

To:	File	
From:	Alan Epstein Arlo M. Chase	
Date:	April 14, 2003	File No.: 52304.001
Subject:	Enactment of a Mitchell-Lama Conversion Study & Impact Fee	

Question Presented

Whether New York City (the “City”), as a part of the process by which owners of Mitchell-Lama developments subject to City supervision remove their developments from the regulation of the Mitchell-Lama program, can require those owners to (i) prove the development’s compliance with the Mitchell-Lama regulations; (ii) complete a impact study of the effects of the removal of the development from the Mitchell-Lama program; and (iii) mitigate the major adverse impacts of the removal.

Short Answer

Yes. Requiring owners to prove the development’s compliance with the Mitchell-Lama regulations as well as study and mitigate the impacts of the removal of the Mitchell-Lama development from the program is properly interpreted as a part of the City’s supervisory authority over City-aided Mitchell-Lama developments and the procedures by which such developments are removed from the Mitchell-Lama Program.

Background

In 1955, New York State instituted the Mitchell-Lama program (“Mitchell-Lama Program” or the “Program”) to create more affordable housing in the state. N.Y.Priv.Hous.Fin.L. § 10 et seq (formerly Pub.Hous.Fin.L. § 301, added 1955). The Program allowed developers to form limited profit housing companies (“LPHCs”) which were eligible for below-market construction financing, municipal tax exemptions, inexpensive land and other forms of state and local subsidies. N.Y.Priv.Hous.Fin.L. § 11. State-financed Mitchell-Lama developments are supervised by the New York State Division of Housing and Community Renewal (“DHCR”). Rental buildings financed by loans issued by the City (“City Mitchell-Lama Developments”) are

supervised by the Department of Housing Preservation and Development (“HPD” or the “Supervising Agency”)¹ and are governed by the Rules of the City of New York. 28 RCNY ch. 3 (“City Regulations”).²

As a condition to the substantial government assistance developers received when doing Mitchell-Lama projects, LPHCs were required to restrict the rental units to low and middle income tenants and the permissible rents were capped at levels determined by DHCR and HPD, as applicable. N.Y.Priv.Hous.Fin.L. §§ 23(4), §31; 10 RCNY §3-02-03. In 1959 & 1960 the Mitchell-Lama legislation was amended to provide that, after 20 years from the date of construction completion, LPHCs owning developments built after 1959 can, absent any inconsistent restrictive covenants, voluntarily dissolve and opt-out of the Program by prepaying their mortgages and any expenses incurred in the dissolution. 1959 N.Y. Laws 675, 1960 N.Y. Laws 669, creating N.Y.Priv.Hous.Fin.L. §35; See also Columbus Park Corporation v. Department of Housing, Pres. & Dev., 80 N.Y.2d 19, 24 (1992) (discussing the opt-out amendments). After the LPHCs dissolve, fee title to the developments can be conveyed to the developer or another private entity.

Discussion

1. Can the New York City Council require LPHC owners of City Mitchell-Lama Developments (i) prove the development’s compliance with the Mitchell-Lama regulations; (ii) complete a impact study of the effects of the removal of the development from the Mitchell-Lama program; and (iii) mitigate the major adverse impacts of the removal, as a part of the process by which LPHCs dissolve and remove their City Mitchell-Lama Developments from the regulation of the Mitchell-Lama program?

A. New York City’s General Authority to Govern Local Affairs and Enact Fees.

Any examination of a New York municipality’s authority begins with an examination of Article IX of the New York Constitution. Article IX declares that “[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state.” N.Y. Const. Art. IX, § 1. Article IX, section two specifies that local governments have the power to “adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs, and government.” The General City Law states 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.” N.Y. Gen.City.L. § 19. These general statements of local power are confirmed and explicated 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 administ[er] ... local government rentals, charges, rates or fees....” N.Y. Munic.Home.Rule.L. §10(1)(a)(ii)(8) & (9-a). Courts have held that a city is not restricted to exercise its specifically granted powers narrowly but in fact possesses such authority as is necessarily incident to or may

¹ Priv.Hous.Fin.L. §§ 2 [15], 23; New York City Charter § 1802.6(a)

² These regulations were amended, effective February 1, 2003.

fairly be implied from its explicit powers.³ Therefore, it is clear that the City has the authority to levy fees for a broad range of governmental affairs.

