ISSUES INVOLVING RIGHTS OF CITIES, TOWNS & VILLAGES IN NEW YORK STATE TO OPT INTO THE EMERGENCY TENANT PROTECTION ACT OF 1974

I. The Net Vacancy Rate is the appropriate standard for determining a housing emergency

Before a municipality can declare an emergency and opt into the Emergency Tenant Protection Act of 1974, the municipality must establish that the "vacancy rate" for the class of housing to be regulated is five percent or less. The ETPA does not specify how that vacancy rate should be defined.

There are two ways of defining a vacancy rate, the gross and the net.

As new municipalities across the state consider opting into the ETPA, there is bound to be confusion about vacancy surveys and vacancy rates. The real estate lobby will try to spread confusion. The only common data source is the American Community Survey conducted by the U.S. Census Bureau, but the ACS is a multi-purpose survey, not focused on housing. The ACS attempts to distinguish housing units that are vacant for different reasons, but with nothing approaching the precision of the New York City Housing and Vacancy Survey. In particular the ACS is not a reliable measure of the net vacancy rate.

The gross vacancy rate includes all vacant apartments at the time of a survey, no matter what the condition of the apartments and no matter why they are vacant.

The net vacancy rate is determined by subtracting from the gross vacancy rate all apartments which are (a) uninhabitable and (b) unavailable for rent. Put another way, the net vacancy rate is comprised of all apartments which at the time of the survey are vacant, habitable, and available for rent.

The reason an apartment is unavailable for rent is irrelevant in terms of determining the net vacancy rate. It doesn't matter if the landlord is warehousing for speculative reasons, or if the landlord is renovating an apartment, or if he is holding it vacant for a friend or relative who is moving in three months after the survey. The important fact is the apartment is off the market, not available to renters who are looking for a place to live. It should therefore not be counted as vacant for purposes of determining the supply of rental housing in a municipality.

The same standard applies to dilapidated apartments, included those that are boarded up. Such units are not available to potential renters looking for a home.

The United States Bureau of the Census uses the net vacancy rate as the valid indicator of a housing emergency, as does the City of New York. The courts, including the New York State Court of Appeals, have consistently upheld the use of the net vacancy rate as justification for a continuing housing emergency, in the face of landlord lawsuits insisting that the standard should be the gross vacancy rate.

Lampert v. Berman ***(Click on name of each case to access the decision)***

For example, in 1967 the gross vacancy rate in NYC was 5.14 percent and the net vacancy rate 3.19 percent, according to a survey conducted by the U.S. Census Bureau for the City of New York. Based on that survey the New York City Council voted to extend the city rent control law for two years. Landlord

Leonard Lampert sued City Rent and Rehabilitation Administrator Frederic S. Berman to overturn rent regulation, claiming that the City should have used the gross vacancy rate.

In his decision dismissing the lawsuit, Supreme Court Justice Joseph A. Sarafite concluded, "Moreover, respondent's finding was challenged on that very issue and fully reviewed at a public hearing before the City Council and thereafter indorsed in the form of a resolution passed by that legislative body. Nor can it be said that there was an insufficient rational basis for the legislative finding of the existence of an emergency as to justify this court to disregard that finding. This is particularly true when it is undisputed that the net vacancy rate factor used by both this respondent and the City Council has had long historical precedence in the process of ascertaining the existence of a housing shortage." *(Lampert v. Berman, 284 N.Y.S.2d 657*).

Amsterdam-Manhattan, Inc. v. City Rent & Rehabilitation Administration

An earlier case dealt with the same issue, as well as a larger challenge to the constitutionality of the New York City rent control law. In 1962 Governor Nelson Rockefeller and the state legislature, for political reasons not detailed here, repealed state rent control within the City of New York and authorized the City Council to enact its own rent control law covering pre-1947 apartments, which the City promptly did. The state authorizing legislation required the City to undertake a survey of the housing supply and condition by 1964, and every two years thereafter. The City contracted with the U.S. Census Bureau in 1962 for such a survey, which when completed in 1963 found that the net vacancy rate was 1.79 percent.

