if the landlord sold the building or the managing agent has retired), although this is not a defense against civil penalties or contempt for the time the respondent was an owner; or

7. The economic infeasibility of code compliance.[298]

The economic-infeasibility defense is based in the Fifth Amendment's Takings Clause, made applicable to the states through the Fourteenth Amendment.[299] Forcing a landlord to suffer unreasonable economic loss to correct code violations may be an unconstitutional taking. As with any other affirmative defense, an owner must prove economic infeasibility by a fair preponderance of the credible evidence,[300] primarily by proof of the building's economic inviability. Relevant evidence includes:

---

297. *Dep't of Hous. Preservation & Dev. v. 163 Ocean Tenants Corp.*, 28 H.C.R. 382A, N.Y. L.J., June 7, 2000, at 28, col. 5 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.).

298. *See Bernard v. Scharf*, 246 A.D.2d 171, 173-76, 675 N.Y.S.2d 64, 66-67 (1st Dep't 1998), *rev'd as moot mem.*, 93 N.Y.2d 842, 689 N.Y.S.2d 1, 711 N.E.2d 187 (1999); *Eyedent v. Vickers Mgmt.*, 150 A.D.2d 202, 205, 541 N.Y.S.2d 210, 212 (1st Dep't 1989) (mem.). For discussions of this defense, see Gerald Lebovits & Deborah E. Fisher, *HP Proceedings: The Tenuous Nature of the Economic-Infeasibility Defense*, LANDLORD-TENANT PRAC. REP. 1 (Oct. 2000); Adam Leitman Bailey & Dov Treiman, Housing Court Practice, *Economic Infeasibility: Rare Defense Requires Total Cooperation of Client*, N.Y. L.J., Mar. 14, 2007, at 5, col. 2.

299. The Takings Clause provides that "private property shall not be taken for public use without just compensation." U.S. Const. Amend. V.

300. *See Buchanan v. Toa Constr. Corp.*, 17 H.C.R. 192A, N.Y. L.J., May 31, 1989, at 21, col. 1 (App. Term 1st Dep't) (per curiam).

1. The building's actual or assessed value;

2. Recent offers to buy the building;

3. The building's tax assessment;

4. The building's financial operating statement; and

5. The cost to effect repairs to correct the violations.[301]

No established presumption favors disclosure for the economic-infeasibility defense. The HP judge may grant an occupant's motion for economic-infeasibility disclosure if the requested information is relevant, limited financial information solely within the owner's knowledge,[302] will directly impact the occupant's case, and will clarify disputed facts.[303]

Because the economic-infeasibility defense is not provided for in the HMC or any other statute governing HP proceedings, the contours of this common-law defense are uncertain. Essentially, the defense may be asserted if it would cost more to repair a building than the building would be worth after the repairs.[304] A successfully interposed defense leaves the respondent-owner with the option either to restore the building or demolish it and compensate rent-regulated tenants and cooperative owners for their lost tenancies.[305]

---

301. *Gonzalez v. Navarro*, 22 H.C.R. 474A, N.Y. L.J., Aug. 10, 1994, at 25, col. 2 (Hous. Part Civ. Ct. Kings County).

302. *City of N.Y. v. Cordero*, 27 H.C.R. 227A, N.Y. L.J., Apr. 14, 1999, at 29, col. 4 (Hous. Part Civ. Ct. Kings County).

303. *153-155 Essex St. Tenants Ass'n v. Kahan*, 32 H.C.R. 365A, 4 Misc. 3d 1008(A), 791 N.Y.S.2d 874, 2004 N.Y. Slip Op. 50769(U), *2, 2004 WL 1592813, at *2, 2004 N.Y. Misc. LEXIS 1399, at *2, (Hous. Part Civ. Ct. N.Y County, May 21, 2004); *cf. St. George Hotel Assocs. v. Alford*, 22 H.C.R. 554A, N.Y. L.J., Sept. 28, 1994, at 24, col. 2 (Hous. Part Civ. Ct. Kings County) (granting disclosure in nonpayment proceeding).

304. *Farrell v. E.G.A. Assocs., Inc.*, -- H.C.R. --, 9 Misc. 3d 1118(A), 2005 N.Y. Slip. Op. 51635(U), *3, 2005 WL 2546561, *3, 2005 N.Y. Misc. LEXIS 2232, at *9 (Hous. Part Civ. Ct. N.Y. County, Oct. 4, 2005) (Gerald Lebovits, J.). For a discussion of *Farrell*, see Warren A. Estis & Jeffrey Turkel, Rent Regulations, *Damaged Buildings: Must a Landlord Restore Tenants to Occupancy?*, N.Y. L.J., Jan. 4, 2006, at 5, col. 2.

305. *See Farrell*, -- H.C.R. --, 9 Misc. 3d 1118(A), 2005 N.Y. Slip. Op. 51635(U), at *3, 2005 WL 2546561, at *3, 2005 N.Y. Misc. LEXIS 2232, at *9; *153-155 Essex St. Tenants Ass'n*, 32

A respondent that violated a statutory obligation or withheld services to force residents to vacate will be estopped from pleading economic infeasibility as an affirmative defense to an order to correct.[306] Courts have also disallowed the defense when the owner did not have "clean hands" or when the owner contributed to the building's economic infeasibility.[307]

From a policy standpoint, the defense allows owners to make rational business decisions, but a successful economic-infeasibility defense does not relieve the owner of liability for damages arising from building condemnation or demolition.

It is no defense to an order to correct that the occupant refused access to repair the violation or that the occupant might be civilly or criminally liable for causing the violation.[308]

H.C.R. 365A, 4 Misc. 3d 1008(A), 791 N.Y.S.2d 874, 2004 N.Y. Slip Op. 50769(U), at *2, 2004 WL 1592813, at *2, 2004 N.Y. Misc. LEXIS 1399, at *2.

306. *Dep't of Hous. Preservation & Dev. v. St. Thomas Equities Corp.*, 128 Misc. 2d 645, 650-51, 494 N.Y.S.2d 787, 791-92 (App. Term 2d Dep't 2d & 11th Dists. 1985) (mem.) (holding that owner that collected rent could not argue non-economic viability when funds were available from HPD, and finding that owner withheld essential services to force tenants to move);*153-155 Essex St. Tenants Ass'n*, 32 H.C.R. 365A, 4 Misc. 3d 1008(A), 791 N.Y.S.2d 874, 2004 N.Y. Slip Op. 50769(U), at *2, 2004 WL 1592813, at *2, 2004 N.Y. Misc. LEXIS 1399, at *2.

307. *Dep't of Hous. Preservation & Dev. v. Mill River Realty, Inc.*, 169 A.D.2d 665, 669, 565 N.Y.S.2d 44, 47 (1st Dep't 1991) (mem.) (holding defense of economic infeasibility unavailable if hardship was self-inflicted in light of owner's delay in making repairs despite repeated notices of violation); *Eyedent v. Vickers Mgmt.*, 150 A.D.2d 202, 205, 541 N.Y.S.2d 210, 212 (1st Dep't 1989) (mem.); *Reinbold v. Gottlieb*, 17 H.C.R. 192B, N.Y. L.J., May 31, 1989, at 21, col. 2 (App. Term 1st Dep't) (per curiam); *Dep't of Hous. Preservation & Dev. v. 69 W. 38th St.*, 15 H.C.R. 251A, N.Y. L.J., Aug. 5, 1987, at 11, col. 1 (App. Term 1st Dep't) (per curiam); *Rodriguez v. Cziment*, 20 H.C.R. 222A, N.Y. L.J., Apr. 22, 1992, at 25, col. 5 (Hous. Part Civ. Ct. Kings County) (denying defense if owner failed to take preventative measures); *Cirillo v. 2166 Second Ave., Inc.*, 146 Misc. 2d 802, 804, 552 N.Y.S.2d 494, 495-96 (Hous. Part Civ. Ct. N.Y. County 1990) (holding that self-inflicted economic hardship vitiates economic-infeasibility defense); *Miller v. Notre Dame Hotel*, N.Y. L.J., Dec. 17, 1980, at 11, col. 3 (Hous. Part Civ. Court Queens County) (finding economic-infeasibility defense unavailable because landlord permitted building to deteriorate).

308. *E.g.*, *D'Agostino*, 12 Misc. 3d at 486, 820 N.Y.S.2d at 471 ("It is not a defense to an order to correct that the tenant refused access to repair the violation . . . .") (citing *Aguilar v. Elk Drive, Inc.*, 117 Misc. 2d 154, 156, 458 N.Y.S.2d 149, 150 (Hous. Part Civ. Ct. Queens County 1982) (citing HMC for proposition that "[t]he fact that a tenant is or may be liable for a violation of this code or any other law or is found liable for civil or criminal penalties does not relieve the owner of his obligation to keep the premises and every part thereof, in good repair")). In any event,

It is no defense to an order to correct that the violations were caused by natural disasters or third parties beyond a respondent-owner's control.[309]

Notice is an element of an abatement claim in a nonpayment proceeding, but the absence of notice is no defense to an order to correct.

It is no defense that the petitioner-occupant did not alert the respondent-owner to the condition, that the owner is seeking insurance reimbursement, that the building has few remaining tenants,[310] or that the petitioner-occupant left the premises under a vacate order, unless the DOB issued a demolition permit to the owner.

It is no defense that the occupant created conditions of physical disorder or overcrowding that render corrections impossible.[311]

Proof of completed repairs is a complete defense to an HP petition. But an owner's testimony, unsupported by documentary proof, that the violations were corrected fails, as a matter of law, to establish the defense.[312] MDL § 328, which makes the contents of HPD's databases prima facie evidence, also suggests that testimony that a violation has been corrected is

---

occupants may refuse access if the parties did not specify access dates in the consent order or stipulation or, under 28 RCNY 25-101, if the owner gave them insufficient written notice, unless access is required to correct an emergency condition.

309. *D'Agostino*, 12 Misc. 3d at 486, 820 N.Y.S.2d at 471 (noting that it is no defense to an order to correct that natural disaster or third parties beyond a respondent's control caused violation).

310. *Metro. Ave.*, 148 Misc. 2d at 956, 959, 561 N.Y.S.2d at 533 (requiring owner to correct all building violations, even those in vacant apartments, and finding that owner is responsible to keep entire building from falling into disrepair even if building is nearly empty of tenants).

311. In these cases, a respondent-owner should include in a stipulation or consent order a provision requiring the petitioner-occupant to remove the condition of disorder or other occupants during repairs or move furniture to enable the repairs like painting and plastering to be made.

312. *Dep't of Hous. Preservation & Dev. v. Varveris, Dodeka Realty*, 20 H.C.R. 370B, N.Y. L.J., June 16, 1992, at 36, col. 6 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.); *Fersedy*, 15 H.C.R. 100B, N.Y. L.J., Apr. 2, 1987, at 16, col. 3; *Knoll*, 120 Misc. 2d at 814, 467 N.Y.S.2d at 468.

insufficient to rebut the presumption of a continuing violation that a violation creates.[313] Certification—the Certificate of Code Compliance—that the violations are corrected must be made in writing and delivered to HPD no later than 14 days after the date set to correct nonhazardous violations and no later than five days after the date set to correct hazardous violations.[314] The certification should include the date when each violation was corrected and a sworn statement from the person who performed the work.[315] Failure to file the certification is prima facie evidence that the violation has not been corrected.[316] In this regard, HPD and petitioner-occupants may prove an owner's failure to file a Certificate of Code Compliance by obtaining from an HPD custodian of records a "certification of non-certification" and by offering it into evidence under CPLR 4256.[317] The presumption of a continuing violation—a presumption that that the condition constituting a violation continues after HPD affixed the notice to the premises[318]—protects HPD's and a petitioner-occupant's rights by removing the onerous burden of proving that the violation existed on every date in question.[319]

Lastly, it is no defense to an order to correct that a lease provides that a tenant waived the right to a habitable unit. RPL § 235-b(2) makes these lease clauses unenforceable, except in the case of one- or-two–family homes, as explained below. For example, a cooperative shareholder may assume the responsibility in a proprietary lease to complete repairs within the shareholder's apartment, but the cooperative corporation is responsible to cure HMC violations if the shareholder refuses to do so, although the cooperative may then charge the shareholder and bring

---

313. *Dep't of Hous. Preservation & Dev. v. Kunkel*, 15 H.C.R. 212C, N.Y. L.J., July 7, 1987, at 13, col. 5 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (holding that HPD database is prima facie evidence "of any matter stated therein" and that courts must take judicial notice of it "as if the same were certified"); *Knoll*, 120 Misc. 2d at 813-14, 467 N.Y.S.2d at 468 (same).

314. HMC (Admin. Code) § 27-2115(f)(1).

315. *Id.*

316. *Id.* § 27-2115(f)(7); *Knoll*, 120 Misc. 2d at 814, 467 N.Y.S.2d at 468-69.

317. The procedure for offering into evidence a certification of non-certification has been judicially approved. *See, e.g.*, *Knoll*, 120 Misc. 2d at 813-14, 467 N.Y.S.2d at 468.

318. HMC (Admin. Code) § 27-2115(k)(1).

319. Tenants and HPD enjoy "a presumption of continuation" to ease their burden of proof and facilitate correction. *Dep't of Hous. Preservation & Dev. v. De Bona*, 101 A.D.2d 875, 876, 476 N.Y.S.2d 190, 192 (2d Dep't 1984) (mem.) (noting for civil penalties "a presumption of a continuing violation"); *Allen*, 33 H.C.R. 13A, 5 Misc. 3d 1032(A), 2004 N.Y. Slip Op. 51666(U), *5, 2004 WL 2963907, at *5, 2004 N.Y. Misc. LEXIS 2770, at *4 (same); *Doukas*, 23 H.C.R. 463A, N.Y. L.J., July 26, 1995, at 22, col. 4.

a nonpayment proceeding.[320] Thus, "even if a tenant agrees to be solely responsible for repairs and maintenance, the landlord remains responsible for the property's compliance with housing laws and regulations."[321]

Tenants may agree to hold a landlord harmless under the HMC only if the premises are one- or two-family dwellings. So long as the landlord-tenant agreement is in writing, a tenant in such a dwelling may assume responsibility for a landlord's HMC obligations, and in that case a landlord of a one- or two-family (non-multiple) dwelling may not be subjected to an order to correct, let alone civil penalties or contempt.[322]

If HPD or the petitioner-occupants prove their case and the respondents-owners' defenses fail, the HP judge will issue an order to correct containing a list of the parties bound by the order, the violations to be corrected, and the time to correct each violation.[323] The HPD attorney prepares the order to correct for the HP judge's signature. The time to correct runs from the date HPD mails the order to correct to the owner.[324] Unless the HP court shortens the time period after a trial or inquest, the owner must correct nonhazardous class "A" violations within 90 days after HPD mails the order to correct, hazardous class "B" violations within 30 days, and immediately hazardous class "C" violations within 24 hours.[325]

CIVIL PENALTIES

Securing Civil Penalties

---

320. *Kahn*, 32 H.C.R. 233A, 2 Misc. 3d 140(A), 748 N.Y.S.2d 921, 2004 N.Y. Slip Op. 50302(U), at *2, 2004 WL 869746, at *2, 2004 N.Y. Misc. LEXIS 409 ("The cooperative, as the statutory owner, is obligated in the first instance to remove Housing Code violations."); *McMunn*, 131 Misc. 2d at 342-43, 500 N.Y.S.2d at 220-21.

