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# NEW YORK DEBATES COMMERCIAL RENT CONTROL: DESIGNER ICE CREAM STORES VERSUS THE CORNER GROCER

## I. Introduction

In the mid-1970's as the City of New York teetered on the brink of bankruptcy, the prospects and predictions for the future of the city were grim. The country, and New York State itself, questioned the city's ability to recover.<sup>1</sup> Despite deep cuts in staffing and services, however, New York City survived this crisis with such remarkable resilience that today it is touted as one of the most successful comebacks in the past ten years.<sup>2</sup>

Notwithstanding New York City's current economic renaissance,<sup>3</sup> not all New Yorkers have benefitted from the revitalized economy.<sup>4</sup>

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1. See Gottlieb, *New York's Rescue: The Offstage Dramas*, N.Y. Times, July 2, 1985, at A1, col. 1 (review of fiscal crisis New York City experienced in mid-1970's and difficulties New York faced in convincing federal government and institutional lenders to aid it in overcoming budgetary shortfalls).

2. See Oreskes, *Proxmire Calls City's Recovery A Fiscal Model*, N.Y. Times, Nov. 20, 1985, at B4, col. 3 (Senator William Proxmire, "New York City's chief nemesis on Capitol Hill during the fiscal crisis of the 70's," declares that New York City's recovery should serve as model for federal government in area of fiscal discipline); Gottlieb, *The New York Recovery: Can It Be Sustained?*, N.Y. Times, Oct. 13, 1985, § 12, at 12, col. 1 (report released by New York Regional Economists Society concluded that "the turnaround that New York City has undergone since 1977 can be classified as nothing short of phenomenal" ).

3. See *Metropolis 1985: A Look At New York's Economic Future*, 5 MANHATTAN REPORT 2 (No. 4 1985).

4. "Liberal critics point out that a large and growing underclass has been shut off from the benefits of growth. Conservative critics attack high taxes and excessive regulations that perpetuate an oversized public sector and threaten the city's long-term economic health." *Id.* In assessing the effects of the nationwide economic recovery during the 1980's, Samuel M. Ehrenhalt, Regional Commissioner of the Federal Bureau of Labor Statistics in New York, stressed that the situation in New York demonstrated how recovery has bypassed many people. " 'New York City has done very well in the last few years . . . but there are apparently limits to the payoff we can expect from economic growth. Only 51 percent of the city's working-age population is employed, as against a national figure of 61 percent.' " Pear, *Millions Bypassed As Economy Soars*, N.Y. Times, Mar. 16, 1986, at A1, col. 1; see also Schanberg, *The Poverty Divide*, N.Y. Times, Jan. 22, 1985, at A25, col. 1 (as New York City booms economically, more people are hungry and homeless in the city than at any time since Depression); *How Many Will Share New York's Prosperity?*, N.Y. Times, Jan. 20, 1985, § 4, at 6, col. 1 (symposium on New York City as economically divided city).

In particular, small business retailers, manufacturers, and professionals have asserted that rapidly increasing rents are threatening both their existence and the economic vitality of the city. Tenants running small businesses are clamoring for relief in the form of rent control and rent stabilization programs.<sup>5</sup> Owners of small businesses maintain that large, uncontrolled increases in rents are forcing them into untenable financial positions. They envision a scenario of unregulated increases in commercial rents that will force many businesses to close their doors, depriving the neighborhood of the goods and services that sustain the economic vitality of a residential area.<sup>6</sup>

In an effort to avoid this result and to mitigate the alleged unreasonableness of commercial rent increases, a number of city and state legislators have proposed legislation to limit commercial rent increases.<sup>7</sup> To date, neither the state nor the city has enacted a law that regulates increases of rent on commercial leases.

Opponents of proposed commercial rent regulation have pointed to various indicia, including high tenant turnover rates and increased tax revenues from areas experiencing economic revitalization, as evidence of an expanding, healthy economy and commercial real

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5. See *Small Business Commission Public Hearing*, (Jan. 24, 1986) (statement of New York City Councilwoman Ruth Messinger) [hereinafter Messinger Statement]. For examples of small businessmen who claim that they need commercial rent regulation to remain in business and to continue providing essential services, see Lewis, *High Rents Squeeze Mom & Pop Citywide*, N.Y. Daily News, Sept. 23, 1984, at 1, col. 1 (flood of 15,000 petitions, post cards and letters from shopkeepers and community leaders in Bronx calling for commercial rent protection inundated offices of Mayor of New York and City Council). See McCain, *Store Rents Skyrocket in a Changing New York City*, Boston Globe, May 19, 1985, at A17, col. 2; Schanberg, *Let Them Eat Boutiques*, N.Y. Times, Aug. 7, 1984, at A25, col. 1 (critical look at replacement of stores providing essential goods and services in West Village of Manhattan by "shops that sell gourmet ice cream, upscale fashions and designer cookies"); see also Carmody, *West Side Beauty Salon Loses to Gentrification*, N.Y. Times, Feb. 27, 1985, at B1, col. 1 [hereinafter Carmody]; Gilgoff, *Neighborhood Minus Its Markets*, N.Y. Newsday (undated) (after closing of two supermarkets, residents and shopkeepers in Flatbush, Queens, neighborhood express concern over loss of services and consumer traffic that supported other area stores) (available at *Fordham Urban Law Journal* office); Fulman, *"Lost Our Lease" Hits Home For 2*, N.Y. Daily News (undated) (two businesses that served neighborhoods for 33 and 40 years plan to close because of unaffordable rent increases) (available at *Fordham Urban Law Journal* office).

6. Wedemeyer, *Debate on Retail Rent Control Crackles*, N.Y. Times, Mar. 18, 1984, § 8, at 7, cols. 2-3 [hereinafter Wedemeyer]; see Messinger Statement, *supra* note 5, at 1.

7. See *infra* notes 72-151 and accompanying text.

estate market in New York City.<sup>8</sup> The underpinning of their position is that any governmental interference in the free market determination of commercial rents would seriously impinge upon the city's long-term economic growth.<sup>9</sup> Accordingly, opponents of commercial rent regulation vigorously oppose enacting commercial rent regulation statutes.

Compounding the issue is the paucity of empirical data to support either position in the debate, which is fueled by strong emotion<sup>10</sup> and self interest on both sides. In addition, both sides have charged that their adversaries have unfairly or inaccurately presented the nature of available data.<sup>11</sup>

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8. See NEW YORK DEP'T OF CITY PLANNING, PRIVATE REINVESTMENT & NEIGHBORHOOD CHANGE 123 (Oct. 1985) (study of two areas undergoing economic revitalization concluded that service levels in these areas, measured by per capita establishment figures, exceeded citywide levels in almost all categories) [hereinafter PRIVATE REINVESTMENT]; *Testimony on Commercial Rent Control Before the City Council on Economic Development* 4 (Feb. 28, 1984) (statement of The Real Estate Board of New York, Inc.). Testimony given before the New York City Council on Economic Development referred to statistics for the period between 1977-1982, which showed that the city's real property tax bill for an area of the Upper West Side of Manhattan—the stretch of Columbus Avenue between 63rd and 86th Streets that experienced economic revitalization—increased from \$2,319,000 to \$3,824,400. See *id.* The testimony asserted that the additional \$1,505,400 in revenues paid for extensive police protection and sanitation services. See *id.*

9. See *Statement of the New York Chamber of Commerce and Industry and The New York City Partnership, Inc. Presented Before The Small Retail Business Study Commission* 2-6 (Jan. 24, 1986) (statement by Edward S. Cabot, President of New York Chamber of Commerce and Industry and Executive Vice President of The New York City Partnership, Inc.) (outline of economic dangers inherent in commercial rent control schemes); *Testimony on Commercial Rent Control Before The City Council on Economic Development* 3 (June 27, 1985) (statement of The Real Estate Board of New York, Inc. by Arthur Margon, its Senior Vice President).

10. The level of emotion surrounding the issue was pointedly demonstrated by an incident involving the Mayor of New York's bestselling book entitled "Mayor." John Scioli, a bookstore proprietor who paid \$1,300 a month in rent for his store in Brooklyn Heights and faced a tripling of the rent, expressed his outrage at Mayor Koch's opposition to commercial rent control by tripling the advertised price on "Mayor" to \$53.85. "Mr. Scioli said the book sold well at the list price of \$17.95. It isn't selling at all at the new price." Anderson & Priol, *Triple Whammy*, N.Y. Times, Mar. 24, 1984, at 27, col. 2.

11. *City Council Hearing on Commercial Rent Control*—(June 27, 1985) (testimony by Alan Altschuler, Dean of Graduate School of Public Administration at New York University and Chairman of the Small Retail Business Study Commission). Altschuler stated:

As for the problem itself, it turns out that virtually all that is known is anecdotal. It is clear that many small retailers have been forced to move by rent increases when their leases ran out, and that some streets have come to be dominated by establishments serving people who are not resident

Edward Koch, the Mayor of New York City, has categorically stated that he does not favor commercial rent control.<sup>12</sup> Despite this position, however, in May, 1985 the Mayor, in conjunction with the New York City Council, created the Small Business Retail Study Commission (Commission) to evaluate the impact of rising rents on businesses, city residents, and neighborhoods.<sup>13</sup> The fruit of the Commission's labor was a report released in June, 1986, detailing its findings and policy recommendations.<sup>14</sup>

This Note will review the history of commercial rent regulation in New York City<sup>15</sup> and examine existing commercial rent regulation proposals, both in terms of their underlying goals and their methods

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in the immediate neighborhood. But no one has data on whether retail business turnover citywide has substantially increased in recent years. Nor is it clear what the consequences have been for consumers, or for the city tax base, or for the attractiveness of neighborhoods as perceived by residents.

*Id.*

Recognizing that "the absence of credible small area data on retail businesses, commercial property owners, and shoppers in New York City neighborhoods mitigated against performing a comprehensive policy appraisal," the Small Retail Business Study Commission undertook extensive research to be incorporated in its final report. SMALL RETAIL BUSINESS STUDY COMMISSION: INTERIM REPORT UPON COMPLETION OF PHASE I-1 to I-2 (Feb. 1986) (opening letter of Commission Chairman Alan Altschuler to Mayor Edward Koch) [hereinafter INTERIM REPORT]. The Commission retained Lou Harris and Associates, a survey research firm, to conduct surveys of retail merchants and local shoppers in twelve selected New York City neighborhoods. *See id.* The surveys were designed to identify conditions and changes affecting small retail businesses in the targeted commercial districts, and to document the impact of any such conditions and changes on local residents who depend on neighborhood businesses for essential goods and services. *See id.* at I-3 to I-4. In addition, the Commission oversaw a citywide survey administered and correlated with neighborhood merchant surveys. *See id.* Neighborhood shopper surveys were "cross-tabulated with citywide statistical sources to create a profile representative of shoppers in the City as a whole." *Id.* at IV-4. For a detailed discussion of the methodology and research design, see *id.* at I-1 to I-3, IV-4 to IV-18.

12. The Mayor stated:

I believe, as I have stated in the past, that one of the solutions proposed for these problems—commercial rent control—is unwise and would be counterproductive. In my judgment, it would create far more problems that (sic) it would solve, and while some individual merchants or businesses might benefit in the short run, such a law would seriously impede the growth and vitality of the city's economy and in the long run result in the loss of both jobs and services.

Statement by Mayor Edward I. Koch 1 (May 7, 1985) (available at *Fordham Urban Law Journal* office).

13. *Id.*

14. SMALL BUSINESS RETAIL STUDY COMMISSION: FINAL REPORT I-1 (June, 1986) [hereinafter FINAL REPORT].

15. *See infra* notes 19-69 and accompanying text.

of operation.<sup>16</sup> The Note will argue that, as a matter of general economic and public policy, the legislature should not enact commercial rent regulations.<sup>17</sup> In light of these policy considerations, the Note will then examine specific conclusions of the Commission in its Final Report and its assessment of proposed strategies to deal with the problem related to the escalation of commercial rents<sup>18</sup> for small businesses and neighborhood consumers in New York City.

## II. Origins and History of Commercial Rent Control in New York

The concept of commercial rent control is hardly new, dating back to the post-World War II period when New York instituted a program to control rent increases on commercial premises. Legislators kept the controls in place for about eighteen years, however, in response to mounting pressure from landlords and warnings from the judiciary in opinions challenging the relevant statutes, the legislature ultimately engaged in a program of gradual decontrol.

### A. The Need for Commercial Rent Control

The exigencies of the Second World War greatly effected the commercial rental sector in urban areas. During the War the Federal Government occupied over 5,000,000 square feet of commercial space in New York City.<sup>19</sup> In addition, the War effort suspended the construction of new buildings.<sup>20</sup> This alteration of the real estate market resulted in a shortage of commercial real estate, exorbitant rent increases and, ultimately, many evictions.<sup>21</sup>

In 1944, the New York State Legislature authorized a special committee to investigate the situation.<sup>22</sup> The Committee, citing the nexus among the shortage of commercial real estate, increased rents

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16. See *infra* notes 70-151 and accompanying text.

17. See *infra* notes 152-201 and accompanying text.

18. See *infra* notes 202-303 and accompanying text.

19. Meringolo, *Rent Control: What Remains and Its Future*, 22 BROOKLYN L. REV. 207, 208 (1955-56) [hereinafter Meringolo].

20. See *id.*

21. See *id.*

22. See *id.*; see also Keating, *The Elmwood Experiment: The Use of Commercial Rent Stabilization To Preserve A Diverse Neighborhood Shopping District*, 28 WASH. U.J. URB. & CONTEMP. L. 107, 125 (1985) [hereinafter Keating].

and the deleterious effect<sup>23</sup> of an unregulated commercial rental sector, concluded that commercial rent control was necessary to avert business stoppages and migrations, which in turn would cause widespread unemployment and a decline in the production of war goods and essential civilian commodities.<sup>24</sup>

## B. The 1945 Statutes

Legislators drafted a bill to remedy the situation in the commercial rental sector. Invoking its police powers<sup>25</sup> in the face of the declared state of emergency,<sup>26</sup> the New York State Legislature in 1945 passed two laws to control rents on commercial leases: the Emergency Commercial Space Rent Control Law<sup>27</sup> (ECSRCL) and the Emergency Business Space Rent Control Law<sup>28</sup> (EBSRCL). The two laws were virtually identical.<sup>29</sup> The Legislature modeled the laws after the World War II federal residential rent control law and the original 1920 New York State residential rent control law.<sup>30</sup>

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23. The New York Temporary State Commission (Temporary Commission) held about 175 private hearings obtaining testimony and written data from over 800 witnesses. See Meringolo, *supra* note 19, at 208-09. In one public hearing in New York on October 5, 1944, 230 persons appeared on behalf of tenants, landlords, trade associations, civic organizations, labor groups and other individuals and groups. See *id.* Forty-one persons gave testimony and statements on behalf of a trade association and a real estate management concern. See *id.* In addition to local hearings and studies, the Temporary Commission examined conditions in other states and consulted federal officials. See *id.* Information was gathered through attendance at hearings conducted by the U.S. Senate Special Committee to Study Problems of American Small Business and by conferring with officials of the Office of Price Administration. See Meringolo, *supra* note 19, at 208-09.

