

CONTACT

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org

**REPORT ON LEGISLATION BY THE
COMMITTEE ON REAL PROPERTY LAW**

Int. No. 737A-2018

Council Members Rodriguez, Espinal, Chin, Rivera, Constantinides, Rosenthal, Reynoso, Menchaca, Ayala, Van Bramer, Levine, Levin, and Cumbo

A Local Law to amend the administrative code of the city of New York, in relation to creating a small business lease program for establishing an environment for fair negotiations in the commercial lease renewal process in order to determine reasonable lease terms.

Small Business Jobs Survival Act

THIS LEGISLATION IS OPPOSED¹

I. BACKGROUND

In March 2018, Council Member Ydanis Rodriguez introduced Int. No. 737-A, named the “Small Business Jobs Survival Act”, (the “Bill”) into the New York City Council (“City Council”). The City Council would premise the enactment of the Bill on its determination that “New York City is more dependent than ever on small business for job growth and revenues,” and that landlords have forced and are forcing small businesses out of leased premises by engaging in improper tactics at the time of lease renewal. The current free market renewal process, according to the City Council, “provides no means for tenants to mediate disputes between tenants and landlords to arrive at fair and reasonable lease renewal terms.” As a result, the City Council has concluded that the absence of a required mediation or arbitration process has accelerated the closing of small businesses and a consequent loss of jobs and taxes. §1.

II. SUMMARY OF PROPOSED LAW

The Bill would create a right for a current commercial tenant at the end of its lease to negotiate an extension of that lease, whether or not the lease provided for such a renewal or other extension right. It would create “a two-step procedure of mediation and, if necessary, arbitration for negotiating commercial lease renewals and rentals.” (§1)

Among other things, the Bill would apply to “all lease renewals for a commercial premises.” (§22-1202) The Bill would grant the tenant (not the landlord) the right to renew the

¹ The Real Property Law Committee has opposed previous iterations of this legislation; *see i.e.* 2010 report opposing Int. No. 154, which updates a December 1987 report, available at <https://www.nycbar.org/pdf/report/uploads/20071977-ReportonCommercialRentControlLegislation.pdf>.

lease for a minimum of ten years (unless mutually agreed with the landlord for a lesser term) and to invoke the procedures set forth in the Bill. (§22-1206) The landlord would be required to provide notice to the tenant at least 180 days before the termination of the lease of any basis on which the lease cannot be extended for a full 10-year term. (§22-1206(c)) Among other reasons, a landlord would have the right to refuse to renew a lease on the following grounds:

- the tenant delayed rent payments without cause and the landlord served the tenant at least three times during the term of the lease with an appropriate notice for payment (which notice may be served only if such rent payment is at least 15 days in arrears) demanding payment within 30 days, and the landlord can show that the tenant did not pay within such 30-day period (§22-1206(d)(1)); or
- the tenant uses the premises either illegally or improperly (§22-1206(d)(2) and (3)); or
- the tenant has defaulted under the lease and failed to cure the default (§22-1206(d)(4)); or
- the landlord intends to demolish or substantially reconstruct the premises (§22-1206(d)(5)); or
- the tenant is a gross and persistent violator of various local laws (§22-1206(d)(7)); or
- the landlord intends to open its own business in that location provided that the business is not the same as is operated by the existing tenant (§22-1206(d)(8)).

Assuming that there are no grounds to refuse renewal, then the following procedures would need to be followed: at least 180 days before the lease termination date, the landlord would be required to notify the tenant of his intent to renew the lease (the “180-Day Notice”). (§22-1206(e)(1)) However, the landlord and tenant could agree at any time to negotiate a new lease, “with any agreed to terms and conditions, not inconsistent with the provisions of this chapter.” *Id.* If they were unable to resolve the rent to be paid during the extension period, then “[t]he tenant is to continue rent payments as set forth in the lease until the parties reach an agreement on a lease renewal or until a decision is otherwise rendered through the arbitration or mediation processes.” *Id.*

During the first 90 days following delivery of the 180-Day Notice, the parties are expected to negotiate but either party may demand mediation. The parties may choose a mutually agreed mediator or ask the American Arbitration Association (“AAA”) to appoint one. *Id.* The mediator may only recommend a non-binding resolution. If the parties do not agree to the proposed resolution, then the tenant has the right within a specified period of time to demand arbitration. The tenant’s failure to demand arbitration in a timely manner constitutes a forfeiture of the right of renewal. *Id.*

Should a landlord refuse to renew a lease, then the landlord would be required to notify the tenant of the same at least one hundred and eighty days before the end of the lease. (§22-1206(e)(2)) In that notice, the landlord would need to specify the grounds for refusal to renew and “furnish the tenant with all pertinent data supporting such reason or reasons.” *Id.* The tenant

would nevertheless have the right to challenge the refusal on a timely basis and then seek arbitration.