321. MARY ANN HALLENBORG, THE NEW YORK LANDLORD'S LAW BOOK 9/6 (2000) [hereinafter "LANDLORD'S LAW BOOK"].

322. HMC (Admin. Code) § 27-2005(c); *Steltzer*, 161 Misc. 2d at 508-09, 614 N.Y.S.2d at 489; *contra Frankel v. Dep't of Hous. Preservation & Dev.*, 108 Misc. 2d 661, 662-63, 438 N.Y.S.2d 458, 459-60 (Sup. Ct. Queens County 1981) (holding that lease provision holding tenant of single-family dwelling responsible for maintenance does not relieve landlord of statutory duty to keep premises in good repair).

323. SCHERER, *supra* note 17, at §§ 19:69-19:70, at 991.

324. HMC (Admin. Code) § 27-2115(c).

325. *Id.*

HP judges have the jurisdiction to hear and adjudicate claims for civil penalties.[326]

If the respondent-owner fails to cure a violation within the time provided in a stipulation that contains a civil penalties provision or in an order to correct, the HP, on its own or on HPD's or the petitioner-occupant's motion, may bring the respondent-owner back to court to determine whether civil penalties should be imposed.[327] As long as the stipulation provided that the petitioner-occupants could seek civil penalties to enforce the stipulation if the respondent-owner did not make repairs and if the respondent-owner could have complied with the stipulation, the court will not lightly set aside a stipulation allowing civil penalties to be used as an enforcement mechanism.[328]

If the respondent-owner did not file a certification of correction and 30 days elapsed after the owner's time to correct expired, the court will grant the motion if the petitioner-occupant or HPD have shown good cause.[329] If the violation is hazardous or immediately hazardous, HPD or the petitioner-occupant need not wait 30 days to move for civil penalties, but may move for civil penalties as soon as the owner's time to correct expires.[330] The parties may serve the motion on the respondent-owner by certified or registered mail, return receipt requested.[331] If civil penalties are appropriate, the court will impose civil penalties from the date of the default.[332]

If an owner has not corrected outstanding HMC violations within the time set forth in the NOV, an occupant or HPD may seek civil penalties for the failure to correct those violations, even absent an order to correct or a stipulation that provides for civil penalties.[333]

HPD often seeks civil penalties when an owner has a poor HMC-compliance record.[334] HPD seeks civil penalties in the majority of cases it initiates if an owner does not comply with an order to correct.[335]

---

326. *Id.* § 27-2115(h) & (i).

327. *Id.* § 27-2115(h).

328. *1420 Concourse Realty v. Cruz*, 175 A.D.2d 747, 750, 573 N.Y.S.2d 669, 672 (1st Dep't 1991) (mem.).

329. HMC (Admin. Code) § 27-2115(i).

330. *Id.*

331. *Id* § 27-2115(j).

332. *Id.* § 27-2115.

333. LEHRER, *supra* note 77, at 24 (citing HMC (Admin. Code) §§ 27-2115(i) & 27-2116)).

Confronted with an order to show cause to restore a proceeding to the calendar to secure compliance and impose civil penalties, the HP court should scrutinize the time limits to correct violations in the stipulation or consent or default order. Before signing the petitioner-occupant's order to show cause, the HP should add five days under CPLR 2103(b)(2) to a default order's effective date if it was mailed to the respondent-owner (as opposed to its having been received and signed for in court, as is usually the case for non-default consent orders and stipulations). That insures a timely motion to restore the proceeding to the court's calendar for compliance and civil penalties.

HPD brings HP proceedings to recover civil penalties from owners for outstanding violations. Any owner who fails to comply with the court's order to correct may be subject to civil penalties.[336] Civil penalties are calculated per day from the date of the default and apply through the last day of trial or inquest or until the violations are corrected.[337] The penalties are as follows under HMC (Admin. Code) § 27-2115(a) and (h):

1. $10 to $50 overall (in the HP judge's discretion) for each class "A" "nonhazardous" violation;

2. $25 to $100 overall (in the HP judge's discretion), and $10 a day, for each class "B" "hazardous" violation;

3. $50 a day for each class "C" "immediately hazardous" violation in a multiple dwelling containing five or fewer dwelling units, from the NOV's or order's correction date until the violation is corrected; or

---

334. N.Y. City Indep. Budget Office, *HPD Code Enforcement: Resources & Level of Effort* 4, *available at* http://www.ibo.nyc.ny.us/iboreports/hpd.pdf (July 10, 2000) (letter from IBO to Justin Foley, Chair, Northwest Bronx Community Clergy Coalition Hous. Cttee.) (last visited Apr. 25, 2007).

335. HMC (Admin. Code) §§ 27-2120 *et seq.*, 27-2116, 27-2127.

336. Under HMC § 27-2004(a)(45), an "owner" includes managing agents, receivers, and a corporation's officers if the officers control the building directly or indirectly. The person registered with HPD as the managing agent is deemed an "owner" under HMC § 27-2098(a)(3).

337. *Deka Realty*, 208 A.D.2d at 46, 620 N.Y.S.2d at 842; *but see 999 Realty Mgmt.*, 20 H.C.R. 536A, N.Y. L.J., Sept. 9, 1992, at 24, col. 3 (applying range of different cure dates and penalty amounts depending on condition's seriousness and length of time that condition existed).

4. $50 to $150 (in the HP judge's discretion), and $125 a day, for each class "C" "immediately hazardous" violation in a multiple dwelling containing more than five dwelling units, from the NOV's or order's correction date until the violation is corrected.

In addition to these penalties, HMC (Admin. Code) § 27-2115(k)(1) provides for additional fines for violations relating to heat and hot water:

1. $250 to $500 a day (in the HP judge's discretion) for inadequate heat (from October 1 through May 31) or hot water (under 120° Fahrenheit), or for not providing either a central heating system or an alternative heat-and-hot-water system;[338] and $500 to $1000 a day (in the HP judge's discretion) for each subsequent violation at the dwelling or multiple dwelling during the same calendar year or, for not providing adequate heat, from October 1 through May 31;

2. The greater of $25 a day or $1000 for installing a device capable of causing a central heating system to become incapable of providing the minimum requirements for heat and hot water.

In heat and hot-water cases, civil penalties accrue from the date the HPD inspectors post an NOV on the dwelling's entrance door.[339]

HMC (Admin. Code) § 27-2115(a) further provides for a civil penalty of $50 to $250, in the HP judge's discretion, for each violation of a housing standard falsely certified as corrected.

The HP judge will also assess costs in every case, currently $150, against a losing owner.

Although an HP petitioner-occupant may seek civil penalties, all court-assessed civil penalties are payable solely to HPD.[340] When HPD settles a civil-penalties claim, whether initiated by HPD or a petitioner-tenant, HPD will always include a provision that the settlement is contingent upon approval of the New York City Office of the Comptroller, although it is rare that the Comptroller will disallow a settlement. The HP may order tenants to pay rent directly to

---

338. Local Law 1 of 2005 amended HMC (Admin. Code) § 27-2115(k)(1) to increase the civil penalty for inadequate heat from $250 a day until the violation was corrected to a minimum of $250 and a maximum of $500 a day until the violation is corrected.

339. HMC (Admin. Code) § 27-2115(k)(1) (penalty due "per day for each violation from and including the date the notice is affixed").

340. HMC (Admin. Code) § 27-2116(a); *Amsterdam*, 136 Misc. 2d at 834, 519 N.Y.S.2d at 336-37.

HPD to satisfy civil penalties. HPD and petitioner-occupants may seek penalties even after the repairs are completed (if the repairs are late) or the building is sold. The respondent-owner might be entitled to a jury trial on a motion for civil penalties if the potential fine is substantial and the owner convinces the court that the penalties are punitive.[341] Civil penalties are subject to a three-year statute of limitations under CPLR 214(2) from the date of the NOV or the order to correct, whichever is later. A laches defense might shorten that period.

From time to time, HPD or a petitioner-occupant will seek compliance and civil penalties—or even contempt—for new violations that arose after a stipulation, consent order to correct, default order to correct, or trial order to correct. To secure compliance, HPD, petitioner-occupants, or the court on its own motion may move to amend the petitions to include the new violations, thus giving the court the right to issue an order to correct new violations.[342] The HP should grant this motion under Civil Court Act § 110(c) if the proceeding is not too old and if doing so is not unduly prejudicial.[343] In any event, the HP may not award civil penalties or find an owner in contempt on the basis of any new violation unless the respondent-owner's inadequate attempt to correct the violation led directly to the new violation.

HPD may urge a settlement even if an occupant does not wish to settle. On HPD's recommendation, the HP may sign a consent order or so-order a stipulation in a tenant-initiated proceeding without the petitioner-occupant's consent if the settlement is fair and reasonable• but only for civil penalties, and nothing else.[344] That often happens when a respondent-owner wants to sign a consent order but the petitioner-occupant is unreasonable or is reluctant to sign a legal document.

In an HP proceeding to recover civil penalties, disclosure or bills of particulars are allowed only by court order.[345]

---

341. *See Deka Realty*, 208 A.D.2d at 45, 620 N.Y.S.2d at 842; *cf. Dep't of Hous. Preservation & Dev. v. All-Boro Mgmt.*, 33 H.C.R. 737A, N.Y. L.J., Aug. 17, 2005, at 19, col. 1 (Hous. Part Civ. Ct. Kings County) (denying jury trial in proceeding seeking an order to correct and, if not corrected, civil penalties).

342. HMC (Admin. Code) § 27-2121.

343. Under Civil Court Act § 110(c), the HP "retain[s] continuing jurisdiction of any action or proceeding relating to a building until all violations of law have been removed."

344. *Amsterdam*, 136 Misc. 2d at 835, 519 N.Y.S.2d at 337-38.

345. Civ. Ct. Act § 110(a); HMC (Admin. Code) § 27-2116(a); 22 NYCRR 208.43(1).

A petitioner-occupant or HPD proves its case for civil penalties, once it asks the court to take judicial notice of order or stipulation, the same way it proves a case to secure an order to correct, as explained above.[346]

Defending or Mitigating Civil Penalties

If a petitioner-occupant or HPD proves the case at trial or inquest and the respondent-owner's trial defenses fail, the HP will issue an order to correct. If corrections are not made and the proceeding is restored, or if by trial or inquest the issue of civil penalties is already ripe, the court will consider an occupant- or HPD-initiated motion for civil penalties.

In defense of or to mitigate civil penalties for uncorrected or tardily cured violations, an owner may prove any of the following affirmative defenses under HMC (Admin. Code) § 27-2116(b)(1) & (2):

1. The violation did not exist when the petitioner-occupant or HPD filed the order to show cause and verified petition or affidavit in lieu of petition;

2. The respondent-owner attempted promptly to correct the violation but failed because of technical difficulties or inability to obtain necessary funds, materials, or labor;

3. The respondent-owner could not gain access to the premises where the violation occurred;[347]

4. Despite "diligent and prompt application," the owner could not obtain a necessary permit or license to correct the violation;

5. The respondent owner corrected the violation timely: or

6. The violation resulted from the act, negligence, neglect, or abuse of someone, such as the occupant, not in the owner's employ or subject to the owner's direction. If this defense or mitigation arises, the owner may move to consolidate

346. *See supra* section entitled "Elements of an HP Proceeding for an Order to Correct: Trials, Inquests, and Defaults."

347. When tenants refuse to provide access by refusing to open their doors, owners need not "dynamite their doorways to make fast repairs." *Maccarone*, 30 H.C.R.584A, N.Y. L.J., Oct. 16, 2002, at 24, col. 1, *rev'd on other grounds mem.*, 33 H.C.R. 405A, N.Y. L.J., May 25, 2005, at 19, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.).

the HP proceeding with the plenary action against the third party, or implead that party, and seek a money judgment for the cost of repairs.[348] The HP must then transfer the HP proceeding to Civil Court for consolidation with the plenary action.

HP judges should be lenient in allowing owners to introduce evidence establishing mitigating circumstances regarding civil penalties.[349]

The constitutionally based common-law economic-infeasibility defense is a defense to an order to correct but not to a proceeding for civil penalties.

Owners can also establish that they corrected the violations within the time specified in the NOV and then filed the compliance certificate.[350] An owner is subject to civil penalties for falsifying its compliance certificate if the owner files a compliance certificate and during re-inspection HPD determines that the owner did not correct the violation.[351] The minimum and maximum penalties are $1000 and $3000, in addition to any other civil penalty, for each falsified compliance certificate relating to lead-paint violations.[352] Owners may mitigate the penalty by showing that they tried to correct the violation[353] or that the condition discovered on re-inspection was caused by an occurrence after the NOV issued.[354] The penalty may not be mitigated to less than the minimum penalty of $1000.[355]

---

348. *See* HMC (Admin. Code) § 27-2116(c).

349. *See, e.g.*, *Dep't of Hous. Preservation & Dev. v. Weg and New Mayfair Hotel Corp.*, 18 H.C.R. 110B, N.Y. L.J., Mar. 5, 1990, at 23, col. 4 (App. Term 1st Dep't) (per curiam) (remanding case for hearing to afford managing agents-owners opportunity to establish whether mitigating circumstances existed to warrant remission of civil penalties because managing agents-owners did not "artfully" raise defense at trial).

350. HMC (Admin. Code) § 27-2116(b)(1).

351. *Id.* § 27-2115(l)(5).

352. *Id.*

353. *See Dep't of Hous. Preservation & Dev. v. 537 Clinton LLC*, 34 H.C.R. 51A, 11 Misc. 3d 327, 330, 809 N.Y.S.2d 430, 433 (Civ. Ct. Kings County 2005).

354. *Id.* at 329, 809 N.Y.S.2d at 432.

355. *Id.* at 331, 809 N.Y.S.2d at 433 (citing *Dep't of Hous. Preservation & Dev. v. Fersedy*, 15 H.C.R. 100B, N.Y. L.J., Apr. 2, 1987, at 16, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) (holding that court may not impose penalty below statutory minimum)).

If the HP judge finds that the owner successfully raised any affirmative defenses, the judge "may remit all or part of any penalties [and] may condition such remission upon a correction of the violation within a time period fixed by the court."[356] Similarly, the HP judge may reduce a civil penalty imposed under the HMC on a respondent-owner's showing of mitigation.[357] Judgments for civil penalties are for money only, not tax liens leading to foreclosure.

The HMC's great peculiarity is that although the affirmative defenses to civil penalties may be absolute or may mitigate civil penalties, no defense to civil penalties affects the HP's obligation to order corrections or absolves the owner of the ultimate responsibility to cure violations. An order to correct will therefore issue even if the respondent-owner later succeeds in raising an absolute defense to civil penalties. If a respondent-owner proves that the tenant caused the violations or prevented the owner from repairing the violations, the owner's duty to cure continues.[358]

Thus, a respondent-owner will avoid civil penalties if a tenant destroys a building's heating system or installs an illegal heating system,[359] but the owner must still repair the heating system to ensure that internal temperatures conform to code standards. The owner's remedy under these circumstances is to make the court-ordered repairs and begin a plenary action for the repair costs or a holdover proceeding or both. Typically, a non-rent-regulated lease or a proprietary lease allows a landlord or cooperative corporation to make repairs that are the tenant's responsibility and to obtain reimbursement from the tenant or shareholder. If the lease or proprietary lease allows the landlord to be reimbursed for these expenditures as added or additional rent, a landlord may bring a nonpayment proceeding and, if allowed by a lease or proprietary lease, secure a possessory judgment to recoup the money it spent on repairs. The

---

356. *Id.* § 27-2115(k)(3); *accord 999 Realty Mgmt.*, 20 H.C.R. 536A, N.Y. L.J., Sept. 9, 1992, at 24, col. 3.