As a result of its investigations, the Temporary Commission reported that a state of public emergency existed on March 1, 1943, and continued to exist because of excessive rents exacted by landlords due to the shortage of commercial space created by the War and the resulting disparity in bargaining powers between landlords and commercial tenants. See *id.* at 209-10.

24. See *id.* at 211-12.

25. "This legislation declared that the health, morals, safety and general welfare of the people was involved." *Id.* at 212.

26. *Id.*; see also Keating, *supra* note 22, at 125.

27. See Emergency Commercial Space Rent Control Law, N.Y. UNCONSOL. LAW §§ 8521-8538 (Consol. 1945) (expired Dec. 31, 1963) [hereinafter ECSRCL]. The ECSRCL applied to commercial space other than stores and offices. See *id.*

28. See Emergency Business Space Rent Control Law, N.Y. UNCONSOL. LAW §§ 8551-8567 (Consol. 1945) (expired Dec. 31, 1963) [hereinafter EBSRCL]. The EBSRCL governed stores and offices. See *id.*

29. See Keating, *supra* note 22, at 125 n.66.

30. See *id.* at 125-26.

Unlike some of the proposals now under consideration for New York City, which apply only to small commercial tenants,<sup>31</sup> these commercial rent control statutes regulated the rents of both small and large commercial tenants alike.<sup>32</sup> The statutory framework permitted the legislature to control rent increases and made available judicial review of these increases on a case-by-case basis.<sup>33</sup> In no case, however, did the statutes permit the court to award rent increases beyond the legislatively mandated ceiling rate.<sup>34</sup> Finally, these schemes proscribed the eviction of commercial tenants without "just cause."<sup>35</sup>

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31. See *infra* notes 72-79 and accompanying text.

32. See Keating, *supra* note 22, at 126.

33. The base rents were those rents in effect on Mar. 1, 1943, for commercial space and on June 1, 1944, for business space. See ECSRCL, *supra* note 27, § 8522(e); EBSRCL, *supra* note 28, § 8552(c). In addition, landlords were permitted to add fifteen percent to these base rents to adjust for the "rollback" period. See *id.*; ECSRCL, *supra* note 27, § 8522(e).

The laws recognized the landlord's right to a reasonable return, see *id.* § 8524; EBSRCL, *supra* note 28, § 8554, and if a landlord believed he deserved more than the statutorily-fixed eight percent increase upon fair value of his property (statute presumed fair value was latest assessed value), he was free to petition the New York Supreme Court and to present other evidence on the fair value of his property. See ECSRCL, *supra* note 27, § 8524(1); EBSRCL, *supra* note 28, § 8554(1).

Contrary to the federal residential rent control program, under which landlords applied to the rent commission (an administrative agency) for rent increases greater than the statutorily fixed amount, the New York Legislature vested the authority to grant such increases in the courts. See Meringolo, *supra* note 19, at 212-13. This decision rested largely on New York's successful experience in allowing the courts to administer the 1920 housing rent laws. See *id.* "Borrowing a page from the precedent and experience gained from the application of those laws, which had proved effective and accomplished the objects sought, the Legislature vested the administration of the enactments in the courts." See *id.* at 213.

34. Fair return increases could not exceed 15 percent annually. See ECSRCL, *supra* note 27, § 8524(2); EBSRCL, *supra* note 28, § 8554(2).

Commercial properties exempted from control included the following: (1) specified businesses (for example, places of public assembly, property with port-related uses, and temporary parking lots), see Keating, *supra* note 22, at 126; (2) leases with less than four-month terms, see *id.*; (3) condemned property, see *id.*; (4) new construction (added by a 1946 amendment), see *id.* at 126 & n.71; (5) vacated space (added by a 1950 amendment), see *id.* at 126 & n.72; (6) leases with variable rents tied to sales volume and graduated rents (upon expiration, rents under new leases were required to be set by arbitration or on the basis of comparable rents), see *id.* at 126 & n.73; and (7) leases in effect since June 1, 1939 (provided that rent did not exceed allowable ceiling), see *id.* at 126 & n.74.

35. The statutes prohibited the eviction of commercial tenants except for enumerated causes. See ECSRCL, *supra* note 27, § 8528; EBSRCL, *supra* note 28, § 8558.

### C. Expiration, Renewal, and Erosion of Commercial Rent Control

Although the legislature originally envisioned that the 1945 laws would expire in 1946, it reenacted them repeatedly until 1963, when it finally allowed the laws to expire.<sup>36</sup> Throughout this period, the legislature embarked upon a program of gradual decontrol by amending the laws generally in accordance with the recommendations of the New York Temporary State Commission, which was created in 1948 to study the rental sector.<sup>37</sup> Thus, what was originally a relatively strict system of commercial rent control was effectively weakened by the legislature's amendments.<sup>38</sup> In 1963, after a series of unsuccessful court challenges by landlords, the legislature allowed the two commercial rent control laws to expire.<sup>39</sup>

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36. See Keating, *supra* note 22, at 127-28.

37. See *id.* at 127-28.

38. Pursuant to the 1946 reenactment, newly-constructed commercial space was exempted. See ECSRCL, *supra* note 27, § 8535; EBSRCL, *supra* note 28, § 8564. In 1949, the legislature amended the laws to allow landlords to evict store tenants who failed to meet the terms of "matching" leases offered to prospective replacement tenants. See Keating, *supra* note 22, at 128-29. Landlords could evict tenants who did not match a noncancellable lease at an annual rent of \$7,500 for a term of ten years or more. See *id.* By 1960 the legislature reduced the threshold annual rent to \$2,500. ECSRCL, *supra* note 27, § 8528(k); EBSRCL, *supra* note 28, § 8558(k); see also Keating, *supra* note 22, at 128-29.

In 1950, the legislature allowed vacated units to be decontrolled. See ECSRCL, *supra* note 28, § 8533; EBSRCL, *supra* note 29, § 8562. Although these amendments spelled the eventual demise of commercial rent control, landlords were not satisfied because "misfit" tenants, tenants who refused to vacate unless landlords bought out their leases at a premium, threatened to obstruct the process of decontrol. See Keating, *supra* note 22, at 128. Another 1950 amendment aimed at preventing tenant windfalls and decontrol obstruction allowed landlords to require tenants subletting 20% or more of their space to pay to the landlord the net rent that they received from the subtenant. See ECSRCL, *supra* note 27, § 8524(4); EBSRCL, *supra* note 28, § 8554(4); see also Keating, *supra* note 22, at 129.

Sustained pressure from landlords persuaded the legislature to once again weaken the commercial rent control laws. See Keating, *supra* note 22, at 129. In 1952, the legislature added a space consolidation amendment which allowed landlords to evict store tenants without making a matching offer when the landlord intended to combine spaces into a single unit renting for \$10,000 or more annually. See ECSRCL, *supra* note 27, § 8528(kk); EBSRCL, *supra* note 28, § 8558(kk); see also Keating, *supra* note 22, at 129.

39. See *infra* notes 40-67 and accompanying text.

#### D. Constitutional Challenges to New York's Commercial Rent Control Laws

Immediately after the commercial rent control laws became effective,<sup>40</sup> litigants challenged their constitutionality.<sup>41</sup> No litigant, however, was ever successful in striking down the statutes.<sup>42</sup> Although the scope of their holdings is narrow, these cases are illustrative of the types of challenges that any commercial rent regulation system may expect to face. These cases are therefore of special significance to jurisdictions contemplating,<sup>43</sup> or currently subject to,<sup>44</sup> commercial rent regulation.

Although landlords mounted numerous challenges against New York's commercial rent control laws, a few leading cases are particularly important in terms of the grounds on which the statutes were challenged and the courts' reasoning in upholding the statutes.

##### 1. *Twentieth Century Associates, Inc. v. Waldman*

The first constitutional challenge to the ECSRCL was *Twentieth Century Associates, Inc. v. Waldman*.<sup>45</sup> In *Twentieth Century Associates*, a landlord challenged the statute on the grounds that it

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40. The ECSRCL was passed and became effective on January 24, 1945. The EBSRCL was passed and became effective on March 28, 1945.

41. See *infra* notes 45-63 and accompanying text.

42. See *id.*

43. Several major cities have considered commercial rent control: (1) New York City, see *infra* notes 70-151 and accompanying text; (2) San Francisco, see Keating, *supra* note 22, at 153; Telephone interview with San Francisco Supervisor W. Britt (Feb. 15, 1986) (recent hearings on need for commercial rent control in San Francisco proved inconclusive); and (3) Los Angeles, see Letter from D.H. Ford, City of Los Angeles Community Dev. Dep't Rent Stabilization Division to the Governmental Operations Committee on Commercial Tenant Protection (Nov. 18, 1983) (discussing status of commercial rent control in Los Angeles) (available in *Fordham Urban Law Journal* office).

44. Berkeley, California, is the only city in the United States that currently regulates commercial rents. See Keating, *supra* note 22, at 136.

45. 294 N.Y. 571, 63 N.E.2d 177 (1945), *appeal dismissed*, 326 U.S. 696 (1946) (landlord, who had executed lease prior to effective date of New York ECSRCL providing for rent increase in excess of emergency rent ceiling sued to recover entire amount of rent stipulated in signed lease). In *Court Square Bldg., Inc. v. City of New York*, 298 N.Y. 380, 83 N.E.2d 843, *cert. denied*, 337 U.S. 916 (1949), a similar challenge to the EBSRCL, the New York Court of Appeals summarily upheld the validity of the law relying on the rationale of the court in *Twentieth Century Assocs.*, 298 N.Y. at 385, 83 N.E.2d at 845.

violated the contracts clause,<sup>46</sup> the due process clause,<sup>47</sup> and the equal protection clause<sup>48</sup> of the United States Constitution. Deferring to the legislative determination that a public emergency existed in the commercial rental sector, the New York Court of Appeals based its decision on two distinct constitutional precepts: (1) the state's police power embraces the authority to impair existing leases when a public emergency arises; and (2) the ECSRL was a rational and valid exercise of the police powers by the legislature in response to the public emergency in the commercial rental sector.<sup>49</sup> Thus, the first constitutional challenge to the legislation failed.

## 2. *Finn v. 415 Fifth Avenue Co.*

The second major decision defining the constitutional parameters of the state's power to control commercial rents was *Finn v. 415 Fifth Avenue Co.*<sup>50</sup> In *Finn*, the United States Court of Appeals for the Second Circuit upheld the constitutionality of the ECSRL

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46. See U.S. CONST. art. I, § 10. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." *Id.*

47. See U.S. CONST. amend. XIV, § 1. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*

48. See U.S. CONST. amend. XIV, § 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

49. See *Twentieth Century Associates*, 294 N.Y. 571, 580, 63 N.E.2d 177, 179 (1945).

At the close of the last war a similar emergency arose in connection with housing conditions in New York City and a group of statutes were enacted to meet the crisis (L. 1920, chs. 136, 942-953). The validity of these laws was considered by this court and by the Supreme Court of the United States and they were sustained as validly enacted in the exercise of the police powers of the State, notwithstanding "the impairment of the obligation of the contract of the lessees to surrender possession" of the leased premises . . . .

The principle is firmly established today that all contracts are subject to the police power of the State, and, when emergency arises and the public welfare requires modification of private contractual obligations in the public interest, the question is not whether "legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end . . . ."

In light of the emergency which called into play the police powers of the State in this case, we are unable to say that the measures taken in the public interest were unreasonable or inappropriate to curb the evils arising from the emergency and to accomplish the public purposes declared in the statute.

*Id.*

50. 153 F.2d 501 (2d Cir.), *cert. denied*, 328 U.S. 839 (1946).

over a landlord's claim that the statute constituted a taking of property without due process of law in violation of the fourteenth amendment.<sup>51</sup> In so holding, the court, in an opinion by Judge Learned Hand, cited the New York Court of Appeals' decision in *Twentieth Century Associates* and the precedent the court relied upon in that case.<sup>52</sup> Once again, the law withstood a constitutional challenge.

### 3. Subsequent Challenges

Landlords persisted in challenging the constitutionality of the enactments each time the legislature renewed them. After the reenactment of the EBSRCL in 1955, a landlord challenged the constitutionality of the statute by arguing that the emergency that had originally legitimized the law as an exercise of the state police powers no longer existed.<sup>53</sup> Despite evidence<sup>54</sup> adduced by the landlord of a substantial increase in new office building space and an increased vacancy rate,<sup>55</sup> the New York Court of Appeals concluded that a rational basis existed for the legislative finding of an emergency that justified the renewal of rent controls on business space.<sup>56</sup> Thus, the court left open the possibility of a successful challenge to the statute on the same grounds as this appeal under circumstances in which a finding of an emergency would lack a rational basis.<sup>57</sup>

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51. See *Finn*, 153 F.2d at 503-504.

52. See *id.* at 504.

53. *Lincoln Bldg. Assocs. v. Barr*, 1 Misc. 2d 560, 149 N.Y.S.2d 460 (Sup. Ct. N.Y. County 1956), *aff'd*, 1 N.Y.2d 413, 135 N.E.2d 801, 153 N.Y.S.2d 633, *appeal dismissed*, 355 U.S. 12 (1957).

54. *Barr*, 1 N.Y.2d at 419, 135 N.E.2d at 805, 153 N.Y.S.2d at 638 ("[t]he evidence below followed the general pattern of that presented to the temporary commission at its afore-mentioned 1955 hearing preliminary to the re-enactment in question").

55. See *id.* at 418, 135 N.E.2d at 804, 153 N.Y.S.2d at 637.

56. *Id.* at 419, 135 N.E.2d at 805, 153 N.Y.S.2d at 639.

At most, then, landlord representatives by their own evidence at both this trial and before the legislative commission did no more than raise a conflict of testimony and opinion—a debatable question as to the existence of an emergency and the need for rent control as to office space. But the resolution of that question was properly for the legislature, and no court may substitute therefor its own evaluation of the weight of such conflicting proof. . . . Here . . . there is a rational basis for the legislative finding.

*Id.* at 419-20, 135 N.E.2d at 805-06, 153 N.Y.S.2d at 639.

57. See *id.* at 420, 135 N.E.2d at 806, 153 N.Y.S.2d at 639 ("[w]hether and for how long the Legislature may lawfully continue office rent control must, and shall, be a question open for future review").

The 1959 reenactment of the two laws prompted the same landlord to challenge the EBSRCL on a similar theory.<sup>58</sup> The trial court upheld the EBSRCL, and once again the New York Court of Appeals affirmed the decision.<sup>59</sup> The court found that the landlord had failed to carry his burden of proof<sup>60</sup> and that a rational basis for the statute still existed.<sup>61</sup> Although the majority claimed to uphold the controls on the ground that an emergency continued to exist, the opinion revealed that the court may have been more convinced of the need to remove the controls gradually than of the existence of any emergency.<sup>62</sup> Both the majority and one dissenting justice recognized that the economic situation in 1959 was quite dissimilar to that in 1945. Justice Burke, however, differed sharply from the majority over how this reality related to the question of the constitutionality of the statute.<sup>63</sup>

The legislature allowed both commercial rent control laws to expire in 1963.<sup>64</sup> Although the laws had withstood constitutional challenges, the influence of active landlord lobbying, the Temporary Committee's position against reenactment,<sup>65</sup> and warnings in judicial opinions against exercising police powers in the absence of a bona

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58. See *Lincoln Bldg. Assocs. v. Jame*, 8 N.Y.2d 179, 168 N.E.2d 528, 203 N.Y.S.2d 86 (1960).

