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COURT OF APPEALS

STATE OF NEW YORK

EAST MIDTOWN PLAZA HOUSING COMPANY, INC.,

Appellant,

-against-

No. 187

ANDREW M. CUOMO, et al.,

Respondents.

27 Madison Avenue
New York, New York 10010
October 10, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

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Jessica B. Cahill
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: East Midtown Plaza,
2 number 187.

3 Counselor, would you like any rebuttal
4 time?

5 MR. RICHARDSON: Two minutes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. Go
7 ahead.

8 MR. RICHARDSON: May it please the Court.
9 My name is George Richardson, and it is my pleasure
10 to appear before you this morning on behalf of the
11 appellant East Midtown Plaza Housing Company.

12 This case involves two legal points. The
13 first involves jurisdiction under the Martin Act; and
14 the second involves a question of how properly to
15 count a vote to privatize and exit the Mitchell - - -

16 CHIEF JUDGE LIPPMAN: Counselor, how do you
17 get around the certificate of incorporation?

18 MR. RICHARDSON: On the - - - on the vote
19 question?

20 CHIEF JUDGE LIPPMAN: Yes, on the vote
21 question.

22 MR. RICHARDSON: The reason we get - - -
23 the reason that that does not apply to this vote is
24 very simply because in counting the vote the housing
25 company followed precisely the rule of its

1 supervising authority, respondent HPD. HPD's rule
2 says specifically that to privatize you have to have
3 a vote of two-thirds of the outstanding shares of the
4 corporation as mandated by the Business Corporation
5 Law. And that is precisely how the vote was
6 conducted. It was how the shareholders were told the
7 votes would be - - -

8 JUDGE SMITH: Suppose - - - I mean, suppose
9 that in this particular case the Business Corporation
10 Law did not mandate it? Does the building - - - does
11 the HPD regulation still require you to do it?

12 MR. RICHARDSON: Sure, if it didn't have -
13 - -

14 JUDGE SMITH: Well, why are the words "as
15 mandated by the Business Corporation Law" in there?

16 MR. RICHARDSON: There is no case law
17 construing that, Judge Smith, but it is my
18 interpretation, and I think HPD agrees with it, is
19 what the idea was of that is to have the super-
20 majority provision that appears in Article 10 of the
21 BCL. That is - - - Article 10 of the BCL says "in
22 order to engage in an extraordinary corporate
23 transaction you must have two-thirds majority."
24 That's what the trial court held - - -

25 JUDGE SMITH: So you take "as mandated by"

1 to mean by the majority required in the BCL?

2 MR. RICHARDSON: Yes, and that's what the
3 trial court held in this case as well.

4 JUDGE GRAFFEO: But doesn't your
5 certificate say the shareholders get one vote?

6 MR. RICHARDSON: It does, Your Honor. Yes,
7 it does. But - - -

8 JUDGE GRAFFEO: So to do it by the way that
9 you folks did it, by shares, doesn't that dilute the
10 voting power of the smaller residences?

11 MR. RICHARDSON: It dilutes the voting
12 power if you look at it in the context of the
13 department's vote. If you look at it in context of
14 people vote; no, not at all. It enfranchises far
15 more people. That's because the larger apartments
16 have more shares allocated to them; and by HPD rules,
17 larger apartments must be occupied by greater numbers
18 of people.

19 So the greater apart - - - the larger
20 apartments, which have more shares allocated to them,
21 have more people living in them by HPD rules.

22 JUDGE CIPARICK: So if there are two people
23 - - - there are two tenants, a couple let's say, each
24 of them get a vote, is that what you're saying?

