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May 14, 2009

Gary R. Connor, General Counsel
NYS DHCR
25 Beaver Street, 7th Floor
New York, New York 10004

VIA E-MAIL (Hard Copy to Follow)

Re: Comments on DHCR's Proposed Regulations Governing Mitchell-Lama and Limited Dividend Housing Companies

Dear Mr. Connor:

We commend DHCR for taking the initiative in revising and simplifying the regulations governing Mitchell-Lama and Limited Dividend Housing Companies and for requesting comments on the proposed changes.

Our comments, set forth below, will focus mainly on the procedure, mechanics and requirements for dissolution, however, a few other items will also be addressed.

The proposed regulations relating to dissolution of mutual companies would be significantly improved if they were further revised. The regulations should spell out clearly the timing of the votes and the required number of votes—which ideally would be 2/3 of all apartments at each stage of the process—to: 1. prepare a Preliminary Plan; 2. to give Notice of Intent to Dissolve and prepare and submit an offering plan to the Office of the Attorney General; and, 3. to dissolve. We believe that very clear and strict rules should govern the dissolution process so that moderate income shareholders are not induced to give up their affordable homeownership based on potentially misleading information.

On July 14, 2006, HPD adopted new rules on dissolution. In HPD co-ops, the Rules for dissolution of mutual companies require three votes:

1. Majority vote at Special Meeting of Shareholders to authorize expenditure of a specified sum to "take steps necessary to ascertain the desirability of dissolution" (DHCR's "Preliminary Plan").
2. Special Meeting to authorize preparation and submission of an offering plan and authorize filing of Notice of Intent—2/3 vote.

3. Notice of Intent must be given to HPD not less than "365 days prior to the anticipated date of dissolution."
4. 2/3 Vote on the Offering Plan.
5. Votes for expenditure of money and dissolution must be conducted by an "independent election company." §3-14 (i)(6-7a)

We strongly recommend that DHCR, too, clearly require three votes rather than two in this process.

HPD's April 3, 2009 proposed rule changes,[1] also provide that:

1. No proxies or absentee ballots, except in case of medical necessity, can be used in the second and third votes, i.e., the vote to give Notice of Intent to Dissolve and prepare and submit an offering plan, and the vote on whether to dissolve . [This is to "ensure that such votes will be fair and equitable and that shareholders are not unduly pressured to vote in a certain manner" (HPD "Statement of Basis and Purpose" for Rule Changes, 4/3/09)]; and

2. The count in each of the three votes, i.e., the vote to prepare the Preliminary Plan, the vote to give Notice of Intent and prepare and submit an offering plan, and the vote to dissolve, shall be by apartment and not by shares ["each dwelling unit shall be entitled to one vote regardless of the number of shares allocated to such dwelling unit . . . ."].

We strongly support uniformity in the DHCR and HPD Rules and the adoption by each agency of the best practices of the other. HPD, in fact, cited the DHCR Rules and proposed Rules, as well as the Business Corporation Law, for the changes in its proposed rules relating to the requirement of one vote per apartment and the prohibition of proxies in votes relating to dissolution.

We also suggest that the following requirements should be included in the dissolution process:

1. That in the resolution to be voted on, the maximum amount authorized to be spent on the preparation of the "Preliminary Plan" be stated. The maximum amount authorized to be spent on the offering plan should also be specified in the resolution authorizing its preparation. DHCR should also require additional votes to authorize expenditures in excess of the amount originally authorized for the preparation of either of these documents. Residents are entitled to know how much they will be paying and be asked to authorize additional expenditures as they arise.

2. As drafted, the DHCR regulations appear to contemplate only one vote until the final vote on dissolution, i.e., "an affirmative vote of at least a majority of shareholders, counted on the basis of one vote per dwelling unit" (p. 120, Section 12(c)) to authorize two things:

[1] Available at: http://www.nyc.gov/html/hpd/downloads/pdf/Mitchell-Lama-Rule-4-3-09.pdf

a. preparation of a "Preliminary Plan, the cost not to exceed $100,000, to explore and explain to all shareholders the ramifications of dissolution" (p. 120, Section 12(c)(1)) and

b. preparation and submission to the Office of the Attorney General of a private cooperative or condominium plan" (p. 120, Section 12(c)(2)).

It is not clear from the language used that, prior to the vote on dissolution, two votes are required—one for preparation of the Preliminary Plan and another to authorize the giving of the Notice of Intent and preparation and submission of an offering plan. Moreover, there should be a requirement for a 2/3 vote for giving the Notice of Intent and authorization of the preparation and submission of an offering plan. Since dissolution requires a 2/3 vote, the vote to give Notice of Intent and prepare and submit an offering plan should surely also require a 2/3 vote before the company incurs any significant expense.

In addition, we have the following further suggestions:

Comment 1. Add the word "all" before shareholders in the voting section on the "Preliminary Plan," otherwise it could mean a majority of shareholders at a meeting at which a quorum is present, which might be only slightly more than a quarter of all shareholders, not a majority of all shareholders.

Comment 2. Require that all amounts authorized to be spent on the preparation of the Preliminary Plan and the Offering Plan be from a special assessment authorized by the same vote authorizing the expenditures for, respectively, the Preliminary Plan and offering plan, so that no operating funds or capital improvement funds are utilized. [In some projects, those favoring privatization tell residents that the Preliminary Plan/ Feasibility Study and Red Herring are "just for information" and "will cost you nothing." If residents must vote for an assessment to pay for these steps in the privatization process they will be aware that this is a costly process. Rental companies seeking to dissolve cannot use operating or capital funds in pursuit of privatization and the same rules should apply in mutual companies].

