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TO: Members of the New York State Senate
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FROM: Mitchell Lama Residents Coalition

BY: Seth A. Miller

DATE: June 16, 2011

RE: S 5763

The Mitchell Lama Residents Coalition opposes S 5763, a bill that, like its predecessors (S4117 and S4117A), is nothing more than a vast gift of public funds to landlords who have broken the law, at the expense of literally hundreds of thousands of innocent, vulnerable working class tenants. The bill advertises itself as providing “relief” to landlords who deregulated apartments in buildings that received J-51 benefits unlawfully but in good faith. Its main beneficiaries, though, are landlords like the owner of Independence Plaza North, who deregulated over 1,300 apartments in the J-51 program without having the slightest basis for believing it was lawful to do so, and the current and future landlords of the approximately 500,000 apartments, nearly all occupied by poor and working class families, that are now exempt from eventual deregulation because of the J-51 program, upon whom this bill confers a license to overcharge tenants, regardless of whether or not they had any basis for believing the overcharges were legal.

This bill rewards lawbreaking, encourages landlords to engage in ever riskier and ever less justifiable evasions of the rent regulatory laws, encourages the public to view the requirements of the rent regulatory laws as having less force than other kinds of laws, creates uncertainty about whether landlords will be relieved from other clear legal obligations that are imposed by current law, deprives the public of the rent regulated housing that has been the *quid pro quo* for receipt of J-51 benefits since the 1950s, allows public funds to be used to subsidize the loss of affordable housing, and threatens the deregulation of literally hundreds of thousands of presently rent regulated affordable housing units, rendering them permanently unaffordable to ordinary New Yorkers.

Although the bill’s sponsors describe the bill as aimed at providing landlords with “relief” from allegedly unexpected consequences arising from the Court of Appeals’ decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270, 890 N.Y.S.2d 388 (2009), the bill’s chief impact would be (a) to grant a single landlord a private and unconstitutional exemption from the rent regulatory laws that every other landlord in New York has to follow, so as to permit the landlord of Independence Plaza North to keep the overcharges it collected during the last seven years, during which it falsely claimed

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that the development was exempt from regulation; (b) to immunize landlords from any overcharge penalties in buildings receiving J-51 benefits prior to October, 2009, even if the overcharges had nothing to do with the deregulation of units that were re-regulated by virtue of the *Roberts* decision; and (c) to permit landlords to resume the deregulation of the hundreds of thousands of apartments now occupied by poor and working class tenants, whose apartments cannot under current law be deregulated because they are in buildings receiving J-51 benefits.

The Gluck Bailout

This bill sends a loud and obnoxious message, that money talks in Albany, and that it speaks louder than the law. There are few landlords in the world who are less deserving of special treatment than Laurence Gluck and Stellar Management, the owners of Independence Plaza North (“IPN”). The Supreme Court has found that Gluck violated the Rent Stabilization Law by claiming that IPN was unregulated despite the receipt of J-51 benefits, and specifically rejected, based on an exhaustive review of the facts, the claim that the violation was innocent: The court found:

The court is unpersuaded by defendants’ argument that they could not have anticipated the applicability of the vacancy destabilization provisions and, hence, could not have included notices in their tenants’ leases that rent stabilization would terminate upon the expiration of the J-51 benefits.

Gluck should have known from the time he purchased IPN that it was rent stabilized. The bill proposes to let him keep all of the overcharges he collected in violation of that clear legal obligation, and to continue forever to overcharge tenants and the Federal taxpayer (who is subsidizing the “market” rents Gluck collects for the approximately half of the development that receives federal Section 8 vouchers). In fact, rather than attempt to square the overcharges at IPN with any known legal principle, the bill instead just uses Gluck’s unreliable invoices, which are the subject of ongoing litigation, as the measure of what the legal rent is at IPN.

Gluck purchased IPN in 2003, and immediately set about removing it from the Mitchell Lama program. IPN was, at the time, an income-qualified development, home to 1,331 families, and one of the few places left in Lower Manhattan that was still affordable. At the time, the recorded mortgage debt at IPN was approximately \$65 million.