59. See *id.* at 182, 168 N.E.2d at 530, 203 N.Y.S.2d at 88.

60. See *id.* at 181, 168 N.E.2d at 529, 203 N.Y.S.2d at 87 ("[t]he evidence presented by the landlord, as developed at the trial, served only to demonstrate that the intensity of the emergency which prevailed in 1955 (the period reviewed in the *Barr* case) has moderated to some extent, but not in substantial degree").

61. See *id.*

62. In the words of the court:

It is our opinion that such a process of gradual, rather than abrupt, cessation of controls, commensurate with the moderation in market conditions, effectuates a transition from controls to normal landlord-tenant relations in a rational and orderly manner, without economic disruption and dislocation. Such a program "designed to protect and promote the public health, safety and general welfare" is hardly capricious and arbitrary, or otherwise violative of constitutional guarantees.

*Id.* at 182, 168 N.E.2d at 530, 203 N.Y.S.2d at 88.

63. See Note, *Rent Control—Review of Emergency Commercial and Business Space Rent Control Laws—Gradual Cessation of Controls*, 7 N.Y.L.F. 81, 90 (1961) ("minority opinion maintained that since the original cause necessitating the acts had disappeared, the Legislature had no power to reenact the laws; whereas the majority contended that an emergency still existed in that the effect of a sudden halt of controls would be disastrous").

64. See Keating, *supra* note 22, at 128.

65. See *supra* note 37 and accompanying text.

fide public emergency<sup>66</sup> combined to persuade legislators to allow the laws to lapse.<sup>67</sup>

No group has ever conducted a systematic evaluation of New York City's commercial rent control system.<sup>68</sup> Nevertheless, commercial rent regulation laws and proposals are emerging once again in response to changes in the commercial rental sector in New York City.<sup>69</sup>

### III. Current Legislative Proposals to Regulate Commercial Rents in New York

Despite New York's unprecedented and extensive experience with commercial rent control, there are no such laws currently in force. Nonetheless, many New York politicians, their constituents, political action committees, and special interest groups are currently embroiled in a heated debate over whether to restore some sort of controls on commercial leases.<sup>70</sup> Two major proposals have emerged from the groups supporting commercial rent regulation.<sup>71</sup> The goal of these proposals is to provide greater protection for small businesses and to restore some bargaining power to commercial tenants in negotiating leases and rent increases.

#### A. Intro. 522: Rent Escalation Limitations and Automatic Right of Renewal

Citing: (1) allegedly exorbitant increases in rents paid by commercial tenants that provide essential goods and services to neighborhoods; and (2) the loss of employment and services of businesses already forced to close in revitalizing neighborhoods,<sup>72</sup> proponents of restoring commercial rent control in New York City introduced Intro. 522 into the New York City Council on February 4, 1986.<sup>73</sup>

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66. See *supra* notes 56-57, 62 and accompanying text.

67. See Keating, *supra* note 22, at 128.

68. See *id.* at 136.

69. See *infra* notes 72-151 and accompanying text.

70. Daniels, *Store Rent Control Is Debated*, N.Y. Times, May 25, 1983, at D21, col. 1.

71. See *infra* notes 72-146 and accompanying text.

72. See Messinger Statement, *supra* note 5, at 1 (statement of New York City Councilwoman Ruth Messinger, primary sponsor of Int. No. 658, highlighting proponents' arguments for commercial rent control).

73. The proposal for rent escalation limitations and a right of first refusal for commercial tenants, first introduced to the New York City Council on September

Unlike the commercial rent control system instituted in New York after World War II,<sup>74</sup> this proposal aimed to preserve "long established" neighborhood small businesses.<sup>75</sup> The proposed legislative findings declared that a public emergency exists as a result of a shortage of commercial space for rent.<sup>76</sup> The proposal further stated that the shortage has produced a distortion in relative bargaining power between landlords and tenants, allowing landlords to exact oppressive rents from tenants.<sup>77</sup> In turn, the neighborhoods that depend on these merchants for essential goods and services are threatened with the prospect of either paying exorbitant prices to purchase the goods or services or losing the availability of such goods and services in their neighborhoods altogether.<sup>78</sup>

If enacted, Intro. 522 would cover all of New York City, however, the scope of the bill's protections would be limited to small businesses situated on commercial premises.<sup>79</sup> Intro. 522 would limit annual rent increases on commercial leases, both at the time of

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27, 1983 as Int. No. 658, was sponsored by Council Member Ruth Messinger and several co-sponsors. See City of New York Int. No. 658 (Sept. 27, 1983) [hereinafter Intro. 658]. The bill was reintroduced subsequently as Int. No. 522 in 1986, and is currently before the City Council. See City of New York Int. No. 522 (Feb. 4, 1986) [hereinafter Intro. 522]. The City Council operates on a four year calendar. Telephone interview with Gail Brewer, Legislative Assistant to New York City Councilwoman Ruth Messinger (Feb. 23, 1987). Once a bill is introduced it may be enacted at anytime before the end of the four year period in which it was introduced. *Id.* Once the four year period ends, all unenacted bills must be reintroduced and renumbered before they can be enacted. *Id.* The New York State Legislature operates on a two year calendar. Telephone interview with New York State Assembly Information Office (Mar. 16, 1987). The proposed ordinance, Intro. 522, was originally entitled "Preservation of small businesses in an emergency situation through limitations on commercial rents." See Intro. 658, *supra*, at § 1.

74. See *supra* note 25-69 and accompanying text.

75. See *id.*; see also Keating, *supra* note 22, at 153.

76. Intro. 522, *supra* note 73, § 1.

77. See *id.*

78. See *id.*

79. Under the proposed ordinance, "commercial premises" means:

[P]remises occupied for non-residential purposes, including but not limited to retail stores, professional, services and other offices, and manufacturing, assembling or processing. Additionally, retail stores shall mean stores of ten thousand square feet or less occupying the street level or one floor above street level; professional, service or other offices shall mean such establishments which occupy premises of ten thousand square feet or less; manufacturing, assembling or processing premises shall mean such premises that occupy twenty-five thousand square feet or less.

*Id.* § 51-1.0(a).

renewal<sup>80</sup> and through escalation clauses,<sup>81</sup> to the lesser of ten percent<sup>82</sup> of the adjusted rent<sup>83</sup> or the prime mortgage interest rate plus three percent.<sup>84</sup> The proposal would prohibit landlords from passing along to tenants any increased costs of services or goods that would raise the rent above the amount specified by the Act.<sup>85</sup> The annual increase permitted under the proposed New York ordinance, however, would not limit rent adjustments to the pass through of certain increased costs.<sup>86</sup> Furthermore, the proposed ordinance would allow landlords automatically to pass along increases in real property taxes to tenants and to apportion the increased taxes among them according to the percentage of square feet of the entire building occupied by each tenant.<sup>87</sup> In cases where there has been no rent increase prior to the ordinance's effective date, the proposed ordinance would entitle the landlord to an adjustment of a percentage of the monthly rent.<sup>88</sup>

The proposed ordinance would also require landlords to offer tenants lease renewals for a minimum of seven years.<sup>89</sup> The tenants would have an option to lease for a term of shorter duration.<sup>90</sup> A landlord would enjoy a limited right to refuse to renew a lease if he intended to expand a business in which he owns a majority interest and has done so for at least four years.<sup>91</sup> The relevant provision further requires that this business be located either on the same property lot or within five hundred feet of the lot containing the commercial premises for a period of at least two years.<sup>92</sup>

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80. See *id.* § 51-2.0(a).

81. See *id.* § 51-2.0(b).

82. See *id.* § 51-2.0(a).

83. Intro. 522 defines "adjusted rent" as "the greater of the monthly rent of the premises at the expiration of the previous lease or the initial monthly rent of the previous lease plus five per centum of the initial monthly rent multiplied by the number of years less three of the term of the previous lease." *Id.* § 51-1.0(f).

84. *Id.* § 51-2.0(a). The latter part of the provision would only come into effect if the prime rate dropped below seven percent. See *id.*

85. *Id.* § 51-6.0.

86. A commercial landlord could increase rent by the percentage specified in the proposed ordinance as a matter of right. See *id.* § 51-2.0(a). Increases would not require justification by any increase in operating costs. See *id.*

87. See *id.* § 51-6.0.

88. See *id.* § 51-1.0(f).

89. See *id.* § 51-2.0(b).

90. See *id.*

91. See *id.* § 51-3.0(a).

92. See *id.*

Once a tenant vacates commercial premises, the unit would be decontrolled temporarily, allowing the landlord to set the rent at market levels.<sup>93</sup> Once a new commercial tenant signs a lease for the premises, the unit again would be subject to rent regulation.<sup>94</sup> The proposed ordinance would deny the privilege to a landlord when a tenant establishes that harassment by the landlord had caused him to vacate.<sup>95</sup> If an administrative agency or a court of law upholds such a claim by a former tenant, the landlord would be liable to the former tenant for damages of ten times the average of the proposed new lease's monthly rent or fifty thousand dollars, whichever would be greater.<sup>96</sup> Consequential and punitive damages would also be available upon such a finding.<sup>97</sup> The proposal further protects tenants by limiting security deposits to three month's rent.<sup>98</sup>

Intro. 522 would charge the Department of Housing Preservation and Development (HPD) with the responsibility of enforcing the provisions of the ordinance.<sup>99</sup> The HPD commissioner would be empowered to impose penalties upon landlords willfully violating any provision<sup>100</sup> and to grant hardship increases greater than the specified rate of return.<sup>101</sup> In addition, the measure would permit

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93. See *id.* § 51-2.0(e).

94. See *id.*

95. See *id.*

96. See *id.*

97. See *id.*

98. See *id.* § 51-2.0(f).

99. See *id.* § 51-4.0(a); *id.* § 51-1.0(c).

100. See *id.* § 51-4.0(a).

101. See *id.* § 51-8.0(a). Under the proposed ordinance, a rent sufficient to provide a reasonable rate of return comprises:

[T]he lesser of (1) a rent sufficient to provide for (i) the payment of the actual costs of operation and maintenance of such real property and of providing essential services to the occupants thereof and the actual amount of all real estate taxes, special assessments and water and sewer rents and charges to be paid with respect to such real property; (ii) the establishment of reasonable and necessary repairs so that a reasonable return on the capital value of the real property in which such commercial premises is located can provide for debt service and return on equity, which reasonable return shall [sic] be a percentage of the value of such real property determined equal to seven percent of the total assessed value for the tax year previous to that in which the application is made of such real property plus three percent of the assessed value for the tax year of the improvements included therein previous to that in which the application is made, or

(2) A rent which will yield a net annual return of three percent plus the

judicial review as part of the enforcement mechanism.<sup>102</sup> Since Intro. 522 was proposed as an emergency measure, the New York City Council would periodically review it.<sup>103</sup>

Proponents of commercial rent regulation introduced a virtually identical bill in the New York State Legislature in 1983.<sup>104</sup> Although the bill passed in the State Assembly Housing Committee by a wide margin, the bill was never reported out of the Assembly Ways and Means Committee.<sup>105</sup> Legislators supporting the proposed bill did not subsequently reintroduce it.

## **B. Bills Proposing a Tenant's Right of First Refusal and Binding Arbitration**

The most recent major initiatives to control rent increases on commercial property are bills that propose first to give landlords and tenants the opportunity to negotiate a new rent, and then, in cases in which no agreement is reached, to trigger a system of last offer binding arbitration to set the new rent. Although only one of the two arbitration proposals was pending in the state legislature and the New York City Council during the 1985-86 session, this Note will examine both proposals.

### *1. The Commercial Tenant Protection Act (CTPA)*

Legislators supporting rent regulation on commercial premises introduced the Commercial Tenant Protection Act (CTPA) in the

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prevailing annual rate interest charged by banks in the state of New York for new first mortgages on real property as determined by the superintendent of banks of the state of New York based on the cash payment received by the seller plus that amount paid by the landlord which is credited towards the principal owned [sic] by such owner to any mortgagee.

*Id.* § 51-8.0(b).

102. *See id.* § 51-9.0.

103. *See* Keating, *supra* note 22, at 158.

104. N.Y.S. 6594, N.Y.A. 6983, 207th Sess. (1984) [hereinafter N.Y.S. 6594, N.Y.A. 6983]. The bill proposed in the state legislature provided any local government the option of limiting commercial rent increases upon a finding by the local legislative body that an emergency exists. *See* Memorandum in Support of Legislation, Bill No. N.Y.S. 6594, N.Y.A. 6983 (available at *Fordham Urban Law Journal* office). Intro. 522 would cover only New York City. *See* Intro. 522, *supra* note 73, § 2. However, unlike Intro. 658, the previously proposed ordinance in New York City, N.Y.S. 6594, N.Y.A. 6983 only applies to businesses with fewer than 100 employees at the leasehold location. *See* Rothman, *Limit Business Rents*, N.Y. Times, Aug. 27, 1983, at A21, col. 2.

105. Schmuckler, *Bigger Clout for Small Business?*, City Business (undated) (available at *Fordham Urban Law Journal* office).

New York State Assembly on March 25, 1986,<sup>106</sup> and supporters in the New York City Council introduced a virtually identical version the following month.<sup>107</sup> In this Note, unless otherwise indicated, both bills are referred to collectively as the CTPA.<sup>108</sup>

The proposed legislative findings of the CTPA declare that pressures on the commercial rental market have engendered a shift in relative bargaining power in favor of the landlord at the expense of the tenant.<sup>109</sup> The findings attribute the closing of many small businesses, the threat posed to the viability of neighborhoods, and instability in the rental market to this imbalance.<sup>110</sup> The intent of the legislation is to restore parity to the relative bargaining power of landlords and commercial tenants.<sup>111</sup>

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106. N.Y.S. 5479-B, N.Y.A. 10174-B, 209th Sess. (1986) [hereinafter N.Y.S. 5479-B, N.Y.A. 10174-B]. The proposal was originally presented to the Legislature in 1985. See N.Y.A. 6913, 208th Sess. (1985) [hereinafter N.Y.A. 6913]. After failing to win enough support, legislators reintroduced the bill in 1986 as N.Y.S. 5479-B, N.Y.A. 10174-B. The bill, entitled the "Commercial Tenant Protection Act" (CTPA), will be referred to accordingly in this Note. See *id.* Initially, the bill was entitled the "Small Business Preservation Act" (SBPA). See N.Y.A. 6913. Despite the change in title, the substantive provisions of the proposed law are generally the same. Compare N.Y.S. 5479-B, N.Y.A. 10174-B with N.Y.A. 6913.

