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EMERGENCY TENANT PROTECTION IN NEW YORK: TEN YEARS OF RENT STABILIZATION

I. Introduction

The New York City rent stabilization system was established in 1969¹ as an alternative to placing all housing constructed after 1947 under standard rent control.² The stabilization system is unique because it places the responsibility of regulation in the hands of the real estate industry³ rather than in governmental hands as have conventional systems of rent control.⁴

Under rent stabilization, registered owners of eligible buildings are entitled to periodic rent increases upon the signing of new leases.⁵ The increase allowed varies from year to year, according to the owners' increased operating and maintenance costs. Uniform increases for the entire housing stock are determined by an impartial rent guidelines board.⁶ As additional incentive to owners, the stabilization system authorized the real estate industry to draft a code, based on express provisions in the law detailing the terms and conditions of the tenants' occupancies.⁷

The code is the key to the owners' self-regulatory powers. It is also the key to tenant protection. The law and code stipulate that the annually set percentage increase is a maximum.⁸ Furthermore, owners may not decrease services which they are required to provide their tenants.⁹ The law is designed to be self-implementing so that when conflicts arise, the parties can resolve their disputes without administrative intervention.¹⁰ Where intervention is necessary, how-

1. N.Y. CITY RENT STABILIZATION LAW, 1969 N.Y. Local Laws No. 16, NEW YORK, N.Y. ADM. CODE §§YY51-1.0 to 7.0 in N.Y. UNCONSOL. LAWS (McKinney 1975 & Supp. 1978) [hereinafter cited as RSL].

2. See N.Y. UNCONSOL. LAWS §§ 8601-17 (McKinney 1974). See also N.Y. CITY RENT AND REHABILITATION LAW, 1962 N.Y. Local Laws No. 20, NEW YORK, N.Y. ADM. CODE §§ Y51-1.0 to -18.0 in N.Y. UNCONSOL. LAWS (McKinney 1975).

3. RSL §YY51-6.0

4. See, e.g., N.Y. UNCONSOL. LAWS §§ 8602, 8604 (New York's Rent Control Law which vested power of regulation in a "city housing rent agency").

5. RSL § YYY51-6.0(c)(2).

6. RSL § YY51-5.0.

7. RSL § YY51-6.0(b)(2).

8. RSL § YY51-6.0(c)(1), 6.0(c)(2).

9. RSL § YY51-6.0(c)(8).

10. See note 91 *infra*.

ever, the parties may appeal to a special quasi-judicial board¹¹ created to interpret the code, resolve disputes, and oversee the law's enforcement.

Observers claim it ironic that landlords have been given power to supervise a system set up to protect tenants, the landlord's traditional adversary.¹² The New York Court of Appeals, however, indicated that industry supervision could benefit the system of adding valuable knowledge and experience to its administration.¹³

Legislative and administrative shortcomings in the stabilization system have become increasingly significant and troublesome with the law's extension in time and expanded jurisdiction. Since 1974, more than half-a-million older housing units have been added to the stabilization stock. Simple rules have grown technical and complex and many fail to consider the individual needs of the diverse structures under its jurisdiction. In addition, owners have become restless with the continued renewal of a law initially deemed temporary.

This Comment surveys the stabilization system's history and current status as a viable method of municipal rent regulation. Part II traces the origins and development of the rent stabilization law in New York City. Part III examines the key problems which have arisen as a result of the system's expansion under the Emergency Tenant Protection Act of 1974. And Part IV examines the effect of long-term extension on a "temporary" solution.

II. Legislative History

A. Background

In 1962, pursuant to enabling legislation enacted by the State,¹⁴

11. RSL § YY51-6.0(b)(2).

12. See, e.g., Comment, *The New York Rent Stabilization Law of 1969*, 70 COLUM. L. REV. 156 (1970) [hereinafter cited as *Law of 1969*]. The author noted "the inherent weakness of a scheme in which the interests of those charged with administering a law are opposed to those of the groups which the law is designed to protect." *Id.* at 170.

Tenant groups agree, indicating that self-policing by landlords is akin to "having the wolf guard the sheep." Letter from Jane Benedict, Chairwoman, Metropolitan Council on Housing, New York City, Nov. 28, 1978.

Some leaders of the real estate industry take issue with the above posture, suggesting that the modern landlord views his tenants not as adversaries, but as "customers." Interview with Sheldon Katz, Chairman, Real Estate Industry Association (RSA), in Brooklyn, August 4, 1978.

13. 8200 Realty Corp. v. Lindsay, 27 N.Y.2d 124, 261 N.E.2d 647, 313 N.Y.S.2d 733, appeal dismissed, 400 U.S. 962 (1970).

14. 1962 N.Y. Laws 51, ch. 21.

the City of New York passed an act which placed more than one million of its residential housing accommodations under city rent control.¹⁵ This act expressly excluded from its purview certain classes of housing accommodations including buildings completed on or after February 1, 1947.¹⁶

Post-1947 housing was left uncontrolled in the hope that supply and demand would eventually work to make controls unnecessary.¹⁷ The legislature believed that the imposition of rent control on new housing would only prolong the post war housing shortage problem by discouraging new construction.¹⁸

A rush to build apartments in the late 1950s and early 1960s left New York with surplus housing by the mid-1960s.¹⁹ However, by 1968 deterioration outstripped construction and the city faced another critical housing shortage.²⁰ Landlords found they had leverage to charge and receive from their tenants rent increases of 40% or more.²¹ By 1969 the vacancy rate had plummeted to an all-time low.²² Tenant groups began to complain that exorbitant rents were driving the middle class from the city.²³ Owners responded that they were entitled to a return on their investments and that supply and demand determined rents.²⁴

15. N.Y. CITY RENT AND REHABILITATION LAW, 1962 N.Y. Local Laws No. 20, NEW YORK, N.Y. ADM. CODE §§ Y51-1.0 to -18.0 in N.Y. UNCONSOL. LAWS (McKinney 1974). Rent control in New York was an emergency measure caused by critical post war housing shortages. In 1942, the United States Government instituted the first emergency rent controls under the Emergency Price Control Act of 1942, ch. 26, § 2, Pub. L. No. 56-421, 56 Stat. 24, repealed by Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 651. In New York, commercial rent control was enacted in 1945, 1945 N.Y. Laws 779, ch. 315 (codified in N.Y. UNCONSOL. LAWS §§ 8521-38 (McKinney 1961)); business rent control also in 1945, 1945 N.Y. Laws 771 ch. 314, codified in N.Y. UNCONSOL. LAWS §§ 8551-67 (McKinney 1961); and residential rent control in 1946, N.Y. UNCONSOL. LAWS §§ 8581-97 (McKinney 1961).

16. See N.Y. UNCONSOL. LAWS § 8582(2)(g). See also N.Y. CITY ADM. CODE § Y51-3.0(2)(h).

17. See 8200 Realty Corp. v. Lindsay, 27 N.Y.2d 124, 136, 261 N.E.2d 647, 653, 313 N.Y.S.2d 733, 742, appeal dismissed, 400 U.S. 962 (1970).

18. *Id.* at 137, 261 N.E.2d at 654, 313 N.Y.S.2d at 743.

19. N.Y. Times, Apr. 2, 1978, §8, at 8, col. 5.

20. *Id.*

21. See Affidavit of Jason R. Nathan, Administrator of the Housing and Development Association (HDA), 8200 Realty Corp. v. Lindsay, 27 N.Y.2d 124, 132, 137-38, 261 N.E.2d 647, 651, 654, 313 N.Y.S.2d 733, 739, 742-43.

22. *Id.*

23. N.Y. Times, Apr. 2, 1978, §8, at 8, col. 5.

24. *Id.*

B. The Rent Stabilization Act

On May 6, 1969, in light of what had become a housing emergency in New York City, the Lindsay administration signed the Rent Stabilization Act of 1969 (RSL) into law.²⁵ Those buildings which rent control had earlier left uncontrolled became subject to the regulations of the RSL. The RSL cited in its legislative findings "exactions of unjust, unreasonable, and oppressive rents and rental agreements . . . profiteering, speculation and other disruptive practices"²⁶ as the conditions which made the legislation necessary.

Under the RSL's original five-year plan only those buildings constructed between February 1, 1947 and March 10, 1969 containing six or more individual apartment units²⁸ were subject to the law's jurisdiction.²⁹ However, to become stabilized, owners of eligible buildings first had to register with the real estate industry association, the Rent Stabilization Association, (RSA)³⁰ created by the law.

Voluntary registration and compliance are key features of the RSL.³¹ However, an interim rent board set up in early 1969 before the RSL's enactment, suggested that a purely voluntary association would not work without some compulsory feature. The board recommended,³² and the law later provided,³³ that the buildings of landlords who refused or failed to register with the RSA be placed under standard rent control. This alternative was so severe that within six months after the RSL's enactment, 98 per cent of all eligible owners

25. 1969 N.Y. Local Laws No. 16, NEW YORK, N.Y. ADM. CODE §§ YY51-1.0 to -7.0 in N.Y. UNCONSOL. LAWS (McKinney 1975 & Supp. 1978).

