

**Privatization of Mitchell-Lama Cooperatives, Another Emerging Disease.
J.S. Poindexter, CU4ML meeting, June 13, 2009**

As a resident shareholder at East Midtown Plaza, where the pursuit of withdrawal and privatization has infected our community for the past 6.5 years, I'd like to talk to you about the **disease "privatization."** This disease has its origins in a 1957 modification of the 1955 Mitchell-Lama (M-L) law allowing owners of rentals to withdraw from the M-L Program and raise rents to market rate in order to escape restraints on their profit. It worked; it enticed developers to build and operate rental units around NY State while making a limited profit for only 20 years, rather than indefinitely. However, care was not taken to exclude the cooperatives from the possibility of withdrawal, and that flaw has proved a tragic mistake for the M-L cooperatives.

In the words of MacNeill Mitchell himself [*NY Times*, 2-23-86; "Unfettering Mitchell-Lama, by P.S. Gutis], "Legislature never intended to convert the developments to private ownership." In short, privatization is an unintended consequence of a hasty modification of a good law [*viz.*, PHFL, article II, the Mitchell-Lama Law].

I ask you this morning to consider this predicament as a disease, and I want to address this disease with respect to three questions:

1. What's it like to experience it?
2. How does it get going?
3. How can it be overcome?

My answers, in brief, will be:

4. It is frustrating, expensive, disruptive, extremely uncomfortable, and significantly damages the community and its property.
5. To get going, it comes on stealthily, then suddenly bursts out and soon is contagious, malignant, and terrifically resistant to remedy.
6. To overcome it, the best protection is prevention; if it cannot be prevented, it has to be caught and remedied in the earliest possible stage.

My illustrations will come mainly from East Midtown Plaza's continuing distress, but the same signs and symptoms are arising in other cooperatives at various stages of this disease.

Onset of the disease.

At EMP, this infectious cancer began in August, 1992, when a Board member suggested that EMP "explore" the possibility of privatization. The board went along with it, and in January 1993, shareholders were called into an informational meeting at which they were told the three steps of the process, pointing out that the shareholders would have to make **three decisions**. Those decisions, taken in three separate Special Meetings, have not changed significantly since we at EMP were first instructed in them in 1992:

Step A. Authorize funds for a "feasibility study."

Step B. Authorize funds for preparation of a preliminary plan (a "Red Herring").

Step C. Finally, vote on an Offering Plan (the "Black Book") that has been accepted for filing by the Attorney General.

On March 2, 1993, 70 % of the votes cast at EMP rejected the feasibility study. Good move. Peace was restored, but it was an illusion. The disease wasn't over; it was only in remission.

Reactivation Disease.

Chicken pox as a childhood disease is a skin eruption that is tolerated by most kids often with nothing worse than severe itching. When it reactivates in the adult, it is a severely painful disease known as "shingles." And so with privatization; the second onset was more severe, more painful, and far, far longer and more costly – 6.5 years vs. 6.5 months.

The pursuit of privatization re-emerged on Sept. 11, 2002, with the suggestion by eleven shareholders (EMP's Eleven, which included the Board president) that the Board "explore" the possibility of privatization. Things happened fast:

Step A. On Friday, Oct. 18, 2002, a Notice of Special Meeting to vote on funds for a STUDY was mailed to shareholders, who received the Notice on Monday, Oct. 21. The date of the meeting was set for Wed., Oct. 30, with a brief opportunity for shareholder comments immediately before the in-person vote during the same meeting. By the time of the meeting, more than half [320 of 634] of the "votes" had already been submitted by proxy nomination with no discussion at all.

The timing of the Notice allowed only six weekdays and one weekend for shareholders who opposed privatization to identify each other. There was no chance of organizing an opposition, and the only opportunity to speak to the shareholders was at the Special Meeting.

Ever see a steamroller move? Read the four-part resolution we were handed that Oct.; it rolled the STUDY and the preparation of the red herring **into one vote**, making the STUDY irrelevant, even though it was the opposition that was accused of being anti-information!!!!

At the end of the meeting, it took the Board's attorney and accountant less than 30 minutes to tally the vote. Surprise: The STUDY was authorized by 82% of the proxy forms plus 30% of the ballots, giving the STUDY a simple majority of 56% of the votes + proxy forms submitted, and the steamroller moved on. For 6.5 years.

Virulence Factors.

