

David A. Paterson  
Governor



Brian E. Lawlor  
Acting Commissioner

**New York State Division of Housing and Community Renewal**  
**Office of Rent Administration**  
Gertz Plaza  
92-31 Union Hall Street  
Jamaica, NY 11433

March 5, 2010

Hon. Marcy Friedman, J.S.C.  
New York State Supreme Court  
80 Centre Street, Room 328  
New York, N.Y. 10013

Collins, Dobkin & Miller LLP  
277 Broadway, 14th Floor  
New York, N.Y. 10007-2001  
Attn: Seth Miller, Esq.

Meister Seelig & Fein LLP  
2 Grand Central Tower  
140 East 45th St., 19th Floor  
New York, N.Y. 10017  
Attn: Stephen B. Meister, Esq.

Re: Independence Plaza North

Dear Justice Friedman and Gentlemen:

In accord with the referral of the Court, please find annexed the determination of the New York State Division of Housing and Community Renewal.

Sincerely,

A handwritten signature in cursive script that reads "Leslie Torres".

Leslie Torres  
Deputy Commissioner

LT/dt

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Determination Pursuant to Court Request

In 2005, various tenants of the building complex known Independence Plaza North (IPN) commenced litigation in New York State Supreme Court seeking, among other things, a determination as to whether IPN is subject to the Rent Stabilization Law (Index No. 117673/05). The New York State Division of Housing and Community Renewal (DHCR) is not a party to this litigation.

Thereafter, the plaintiff-tenants brought a motion seeking an order remanding to DHCR the issue of whether the complex was subject to the Rent Stabilization Law. On April 3, 2009 the Hon. Marcy Friedman, J.S.C., granted the tenants' motion and, on May 26, 2009, signed an order (entered on July 6, 2009) referring the rent regulation jurisdictional issue to DHCR and asking for a determination.

The Court's order directed the litigants to provide DHCR with copies of all of their prior submissions during the course of the litigation on the jurisdictional issue. Upon receipt of the order and submitted court documents DHCR reviewed the issues raised and based upon the documents before it renders the within determination. In so doing, DHCR has not opened an adjudicatory proceeding involving the parties, nor has it held a hearing or issued an order.

## Facts

IPN, a multi-building residential development located in Lower Manhattan, was financed and constructed as a housing company pursuant to what is commonly known as the Mitchell-Lama program (Article II of the Private Housing Finance Law). Construction of the development was completed after January 1, 1974. Oversight of the housing company while it was subject to Mitchell-Lama regulation was performed by the New York City Department of Housing Preservation and Development (HPD).

On September 24, 1998, HPD issued a Certificate of Eligibility (97/0797) for J-51 tax benefits (Administrative Code of City of New York Section 11-243) for 80 North Moore Street, NY, NY, which is one of the buildings that form IPN. The Certificate of Eligibility set forth a certified reasonable cost of \$90,600 for waterproofing, masonry, roof surface, lintel replacement, and painting. The initial year for the abatement was tax year 1998/99 and the abatement allowed was \$7,550.00.<sup>1</sup>

In June of 2003 the owners of the complex wrote to HPD and informed them that it was their intent to pay off the mortgage, an action that would allow them to leave the Mitchell-Lama program. The owner also notified the tenants of this fact. The existing Tenants Association sought guidance from HPD and local elected officials.

Interaction between the owners, tenants and HPD (which also assisted the parties by agreeing to administer Section 8 assistance for qualifying tenants) resulted in an agreement dated March 12, 2004 whereby the future rent tenants paid would be subsidized for those tenants who qualified for such assistance. The non-subsidized tenants, even though not subject to rent stabilization would have their rents calculated by using rent stabilization guidelines for the first

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<sup>1</sup> Although IPN is comprised of several buildings, the buildings are contained on a single tax lot and for real estate tax purposes treated as a single entity.

nine years after leaving the Mitchell-Lama program and thereafter would have an additional supplemented amount added to the guidelines increase (3 1/3 % in years 9-12 and 1% after year 12).

On June 28, 2004, the former owner paid off the Mitchell-Lama Mortgage and delivered a letter to the New York City Department of Finance indicating the housing company was dissolved and the "property shall forthwith be restored to a full tax paying position effective as of the dissolution date".

The record shows that subsequent to dissolution the owner received tax abatement benefits for almost two years. It is also clear that in the summer of 2005 HPD became aware that IPN was continuing to receive J-51 benefits. Subsequent to that time the record shows that there were at least three meetings between representatives of the owner and HPD, the subject of which was whether the J-51 should have terminated upon the complex leaving Mitchell Lama regulation. The record also shows that this subject generated a significant amount of discussion internally at HPD.

On March 23, 2006, while the litigation that resulted in this matter before DHCR was still pending before the Supreme Court, HPD wrote to the New York City Department of Finance (DOF) about IPN. In relevant part, the letter stated that "HPD has determined that the J-51 Abatement should have been terminated, and the property should have been restored to full tax paying status, on the Dissolution Date." The letter went on to request that DOF adjust its records to show termination of J-51 benefits on the dissolution date. DOF records were adjusted and it is undisputed that the owner repaid the City for the tax abatements received subsequent to its exiting the Mitchell Lama program.

