

# H O U S I N G I N S I G H T S

The Voice of the Small Property Owners of New York

January – March 2009

## “STEALING” PRIVATE PROPERTY

**T**he regulatory taking of private property for public good - eminent domain - is used by the government to confiscate private property. Some financial compensation is given to the owner, and the government proceeds to build (among other things) schools, roads, and libraries.

However, in recent years, an alarming trend began to develop in which certain cities and municipalities condemned properties for the alleged public good...but not for the purposes described above. The government, working with developers, condemned private property so **the land could be economically developed by another private owner**. The justification is that public good comes in the form of increased tax revenues and jobs resulting from the development. In other cases, property is taken for ‘non-profit’ use but the lost use and lost income tax will never be replaced.

We do not object to the taking of property for a public project but find it abhorrent that private property should be condemned so that a private or non-profit entity can develop it for their own use.

What makes us even more concerned is that in 2005, the U.S. Supreme Court affirmed the right of cities and other government agencies to use eminent domain for private enterprise. We don’t object to development and the potential economic benefit it brings, but it should be done in an above-board, forthright manner in which the developer negotiates a purchase price with the property owner and helps them relocate and pays all related costs. We do object to developers working with the government to undermine and manipulate property rights by using eminent domain for personal gain. We do object to the overtones and possibility of corruption and invitation to collusion which the Federal government has seemingly sanctioned.

The Federal government’s decision in the *Kelo v. New London* case motivated more than 40 states to pass protective legislation, but California and New York aren’t among them. California put Proposition 98 (which would protect owners from certain types of eminent domain) on the ballot this past June, and we regret to inform you that it didn’t pass. This state-wide initiative would have banned eminent domain for economic development and force cities to pay just compensation for regulatory takings. The problem may have been that the initiative was too all-encompassing as it also included an end to rent-control. We certainly hope that they will introduce another initiative in the near future and that they don’t give up this good battle.

Recently, New York State approved the taking of a significant portion of land in West Harlem, north of 125<sup>th</sup> Street and west of Broadway, despite the fact that a large number of vibrant and active businesses, rendering services not only to the Harlem community, but also to the larger New York City community were located there.

*continued on page 4*

## CAUGHT IN THE WEB

**W**hen we received the call this past summer, I was advised that this was a very difficult case, very problematic, and that we should stay away from it. When I received a pleading e-mail from the owner, I simply couldn’t resist reaching out to her to try and help, although it seemed an exercise in futility.

A few years ago, the owner took two tenants (both receiving government rent subsidies) to court for non-payment of their portion of the rent. The two tenants met while waiting for their cases to be called in Landlord-Tenant Court. The problems started shortly thereafter.

The tenants started making complaints to HPD regarding repairs to their apartments. When the owner attempted to make the repairs, she was denied access by the tenants.

Family matters compelled the owner to spend approximately one month away from New York. Upon her return, she found work being done in her building that she had not authorized. A series of confrontations occurred between the owner, her superintendent and the uninvited contractors. Despite the fact that the contractors (hired by the Emergency Repair Program – ERP – of the Department of Housing Preservation and Development – HPD) saw work in progress, they refused to leave the premises or to report work in progress to the ERP. All the while, the tenants continued to call in complaints.

An HP action was brought against the owner for failure to cure the growing list of violations on the property. She was fined \$40,000.00 for fees and penalties which had nothing to do with the growing liens on the property for “emergency repair” work.

An intelligent and industrious minority mother of two, this owner proceeded to try to rectify what she felt was a gross injustice by contacting every conceivable agency, commissioner and elected official that might have a beneficial impact on her case. Time after time, she was promised that she would receive help in resolving her problem, only to be told a few days later that they couldn’t help her (after they spoke to HPD).

We stepped in. I contacted HPD and discovered that she was considered a “bad” owner. She refused to pay for the repairs and failed to honor agreements to pay a greatly reduced settlement of the \$40,000.00 fine imposed by the court. She was advised by HPD that she shouldn’t take a court action against them and she did. She didn’t follow directions. She made promises she didn’t keep. She was driving around in a new Cadillac, so she had the money and just didn’t want to pay it (yes, this is what I was told).

I became frustrated as well, and advised the owner that she should simply pay the money and move on with her life. The folks at HPD were adamant about not giving her any slack and she was fighting a government bureaucracy...it was a no-win situation.

