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PRELIMINARY STATEMENT

The question on this appeal is whether the New York City Rent Guidelines Board (the “Board”) has the authority to promulgate a separate rent guideline for a narrowly defined group of tenants living in rent stabilized apartments. The court below correctly held that the Board does not.

The Supreme Court’s decision was correct for three reasons. First, the Board does not have the authority to create a class of housing accommodation that is subject to the Rent Stabilization Law (“RSL”), either explicitly or as a matter of fact. The Board concedes that it does not have the authority to expressly create a new class of accommodation. However, by distinguishing between tenants within the class of rent stabilized apartments, the Board has de facto created a new class of accommodation. The Board is directed by law to promulgate a single rent guideline for each class of rent stabilized apartments.¹ The Second Department has ruled that, in issuing rent increases, a rent guidelines board may not distinguish among tenants within a class of housing accommodation based on tenant characteristics, because the Board in effect is creating a new class of accommodation. The Board asserts, nonetheless, that it has the authority to make distinctions among housing accommodations, but relies largely on legal authority

¹ The Legislature has expressly authorized “different levels of fair rent increases for hotel dwelling units renting within different rental ranges,” RSL § 26-510(e), but hotel dwelling units is a class of accommodation which is not at issue in this case.

that permits distinctions among different classes of accommodation – a power that is not at issue in this case.

Second, by promulgating a separate rent guideline for long-term tenants, the Board has wrongfully usurped the policymaking discretion that is reserved to the Legislature. The Council and the Legislature created three classes of accommodation that are subject to rent stabilization: apartments, hotel dwelling units, and lofts. Neither legislative body created a class of long-term tenants. Yet despite this, the Board effectively created a fourth class consisting of long-term tenants. As an administrative agency, the Board is bound by the limits of its legislative mandate. Thus the Board has impermissibly breached the limits of its authority.

Third, even if the Board does have the authority to make distinctions within a class of accommodation, which it does not, it may not single out tenants for higher increases based on their length of occupancy because such a distinction plainly violates the Council's legislative intent to protect long-term tenants. When the Council adopted the RSL, it specifically identified longstanding community residents as a group that must be protected. The Board, in public materials on its web 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." An agency's interpretation of a

statute cannot stand where it directly contravenes the will of the legislature. Notably, this is the first time that the Board has imposed a penalty on long-term tenants. Therefore, the issue of acquiescence by the legislative branch is not triggered in this case. Neither the Council nor the Legislature could have acquiesced to the Board's first erroneous interpretation of its authority to single out long-term tenants.

In sum, the longevity penalty imposed by the Board in Order Nos. 40 and 41 offends the basic notion of a representative democracy. The Board, an unelected body, overstepped bright lines drawn by the legislature and seeks 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 deny appellants' requested relief and affirm the lower court's order declaring certain provisions of Order Nos. 40 and 41 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 in this appeal is whether the Board exceeded its authority under the City's Rent Stabilization Law in approving Order Nos. 40 and 41.

In 1969, in response to a public housing crisis, the Council enacted the RSL, which created the Board. See Local Law 16 of 1969 (codified as amended at N.Y.C. Admin. Code § 26-510) (R. 2794-2802).² Pursuant to the RSL, the Board is responsible for promulgating annual rent increase percentages for classes of rent stabilized apartments, as created by the Council. Id. When the State Legislature enacted the ETPA in 1974, it expressly preserved the RSL and the Council’s lawmaking authority over the Board. Moreover, the ETPA explicitly adopted the two classes of accommodation created by the Council: multiple dwelling units constructed after 1947 that were not owned as cooperatives or condominiums, and long-term rental units in hotels constructed prior to July 1, 1969. See ETPA § 3 (codified at McKinney’s Unconsol. Laws § 8623). In 1982, the Legislature added lofts as a third class of accommodation. N.Y. Mult. Dwell. Law § 286(7). Neither the Council nor the Legislature created a class of accommodation composed exclusively of long-term tenants.

