

**Testimony by Alan Epstein, Esq.**  
**Before the City Council Committee on Housing and Buildings**  
**Regarding Intro 523 –**  
**The Mitchell-Lama Conversion Protection Bill**

October 29, 2003 – City Hall

My name is Alan Epstein. I am a partner in the law firm of Manatt, Phelps & Phillips, LLP, which has considerable experience in the field of housing development and policy. Our firm was been retained by the Independence Plaza North Tenants Association in connection with a proposed conversion of their homes out of the Mitchell-Lama Program. Attached to this statement is a legal memorandum that discusses in greater detail the legal issues involved with this matter. The Council clearly has the legal authority to pass Intro 523.

The Mitchell-Lama program provided Project Owners with below-market construction financing, municipal tax exemptions, inexpensive land and other forms of state and local subsidies. In exchange for this substantial government assistance, Project Owners were required to restrict the rental units to low and middle-income tenants, the permissible rents were capped and the Projects were required to comply with certain other restrictions. The Projects financed by the State are supervised by DHCR. The Projects financed by the City are supervised by HPD. The Mitchell-Lama legislation also allows Project Owners of projects built after 1959 to opt-out of the Program after 20 years.

Mitchell-Lama buildings began opting-out in the early 1990's, with the pace accelerating in the last 3 years. As is discussed in more detail in other testimony, if the trend of Mitchell-Lama buildings opting-out continues unabated, the City's already meager stock of affordable housing will be decimated.

The Intro is a measured bill which amends the existing opt-out guidelines and thereby makes the Project Owners responsible for a greater (though still small) portion of the ramifications of their actions. The Intro was drafted carefully in consultation with lawyers to the Council to work within the existing regulatory structure – that has withstood judicial scrutiny – and stay well within the Council's authority so as to avoid conflicting with state law.

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The Intro amends the existing City Regulations for City sponsored Mitchell-Lama Projects and requires Project Owners of these Projects seeking to opt out to (i) give notice to HPD and the tenants at least 18 months before completing the Conversion Process; (ii) prove the development's compliance with the Mitchell-Lama regulations and pay fines for material noncompliance; and (iii) either complete or pay for mitigation of the major adverse impacts of the conversion. In addition, the Intro mandates the payment of a one-time administrative Mitchell-Lama Community Impact Fee of \$1,000 per unit by each Project Owner who seeks to opt out. The Community Impact Fee would be used by HPD to conduct a study of the major adverse impacts of the conversion and to supervise the applicable Project Owner's particular Conversion Process.

The Intro grants HPD the discretionary power to waive the requirements of the Intro, including paying the fee and doing the mitigation, if the Project Owner and the residents enter into a settlement which both: (i) preserves the Project as affordable housing for those tenants in place at the time of the settlement and their lawful successors; and (ii) maintains, at a minimum, the same level of building services and staffing provided at the time the Project completes the Conversion Process. This provision provides an incentive to both parties to negotiate – with oversight from the City – a resolution that achieves the goals outlined in the bill's preamble.

The Council clearly has the authority to enact the Intro. The New York State Constitution grants broad authority to local governments and expressly provides that local governments have the power to “adopt and amend local laws not inconsistent with the provisions of [the New York State] constitution or any general law relating to its property, affairs, and government.” The General City Law reinforces these powers by stating that the City has the “power to regulate, manage and control its ... local affairs and is granted all the rights, privileges and jurisdiction necessary to and proper for carrying such power into execution.”

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These general statements of local power are confirmed by the Municipal Home Rule Law, which gives cities the power to administer “local taxes authorized by the state legislature and of assessments for local improvements” and to “fix, levy, collect and administer ... local government rentals, charges, rates or fees....” Courts have consistently held that a municipality is not restricted to exercise its specifically granted powers narrowly, but in fact possesses such authority as is necessarily incident to or may fairly be implied from its explicit powers.

I will briefly address the assertion made by the Intro’s opponents that the Intro impermissibly changes the contractual agreement between the State and the Mitchell-Lama owners reflected in the PHFL; specifically that after the requisite 20-year period, a Mitchell-Lama owner may opt-out of the program requirements.

This objection is easily dismissed as a legal matter because the owners’ right to opt-out of Mitchell-Lama program is not a contractual right. The test to determine whether legislation creates a contractual obligation for the government under New York law is whether the statutory language is “susceptible of no other reasonable construction than that a contract was intended.” Applying this test to the Mitchell-Lama statute, it is clear that the right to opt-out of the Mitchell-Lama program is not a contractual right. Section 35(2) of the PHFL states only that, after the requisite 20-year period, a LPHC “may voluntarily be dissolved.” This statutory language does not approach contractual language, it does not address specific parties, and it does not use language which binds the government. Indeed, this reasoning was recently relied on by the Federal Court of Appeals for the Second Circuit when it ruled that the Mitchell-Lama statute does not confer any contractual rights on owners of Mitchell-Lama developments.

Moreover, the structure of the Mitchell-Lama Statute precludes any claim that the Intro conflicts with State Law. The Mitchell-Lama statute grants to municipalities a co-equal role with the State in the financing and establishment of Mitchell-Lama developments. The statute grants HPD, as the relevant supervising agency, broad authority to set rules for, supervise, review and monitor City Mitchell-Lama Housing Developments. HPD’s regulatory authority begins at conception, as it is required to approve the creation of the development and approve the Project Owners.

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HPD's supervision continues during the life of Mitchell-Lama developments and includes:

- Setting allowable rents,
- Approving any and all alterations and improvements to developments,
- Reviewing the annual budgets and quarterly financial statements,
- Investigating the affairs of a Project by requiring the Project Owner to offer testimony and submit records, and
- Supervising the boards of directors of the Project Owner and removing directors thereof for any violations of the statute or regulations.

In addition to these specific grants of regulatory authority, the Law assigns HPD the "exclusive power to promulgate such supplementary rules and regulations ... as may be necessary to carryout the provisions of the Mitchell-Lama Program.

Given the broad existing HPD role in regulating City-sponsored Mitchell-Lama developments, the Council should feel comfortable that the Intro's requirements are clearly within the City's authority as the supervising agency of City Mitchell-Lama Developments. Indeed, the Intro's impositions on LPHCs are property seen as simple modifications and expansions on the existing City Regulations governing the dissolution of LPHC's.

In sum, for the reasons stated herein and those set forth in my legal memorandum, the amendments to the City Regulations proposed in the Intro would properly be upheld by New York Courts. Such amendments would best be interpreted as a part of the City's supervisory authority over Mitchell-Lama Developments and a mere modification of the already-existing procedures by which such Developments withdraw from the Mitchell-Lama Program.