Court Confirms Board Authority to Increase Rents

Warren A. Estis and Jeffrey Turkel, partners at Rosenberg & Estis, review the Court of Appeals recent ruling that the New York City Rent Guidelines Board is authorized to impose discrete, minimum rent increases on certain low-rent rent stabilized apartments that have been continuously occupied for many years.

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In a decision issued on March 24, 2011, the New York State Court of Appeals, by a 5-2 margin, ruled that the New York City Rent Guidelines Board (RGB) is authorized to impose discrete, minimum rent increases on certain low-rent rent stabilized apartments that have been continuously occupied for many years. The decision, *Casado v. Markus*,[1] reversed an earlier ruling by the Appellate Division, First Department. (The authors' firm, Rosenberg & Estis, represented amicus curiae Rent Stabilization Association of NYC Inc. and Community Housing Improvement Program Inc. in *Casado)*.

Background

Section 26-510(b) of the Rent Stabilization Law authorizes RGB to annually establish "guidelines for rent adjustments" for hundreds of thousands of rent stabilized apartments throughout New York City. To that end, each year RGB issues RGB orders, which generally set forth increases for one- and two-year renewal leases.

On or about June 9, 2008, RGB issued Order No. 40, relating to rent stabilized renewal leases commencing between Oct. 1, 2008, through and including Sept. 30, 2009. Order No. 40 authorized landlords to collect a 4.5 percent increase for a one-year renewal, and an 8.5 percent increase for a two-year renewal. For those apartments where the landlord did not provide heat, the rent increases were 4 percent and 8 percent, respectively.

Critically, Order No. 40 called for minimum dollar increases for apartments where the most recent vacancy lease was executed six years or more prior to the date of the renewal lease. Those increases were as follows: for units where the landlord was required to provide heat, the increase for one-year leases would be 4.5 percent or $45, whichever was greater; for two-year leases, the increase would be 8.5 percent or $85, whichever was greater. For apartments where heat was not provided, the increases would be, respectively, 4 percent or $40, whichever was greater, or 8 percent or $80, whichever was greater. Mathematically, the minimum dollar increases could only apply to apartments renting for less than $1,000 per month.

The following year, in Order No. 41, RGB announced similar minimum dollar increases.

The Supreme Court Challenge

Various tenants and tenant groups challenged the minimum dollar increases set forth in Order Nos. 40 and 41 as exceeding RGB's authority under the Rent Stabilization Law. In a decision dated Jan. 20, 2010, New York County

Supreme Court Justice Emily Jane Goodman ruled in favor of the tenants and struck down the minimum dollar increases.[2] The Supreme Court ruled that pursuant to the Emergency Tenant Protection Act (ETPA) (L. 1974, ch. 576, § 4), only the New York City Council has the authority to "define classes of accommodations" that are or are not subject to rent stabilization. The court held that RGB, by distinguishing between low-rent stabilized apartments and all other stabilized apartments, impermissibly created a class of accommodations and thus exceeded its powers.

The First Department Affirms

On June 22, 2010, the Appellate Division, First Department unanimously affirmed the Supreme Court's order.[3] The First Department ruled in relevant part:

Under the Emergency Tenant Protection Act of 1974, the Council of the City of New York is empowered to regulate the rents of housing accommodations subject to the New York City Rent Stabilization Law. The New York City Rent Guidelines Board was created pursuant to that statutory authority, and under Rent Stabilization Law § 26-510(b), is authorized to annually adjust the 'maximum rate or rates of rent' for rent stabilized units. In doing so, the Rent Guidelines Board is necessarily subordinate to the City Council, which is vested by the State with the exclusive power to promulgate local rent regulations. Although the City Council has the power to establish classifications of housing accommodations, and, if deemed necessary, to thereby allow for differentiations of rental treatment, it has not done so. It does not follow, however, that the Rent Guidelines Board may, in effect, step into the breach, without express statutory authority or delegation by the City Council. (Internal citations omitted).[4]

Court of Appeals Reverses

On Oct. 26, 2010, the Court of Appeals granted RGB leave to appeal. On March 24, 2011, the Court of Appeals issued its ruling and reversed the Appellate Division.

