

MAIN FEATURES OF RENT STABILIZATION

The landlord/tenant context — objectives, enforcement & primary provisions of the Emergency Tenant Protection Act, Rent Stabilization Law, Rent Stabilization Code & related laws

As seen from the history of rent regulation, the rent stabilization system has evolved from a combination of State, City and administrative agency actions beginning in 1969. Under the Emergency Tenant Protection Act (ETPA) of 1974, the State established the broad legal parameters within which the City, its agencies, and now the State Division of Housing and Community Renewal must administer rent stabilization. Much of the ETPA, however, refers to and relies upon provisions of the local Rent Stabilization Law (RSL) of 1969 as governing the administration of rent stabilization within New York City. Both laws in turn prescribe the establishment of a code of regulations known as the Rent Stabilization Code (RSC) which implements the provisions of these laws in detail.

Although the provisions of the ETPA concerning rent setting and the role of the Rent Guidelines Board(s) were previously noted, it may be worthwhile to consider some of the general themes of the rent stabilization laws and regulations before proceeding with a more detailed discussion of the administration of rents.

The rent stabilization system is structured to provide three interrelated protections to tenants while permitting a fair return to owners who invest in rental property. A prime concern of lawmakers in establishing the system was to preserve the basic **affordability** of rental housing. Yet, affordable rents would provide little protection for tenants who are at the same time vulnerable to arbitrary evictions or service reductions. Consequently, the rent regulation system goes far beyond the simple establishment of rents and addresses a whole range of landlord/tenant issues. These issues mainly concern **habitability** and **security of tenure**.

It is also important to consider whether rent regulation produces **fair returns** for affected owners. As previously discussed, the interests of owners are vested with certain protections based upon the constitutional guarantees of equal protection, due process and just compensation for the taking of private property for public use. Concern for these protections has been incorporated into the structure of the rent stabilization system through the allowance of “hardship” rent increases for owners and by the various constitutional limitations governing the Board’s and the DHCR’s general authority. Additionally, the system is designed to prevent tenants from

unfairly abusing or profiting from their control over regulated units. Finally, mechanisms have been added to encourage owners to invest in major capital improvements and to develop new rental units or to improve existing units.

A general familiarity with all of these aspects of rent stabilization is helpful in understanding the regulatory framework within which the rent guidelines must be established and enforced.

Affordability

The findings of the City Council in enacting the Rent Stabilization Law of 1969, and the State legislature in adopting the Emergency Tenant Protection Act of 1974, clearly establish that fair and *generally* affordable rents are a primary objective of these laws. The intent is clearly not to guarantee an affordable rent for every tenant. Rather, it is to protect tenants against “abnormal” rents driven up by chronic housing shortages. A full reprint of the findings from the Rent Stabilization Law of 1969, as amended, is provided below:

Rent Stabilization Law of 1969 (as amended) Findings and Declaration of Emergency

The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York and will continue to exist after April first, nineteen hundred seventy-four; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing; that the legislation enacted in nineteen hundred seventy-one by the state of New York, removing controls on housing accommodations as they become vacant, has resulted in sharp increases in rent levels in many instances; that the existing and proposed cuts in federal assistance to housing programs threaten a virtual end to the creation of new housing, thus prolonging the present emergency; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action by the council continues to be imperative; that such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; that the transition from regulation

to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency; and that the policy herein expressed is now administered locally within the city of New York by an agency of the city itself, pursuant to the authority conferred by chapter twenty-one of the laws of nineteen hundred sixty-two.

The council further finds that, prior to the adoption of local laws sixteen and fifty-one of nineteen hundred sixty-nine, many owners of housing accommodations in multiple dwellings, not subject to the provisions of the city rent and rehabilitation law enacted pursuant to said enabling authority either because they were constructed after nineteen hundred forty-seven or because they were decontrolled due to monthly rental of two hundred fifty dollars or more or for other reasons, were demanding exorbitant and unconscionable rent increases as a result of the aforesaid emergency, which led to a continuing restriction of available housing as evidenced by the nineteen hundred sixty-eight vacancy survey by the United States bureau of the census; that prior to the enactment of said local laws, such increases were being exacted under stress of prevailing conditions of inflation and of an acute housing shortage resulting from a sharp decline in private residential construction brought about by a combination of local and national factors; that such increases and demands were causing severe hardship to tenants of such accommodations and were uprooting long-time city residents from their communities; that recent studies establish that the acute housing shortage continues to exist; that there has been a further decline in private residential construction due to existing and proposed cuts in federal assistance to housing programs; that unless such accommodations are subjected to reasonable rent and eviction limitations, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; and that such conditions constitute a grave emergency. (§26-502 of the RSL continues and re-affirms these findings.)

The question of how much weight to give to affordability is a controversial one. Two judicial pronouncements on the issue indicate that tenants' ability to pay is a permissible consideration in setting the guidelines.⁸⁶ Owner representatives have often asserted that affordability (as reflected in tenant incomes, unemployment statistics, shelter allowances, non-payment petitions, evictions etc.) should not be a factor in the Board's annual deliberations. They have argued that rent limits established by focusing on economic factors - such as operating costs, vacancy rates, mortgage rates and so on -

⁸⁶ See *Greystone Hotel Co. v. City of New York, Rent Guidelines Board et al.*, case #17, supra at p.45. Note: This case was not published and may not be cited as precedent in any other case. See also *Matter of Muriel Towers Co.*, case #10, supra at page 42.

preserve affordability to the extent intended by the system. In other words, guidelines that are exclusively concerned with the specific considerations prescribed by law⁸⁷ result in presumptively “fair” rents. Tenants counter that this focus on the mandated considerations neglects the intent of the legislation - described in the above Declaration of Emergency - and ignores the third section of the charge to the Board which permits it to consider “such other data as may be made available to it”.