B. New York City's Specific Authority to Regulate City Mitchell-Lama Developments.

Sections 11 & 11-a of the Private Housing Finance Law ("PHFL") grant to municipalities a co-equal role with the state in the financing and establishment of Mitchell-Lama developments.⁴ Section 23 of the PHFL grants HPD, as the relevant supervising agency, broad authority to set rules for, supervise, review and monitor LPHCs and City Mitchell-Lama Housing Developments. HPD's regulatory authority begins at conception, as it is required to approve the creation of the LPHC developing the City Mitchell-Lama Development and the sponsors thereof.⁵ The statute and regulations establish that HPD has innumerable powers to regulate and oversee the operation of the particular LPHC and City Mitchell-Lama Development. HPD's areas of regulation include: the setting of allowable rents,⁶ deciding which groups are to receive preference in tenant selection,⁷ approving any and all alterations and improvements to developments,⁸ approving the acquisition of any real property,⁹ recognizing tenants' associations and councils,¹⁰ reviewing the LPHCs' annual budgets and quarterly financial statements,¹¹ examining each development and keeping appraised as to the status of the developments by requiring the LPHCs to submit annual reports,¹² investigating the affairs of a LPHC by requiring a LPHC to offer testimony and submit records¹³ and supervising the boards of directors of the LPHCs and removing directors thereof for any violations of the statute or regulations.¹⁴ In addition to these specific grants of regulatory authority, the PHFL assigns HPD the "exclusive power to promulgate such supplementary rules and regulations ... as may be necessary to carryout the provisions of the [Mitchell-Lama

³ See, e.g. General Contractors Ass'n of N.Y. v. Tormenta, 687 N.Y.S.2d 871, 874 (N.Y. Supt. Ct. 1999) aff'd 696 N.Y.S.2d 155 (1st Dep't 1999); City of Albany v. McMorran, 230 N.Y.S.2d 421, 432-33 (Albany Sup. Ct. 1962) (citing cases).

⁴ See especially Section 11a(5), which states:

It is the purpose of this article to enable municipalities to undertake projects directly or in combination with the Federal government, private enterprise and any of the other responsible components of the community, to accomplish the public purposes herein described through the most effective and economical concentration and coordination of Federal, State, local and private resources and efforts.

NY Priv.Hous.Fin.L. § 11(5).

⁵ See 10 RCNY §3-01, NY Priv.Hous.Fin.L. § 13.

⁶ See 10 RCNY §3-02-03, NY Priv.Hous.Fin.L. § 31(1), (9).

⁷ See 10 RCNY §3-02, NY Priv.Hous.Fin.L. § 31(4)-(8).

⁸ See NY Priv.Hous.Fin.L. § 27(4)(a).

⁹ See NY Priv.Hous.Fin.L. § 27(1).

¹⁰ See 10 RCNY §3-17, NY Priv.Hous.Fin.L. § 32-a(1).

¹¹ See 10 RCNY §3-7(g)(2), NY Priv.Hous.Fin.L. § 32-a(6).

¹² See 10 RCNY §3-7(g)(2), NY Priv.Hous.Fin.L. § 32(1)-(2); §32-a(2); .

¹³ See NY Priv.Hous.Fin.L. § 32(5).

¹⁴ See 10 RCNY §3-13, NY Priv.Hous.Fin.L. § 32(6).

