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July 18, 2005

The Honorable Michael Bloomberg
 Mayor of the City of New York
 City Hall
 New York, NY 10007

Re: Introduction 186-A (To amend the administrative code of the city of New York, in relation to creating a right of first refusal and a first opportunity to purchase.)

Dear Mayor Bloomberg:

We write to urge you to veto Intro 186. In our view, this bill will undermine the City's credibility as a reliable partner with private providers of affordable housing and will be counterproductive to solving the City's housing problems.

While the intent of the legislation—to preserve the city's affordable stock—is laudable, the manner by which Intro 186 would accomplish this would create more harm than good. We believe there are other ways to accomplish this worthy goal.

In our view, Intro 186 would undermine the development of additional affordable housing by the private sector. By seriously abridging the statutory rights of housing providers to terminate subsidy agreements and continue to own and manage their properties, Intro 186 will sour relations between the City and the housing development industry at the very time the City is implementing innovative strategies to involve them in solving our housing problems. When owners entered into the subsidy programs covered by this bill (whether Mitchell-Lama, Section 8, or other City, State, or Federal programs), they did not waive their right to continue to own their property at the end of the compliance period. Forcing them to do so will serve as a strong disincentive to future private investment, which is vital to the production of affordable housing.

Successful City policies in recent decades have recognized that expanding the housing supply requires private investment. This was the foundation of Mitchell-Lama production as well as of HPD programs that resurrected tens of thousands of formerly derelict *in-rem* buildings throughout the five boroughs. Given the scarcity of public resources, the City must have the cooperation of the private sector as it moves to address our housing problems.

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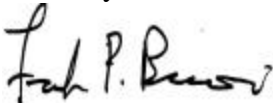
The rapid escalation of buy-outs and conversions in the last several years are cause for concern but the City's approach should be multifaceted and mindful of the potential implications for future development. The best policy approach is to encourage owners to remain in the programs. Owners who do not wish to sell their property can be induced to maintain affordability by extending tax benefits and/or providing favorable refinancing terms and below-market modernization loans in exchange for extended affordability. HPD, HDC, and the State's HFA are actively pursuing that strategy with the Mitchell-Lama inventory and their efforts could be enhanced with enactment of A.2454, the bill your Administration drafted. Preservation of federally-subsidized affordable housing is more complicated because national budget politics are involved, but we encourage HPD to continue its efforts to address the preservation of that stock.

When owners nevertheless wish to sell their properties or to terminate affordability agreements in accordance with laws, regulations, and contracts that govern each program, we are sympathetic to the goal of tenant purchase. In those cases, the City could assist the tenants to prepare their purchase proposal by providing technical assistance and even financing. Since conversions occur in neighborhoods where the market rents are high, however, public funds may be necessary to help tenants effect a purchase. Good public policy requires that appropriate conditions and controls are placed on such expenditures to ensure the long-run affordability of the housing and that public funds do not result merely in financial windfalls for existing residents.

The purpose of Intro 186 is to give tenants a full opportunity to purchase a building leaving a City, State, or Federal subsidy program and to operate it as a long-term affordable housing resource. We are sympathetic to that goal as well, but believe that the legislation incorporates coercive processes that may, in fact, be unconstitutional. Consequently, we urge you to veto Intro 186 and to direct HPD to conduct a thorough study of how "right of first refusal" provisions in existing Federal housing law have performed. After such a review, the City will be in a better position to create procedures and programs that preserve affordable housing without infringing on the ownership, statutory, or contractual rights of private owners.

We at the Citizens Housing and Planning Council have been working to improve housing and neighborhood conditions in New York City since 1937. Through the Great Depression, wartime shortages, suburbanization and abandonment, and revitalization and gentrification, we have found that housing problems can only be effectively addressed through the cooperative efforts of the public and private sectors. We fear that Intro 186 would damage that tradition of cooperation and believe that better approaches to meeting its goals can be devised.

Sincerely,



Frank P. Braconi
Executive Director

Enclosures

MEMORANDUM

TO: ELAINE R. TORIBIO
CITIZENS HOUSING AND PLANNING COUNCIL

FROM: PROFESSOR PHILIP WEINBERG
ST. JOHN'S UNIVERSITY LAW SCHOOL

SUBJECT: CONSTITUTIONALITY OF INTRO 186

DATE: 7/22/2005

CC: CHPC LEGISLATIVE WATCH COMMITTEE

I have serious problems with the constitutionality of Intro 186.

It seems to require an owner who opts out of Mitchell-Lama or Section 8 to sell to its tenants at the appraised price, whether the owner wants to or not. The city may acquire property through eminent domain for a public use, including affordable housing, *Berman v Parker*, 348 US 26 (1954). But it cannot delegate that power to a private group, other than a railroad or public utility. Even in the recent *Kelo v City of New London*, just decided by the Supreme Court, upholding eminent domain for economic redevelopment, it was the city that used the eminent domain power—not a totally private entity.

It would be different if Intro 186 required an owner who was selling anyway to sell to its tenants. Here, it seems to require the owner either to sell to the tenants (if they want to purchase) or remain in the program. In addition, it can be argued that requiring the owner to sell to the tenants constitutes a taking of the owner's property or an unconstitutional impairment of the owner's contractual rights. The right to convey (or not) to whom one chooses seems to be pretty basic, like the owner's right to exclude others from one's property, as in *Nollan v Calif. Coastal Comm'n*, 483 US 825 (1987). The purpose of Intro 186—to maintain affordable housing—is laudable but that does not justify a taking.

Although forcing the owner to sell is an abuse of the eminent domain power, I do not believe Intro 186 would unconstitutionally impair a contractual obligation, since by operating a Mitchell-Lama or similar subsidized housing the owner entered a heavily regulated industry, so its expectations are limited, as in cases involving public utilities. See *Energy Reserves Group v Kansas Power & Light Co*, 459 US 400 (1983).

In the end, I see major constitutional problems with this legislation.