Regardless of who has the better of this argument there is an independent and quite plausible reason for continuing to review and factor affordability into the guidelines. In the purest economic sense, the object of the guidelines should be to eliminate the effects of the housing shortage on rent levels. All of the mandated criteria suggest that the Board should be making a rough attempt to simulate the kinds of rents that a competitive market with a vacancy rate in excess of 5% might provide. Such a market would be shaped by the same basic forces that control all unregulated markets: supply and demand. Demand would in turn be determined by a host of factors, the most significant of which is tenant affordability.

In an unregulated rental housing market, if incomes fall or unemployment rises the demand curve will gradually shift downward - more people will double up, move away, skip out on payments or negotiate more vigorously with owners - and rents will eventually fall or rent increases will be limited. This pattern was clearly in evidence in unregulated markets nationally where rents remained virtually flat throughout the recession of the early 1990's.⁸⁸ In New York's unregulated rental sector, rents fell by as much as 15% during this recession.⁸⁹ Vacancy rates are higher in other areas of the country, giving rise to more balanced bargaining relations and permitting the partial transfer of recessionary pressures from tenants to owners. Except in high rent sectors where market rents prevail, New York's housing shortage largely suppresses or masks these consequences. Housing options in middle and low-income markets are limited. Owners are commonly in a position to say, “take it or leave it” and tenants have little choice but to accept what is offered. The benefit to low and moderate-income tenants of a recession-induced deflation of rents is largely lost. In short, a genuine attempt to simulate a competitive equilibrium rental price will recognize that rents fall in a

⁸⁷ Recall that the mandated considerations include:

- (1) the economic condition of the residential real estate industry in N.Y.C. including such factors as the prevailing and projected (i) real estate taxes and sewer and water rates, (ii) gross operating maintenance costs (including insurance rates, governmental fees, cost of fuel and labor costs), (iii) costs and availability of financing (including effective rates of interest), (iv) over-all supply of housing accommodations and over-all vacancy rates;
- (2) relevant data from the current and projected cost of living indices for the affected area; and
- (3) such other data as may be made available to it.

⁸⁸ See State of the Nation's Housing - 1992, Joint Center for Housing Studies of Harvard Univ., Exhibit 2a.

⁸⁹ N.Y. Times 2/7/93 Real Estate Section at 12, col. 1

recession because incomes fall. From this perspective, ability to pay may be an important economic factor for the Board to consider.

The consideration of affordability does not necessarily compel lower rent adjustments. Those who are willing to factor affordability into the guidelines by limiting increases during a recession are bound to accept a logical corollary - when tenant incomes rise so should rents. Nothing in the Declaration of Emergency suggests that rent levels should be immunized against inflationary pressures brought on by rising incomes.

The RGB's main tool for studying affordability issues is the annual *Income and Affordability Study (I&A)*, published and presented each spring by RGB staff members. The full report can be found on our website or in the annual *Housing NYC: Rents Markets and Trends* book, also published by the RGB. This study attempts to capture the most recent reports and statistics regarding the affordability of New York City housing. Studies vary by year, but generally include data from the triennial *Housing and Vacancy Survey (HVS)*, the most recent *American Community Survey* data, employment and economic statistics, as well as reports produced by policy institutes and advocacy groups.

According to the 2008 *HVS*, which reflects household income for 2007, the median income for rental households was \$36,200, in real terms a 2.0% increase from 2004 levels.⁹⁰ Owner households earned substantially higher income, which in 2007 was \$70,000, almost double the average income of renters. The 2008 *HVS* found different income levels among those living in units that were rent controlled, rent stabilized, or unregulated. Rent controlled tenants continued to have the lowest household income, earning a median of \$24,000 in 2007, a decrease in real terms of 2.4%. Tenants living in stabilized buildings built prior to 1947 ("pre-war") had a median income of \$35,000 (a decrease of 1.4%), and post-46 ("post-war") tenants earned a median income level of \$38,000 (a decrease of 1.6%). Stabilized tenants on the whole had a median income of \$36,000, an increase of 1.4%. Those tenants in unregulated apartments earned a median of \$50,000 in 2007, a 7.5% increase, which helped increase all renter incomes by 2.0%.

The *HVS* also examines rent levels, and it revealed that in 2008, the median monthly contract rent, which excludes any additional tenant payments for fuel and utilities, for all rental units was \$950 (an 11.8% nominal increase from 2005 and a 1.6% real dollar increase). Rent stabilized tenants paid, on average, less than the

⁹⁰ Unless otherwise noted, all following data is from the 2008 *Housing and Vacancy Survey*, conducted by the Census Bureau. Total household income in the HVS includes wages, salaries, and tips; self-employment income; interest dividends; pensions; and other transfers and in-kind payments.

typical rental tenant, with a median contract rent of \$925 for all rent stabilized tenants in 2008 (a 0.4% real decrease), \$900 for pre-war rent stabilized apartments (a 1.0% real increase), and \$985 for post-war rent stabilized apartments (a 0.4% real decrease). Rent controlled tenants paid the least in contract rent, a median of \$721 (a 19.0% real increase), and tenants living in private nonregulated rentals paid \$1,200 (a 9.1% real increase).⁹¹

Median gross rent, which includes fuel and utility payments, was \$1,057 for all renters (a 14.9% nominal increase and a 4.4% real dollar increase). Rent stabilized tenants on the whole paid a median gross rent of \$1,030 in 2008 (a 2.5% real increase), \$1,010 for pre-war rent stabilized apartments (a 2.0% real increase), and \$1,065 for post-war rent stabilized apartments (a 1.9% real increase). Rent controlled tenants also paid the least in gross rent, a median of \$813 (a 14.0% real increase), and tenants living in private nonregulated rentals paid \$1,350 (a 9.1% real increase).