The owner tried to raise the money to

*continued on page 3*

4 YEAR VACANCY=FREE AT LAST

When a SPONY member told me about a new 6 family house he had just purchased, he was very excited because all the units had been vacant for over four years and he was informed that he could charge whatever rent he wanted.

Something didn't sound right to me, so I did a little investigating. I was told by one property manager that the rent should be the last rent registered with the DHCR. An attorney told me that the rent would be the last rent charged plus a deemed one year renewal increase for each year of vacancy and, upon offering a vacancy lease, the state vacancy increase could be then be included in the final calculation. Both were wrong. Here's the final word on what rent you may charge if an apartment was vacant for four years prior:

Rent Stabilization Code Section 2520.11(r) limits the exploration of rent history to the four-year period prior to the filing

CHANGE IN HPD YEARLY REGISTRATION

Owners of buildings with three or more apartments must file an annual registration with the Department of Housing Preservation and Development (HPD) and it is an extremely important filing. It informs the city of where to find you should they need to reach you. In the past, when an owner sold his property, it was not unusual for that owner to receive notices from the city long after the sale, such notices including water and tax bills, violations, etc. It was almost impossible to get the former owner's name removed from the record if the new owner hadn't properly filed his own HPD registration.

On October 23, 2008, City Council passed a bill (Intro 824A) which, after Mayor Bloomberg signs, will become law in 180 days. Part of that bill resolves the problem. It gives the prior owner the right to invalidate his prior registration if the new owner hasn't filed his own form within 30 days after the sale. The bill also expands the requirement to file down to one and two family homes (previously exempt) unless they are all or partially owner occupied (including the owner's family).

HPD Registration requires that each owner list a contact address, and many owners who use a P.O. Box as their business address also list their home address as a physical contact address. Recently HPD made clear that this information is not private and that if a tenant requests a contact address this information will be released. In light of this, you may want to list your attorney's office address as your contact address.

FORCING ACCEPTANCE OF SECTION 8 TENANTS - CONTRARY TO FEDERAL LAW?

The Tenant Empowerment Act (Local Law 79 of 2005) mandates that owners of properties who withdraw from housing subsidy programs give tenants the right to purchase the building. The price of the property would be set by a three-member advisory panel, or the price offered by a bona fide purchaser "as approved by the department" (*whatever that means - could "the department" disapprove of the bona fide offer?*). The owner must accept the offer made by the tenants unless that offer is below the appraised value. Amazingly, the tenants then have the right to assign - to transfer their right to purchase - to a "qualified entity" (*the qualified entity could easily be a community development group under ACORN'S umbrella* ).

of the tenant's complaint. DHCR and the courts may not pierce the four-year statute of limitation regarding rent, but can do so when determining the regulatory status of an apartment. Luxury decontrol is an exception and the four-year rule prevails, but the owner must be able to prove beyond a doubt that the apartment was vacant at that time. Rent Stabilization Code Section 2526.1(a)(3)(iii) states that if an apartment is vacant or temporarily exempt on the base date, the rent agreed to by the owner and the first tenant to move in is the legal regulated rent (or, if over \$2,000.00, the undisputed unregulated rent).

If you have a similar situation, we advise you to rent immediately, since it is definite that our state legislature will be increasing the \$2,000.00 threshold for luxury decontrol in the near future. If you wait, your first rent will be your legal regulated rent, not your free-market deregulated rent.

The Appellate Division, First Department, in October 2008 (Mother Zion Tenant Assn. v. Donovan/HPD) made a decision that voided Local Law 79 (in part). In March 2006, the owner had informed the tenants in his 76-unit building that he would be withdrawing from his Section 8 contract the following year. The tenants then informed the owner that they had the right to purchase the building and were exercising their option. The owner refused.

The tenants proceeded to sue the owner and HPD to force compliance with Local Law 79 AND LOST. The court found that there is a conflict between Local Law 79 and federal law. Federal Section 8 is an entirely voluntary program and where there is a conflict between local and federal law, federal law prevails. *Con't p4*

*Omission correction: in our last issue, we published a testimonial to Carole Gerst, SPONY's executive secretary. We would like to add the following acknowledgement which we neglected to do at that time: Ira Greene Esq, Roberta Bernstein's classmate and Carole's friend for more than forty years, wrote Carole's memorial and placed it in the New York Times on September 10, 2008 as a gift to her family.*

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## AMERICA'S "NEW DAY"

Many of us voted for Barack Obama. Many of us did not. Regardless, everyone I know, including myself, extends a prayer - a hope - a fervent wish that he succeeds in making this country whole again. We also hope that he accomplishes this by moving toward a centrist position instead of maintaining his left-wing roots that so many of us took issue with.

