

VICTORY FOR MITCHELL-LAMA ADVOCATES IN COURT CASE

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In a victory for advocates of affordable Mitchell-Lama housing, Justice Emily Jane Goodman of the New York State Supreme Court on March 9, 2010 handed down a decision that vindicated the positions advanced by the East Midtown Plaza Mitchell-Lama Organization (EMP-MLO) in a case initiated by the pro-privatization EMP board.

EMP-MLO had been granted the right to intervene in the case of East Midtown Plaza Housing Company, Inc. v. Andrew M. Cuomo, as Attorney General of the State of New York and The New York City Department of Housing Preservation and Development (Index No. 401278/09).

The EMP Board, as Petitioner, had sued the Attorney General (AG) and the City Department of Housing Preservation and Development (HPD) in April, 2009 claiming that the January 14, 2009 vote on privatization should be counted on a per share rather than on a per unit basis. If the vote were counted according to shares, the Board claims that it would have succeeded in achieving the necessary two-thirds threshold to exit the program. By apartment units, however, the result clearly fell short of achieving the required proportion.

On the crucial issue of whether the pro-private EMP Board, as Petitioner, obtained the necessary votes to exit the Mitchell-Lama program, Justice Goodman ruled that the 1968 Certificate of Incorporation, “[P]etitioner’s own creation, specifically and unambiguously starts with the proposition that votes are counted per unit reflecting an intent to broaden the equities and equal standing of the residents by giving each resident the same voting rights.”

In answering the question of how to count the votes, Justice Goodman explained that “the Court must start with the Certificate of Incorporation which provides that ‘[e]ach holder of shares of capital stock entitled to vote shall be entitled to one vote at any and all meetings of stockholders for any and all purposes regardless of the number of shares held by such holder...’. The Board tried to argue that dissolution of the corporation was an exception to this rule, but the judge rejected this contention, holding that such an interpretation would “render meaningless” the language of the Certificate and that the method of voting applies to “any and all meetings” and “for any and all purposes.”

The judge said that the vote by unit is “the only construction that effectuates the intent of the Certificate of Incorporation, the only document created by Petitioner, as well as the Business Corporation Law.”

The Board’s alternative argument that the AG is without jurisdiction over Mitchell-Lama offering plans “lacks any support whatsoever,” according to Justice Goodman. The judge chided the Board for its “glib reference” to EMP’s so-called “voluntary” compliance with AG regulations, reminding the Board that the offering plan, amendments and relevant correspondence are “replete with references to mandatory submission to the AG” and that the offering plan “put residents on notice that each aspect of the project required AG approval.”

The need for AG supervision over the Offering Plan is apparent because, as the judge pointed out, “[T]he reality is that current shareholders are being offered interests in a new private entity, which has different rights and liabilities from Petitioner.”

Finally, Justice Goodman dismissed the Board’s contention that HPD was without power to change its rules clarifying the method of counting votes. The Board’s attorneys had confused HPD rules with laws enacted under the NYC Administrative Code. The court explained that “[W]hile it is true that the Administrative Code is composed of city laws, that does not change agency rules into laws...and [rules] can be and were amended internally in order to comply with, or clarify, the law.”

All of the arguments set forth by EMP-MLO in its briefs and oral argument before the court were upheld by Justice Goodman. The Board has announced that it intends to appeal the court’s ruling. This could drag the matter on for another year or more, while critical shareholder revenue continues to be diverted by the Board for legal fees for a case of dubious merit.