The HVS also breaks down the distribution of renter occupied housing by gross rent level. Of the 2.08 million rental units in New York City that report cash rent, 10.9% rent for less than \$500, while 55.9% rent for over \$1,000, including 22.0% that rent for more than \$1,500. A third (33.2%) of all rental units rent for between \$500 and \$999.⁹²

Examining affordability of rental housing, the 2008 HVS reported that the median gross rent-to-income ratio for all renters was 31.5%, meaning that half of all households residing in rental housing pay more than 31.5% of their income in gross rent, and half pay less. Furthermore, more than a quarter (29.4%) of rental households pay more than 50% of their household income in gross rent. Generally, housing is considered affordable when a household pays no more than 30% of their income in rent.⁹³ Both the overall gross rent-to-income ratio and the proportion of households paying more than 50% of income towards rent increased from the 2005 HVS, which reported proportions of 31.2% and 28.8% respectively.

Rent controlled tenants are the tenants facing the highest financial burden, with a median gross rent-to-income ratio of 35.5%, meaning a majority of rent controlled tenants are not able to afford their apartments, based on the HUD benchmark for housing affordability. Unregulated tenants had the second highest gross rent-to-

⁹¹ Private non-regulated units consist of units which were never rent controlled or rent stabilized, units which were decontrolled, and unregulated rentals in cooperatives or condominium buildings.

⁹² There were 35,402 units which did not report a cash rent.

⁹³ The HUD benchmark for housing affordability is a 30% rent-to-income ratio. Source: Basic Laws on Housing and Community Development, Subcommittee on Housing and Community Development of the Committee on Banking Finance and Urban Affairs, revised through December 31, 1994, Section 3.(a)(2)

income ratio, 31.9%, and rent stabilized tenants as a whole had a median of 31.7%, with pre-war tenants at 31.7% and post-war at 31.6%. For rent stabilized tenants on the whole, this ratio decreased between 2005 and 2008, by 0.2 percentage points. It also decreased 0.5 percentage points in pre-war apartments, but increased 1.1 percentage points in post-war apartments.

Despite ongoing efforts by a number of government agencies and non-profit groups, housing affordability remains an issue in a city ranked 11th highest among 71 big cities (cities with more than 250,000 persons) in the nationwide *2008 American Community Survey* of monthly rental costs (\$1,044), but only 21st highest in median household income (\$51,116).⁹⁴ This survey also reports that between 2007 and 2008, median rents for all apartments in New York City increased a nominal 6.0%, and the median gross rent-to-income ratio increased slightly from 29.9% to 30.1%. The percentage of households paying more than 50% of their income towards rent in 2008 also increased slightly, up to 26.9% from 26.6% in 2007.

The survey also provides mean household income for cities in quintiles. In New York City the top quintile in mean household income makes 24.88 times more than the lowest quintile, the fifth highest ratio among big cities, and an increase from 23.78 in 2007. The lowest disparity is in Santa Ana, California with a ratio of 8.63. New York's ratio is only behind Atlanta, Washington D.C., New Orleans, and Boston, which have ratios of 30.55, 28.13, 26.20, and 25.38 respectively. Other major cities, such as Los Angeles (21.25), Chicago (22.06), Houston (18.43), and Philadelphia (19.16), all have smaller differentials between income levels. While the ratio between the upper and lower quintiles was 24.88 for all of New York City, it was 42.02 in Manhattan where the top quintile makes more than \$400,000 more annually than the lowest quintile. These figures are somewhat higher than the prior year.

One of the many prices tracked in the federal Consumer Price Index (CPI) is the cost of rental housing. While not specific to New York City (the local CPI area extends into Northern New Jersey and Long Island), the CPI can provide a useful comparison of the rise of housing costs to those of other components of the price index.⁹⁵ For instance, in the 1970s overall inflation in the New York area was 92.4%, while rental costs rose at a slower pace, 77.9%. In the 1980s and 1990s costs were more comparable between the two indices, with overall inflation in the 1980s at 77.2% and rental inflation at 86.0%, and overall inflation in the 1990s at 35.5% and rental inflation at 38.4%. But in the 2000s rental costs rose at a much faster pace than overall inflation, seeing a 56.2% rise in costs versus an overall inflation rate of 33.8%.

⁹⁴ *2008 American Community Survey*, U.S. Census Bureau. <http://factfinder.census.gov> (Based on places with a population of more than 250,000).

⁹⁵ Bureau of Labor Statistics; <http://www.bls.gov>; Data accessed March, 2010

For the entire 40-year period in New York, overall prices rose 518% and the cost of rental housing rose 615%.

Comparing the rise in rental costs in the New York area to other major metropolitan areas in the 2000s, rental costs rose at a slower pace than those in Los Angeles, which saw a 65.0% increase in prices and Washington, DC, which saw a 59.5% rise. But New York costs rose at a faster pace than many other areas, such as Atlanta (17.5%), Chicago (36.1%), San Francisco (39.6%), Philadelphia (39.8%), and Boston (44.7%). For the U.S. as a whole, rental costs over the 40-year period were comparable to overall price increases, with overall prices rising 457% and rental costs rising 485%. Notably, just as in the New York area, rental costs in the U.S. as a whole rose at a significantly faster rate than overall prices during the 2000s, rising 40.2% versus a 28.8% increase in all prices.