When he purchased IPN, Gluck was given actual notice of the J-51 benefits in place. They were specifically mentioned in the title report. During the time when IPN was a Mitchell Lama development, it obtained a J-51 subsidy for major roof work. It is doubtful the work would have taken place but for

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the J-51 benefits.

As part of the privatization process, Gluck was required to notify both HPD and the tenants of the J-51 benefits. He did neither. He was required to include notice of the benefits in each tenant's lease. He failed to do so. Instead, the receipt of J-51 benefits was a secret known only to Gluck.

Gluck successfully incited a year of panic and alarm at IPN by announcing in 2003 that the development was soon to be privatized as unregulated luxury housing. In order to maximize the federal subsidies he could receive, he offered to limit rent increases for tenants whose voucher applications were denied to slightly above what they would be under rent stabilization, but only if the Tenants' Association made an effort to persuade "each and every tenant" to apply for vouchers, and did not sue to prevent IPN from exiting the Mitchell Lama program. Not knowing that the development was receiving J-51 benefits, and that Gluck had misrepresented the facts, the Tenants' Association reluctantly agreed.

Gluck privatized IPN at the end of June, 2004. He immediately broke his promise to limit the rents charged to the tenants who were denied vouchers, instead imposing an immediate retroactive rent increase of about 30% on 200 families. It is only because some of them stood up to Gluck's bullying, and sued, that they learned of the J-51 benefits that Gluck had illegally concealed from them.

In July, 2005 Gluck found out that the J-51 benefits at IPN were no longer a secret. He immediately set up a series of private meetings with high officials at HPD, including three in-person meetings with the Commissioner, in an effort to get permission to waive the J-51 benefits that were now a matter of public knowledge. These improper meetings were evidence of Gluck's knowledge that the benefits required IPN to be regulated. He wanted to cover up that fact. He sent the City of New York a check for the J-51 benefits received after IPN left Mitchell Lama and then, ever since, has falsely denied that they were ever received in the first place. As the Supreme Court stated: "the court categorically rejects defendants' contention that IPN never received J-51 benefits after it exited the Mitchell Lama program."

The tenants of IPN could not get private meetings with the Commissioner of HPD. They cannot get the Chairwoman of the Senate Housing Committee to write a private bill for their benefit. The only place where they can stand on an equal footing with Mr. Gluck is in a court of law. This bill seeks to take away their day in court, leaving them, and the public, with no benefit in exchange.

Gluck intentionally violated the law by treating IPN as a deregulated development for the seven years that have passed since it left Mitchell Lama. He multiplied the debt load by a factor of eight, increasing it unsustainably and irresponsibly from \$65 million to \$575 million. (This, and not the J-51

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program, is what has created “market uncertainty” at IPN). Despite pending lawsuits, Gluck took no steps to prepare for the day when IPN would be returned to rent stabilization. His companies have received tens of millions of dollars in excessive federal subsidies on the basis of the illegal market rents set at IPN. Gluck expects the Federal taxpayer to subsidize the looting of IPN, and for the legislature to consent. No landlord in New York is less deserving of a bailout.

Section 11 of the bill proposes to accept whatever rent Gluck “billed on August Thirtieth, Two Thousand Ten” (the date of the Supreme Court decision finding IPN to be rent stabilized), as the legal rent. The bill makes no pretense of setting rents based on any principle of law or fairness, not even one favorable to Gluck. The legislature has not audited the rent invoices at IPN, and has no basis for taking Gluck’s side in the numerous disputes, both large (disputes over whether Gluck is charging the rent he agreed to charge) and small (disputes over improper late fees, rent paid but not credited, and clerical errors) that are now pending concerning those invoices.

Section 11 would also impose vacancy decontrol on IPN beginning April 2, 2006, the date when Gluck paid back the post-Mitchell Lama J-51 benefits at IPN. This provision is designed to deprive the tenants at IPN who took occupancy after that date of their day in court. They have sued to establish that they are rent stabilized, since the J-51 benefits at IPN were for a period of up to 20 years and have never been exhausted.

Section 12(e) of the bill precludes any challenge relating to “the regulation or rents” of former Mitchell Lama developments that received J-51 benefits, where the owner has returned those benefits. At IPN this means that every overcharge collected from tenants and from the Federal government, as well as every mistaken charge contained in every rent invoice, would be immunized from independent review. The courthouse door would be slammed shut forever.

