THERE ARE TOO MANY PEOPLE IN THAT APARTMENT!

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I. INTRODUCTION

I answer many questions on landlord and tenant law in New York City. Many of those questions can be grouped together under a broad category that I call -- *WHO, BESIDES THE TENANT ON THE LEASE, HAS A RIGHT TO BE IN AN APARTMENT AND FOR HOW LONG?* This booklet attempts to answer that question by explaining the various areas of real estate law that shape the answer, including the laws regarding: roommates; subletting; short term leasing (i.e. the law that affects Airbnb, Couchsurfing, and many other short-term leasing platforms); having a business in an apartment; and occupancy limits.

II. ROOMMATES AND FAMILY MEMBERS

Under New York Real Property Law § 235(f), often referred to as the "Roommate Law", a residential lease entered into by one tenant implicitly permits that tenant to share the apartment with either his/her immediate family or unrelated persons. **This is true even if a residential lease says otherwise**.

If a landlord violates the Roommate Law, a tenant may seek an injunction to enjoin and restrain such unlawful practice and, the tenant can recover actual money damages sustained as a result of such unlawful practice, including tenant's court costs and, depending on the lease, attorney fees.

A. A Lease for One Tenant

A landlord may not restrict occupancy of an apartment to a tenant or even to such tenant and his or her immediate family. Any such restriction in a lease is unenforceable as against public policy. The court will simply ignore it.

Any residential lease entered into by one tenant shall be construed to permit occupancy by:

- the tenant
- immediate family of the tenant
- one additional occupant, and
- dependent children of the occupant

An example of how this could work is as follows.

EXAMPLE # 1 – ONE TENANT ON THE LEASE

Landlord rents to Mr. Smith, **the tenant**. Mr. Smith moves his **immediate family** in, Mrs. Smith and their two children. Then Mr. and Mrs. Smith decide that they need a roommate in order to make ends meet. This is not so crazy – see the recent New York Times piece on married couples getting a roommate.[1] So Mr. and Mrs. Smith get Mr. Jones as a **roommate**. Mr. Jones has two **dependent children**. Now you have three adults and four children living in an apartment, even though there is only one tenant on the lease.

B. A Lease for MORE THAN One Tenant

Any residential lease entered into **by two or more tenants** shall be construed to permit occupancy by:

- tenants
- immediate family of tenants
- occupants and
- dependent children of occupants,
- provided that the total number of tenants and occupants, excluding occupants' dependent children, does not exceed the number of tenants specified in the current lease, and that at least one tenant or a tenants' spouse occupies the premises as his primary residence.

[1] http://www.nytimes.com/2015/04/12/realestate/married-with-roommates.html

In other words, if you make a residential lease with three tenants, there can be a ***combined number of tenants and occupants*** of no more than three. But see the following example using only two tenants on the lease for how this can work out.

EXAMPLE # 2 – MULTIPLE TENANTS ON THE LEASE

Landlord rents to Mr. Smith and Mr. Williams, **the tenants**. Mr. Smith moves his **immediate family** in, Mrs. Smith and their two children. Mr. Williams moves his **immediate family** in, Mrs. Williams and their two children. Mr. Williams, who remains on the lease, moves out because he takes a job in California. Then they get a roommate, Mr. Jones. Mr. Jones has two **dependent children**. **Now you have four adults and six children living in an apartment**, **even though there are only two tenants on the lease**.

If you examine the text of the statute (RPL § 235(f), included in the footnote below[2]) you see that the "immediate family of tenant" is omitted from the definition of

[2] Real Property Law § 235(f):

1. As used in this section, the terms:

(a) "Tenant" means a person occupying or entitled to occupy a residential rental premises who is either a party to the lease or rental agreement for such premises ...

(b) "Occupant" means a person, other than a tenant or a member of a tenant's immediate family, occupying a premises with the consent of the tenant or tenants.

2. It shall be unlawful for a landlord to restrict occupancy of residential premises, by express lease terms or otherwise, to a tenant or tenants or to such tenants and immediate family. Any such restriction in a lease or rental agreement entered into or renewed before or after the effective date of this section shall be unenforceable as against public policy.

3. Any lease or rental agreement for residential premises entered into by one tenant shall be construed to permit occupancy by the tenant, immediate family of the tenant, one additional occupant, and dependent children of the occupant provided that the tenant or the tenant's spouse occupies the premises as his primary residence.

4. Any lease or rental agreement for residential premises entered into by two or more tenants shall be construed to permit occupancy by tenants, immediate family of tenants, occupants and dependent children of occupants; provided that the total number of tenants and occupants, excluding occupants' dependent children, does not exceed the number of tenants specified in the current lease or rental agreement, and that at least one tenant or a tenants' spouse occupies the premises as his primary residence.