Comment 3. Require that if requested by a petition of 10% of the shareholders (counted by apartment) a sum of not less than $15,000 nor more than $25,000 shall be allocated to such shareholders to engage an accountant, attorney, and/or other real estate professionals to critique the Preliminary Plan and discuss any risks inherent in it. [It is usually a pro-privatization board that promotes the Preliminary Plan and the Plan may well reflect a rosy biased picture which does not disclose the realities of privatization. No public agency reviews the Preliminary Plan for truth or accuracy so the Preliminary Plan can mislead shareholders and this misleading information is never required to be corrected].

Comment 4. Require that the Preliminary Plan be distributed to all shareholders before any vote to prepare an offering plan. [This Preliminary Plan should give the

shareholders information that will let them know whether it is prudent to spend an even greater sum to prepare and submit an offering plan to the Attorney General's Office and give a Notice of Intent to Dissolve. If they are not given a copy of the Preliminary Plan, this purpose will be subverted].

Comment 5. Require a 2/3 vote, "counted on the basis of one vote per dwelling unit," to give Notice of Intent to Dissolve and to authorize an amount of money to be spent on preparation and submission of an offering plan. [This is the new HPD rule in the 4/3/09 regulations. Additionally, since the final vote on dissolution will require a 2/3 vote, this vote will show whether there is sufficient interest in privatization to warrant the great expenditure for preparing an offering plan. These funds will be wasted if there is insufficient interest to effect privatization].

Comment 6. Do not allow proxies or absentee ballots, except in case of medical necessity, to be counted in the second and third votes on dissolution. [Some developments have attempted to use undirected proxies to garner the requisite vote to go ahead with privatization. This should not be permitted when people are in danger of losing their affordable homeownership if they do not understand the risks of privatization and, in essence, give their vote away with a proxy].

Comment 7. Require that the co-op's reserves, if it dissolves, be escrowed, so that what were capital reserves as a Mitchell-Lama or Limited Dividend Company are not shown in the one-year privatization budget—required by the Attorney General's Office—as available to subsidize operating costs, as appeared to be the case in the Trump IV privatization budget. [In HPD supervised projects, the Private Housing Finance Law requires that all uncommitted reserves be returned to the City at the closing. There is no such requirement for DHCR projects. The result of this is that DHCR supervised projects can accumulate significant amounts of reserves, while subsidized, and then use these reserves to pay part of their operating costs when privatized. Since these reserve funds are not required to be escrowed, they may be quickly depleted by increased operating costs and no funds may be available for urgent capital repairs once the project exits the program].

Comment 8. Require the project to offer vacant apartments to those on the waiting list up until the date of the closing. Otherwise, companies will be encouraged to warehouse vacant apartments to reap an additional windfall profit by selling or renting as many as possible of these "unsold shares" after the closing.

There are currently 63,616 Mitchell-Lama co-op units, 33,265 supervised by DHCR and 30,351 supervised by HPD, and 9,408 Limited Dividend co-op units for a total of 73,024 units remaining in the affordable home ownership housing stock.

Within the next three to four years, 19,991 units of affordable Mitchell-Lama co-ops under DHCR supervision—almost two thirds of the DHCR supervised stock—may be lost to privatization unless the rules are tightened and shareholders are clearly apprised

of the risks of privatization, are not unduly influenced by proponents of buying out, and make their own informed choice.[2]

Comments Not Related to Dissolution[3]

Comment 1. The proposed definition of "Family Member" includes "a husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, or sister" (p. 3). The HPD Rules define family members to include also a "nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, son-in-law, or daughter-in-law of the tenant cooperator." We suggest that the list of defined family members be expanded to include those on the HPD list.

Comment 2. The current and proposed DHCR Regulations require a three year term (after the initial staggered elections) for Board members. We recommend that the term of the Board members not be specified in the Regulations, but instead be left to be decided by the housing company in its by-laws. There are cogent reasons for shorter terms for Board members, chief among them the need for accountability and responsiveness to the shareholders. In addition, we recommend that the new DHCR regulations include a requirement that "no Board member can serve consecutively for more than six years." Such a limit would ensure that Board members and officers do not become entrenched and thus accumulate power and become difficult to unseat by residents who may fear reprisals.

Comment 3. We applaud DHCR for the numbered on-line waiting lists but strongly recommend that the first and last name of those on the waiting list be added. [This way residents can see that if the waiting list says "Smith," that it is actually Smith who moves in. If there is merely a number on the waiting list, there is a greater chance of fraud and manipulation. No one who signs up for a subsidized apartment should have any objection to their first and last names appearing on a public waiting list].

Comment 4. In addition to the requirement that a board member who has an interest in a contract not vote (p. 18), there should be requirement that the Board member disclose the conflict of interest. [If there is no disclosure, the interested board member could influence the vote even though he/she abstains from voting].

Comment 5. We agree with the proposed rule permitting those whose "incomes increase over the admission limits' to continue in occupancy" (p.31), since this would

[2] In 2007, 2,820 DHCR supervised units at Trump III and IV were withdrawn from the Mitchell-Lama program. It appears that currently three more projects, with a total of 4,619 units, have either voted to prepare an offering plan or Preliminary Plan to dissolve and reconstitute (1,651 units at Southbridge Towers, 2,595 at Warbasse and 373 at Rivercross). Furthermore, in two years, Co-op City, with 15,372 apartments, may again vote to do a Preliminary Plan as it did in 2002.

[3] Page number refer to pages in the proposed regulations.

insure that no one would be forced to move and would promote economic diversity, but Section 1727-5.3(a)(6) (p. 55) should be revised to conform to this rule.

We very much appreciate this opportunity to comment and would welcome a meeting with you to discuss these comments more fully. We will be contacting your office in the next week to see whether such a meeting would be possible.

Best regards,

Joan Meyler, Esq., on behalf of Cooperators Untied for Mitchell-Lama