

WRITTEN TESTIMONY OF THE REAL PROPERTY LAW COMMITTEE

NEW YORK CITY COUNCIL SMALL BUSINESS COMMITTEE
HEARING ON INT. NO. 737-A, THE SMALL BUSINESS JOBS SURVIVAL ACT

October 22, 2018

Good afternoon. My name is Steven Kirkpatrick, and I am a member of the New York City Bar Association's Real Property Law Committee. I have practiced real estate law for over 20 years, representing both property owners and commercial tenants in connection with lease disputes. I helped prepare the Committee's legal analysis regarding Intro 737A-2018.¹

The Committee concluded that the New York City Council is not authorized to enact this legislation because it is tantamount to rent control as it limits a landlord's rights with regard to the use and occupancy of his or her commercial space. In its common definition, rent control is a statutory scheme which places limitations on the amount of rent that may be charged, and may include other requirements such as mandatory lease extensions. Because of the Committee's plenary conclusion, we did not analyze possible constitutional objections to the bill.

While policy concerns were not the Committee's focus, our committee members are concerned about the bill's likely unintended consequences, and there seem to be many, because the bill applies to all property owners, and to all commercial tenancies in the City of whatever kind, without limitation.

For instance, the legislation applies to residential cooperatives renting a store or office in their building, or even possibly just a cellar storage space, or an exercise room. The bill applies to churches renting any extra space, and not just a retail space but even a meeting room. It applies to mom and pop building owners, including those who may be renting their one store to a national tenant with hundreds of stores nationwide, and an army of lawyers behind it. It applies regardless of the tenant's size and sophistication, and without regard to how many locations it may have, either in the City, or nationwide.

Whether it is a local pizzeria in Harlem or a Fortune 500 company renting 100,000 square feet of office space in midtown, the tenant would have the right to the 10-year renewal option provided for in the bill, even the original lease term were six months, for example. It would also apply to subleases and subtenants, and could potentially give them more rights than the prime

¹ The Committee's report on Int. No. 737A-2018 is available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/small-business-jobs-survival-act-commercial-rent-control>.

tenant has, and create rights overlapping in time. The bill also isn't clear as to how many 10-year renewals must be offered.

Another consequence is that it would reduce the turnover, and thus availability of commercial spaces. The bill gives tenants "two bites at the apple" - - if the tenant, after arbitration, does not agree to the arbitrator's rent determination, and landlord finds a prospective tenant who agrees to the rent, the original tenant can match that deal. What prospective tenant is going to take the time and incur significant costs to negotiate a lease knowing that he or she may lose it? What will be the impact on brokers who invest resources in marketing a space and find a new tenant, only to have the original tenant decide after all that it wants to remain in the space under the terms of the new tenant's lease? Does a commission get paid to that broker? If so, what happens to the existing tenant's broker? Could owners be obligated to have to pay two commissions as a result of this bill? Given the incredible broadness of the legislation's applicability, the unintended consequences are likely to be unexpected and overwhelming.

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. And there is no State enabling statute expressly authorizing the City to control rents, let alone commercial rents which have historically not been regulated in the same manner as residential rents.

Further, the City Charter, the State Constitution and the Municipal Home Rule Law contain no express provision authorizing the City to control commercial 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 specifically to their own property, affairs or government, or generally for health and welfare purposes.

Although no cases could have arisen specifically resolving the City's power as to commercial rents or spaces, attempts by the City to enact residential rent control legislation without explicit State authorization have been invalidated by the courts. Because the interests of residential tenants are much more closely related to "health and welfare" concerns of a local government than commercial tenants as a general class, the result in the residential area would seem to apply to the commercial area.

The enactment of the bill would also create inconsistencies with existing provisions of the State Real Property Law. For instance, the bill purports to create several new substantive rights for commercial tenants not now existing under State law, including a right to a lease extension of ten years. The Bill would also create a right to binding arbitration whenever 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. These rights conflict with the rights of commercial landlords under Real Property Law § 228, to terminate tenancies at will within 30 days and re-enter, and under Real Property Law § 232-a, to terminate month-to-month tenancies on 30 days' notice. Furthermore, such automatic lease renewal conflicts with Real Property Law § 229, which provides for the recovery by Landlord of double

rent from hold-over tenants. Entitling tenants to automatic renewals also thwarts contractual relationships between landlords and tenants.

The Bill also conflicts with Real Property Law § 235-d (2), which 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's requirement that landlord-tenant disputes including renewal rights and setting of rents be subject to binding arbitration also infringes on the State's control over the court system as it establishes a parallel adjudicatory system in conflict with existing State court powers, which are governed by Municipal Home Rule Law, § 11(1)(e), providing that the State retains power over legislation which applies to or affects the courts.

The arbitration requirements also conflict with landlords' and tenants' rights to resolve their disputes through judicial proceedings, such as summary eviction proceedings brought under Real Property Actions and Proceedings Law Article 7, and Civil Practice Law And Rules § 7501 and 7511, which recognize that the parties are entitled to litigate their controversies unless by contract they have agreed to arbitrate them and make all arbitral awards subject to judicial review before they are enforceable at law.

While the courts have not firmly established a clear and bright line test regarding which types of inconsistencies are impermissible, the inconsistencies relating to lease renewal and termination between the bill 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 likely be invalidated.

Given the history of court decisions finding local laws attempting to control residential rents and the landlord tenant relationship to be invalid in the absence of express State authority, the Real Property Law Committee of the New York City Bar Association has concluded that New York City, and by extension, the New York City Council, lacks power to enact commercial rent controls by local law.