Program].”¹⁵

C. The Current Procedures for City Mitchell-Lama Developments to Withdraw from the Program.

Section 35(2) of the PHFL specifies that, after the requisite 20-year period, the dissolution of a LPHC and the opting out of the Mitchell-Lama Program (the “Conversion Process”) does not require the consent of the supervising agency. Nonetheless, included in the City Regulations are detailed procedures that the LPHCs owning City Mitchell-Lama Developments must follow before completing the Conversion Process. 28 RCNY § 3-14(i).¹⁶ The City Regulations closely track those promulgated by DHCR, which apply to state-financed Mitchell-Lama developments. See 9 N.Y.C.R.R. § 1750.1 et seq. The City Regulations require that LPHCs owning City Mitchell-Lama Developments take the following steps before dissolving, among others: (a) Give notice to HPD one year before the anticipated date of dissolution; such notice shall include including a list of the tenants who are “presently receiving rent subsidies which may be discontinued as a result of dissolution and the proposed rents to be charged to such tenants after dissolution”; (b) At least 60 days prior to the date set for dissolution, the LPHC must provide HPD for its review and written approval a schedule prepared by an independent accountant of all accounts payable, taxes due and any other indebtedness, including the par value and accrued dividends of outstanding stock; (c) At least 60 days prior to the date set for dissolution, the LPHC must provide each resident with notice of the intent to dissolve; and (d) The LPHC must hold at least one public information meeting with the residents and inform such residents of their rights, prospective changes in ownership and any other relevant information regarding future plans for the LPHC and the Development. 28 RCNY § 3-14(i)(2)-(4), (10), (11). Only after HPD is satisfied that such requirements have been complied with will it issue a “Letter of No Objection” to the completion of the Conversion Process. See 28 RCNY § 3-14(i)(2)-(4), (10), (11).

D. The Proposed Revisions to the Conversion Process.

The legislation proposed (the “Intro”) directs HPD to change its regulations and require LPHC owners of City Mitchell-Lama Developments seeking to complete the Conversion Process to (i) prove the development’s compliance with the Mitchell-Lama regulations; (ii) complete a impact study of the effects of the removal of the development from the Mitchell-Lama program; and (iii) mitigate the major adverse impacts of the removal. In addition, the Intro mandates the payment of a one-time administrative Mitchell-Lama Community Impact Fee of \$1000 per unit (hereinafter, the “Community Impact Fee”) by each LPHC owning a City Mitchell-Lama Development which seeks to undergo the Conversion Process.

As mentioned, in addition to the Community Impact Fee which must be paid at the time the LPHC submits its notice of intent to dissolve discussed above, the LPHC would be required

¹⁵ See NY Priv.Hous.Fin.L. § 23-(2).

¹⁶ This Section was previously found at 28 RCNY § 3-14(k).

under the Intro to submit evidence of the City Mitchell-Lama Development's substantial compliance with the essential City Regulations. Such evidence would be shared with the tenants, who would be permitted to comment at the public hearing already provided for in the existing regulations and to present counter-evidence. HPD is ordered to determine to whether the City Mitchell-Lama Development has substantially complied with the City Regulations, and if not, whether the Tenants or the City have materially suffered as a result of such non-compliance. If HPD determines that the City Mitchell-Lama Development did not substantially comply with the City Regulations and that the Tenants and/or the City were materially damaged by such non-compliance, HPD can order payment of a fine as a condition of issuing a Letter of No Objection to the proposed dissolution of the LPHC. HPD is directed to distribute the fine to the Tenants and/or the Tenants Representative or to the City, according to the damages suffered.

Furthermore, the Intro requires each LPHC intending to dissolve to conduct "a Mitchell-Lama Conversion Impact Study which examines the effects and impacts of the Conversion Process on the residents of the particular City Mitchell-Lama Development and the surrounding schools and neighborhood." The Intro requires each Conversion Impact Study to include, inter alia, the following: the likely amount of rental increase in the units after the Conversion Process, the percentage of the current residents that will likely be unable to pay the projected rental increases and will have to move, the availability of affordable units in the area which are similar in size, quality and cost to those in the City Mitchell-Lama Development, a demographic study of those residents likely to be required to move to other neighborhoods to find suitable replacement housing units and the effect of the Conversion on local schools and businesses. Each Community Impact Study must also include recommendations (the "Study Recommendations") for minimizing the adverse impacts that may be found to be associated with a Conversion and specify the costs of implementing such Study Recommendations.

A draft of the Conversion Impact Study must be distributed to HPD, the Department of City Planning, the local Community Board and the Tenants of the applicable Development, who may comment on the draft at a mandatory public hearing. After the Community Impact Study is issued in final form, as certified by HPD, the LPHC owner shall "have the choice of (i) implementing the Study Recommendations and mitigating the major effects of the Conversion Process to the reasonable satisfaction [HPD]; or (ii) depositing into escrow with [HPD] an amount sufficient to enable [HPD] or its designee to implement the Study Recommendations and to mitigate the major effects of the Conversion Process," such amount to be determined by HPD.