25 MR. RICHARDSON: No, the shares would vote.

1 Whatever the number of shares allocated to the
2 apartment are, but - - -

3 JUDGE CIPARICK: The certificate of incorp
4 - - - the certificate specifically says "regardless
5 of the number of shares held by such holder." It
6 talks about a holder, a singular holder - - -

7 MR. RICHARDSON: Yes.

8 JUDGE CIPARICK: - - - voting one share.

9 MR. RICHARDSON: Yes.

10 JUDGE CIPARICK: I mean I guess we're
11 reading that to mean unit, correct?

12 MR. RICHARDSON: When you're reading the
13 certificate of incorporation or if you're reading the
14 HPD rule?

15 JUDGE CIPARICK: Well, I'm reading the
16 certificate of incorporation which says, "Each holder
17 of shares."

18 MR. RICHARDSON: Yes, the certificate of
19 incorporation has voting by apartment. We don't
20 disagree with that proposition.

21 What we are saying is that we follow the
22 HPD rule.

23 JUDGE GRAFFEO: Well, why shouldn't the
24 certificate govern - - -

25 MR. RICHARDSON: Sure.

1 JUDGE GRAFFEO: - - - as opposed to the HPD
2 rule? I guess that's the - - -

3 MR. RICHARDSON: That's the question.

4 JUDGE GRAFFEO: - - - fundamental question.

5 MR. RICHARDSON: That's the question, is if
6 you have a supervising authority that says that you -
7 - - if you wish to engage in this corporate
8 transaction you must count the vote in this method,
9 does that trump the certificate of incorporation?
10 And I think there's no question, Judge Graffeo, that
11 it does in this case for the simple reason that HPD
12 has a companion rule, which is obviously cited in our
13 brief, that says if you have something in your
14 organizational documents contrary to HPD rules
15 they're null and void.

16 So HPD says - - -

17 JUDGE GRAFFEO: Did the tenants know this?
18 I mean that's one of - - -

19 MR. RICHARDSON: Sure, this was - - -

20 JUDGE GRAFFEO: - - - the problems I'm
21 having.

22 MR. RICHARDSON: Yes, absolutely dis - - -

23 JUDGE GRAFFEO: I can understand they'd
24 know what was in the certificate - - -

25 MR. RICHARDSON: Yeah.

1 JUDGE GRAFFEO: - - - but are they going to
2 know these rules are going to change?

3 MR. RICHARDSON: They sure did. In the
4 plan, it was specifically disclosed what the
5 certificate of - - -

6 CHIEF JUDGE LIPPMAN: So HPD's rules trump
7 everything else, the BCL, the certificate of
8 incorporation everything? It goes by their rules?
9 Does that - - -

10 MR. RICHARDSON: I don't - - -

11 CHIEF JUDGE LIPPMAN: Does that make any
12 sense?

13 MR. RICHARDSON: Chief Judge, I don't
14 believe that the HPD rules could trump the BCL, but
15 they don't have to in this case. All they have to do
16 is trump the organizational documents, and they are
17 the supervising authority of all Mitchell-Lama
18 housing projects in the city. And they do have a - -
19 -

20 CHIEF JUDGE LIPPMAN: Doesn't 612 say vote
21 my share unless the certificate of the incorporation
22 says otherwise?

23 MR. RICHARDSON: It does, but that - - -

24 CHIEF JUDGE LIPPMAN: And doesn't 1001 say
25 two-thirds votes of those entitled.

1 MR. RICHARDSON: It does.

2 CHIEF JUDGE LIPPMAN: So everything goes to
3 this - - - all of this, including the certificate of
4 incorporation, is kind of obviated by the HPD rule?

5 MR. RICHARDSON: By the HPD rule, that's
6 exactly right.

7 CHIEF JUDGE LIPPMAN: Why? Why?

8 MR. RICHARDSON: Let me - - - let me step -
9 - -

10 CHIEF JUDGE LIPPMAN: What's the logic of
11 that?

12 MR. RICHARDSON: Sure, let me step back, if
13 I may. In 2004, EMP had their first vote to go
14 private. At the time HPD's rule said what it says
15 when took the second vote; and that is count the
16 shares, two-thirds of the outstanding shares of the
17 corporation. The vote was taken. It passed
18 according to two-thirds of the shares - - - of the
19 outstanding shares of the corporation.