26. RSL § YY51-1.0.

27. RSL § YY51-3.0(1).

28. However, apartments in the following buildings may be rent stabilized even if the building contains fewer than six dwelling units: buildings receiving tax abatement benefits pursuant to Section 421 of the Real Property Tax Law or Section J51-2.5 of the Administrative Code; buildings under the participation loan program of Article 15 of the Private Housing Finance Law. N.Y. City Conciliation and Appeals Board, *Tenant's and Owner's Rights and Duties Under The Rent Stabilization Law 7* (1978).

29. RSL § YY51-3.0. The RSL also covered apartments decontrolled under the rent control law and buildings constructed after March 10, 1969 which received special tax abatements. See note 28 *supra*. The law did not cover apartments in buildings owned by city, state, or federal agencies nor apartments in buildings financed by loans from public agencies or public-benefit corporations. Co-operatives and condominiums are also not covered. *Id.*

30. RSL § YY51-6.0.

31. RSL § YY51-6.0(b)(4).

32. See PRACTISING LAW INSTITUTE, 2 PRACTICE UNDER THE NEW RENT STABILIZATION LAW 4 (1970).

33. RSL § YY51-4.0(a).

had reportedly joined the association.³⁴ Registered owners who failed to comply with the law, by exceeding allowable rent levels or by harassing tenants in order to obtain vacancies, were subject to a number of possible sanctions including fines, reductions in rent, or expulsion from the RSA.³⁵

In addition to the coercive threat of rent control, rent stabilization created a novel incentive to encourage owner compliance. The rent stabilization law gave to a private association of stabilized landlords the authority to draft a code for the regulation of rent increases and other landlord-tenant related matters specified in the law.³⁶ The code was subject to scrutiny and supervision by the Housing and Development Association (HDA) and was based on express provisions found in the 1969 statute.³⁷ Still, the approach was unprecedented in the history of rent regulation and gave the landlords a significant measure of authority. The hope was that self regulation would not impede and might even encourage new construction, unlike rent control which, while keeping down rents also destroyed incentive for properly maintaining building investments.

Rent stabilization entitles owners to periodic rent increases upon the signing of new leases.³⁸ The increase permitted varies from year to year according to the determination of the owners' increased costs by a rent guidelines board.³⁹ The percentage is added to a "base date" rent, the rent charged and paid on the date when the tenant's unit first became stabilized,⁴⁰ and sets a ceiling on ordinary increases which an owner may demand from his stabilized tenants.⁴¹

34. N.Y. Times, Nov. 4, 1969, at 30, col. 2. However, the report issued by Mayor Lindsay indicating 98 percent enrollment in the stabilization program should be considered in light of the fact that it was issued on election night. *Law of 1969, supra* note 12, at 176 n.132.

35. RSL §§ YY51-6.0(c)(10)-(11).

36. CODE OF THE REAL ESTATE INDUSTRY STABILIZATION ASSOCIATION OF N.Y. CITY, INC., in N.Y. UNCONSOL. LAWS (McKinney 1974) [hereinafter cited as RS CODE] (adopted pursuant to RSL § YY51-6.0).

37. RSL § YY51-6.0.

38. RSL § YY51-5.0(d).

39. RSL §§ YY51-5.0, -6.0(c)(2).

40. R.S. CODE § 2(i).

41. Under the RSL, owners must renew their tenant's leases in accordance with strict time requirements, and may only refuse renewals upon grounds set out in the code. RS CODE §§ 60, 54. A five percent additional increase above the prior rent is permitted on vacancy leases. RSL § YY51-5.0(d). Furthermore, owners may apply to the Conciliation and Appeals Board (CAB) for increases above the standard guidelines percentage. The code specifically provides additional increases for comparative hardship, installation of new equipment, and major capital improvements. RS CODE §§ 43, 20 (c), 41.

The system of maximum percentage increases was intended to safeguard the tenant's right to a reasonable rental while assuring the landlord an adequate income by which to meet inflation and rising maintenance costs.

To achieve these objectives, the 1969 statute provided for the establishment of three administrative boards. These three boards are the RSA⁴² (the owner's group), the Rent Guidelines Board⁴³ (which establishes the periodic percentage increases), and the Conciliation and Appeals Board⁴⁴ (which enforces the law by resolving any landlord-tenant conflicts arising under it). The overall supervision of the regulatory process is vested in the HDA.⁴⁵ The HDA is expressly authorized to enact rules and regulations for the implementation of the statute,⁴⁶ to approve the code of the owner's group,⁴⁷ and to discipline the owners.⁴⁸

1. Rent Stabilization Association (RSA)

The RSA is the private association of landlords empowered under the 1969 law to draft a code⁴⁹ detailing the terms and conditions of the tenants' occupancies. The RSA was further empowered to oversee the registration of all stabilized owners⁵⁰ and to collect dues to finance the law's administration.⁵¹

The RSA's rent stabilization code⁵² is the key to the owners' self-regulatory powers. Based on express provisions in the law and sub-

42. RSL § YY51-6.0.

43. RSL § YY51-5.0.

44. RSL § YY51-6.0(b)(3).

45. RSL § YY51-4.0(c). HDA's name was changed in early 1978 to the Department of Housing Preservation and Development. However, for the purposes of this Comment, it will be referred to throughout as HDA.

46. *Id.*

47. RSL § YY51-6.0(b)(2).

48. RSL § YY51-6.0(c)(11).

49. RSL § YY51-6.0(b)(2).

50. NEW YORK CITY CONCILIATION AND APPEALS BOARD OF THE RENT STABILIZATION LAW, 1977 YEAR END REPORT, at 5 [hereinafter cited as CAB REPORT].

51. RSL § YY51-6.0(c)(12); RS Code § 9. Under the RSL, taxpayers are not required to contribute towards the cost of financing the stabilization program. To raise the nearly three million dollars needed to administer and enforce the law in 1978, all stabilized owners were assessed \$4.25 for each of their rent stabilized apartments. N.Y. Times, Apr. 2, 1978, § 8, at 1, col. 2.

52. RS CODE, *supra* note 36. RSL § YY51-6.0(c)(1) provides that the code "is designed to provide safeguards against unreasonably high rent increases and, in general, to protect tenants and the public interest, and not to impose any industry wide schedule of rents or minimum rentals."

ject to HDA's approval,⁵³ the code was nevertheless designed hastily⁵⁴ and contained many ambiguities⁵⁵ and loopholes.⁵⁶

2. Rent Guidelines Board (RGB)

The second organization created by the stabilization law is the Rent Guidelines Board (RGB),⁵⁷ an independent city agency which annually establishes the maximum levels of fair rent increases an owner may charge a tenant entering into a vacancy or renewal lease. The RGB is composed of two tenant representatives, two owner representatives, and five public members, each of whom is required to have some expertise in either finance, economics or housing.⁵⁸ To maintain impartiality, the nine-member board may not contain anyone who owns residential property covered by the law, nor may it include any person who is an officer of a tenant organization within the city.⁵⁹ All of the members are appointed by the Mayor and one of the public members is designated to serve as chairman.⁶⁰

To develop guidelines reflecting the costs of the vast majority of apartments regulated by the law, the RGB studies price and cost information for pre-and post-war housing, then takes a weighted average of the two in order to arrive at a uniform percentage increase for the entire housing stock.⁶¹ The guideline allowances may not be

53. RSL §§ YY51-6.0(b)(2), -6.0(c).

54. See *Law of 1969*, *supra* note 12, at 169 n.95. The landlords were given 60 days in which to draw up a code. RSL § YY51-6.0(a). The first code was submitted to HDA in late June, 1969, and was rejected on July 8. A revised code was then submitted on July 11, the day before the 60-day deadline. HDA officials worked on the code, further revising it, until 2 a.m. July 12, the date the code was approved. *N.Y. Times*, July 13, 1969, at 1, cols. 5-6.

55. For example, the New York Supreme Court has stated that "section 2(m) of the Rent Stabilization Code [the section dealing with base date requirements] is less than a model of clarity." *Two Lincoln Square Assoc. v. N.Y. City Conciliation and Appeals Board*, N.Y.L.J., Nov. 20, 1978, at 13, col. 2. See text accompanying notes 152-199 *infra* for a more detailed analysis of the ambiguities inherent in section 2(m) of the code.

56. For example, section YY51-6.0(c)(10) specifically provided that owners found exceeding the rent levels permitted under the law would no longer be considered members in good standing of the RSA; *i.e.*, they would become subject to rent control. However, section 7(a) of the stabilization code provides that owners lose their good standing only upon a showing that their non-compliance with the legal rent level was "willful." Thus, despite the code's purpose to "insure that the level of fair rent increases established under this law will not be subverted and made ineffective," RSL § YY51-6.0, the code contains provisions in which it departs, sometimes significantly, from the letter of the law.

