

VICTORY IN COURT OF APPEALS FOR MITCHELL-LAMA ADVOCATES

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In the third and final act in the court battle to preserve affordable Mitchell-Lama housing at East Midtown Plaza, the New York Court of Appeals, the highest court in the State, issued a decisive ruling on November 19, 2012, in favor of the advocates of Mitchell-Lama housing. The decision represented a resounding vindication of the positions argued by the East Midtown Plaza Mitchell-Lama Organization (EMP-MLO) and rejected the contentions advanced by the privatization EMP board.

By a 6-0 vote, the Court affirmed the rulings of two lower courts in finally dismissing the case brought by the EMP board. In the lower court, 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.

The EMP Board, as Petitioner, had sued the State Attorney General (AG) and the City Department of Housing Preservation and Development (HPD) in April, 2009, in an effort to force the government agencies to allow EMP to exit from the Mitchell-Lama program. On the appeal, EMP argued that the AG had no jurisdiction or authority to prevent EMP from leaving the program and that HPD's method of counting dissolution votes was contrary to the agency's own regulations.

The Court of Appeals rejected both arguments. On the first issue, the court held that Article 23-A of the General Business Law, commonly referred to as the Martin Act, applies in this case and that the Attorney General has jurisdiction over this matter. The court said that the Martin Act "should be liberally construed to give effect to its remedial purpose of protecting the public from fraudulent exploitation in the offer and sale of securities."

The court held the Attorney General properly required EMP to file an offering statement under the Martin Act to allow existing shareholders to make an informed decision regarding the pros and cons of withdrawal from the Mitchell-Lama program. The court explained that privatization would result in a number of substantial changes to the nature of its shareholders' interests. These changes included loss of eligibility for government-subsidized financing and property tax reductions; the imposition on shareholders of a 45% "flip tax" from the proceeds of the first sale of shares; the possibility that individual shareholders would become disqualified from government programs for persons in need; and potential increases in maintenance charges.

"In short," the decision stated, "the changes affecting shareholders are substantial enough to constitute a different investment such that the proposed privatization can fairly be characterized as an 'offering or sale' of securities under the Martin Act.

On the second issue on how to count votes on dissolution, the court held that the Attorney General properly rejected petitioner's second amendment to the offering plan because it

inaccurately stated that petitioner's privatization plan had passed. EMP had contended that the shareholders passed the dissolution plan, based on a per-share vote counting method, when, in fact, it had not passed in accordance with HPD's required per-apartment unit method. The court held that EMP's certificate of incorporation—calling for one vote per apartment—is the controlling document.

The judges held that there was no conflict in the Certificate of Incorporation, the Business Corporation Law and the HPD rules when they determined that the correct methodology of voting was one vote per apartment, regardless of the number of shares held by a shareholder.

The major points set forth by EMP-MLO in its brief and oral argument before the Court of Appeals were fully vindicated and upheld by the court.