In every co-op that contracts this disease, the two biggest **traps** used at this point are:

- Trap # 1.** **Shame on you for opposing information!** The STUDY is needed. Good sense, general knowledge, and moral commitment to affordable cooperative housing are not adequate bases for deciding on the future of your home. Cooperators need to be exposed to a deluge of incomprehensible numbers in order to decide their fate.
- Trap # 2.** The big reason for going private is **finance repairs**. We poor M-L cooperators can't afford our own upkeep, and the "government has run out of money." We need to sell the family heirlooms (our apartments) in order to fix broken windows, *etc.*

The **major weapons** that will be used throughout the process are:

1. **Secrecy of Board actions.** In Sept., 2002, the pushers of privatization admitted to having been planning the resolution and the meeting – with legal assistance – for nine months.
2. **Proxy forms,** which are used as ballots!! and collected into the hands of the pro-private sect through coercion or cajoling of shareholders. This form of voting is not secret, and shareholders who submit proxy forms make themselves conveniently susceptible to intimidation. Every M-L co-op already knows about this means of controlling the outcome of voting.
3. **Hands in the corporate till.** No matter what any law, regulation or resolution mandates, there will be NO review of expenditures, NO monitoring, NO limits, and NO timely accounting. At EMP, the first bit of accounting was provided only after 4 years into the process. Eventually, expenditures of well over \$1 million have been revealed in Annual Reports, with \$386,504. in fiscal 2008 alone – the equivalent of 4 weeks of net maintenance income for the year – and another \$250,000. has been budgeted for such fees in fiscal 2009. By the end of fiscal 2009, the cost will have accumulated to about \$1.5 million. There are far better ways to use our maintenance payments. Like, for maintenance!!!!

The Productive Stage, the most helpful in diagnosis, when cause becomes clear.

Step B. The second decision-making meeting was held late in 2004 to determine whether to move beyond the STUDY to the preparation of a preliminary Offering Plan.

But what's this? Instead of a study, we received in early Nov. a document boldly labeled "Reconstitution Plan"! We were made to vote on it on Dec. 14. This time, as a consequence of a petition from 363 shareholders (of 725 or so), Honest Ballot Association was hired to conduct the voting, and the EMP-M-L Organization was allowed to have League of Women Voters observers and hired attorneys as monitors at the polling place. Lots and lots of proxy manipulating took place anyway, **prior** to the in-person voting.

Result: 64.4% of the apartments voted in favor. At that time (2004), the process required only a simple majority for approval, so the disease progressed.

In February, 2006, the Preliminary Offering Plan (Red Herring) was distributed, and the Board and its supporters, the "Study" Group, each promptly issued notices to shareholders that no further shareholder decision would be required!!! On their own, the Board/Study Group attempted to overrule the process that they themselves had twice described to the shareholders, fully aware that the Attorney General's review of the plan was required **before** the final shareholder decision. It would not be the last time they tried to rewrite the process.

Signs and symptoms of the disease.

The disease causes characteristic changes in the cooperative. Two common conditions are:

Physical deterioration. Twice between 2003 and 2006, EMP was studied by engineers (for substantial

fees) and diagnosed with many major problems. The estimated cost of rehabilitation to ensure comfort and safety of our property – plumbing, wiring, sidewalks, plaza deck, windows – is \$20-26 million. Practically all of the problems have gotten worse in the past 6.5 years of neglect. Why? Because the Board insists that privatization is the ONLY WAY they would use to finance the repairs. It's a way of saying: vote our way, or we'll aggravate your physical problems through persistent neglect.

Confusion. The virulence factors responsible for confusion include abundant secrecy, absence and concealment of information, misleading statements, and downright falsehoods. At EMP, some of the most blatant examples were:

- A. If we went private, cooperators could get reverse mortgages. In truth, reverse mortgages are not available to cooperatives. Period.
- B. The private corporation would provide support equivalent to SCRIE and DRIE for those shareholders who would lose those benefits as a consequence of privatization. In truth, no projection of these costs appears in the budgets.
- C. EMP would not have to pay the City and State property transfer taxes; the Sponsor said this in the plan, even though both taxation departments had ruled the contrary. In truth, when current rulings were obtained through the persistence of shareholders who were not board members, it turned out that the total tax bill that would have to be paid would be \$20 million, not the \$14 million the Sponsor estimated – of the total \$77-million cost of privatizing.
- D. The offering was a non-eviction plan. In truth, this meant that no SHAREHOLDER would be evicted as a consequence of privatization. Problem? EMP's community includes capital-grant residents, whose shares are held by NY State. Unless they buy their M-L shares before the day of conversion, they will be evicted on that day. It says so in the Offering Plan

Two further examples were prepared, but were omitted on June 13 because of limited time.

- E. Government agencies are unable to provide any financial assistance to accomplish major repairs. In truth, there is a long list of resources available to M-L cooperatives, and NY City's Housing and Development Corporation (HDC) offered EMP not just loans, but a \$7-million grant – no interest at all, no repayment ever. The board has stated repeatedly that they are unwilling to commit to staying in M-L long enough to do the necessary repairs.
The board at Cadman Towers behaved in the same manner, despite a shareholder vote directing the board to borrow from the HDC programs. The board claims that shareholders' opinion is only advisory.
- F. To avoid the flip tax, you can leave your apartment to your children or grandchildren (for whom it will become their personal toxic asset). In truth, the heirs' burden deprives the cooperative of a major source of income: the magical Flip Taxes. (EMP's plan indicates that more than 50% of its income will be flip-tax revenue. Just hope that your neighbors don't pass their apartments to their heirs.)
Trump Village West, which withdrew from M-L in 2007, is currently proposing removing grandchildren from the list of acceptable heirs; it seems there are too many doubtful relationships. They also have a pressing problem with illegal sublets and want to impose a fine of \$2,500./month on shareholders who sublet their apartments to unscreened renters. When a M-L co-op goes private, it becomes desperate for revenue.

