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PRELIMINARY STATEMENT

It is beyond dispute that an agency created by the legislative branch may not overstep the statutory authority granted to it. In this matter, the New York City Rent Guidelines Board (the “Board”), an agency created by the Council, clearly overstepped its authority under the New York City Rent Stabilization Law (the “RSL”) and the New York State Emergency Tenant Protection Act (“ETPA”).

Under the plain language of the RSL and the ETPA, the Board is authorized to issue rent increase orders for “classes of accommodations” identified by the New York City Council (the “Council”) as accommodations for which a housing shortage exists. As allowed for under the ETPA, the Council has declared a housing emergency for all classes of housing accommodations within the City of New York (the “City”). The only units of housing identified by the Council for separate treatment by the Board are long-term rental units within hotels. As made clear by a 2008 Second Department decision, the Board may not identify another class of properties and set a separate rate increase for such class.

This year the Board cavalierly set a separate rate schedule for a class of properties wholly conceived of by the Board. In its 2008 Apartment & Loft Order # 40 (“Order No. 40”), the Board imposed a separate, higher increase for units occupied by tenants for six years or more whose rent is less than \$1,000.¹ At no point has the Council identified these tenants as a class that may be the subject of a separate rent increase order. To the contrary, when the Council adopted the RSL, it specifically and expressly emphasized that longstanding tenants must be protected. The Board, in public materials on its web

¹ The remaining provisions of Order No. 40, which establish rent increases for all other tenants, are not at issue in this case.

site, acknowledges as much: “The creators of rent stabilization were particularly concerned with community and household stability and sought to avoid the displacement of ‘long-time’ residents.”

Order No. 40 is wrong on all levels:

- It violates the plain language of the RSL and the ETPA;
- It is repudiated by the Second Department’s recent decision; and
- It is bad policy that, as acknowledged by the Board, is offensive to the creators of the statutory scheme.

In sum, Order No. 40 offends the basic notion of a representative democracy. The Board, an unelected body, overstepped bright lines drawn by the legislature and sought to overturn policy decisions expressly made by the legislature. Accordingly, and for the reasons more fully discussed below, the Council respectfully requests that this Court grant petitioners’ requested relief to declare Order No. 40 null and void.

STATEMENT OF INTEREST

The Council is the lawmaking body of the City. It is composed of 51 elected council members who each represent a Council District in one of the five boroughs of the City. See New York City Charter §§ 21, 22. One of the Council’s primary responsibilities is the adoption of local laws. The primary issue raised in the petitioners’ motion papers is that Order No. 40 usurps the Council’s lawmaking authority.

In 1969, in response to a public housing crisis, the Council enacted the RSL, which created the Board. See N.Y.C. Admin. Code § 26-510. Pursuant to the RSL, the Board is responsible for promulgating annual rent increase percentages for rent stabilized apartments. Id. When the State Legislature enacted the ETPA in 1974, the State deferred

to the Council. It expressly preserved the RSL and the Council's lawmaking authority over the Board.

Over the years, the Council has enacted significant legislation modifying the Board's powers. For example, in 1979, the Council enacted a law requiring the Board to hold public hearings prior to the annual rent adjustment. See Local Law 25 of 1979, attached to the Affidavit of Lauren G. Axelrod, dated October 1, 2008, as Exhibit A.² As another example, in 1980, the Council increased the per diem compensation of Board members and authorized the chairman of the Board to hire and supervise his own employees. See Local Law 11 of 1980 (Axelrod Aff., Ex. B).

In addition to adopting local laws concerning the Board, individual council members have also offered public testimony for the Board to consider prior to its annual rent increase. For example, this year Speaker Christine C. Quinn and Council Members Charles Barron, Gale Brewer, Daniel Garodnick, Eric Gioia, Robert Jackson, Letitia James, Jessica Lappin, Diana Reyna, and David Yassky each testified before the Board. (R. at 1475-92, 1531-49, 1568-77, 1593-1614, 2083-96, 2113-26, 2202-16, 2476-77, 2485-86). Council Member Vincent Gentile submitted written testimony to the Board. (R. at 2480-81).³

STATUTORY BACKGROUND

The Council adopted the RSL in 1969. The RSL created the City's system of rent stabilization and established the Board to set annual rent increases based on periodic

² All exhibits to the Axelrod Affirmation are hereinafter referred to as "Axelrod Aff., Ex. ___."