357. *Dep't of Hous. Preservation & Dev. v. 2025 Walton Ave. Corp.*, 13 H.C.R. 309A, N.Y. L.J., Sept. 30, 1985, at 6, col. 1 (App. Term 1st Dep't) (per curiam) (holding that court may not reduce civil penalties absent mitigation).

358. *Cf.* HMC (Admin. Code) § 27-2115(k)(3) (heat and hot water).

359. *See Eckman v. Jo Fra Properties*, -- H.C.R. --, 5 Misc. 3d 1013(A), 2004 N.Y. Slip Op. 51359(U), at *5, 2004 WL 2563647, at *4, 2004 N.Y. Misc. LEXIS 2115, at *5 (Hous. Part Civ. Ct. N.Y. County, Oct. 20, 2004) (Gerald Lebovits, J.) (denying tenant's motion for contempt because tenant installed illegal heating system).

landlord may also bring a holdover proceeding to evict if the tenant violated a substantial obligation of the tenancy or any HMC obligation.[360]

No civil-penalty-enforcement mechanism compels an owner to obey a court order that requires the owner to correct violations subject to the absolute defense that arises when the tenant caused the condition or when the tenant refused access to effect repairs. The sanctions are rent abatements for other tenants and, depending on the case, contempt, if access to repair is available after the HP issues an order to correct. To compensate for potential economic injury, owners must protect themselves with insurance coverage.

CONTEMPT

Contempt Proceedings: Generally

In addition to civil penalties, a tenant or HPD may compel compliance in a contempt proceeding under Judiciary Law Article 19 if a respondent-owner fails to comply with an order to correct violations or a so-ordered stipulation requiring repairs.[361] The court's order on which contempt might be predicated is usually written, but it may be oral if the accused contemnor is present when the order is issued.[362] Any party seeking contempt must come to court with clean hands.[363]

---

360. *McMunn*, 131 Misc. 2d at 343, 500 N.Y.S.2d at 221. Mary Ann Hallenborg, the publisher and managing editor of the formerly extant Landlord-Tenant Practice Reporter (in which this article's predecessor was originally published), explained the concept well: "What happens . . . if the tenant does something to make the property unfit—for example, by negligently breaking the water main? . . . . The landlord . . . remains responsible for seeing that the work gets done and the property returned to a habitable state. In this situation, the landlord could rightly bill the tenant for the repair." LANDLORD'S LAW BOOK, *supra* note 321, at 9/5.

361. *See supra* section entitled "Civil Penalties: Securing Civil Penalties." *See also Various Tenants v. Dep't of Hous. Preservation & Dev.*, 153 Misc. 2d 221, 222, 588 N.Y.S.2d 840, 841 (App Term 1st Dep't 1992) (per curiam), *aff'd*, 194 A.D.2d 311, 603 N.Y.S.2d 718 (1st Dep't 1993) (mem.) (affirming Appellate Term, First Department, which found HPD in civil contempt for failing to perform work required by stipulation); *Living Waters*, 14 Misc. 3d at 486, 827 N.Y.S.2d at 629 (finding former managing agent and prior owners in civil and criminal contempt for willfully disobeying consent order by not correcting 117 violations).

362. *Betancourt v. Boughton*, 204 A.D.2d 804, 808, 611 N.Y.S.2d 941, 945 (3d Dep't 1994); *Rudnick v. Jacobson*, 284 A.D. 1064, 1064, 136 N.Y.S.2d 127, 128 (2d Dep't 1954) (mem.).

363. *See Eckman*, -- H.C.R. --, 5 Misc. 3d 1013(A), 2004 N.Y. Slip Op. 51359(U), at *4-5, 2004 WL 2563647, at *4-5, 2004 N.Y. Misc. LEXIS 2115, at *5 (denying contempt motion because tenant's illegal heating system caused owner's delay in repairing) (citing *St. Thomas Equities*, 128 Misc. 2d at 651, 494 N.Y.S.2d at 792 (holding that courts should not allow wrongdoers to

The petitioner-occupant or HPD can seek civil or criminal contempt, which serve separate, distinct purposes, [364] or both civil and criminal contempt.[365] The same act can be punished by both civil and criminal contempt, but the standards of proof and penalties differ, principally, according to the Court of Appeals, because "the element which escalates a contempt to criminal status is the level of willfulness associated with the conduct."[366] Some cases in the First and Second Departments have held, however, that unlike a movant in a criminal-contempt proceeding, a movant in a civil-contempt proceeding need not prove willful disobedience if the disobedience was calculated to or did defeat, impair, impede, or prejudice the party's rights.[367]

---

profit from their illegal conduct)).

364. *See generally* Michael B. de Leeuw & Darcy M. Goddard, *Oh, What Litigators Dare Do*, N.Y. L.J., Dec. 4, 2006, Special Section (Litigation), at S4.

365. Judiciary Law §§ 750, 753; *Dep't Environ. Protect. of City of N.Y. v. Dep't Environ. Conserv. of State of N.Y.*, 70 N.Y.2d 233, 239, 519 N.Y.S.2d 539, 542, 513 N.E.2d 706, 709 (1987) (per curiam); *2025 Walton Ave.*, 13 H.C.R. 309A, N.Y. L.J., Sept. 30, 1985, at 6, col. 1.

366. *McCain v. Dinkins*, 84 N.Y.2d 216, 226, 616 N.Y.S.2d 335, 340, 639 N.E.2d 1132, 1137 (1994); *accord Dep't of Environ. Protect.*, 70 N.Y.2d at 240, 519 N.Y.S.2d at 542, 513 N.E.2d at 709 ("To be found guilty of criminal contempt, the contemnor usually must be shown to have violated the order with a higher degree of willfulness than is required in a civil contempt proceeding."); *Schlueter*, 33 H.C.R. 903A, 9 Misc. 3d 1105(A), 2005 N.Y. Slip Op. 51405(U), at *11, 2005 WL 2171204, at *11, 2005 N.Y. Misc. LEXIS 1897, at *28.

367. *Goldsmith v. Goldsmith*, 261 A.D.2d 576, 577, 690 N.Y.S.2d 696, 698 (2d Dep't 1999) (mem.) ("The mere act of disobeying the temporary restraining order was sufficient to sustain a finding of civil contempt, regardless of motive, where, as here, it was calculated to or actually did defeat, impair, impede, or prejudice the plaintiff's rights"); *Yeshiva Tifferes Torah v. Kesher Int'l Trading Corp.*, 246 A.D.2d 538, 538, 667 N.Y.S.2d 759, 761 (2d Dep't 1998) (mem.); *Italian Am. Civic Ass'n of Mineola, N.Y., Inc. v. Cataldo*, 225 A.D.2d 733, 733-34, 639 N.Y.S.2d 944, 944 (2d Dep't) (mem.) ("[W]illfulness is not an element of civil contempt . . . ."), *appeal dismissed*, 88 N.Y.2d 1065, 651 N.Y.S.2d 408, 674 N.E.2d 338 (1996); *Modon v. N.Y. City Hous. Auth./Red Hook E. Houses*, 33 H.C.R. 868B, 9 Misc. 3d 128(A), 2005 N.Y. Slip Op. 51522(U), *1, 2005 WL 2347602, at *1, 2005 N.Y. Misc. LEXIS 2064, at *1 (App. Term 2d Dep't 2d & 11th Jud. Dists., Sept. 20, 2005) (mem.) (declining to find NYCHA in civil contempt because tenant made no showing that NYCHA "took action, in violation of a court order, which was 'calculated to or actually did defeat, impair, impede or prejudice' [his] rights") (quoting *Home Surplus of Brooklyn, Inc. v. Home Surplus, Inc*, 3 A.D.3d 472, 473, 769 N.Y.S.2d 904, 904 (2d Dep't 2004); *In re Congregation Yetev Lev D'Satmar v. Kahana*, 308 A.D.2d 447, 448, 764 N.Y.S.2d 140,142 (2d Dep't 2003)); *Various Tenants of 446-448 W. 167th St. v. Dep't of Hous. Preservation & Dev.*, 153 Misc. 2d 221, 222, 588 N.Y.S.2d 840, 841 (App. Term 1st Dep't 1992)

To impose criminal contempt,[368] the HP must find, beyond a reasonable doubt,[369] that the respondent-owner:

1. Knew of a lawful, unequivocal order to correct or other court mandate, such as a so-ordered stipulation, requiring repairs; and

2. Willfully disobeyed the order to correct or other mandate.[370]

(per curiam) ("Nor were the petitioners required to establish that appellant's actions were deliberate or willful in order to sustain a finding of *civil* contempt.") (emphasis in original), *aff'd mem.*, 94 A.D.2d 311, 603 N.Y.S.2d 718 (1st Dep't 1993).

368. *See generally Dep't of Hous. Preservation & Dev. v. Half Moon Real Estate Co., Inc.*, 24 H.C.R. 196A, N.Y. L.J., Apr. 10, 1996, at 26, col. 6 (Hous. Part Civ. Ct. N.Y. County) (imposing criminal contempt).

369. *N.Y.C. Coalition to End Lead Poisoning v. Giuliani*, 245 A.D.2d 49, 50 (1st Dept 1997) (mem.) (vacating criminal contempt finding because evidence insufficient to prove beyond reasonable doubt that HPD Commissioner deliberately and willfully violated preliminary injunction); *People v. Metropolitan*, 231 A.D.2d 445, 446, 647 N.Y.S.2d 11, 12 (1st Dep't 1996) (finding that record supported, beyond a reasonable doubt, civil and criminal contempt finding that defendants violated consent judgment); *Gouiran Holdings, Inc. v. McCormick*, 163 A.D.2d 44, 44, 558 N.Y.S.2d 18, 19 (1st Dep't 1990) (mem.), *appeal dismissed*, 76 N.Y.2d 851, 560 N.Y.S.2d 991, 561 N.E.2d 891 (1990); *Yorktown Cent. Sch. Dist. No. 2 v. Yorktown Congress of Teachers*, 42 A.D.2d 422, 426, 348 N.Y.S.2d 367, 372 (2d Dep't 1973) (per curiam); *Arietta v. Jude Hotel Corp.*, 17 H.C.R. 341B, N.Y. L.J., Sept. 13, 1989, at 21, col. 3 (App. Term 1st Dep't) (per curiam) (vacating criminal-contempt finding because evidence did not prove willful disobedience beyond reasonable doubt); *Hynes v. Doe*, 101 Misc. 2d 350, 352, 420 N.Y.S.2d 978, 980 (Sup. Ct. N.Y. County 1979); *Living Waters*, 14 Misc. 3d at 486, 827 N.Y.S.2d at 630 (noting that under criminal-contempt standard, movant must demonstrate beyond reasonable doubt that alleged contemnor willfully disobeyed court order).

370. Judiciary Law § 750(A)(3); *In re Spector v. Allen*, 281 N.Y. 251, 257, 22 N.E.2d 360, 363 (1939); *Deka Realty*, 208 A.D.2d at 45, 620 N.Y.S.2d at 842; *Bayamon v. Platt*, 191 A.D.2d 249, 249, 595 N.Y.S.2d 8, 9 (1st Dep't 1993) (mem.) (affirming decision finding defendant in civil and criminal contempt because defendant intentionally, repeatedly, and willfully disobeyed court orders); *In re Murray*, 98 A.D.2d 93, 98-99, 469 N.Y.S.2d 747, 751 (1st Dep't 1983); *Schlueter*, 33 H.C.R. 903A, 9 Misc. 3d 1105(A), 2005 N.Y. Slip Op. 51405(U), at *11, 2005 WL 2171204, at *11, 2005 N.Y. Misc. LEXIS 1897, at *27-28.

Willfulness may be proven by evidence that the respondent-owner failed to make repairs when able to do so,[371] failed to correct a substantial portion of the violations,[372] or falsely testified or certified that it effected repairs.[373] The HP may also consider evidence of the respondent-owner's misconduct at other buildings to establish the respondent's willful failure to make repairs in the building that is the subject of the HP proceeding.[374] The court should be careful, however, not to base a contempt finding on a vague HPD violation report.[375]

Because the elements of criminal contempt must be proven beyond a reasonable doubt, criminal contempt is a rare penalty. It is usually more practical for petitioner-occupants to seek civil contempt, which requires proof of the disobedience only to a reasonable certainty.[376]

---

371. *Dep't of Hous. Preservation & Dev. v. B.B. AM Holdings, Inc.*, 23 H.C.R. 366B, N.Y. L.J., June 22, 1995, at 28, col. 4 (App Term 1st Dep't) (per curiam).

372. *Living Waters*, 13 Misc. 3d at 488, 827 N.Y.S.2d at 631.

373. *Odimgbe*, 153 Misc. 2d at 591, 582 N.Y.S.2d at 914.

374. *Dep't of Hous. Preservation & Dev. v. Hunter*, 28 H.C.R. 129A, N.Y. L.J., Mar. 1, 2000, at 33, col. 2 (Hous. Part Civ. Ct. Kings County).

375. *See, e.g.*, *Chelsea Realty Assocs. v. Graham*, N.Y. L.J., June 25, 1982, at 12, col. 6 (App. Term 1st Dep't) (per curiam) (holding non-specific violation report to be insufficient proof of civil contempt); *compare Gottlieb*, 136 Misc. 2d at 377, 518 N.Y.S.2d at 581 (holding that declarants need not be produced if violation report contains factual observations gathered under inherently reliable circumstances).

376. *See In re McCormick v. Axelrod*, 59 N.Y.2d 574, 583, 466 N.Y.S.2d 279, 283, 453 N.E.2d 508, 512-13 (1983) (per curiam) (citing *Pereira v. Pereira*, 35 N.Y.2d 301, 361 N.Y.S.2d 148, 319 N.E.2d 413 (1974)) (noting that what separates civil from criminal contempt is level of willfulness; court must determine, for civil-contempt finding, that lawful court order, clearly expressing unequivocal mandate, was in effect and that with "reasonable certainty" order was disobeyed), *order amended mem.*, 60 N.Y.2d 652, 467 N.Y.S.2d 571, 454 N.E.2d 1314 (1983); *Ellenberg v. Brach*, 88 A.D.2d 899, 901, 450 N.Y.S.2d 589, 591 (2d Dep't 1982) (mem.); *Coan v. Coan*, 86 A.D.2d 640, 641, 447 N.Y.S.2d 29, 30-31 (2d Dep't 1982) (mem.), *lv. denied*, 57 N.Y.2d 608, 456 N.Y.S.2d 1025, 442 N.E.2d 448 (1982); *In re Hynes v. Hartman*, 63 A.D.2d 1, 4-5, 406 N.Y.S.2d 818, 819-20 (1st Dep't 1978); *BNS Buildings, LLC. v. Darzi*, 31 H.C.R. 198B, N.Y. L.J., Apr. 25, 2003, at 18, col. 1 (App. Term 1st Dep't) (per curiam). Some courts have applied a clear-and-convincing standard of proof before finding civil contempt. *See, e.g.*, *Yalkowsky v. Yalkowsky*, 93 A.D.2d 834, 835, 461 N.Y.S.2d 54, 55 (2d Dep't 1983) (mem.) (finding that party seeking civil contempt must prove violation by clear and convincing evidence); *Living Waters*, 14 Misc. 3d at 486, 827 N.Y.S.2d at 629 (citing *Vujovic v. Vujovic*, 16 A.D.3d 490, 491, 791 N.Y.S.2d 648, 649 (2d Dep't 2005) (mem.); *Green v. Green*, 288 A.D.2d 436, 437, 733 N.Y.S.2d 682, 684 (2d Dep't 2001) (mem.)); *Dole*, -- H.C.R. --, 13 Misc. 3d

Additionally, because the essence of civil contempt is to make the aggrieved party whole, money is awarded directly to the occupant, as opposed to HPD (civil penalties) or New York City (criminal contempt). Service, moreover, is easier for civil contempt than for criminal contempt, as explained below. For these reasons, tenant advocates suggest that tenants seek civil contempt instead of, or in addition to, criminal contempt.