On and on rolled the steamroller, fueled by greed; driven by deception, by libel of opponents, and by intimidation of residents who feel powerless to resist; and constrained only by an attentive staff in the Attorney General's Office (AGO), which watches out for hidden flaws in Offering Plans.

But: there is no limit on the number of revisions submitted by a Sponsor (EMP prepared at least 10), and the AGO's job is to explain what is deficient. The effect is that the AGO teaches the sponsor how to write an acceptable Offering Plan. Ultimately, the Sponsor cannot fail to win AGO acceptance.

The Crisis Stage.

Step C. At last, the time of crisis arrives – the time in the course of a disease when the outcome is suddenly determined. Will the patient succumb or recover? The critical moment in this disease is the shareholder vote on the final version of the Offering Plan.

The date for the vote was set for April 9, 2008, but in March, board members distributed two documents that had not been reviewed by the AGO. The AGO was not amused by this and suspended the vote until an amendment admitting to the misbehavior was submitted. Eventually, after about seven more revisions, an amended Offering Plan was accepted for filing in Dec., 2008, and the vote was set for January, 2009.

Plenty of manipulation and new kinds of Board/Study Group hanky-panky accompanied the voting, but the result was: **only 63.5% of eligible apartments voted in favor of the Plan**. The crisis had passed. EMP would not withdraw.

But: the Board/Study Group will not take the shareholders' NO for an answer. They have petitioned the NY State Supreme Court to rule that the Attorney General has no jurisdiction over EMP's Offering Plan, and if the court fails to agree with that, to rule that the January vote must be counted by shares, not by apartments, because then they might win. The Business Corporation Law requires votes to be counted as mandated by the corporation's own Certificate of Incorporation. EMP's Certificate of Incorporation mandates counting by apartment, "on any and all issues."

Does the Board/Study Group have a case? Perhaps not, but **they are using EMP operating funds to pay for their court challenge**. How can they get away with that? Because there is no mechanism in the process for preventing it.

Convalescence.

Even as the patient appears to be recovering, there remains much accumulating **deterioration** to be reversed. That, however, will require that the choke-hold of the current board be released. They have stated repeatedly that they are unwilling to apply for government assistance. They'll have us rot rather than accept their responsibility or step aside.

Manhattan Borough President Stringer told me last March that the collapse of the real estate market and of private financing will convince M-L cooperators that it is absurdly risky to attempt to go private, particularly at present. But **the disease has become chronic**, and the dire financial condition of real estate, of private financing and of unemployment in the USA is having no more effect on enthusiasm for possible profit than the appearance of the AIDS virus has had on enthusiasm for sexual promiscuity.

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Summary and conclusion.

What have I offered you here? A way to think about privatization as a more familiar experience – disease. And there’s one more thought I’d like to add to that:

When you become ill, you seek medical assistance, but your ultimate recovery will be determined by what you do for yourself. When your cooperative catches the disease “privatization,” you will need guidance and assistance from other cooperatives, affordable-housing organizations such as CU4ML, and public servants such as those in our supervising agencies and in our political bodies. Get acquainted with them and learn what they can do for you, but be aware that within the current process, your ultimate remedy is shareholder action. Take every possible step to vaccinate your cooperative against this disease by making your cooperators aware of the consequences of the disease before they are asked to “explore” it.

The least costly measure is to ignore the opportunity to vote on privatization and continue to serve your public purpose by being good and faithful stewards of your privileged housing. If the disease appears in your community, nip it in the bud by saying NO to a “study.” Once a “study” has been approved, you will be trapped in the process, which is designed to carry through to a vote on an Offering Plan.

The ideal goal of any vaccination program is to eradicate the disease, and in fighting privatization, we do have an advantage over natural infectious and malignant diseases:

the pathology that is privatization of M-L cooperatives, which arose from amendment of legislation, could be eradicated by corrective amendment of the legislation. CU4ML will support any such legislation and any legislator – in the City or in the State – that could lead to eradication of the scourge of privatization.

Join us and help us in our efforts to control the spread of privatization, improve the cooperatives’ resistance to this disease, and work toward its ultimate eradication. In short, help preserve the Mitchell-Lama cooperatives, in perpetuity.

Preserving the affordability of your M-L home is your public service. Perform it in good health.