³ The Council passed a resolution endorsing Speaker Quinn's decision to seek *amicus curiae* status in this litigation. New York City Council Resolution No. 1612 of 2008, available at <http://webdocs.nycouncil.info/textfiles/Res%201612-2008.htm?CFID=1865245&CFTOKEN=98023910>.

examinations of economic trends. In the mid-1970s, rent costs in the New York City metropolitan area skyrocketed in large part due to the enactment of new state rent decontrol laws.⁴ In response, in 1974, the State Legislature reversed course and adopted the ETPA. The ETPA continued the Council's local rent regulation scheme by expressly providing that the RSL would remain in force. See N.Y. Unconsol. Law § 8623(a).

A. The Enactment of the Rent Stabilization Law

The RSL imposed a system of rent stabilization upon hundreds of thousands of units that previously were not subject to rent control or had been decontrolled. See Local Law 16 of 1969, § YY51-1.0 (legislative findings) (Axelrod Aff., Ex. C). To carry out this mandate, the RSL created the Board to study economic indicators and issue annual rent increase percentages. See id. at § YY51-5.0 (currently codified as N.Y.C. Admin. Code § 26-510).

When it was first enacted, the RSL applied only to Class "A" multiple dwelling units⁵ constructed after 1947 that were not owned as cooperatives or condominiums. (Axelrod Aff., Ex. C.) Three months after it enacted the RSL, the Council added an additional type of dwelling unit for which the Board could impose annual rent increases

⁴ New York Div. of Housing and Community Renewal, Rent Regulation After 50 Years: An Overview of New York State's Rent Regulated Housing (1993), available at <http://www.tenant.net/Oversight/50yrRentReg/history.html> (follow "Table of Contents" hyperlink; then follow "History of Rent Regulation" hyperlink).

⁵ A multiple dwelling unit is "a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other." N.Y. Mult. Dwell. Law § 4(7). A Class "A" multiple dwelling unit is "a multiple dwelling which is occupied, as a rule, for permanent residence purposes." Id. § 4(8)(a).

— hotels constructed prior to July 1, 1969.⁶ See Local Law 51 of 1969, § YY51-3.1 (currently codified as N.Y.C. Admin. Code § 26-506) (Axelrod Aff., Ex. D).

The Council found that the enactment of the RSL was “imperative . . . in order to prevent exactions of unjust, unreasonable and oppressive rents. . . .” See Local Law 16 of 1969, § YY51-1.0 (currently codified as N.Y.C. Admin. Code § 26-501) (Axelrod Aff., Ex. C). Specifically, the Council found that such rent increases were “uprooting long-time city residents from their communities.” Id. As Mayor Lindsay noted in support of the RSL, the concern was that City residents would “have nowhere else to go for housing — except to the suburbs; and the City will do everything in its power to prevent that.” Press Release, Mayor John V. Lindsay (Feb. 8, 1969) (Axelrod Aff., Ex. E).

B. The Emergency Tenant Protection Act

In 1974, the State enacted the ETPA, which authorized local legislative bodies in the City and certain surrounding counties to declare a housing emergency for any “classes of housing accommodations” if vacancy rates for any class fell below five percent. See N.Y. Unconsol. Law §§ 8623(a), 8634; see also 1981 N.Y. Op. (Inf.) Att’y Gen. 237.⁷ The ETPA also provided that a locality could declare a state of emergency for all classes of accommodations. N.Y. Unconsol. Law § 8623(a). A local legislature’s decision to add a class of accommodations must be enacted via a resolution, which must be preceded by a public hearing. See N.Y. Unconsol. Law § 8623(c). Once a locality has

⁶ The State Legislature, through the Multiple Dwelling Law, also has authorized the Board to set a separate rent increase schedule for lofts. N.Y. Mult. Dwell. Law § 286(7). The Board’s schedule for lofts is not at issue in this litigation.

⁷ Local legislative bodies are also authorized to declare an end to a housing emergency. See N.Y. Unconsol. Law § 8623(b).

determined the existence of a housing emergency, it must establish a rent guidelines board to gather economic findings and set annual rent increases. See N.Y. Unconsol. Law § 8624(a). Once a rent guidelines board has set the annual rent increase, the state DHCR administers and enforces the rent guidelines. See N.Y. Unconsol. Law § 8628(c).