The City Rent & Rehabilitation Administrator embodied the Census findings in a report, "People, Housing and Rent Control in New York City" which the Mayor transmitted to the City Council in December 1963. The Metropolitan Fair Rent Committee, a landlord organization, submitted its own report to the City Council, "Memorandum to the City Council of New York on Rent Control."

Based on the Census findings, and after a January 23, 1964 public hearing at which 173 people testified, the City Council voted to renew the housing emergency. Landlords sued. They claimed that reliance on any vacancy rate to determine a housing emergency "provides little meaningful aid in analyzing the housing situation" in NYC. They claimed that the net vacancy rate was invalid because it excludes units (1) rented seasonally, (2) rented but not occupied, (3) used as an occasional second residence, (4) held off the market because of pending litigation, (5) held by a business firm for entertainment of out-of-town visitors and personnel, and (6) those in a dilapidated condition. Supreme Court Justice Birdie Amsterdam (with the same last name as the lead plaintiff) ruled that reliance on the net vacancy rate "afforded a rational basis for the legislative determination of emergency."

Amsterdam-Manhattan also deals with larger issues concerning the proper exercise of police power by government to protect the public. To summarize briefly, Justice Amsterdam found that renewal of the city rent control law met the standards of rational basis and reasonableness. In a May 14, 1964 decision, she granted summary judgment to the City.

The landlords appealed and the Court of Appeals upheld the lower court in a 6-1 vote on April 15, 1965. COA Judge John Van Voorhis issued a long dissent in which he questioned the validity of continuing to rely on a wartime emergency, and stated that the net vacancy rate alone was not adequate to determine the continuation of a housing emergency. *(Amsterdam-Manhattan, Inc. v. City Rent & Rehabilitation Admin., 15 N.Y.2d 1014. 207 N.E.2d 616)*

NOTE: An interesting sidebar to this case: In March 1964 the City Council voted to end rent control for apartments renting for $250 or more per month, except for those with families of four or more persons, and with a proviso that families with children would not have to move before the end of the school year. This was the second time "luxury decontrol" was adopted; in 1957 the state rent administrator issued an order that decontrolled larger apartments renting for $416.66 per month. Both of these rulings were upheld in court. U.S. Census data from 1960 found that only some 8,700 rent-controlled apartments in NYC rented for more than $250 per month.

The U.S. Census Bureau standard

The U.S. Bureau of the Census conducts an extensive Housing and Vacancy Survey for the City of New York every three years. While the HVS contains a wealth of data about housing, neighborhoods, rents, tenant household incomes and other useful information, its primary purpose is to calculate the citywide vacancy rate, required before the City Council can periodically renew the city rent control law and before the City Council and Mayor can renew the NYC Rent Stabilization Law of 1969.

The Census Bureau has always determined that the net vacancy rate is the relevant measure to determine if a housing emergency continues to exist in NYC.

Here is an explanation from "Selected Initial Findings of the 2017 New York City Housing and Vacancy Survey," on the website of the NYC Department of Housing Preservation and Development:

"Since the first HVS in 1965, the Census Bureau has applied the same definition and equation, without exception, in estimating the rental vacancy rate in New York City, using data from the HVS, as specified in the following:

$$\frac{\text{Number of Vacant Non-Dilapidated Units Available for Rent}}{\text{Number of Vacant Non-Dilapidated Units Available for Rent} + \text{Number of Renter-Occupied Units, Dilapidated and Non-Dilapidated}}$$

"Starting with the first HVS in 1965, the Census Bureau has treated dilapidated vacant units as unavailable for rent and has excluded them in counting the number of vacant units available for rent and, thus, in estimating the rental vacancy rate. On the other hand, in counting the number of occupied rental units, the Census Bureau has counted all occupied rental units, whether or not they are dilapidated." [The number of dilapidated apartments in New York City is quite small, and has decreased dramatically over the years.]