Selected results from the *2008 HVS*⁹⁶ reveal that 4% of market rate renters receive Section 8 vouchers, while 8% of rent stabilized tenants do so. In addition, 3% of rent stabilized tenants receive a shelter allowance (versus 2% of market rate renters) and 5% are in the SCRIE (Senior Citizen Rent Increase Exemption) program⁹⁷. More than 21% of rent stabilized tenants live under the federal poverty level (versus 15% of market rate tenants), while 16% receive public assistance (versus 10% of market rate renters). Rent stabilized tenants also live in more crowded conditions than other renters, with 12% of apartments considered overcrowded (more than one person per room), as compared with 10% of market rate apartments. They also live, on average, in smaller apartments than non-regulated tenants, with an average of 3.2 rooms per apartment versus 3.8 rooms in market rate apartments.

Rent regulation does, of course, play some role in limiting the rents paid by many households that receive limited or no assistance. Yet, in spite of the high number of rental households protected by rent regulation, the proportion of household income paid in rent rose steeply throughout the early period of stabilization. (This phenomenon also occurred - to a lesser extent - throughout the nation during the same period.) The median “rent to income ratio,” or percent of gross income paid in rent, increased from 20% to 32% for all renters and from 22% to 32% for stabilized renters over the past 38 years (see table on next page).⁹⁸

⁹⁶ All data in this paragraph is from the 2008 Housing and Vacancy Survey. Percentages are based on those households that responded to the question and excludes any household that did not report an answer. With the exception of those households living in poverty, between 20%-30% of respondents did not respond to the questions reported in this paragraph.

⁹⁷ This statistic is derived not from the HVS (which has data on the SCRIE program, but because more than 86% of respondents did not answer the question is highly unreliable), but from the reported 49,691 tax abatements given to owners in FY 2011, as reported by the Dept. of Finance.

⁹⁸ Housing and Vacancy Surveys 1970-2008

Table III.

Percent of Gross Income Paid in Rent for all Renters and Stabilized Renters in New York City 1970-2008		
Year	All Renters	Stabilized Renters
1970	20%	22%
1975	25%	27%
1978	28%	30%
1981	27%	29%
1984	29%	30%
1987	29%	29%
1991	29%	28%
1993	30%	31%
1996	30%	30%
1999	29%	30%
2002	28%	28%
2005	31%	32%
2008	32%	32%

Source: Housing and Vacancy Surveys 1970-2008, U.S. Bureau of the Census

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. While existing tenants face guideline adjustments upon renewal of their leases, new tenants are charged vacancy increases (in accordance with the statutory formula). This approach has, however, resulted in widely “skewed” rents for comparable apartments. Notably, the RGB staff has found that “longevity discounts” exist in unregulated housing as well as in New York’s regulated market.⁹⁹ Whether regulated or not, landlords favor long-term steady rent payers. The critical difference is that rent regulated tenants tend to stay in their units about twice as long (about nine years on average) as their unregulated neighbors. Thus the longevity discounts accumulate over a longer period.

Habitability

Historically a tenant’s obligation to pay rent was considered independent of an owner’s obligation to provide a habitable apartment. Thus tenants were required to pay rents even when services were unavailable or hazardous conditions existed. In 1939 the State began to depart from this tradition by permitting tenants to deposit rents into court when apartment conditions threatened life, health or safety. This

⁹⁹ See Rent Stabilized Housing in New York City, A Summary of RGB Research, 1994; Rent Skewing in Rent Stabilized Buildings, 1994, p. 62, noted further herein at page 105.

process required a court proceeding, however, and did not provide the tenant with compensation for having to live with the dangerous conditions or for the loss of services. The court simply withheld the rents to induce the landlord to make the needed repairs or to restore services - or the court ordered that the problems be remedied directly with the deposited funds.¹⁰⁰ No abatement of rent was authorized for the period in which tenants were without full enjoyment of their apartments.¹⁰¹

In 1943, under federal rent controls, owners were required to provide essential services or face a downward adjustment of rents. These protections were continued when the State took over the administration of rent control in 1951. In 1971, amendments to the rent control laws establishing the MBR system expanded tenant protections by requiring owners to correct all “rent impairing” violations - a designation given to a select group of housing code violations by the City’s housing agency - and at least 80% of all other violations, prior to receiving any rent increase. These protections for rent controlled tenants continue in effect today.

In adopting the Rent Stabilization Law of 1969, the City established protections against loss of services for the newly created class of rent stabilized tenants by requiring that such protections be included in the code of regulations to be established by the real estate industry.¹⁰² The current Rent Stabilization Code [now promulgated by the DHCR] requires owners to certify annually that they are continuing to provide the same services as those provided at the time the apartment first became subject to stabilization.¹⁰³

In 1975 the State reversed completely the policy of decoupling the obligation to pay rent from the obligation to supply fully habitable premises. Under the **warranty of habitability**¹⁰⁴ all residential leases are now “effectively deemed a sale of shelter and services by the landlord who impliedly warrants: first, that the premises are fit for human habitation; second, that the condition of the premises is in accord with the uses reasonably intended by the parties; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety.”¹⁰⁵ Consequently

¹⁰⁰ Former Civil Practice Act, 1920, section 1446-a, added L. 1939, c. 661, and repealed by CPLR 10001. Now section 755 of the Real Property Actions and Proceedings Law.

¹⁰¹ In 1965, §302-a was added to the Multiple Dwelling Law permitting, under certain circumstances, a complete abatement of rent if selected violations, designated as “rent impairing” remain uncorrected.

¹⁰² See former RSL section YY51-6.0(c)(8), and current RSL section 26-514.

¹⁰³ See RSC sections 2523.2 through 2523.4

¹⁰⁴ Real Property Law section 235-b.