Sections 9, 10 and 11 of this bill would violate Article 3 §17 of the New York State Constitution. They are tailored to benefit only Gluck. This is true notwithstanding the clever mechanism whereby Sections 9 and 10 purport to allow “all” post-1973 former Mitchell Lama developments to waive J-51 benefits and become totally deregulated, while Section 11 purports merely to “re-regulate” IPN on terms favorable to Gluck. IPN is the only Mitchell Lama development that has been found to be rent stabilized solely on the basis of receiving J-51 benefits. It is therefore the only development where the deregulation contemplated by Sections 9 and 10 would have any practical effect. As for Section 11, it is blatantly tailored to fit only IPN, the only post-1973 former Mitchell Lama that was privatized after January 1, 2004 while receiving Mitchell Lama benefits. The rent-setting date is the date of the Supreme Court decision finding IPN to be rent stabilized. The vacancy decontrol date is the date of Gluck’s waiver of J-51 benefits.

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Because the bill is only for the benefit of IPN, it is unconstitutional. As Justice Cardozo put it in a case invalidating a bill providing for the compensation of a private landowner, when he was Chief Judge of the New York State Court of Appeals:

An act is not general when the class established by its provisions is at once so narrow and so arbitrary that duplication of its content is to be ranked as an unexpected freak of chance, a turn of the wheel of fortune defying probabilities.

Matter of Mayor of City of N.Y., 246 NY 72 (1927).

Because it is an unconstitutional private bill, S 5763 will not do what it claims to do. It will not “create market certainty going forward.” It will lead to more litigation, discourage Gluck from ever implementing the affordable rents at IPN that the law (and his own agreement) requires, and lead to further delays in the final resolution of the status of IPN.

The License to Collect Overcharges

Although the bill purports to provide a mechanism for setting the rent for apartments that, but for the *Roberts* decision, would lawfully have been deregulated, that mechanism would apply by its terms so as to legalize the most blatant and fraudulent overcharges in buildings that received J-51 benefits as of October, 2009.

Section 3 of the bill defines every apartment that was rent stabilized or rent controlled prior to receiving J-51 benefits as an apartment that is “subject to the ruling of the State Court of Appeals in *Roberts v. Tishman Speyer*.” It goes on to set the legal rent for all such apartments at the rent actually paid as of October 22, 2005. That means that an apartment with an overcharge complaint having nothing to do with *Roberts* is nevertheless subject to the rent setting mechanism of the bill.

For example, a tenant who filed an overcharge complaint in January, 2009, for having been charged a deregulated rent in February, 2005 in an apartment where no renovations were performed, would have that complaint determined according to the rent actually paid in October, 2005, even if the building did not get any J-51 benefits until after the rent at issue began to be charged.

This bill would therefore provide every landlord who received any J-51 benefits prior to October, 2009 with a license to overcharge tenants, since it sets a base rent of October, 2005 even in cases where the October, 2005 rent is the product of fraud.

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Eliminating the Protection Against Deregulation

Although the bill purports to provide a mechanism for setting the issue of the regulatory status of apartments that, but for the *Roberts* decision, would lawfully have been deregulated, that mechanism would apply by its terms so as to deregulate apartments where the rent has not gone over the \$2,000.00 threshold.

Section 12(c) of the bill forecloses any “claims relating to the deregulation of housing accommodations which were subject to rent regulation immediately prior to the receipt of tax benefits.” By its terms, this includes apartments where the rent has not legally gone over the \$2,000.00 threshold, so long as the landlord has illegally deregulated the apartment, received J-51 benefits, and has paid back the pre-October, 2009 portion of the benefits. This provision rewards and even incentivizes blatant fraud.

More broadly, the bill unjustifiably permits landlords to resume deregulating vacant apartments in buildings receiving J-51 benefits. The sponsor’s memorandum offers no justification for doing so.

Right now, in buildings that received J-51 benefits on or before October, 2009 tenants of modest means living in ordinary stabilized apartments at rents well below \$2,000.00 per month can take comfort in knowing that their apartments cannot be deregulated, and that neither the landlord nor any speculators have an incentive to try to push them into the streets. This exemption from deregulation costs landlords nothing. It protects literally hundreds of thousands of tenants. Its elimination is not justified by any of the rhetoric accompanying the bill.