5. The tenant shall inform the landlord of the name of any occupant within thirty days following the commencement of occupancy by such person or within thirty days following a request by the landlord.

6. No occupant nor occupant's dependent child shall, without express written permission of the landlord, acquire any right to continued occupancy in the event that the tenant vacates the premises or acquire any other rights of tenancy; provided that

"occupant"[3]. This is important. In essence then, we have **four categories of humans** referred to in the statute, which are:

- tenants
- tenant's immediate family
- occupants (let's call them "roommates")
- occupant's dependent children ("roommates kids")

Thus the proviso that, *"provided that the total number of tenants and occupants, excluding occupants' dependent children, does not exceed the number of tenants specified in the current lease and that at least one tenant or a tenants' spouse occupies the premises as his primary residence",* excludes tenants' immediate families and roommate's kids. We only count the number of tenants and occupants (roommates).

In the above example, the lease allows two tenants. When Mr. Smith and Mr. Williams lived in the apartment, even when they had each moved in a wife and each moved in two kids (for a total of eight people in the apartment), but before they allowed Mr. Jones to come and stay with them, **the *total number of tenants and occupants*** (**Mr. Smith and Mr. Williams**) **was two**. Then Mr. Williams left for California. Later, Mr. Jones moved in with his two kids. Again, **the *total number of tenants and occupants*** (**Mr. Smith and Mr. Jones**) **was still only two**. Yet the number of people in the apartment increased by two to a total of ten, as Mr. Jones came with two kids.

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nothing in this section shall be construed to reduce or impair any right or remedy otherwise available to any person residing in any housing accommodation on the effective date of this section which accrued prior to such date.

7. Any provision of a lease or rental agreement purporting to waive a provision of this section is null and void.

8. Nothing in this section shall be construed as invalidating or impairing the operation of, or the right of a landlord to restrict occupancy in order to comply with federal, state or local laws, regulations, ordinances or codes.

9. Any person aggrieved by a violation of this section may maintain an action in any court of competent jurisdiction for:

(a) an injunction to enjoin and restrain such unlawful practice;

(b) actual damages sustained as a result of such unlawful practice; and

(c) court costs.

[3] RPL § 235-F (1)(b).

Here is a chart that may illustrate this better:

CATEGORY	WHO	NUMBER HUMANS	NUMBER TENANTS OR OCCUPANTS	NOTES
tenants	Mr. Smith, Mr. Williams	1	1	when Mr. Williams went to California Mr. Jones took his place
tenant's immediate family	Mrs. Smith and 2 Smith children; Mrs. Williams and 2 Williams children	6	0	
occupants ("roommates")	Mr. Jones	1	1	
occupant's dependent children ("roommates kids")	2 Jones dependent children	2	0	
	TOTAL	**10**	**2**	

Are there any limits on the number of people who can be in the apartment?! Yes. But we thought it first important that the reader really understand how the mechanics of the statute work before we start introducing the limitations.

C. How Many Humans Can Be Crammed Into An Apartment – Occupancy Limitations

So how many people can be crammed into an apartment?

Pursuant to New York City's Administrative Code Section 27-2075, there must be **at least 80 square feet per person in an apartment**. This goes for Multiple Dwellings and one- and two-family houses.

When measuring the available area, for purposes of this statute, the kitchen is counted but bathrooms are excluded.

For every two people who may lawfully reside in an apartment, one child under four may also reside there. In any case where the birth of a child or its attainment of the age of four causes the number of persons or children to exceed the maximum occupancy permitted, such excess occupancy shall be permissible until one year after such event.

A landlord may demand in writing that a tenant submit an affidavit setting forth the names and relationship of all occupants residing within an apartment and the ages of any minors. In the event of an increase in the number of occupants, the tenant must advise the landlord.

Unfortunately, eighty square feet is not very big. In the above Example 2, if two of the six children are under four-years old, then the space required to house the ten people is 640 square feet, including the kitchen. Remember, Example 2 applied to TEN (10) humans. Thus, 10 people can be legally crammed into 640 square feet. Here is a chart, which may better illustrate how this works.

	units of 80 sf	**actual people**
4 Adults (and 2 freebie kids under four)	4	6
4 kids over four	4	4
TOTAL UNITS	*8*	*10*
80 square feet each unit =	**640**	

D. Some Other Requirements and Limitations on the Tenant Under the Roommate Law

There are a few other caveats for a tenant under the Roommate Law.