To impose civil contempt,[377] the court must find to a reasonable certainty that the respondent-owner:

1. Knew about the order to correct or other unequivocal court mandate requiring the owner to make repairs;

2. Disobeyed the order to correct or other mandate; and

3. Prejudiced, impeded, or defeated the petitioner-occupant's or HPD's rights or intended to do so.[378]

1241(A), 2006 N.Y. Slip Op. 52208(U), *7, 2006 WL 3410144, at *6, 2006 N.Y. Misc. LEXIS 3421, at *20 (noting that burden of proof on party seeking to hold another in civil contempt is clear and convincing evidence).

377. *See Garcia v. Great Atlantic & Pacific Tea Co., Inc.*, 231 A.D.2d 401, 402, 647 N.Y.S.2d 2, 3 (1st Dep't 1996) (mem.); *Cannizzaro v. Cannizzaro*, 186 A.D.2d 776, 778, 588 N.Y.S.2d 912, 914 (2d Dep't 1992) (mem.); *Garry v. Garry*, 121 Misc. 2d 81, 85, 467 N.Y.S.2d 175, 178 (Sup. Ct. N.Y. County 1983).

378. *McCormick*, 59 N.Y.2d at 583, 466 N.Y.S.2d at 284, 453 N.E.2d at 513; *McCain*, 84 N.Y.2d at 225-26, 616 N.Y.S.2d at 340, 639 N.E.2d at 1137; *Troiano v. Ilaria*, 205 A.D.2d 752, 752, 614 N.Y.S.2d 916, 916 (2d Dep't 1994) (mem.) ("To succeed on a motion to punish for civil contempt, the moving party must show that the alleged contemnor has violated a clear and unequivocal court order and that the violation prejudiced a right of a party to the litigation."); *Garcia*, 231 A.D.2d at 402, 647 N.Y.S.2d at 3; *Odimgbe*, 153 Misc. 2d at 591, 582 N.Y.S.2d at 914. A respondent-owner that does not repair violations, at least hazardous and immediately hazardous violations, necessarily prejudices, impedes, impairs, or defeats a tenant's rights. *Various Tenants of 446-448 W. 167th St.*, 153 Misc. 2d at 222, 588 N.Y.S.2d at 841 (citing Judiciary Law § 753(A)(3)) (finding that if repairs are not completed according to stipulation, "tenants' rights in the litigation [are] necessarily and significantly impaired"); *Schlueter*, 33 H.C.R. 903A, 9 Misc. 3d 1105(A), 2005 N.Y. Slip Op. 51405(U), at *10-11, 2005 WL 2171204, at *9, 2005 N.Y. Misc. LEXIS 1897, at *26 ("When a court requires a landlord to make repairs in a tenant's apartment and the landlord fails to do so, the landlord's failure to effect the repairs necessarily prejudices the tenant.").

Contempt Proceedings: Procedurally

HPD or a petitioner-tenant seeking to hold another in contempt for failing to comply with a court order or mandate must apply to the HP judge who issued the underlying repair order. All Housing Court judges are authorized by Civil Court Act § 110(e), through Judiciary Law § 757, to adjudicate contempt issues. The application may be made by order to show cause or by notice of motion.[379] It is in HPD's and the petitioner-occupant's best interests to insure compliance with an order to correct by naming at the outset all owners, managing agents, and corporate officers as respondents.

The order need not be in writing to serve as a basis for contempt. An oral order made in the respondent's presence and transcribed into the record may serve as the basis of a contempt citation.[380] Nor need the order itself be served if the accused contemnor or the accused contemnor's attorney knew about the order.[381]

In the context of civil-contempt proceedings, the notice of motion or order to show cause must state on the first page that "the purpose of the hearing" (or that one of the purposes of the hearing, if additional relief is sought) "is to punish the accused for a contempt of court, and that

---

379. Judiciary Law § 756; *Two Daughter Realty, Inc. v. Franco*, 21 H.C.R. 186A, N.Y. L.J., Apr. 23, 1993, at 25, col. 5 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.) (finding that contempt proceeding may not be commenced by letter to court).

380. *Guiliano v. Carlisle*, 236 A.D.2d 364, 365, 653 N.Y.S.2d 635, 637 (2d Dep't 1997) (mem.); *Betancourt*, 204 A.D.2d at 808, 611 N.Y.S.2d at 945; *Rudnick*, 284 A.D. at 1064, 136 N.Y.S.2d at 128; *Santana v. 144th St. Holding Corp.*, 12 H.C.R. 107B, N.Y. L.J., May 14, 1984, at 13, col. 3 (App. Term 1st Dep't) (per curiam).

381. Although CPLR 5104 suggests that a contemnor need have been served with a certified copy of order, case law states otherwise. It is enough if the contemnor knew about the order, *McCain*, 84 N.Y.2d at 226, 616 N.Y.S.2d at 341, 639 N.E.2d at 1148 ("[I]t is not necessary that the order actually have been served upon the party."); *McCormack*, 59 N.Y.2d at 583, 466 N.Y.S.2d at 284, 453 N.E.2d at 513 (same), or even if the attorney knew about the order, *Dep't of Environ. Protect.*, 70 N.Y.2d at 242, 519 N.Y.S.2d at 544, 513 N.E.2d at 711 (finding that accused contemnor had notice "since the terms of the order were promptly communicated orally and in writing to its attorneys"); *Campanella v. Campanella*, 152 A.D.2d 190, 193-94, 548 N.Y.S.2d 279, 281 (2d Dep't 1989) (finding that because bank knew about order freezing couple's joint bank accounts, wife's failure to serve "properly certified" copy of order on bank allowed finding of civil contempt); *Fuerst v. Fuerst*, 131 A.D.2d 426, 426-27, 515 N.Y.S.2d 862, 863-64 (2d Dep't 1987) (mem.) (finding that court's so ordering of stipulation read into open-court record dispensed with need for written order and notice of entry to be served).

such punishment may consist of fine or imprisonment, or both, according to law."[382] The Judiciary Law also requires that the first page of the notice of motion or order to show cause for civil contempt contain a warning, in at least eight-point bold type, that the respondent's "failure to appear in court may result in the [respondent's] immediate arrest and imprisonment for contempt of court."[383] The HP must dismiss a motion for civil contempt that lacks these warnings, required in civil-contempt but not criminal-contempt proceedings, if the respondent-owner objects timely and if the respondent did not waive its right to the warning.[384]

If not dismissed, contempt motions can be settled on any terms, including awarding the petitioner-tenant an abatement, buying out the petitioner-tenant,[385] or relocating the petitioner-tenant to a new apartment. HPD's attorneys will not sign a stipulation that settles a contempt motion on these terms.

Unless the HP specifies otherwise in an order to show cause, the petitioner-occupant or HPD must serve a civil-contempt motion no fewer than 10 and no more than 30 days before the motion is scheduled to be heard.[386] The motion may also be served on the respondent-owner by ordinary mail, without court permission, if the respondent was a party to the initial proceeding.[387] Service by mail, under CPLR 2103(b)(2), adds another five days. If brought by order to show cause, the motion must be served in the time and manner the court requires.

---

382. Judiciary Law § 756. Surprisingly, this warning is not required for criminal contempt, and, unlike the warning that any "failure to appear in court may result in the [respondent's] immediate arrest and imprisonment for contempt of court," it need not be in eight-point bold type.

383. *Id.*

384. *See In re Rappaport*, 58 N.Y.2d 725, 726, 458 N.Y.S.2d 911, 912, 444 N.E.2d 1330, 1330 (1982); *P & N Tiffany Props. v. Williams*, 302 A.D.2d 466, 466-67, 755 N.Y.S.2d 410, 411-12 (2d Dep't 2003); *Bigman v. Dime Sav. Bank of N.Y.*, 138 A.D.2d 438, 439 526 N.Y.S.2d 17, 18 (2d Dep't 1988) (mem.); *Murrin v. Murrin*, 93 A.D.2d 858, 858, 461 N.Y.S.2d 360, 360-61 (2d Dep't 1983) (mem.).

385. As noted earlier, Civil Court frowns upon an unrepresented tenant's agreement to convert an HP to a holdover.

386. Judiciary Law § 756. This requirement differs from other motions, which generally requires eight days' notice.

387. *Id.*; *Quantum Heating Servs., Inc. v. Austern*, 100 A.D.2d 843, 843, 474 N.Y.S.2d 81, 83 (2d Dep't 1984) (mem.); *N.Y. Higher Ed. Assist. Corp. v. Cooper*, 65 A.D.2d 906, 907, 410 N.Y.S.2d 687, 687 (3d Dep't 1978) (mem.); *City Sch. Dis't of Schenectady v. Schenectady Fed'n of Teachers*, 49 A.D.2d 395, 398, 375 N.Y.S.2d 179, 182-83 (3d Dep't 1975).

A motion seeking civil contempt must be served on the accused, unless an order to show cause permits service on the accused contemnor's attorney.[388] A motion not brought by order to show cause and which secures the HP judge's permission to serve only on an attorney must, unlike other kinds of motions, be served on the accused, not on the attorney alone.[389] Like all HP motions, service must also be made on HPD as well. HPD will accept service by mail, in its clerk's office at 100 Gold Street in Manhattan, and, often, even in the HP courtroom.

If the accused contemnor is a party to the HP proceeding, service by ordinary first-class mail may be used without court permission.[390] Motion papers seeking to hold a nonparty in civil contempt must be served by personal service pursuant to any of the methods authorized by CPLR Article 3. The HP may authorize service by certified mail, return-receipt requested, or by first-class mail with a certificate of mailing may be authorized by the HP if the alleged nonparty contemnor is evading service or if personal service under CPLR Article 3 cannot otherwise be effected with due diligence.

A motion for criminal contempt must be served on the respondent by personal service and within a reasonable time before the return date.[391] Failure to effect personal service pursuant to CPLR Article 3—by in-hand personal delivery, substituted service, or duly diligent conspicuous service—requires that the criminal contempt motion be dismissed.[392] Stated another way, for criminal contempt, personal in-hand, substituted, or duly diligent conspicuous service are valid.[393] Substituted and duly diligent conspicuous-place service are not complete until the order to show cause or notice of motion is mailed.

---

388. Judiciary Law § 761.

389. *Id.*

390. *Silverstein v. Diaz*, 124 Misc. 2d 597, 599-600, 476 N.Y.S.2d 978, 980-81 (Hous. Part Civ. Ct. Queens County 1984).

391. Judiciary Law § 751(1).

392. *Lu v. Betancourt*, 116 A.D.2d 492, 494, 496 N.Y.S.2d 754, 756 (1st Dep't 1986) (mem.); *People v. Balt*, 34 A.D.2d 932, 933, 312 N.Y.S.2d 587, 589-90 (1st Dep't 1970) (per curiam); *Allen*, 33 H.C.R. 13A, 5 Misc. 3d 1032(A), 2004 N.Y. Slip Op. 51666(U) at *3, 2004 WL 2963907, at *3, 2004 N.Y. Misc. LEXIS 2770, at *9.

393. *Dep't of Hous. Preservation & Dev. v. Arick*, 131 Misc. 2d 950, 952, 503 N.Y.S.2d 489, 491 (Hous. Part Civ. Ct. N.Y. County 1986), *rev'd sub nom. on other grounds per curiam Dep't of Hous. Preservation & Dev. v. Chaney*, 137 Misc. 2d 1079, 526 N.Y.S.2d 51 (App. Term 1st Dep't 1988).

The Housing Court's current pro se order to show cause to hold respondents in civil and criminal contempt is unclear about what service methods are required. The Housing Court's Office of the Self-Represented, located in the court's Resource Center, will give unrepresented occupants detailed directions on how to serve properly. Good, simple advice for a pro se litigant who seeks both civil and criminal contempt is to serve each respondent and each respondent's attorney by personal service, with notice by mail to HPD.

Under CPLR 1103 and Judiciary Law § 770, an HP judge may appoint an attorney to a respondent-owner who cannot afford one.[394]

Who May Be Held In Contempt?

Any party, including a governmental entity, may be subject to contempt if it violates a court order.[395] Even HPD may be held in contempt for failing to comply with a consent order,[396] although HPD benefits from an automatic stay if it appeals a contempt adjudication to the Appellate Term.[397] The HP may impose civil-contempt penalties against non-parties. Non-parties "who have knowledge of the [HP's order] may be bound by the injunction providing they are in privity with a party, such as officers or agents or servants of a party acting in collusion with the party."[398] Thus, the officers of a respondent-corporation may be held in civil contempt if they knew of the court's order and failed to comply with it, even if they were not named as respondents.[399]

---

394. *See, e.g.*, *Martinez v. Capella*, 23 H.C.R. 606B, N.Y. L.J., Oct. 17, 1995, at 32, col. 1 (Hous. Part Civ. Ct. Kings County).

395. SCHERER, *supra* note 17, at §§ 19:85-19:86, at 997.

396. *Id.* (citing *Various Tenants of 446-448 W. 167th St.* 153 Misc. 2d at 222, 558 N.Y.S.2d at 841).

397. CPLR 5519(a)(1) provides that all City agencies and departments, including HPD, benefits from an automatic appellate stay, not only from a contempt adjudication, but also from any adjudication in which it is an aggrieved party.

398. *Estate of Rothko*, 84 Misc. 2d 830, 869, 379 N.Y.S.2d 923, 962 (Surrogate Ct. N.Y. County 1975), *modified on other grounds*, 89 A.D.2d 499, 392 N.Y.S.2d 870 (1st Dep't 1977), *aff'd*, 43 N.Y.2d 305, 401 N.Y.S.2d 449, 372 N.E.2d 291 (1977); *accord B.B. AM Holdings*, 23 H.C.R. 366B, N.Y. L.J., June 22, 1995, at 28, col. 4 (holding officer liable for corporation's contempts); *Dep't of Hous. Preservation & Dev. v. Newell*, 18 H.C.R. 77B, N.Y. L.J., Feb. 8, 1990, at 23, col. 3 (App. Term 1st Dep't) (per curiam) (reinstating contempt proceeding because contemnor consented to be added as party, paid money in settlement of civil penalties, and subjected himself to terms of order).

399. *See Atop Roofing & Siding*, 135 Misc. 2d at 747, 516 N.Y.S.2d at 409 (holding corporate

A non-party that willfully contravenes a court order may also be held in criminal contempt.[400] The petitioner-tenant must personally serve the non-party under CPLR Article 3 to subject the non-party to civil or criminal contempt.[401] In-hand delivery is preferable, but "so long as the [person] charged is notified of the accusation and is afforded a reasonable time to defend," any Article 3 service is valid.[402]

Defenses to Contempt

A respondent-owner may defend against or mitigate civil or criminal contempt sanctions for its failure to comply with a court's order or mandate if:

1. The violation does not exist (this is a defense to criminal contempt but not to civil contempt);[403]

2. It corrected the violation and otherwise complied with the order within the time specified in the order or mandate;

---

officer subject to contempt for failing to comply with HP order).