57. RSL § YY51-5.0(b)(3).

58. RSL § YY51-5.0(a).

59. *Id.*

60. *Id.*

61. *Id.* § YY51-5.0(b). See also Explanatory Statement to Rent Guidelines Board (RGB)

exceeded and are, therefore, updated once a year to permit the owner to obtain, through lease renewals, sufficient rental income to cover projected increases in operating expenses over a one-, two-, or three-year lease term.⁶²

3. Conciliation and Appeals Board (CAB)

Supervision and enforcement of the law is the responsibility of the Conciliation and Appeals Board (CAB),⁶³ an independent and quasi-judicial board which arbitrates and resolves any disputes that may arise between the owners and tenants of rent stabilized buildings. Under the RSL, the CAB is to receive and act upon written complaints from stabilized tenants, as well as complaints and appeal applications from owners claiming hardship in maintaining their buildings at the permitted rent levels. It is the CAB's job to interpret the rent stabilization code, and to apply its provisions. To verify a tenant's complaint the CAB staff makes inspections, or requests that the Office of Code Enforcement do so. Where the CAB has no jurisdiction over the subject of a complaint, it will forward the tenant's application to the appropriate city agency.

The nine members of the CAB are appointed by the Mayor, subject to the approval of the City Council.⁶⁴ Four represent tenants' interests, four represent owners' interests, and one is an impartial chairman.⁶⁵ All of the Board's expenses, including the \$15,000 salary for each of its members and the \$35,000 salary of the chairman, are paid by the RSA.⁶⁶ However, despite city appointment and RSA funding, the CAB considers itself an independent public body.⁶⁷

C. Vacancy Decontrol Laws

In 1971, the New York State Legislature enacted Vacancy Decontrol laws⁶⁸ which did away with stabilization and rent control for all apartments becoming vacant on or after July 1, 1971. Vacancy de-

Order No. 10, in *The City Record*, Sept. 7, 1978, at 2433-34.

62. RSL § YY51-6.0(c)(4).

63. RSL § YY51-6.0(b)(3).

64. *Id.*

65. *Id.*

66. RS CODE § 31.

67. CAB REPORT, *supra* note 50, at 5.

68. N.Y. UNCONSOL. LAWS §§ 8581-82 (McKinney Supp. 1971). Under this act, section 8582(2)(i) specifically decontrolled the apartments as they became vacant.

control was enacted (1) to attack the ills caused by rent controls, (2) to restore reasonable market incentives for maintenance and upgrading of housing, (3) to discourage abandonment of housing, and (4) to establish an atmosphere conducive to massive construction of new housing by the private sector.⁶⁹

The vacancy decontrol laws resulted in the destabilization of approximately 110,000 rent-stabilized apartments and hotel units over the next three years.⁷⁰ About 400,000 rent controlled units were similarly decontrolled during that period.⁷¹

Under vacancy decontrol, owners of decontrolled and destabilized apartments were free to charge their tenants whatever rent the unregulated market would bear. With the vacancy rate in New York City at its lowest due to increased abandonment of buildings and a minimal amount of new construction,⁷² owners under vacancy decontrol enjoyed a seller's market. When the price of oil increased in 1974, landlords were able to pass along their increased operating costs to their unprotected tenants, many of whom were unable to afford the added burden.⁷³

D. Emergency Tenant Protection Act

In March of 1974, the City Council under the Beame administration voted unanimously to extend the rent stabilization program for five years.⁷⁴ Despite the extension, rent gouging continued unabated in apartments destabilized and decontrolled under the Vacancy Decontrol laws.⁷⁵ In June of 1974, faced with spiraling rents and a severe housing shortage, the New York State Legislature passed the Emergency Tenant Protection Act (ETPA)⁷⁶ which took

69. Governor's Memorandum, 1971 N.Y. Laws 2608-10.

70. CAB REPORT, *supra* note 50, at 2. Hotel units, however, are covered under a separate Hotel Code sanctioned by the RSL. See RSL §§ YY51-3.0(1)(e), -6.1.

71. CAB REPORT, *supra* note 50, at 2.

72. N.Y. Times, Apr. 2, 1978, § 8, at 8, col. 5.

73. See N.Y. Times, June 29, 1974, at 29, cols. 2-3.

74. N.Y. Times, Mar. 22, 1974, at 1, col. 3.

75. N.Y. Times, July 14, 1974, § 4, at 6, col. 3.

76. N.Y. UNCONSOL. LAWS §§ 8621-34 (McKinney Supp. 1978), *originally enacted as* 1974 N.Y. Laws 767, ch. 576. The Emergency Tenant Protection Act (ETPA) expanded the jurisdiction of the RSL to all dwelling units which (a) had previously been subject to the RSL or the City Rent Law but had become vacancy destabilized or vacancy decontrolled between 1971 and 1973, (b) were built between March 10, 1969 and December 31, 1973, (c) were or are decontrolled because of owner occupancy, (d) are still subject to the City Rent Law but become vacant in the future, or (e) were entitled to tax exemption benefits under section 423

effect in New York City upon its adoption by the City Council later that month.⁷⁷ This statute totally repealed vacancy decontrol for the city's destabilized housing stock. On July 1, 1974 it restored 110,000 previously destabilized apartments and hotel units to the rent stabilization system.⁷⁸

The legislation further modified vacancy decontrol as it applied to rent-controlled housing by placing approximately 400,000 vacancy decontrolled, pre-World War II apartments under rent stabilization.⁷⁹ In addition, the law provided that every vacancy which occurs in a rent controlled apartment on or after July 1, 1974 will trigger that apartment's immediate transfer into the stabilization system.⁸⁰ The ETPA of 1974 also extended rent stabilization to some 7,500 luxury apartments built between 1969 and 1973 which had never been subject to any previous rent regulations.⁸¹

The ETPA was initially set to expire on June 30, 1976 but was extended for an additional twelve months by the City Council. In light of prevailing emergency conditions, the City Council in 1977 extended the ETPA for another four years.⁸²

III. Expansion Under ETPA

Since the system's expansion by the ETPA in 1974, rent stabilization has become the virtual successor to rent control in New York City.⁸³ The system of stabilization which originally had jurisdiction over fewer than 400,000 newly constructed buildings, presently encompasses nearly one million dwelling units of all ages.⁸⁴ Because

of the Real Property Tax Law. The ETPA left unprotected any apartments in buildings with fewer than six units and eliminated from the stabilization stock any unstabilized apartments in buildings owned or operated by charitable or philanthropic organizations. *Id.*

77. N.Y. Times, June 21, 1974, at 41, col. 3.

78. CAB REPORT, *supra* note 50, at 3.

79. *Id.*

80. *Id.* See also note 76 *supra*. Once an apartment was stabilized or restabilized under the ETPA, future vacancies were not to result in its deregulation.

81. CAB REPORT, *supra* note 50, at 3.

82. N.Y. Times, Apr. 26, 1977, at 30, col. 4.

83. According to a 1978 New York City Housing and Vacancy Survey, there are fewer than 403,000 rent controlled apartments left in New York City today, as opposed to more than one million when rent control was first initiated. CITY OF NEW YORK, [1978] 1A N.Y. CITY HOUSING & VACANCY SURVEY 1 (table 10001).

84. CAB REPORT, *supra* note 50, at 2. See generally L.N. BLOOMBERG, THE RENTAL HOUSING SITUATION IN NEW YORK CITY (1975).

few significant changes have been made in the law since the inclusion of older buildings, the rents and tenancies of all stabilized buildings today are regulated on a largely uniform basis.⁸⁵ In addition, the system's expansion has made enrollment and enforcement harder to police.

A. Uniform Rent Increases

To effect a system which could be self-implemented, the RSL provided simple rules to be applied uniformly among the entire housing stock. These rules, however, often fail to recognize owners' individual needs. For example, all owners are restricted to the same percentage increase on rents.

While the control of all rent increases by a common percentage increase has the appearance of equanimity, it may not be suitable in all situations.⁸⁶ Owners of older buildings usually incur greater expenses for repairs and operating costs than do owners of newer buildings.⁸⁷ In addition, older buildings have higher fuel and utility bills,⁸⁸ primarily due to antiquated heating and plumbing systems. Furthermore, there exists a higher proportion of dilapidated units and units with maintenance and equipment deficiencies in the stabilized pre-1947 buildings. Although the RGB now considers statistics on the cost and upkeep of the system's 560,000 older buildings,⁸⁹ and uses a weighted average approach in formulating its uniform

85. "The law is applied uniformly; the distinctions arise from the nature of base date practices arising in new and old buildings." Letter from Nathaniel Geller, Deputy Director/Deputy Counsel of CAB, New York City, December 29, 1978.

86. For an excellent critique of uniform percentage increases for rent controlled buildings, see OWEN, *Rent Controls: Solution or Problem*, 41 SASK. L. REV. 3 (1976).

87. "A lower proportion of total expenditures of older buildings is incurred for real estate taxes and labor costs while a higher proportion is expended on repairs (contract maintenance) relative to newer buildings in the stabilized stock." Explanatory Statement to RGB Order No. 9, in *The City Record*, Aug. 4, 1977, at 2387 col. 2.