The Intro grants HPD the discretionary power to waive the requirements of the Intro, including the study and the mitigation, if the owner of the City Mitchell-Lama Development and the residents enter into a settlement which both: (i) preserves the Development as affordable housing for those tenants in place at the time of the settlement; and (ii) maintains, at a minimum, the level of services, staffing and wages for those building services workers employed at the Development.

E. Whether the City Can Revise the Conversion Process as Proposed and Require Compliance with the Additional Requirements before Issuing a Letter of No Objection to the Dissolution of the LPHC?

This memo will first consider the Intro's requirement that the LPHC (i) prove the development's compliance with City Regulations; and (ii) complete a impact study of the effects of the removal of the development from the Mitchell-Lama program. These requirements are clearly within the City's authority as the supervising agency of City Mitchell-Lama Developments. Indeed, these impositions on LPHCs are properly seen as simple modifications and expansions on HPD's existing regulations governing the dissolution of LPHCs. As reviewed, the regulations currently require LPHC's to (i) give notice of intent to dissolve one year before the scheduled date of dissolution, (ii) provide HPD for its review and approval an accountant's schedule of all accounts payable, taxes due and any other indebtedness, and (c) provide residents with notice of the intent to dissolve and hold at least one public information meeting with the residents to discuss the dissolution. 28 RCNY § 3-14(i)(2)-(4), (10), (11). The Intro's requirements to prove compliance and complete a study therefore do not alter the nature of HPD's existing regulations.

A somewhat more nuanced discussion is warranted by the Intro's other provisions, requiring LPHC owners to (i) pay to HPD a \$1000/unit administrative fee for supervising the Conversions Process, and (ii) implement the mitigation measures recommended by the Impact Study or pay HPD a sufficient amount to take such measures.

As a basic premise, the City has the general legal authority to require the payment of fees. As detailed above in Section 1A, both the state Constitution and the General City Law grant the City the power to regulate, manage and control its local affairs and all the rights, privileges and jurisdiction necessary in order to complete the same. Furthermore, the Municipal Home Rule Law gives the City the power to "[fix], levy, collect[] and administ[er] ... local government rentals, charges, rates or fees...." N.Y. Munic.Home.Rule.L. §10(1)(a)(ii)(8) & (9-a). One New York court specifically held that the City's imposition of a \$45,000 per unit "buy-out fee" did not constitute a "tax" which would have required explicit authorization from the state Legislature.¹⁷

Likewise, the payment of an administrative fee and completion of mitigation measures should not be seen as a tax on the LPHCs. The administrative fee is a reasonable amount properly allocated to HPD to undertake a very significant administrative burden in supervising the Conversion Process. Indeed, it is worth noting that state-financed Mitchell-Lama developments are already required to pay an administrative fee, albeit a lower amount, before being allowed to complete the Conversion Process. 9 N.Y.C.R.R. § 1750.13. Requiring LPHCs to undertake the mitigation measures is similarly not analogous to a tax. Unlike a tax, no set amount is required of the LPHCs. Rather, the LPHCs are asked to pay to mitigate the effects caused by the elimination of the affordability provisions on the units. Given the substantial city subsidies and other economic benefits provided to LPHCs and their sponsors, such a requirement has ample legal and political justification.

¹⁷ See Seawall Assoc. v. City of New York, 510 N.Y.S.2d 435, 444-46 (N.Y. Sup. Ct. 1986) (the Court did find the statute unconstitutional on other grounds), rev'd on other grounds 534 N.Y.S.2d 958 (1st Dep't 1988), rev'd 544 N.Y.S.2d 542 (1989).

However, despite the City's general authority to enact fees and the fact that the requirements on the LPHCs are not taxes, the proposed administrative fee and mitigation requirement would not be free from legal challenge. Opponents might assert that, since the state has passed comprehensive legislation governing the Mitchell-Lama Program, including a statute allowing for the withdrawal from the Program after 20 years, the City is preempted from adopting the proposed legislation. State preemption of local enactments is found by New York courts in two situations; (1) where there is "express conflict" between the provisions of state and local law, and/or (2) where the state has "evidenced its intent to occupy [a] field." [Albany Area Builders Assoc. v. Town of Guilderland, 74 N.Y.2d 372, 377 \(1989\)](#).