400. *See, e.g.*, *Citibank, N.A. v. Anthony Lincoln Mercury, Inc.*, 86 A.D.2d 828, 829, 447 N.Y.S.2d 262, 263 (1st Dep't 1982) (mem.); *B.B. AM Holdings*, 23 H.C.R. 366B, N.Y. L.J., June 22, 1995, at 28, col. 4.

401. *John Sexton & Co. v. Law Foods, Inc.*, 108 A.D.2d 785, 786, 485 N.Y.S.2d 115, 117 (2d Dep't 1985) (mem.); *Long Island Trust Co. v. Rosenberg*, 82 A.D.2d 591, 591-92, 442 N.Y.S.2d 563, 563 (2d Dep't 1981). Personal delivery is sufficient but not required. *Dep't of Hous. Preservation & Dev. v. 24 W. 132 Equities, Inc.*, 137 Misc. 2d 459, 460-61, 524 N.Y.S.2d 324, 326 (App. Term 1st Dep't 1987) (per curiam), *aff'd mem.*, 150 A.D.2d 181, 540 N.Y.S.2d 711 (1st Dep't 1989), *appeal dismissed*, 74 N.Y.2d 841, 546 N.Y.S.2d 558, 545 N.E.2d 872 (1989), *cert. denied sub. nom Morfesis v. Dep't of Hous. Preservation & Dev.*, 493 U.S. 1078 (1990), *habeas corpus denied*, 733 F. Supp. 745 (S.D.N.Y. 1990); *Arick*, 131 Misc. 2d at 952, 503 N.Y.S.2d at 491, *rev'd sub nom. on other grounds per curiam Dep't of Hous. Preservation & Dev. v. Chaney*, 137 Misc. 2d 1079, 526 N.Y.S.2d 51 (App. Term 1st Dep't 1988). For a good discussion of these and other contempt issues, see Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 ST. JOHN'S L. REV. 337 (1998).

402. *24 W. 132 Equities*, 137 Misc. 2d at 461, 524 N.Y.S.2d at 326.

403. *Cf.* HMC (Admin. Code) § 27-2115(k)(3) (pertaining to civil penalties (not contempt) for heat and hot water.

3. It could not complete all the corrections because of technical difficulty, lack of materials, funds, labor, or access(this is a defense to criminal contempt but not to civil contempt);[404]

4. Inability to obtain permit despite diligent and prompt application (this is a defense to criminal contempt but not to civil contempt);[405]

5. The order or mandate is unclear or ambiguous;[406]

6. It was unaware of the order or was not properly served with the motion papers;

7. The motion papers for civil contempt do not contain the Judiciary Law warnings;[407]

8. The violation resulted from the act, negligence, neglect, abuse, or refusal to provide access of someone not in the owner's employ or subject to the owner's direction (the inability-to-comply defense);

9. The failure to comply was not willful (criminal contempt) or did not prejudice the tenant's or HPD's rights (civil contempt); or

10. The delay in bringing the contempt motion prevented the accused contemnor from taking action that could have been taken if the motion had been made sooner (laches).[408]

---

404. *Cf. id.*

405. *Cf. id.*

406. Contempt sanctions may not be imposed if an order is unclear or if the order contains disputed facts. *See, e.g., Collins v. Hayden on the Hudson Condominium*, 223 A.D.2d 434, 435, 637 N.Y.S.2d 51, 52 (1st Dep't 1996) (mem.); *340 E. Corp. v. Hill*, 25 H.C.R. 654A, N.Y. L.J., Dec. 15, 1997, at 28, col. 3 (App. Term 1st Dep't) (per curiam). Thus, contempt is unavailable if the order "is not so explicit as to eliminate legitimate disagreement between the parties." *Hoglund v. Hoglund*, 234 A.D.2d 794, 796, 651 N.Y.S.2d 239, 241 (3d Dep't 1996). If in doubt, practitioners are advised to have the order's terms clarified.

407. Judiciary Law § 756. A respondent-owner that contests an application for contempt on the merits but fails to object timely to the omission of a Judiciary Law § 756 warning waives its right to that warning. *Rappaport*, 58 N.Y.2d at 726, 458 N.Y.S.2d at 911, 444 N.E.2d at 1330; *Mayfair Nursing Home v. Neidhardt*, 173 A.D.2d 794, 794-95, 571 N.Y.S.2d 30, 30 (2d Dep't 1991) (mem.).

Financial inability to comply with a contempt order is also a defense to a civil-contempt proceeding. To prove financial inability, the respondent-owner must prove that it "does not have, and has not had, the financial ability to [comply], since entry of the . . . contempt order."[409]

On the other hand, substantial compliance is not a defense to civil contempt,[410] but it may be raised to attack an assertion of willfulness in a criminal-contempt proceeding.[411] In this regard, HPD will not seek contempt if the owner substantially complies with an HP order or stipulation and cures all class "C" violations and 80 percent of the class "B" and class "A" violations, but occupants seeking contempt are not bound by HPD's policy.

An accused contemnor's good-faith belief that the court order is no longer in effect is not a defense, but that belief may be raised to negate willfulness.[412] An accused contemnor's belief that a validly issued court order is defective, misguided, or erroneous is, similarly, no defense to a contempt proceeding. The contemnor's remedy is to challenge the order, not ignore it.[413] It is no defense that an accused contemnor did not benefit from disobeying the order,[414] that the statute of limitations on the original claim has expired,[415] or that an appeal is pending, unless the

---

408. *See Hero Boy, Inc. v. Dell'Orto*, 306 A.D.2d 226, 228, 761 N.Y.S.2d 648, 650-51 (1st Dep't 2003) (mem.) (applying laches to damages in civil-contempt proceeding).

409. *Richardson v. Gray*, 284 A.D.2d 198, 200, 726 N.Y.S.2d 105, 107 (1st Dep't 2001) (mem.); *accord Dep't of Hous. Preservation & Dev. v. Skydell*, 161 Misc. 2d 647, 650, 616 N.Y.S.2d 565, 566-67 (App. Term 1st Dep't 1994) (per curiam) (implying that financial inability to comply with contempt order is valid defense).

410. *See In re Hanna v. Turner*, 289 A.D.2d 182, 183, 735 N.Y.S.2d 513, 514 (1st Dep't 2001) (mem.).

411. *In re Spinnenweber v. N.Y. State Dep't of Envtl. Conservation*, 160 A.D.2d 1138, 1140, 554 N.Y.S.2d 346, 348 (3d Dep't 1990).

412. *Gouiran Holdings*, 163 A.D.2d at 44-45, 558 N.Y.S.2d at 19.

413. *Sigmoil Resources N.V. v. Fabbri*, 228 A.D.2d 335, 336-37, 644 N.Y.S.2d 503, 505 (1st Dep't 1996) (mem.); *Bickwid v. Deutsch*, 229 A.D.2d 533, 534-35, 645 N.Y.S.2d 539, 540-41 (2d Dep't) (mem.), *lv. denied*, 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232 (1996).

414. *Campanella*, 152 A.D.2d at 194, 548 N.Y.S.2d at 281.

415. LEHRER, *supra* note 77, at 10.

order has been stayed.[416] An accused contemnor's reliance on counsel's interpretation of a court order also provides no defense.[417]

An accused contemnor has the burden to prove an inability to comply. Conclusory allegations are insufficient.[418] An inability-to-comply defense may not be asserted successfully, moreover, if the accused caused the acts that led to the inability to comply.[419]

Contempt Hearings, Sanctions, and Orders

Except as explained below, the HP must conduct a hearing or inquest before it finds a respondent-owner in contempt. When a hearing or inquest is held, petitioner-occupants prove their cases, after they ask the HP to take judicial notice of the order or stipulation, the same way they prove a case to obtain an order to correct or a case to secure civil penalties.[420]

When contempt motion papers establish the essential elements of contempt, no hearing is required unless the accused contemnor serves opposition papers that contradict the aggrieved party's allegations.[421] Those opposition papers must set forth more than mere conclusions that

---

416. *Id.*

417. *N.Y.C. Dep't of Envt'l Prot. v. N.Y.C. Dep't of Envt'l Conservation*, 70 N.Y.2d 233, 241-43, 519 N.Y.S.2d 539, 543- 44, 513 N.E.2d 706, 709-11 (1987) (per curiam) (finding utility company, which relied on lawyer's advice to continue to burn coal, in criminal contempt because it willfully disobeyed partial stay order after having received actual notice of order). Allowing accused contemnors to blame their counsel for misconduct to avoid responsibility "would allow judicial orders to be too easily evaded and disobeyed." *Id*. at 242, 519 N.Y.S.2d at 544, 513 N.E.2d at 711.

418. *In re Hildreth*, 28 A.D.2d 290, 292, 284 N.Y.S.2d 755, 757 (1st Dep't 1967) (exercising its discretion, however, to allow respondent "not [to] be committed without being given the opportunity to make a factual showing in support of his claims").

419. *People ex rel. McGoldrick v. Douglas*, 286 A.D. 807, 807, 141 N.Y.S.2d 353, 353-54 (1st Dep't 1955) (per curiam).

420. *See supra* section entitled "Elements of an HP Proceeding for an Order to Correct: Trials, Inquests, and Defaults."

421. *See, e.g.*, *Sexter v. Kimmelman, Sexter, Warmflash & Leitner*, 277 A.D.2d 186, 187, 716 N.Y.S.2d 661, 662 (1st Dep't 2000) (mem.) ("The court was not required to hold a hearing before issuing the appealed contempt order because the documents submitted by defendants established with reasonable certainty that plaintiffs knowingly disobeyed the court's earlier discovery orders."); *Goldsmith v. Goldsmith*, 261 A.D.2d 576, 577-78, 690 N.Y.S.2d 696, 698

fail to raise an issue of fact.[422] They must include an affidavit from someone with personal knowledge.[423]

For civil contempt, no right to a jury trial exists.[424] For criminal contempt, the right to a jury trial depends on whether the offense is petty or serious in terms of the possible length of the prison sentence or the magnitude of the fine sought.[425] In New York, there is no right to a jury trial for a single count of criminal contempt. Criminal contempt is a "petty" offense, with a maximum jail term of 30 days for each contempt[426] and a maximum fine of $1000.[427] A contemnor who fails to pay the fine and is sentenced to a definite jail term may be jailed for an additional 30 days at the end of the jail term imposed by the contempt order.[428] If the accused contemnor is charged with multiple offenses and the maximum potential aggregate sentence exceeds six months, the accused contemnor is entitled to a jury trial.[429]

(2d Dep't 1999) (mem.) (holding that court is not required to hold hearing if accused contemnor does not contradict contempt allegations); *Cashman v. Rosenthal*, 261 A.D.2d 287, 690 N.Y.S.2d 251 (1st Dep't 1999) (mem.) (affirming decision holding contemnor in contempt without hearing when contemnor did not submit opposition papers); *Gottlieb*, 136 Misc. 2d at 374, 518 N.Y.S.2d at 581 (requiring contempt hearing only to resolve disputed issues of material fact); *Santana*, 12 H.C.R. 107B, N.Y. L.J., May 14, 1984, at 13, col. 3 (holding that court need not hold contempt hearing if accused contemnor does not rebut contempt allegations).

422. *Vartwin Investments, Ltd. v. Aquarius Media Corp.*, 295 A.D.2d 216, 216-17, 743 N.Y.S.2d 492, 492-93 (1st Dep't 2002) (mem.) (finding that conclusory statements are insufficient to rebut contempt allegation), *appeal dismissed*, 99 N.Y.2d 637, 760 N.Y.S.2d 91, 790 N.E.2d 264 (2003).

423. *Garbitelli v. Broyles*, 257 A.D.2d 621, 622, 684 N.Y.S.2d 292, 293 (2d Dep't 1999) (mem.) (finding that accused contemnor may not contradict contempt allegations without affidavit from someone with personal knowledge).

424. *Deka Realty*, 208 A.D.2d at 46-48, 620 N.Y.S.2d at 843-44; *Dep't of Hous. Preservation & Dev. v. Chance Equities, Inc.*, 135 Misc. 2d 375, 380, 515 N.Y.S.2d 709, 712 (Hous. Part Civ. Court N.Y. County 1987).

425. *Id.*, 620 N.Y.S.2d at 844.

426. *24 W. 132 Equities*, 137 Misc. 2d at 461 n.1, 524 N.Y.S.2d at 326 n.1.

427. Judiciary Law § 751(1).

428. *Id.*

429. *People v. DiLorenzo*, 153 Misc. 2d 1021, 1025-26, 585 N.Y.S.2d 670, 673 (Crim. Ct. Bronx County 1992).

The order finding the accused in contempt must state whether the finding is civil, criminal, or both.[430] A silent order implies civil contempt only.[431] The court must specify the fine's amount and the imprisonment's duration.[432] Determinate sentences are possible only for criminal contempt. For civil contempt, a jail sentence of specific duration is inappropriate because "the offender has it within his power to perform the act or duty required by the underlying order."[433] In other words, civil contemnors hold the key to their jail cells. They must be released if they perform the act for which they are incarcerated.

A contemnor committed for a definite time and who fails to pay the criminal-contempt fine may be imprisoned until the fine is paid.[434] A contemnor may not, however, be imprisoned indefinitely. If the contemnor complied with the repair order but failed to pay a fine of less than $500, the contemnor may be confined for up to three months; if the contemnor complied with the repair order but failed to pay a fine more than $500, the contemnor can be confined for up to six months.[435] The language the HP judge must use to impose sentence is spelled out in at least one published opinion.[436]

The HP court has the discretion in criminal-contempt cases to allow contemnors to purge themselves of the contempt by performing community service.[437] The court may also award costs, expenses, and attorney fees to the aggrieved party as "reasonable and necessary costs and

---

430. Judiciary Law § 770.

431. *Seril v. Belnord Tenants Ass'n*, 139 A.D.2d 401, 401-02, 526 N.Y.S.2d 462, 464 (1st Dep't 1988) (mem.).

432. Judiciary Law § 774(1).

433. *Dep't of Hous. Preservation & Dev. v. Foster*, 17 H.C.R. 341A, N.Y. L.J., Sept. 13, 1989, at 21, col. 2 (App. Term 1st Dep't) (per curiam) (vacating determinate sentence of 30 days for civil contempt.)

434. Judiciary Law § 774(1).

435. *Id.*

436. *See Allen*, 33 H.C.R. 13A, 5 Misc. 3d 1032(A), at *3-9, 2004 N.Y. Slip Op. 51666(U), at *3-9, 2004 WL 2963907, at *5-11, 2004 N.Y. Misc. LEXIS 2770, at *9-15.

