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Perspective

Proposed New York City Commercial Rent Regulation: An Improper Usurpation of State Power

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Yet another destructive proposal is pending in the New York City Council and is making owners even more anxious than they otherwise were: commercial rent control.

Most readers of this article are surely familiar with the ironic phrase "may you live in interesting times" (attributed to traditional Chinese culture), whereby one wishes ill on another. Unfortunately, it appears that such a curse has been placed on the New York real estate industry. From the Amazon-Long Island City debacle to the Housing Stability and Tenant Protection Act of 2019 and the possibility of "good cause eviction," i.e., universal rent control (among many other lowlights), real estate practitioners have been pressed into duty as amateur psychologists to help clients navigate the cascade of "interesting" events that have occurred since the beginning of 2019.

Unfortunately, yet another destructive proposal is pending in the New York City Council and is making owners even more anxious than they otherwise were: commercial rent control. The first iteration of commercial rent control came in 2018 in the form of the so-called "Small Business Jobs Survival Act," a deceptively-titled bill that would have compelled landlords to renew commercial leases for terms of at least 10 years, severely restricted landlords' ability to refuse to renew such leases, and given existing commercial tenants the right to remain in place and renew tenancies at certain specified rents. While that bill died, commercial rent control proponents in the City Council were just getting started.

SHUTTERSTOCK

In late 2019, legislation known as "Intro 1796" was proposed in the New York City Council. Spearheaded by Councilmember Stephen Levin of District 33 in Downtown Brooklyn, Intro 1796 would create a seven-member rent guidelines board appointed by the City Council which, according to the bill's summary, would be "responsible for annually establishing guidelines and the rate of rent adjustments for covered commercial spaces" (i.e., retail stores and office

spaces of 10,000 square feet or less and manufacturing establishments of 25,000 square feet or less)—echoing the residential Rent Guidelines Board, which annually sets rents for rent-stabilized apartments. While the authors believe that the bill is a terrible idea from a policy perspective, we will analyze a different fatal flaw: New York state law bars New York City from unilaterally enacting Intro 1796.

Unlike New York state, New York City is not a sovereign body. Accordingly, the City's authority to enact local laws must stem from one of four possible sources: the City's Charter, the State Constitution, the Municipal Home Rule Law (MHRL), or an enabling statute passed by the State Legislature. See *La Guardia v. Smith*, 288 NY 1, 8 (1942). The best way to understand this framework—and why the City lacks the independent power to enact commercial rent regulation—is to study the history behind residential rent regulation in New York.

In 1949, New York City passed local rent regulation, colloquially known as the "Sharkey Law." However, in *F.T.B. Realty Corp. v. Goodman*, 300 NY 140 (1949), the Court of Appeals struck the law as contrary to Article IX of the State Constitution, which defines and limits the home rule powers of local governments. However, days later, the State Legislature exercised its prerogative and retroactively validated the Sharkey Law.

Thereafter, there was a desire to reimpose residential rent regulation in New York, but, in light of recent experience with the Sharkey Law, the Legislature sought to ensure that regulation was imposed consistently with New York's constitutional framework. Accordingly, in 1962, the Legislature passed the Local Emergency Housing Rent Control Act (LEHRCA), which empowered New York City to "adopt and amend local laws or ordinances in respect of the regulation and control of residential rents." Thus enabled by LEHRCA, the City Council enacted the Rent Stabilization Law of 1969. Similarly, in 1974, the Legislature passed the Emergency Tenant Protection Act (ETPA), which enabled New York City to declare a housing emergency and expand rent regulation consistent with the parameters set by the Legislature.

> It is clear that state law prohibits the City Council from independently enacting Intro 1796. Rather, the City can regulate commercial rents only if expressly authorized to do so by a state enabling statute—which, as of the date of this article, does not exist.

Accordingly, absent an enabling statute such as LEHRCA or ETPA, the City lacks authority to unilaterally enact rent regulation.

