From: Paula Z. Segal, Senior Staff Attorney, TakeRoot Justice
Date: July 6, 2022
Re: **New York City's Authority to Regulate Rents of Non-Residential Spaces**

QUESTION PRESENTED

Is Intro. 93, which proposes to create a system of Commercial Rent Stabilization for non-residential spaces in the City of New York, lawful under New York State and Federal laws?

SHORT ANSWER

Yes. The City has police powers under State law sufficient to regulate persons and property for the purpose of securing the public health, safety, welfare, comfort, peace and prosperity of the municipality and its inhabitants. Limits on municipal powers *can* be placed by the State, but the City has the power under N.Y.S. Home Rule to regulate in any field the State has not occupied. The State has not occupied the field of regulating rents in non-residential units.

In contrast, regulation of the end of a tenancy would likely be preempted by State law, but Intro. 93 contains no provisions that would regulate or limit this element of the landlord-tenant relationship.

Further, commercial rent regulation is not a Taking under the federal Constitution as it does not eliminate all economic potential of leasing property for landlords.

THE PROPOSED LOCAL LAW, INTRO. 93

When enacted, Intro. 93 will establish a system for regulating rent increases for tenants of non-residential premises in New York City that is based on a newly-established Commercial Rent Guidelines Board ("Board"). The purpose of Intro. 93 is to give small businesses a measure of stability by limiting landlords' ability to sharply increase rents far beyond market rates and what small businesses can bear, thus addressing directly the inequitable displacement and vacancy rates affecting the City's commercial corridors.

The Board, representing diverse interests, will use economic statistics and indicators as well as public input to determine how much non-residential rents can increase from year to year by setting permissible annual rental rate adjustments.[1] New and renewal leases would be subject to regulation.

No existing contracts would be impacted by regulation; those contracts would be allowed to run their remainder of their term and regulation of relationships between landlords and their current tenants would only apply once the current rental agreement expires or the relationship ends.

[1] Initial rental rates upon which annual adjustments would be based would be based on the most recent agreement before implementation of the law.

The proposed law simply creates a system of price controls. It does not impact the rights of landlords and tenants at the end of a tenancy.

The law would also establish responsibility for enforcement in a city agency that would accept requests from landlords or tenants to adjust rents that deviate widely from market rates, complaints, and claims of tenant harassment.[2] Each owner of a non-residential space that is leased or available for leasing would register with the agency and pay an annual fee to support enforcement.

THE LEGAL LANDSCAPE

Regulation of Non-Residential Landlord-Tenant Relationships in NYC

There is currently no City or State agency that monitors, licenses or otherwise regulates commercial landlords or the relationship between such landlords and their current or potential tenants. New York State regulated such relationships between 1945 and 1962[3] but has since ceased.

Last year, the Second Circuit federal court affirmed that the City has the right to regulate landlord behavior by upholding a law limiting landlords' ability to collect past-due business rents from business owners' personal assets during the COVID-19 pandemic. *See Melendez v City of NY*, 503 F.Supp.3d 13 (S.D.N.Y. Nov. 25, 2020) *aff'd* (16 F.4th 992, 2d Cir. Oct. 28, 2021) (ordinance limiting ability of commercial landlords to enforce existing contracts lawful; acknowledging "substantial impairment on landlords' contractual rights" but holding that impairment is constitutional under the Contracts Clause if evidence shows that impairment advances a significant public purpose). This recent decision is the only one in which any court addresses regulation of non-residential landlord-tenant relationships by the City within our present-day statutory framework and under the current New York State Constitution. Intro. 93 would likewise be found to be a lawful local intervention in this field, but would not be subject to the evidentiary rigor that the *Melendez* court is requiring as the proposed Local Law would not impact any existing contractual agreement.