The tenant must inform the landlord of the name of any occupant within thirty days following the commencement of occupancy by such person or within thirty days following a request by the landlord. We recommend that landlords build into their management protocols a regular request to tenants for information about who is occupying their apartments.

A roommate does not acquire any right to continued occupancy in the event that the tenant vacates the premises.

Nothing in the Roommate Law shall be construed as invalidating or impairing the operation of, or the right of a landlord to restrict occupancy in order to comply with federal, state or local laws, regulations, ordinances or codes.

E. Some Real Life Examples of Roommate Law Questions

Below are two questions from LandlordsNY members that the author answered in her capacity as "Legal Expert"[4].

Question: (paraphrased) *"I have a two-family home and I want to write the lease for the rental apartment in such a way that the tenants cannot have a guest for more than a month. In addition, if the tenants do have a guest for more than a month, can I charge if their guest stays more than 29 days? I am renting the better space of my two-family house, a 1500sq ft duplex and it is very spacious. Thus, I am constantly dealing with this issue, especially when there's only two people in a two-bedroom apartment of such a large size. How can I word this so it a legal statement on my lease."*

Answer

I hate to be the bearer of bad news – but you cannot legally prevent either of your tenants from having roommates. Please listen carefully.

Under New York Real Property Law § 235(f), often referred to as the "Roommate Law", a residential lease entered into by one tenant implicitly permits that tenant to share the apartment with either his/her immediate family or unrelated persons "for reasons of economy, safety and companionship." RPL § 235(f)-3. **This is true even if a residential lease says otherwise**.

In fact, as long as the tenant or the tenant's spouse is still living there full time (i.e. they haven't sublet the apartment), you have to let the tenant's immediate family move in with him or her, and on top of that, one additional occupant. That can get more crowded than you like, especially since you are living in the house as well. But you have no choice.

What CAN you do? Here are some suggestions.

[4] https://www.landlordsny.com

- Screen potential tenant very well. Get references and actually check them. Talk to the potential tenant's last landlord.

- Pursuant to RPL § 235 (f)-5, you can request that the Tenant tell you the name of the occupant within thirty days of you demanding such. This isn't much, but it can show the tenant that you are watching the situation. Also, if tenant has more than one extra occupant, then you can talk to your lawyer and possibly proceed to terminate the lease early.

- Watch carefully who comes and goes, perhaps even consider using security cameras. What the tenant does NOT have a right to do is illegally sublet the apartment. In other words, the tenant cannot install someone new in the apartment and then move out. If that happens, the occupant has no right to remain and you can evict him or her. AS LONG AS, you do not take money from the occupant directly, which might establish a landlord and tenant relationship between you and the occupant. Watch out for that!

- The ultimate bottom line is that you are lucky that the apartment is in a two-family building and, thus, not subject to Rent Stabilization. Therefore, if you do not like a tenant's behavior, you can always refuse to renew the lease. Perhaps you should not make leases that are longer than a year.

Question: *"I raised the rent 3%. The tenants want an additional roommate added to the lease. The new roommate's credit check shows a 4-year-old bankruptcy, and a 1-year-old federal tax lien. Can I charge an additional $25.00 for rent, and request a second security deposit? I own a three family, owner occupied 4-story townhouse; market rental."*

Answer

This is a three family building, so it is free market. You can, therefore, insist on any terms you want before you enter into a lease – more security, higher rent, or you can refuse to add this person to the lease. You do NOT have to make a contract (in this case a lease) with someone with whom you do

not want to make a contract. But (I know, there is always a "but" with me) there are a few things that you cannot do that you should be aware of.

Please listen carefully. The tenant is allowed to have one roommate. A roommate is different from a person added to the lease. You described this prospective occupant as *"a roommate added to the lease."* Again, you do not have to make a lease with a person that you do not want to, as long as the reason that you do not want to is not based upon the person's inclusion in a protected class, such as race. However, you may NOT prevent the tenant of record from having a roommate of the tenant's choice (who is not on the lease).

Under New York Real Property Law § 235(f), often referred to as the Roommate Law, a residential lease entered into by one tenant implicitly permits that tenant to share the apartment with either his/her immediate family or unrelated persons "for reasons of economy, safety and companionship." RPL § 235(f)-3. This is true even if a residential lease says otherwise.

