



Stuy Town J-51 Decision Reversed

In the September 2007 edition of the *Inside Edge*, we reported on the decision of Judge Richard B. Lowe of the New York State Supreme Court which indicated that accepting J-51 tax benefits from New York City did not prevent a building owner from utilizing the high rent and luxury decontrol provisions of the rent stabilization law. As of March 5, 2009 the Appellate Division of the New York State Supreme Court has reversed that decision and ruled that if you accept J-51 benefits you may *not* utilize the high rent and luxury decontrol provisions of rent stabilization. This *Inside Edge* explains the new ruling and its impacts, which will extend far beyond Stuyvesant Town into the 350,000 units of rental housing now receiving J-51 benefits.

Stuy Town and Peter Cooper

After Stuyvesant Town and Peter Cooper Village (STPCV) were recently purchased, a group of tenants brought legal action to challenge the new owners' ability to take apartments out of rent stabilization through the "luxury decontrol" rules which came into effect in 1993. Under that provision of the law, when rents exceed \$2,000 on vacancy or when an existing tenant's income exceeds \$175,000 *and* the rent for their apartment exceeds \$2,000, the

owner can apply to DHCR to remove that apartment from rent stabilization.

The tenants based their claim on the fact that the buildings had received tax benefits under the J-51 program which requires that eligible buildings must be subject to rent stabilization. If they are not subject to rent stabilization at the time of application for J-51 they must enter the program in order to receive benefits. STPCV was rent stabilized prior to getting J-51 benefits in 1992.

On August 16, 2007 Judge Lowe of the New York State Supreme Court ruled that the owners of Stuyvesant Town and Peter Cooper Village could continue to exempt apartments from rent stabilization under "luxury decontrol".

Why Was the Decision Overturned?

As we noted in our last report, this issue is complex since J-51 benefits require that if the properties are not otherwise subject to rent stabilization at the time of application for tax benefits, they must become subject to those rules in order to receive the J-51 benefits.

In the Rent Regulatory Reform Act of 1993 the New York State Legislature amended the rent stabilization statutes to permit the "luxury decontrol" of units from rent stabilization when the

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apartment becomes vacant and the legal rent exceeds \$2,000 *or* when the legal rent exceeds \$2,000 and the tenant's income exceeds \$250,000 (later reduced to \$175,000). However the amendment stated that this exemption would not be available to dwelling units which "...became or become subject to [rent stabilization] ... *by virtue of* receiving tax benefits..." under J-51 (emphasis added). The legislature clearly was concerned that where J-51 benefits were provided to the owner, tenants should receive the benefits of rent stabilization.

By Virtue Of

The question before the court was what does the phrase "by virtue of" actually mean? There are two possibilities:

1. A building owner cannot use the luxury decontrol provisions if the building is receiving J-51 benefits.

This category would include all buildings that are subject to rent stabilization and then subsequently receive J-51 benefits. For example, New York City multiple dwellings built before 1974 that carried out rehab and then received J-51 benefits would be prevented from utilizing luxury decontrol.

or

2. A building owner cannot use the luxury decontrol provisions if the building is receiving J-51 benefits and the *sole* reason the building is in rent stabilization is because it was required to enter rent stabilization in order to receive J-51 benefits.

This category would include buildings that were not otherwise subject to rent stabilization, but entered rent stabilization solely for the purpose of qualifying for J-51 benefits. For example multiple dwellings built after 1974 would be prohibited from utilizing luxury decontrol.

In 2000 DHCR amended the Rent Stabilization Code to adopt this reading of the statute and clarify when luxury decontrol would apply.

Judge Lowe agreed with DHCR that the second option was correct and that luxury decontrol is available to J-51 recipients where there was *any other reason* for the building to be regulated. Since Stuyvesant Town and Peter Cooper Village were pre-1974 buildings that had already been in rent stabilization, J-51 was not the "sole" reason for being in Rent Stabilization and the luxury decontrol option would apply.

The Appeals Court Opinion

The Appellate Division disagreed with Judge Lowe and the DHCR. The court adopted the first option which would bar any multiple dwelling receiving J-51 from using the luxury decontrol provisions. The Court decided that if the legislature had meant to exempt only J-51 buildings that are in rent stabilization "solely" because of J-51, it would have used the word "solely".

What Happens Now?

Tishman Speyer, the owner of STPCV may choose to appeal this decision to the Court of Appeals. Whether the Court would accept the appeal is unclear. Normally in a case such as this one the matter would be returned to the trial court for further motions or a trial on the facts.

Some observers think, however, that the Court of Appeals may choose to hear this appeal due to the importance of STPVC and the many other housing units that may be in the same position.

Unanswered Questions and Impacts

This case will resonate far beyond STPVC and the over mortgaged buildings that have been the focus of recent



discussion. If the decision stands, there may be substantial impact on J-51 housing. Currently there are approximately 350,000 rental units in over 8,000 buildings receiving J-51 tax benefits. Exactly how many of these units were actually decontrolled under luxury decontrol is, as yet, unknown. Nor is it known how many buildings had J-51 benefits which have already expired and may have utilized luxury decontrol.

Its important to note that these 8,000 buildings cover a wide range of New York City buildings. They include smaller buildings, buildings renovated under government programs, buildings that were not recently purchased or over mortgaged, as well as large projects that were bought or re-financed at inflated prices at the height of the recent real estate bubble.

The current decision also leaves some important issues unresolved as to the extent and timing of the impact. Normally any rent stabilized rent that was set more than four years ago would be exempt from challenge under the existing four year statute of limitations. However there is some reason to believe that the courts may not look at this issue as bound by the four year limit. In *East West Renovating Co. v. Division of Hous. & Community Renewal*, 16 AD3d 166, 791 N.Y.S.2d 88 [2005] the Appellate Term made a decision that could be a precedent for allowing a much longer look back period. This issue will probably be the subject of more litigation.

Further DHCR is facing an administrative nightmare. Will they be flooded with thousands of complaints that they must individually resolve? How will they determine rents in a unit which was decontrolled but had multiple tenancy changes? If refunds are required for tenants

no longer in occupancy, how will they be determined or claimed? DHCR may need to work with HPD to assemble a list of buildings affected by the decision and proactively reset the rents where appropriate.

In any event some owners will find that their rental revenues will go down, in some cases drastically, while their legal fees go up. Moreover they may be liable for substantial refunds to tenants. For owners, such as those at STPCV, who were counting on ever increasing revenues to pay their mortgages, this will make a difficult financial position worse. For other owners, who were not over mortgaged, they may find sudden, unexpected, declines in income accompanied by requirements to make refunds.

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This is part of a series of CHPC briefings examining current issues of importance to the NYC housing and community development industries.

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