Under the bill, a landlord wishing to deregulate apartments that are now exempt from deregulation can simply pay back the pre-October, 2009 J-51 tax benefits received from the City of New York, and then resume deregulating apartments by obtaining vacancies, including by targeting those apartments now occupied by tenants paying below-market rents. The landlord need not pay interest on the benefits, and can keep the post-October, 2009 benefits received at the building.

These benefits were and are designed to subsidize improvements to affordable housing. The bill would instead allow landlords to spend public money to subsidize the deregulation of affordable apartments, by using J-51 benefits to finance improvements, leading to rent increases, without requiring that the buildings receiving benefits remain rent regulated.

Ever since its enactment in 1955, the J-51 program has had, as its core purpose, the use of public subsidies to fund improvements to regulated apartments, in exchange for a commitment that such apartments remain affordable. According to the 1955 Legislative Annual, the original purpose of the

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program was as follows:

it is believed that, in as much as new housing is not being produced at a fast enough pace to provide decent, safe and sanitary homes for lower income families, some provisions must be made to encourage owners to alter and improve salvageable buildings.

From the earliest days of the program, owners who sought to use J-51 benefits to fund work that would result in deregulation were held to be ineligible for benefits. *Alwalt Realty Corp v. Boyland*, 5 Misc.2d 1061, 160 N.Y.S.2d 504 (Sup. Ct., NY Co., 1957). The focus of the program has always remained upon the same basic purpose: “to increase the supply of moderate rental housing with satisfactory standards.” *111 Fourth Ave. Assoc. v. Finance Administration of the City of New York*, 101 Misc.2d 950, 422 N.Y.S.2d 558 (Sup. Ct., NY Co., 1979). For this reason, the J-51 Ordinance contains numerous rules that are designed, with varying degrees of success, to eliminate the incentive for owners to use J-51 benefits for luxury housing: for example, the limitation on the amount of the total assessed valuation of the building that will receive an exemption (New York City Administrative Code §11-243 (d)(8)(c); and the geographic limitations applying special requirements to certain areas in Manhattan such as a “minimum tax zone” (New York City Administrative Code §11-243(d)(6)) and a “tax abatement exclusion zone” (New York City Administrative Code §11-243(d)(7)).

The principal means by which the J-51 program has prevented the use of public funds to subsidize unregulated luxury housing and the displacement that goes with it, has been the mandate, unchanged before and after the advent of “luxury” deregulation, that every single apartment in a building receiving J-51 assistance remain rent regulated at least throughout the tax benefit period and, if the tenants are not notified of the receipt of J-51 benefits, that they remain regulated until they vacate.

These laws and regulations were on the books before 1993 and they remain on the books today. They were the law throughout the time when landlords were heedlessly deregulating apartments in J-51 assisted buildings. They include Rent Stabilization Law §26-504 (c), which required at the time and still requires that *all* of the “dwelling units in a building or structure receiving benefits” be made rent stabilized; NYC Admin. Code §11-243 (i) (1), which required and still requires that “the benefits of this section shall not apply . . . to any existing dwelling [defined as ‘a class A multiple dwelling or a building’] which is not subject to the provisions of the . . . city rent stabilization law;” and HPD’s regulations at 28 RCNY §5-03(f)(1), which required and still requires that “for at least so long as a building is receiving the benefits of the Act . . . all dwelling units in buildings or structures converted, altered or improved shall be subject to rent regulation pursuant to: . . . the Rent Stabilization Law of 1969.”

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Under these laws, the public has spent billions of dollars and under current law is entitled, in exchange, to insist that hundreds of thousands of apartments remain rent regulated. Specifically, according to the “Annual Report on Tax Expenditures” prepared by the New York City Department of Finance for fiscal year 2011, “[i]n FY 2011, the J-51 program provided 20,758 exemptions and 151,957 abatements to approximately 750,000 apartments. The exempt assessed value of these properties was \$1,208.4 million.” According to the same report for fiscal year 2010, “[i]n FY 2010, the J-51 program provided 19,981 exemptions and 141,890 abatements to 724,971 apartments. The exempt assessed value of these properties was \$1,192.7 million.” The report for fiscal year 2009 states: “[i]n FY 2009, the J-51 program provided 15,093 exemptions and 137,386 abatements to 723,811 apartments. The exempt value of these properties was \$1,156.8 million.” Similar numbers have been reported for prior years. These reports, and the ones for the years going back to 1998, are accessible at the following web address: http://www.nyc.gov/html/dof/html/pub/pub_reports_other_tax.shtml.