The ETPA expressly continued the RSL and ratified the Council’s rent stabilization scheme, including the Council’s authority over the Board. The Council implemented the ETPA by passing Resolution 276 of 1974, which declared a state of emergency for “all classes of housing accommodations within the City of New York.” See Resolution 276 of 1974 (Axelrod Aff., Ex. F). In the resolution, the Council reaffirmed its prior concern about the impact of the rapid rise of rent for long-time city residents. In sum, the ETPA and the Council’s implementing resolution effectively continued the rent stabilization system established by the RSL.⁸

ARGUMENT

POINT I

ORDER NO. 40 BRAZENLY VIOLATES THE PLAIN LANGUAGE OF THE RSL AND THE ETPA AND INVALIDLY USURPS THE COUNCIL’S LEGISLATIVE AUTHORITY

The plain language of the RSL and ETPA require that Order No. 40 be declared null and void. The RSL and ETPA clearly and unambiguously make clear that the Council, and not the Board, has the authority to identify “classes of accommodations” that may be the subject of rent increases by the Board. The Council is not alone in this

⁸ In 2003, the State Legislature enacted a law limiting the Council’s authority to adopt laws specifically strengthening the regulation of residential rents. See N.Y. Unconsol. Law § 8605. This state law did not disturb the balance of power between the Council and the Board.

conclusion. The Second Department, in a decision that is binding on this court,⁹ recently so held in invalidating an order of the Nassau County rent guidelines board that is very similar to Order No. 40.

A. The Plain Language of the ETPA and RSL Require Invalidation of Order No. 40

Under the ETPA, the “local legislative body” is empowered to declare the existence of a public housing emergency requiring rent regulation. See N.Y. Unconsol. Law §§ 8622, 8623. Such a declaration “may be made as to any class of housing accommodations if the vacancy rate for the housing accommodations in such class within such municipality is not in excess of five percent.” Id. A declaration also may be made “as to all housing accommodations if the vacancy rate for the housing accommodations within such municipality is not in excess of five percent.” Id. Under the RSL, the Council made a general declaration that a public housing emergency exists; the only properties treated separately by the Council under the RSL are units in hotels. N.Y.C. Admin. Code §§ 26-501, 26-506, 26-510(e).

The RSL’s discussion of the Board’s authority to set rent increases makes clear that the Board must set the same increase schedule for each “class of accommodations.” The RSL provides that the Board must “establish annually guidelines for rent adjustments” after considering certain financial data identified by the Council. N.Y.C. Admin. Code § 26-510(b).¹⁰ The RSL further provides that these rent adjustments must be “for one or more classes of accommodations subject to this law.” Id. (emphasis

⁹ The Court of Appeals has held that trial courts located within one department of the Appellate Division must follow precedent set by another department of the Appellate Division until a contrary decision is issued by either the Court of Appeals or the department in which the trial court sits. See People v. Turner, 5 N.Y.3d 476, 482 (2005) (citing Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 664-5 (2d Dep’t 1984)).

¹⁰ The Council also provided that the Board must also consider “such other data as may be made available to it.” N.Y.C. Admin. Code § 26-510(b).

added). (The Board “shall file with the city clerk its findings . . . and shall accompany such findings with a statement of the maximum rate or rates of rent adjustment, if any, for one or more classes of accommodations subject to this law . . .”). Classes of accommodations become “subject to” the RSL via the Council’s declaration of the existence of an emergency. See N.Y. Unconsol. Law § 8623(a). A class of accommodations may not exist absent a legislative finding that a state of emergency exists for the specific class. No such legislative finding was made by the Council for units occupied by tenants for six years or more.

As this Court is aware, the plain meaning of a statute is controlling. See DaimlerChrysler Corp. v. Spitzer, 7 N.Y.3d 653, 660 (2006) (“[C]ourts should construe unambiguous language to give effect to its plain meaning. . . .”) (citation omitted); Washington Post Co. v. New York State Ins. Dep’t, 61 N.Y.2d 557, 565 (1984) (“When the plain language of [a] statute is precise and unambiguous, it is determinative. . . .”) (citation omitted); Patrolmen’s Benevolence Ass’n v. City, 41 N.Y.2d 205, 208 (1976) (“It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature . . . and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used. . . .”) (citations omitted).

Likewise, it is a bedrock principle of our representative democracy that an agency created by a legislative body may not overstep bright line rules drawn for it by that legislative body. See Abiele Contracting, Inc. v. New York City School Constr. Authority, 91 N.Y.2d 1, 10 (1997) (“as a general rule, ‘the jurisdiction of an administrative board or agency consists of the powers granted it by statute, [and thus] a

determination is void . . . where it is made either without statutory power or in excess thereof.”); Boreali v. Axelrod, 71 N.Y.2d 1, 9 (1987) (agency exceeded its authority by attempting to extend its power from administering codes for public health to “drafting a code embodying its own assessment of what public policy ought to be”); New York v. Prendergast, 202 A.D. 308, 316 (1st Dep’t 1922) (“ ‘The [c]ommission . . . must have the power conferred by a statute in language free from doubt. The power is not to be taken by implication; it must be given by language that admits of no other reasonable construction.’ . . . If there is doubt whether the power is given, the [c]ommission should not assume to act; but if it seems appropriate that the [c]ommission should have the power, the Legislature should be asked to give it.”) (citation omitted).

