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Op-Ed

**RENT BOARD DECISIONS DESERVE NO DEFERENCE**

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In a large number of New Jersey municipalities the ability of property owners to raise rents -- whether based on the U.S. Consumer Price Index, capital improvements, tax surcharges, hardship or otherwise -- is controlled by local rent boards.

According to one recent compilation, approximately 100 New Jersey municipalities have rent-control ordinances, including Newark, Jersey City, and Bayonne.[FN1]

Needless to say, rent board decisions do not always satisfy property owners. Frequently, appeals are taken by actions in lieu of prerogative writ to the Superior Court Law Division in the county in which the municipality is located. But the courts apply a narrow standard of review, ?? apparently borrowed from land-use appeals ?? that presumes the validity of local rent boards' decisions and gives them substantial deference.

However, given the makeup of local rent-control boards, the nature of their decisions, and the significant differences between rent control and land use, a quandary arises whether such deference is warranted. Should reviewing courts analyze the matter de novo, just as municipal governing bodies -- authorized by ordinance to review rent-board decisions -- must do?[FN2]

**Deference Plausible**

The traditional basis for deference to decisions of an administrative agency is the specialized expertise of that agency in the substantive area. That rationale is appropriately applied, for example, to decisions of state administrative agencies. The employees of those agencies are professionals who spend full time overseeing a particular substantive area, and promulgating and enforcing administrative regulations.

The numerous substantive regulated areas, such as environmental law, securities or other specialized subjects are often unfamiliar to generalist judges who are not exposed to more than a handful of cases in the traditionally administrative areas. Thus, deference often has merit.

Decisions of municipal planning boards and boards of adjustment receive deference for a different reason. In *Ward v. Scott*, 16 N.J. 16, 23 (1954), the state Supreme Court stated that the basis for deference to the decisions of planning boards or boards of adjustment was their peculiar familiarity with local conditions. That rationale has continued to underlie the now well-established rule that courts will not substitute their judgment for that of municipal land-use agencies, but will uphold the agency decision if there is any basis for it in the record.[FN3]

Courts that have considered the issue of standards of review have transplanted the municipal land-use agency standard to rent control without serious consideration of whether the standard really is transferable. In *Reid v. Hazler Twp.*, 198 N.J. Super. 229, 234 (App. Div. 1985), certif. denied, 101 N.J. 262 (1985), the court held that a municipal governing body should make a plenary review of a local rent-board decision, just as it is required to

do on appeal from a local board of adjustment, where municipal ordinances permit such an appeal.[FN4] The case seems to assume, however, that the standard for judicial review of municipal rent-board decisions would be the same deferential standard applied on appeal from decisions of local municipal land-use agencies, comparing plenary review with “the narrow judicially oriented type of [arbitrary and capricious] review.” Id. Other decisions that have discussed the judicial standard of review of rent-board decisions have endorsed the deferential standard, again relying mainly on cases from New Jersey’s substantial body of land-use law.[FN5]

#### Irrational Deference

Neither of the foregoing reasons for deference to administrative decisions justifies the courts in deferring to rent board decisions. In contrast to state administrative agencies, municipal rent boards are populated by untrained, part-time lay people, as our courts have long recognized: In most municipalities, there are no special requirements for board membership.[FN6]

Rent-board appointees are normally either members of the victorious political party, or persons drawn from the constituencies affected by rent control (landlords, tenants, and non-landlord property owners).[FN7] No municipality has a full-time rent-board, and many have little or no professional staff. Experience teaches that it is the board attorney (when one is present), the lone professional, who is often the guiding force behind the board’s substantive decisions.

The general lack of rent-board expertise is accentuated in cases involving larger apartment complexes. This is because there are far fewer such complexes than there are smaller ones. In *Park Tower Apts., Inc. v. Bayonne*, 185 N.J. Super. 211, 222 (Law Div. 1982), a study presented to the court showed that only 24 percent of the 19,361 apartment units - 10 the city of Bayonne are in complexes of five units or more. The average size of even those dwellings is only 9.75 apartments.

The unfamiliarity of rent boards with larger complexes results in unfair treatment of such properties. The natural suspicions of boards when confronted with larger property owners, who are more likely to be represented by attorneys, are fueled by the numerous tenants -- often also with attorney’s -- who appear in opposition to any rent increase sought by the owner. Additionally, the economics of larger properties are foreign to boards used to dealing with smaller dwellings. Those factors lead to erroneous decisions.

