

**Day Care in Apartments:
Owners and Children at Risk
By Mitchell Posilkin, Esquire**

Ordinarily, the operation of commercial activities in apartments is prohibited by residential leases. Owners usually do not want businesses operating out of their buildings because of potential zoning violations, quality of life issues, increased wear and tear on the building and other legal and practical concerns.

Day care businesses cause property owners particular concern because of the daunting liability issues arising from exposure to lead-based paint hazards, window guard requirements and other concerns relating to the safety of the children. The risks to the children and property owners are quite real and are a direct result of activities that are specifically prohibited by their leases with the tenants who operate those businesses.

Amazingly, despite those lease prohibitions, licenses are issued by the State for day care facilities in apartments. Owners who have sued tenants in Housing Court seeking to stop these activities typically do not succeed either because the courts find that these facilities serve a beneficial purpose, or because of the operation of Social Services Law provisions, or both. Owners and children are being placed at risk in these situations.

In 2004, two cases were decided in the City's Housing Court which exemplify this problem. In *Marick Real Estate LLC v. Ramirez* (New York Law Journal; 8/31/04), day care services were provided on the third floor of a non-fireproof multiple dwelling. Confronted with a tenant violating the explicit terms of the lease, the threatened loss of coverage by his insurer, and the illegality arising from child care services being provided in a non-fireproof building above the ground floor, the owner sought the cessation of the day care activities and, failing in that effort, the eviction of the tenant.

Housing Court Judge Maria Ressos ruled that "Nevertheless, [the license] to provide family day care service has been renewed by OCFS, the appropriate regulating agency..." Despite the violation of the lease, the violation of State law and the obvious dangers posed to the children, the day care facility was allowed to continue and the owner's proceeding was dismissed.

Similarly, in *Carrol Street Properties v. Puent*, (NYLJ; 6/23/04) with facts very similar to the Marick situation, Housing Court Judge George Heymann also rejected a property owner's claim where the day care facility was operated on the second floor of a non-fireproof multiple dwelling. These decisions are being appealed by the owners, who are represented on appeal by Jeffrey Metz, Esq. from Borah, Goldstein, Altshuler, Schwartz & Nahins.

RSA (Rent Stabilization Association) has communicated the concerns of property owners to the commissioners of the State Office of Children and Family Services and the City's Department of Health and Mental Hygiene, the agencies that license day care facilities. It is imperative they know that licenses are being issued for day care businesses located in non-fireproof buildings.

All families in New York City require and deserve adequate day care options for their children. But such options cannot ignore the safety and well-being of these children and at the same time endanger the livelihoods of property owners.

As government defaults once again on their responsibilities, property owners are being compelled to absorb the burdens of that responsibility without their consent. Owners are left facing the prospect of the loss of insurance coverage and unlimited liability. These concerns are specific and genuine and confront owners on a daily basis.

The question, ultimately, is whether government will take the actions necessary to protect property owners while also providing necessary assistance to families with children.

[Editor's Note: One of our members was recently faced with this situation when a tenant informed him that they were opening a Child Care Facility in his building. The tenant also handed him a letter from the California Department of Social Services, Community Care Licensing Division which stated, "The property owner/landlord is prohibited by law from imposing any direct or indirect restriction on, or prohibitions against this tenant's operation of this family child-care home on the rental property." As I mentioned then, it seems like this could happen in some Socialist or Communist country, not in the United States! I never dreamed that it could get this bad.]

Reprinted with permission of the RSA Reporter. Mitchell Posilkin is legal counsel for the Rent Stabilization Association in New York.