The record also contains a letter dated June 7, 2006, from the then Commissioner of HPD to the Manhattan Borough President. In this letter, which was in response to a letter from the Borough President concerning IPN, the HPD Commissioner states:

"In the absence of any other action, the J-51 Abatement would have been exhausted in approximately 5 years after the Dissolution Date. HPD after reviewing the facts as well as equitable and public policy consideration, determined that the J-51 Abatement should have been terminated on the Dissolution Date and the Property should have been restored to full tax paying status at that time. HPD therefore directed the Department of Finance to adjust its records to reflect the termination of the J-51 Abatement as of the Dissolution Date."

The HPD Commissioner in his letter also pointed out that:

"The owner and the tenant association negotiated an exceptional agreement when IPN left the Mitchell Lama Program that provided existing residents with long-term protection against unaffordable rent increases and displacement."

The HPD Commissioner summarized the terms of the agreement for the Borough President and noted that HPD, taking any other kind of action would:

"not only potentially harm the tenants of IPN, but could also harm the residents of other Mitchell Lama developments by having a chilling effect on negotiation between tenant and owners in future buyouts. For the low and moderate income tenants affected by such buyouts, this would be disastrous."

#### Arguments of the Parties

Simply stated, it is the owner's position that since IPN was constructed after January 1, 1974 and since the J-51 benefits it had received while it was under Mitchell Lama program were terminated by directive of HPD, effective upon the complex exiting that program, on June 28, 2004, IPN never became subject to the Rent Stabilization Law. The owner argues that IPN qualified for the J-51 tax abatement because it was a Private Housing Finance Law, Article II

Mitchell-Lama development and that when it determined to pay off the government subsidized mortgage and leave the Mitchell-Lama program, it was no longer entitled to J-51 tax benefits. The owner asserts that by its regulations, HPD was required to end or terminate the J-51 abatement, as the complex was leaving Mitchell-Lama regulation.

The tenants argue that although IPN exited the Mitchell Lama program on June 28, 2004 the complex continued to receive J-51 tax benefits for almost two years thereafter and it was only after the owner received an inquiry from tenants about the tax abatement and rent stabilization that the owner approached HPD and had the abatement terminated as of the day of dissolution. Since rent regulation is a *quid pro quo* for the receipt of J-51 tax benefits and the owner actually received J-51 benefits after it exited the Mitchell Lama program, the complex must be rent stabilized and the subsequent revocation by HPD of the J-51 benefits for IPN does not alter the rent stabilized status of the development, as HPD's own regulations [28 RCNY 5.0-3(f)(3)] provide that rent regulation shall not be terminated by the waiver or revocation of J-51 benefits. The tenants also argue that there was no requirement that HPD terminate the J-51 tax abatement when the development exited the Mitchell Lama program, as the development, like others, could migrate from the Mitchell Lama program, which is only one of several forms of rent regulation, to Rent Stabilization, and thus be in compliance with the requirement that a building receiving J-51 benefits be subject to rent regulation.

#### Court Requested Determination

Since IPN was constructed after January 1, 1974, the only basis for a finding that the complex is subject to rent stabilization, based on the Rent Stabilization Law itself, is derived from the provisions of Section 26-504c of the Rent Stabilization Law ("RSL"). The RSL provides, in substance, that dwelling units in a building that is receiving the benefits of a J-51

Tax Abatement are subject to the law. Thus, if the complex received J-51 benefits for the period after it exited the Mitchell Lama program, on June 28, 2004, the development is subject to rent stabilization.

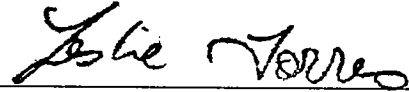
The J-51 program is administered by HPD and DHCR has no oversight responsibility or appeal authority regarding HPD's implementation or administration of that program. Thus, a determination by HPD as to whether J-51 benefits for the complex terminated or ended upon its exiting the Mitchell Lama program is controlling for purposes of the instant matter before DHCR, as it is not within the purview of DHCR to second guess or overrule that decision. Indeed, DHCR's has been criticized for setting policy as to when and how HPD should accept the termination of J-51 benefits and its related impact on rent stabilized. See Roberts v. Tishman-Speyer Properties LP, 62 A.D.3d 71, 79 (1<sup>st</sup> Dept. 2009), 13 N.Y.3d 270, 390 (2009) referring to such interpretative language in a DHCR January 16, 1996 advisory opinion. DHCR, unlike the courts which have in the proper case such reviewing authority, must acknowledge the general presumption of the regularity of the operations and decisions of a government agency and treat, in these circumstances, such presumption as part of its analysis.

In view of the fact that HPD terminated the J-51 tax abatement effective as of the dissolution date as part of the dissolution, the complex was not effectively receiving benefits subsequent to leaving Mitchell Lama regulation and, therefore, RSL 26-504c would not be applicable. Thus, IPN is not subject to the Rent Stabilization Law and Code. Since IPN did not become subject to rent stabilization in the first place, 28 RCNY (5.0-3(f)(3), the provision of HPD's J-51 regulation that mandates continued rent regulation when J-51 benefits are revoked or waived would accordingly not be applicable to this matter, since according to HPD the benefits never attached after dissolution.

Based upon the foregoing, it is DHCR's opinion that the building complex known as Independence Plaza North is not subject to the Rent Stabilization Law and Code.

March 5, 2010

Date



Leslie Torres  
Leslie Torres  
Deputy Commissioner