The only New York State law that currently impacts such relationships is the law that governs the end of tenancies and their adjudication in the State courts. *See* Real Prop. Law § 228 (McKinney 1968 & Supp. 1987) (codifying landlords' rights to terminate tenancies at will); Real Prop. Law § 232-a (McKinney 1968 & Supp. 1987) (codifying landlords' rights to terminate month-to-month tenancies); Real Prop. Law § 229 (McKinney 1968 & Supp. 1987) (codifying

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[2] While non-residential tenant harassment has been an independent cause of action that tenants can pursue as a claim against their landlords since 2016, *see* N.Y.C. Admin. Code § 22-902 et seq., in this context a judicial finding of harassment will reduce how much a landlord is able to raise rent.

[3] *See* 1945 N.Y. Laws 3; *see 20th C Associates v. Waldman*, 294 NY 571 (1945) (commercial rent regulation by the State was a valid exercise of its police powers).

recovery from holdover tenants). Non-residential tenancies do not involve "housing accommodation" and thus are not subject to the established State system of regulation in that arena.[4]

Critically, Intro. 93 would not impact the termination-of-tenancy processes established by State law.

Considering the federal courts' deference to local lawmaking as evinced by *Melendez*, Intro. 93 would certainly also be found to be lawful as long as it advances a legitimate public interest. Intro. 93, by its structure of maximum price controls on future rent receivable, would not even ra~~i~~se to the level of overt cancellation of contractual rights that in the NYC local law that the court examined and upheld in *Melendez*

N.Y.S. Home Rule

New York State's basic system of local governance is set forth in Article IX of the State Constitution.[5] Article IX authorizes local governments to adopt local laws in a wide range of fields including the government, protection, order, conduct, safety, health and well-being of persons or property within the locality. N.Y. Const. art. IX, § 2(c)(ii)(10); Municipal Home Rule Law § 10(1)(ii)(a)(12); *see also* N.Y. City Charter § 28(a).[6]

Adopted in 1963, a year after the expiration of commercial rent controls that had been imposed on the City by the State of New York, the new Article IX was intended to expand and secure the powers enjoyed by local governments. Home Rule in the 1963 Constitution is explicit: powers of local governments to act in their own jurisdiction are meant to be construed broadly by the courts. N.Y. Mun. Home Rule L. § 51 (providing that home rule powers "shall be liberally construed"); N.Y. Stat. Local Gov. § 20(5) (same). Under post-1983 Home Rule, the State need not expressly delegate or enable local government action that is encompassed by Home Rule. *See People v. New York Trap Rock Corp.,* 57 N.Y.2d 371, 378 (1981) ("(i]t is, therefore, well settled that if a town or other local government is otherwise authorized to legislate, it is not forbidden to

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[4] The City is particularly not restricted by limits that the State has put on localities' regulation of "housing accommodations." *See* N.Y. Uncons. Laws § 8605 (sometimes referred to as "the Urstandt law"). Cases in which the courts interpret this housing-specific provision are irrelevant to an analysis of commercial rent regulation, *e.g. 241 E. 22nd Street v. City Rent Agency*, 33 N.Y.2d 134 (1973); *210 E. 68th Street v. City Rent Agency*, 76 Misc. 2d 425, (Sup. Ct. N.Y. 1973), *aff'd*, 34 N.Y.2d 560 (1974), as are cases examining whether local ordinances are preempted by State's regulation of the tenancy in housing accommodations, *e.g. Pusatere v. Albany* (Albany Cty. Ind. 909653-21) (Jun. 30, 2022).

[5] *See generally,* N.Y. State Bar Association, *Report and Recommendations Concerning Constitutional Home Rule* (April 2, 2016), *available at* https://www.nysba.org/homerulereport/.

[6] Municipalities have expanded sovereignty when their local laws address their own "property, affairs and government," N.Y. Municipal Home Rule Law §10(1) (ii); *see Adler v. Deegan*, 251 N.Y. 467, 472 (1929). While the proposed Local Law would likely be found to address NYC's affairs and thus to trigger this expanded standard for sovereignty, there is no need to rely on such a finding when the broader Home Rule grant easily applies.

do so unless the state, expressly or impliedly, has evinced an unmistakable desire to avoid the possibility that the local legislation will not be on all fours with that of the state").[7]