If arbitration is requested by the tenant, then the landlord and tenant would choose an arbitrator from a list provided by the American Arbitration Association ("AAA"), and if they unable to agree upon an arbitrator, the arbitrator would be selected by the AAA (§22-1206(3)(a)).

If arbitration is invoked under §22-1206 (e)(1), (i.e., there is no basis not to renew the lease but the parties cannot agree on the rent), then the arbitrator's determination of the renewal rent would be required to consider, among other things: (a) the cost of maintenance and operation of the entire property, including debt service; (b) any services furnished by the landlord; (c) the condition of the space, including capital improvements made by the tenant; (d) the current fair market rates for comparable properties in the area in which the property is located; (e) the longevity of the business; (f) the extent to which the business is bound to its particular location; and (g) the cost of leasing similar premises within a one mile radius of the property. (§22-1206(e)(3)(d))

In those instances where arbitration is invoked under §22-1206(e)(2), (i.e., the landlord has refused to extend the lease on the basis of a statutorily provided rationale), the arbitrator's determination of whether the lease must be renewed would have to consider, among other things, appropriate laws applicable to commercial spaces, the terms of the lease, and tenant's compliance with laws and the lease. (§22-1206(e)(3)(e)) If the arbitrator were to decide in favor of the landlord, then the tenant would need to move out at the end of the current lease. However, if the tenant prevailed, then the arbitrator would have to consider the same factors set forth above in determining the rent for the extension period. *Id.*

The arbitrator's decision establishing the rent would be "final and binding." (§22-1206(e)(3)(f)) However, despite the arbitrator's determination that the tenant has the right to extend the lease and/or the amount of the renewal rent, the tenant would have the right to elect not to pay the rent set by the arbitrator and, instead, remain in occupancy and pay a rent "no greater than a ten percent increase of the average rent charged during the final twelve months of the last rental agreement between the landlord and tenant from the termination date of the existing lease until such date on which the tenant shall remove his or her property from the premises." (§22-1206(e)(3)(g))

In the interim, the landlord could market the premises to a new tenant. However, the landlord could not rent the space to the new tenant without first offering the premises to the existing tenant at the same rent and other terms agreed to by the prospective tenant. If the existing tenant were to refuse those terms, then, and only then, would the existing tenant be required to move out. If the existing tenant were to agree to those terms, then the landlord and the existing tenant would be required to enter into a new lease on the terms to which the landlord and prospective tenant agreed. *Id.*

Generally, the Bill would limit the amount of security which a landlord may hold to a maximum of two months. (§22-1207) Landlords and tenants seeking to enforce this ordinance may obtain injunctive relief mandating arbitration or seeking damages against the party refusing

to submit to arbitration as set forth in the statute. (§22-1211)

III. ARGUMENT

A. New York City is not authorized to enact legislation tantamount to rent controls

Inasmuch as several provisions in the Bill purport to limit a landlord's rights with regard to use and occupancy of the space, the Committee views these provisions as the equivalent of rent control.² As discussed in greater detail in the attached memorandum of law, courts have found that New York City ("City") is not authorized to enact rent controls under its general powers with respect to the property, affairs or government of the City. The only possible basis for their validity is under the general "health and welfare" powers. Whether the power to enact legislation that mimics aspects of commercial rent control is within the City's general health and welfare power has not been specifically decided by the courts.

The power of a local government in New York State, such as the City, to enact local laws must be based upon a grant of authority found within its charter, the State Constitution, the Municipal Home Rule Law or a State enabling statute. No State enabling statute expressly authorizes the City to control rents. Further, the City Charter (the "Charter"), the State Constitution and the Municipal Home Rule Law contain no express provision authorizing the City to control rents. Rather, each of these sources of authority grants a general power to municipalities to enact local laws, not specifically barred or pre-empted by State law, or not inconsistent with the State Constitution or other State law, and either relating to their own property, affairs or government, or for health and welfare purposes.

