THE LEGAL FOUNDATION AND SUPERVISION OF MITCHELL-LAMA COOPERATIVES
PRESENTATION BY BARRY MALLIN, ESQ. AT THE CU4ML MEMBERSHIP MEETING HELD ON JUNE 13, 2009

The best introduction to understanding the Mitchell-Lama laws and regulations is to tell the story of the legal battle behind the fight to save Mitchell-Lama housing at East Midtown Plaza, a 750-unit cooperative in Manhattan. This is a story on how to use the law to fight back and preserve affordable housing in a Mitchell-Lama cooperative.

This is a story of a gallant and courageous group of shareholders at EMP who cared about the original principals behind the enactment in 1955 of the Mitchell-Lama program--the development and preservation of affordable housing. Working with these advocates has been a great inspiration for me and reminds me of the reason that I became a lawyer—to represent people who are fighting a just cause.

Mitchell Lama comes out of state legislation—Article II of the Private Housing Finance Law—and one of its stated goals is the creation of affordable housing for moderate income people. Some were created as rentals and some built as limited equity cooperatives. Depending on the sources of financing, some are regulated by the state and some by the city. For cooperatives, the law speaks of cooperative action by tenants to acquire ownership and to operate their housing on a nonprofit basis and that such cooperative ownership with its pride and responsibility of ownership would lead to stabilization and renewal of neighborhoods. And this in fact has become a reality. The limited equity Mitchell-Lama co-ops have become one of the greatest resources of affordable housing in the history of this city.

The law did give these developments the option to exit the program after 20 years. And here is where the conflict at EMP arose. The law does not require you to leave the program- it is a path that need not be taken. The battle lines at EMP were drawn between those who wanted to go private and those who believed that Mitchell-Lama should be preserved to continue to give people low cost decent housing regardless of their circumstances.

But how do you fight the tidal wave of privatization? You fight by understanding the law because things were very dire at EMP. The shareholders voted to give the go-ahead to a privatization plan in December 2004. An offering plan was prepared by EMP's attorneys and filed with the Attorney General. After distribution to the shareholders, a new vote was scheduled to take place in April, 2008. It looked really bad for those who cared about keeping their homes affordable. How could they challenge such an array of forces. The group educated themselves. Knowledge is power. They studied the law. There are three basic statutes that came into play here. This is where the process starts with the basic laws: the Private Housing Finance Law, the Business Corporation Law and the General Business Law. From those laws come the regulations promulgated by lead agencies-some cases DHCR and in some cases HPD. East Midtown Plaza is regulated by HPD--and also in the case of co-ops seeking to exit the program,

the New York State Attorney General. All of these agencies have regulations. Then from the regulations you must next look at the governing documents of the co-op—deed, certificate of incorporation and by-laws. In EMP, shareholders had to pore through a huge document known as an Offering Plan that had to be voted upon before EMP could go private.

And all of these pieces played a role in the fight to oppose the privatization plan. We pick up the story in 2008-when I got involved. There were meetings called by the Mitchell-Lama advocates, but I must confess, things were not looking good. But then, like a gift from the gods, the sponsor made a major blunder.

The blunder involved what we considered to be serious violations of the law which governs disclosure in offering plans. We sent a letter to the Attorney General detailing these transgressions of the Martin Act provisions of the General Business Law.

Cited in our letter were two pieces of literature--not approved by the Attorney General-which had been disseminated to all shareholders by the board of EMP.

The first was a Memorandum regarding special risks detailed in the Offering Plan or black book. The Memorandum sought to minimize and deceive shareholders regarding the substantial risks involved in the plan. The special risks were trivialized as being no more risky as crossing the street. This was a deliberate pattern of deception and misinformation. Special Risks are there for a reason—because there is substantial risk involved in going private. And they should not be ignored or trivialized –and they are in the offering plan for people to read and assess.

It was deceptive and wrong to lull shareholders into ignoring the risks involved.

The second piece of literature sent to all shareholders was the so-called "Little Black Book". This was printed to appear as an official looking presentation. The cover letter invited shareholders to use the LBB "as a way to get a quick answer" to the black book.

The board didn't want shareholders to read the offering plan. They wanted shareholders to read their version—not the version approved for distribution by the Attorney General.

We asked the A.G. to intervene in this matter—to investigate what we contended were violations of the Martin Act which had tainted and seriously compromised the legal validity of the offering plan.

Shareholders had already received the offering plan filed with the A.G., but the board and an individual member of the board disseminated their own personal, sugar-coated watered down version of the plan. They down-played the risks. Here are some direct quotes mocking the special risks section of the black book:

- "no assurance can be given that car will not run a red light and hit you"
- "no assurance can be given that a meteor won't hit you"
- "no assurance can be given that a plane will not crash in the intersection and kill you"

We wrote to the A.G. claiming that the dissemination by the sponsor of unauthorized and misleading literature tainted the entire offering process. And we got action. The Attorney General forced the board to postpone the vote. The A.G. said the board had to file a new amendment disowning their tainted documents.

This also gave us an opportunity to open the whole voting process to other legal challenges. We protested against the board hiring a proxy goon squad in the guise of a so-called independent company to intimidate shareholders-not to mention some $30,000 in fees to the company. The board was forced to back off from that ploy. The board tried to claim that city and state transfer taxes would not apply to this matter--some 14 million dollars. But shareholders petitioned the city and state and succeeded in obtaining a ruling that they did apply, further poking holes in the shaky financial structure.

The voting was held in January, 2009. Here's the next dispute. How do you count the votes. By shares or by unit. HPD and the A.G. and the Business Corporation Law and EMP's certificate of incorporation all point to the conclusion that it should be by unit. This is the basis of limited equity cooperatives—everyone has one vote--everyone is equal.

But then the sponsor decided to re-write history; rewrite the law; re-write the governing documents and declare victory. In fact, it sent a notice to shareholders telling them that privatization had been accepted by more than a two-thirds count of shares. But this was a false claim. The vote by units did not achieve the required two-thirds. We again protested to the A.G. and HPD. The Attorney General would have nothing of this claim. The A.G. told the sponsor that it could not accept its claim of victory. The count is by units, not shares.

Now comes the next chapter—the board of EMP has sued the A.G. and HPD, claiming that it is not even subject to the disclosure laws and that it can write its own voting rules, and further seeking to invalidate a 2006 ruling by HPD that a new vote was needed. The gallant group of Mitchell-Lama advocates at EPM has decided to intervene in the case.

The suit is a distortion of the record, of the laws, of the regulations, of the governing documents and the basic principals under which Mitchell-Lama was created and under which limited equity co-ops are governed as democratic organizations. If the plan went through it would favor those who want to sell out; those who are absentee owners; those who are heirs of deceased shareholders who want to cash out; those who are most affluent because they would no longer have to pay surcharges--to the detriment to those who want to stay on; those who are on fixed incomes, including seniors; those with lower incomes because their maintenance would disproportionately rise; those who

would be most vulnerable because of loss of rental subsidies; those would have to bear the burden of an ill-conceived plan that would destroy the very fabric of what is and would continue to be affordable housing.

The last chapter is yet to be written-as we will be going to court in July. We will keep you posted. But we are confident that the good people will prevail and save Mitchell-Lama housing at EMP.

Author's Postscript

Oral Argument on the court case was held on October 15, 2009 before Judge Emily Goodman in State Supreme Court, New York County. We are awaiting a decision from the court.