In 2003, the Legislature took for itself the authority to create new classes of housing accommodation that are subject to the RSL, but left intact the Council’s authority to adopt or amend local laws or ordinances “for the purpose of reviewing the continued need for the existing regulation and control of residential rents or to remove a classification of housing accommodation from such regulation and

² All references to the Record on Appeal are denoted as (R. ___).

control. . . .” Local Emergency Housing Rent Control Act of 2003 § 1 (codified at McKinney’s Unconsol. Laws § 8605). The Council has continued to affirm its finding of emergency, as the vacancy rate has remained extremely low during the thirty-one years since the Council enacted the RSL. Despite myriad legislative amendments, the protection of long-term tenants has remained a central goal of the RSL and ETPA. The Council is interested in ensuring that the Board act within its statutory authority under the RSL, and make decisions consistent with legislative intent.

ARGUMENT

POINT I

THE BOARD EXCEEDED ITS AUTHORITY UNDER THE RSL AND ETPA BY CREATING A CLASS OF ACCOMMODATION CONSISTING OF LONG-TERM TENANTS

The power to create a class of housing accommodation that is subject to the RSL belongs exclusively to the legislative branch. The Board cannot create new classes of accommodation either explicitly or de facto by drawing distinctions among tenants within an existing class. By distinguishing among tenants within a class of housing accommodation, the Board exceeded its authority by de facto creating a new class of accommodation.

A. The Board Cannot Expressly Create a Class of Accommodation

The power to create new classes of accommodation resided first with the Council and more recently with the State Legislature. For nearly 25 years, the governing laws clearly and unambiguously stated that the Council had the sole authority to identify “classes of accommodation” that may be subject to rent increases by the Board. See Local Emergency Rent Control Act of 1969 (codified as amended at McKinney’s Unconsol. Laws § 8605) (“local legislative body” shall enact the RSL and create classes of accommodation subject to the RSL); ETPA §3(a) (codified at McKinney’s Unconsol. Law §8623(a)) (declaration of emergency for any or all classes of accommodation “shall be made by the local legislative body”). Now, the State has the authority to add new classes of accommodation to those already in existence. Local Emergency Housing Rent Control Act of 2003 § 1 (codified at McKinney’s Unconsol. Law § 8605). The Board concedes that it does not have the authority to create a new class of housing accommodation. (App. Br. at 26.) (“The Board may not, however . . . classify a housing accommodation as being subject to the RSL or the ETPA. That power is reserved to the Legislature. . .”).

B. The Board May Not Create, De Facto, A New Class of Accommodation By Making Distinctions Among Tenants Within An Existing Class

The Board is authorized to set rent guidelines for particular classes of accommodation. It is not authorized to draw distinctions among and set different rent adjustments for tenants within a class. Drawing such distinctions among tenants is tantamount to creating a new class of accommodation. In adopting Order Nos. 40 and 41, the Board has singled out tenants based on how long they have resided in their apartments. This distinction created a new class of accommodation consisting of long term tenants. The court below properly vacated these orders.³

1. **The Board Is Only Authorized to Promulgate One Rent Guideline for Each Class of Accommodation**

Section 26-510(b) of the RSL requires the Board to annually promulgate “a statement of the maximum rent or rates of rent adjustment, if any, for one or more classes of accommodations subject to this law. . . .” RSL § 26-510(b). This plain

³ The court based its holding on its finding that “the RGB may not impose a separate rate increase for a class of accommodation, not recognized by the City Council. . . . Although RGB maintains that the challenged increase is not based on indicia regarding the tenants, but rather, indicia regarding the housing accommodations themselves, that distinction cannot overcome the fact that the City Counsel [sic], not the RGB, had the power to create separate classes.” (R. 2866).

language of the statute authorizes one rent statement for each class of accommodation.⁴

The Board has openly discussed the difficulty of abiding by a “one size fits all” rent guideline for the entire class of rent stabilized apartments. In particular, a number of Board members commented on this challenge in deliberations regarding the adoption of Order No. 40. For example, Board Chair Marvin Markus stated that:

[T]his so-called ‘one-size-fits-all’ approach has become antiquated. It is clear that an across-the-board increase for one- and two-year lease renewals does not target the areas of the stabilized stock that need larger increases . . . [T]he public members of the Rent Guidelines Board . . . strive to create a shoe that fits both the ballerina and the Celtic player. This is just not possible . . . under the current version of the Rent Stabilization Law.

Testimony of Board Chair Marvin Markus (June 19, 2008) (R. 2690-91).