107. See City of New York Int. No. 581 (Apr. 10, 1986) [hereinafter Intro. 581]. In 1985, New York City Council Member Abraham Gerges was the primary sponsor of City of New York Int. No. 988, a bill that proposed a similar plan of right of first refusal and last offer binding arbitration. City of New York Int. No. 988 (June 21, 1985) [hereinafter Intro. 988]. When Intro. 988 was not enacted, two of its sponsors in the City Council became co-sponsors of Intro. 581, which is broader and does not require a landlord to secure a prospective new commercial tenant before the sitting tenant exercises its right of first refusal. Compare Intro. 581, § 26-804(d)(2) with Intro. No. 988, § 51-3.0(3).

108. There are three main differences between the bills. First, the Assembly bill is enabling legislation which would provide local governments with the powers described in it upon a finding of an emergency, whereas the City Council bill would grant the described powers, indicating in the Legislative Findings that an emergency presently exists. Compare N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 282 with Intro. 581, *supra* note 107 Section one. Second, unlike the bill in the state legislature, the City Council bill includes a provision requiring the establishment of review periods to consider rent adjustments in longer term leases. See Intro. 581, *supra* note 107, § 26-806. Third, while the City Council bill covers all "commercial premises," the Assembly bill is more narrowly constructed to include only those "commercial premises" under ten thousand square feet. Compare N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 284(1) with Intro. 581, *supra* note 107, § 26-802(a).

109. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 282; Intro. 581, *supra* note 107, Section one.

110. See *supra* note 109.

111. See *id.*

The bill would seek to achieve its objective by establishing specific rules and procedures that landlords must observe both in refusing to renew leases and in renewing leases and setting new rents. The CTPA would grant commercial tenants a qualified right of lease renewal for a minimum of five years, however, the tenant could opt for a lease of shorter duration.<sup>112</sup> The tenant's renewal right is qualified by the landlord's right to refuse to renew with proof of one or more of the grounds prescribed in the statute.<sup>113</sup> If the sole reason the landlord refuses to renew is that he either intends to demolish the space or intends to carry on his own business at the location, the tenant is then entitled to compensation.<sup>114</sup> In the event that the lease contains no provisions for compensation, arbitrators will determine fair compensation.<sup>115</sup>

If the landlord wishes to refuse renewal of a commercial tenant's lease, the landlord must notify the tenant at least 240 days prior to the expiration of the lease, stating in detail the reasons for the

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112. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(1); Intro. 581, *supra* note 107, § 26-804(a).

113. The landlord may refuse to renew a commercial lease with proof of one or more of the following grounds: (1) the tenant's failure to maintain the property; (2) consistently late payment of rent provided the landlord has served at least three prior notices during the life of the lease and each notice of late payment was occasioned by two weeks tardiness to justify the notice; (3) breach of obligations of the lease; (4) conduct which contributes any form of illegal activity on the premises; (5) use of the space for reasons other than those set forth in the lease; (6) nuisance, discomfort or safety hazards to other tenants caused by the tenant being denied lease renewal; (7) the landlord's intent to demolish the space; (8) the landlord's intent to carry on his own business at the location; and (9) the tenant sublets the space without notifying the landlord. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(1)(a)-(i); Intro. 581, *supra* note 107, § 26-804(a)(1)-(9).

In order for the landlord to deny renewal by demolishing the space or carrying on his own business at the location, he must have been the landlord of record for at least three years prior to the termination date. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(1)(f), (g); Intro. 581, *supra* note 107, § 26-804(a)(6), (a)(7).

Unlike the City Council bill, the Assembly bill allows a landlord to terminate a lease without giving a reason for nonrenewal provided that the landlord satisfy certain conditions: (1) that the tenant be notified at least 240 days prior to expiration of the lease; and (2) that the tenant be compensated in an amount equaling three months rent for each year the tenant has been in possession of the premises, using the last month's rent of the last year of the lease to calculate the amount due. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(1)(j).

114. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(2); Intro. 581, *supra* note 107, § 26-803(b).

115. See *supra* note 114.

decision.<sup>116</sup> The tenant is free to challenge the validity of the landlord's refusal within twenty-one days after receiving the notice.<sup>117</sup> The parties must then submit all relevant documentation and evidence<sup>118</sup> to an arbitration panel,<sup>119</sup> which will notify both parties of its decision within twenty-one days of the hearing.<sup>120</sup> The panel's decision would be final and binding upon both parties.<sup>121</sup>

In the event that the landlord is willing to renegotiate a lease agreement, he must notify the tenant of his willingness at least 180 days prior to the expiration of the lease.<sup>122</sup> The negotiation period extends for 180 days, starting on the date of the first physical meeting of the parties, not on the date of notification.<sup>123</sup> If the period runs beyond the expiration date of the old lease, the tenant

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116. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(3)(a); Intro. 581, *supra* note 107, § 26-804(c)(1).

117. See *supra* note 116.

118. See *id.* "The landlord and tenant will each be given no more than one day to present their case. They shall be allowed to present testimony, witnesses, pictures, videos, documents and any other relevant data. Every party shall be allowed to confront and cross-examine adverse witnesses." Intro. 581, *supra* note 107, § 26-804(c)(2); see N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(3)(b). The arbitrators, however, are not to rely solely on the tenant to ensure the accuracy of the documentation. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(3)(a); Intro. 581, *supra* note 107, § 26-804(c)(1). Thus, they must decide, *inter alia*, whether to inspect the space or hire expert consultants such as a real estate accountant to check for data manipulation. See *id.*; N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(3)(a).

119. The arbitration panel shall consist of one to three members, the number and specific arbitrators to be determined by the parties or by the arbitration company in the event that the landlord and tenant cannot agree. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(3)(b); Intro. 581, *supra* note 107, § 26-804(c)(2).

120. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(3)(b); Intro. 581, *supra* note 107, § 26-804(c)(2). If the landlord prevails, then the tenant will have until the end of the current lease to vacate. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(3)(b); Intro. 581, *supra* note 107, § 26-804(c)(2). If the panel decides in favor of the tenant, then the landlord must notify the tenant within one hundred and eighty days prior to the expiration of the lease that the landlord is prepared to renegotiate the lease with the tenant. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(3)(b); Intro. 581, *supra* note 107, § 26-804(c)(2).

121. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(3)(b); Intro. 581, *supra* note 107, § 26-804(c)(2).

122. The CTPA provides that a landlord of commercial premises must notify tenants in writing no later than 180 days prior to the expiration of the lease to indicate his willingness to renegotiate the lease agreement. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(a); Intro. 581, *supra* note 107, § 26-804(d)(1).

123. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(a); Intro. 581, *supra* note 107, § 26-804(d)(1).

continues to pay rent at the old rate until the parties reach an agreement or the arbitration panel renders a decision.<sup>124</sup>

If after the first ninety days of the 180-day period the parties do not reach an agreement, the landlord may request a hearing before the local arbitration panel.<sup>125</sup> The landlord and the tenant shall each submit the exact rental figure each party believes to be a fair rent for the commercial space in dispute.<sup>126</sup> In addition, the parties must furnish the panel as well as one another with all documentary evidence supporting their cases.<sup>127</sup> Each party may defend his rent figure before the panel for one day.<sup>128</sup>

The arbitration panel will choose either the landlord's or the tenant's rent figure<sup>129</sup>—there will be no compromise figure.<sup>130</sup> The proposed law vests the panel with broad discretion in formulating the criteria relied upon in deciding the most equitable rent of the two figures proposed<sup>131</sup> and requires the panel to give due consideration to several criteria set forth in the statute.<sup>132</sup>

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124. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(a); Intro. 581, *supra* note 107, § 26-804(d)(1).

125. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(a); Intro. 581, *supra* note 107, § 26-804(d)(1).

126. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(a); Intro. 581, *supra* note 107, § 26-804(d)(1).

127. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(a); Intro. 581, *supra* note 107, § 26-804(d)(1). Documentary evidence may include, but would not be limited to, bills, leases, cancelled checks, receipts, agreements, and premises' purchase price, maintenance and operating costs, mortgage and tax documents. See *id.* If any of the information supplied to the panel in supporting documentation proves to be false, inaccurate or misleading, then the panel must rule in favor of the opposing party even before the hearings. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(a); Intro. 581, *supra* note 107, § 26-804(d)(1). All evidence submitted is subject to verification and investigation by the panel or hired experts. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(a); Intro. 581, *supra* note 107, § 26-804(d)(1).

128. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(b); Intro. 581, *supra* note 107, § 26-804(d)(2). In addition, the landlord and tenant may defend their respective rent figures through the use of various forms of documentation, including charts, pictures, witnesses and videos to help express their point of view. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(b); Intro. 581, *supra* note 107, § 26-804(d)(2). The CTPA would permit the confrontation and cross-examination of adverse witnesses. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(b); Intro. 581, *supra* note 107, § 26-804(d)(2).

129. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(a); Intro. 581, *supra* note 107, § 26-804(d)(1).

130. See *supra* note 129.

131. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(b); Intro. 581, *supra* note 107, § 26-804(d)(2).

The panel must notify the parties of its decision within twenty-one days after the hearing.<sup>133</sup> If the panel decides in favor of the landlord, the tenant has the "right of first refusal" to remain in possession at the new rent rate.<sup>134</sup> If the tenant declines to renew at that rent, he has ninety days from the date notice is received to vacate the premises.<sup>135</sup> Alternatively, if the panel decides in favor of the landlord and the tenant declines to exercise the right of first refusal, the parties may negotiate a settlement for a term of less than five years and for an amount different from that set by the arbitrators, provided the Arbitration Board receives a written copy of the special agreement.<sup>136</sup>

The CTPA also establishes certain other rights and protections for both landlords and tenants. The Act provides that security deposits cannot exceed an amount equal to three month's rent and that a landlord place all security deposits in interest-bearing accounts.<sup>137</sup> In any case in which a landlord retaliates against a tenant for the tenant's assertion or exercise of any right under the Act, the landlord may be liable for actual and punitive damages, injunctive relief, and attorney's fees.<sup>138</sup> The CTPA guarantees to tenants the right to assign their lease to the purchaser of the tenant's

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132. See *supra* note 131. The criteria set forth in N.Y.S. 5479-B, N.Y.A. 10174-B and Intro. 581 include: (1) cost of maintenance and operation of the space; (2) location of the space; (3) character of the location, and the character of the stores in the location; (4) size of the space; (5) kind, quality, and quantity of services furnished; (6) the condition of the space; (7) current interest rate on bank deposits and U.S. government bonds; (8) the current inflation rate and the individual components of the inflation index; (9) the lease history; and (10) capital improvements made by the tenant. *Id.* Furthermore, the "panel shall consider that each commercial tenant and landlord relationship is unique and should be dealt with as such." N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(b); see also Intro. 581, *supra* note 107, § 26-804(d)(2).

133. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 287(4)(b); Intro. 581, *supra* note 107, § 26-804(d)(2).

134. See *supra* note 133.

135. See *supra* note 133.

136. See *supra* note 133.

137. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 289; Intro. 581, *supra* note 107, § 26-807. Interest received from such amounts shall be paid at least annually to tenants, less one percent to cover a landlord's administrative costs. See *id.*; N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 289.

138. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 289-c; Intro. 581, *supra* note 107, § 26-810. In addition to any remedy awarded to a tenant against a landlord by a court, any proven retaliation will be cause for the arbitration panel to rule in favor of the tenant if a hearing is in progress. See *id.*; N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 289-c.

business, provided the purchaser can comply with the terms of the lease and that the landlord can be paid for any necessary and reasonable expenses caused by the assignment.<sup>139</sup> The Act prohibits lease provisions for increases that pass along costs that raise the rent above the agreed upon base rent.<sup>140</sup>

Landlords, however, may increase rent charged above the base rent in either of two instances: (1) when the local government has raised real property taxes on the premises, in which case the landlord may apportion the increase among the commercial tenants according to the percentage of the total square footage that each tenant occupies;<sup>141</sup> and (2) when the landlord has successfully petitioned the arbitration panel to pass along the cost of completed capital improvements that will directly benefit the tenant.<sup>142</sup> Although a landlord may waive any of his rights granted by the CTPA, the CTPA declares invalid any provision in a lease that waives or diminishes any right of a tenant.<sup>143</sup>

The CTPA would be applied prospectively,<sup>144</sup> and as emergency legislation, would be subject to annual evaluation by an arbitration company<sup>145</sup> in a report to the legislative body enacting it.<sup>146</sup>

### C. Intro. 1017: Moratorium on Rent Increases

Intro. 1017 introduced into the New York City Council on September 12, 1985, seeks to freeze rents on the effective date of the ordinance and to place a moratorium on rent increases on com-

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139. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 289-d; Intro. 581, *supra* note 107, § 26-811.

140. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 289-a; Intro. 581, *supra* note 107, § 26-808.

141. See *supra* note 140.

142. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 289-b; Intro. 581, *supra* note 107, § 26-809.

143. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 289-e; Intro. 581, *supra* note 107, § 26-812.

144. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 2; Intro. 581, *supra* note 107, § 3.

145. An independent private company which specializes in arbitration would administer the arbitration program created pursuant to the CTPA. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 288; Intro. 581, *supra* note 107, § 26-805. The local government or appropriate government agency would enter into and make an annual review of the contract with the company before renewal. N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 288; Intro. 581, *supra* note 107, § 26-805.

146. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 289-g; Intro. 581, *supra* note 107, § 26-814.

mercial premises.<sup>147</sup> The moratorium would continue for eighteen months or until the Council repeals the ordinance or imposes a system of commercial rent regulation, whichever is sooner.<sup>148</sup> The proposed ordinance prescribes penalties for its violation<sup>149</sup> and permits increases in rent only for a share of increased property taxes in proportion to square footage of the entire premises that each tenant occupies.<sup>150</sup> Proponents of the proposed ordinance do not consider it a long-term solution to the problems associated with commercial rents. Instead, the proposed measure seeks to prevent any harm that might befall small businesses before legislators can enact protective legislation.<sup>151</sup>

#### IV. The Inadvisability of Legislated Commercial Rent Regulation Systems

The wisdom of imposing any commercial rent regulation system rests not on its ability to withstand constitutional challenges<sup>152</sup> in

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147. City of New York Intro. No. 1017, § 51-2.0(a) (Sept. 12, 1985) [hereinafter Intro. 1017]. Section 51-1.0(a) of Intro. 1017 contains the same definition of "commercial premises" as does Intro. 522, § 51-1.0(a). For this definition, see *supra* note 79.

148. Intro. 1017, *supra* note 146, § 51-2.0(a).

149. *Id.* § 51-2.0(c).

150. *Id.* § 51-3.0(a).

151. *Id.* § 1.

