

Court of Appeals Delivers Final Word on Stuy Town

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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.

The Inside Edge has been closely following the case of *Roberts vs. Tishman* from Supreme Court (see *The Inside Edge*, September 2007 edition) to the Appellate Division (see *The Inside Edge* March 2009 edition). Now the Court of Appeals has issued a ruling that finally settles the issue of whether buildings with J-51 tax benefits can utilize the luxury decontrol provisions of the rent stabilization law. They can't.

But in answering this question the Court of Appeals has clarified the law on how to deal with this problem going forward. It has, however, not provided guidance on how to resolve the many issues that remain for tenants and owners that are not in compliance today. The answers to those questions will await further litigation and, perhaps, future Court of Appeals decisions. Worse, the two administrative agencies most impacted, the New York State Division of Housing and Community Renewal (which administers the New York City Rent Stabilization Law of 1969 and its successors) and the New York City Department of Housing Preservation and Development (the primary administrator of the tax abatement and exemption program for rehabilitated multiple dwellings under §11-242 of the NYC Administrative Code, popularly known as the J-51 tax program) are left with little guidance on how to resolve such questions. This *Inside Edge* will examine the open questions and their impact on the administration of the rent stabilization law and of the J 51 tax program.

What Was Decided

The Court of Appeals, New York's highest court, has now affirmed the decision

of the Appellate Division. The court has ruled that if a property received a J-51 tax benefit its owner may not utilize luxury decontrol of the unit pursuant to the rent regulatory reform acts of 1993 and 1997. (Luxury decontrol comes in two forms, high-rent high-income decontrol - rent over \$2,000/month and family income over \$175,000 per year or high-rent vacancy decontrol - a vacant unit with a rent over \$2,000/month).

What Wasn't Decided

The Court of Appeals left a number of important issues undecided.

First, they did not decide the issue of retroactivity. Normally a court decision is an interpretation of the law as it was, is and will be. That is, it is normally retroactive. However, in the briefs and arguments before the court, the defendants argued that the court should make this decision prospective only. The argument for such an unusual step is that, in 2000, DHCR amended the Rent Stabilization Code to specify that buildings receiving J-51 tax benefits and luxury decontrol of rent stabilized units could co-exist within the same building, and that many owners had relied on this determination.

The Court decided that, although this issue had been briefed and argued, they would not decide it since the issue of retroactivity not been considered by the lower courts. Thus, this issue is returned to the Supreme Court for determination.

This leaves both DHCR and HPD with no guidance to make decisions on issues that are now sure to arise. For instance, if a tenant now makes a claim to DHCR for rent

overcharge based on this decision, is the remedy merely to change the rent going forward from the date of the decision, or does the tenant have a claim for overcharge that goes back to the initiation of de-control of the tenant's apartment? If it is ultimately determined that the decision does have retroactive effect, was the rent overcharge "willful" thus entitling the tenant to treble damages? These questions await more litigation or legislative action.

In the meantime, the failure to answer these questions leaves DHCR and the lower courts with no way to resolve the tens of thousands of claims that will eventually come before them. If DHCR were to assume that the decision has retroactive effect, then it would order owners to pay back to tenants the excess rent collected. However, if the courts eventually decide that there is no retroactive effect then those tenants have no claim and would have to return the money to the building owners. The only reasonable course of action for DHCR and the lower courts is to wait for clarification.

Second, the Court did not address the issue of the 4 year *statute of limitations* that generally applies to rent overcharge claims. In the 1993 Rent Regulatory Reform Act, a provision was added that neither DHCR nor a court can look back more than 4 years when a tenant claims a rent overcharge. If the courts eventually decide for retroactive effect of the decision, will that retroactive effect be bound by the 4 year statute of limitations?

Some recent court decisions (see *Matter of Grimm v. State of New York Div. of Hous. & Community Renewal Off. of Rent Admin.*, 2009 N.Y. App. Div. LEXIS 6461 (N.Y. App. Div. 1st Dep't, Sept. 24, 2009) and *East West Renovating Co. v. Division of Housing & Community Renewal*, 16 AD3d 166, 791 N.Y.S.2d 88 [2005]) suggest that the 4 year limit can be ignored under some circumstances. The Court of Appeals might well find that the confusion surrounding the statute also overrides the 4 year limit.

This issue leaves DHCR and the lower courts unable to decide who was actually overcharged on their rent and thus entitled to relief. Once again, resolution of these problems is postponed.

And what if the Court finds that the 4 year statute of limitations does apply for rent overcharge complaints? How will that affect the resolution of J-51

benefits that were received more than 4 years ago? We don't know.

The Court of Appeals seems willing to tolerate several more years of confusion. They wrote:

Moreover, the dissent predicts that our decision will cause "*years of litigation over many novel questions to deal with the fallout from today's decision*". That the courts and litigants may experience some additional burden, however, is no reason to eschew what we view as the only correct interpretation of the statute. [Emphasis added, citations omitted.]

