The Inside Edge

Fallout from Roberts vs. Tishman

By Harold Shultz

April 2010

As predicted, the Court of Appeals decision in *Roberts vs. Tishman*, which found that buildings with J-51 tax benefits could not utilize luxury decontrol of rent stabilized apartments, is beginning to generate litigation on related and not- so-related issues.

One of the more surprising decisions is by Housing Court Judge Bruce E. Scheckowitz in the case of *W Associates vs. Maverick Scott* (Housing Court, New York County, Index No. 73831/2009, December 23, 2009).

The case involves a building (37 Wall St.) in the Financial District which received a tax abatement pursuant to §421-g of the New York State Real Property Tax Law. §421-g, passed in 1995, is a tax abatement program designed to encourage the conversion of outmoded downtown office buildings to residential uses and to help create a mixed use community in lower Manhattan. In fifteen years the program has successfully transformed the Financial District into a 24 hour neighborhood. Currently there are about 84 buildings receiving §421-g tax abatements.

As with most residential real estate tax abatement legislation the residential apartments must be rent stabilized during the pendency of the tax abatement. However the owner claimed that the apartment in the lawsuit had been destabilized under the vacancy/high rent provisions of luxury decontrol (*Downtown Express* reported in its January 8th edition that Scott moved into his apartment in 2007 and that the rent is $4,920). Citing the *Roberts vs. Tishman* decision, Judge Scheckowitz ruled that luxury decontrol was unavailable in the 421-g program and the apartment was, in fact, rent stabilized.

However Judge Scheckowitz's opinion failed to explain why *Roberts vs. Tishman* applied in this case. When the New York State Legislature passed luxury decontrol in 1993, it included a specific exemption for buildings receiving J-51 and §421-a tax abatements. It was this provision that the Court of Appeals relied on in its *Roberts vs. Tishman* decision. Notably, the law (New York City Administrative Code §26-504.2) that provides that exemption did not name §421-g as one of the tax abatements for which luxury decontrol is prohibited, since §421-g had not yet been created.

When the legislature did create §421-g in 1995 they could have easily included it in the list of tax exemptions for which luxury decontrol was prohibited. That was not done. Moreover, there is evidence that the legislature *intended* that luxury decontrol be available for §421-g buildings. An exchange of letters between then Mayor Rudolph Giuliani and then Senate Majority Leader Joseph Bruno specifically discusses the issue of whether §421-g buildings would be allowed to use luxury decontrol - and both parties agreed that luxury decontrol *would* be available to such buildings. Thus the bill did not add §421-g buildings to the list of programs exempted from luxury decontrol. Only after this agreement did §421-g pass the Senate.

As of April 7, 2010, a motion to reargue has been made to Judge Scheckowitz asking him to reconsider his decision. We will let you know the results.

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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.

Publication of The Inside Edge is made possible through the generous support of the Community Preservation Corporation, the Estate of Marian Naumburg and contributions from CHPC's Board of Directors