152. The grounds of such claims have included taking without just compensation, impairment of contracts, the denial of equal protection, and the violation of federal antitrust laws. See Keating, *supra* note 22, at 161-78. For a discussion on why contract clause claims, equal protection clause claims and other challenges have failed in the past and signal no significant change in the future; see *id.* A recent Supreme Court decision on a Berkeley, California, residential rent control ordinance indicates that an antitrust challenge to commercial rent control as constituting unlawful price fixing will fail. In *Fisher v. City of Berkeley*, 106 S. Ct. 1045 (1986), challengers of Berkeley's residential rent control ordinance sought to invalidate the ordinance on the grounds that it was not covered by the state action exemption under which municipal governments are granted an implied exemption from the coverage of federal antitrust laws, since there was no state policy authorizing the regulations. See 106 S. Ct. at 1048. The Court held that the local rent control ordinance did not constitute concerted action within the meaning of section one of the Sherman Antitrust Act. See *id.* at 1049-50. Thus, regardless of any state action exemption, the ordinance did not violate the Sherman Antitrust Act. See *id.* at 1051. Section one of the Sherman Antitrust Act prohibits only concerted actions or conspiracies in restraint of trade between separate entities, see *id.* at 1051, not restraints "unilaterally imposed on the landlords by the city" to the exclusion of private control. *Id.* at 1051. "A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." *Id.*

the courtroom but rather, on the underlying policy issues. Although neighborhood stability, adequate provision of basic goods and services to communities, and the preservation of small businesses are valid concerns that must be addressed, legislators must resist the temptation to enact commercial rent regulations as a panacea for the many social and economic ills faced by urban neighborhoods. The problems demand a more sophisticated approach involving programs more narrowly tailored to particular community needs; moreover, in the long run, commercial rent regulations will only exacerbate several problems faced by many cities today. These problems include: (1) physical degradation of the commercial property stock; (2) stunting of economic growth; and (3) fundamental unfairness to landlords.

### A. Physical Degradation

Imposing commercial rent controls will lead to disinvestment<sup>153</sup> and overall physical degradation of commercial properties.<sup>154</sup> When

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at 1049-50.

The Court's opinion in *Fisher* effectively blunts antitrust attacks on commercial rent controls. "The net effect is to remove the antitrust laws as a significant source of restraint on a panoply of state and local government regulatory activity." "Strict Rent Control Upheld," N.Y. Times, Feb. 27, 1986, at B11, col. 2. At the present time, the only way to invalidate commercial rent controls on antitrust grounds is to show that a government regulatory power, see 106 S. Ct. at 1050, or that a government-administered price stabilization scheme, is really a "private price-fixing conspiracy, concealed under a 'gauzy cloak of state involvement.'" *Id.* at 1051. Neither possibility seems to pose a great threat to commercial rent control programs that are carefully constructed and executed.

153. To understand why disinvestment in the commercial property sector occurs, one must examine investor expectations and how rent controls would affect the value of an investment in rental property. When an investor purchases a commercial property his investment has two components: (1) the current value of the underlying asset with its potential to appreciate, here called the capital value; and (2) the current rate of return on the property, usually expressed as a percentage of the market value of the asset. See W. KLEIN, BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 208 (1980) [hereinafter KLEIN]. In a free market, the capital value and the current return are directly proportionate, *i.e.*, as one increases or decreases the other must follow in the same direction. Thus, if rent controls artificially restrain the current return, *i.e.*, the stream of rental payments, the capital value of the property will also be depressed.

To illustrate, suppose that a building produces net income of \$8,000, after all expenses and after making proper allowance for replacement. In addition, assume that the appropriate rate of return on such investments is 10%. The formula for determining capital value is  $P = A/r$ , where  $P$  is the capital value,  $A$  is the level annual amount or current return, and  $r$  is the rate of return. See KLEIN, *supra*,

taxes, in tandem with property values and mortgage obligations,

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at 208-09. Applying the given values, the capital value would be \$80,000, determined as follows:  $P = A/r = \$8,000/.10 = \$80,000$ . However, if expected net income were \$5,000, the capital value would be only \$50,000 ( $\$5,000/.10$ ). By limiting the current return ( $A$ ) as rent controls would, capital value would be depressed. Thus, if an investor knows that his investment will yield \$8,000 per annum and that the appropriate interest rate on such investments is 10%, the investor can ask himself what amount would he be required to invest in order to produce that income at that interest rate. The answer is \$80,000, since at 10%, \$80,000 will yield \$8,000 per annum. *See id.* Thus, if there is a different investment vehicle with approximately the same risk in which one could invest a lesser amount and earn the same income or invest the same amount and earn more income, the rational investor would move his money into these more lucrative investment vehicles. *See id.* In the case of commercial rental property, capping the current return would not only deprive the owner of some net income that the property would generate in a free market but would also decrease the capital value of the property. In essence, if he wanted to sell the property he would be forced to sell it for less assuming other investment opportunities with higher rates of return existed. As values adjusted to reflect the artificially limited yield of an investment in commercial rental property, existing commercial property owners would be forced to bear the cost of this shift in terms of the loss of capital value. Thus, it follows that disinvestment in the commercial rental property sector, that is, the lack of new construction and renovation of old buildings, would occur since the capital outlay required to construct or renovate a building is substantial and could be placed in a higher yielding investment opportunity of comparable risk. A particular mutual fund could conceivably yield the same return as a building in New York City yet the capital outlay for the construction or renovation of a building would likely greatly exceed the cost of shares in a mutual fund. Even if an investor desired to invest in constructing or renovating commercial rental property, he could do so in some city other than New York City where his current return would not be restrained by commercial rent controls.

Arguably, one of the proposed bills to control rent increases in New York City, Intro. 522, *supra* notes 72-105 and accompanying text, would only limit increases on retail tenants occupying up to 10,000 square feet of space and manufacturing tenants occupying up to 25,000 square feet of space and consequently, would not affect rents charged on commercial properties designed for tenants occupying larger spaces. *See supra* note 79 and accompanying text. However, one commentator's analysis of rent control in the residential rental sector in New York City indicates a different conclusion. *See Olsen, An Econometric Analysis of Rent Control*, 80 J. POL. ECON. 1081 (1972). The commentator asserted that the cost of producing housing service in the uncontrolled market is quite likely higher than it would have been had rent control been terminated in New York City shortly after the Second World War. *See id.* at 1098. The existence of rent control in New York City probably causes owners of uncontrolled rental housing to be sensitive to the possibility of changes in the rent control law that would inflict capital losses on them. For example, in 1969, a limited form of rent control was extended to over half of the then-uncontrolled residential rental stock. Unlike other housing markets where rent control terminated fifteen to twenty years earlier and landlords most likely do not consider the imposition of rent control very probable, it is reasonable to expect that investors in rental housing in New York City will demand and receive a higher-risk premium. *See id.* "If this argument is correct . . . the long-run supply

rise more rapidly than rents, the cash flow available for physical maintenance decreases.<sup>155</sup> A continuing rise in property values, with resulting potential capital gains, will act as an incentive for increased expenditures by a landlord on maintenance and capital improvements in order to preserve and enhance the value of his investment.<sup>156</sup> When property values level off the landlord will increase expenditures on maintenance and capital improvements only insofar as they will allow him to command higher rents.<sup>157</sup>

Placing an artificial ceiling on rents that a landlord may charge for a commercial space eliminates incentive to maintain and improve the property and limits or reduces the landlord's net operating income.<sup>158</sup> The only means for a landlord to increase his net op-

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price of housing service in the uncontrolled market in 1968 was greater than it would have been had rent control never gone into effect in New York City. This implies that the occupants of uncontrolled housing were worse off than they would have been in the absence of rent control." *Id.* Logically, if part of the commercial rental sector were subject to rent control, the owners would be sensitive to the possible legislative caprice of extending rent controls to include their property and would reflect this fear in their demand for a high-risk premium. *See id.* Therefore, partial control of the commercial rental sector would place upward pressure on prices charged on uncontrolled properties in addition to upward pressure on rents created by heightened competition among merchants for space as a result of commercial tenants' reluctance to move out of controlled premises. *See infra* note 179 and accompanying text.

154. "While it may be possible to establish the rent that would be charged for a given unit of space, it is virtually impossible to regulate the quality of space. Rent regulation will encourage disinvestment leading to substantial deterioration of the city's commercial building stock." Charaton-Berger, *Real Estate Community Must Act to Defeat Commercial Rent Control*, *Real Estate Today* (undated) (emphasis added) (available at *Fordham Urban Law Journal* office).

155. Baar, *Guidelines For Drafting Rent Control Laws: Lessons of a Decade*, 35 RUTGERS L. REV. 723, 739 (1983) [hereinafter Baar].

156. *See id.* ("[a]s long as values continue to rise, potential capital gains may provide an incentive for increases in maintenance and capital improvements").

157. *See id.* ("[w]hen values reach a plateau only cash flow incentives for maintenance remain").

158. One commentator stated:

The impact of reductions in net operating income and value resulting from stringent rent restrictions may differ from that of market-induced reductions in net operating income. Often the rent-controlled reductions in income are accompanied by increased rather than decreased tenant stability. However, they too lead to a reduction in funds available for maintenance, and reduce the certainty that is required to induce long-term maintenance.

*Id.*; *see also* PRIVATE REINVESTMENT, *supra* note 8, at 122 ("reinvestment disincentives created by commercial rent control could seriously hinder the improvement of retail areas in need of revitalization. . . . If rent control eliminated the possibility of future returns to offset the risks, needed improvements to such commercial streets would not be made by private investors").

erating income, in fact, is to reduce expenditures on maintenance and capital improvements.<sup>159</sup> Thus, the commercial property will physically deteriorate. A common sense view of the situation indicates that in many situations a landlord's interest in at least protecting an investment in commercial property without enhancing it will probably not be as great as his interest in maintaining or increasing net operating income. Additionally, in tight commercial property markets, such as New York City,<sup>160</sup> the incentive to protect one's investment through maintenance and improvements will be further weakened by the fact that a tenant will often be willing to rent the property regardless of its condition.<sup>161</sup>

Ultimately, the ill effects of rent control will touch tenants, landlords, and city residents. Commercial tenants will be trapped in buildings that are caught in a pattern of irreversible physical deterioration. The city's ability to attract new businesses to increase employment and the tax rolls will be hampered since it will be unable to offer an attractive commercial property stock.<sup>162</sup> The

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159. See *supra* note 157.

160. See *The New York Recovery: Can It Be Sustained?*, N.Y. Times, Oct. 13, 1985, § 12, at 12, col. 4 (given that vacancy rate in New York City has hovered near 2% for decades, "[i]f the region continues to generate new housing at its current rate, the Regional Plan Association predicts, it will supply only 1.3 million of the 2.7 million new dwelling units the economy will need"); see also *infra* note 164.

161. Baar, *supra* note 155, at 739. Under certain types of rent control programs, the trend of physical degradation of the commercial property would accelerate even more. For example, under one of the plans offered to legislators in New York to control commercial rents, a landlord may pass along the costs of capital improvements to tenants only after showing a panel established by the ordinance that the tenant will directly benefit from the improvement. See N.Y.S. 5479-B, N.Y.A. 10174-B, *supra* note 106, § 289-b; Intro. 581, *supra* note 107, § 26-809. This plan would discourage landlords from engaging in certain capital improvements that are necessary to preserve the physical plant yet do not necessarily benefit any single tenant directly. For instance, sandblasting may be necessary to protect the facade of a building from corrosive agents; however, no single tenant may be said to benefit directly from the process.

162. For example, the Upper West Side of Manhattan from 70th Street to 86th Street is an area generally agreed to be flourishing economically and growing in popularity as a result of extensive reinvestment activity between 1970 and 1980. PRIVATE REINVESTMENT, *supra* note 8, at i. "Between 1977 and 1982, the city's real property tax bill for the stretch of Columbus Avenue [on the Upper West Side] between 63rd Street and 86th Street increased from \$2,319,000 to \$3,824,400." *Testimony on Commercial Rent Control Before The City Council on Economic Development* 4 (Feb. 28, 1984) (statement presented for The Real Estate Board of New York, Inc.). One real estate professional has observed that the additional \$1,505,400 in revenue pays for a great deal of police protection and sanitation service. See *id.*

property owner will suffer decline in the value of his investment<sup>163</sup> as the property deteriorates,<sup>164</sup> with the result that he may eventually abandon it altogether.<sup>165</sup>

## B. Stunting Economic Growth and Desired Change

Although commercial rent regulation would allow merchants and businessmen with longstanding ties to neighborhoods to remain in business in the particular location without the fear of being driven out by large rent increases, the regulations would breed economic distortions. As the complexion of a neighborhood changes in terms of age, ethnicity, affluence, and other factors, local commercial areas must adapt to the changing tastes and demands or risk losing their customers to other areas that are more responsive.<sup>166</sup>

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163. See *infra* note 152.

164. See *infra* notes 153-58 and accompanying text.

165. The experience of New York City in the rent-controlled residential sector demonstrates how the landlord's plight becomes the city's plight. From 1978 to 1981 housing abandonment contributed heavily to New York's loss of an estimated 81,000 units. See PRIVATE REINVESTMENT, *supra* note 8, at 125.

166. The Small Retail Business Study Commission recognized that "[t]he maintenance of viable patterns of neighborhood life assumes reasonably convenient access of residents to establishments which sell regularly used and frequently purchased goods and services." INTERIM REPORT, *supra* note 11, at II-1. The Commission further observed that 83.5% of all purchases in convenience goods stores within New York City are made in residential neighborhoods, as opposed to in central business districts or major retail centers. See *id.*

Imposing commercial rent controls threatens to deprive residents of easy access to desired goods and services by impeding this natural change in the types of services offered when the population of the neighborhood changes. See *Prospects for Commercial Rent Control in New York: Testimony Before the Economic Development Committee of the New York City Council* 5 (June 27, 1985) (statement by Gerard C. S. Mildner, Manhattan Institute for Policy Research) [hereinafter Mildner]. New York City has, in the past, witnessed changes in the types of businesses that serve an area as the consumer demands of neighborhood residents change through migration or aging. See *id.* For example, the change in the population of the Upper West Side has been accompanied by the opening of new businesses such as restaurants, boutiques and specialty stores that cater to the young and the affluent. See *id.* Similarly, the influx of population to Flushing has been followed by the appearance of more Korean restaurants and grocery stores. As Jackson Heights in Queens has become more Hispanic, more Spanish cuisine restaurants and bodegas have opened. See *id.* Thus, while rent control might help prolong the operation of some businesses, it might do so at the expense of an area's economic evolution and growth. See *id.*

In fact, in the commercial rental sector, in which no rent controls currently exist, accessibility of everyday retail goods and services does not appear to be a significant problem. See FINAL REPORT, *supra* note 14, at II-15. The Shopper Survey conducted for the Commission revealed that nine out of ten shoppers typically used neigh-

In turn, impeding change in the types of goods and services offered in an area deprives neighborhood residents of the easy accessibility to the goods and services that they most desire.<sup>167</sup> The free market has not always produced easy accessibility to the perfect mix of retail services for a neighborhood;<sup>168</sup> yet there is no guarantee that commercial rent controls would succeed where the free market has failed. Businesses frequently close or relocate for reasons unrelated to rent levels.<sup>169</sup> If a business closed in a neighborhood, commercial rent control would provide no assurance that economic forces would find a similar business to replace it.<sup>170</sup> Other factors,

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neighborhood stores, whether the shopping trips entailed perishable or bulky goods, small grocery stores or large supermarkets, cleaners or stationery stores. *See id.* For shoppers who reported shopping at times outside their own neighborhoods for everyday items, only 18% cited lower prices. *See id.* This relatively low figure is further diluted by the fact that the survey permitted respondents to supply multiple reasons. *See id.* Among other reasons given for shopping outside one's own neighborhood, 42% cited proximity to the workplace, 28% cited variety, and 20% cited better quality of goods. *See id.*

167. "For New York City as a whole, recent trends—in jobs, sales and the number of establishments—demonstrate the overall vitality of the City's retail trade sector. These citywide data, however, mask disparities among boroughs and neighborhoods in the quantity and mix of retail services available to local residents." INTERIM REPORT, *supra* note 11, at I-3.