Legislative reform?

It is worth considering a legislative amendment to the ETPA to clarify the situation, by making it clear that the appropriate measure is the net vacancy rate.

II. Legal precedents involving vacancy surveys & declarations of emergency

Since enactment of the Emergency Tenant Protection Act of 1974, landlords have repeatedly sued municipalities in the three suburban ETPA counties (Nassau, Rockland and Westchester) after the municipalities have voted to opt into ETPA. Landlords have won some of these cases and lost others.

Following is a brief description of relevant cases. Links to the decisions are included for those who want to read them in detail. ***(Click on name of each case to access the decision)***

Seasons Realty Corp. v City of Yonkers, 80 Misc.2d 601, 363 N.Y.S.2d 738

The City of Yonkers voted to adopt the ETPA on June 28, 1974, several weeks after ETPA had been enacted in Albany. Landlords sued on grounds that the City had failed to undertake a vacancy survey but rather relied on 1970 data from the U.S. Census Bureau with an updated statistical analysis by the city Department of Planning, and that the City had erred by including exempt rental classifications in its calculations instead of only housing eligible for ETPA coverage. The landlords also claimed that the City's determination was an administrative act rather than a legislative one, which would require more substantial evidence before the City Council could act. Justice George Beisheim ruled against the landlords, finding that the action by the Council was clearly a legislative, not administrative decision. He also upheld the declaration of emergency despite the lack of a formal vacancy survey, and despite the fact that the Dept. of Planning's finding that the June 1974 vacancy rate was 4.1 percent was not completed until December 1974. The judge also wrote that a survey conducted by the Yonkers Builders Institute and Apartment Owners Advisory Council, purporting to show a 5.26 percent vacancy rate, was not credible as it covered only 3,000 rental units out of 12,000 to 13,000 in the city.

Central Plains Co. v City of White Plains, 48 A.D.2d 326, 369 N.Y.S.2d 483

The City of White Plains conducted a survey that found that the citywide vacancy rate was less than five percent, and based on that finding the Common Council voted to declare a housing emergency on July 29, 1974, thus opting into the ETPA. Landlords sued, claiming that the survey was invalid because it included all housing within the city, including exempt units such as public housing. The landlords claimed that including housing which is always occupied and thus virtually vacancy-free would lead to a perpetual finding of an emergency despite conditions in the private sector and pervert the purpose and intent of the ETPA. The landlords claimed that without including the exempt units, the vacancy rate exceeded 5 percent. The lower court agreed with the landlords and invalidated the emergency declaration. The City appealed and the Appellate Division, Second Department voted unanimously to reverse the lower court, finding that the term "exempt" applied to classes of housing that are ineligible for coverage (because they are already regulated by other laws, or in smaller buildings) but not for purposes of determining the availability of housing. The appellate judges pointed out that ETPA allows municipalities to survey a particular class of housing accommodations, or survey the entire community.

Spring Valley Gardens Associates v Victor Marrero, 100 A.D.2d 93, 474 N.Y.S.2d 311

A series of seven consolidated lawsuits seeking to overturn a declaration of emergency by the Village of Spring Valley. The landlords claimed that because the village had not included buildings with fewer than 6 units in the survey, and because it had imputed zero vacancies to buildings whose owners stonewalled a survey, the declaration was invalid. On August 28, 1978 the Village Attorney sent letters and

questionnaires to the owners of 53 buildings containing 4,786 apartments, from a list of buildings with six or more units she obtained from assessment records. She requested information about vacancies as of September 5. Eighteen landlords responded and the Village sent inspectors to 19 other buildings, where they determined that 12 had no vacancies and superintendents of the other 7 refused to grant access. The Village Attorney sent a follow-up letter and another copy of the questionnaire to those landlords who had not replied, telling them that if they did not respond by October 20, she would assume that there were no vacancies. She reported to the village board of trustees on November 6 that the vacancy rate on September 5 was less than 2 percent; the board of trustees held a public hearing on December 5 and declared an emergency. The trial court invalidated the declaration, because of the assumption of no vacancies in the 16 unresponsive buildings, and the failure to include the under-six buildings. The appellate court reversed the lower court, upholding the declaration of emergency on a "common sense" basis despite the flaws of the survey methodology; one justice dissented.