Similarly, Board Member Steven Schleider stated, “[W]e agree that the one-size-fits-all is a limited, at best, approach. However, it is what we have to work with. And what we’re mandated to do is to set a generally affordable rate of increase. That’s it.” Testimony of Board Member Steven Schleider (May 5, 2008) (R.

1147). Additionally, Board Member Adrienne Holder stated “I don’t know what it

⁴ Indeed, when the Council first enacted the RSL and only one class of housing accommodations existed, the Council clearly stated that the Board “shall establish a guideline for rent increases upon renewal leases to dwelling units covered by this law.” Local Law 16 of 1969 (R. 2798) (emphasis added). When the Council later added hotel dwelling units as a second class of accommodation, it again provided that “[w]ith respect to hotel dwelling units. . . the rent guidelines board shall establish a guideline for rent increases.” Local Law 51 of 1969 (R. 2807).

is that this Board can do but to continue to push along the one-size-fit-all process. . . .” Testimony of Board Member Adrienne Holder (May 5, 2008) (R.1136).

However, despite the Board’s documented understanding of its limited authority, or perhaps due to the difficulties the Board believed such restrictions imposed upon it, it chose to disregard this limitation and instead to draw an impermissible distinction among tenants within an existing class of housing.

2. By Distinguishing Among Tenants Within an Existing Class of Accommodation, the Board has De Facto Created a New Class of Accommodation

Order Nos. 40 and 41 set a separate rent guideline for long-term tenants. By distinguishing among tenants within a class of accommodation to impose a separate rent increase on a particular group of tenants, the Board has unlawfully created a new class of accommodation.⁵

The Second Department ruled in a similar case that a rent guidelines board governed by the ETPA may not distinguish among tenants within a class of accommodation, because this action constitutes the creation of a new class of accommodation. See New York State Tenants & Neighbors Coalition, Inc. v.

⁵ In fact, the Board presents the question before the Court on this appeal as whether the court below erred in invalidating Order No. 40 “on the grounds that only the Legislature had the authority to create classes of housing accommodations.” (App. Br. at 2) (emphasis added). The Board thus effectively concedes that Order 40 created a new class of accommodation.

Nassau County Rent Guidelines Board, 53 A.D.3d 550 (2d Dep't 2008).⁶ As the lower court held, and the Second Department affirmed, “[b]y dividing the class of tenants on the basis of income, the Board is offering greater rent protection for one group of tenants than for another group for which the emergency was declared.” 2006 N.Y. Misc. LEXIS 3289 (Sup. Ct. Nassau Co. 2006), aff’d 53 A.D.3d 550 (2d Dep't 2008).⁷

Notwithstanding the Second Department’s decision, the Board argues that it has the authority to distinguish among housing accommodations. To support this argument, the Board cites its mandate to consider economic data, its authority to set a rent guideline for each class of accommodation, caselaw which it claims gives it quasi-legislative authority, and the simple absence of an express prohibition. However, a review of the Board’s arguments fail to support the conclusion that it can draw distinctions among tenants within a class.

First, the Board cites its legislative mandate under RSL Section 26-510(b) to consider economic data. (App. Br. 28-29). RSL Section 26-510(b) provides

⁶ The lower court properly followed this case, as 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 unless 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)).

⁷ The Board argues that this Court should not read this case “broadly to prohibit any distinctions among housing accommodations.” (App. Br. at 31). However, even on a narrow reading of the case, this Court may conclude that a rent guidelines board exceeds its authority if it singles out a group of tenants from within an existing class of accommodation for disparate treatment.

that the Board, “in determining whether rents for housing accommodations... shall be adjusted shall consider, among other things. . . the economic condition of the residential real estate industry” and several types of economic data. The Board conclusively states that, because it must consider data, “it follows” that it may distinguish “among” accommodations. (App. Br. 30). The Board certainly must use economic data to determine whether a rent increase is warranted for each class of housing accommodation. It does not follow, however, that the Board can consider this data to draw distinctions among tenants within a class of accommodation.⁸

Second, the Board cites a provision of Section 26-510(b) which provides that the Board shall promulgate “a statement of the maximum rate or rates of rent adjustment, if any, for one or more classes of accommodation subject to this law.” (App. Br. 29-30) The Board argues that the phrase “for one or more classes” implies that the Board can distinguish among accommodations subject to the RSL – but, again, the issue here is whether the Board can set several rates within a single class.⁹

⁸ The only case the Board cites for this argument is Matter of Apartment House Council of Nassau v. County RGB, 52 A.D.3d 702 (2d Dep’t 2008). This case, however, did not address whether the Board may impose a different maximum rent increase on a new class of accommodation. Rather, Apartment House Council merely held that the Board has discretion to decide how to weigh particular data in promulgating a rent guideline.