The courts have found that the City is not authorized to enact rent controls under the rubric of the property, affairs or government of the City; thus, the only possible basis for their validity is under the general "health and welfare" powers. Whether the power to enact commercial rent control is within the City's general health and welfare power has not been specifically decided by the courts. Commercial rent control existed in the City from 1945 to 1963 pursuant to New York State ("State") law. These controls were upheld, as within the power of the State to enact in *Twentieth Century Ass'n v. Waldman*, 294 N.Y. 571, 582 (1945). State enforced commercial rent control expired on December 31, 1963 under a sunset provision in the State statute. Thus, since commercial rent control was imposed in the State only under State legislation, no cases could have arisen specifically resolving the City's power.

However, attempts by the City to enact residential rent control legislation without explicit State authorization have been invalidated by the courts. As the interests of residential tenants as a class are much more closely related to "health and welfare" concerns of a local government than commercial tenants as a class, the result in the residential area would seem to apply, *a fortiori*, to the commercial area.

² Rent control is generally considered and assumed to be a statutory scheme which places limitations on the amount of rent that may be charged and requirements for leases to be renewed or extended, and may include other regulations regarding the tenancy, including restrictions on occupancy and subletting.

B. The proposal would create inconsistencies with state law

The enactment of the Bill would also create many inconsistencies with existing provisions of the State Real Property Law. While courts have permitted City laws to remain in effect when such laws were somewhat inconsistent with State laws addressing minor State interests, they have generally invalidated City laws that were inconsistent with State laws addressing significant State interests. Although the courts have not firmly established a bright line test as to which types of inconsistencies are impermissible, the inconsistencies between the proposed commercial rent control legislation and existing State Real Property Law are so substantial and involve such a significant State interest that commercial rent control laws enacted by the City would be invalidated. Thus, the City lacks power to enact commercial rent controls by local law.

IV. SUMMARY

For the reasons explained above and in the attached memorandum of law, Int. No. 737-A is opposed.

Committee on Real Property Law
Jason T. Polevoy, Chair

Reissued September 2018

**MEMORANDUM OF LAW IN SUPPORT OF
REPORT ON LEGISLATION
BY THE COMMITTEE ON REAL PROPERTY LAW**

QUESTION PRESENTED

Can the City Council institute commercial rent control absent State enabling legislation?

DISCUSSION

**A. State Law Does Not Expressly Delegate To The City
The Power to Enact Commercial Rent Control**

Inasmuch as the City has no inherent sovereign power, but rather governs as an agency of the State, authority for the City to legislate in a given area must be found either in the State Constitution, the Municipal Home Rule Law or an enabling statute. *LaGuardia v. Smith*, 288 N.Y. 1, 7 (1942). The State has not expressly delegated to the City by the State Constitution, the Municipal Home Rule Law, or an enabling statute, the power to enact commercial rent control.

**B. The Power To Enact Commercial Rent Control
Cannot Be Supported Under Inherent City Powers
To Enact Legislation Concerning Its Property,
Affairs Or Government**

The Municipal Home Rule Law, in conjunction with Article Nine of the State Constitution, set the parameters of State delegation of legislative power to the City. Under the Home Rule Law, the City has broad powers to enact laws relative to its own “property, affairs or government” which cannot be infringed upon by the State except by general law or constitution. N.Y. Municipal Home Rule Law §10(1) (ii). In addition, the City also has a general power to enact health and welfare legislation. *Id.* at § 10(1) (ii) (a) (12). Local government powers in the health and welfare area are, however, subject to greater State control than are its powers in the area of its property, affairs and government, since health and welfare powers can be constrained by special State laws pertaining solely to a single local government. *Id.* at § 10(1) (ii). Further, local government powers under the “property, affairs or government” provisions of the Municipal Home Rule Law are construed narrowly. *See Adler v. Deegan*, 251 N.Y. 467, 472 (1929). In particular, the courts have ruled that the subject of rent control is one in which the “local laws must remain consistent with State statutes since rent control is primarily a matter of State concern.” *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). In *City of New York v. State of New York*, the City sued the State to invalidate the Vacancy Decontrol Law of 1971, claiming that rent control was within the City’s more expansive home rule powers. 67 Misc. 2d at 514. The Court ruled that rent control was a matter of State concern that was not within the City’s “property, affairs and government” powers. *Id.* at 514.

In *241 E. 22nd Street v. City Rent Agency*, 33 N.Y.2d 134 (1973) and *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), the Court of Appeals clearly indicated that the enactment of rent control legislation was not within the power of the City. In *241 E. 22nd Street*, the Court of Appeals upheld a State law that gave the State Housing Commissioner veto power over City rent regulations that were more restrictive than those provisions previously in force. In *210 E. 68th Street*, the Court declared constitutional a State law prohibiting enactment by the City of more stringent regulation than that already in effect, and also invalidated Local Law 24 of 1973, which gave the City Council authority to repeal certain provisions governing rent increases.

