

# RSA Reporter

WE HOUSE NEW YORK

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## Second Circuit Issues Decision in Constitutional Lawsuit

### *RSA/CHIP Will Seek Path to SCOTUS*

Nearly one year after RSA and the Community Housing Improvement Program's (CHIP) legal team made oral arguments for our constitutional lawsuit at the U.S. Second Circuit Court of Appeals, the Court has officially issued their long-awaited opinion.

On February 6<sup>th</sup>, the three-judge panel of the Second Circuit issued a unanimous decision affirming the September 2020 decision made by Judge Eric Komitee of the U.S. District Court for the Eastern District of New York. The decision by the Second Circuit came almost one year to the date that Andrew Pincus of Mayer Brown LLP provided oral arguments to the Court.

The Second Circuit rejected both the physical and regulatory taking challenges to the State's rent stabilization laws (RSL), ignoring both the drastic changes enacted in recent years to the RSL, as well as the demonstrated devastating impact on property owners and the New York City rent-regulated housing stock, and instead relying on prior caselaw that examined a rent stabilization law that existed decades ago and which no longer exists today.

The Second Circuit held that because building owners voluntarily entered the rental market, any regulation of that rental market, as long as some avenues exist for terminating tenancies, no matter how limited, does not rise to the level of a taking. Similarly, the Court held that the **Penn Central** three-prong test does not apply because although some owners may have experienced an adverse economic impact, or may have had their investment-backed expectations impacted, the plaintiffs in this case cannot make a facial showing that this applies to all rent-stabilized property owners.

Finally, with respect to the due process claim, the Court held that property owners cannot make this argument to bypass the insufficiency of their takings claim, and even if it was available to

them, the RSL is rationally related to the legitimate government interest of regulating neighborhood continuity and stability for low- and mid-income New Yorkers.

By way of background, during oral arguments on February 16, 2022, Mr. Pincus argued that recent U.S. Supreme Court (SCOTUS) rulings, such as the one in *Cedar Point Nursery v. Hassid* (a case where SCOTUS held that a California regulation requiring farm owners to provide physical access to union organizers was a taking), coupled with the parameters set forth by SCOTUS in *Yee v. City of Escondido*, support our position that the requirement to offer perpetual lease renewals for the life of the tenant and successors amounts to a physical taking.

Mr. Pincus also pointed out numerous times that property owners are forced to continue to operate in the rental market, as virtually no exit ramps from regulation exist for these building owners who no longer want to use their property for residential rental. The State and City respondents argued in opposition that the law surrounding rent regulation is well-settled and that the ruling in *Cedar Point* should not influence the panel's decision in this case, especially given the millions of apartments that could be affected by the ruling. Mr. Pincus countered that argument by stating that a public benefit is being placed upon a small group of property owners to bear the cost and that should we prevail in our lawsuit, it would be up to the New York State Legislature to enact provisions that will comply with the U.S. Constitution.

At the conclusion of the oral arguments, our legal team was optimistic after the three-judge panel appeared to be somewhat receptive to the arguments made. One of the judges in particular, Judge Guido Calabresi, seemed to express reservations with some of the provisions of rent regulation. Judge Barrington Parker even

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# PRESIDENT'S MESSAGE



Joseph Strasburg

## Federal Lawsuit: Onward & Upward

The long-awaited decision by the U.S. Second Circuit Court of Appeals with regard to our federal lawsuit was expected, and now we seek to bring our case forward to the highest Court in the entire country.

If you have been closely monitoring RSA and the Community Housing Improvement Program's (CHIP) lawsuit that challenges the constitutionality of the State's rent stabilization laws, we have prepared for a loss at the Court of Appeals. This defeat though disappointing, was all part of our projected path to the U.S. Supreme Court (SCOTUS), and one that we have warned our members about since our lawsuit was first filed in the summer of 2019.

Although it would have been helpful to have some form of a favorable ruling from the Second Circuit, we always anticipated that the Court would rule on precedent since no challenge against rent regulation has ever been successful in New York State. Now, our legal team at Mayer Brown is preparing our organizations for the next steps, which hopefully include a path to SCOTUS.

From the early stages of preparing this legal challenge, both organizations were always confident about our chances at SCOTUS, regardless of the Court's makeup. However, three conservative-leaning justices have been appointed to SCOTUS since our lawsuit was filed nearly four years ago. Politics aside, it is important to note that conservative-leaning justices are typically supportive of property owner rights. SCOTUS' six-to-three makeup of conservative judges, coupled with recent rulings that support our arguments (*Cedar Point*), allow our team to remain optimistic about our chances of ultimately succeeding.