On a more local level, we can expect that our new Democratic President in addition to a Democratic House of Representatives and Senate in Washington will have an impact on housing issues here in New York. Our concern is that the pendulum will swing from lack of federal regulation to over-regulation (including housing) and we all know how devastating that can be.

Barack Obama's history as a community organizer and his involvement with ACORN (a national "umbrella" organization for community development groups - all with strong anti-owner bias) give us cause for concern. The original "bail-out" proposal included a \$20,000,000.00 "gift" to ACORN and other non-profit groups which was later rescinded due to public pressure.

What was rescinded could easily be given again, since the government seems to have a penchant for ignoring history. Even as this is written, Congress is considering a program called "Hope for Homeowners" which will repeat the subprime lending policies that was a major factor in bringing us to our present economic woes.

The failure of government to be a watch-dog in critical sectors must be corrected. On a large scale, corruption and greed in world-impacting financial centers must be guarded against and monitored. On a lesser scale, diligence and scrutiny must be enhanced to eliminate fraud and abuse by recipients of public funds.

We believe in regulation where necessary, but have grave concerns that our new administration will become immersed in

regulation and funding, thus giving new energy to legal aid and community groups with strong anti-business, anti-owner agendas.

What is to be expected is that owners will continue to be viewed as profiting exorbitantly despite the fact that they now face difficulties in renting commercial space and may have difficulties in collecting residential rents. On January 1<sup>st</sup> 2009, New York City property owners faced three sets of property taxes: the standard taxes due on that date; a retroactive property tax rate increase dating to July 1<sup>st</sup>; and a new rate increase approved on December 18<sup>th</sup>. Despite public statements by the Department of Finance that the tax rate increase amounted to 7%, the effective additional amount due amounted to 11.22%. For many owners this amounted to an additional \$2,000-5,000 due immediately, with no previous advisement. A non-profit that owns or operates a building is allowed to pass such cost increases through to their tenants (or may not need to pay tax at all) but small property owners cannot. What can be expected in New York State will be an increase in rent regulations, which will further impair our ability to operate our properties.

For those who have concerns that we will have a federal rent regulatory program, they need not worry because rent regulation is a state issue (35 states bar rent regulation). More of a concern is the Supreme Court, since issues of eminent domain and public taking (through rent regulation) were decided against property owners in a more conservative time. The Supreme Court, with appointments to be made by the new administration, will certainly be less likely to be decide these issues in our favor.

We live in interesting times and all we can do is wait and see what happens in New York - and be ready to become activists. Every one of us must become politically active before the pendulum reaches the far left arc of its swing and we are crushed by its momentum.

### CAUGHT IN THE WEB *continued from page 1*

pay what now amounted to over \$70,000.00 in assorted liens and fines and accumulated debts. She depleted all the money in her retirement account. She approached her bank to increase her mortgage. They agreed, but only if HPD would agree to certain things. They would not. The bank did not lend her the money. She contacted "hard money" lenders only to be informed that this was the worst time to be lending money...nothing was available. While all this was going on, HPD froze her checking account and took a substantial amount of money towards the fine, crippling her ability to function. She finally asked HPD if they would agree to let her work out an 'in-rem' agreement with the Department of Finance (DOF) where the repair charges had now become liens against the property. HPD, thinking the owner was trying to get out of paying, refused.

Why did this owner fight HPD so hard? Why didn't she just comply with their demands? It was because she felt a grave injustice had been done to her. She was never notified that ERP was going to make repairs, there were alleged duplications in the billing, and some of the work orders were non-essential and arbitrary. I agree. While a majority of the work involved window guards and lead paint, there were a few "repairs" that seem highly questionable (the following are exact quotes from the work order):

1. (two different apartments) "Remove all the fixtures at bathrooms and kitchens and save for future use. Remove the new plywood underlayment.  
Award amount - \$12,820.00  
Work order status - CANCEL - reason for cancellation - Complainant Refused.