Based upon uniform case law and narrow construction of local government powers in the areas of its “property, affairs or government,” rent control cannot be considered a matter within the City’s more expansive home rule powers. Thus, authority for local legislation establishing commercial rent control would have to be supported, if at all, by the City’s general health and welfare powers.

**C. The Power To Enact Rent Controls
Cannot Be Supported By General City
Health And Welfare Powers**

Local governments have a general mandate under Article Nine of the State Constitution and the Municipal Home Rule Law to enact health and welfare legislation. This power is subject to the limitation, however, that such laws not be (1) inconsistent with any general State law or constitutional provision, or (2) barred by any special State law restricting local legislative action. *See New York State Club Ass’n v. City of New York*, 69 N.Y.2d 211 (1987). These limitations have been repeatedly enforced by the courts on preemption grounds.

For example, in *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99 (1983), a unanimous Court of Appeals struck down a local law that authorized a town board to determine whether an applicant could apply to a state sitting board for a license to build a power plant by requiring that the applicant obtain a pre-application license from the town board before initiating the state-required site studies for power plant licensing. The Court stated:

Inconsistency is not limited to cases of express conflict between State and local laws. (citation omitted). It has been found where local laws prohibit what would be permissible under State law (citations omitted), or impose “prerequisite ‘additional restrictions’” on rights under State law (citation omitted), so as to inhibit the operation of the State’s general laws. *Id.* at 108.

See also Wholesale Laundry Bd. v. City of New York, 12 N.Y.2d 998 (1962)

In addition to the State Constitution and the Municipal Home Rule Law, the City Charter also grants the City Council similar general health and welfare powers. These powers are to adopt local laws

which it deems appropriate, which are not inconsistent with the provisions of this charter or with the constitution or laws of the

United States or this state, for the good rule and government of the city; for the order, protection and government of persons and property; for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants; and to effectuate the purposes and provisions of this charter or of the other law relating to the city.

City Charter § 28(a). This grant is silent, however, as to whether the City Council has power to enact commercial rent control.

Although the State grant of health and welfare powers to the City contains no express bar to City rent control legislation, local rent control laws enacted other than in conformity with State enabling laws have been invalidated on the ground that the field is one of State concern. One case even invalidated City residential rent control legislation that was “substantially a re-enactment” of earlier State residential rent control laws which had expired. *Gennis v. Milano*, 135 Misc. 209, 211 (1st Dep’t 1929). Thus, the absence of State regulation of commercial rents does not mean that the area is one in which the City is free to act.

In fact, rent control has historically been a matter of State interest. For example, in 1945 the Legislature moved to establish commercial rent controls in the City. 1945 N.Y. Laws 3. The following year, the State Legislature passed the Emergency Housing Rent Control Law. 1946 N.Y. Laws 274. Although commercial rent control expired in 1962, the Emergency Housing Rent Control Law and the Emergency Tenant Protection Act of 1974 (1974 N.Y. Laws 576) continue to control residential rents in the City. The existence of these State residential rent control laws, in conjunction with case law upholding State preeminence in the area of rent control, support the conclusion that local assertions of commercial rent-fixing power are inherently invalid absent clear delegation of such power by the State.

Indeed, State residential rent control enactments have assumed pre-eminence in this area by previously granting the City the power to enact “regulation and control of residential rents.” 1962 N.Y. Laws 21. The Legislature stated that “[t]he validity of any such local laws shall not be affected by and need not be consistent with ... the state emergency housing rent control law.” *Id.* That it was deemed necessary for the State to grant authority to the City supports the lack of inherent local authority. Furthermore, the Legislature’s emphasis upon the need for consistency with State rent control laws also indicates that State interests in this area are otherwise paramount.

The courts in New York have uniformly struck down local attempts to assert rent control powers absent State enabling legislation. For example, in *Gennis v. Milano*, 135 Misc. 209 (App. T. 1st Dep’t 1929), the Court struck down a City ordinance allowing residential tenants to assert a defense of unreasonable rent to an action for eviction. Despite the State’s grant by Home Rule Law then in effect to the City of power to enact health and welfare legislation, the Court found that the local law conflicted with the State law of summary proceedings, finding that relationships between landlord and tenant, as well as the operation of summary proceedings, were a matter of “exclusively State concern.” *Id.* at 212. The Court’s decision is also significant because the City legislation was enacted after the expiration of State rent control. Thus, the fact that the State had once regulated in an area, but allowed that regulatory scheme to expire, does

not constrain a court from invalidating subsequent local legislation as inconsistent with State Law.