20 EMP mailed the notice - - - sent a notice
21 over to HPD saying we've held this vote; this is how
22 we counted the vote. HPD had no objection
23 whatsoever.

24 JUDGE SMITH: Well, did it matter in 2004?

25 MR. RICHARDSON: It did not. According to

1 a subsequent rule change by HPD it didn't matter, but
2 at the time we did say that. HPD didn't respond; and
3 what does HPD say to this Court, well, I guess we
4 didn't look at the certificate of incorporation back
5 then when we didn't object to the vote in 2004.

6 JUDGE SMITH: And has HPD ever - - - I mean
7 I understand what you're saying, that they implicitly
8 read their rule your way back in 2004. Have they
9 ever explicitly read it that way?

10 MR. RICHARDSON: Not that I'm aware of, but
11 I can tell you by their actions they explicitly read
12 it that way, because subsequent to our vote they
13 amended their rule to say voting has to be by
14 apartment.

15 JUDGE SMITH: They, of course, would say
16 it's a clarification?

17 MR. RICHARDSON: They would say it was a
18 clarification.

19 CHIEF JUDGE LIPPMAN: The Attorney General
20 has been consistent in their position, right?

21 MR. RICHARDSON: On the vote issue or on
22 the jurisdiction of the Martin Act?

23 CHIEF JUDGE LIPPMAN: On both.

24 MR. RICHARDSON: They have - - - they have
25 - - - they have not been consistent, Your Honor. No,

1 they have not.

2 CHIEF JUDGE LIPPMAN: In what sense?

3 MR. RICHARDSON: It was only, I believe, in
4 a year or two before the second vote. Remember we
5 started this process in 2004. It was a short time in
6 that time span before the second vote, which took
7 place in January where the Attorney General called up
8 and said to counsel - - - corporate counsel for the
9 company - - - HPD has informed us that they look at
10 their rule differently now and that we're going to
11 expect that the vote be counted that way. And,
12 again, this was disclosed in the plan.

13 We said this is what the terms of the
14 certificate of incorporation say, this is how we're
15 going to control the vote, the AG and HPD take a
16 different view, and we reserve our right to go to
17 court if the vote doesn't work regardless of the way
18 you count the votes.

19 If I may, move to the Martin Act issue?

20 CHIEF JUDGE LIPPMAN: Go ahead.

21 MR. RICHARDSON: Okay. The Martin Act does
22 not apply in this case for a very simple reason.

23 CHIEF JUDGE LIPPMAN: Why is it this is a
24 very - - - if this goes through, why isn't this a
25 totally different universe in terms of the

1 shareholders?

2 MR. RICHARDSON: Sure. There's certainly
3 things that change, Your Honor, but there are - - -

4 CHIEF JUDGE LIPPMAN: And why doesn't that
5 make it - - -

6 MR. RICHARDSON: - - - there's one - - -

7 CHIEF JUDGE LIPPMAN: - - - subject to the
8 Martin Act?

9 MR. RICHARDSON: It is not subject to - - -

10 CHIEF JUDGE LIPPMAN: The privatization.

11 MR. RICHARDSON: Yeah, it's not subject to
12 the Martin Act for a simple reason that there was no
13 dissolution, there was no offer or sale of shares,
14 there was no transfer of the property - - -

15 JUDGE CIPARICK: The original - - - your
16 original plan contemplated transfer of shares, right?

17 MR. RICHARDSON: Judge Ciparick - - -

18 CHIEF JUDGE LIPPMAN: But what's the - - -

19 MR. RICHARDSON: - - - yes, it did.

20 CHIEF JUDGE LIPPMAN: But what's the
21 difference? Isn't it a new private corporation?

22 MR. RICHARDSON: No, it is not. It is the
23 same - - -

24 CHIEF JUDGE LIPPMAN: What - - - go ahead.

25 MR. RICHARDSON: - - - it is the same

1 company before and after. All we were doing was
2 amending the certificate of incorporation and there -
3 - -