168. *See* PRIVATE REINVESTMENT, *supra* note 8, at 121-22.

169. *See id.* at 121. "Each year, thousands of businessmen fail in their enterprise, and instinctively, these businessmen see high costs, particularly high rents, as causing their problems. In many instances, the businessman's own lack of marketing and business skills has caused his failure." Mildner, *supra* note 166, at 1.

Merchants themselves concede other factors in selling or going out of business. Of the 1,188 neighborhood merchants surveyed by the New York City Small Retail Business Study Commission, *see* FINAL REPORT, *supra* note 14, at II-2, 29% of the total neighborhood merchant sample, 31% of the renters, had leases due to expire in 1986, 1987 or 1988. *See id.* at II-9 to II-10. Of these, 9% expected to sell or go out of business. *See id.* at II-10. Merchants who did not expect to renew their current leases were able to offer multiple reasons. *See id.* at II-11. Of those who expected to sell or go out of business, 49% cited reasons other than or in addition to rent or landlord refusal to renew. *See id.* Among the reasons cited were "will need more space," "business is bad," and "owner retiring." *Id.*

170. PRIVATE REINVESTMENT, *supra* note 8, at 121-22. The Commission's Shopper Survey found that about half of the respondents reported that one or more stores they patronized in their neighborhoods had gone out of business during the past two years. *See id.* However, of these businesses over three quarters indicated that they had found replacements within their neighborhoods. *See* FINAL REPORT, *supra* note 14, at II-15. Undoubtedly, some neighborhood residents were forced to patronize certain businesses that they had chosen not to use previously; nevertheless, only 13% felt that the turnover had reduced the variety of available products. *See id.* at II-16. Seventy-eight percent of the shoppers surveyed felt that the new stores had left the variety of retail products available unchanged (44%) or improved

such as the overall change in societal demand for a particular service, affect the mix of goods and services in an area.<sup>171</sup> Furthermore, commercial rent regulations are geared in part toward stabilizing the cost of goods and services by reducing the need to pass along increased operating costs to consumers.<sup>172</sup> Notwithstanding that intention, commercial rent regulation provides no mechanism to control prices charged by businesses.<sup>173</sup> In fact, in some situations commercial rent controls would serve to drive prices of goods and services upward.<sup>174</sup>

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(34%). See *id.* In fact, in New York City neighborhoods that are undergoing revitalization and largely have provided the impetus to proponents of commercial rent control, the variety of available services is not necessarily as great a problem as elsewhere. See *id.* While 68% of the shoppers surveyed rated the variety of goods and services available in their neighborhoods as either excellent (17%) or pretty good (51%), "[r]esidents of low income neighborhoods were most likely to give negative ratings." *Id.*

171. As the cost to replace certain goods has fallen relative to the cost to repair them, businesses associated with the latter have dropped in number permanently. Cf. *Some Consequences of Commercial Rent Control: Testimony Before the Small Retail Business Study Commission* 5 (Jan. 31, 1986) (statement of Professor John Kambhu, Department of Economics, Graduate School of Arts and Sciences, Columbia University) [hereinafter Kambhu Statement]. For example, fewer shoe repair shops exist today than 25 years ago as a result of the shift in the economies of replacement versus repair. Cf. *id.* The same phenomenon has occurred in businesses established to repair certain electronic or electrical appliances. Cf. *id.* It is frequently cheaper simply to purchase a new solid state digital watch, for example, than to have it repaired. Cf. *id.* As one economist pointed out to the Small Retail Business Study Commission,

Had these laws been in existence [sic] 20 or 30 years ago, in any neighborhood [sic] today one would find more small shoe repair shops, but fewer commercial day care centers, xerox copy shops, and video rental shops. Perhaps the advocates of these proposals prefer shoe repairs to xeroxing and videos, but it is not obvious that most of the people in the city have the same strong preferences for shoe repair shops.

*Id.*

172. See PRIVATE REINVESTMENT, *supra* note 8, at 121.

173. A New York City planning study states:

Neighborhood concerns about rising consumer prices and their economic toll on residents would not necessarily be addressed by commercial rent control. Merchants with controlled rents would be free to raise prices; many would continue to do so as other aspects of their operating costs increased and as local purchasing power grew, increasing demand. Commercial rent control therefore, might have the effect of increasing the profitability of some stores without lowering prices for shoppers.

*Id.* at 123.

174. In the current environment of non-rent controlled commercial rental property, extreme variations exist in the size of rent increases experienced by different types of merchants. See FINAL REPORT, *supra* note 14, at II-5. For example, food-related

Small businesses, which proponents of New York's proposed commercial rent regulation seek to protect,<sup>175</sup> will be adversely affected by any such system in a number of ways. Imposing the proposed commercial rent regulations would create an unfair advantage for businesses already operating under a lease at the time the regulations go into effect. In effect, the regulations would create two classes of commercial tenants. In essence, the price of commercial space that is not under a lease or that becomes decontrolled as a result of vacancy will rise in response to competition for these spaces. The net effect is that those businesses with a lease subject to commercial rent regulation are subsidized by the higher prices paid by businesses without leases or those that have to sign a free market first lease before coming under the purview of the regulation.<sup>176</sup> Businesses signing a free market first lease will find it more difficult to compete with established competitors nearby since they would

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stores in the survey sample reported two-year rent increases of only five percent, while merchants in the "personal services area" such as repair shops, tailors, and cleaners experienced rent increases averaging fifty percent. *See id.* Imposition of a rent control program with set rent increases would permit some merchants to raise prices beyond the increased rental cost, since the allowable rent increase would exceed the increased costs that normally are passed along to consumers. *See Kambhu Statement, supra* note 171, at 2. Thus, while instituting commercial rent controls would restrain pass alongs to consumers of personal services, inflation in the cost of food would be fueled by such a program. *See id.* Rather than disrupting the market with commercial rent controls, one scholar has suggested that a hands-off approach would produce the most favorable result. *See generally* Mildner, *supra* note 166. Just as proprietors of photo labs and certain repair shops have shifted to a network of drop-off and pick-up storefronts with most of the work being performed in a less expensive part of the city, other personal service suppliers could follow such a course. *See id.* Obviously, "[t]he market for cleaning and tailoring services hasn't fallen off; people still need to maintain their clothes. Only the economies (sic) of running such a business has changed." *Id.*

175. *See supra* notes 79, 110-11, 115 and accompanying text.

176. *Statement of the New York Chamber of Commerce and Industry and the New York City Partnership, Inc. Presented Before the Small Retail Business Study Commission 4* (Jan. 24, 1986) (statement of Edward S. Cabot, President of the New York City Chamber of Commerce and Industry and Executive Vice President of the New York City Partnership, Inc.) [hereinafter Cabot Statement: Before Business Commission]. A "free market first lease" is the initial lease that a tenant would sign. The rent would be set at the highest amount that the landlord could command in the market absent controls. Once this base rent is set, the regulations for controlling commercial rents would go into effect with statutory increases being calculated on the basis of the free market rent figure. *See generally Statement of the New York Chamber of Commerce and Industry Re: Commercial Rent Increases and Proposed Commercial Rent Controls Before the City Council Committee on Economic Development 2-3* (Feb. 28, 1984) (statement of Lou Venech, Vice President/City Affairs at City Hall) [hereinafter Venech Statement].

be locked into a higher rent and, therefore, higher costs.<sup>177</sup>

While such regulation may still appeal to already established businesses, their support for it would undoubtedly wane if they consider that at some point they may decide to move or expand. Not only would they be subject to the same dilemma as the new business signing a free market lease,<sup>178</sup> but they would also find their options in the commercial property stock sharply limited. First, in an effort to avoid having to sign a free market first lease, businesses will be reluctant to move unless absolutely necessary. The low vacancy turnover rate will curtail the number of choices available in commercial property.<sup>179</sup> Second, cities that embark upon such a program will be instituting a disincentive to new commercial investment or reinvestment. Common sense dictates that a private investor would not build or rehabilitate commercial space in an area "under the specter of commercial rent controls, when the same space could be created in a free market" elsewhere<sup>180</sup> or when the investor could merely choose a totally different type of investment vehicle that has no artificial ceiling on the return.<sup>181</sup>

Over time, the commercial rental sector will face a crisis similar to that being experienced by the residential rental sector in New

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177. See Venech Statement, *supra* note 176, at 3.

178. At any time when commercial premises are vacant, the proposed laws would decontrol them until a new tenant signs a lease. See *supra* notes 71-146 and accompanying text. Once the tenant signs a lease, the law would trigger the controls on rent increases for each subsequent renewal. See *id.* Thus, only a sitting tenant would enjoy the protection of the proposed laws. See *id.*

179. Venech Statement, *supra* note 176, at 2-3.

180. See *id.* at 2; see also Wedemeyer, *supra* note 6, § 8, at 7, col. 4. The adjoining state of New Jersey poses a perennial threat to New York's growth potential.

All five boroughs are engaged in a very tough competition with other states and regions. A fact of that (sic) world is that commercial investors have an alternative. It is called New Jersey and it is a very tough competitor indeed . . . the hard fact is that if we make investments in New York sufficiently unattractive to investors, they will look to New Jersey.

*Statement of the New York Chamber of Commerce and Industry and The New York City Partnership on Proposed Commercial Rent Control Legislation Presented Before The City Council Committee on Economic Development 3* (June 27, 1985) (statement by Edward S. Cabot, President of the New York Chamber of Commerce and Industry and Executive Vice President of New York City Partnership, Inc.) [hereinafter Cabot Statement: Before City Council].

181. For example, no law limits the return from an investment in mutual funds, art, precious metals, securities, and other investment vehicles.

York City.<sup>182</sup> Landlords of residential properties are making an exodus from the market.<sup>183</sup> The warehousing of apartments for conversion to condominiums and cooperatives and the dearth of construction of new residential units other than luxury units characterizes the trend.<sup>184</sup> Thus, the residential rent regulation experience of New York City indicates that demand will substantially outpace supply in the commercial rental sector if the city were once again to impose commercial rent controls.

During periods in which the economy is weak and the commercial rental market is soft, commercial rent regulations would work against

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182. The findings of one economist who has studied New York City's experience with residential rent controls indicate what New York City's commercial rental sector can expect if the legislature or City Council enacts commercial rent controls. See Olsen, *Questions and Some Answers about Rent Control—An Empirical Analysis of New York's Experience*, RENT CONTROL: A POPULAR PARADOX 107, 108-10 (1975). The commentator observed that rent control is almost always proposed initially as a solution to a housing shortage, which is characterized by rapidly rising rents and a low vacancy rate. See *id.* at 108. Money that tenants would have spent on housing in the absence of rent control is spent on other goods and services, thereby driving up their prices. See *id.* at 109. Consequently, the inflation problem is not truly solved. See *id.* Rent controls would also fail to solve the low vacancy rate. See *id.* Statistics compiled by the economist suggest that decontrol would lead to a higher vacancy rate. See *id.* For example, in 1940 when neither New York City nor other cities in the United States had rent control ordinances, the vacancy rate in New York City exceeded that in other cities. *Id.* In 1950, however, when almost all of these cities were covered by federal rent controls, the vacancy rate was much lower than in 1940 and about even between New York City and other cities. See *id.* By 1960, almost all other cities had long since decontrolled rents, yet New York City continued to retain its rent control ordinance. See *id.* at 110. In 1960, the rental vacancy rate in New York City was less than half of that in other cities. See *id.* Additional statistics also show that the vacancy rate in uncontrolled housing in New York City was generally greater than in controlled housing. See *id.* Thus, "the evidence from NYC strongly suggests that rent control exacerbates rather than solves a housing shortage." See *id.*

183. See Meislin, *In City Housing Court, Focus Is Now More on Evictions Than on Rents*, N.Y. Times, Feb. 4, 1986, at B1, col. 1 (number of landlords in New York City housing court seeking to evict tenants from apartments is growing "as owners seek to stop renting apartments and instead sell them as more lucrative cooperatives and condominiums"); *id.* at B1, col. 5-6 (in 1984, number of petitions filed in housing court by landlords trying to regain possession of their apartments rose by 25% over previous year in Manhattan to 6,276 and by 8% in Brooklyn to 5,974).

184. See Schanberg, *The Poverty Divide*, N.Y. Times, Jan. 22, 1985, at A25, col. 1 (contrasting lack of low or moderate income housing with boom in construction of luxury apartments); Gottlieb, *New York Recovery: Can It Be Sustained?*, N.Y. Times, Oct. 13, 1985, § 12, at 12, col. 1 (expiration of tax-abatement law has produced "a flurry of luxury-housing construction in Manhattan, but the advent of widespread new housing here remains uncertain").

the interests of businesses. Any regulation that contained a prescribed formula for determining permissible rent increases intended as a ceiling would instead be transformed into a floor.<sup>185</sup> In the event of this anomalous situation, a landlord could refuse to take less than the amount to which the law entitled him, regardless of whether, in the free market, he might be able to command only a smaller rent increase.<sup>186</sup>

Obviously, commercial rent controls would not adversely affect only New York City landlords and commercial tenants. Over time, the regulation of commercial rents would touch most city residents. As mentioned above, the commercial property stock would tighten and probably shrink as new investment slowed to a rate below the rate of abandonment of buildings.<sup>187</sup> Consequently, rent regulation would impair the city's ability to attract new businesses and keep established ones. The main implication of this handicap is the loss of jobs and of tax revenue.<sup>188</sup>

Another negative effect of regulating rents of commercial properties would be to keep depressed areas or areas in need of revitalization in their current state.<sup>189</sup> Lower rents, which ordinarily would encourage existing businesses to explore the possibility of moving into these areas, would disappear if commercial rent regulations were imposed.<sup>190</sup>

Finally, a system of commercial rent regulation would require enforcement mechanisms, of which the city would have to bear the cost.<sup>191</sup> The facade of neighborhood economic stability that com-

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185. See Venech Statement, *supra* note 176, at 3; see also Wedemeyer, *supra* note 6, § 8, at 7, col. 4.

186. See Venech Statement, *supra* note 176, at 3.

187. See *id.* at 2; see also *supra* note 165.

188. One expert stated:

Over time, control would depress assessments substantially for properties in the most vital and economically strongest areas of [New York City], and this would reduce tax revenues. Ultimately the weaker markets would be forced to assume a disproportionately heavier share of the tax burden. This burden in turn would lead to the economic stagnation of communities which otherwise may be undergoing revitalization.

Cabot Statement: Before Business Commission, *supra* note 176, at 6; see also *supra* note 162.

189. See Cabot Statement: Before Business Commission, *supra* note 176, at 5, 6.

190. See Cabot Statement: Before City Council, *supra* note 180, at 4 (commercial rent regulation would seriously curtail interborough migration of businesses from Manhattan's central business district).

191. See Mildner, *supra* note 166, at 5 (rent board needed to determine what

mercial rent regulation would foster would eventually yield to the complete havoc that it was actually wreaking on the economic health of the city. Consumers, small businesses, and the city all would be casualties of commercial rent regulation.