88. Studies conducted by the Office of Rent Control in 1977 indicated that fuel and utilities make up "a much higher proportion of overall operating and maintenance expenses in the older stock than it does in newer buildings." *Id.*

89. See RGB Explanatory Statement to Guideline No. 9 (table II) (chart indicating higher rentals received by owners of newer buildings), in *The City Record*, Aug. 4, 1977, at 2387, col. 1. The RGB noted that "the portion of the stabilized stock covered by the original rent stabilization law, units built after 1947 in larger buildings, has higher per room rents, and has tenants with higher incomes and lower rent/income ratios than in formerly rent controlled units." *Id.* See also *Real Estate Weekly*, July 24, 1978, at 13, col. 3 (column by R. Klein, President, N.Y. Realty Owners Association, noting that "every guidelines established during the past nine years has been totally inadequate in order to maintain rental housing.").

guidelines percentages,⁹⁰ it does not review operating costs on a case-by-case basis.⁹¹ The burden to administrators is eased at the expense of older building owners.

The stabilization system provides hardship and other increases above the guidelines percentage for which an owner may apply to the CAB when the standard increase is inadequate. However, owners in greatest need of these additional increases are often unaware of them, or unable to fulfill their technical requirements which may presuppose the hiring of an accountant, or the obtaining of tenants' written consent. While more complicated and demanding procedures such as those for comparative hardship increases may merely mean an added nuisance or expense for large scale realty companies with lawyers and accountants, for the small scale, unsophisticated owner it can be a nightmare entailing expenses beyond his means.⁹²

B. Delivery of Services

The CAB has indicated that "some of the system's elements are not wholly geared to the problems presented by housing on the lowest rungs of the ladder by age and physical condition."⁹³ In some instances, owners of very old pre-war buildings are unable, sometimes unwilling, to fulfill the self-regulatory standards and voluntary compliance aspects of the system.⁹⁴

These owners often do not strictly adhere to requirements to fill and maintain base date services.⁹⁵ Because of their late entrance into the system of unfamiliarity with its requirements, they have not maintained the kinds of records RSL requires for all of the years dating back to the base date.⁹⁶

The problem is further complicated by the presence of "hybrid"

90. See Explanatory Statements to RGB Orders No. 9, *supra* note 87.

91. However, such a case-by-case review would be contra to the intent of the law which is to provide expeditious resolution of disputes arising under it. "Many of the system's rules and regulations were designed for implementation by owners and tenants directly so as to encourage negotiation between the parties directly thus eliminating the need for administrative processing except where disputes arise." Mayor's Task Force on Federal Pre-Emption of Local Rent Laws in New York City, Sept. 1, 1977, at 3, in CAB REPORT, Appendix N.

92. N.Y. Times, June 21, 1975, at 31, col. 6.

93. CAB REPORT, *supra* note 50, at 3.

94. *Id.*

95. Letter from N. Geller, *supra* note 85. See also text accompanying notes 172-200 *infra*.

96. *Id.*

buildings, those with some units still subject to standard rent control while other apartments in the same complex are subject to rent stabilization. This dual system occurs most often in the once entirely rent-controlled buildings and is responsible for the resultant confusion of small-time owners who must then contend with not only one beauracracry, but with two.⁹⁷

C. Enforcement

The number of cases received and processed by the CAB increased tenfold⁹⁸ after the ETPA's enactment. The Board's backlog of cases also grew substantially.⁹⁹ However, since 1976 the CAB kept pace with its increased volume and substantially reduced its backlog as well.¹⁰⁰ If the results of judicial review of CAB opinions presents any indication of CAB's ability to fairly resolve disputes, the CAB's record is respectable. Of the more than 7,000 opinions issued by the Board as of the end of 1977, less than 350 were appealed.¹⁰¹

However, the administrative resolution of these cases does not always result in owner compliance. According to the CAB, more than 20 per cent of the orders issued are ignored by the owners or are performed unsatisfactorily.¹⁰² Failure to comply can be unintentional; more than half of all rent overcharges are the result of owners incorrectly computing the allowable guidelines increases for his apartments.¹⁰³

Non-compliance can also be intentional; efforts to evade the sanc-

97. "The dual system exists, often within the same building, because of the tangle of state and local laws enacted over the years." N.Y. Times, Dec. 17, 1978, at 59, col. 1. Some buildings became hybrid because of an owner's failure to register each of his apartments individually with the rent stabilization system as required, at the same time the owner himself registered for membership with the RSA. See text accompanying note 115 *infra*. This did not forfeit the owner's status in the stabilization system, but did subject to rent control those individual apartments which he failed to register. See text accompanying note 116 *infra*. Furthermore, buildings which initially were exclusively rent controlled have since become hybrid due to the ETPA switching controlled apartments into the stabilization stock upon a change in tenancy. See note 80 *supra* and accompanying text.

98. CAB REPORT, *supra* note 50, at 10.

99. *Id.*

100. *Id.*

101. *Id.* at 11. Of those, two hundred and sixty Article 78 proceedings were initiated by owners, 73 by tenants. One hundred seven were later withdrawn, 96 upheld, 20 reversed, 39 remanded by consent, and 5 remanded by the court. Fourteen of 26 recent appeals were still pending in the higher courts as of the end of 1977. *Id.*

102. N.Y. Times, Apr. 2, 1978, §8, at 8, col. 4.

103. *Id.* at col. 1.

tions of stabilization are not unheard of. However, willfulness is difficult to prove under the stabilization law. In addition, the threat of expulsion from the stabilization system and placement under rent control has, with rent control's demise, become a rarely exerted penalty.¹⁰⁴ Thus, except in the case of chronic offenders the CAB usually opts for less stringent penalties, fines and rent rollbacks, to impose upon non-complying owners. Intention becomes irrelevant in CAB determinations and the deterrent impact of expulsion is weakened. Apparently, the CAB believes that using the expulsion order sparingly better serves the purposes of tenant protection since expelled units, until officially transferred to the jurisdiction of the rent control system, receive little protection from any of the city's rent laws.

D. Enrollment

Enrollment of owners into the stabilization system is another area in which the threat of rent control has proven ineffective. The addition of half-a-million housing units to the system has heightened the problem by diminishing further the coercive effect of rent control.

To reap the benefit of periodic rent increases under stabilization, an owner must first register with the RSA.¹⁰⁵ The law is clear on this and indicates that owners who fail to register become subject to the harsher restraints of the city's rent control program.¹⁰⁶ However, by not registering, many owners simply escape the jurisdiction of *any* of the city rent laws.

Allegedly, enrollment of owners in 1969 was virtually 100%¹⁰⁷ with

104. The New York Times in 1978 indicated that no dwelling unit in the history of the RSL had ever been withdrawn from the stabilization stock and placed under rent control for non-compliance. *Id.* at cols. 3-5. However, the Deputy Director of the CAB indicated that approximately twenty-five orders expelling 250 units from the stabilization system have been issued by the Board for owners' failure to comply with CAB directives. Letter from N. Geller, *supra* note 85.

105. RSL § YY51-4.0(a).

106. *Id.* The legislation specifically provides that

[d]welling units covered by this law . . . shall be deemed to be housing accommodations subject to control under the provisions of title Y of chapter fifty-one of the administrative code [rent control] . . . unless the owner of such units is a member in good standing of any association registered with the housing and development association pursuant to section YY51-6.0 or section YY51-6.1.

Id. But see note 104 *supra* and accompanying text.

107. See note 34 *supra* and accompanying text.

HDA actively supervising the system's total enrollment.¹⁰⁸ However, by 1975 the results of a city census¹⁰⁹ indicated that the owners of over 100,000 apartments in New York City had probably avoided the City rent laws by failing to register their apartments.¹¹⁰

Under the ETPA, effectively enrolling owners in the stabilization system became a challenge. The ETPA extended enrollment to rent controlled units as they became vacancy decontrolled.¹¹¹ Vacancy decontrolled apartments which became stabilized had to be registered with the RSA if in a building with six or more dwelling units.¹¹² However, because these units became eligible for enrollment at different times and no requirement existed then or now for reporting a vacancy decontrolled unit with HDA, it has become increasingly difficult for HDA to police the enrollment of these units.¹¹³ Those units not enrolled cannot be assessed for any dues that would otherwise be required of them under the rent stabilization law and code,¹¹⁴ nor can the RSL be enforced against them.

In addition to requiring an owner to register himself and his buildings with the RSA, the code further requires stabilized owners to register each of their individual stabilized units with the RSA.¹¹⁵ Failure to register each apartment individually does not forfeit the owner's status in the stabilization system, but theoretically subjects to rent control those individual apartments which the owner failed to register.¹¹⁶ Although the CAB acknowledges that an owner today must still enroll each individual unit with the RSA for the apartment to become stabilized, the CAB abrogates that rule by entertaining jurisdiction of complaints filed by tenants of units *not* registered with the RSA.¹¹⁷ The CAB's action grants the protection of stabilization to more tenants, but defeats express registration requirements and puts the owner on notice that failure to register will

108. CAB REPORT, *supra* note 50, at 11.

109. CITY OF NEW YORK, [1975] 2A NEW YORK CITY HOUSING & VACANCY SURVEY 1-75 (control-status categories by borough). The most recent survey, compiled in MARCUSE, RENTAL HOUSING IN THE CITY OF NEW YORK (1979), confirms the results of the 1975 survey.