As we prepare for the next phase of our legal challenge, our public relations team is putting our educational efforts into full gear. Over the next few months, we will continue to discuss our case with various think tanks and editorial boards throughout the country. Our goal is to prove how unsuccessful rent control measures are and why they have exacerbated the affordability crisis for tenants all across the country.

## Focus on Good Cause Eviction

Now that Governor Kathy Hochul has put forth her preliminary budget for the upcoming fiscal year, the negotiating battle between her and the Legislature is officially underway.

From the day that her budget was announced, progressive members of the Legislature were highly critical of her housing initiatives. Tenant advocates believe that her proposals do not go far enough to protect low-income tenants, and have pushed a list of items that they would like passed, including Good Cause Eviction.

Due to the uncertainties surrounding the proposed legislation, we have ramped up our opposition to the bill once again. Unlike last year, anti-owner lawmakers have been very vocal about the momentum that they believe they have to finally pass the bill this year. Over the course of the next few months, we will provide you with the information that you need to know to help us fight off this controversial bill once again. In the meantime, it is vital that you begin contacting your local State representatives through our statewide housing coalition (*see page 8*).

## Second Notice for Membership Dues

Within the next few weeks, you will be receiving a second reminder for your membership dues and balances for 2023. If you paid your dues in full after receiving the first billing statement in early January, please disregard the second notice.

Based on what you have read so far in this month's President's message alone, you can already see that the rental housing industry is once again at the center of the political world. Keeping up with your membership dues means keeping up with all of the latest news for property owners. This not only means being able to utilize all of the exceptional services that we provide to you, but also being able to receive our monthly newsletter and our triweekly and breaking news email blasts. As we have stated in the past, if dues are not paid, you will not be able to take advantage of all that RSA has to offer.

The next few months will be filled with important news and updates and as always, RSA will be at the forefront. This includes news from Albany, the City Council, the City Rent Guidelines Board (RGB), and much more. An active membership will allow you to stay on top of all of RSA's advocacy efforts. ■

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## Judge Issues Mixed Decision in Kingston RGB Case

*ETPA Remains, RGB Order Rescinded*

Despite optimism that the Ulster County Supreme Court would reverse Kingston's decision to opt in to rent stabilization, an early-February decision from the Court only provided a partial victory.

On February 10<sup>th</sup>, Judge David M. Gandin issued his long-awaited ruling for the Hudson Valley Property Owners Association (HVPOA), who are represented by Matthew Brett of Belkin Burden Goldman, LLP. If you recall, the legal challenge by HVPOA focused on two issues: whether the adoption of rent stabilization in Kingston last summer was proper given the deficiency in their vacancy survey; and whether the rent rollback voted on by the Kingston Rent Guidelines Board (KRGB) in November, 2022 was proper and legal.

With respect to the first challenge, the Court found that despite the errors in the City's vacancy data demonstrated by the Plaintiff, Kingston's survey was not unreasonable and was performed *"in good faith based on reasonably adequate data and proper methodology."* This portion of the ruling was particularly disappointing given the strong arguments made by HVPOA's legal team over the last few months, as well as the initial ruling by Judge Gandin in mid-November that resulted in a temporary restraining order (TRO) of the KRGB's decision to reduce rents.

With respect to the second challenge, the Court took issue mostly with the portion of the KRGB order that set a 16 percent maximum increase in the rent of each affected unit as measured during the time period between January 1, 2019 and the date of the order, finding that the Emergency Tenant Protection Act (ETPA) does not give the KRGB blanket authority *"to simply declare rent adjustments for all subject units based on fixed percentages."* Rather, *"a case-by-case determination as to the fair market rental value for each unit"* must be made in order to set initial legal regulated rents for these newly stabilized units. The Court found that the *"practical effect of the RGB creating rent increase limitations retroactive to January 1, 2019 is to rewrite the effective date of the HSTPA."* The Court therefore vacated the KRGB order in its entirety, and remitted the

matter back to KRGB so that guidelines could be established based on the language in the Court's order.

By way of background, Judge Gandin granted a TRO on November 18, 2022 of the KRGB's vote to become the first municipality in State history to enact a rent reduction. Four days later, Judge Gandin ordered that Kingston owners will not be obligated to issue renewal leases, but rather, tenants will remain as month-to-month tenants until the case is concluded. Furthermore, he ruled that the current rent in place would be the legal regulated rent and the State Homes and Community Renewal (HCR) was stayed from processing any complaints for failure to renew lease renewal or fair market rent appeals while the Kingston property owners' challenge was pending.