4 CHIEF JUDGE LIPPMAN: It's night and day,
5 in terms of the effect on the people --

6 JUDGE CIPARICK: Tenants?

7 CHIEF JUDGE LIPPMAN: - - - who live there,
8 isn't it?

9 MR. RICHARDSON: I disagree, Your Honor.

10 CHIEF JUDGE LIPPMAN: It's not night and
11 day?

12 MR. RICHARDSON: I disagree.

13 JUDGE GRAFFEO: Some of them are going to
14 lose subsidies, aren't they?

15 MR. RICHARDSON: They are - - -

16 JUDGE GRAFFEO: Isn't that the substantial
17 change for them?

18 MR. RICHARDSON: The only - - - the only
19 difference should be that in one case they were under
20 a regulation of HPD and the other way they are not.

21 CHIEF JUDGE LIPPMAN: That's the only
22 difference to - - -

23 MR. RICHARDSON: Yes.

24 CHIEF JUDGE LIPPMAN: - - - to the
25 shareholders?

1 MR. RICHARDSON: Yes. And the reason - - -

2 CHIEF JUDGE LIPPMAN: How can that be the
3 only difference.

4 JUDGE CIPARICK: They're going to lose
5 reserve accounts, they're going to lose - - - their
6 maintenance is going to go up.

7 MR. RICHARDSON: Judge Ciparick, their
8 maintenance is not going to go up. That is pure
9 speculation on the part of the Attorney General.

10 CHIEF JUDGE LIPPMAN: What happens when
11 they sell their apartments?

12 MR. RICHARDSON: Say again.

13 CHIEF JUDGE LIPPMAN: What happens when
14 they want to move out? What's the difference to the
15 individual person who has an apartment under the old
16 plan, and then if this is allowed to go through?

17 MR. RICHARDSON: Under - - - when you're
18 within Mitchell-Lama you put your shares back to the
19 company.

20 CHIEF JUDGE LIPPMAN: So you may have a
21 few, whatever it is your shares are worth, a few
22 thousand dollars when you got 'em, and then when you
23 get back you get those monies. What happens after it
24 changes?

25 MR. RICHARDSON: You can sell your shares

1 to anybody you like.

2 CHIEF JUDGE LIPPMAN: And you mean you can
3 sell your shares for a million dollars?

4 MR. RICHARDSON: Yes, that's certainly
5 possible.

6 CHIEF JUDGE LIPPMAN: That would be really
7 a pretty big difference, wouldn't you think?

8 MR. RICHARDSON: It is not a significant
9 difference. It's a difference of a million dollars.

10 CHIEF JUDGE LIPPMAN: For the people who
11 live there it's not a significant difference?

12 MR. RICHARDSON: It is not a significant
13 difference in tripping the jurisdictional means of
14 the Martin Act. The Martin Act - - -

15 CHIEF JUDGE LIPPMAN: Why not? Why isn't
16 it?

17 MR. RICHARDSON: Because the Martin Act
18 requires the sale or offer of securities. It is not
19 a general business statute; it is not a general fraud
20 statute.

21 CHIEF JUDGE LIPPMAN: You mean if you don't
22 get a new stock certificate, that's the determining
23 factor - - -

24 MR. RICHARDSON: In - - -

25 CHIEF JUDGE LIPPMAN: - - - rather than the

1 substance of what's going on?