### C. Fundamental Inequities of Commercial Rent Control

The inherent unfairness of commercial rent regulation to landlords and commercial tenants negotiating a first lease speaks strongly against it as a solution.<sup>192</sup> It is of the utmost importance to recognize that commercial property owners are themselves businesspersons—they have invested their capital to make a profit, not to provide a free benefit to other businesses and neighborhood residents. Yet this free benefit is precisely the consequences of commercial rent regulation.<sup>193</sup> Under such a system, a commercial prop-

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“fair” rent increase would be; an already overburdened housing court required to adjudicate violations of law which would otherwise not arise if market were allowed to operate freely, and City forced to subsidize new commercial buildings to redevelop abandoned neighborhoods).

192. For a discussion on the unfairness of commercial rent control to commercial tenants, see *supra* notes 175-77 and accompanying text. For a discussion on the unfairness of commercial rent control to landlords, see *infra* notes 193-201 and accompanying text.

193. Even assuming that redistributing income from the rich to the poor is a societal goal, one commentator has argued persuasively that rent control is a very poor redistributive device. See Johnson, *Rent Control and the Distribution of Income*, 41 AMERICAN ECONOMIC REVIEW 569, 582 (1951) [hereinafter Johnson]. First, people who wish to help low income families are frequently motivated by the misguided notion that landlords are necessarily richer than tenants. See Olsen, *The Role of Government in the Mixed Economy: Symposium 1982*, 204-05 (H. Giersch ed. 1982) [hereinafter *Role of Government*]. A study cited by the commentator has demonstrated that it is not true that every tenant is poorer than his landlord. See *id.* (citing Johnson, *supra*, at 582). Second, rent control is an inefficient redistributive device because it substantially distorts consumption patterns. See *id.* One significant indication of the distortion in consumption patterns of occupants of controlled housing is the divergence between the benefit to tenants and the cost to landlords. See *id.* To support this point, the commentator cited a previous collaboration in which it is estimated that the mean difference between the market and actual rent of controlled apartments in New York City in 1965 was \$395. See *id.* (citing Olsen & York, *The Effect of Different Measures of Benefit on Estimates of the Distributive Consequences of Government Programs*, Paper Presented at the National Bureau of Economic Research Conference on Research in Income and Wealth, Madison, Wisconsin (May 14, 1982)). Olsen and York's estimate of the annual unrestricted cash grant, which—if given to the family in place of rent control—would make the family neither better nor worse off than it was under the rent control ordinance, is \$107. See *id.* The commentator concluded that if rent control were the equivalent to an unrestricted cash grant program and

erty owner loses part of his investment<sup>194</sup> and, in effect, benefits the commercial tenant through an indirect subsidy.<sup>195</sup>

Moreover, commercial rent regulation would force the owner initially to assume the cost of providing a benefit to the public without compensation. Rent control laws do not attempt to allocate the cost of the benefit to the real beneficiary, society at large.<sup>196</sup> Instead, as one commentator has pointed out:

The accident of ownership of a particular location determines the persons in the community bearing the cost of increasing the general welfare. A further consequence of an attempt to obtain a benefit by means of a restriction is that the full cost of the public benefit is thereby concealed from those in our democratic society who are given the power of deciding whether or not they want to obtain a benefit.<sup>197</sup>

In other words, the ultimate social cost of commercial rent regulation would be the removal of private property from productive

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hence did not distort consumption patterns, there would be no difference between the two estimates. *See id.* However, the cost of rent control to landlords was almost four times its value to tenants. *See id.*

In elaborating on rent control as not only "an inefficient redistributive device but also a grossly inequitable one," the commentator asserted that rent control is flawed in a number of respects: (1) a great variance exists in the cost borne by equally wealthy families; (2) rent control is not limited to low income families and does not serve all such families; and (3) among families who occupy controlled housing and are similar in many respects there is an enormous variance in benefits. *See id.*

Conceding that there is no detailed evidence on the distribution of the cost of rent control, the commentator offered some general propositions.

The majority of families at each income level do not own rental housing. The cost of rent control is borne overwhelmingly by people who own rental housing at the time it is adopted. Equally wealthy owners of rental property do not bear the same cost because they hold different proportions of their assets in this form. These propositions lead to two questions that are in my opinion unanswerable. Why should rent control which allegedly serves a public purpose be financed by an implicit tax on such a small proportion of the population, and why should the magnitude of this tax on equally wealthy people depend upon the proportion of their assets held in the form of rental housing?

*Id.*

194. *See supra* note 153.

195. *See Role of Government, supra* note 193, at 205.

196. *Cf. Fred F. French Inv. Co., v. City of New York*, 39 N.Y.2d 587, 596, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 11 (1976).

197. Dunham, *A Legal and Economic Basis For City Planning (Making Room For Robert Moses, William Zeckendorf, and a City Planner in the Same Community)*, 58 COLUM. L. REV. 650, 665 (1958) [hereinafter Dunham].

use. The system would hide this cost by imposing the cost on the commercial property owner alone.<sup>198</sup> "When [such costs are] successfully concealed, the public is not likely to have any objection to the 'cost-free' benefit."<sup>199</sup>

Notwithstanding the good intentions behind commercial rent regulations, such schemes are inimical to the interests of landlords, business proprietors, and society as a whole.<sup>200</sup> Therefore, if public officials and policymakers identify a particular community need or if they deem that a specific class of persons requires special relief from some burden, the government should respond accordingly. The government, however, should respond equitably and cautiously so as not to solve the problem of one group by arbitrarily imposing the cost of the solution solely on another group.<sup>201</sup>

### V. The Small Retail Business Study Commission

The Small Retail Business Study Commission had to consider these policy arguments and others both in favor of and against the regulation of commercial rents in New York City.<sup>202</sup> In order to organize its work most effectively and evaluate the relevant policy issues, the Commission divided its task into an examination of six strategies that the city could pursue in this area.<sup>203</sup> After focusing on and assessing the six policy options, the Commission recommended the adoption of two options and rejected the other four.<sup>204</sup> The courses of action recommended by the Commission are con-

198. Cf. *Fred F. French Inv. Co.*, 39 N.Y.2d at 597, 350 N.E.2d at 597, 350 N.E.2d at 387, 385 N.Y.S.2d at 11 (citing Dunham, *supra* note 197, at 665).

199. *Id.*

200. See *supra* notes 153-99 and accompanying text.

201. See *supra* notes 192-99 and accompanying text.

202. See *supra* notes 12-13 and accompanying text.

203. See *infra* notes 206-303 and accompanying text.

204. See FINAL REPORT, *supra* note 14, at I-8. Those members of the Commission who disagreed with the majority issued a separate dissenting report that both criticized the majority's recommendations and its interpretation of the findings of studies conducted by Louis Harris and Associates and other staff. See REPORT OF THE DISSENTING COMMISSIONERS OF THE SMALL RETAIL BUSINESS STUDY COMMISSION—(June 4, 1986) [hereinafter DISSENTING REPORT].

The majority itself conceded that it is "far from uniform in its general views on the range of circumstances in which governments ought to regulate markets." FINAL REPORT, *supra* note 14, III-2. Notwithstanding differences among majority members over the extent of regulation favored, it unanimously agreed that "extreme caution should be the watchword in appraising demands for regulation to favor some businesses in their dealings with others." *Id.*

structive and, on the whole, well-balanced among the interests of landlords, commercial tenants, and city residents.<sup>205</sup> Review of the policy options and the Commission's rationale in recommending or rejecting them is therefore worthwhile.

#### A. The Commission's Recommended Options

The two policy options recommended by the Commission are: (1) a system of mandatory negotiation, non-binding mediation, and lease extension; and (2) a program of supply expansion.

##### 1. *Mandatory Negotiation, Non-Binding Mediation, and Lease Extension*

The Commission strongly recommends mandatory negotiation, non-binding mediation, and lease extension.<sup>206</sup> As proposed by the Commission, 180 days prior to expiration of any retail lease, the landlord must provide notice of his intention to renew or not to renew and, if he intends to renew, on what terms.<sup>207</sup> If renewal is offered, within thirty days the tenant must notify the landlord of his intention to vacate, to accept the landlord's terms, or to seek negotiation.<sup>208</sup> If negotiation fails after fifteen days, either party may invoke non-binding mediation.<sup>209</sup> If at the end of the prescribed period for mediation the process has yielded no agreement, the tenant is entitled to an automatic one-year lease extension on the same terms, except that the landlord may charge up to fifteen percent more for the one-year extension than the rent charged in the final year under the expiring lease.<sup>210</sup> At the end of the

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205. The Commission majority prefaced the review of the six policy options with a brief discussion on the fundamental factors and motivations guiding its choices. See FINAL REPORT, *supra* note 14, at III-3 to III-4. The Commission was loath to adopt policies that interfere with the efficient operation of the market system. See *id.* While it recognized that some types of regulation are necessary to protect broad public interests of health, safety, and fair dealing, it believed that such regulations must permit markets to function within the constraints established. See *id.* The Commission sought programs and policies that would help small businesses facing rapid rent escalation "to facilitate their adaptation without seriously undermining the market system of commercial space allocation," *id.*, that was precisely the result of "regulations explicitly designed to shield certain businesses from market forces." *Id.* at I-9.

206. See *id.* at III-5.

207. See *id.*

208. See *id.*

209. See *id.* at III-6.

210. See *id.*

year, the tenant must vacate the premises in compliance with the agreement he was obliged to sign in order to avail himself of the lease extension option.<sup>211</sup>

The enforcement of the plan would be a matter for the courts,<sup>212</sup> and any failure to adhere to the deadlines set by the plan would result, in the case of a landlord violation, in a postponement of the lease expiration,<sup>213</sup> or in the case of a tenant violation, in a just eviction on the lease expiration date.<sup>214</sup> For the sake of simplicity, the Commission rejected a proposal to vary these requirements in accord with the length of time the tenant had been in place, the duration of the expiring lease, and the recent inflation rate.<sup>215</sup> The Commission did endorse a proposal to allow the legislature to adjust the level of rent increase permitted for the extension year if the inflation rate moved into double-digits.<sup>216</sup>

The Commission endorsed this option on the grounds that "it would encourage landlords and tenants to negotiate, it would leave lease terms to the marketplace, and where negotiations failed it would provide tenants with considerable time to search for alternative space."<sup>217</sup> Landlords who in the free market could command a rent significantly higher than that permitted under the one-year

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211. *See id.*

212. *See id.* at III-7.

213. *See id.*

214. *See id.*

215. *See id.* at III-6 to III-7.

216. *See id.* at III-7.

217. *Id.* While the one-year extension provides businesses with time to seek out alternative space, a business may have to move a considerable distance to find an affordable location. Stores that have built up goodwill in a neighborhood and rely on their location to generate business may not be able to survive such a move. *See Carmody, supra* note 5, at B1, col. 1. Proponents of stronger regulation also argue that without regulation of commercial rents neighborhood residents may be deprived of accessibility to essential services. The study conducted by Louis Harris & Associates revealed that shoppers in all twelve neighborhoods sampled reported frequent and near exclusive use of neighborhood stores for essential shopping goods. *See FINAL REPORT, supra* note 14, at II-13 to II-15. No deprivation of essential services seems to have resulted in the existing free market. *Cf. id.* The fact that residents in certain discrete areas must venture outside them for certain services or goods does not mandate stronger citywide regulation. Rather than masking broad disparities within the city's neighborhoods as the dissenting commissioners assert, the Harris study points to the overall efficiency of the free market system presently in operation. *Cf. id.* Therefore, strategies to correct the specific problems of particular neighborhoods should be carefully constructed; however, citywide regulation that threatens to disrupt the market system and investment climate is not helpful.

automatic lease option would have an incentive to negotiate in good faith since it would be in a landlord's interest to immediately charge approximately the market value rather than to have to wait a year.<sup>218</sup> The process would encourage the commercial tenant to negotiate in good faith if its business is able to pay market rents.<sup>219</sup> Otherwise, it is reasonable to assume that a successful business would risk the loss of goodwill and profits if it were forced to move to a new location by taking the short-term advantage of the one-year lease extension option.<sup>220</sup> For businesses unable to pay the market rent, the one-year extension would provide tenants with a fair amount of time to search for alternative space.<sup>221</sup>

Another positive aspect of this option is the "natural 'sunset' feature."<sup>222</sup> Basically, the plan's greatest impact will be felt in the short term as existing leases expire.<sup>223</sup> Over time, new leases will be for shorter terms as lease extension is taken into account.<sup>224</sup> As landlords, in their efforts to restore their bargaining power, shorten the average lease term, tenants still will have the one-year lease extension protection.<sup>225</sup> In the long term, as the economy shifts, legislators may then make a more informed decision regarding the need for further intervention in the commercial rental market.<sup>226</sup>

## 2. Supply Expansion

In the effort to formulate policies that will alleviate the problems in the commercial rental sector in both the long and short term, and to avoid merely reacting to current pressures in the commercial rental sector, the Commission recommended a program of supply expansion.<sup>227</sup> The Commission outlined changes in zoning and tax laws that would promote the conversion of unused space to commercial use and the construction of new retail space.<sup>228</sup>

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218. *See id.* at III-7.

219. *See generally id.* at III-7.

220. *See id.*; *see also supra* note 217.

221. *See FINAL REPORT, supra* note 14, at III-7.

222. *See id.* at III-8. A law that "sunssets" either expires at a fixed time or no longer bears its intended effect. *See id.*

223. *See id.*

224. *See id.*

225. *See id.*

226. *See id.* at III-8 to III-9.

227. *See id.* at III-9.

228. *See infra* notes 229-31, 235-37 and accompanying text.

In the short run,<sup>229</sup> strategies aimed at stimulating space conversion of vacant second-story space available in many older commercial buildings could reduce pressure in the commercial rental sector.<sup>230</sup> The city could overcome traditional resistance of merchants and shoppers by enhancing the option through the combination of second-floor space with ground-floor space, attracting shoppers and preserving proximate accessibility of desired goods and services.<sup>231</sup>

A mid-range approach to the need for retail space expansion involves the disposition of retail properties that the city holds for such reasons as tax delinquency.<sup>232</sup> Instead of adhering to the normal practice of auctioning off these *in rem* properties to the highest bidder,<sup>233</sup> the Department of Housing Preservation and Development and the Department of General Services, which manage these properties, would periodically supply the city's Office of Economic Development (OED) with lists of available *in rem* properties containing commercial space.<sup>234</sup> The OED could then market appropriate properties to existing tenants and prospective owner-occupants who would be willing to provide targeted goods or services in short supply in a particular area.<sup>235</sup>

With regard to the long-term objective of new construction, the Commission is least specific. It does, however, urge the city to review tax incentive programs. The Commission urges the extension of tax incentives for commercial space construction and major renovation available under the Industrial and Commercial Incentive Program (ICIP) to areas now excluded.<sup>236</sup> In addition, the Commission suggests that the implementation of tax incentive programs could make new construction feasible in areas where rents are not high enough to justify the cost of new construction, yet are in need of more retail space.<sup>237</sup>

The Commission's recommendations for supply expansion comprise the framework of a carefully constructed strategy. First, the

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229. The Commission defined the "short run" as the next three to five years after the issuance of its final report. See FINAL REPORT, *supra* note 14, at III-9.