Although the Court's ruling to not overturn the City of Kingston's decision to opt into rent stabilization was an unfortunate loss for the HVPOA, the decision to vacate the KRGB's historic vote to rollback rents was in fact a significant one. The Board's egregious decision to rollback rents by 15 percent was unprecedented and could have had a negative impact on upcoming deliberations for the New York City Rent Guidelines Board (RGB). Although we are confident that soon-to-be released RGB research reports will justify adequate rent adjustments this year, any rent rollback confirmed by a State Court would have set a negative tone for all future RGB orders and would have rallied tenant advocacy groups.

Now that the KRGB will be required to set new guidelines based on the Court's ruling, we anticipate that deliberations for rent adjustments will continue this spring and be in line with New York City, Nassau, Westchester, and Rockland's RGB processes. Furthermore, the HVPOA is expected to appeal the Court's decision to reinstate rent stabilization for approximately 1,200 units in Kingston. As we went to press, the HVPOA filed a notice of appeal. We will keep you apprised of all important developments with regard to this case. ■

## Second Circuit Issues Decision in Constitutional Lawsuit *(Cont'd From Cover...)*

made an interesting remark, noting that our case "cries out for a legislative fix." Despite the optimism, we questioned whether or not the Second Circuit would issue a ruling that would drastically depart from previous rulings made on the State's rent regulation system. The Court ultimately ruled in line with past rulings and did not see a connection to recently issued guidance by SCOTUS with regard to property rights.

It is important not to be discouraged by the Second Circuit's decision. If you have been following our case since it was first filed in July, 2019, then you know that it was unlikely that we would

succeed at the lower Courts. The goal of our efforts has always been to bring our case to and to succeed at SCOTUS. We are now in active discussions with our legal team and stakeholders concerning our next steps, which includes petitioning SCOTUS to hear our case. Now that tenant protections are becoming a major topic of discussion throughout the country, our case could potentially have larger, national implications.

We will keep your apprised of all developments with regard to our historic case in the weeks and months to come. ■

### Bill Expediting No. 4 Oil Phaseout Passes with Modifications

#### *RSA Lobbied for Helpful Amendments*

Although the City Council has passed legislation to accelerate the phase-out of No. 4 heating oil in buildings, RSA successfully lobbied for critical amendments to the bill before it was enacted.

At the Council Stated Meeting on February 16<sup>th</sup>, the Council voted in favor of Council Member James Gennaro's **Intro. 470-A**, which establishes new deadlines for the phase-out of No. 4 heating oil, prohibiting its use after July 1, 2027 for all boilers located in privately owned buildings. This law also raises the minimum and maximum penalties for burning a prohibited fuel oil after the phase out dates and prohibits the issuance or renewal of any boiler permit, for a boiler using No. 4 oil, after June 30, 2024.

Furthermore, if, solely due to the work required to comply with the expedited conversion date, any additional City construction code requirements are triggered for the boiler or related components, then an owner may apply to the City Department of Buildings (DOB) for a temporary extension to the date by which such additional requirements must be met by January 1, 2030 at the latest. DOB will approve the extension as long as the property owner certifies that their building is or will soon be in compliance with the phase-out of No. 4 heating oil.

If you recall, the original version of the legislation would have required building owners citywide to end the use of No. 4 heating oil by December 31, 2023 for specific boilers and by January 1, 2025 for all boilers. RSA adamantly testified against the legislation at a hearing last June (see page 11 of the July/August 2022 *RSA Reporter*).

Council Member Gennaro's first draft of Intro. 470 was a blatant breach of Local Law 38 of 2015, which had established a January 1, 2030 deadline for the phase-out of No. 4 heating oil. RSA had negotiated with various citywide elected officials and prominent industrywide professionals who recognized that in order for building owners to meet this milestone, owners would have to invest in modifications and upgrades to their current heating systems. While presenting testimony to the Council Committee on Environmental Protection, RSA argued that building owners were relying on the existing timeline set forth by Local Law 38, which had already been in place for seven years, in their budgetary and systems upgrade planning and to determine how to meet Local Law 97 benchmarking requirements. You can read RSA's testimony from

that hearing on our website by visiting <https://bit.ly/3xlBmJA>.

Over the last eight months, RSA lobbied Council Member Gennaro and other Council Members on the committee to withdraw the legislation and allow the original 2030 deadline to remain in place. RSA has been on board with the City's environmentally-friendly proposals for decades, but emphasized that this proposal would be a massive financial burden for rental property owners, diverting critical building resources and adding additional costs and hurdles.