2 MR. RICHARDSON: But the substance - - -

3 CHIEF JUDGE LIPPMAN: You follow what I'm
4 saying?

5 MR. RICHARDSON: I follow you. It is the
6 form. Let me give you a very simple example.

7 CHIEF JUDGE LIPPMAN: It's the form that
8 matters?

9 MR. RICHARDSON: It's the form that matters
10 because of the Martin Act. If there is a building in
11 Manhattan, and I want to buy that building, there's
12 two ways for me to do it. I can exchange cash for
13 the deed, that's one way to do it; or, I could buy
14 all of the shares in the corporation that owns the
15 building. One is a securities transaction, the other
16 is not.

17 For hundreds of years lawyers have been
18 structuring transactions to embrace the benefit or
19 avoid the burden of particular statutes. The form of
20 this transaction matters.

21 JUDGE SMITH: Could I just add - - -
22 because, I mean, I'm confused about something.
23 Suppose you win the argument you're just making and
24 the Attorney General has no jurisdiction, but you
25 lose the other argument on the majority required.

1 What good does it do you, you still can't close your
2 deal?

3 MR. RICHARDSON: Well, if there is no
4 jurisdiction under the Martin Act, then the Attorney
5 General's refusal to accept the plan for filing is
6 out of the way.

7 JUDGE SMITH: Yeah, but you can't - - - you
8 still can't privatize, because you haven't got the
9 votes.

10 MR. RICHARDSON: That depends on what HPD
11 says, and HPD hasn't said anything. As we say in our
12 papers, they stood mute in response to the - - - when
13 we filed the second amendment, which would be
14 effective.

15 CHIEF JUDGE LIPPMAN: But if you get the
16 Attorney General out of the picture, then HPD will be
17 more receptive to this?

18 MR. RICHARDSON: I have no idea, Your
19 Honor.

20 JUDGE SMITH: But doesn't it also depend on
21 what the law - - - if we say the law says that you
22 got to have two-thirds by apartment, then aren't you
23 wasting your breath arguing the other issue?

24 MR. RICHARDSON: Yes.

25 CHIEF JUDGE LIPPMAN: Okay. Thanks,

1 counselor, you'll have your rebuttal.

2 Okay, counselor, do you want any rebuttal
3 time, Mr. McConnell?

4 MR. MCCONNELL: Two minutes also, Your
5 Honor, please.

6 CHIEF JUDGE LIPPMAN: Two minutes. Go
7 ahead, you're on.

8 MR. MCCONNELL: Pardon me. Kevin
9 McConnell, I'm the attorney for the East Midtown
10 Plaza Tenant-Cooperator Association, a voluntary
11 association of individuals and families who reside at
12 East Midtown Plaza, and we are in favor - - -

13 CHIEF JUDGE LIPPMAN: Counsel, what's your
14 interest? Why is it advantageous to the people in
15 your association to have this - - -

16 JUDGE CIPARICK: Privatize?

17 CHIEF JUDGE LIPPMAN: - - - pass?

18 MR. MCCONNELL: Mainly - - - one of the
19 primary reasons, Your Honor, is the condition of East
20 Midtown Plaza at this point in time. It's not
21 allowed to - - -

22 CHIEF JUDGE LIPPMAN: But isn't it, in
23 reality, that you would want to be able to sell your
24 apartment at market price?

25 MR. MCCONNELL: Yes, Your Honor.

1 CHIEF JUDGE LIPPMAN: Even with the fee
2 that's - - -

3 MR. MCCONNELL: Even - - -

4 CHIEF JUDGE LIPPMAN: I mean that's the
5 main - - - that's what this all about, isn't it?

6 MR. MCCONNELL: This is about the right to
7 one, sell apartments - - -

8 CHIEF JUDGE LIPPMAN: Right, okay.

9 MR. MCCONNELL: - - - two, to put East
10 Midtown Plaza back in the kind of shape that it
11 should be in - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. MCCONNELL: - - - because forty-five
14 percent of the sale of any apartment will go back
15 into the building with respect to this flip tax.