2. (a third apartment) "Take off all kitchen and bathroom fixtures and set aside for future use. Demolish kitchen floor 100 sq. ft. Provide and install 8 new beams.  
Award Amount - \$6,750.00  
Work order status - partially completed"

It must be assumed that the above work orders related to sloping floors. However, this is not a life-threatening condition - if it were, the work order wouldn't have been cancelled simply because the complaining tenant didn't want to be inconvenienced by the extent of the work.

In the 1980's and early 1990's ERP routinely made unnecessary repairs based on tenants' complaints. When the charges were sent to the Department of Finance, there was no way of knowing what the charges were for, or what the individual charges were that made up the total lien. At SPONY's repeated requests, Councilman Antonio Pagan pressured HPD to make its repair program more limited and transparent. Ultimately, the ERP repairs were limited to cascading water, window guards and lead paint and an itemized accounting of repair costs was given to owners. However, when City Council passed Speaker Christine Quinn's harassment bill in 2007, the ERP repairs were expanded once again.

It now seems probable that this owner is going to lose her building...because of two tenants who knew how to use the system, because of a city repair program starting to go out of control once again, and because she didn't pay fines she felt were unjust and unfair. *continued on page 4*

These businesses employ several hundred individuals whose livelihood will now be terminated. The beneficiary of this process is Columbia University, which plans to expand into the area.

Aside from the now realistic possibility that the promised grants and donations, which were to fund the new construction may now disappear into the ether, we have a further question. Columbia planned to build laboratories on this site, which would serve not only to educate students, but also to develop new processes and medications. In recent years, a clear pattern has developed in which educational institutions sell the patents to new medications to pharmaceutical companies. They are also selling patents to mechanical and chemical processes that they have

developed.

In light of this, a question arises – can and should a ‘non-profit’ institution, which is not taxed and where the staff and administrators earn significantly more than local residents and small businesses, continue to benefit from the rights of eminent domain? The businesses located in ‘Columbia seizure area’ paid property taxes, paid employment taxes and paid income taxes. In a period of economic crisis, the City of New York is losing jobs and tax dollars, not only for the present but the future.

New York State should protect its property owners and stop eminent domain abuse, and we anxiously await the moment when our legislators in Albany propose appropriate bills.

**SECTION 8** *continued from page 2*

However, this case specifically targeted federal programs. If a building is receiving only city or state subsidies, it is our opinion that Local Law 79 would still prevail.

Local Law 10 of 2008 forces owners to accept tenants regardless of source of income. This means that an owner cannot refuse to rent to a prospective tenant because he is receiving Section 8 benefits. However, it still remained unclear whether owners had to accept Section 8 vouchers from existing stabilized tenants. An appeals court ruling (Kosoglyadov v. 3130 Brighton Seventh) partially clarified this issue by mandating that if a property is receiving J-51 tax benefits, the owner must accept Section 8 from existing rent stabilized tenants. Although, in this particular case, the vacancy lease contained a Section 8 clause (stating the owner would accept it), the courts are using a broader ruling that encompasses all J-51 buildings. However, it still remains unclear if buildings that are not receiving J-51 benefits must accept Section 8 from existing tenants. If you want to leave more potential options open for yourself eliminate any Section 8 clauses from your vacancy leases.

As discussed at the beginning of this article, Local Law 79 was struck down because it conflicts with federal law regarding Section 8. It would seem that Local Law 10, which forces acceptance of tenants who receive Section 8 subsidies, is even more severely in conflict with federal law. Federal law clearly states that the acceptance of Section 8 rent subsidies by an owner is totally voluntary. Forcing owners to comply with Local Law 10 is contrary to federal law. This situation is pleading for a lawsuit. It just needs the right case to be presented properly by just the right people.

**CAUGHT IN THE WEB** *continued from page 3*

A few months ago, SPONY had brought general ERP problems before Councilman Erik Dilan, Chairman of the Housing and Buildings Committee. SPONY, RSA and CHIP met with him again just before the holidays and at the end of the meeting, I discussed this case with him. I knew his staff was aware of the case, had adopted HPD’s opinion of this owner, and were unwilling to do anything further for her. To his great credit,

Councilman Erik Dilan agreed to meet personally with this owner the very next morning. He seemed to be very surprised by her story. We can only hope that this surprise and awareness lead to some type of action that will help this minority owner keep her building, and we thank Councilman Erik Dilan for his interest, heart and compassion. However, as of this writing, there has been no change in the status of this case.

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