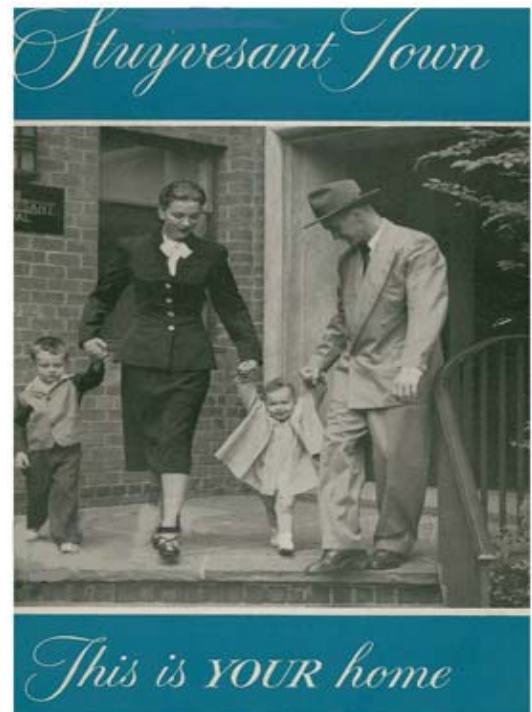


Image: CHPC Archival Library

Impacts

This case will resonate far beyond Stuyvesant Town and Peter Cooper Village and the over mortgaged buildings that have been the focus of recent discussion. While there will be confusion over how to deal with rent overcharge claims, that uncertainty will also impact the administration of the J-51 tax abatement program. Currently, there are approximately 355,000 rental units in over 8,000 buildings receiving J-51 tax benefits.

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.

HPD, in its administration of the J-51 tax program, is left without guidance as to how to treat owners who received tax exemptions and abatements that now may have been granted contrary to the law. J-51 tax benefits typically extend over a 12 year period and sometimes longer. Thus, there are many buildings that have had both J-51 tax benefits and now, following the recent court decision, improperly decontrolled rent stabilized units. Until DHCR has a recognized method of resolving claims, HPD cannot know when an owner is in compliance with the rent stabilization laws for past years.

As to the number of apartments affected, we can only offer estimates. In order to arrive at an accurate number DHCR would have to match their confidential rent registration records to New York City's list of buildings receiving J-51 tax benefits. While the data has obvious weaknesses (registration and reporting of luxury decontrolled units was voluntary from 1994 through 1999 and only mandatory thereafter), DHCR can make a much better estimate of the number of affected units than any outside analyst can. We understand that DHCR is currently engaged in this effort. We recommend that they finish it as quickly as possible.

Absent of that, we can make some rough estimates. As of January 1, 2009, there are 354,084 housing units in 8,142 buildings of 6 units or more receiving J-51 benefits. We also know from research done by the Rent Guidelines Board that from 1994 through 2008 owners reported 88,328 units as having been removed from rent stabilization through luxury decontrol (4,501 through high rent/high income decontrol and 83,827 through high rent/vacancy decontrol). We also know that there are, as of 2008, 1,026,839 total rent stabilized units.

Therefore, we can say the following: the 88,328 decontrolled units represent about 7.9% of the total rent stabilized housing stock. 7.9% of units receiving J-51 tax benefits (354,084) is 28,046 units. If we estimate that our number can be off by about 2 percentage points on either side, we get an estimated range of 19,121 to 36,825 housing units affected by the decision. (Our estimate leaves out

rent stabilized units in formerly rent regulated buildings that have been converted to co-ops and condos. We do not have any tools to estimate this number. We note that for co-ops and condos the question of how this decision affects the status and rent of such units is another, separate legal problem.)

For all of the tenants in apartments affected by this decision, we note that they are the beneficiaries of a windfall. All of these tenants either have family incomes in excess of \$175,000 or rented the apartment knowing what the rent was and presumably were able to afford it. The tenants who benefit from this decision are at the upper end of New York City's rental housing market, not the tenants at the lower end.

What Should Happen

For those who say that this is not a big problem, we disagree. For owners and the rental housing market, confusion will reign. Since there will be buildings for which we cannot quantify their potential losses, they will, among other things, be unable to obtain financing needed for repairs. From the perspective of maintaining buildings and neighborhoods it is always a major risk when repairs have to be deferred.

Roberts vs. Tishman took over two years and a half years from its start in the trial court to decision in the Court of Appeals. We should not wait that long for resolution of these new, critical problems.

As the Court itself suggests, this could be addressed with legislative action. The legislature should create a special statute of limitations for this problem. Such a law would provide that there are no claims that could be made for overcharges prior to the date of the decision, and that any J-51 tax benefits given prior to the date of the decision are not subject to recoupment. This would effectively give *Roberts vs. Tishman* prospective effect only and eliminate the specter of tens of thousands of hearings and court cases clogging DHCR and the lower courts. Both HPD and DHCR could then put into effect procedures that would allow owners to bring their buildings into compliance.

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