⁹ The Board claims that its interpretation of the RSL should be afforded deference by this Court because such interpretation requires specialized knowledge. (App. Br. at 36, quoting Matter of

Third, the Board cites Stein v. Rent Guidelines Board, 127 A.D.2d 189, 198 (1st Dep't 1987), appeal denied, 70 N.Y.2d 603 (1987), for the proposition that the Board may act in a "quasi-legislative capacity." (App. Br. at 29). However, the question presented in Stein was the breadth of the factual findings upon which the Board must base its annual rent guideline, not whether it could use factual findings to draw distinctions among tenants within a class of accommodation. The Board has discretion to determine, for example, whether economic data warrants a rent increase of 2% or 3%, but not to determine whether some tenants in a class could face a 2% increase and others an increase of 3%. See RSL §26-510(b) ("The rent guidelines board. . . in determining whether rents for housing accommodations. . . shall be adjusted shall consider, among other things . . . the economic condition of the residential real estate industry . . . [and] such other data as may be made available to it.").

Fourth, the Board argues that the absence of language prohibiting it from making distinctions among classes of accommodation amounts to an affirmative

Ansonia Residents v. New York State Division of Housing and Community Renewal, 75 N.Y.2d 206, 213 (1989)). However, where, as here, interpretation of a statute turns purely on plain language and legislative intent, the Board's interpretation is not entitled to any special deference. See Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459 (1980) ("Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight."). This language from the Kurcsics decision directly follows the language cited by the Ansonia court, upon which the Board relies.

grant of authority. (App. Br. 28, 36). This court should not infer a substantial policymaking power – the ability to create a class of housing accommodation for which a separate rent increase may be set – from the mere absence of an express prohibition.¹⁰ As the court below properly held, “where the power conferred by statutory language is not free from doubt, the power may not be taken by implication. . . .” (R. 2867) (citing New York v. Prendergast, 202 A.D. 308, 316 (1st Dep’t 1922)). See also T.D. v. New York State Office of Mental Health, 228 A.D.2d 95, 107-108 (1st Dep’t 1996) (rejecting an agency’s claim that, “by negative implication,” it could regulate in an area not specifically prohibited by its enabling statute).

The law is clear that the Board may not expressly create a class of accommodation. Here, the Board has sought to circumvent this mandate by distinguishing among tenants within a class of housing accommodation that is subject to the RSL, thereby de facto creating a new class of accommodation. The court below properly negated this action.

¹⁰ Indeed, the City’s rent guidelines board has even less discretion than a county rent guidelines board, which may set different rent guidelines not only for classes of accommodations created by the legislature, but also for different zones or jurisdictions. ETPA §4(b) (codified at McKinney’s Unconsol. Law § 8624(b)).

POINT II

THE BOARD HAS USURPED THE LEGISLATURE'S POLICYMAKING ROLE BY IMPLEMENTING ITS OWN POLICY FOR LONG-TERM TENANTS

The Board's expansive interpretation of its powers violates basic separation of powers principles. The Council created a rent stabilization system which provides for rent adjustments by class. This system has been continued by the Legislature. The Board is bound by this system. It may express its views on the current scheme, but it cannot take action to redress what it considers deficiencies in the current law.

The Board, as an administrative agency, must operate within the limits of the rent regulation scheme which the legislative branch has chosen. See Boreali v. Axelrod, 71 N.Y.2d 1, 11 (1987) (holding that where statute only gave agency the power to administer codes for public health, the agency exceeded its statutory authority "when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be"); Kerwick v. New York State Board of Equalization and Assessment, 117 A.D.2d 65, 68 (3d Dep't 1986) (where statutory scheme required local authorities to make initial tax assessment, board's attempt to define procedures for that assessment was illegal).