The disadvantage of putting the roommate on the lease is that you are giving the roommate more rights than if he or she was just a roommate. For example, if you ever need to do a Rent Demand with respect to this apartment, you will be legally required to serve one on each tenant. The advantage of putting the roommate on the lease is that now two people legally owe you the rent. If you do not put the roommate on the lease and you have to sue the tenant someday, you CAN evict the roommate at the same time as the tenant, but you cannot get a money judgment for the rent against the roommate because the roommate does not have a contract with you saying that he owes the rent. He is just roommate. In summary – those on the lease have more rights than those not on the lease. But those on the lease also have more liability to the landlord than those not on the lease.

One final thing. If you decide not to put the roommate on the lease, than be careful to never accept rent directly from the roommate. If you do accept rent directly from the roommate (for example, by accepting a check from the roommate's bank account) than you may actually be doing the

equivalent of putting the roommate on the lease, because you may be creating a direct landlord and tenant contract with the roommate.

F. Do Not Accept Rent Directly From the Roommate

If a landlord accepts rent directly from a roommate, it may inadvertently create a direct landlord and tenant relationship between the landlord and the roommate, and grant the roommate many rights that the landlord did not intend to grant. A landlord should always only accept rent from the tenant of record. In the absence of a lease, the acceptance of rent on a monthly basis creates a month-to-month tenancy. *Cobert Construction Corp. v. Bassett*, 109 Misc.2d 119, 442 N.Y.S.2d 678 (N.Y. Sup 1981).

III. SUBLETS

A. Sublets In General

Under New York Real Property Law 226-b, a tenant renting a residence **in a building with four or more residential units** has a right to sublease the apartment **subject to the written consent of the landlord in advance of the subletting**. Furthermore, the **landlord is prohibited from unreasonably withholding consent**.

The devil is in the details with respect to RPL § 226-b(2). A tenant does indeed have a right to sublet. But it's a lot of work to exercise that right. There is a specific procedure that the tenant must follow, which is detailed in RPL § 226-b(2), when requesting the landlord's permission to sublet the apartment.

First, the tenant must inform the landlord of tenant's intent to sublease by mailing a notice of such intent by certified mail, return receipt requested, to the landlord no less than 3**0 days prior to the proposed subletting** with:

- the term of the proposed sublease
- the name of the proposed subtenant
- the business and home address of the proposed subtenant
- tenant's reason for subletting
- tenant's address for term of the proposed sublease
- written consent of any co-tenant or guarantor of the lease
- a copy of the tenant's lease, where available, attached to a copy of the proposed sublease, acknowledged by the tenant and subtenant as being a true copy of the sublease.

Then, within **ten (10) days** after the mailing of the request, the owner may ask the tenant for additional information. Any such request for additional information shall not be unduly burdensome.

Within 30 days after the mailing of the tenant's request to sublet, or of the additional information reasonably asked for by the owner (whichever is later), the owner must send a reply to the tenant consenting to the sublet or indicating the reasons for denial. Failure of the owner to reply to the tenant's request within the required 30 days will be considered consent.

If the owner consents, or does not reply to the request within the appropriate 30 day period, the apartment may be sublet. If the owner reasonably withholds consent, the tenant may not sublet the apartment.

If the owner unreasonably withholds consent, the tenant may sublet the apartment and may also recover court costs and attorney's fees spent on finding that the owner acted in bad faith by withholding consent. Whether a landlord's withholding of consent is "reasonable" is naturally a fact-sensitive question but a court will objectively evaluate the proposed sublet based on the character and financial status of the subtenant as relevant factors. *See Vance v. Century Apartments Associates, 93 A.D.2d 701, 703-04 (1st Dep't 1983)* ("Where a lease affords to a tenant a right to assign or sublet subject to the consent of the landlord, the reasonable ground to support a withholding of consent has always been tested by an objective standard, relating to the acceptability

of the proposed subtenant or assignee. Thus, among the relevant criteria from the point of view of the landlord is the character and financial responsibility of the proposed tenant and the nature of the occupancy or purposes for which the property is to be used.")

B. Rent Stabilized Sublets

Rent Stabilized tenants have further restrictions on their right to sublet.

A Rent Stabilized tenant may not sublet an apartment for more than two years out of the four–year period before the termination date of the sublease. *Rent Stabilization Code § 2525.6(c).*

Subletting can never, for a Rent Stabilized tenant, be about making a profit on the landlord's real estate. If the prime tenant sublets the apartment fully furnished, the prime tenant may charge an additional rent increase for the use of the furniture. ***This increase may not exceed ten percent of the lawful rent***. The prime tenant may not demand "key money" or overcharge the subtenant. If the prime tenant overcharges the subtenant, the subtenant may file a *"Tenant's Complaint of Rent Overcharge and/or Excess Security Deposit"* with DHCR. If the DHCR—or a court--finds that the prime tenant has overcharged the subtenant, the prime tenant will be required to refund to the subtenant three times the overcharge.

