As seen in

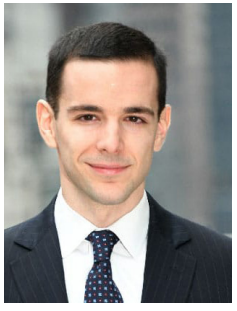
REAL ESTATE WEEKLY

WEDNESDAY, MARCH 18, 2020

Proposed commercial rent regs an improper usurpation of state power

Legal Viewpoints

By Alexander Lycoyannis and Dejan Kezunovic, Rosenberg & Estis



Dejan Kezunovic and Alexander Lycoyannis

Most readers of this article are surely familiar with the ironic phrase "may you live in interesting times," 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" (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 making owners even more anxious than they otherwise were: commercial rent control. In late 2019, legislation known as "Intro 1796" was proposed in the New York City Council. 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). 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 enacting Intro 1796.

Unlike New York State, the City is not a sovereign body. Accordingly, its 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. The best way to understand this framework -- and why the City lacks 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, that same year, 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.

In 1962, the Legislature passed the Local Emergency Housing Rent Control Act (LEHRCA) to empower the City to pass residential rent regulation. Enabled by LEHRCA, the City Council enacted the Rent Stabilization Law of 1969. Similarly, in 1974, the Legislature passed the Emergency Tenant Protection Act, which enabled New York City to declare a housing emergency and expand rent regulation consistent with the parameters set by the Legislature. Absent enabling statutes such as these, the City has no authority to 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." Although some have asserted that this provision authorizes the City to unilaterally enact rent regulation, the courts have repeatedly rejected this argument, finding that rent regulation is exclusively a matter of State concern.

Similarly, the City Charter, the State Constitution and the MHRL authorize local governments to enact laws in connection with "health and welfare" of their citizens, provided that such laws are not inconsistent with State law and the subjects thereof are not primarily matters of State concern.

Finally, the City Council also lacks authority to enact commercial rent regulation pursuant to the doctrine of preemption, which represents a "fundamental limitation" on home rule powers and applies in cases of express conflict between local and State law and where the State has evidenced an intent to occupy the entire field.

The preemption doctrine applies to commercial rent regulation for two reasons. First, as explained above, the courts have uniformly held that rent regulation is primarily a matter of State concern, thus prohibiting regulation by local governments absent an enabling statute. Second, the State enacted commercial rent regulation in 1945, which was permitted to expire in 1963. By legislating in this area, the State evinced an unmistakable intent to occupy the field of commercial rent regulation -- and permitting the statute to expire and the free market to govern commercial rents for nearly 60 years is as much of a policy choice as enacting the statute in the first instance.

Therefore, it is clear that the City Council is not authorized to independently enact Intro 1796. Rather, the City can regulate commercial rents only if expressly authorized by a proper State enabling statute – which, as of the date of this article, does not exist.