437. *Gregori v. Ace 318 Corp.*, 134 Misc. 2d 871, 876, 513 N.Y.S.2d 620, 625 (Hous. Part Civ. Ct. N.Y. County 1987), *modified on other grounds per curiam*, 142 Misc. 2d 1028, 540 N.Y.S.2d 636 (App. Term 1st Dep't 1989); *Odimgbe*, 153 Misc. 2d at 593-94, 582 N.Y.S.2d at 915-16.

expenses" in pursuing civil contempt.[438] The court may not award attorney fees for criminal contempt, which is meant to punish a party for disobeying a court order.[439] But attorney fees may be awarded, as explained below, to compensate an aggrieved party in a civil-contempt proceeding. Attorney fees may also be awarded if the petitioner moves for both civil and criminal contempt, because the purpose of civil contempt is to compensate the aggrieved party.[440]

If the HP finds that the respondent-owner willfully disobeyed its mandate, the court may fine the criminal contemnor up to $1000, payable to the New York City Commissioner of Finance, or imprison the contemnor for up to 30 days, or both.[441] The maximum fine may be imposed against each contemnor.[442] Under Judiciary Law § 751(1), a contemnor who fails to pay the criminal-contempt fine may be imprisoned up to an additional 30 days. The penalty for criminal contempt, intended to compel respect for the court's mandate, is punitive rather than coercive.[443]

If civil contempt is established, the petitioner-occupant may seek compensatory fines for actual damages resulting from the contemnor's misconduct[444] but only "for the period following the repair deadline set forth in the order."[445] Under Judiciary Law § 773, compensation for the

---

438. Judiciary Law § 773; *see also Holskin v. 22 Prince St. Assocs.*, 178 A.D.2d 347, 348, 577 N.Y.S.2d 399, 400 (1st Dep't 1991) (mem.); *Glanzman v. Fischman*, 143 A.D.2d 880, 881, 533 N.Y.S.2d 525, 526 (2d Dep't 1988) (mem.), *appeal dismissed*, 74 N.Y.2d 792, 545 N.Y.S.2d 107, 543 N.E.2d 750 (1989); *Quantum Heating Servs.*, 121 A.D.2d at 843, 503 N.Y.S.2d at 82; *Ross*, 12 Misc. 3d at 572 , 814 N.Y.S.2d at 847 (assessing attorney fees for tenant who prevailed on civil contempt motion in HP proceeding); *Alfonso v. Rosso*, 137 Misc. 2d 915, 916-17, 522 N.Y.S.2d 813, 814-15 (Hous. Part Civ. Ct. N.Y. County 1987).

439. *Clinton Corner HDFC v. Lavergne*, 279 A.D.2d 339, 341, 719 N.Y.S.2d 77, 80 (1st Dep't 2001) (mem.).

440. *Soho Alliance v. World Farm Inc.*, 300 A.D.2d 22, 22, 749 N.Y.S.2d 879, 879 (1st Dep't 2002) (mem.).

441. Judiciary Law § 751(1).

442. *Deka Realty*, 208 A.D.2d at 45, 620 N.Y.S.2d at 842 (imposing maximum $1000 fine for criminal contempt against each contemnor).

443. *King v. Barnes*, 113 N.Y. 476, 480, 21 N.E. 182, 183 (1889) (per curiam).

444. Judiciary Law § 773; *Martinez*, 23 H.C.R. 606B, N.Y. L.J., Oct. 17, 1995, at 32, col. 1.

445. LEHRER, *supra* note 77, at 13.

"actual loss or injury [must be] sufficient to indemnify the aggrieved party." Actual damages may include, if quantifiable in a dollar amount, the economic value of the petitioner-occupant's leasehold,[446] damage to property, loss of time from work, out-of pocket expenses, pain and suffering, and loss of quality of life.[447] A petitioner-occupant's actual damages may also include damages for the respondent-owner's breaching the warranty of habitability under RPL § 235-b. Damages are calculated from the deadline for repairs in the court's order or the parties' stipulation.[448]

A petitioner-occupant may bring a plenary action or assert a defense in another proceeding seeking damages or an abatement for a breach of the warranty of habitability occurring before the deadline in the court's order or the parties' stipulation. A petitioner-occupant may not collect both an abatement in a nonpayment proceeding and a compensatory award for breach of warranty of habitability for the same conditions and time period; occupants must elect their remedies.

If the petitioner-occupant is unable or chooses not to establish actual damages, the HP, if it sustains the motion for civil contempt, may award up to $250 plus costs and expenses,[449] including attorney fees, for each moving petitioner-tenant,[450] but not for each violation.[451] Thus,

---

446. *Martinez*, 23 H.C.R. 606B, N.Y. L.J., Oct. 17, 1995, at 32, col. 1.

447. *Arnold v. Forest Hills No. 1 Co. Gale Realty*, N.Y. L.J., June 2, 1981, at 11, col. 6 (App Term 2d Dept 2d & 11th Jud. Dists.) (mem.) (warranty of habitability); *Resolution GGY OY v. Mixon*, 25 H.C.R. 317A, N.Y. L.J., June 11, 1997, at 32, col. 6 (Hous. Part Civ. Ct. Kings County) (awarding "both out-of-pocket actual monetary damages and all actual nonpecuniary damages for the injuries they demonstrated" and "damages for pain and suffering and diminution of the quality of life to compensate respondents for the physical and emotional consequences of any injury including their ability to enjoy normal pursuits"); *Quinn v. Kim*, 25 H.C.R. 34B, N.Y. L.J., Jan. 15, 1997, at 26, col. 5 (Hous. Part Civ. Ct. N.Y. County) (same).

448. LEHRER, *supra* note 77, at 3 ("[T]he period for which . . . damages [for breaching the warranty of habitability] may not pre-date the deadline for repairs set forth in the court's order to correct [or the stipulation].").

449. *See* Judiciary Law § 773; *Brown v. 315 E. 69 St. Owners Corp.*, 34 H.C.R. 441A, 11 Misc. 3d 1069(A), 2006 N.Y. Slip Op. 50434(U), *3, 2006 WL 756074, at *3, 2006 N.Y. Misc. LEXIS 562, at *3 (Hous. Part Civ. Ct. N.Y. County, Mar. 21, 2006) (awarding petitioners $250 for civil contempt because they were unable to establish actual damages).

450. *Gregori v. Ace 318 Corp.*, 142 Misc. 2d 1028, 1029, 540 N.Y.S.2d 636, 636 (App. Term 1st Dep't) (per curiam) ("[E]ach petitioner, as an "aggrieved party" or "complainant", is entitled to recover the statutory fine of $250. Each petitioner clearly has a separate contempt claim and should not be penalized because those claims have been consolidated in one proceeding.") (citations omitted).

whether or not the occupant can establish actual damages in a civil-contempt proceeding, the occupant is entitled to recover the costs, expenses, and attorney fees for bringing the contempt motion.[452] Whether appellate costs, expenses, and attorney fees are recoverable depends on the contempt order's language.[453]

Under Judiciary Law § 773, an owner's paying and an occupant's accepting a civil-contempt fine for the occupant's actual loss bars the occupant from commencing a plenary action to recover damages for the same loss. As one expert explained, "one should carefully consider whether to seek such damages in a contempt motion or in a separate action or proceeding."[454]

In addition to paying compensatory damages, the civil contemnor may be imprisoned indefinitely—much longer than the 30-day maximum for criminal contempt—until the act is performed and all fines are paid, if the misconduct consists of the contemnor's failure to perform an act or duty that the court finds was and continues to be within the contemnor's power to perform.[455] Even if the court's order requires the contemnor to correct multiple violations, the contemnor's failure to correct multiple violations is punishable as a single contempt.[456] The imprisoned contemnor is entitled to appear before the HP sentencing judge at least once every 90 days for the judge to determine whether release from prison is appropriate.[457] A civil contemnor who complies with the court's mandate but fails to pay the requisite fines may be imprisoned for up to three months, if the fine is less than $500, or up to six months if the fine is $500 or more.[458]

---

451. *Deka Realty*, 208 A.D.2d at 44-45, 620 N.Y.S.2d at 841-42.

452. *Jamie v. Jamie*, 19 A.D.3d 330, 330, 798 N.Y.S.2d 36, 37-38 (1st Dep't 2005) (mem.).

453. *Id.* at 331, 798 N.Y.S.2d at 37.

454. LEHRER, *supra* note 77, at 14.

455. Judiciary Law § 774(1); *People ex rel. Feldman v. Warden, N.Y.C. Corr. Inst. for Women*, 46 A.D.2d 256, 258, 362 N.Y.S.2d 171, 173 (1st Dep't 1974), *aff'd mem.*, 36 N.Y.2d 846, 370 N.Y.S.2d 913, 331 N.E.2d 691 (1975).

456. *See N.A. Development Co. v. Jones*, 99 A.D.2d 238, 245, 472 N.Y.S.2d 363, 367 (1st Dep't 1984) (affirming criminal-contempt finding punishing contemnor for not correcting multiple violations with single count of contempt).

457. *See* Judiciary Law § 774(2).

458. *Id.* § 774(1); *N.A. Development Co., Ltd. v. Jones*, 114 Misc. 2d 896, 899, 452 N.Y.S.2d 992, 994 (Hous. Part Civ. Ct. N.Y. County 1982), *modified on other grounds*, 99 A.D.2d 238, 472 N.Y.S.2d 363 (1st Dep't 1984).

If the civil contemnor is unable to perform the act—for example, the contemnor can no longer pay for the repairs• imprisonment is limited to six months and until the fine, if any, is paid.[459] The purpose of civil contempt is to coerce compliance with the order to correct and to compensate injured parties, not to punish.[460]

If the respondent-owner appears and opposes a motion for civil or criminal contempt but then defaults on the return date for the hearing, the court may hold an inquest or direct HPD to submit an order directing the sheriff to arrest the alleged contemnor.

An order adjudicating an accused contemnor in criminal contempt must be reduced to writing, specify that the contemnor is cited for criminal contempt, outline the particular circumstances of the offense in the mandate of commitment if the contemnor is sentenced to jail,[461] explain that the contemnor's conduct was willful, and specify the amount of the fine and the duration of the incarceration.

An order adjudicating an accused contemnor in civil contempt must be reduced to writing. The order must state that the contemnor is cited for civil contempt, although not doing so is not always fatal.[462] It must also, under Judiciary Law § 774(1), specify the amount of the fine and the duration of the jail term. The opinion underlying the order must further describe the acts the contemnor committed or omitted and state what the contemnor must to do to purge the contempt.[463] For civil contempt, moreover, the court, to comply with Judiciary Law § 753, "must

---

459. Judiciary Law § 774(1).

460. *State of N.Y. v. Unique Ideas, Inc.*, 44 N.Y.2d 345, 349-50, 405 N.Y.S.2d 656, 658-59, 376 N.E.2d 1301, 1303-04 (1978).

461. Judiciary Law § 752.

462. *Seril v. Belnord Tenants Ass'n*, 139 A.D.2d 401, 401-02, 526 N.Y.S.2d 462, 464 (1st Dep't 1988) (mem.) (forgiving the hearing court's failure to denominate its finding as one for civil or criminal contempt because "[r]espondent . . . concedes that she originally sought an order holding defendant in civil contempt, and the order itself cites as authority a civil case reciting the standard of proof necessary to support a finding of civil contempt").

463. *Loeber v. Teresi*, 256 A.D.2d 747, 749, 681 N.Y.S.2d 416, 418-19 (3d Dep't 1998) ("'Every order adjudging a party guilty of a civil contempt must contain three items: (1) a description of the acts which were committed or omitted by the [party] constituting the contempt; (2) a determination of what the [party] should do, or how much he should pay, if anything, in order to purge himself from contempt; and (3) an adjudication that the acts done or omitted impaired the rights of a party to the action.'" (quoting 21 N.Y. Jur. 2d, Contempt, § 136, at 523) (alterations added) (citing Judiciary Law §§ 755, 774(1).).

expressly find that the person's actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party to a civil proceeding."[464] If the opinion does not do so, the judgment will be modified if the record supports that finding,[465] or reversed if it does not. The order must specify the sanction; it may not hold the contemnor's punishment in abeyance.[466] An order providing for commitment is executable, without further process, by a New York City sheriff on service of a certified copy of the order.[467]

If, after the HP awards money for contempt, the judgment debtor is hiding in or is about to leave the state with unexempt property, CPLR 5250 provides that a court on an ex parte motion can issue a warrant directing the sheriff to seize the debtor and bring him to court.[468] This order directs the debtor to appear for an accounting of assets to assure compliance with any restraining notice.[469]

DIVISION OF HOUSING AND COMMUNITY RENEWAL

The DHCR oversees and regulates public and publicly assisted rental housing, community development and preservation programs, and rent administration for the over-one-million rent-regulated properties in New York City and the surrounding counties.[470] Housing Court has concurrent jurisdiction with the DHCR in many instances.[471]

---

464. *Oppenheimer v. Oscar Shoes, Inc.*, 111 A.D.2d 28, 29, 488 N.Y.S.2d 693, 695 (1st Dep't 1985) (mem.).

465. *Vastwin Invs. v. Aquarius Media Corp.*, 295 A.D.2d 216, 217, 743 N.Y.S.2d 492, 493 (1st Dep't 2002) ("The absence of the required recital pursuant to Judiciary Law § 770 was . . . a mere irregularity and we, accordingly, modify only to include the required language in the order."), *appeal dismissed*, 99 N.Y.2d 637, 760 N.Y.S.2d 91, 790 N.E.2d 264 (2003).

466. *Seril*, 139 A.D.2d 401, 402, 526 N.Y.S.2d 462, 464 ("Although a contempt order may provide a party with an opportunity to purge the contempt, it cannot 'defer, dependent upon future conduct, the determination of what punishment shall be inflicted.'" (quoting N.Y. Jur. 2d Contempt at 330)).

467. *See* Judiciary Law § 772.

468. CPLR 5250.

469. *Id.*

470. *N.Y. St. Div. Hous. & Comm. Renewal*, *available at* http://www.dhcr.state.ny.us (last visited Apr. 25, 2007).

471. *Principe v. Jemrock Realty Co.*, 24 H.C.R. 251A, N.Y. L.J., May 8, 1996, at 29, col. 6 (Hous. Part Civ. Ct. N.Y. County) (noting that D.H.C.R. does not have exclusive jurisdiction

Under the DHCR's regulations, an owner must provide and maintain all services and equipment, building wide and within individual apartments, required by rent-control or rent-stabilization regulations, including repairs, heat and hot water, maintenance, painting, and janitorial services.[472] If the landlord does not maintain these services, the tenant, with certain exceptions, must first inform the owner in writing.[473] If the owner does not restore services to an individual apartment, the tenant may complain to the DHCR by filling out form RA-81, entitled "Individual Tenant Statement of Complaint of Decrease in Services."

For a decrease in building-wide services, the tenant may complain to DHCR by filling out form RA-84, entitled "Statement of Complaint of a Decrease in Building-Wide Services." The DHCR may then inspect the premises. If, after an inspection, the DHCR finds that the owner has not provided adequate services to the apartment, the DHCR will issue an order listing the specific services the owner failed to maintain, reducing the rent, and directing the owner to restore the services.[474] The HP can issue an order to correct the conditions underlying a DHCR order to correct and consider a DHCR order when deciding whether to impose a violation for an alleged condition.[475]

For more information about rent-regulated housing in NYC, visit the DHCR's Web site at http://www.dhcr.state.ny.us (last visited Apr. 25, 2007)

HPD'S DIVISION OF NEIGHBORHOOD PRESERVATION

HPD's Division of Neighborhood Preservation (DNP), formerly the Division of Anti-Abandonment, addresses New York City's at-risk housing by identifying buildings in distress, assessing building conditions, and working with building owners to correct building problems. Owners can attend introductory seminars given by the Housing Education Program, receive services from not-for-profit organizations like the Neighborhood Preservation Consultants

---

over housing standards).

472. http://www.dhcr.state.ny.us/ora/pubs/html/orafac3.htm (last visited Apr. 25, 2007).

473. *N.Y. St. Div. Hous. & Comm. Renewal, available at* http://www.dhcr.state.ny.us (last visited Apr. 25, 2007).

474. *Id.*

475. *Dominijanni v. Marassa*, 20 H.C.R. 634A, N.Y. L.J., Oct. 28, 1992, at 23, col. 4 (Hous. Pt. Civ. Ct. Kings County) (declining to exercise jurisdiction, however, because petitioner-tenants in HP case had also brought D.H.C.R. proceeding, and doing so "elevated the D.H.C.R. as the forum to resolve their claim").