¹⁰⁵ Quoting Cooke, Ch. J., N.Y. Court of Appeals, *Park West Management Corp. v. Mitchell*, 1979, 47 N.Y. 2d at 319.

all tenants, regardless of rent regulation status, are now eligible to seek repairs and rent abatements for violations of this warranty.¹⁰⁶

The right of rent stabilized tenants to seek compensation for lost services and to obtain the restoration of such services is still in some ways broader than the rights afforded by the warranty of habitability. The services protected by the warranty or otherwise required by law may not include all services furnished on certain applicable base dates, which the Rent Stabilization Code has categorized as “required services” and which rent stabilized tenants have a right to continue.¹⁰⁷ If a required service is not provided, the DHCR may reduce the rent to the amount in effect prior to the most recent guideline increase for the period in which the tenant is deprived of the service. The rent reduction commences on the first day of the month following the month in which the owner is served with a copy of the tenant's complaint. It is important to note that the warranty of habitability may provide greater relief for loss of those services covered by the warranty because rent abatements under the warranty may be retroactive and are not limited solely to the elimination of guideline increases.

It is also worth noting (although unconnected with habitability) that rent stabilized tenants have a right to a renewal lease on the same terms and conditions as the expiring lease. If a tenant received what the Code considers an “ancillary service” (e.g. garage space, swimming pool access, health club rights etc.) under an expiring apartment lease - even though such service was not provided on the applicable base dates for required services - the tenant may continue to demand such services at stabilized rents upon renewal of the lease. While the owner may not demand that the tenant rent the ancillary service (other than security) as a condition of renting the apartment, once the tenant has accepted the service, the owner may demand that the service (and special charges for it) be included in subsequent renewal leases. However, tenants have a right to sublet such services. These renewal rights and obligations are not protected under the Code if the service is not provided primarily for the tenants in the building and is governed by a separate agreement.

Security of Tenure

It has long been recognized that any “attempt to limit the landlord’s demands” through rent regulation would fail “[I]f the tenant remained subject to the landlord’s power to evict”.¹⁰⁸ Therefore, under rent regulation the general power to evict is eliminated in favor of a limited power to remove tenants for specifically enumerated causes. Also,

¹⁰⁶ See also §235 of the Real Property law, which makes willful refusals to provide essential services a misdemeanor.

¹⁰⁷ See RSC 2520.6(r).

¹⁰⁸ Quoting O.W. Holmes, J., U.S. Supreme Court *Block v. Hirsh* 256 U.S. 135,157-58 (1921).

special protections have been added to protect tenants from illegal evictions and harassment.

Under the **rent control** system tenants have permanent tenure and their rights and obligations are fully spelled out in the state Rent and Eviction Regulations.¹⁰⁹ Consequently they are referred to as statutory tenants and they do not face periodic lease renewals. Rent controlled tenancies may only be terminated on grounds set forth in the Rent and Eviction Regulations. Under the **rent stabilization** system tenants are also granted permanent tenure, but their rights and obligations are defined by both the Rent Stabilization Code and their individual leases. Rent stabilized tenants have a general right to renew their leases as they expire. Under rent stabilization there are two means for ending a tenancy: First, there are a number of grounds to **evict** the tenant such as nonpayment of rent, maintaining a nuisance, illegal subletting or use of the apartment for unlawful purposes; Second, there are grounds for **refusing to renew the lease** such as recovery of the apartment for the owner's personal use or recovery when the tenant maintains a primary residence elsewhere.

If an owner attempts to remove the tenant unlawfully s/he will be subject to both civil and criminal penalties. The Rent Stabilization Code provides as follows:

*It shall be unlawful for any owner or any person acting on his or her behalf, directly, or indirectly, to engage in any course of conduct (including, but not limited to, interruption or discontinuance of services, or unwarranted or baseless court proceedings) which interferes with, or disturbs, or is intended to interfere with or disturb the privacy, comfort peace, repose, or quiet enjoyment of the tenant in his or her occupancy of the housing accommodation, or is intended to cause the tenant to vacate such housing accommodation or waive any right afforded under this Code.*¹¹⁰

If a tenant was removed from a unit through harassment, the owner is not permitted to collect a vacancy increase from the next tenant who occupies the unit.¹¹¹ Whether or not the tenant vacates, the Division of Housing and Community Renewal may impose fines against the owner and future rent increases of any sort may be denied.¹¹² Further, criminal penalties may be sought through the Office of Corporation Counsel under the Unlawful Eviction Law.¹¹³ Note that this latter law protects tenants in all rental units - not just rent regulated units.¹¹⁴ In addition, treble damages for

¹⁰⁹ NYCRR §2200 et. seq.

¹¹⁰ R.S.C. §2525.5

¹¹¹ See RSL §26-510(d).

¹¹² See RSC §2526.2(c)(3) & (d).

¹¹³ N.Y.C. Admin. Code §26-521 et. seq.

¹¹⁴ See also §235-d of the Real Property law granting all tenants the right to obtain injunctive relief against harassment; §286(6) of the Multiple Dwelling Law denying free market status to loft units held by owners found guilty of harassment; §26-412(d) & §26-403(e)(2)(i)(9) of the NYC Rent Control Law, making

unlawful evictions may be imposed under section 853 of the Real Property Actions and Proceedings Law.

Fair Returns

The broad goal of the rent stabilization system is the establishment of “fair” rent levels for both owners and tenants. Fairness, of course, is a normative matter that is open to interpretation. Given the overall legal framework supporting the establishment of rent guidelines the term appears to connote a process that attempts to balance three objectives. One objective is the establishment of rent levels that are generally humane - in the sense that owners are not permitted to fully exploit demand for housing accommodations driven by situational scarcity. A corresponding objective is setting rents that reasonably support the reliance and expectation interests of good faith (non-speculative) investors. While the Board cannot guarantee a profit for every owner, it should attempt to preserve the kind of returns that a competitive market with a vacancy rate in excess of 5% might generate - given all the various and changing factors of supply and demand such as tenant incomes and costs of operation. Finally, fairness requires that the overall rent burden be allocated among tenants in an even-handed way - or that differentials in rent adjustments among similarly situated tenants bear some reasonable relationship to legitimate public policy.