Further, under Home Rule, courts treat with deference local laws designed by local legislatures like the NYC City Council to address specifically local conditions. *See e.g. Board of Elections v. Mostofi,* 108 N.Y.S.3d 819, 830 (Sup. Ct. N.Y. Co. Sept. 19, 2019) ("while there are municipalities in other parts of the state that have [limited English proficiency ("]LEP["")] voters who would benefit from having interpreters, given the sheer number of LEP voters in the City who need language assistance the scope of the need for interpreter services *is unique to the City, and supports this local initiative to address the issue*" (emphasis added)). The Court of Appeals has been clear that N.Y. Municipal Home Rule Law authority can apply to regulation of all affairs within a local jurisdiction. *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 434 (1989) (describing legislative intent of the present-day Municipal Home Rule Law which recognized that "the legislation could "enable drastic changes").

Home Rule addresses two basic questions: (1) can the State legislate in a way that impacts the City? and (2) can the City legislate in a particular arena? New York law, since 1963, has balanced municipal sovereignty with New York State's interests in the welfare of its residents while answering both of these questions. As the question presented here regards a City law, this memo will be limited to an analysis of the second question only.[8]

When the question is whether a City can properly enact a local law per its powers under the New York State Constitution, a "local law will be preempted either where there is a direct conflict with a state statute (conflict preemption) or where the legislature has indicated its intent to occupy the particular field (field preemption)." *Eric M. Berman, P.C. v. City of New York*, 25 N.Y.3d 684, 690 (2015).

Conflict Preemption: Look Out for a Head-on Collision

Local laws that do not prohibit what State law expressly allows or that allow what State law expressly prohibits are not viewed by the courts as unlawfully in conflict. *See e.g. Wholesale*

[7] No reliance at all can be placed on pre-1963 cases regarding conflicts between State and City regulation of rents for housing accommodations, *e.g. Gennis v. Milano*, 135 Misc. 209 (1st Dep't 1929), as the relevant State Constitutional provisions have been amended and the subject of the proposed law is not housing accommodations.

[8] For the purposes of analyzing whether *the City* can legislate in the arena of commercial rent regulation, it is important to distinguish between the line of cases that arose out of State legislation and those that arose out the actions of local governments. For example, in *City of New York v. State of New York*, 67 Misc.2d 513, 514 (Sup. Ct. N.Y. 1971), *aff'd*, 31 N.Y. 2d 804 (1972) the City of New York attempted to restrain the State of New York from implementing Residential Vacancy Decontrol Law. No City law was before the Court. The City hadn't exercised its own home rule powers but was instead attempting to assert its sovereignty to overturn a State law. The Court of Appeals affirmed this, because the state had legislated in residential vacancy decontrol and therefore that the City was clearly precluded from legislating in this arena; here, the specific legislative action was the subject of the case.

Laundry Bd. v. City of New York, 17 A.D.2d 327, 329 (1st Dept.), *aff'd*, 12 N.Y.2d 998 (1963) (State law permitted paying workers a minimum wage; City law that raised that wage was not lawful because it prohibited paying workers an hourly amount that State law explicitly permitted); *Chwick v. Mulvey*, 81 A.D.3d 161, 169 (2d Dep't 2010) ("without a 'head-on collision' between the [State] Law and the amended ordinance, conflict preemption does not apply;" local ordinance regulating colored guns upheld even though State Penal Law regulates gun ownership). The *Chwick* court explained,

> the mere fact that the Legislature's silence appears to allow an act that a local law prohibits does not automatically invoke the preemption doctrine. 'If this were the rule, the power of local governments to regulate would be illusory. Any time that the State law is silent on a subject, the likelihood is that a local law regulating that subject will prohibit something permitted elsewhere in the State. That is the essence of home rule.

81 A.D.3d 168-9 (quoting *People v. Cook*, 34 N.Y.2d 100, 109 (1974)).

Field Preemption: Unequivocal Occupation?