With that restriction in place, no one is ever going to be able to run a profitable bed and breakfast out of their Rent Stabilized apartment, assuming they had the room and didn't mind sharing their space with a guest.

The landlord may charge the prime tenant the sublet allowance in effect at the start of the lease, if the lease is a renewal lease. The allowance is established by the New York City Rent Guidelines Board Order. The prime tenant may pass this sublet allowance along to the subtenant.

Below is a question from a LandlordsNY member that the author answered in her capacity as "Legal Expert".

Question: *"My tenant sent me an email stating she is moving to Ohio to pursue a degree program for 3 years and she will sublet her apartment while she is gone. According to her, the stabilized rules allow for this scenario. I cannot find any information that supports this. The sublet is not a relative. Can she legally do this? What are my options? Thank you."*

Answer

The short answer is – No, your Rent Stabilized tenant may not sublet her apartment for three years. Moreover, the process of subletting might not be as simple as she thinks because there are many rules with which she must comply. [EXPLANATION OF LAW]

From what little you have told me, you have two options. One is to do nothing, and the other is to assert your rights in a letter to the tenant.

The pros of doing nothing are that doing nothing is easy and cheap, in the short term. And sometimes doing nothing works out in life and in business. You never know. The cons of doing nothing are that you are handing the management of your real estate asset over to this Rent Stabilized tenant who is planning on disappearing for three years.

The risk of doing nothing is that a lot of bad stuff can come of you not being more involved in this sublet (or denial of sublet) process. The subtenant installed by the prime tenant could be a psychopath. In that case, you have to begin eviction proceedings against the tenant (you have no privity of contract with the sub). The subtenant may be a perfectly nice person but may simply stop paying the sub-rent, in which case the tenant will stop paying you rent. The tenant may overcharge the subtenant and take the tenant to court, which will also likely result in the tenant missing rent payments. These are just the three most obvious problems. When someone moves into your real estate, whom you did not put there, there is always a whole bunch of risks.

We suggest that you write the tenant a letter that pretty much says everything I did above. Demand that the tenant comply with the rules for subletting. Send her a copy of DHCR Fact Sheet #7

http://www.nyshcr.org/Rent/FactSheets/orafac7.htm. Let her know that this is a serious business.

The pros of this approach are that you are not allowing this Rent Stabilized tenant to push you around and run your real estate for you. In which case, if she wants to go away for graduate school, she might give up the apartment and you get a twenty percent (20%) vacancy increase. Or, she may illegally sublet the place without seeking your permission pursuant to RPL § 226-b, in which case you have grounds for her eviction.

One final warning. Never accept rent directly from the subtenant (on a bank account only in the subtenant's name). Doing so may create a direct landlord and tenant relationship between you and the subtenant, and if the tenant does decide to stay in Ohio, then the subtenant becomes your new Rent Stabilized tenant.

C. Co-Ops Sublets

Every proprietary lease forbids subletting without first obtaining permission of the board. The only exception to this would be proprietary leases for holders of unsold shares, which frequently allow subletting without the board's permission.

A typical proprietary lease will provide for a notice to cure within 10 – 15 days in the event of default. If a shareholder is illegally subletting and does not cure within the required period, the board can terminate the proprietary lease and follow that up with the commencement of a summary holdover proceeding. This is a fairly routine type of case.

The board must give notice to the current lender of the shareholder (if there is one). When a shareholder uses a bank loan to buy a co-op, there is a three-way agreement signed at closing between the Board, the lender and the shareholder, commonly known as a Recognition Agreement. A Recognition Agreement typically requires the board to notify the Bank before terminating a proprietary lease. The notice provisions of the Recognition Agreement must be strictly adhered to. This is a vital step. The bank is as much a part of this situation as the board, shareholder, and the sub-tenant.

Below is a question from a LandlordsNY member that the author answered in her capacity as "Legal Expert".

Question: *"A coop owner passed away, and the parents stopped paying the maintenance and mortgage a few years ago. The bank has been paying maintenance for over two years. The parents are now trying to sell the apartment and have lined up a buyer, who has issued a lease to a young couple who have moved in. ConEd, Keyspan and TimeWarner all accepted the lease and turned on services. No one contacted the building, coop board or management company, and no transfer of ownership, coop application/approval has occurred. Where do we go from here? We are looking to get the illegal tenant out and revoke the lease for blatant disregard of all rules and laws."*

Answer

While we have not seen your proprietary lease, we have never seen a proprietary lease that permits subletting without first obtaining permission of the Board (unless we are talking about the holder of unsold shares, which, I assume we are not here.)