In *Tartaglia v. McLaughlin*, 190 Misc. 266 (Sup. Ct. Kings 1947), *aff'd* 273 A.D. 821, *rev'd on other grounds* 297 N.Y. 419 (1948), the Court struck down Local Law 66 of 1947, which required a residential landlord to obtain a certificate of eviction before instituting court eviction proceedings. The Court found that the eviction certificate requirement abrogated State power to determine the functions and organization of its courts. *Id.* at 270.

After the State Legislature later passed a statute validating Local Law 66, which had been previously declared invalid in *Tartaglia*, 1948 N.Y. Laws 4, Local Law 66 was upheld in a subsequent challenge. *Molnar v. Curtin*, 273 A.D. 322 (1st Dep't 1948), *aff'd*, 297 N.Y. 967 (1948). The Court noted that “[u]ndoubtedly the State, and the City of New York when granted power by the State, can under the police power adopt legislation of the kind herein involved.” 273 A.D. at 325 (emphasis added).

The following year, the Court of Appeals considered the limits of City power in ruling upon a similar City residential rent control statute in *F.T.B. Realty Corp. v. Goodman*, 300 N.Y. 140 (1949). In striking down the local law requiring landlords to petition a local housing commission for a certificate of eviction prior to instituting eviction proceedings, the Court noted that the local law placed “additional restrictions” upon the State law of summary proceedings which made it inconsistent with State law. *Id.* at 148.

In *Haque v. Pocchia*, 186 Misc.2d 806 (App. T. 2d Dep't 2000), the Court invalidated a City statute requiring the owner of a one or two family house who does not live within the City to register with the City because it restricted the owner's right to maintain a summary proceeding and recover a judgment for rent in accordance with State law.

In 1971, the City challenged State enactment of the Vacancy Decontrol Act of 1971, which removed local authority to apply rent control to decontrolled apartments. *City of New York v. State of New York*, 67 Misc. 2d 513 (Sup. Ct. N.Y. Co, 1971), *aff'd* 31 N.Y.2d 804 (1972). The Court held that the City had no authority to challenge a diminution of its power to impose rent controls since this area was “primarily a matter of State concern.” *Id.* at 514.

Thus, although the City has a general power to enact health and welfare legislation, courts have found rent controls to be outside of this power on various grounds, including conflicts with State control over the functions of courts and real property law in general, and because the State has traditionally acted as the exclusive arbitrator of landlord-tenant relations. Outside of the rent control area, however, a range of local regulatory legislation has been upheld under the Municipal Home Rule Law. For example, the City may require a retailer to disclose a manufacturer's suggested retail price, *City of New York v. Toby's Electronics, Inc.*, 110 Misc. 2d 848, 855-56 (Civ. Ct. N.Y. 1981), or dictate the manner in which a garage stores cars or posts prices. *Pomeranz v. City of New York*, 1 Misc. 2d 486, 491 (Sup. Ct. Kings 1955). The City can also require that cooperative or condominium conversions establish a three percent reserve fund for capital improvements. *Council for Owner Occupied Housing, Inc. v. Koch*, 119 Misc. 2d 241, 246 (Sup. Ct. N.Y.), *aff'd*, 61 NY 2d 942 (1984). Moving companies in the City may also be regulated by Local Law. *Myerson v. Lentini Brothers Moving S Storage Co.*, 33 N.Y.2d 250, 255

(1973).

The City also has certain inherent powers to regulate, or at least affect, prices absent conflict with State law. In *People v. Cook*, 34 N.Y.2d 100, 104 (1974), the City established a differential price system for cigarettes which attached higher City tax to cigarettes with a greater nicotine content. In upholding the price differential as within the City's inherent power, the Court of Appeals noted that their "conclusion is in no way vitiated by the fact that the price differential undeniably regulates prices to a certain degree." *Id.* at 107. The court went on to note that "the leading New York cases interpreting the police power of municipalities support the validity of municipal price regulation in certain instances." *Id.* Similarly, in *People v. Lewis*, 295 N.Y. 42 (1945), the Court of Appeals upheld a City ordinance which established higher local penalties than State penalties for the sale of commodities at a price above that allowed by the Federal Price Administration. The court noted that, absent an inconsistency with State law or Constitution, there was "no doubt that such a law is within the field of legislative power of the city." *Id.* at 50. However, not every local assertion of price-fixing power has been upheld by the courts as valid. In *Wholesale Laundry Bd. v. City of New York*, 17 A.D.2d 327, 329 (1st Dept.), *aff'd*, 12 N.Y.2d 998 (1963), a City minimum wage law was struck down as inconsistent with a State law establishing minimum wages at a lower level. Since *Cook*, *Lewis* and *Wholesale Laundry Bd.* all involve City laws which affected prices within an existing State regulatory system, it is unclear what forms of local price fixing are valid.