In the alternative, a court may find that a local law is preempted by State law where there is evidence that the State desired to occupy the field. "A desire to pre-empt may be implied from a declaration of State policy by the Legislature or from the fact that the Legislature has enacted *a comprehensive and detailed regulatory scheme* in a particular area. *Consol. Edison Co. of New York v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983) (emphasis added). *See Board of Elections v. Mostofi,* 108 N.Y.S.3d at 830 (no conflict preemption for local law mandating the provision of interpreters at polling places despite the State Election Law providing a comprehensive regulatory scheme as no provision of the Election Law expressly governs the ability to provide interpreter services to voters; "[t]he Election Law contains no express legislative statement of an intent to preempt municipal action"); *New York Bankers Ass'n, Inc. v. City of New York,* 119 F.Supp.3d 158, 194 (S.D.N.Y. 2015) (local law regulating state-chartered banks found to be preempted by State law where that State "evinces an intent to preempt the field of regulating state-chartered banks" by including language in the statute creating a State regulatory agency that it is "the policy of the state of New York that the business of all… banking organizations shall be supervised and regulated through the" State agency which will "have broad powers of regulation to control and police the banking institutions under their supervision" (internal citations and quotations omitted)). *Chwick*, 81 A.D.3d at 170 (detailed Penal Law scheme for firearms licensing preempts local law licensing provisions); *People v. Kelsey's Seafood,* 112 Misc. 2d 927, 930 (Dist. Ct. Suffolk 1982) (local law that required shellfish wholesalers to obtain local permit in addition to the permit that the State already required found to be preempted).

Simply legislating in an area is not sufficient to occupy the field. Even where there are some State interests, where the State's interests are "minor" and its regulation limited, courts have allowed local laws that supplement the State's limited engagement in particular arenas. For example, in *Council for Owner-Occupied Housing, Inc. v. Koch,* 119 Misc. 2d 241 (Sup. Ct. N.Y. 1983), the court found that since existing State laws in the area of cooperative and

condominium conversions were primarily disclosure statutes, there was no conflict with a City ordinance that added a new requirement that a three percent reserve fund be established in cooperative or condominium conversions. Even where there is some State law that seems to overlap with a local law, but the court finds that State enforcement is limited, local legislation will survive a challenge. *See e.g. Ambulance and Medical Transp. Ass'n v. City of New York,* 98 Misc. 2d 537, 539 (Sup. Ct. N.Y. 1979) (more exacting City regulation of wheelchair-accessible transportation upheld given evidence of less-than-forceful State enforcement of a parallel provisions); *see also People v. Judi,* 38 N.Y.2d 529, 531 (1976) (Court of Appeals upheld a City ordinance criminalizing possession of toy guns without intent to use unlawfully even though State law required that possession with intent to be used unlawfully be proven); *People v. Lewis,* 295 N.Y. 42 (1945) (City penalties for black market activities which exceeded State penalties were found not to create unlawful inconsistency).

The fact that both the State and the City seek to legislate in the same area does not alone create an inconsistency. *Eric M. Berman, P.C. v. City of New York*, 796 F.3d 171, 174 (2d Cir. 2015) (finding "no express conflict between the broad authority accorded to [New York State] courts to regulate attorneys under the [New York] Judiciary Law and the [local] licensing of individuals as attorneys who are engaged in debt collection activity falling outside of the practice of law," and further finding that the "authority to regulate attorney conduct does not evince an intent to preempt the field of regulating" all services rendered by attorneys (internal citations and quotations omitted)); *see also People v. Webb,* 78 Misc. 2d 253, 256 (Crim. Ct. N.Y. 1974).

There is no State law that explicitly regulates the rents of non-residential spaces, the proposed Local Law does not conflict with any State law as the State (i) has no system in place to regulate commercial rents at all and (ii) has not had one since before the 1963 revision of the Home Rule section of the New York State Constitution. The State has neither made a declaration of its intention to occupy the field of commercial leasing, nor enacted any regulatory scheme that applies to the field. State laws governing the process of termination of tenancy will likely be found to be evidence of a minor interest in the relationship between commercial landlords and tenants, insufficient to establish a head-on conflict or an intention to occupy the field.

The proposed local law is not an attempt to establish a regulatory agency which parallels a State agency as there is no current State agency that controls commercial leasing. The City is not proposing to add regulations and requirements to activities that are already regulated by the State as the locality did in *Kelsey's Seafood* when it required operators who were already required to get a permit from the State to get another local permit.