(NPCs), or meet with the Owner Services Program (OSP) for financial and credit counseling.[476] The Division of Neighborhood Preservation, part of HPD's Office of Preservation Services, has loan programs that offer owners low-interest home-improvement loans.[477]

In the past, the City's real-property tax policy resulted in long-term City ownership and management of large numbers of tax-delinquent residential properties.[478] Not only did the policy fail to address the underlying reasons for tax delinquency and abandonment, but the City was unable to resell the properties quickly to responsible private owners. Local Law 26 of 1996 now permits the Commissioner of Finance to sell the tax liens of properties that have tax arrears but are not distressed.[479] Under Local Law 37 of 1996, the Department of Finance may initiate an in rem foreclosure proceeding to compel the owner to pay taxes.[480] If the taxes are not paid, the City can convey a tax-delinquent residential property to a qualified third party after obtaining an in rem foreclosure judgment.[481] Similarly, HPD can bring an in rem proceeding in Supreme Court against a building that has a money judgment against it to impose civil penalties or contempt.[482]

Through its Article 7-A Program, HPD can ask the HP court to appoint administrators to operate privately owned but neglected buildings that have conditions dangerous to an occupant's life, health, and safety. Article 7-A administrators act under court order to collect rent. They use the rent money to provide essential services to the tenants and make necessary repairs.[483] Tenant- and HPD-initiated Article 7-A proceedings are heard in the HP.

---

476. *Division of Neighborhood Preservation, available at* http://home2.nyc.gov/html/hpd/html/pr2006/pr-12-07-06.shtml (last visited Apr. 25, 2007).

477. *Id.*

478. *Id.*

479. *In Rem Actions and Third Party Transfer to Responsible Private Owners, available at* http://www.nyc.gov/html/hpd/html/developers/third-party-ownership.shtml (last visited Apr. 25, 2007).

480. *Id.*

481. *Id.*

482. *See, e.g.*, *Allen*, 33 H.C.R. 13A, 5 Misc. 3d 1032(A), 2004 N.Y. Slip Op. 51666(U) at *3, 2004 WL 2963907, at *5, 2004 N.Y. Misc. LEXIS 2770, at *9 (granting HPD money judgment enforceable as lien against building).

483. *7-A Management, available at* http://www.nyc.gov/html/hpd/html/owners/supporting-7a.shtml (last visited Apr. 25, 2007).

ARTICLE 7-A PROCEEDINGS

Article 7-A Generally

In a tenant-initiated proceeding, one-third or more of a dwelling's tenants may commence a summary proceeding under RPAPL Article 7-A. The HPD commissioner may also initiate an Article 7-A proceeding without regard to the one-third requirement. However, one-third or more of the tenants may, at any time during an HPD-initiated proceeding or after the final judgment, move to substitute themselves in HPD's place. The HP judge should grant the motion unless HPD or the owner shows good reason to the contrary.[484] Tenants have standing to bring a tenant-initiated Article 7-A proceeding if they occupy the building,[485] if they were removed because of a vacate order, if they occupy City-owned housing,[486] if they are proprietary lessees,[487] or if they are free-market, rent-stabilized, or rent-controlled tenants.[488] If the tenants prevail, the HP court may appoint an Article 7-A administrator to manage the building.[489]

An Article 7-A proceeding is available to tenants when a dwelling lacks heat, running water, light, electricity, or adequate sewage disposal facilities or has any other condition dangerous to life, health, or safety for five days, or if the owner harasses, illegally evicts, or

---

484. 3 ROBERT F. DOLAN, RASCH'S LANDLORD AND TENANT—INCL. SUMMARY PROCEEDINGS § 49:2, at 268 (4th ed. 1998); *Long v. Kissling Real Estate*, 80 Misc. 2d 817, 819, 364 N.Y.S.2d 134, 136 (County Ct. Rockland County 1975) (noting that in Suffolk, Nassau, Westchester, and Rockland counties, only tenants have standing to bring Article 7-A proceeding).

485. *See Ansonia Assocs. v. King*, 20 H.C.R. 306A, N.Y. L.J., May 27, 1992, at 24, col. 2 (Hous. Part Civ. Ct. N.Y. County) (noting that under RPAPL 770, only occupants may maintain 7A proceeding).

486. *See Artis v. City of New York*, 133 Misc. 2d 629, 632-35, 509 N.Y.S.2d 734, 736-38 (Hous. Part Civ. Ct. N.Y. County 1986) (allowing residents of City-owned housing to bring Article 7-A proceeding).

487. *Wall St. Transcript Corp. v. Finch Apt. Corp.*, 148 Misc. 2d 181, 183-84, 559 N.Y.S.2d 920, 922 (Hous. Part Civ. Ct. N.Y. County 1990) (counting cooperative shareholder tenants and non-purchasing tenants toward one-third requirement).

488. *Schachtman v. N.Y. St. Div. of Hous. & Comm. Renewal*, 143 A.D.2d 53, 54, 531 N.Y.S.2d 804, 805 (1st Dep't 1988) (mem.) (allowing rent-stabilized tenants to pay stabilized rent even though doing so would deplete funds available for repairs).

489. RPAPL 770(1).

continually deprives tenants of essential services.[490] A non-functioning bell and buzzer or intercom system are grounds for an Article 7-A proceeding;[491]a landlord's failure to employ a 24-hour doorman is not.[492] HPD generally requires at least two class "C" immediately hazardous violations in each unit before it will consider bringing an HPD-initiated Article 7-A proceeding, unless the violations are particularly serious.[493]

Article 7-A is an ameliorative statute. When possible, it should be given priority over other statutes to foster safe and affordable housing.[494] Although the statute is broadly construed, it does not bar an owner from entering an Article 7-A building to inspect or to recover personal property, so long as the owner does not interfere with the 7-A administrator's duties. [495] The order of appointment typically allows the owner to access the building to inspect or to recover personal property. Because Article 7-A is intended to promote the public good, a tenant may not in a lease or stipulation waive the right to bring an Article 7-A proceeding.[496]

The number of Article 7-A proceedings has been declining in recent years, reflecting New

---

490. *Id.*; *see also Dep't of Hous. Preservation & Dev. v. 3443 Fulton St.*, 17 H.C.R. 109A (Hous. Part Civ. Ct. Kings County 1988) (finding harassment or deprivation to be grounds for 7-A even if not dangerous to life, health, or safety).

491. *Tynan v. Willowdale Commercial Corp.*, 69 Misc. 2d 221, 223, 329 N.Y.S.2d 695, 697-98 (Civ. Ct. Bronx County 1972) (finding that faulty bell and buzzer system inoperative for extended period of time is dangerous to tenants' life, health, or safety).

492. *DeKoven v. 780 W. End Realty Co.*, 48 Misc. 2d 951, 954, 266 N.Y.S.2d 463, 467 (Civ. Ct. N.Y. County 1965) (holding that failure to provide doorman cannot lead to Article 7-A administrator).

493. N.Y.C. Indep. Budget Office, Review of the Department of Housing Preservation and Development's Article 7A Program 1 (revised May 9, 2003), *available at* http://www.ibo.nyc.ny.us/iboreports/7amemo.pdf (last visited Apr. 25, 2007).

494. *See Rodriguez v. Flores*, 154 Misc. 2d 160, 162, 584 N.Y.S.2d 269, 271 (Hous. Part Civ. Ct. N.Y. County 1992) (holding that giving priority to RSL § 26-517.1, which requires owners of rent-controlled or rent-stabilized apartments to pay fee before raising rents, would frustrate aims of Article 7-A); *Himmel v. Chase Manhattan Bank*, 47 Misc. 2d 93, 96, 262 N.Y.S.2d 515, 519 (Civ. Ct. N.Y. County 1965) (finding Article 7-A a constitutional exercise of state's police power).

495. *See People v. Mauer*, 82 Misc. 2d 753, 756, 370 N.Y.S.2d 443, 446 (Crim. Ct. Bronx County 1975) (finding owner not guilty of criminal trespass if entering building did not interfere with administrator's duties).

496. RPAPL 780.

York State's competitive real-estate market.[497] When property values are high, landlords are unwilling to lose control of their buildings to a court-appointed administrator. Owners dislike the program, and thus maintain their buildings better than they did in years past, because although administrators receive all the rent money, owners must continue to pay mortgage installments, insurance premiums, and property taxes.[498] Because they frequently cannot make these payments without rental income, owners risk losing their 7-A properties through mortgage and tax foreclosures.[499] Although an owner may sell an Article 7-A-administered property, it is difficult to find a buyer willing to take on the burdens of Article 7-A administration.

Commencing an Article 7-A Proceeding

Article 7-A proceedings begin with a petition and notice of petition issued by a judge or the HP clerk,[500] not by an order to show cause with a verified petition, an affidavit in lieu of petition, or a summons and complaint. It is unnecessary to obtain Supreme Court's leave to begin an Article 7-A proceeding.[501] The Civil Court clerk's office does not have pro se forms for Article 7-A proceedings; professional help to begin an Article 7-A proceeding is therefore advised. The notice of petition should specify the time and place of the hearing and state that if the owner does not establish a defense, the HP judge may direct that all rents be deposited with an Article 7-A administrator to remedy the alleged conditions.[502] The petition should include the identity of all petitioners and respondents, the address of the premises, the material facts that support the contention that detrimental conditions exist, a brief description of work to be performed, and (if HPD initiated) a cost estimate, the amount of rent due from each petitioner, and the ultimate relief sought.[503] In a tenant-initiated proceeding, the petition need not include the estimate of correction costs.[504] The petitioner-tenants or HPD may file a lis pendens in the

---

497. *See* N.Y.C. Indep. Budget Office, *Saving Homes: City Spending on Housing Preservation Grows* 6 (Feb. 2003), *available at* http://www.ibo.nyc.ny.us/iboreports/antiabandonment.pdf (last visited Apr. 25, 2007).

498. William Tucker, *The Hidden Cost of Housing Madness*, CITY JOURNAL 6 (Autumn 1990), *available at* http://www.city-journal.org/article01.php?aid=1629 (last visited Apr. 25, 2007).

499. *Id*.

500. RPAPL 771(1).

501. *Esquilin v. Jain*, 217 A.D.2d 571, 571, 628 N.Y.S.2d 822, 823 (2d Dep't 1995) (mem.).

502. RPAPL 771(2).

503. *Id*. 772(1)-(5).

504. *Maresca v. 167 Bleecker, Inc.*, 121 Misc. 2d 846, 848, 467 N.Y.S.2d 130, 132-33 (Hous.

County Clerk's office.[505] The petition and notice of petition must be served at least five days before the hearing date.[506]

RPAPL 771(3) requires the tenants or HPD to serve the last owner of the building registered with HPD; every mortgagee and lienor of record (including HPD's ERP or the New York City Department of Health and Mental Hygiene); New York City, through the HPD commissioner; and a receiver if one has been appointed for a building.[507] For Article 7-A proceedings, "owner" includes the owner of the freehold of the premises, a mortgagee or vendee in possession, an assignee of rents, and a receiver, executor, trustee, lessee, agent, or any other person, firm, or corporation controlling a dwelling directly or indirectly.[508] A proceeding may be maintained against New York City with respect to buildings the City acquired through an in rem tax foreclosure.[509] Petitioner-tenants or HPD need not name in the petition any non-petitioning tenants, but these tenants must be given notice of the proceeding by the petitioners' "affixing a copy of the notice of petition and petition upon a conspicuous part of the subject dwelling."[510]

RPAPL 771(5)(a) requires due diligence in effecting personal delivery of the petition and

---

Part Civ. Ct. N.Y. County 1983) (holding that tenants are not competent to estimate costs and are not required to do so).

505. Donoghue, *supra* note 287, at 237; *see also Dep't of Hous. Preservation & Dev. v. Holmes*, 29 H.C.R. 422A, 2001 N.Y. Slip Op. 40183(U), *12, 2001 WL 1358625, at *12, 2001 N.Y. Misc. LEXIS 433, *15-16 (Hous. Part Civ. Ct. Kings County, July 25, 2001) (holding that even if vacating lis pendens would not prejudice parties, court must consider prejudice to public, potential purchasers, or lending organizations).

506. RPAPL 771(3).

507. For a list of agencies enabling someone to find the owner last registered with HPD, any lienors of record, and the current owner (through tax records), see the Community Training Resource Center Fact Sheet 400, *available at* http://www.tenant.net/Rights/CTRC/tresourc.html (last visited Apr. 25, 2007).

508. RPAPL 781.

509. *See Artis*, 133 Misc. 2d at 631-35, 509 N.Y.S.2d at 736-38 (finding City, an "owner" under RPAPL 781, subject to 7-A proceedings for buildings it acquired through in rem tax foreclosures).

510. RPAPL 771(6); *accord Matthews v. Marcus Garvey Brownstone Houses, Inc.*, 188 Misc. 2d 503, 505, 729 N.Y.S.2d 292, 295 (Hous. Part Civ. Ct. Kings County 2001) (holding that court has no jurisdiction to hear case if notice to non-petitioning tenants was not posted in accordance with RPAPL 771(6)).

notice of petition. An affidavit of service must be filed with the HP clerk on or before the return date. If personal delivery to the owner and the building's registered managing agent cannot be made with due diligence, service can be made by posting the petition and notice of petition on the premises and, within two days of posting, by mailing a copy of the petition and notice of petition by certified or registered mail, return receipt requested, to the address listed for the owner on the MDR statement or to the address on the deed.[511]

Defenses to Article 7-A Proceedings

Valid affirmative defenses to an Article 7-A proceeding are that the alleged conditions do not exist or have been fixed[512]; that the tenants, their families, or their guests caused the conditions; or that the tenants have denied access to make the repairs.[513] No HP judge has held in a published opinion that economic infeasibility is not a defense in an Article 7-A proceeding, but no published opinion has allowed an owner to prevail on this defense in an Article 7-A proceeding, either.[514] Landlords have, however, occasionally prevailed by arguing that a building is not economically viable and that appointing an administrator would be futile.[515] Having a receiver is not a defense.[516] Nor is an owner's good intentions a defense.[517]

---

511. *See Eversley v. Ulkan Realty Corp.*, 70 Misc. 2d 153, 153, 332 N.Y.S.2d 496, 497-98 (Civ. Ct. N.Y. County 1972) (outlining Article 7-A service requirements).

512. *See Feliciano v. Kia*, 18 H.C.R. 301B, N.Y. L.J., June 11, 1990, at 26, col. 5 (App. Term 1st Dep't 1990) (per curiam) (finding that 7-A administrator should not be appointed if no conditions threaten tenants' life or health).

513. *Ansonia Assocs.*, 20 H.C.R. 306A, N.Y. L.J., May 27, 1992, at 24, col. 2 (denying appointment of administrator because tenants denied access to landlord to make repairs).

514. *See, e.g.*, *Mill River Realty*, 169 A.D.2d at 669, 565 N.Y.S.2d at 47 (holding defense of economic infeasibility unavailable if hardship was self-inflicted in light of owner's delay in making repairs despite repeated notices of violation); *St. Thomas Equities*, 128 Misc. 2d at 650-51, 494 N.Y.S.2d at 791-92 (holding that owner that collected rent could not argue non-economic viability when funds were available from HPD, and finding that owner withheld essential services to force tenants to move); *Cirillo*, 146 Misc. 2d at 804, 552 N.Y.S.2d at 495-96 (holding that self-inflicted economic hardship vitiates economic-infeasibility defense).