Indeed, none of the City Charter, the State Constitution or the MHRL authorize the City to independently enact commercial rent regulation. Article IX of the State Constitution and the MHRL grant local governments authority to enact legislation in connection with their "property, affairs and government." N.Y. Mun. Home Rule Law §10(1)(ii). Some have asserted that this provision authorizes the City to unilaterally enact rent regulation. The courts, however, have repeatedly rejected this argument, finding that "State rent control legislation does not relate to the 'property, affairs or government' of the city" because "[r]ent control is a matter of State concern." *210 E. 68th St. Corp. v. City Rent Agency*, 76 Misc.2d 425, 427 (Sup. Ct., NY County 1973), mod., 43 A.D.2d 687 (1st Dept. 1973), aff'd, 34 N.Y.2d 560 (1974); *241 E. 22nd St. Corp. v. City Rent Agency*, 33 N.Y.2d 134, 142 (1973) (holding that "the subject of rent control is primarily a matter of State concern and a function of the State at large"); *City of New York v. State*, 67 Misc.2d 513, 514 (Sup. Ct., NY County 1971), aff'd, 31 N.Y.2d 804 (1972) (rejecting the City's argument that rent control was within the City's home rule powers).

Similarly, the City Charter, the State Constitution and the MHRL give local governments the power to enact laws in connection with "health and welfare" of their citizens (N.Y. Mun. Home Rule Law §10(1)(ii)(a)(12); City Charter §28), provided that such laws are not inconsistent with state law (see *New York State Club*

Association v. City of New York, 69 N.Y.2d 211 (1987)). New York courts have uniformly held that local governments may not, under the guise of protecting their citizens' "health and welfare," regulate areas that are primarily matters of state concern, such as rents. See, e.g., *F. T. B Realty*, 300 NY at 147-48.

Finally, and notwithstanding the foregoing, the City Council lacks authority to enact commercial rent regulation pursuant to the doctrine of preemption, which represents a "fundamental limitation" on home rule powers "in an area that the State has clearly evinced a desire to preempt." *Ba Mar, Inc. v. County of Rockland*, 164 A.D.2d 605, 612 (2d Dept. 1991) (citing *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989)). The preemption doctrine, which embodies the Legislature's "primacy" to act with respect to matters of state concern and its overriding policy interests, applies both in cases of express conflict between local and state law and in cases where the state has evidenced an intent to occupy the entire field. See *Albany Area Builders*, 74 N.Y.2d at 377. The state's intent may be "implied" from the nature of the subject matter being regulated, or from the purpose and scope of the state legislative scheme. See *Ba Mar*, 164 A.D.2d at 612.

To illustrate, in *Albany Area Builders*, the Town of Guilderland projected a substantial population increase over 20 years, that such increase would require capital improvements on its existing road system, and that its revenue was insufficient to fund these improvements. Based on these projections, the Town enacted a local law which imposed an "impact fee" on all new developments that would generate additional traffic. Applying the preemption doctrine, the Court of Appeals held that the law was invalid because the state had already enacted comprehensive highway funding legislation, thus preempting local legislation on that subject. Id. at 377-79.

Similarly, the preemption doctrine clearly applies to the City's attempts to impose commercial rent regulation. This is so for two reasons. First, as explained above, New York courts have uniformly held that rent regulation is primarily a matter of state concern, barring parallel regulation by local governments absent an express enabling statute. Second, in 1945 the state enacted a commercial rent regulation statute, which froze all commercial rents in the City at certain specified levels. Such statute, however, was permitted to expire pursuant to a sunset provision on Dec. 31, 1963. By legislating in this area, the state evinced an unmistakable intent to occupy the field of commercial rent regulation—and permitting the commercial rent regulation statute to expire was as much of a policy choice as enacting the statute in the first instance. See, e.g., *Gennis v. Milano*, 135 Misc 209, 209 (App Term, 1st Dept. 1929) (invalidating City legislation which was "substantially a re-enactment" of expired state law, because the subject field was "exclusively state concern").

By reason of the foregoing, it is clear that state law prohibits the City Council from independently enacting Intro 1796. Rather, the City can regulate commercial rents only if expressly authorized to do so by a state enabling statute—which, as of the date of this article, does not exist. However, given recent history and New York's extreme anti-owner political climate, we expect pro-regulation interests intent on passing commercial rent regulation to propose state enabling legislation if their efforts to push Intro 1796 through the City Council fail. Given the profoundly detrimental effect commercial rent regulation would have on the New York City real estate industry and the economy more generally, owners will be monitoring the situation very closely.

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