Police Powers

In addition to the Home Rule powers enumerated above and granted by the Constitution and specific State statutes, municipalities have broad police powers.

> Legislation which has for its object the promotion of the public welfare and safety, falls within the scope of the police power and must be submitted to even though it imposes restraints and burdens on the individual.

People v. Ortiz, 479 NYS2d 613, 620 (2nd Dept 1984).

The police power has been defined generally as the power to regulate persons and property for the purpose of securing the public health, safety, welfare, comfort, peace and prosperity of the municipality and its inhabitants *Village of Carthage v. Frederick*, 122 N.Y. 268 (1890) (affirming village law imposing responsibilities on owners of real property in its limits). The power is as old as is the organization of municipalities.

In *People v. Cook*, the Court of Appeals affirmed that police powers of a local government give it the power to establish price controls. 34 N.Y.2d at 104 ("the leading New York cases interpreting the police power of municipalities support the validity of municipal price regulation in certain instances"). It is a "a proper exercise of the City's police power to regulate … businesses in the public interest," *Short Stop Industrial Catering*, 485 N.Y.S.2d 921, 924 (Sup. Ct. N.Y. Co 1985),[9] and there is no exclusion for the regulation of real estate businesses.

Price controls are a hallmark of police powers granted to municipalities and the controlling of rent increases by Intro. 93 would not fall outside this broad grant of power.

Takings that Require Just Compensation

A Local Law that makes a business "less profitable", while not eliminating its ability to profit entirely, is not a taking that requires compensation under the federal Constitution. *Everest Foods Inc. v. Cuomo*, 2022 WL 355553 (S.D.N.Y. Feb. 7, 2022) (affirming State and City rights to regulate business activities to advance public interest). As a New York District Court explained,

> Every restriction upon the use of property, imposed in the exercise of the police power, deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety, or morals from dangers threatened is not a taking.

Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc., 592 F.Supp. 304 (N.D. N.Y. 1984) (*quoting Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting)).

The Supreme Court of the United States has recognized only two "relatively narrow" categories of regulatory takings: regulatory actions (1) that permanently invade the owner's property, or (2) completely deprive an owner of *all* economically beneficial use of the property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (*quoting Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

[9] *See* NYC Admin. Code § 5-42 (Unlawful Price Gouging); *see also* https://www1.nyc.gov/site/dca/media/Face-Masks-in-Short-Supply-Due-to-COVID-19.page (cataloguing Local Laws that control prices).

Where a property retains some of its value, courts will consider whether such action constitutes a partial taking. A government action that "merely adjust[s] the benefits and burdens of economic life," is not a "taking." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

The Supreme Court "has consistently affirmed that States have broad power to regulate [...] the landlord-tenant relationship without paying compensation for all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 440 (1982); *see Dawson v. Higgins*, 610 N.Y.S.2d 200, 207 (App. Div. 1st Dept. 1994) (upholding regulatory rule permanently preventing certain evictions from rent-controlled units). Denying the owner a "reasonable return" on the land does not prevent economically viable use, and is thus not a "taking." *Rent Stabilization Ass'n v. Dinkins*, 805 F. Supp. 159, 163 (S.D.N.Y. 1992) (upholding New York City's Rent Stabilization Law).

Rent increase regulation for non-residential tenancies does not destroy all economically beneficial or productive use, and thus not a "taking." Landlords will continue to get the right to collect rents and to choose their tenants once Intro. 93 is the law in NYC.

CONCLUSION
Commercial Rent Regulation by the City of New York is Lawful

The City has all the authority it needs under the New York State and Federal Constitutions to create a system of price controls for non-residential spaces located in its geographic boundaries.

Home Rule and police powers provide a solid foundation upon which such regulation can rest; the Takings Clause of the federal Constitution does not mandate any compensation to landlords who find themselves regulated by the new Local Law.

It is urgent that the City Council act now as rent hikes for existing tenants seeking to renew their leases daily function as evictions that close institutions our neighborhoods rely on and inflated asking rents keep storefronts where new businesses thrive shuttered for years.