Understanding the tremendous financial impact that Intro. 470 would have on building owners, all while trying to balance the City's well-intended climate goals, Council Member Gennaro and his colleagues agreed to the critical amendments detailed above.

The law will go into effect immediately upon signature by Mayor Eric Adams. We will keep you apprised of the new Local Law number, as well as updates from DOB concerning applications for compliance extensions. ■

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## Good Cause Eviction Battle Officially Heats Up in February

*Progressives See a Path This Legislative Session*

With Governor Kathy Hochul and progressive lawmakers expected to battle over the State budget, anti-owner members of the Legislature are beginning to feel more optimistic about their push for Good Cause Eviction.

Since the last issue of the RSA Reporter, tenant activists have expressed rage over Governor Hochul's housing proposals, believing that her agenda does not do enough to protect low-income tenants. Many tenant advocacy groups have put forth a list of items that they would like to see prioritized by the Legislature and Governor. To no surprise, Good Cause Eviction is at the top of the list.

In early February, Senator Andrew Gounardes of Brooklyn made a critical announcement when he publicly stated that he would put his full support behind Good Cause Eviction. Gounardes' endorsement is critical for multiple reasons. For one, this gives at least one more vote that the State Senate would need to pass the legislation. Second, RSA members and members of the Small Property Owners of New York (SPONY) have lobbied Senator Gounardes over the last two years to remove any support of the bill because of the negative impact that it would have on small property owners in his district. Although the efforts were largely successful last year after Gounardes removed his name off of the bill, he has cited redistricting and the demands of his constituency as reasons why he must support the legislation again.

The decision by Senator Gounardes rallied bill supporters in the Legislature, as well as major tenant advocates, who now believe that enough momentum is on their side to garner the support that they need for the legislation to pass this session. Since Gounardes' announcement, many media outlets in New York City, such as New York 1's Inside City Hall, have aired multiple segments on Good Cause Eviction. For the most part, these segments and interviews have only featured tenant activists, rather than Senators

or Assembly Members whose votes could play a pivotal role in whether or not the bill passes.

Though it is still possible that some lawmakers could attempt to negotiate Good Cause Eviction as part of the State budget (*see page 5*), it seems as if Senator Brian Kavanaugh and Assemblywoman Linda Rosenthal, chairs of their respective housing committees, have prioritized housing vouchers for the time being. As we reported on the next page, Senator Kavanaugh and the Senate Committee on Housing advanced the Housing Access Voucher Program (HAVP) bill out of committee at the end of January. At her first Assembly Standing Committee on Housing hearing as chairwoman on February 14<sup>th</sup>, Assemblywoman Rosenthal made HAVP the top legislative item on the committee's agenda and advanced the bill as well. Because HAVP would require significant funding from the State, it is clear that progressive lawmakers will make this program their top priority for budget negotiations. If Good Cause Eviction is not negotiated as part of the State budget, we expect progressive lawmakers to turn their undivided attention towards this bill after the budget passes and attempt to pass it as a standalone bill before the end of the legislative session in June.

In the meantime, our statewide coalition known as Homeowners for an Affordable New York (HFAANY) has officially kicked-off our latest campaign to stave off Good Cause Eviction. In early February, our campaign launched a handful of new digital and radio ads, have sent out hundreds of mailings into various Senate and Assembly districts throughout the State, and have commenced an effective public relations campaign. Over the next few months, we will have frequent updates concerning our efforts, as well as details as to how our membership could be helpful. For now, we encourage you to utilize the HFAANY homepage at [www.hfaany.com](http://www.hfaany.com) to "Take Action" and contact your State representatives via email and Twitter. ■

## Council Members Tour RSA Board Members' Vacant Apartments *(Cont'd From Previous Page...)*

in order to bring them up to code, and the building owner had no choice but to leave them vacant as a result of inadequate funds to complete the overhaul. Nevertheless, the owner is waiting for estimates from various contractors.

Although various stakeholders are pushing Albany to revisit the HSTPA, or consider new legislation to provide owners the ability to bring these apartments back on the market, Council Members Borelli and Carr will be addressing vacant unit concerns to their colleagues at the Council. In fact, Council Member Borelli, who has been a strong opponent of stringent regulations on rental

property owners, penned a scathing op-ed in the New York Post that detailed his tour. You can read the op-ed by visiting: <https://bit.ly/3EceGWI>.

In addition to stopping Good Cause Eviction, one of the biggest priorities for the rental housing industry moving forward is to address the inability of owners to invest and renovate vacant units with long tenancies or considerable damage made by prior tenants. We will keep you apprised of all developments on the State and City level. ■