110. N.Y. Times, Jan. 19, 1976, at 1, cols. 5-6.

111. See text accompanying note 80 *supra*.

112. RSL § YY51-4.0(a).

113. CAB REPORT, *supra* note 50, at 11-12.

114. In 1977, the CAB was forced to operate on an austerity budget because the RSA failed to collect dues from all of its enrolled members. CAB REPORT, *supra* note 50, at 13.

115. RSL § YY51-4.0(a).

116. *Id.* See note 106 *supra*.

117. Letter from N. Geller, *supra* note 85.

not necessarily condemn his apartments to the jurisdiction of rent control. More effective and mandatory registration requirements are needed if the law, which depends for its success on the extent to which its rules are voluntarily complied with, is to be implemented to its fullest capacity.

Another policy followed by RSL administrators rendering impotent the threat of expulsion is late enrollment.¹¹⁸ Under the RSL an owner is required to register with the RSA thirty days after his building becomes stabilized or thirty days within becoming owner of a stabilized building.¹¹⁹ Owners of buildings which became subject to stabilization by virtue of the ETPA are given sixty days to register with the RSA.¹²⁰

Owners who fail to register with the RSA within the deadline period should be rent controlled. However, section twelve of the code provides that owners who miss the registration deadline may apply for late enrollment, subject to HDA's approval.¹²¹ Furthermore, the membership of late enrollers is often made retroactive to the beginning of their ownership or the apartment's stabilization.¹²² No provisions authorizing late enrollment or retroactive membership are found in the RSL or the ETPA, yet the HDA grants the opportunity to owners, frustrating the rent control office's attempts to legally assume jurisdiction over unregistered apartments. Again, the threat of rent control is enfeebled by provisions in the code and actions of the RSL's administrators.

E. Dissension Among Landlords

The failure of stabilization to account in any significant way for the fundamentally different needs of the owners of the system's older housing created a tense division of interests between newer building owners and older building owners in RSA.¹²³ Internal dissension intensified upon the older building owners obtaining a majority of RSA's membership in 1977, and culminated in a full-scale proxy battle waged by "dissident" directors of the industry against incumbent management in 1978.¹²⁴ The dissidents, speaking for sev-

118. RS CODE § 12.

119. RSL § YY51-4.0(a).

120. *Id.*

121. RS CODE § 12.

122. *See, e.g.*, CAB Opinion No. (late enrollment retroactive to lease commencement).

123. N.Y. Times, May 11, 1978, § 2, at 12, col. 3.

124. Industry leaders deplore such fractionalization because they believe that all owners

eral major landlord groups in New York City, charged that the RSA Board of Directors, composed almost exclusively at that time of newer, luxury apartment building owners,¹²⁵ were "not responsive to the needs of thousands of owners of older apartment buildings."¹²⁶ On August 2, 1978, the dissidents succeeded in electing a majority of their spokesmen to the RSA Board of Directors.¹²⁷

The most severe criticism of the incumbent RSA management was the association's failure to take a more active pro-owner position in opposing the RGB's annual rent guidelines.¹²⁸ Dissidents claimed that the rental increases were inadequate and failed to take into account the greater expenses incurred by owners of older buildings.¹²⁹ They suggested that RSA was lax in protesting because the incumbents were owners of newer luxury buildings who were satisfied with the high rents they were already receiving.

RSA incumbents responded that the dissidents were demanding

are burdened equally by laws such as the RSL which they claim "destructively limits the rents they may collect and otherwise threatens their investments." N.Y. Times, May 11, 1978, § 2, at 12, col. 4.

125. "The existing Board of Directors and Officers represent the luxury East Side apartment houses who have been getting market rents and are thus satisfied with conditions as they exist." Real Estate Weekly, June 19, 1978, at 9, col.1. "The leadership has never changed to reflect that increase in older units." *Id.* at 7, col. 2.

The RSA responded by noting that the RSA's 24 directors consisted of landlords with diverse property interests including pre and post-World War II units, luxury, and lower rent apartments. "Most of these directors own and manage residential real estate of all types, rent controlled and rent stabilized, and are therefore fully aware of the problems faced by the industry." Real Estate Weekly, June 5, 1978, at 9, col. 2. See also N.Y. Times, May 11, §2, at 12, col. 3-4.

126. N.Y. Times, May 11, 1978, §2, at 12, col. 3, and Real Estate Weekly, July 24, 1978, at 3, col. 2, (column by S. Zuckerman). The author further noted that the RSA "has provided no more service to the industry than the Office of Rent Control. Yet the Rent Control Office is an adversary organization whereas RSA is supposedly an owner's group." *Id.*

In an earlier column, Mr. Zuckerman speculated:

Perhaps this is why the fat cats of RSA have not fought harder for the industry. The present RSA Board overwhelmingly consists of an elite group of super-owners of luxury buildings. These are the power brokers, the aristocrats, those with a multitude of dealings with the City of New York. They are the people who, when the chips are down, dare not rock the boat for fear of jeopardizing their own lucrative relationships.

Real Estate Weekly, July 10, 1978, at 9, col. 1.

127. Real Estate Weekly, Aug. 28, 1978, at 1, col. 4. The election, which was held at the Annual Meeting of the RSA at the Roosevelt Hotel in New York City on August 2, 1978, drew the largest turnout of owners in the nine-year history of RSA.

128. See, e.g., Real Estate Weekly, June 19, 1978, at 9, cols. 1-2. (main issue behind proxy battle "the failure of the existing Board of Directors and Officers to get more rent for the rent stabilized sector").

129. See notes 87 & 88 *supra*.

action which the RSA could not legally take.¹³⁰ The incumbent management warned that the more active RSA role in city housing affairs desired by the dissidents could lead to revocation of RSA's charter and a return of the entire stabilized housing stock to the rent control system.¹³¹

The RSA officers further contended that the dissidents' attitude was contrary to the profile which RSA was obligated under law to maintain.¹³² One head of the association noted that the "RSA is a creature and creation of statute, and unlike other real estate trade organizations, RSA is bound by the parameters of this statute. The Association must obey the letter of the law or else face dissolution of rent stabilization and widespread rent control."¹³³

In addition to internal dissension, extension of the RSL over ten years pitted the owners against the other stabilization agencies in efforts to invalidate or terminate the law. Such action may very well be contrary to RSA's legal obligations under the RSL. The immediate purpose of the 1969 statute was to "prevent exactions of unjust, unreasonable, and oppressive rents and rental agreements."¹³⁴ The law was also expressly geared towards a smooth transition from regulation back to a "normal market of free bargaining between landlord and tenant."¹³⁵

Free market transition seems to dominate the thoughts of the real estate industry. One RSA spokesman referred to the goal of free market transition in explaining why CAB was permitted to renew its lease for prime Fifth Avenue office space, rather than enter a new ten year lease for less expensive headquarters:

[B]y entering into a long term lease, the real estate industry would have signaled legislators and the public that the real estate industry is resigned to the continuation of rent stabilization. Such an action would be interpreted

130. Real Estate Weekly, July 24, 1978, at 4, cols. 1-2 (letter from H. Liebman, Chairman, RSA).

131. N.Y. Times, June 28, 1978, at 18, col. 1. See also Real Estate Weekly, June 5, 1978, at 7, col. 2 (statement by former RSA president M.I. Sroge, that because RSA is charged by statute with the responsibility of self-regulation, "this in itself limits militancy on our part").

132. RSL § YY51-6.0(b)(5). The section provides that the RSA must be "of such character that it will be able to carry out the purposes of this law."

133. Real Estate Weekly, *supra* note 130. The chairman of RSA also indicated that although RSA is bound to administer the stabilization program even-handedly, it has not remained entirely neutral and impartial. *Id.*

134. RSL § YY51-1.0.

135. *Id.*

as implicit acceptance of a permanent ETPA. The industry would not and will not concede that rent stabilization is to be everlasting.¹³⁶

Clearly, this objective is not contrary to the purposes of the stabilization law since it is, in fact, the ultimate goal behind the legislation. Still, it is neither the exclusive nor the immediate goal of the RSL. Tenant protection was the foremost concern of the legislature in enacting the RSL,¹³⁷ and it remains the law's primary focus today.

The inevitable question is whether a system which provides for self-regulation by landlords is capable of protecting the interests of the city's tenants. At the law's inception, owners showed little enthusiasm for this responsibility. They joined the RSA reluctantly,¹³⁸ under the threat of rent control for failure to comply.¹³⁹ As required under law, they drew up a code for tenant protection but left it riddled with ambiguities and loopholes.¹⁴⁰ Time and again, members of RSA have instituted lawsuits seeking to invalidate the stabilization law as unconstitutional.¹⁴¹

Some observers find these actions indicative of a recalcitrant attitude on the part of stabilized owners. Landlord's self-policing of the system has been compared to the fox guarding the henhouse,¹⁴² and

136. Real Estate Weekly, June 19, 1978, at 6, col. 3. A similar view was expressed during an interview with Sheldon Katz, *supra* note 12.