Colonial Arms Apts. v Village of Mount Kisco, 104 A.D.2d 964, 480 N.Y.S.2d 895

The Village of Mount Kisco declared a housing emergency on November 19, 1979 with respect to buildings with 16 or more apartments. The village relied on a survey prepared by a consultant in connection with an unrelated housing assistance plan submitted by the village to the U.S. Department of Housing and Urban Development, which stated that the village had a 3.2 percent vacancy rate as to rented accommodations in general. The Appellate Division, Second Department invalidated the emergency declaration on October 22, 1984 because of the failure of the village to undertake a survey of buildings with 16 or more housing units. Since the Mount Kisco appellate decision, municipalities considering whether to opt into ETPA have been well advised to conduct a vacancy survey of the class of housing accommodations to be regulated.

Kaplen (d/b/a Mountainside Apartments) v Town of Haverstraw, 126 A.D.2d 606, 511 N.Y.S.2d 44

Wilson Kaplen, owner of Mountainside Apartments, and other landlords sued the Town of Haverstraw, seeking to invalidate a September 12, 1983 declaration of emergency for buildings with 120 or more dwelling units (which resolution was later corrected to regulate apartment complexes with 100 or more dwelling units). The landlords maintained that the declaration was invalid because the village should have been required to survey all housing units within its borders, and that adoption of ETPA for buildings with 120 apartments or more was arbitrary and capricious. The Supreme Court sided with the village on both points, as did the appellate division in a unanimous decision of January 20, 1987.

Roslyn Garden Assoc. v Board of Trustees of Incorporated Village of Roslyn, 190 A.D.2d 722, 593 N.Y.S.2d 301

The Village of Roslyn declared a housing emergency and opted into ETPA in 1981. In 1990 the landlords of the village submitted what they claimed was proof that the vacancy rate exceeded 5 percent, which under the ETPA would require the village to declare the emergency at an end. Instead of undertaking its own survey, the mayor and board of trustees stonewalled, and the landlords sued. The trial court heard evidence that the vacancy rate was in excess of 5 percent, which no one contested, and the court directed the village to declare the emergency at an end. The village appealed, claiming that the court had impermissibly usurped the legislative discretion of the board of trustees. The appellate division ruled against the village in a unanimous decision on February 8, 1993.

Executive Towers at Lido LLC v City of Long Beach, 784 N.Y.S.2d 130, 11 A.D.3d 651

NOTE: I was involved in this fight as an organizer and adviser to the Long Beach Tenants Coalition.
The City of Long Beach declared an emergency in 1974 for buildings with 100 or more units, then in 1976 enacted a second emergency declaration for buildings with 60-99 apartments. In January 1996 landlords sent a letter to the City Council claiming that the vacancy rate had exceeded 5 percent. The City Council responded with a proposal to enact Vacancy Decontrol. Long Beach tenants organized to fight back, sending testers into buildings to ask to rent apartments, who were told that there were no vacancies at the moment; tenant associations in the same buildings canvassed door-to-door to document vacancies. More than 300 angry renters packed City Council meetings on two occasions, presenting evidence of warehousing by landlords to inflate the vacancy rate artificially. At the second meeting the City Council withdrew the proposed vacancy decontrol amendment, whereupon the landlords sued. The case was assigned to a referee, a retired Supreme Court Justice, who dismissed concerns about warehousing and disparaged the credentials of the consultant the City hired to reconstruct the vacancy rate in the spring of 1996. In 2002 the referee ruled that the vacancy rate in the "100 or more" class had exceeded 5 percent between March and June 1996 and that the City was therefore obligated to declare the emergency at an end. He awarded $4 million in damages to one landlord and $2 million to another. The City appealed and on October 25, 2004 the Appellate Division, 2d Dept. unanimously reversed the lower court. The appellate court ruled that landlords did not have a private right of action to recover damages from City's failure to declare the emergency at an end. While the appellate judges concluded that the vacancy rate for the larger class had exceeded 5 percent between March and May 1996, this was now moot, because in August 2003 the City Council had voted to consolidate the two classes into one, for buildings with 60 or more apartments.