Obviously, the Board is now in a position to default the parents as successive shareholder/assignees of the subject proprietary lease. [EXPLANATION OF LAW]

In all likelihood, just serving the predicate notice to cure default will result in the representatives of the parents, the purchaser, and the sub-tenants calling up and desperately trying to resolve the situation. At that point, you can insist that the subtenant vacate or you can compel the prospective purchaser and parents to follow the board procedure for submitting an application to purchase. In any event, you can also choose to proceed to Civil Court and force and terminate the lease.

Do NOT forget to notice the current lender to the shareholder with the predicate notices and the holdover. The Bank is certainly the beneficiary of a Recognition Agreement -- an agreement whereby the co-op agrees to notice the Bank before terminating a proprietary lease. The notice provisions of the Recognition Agreement must be strictly adhered to.

Make sure you hit all addresses possible for the lender – both those in the agreement and those you deal with presently as the bank pays the maintenance. This is a vital step that I find many attorneys miss. The bank is as much a part of this situation as the shareholders, the purchaser, and the sub-tenant.

Finally, we wish to emphasize the following. The co-op holds all the cards here. What these shareholders and their cohorts are doing is wrong. It is not good for the co-op on many levels to allow shareholders to flout the rules. Inaction is not good for the building economically and it is also detrimental to the culture of the building to allow shareholders to make their own rules. Do not make the mistake that many boards that come to us have made – do not tolerate bad behavior and wait and hope it all works out. It seldom does. As time goes on, the mess gets harder to clean up. The co-op should act and act fast.

IV. THE SHORT TERM LEASING LAW

Short-term (under 30 days) subletting of residential apartments has become a very widespread practice. Platforms that facilitate short-term leasing include AirBnB, Couchsurfing, HomeAway, One Fine Stay, KidandCo, VRBO, Tripping, iStopOver, Wimdu, 9Flats, Flipkey, and Roomorama.

Multiple Dwelling Law § 4(8)(a) became effective on May 1, 2011, and it severely curbs the right to participate in short-term renting. Supporters of the new law characterize short-term rentals as "illegal hotels" which create nuisance and security issues for regular tenants in the building. Supporters also point to decreased hotel tax revenue.

There still seems to be a great deal of confusion surrounding this area of law. Let us demystify here what can and cannot be done.

A "multiple dwelling" is a dwelling which is rented as the residence or home of three or more families living independently of each other. Multiple Dwelling Law § 7. Therefore, this law applies only to buildings that legally have three or more units. Multiple Dwelling Law § 4(8)(a) is the relevant section of the statute and we need to read it closely.

Multiple Dwelling Law § 4(8)(a):

> A "class A" multiple dwelling is a multiple dwelling [3 units] that is occupied for permanent residence purposes…A class A multiple dwelling shall only be used for permanent residence purposes. **For the purposes of this definition**, "**permanent residence purposes**" **shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit**. The following uses of a dwelling unit by the permanent occupants thereof shall not be deemed to be inconsistent with the occupancy of such dwelling unit for permanent residence purposes:
>
> (1)(A) occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons living within the household of the permanent occupant such as house guests *or lawful boarders, roomers or lodgers*; or (B) incidental and occasional occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons when the permanent occupants are temporarily absent for personal reasons such as vacation or medical treatment, provided that there is no monetary compensation paid to the permanent occupants for such occupancy.
>
> [Emphasis supplied.]

We need to check out Multiple Dwelling Law § 4(5) to make sure we understand what the statute means by *"lawful boarders, roomers or lodgers"* *"Lawful boarders, roomers or lodgers"* is defined "a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein." So this would be what we commonly refer to today as a roommate, but the key modifier here is that the boarder, roomer or lodger needs to be "living within the household of the permanent occupant".

Thus, it is only permissible for people to stay with the permanent occupant of a multiple dwelling for less than 30 days under two circumstances. First, less than 30 days is allowable if the person staying is "living within the household of the permanent occupant". This is classic bed and breakfast gig, where a guest lives with the permanent occupant for a few days. Second, less than 30 days is allowable if the permanent occupant is temporarily away and the guest does NOT pay. So if the tenant is on vacation for a week and she lets her cousin stay in the apartment to take care of her cat and does not take any money for the favor, that is OK.

Put simply, **what is never ok in New York City is taking a paying guest for less than thirty days into your dwelling and leaving them there when you are not home**.