137. See legislative findings, RSL § YY51-1.0.

138. See *Law of 1969*, *supra* note 12, at 156 and text accompanying n. 4.

139. RSL § YY51-4.0(a).

140. See, e.g., notes 55 & 56 *supra*.

141. See *Fifty Cent. Pk. West Corp. v. Bastien*, 60 Misc. 2d 195, 302 N.Y.S.2d 167 (Civ. Ct. N.Y. 1969) (unconstitutional delegation of power to private association of landlords), *aff'd*, 64 Misc. 2d 911 (App. T. 1st Dep't 1970) (finding it unnecessary to decide on question of unconstitutionality); *Patterson v. Daquet*, N.Y.L.J., Feb. 19, 1970, at 14, col. 7 (Civ. Ct. N.Y.) (unconstitutionally required landlords to "voluntarily" join association of property owners); *Somerset-Wilshire Apts., Inc. v. Lindsay*, 304 F. Supp. 273 (S.D.N.Y. 1969) (upholding constitutionality of RSL); *8200 Realty Corp. v. Lindsay*, 27 N.Y.2d 124, 261 N.E.2d 647, 313 N.Y.S.2d 733, *appeal dismissed*, 400 U.S. 962 (1970) (RSL constitutional); *Housing and Development Assoc. v. Community Housing Improvement Program, Inc.*, 83 Misc. 2d 977 (Civ. Ct. N.Y. 1975) (rent control and rent stabilization laws unconstitutional as administered), *rev'd on other grounds*, 90 Misc.2d 813, 815 (App. T. 2d Dep't), *aff'd*, 59 A.D.2d 773 (2d Dep't 1977).

Stabilized landlords continue to initiate judicial proceedings attacking the constitutionality of the RSL as it is currently administered. See *Benson Realty Corp. v. Beame*, N.Y.L.J., Oct. 4, 1978, at 13, col. 2 (Sup. Ct.) (action seeking declaratory judgment that rent control and rent stabilization laws, as currently administered, be declared unconstitutional, could proceed to trial on merits); *Rent Stabilization Ass'n v. Rent Guidelines Board*, N.Y.L.J., Sept. 29, 1978, at 4, col. 3 (App. T. 1st Dep't) (guidelines remanded to RGB to correct procedural defect).

142. See text accompanying note 12 *supra*.

tenants claim that the industry cannot be expected to zealously protect the public interest when its eventual goal is the elimination of the law itself. Still, the possibility exists that the corruptive influence of self-regulation has been overemphasized.

The New York Court of Appeals, holding the law constitutional in *8200 Realty Corp. v. Lindsay*¹⁴³ in 1969, expressed the view that self-policing could be beneficial to the system:

That members of a complex industry play a part in guiding government to a fair regulation of the industry is an obvious advantage as long as government keeps the ultimate controls in its own hands. The knowledge and experience of the industry may be of valuable assistance to administration.

The cooperation of the industry is more likely when the industry plays a responsible part in the regulation itself than when it stands outside and takes the prescriptions of public authority when handed down as the real estate industry does in the regulations under Title Y¹⁴⁴ [rent control].

[W]hatever delegation may be said to have come down to the Real Estate Industry Association [RSA] described in this statute, closely circumscribed and regulated as this is, no one could seriously entertain a fear that government has yielded any real sovereign power.¹⁴⁵

The court of appeals based its optimistic stance partially on the fact that the system's boards were theoretically independent of one another,¹⁴⁶ serving as an effective system of checks and balances. By providing for equal representation of adverse interests on their boards,¹⁴⁷ CAB and RGB decisions maintain a measure of fairness and impartiality. And although independent, the agencies are ultimately subject to governmental guidance and control through HDA. The RSA is subject to supervision and reprimand from both HDA and CAB.¹⁴⁸ The landlord or tenant dissatisfied with a CAB ruling may initiate an Article 78 proceeding in court to contest it.¹⁴⁹ The

143. *8200 Realty Corp. v. Lindsay*, 27 N.Y.2d 124, 261 N.E.2d 647, 313 N.Y.S.2d 733, appeal dismissed, 400 U.S. 962 (1970).

144. *Id.* at 131, 132.

145. *Id.* at 132.

146. *See, e.g.*, CAB REPORT, *supra* note 50, at 4, 6. Furthermore, the N.Y. Court of Appeals indicated that "it is not an uncommon practice for a regulated industry to provide the funds expended by a public agency in its regulation." *8200 Realty Corp. v. Lindsay*, 27 N.Y.2d 124, 134, 261 N.E.2d 647, 652, 313 N.Y.S.2d 733, 740 (1969). Examples of other industries which similarly provide the funds for their supervision, include the insurance industry (INSURANCE LAW § 32-a), public utilities (PUBLIC SERVICE LAW § 18-a), and the banking industry (BANKING LAW § 17 subd. 3). *Id.*

147. *See* text accompanying notes 58-60 & 64-65 *supra*.

148. RSL §§YY51-4.0(a), (c), -6.0(b)(2), (4), (c)(10).

149. N.Y. CIV. PRAC. LAW §§ 7801-06 (judicial proceeding against public body or officer).

RGB is required by law to accept for review all pertinent data submitted to it by outside agencies and individuals, to arrive at reasonably most accurate guidelines.¹⁵⁰

Still, these measures may be inadequate to secure compliance and impartial administration of the law. One appellate justice suggested that the CAB, despite its division into a landlord's faction, a tenant's faction, and an impartial chair, is really no more than a "tripartite facade." He stated that:

The statute provides for virtual self-regulation by the industry . . . without any real intervention or supervision by an effective, functioning and adequately staffed independent governmental agency. Indeed, and despite the tripartite facade of the CAB, the industry appears to be acting as both judge and jury. One recalls the venerable maxim of Pascal: "No one should be Judge in his own cause."¹⁵¹

The dissidents' demands for greater input into CAB and RGB decisions would seem to imply that RSA prefers infiltration and partiality to independence. Yet independence, as a check and balance on each board's power bloc, is essential to the fair and effective functioning of the stabilization system. Whether the election of a majority of dissidents to the RSA Board of Directors will lead to the downfall of self-regulation depends largely on their actions and the extent to which they overstep legal limitations imposed upon them.

IV. Extension of the Law: Base Date Provisions

The law's extension over ten years has not only increased strife among owners and within the system as a whole, but has also led to the breakdown of certain provisions in the law and code. Some provisions have become useless, others increasingly technical and complicated. The base date provision is a prominent example of declining practicality in the face of long-term extension.

Originally a simple system for computing stabilized rents, there currently exist twelve categories of apartments, each with a different base date.¹⁵² In addition, one building may have different base dates for building-wide services and for individual apartment serv-

150. RSL §§ YY51-5.0(b)(2) & (3).

151. *Windsor Park Tenants' Ass'n. v. CAB*, 59 A.D.2d 121, 625, 397 N.Y.S.2d 828, 845 (2d Dep't 1977). (Hawkins, J., concurring).

152. See CAB, *Tenant's and Owner's Rights and Duties Under The Rent Stabilization Law* 4-7 (1978).

ices, and the base dates for two neighboring units may differ as well.¹⁵³ Furthermore, the limitation formula is highly technical to inexperienced owners. Owners must have in their possession all lease records back to the base date.¹⁵⁴ To compute the legal rent, the limitation formula must be applied to each year in which a new lease was entered. Owners, unaware of the formula or unable to properly apply it, may lose out on valuable increases or subject their tenants to incorrect rentals. Tenants aware of the formula may apply to the CAB for a rent reduction if the Board finds the current rent charged to be improper. There is no statute of limitations on rent rollbacks; thus, tenants are not penalized for late discoveries of overcharges. However, as the allowable increase is merely a maximum which may not be exceeded, the owner inadvertently charging a lower rent will have no recourse by which to recoup lost earnings. The following section further discusses these shortcomings.

A. Rental Charges

Under the stabilization code, guidelines increases are computed on a percentage basis above the rent charged and paid on the base date. If the purpose of rent regulation is to prevent rent "gouging" by landlords, then the regulation is effective only to the extent that no gouging existed on the base date.¹⁵⁵

City census bureau studies show that despite rent control and rent stabilization, New York City rents have risen more than three times as fast as tenant incomes since 1970.¹⁵⁶ Over half of the city's tenants pay more than twenty five percent of their income for rent, including half-a-million households that pay more than thirty-five percent of their income.¹⁵⁷ The studies further show that while rents have increased 23.3 percent since 1975, owners' operating and maintenance costs, which generally account for fifty to eighty per-

153. See RS CODE § 2(i).

154. See RS CODE § 42.

155. "[W]e are dealing with past buildings which in many cases have rent inequities built into them because, *e.g.*, they came on the market at a time of glut or one of shortage." PRACTISING LAW INSTITUTE, 2 PRACTICE UNDER THE NEW RENT STABILIZATION LAW at 48. Further inequities exist because many tenants paid high increases for apartments leased during the three years of vacancy decontrol before the ETPA was enacted. See N.Y. Times, July 15, 1974, at 28, col. 2.