230. See *id.* at III-9 to III-10.

231. See *id.* at III-10.

232. See *id.* at III-10 to III-11.

233. See *id.* at III-11.

234. See *id.*

235. See *id.*

236. See *id.* at III-10.

237. See *id.* at III-11 to III-12.

Commission opposes any efforts to convert residential spaces to commercial use that would merely exacerbate the shortage crisis in the residential rental sector.<sup>238</sup> Second, the proposal to alter the method of disposing of *in rem* properties that the city possesses meets the twin objectives of expanding the supply of available retail space and expanding retail services in underserved, low-income areas.<sup>239</sup> Third, the Commission is cognizant that the "use of zoning as a tool for reinforcing the viability of neighborhood retail streets" engenders "primarily longer term incremental benefits" and that any zoning strategies are properly viewed as "fostering, rather than assuring, general policy objectives."<sup>240</sup> Finally, in response to concerns expressed by dissenting Commission members,<sup>241</sup> the Commission notes that its recommendations are intended neither to subordinate other neighborhood objectives nor to endorse extreme tax concessions.<sup>242</sup> The Final Report merely underscores the need to assign space expansion objectives sufficient importance in establishing planning priorities and making planning tradeoffs.<sup>243</sup>

## B. Rejected Options

The policy options rejected by the Commission include among others: (1) non-intervention; (2) a system of commercial rent stabilization; (3) a right of first refusal for sitting tenants; and (4) a system of binding arbitration.

### 1. Non-Intervention

In the range of possible courses of action for the city to pursue in this area, the Commission considered the option of the city simply doing nothing. Recognizing that recent rates of rent escalation in many New York City neighborhoods have resulted in: (1) "windfall profits" to some landlords; (2) substantial hardship and insecurity to some retail tenants; and (3) disturbing retail business turnover rates, the Commission rejected the option of non-intervention. The Commission defended its rejection of this option because it "searched hard for mitigating policy options consonant with

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238. See *id.* at III-10.

239. See *id.* at III-10 to III-11.

240. See *id.* app. E.

241. See *supra* note 204.

242. See FINAL REPORT, *supra* note 14, at III-12.

243. See *id.*

the preservation of a market economy in commercial real estate" and succeeded in identifying two such options.<sup>244</sup>

## 2. *Rent Stabilization*

The Commission strongly rejected any retail rent stabilization option that would be based largely on the model of New York City residential rent stabilization.<sup>245</sup> The Commission reasoned that commercial rent stabilization, a form of price control, is justifiable only in an emergency, which the Commission did not deem to exist.<sup>246</sup>

In rejecting this option, the Commission cited several reasons why it believed that commercial rent stabilization would be detrimental to the city's interests. First, stabilization of commercial rents would protect current tenants at the cost of depressing the city's tax base by discouraging new investment and the entry of entrepreneurs.<sup>247</sup>

Second, a stabilization program would directly contravene efforts aimed at expanding the supply of commercial space by discouraging investment in construction and rehabilitation of commercial retail space.<sup>248</sup> According to the Commission, as the commercial rental stock becomes static and market levels move increasingly away from "stabilized" rents, voters, fearing huge rent escalations, will resist deregulation.<sup>249</sup> Even if it made economic sense to eliminate rent stabilization, according to the Commission, "the political feasibility of repeal tends to diminish over time."<sup>250</sup>

Finally, the Commission reaffirmed its commitment to allow the free market to operate free of such restrictive regulation.<sup>251</sup> Just as the government does not generally regulate the prices charged for goods and services provided by commercial tenants, it is inappropriate for the government to regulate the prices charged by commercial property owners in the absence of an emergency.<sup>252</sup> Furthermore, commercial property owners deserve to be treated in

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244. *See id.* at III-5.

245. *See id.* at I-9, III-2.

246. *See id.* at III-4.

247. *See id.*

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.* at III-4 to III-5.

the same way as the suppliers and employees of commercial tenants in that they may charge market prices for the goods and services that they provide.

### 3. *Right of First Refusal*

The right of first refusal<sup>253</sup> is one of two options the Commission rejected on general policy grounds. Although each option falls short of government rent stabilization, the Commission believed that the options would regulate landlord-tenant relations in such a way that it "would profoundly change the nature of the commercial real estate market."<sup>254</sup>

The right of first refusal option is based on the notion that current tenants should be able to remain in place as long as they are willing to pay market rent.<sup>255</sup> The right of first refusal plan would operate by requiring a landlord to offer renewal rental terms to a sitting commercial tenant at a specified date prior to lease expiration.<sup>256</sup> Within a specified time, the tenant may accept the terms, vacate, or reject the terms and retain occupancy.<sup>257</sup> If the tenant rejects the terms and retains occupancy, the landlord may seek another tenant.<sup>258</sup> Once the landlord has secured a prospective tenant, he must give the sitting tenant the opportunity to sign a lease with the same terms as those offered to the prospective tenant.<sup>259</sup> If the sitting tenant declines to do so, he must vacate within a specified time or upon expiration of his lease, whichever comes later.<sup>260</sup>

Notwithstanding the appeal of this option's apparent fairness, the Commission found it to be seriously flawed.<sup>261</sup> Despite the plan's theoretically "ingenious approach to discovering market rents" by allowing a landlord to find a prospective tenant who will pay more than the current tenant, practically speaking, the mechanism is unworkable. First, the plan would deter prospective tenants from

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253. See *supra* notes 133-35 and accompanying text for a discussion of how the first refusal process works.

254. See FINAL REPORT, *supra* note 14, at III-12.

255. See *id.*

256. See *id.*

257. See *id.*

258. See *id.*

259. See *id.*

260. See *id.* at III-12 to III-13.

261. See *id.* at III-13.

negotiating with the landlord because of the inescapable time lags that are built into the process to allow sitting tenants to consider whether to meet the terms negotiated by the prospective tenant.<sup>262</sup> In addition, any difference in terms previously offered the sitting tenant would start the first refusal process all over again.<sup>263</sup> With no guarantee that negotiated terms will result in a lease for a commercial property, prospective tenants, an essential element in the process for determining market rents, will remove themselves from the process rather than expend the time, money, and legal fees connected with negotiating a lease.<sup>264</sup> The potential for litigation over the infringement of sitting tenant's rights, and the resulting difficulty of the landlord delivering the premises on time acts as a further disincentive for prospective tenants to seek space in areas covered by the program.<sup>265</sup> Essentially, the first refusal process is flawed because it relies upon prospective tenants and landlords to bear its cost.<sup>266</sup> Since prospective tenants will undoubtedly curtail their participation, the first refusal process is not likely to produce free market rents.<sup>267</sup> Furthermore, the process would frustrate efforts by a landlord to market his property most effectively because the presence of sitting tenants would preclude space reconfiguration.<sup>268</sup>

The Commission conceded that in certain instances landlords have misjudged the market with the result that a business has been forced to vacate and a store remains vacant for a substantial period, however, it also pointed to evidence that landlords often seek to hedge this risk by offering more favorable terms to tenants than they could command in the open market.<sup>269</sup> The Commission resolved the dispute on this point by rejecting the option on the grounds that a market economy requires prices to evolve by trial and error and that the first refusal process could prove more disruptive than efficient.<sup>270</sup>

#### 4. *Binding Arbitration*

The binding arbitration option is the second option that the Commission vigorously opposed as an endangerment to the fundamental

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262. *See id.* at III-12 to III-13.

263. *See id.* at III-13.

264. *See id.*

265. *See id.*

266. *See id.*

267. *See id.* at III-13 to III-14.

268. *See id.* at III-13.

269. *See id.*

270. *See id.* at III-14.

nature of the commercial real estate market.<sup>271</sup> As envisioned by the dissenting Commission members who favored this option, it would supplement the lease extension option.<sup>272</sup> This plan would require landlords to make a renewal offer ninety to 120 days prior to lease expiration.<sup>273</sup> If a tenant refused to accept these terms, he could either: (1) vacate; or (2) seek agreement within thirty days through mandatory negotiation and non-binding mediation to last for specified time periods of ten and twenty days respectively.<sup>274</sup> If these exchanges failed to produce an agreement, the tenant could opt for the one-year mandatory lease extension.<sup>275</sup> In cases in which the landlord was seeking a rent increase greater than a city-designated inflation index, the tenant could elect binding arbitration.<sup>276</sup> If the tenant rejected the arbitrator's decision, he would have to vacate the premises within ninety days after the decision.<sup>277</sup>

The option dictates that the arbitrator consider several factors in setting a reasonable rent.<sup>278</sup> The option, however, fails to include the consideration of rents on comparable properties that have been established by free market transactions.<sup>279</sup>

The Commission took issue with the binding arbitration option as a policy whose aim is essentially rent control regardless of what fair market values of commercial property are.<sup>280</sup> Although an arbitrator would consider a landlord's costs in setting rent, the plan fails to give weight to changing market conditions that may greatly influence rents in a free market system.<sup>281</sup> The virtually unfettered

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271. See *id.* at III-12.

272. See *id.* at III-14; see also DISSENTING REPORT, *supra* note 204, at 63.

273. See FINAL REPORT, *supra* note 14, at III-14.

274. See *id.*

275. See *id.*

276. See *id.*

277. See *id.*

278. The dissenting commissioners listed several criteria that an arbitrator would have to consider when setting a "reasonable commercial rent": (1) the cost of maintenance and operation of the entire building and land; (2) the amount paid directly by the owner for taxes assessed against the property; (3) the kinds, quality, and quantity of services furnished; (4) a reasonable return on capital, comparable to the risk of investment, excluding amortization or interest paid or accrued; (5) the extent to which a business contributes to the uniqueness and diversity of the neighborhood and to the availability of goods and services in the neighborhood and the city. See DISSENTING REPORT, *supra* note 204, at 65; see also FINAL REPORT, *supra* note 14, at III-14.

279. See *id.* at III-14 to III-15.

280. See *id.* at III-15 to III-16.

281. See *id.* at III-16.

discretion of arbitrators "to pursue community values at the expense of the landlords" further dilutes any protection the plan offers to landlords.<sup>282</sup>

The option has also drawn sharp criticism because it is likely to create inconsistency among the cases arbitrated.<sup>283</sup> The Commission recognized that an arbitration system would not necessarily have to designate all criteria when the plan is instituted provided "their evolution is constrained by the discipline of judicial review."<sup>284</sup> Nonetheless, such a system of private arbitration would be subject only to limited judicial review,<sup>285</sup> and even if this were not the case, judicial review would merely lengthen lease renewal disputes, impose heavy legal costs upon the parties, and leave sitting tenants in place pending resolution of the dispute.<sup>286</sup>

Finally, although advocates of this option had argued that it, unlike a more comprehensive regulatory system, would be used only when necessary, the Commission disagreed.<sup>287</sup> The Commission appropriately pointed out that almost any tenant experiencing rent pressure would avail himself of the arbitration process with little risk that the arbitrator would set a rent higher than that sought by the landlord.<sup>288</sup>

While the Commission endorsed agreements to arbitrate that are freely negotiated by both parties,<sup>289</sup> government-imposed arbitration systems that "explicitly omit the market touchstone"<sup>290</sup> are imprudent and imperil the integrity of the market system in the commercial rental sector.<sup>291</sup>

### C. Other Options

In an addendum to its discussion of the six policy options in its Final Report, the Commission briefly addressed a policy option that it had consistently rejected throughout its work—the rent moratorium.<sup>292</sup> In addition, the Commission addressed several other

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282. *See id.*

283. *See id.*

284. *See id.*

285. *See id.*

286. *See id.*

287. *See id.*

288. *See id.*

289. *See id.* at III-16 to III-17.

290. *See id.* at III-17.

291. *See id.*

292. *See id.*

policies that it had never discussed as a full Commission. These other policies were: (1) prescription by the government of standard definitions and clauses "in plain English" for use in retail leases; (2) a requirement that every lease be officially recorded; and (3) discretionary tax abatements for essential businesses, as well as for non-profit and certain voluntary organizations unable to pay what arbitrators would determine to be market rent.<sup>293</sup>

### 1. *Rent Moratorium*

Aside from the Commission's well-defined and well-stated opposition to such drastic intervention in the commercial rental market, it was particularly averse to a moratorium for fear that it could be perpetuated for years and send the commercial rental sector in New York City into structural rather than cyclical decline.<sup>294</sup> The Commission reasoned that once a moratorium was in place, its beneficiaries would wield powerful leverage to resist its replacement until a longer term solution more favorable to their interests was formulated.<sup>295</sup>

### 2. *Plain-English Requirements in Commercial Leases*

Governments have generally adopted plain-English requirements to protect individual consumers who may enter into contracts with businesses without the benefit of legal advice.<sup>296</sup> The Commission did not conclude that "esoteric" contract provisions were a major problem in the issue of fair rents.<sup>297</sup> Proponents of extending requirements to cover commercial leases argue that the standardization of key definitions would facilitate the comparison of cost of rental spaces.<sup>298</sup> The Commission remained largely neutral on the issue except to point out that the objective of the proponents of the policy is to facilitate arbitration, an option which the Commission strongly opposed.<sup>299</sup> Although the Commission's caveat against promoting the plain-English requirement policy is well-advised, the Commission should approve the policy option since it would make easier

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293. *See id.*

294. *See id.*

295. *See id.*

296. *See id.*

297. *See id.*

298. *See id.*; *see also* DISSENTING REPORT, *supra* note 204, at 68.

299. *See* FINAL REPORT, *supra* note 14, at III-18.

the work of those who study the commercial rental sector and its problems in the future.

### 3. *Recording of Commercial Leases*

Since the Commission examined this policy option only as a means of facilitating arbitrators' work, the Commission did not spend time debating the merits of recording commercial leases and, hence, offered no opinion.<sup>300</sup>

### 4. *Discretionary Tax Abatements*

The Commission's primary concern about discretionary tax abatements was that the policy would lead to "extreme politicization" of the tax abatement process without the desired return of saved businesses.<sup>301</sup> Alternatively, the Commission suggested that a more appropriate method for preserving particular types of businesses would be to supply direct subsidies that the city could scrutinize annually and debate as a line item appropriation in competition with all other budget items.<sup>302</sup> As for non-profit and voluntary organizations providing social services to areas, the Commission felt that the city would be better advised to increase aid to them to meet increased rents without reducing services or to urge them to relocate to less expensive space.<sup>303</sup>

## VI. Conclusion

In evaluating proposals to control commercial rent increases and ensure the accessibility of goods and services to neighborhood residents, New York City must not base its assessment on the ability of those proposals to withstand judicial scrutiny but rather, on economic policy considerations and principles of equity. The pitfalls that underlie the apparent attractiveness of commercial rent regulation as a solution to problems faced by businesses and residents in revitalizing neighborhoods weigh against such intervention in the commercial rental sector. To foster economic prosperity in New York for the benefit of all groups, the city must formulate policies that

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300. *See id.*

301. *See id.*

302. *See id.*

303. *See id.*

encourage investment and innovation through changes in its zoning and tax laws.

*John J. Powers*