Here, Order No. 40 creates a “class of accommodations” not identified by the Council and thereby ignores the plain language of the RSL and ETPA and oversteps the boundaries of the Board’s authority. Accordingly, this Court should invalidate Order No. 40.

B. The Second Department Properly Invalidated An Order Similar to Order No. 40

On July 8th of this year, the Second Department upheld a Supreme Court decision to annul a rent increase order by the Nassau County Rent Guidelines Board which imposed a separate rent increase for a “class of accommodations” not recognized by the local legislative body. New York State Tenants & Neighbors Coalition, Inc. v. Nassau County Rent Guidelines Board, 53 A.D.3d 550 (2d Dep’t 2008), aff’g 2006 N.Y. Misc. LEXIS 3289, 236 N.Y.L.J. 91 (Sup. Ct. Nassau Co. 2006).

The order at issue in the Nassau County litigation set different rent increase schedules based upon whether a tenant’s gross aggregate family income was above or

below \$24,000 per year. However, the local legislative body had not created classes of accommodations for tenants whose income was above or below \$24,000 per year. In vacating the rent guidelines board's order, the Second Department emphasized that the local legislative body, and not the guidelines board, has the authority to create "classes of accommodations" for which a rent increase may be set:

The 'classes of accommodation' for which the Board may establish rent adjustments are created, in the first instance, by the legislative body of the relevant city, town, or village, which is empowered to declare (or declare at an end) a residential housing emergency for such classes. . . . Therefore, the Board exceeded its statutory authority in establishing a separate class of accommodation based on tenant income. . . .

New York State Tenants & Neighbors Coalition, 53 A.D.3d at 551 (internal citation omitted).¹¹ This Court is bound by the Second Department's decision. See Turner, 5 N.Y.3d at 482.

POINT II

THE BOARD EFFECTIVELY HAS CONCEDED THAT ITS SUPPLEMENTAL INCREASE BASED UPON THE LENGTH OF A TENANT'S RESIDENCY IS INCONSISTENT WITH THE LEGISLATIVE INTENT OF THE RSL TO PROTECT LONG-TERM TENANTS

The Board's own overview of itself (which is featured on its website) contains a significant admission which makes clear that Order No. 40's disproportionate increase on long-tenured residents is inconsistent with the Rent Stabilization Law:

The creators of rent stabilization were particularly concerned with community and household stability and sought to avoid the displacement of 'long-time' residents.

¹¹ The rent guidelines boards outside of the City are permitted to set different rates for different zones or jurisdictions within their respective counties. See N.Y. Unconsol. Law § 8624(b). Under the RSL, the Board does not have any analogous authority to set different rates for different geographic areas within the City.

An Introduction to the NYC Rent Guidelines Board and the Rent Stabilization System at 64, available at <http://www.nyc.gov/html/rgb/home.html> (follow “About Us” hyperlink; then follow “Intro to the RGB” hyperlink; then follow “Main Features of Rent Stabilization” hyperlink). The Board’s assessment of the Council’s intent is correct. In 1969, when the Council enacted the RSL, the Findings and Declaration of Emergency emphasized that a prominent concern in adopting the RSL was the “uprooting [of] long-time city residents from their communities.” Local Law 16 of 1969, §§ YY51-1.0 (currently codified as N.Y.C. Admin. Code § 26-501) (Axelrod Aff., Ex. C). In 1974, when the Council implemented the EPTA by resolution, the Council restated this concern. See Resolution 276 of 1974 (Axelrod Aff., Ex. F); see generally Shapiro v. Dwelling Managers, Inc., 92 A.D.2d 52, 59 (1st Dep’t 1983) (Milonas, J., concurring), appeal withdrawn, 60 N.Y.2d 612 (1983) (citing the Council’s findings that rent increases ““were uprooting long-time city residents from their communities.””) (emphasis added).

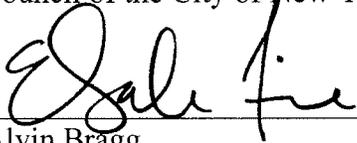
In sum, even if the Board were authorized to create a separate class of accommodations (which it is not), it certainly may not single out tenants residing in their apartments for more than six years. Order No. 40 runs far afoul of the Council’s clear intent to protect longstanding tenants.

CONCLUSION

The Council respectfully requests that the Court (i) grant its application for status as an *amicus curiae* and (ii) grant the Petitioners' motion that Order No. 40 be declared null and void.

Dated: New York, New York
October 1, 2008

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