156. N.Y. CITY, 1975 CENSUS BUREAU STUDY.

157. *Id.*

cent of rental property costs, have gone up by only 15.3 percent.¹⁵⁸ One key suggestion from the studies is that gouging during periods of rent control and during decontrol has created excessive base rents upon which later increases are computed.¹⁵⁹ And to compensate for what they still consider inadequate rentals, owners continue charging tenants rentals higher than those permitted under law.¹⁶⁰ Despite stabilization, gouging continues to thrive in New York City.¹⁶¹

Once overcharging is discovered by the CAB, penalties imposed are very light.¹⁶² A landlord found guilty of overcharging is ordered by the CAB to roll the rent back to the legal limit and to make a refund, either in rent credit or in cash. However, the refund does not include interest and punitive action is rarely taken against the landlord.¹⁶³

Furthermore, although a landlord cannot legally evict a tenant for complaining to the CAB, a landlord is in a position to make it unpleasant for a complaining tenant to actively pursue enforcement of a CAB directive. Section 52 of the code forbids an owner from harassing a tenant by interfering with or disturbing the "comfort, repose, peace or quiet of the tenant in use and occupancy" of his apartment, but few owners have been expelled for harassment. The stabilization law depends, in large part, on tenant initiation of complaints. Though the code protects tenants from owner retaliation for pursuit of legal rights, tenants in a seller's market are intimidated and may refrain from complaining about illegal rent overcharges or non-compliance with a rent rollback order.¹⁶⁴

Tenants who do complain often are confronted with an anoma-

158. MARCUSE, *RENTAL HOUSING IN THE CITY OF NEW YORK*, (1979).

159. N.Y. Times, Jan. 19, 1976, at 1, cols. 5-6. For other suggestions from the 1975 survey, see text accompanying note 110 *supra*, which indicated that owners of more than 100,000 apartments had probably avoided the rent laws altogether by failing to register their apartments as required under law.

160. Most gouging occurs in stabilized buildings. See N.Y. Times, Nov. 26, 1978, § 8, at 4, col. 1.

161. See Bordewich, *Real Estate: How High The Boom?*, New York Magazine, Dec. 11, 1978, at 62.

"A lot of people are doing it . . . [a]nd I'm not so sure it's wrong. If a landlord's weighed down with a lot of rent-controlled tenants in his building, he's losing money on them, and he's going to try to make up the difference by charging what the market will bear for the other apartments."

Id. at 65, cols. 2-3 (emphasis added).

162. N.Y. Times, Nov. 26, 1978, §8, at 4, col. 4.

163. *Id.*

164. See N.Y. Times, Nov. 26, 1978, § 8, at 4, col. 1.

lous situation inherent in the RSL. A clause in the 1969 code protects tenants against overcharges by requiring landlords to attach to a new lease on an apartment the name of the prior tenant and the rent payable under the previous lease.¹⁶⁵ However, owners are usually lax in doing so and the CAB does not keep its own lease records, relying instead on landlords to provide the previous leases when questions on legal rents arise.¹⁶⁶ More often than not these leases are never produced and the CAB is forced to rely on tenants' allegations to determine the proper rent. The tenant in such a situation wins a lower rental by virtue of an ignored and unenforceable provision in the law, rather than through the provisions' explicit design to benefit the tenant by coercing owner compliance. More recently, the CAB has attempted to rectify this situation by refusing the owner the benefit of the latest guidelines increases until the requested lease records have been provided.¹⁶⁷ This seems a fairer penalty in that it does not depend exclusively upon tenant hearsay.

Under the ETPA, a system was devised to alleviate built-in rent inequities. Tenants under this system could, in certain newly stabilized apartments, negotiate a "first rent" with their landlord.¹⁶⁸ This rent would then be subject to a Tenant Fair Market Rental Appeal¹⁶⁹ if the tenant believed he was paying more than the rent paid for comparable apartments. Because of the "comparable apartment" provision, however, tenants in these newly stabilized apartments usually end up paying whatever the market will bear. In addition, tenant groups have claimed that the appeal procedure is too complicated and difficult to be of much practical use to the average tenant.¹⁷⁰

165. RS CODE §42(A)(1). Until recently, the CAB was not even aware that this section of the code required an owner to attach a rider to a new tenant's lease, indicating his right to prior lease records for the apartment. N.Y. Times, Nov. 26, 1978, § 8, at 4, col. 2. Since then CAB opinions have reflected their change in awareness. See, e.g., CAB Opinion No. 9129.

166. N.Y. Times, Nov. 26, 1978, § 8, at 4, col. 4. See, e.g., Fresh Meadows Assoc. v. CAB, 64 A.D.2d 548, 407 N.Y.S.2d 850 (1st Dep't 1978) (owner who failed to provide lease records for CAB inspection ordered by court to produce them).

167. CAB Opinion No. 9129.

168. RS CODE § 25.

169. *Id.*

170. N.Y. Times, June 21, 1975, at 31, col. 7. Section 25(b) of the Code provides that a tenant must fill out a Tenant Fair Market Rent Adjustment application with the CAB within 90 days after the tenant receives an Initial Legal Regulated Rent notice from his landlord. This time limit puts tenants in older buildings, which are mostly the object of the provision, into a tight spot since many of them are aged, alien, or undereducated and either fail to

All base date rent problems are further exacerbated by the periodic percentage increases sanctioned under the RSL. Whatever inequities existed in the base date rent are heightened upon each signing of a new lease. The Metropolitan Council on Housing, a tenants' group, has observed that the increases could, conceivably, go on forever.¹⁷¹

B. Services

Under the stabilization code an owner must continue to provide the tenant with those services he provided, or was required to provide, on the base date.¹⁷² This requirement was intended to prevent an owner from cutting costs and evading rent restrictions by diminishing or deleting services he earlier provided to his tenants.

1. Determining the Services Required

Although the law prohibits owners from giving fewer services under a new lease than under the old, this provision is virtually meaningless unless the prospective tenant can discover what services the landlord had been providing on the base date.¹⁷² Under the law an owner is required to show a new tenant the previous lease to the apartment,¹⁷⁴ but this does not tell the new tenant what services were required under that lease.

Furthermore, the CAB has no simple way of determining what services were provided to the previous tenant. Unlike rent control,¹⁷⁵ there is no provision under the RSL or the ETPA requiring an owner to register such information with any of the system's agencies. Thus, where no records or evidence is presented, the CAB is forced to base its conclusions as to decrease in service upon mere presumptions.

read the small-print time requirements for filing, or cannot read it, causing them to forfeit their rights under the Code.

171. Letter from J. Benedict, *supra* note 12.

172. RS Code §2(m) provides that required services consist of [t]hat space and those services which were furnished or were required to be furnished for the dwelling unit on [the base date] and all additional services provided or required to be provided thereafter. These shall to the extent so furnished or required to be furnished, include repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, telephone, elevator service, removal of refuse and janitorial services and ancillary services including but not limited to garage space and service, protective services and recreational facilities.

173. *Law of 1969*, *supra* note 12, at 174; N.Y. Times, Nov. 26, 1978, § 8, at 4, col. 4.

174. RS CODE §42(A)(2).

175. See N.Y. CITY RENT, EVICTION & REHABILITATION REGULATIONS §41, in *NEW YORK RENT CONTROL* 449 (J. Rasch ed. 1968).

One such presumption is based upon the owner's failure to supply the Board with requested records. A failure to provide records leads to the Board's presumption that the tenant's allegation of decreased services is true. Similarly, the Board presumes a decrease in services where inspection shows that the premises are not being properly maintained.

Recently, the Appellate Division of the New York Supreme Court was faced with the problem¹⁷⁶ "inherent in the Rent Stabilization Law, of how to determine whether there has been a decrease in services under the Rent Stabilization Code."¹⁷⁷ In *In re Fresh Meadows*¹⁷⁸ the tenants complained that the premises were not being properly maintained. The CAB inspected, found improper maintenance, and ordered the owner to correct the condition by restoring base date porter services—all without knowing what porter services were provided on the base date or what porter service was being provided now. Special term annulled CAB's determination on the ground that it was without "rational basis" since (1) CAB relied upon the owner's *failure* to supply it with data to determine whether there had been a diminution in base date services, and (2) the directive to restore base date services lacked any objective criteria upon which compliance could be ascertained.¹⁷⁹ On appeal to the appellate division, the matter was remanded to the CAB for a further determination of base date services,¹⁸⁰ based upon the base date records of the premises' prior owner.¹⁸⁰ But in remanding, the majority of the court approved the CAB finding decreased services by implication where staff inspections revealed improper maintenance of the premises.¹⁸¹

One justice strongly dissented, observing that "[t]he Code does not authorize the respondent [CAB] to make determinations based upon a general lack of maintenance or any other arbitrary standards that might be formulated by individual inspectors."¹⁸² The dissenter

176. *In re Howard-Carol Tenants' Ass'n*, 64 A.D.2d 546, 406 N.Y.S.2d 845 (1st Dep't 1978); *In re Fresh Meadows Assoc.*, 64 A.D.2d 548, 407 N.Y.S.2d 850 (1st Dep't 1978).