The Board has voiced its concerns about the limitations of its mandate, and about the protections for long-term tenants. During the Board's May 2, 2008

public hearing on Order No. 40, Board Member Risa Levine asked State Senator Thomas Duane about a pending state bill that would reform the rent stabilization law and modify the board's powers:

I'm wondering if it will address some of those problems, specifically the longevity problem, tenants being in, you know, the same apartment for over 30 years, et cetera, so they're not – they're not getting vacancy, the ability to raise the rates upon vacancy, or the one-size-fits-all problem, coming up with a – an adjustment in the guideline for the entire New York City, when there's competing concerns between the five boroughs, and certain [sic] for Manhattan. . . . So, I'm wondering if those issues were considered at all, in drafting this legislation.

(R. 842). Despite the Board's frustration, however, it has no license to change the law.¹¹

The Council created New York City's rent stabilization system and deliberately chose a scheme in which the Board may only exercise the limited authority to set a single rent guideline for the entire class of rent stabilized apartments. The Legislature expressly adopted the system, and any modifications thereto may only be made by the Legislature. The court below refused to allow the

¹¹ In fact, the Legislature has already created one mechanism to address the disparities created by the "one-size-fits-all" approach, which does not harm current tenants. In 1997, the Legislature authorized a higher vacancy allowance depending upon the former tenant's length of stay. Rent Regulation Reform Act of 1997, 1997 N.Y. Laws 116 §19 (codified at N.Y.C. Admin. Code §26-511(c)(5-a)). The State's approach not only addresses the systemic imbalances which the Board cites as its justification for the longevity penalty (App. Br. at 12, 14, 15, 20), but it also preserves the Council's intent to protect current long-term tenants. As Governor George Pataki stated in his Memorandum in Support, "the bill continues the protections of rent regulation for current tenants." Memorandum of George Pataki, 1997 A.B. 8346, Ch. 116 (June 19, 1997).

Board to reverse years of legislative policymaking and fine-tuning through a single *ultra vires* action. The Council urges this Court to uphold these fundamental restrictions on the Board's authority as an administrative, not a legislative, body.

POINT III

THE BOARD'S LONGEVITY PENALTY VIOLATES THE LEGISLATIVE INTENT UNDERLYING THE RENT STABILIZATION LAW

New York City's rent stabilization scheme was enacted to protect long term tenants. The Board's longevity penalty contravenes this legislative intent. Hence, even if this Court were to determine that the Board has the authority to make distinctions within a class of accommodations that are subject to the RSL, the Court should nonetheless strike down the separate rent increase for long-term tenants.

The legislative history of the RSL and the ETPA demonstrates the Council's intent to protect long-term tenants. The Council adopted the Rent Stabilization Law in 1969, in response to a public housing emergency which still exists today.¹²

¹² The City was experiencing vacancy rates of less than 5%, and construction of new residential housing had slowed to an extremely sluggish rate. Press Release 70-69, Mayor John V. Lindsay (Feb. 8, 1969) (R. 2812-13). As of 2008, the citywide vacancy rate was 2.89%. N.Y.C. Department of Housing Preservation and Development, Selected Findings of the 2008 New York City Housing and Vacancy Survey, available at <http://www.nyc.gov/html/hpd/downloads/pdf/Selected-Findings-tables-2008-HVS.pdf>.

The Council found that “unreasonable rent increases were “uprooting long-time city residents from their communities.” Local Law 16 of 1969 §1 (R. 2795). As Mayor Lindsay noted in support of the RSL, City residents “have nowhere else to go for housing – except to the suburbs; and the City will do everything in its power to prevent that.” (R. 2812-13). The Council created the Board to carry out its expressed goals of rent stability and long-term tenancy. In 1974, when the Legislature expressly authorized continuation of the Council’s rent regulation scheme, the Council reaffirmed its finding that unreasonable rent demands “were uprooting long-time city residents from their communities.” New York City Council Resolution 276 of 1974 (R. 2815-16).

New York courts have long recognized the Council’s intent to protect long-term residents. See Manocherian v. Lenox Hill Hospital, 84 N.Y.2d 385, 394-95 (1994) (a “central, underlying purpose of the RSL is to ameliorate the dislocations and risk of widespread lack of suitable dwellings.”); 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 ““exorbitant and unconscionable rent increases’ were causing severe hardship to tenants of such accommodations and were uprooting long-time city residents from their communities.”) (emphasis added).