While a challenge to the Intro under the preemption doctrine may have an initial appeal, on balance a court would likely find that the City's authority to enact such a fee is not preempted. As detailed in Section 1B above, HPD has legal authority over virtually every stage and aspect of the operation and governance of City Mitchell-Lama Developments. It is therefore unpersuasive to assert that the state has "evidenced its intent to occupy [the Mitchell-Lama] field." Indeed, it is likely that a court would find that there exists a kind of dual sovereignty over the governance of City Mitchell-Lama Developments. Another example of this "dual sovereignty" is found in Section 33 of the PHFL, where the state grants municipalities the power to grant various tax exemptions to Mitchell-Lama developments, *if the municipality so chooses*. In addition to the specific grants of regulatory authority, the PHFL 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]." ¹⁸

The City could persuasively defend the requirements imposed by the Intro by noting that such requirements have indeed been found to be necessary to carryout the provisions and intents of the Mitchell-Lama Program. The Intro includes detailed legislative findings about the City's crisis in the lack of affordable housing, the need to maintain affordable housing units and the potentially harmful impacts, on the residents and the surrounding neighborhood and local schools, as well as the City as a whole, of the removal of such developments from the Mitchell-Lama Program and the consequential loss of affordable housing units. The Intro finds that "before any more City Mitchell-Lama Developments complete the Conversion Process, the in-depth effects and impacts each Conversion Process be studied ... and the appropriate steps be taken to mitigate and address the impacts of the elimination of such Affordable Housing units."

In sum, the enactment of the Intro would appear to be well within the regulatory authority granted by the state and therefore such enactment is not preempted. This conclusion is buttressed by several holdings in analogous situations by New York Courts. In [Seawall Associates](#), for example, despite the comprehensiveness of the state statutes relating to rent regulation, the court ruled the City was not preempted from adopting further rent restrictions on certain classes of property already subject to state regulation. ¹⁹

¹⁸ See NY Priv.Hous.Fin.L. § 23-(2).

¹⁹ [Seawall Assoc. v. City of New York](#), 510 N.Y.S.2d 435, 444-446 (N.Y. Sup. Ct. 1986); [See also](#)

A challenge to the proposed Intro based on the grounds that the Fee is in “express conflict” with state law is even weaker. The state law merely provides that, after the requisite period and payment of mortgage and other costs, LPHCs owning Mitchell-Lama developments have the right to undergo the Conversion Process. In no way would imposing the requirements of this Intro deny the right of the LPHC to dissolve and withdraw from Mitchell-Lama regulation. The Intro would simply add to the already significant administrative burdens imposed on a LPHC to complete the Conversion Process.²⁰

F. The Procedure for Creating New Regulations

As discussed above, under both City and state law, HPD has the authority and responsibility for adopting regulations which govern the City Mitchell-Lama Developments.²¹ HPD must follow the City Administrative Procedures Act before adopting any regulations on a non-emergency basis, which include, inter alia, providing an opportunity for public comment and holding a public hearing. N.Y.C. Charter § 1041 et seq.

Conclusion

In sum, for the reasons stated in this memo, 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 City Mitchell-Lama Developments and a mere modification of the already-existing procedures by which such Developments withdraw from the Mitchell-Lama Program.

Council for Owner Occupied Housing v. Koch, 462 N.Y.S.2d 762 (Sup. Ct. 1983) (finding that the City was not preempted from imposing a requirement that buildings converting to cooperative or condominium status create a reserve fund for repairs, despite the existence of extensive state legislation and regulation of such conversions), aff’d 61 N.Y.2d 942 (1984).

²⁰ This reasoning is supported by the recent Court of Appeals decision in City of New York v. N.Y.S. Div. of Hous. & Comm. Ren., 97 N.Y. 2d 216, 227-28 (2001). In that case the Ct. of Appeals upheld a change in the City’s method of assessing real estate for the purposes of determining the amount of permissible increases in yearly rents; such change decreased certain landlords’ profits. The court upheld the City’s change *despite* a state law which said that localities could not amend rent regulation laws to make them more stringent or restrictive. The Court interpreted the law to prevent “power grabbing” by the locality, not the adoption of rent regulation laws which worsened a landlord’s bottom line.

²¹ See N.Y. Private Housing Finance law §§ 2[15], 23; N.Y.C Charter § 1802.6(a).