Executive Towers at Lido, LLC v City of Long Beach, 831 N.Y.S.2d 445, 37 A.D.3d 650

Following this 2003 consolidation, the landlords filed a new lawsuit, seeking damages under civil rights law and a declaration that the emergency was at an end. The Supreme Court granted summary judgment for the City, dismissed the owners' claims for civil rights damages, and upheld the consolidation of the two classes, while granting the landlords' motion for partial summary judgment declaring that the vacancy rate exceed 5 percent for the larger class between January and May 2003. The parties cross-appealed and on February 20, 2007 the Appellate Division, 2d Dept. unanimously sided with the City. The appellate panel dismissed the owners' claim for civil rights damages and ruled that their challenge to the consolidation of the two classes was "without merit." The judges ruled that the vacancy rate for the larger class had exceeded 5 percent for a few months in 2003, and that the 2003 survey by the City that concluded that the vacancy rate for the larger class had not exceeded 5 percent was not a good faith study derived from precise data. But once again this finding was mooted by the fact that the declaration of emergency now applied to all buildings with 60 or more apartments.

The Takeaway:

Landlords are quick to sue cities, towns and villages to prevent enactment of ETPA, and to sue to terminate ETPA at a later stage, often on trumped-up grounds. Tenants and local legislative bodies should fight all such efforts, and be aware of precedent.

1. There is a presumption of validity for legislative actions that are made on a rational basis.
2. Declaring an emergency after conducting a survey that is based on precise data will be upheld.

3. It is well settled law, and probably best practice, to rely on net vacancy rate rather than gross; there have been no challenges to use of the net vacancy rate since the 1960s.
4. The municipality should decide whether to survey all of the housing stock or a particular class. Since the Mount Kisco decision, it is imperative that municipalities at least conduct a vacancy survey of the class of housing they seek to regulate.
5. The design and execution of a vacancy survey is important, whether for initial opt-in or to defend a housing emergency declaration at a later date, so attention should be paid to the qualifications of any consultant responding to an RFP. Where municipalities have cut corners, they have sometimes gotten away with it but in other cases have lost the protections of rent stabilization. Stonewalling, as shown in the Roslyn decision, is a mistake. The municipality must be able to justify the design of the survey, and the data should be available if there is a lawsuit.

A paragraph in the appellate decision in the second Long Beach case is relevant:

"In reaching a determination as to whether to declare or end an Emergency Tenant Protection Act (ETPA) housing emergency, a municipality need not conduct a complete survey of all housing, but it must ground its determination upon a common sense approach, and its survey must demonstrate a good faith study derived from precise data." *McK.Unconsol.Laws § 8623 et seq.*

The Spring Valley appellate court also ruled in favor of the municipality in part because the judges found that "a good-faith study was made based on precise data obtained from a substantial majority of the complexes," even though some of the landlords refused to answer the village's questionnaire.

Bottom line: As long as the decisions around the vacancy surveys were rational and justifiable, the courts have generally upheld the declarations of emergencies. Roslyn's actions were not rational. And Mount Kisco didn't have data to show the judge.

Respectfully submitted,
Michael McKee, Treasurer
Tenants Political Action Committee
August 2019