177. N.Y.L.J., July 26, 1978, at 4, cols. 3-4 (referring to section 2(m) of the rent stabilization code which mandates that services be maintained at the same level provided on May 31, 1968).

178. *In re Fresh Meadows Assoc.*, 64 A.D.2d 548, 407 N.Y.S.2d 850 (1st Dep't 1978).

179. *Id.* at 548.

180. *Id.*

181. *Id.*

182. *Id.* at 550. (Murphy, J., concurring in part and dissenting in part).

believed that decreased service should be found only upon an express showing through records or other evidence that the service itself has been decreased. He indicated that lack of cooperation by the owner, for example failure to provide records, could not, in and of itself, "affirmatively establish the base level of services for a particular building nor does it assist the respondent [CAB] in formulating an order directing that maintenance be upgraded to the base level."¹⁸³

Finally, the dissenting justice astutely observed that

[a]s the base date becomes more removed, in time, it will become increasingly more difficult to prove the base level of services in any rent stabilized building, even with the full cooperation of all concerned. The Stabilization Association should take cognizance of that fact and set up, with the approval of HDA, alternative criteria for determining whether a stabilized building is in disrepair.¹⁸⁴

2. *Non-Essentiality Of The Services*

The remoteness in time of the base date creates unfairness in other respects as well. The stabilization law is temporary in scope but the longer it is extended, the more buying patterns and concepts of necessities change. Without revisions corresponding to society's and the economy's changing demands, what constituted a vital service in 1969 or 1974 may no longer be valid five years later, and even less so ten or fifteen years later.¹⁸⁵

In fact, the stabilization code makes no reference to any *essential* services which the owner is required to provide.¹⁸⁶ While an owner is required to abide by the city's Health Code¹⁸⁷ and Multiple Dwelling Law,¹⁸⁸ the stabilization code itself does not obligate the owner to provide any specified services other than a painting of the premises every three years¹⁸⁹ and all "base date services." Base date services need not be essential, necessary, or even significant for an

183. *Id.*

184. *Id.*

185. Interview with Sheldon Katz, *supra* note 12. By retaining the 1968 and 1974 base dates, the base date services which an owner is obligated to provide may become less vital to the adequate maintenance of the tenant's apartment years later. *Id.*

186. See RS CODE §2(m).

187. N.Y. CITY CHARTER § 1706, ch. 60.

188. N.Y. MULT. DWELL. LAW §§ 1-367 (McKinney 1974).

189. RS CODE §2(m) provides in part that "[o]wners shall comply with the requirement of the Housing Maintenance Code that each dwelling unit must be painted at least once every three years."

owner to be required to continue providing them.¹⁹⁰ The only requirement is that the owner have provided them on the base date, or at any time thereafter. Thus, required services under the RSL have included non-essential services from egg trays and meat keeper compartments in refrigerators¹⁹¹ and ash trays in the lobby,¹⁹² to sandboxes in adjacent parks¹⁹³ and toothbrush racks in the tenant's bathroom.¹⁹⁴ Obviously, a provision which requires the CAB to expend its quasi-judicial energies deliberating over the owner's obligation to provide these minor items, impairs the CAB's effectiveness at safeguarding more vital tenant interests.

3. *Charges For Base Date Services*

Although a landlord may not charge a tenant for services provided gratuitously on the base date,¹⁹⁵ he may charge the tenant for services which he is now providing but which he was not providing on the base date,¹⁹⁶ or for those services for which he charged on the base date.¹⁹⁷ Services accompanied by a charge on the base date are known under the law as "ancillary" services.¹⁹⁸ They are required services and are considered part of the rental for the purpose of computing guidelines increases.¹⁹⁹

An owner may charge a tenant for new services added since the base date, if the tenant granted written permission to the owner for such additional service.²⁰⁰ However, an owner may not begin to charge a tenant for a service which he was providing free to the tenant on the base date, even if new tenants in the building are paying new service charges for the same service. Thus, a tenant using an air conditioner free of charge on the base date will be permitted to continue using it free of charge despite the added burden of its operation on the landlord's pocketbook because of rising electricity costs. It is of no consequence that the tenant's neighbors

190. J.M. STRIKER & A.O. SHAPIRO, *SUPER TENANT* 131 (1978).

191. CAB Opinion No. 4223.

192. CAB Opinion No. 6719.

193. CAB Opinion No. 3090.

194. CAB Opinion No. 1316.

195. RS CODE §2(m)(2).

196. RS CODE §20(c).

197. RS CODE §2(m)(1)(a), (b), (c).

198. RS CODE §2(m)(i).

199. *Id.*

200. *See* RS CODE § 20(c).

who moved in after the base date may be paying for the very same service. The landlord who failed to assess a tenant for the cost of a service on the base date, under the stabilization code's base date provisions suffers the economic consequences for years to come.

Base date services are not the only services which an owner is required to provide. Many maintenance standards for stabilized buildings are set by the Housing Maintenance and Preservation Code²⁰¹ while other requirements come from the Board of Health.²⁰² These services are often vital to an apartment's upkeep but because they fall outside the scope of stabilization's express requirements, the CAB is powerless to enforce them. The most CAB can do is refer these complaints to the proper city agency. In addition, some requirements *within* the realm of rent stabilization's jurisdiction, for example, the proper upkeep of elevators, can, theoretically, only be enforced by some outside agency such as HDA's Office of Code Enforcement. However, the OCE is often powerless to enforce compliance because the subject of the complaint falls outside the scope of *their* express authority.²⁰³ Thus, where enforcement of requirements vital to a tenant's occupancy depend on the ability and effectiveness of other agencies' enforcement measures the stabilization system can not assure its tenants the receipt of all required services.

V. Conclusion

Rent regulation is not regarded as a permanent safeguard of tenants' rights, but as an emergency measure to ensure decent housing at reasonable prices until market conditions stabilize. As the court of appeals stated in regard to rent control: "Rent controls, all will agree, ought not achieve a status of permanence in our economy. They have no justification except in periods of emergency

201. N.Y. CITY ADM. CODE §D26-1.01 to -57.11.

202. See N.Y. CITY CHARTER §1705, ch. 60.

203. Letter from Frank A. Dell'Aira, Assistant Commissioner, Office of Code Enforcement, N.Y. City, Dec. 1, 1978. The assistant commissioner indicated that

[i]n some instances, the stabilization system deals with services that are not required by these laws (i.e.: . . . doorman and elevator man services) which are not enforceable by this agency [the OCE]. Since the services provided by this agency are not paid for by rent stabilization but by the City, State & Federal Community Development Funds, we cannot alter our scope of work to accommodate rent stabilization's extra curricular activities.

Id.

. . . Whether and for how long the Legislature may lawfully continue office rent control must, and shall, be a question open for future review."²⁰⁴

It is apparent that some form of regulation is needed to guide New York City's tenants through the current inflationary spiral. The same conditions prevail now which led to the RSL's enactment ten years ago, namely: exorbitant rents, uncontrolled inflation, and a serious shortage of housing. Thus, it is doubtful that the RSL and the ETPA will be permitted to expire or be phased out in the near future.

Nevertheless, the present stabilization system has serious flaws. The draftsmanship of the code and its implementation by the stabilization agencies has left much to be desired. The longer the base date provisions for rents and services continue, unamended, the more inequitable the rents are destined to become and the less adequate the services. The system's enforcement agencies must be aided in their responsibilities by the passage of stricter and more explicit guidelines binding the regulated parties to standards of compliance and discipline. The plight of older buildings which now constitute a majority of the stabilization stock must be better accommodated by full analyses of their operating expenses when guidelines are computed, or alternatively, by the issuance of more discriminating guidelines: perhaps one set for pre-war housing and another for post-war housing.

Self-policing, in and of itself, need not be the downfall of the stabilization system.

The ultimate success, or even the utility, of the statutory mechanism which brings an industry association into an active role of regulative responsibility may be arguable one way or another. But fair latitude should be allowed by the Court to the legislative body to generate new and imaginative mechanisms addressed to municipal problems.²⁰⁵

The RSL's administrators must aggressively seek out violators and impose harsher penalties to assure their compliance. Penalties should be stated with specificity in the code to adequately forewarn owners. The rent stabilization code should be amended to simplify

204. *Lincoln Bldg. Assoc. v. Barr*, 1 N.Y.2d 413, 420, 135 N.E.2d 801, 806, 153 N.Y.S.2d 633, 639 (1956), *appeal dismissed*, 355 U.S. 12 (1957).

205. *8200 Realty Corp. v. Lindsay*, 27 N.Y.2d 124, 132, 261 N.E.2d 647, 651, 313 N.Y.S.2d 733, 738 (1969).

provisions which have become overly technical and complicated. A system should be devised by which all stabilized parties are given notice of their specific rights and obligations under the stabilization law. Failure to remedy stabilization's key problems now could lead to the crumbling of an otherwise solid regulatory wall erected by the RSL to protect New York City tenants and owners.

Diane Ungar

