

# REAL ESTATE WEEKLY

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## Squeezing out evidence of apartment overcrowding

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For middle class American society, the idea of the minimum amount of space one would want to live in is vastly larger than standards accepted as absolutely normal in other times, places, and cultures.

Consider that a 64 square foot igloo is commonly said to comfortably house five adults. However, any New York landlord looking at five adults living in an 8 ft. x 8 ft. apartment would be on the phone with counsel to find out what kind of proceeding to bring for the apparent overcrowding.



And in that situation, the landlord would be correct. That would indeed be overcrowding.

According to New York City Administrative Code §27-2075, “Every person occupying an apartment in a class A or class B multiple dwelling, or in a tenant-occupied apartment in a one- or two-family dwelling, shall have a livable area of not less than eighty square feet.

“The maximum number of persons who may occupy any such apartment shall be determined by dividing the total livable floor area of the apartment by eighty square feet. For every two persons who may lawfully occupy an apartment, one child under four may also reside therein, except that a child under four is permitted in an apartment lawfully occupied by one person.”

In order to calculate those 80 square feet, hallways, foyers, and bathrooms don’t count.

This simple law, however, should not lead one to conclude that evictions for overcrowded apartments are easily gotten as a matter of mere arithmetic.

First, the landlord has to have actual proof of the size of the apartment and the courts have held that the landlord’s mere knowledge that the apartment is the same size as another apartment the landlord actually has measured is not enough to furnish the missing proof.

Also, since the standard is “livable” area, it is necessary that the measurement of the apartment be done by a licensed architect who will be available to testify both as to her expertise and as to what standards she used to determine what is and what is not livable.

However, at least one court precedent has ruled that a landlord is entitled to access for the purpose of taking the measurements.

Finally, the court will not entertain the case at all unless the City has actually placed a violation against the apartment for the overcrowding. Realistically speaking, this requires the landlord calling in a violation on itself.

Closely conceptually related to the City Code requirements as to overcrowding is the State's roommate law, Real Property Law §235-f. Put simply, a tenant is entitled to an additional occupant plus the dependent children of the additional occupant.

When it was passed, many landlords ran to the courts on the assumption that the law gave them a new basis to evict people. However, the courts were quick to point out that the purpose of the law was to take away the landlord's right to evict that had been present in leases that limited occupancy to those actually named on the lease (with or without immediate family.)

Of course, what often gives rise to the overcrowding is not the addition of additional family and non-nuclear family members of the tenant, but rather the tenant renting out rooms to complete strangers. When the tenant of record is not living in the apartment at all, everyone recognizes this situation as an illegal sublet.

However, if the tenant is living there, there are many, including some judges, who fail to see that this is a sublet and a violation of the lease. In all fairness, sometimes these cases can be hard to distinguish from the roommate situation.

It is clear that the law of roommates does not require that the participants knew each other ahead of time or feel any kind of affection for each other. The more stranger they are to each other, the more they are inclined to keep their lives separated: locks on bedroom doors, other rooms forbidden to one or the other, limited or non-existent kitchen privileges, with or without cupboards designated for only one person's use.

All of these and other indications of exclusivity indicate a sublet rather than roommate situation, one for which the landlord can successfully sue to evict. And in such situations, the 80 square feet per person standard is irrelevant.

Overcrowding can be physical or merely legal. Often, something will appear to be overcrowding to the landlord, but from a legal point of view, it either isn't overcrowding or it isn't the kind of overcrowding that the courts will really care about.