Thus, although the City has a general power to enact health and welfare legislation, courts have uniformly found rent controls outside of this power. The courts have invalidated local controls by finding a conflict with State control over the functions of its courts and real property law in general. They invalidate such controls without any need to determine whether the local law conflicts with a parallel system of State rent control. Although these cases have cited the conflicts between State and local legislation as the rationale for invalidating city legislation, these conflicts were not direct. Rather, local legislation was invalidated because the State has traditionally acted as the exclusive arbitrator of landlord-tenant relations.

D. The Proposed City Council Commercial Rent Control Laws Are Inconsistent With The General Law of The State

The general power of local governments to enact legislation in the health and welfare area is subject to the limitation that it not be (1) inconsistent with any general State law or the State Constitution; or (2) specifically prohibited by State law. *People v. Cook*, 34 N.Y.2d 100, 105-106 (1974).

The Bill now before the City Council purports to create several new substantive rights for commercial tenants not now existing under State law. The Bill would create a right to a lease extension of ten years. The Bill would also create a right to binding arbitration whenever, upon lease renewal, a commercial landlord and tenant could not agree on the amount of rent or the landlord refused to renew the existing lease on the basis of any of the grounds set forth in the Bill. Further, if a tenant is unwilling or unable to pay the rent set by the arbitration panel, the Bill would create a right to remain in place at 110% of the old rent until a new tenant is found, at which point the tenant in possession would have the right of first refusal. Moreover, it would

limit security deposits to two months' rental. The Bill would also create a statutory right to actual, injunctive relief and attorney's fees for a tenant in any successful action against a landlord for landlord retaliation against tenant for the exercise of any of these rights. In addition, the Bill would create a statutory right to injunctive relief mandating arbitration against any landlord who fails to submit voluntarily to arbitration. To these proposals, we now consider the law and cases on inconsistency.

Courts have defined inconsistency as representing an incompatibility rather than merely a difference between State law and local legislation. *Council for Owner-Occupied Housing, Inc. v. Koch*, 119 Misc. 2d 241, 245 (Sup. Ct. N.Y. 1983). Thus, the fact that both the State and the City seek to legislate in the same area does not alone create an inconsistency. *People v. Webb*, 78 Misc. 2d 253, 256 (Crim. Ct. N.Y. 1974). The Court of Appeals in *People v. New York Trap Rock Corp.*, 57 N.Y.2d 371 (1981), noted that "(i)t is, therefore, well settled that if a town or other local government is otherwise authorized to legislate, it is not forbidden to 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." *Id.* at 378. Such result is hardly surprising as any requirement that local legislation be identical to State legislative enactments would make the power to enact Local Laws meaningless.

For example, local laws which supplement penalties imposed under State law are not deemed inconsistent because they do not prohibit conduct which is not already prohibited under State law. In *People v. Lewis*, 295 N.Y. 42, 50 (1945), City penalties for black market activities which exceeded State penalties were found not to create an inconsistency.

Similarly, the courts have noted that "local laws which do not prohibit what the state law permits nor allow what the state law forbids are not inconsistent." *Wholesale Laundry Bd. v. City of New York*, 17 A.D.2d 327, 329 (1st Dept.), *aff'd*, 12 N.Y.2d 998 (1963), *S.H. Kress & Co. v. Dep't of Health*, 283 N.Y. 55, 59 (1940); *People v. Cook*, 34 N.Y.2d at 109. Unfortunately, the question of whether a local law is inconsistent with a State law has not been resolved by a clear test. Nevertheless, courts have invalidated local legislation where such legislation adds additional requirements to an existing regulatory framework. Inconsistencies between State and local law have been found in three instances: (1) where a locality imposed additional procedural restrictions upon State rights, *F.T.B. Realty Corp. v. Goodman*, 300 N.Y. 140, 147 (1949); (2) where a locality established a parallel regulatory system for licensing businesses which could potentially deny licensing to businesses already licensed by the State, *S.H. Kress & Co. v. Dep't of Health*, 283 N.Y. 55, 58 (1940); or (3) where a locality supplemented an existing State legislation by altering the substantive elements of a State created substantive right. *Wholesale Laundry Bd.*, 17 A.D.2d at 327.