The majority opinion was authored by Judge Robert S. Smith, and was joined by Chief Judge Jonathan Lippman and Judges Victoria A. Graffeo, Eugene F. Pigott, and Susan P. Read. Judge Smith first distinguished between the New York City Council, which, pursuant to L. 2003 ch. 82, was stripped of all power to subject various classes of housing accommodations to rent stabilization, and RGB, which establishes annual rent increases:

The language that empowers the RGB to establish 'the maximum rate or rates of rent adjustment…for one or more classes of accommodations' does not, as a simple matter of grammar, say or imply that there must be only one 'maximum rate…of rent adjustment' for each class. And the ETPA language that petitioners rely on (which has been in any event largely nullified by later legislation) has nothing to do with the issue before us. To say that a 'local legislative body' may determine when a 'public emergency' exists requiring rent regulation for 'all or any class or classes of housing accommodations' is to say nothing at all about whether, or by whom, multiple levels of rent increases may be permitted within each class. (Internal citations omitted).

Judge Smith then addressed RGB's principle argument, that RGB, for many years, had distinguished among classes of housing accommodations without challenge:

The RGB has made a number of…distinctions within the apartment 'class.' It has allowed landlords to charge extra when electricity is included in the rent, and to collect 'fuel adjustment surcharges.' Indeed, the order challenged in this case distinguishes between apartments in which heat is provided by the landlord and those in which it is not. Petitioners say that all these distinctions are invalid, and have survived only because the power to create them has never been challenged; they assert that they could, but chose not to, attack the heat-based distinction contained in the order now at issue. To us, however, the fact that such distinctions have long been accepted without question is further confirmation that nothing in the governing legislation can fairly be read to prohibit them. (Internal citation omitted).

Finally, the majority addressed the tenants' argument that the Legislature's adoption of statutory vacancy increases in L. 1997, ch. 116 (the "Rent Regulation Reform Act of 1997") indicated that the Legislature knew of, and approved of, the fact that there would be substantial rent gaps between recently vacated apartments and low-rent apartments which had not become vacant for many years, i.e., the exact class of apartments RGB made subject to its minimum dollar increases. The majority wrote:

There is no conflict between the RGB's…minimum increases, which give some benefit to landlords of low-rent, slow-turnover apartments while their tenants remain in possession, and the State legislation, which gives relief regardless of rent level after a slow-turnover apartment has finally become vacant. It is true that some landlords may, eventually, benefit from both provisions, but the two benefits, even where cumulative, are not logically inconsistent. Nor is the State legislation so detailed and comprehensive as to imply that the Legislature has preempted the field.

The Dissent

Judge Carmen B. Ciparick authored the dissenting opinion, and was joined by Judge Theodore T. Jones. The dissent was based on the "preemption" argument that the majority had rejected. The dissenters wrote:

Of course, it is no coincidence that long-term tenants are the greatest beneficiaries of rent stabilization, or that, in the majority's words, 'tenants paying higher rents must subsidize those paying lower rents.' This inequality is due, in large part, to the Rent Regulation Reform Act of 1997, which amended the Rent Stabilization Law to provide that a vacancy lease can increase a unit's rent by up to 20 percent, and even more where there has been no vacancy increase for over eight years or the rent is particularly low. The evident purpose of these changes was to bring apartments closer to market rent as they became vacated. Critically, the Legislature did not couple the large rent increases it was authorizing for new tenants with any alteration in how rent increases were calculated for current tenants. Under this scheme, by design, there is a large rent gap between new tenants and those whose tenancies predate the amendment, and it will increase as many apartments experience repeated vacancies.

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By creating varied rates with the intended effect of minimizing the degree to which landlord costs are disproportionately covered by higher paying apartments, the Board sought to mitigate a rent disparity the Legislature created.

As noted, RGB has, in the past, distinguished among classes of apartments based on various factors, such as whether the landlord provides heat or electricity. The Court of Appeals has now made clear that RGB has the power to so distinguish. How RGB will use that power in the future remains to be seen.

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Endnotes:

1. *Casado v. Markus*, 16 N.Y.3d 329, ____ N.Y.S.2d ___ (2011).

2. *Casado v. Markus*, 27 Misc. 3d 340, 898 N.Y.S.2d 780 (Sup. Ct. N.Y.Co. 2010).

3. *Casado v. Markus*, 74 A.D.3d 632, 903 N.Y.S.2d 387 (1st Dep't 2010).

4. 74 A.D.3d at 633.