Does rent stabilization produce “fair” returns? In order to consider this question logically it would be useful to have a common measure to determine whether the goal is being achieved. Unfortunately, much of the disagreement over the effectiveness of rent regulation is really disagreement over the objectives of rent regulation. Rent regulation may have many purposes:

- to keep rents generally affordable;
- to maintain a building’s net operating income at stable levels; or
- to ensure a “reasonable return”

The closest thing to an authoritative measure for considering the success of the rent stabilization system is contained in the law itself, and, like many laws, the rent stabilization law contains some objectives and ideals that may not operate in complete harmony.

harassment a violation and forbidding decontrol of units vacated via harassment, respectively. Further, see §2.7(2)(a) of the City's 421-a regulations included in Appendix P - prohibiting deregulation in certain cases where harassment occurs, and §26-504.2 of the RSL prohibiting high rent vacancy decontrol in the case of harassment.

The rent stabilization law generally directs that the Rent Guidelines Board consider **cost-push** inflationary factors such as increases in heating fuel or labor costs before establishing rent adjustments. In addition, special rent increases administered by the DHCR are permitted to encourage major capital improvements, individual apartment improvements and to remedy economic hardship. Yet, the same laws appear to prescribe an end to the effects of **demand-pull** inflation on rents. This is the type of inflation that commonly results from a shortage or fixed supply of a needed good. As Justice Bellacosa summarized in the case of *Manocherian v. Lenox Hill Hospital*, “the State intended to protect dwellers who could not compete in an overheated rental market, through no fault of their own... and to 'forestall profiteering, speculation and other disruptive practices.’”¹¹⁵

Notably, the Rent Stabilization Law does not speak about “profits.” There is a good reason for this. Simply put, the Board does not control profit levels. Any such attempt would result in an intractable circularity problem: rents rise, property values climb, investors must spend more to purchase properties, rents must rise again to maintain the same relative return on investment.

Generally speaking there are two investors in every rental property: the purchaser and the lending institution. The lender’s profit is determined by the interest it charges and the percentage of defaults it copes with. The purchaser’s profit is determined by the return it realizes on the amount of capital it has placed at risk. In a very real sense, virtually all owners of rent stabilized properties receive market rate profit levels.¹¹⁶ That is because purchase prices are wholly unregulated and market driven.

The rent stream of any given building will determine its market value. Although the Board sets the rents, it cannot order an investor to pay more (or a seller to take less) than the building is worth in market terms. Thus, if the Board sets a rent below market, it will limit a building’s appreciation and value. Any purchaser of that building will pay less for it in order to ensure that the investment is worthwhile. Whether the investment was a wise one will depend on how well the investor predicted future rent streams given the regulatory environment in which the building operates. The ultimate effect of rent stabilization is, therefore, to mute property values – not profits.¹¹⁷ In the absence of rent regulation an investor would presumably pay

¹¹⁵ 84 N.Y.2d 385 (1994) *cert denied*, 514 U.S. 1109 (1995).

¹¹⁶ A notable exception to this generalization would be those owners who purchased buildings in an open market environment and were subsequently subjected to rent regulations. The precise proportion of such buildings in the stabilized stock is not known, but is thought to be relatively small.

¹¹⁷ Notably, in empirical terms, the actions of the Rent Guidelines Board have not been shown to mute growth in the re-sale value of rent stabilized buildings. In a survey of real estate transactions for rental buildings in New York City covering the period from 1976 through 1993, median sales prices increased over 400% while the national inflation rate increased at less than half that rate. See *Sales Price Data, Rent Stabilized*

more for the subject property, and, in a sense, gamble against what the market would bring in terms of changes in demand. Under rent regulation, the investor pays less and gambles against what regulatory authorities will do.

Of course, the Board may affect profit levels in unforeseen ways if it acts unpredictably or erratically. Thus, if the Board gave a far larger rent increase than its prior practices would have suggested, prudent investors would be awarded with an unexpected windfall. Conversely, if the Board adopted rent adjustments well below those suggested by its past actions, the reasonable expectations of owners who purchased stabilized buildings would be frustrated.

In sum, one factor in ensuring fair *profit* levels is steady and predictable behavior on the part of the Rent Guidelines Board. Stable behavior on the part of the Board allows new investors to make a rational assessment of whether or not the asking price of a particular building is competitive relative to other investments.

The Commensurate Rent Formula

Stability requires that the Board monitor the changing relationship between operating costs and rent levels. The general approach taken by the Rent Guidelines Board over the past three decades has been to “keep owners whole” for changes in operating costs, and to protect net operating incomes from the effects of inflation. This has been accomplished, with varying degrees of accuracy, through the use of an annual price index of operating costs, along with certain formulas falling under the heading of “the commensurate rent adjustment.” The “traditional” commensurate formula simply attempted to ensure that net operating income was preserved in nominal terms – unadjusted for inflation.

The commensurate rent formula has evolved over the years to a rather precise mechanism that reflects actual lease renewal and vacancy patterns from year to year. In addition, an adjustment has been added to preserve net operating income against the effects of inflation. A complete discussion of the various formulae used to construct the commensurate adjustment is included in Appendix J.