The Board has also expressed an understanding of (and frustration with) the protections afforded to long-term tenants under the Rent Stabilization Law:

Tenants currently residing in rent stabilized apartments (as distinguished from those searching for new apartments) receive the greatest level of protection under the existing system. The creators of rent stabilization were particularly concerned with community and household stability and sought to avoid the displacement of 'long-time' residents.

An Introduction to the New York City Guidelines Board and the Rent Stabilization System at 64, available at

[http://www.housingnyc.com/html/about/intro%20PDF/full%20PDF/intro_2006\(full\).pdf](http://www.housingnyc.com/html/about/intro%20PDF/full%20PDF/intro_2006(full).pdf). Similarly, in its papers filed with this Court, the Board asserts that “it is the low rent units with the long-term tenants that benefit the most from the one-size fits all approach of an across-the-board increase.” (App. Br. 15).

As a general matter, the Court of Appeals has recognized that “[i]t is a fundamental principle of administrative law that an agency cannot promulgate rules or regulations that contravene the will of the Legislature. . . [I]f an agency regulation is ‘out of harmony’ with an applicable statute, the statute must prevail.” Weiss v. City of New York, 95 N.Y.2d 1, 4-5 (2000). Accordingly, even if the Board were authorized to impose a separate rent guideline for a subgroup of tenants, which it is not, it certainly is “out of harmony” with the legislative intent of the RSL to single out for higher rent those tenants who have lived in their

apartments for more than six years. The Council urges this Court to reject the Board's claim that it may impose an additional fee on long-term tenants as a direct challenge to the Council's decision to protect this group of tenants.

POINT IV

ORDER NO. 40 IS THE BOARD'S FIRST ATTEMPT TO IMPOSE A LONGEVITY PENALTY AND THEREFORE THE BOARD'S ACQUIESCENCE ARGUMENT MUST FAIL

There was no legislative acquiescence to the Board's interpretation of the RSL in this case. The Board has never previously penalized current tenants for the length of their occupancy. See Orders 1- 40 (R. 88-91).¹³ Accordingly, the Board's overreaching could not have come to the attention of either the Council or the State Legislature before the Board approved Order No. 40. As the Board admits, an acquiescence claim must fail where the statutory interpretation at issue is entirely new. Roberts v. Tishman Speyer, 13 N.Y.3d 270, 287 (2009) (Legislature could not be charged with acquiescence where "at the time the Legislature most recently considered the statute, there is no indication that the specific question presented here... had been brought to the Legislature's

¹³ The Board has previously allowed an increased vacancy allowance for units whose former occupants were long-term tenants. See Order Nos. 12, 12a and 15 (R. 90).

attention.”) (cited by the Board at App. Br. 46-47).¹⁴ The Board, and proposed *amici*, attempt to distract this Court with detailed discussions of previous orders. (App. Br. 38-42; RSA Br. 8-11). However, none of those orders imposed a longevity penalty on current tenants, and none of those orders are before this court today. The only order before this Court is the Board’s first-ever attempt to unlawfully penalize long-term tenants.

Even if the Council or the Legislature did have previous knowledge of the Board’s interpretation, which they did not, a court should not uphold an agency’s longstanding interpretation of a statute if it would violate the purpose of the statute. See Judd v. Constantine, 153 A.D.2d 270 (3d Dep’t 1990) (Casey, J., concurring) (“If the administrative interpretation of the statute is not consistent with the spirit, purpose and objectives of the statute, that interpretation should be rejected, irrespective of whether the administrative officer has any special expertise or whether his interpretation has been long standing.”) (emphasis added).

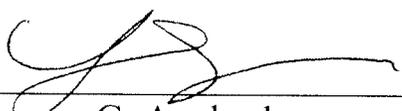
¹⁴ In its brief submitted to this Court, the Board conveniently omits the sentence immediately preceding the language it quotes, which states: “Legislative inactivity is inherently ambiguous and affords the most dubious foundation for drawing positive inference.” Roberts, 13 N.Y.3d at 287 (internal quotations omitted).

CONCLUSION

The Council respectfully requests that the Court (i) grant its application for status as an *amicus curiae* and (ii) affirm the order appealed from in all respects.

Dated: New York, New York
 April 21, 2010

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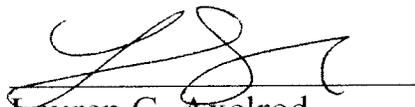
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