A lease can further limit a tenant's right to do short-term leasing. Nothing protects a tenant's right to do short-term leasing in the way that a tenant's right to a roommate or a subtenant is protected by other statutes. The Standard Form of Apartment Lease promulgated by the Real Estate Board of New York states the following in the "use" section:

> The Apartment may be occupied by the tenant or tenants named above and by the immediate family of the tenant or tenants and by occupants as defined in and only in accordance with Real Property Law §235-f. [235-f is the "Roommate Law", see above]

Moreover, **when an apartment is Rent Stabilized**, **using it as a hotel room and profiteering off it is ground for eviction and is incurable**, **as it undermines a purpose of the Rent Stabilization Code**. 42nd & 10th Assoc. LLC v Ikezi, 46 Misc.3d 1219(A), 2015 WL 731616; *West 148 LLC v. Yonke*, 11 Misc 3d 40, 41 (App. Term 1st Dept. 2006); *Brookford, LLC v. Penraat*, 2014 NY Misc. LEXIS 5476 (S. Ct. NY Co. 2014). *See Also Cambridge Dev., LLC v. Staysna*, 68 AD3d 614, 615 (1st Dept. 2009), *151-155 Atl. Ave., Inc. v. Pendry*, 308 AD2d 543, 543-544 (2nd Dept. 2003), *51 W. 86th St. Assoc. LLC v. Fontana*, 28 Misc 3d 140A (App. Term 1st Dept. 2010), *643 Realty LLC v. Thadal*, 15 Misc 3d 131A (App. Term 2nd Dept. 2007), *Central Park W. Realty v. Stocker*, 1 Misc 3d 137A (App. Term 1st Dept. 2004), *145 Ave. C LLC v. Kelly*, 2006 NY Misc. LEXIS 3980 (Civ. Ct. NY Co. 2006), *Husda Realty Corp. v. Padien*, 136 Misc 2d 92, 94 (Civ. Ct. NY Co. 1987) (profiteering on a sublet undermines rent regulation and is therefore incurable). As Respondent's infraction is incurable, Petitioner was not required to serve Respondent a notice to cure. *West 148 LLC v. Yonke*, 11 Misc 3d 40, 41 (App. Term 1st Dept. 2006), *326-330 E. 35th St. Assoc. v. Sofizade*, 191 Misc 2d 329, 331 (App. Term 1st Dept. 2002).

V. RUNNING A BUSINESS IN AN APARTMENT

We include this section because if a tenant is allowed to run a business in his or her apartment (and in some instances, a tenant may), then what does this mean in terms of the amount and nature of customers and employees allowed in the apartment as a result of the business?

First, we look at what types of business are allowed to be run from apartments.

The Zoning Resolution of the City of New York § 12-10 ("ZR 10-12") has this to say about carrying on an occupation inside one's apartment:

> (a) A "home occupation" is an accessory use which: is clearly incidental to or secondary to the residential use of a dwelling unit…; is carried on within a dwelling unit…by one or more occupants of such dwelling unit, except that, in connection with the practice of a profession, **one person not residing in such dwelling unit…may be employed**; and occupies not more than 25 percent of the total floor area of such dwelling unit…and in no event more than 500 square feet of floor area.
>
> (b) In connection with the operation of a home occupation, it shall not be permitted:
>
> (1) to sell articles produced elsewhere than on the premises;
> (2) to have exterior displays, or a display of goods visible from the outside;
> (3) to store materials or products outside of a principal…building;
> (4) to display, in an R1 or R2 District, a nameplate or other sign except as permitted in connection with the practice of a profession;
> (5) to make external structural alterations which are not customary for residences; or
> (6) to produce offensive noise, vibration, smoke, dust or other particulate matter, odorous matter, heat, humidity, glare, or other objectionable effects.
>
> (c) Home occupations include, but are not limited to:

fine arts studios
professional offices
teaching of not more than four pupils simultaneously, or, in the case of musical instruction, of not more than a single pupil at a time.

(d) However, home occupations shall not include:

advertising or public relations agencies
barber shops
beauty parlors
commercial stables or kennels
depilatory, electrolysis or similar offices
interior decorators' offices or workshops
ophthalmic dispensing pharmacy
real estate or insurance offices
stockbrokers' offices
veterinary medicine.

[Emphasis supplied]

In *Mason v. Department of Buildings of City of New York,* 307 A.D.2d 94 (1st Dep't 2003), the court upheld a finding by the DOB that a tenant's renting out of an apartment as a commercial recording studio was an invalid home occupation use of the property. Other than the *Mason* case, there is a dearth of case law on this topic in New York City. Therefore, we did a survey of existing case law and below we include a chart that shows the types of uses permitted or not permitted. Unfortunately, the outcomes seem almost arbitrary, and the geographical locations of these cases also cast doubt upon the amount of guidance they provide for New York City – a Lawnmower Repair Business is permissible on Shelter Island but a Lawn Care business is not OK in Westchester.