The commensurate is neither a rent floor nor a ceiling. When the commensurate is relatively high, the Board tends to adopt guidelines somewhat lower than it suggests. When it is low, the guidelines typically exceed it. For example, in

Housing in New York City: A Summary of Rent Guidelines Board Research, 1993, p. 112. Although this increase may be affected by a variety of factors, such as the type and quantity of buildings being sold, this consistent trend does suggest that, in general, the RGB has not acted to frustrate the reasonable expectations of good faith investors.

1990, when a 21% spike in fuel and utility costs resulted in a commensurate rent adjustment of 7.3% for one-year leases and 9.5% for two-year leases (under the “traditional” formula), the Board adopted a 4.5% for one-year leases and a 7% for two-year leases. In 2000, the traditional formula suggested a 4.8% one-year guideline and a 6% two-year guideline; the CPI adjusted formula suggested a 6% one-year guideline and a 10% two-year guideline (largely due to fuel costs). The Board adopted a 4% one-year guideline and a 6% two-year guideline.

By comparison, in the low inflation years of 1995, 1998 and 1999, when the traditional commensurate was 0% for one-year leases and ranged from 1.1% to 1.8% for two-year leases, the Board adopted 2% increases for one-year leases and 4% increases for two-year leases. For further detail, see the chart of commensurate rent increase formulas as presented to the Rent Guidelines Board, the PIOC percent change and final rent guidelines.

Table IV.
Commensurate Rent Increase (as reported to RGB)

Year	PIOC Change	Traditional		Net Revenue w/ Vacancy		Net Revenue w/o Vacancy		CPI-Adjusted w/ Vacancy		CPI-Adjusted w/o Vacancy		Rent Guidelines	
		1-YR	2-YR	1-YR	2-YR	1-YR	2-YR	1-YR	2-YR	1-YR	2-YR	1-YR	2-YR
1994	2.0%	1.4%	2.6%	1.0%	1.75%	1.75%	2.5%	2.0%	3.0%	2.5%	4.0%	2.0%	4.00%
1995	0.1%	0.0%	1.1%	—	—	—	—	—	—	—	—	2.0%	4.00%
1996	6.0%	4.0%	5.0%	3.0%	4.0%	5.0%	7.0%	4.5%	6.0%	7.0%	8.0%	5.0%	7.00%
1997	2.4%	1.6%	2.2%	—	—	1.5%	3.0%	—	—	2.5%	4.5%	2.0%	4.00%
1998	0.1%	0.0%	1.1%	—	—	0.0%	0.0%	—	—	0.5%	1.5%	2.0%	4.00%
1999	0.03%	0.0%	1.8%	—	—	0.0%	0.0%	—	—	0.0%	1.5%	2.0%	4.00%
2000	7.8%	4.8%	6.0%	4.0%	7.5%	6.5%	9.5%	6.0%	10.0%	8.5%	12.0%	4.0%	6.00%
2001	8.7%	5.2%	5.9%	4.5%	8.0%	6.5%	11.0%	6.5%	10.5%	9.0%	13.0%	4.0%	6.00%
2002	-1.6%	0.0%	0.0%	-5%	-3.5%	-2.3%	-1.0%	-3.5%	-1.8%	0.0%	0.0%	2.0%	4.00%
2003	16.9%	10.4%	12.6%	12%	16%	15%	20%	13.5%	18%	16%	23%	4.5%	7.50%
2004	6.9%	4.3%	5.5%	2.5%	4.5%	5.5%	9.0%	4.0%	7.0%	7.0%	11.5%	3.5%*	6.5%*
2005	5.8%	3.6%	5.9%	2.5%	4.5%	4.25%	8.0%	4.0%	7.0%	6.5%	10.5%	2.75%*	5.5%**
2006	7.8%	5.3%	7.5%	5.0%	9.5%	6.5%	11.0%	6.5%	12.0%	8.0%	13.5%	4.25%*	7.25%
2007	5.1%	3.6%	6.8%	3.25%	5.75%	4.5%	7.5%	4.5%	8.0%	5.75%	9.75%	3.0%	5.75%
2008	7.8%	5.4%	8.1%	4.75%	9.5%	6.25%	11.5%	6.0%	11.25%	7.5%	13.25%	4.5%•	8.5%•
2009	4.0%	2.7%	3.5%	1.75%	2.5%	3.5%	5.5%	3.25%	5.0%	5.0%	8.0%	3.0%•	6.0%•
2010	3.4%	2.4%	4.8%	1.25%	2.25%	2.75%	5.5%	1.5%	2.5%	3.0%	5.75%	2.25%	4.5%

Source: Price Index of Operating Costs reports 1989-2010; RGB Orders #26-42. *Guidelines are 0.5% lower for tenants that pay for their own heat. **Guideline is 1% lower for tenants who pay their own heat. •Minimum” guidelines for these years were also passed by the RGB, and are currently in litigation.

The practice of “smoothing” out year-to-year adjustments to obtain a steady pattern of increases, although not without its critics, has been a consistent feature in past RGB orders. This may, in part, be due to the fact that approximately one third of tenants do not experience renewals in any given year. Those tenants in the second

year of a two-year lease, signed under a prior guideline, may either miss, or be consistently hit by periodic jumps in the guidelines. Consequently, the Board has leaned against mechanical application of the commensurate rent formula.

