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A MATTER OF INTERPRETATION: HOW WILL COURT VIEW J-51?

Tax breaks for landlords and rent rates for thousands of tenants hang in the balance as a high court decision is awaited. > *By Nicholas Jahr*

Even as developments in the housing landscape look uncertain on the state legislative, local rent-setting, and city budgetary fronts, one ember glows among the shadows for middle-income tenants.

Come September, the state's highest court will consider *Roberts v. Tishman Speyer*, a suit challenging rent deregulation at Manhattan's Stuyvesant Town and Peter Cooper Village. If the Court of Appeals upholds the decision of the Supreme Court's Appellate Division, mega-developer Tishman Speyer will be deemed to have illegally deregulated apartments, promising financial compensation not only for the residents of Stuy Town, but for tenants throughout the city.

"The decision is hugely significant," says Patrick Coleman, director of organizing and advocacy for tenants' rights group Tenants & Neighbors. "There's an opportunity for tenants to be repaid some of the funds they've improperly shelled out."

Nobody, however, is quite sure of the full ramifications of the decision – should it be affirmed. "There's going to be a hell of a mess sorting this out," says Harold Shultz, senior fellow at the Citizens Housing and Planning Council, a nonprofit research center. "And that mess is going to be big."

Back in October 2006, Tishman spent an unheard-of $5.4 billion to purchase the 110 residential buildings that make up Stuyvesant Town and Peter Cooper Village, in what was trumpeted as the most expensive real estate transaction in U.S. history. Now it seems like the moment the housing bubble swelled to the limit – and the biggest in a long list of local purchases in which developers bought buildings or complexes with an eye to forcing out rent-regulated tenants and replacing them with tenants who can afford the market rate (thereby helping to pay off the price tag on the deal).

Stuy Town, however, was already receiving a city subsidy known as J-51. As CHPC's Shultz puts it, J-51 "evolved well beyond its origins." In the mid 1950s, the city wanted to ensure that every building had central heating and hot running water. So it offered landlords a deal: in exchange for making the improvements, they would receive a break on their taxes. The catch: any landlord who took J-51 had to place the benefiting building under rent regulation. "J-51 is designed to say, if you make improvements in your building, the city will share the cost by giving you deferments on your real estate taxes," Shultz says.

When the state reformed rent regulation in 1993, it allowed what's known as luxury decontrol. If the rent for a stabilized apartment went over $2,000 a month, and the tenant left (or made more than $175,000 for two years in a row), that apartment would be "decontrolled," or removed from rent regulation. Activists estimate that "vacancy decontrol" allowed roughly 300,000 units to leave rent regulation and go to market rate, while fewer than 20,000 units were surrendered due to the "luxury" provisions.

The question posed by *Roberts* was whether a building receiving J-51 benefits could also take advantage of the decontrol provisions. The 1993 law was ambiguous on this point, and the state's Division of Housing and Community Renewal interpreted the law to say that only buildings solely subject to rent regulation *because* of J-51 were prohibited from opting out – as opposed to buildings which took advantage of J-51 but were subject to rent regulation for other reasons.

"Prior to the *Roberts* decision, DHCR misinterpreted the law," declares David Hershey-Webb, an attorney with Himmelstein McConnell Gribben Donoghue & Joseph, which filed on amicus brief in the case on behalf of Tenants & Neighbors and the Metropolitan Council on Housing. Ellen Davidson, a staff attorney with the Legal Aid Society, which represents tenants in similar circumstances, agrees: "If you read the statute, the statute's pretty clear. The fact that DHCR, at the urging of landlords, years ago came out with a different position doesn't mean the law as the legislature enacted it changed its meaning."

Nobody has a precise estimate of how many apartments could be subject to the ruling. A briefing paper on the

decision released by CHPC estimates that there are around 350,000 units in 8,000 buildings benefiting from J-51. How many of those units were illegally released from rent regulation is anybody's guess, as is how many more buildings that might have already opted out of J-51 but still be subject to the ruling.

Research by the Association of Neighborhood and Housing Development has pinpointed a much smaller number of J-51 buildings, 266 total, that have fallen prey to "predatory equity" – overpayment for a property that, as at Stuy Town, depends on a too-high rate of replacing rent-regulated tenants with market-rate tenants to repay the mortgage – and whose tenants are (or were) therefore quite possibly in a similar position to those at Stuy Town. While ANHD's research focused only on developers known to deal in predatory equity, they still turned up 27,708 units that are probably on the line in the case.

"Clearly the decision is going to be good for tenants; deregulation has been really destructive," observes Ben Dulchin, ANHD's executive director. "Beyond that, I don't think it's going to have a huge impact on the New York City housing market."

But Mitch Posilkin, general counsel for the Rent Stabilization Association, the landlord lobbying group, says there will in fact be a huge impact on his members. "The purchase price of buildings was affected by the interpretations that everyone believed to be the case for the last 15 years. Lending institutions relied upon 15 years of interpretation and practice. Real estate taxes for all of these buildings around the city were increased by some extraordinary amount over the years as assessments increased with the number of deregulated units in these buildings."

So, says Posilkin, the decision is "a tragedy waiting to happen" – landlords could even be forced into foreclosure by lower, re-regulated rents. "At the end of the day, what we have is tenants who entered into market-rate leases, who could afford to pay market-rate rents, now potentially receiving a windfall of extraordinary sums of money."

Even if the number of units affected by the decision is relatively small, Tenants & Neighbors' Coleman points out: "One of the purposes of rent regulation is not only to protect the people who currently live in rent-regulated apartments, but also to ensure that there is a stable, accessible, affordable rent-regulated housing stock for future generations."

Organizing tenants to take advantage of the decision poses its own set of challenges. "The problem for a market-rate tenant who may be protected by the *Roberts* decision is that there's a strong argument for waiting for the Court of Appeals," says David Hershey-Webb. "If they make a claim right now, that means the owner's not going to be too interested in renewing their lease. For most people in that situation it probably makes sense to wait until the fall when there's a decision." At the moment, any class action suit is on hold.

In the meantime, DHCR faces the Gordian task of sorting out which landlords essentially illegally deregulated apartments, not to mention a potential onslaught of overcharge complaints by tenants. At first, DHCR was allegedly allowing evictions of rent-regulated tenants to proceed, but put a halt to the practice after several local politicians put the agency on notice. (See officials' letter here and DHCR's response here.) DHCR spokesman Jim Plastiras says that the agency is now working with the city's Department of Housing Preservation and Development to compile a list of units at stake in the decision.

"Whether or not it's an administrative burden, it should happen," says Coleman of Tenants & Neighbors. "It was improper for DHCR to let these units leave the rent regulation system in the first place."

The RSA's Posilkin insists that: "The appellate division did not give appropriate deference to the interpretation by the state housing agency. And they did not give enough deference to 15 years of practice."

Over at Legal Aid, attorney Davidson suggests a radical response to this criticism: that DHCR could actually join the case on behalf of the tenants. The agency has done this in the past, most recently in the case of *Rosario v. Diagonal Realty*, in which the Court of Appeals upheld the right of tenants who receive a Section 8 voucher to receive a new lease on the same terms as their previous lease.

But DHCR's Plastiras holds out little hope that the agency will do so: "The legal decision is not final. So we are essentially waiting for the final resolution for this case and for the courts to make their determination and provide us with direction about how we should handle these cases." The tenants at Stuyvesant Town and Peter Cooper Village are waiting, too.

- Nicholas Jahr