In *F.T.B. Realty Corp.*, a landlord challenged the "Sharkey Law", which set residential rent limits and established a regulatory system requiring application before a City rent commission before eviction proceedings could occur. 300 N.Y. at 145-146. The Court of Appeals struck down the "Sharkey Law" as inconsistent with State law governing summary proceedings because it added "additional restrictions" upon the rights granted landlords under the then-existing N.Y. Civil Practice Act. *Id.* at 148.

Although *F.T.B. Realty Corp.* does not discuss in detail the exact inconsistencies the

court found between State and City law, it appears to state that a locality may not add either substantive or procedural requirements to a State-created right. Thus, the City could not require landlords to petition a City rent commission for a discretionary eviction certificate or make eviction for non-payment of rent contingent upon the commission's certification that the rent charged was within the limits proscribed by law. The court found that these requirements were inconsistent with what was then Article 83 of the Civil Practice Act. Article 83 encompassed what are most Sections of the Real Property Actions and Proceedings Law involving summary proceedings.

Despite the fact that there is no State system of commercial rent control which defines the precise terms of commercial lease renewal, tremendous inconsistency exists between State law and the proposals for commercial rent control currently before the City Council. The Bill would establish a right to lease renewal which contravenes the rights of commercial landlords under Real Prop. Law § 228 (McKinney 1968 & Supp.1987) to terminate tenancies at will within 30 days and re-enter, and under Real Prop. Law § 232-a (McKinney 1968 & Supp. 1987) to terminate month-to-month tenancies on 30 days' notice. Furthermore, such automatic lease renewal conflicts with Real Prop. Law §229 (McKinney 1968 & Supp. 1987) which provides for the recovery by Landlord of double rent from holdover tenants. Entitling tenants to automatic renewals conflicts with these termination rights of landlords and thwarts contractual relationships between landlords and tenants.

The Bill would also create a right to damages for harassment by the non-renewal of a commercial lease which right also conflicts with State law. Real Prop. Law § 235-d (2) (McKinney Supp. 1987) now proscribes harassment but explicitly excludes the refusal to renew a lease as a form of harassment. Even though such law explicitly permits conflicting local law (*Id.* at § 235-d (5)), it does so only for existing Local Law and amendments thereof, but not for new Local Laws. Thus, these provisions of the Bill expressly conflict with State law.

The Bill would also require that landlord-tenant disputes including renewal rights and setting of rents be subject to binding arbitration and thereby infringes on the State's control over the court system as it establishes a parallel adjudicatory system in conflict with existing State court powers. *See Tartaglia v. McLaughlin*, 190 Misc. 266, 269-270 (Sup. Ct. Kings 1947), *aff'd*, 273 A.D. 821, *rev'd on other grounds*, 297 N.Y. 419 (1948), (summary proceedings are procedural matters related to court system which is a matter of exclusive State concern); N.Y. Municipal Home Rule Law, S 11(1)(e) (McKinney 1969 & Supp. 1987) (State retains power over legislation which applies to or affects the courts).

Such mandatory, binding arbitration directly conflicts with landlords' and tenants' rights to resolve their disputes through judicial proceedings such as summary eviction. N.Y. Real Prop. Acts. § 701 (McKinney 1979 & Supp. 1987). Furthermore, N.Y. Civ. Prac. L. & R. C7501:4 (McKinney 1980 & Supp. 1987) specifically states that "[a]part from compulsory arbitration in such matters as labor disputes . . . it is axiomatic that parties are entitled to litigate their controversies unless by contract they have agreed to arbitrate them" (emphasis added). Furthermore, under N.Y. Civ. Prac. L. & R. § 7511 (McKinney 1980 & Supp. 1987), all arbitral awards must be reviewed before they are enforceable at law.