Courts do not defer to state administrative-agency decisions involving issues that can be evaluated equally as well by courts as by the agencies.[FN8] The primary issues involved in rent-board decisions are purely legal interpretations of the applicable rent-control ordinance (such as what constitutes a “capital improvement”), or simple mathematical calculations (such as CPI guideline increases). Rent boards are no better able to make these decisions than are courts. Indeed, no deference to rent-board legal interpretation is warranted - in any event.[FN9]

Hardship applications should require the board to employ some expertise to determine issues such as which property owners are efficient operators, and whether expenses, are reasonable. However, there are very few hardship applications, due in part to the prohibitive cost in dollars and time to bring such applications, as discussed below. Thus, rent boards have little opportunity to develop expertise with hardship applications that would require judicial deference.

#### Different Statute Controls

Although these arguments might appear to apply to planning boards and boards of adjustment as well, there are significant differences. Unlike rent control land-use decisions of municipal agencies are made within the framework of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. That statute contains not only uniform substantive guidelines, but procedural rules designed to minimize the potential of arbitrary action and ensure fair-

ness to all parties.[FN10]

In contrast, there are no such uniform rules for rent-board decisions, a deficiency noted by the state Supreme Court in one of its first rent-control decisions.[FN11] Instead, the establishment of such basic principles as transcriptions of rent-board hearings and proper findings and conclusions, required tortuous judicial proceedings.[FN12]

Transplantation from municipal land use is also inappropriate, because the basis for deference there -- the familiarity of the local agency with "local conditions" -- is completely inapplicable to rent control. The municipal land-use law specifically requires local land-use decisions, such as the grant or denial of variances to take into account any impact on the locality.[FN13]

Rent-control decisions have nothing to do with "local conditions." Instead, they concern purely the application of the local rent-control ordinance to the requested increase as a matter of law, or, in the case of requested hardship increases for example, whether a particular property owner is receiving a constitutionally fair return. The effect of the increase on the community at large is never an issue.

Thus, there is no basis for the analogy to the standard of review of decisions of municipal land-use agencies instead, reviewing courts should employ the same *de novo* review of the record below that municipal governing bodies have been charged to employ.[FN14]

The need for real oversight of local rent control decisions has been accentuated by another fact. The ability of a property owner to obtain a constitutionally fair return by filing a hardship application if all else fails has been severely undermined by the expense of such applications. In *Helmsley v. Fort Lee*, 78 N.J. 200, 231 (1978), the Court recognized that the cost of filing a hardship application is often so burdensome that property owners do not seek hardship increases, thus rendering that safety valve useless.

Many current ordinances contain hardship procedures that are so time-consuming and require so much expense to comply with the numerous intricate requirements that property owners are daunted by the mere prospect of filing a hardship application. The cost problem is compounded by the further requirement, often present in local ordinances, that the hardship applicant pay for the cost of an accountant to act as the board's expert on the application.

With the hardship route so onerous, it becomes more critical that day-to-day rent-board decisions on annual increases, capital-improvement surcharges and the like be properly reviewable. Otherwise, property owners victimized by erroneous rulings face the eventual choice of filing an expensive, time consuming hardship application or cutting corners on maintenance in order to minimize red ink. The latter choice certainly does not benefit tenants in the long run either.

#### Poor Performance Record

If a presumption of validity is not established by statute, neither is there a track record to justify it. In *Park Tower*, supra, 185 N.J. Super. 211, the board simply adopted the findings of its accountant without providing even a semblance of due process to the property owner. That decision was reversed.

More egregious was the original decision in *Prudential Ins. Co. of America v. Guttenberg Rent Control Bd.*, 220 N.J. Super. 25 (App. Div. 1987), certif denied, 109 N.J. 505 (1987). As the court noted there, the initial decision of the Guttenberg Rent-Control Board was reversed because it smacked of a purely political action taken by board members to benefit the widow of the mayor who had appointed them. *Id.* at 32.

In *Goldberg v. East Orange Rent Control Bd.*, 175 N.J. Super. 19 (Law Div. 1980), the board attempted to limit an increase to two-thirds of the amount to which the property owner was entitled as a matter of right. The court properly reversed that decision as well.

Practitioners in this area are aware of other decisions that, though unappealed due to the economics involved, or

unpublished if appealed, demonstrate the need to abandon deference. Substantively erroneous rent-board decisions are often upheld because a court can divine a "rational basis." Thus, the deferential standard of review itself discourages meritorious appeals except where the monetary loss to the property owner is huge, or the owner can otherwise afford the litigation.

Given the absence of any underlying rationale for deference to rent-board decisions, there is no reason to perpetuate this shield. The courts should discard the presumption of validity of rent-board decisions, and assume a much more vigilant posture on review of those decisions.

The author, a member of Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein in Woodbridge, has handled rent-control matters throughout the state.

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FN2. ??

FN3. ??

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