Historically, the Board has managed to maintain a very stable relationship between building incomes and expenses. Indeed, the best evidence available to the Board's staff suggests that pre-war buildings, which include more than two out of three stabilized units, have witnessed a substantial increase in relative net operating income since 1970. This resulted from a decline in the proportion of each rent dollar devoted to operating expenses (the "O&M to Rent Ratio"). This occurred despite the fact that aging buildings usually tend to see a rise in the O&M to Rent Ratio over time. Relative returns in post-war buildings are more difficult to track, but appear to be stable. Overall, the RGB staff has estimated that in 1967 about 62% of rent was devoted to operating expenses. By 1997, in essentially the same group of buildings, only 59% of rent went to operating costs. As a result, average net operating income rose from 38% to 41% of rent over the period of stabilization. A detailed analysis of this issue was set forth in a May 13, 1999 memo to the Board, and is included herein at Appendix K. The usefulness of this memo cannot be overstated. It provides the best evidence available to the Board of the effects of rent stabilization on operating returns since the rent stabilization system began. The original income and expense review from 1993 is also included herein in Appendix K1.

Protection Against Tenant Abuses

In attempting to equalize bargaining relations between owners and tenants the rent regulation laws conferred special benefits on tenants that were generally intended to protect their welfare. If such benefits are exchanged for the personal enrichment of the tenant, or if put to frivolous use, the objective of the laws would be undermined. Consequently, the rent stabilization laws prohibit or limit tenants from engaging in such practices as subletting or assigning apartment leases at a profit; assigning leases without the owner's consent; passing lease renewal rights on to occupants who have no legally recognized relationship with the tenant; or claiming the protection of rent regulation when the apartment is not used as a primary residence. In addition to these prohibitions, the rent laws continue to permit the remedy of eviction for practices that are generally recognized as abuses. These practices include non-payment of rent, maintaining a nuisance, use of the unit for illegal or immoral purposes or refusal to provide access for repairs.¹¹⁸

¹¹⁸ Procedures used in eviction proceedings are generally governed by Article 7 of the Real Property Actions and Proceedings Law.

Subletting

Subletting rent stabilized apartments is permissible under limited circumstances. Apartments may be sublet for two years in any four-year period if the owner has agreed to the sublet. The tenant must, however, be able to establish that the apartment will be maintained for his or her primary residence and that s/he intends to return to it upon the expiration of the sublease.¹¹⁹ An owner may not unreasonably refuse to grant permission to sublet, and a failure to respond within 30 days to a request from the tenant for permission to sublet is considered an approval of the request. This procedure is described in detail in the Real Property Law §226-b, which governs all sublets in buildings with four or more units. In rent stabilized apartments subtenants may not be charged any rent in addition to the stabilized rent except for the following:

- Ten percent may be added by the prime tenant for furnishings - the 10% **furniture allowance** is a constant statutory percentage and is not affected by actions of the Rent Guidelines Board. This fee is paid by the subtenant to the prime tenant; and
- The **sublet allowance** under the rent guideline in effect at the commencement of the prime lease may be added by the owner. This allowance percentage is determined annually by the Rent Guidelines Board. The sublet allowance is paid by the subtenant to the prime tenant, who in turn pays it to the owner.

Lease Assignment

A rent stabilized tenant may not freely assign his or her lease (i.e. transfer to another all rights under the lease). According to §226-b of the Real Property Law, written permission of the owner is required unless a right to assign is already contained in the lease. If the owner unreasonably withholds such permission, the tenant's only remedy is to gain release from the lease after 30 days notice to the owner. If permission to assign is granted, the owner is entitled to increase the rent by the vacancy allowance in effect at the time the departing tenant last renewed his or her lease.

Tenants are generally obligated to honor their lease obligations throughout the lease period. Tenants who vacate before their leases expire may be held liable for rent due through the remaining period.

The limitations on assignments should not be confused with the “succession rights” of occupants of the apartment who are family members as defined in §2520.6(o) of the Rent Stabilization Code. These occupants may have the right to

¹¹⁹ See RSC §2525.6.

renew the lease in their own name upon the death or departure of the tenant of record.¹²⁰

Succession Rights

Spouses or family members¹²¹ who have resided in the apartment for the qualifying periods provided in the Rent Stabilization Code may remain in the apartment as fully protected rent stabilized tenants. The inclusion of adult lifetime partners within the definition of spouse or family member is recognized by the Division of Housing and Community Renewal and has been upheld by the courts.¹²²

Primary Residence

Under §2524.4 of the Rent Stabilization Code an owner may refuse to renew the lease of any tenant who does not occupy his/her apartment as a primary resident. The evidence necessary to establish non-primary residence is left to the discretion of “a court of competent jurisdiction”. Often tax filings, voter registration records, utility bills, drivers licenses and other evidence of a regular presence in the unit are reviewed.

Finally, tenants who refuse to execute properly offered leases are subject to eviction.¹²³

Roommates

A rent stabilized tenant’s right to have a roommate is secured by Section 235-F of the Real Property Law, which governs additional occupants in all types of housing. Prior to the last revision of the Rent Stabilization Code, a tenant’s right to charge rent to an additional occupant was unlimited. Under § 2525.7 of the new code, rent stabilized tenants may charge roommates no more than a proportionate share of the rent. A proportionate share of the rent is determined by dividing the legal rent by the total number of tenants named on the lease and the total number of occupants in the apartment. However, a tenant’s spouse and family, or an occupant’s dependent child, are not included in the total.

¹²⁰ See RSC §2523.5(b).

¹²¹ “Family member” is defined as a husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant or permanent tenant. See also page 38 for a discussion of changes to the definition of family member under the Rent Regulation Reform Act of 1997.

¹²² This regulation was upheld by the N.Y. State Court of Appeals. See *Lease Succession Regulations Upheld*, N.Y.L.J., 12/22/93, page 1, col. 3, describing the court’s ruling in *RSA v. Higgins*, 164 AD 2d 283 (1st Dept. 1990), Affirmed, 83 N.Y. 2d 156 (1993), *cert denied*, 512 U.S. 1213 (1994).

¹²³ See RSC §2524.3(f).