TYPE OF OFFICE	ALLOWED	CASE	JURISDICTION
Social Work Office	YES	Osborn v. Planning Bd. of Town of Colonie, 146 A.D.2d 838, (3d Dep't 1989).	Town of Colonie
"Management Consultant"	NO	Simon v. Board of Appeals on Zoning of City of New Rochelle, 208 A.D.2d 931, (2d Dep't 1994).	New Rochelle
Extermination Business	NO	Mack v. Board of Appeals, 25 A.D.3d 977, (3d Dep't 2006).	Town of Homer
Limousine Service -- where the use consisted solely of the receiving of telephone requests for service	YES	City of White Plains v. Dewvo, 159 A.D.2d 534, 552 N.Y.S.2d 339 (2d Dept. 1990).	White Plains
Lawnmower Repair Business	YES	Krause v. Piccozzi, 106 A.D.3d 1007, 965 N.Y.S.2d 379 (2d Dep't 2013).	Shelter Island
Lawn Care Business	NO	Saglibene v. Baum, 246 A.D.2d 599 (1998).	Westchester
Fence Construction Business	YES	Palladino v. Zoning Bd. of Appeals of Town of Chatham 39 A.D.3d 1004 (2nd Dept. 2007).	Town of Chatham

In *Dept. of Buildings v. Owners and Occupants of 86 Prospect Park Southwest, OATH Index N. 1900/06 (2007),* a Board of Standards an Appeals case, the occupant of the premises ran a business called AIM Strategies "in the front portion of her home performing work as an organization development consultant. The building in question was a three-story building and the home office was situated in a room off the front entry of the house. The office contained three desks, **one was used by an employee**." The occupant testified that she used "the office to research, design and develop materials for her company but did not see clients there." At issue was whether her use of the premises violated the Zoning Resolution or is a "permissible home occupation accessory use." The City argued that the tenant was "not operating a permissible home occupation because her office occupies more space than is permitted under the Zoning resolution, and because 'organizational development consultant' is not a permissible profession under the Zoning Resolution." Ultimately, after a seventeen (17) page decision, the Board of Standards and Appeals found that the use WAS permissible.

The conclusion here is that, assuming it is lawful for a business to be conducted from an apartment, one employee is allowed to work in that apartment at the business. There is no clear indication of how many customers the business is allowed to bring in, but clearly the business should not be attracting retail traffic.

ABOUT THE AUTHOR

Michelle Maratto Itkowitz is *the* "Itkowitz" in Itkowitz PLLC. She practices real estate litigation. Michelle has over twenty years of experience, and is best known for her work in the area of commercial and complex-residential landlord and tenant law in the City of New York. She also is very experienced in general commercial litigation and all manner of real estate transactions. See our Accomplishments section to get an idea of the breadth of Michelle's work.

Michelle publishes and speaks frequently on legal issues in real estate. The groups that Michelle has written for and/or presented to include: Lawline.com; The Columbia Society of Real Estate Appraisers; LandlordsNY; Lorman Education Services; The Association of the Bar of the City of New York; The New York State Bar Association, Real Property Section, Commercial Leasing Committee; Thompson Reuters; The Cooperator; The New York State Bar Association CLE Publications; The TerraCRG Brooklyn Real Estate Summits; The Association of the Bar of the City of New York; and BisNow

Michelle regularly creates and shares original and useful content on real estate and law, including booklets, videos, podcasts, and articles. She is frequently quoted in the press on a variety of real estate and legal issues. As the "Legal Expert" for LandlordsNY.com, the first social platform exclusively for landlords and property managers, Michelle answers member's questions, guest blogs, and teaches. Michelle recently developed a six-part, seven-hour continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation". Over 16,000 lawyers have purchased Michelle and Jay Itkowitz's earlier CLE classes from Lawline.com, and the programs have met with the highest reviews. Jay and Michelle are currently co-authoring a chapter on lease remedy clauses for the New York State Bar Association, Real Property Section, Commercial Leasing Committee.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College, and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman.

There are many ways to keep up with Michelle. When Michelle tweets, which is not an obnoxious amount, she does so in an easy to understand manner about useful stuff regarding real estate, business, the legal industry, and organic herb gardening. Feel free to contact Michelle; she would be happy to speak to you.

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See good tweet right?