515. *McGovern v. 310 Riverside Corp.* 49 A.D.2d 949, 949, 374 N.Y.S.2d 137, 138 (2d Dep't 1975) (mem.) (holding that it might be a defense that building is economically non-viable and therefore that appointing administrator would be futile).

516. *See Gomez v. S. Williamsburg Better Hous. Corp.*, 129 Misc. 2d 542, 546, 493 N.Y.S.2d 419, 421 (Hous. Part Civ. Ct. Kings County 1985) (holding that even if receiver is in place, 7-A administrator may be appointed to correct conditions, because receiver is not required to repair but rather works for owner's benefit).

After trial, any person with an interest in the property, such as an owner or a mortgagee, may apply to correct the conditions. The movant must demonstrate its ability to correct the conditions promptly and then post security to guarantee performance.[518] If the movant does so, the HP judge may appoint an Article 7-A administrator to execute the judgment or enter an order directing the movant to make the repairs.[519]

Judgment

If the petitioner-tenants or HPD have proven the existence of the conditions alleged and the respondent-owner has not successfully raised a defense, RPAPL 776 outlines a judgment in an Article 7-A proceeding:

1. All rents due from the tenants shall be deposited with an administrator the HP judge appoints;

2. Future rents due from the tenants shall be deposited with the administrator as they become due;

3. Deposited rents will be used, according to the court's direction, to correct the conditions alleged in the petition; and

4. When the work the judgment directs is completed, any remaining funds will be turned over to the owner, along with an accounting of the rents deposited and the costs incurred.

A certified copy of the judgment must be personally served on each non-petitioning tenant and on HPD.[520]

The Article 7-A Administrator

The administrator may be "a person other than the owner, a mortgagee or lienor."[521] A

---

517. *Artis*, 133 Misc. 2d at 636, 509 N.Y.S.2d at 739.

518. RPAPL 777(a); *see also Shihab v. 215-217 W. 108th St. Assocs.*, 133 Misc. 2d 145, 149, 506 N.Y.S.2d 651, 654 (Hous. Part Civ. Ct. N.Y. County 1986) (giving mortgagees right to post bond and perform repairs themselves); *Maresca*, 121 Misc. 2d at 851, 467 N.Y.S.2d at 134 (finding that owner's assurances that corrections would be made were unconvincing).

519. N.Y.C. Indep. Budget Office, *supra* note 493, at 6.

520. RPAPL 776(b).

potential administrator must fill out an application with HPD and meet its requirements that the administrator have a property-management background heading an approved organization in operation for at least three years and has maintained buildings in a "very good" to "excellent" status with all New York State and City departments and agencies.[522] HPD currently has a list of 30 pre-qualified administrators for Article 7-A buildings.[523] Within 15 days of the appointment, the administrator must file with the County Clerk a transcript of the appointing judgment.[524]

An administrator's power includes ordering and paying for necessary materials, labor, and services; demanding, collecting, and receiving rents from the tenants; instituting all necessary legal proceedings (including summary holdover proceedings to remove tenants); renting or leasing any part of the premises for a term not longer than three years; and accepting and repaying money borrowed or received from HPD to make repairs the court authorizes.[525]

The administrator's first duty is to remove code violations. The administrator must disburse funds collected from rents and HPD loans in the following order: pay for work specified in the judgment; pay for the administrator's services;[526] pay the City's outstanding real-property tax liens;[527] pay outstanding liens; and pay the owner any surplus.[528] The administrator must file an accounting upon completing the work the judgment prescribes[529] and, unless New York City

---

521. *Id.* 778(1).

522. *Requirements to Qualify as a 7A Administrator, available at* http://www.nyc.gov/html/hpd/html/owners/7a-requirements-appli.shtml (last visited Apr. 25, 2007).

523. N.Y.C. Indep. Budget Office, *supra* note 493, at 3.

524. RPAPL 778(4).

525. *Id.* 778.

526. *See Cole v. Westlong Investors Corp.*, 65 Misc. 2d 114, 121, 318 N.Y.S.2d 342, 349 (Civ. Ct. N.Y. Country 1970) (holding that administrator's fee must be based on reasonable rate for management services and relate to amount of rent collected).

527. *See Kahn v. Riverside Syndicate, Inc.*, 59 Misc. 2d 238, 239, 298 N.Y.S.2d 853, 854 (Civ. Ct. N.Y. County 1969) (finding that Article 7-A administrator need not give owner rent money to pay charges like taxes or mortgage payments). For a discussion of 7-A liens, see *Rosenbaum v. City of N.Y.*, 96 N.Y.2d 468, 730 N.Y.S.2d 774, 756 N.E.2d 62 (2001).

528. RPAPL 778.

529. *Id.*

is the administrator, must post a bond in an amount and form the court determines.[530] In the court's discretion and for good cause shown, the court may dispense with the bond.[531]

An Article 7-A administrator may bring an action to evict a tenant for not paying rent, but the tenant may raise a warranty-of-habitability defense (if the tenant can prove under RPAPL 783 that the conditions were caused by the administrator's failure to perform duties in a reasonable manner)[532] or illegal-rent[533] defense or counterclaim against the administrator.

The administrator can be removed only by an order of the appointing HP judge if the conditions on which the appointment were based have been corrected and if the owner submits to the court a realistic plan for continued building maintenance.[534] Before the HP judge will relieve an administrator, the administrator must submit a proposal for a successor or a plan for further management and state the level at which essential services are maintained, the extent to which conditions have been remedied, and what remains to be done.[535] The administrator must also

---

530. *Id.* 778(3).

531. *Id.*

532. *See Dep't of Hous. Preservation & Dev. v. Sartor*, 109 A.D.2d 665, 666-67, 487 N.Y.S.2d 1, 2 (1st Dep't 1985) (mem.) (holding that RPL § 235(b) protects tenants who pay rent to 7-A administrators); *Geffner v. Phillips*, 123 Misc. 2d 127, 127, 472 N.Y.S.2d 851, 852 (Hous. Part Civ. Ct. N.Y. County 1984) (holding that counterclaim for breaching warranty of habitability against 7-A administrator states cause of action).

533. *See Olton v. Hunter*, 32 H.C.R. 306A, 3 Misc. 3d 133(A), 787 N.Y.S.2d 679, at *2, 2004 N.Y. Slip Op. 50437(U), at *2, 2004 WL 1159919, at *1, 2004 N.Y. Misc. LEXIS 616 (App. Term 1st Dep't, May 12, 2004) (per curiam) (holding that tenants entitled to credit rent overcharge against rent payments to an owner may continue credit even if Article 7-A administrator takes over management).

534. *See Dep't of Hous. Preservation & Dev. v. 333 W. 16 St. Assocs.*, 17 H.C.R. 210A, N.Y. L.J., June 7, 1989, at 21, col. 1 (App. Term 1st Dep't) (per curiam) (noting that to discharge administrator, "there should be at least a prima facie [s]howing that the reason for the appointment no longer exists. In other words, the movant would have to demonstrate to the trial court that repairs have been made or essential services provided and that there is a plan for the continued maintenance of the building.") (citing *Swallow v. Schnipper*, 12 H.C.R. 208B, N.Y. L.J., Sept. 21, 1984, at 14, col. 4 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2006) (mem.); *940 St. Nicholas Ave. Tenants Assoc., v. Dixon*, 13 H.C.R. 145B, N.Y. L.J., May 20, 1985, at 13, col. 5 (App. Term 1st Dep't) (per curiam); *Dep't of Hous. Preservation & Dev. v. DeKalb Ave.*, 31 H.C.R. 24B, N.Y. L.J., Jan. 16, 2003, at 24, col. 1 (Hous. Part Civ. Ct. Bronx County).

535. *Mercer v. 944 Marcy Ave. Holding Corp.*, 92 Misc. 2d 564, 567, 400 N.Y.S.2d 991, 994 (Hous. Part Civ. Ct. Kings County 1977) (outlining what administrator should submit to be

submit a detailed accounting of receipts and expenditures.[536] The administrator may also be removed for malfeasance, inefficiency, or ineffectiveness[537] or for failing to file required financial reports, to make repairs, or to apply for the loans that HPD estimated were necessary to effect repairs.[538] If a building is sold while under Article 7-A administration, the new owner may seek an order removing the administrator and allowing the owner to complete the remaining repairs.[539]

Attorney Fees

A tenant may recover legal fees in a successful Article 7-A proceeding if the lease contains an attorney-fees provision.[540] Landlords may also recover attorney fees when successfully defending an Article 7-A proceeding if a provision for fees is in the lease.[541]

RELOCATION EXPENSES

Tenants may recoup all reasonable relocation costs if their health and safety are at risk and if the owner is at fault for the conditions. If these criteria are met, the HP may enter a money judgment or order an owner to pay the tenants directly.[542] The HP's authority to direct an owner to pay for relocation is based on case law; no statute, including the Lead Law, allows for relocation expenses. If an apartment is contaminated by lead, the first place a tenant should apply for expenses is to the HPD administrator who contacted the occupant about the lead condition. If

---

relieved of duties).

536. Donoghue, *supra* note 287, at 241.

537. *Id*.

538. N.Y.C. Indep. Budget Office, *supra* note 493, at 3-4.

539. *Id*. at 2.

540. *See Greco v. GSL Enters., Inc*., 137 Misc. 2d 714, 716, 521 N.Y.S.2d 994, 996 (Hous. Part Civ. Ct. N.Y. County 1987) (holding that where an attorney-fee provision is in lease, tenants may recover fees from owner incurred during 7-A proceeding).

541. *See Thenebe v. Ansonia Assocs.*, 226 A.D.2d 211, 211, 640 N.Y.S.2d 552, 552-53 (1st Dep't 1996) (mem.) (holding that tenants whose leases provide for paying attorney fees may be liable for these fees incurred as a result of respondent's successfully defending against Article 7-A).

542. *Farber*, 30 H.C.R. 102A, 2002 N.Y. Slip. Op. 50064(U), at *3, 2002 WL 317987, at *1, 2002 N.Y. Misc. LEXIS 118, at *2 (finding in that case, however, that relocation costs were inappropriate).

HPD pays the relocation expenses because it, or the DOB or other agency, issued a vacate order, the City is entitled to reimbursement and may bill the owner and place a lien on the property.[543] Only tenants on a lease, not squatters or other occupants, are entitled to reimbursement, and the City may not seek reimbursement on a squatter's behalf.[544]

ATTORNEY FEES FOR PREVAILING HP LITIGANTS

When a lease permits an owner to recoup attorney fees in the event of litigation with a tenant, RPL § 234[545] affords HP tenant-litigants a reciprocal right to attorney fees if the tenant was forced to initiate an HP proceeding to compel compliance and prevails on the central claim for an order to correct.[546] The rule is different in the Second Department: To trigger a tenant's

---

543. Bldg. Code (Admin. Code) §§ 26-301 (regarding tenant's relocation and allocation of expenses), 26-305 (requiring that owner reimburse DHPD for providing relocation expenses to occupant); 28 RCNY 18-01 (HPD regulations); *Toolsee v. Dep't of Hous. Preservation & Dev.*, 299 A.D.2d 209, 211-12, 750 N.Y.S.2d 24, 26 (1st Dep't 2002) (mem.).

544. *City of N.Y. v. N.Y. & Hong Kong Reciprocation Exch.*, 193 Misc. 2d 716, 718-21, 749 N.Y.S.2d 405, 406-08 (Sup. Ct. N.Y. County 2002).

545. RPL § 234 provides that

> Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy.

546. *Fallon v. Seidel & Gross*, 20 H.C.R. 193B, N.Y. L.J., Apr. 13, 1992, at 29, col. 1 (App. Term 1st Dep't) (per curiam) (holding that tenants successful in HP proceeding are entitled to attorney fees); *313 W. 100th St. Tenants Ass'n*, 143 Misc. 2d at 567, 545 N.Y.S.2d at 54–55 (awarding attorney fees to tenants for costs arising out of breach of warranty-of-habitability claim).

statutory right to recover attorney fees in an HP proceeding, the lease must specifically provide for a right of recovery "in any action or summary proceeding" as delineated in RPL § 234.[547]

A tenant may be able to recover attorney fees even if the HP proceeding culminates in a consent order[548] without a trial or inquest. If the case is resolved by a stipulation of settlement, fees are awardable to the prevailing party only if the stipulation provides for fees or at least preserves a claim for them.[549] A tenant must request attorney fees in the verified petition or affidavit in lieu of petition. If the tenant did not do so, the tenant must move to amend. Attorney fees may not be awarded against HPD,[550] and in practice HPD never seeks attorney fees. Whether a respondent-landlord may recoup attorney fees is uncertain; no published opinion addresses the topic directly. At least one court suggested, however, that a landlord might have been entitled to attorney fees in an HP proceeding had the landlord been the prevailing party.[551]

CONCLUSION

The Housing Court has a broad mandate to preserve and protect housing stock. Practitioners for tenants and landlords must be familiar with code-enforcement mechanisms.

---

547. *Hamilton v. Menalon Realty, LLC.*, 14 Misc. 3d 13, 17, 829 N.Y.S.2d 400, 404 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2006) (mem.) (finding that because lease did not provide for right of recovery "in any action or summary proceeding," lease provisions entitling landlord to attorney fees did not sufficiently fall under RPL § 234).

548. *See generally Rosario v. 288 St. Nicholas Realty, Inc.*, 177 Misc. 2d 78, 79, 676 N.Y.S.2d 754, 755 (App. Term 1st Dep't 1998) (per curiam) ("Notwithstanding that the proceeding did not proceed to trial or final judgment, it was resolved by a court-ordered stipulation wholly favorable to the tenants which secured to them the central relief sought.") (citing *Nestor v. McDowell*, 81 N.Y.2d 410, 599 N.Y.S.2d 507, 615 N.E.2d 991 (1993)); *cf. Sykes v. RFD Third Ave. I Assocs. L.L.C.*, -- A.D.3d --, -- N.Y.S.2d --, 2007 N.Y. Slip Op 03002, at *2, 2007 WL 1052888, at *2, 2007 N.Y. App. Div. LEXIS 4380, at *3 (1st Dep't, Apr. 10, 2007) (granting attorney fees to tenants in non-HP proceeding because escrow agreement allowed prevailing party to collect fees and because tenants prevailed).

549. *Dorval v. 540 W. 146 St. Hous. Dev. Fund Corp.*, 35 HCR ####, Serial #00016473, 15 Misc. 3d 133(A), 2007 N.Y. Slip Op. 50717(U), *1, 2007 WL 1029037, at *1, 2007 N.Y. Misc. LEXIS 2205, at *1 (App Term 1st Dep't, Apr. 5, 2007) (per curiam) (finding premature Housing Part's determination that tenant was prevailing party because stipulation between landlord and tenant, which provided that landlord would make necessary repairs to correct violations, failed to provide which party would pay for repairs or attorney fees).

550. 177 Misc. 2d at 79, 676 N.Y.S.2d at 755.

551. *See Locker*, 23 H.C.R. 121A, N.Y. L.J., Feb. 28, 1995, at 29, col. 6 (denying attorney fees to both parties because neither party prevailed).

Tenants and landlords often have unrealistic expectations of what an HP proceeding can accomplish. It is important that practitioners be aware of their clients' rights and obligations under the housing codes and that they be familiar with the HP's practice and procedure. So, too, is it important that the courts handle HP proceedings fairly and patiently under the law to protect the rights of owners and occupants and to promote the public interest.