The bill, would permit the owner of every apartment that received J-51 benefits prior to October, 2009 and is now exempt from deregulation because of the J-51 program to waive J-51 benefits and thereby target the apartment for deregulation.

This windfall goes far beyond limiting landlords’ potential liability for overcharges under *Roberts*. By holding that apartments in J-51 assisted buildings cannot be deregulated *Roberts* extended a shield of protection around hundreds of thousands of working-class tenants who now pay affordable rents and who would otherwise be targeted for harassment, threats and baseless eviction proceedings. *Roberts* took away a significant part of the incentive that has driven owners to resort to illegal tactics to obtain vacancies. The elimination of that incentive did not, by itself, cost any landlord any money. Nevertheless, the bill’s sponsors now wish to paint a fresh target on the backs of these tenants.

The stated rationale of the bill does not apply to this category of housing. There is no legal uncertainty about which apartments are now exempt from deregulation. The exemption costs landlords nothing. Eliminating it would do nothing more than provide landlords with an unearned windfall.

Undermining the Rule of Law

Even if the bill were one that fit within its stated rationale, it would still be an insult to the American ideal of the rule of law. The *Roberts* case was decided one and a half years ago, and, notwithstanding the predictions of the real estate industry, the world has not come to an end. The *IPNTA* case was decided nine months ago. The same landlords who have asked the legislature to relieve them from overcharge liabilities have claimed, in court proceedings that are ongoing, that they have no liability to worry about. They have come to court armed with all of the protection they might reasonably want, since existing law already places enormous obstacles in the path of tenants seeking to recover

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overcharges. If there were any truth to their claims of having relied on DHCR regulations as a basis for deregulation, then they would be able to use that argument to avoid having to pay treble damages. As numerous owners have pointed out in their court filings, they are presumptively entitled to charge rents based on the inflated and often illegally-deregulated rents they were charging four years before they were sued. This presumption is overcome only when there has been a showing of fraud. Surely the legislature does not wish to give its imprimatur to fraud.

The rationale of the bill is based upon a myth. It was never legal to deregulate apartments in J-51 assisted buildings. As noted above, the pre-1993 law that required that “all” apartments in J-51 assisted buildings remain regulated was never changed. As the Court of Appeals said in *Roberts*, the plain meaning of the statutory language indicates that J-51 assisted apartments are exempt from deregulation, an obvious conclusion when the deregulation statute is read together with the laws and regulations governing the J-51 program. DHCR’s initial reaction to the 1993 deregulation statute was to hold that all assisted apartments were required to remain regulated.

The sponsors’ contention that landlords began deregulating apartments in J-51 buildings in reliance upon binding DHCR rulings, is also a myth. Prior versions of this bill were accompanied by memos in which the sponsors admit that “the deregulation of those apartments occurred since 1993.” It was not until 1996 that DHCR issued a private, non-binding opinion letter approving of the deregulation of any J-51 assisted units, and there is no evidence that anyone but a few insiders knew about it. It was not until December 2000 that DHCR adopted regulations that would explicitly permit deregulation in J-51 assisted buildings, and they were described at the time as a change in the law. After their adoption there were still two contradictory sets of regulations on the books, those of HPD (requiring that “all” apartments remain regulated) and those of DHCR.

In the face of what was still an uncertain legal picture, owners plunged heedlessly into deregulation, without ever seeking a court ruling on the issue. As the sponsors admit, they began deregulating apartments before there was ever any legal authority supporting it.

Now the owners who took that risk are seeking a legislative bailout. Their request should be denied. If they get a bailout they will expect, based on experience, to be relieved of the consequences of ever more risky challenges to the obligations imposed by the rent laws. They should not be rewarded for having disregarded their clear legal obligations.