Notwithstanding the above discussion, the conflicts between other provisions of the Bill

and State law may not rise to the level of an invalidating inconsistency. Some courts have found no inconsistency in cases where additional minor local restrictions are imposed. Thus, in *People v. Judi*, 38 N.Y.2d 529, 531 (1976), the 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. Similarly, the City has been permitted to set more restrictive standards for wheelchair-accessible vehicles than those imposed under the State Emergency Medical Service Code. *Ambulance and Medical Transp. Ass'n v. City of New York*, 98 Misc. 2d 537, 539 (Sup. Ct. N.Y. 1979).

On the other hand, courts have found inconsistencies between State and local legislation where a locality attempts to establish regulatory agencies which parallel State agencies. In these cases, businesses have been required to obtain both local and state permits to operate. A local law which required shellfish wholesalers to obtain a local permit in addition to a State permit was found invalid. *People v. Kelsey's Seafood*, 112 Misc. 2d 927, 930 (Dist. Ct. Suffolk 1982).

Since there is no existing State commercial rent control system, these cases are not on point with the Bill but they do, however, provide relevant holdings that lead to the observation that courts have most frequently struck down local laws where they have modified and expanded some State-created substantive right. In *Wholesale Laundry Bd. v. City of New York*, 17 A.D.2d 327, 329 (1st Dept.), *aff'd*, 12 N.Y.2d 998 (1963), a City minimum wage law establishing a wage in excess of the State minimum wage was declared invalid. The court noted that "[t]he local law forbids a hiring at a wage which the state permits and so prohibits what the state law allows." *Id.* At 330.

An inconsistency between State and local law has also been found where the City enacted more restrictive Sunday closing laws for laundries than those found under State blue laws, *Schacht v. City of New York*, 30 Misc. 2d 77, 82 (Sup. Ct. N.Y. 1961); where the City banned a food additive not banned under existing State food regulations, *People v. Blue Ribbon Ice Cream Co.*, 1 Misc. 2d 453, 458 (Magis. Ct. Kings 1958); and where a local government set additional requirements for power plant siting studies, *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 108 (1983).

This rule is not absolute. In *People v. Cook*, 34 N.Y.2d at 107, the Court of Appeals discussed the power of the City to enact price differentials for cigarettes in the absence of any State legislation establishing price differentials. The Court noted that a cigarette retailer had raised a challenge to the statute by arguing that a locality may not "enact a local law which prohibits conduct which is permitted by State law". This statement of the law is too broad, as 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. 34 N.Y.2d at 109.

While not explicitly articulated by the cases, the consistent element in the rulings of the courts in this area is that where a local statute does add new substantive provisions to a statutory scheme established under State law, courts will not find a conflict where the State interests are found to be minor. Thus, in *Council for Owner-Occupied Housing, Inc. v. Koch*, 119 Misc. 2d at 245, the fact that a City ordinance added a new requirement that a three percent reserve fund be

established in cooperative or condominium conversions did not invalidate the local law. The court found that since existing State laws in the area of cooperative and condominium conversions were primarily disclosure statutes, there was no conflict. Similarly, in *Ambulance & Medical Transp. Assn v. City of New York*, 98 Misc. 2d at 539, more exacting City regulation of wheelchair-accessible transportation was upheld given evidence of less-than-forceful State enforcement of parallel provisions.

Given, however, the history of court decisions finding local law attempting to control rents, in the absence of express State authority, inconsistent with State law, the few cases allowing inconsistencies where State interests were deemed minor cannot save the proposed legislation. While the Bill seems to have been written to minimize its express resemblance to previously invalidated statutes and prior bills previously reviewed by this Committee, the Bill would impose substantial and important restrictions on substantive rights of commercial landlords established by State law and create inconsistencies with State laws.

Given the uniformity of case law, the generally narrow construction of local government powers in the area of its "property, affairs or government" and "health and welfare," it is clear that the enactment of commercial rent control is not presently within the powers of the City of New York.

AFTERWARD

This report, as is explicitly stated, deals only with whether the City presently has the inherent power to legislate in the area of commercial rent controls. As discussed in this report, the State has, in the past, by general legislation or by special enabling states, authorized local governments to take action and adopt local legislation in areas which, but for such state action, would be beyond the localities' inherent powers. As there has been no such explicit grant of authority, this report has not considered the validity of the Bill under the State and Federal constitutions. The Committee recognizes, however, that such concerns have been raised in the past by opponents of commercial rent controls. As this report does not address them it does not, by its silence, impliedly support or reject these constitutional concerns.

Similarly, this report does not consider the wisdom of the rent control proposal and how it would operate. Here too, silence is not a statement by the Committee in support of either proposal or its details.

Committee on Real Property Law
Jason T. Polevoy, Chair

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