16 CHIEF JUDGE LIPPMAN: Right.

17 JUDGE GRAFFEO: That's for the first sale,
18 right?

19 MR. MCCONNELL: That's for the first sale,
20 yes, Your Honor.

21 CHIEF JUDGE LIPPMAN: Yeah.

22 MR. MCCONNELL: With regard to the
23 certificate of incorporation, there's an exception in
24 the certificate of incorporation. The certificate of
25 incorporation, of course, is that document that the

1 residents at East Midtown Plaza have devised so that
2 way they can run their affairs. And the exception is
3 it's a per shareholder vote except as otherwise
4 provided by statute.

5 And where do we look with regard to the
6 statute? Well, you have the Private Housing Finance
7 Law, Section 35(2) and (3), which provide the means
8 by which a company can withdraw from the Mitchell-
9 Lama program. Dissolution: upon dissolution, the
10 company can either sell the apartment - - - sell the
11 building to another corporation or reconstitute.

12 What East Midtown Plaza did here was it
13 reconstituted. Now, in order to dissolve a
14 corporation, what do we look for? Well, HPD
15 regulation says, as mandated by the BCL, voluntary
16 dissolution and/or reconstitution. The certificate
17 of incorporation says you look to the BCL, because
18 the company's operations are subject to the
19 limitations and provisions of the BCL.

20 The Private Housing Finance Law itself says
21 you look to the Business Corporation Law.

22 JUDGE SMITH: But the BCL says you can put
23 what you want in your certificate of incorporation.

24 MR. MCCONNELL: It can, except as otherwise
25 provided by law, and there is statute, the

1 both voting shares, but they vote ten for one. Are
2 you saying that the effect of Section 1001 is to
3 suspend that and make them vote one for one on
4 dissolution?

5 MR. MCCONNELL: Two-thirds of the shares
6 entitled to vote thereon, Your Honor.

7 JUDGE SMITH: That's a yes?

8 MR. MCCONNELL: If both shares - - - yes,
9 it's a yes. If both shares are entitled to vote,
10 then you must obtain two-thirds of the shares.

11 JUDGE SMITH: There must have been a lot of
12 corporations with weighted voting that dissolved. Is
13 there any precedent on how it's done? I mean in the
14 history of - - - I mean weighted - - - shares with
15 different votes are not unknown in the corporate
16 world and a lot of those corporations must have
17 dissolved. I guess I don't know, but I'd be
18 surprised to know that they all abandoned the
19 weighted voting when they voted on dissolution.

20 MR. MCCONNELL: Your Honor, I don't know
21 the answer to that. I do know that dissolution is
22 such a - - - is a significant economic event, and
23 shares of stock generally decide how decisions of
24 corporations are to be conducted, by shares. So,
25 therefore, BCL 1001 says two-thirds of the shares

1 entitled to vote thereon.

2 JUDGE GRAFFEO: How do you address 612,
3 subdivision A, because it clearly says "unless
4 otherwise provided in the certificate of
5 incorporation."

6 MR. MCCONNELL: It does, Your Honor. One
7 way to address it is it an Attorney General opinion
8 back in 1910 in which the Attorney General opined
9 that you can have a vote by per shareholder vote
10 except as otherwise provided by law. If law says
11 that a percentage of the shares must vote on an
12 issue, then that was - - - that is what must be
13 followed. And here we have a law, namely the BCL
14 1001, and we even have - - -

15 CHIEF JUDGE LIPPMAN: 1001 controls, is
16 what you're saying.

17 MR. MCCONNELL: What I'm saying is 1001
18 controls as does the HPD regulation, which says two-
19 thirds of the shares, and then it goes on to say - -
20 -

21 CHIEF JUDGE LIPPMAN: And the certificate
22 of incorporation in 612(a), what about them?

23 MR. MCCONNELL: They're not inconsistent.

24 CHIEF JUDGE LIPPMAN: Do they fall by the
25 wayside?

1 MR. MCCONNELL: No, Your Honor, because the
2 certificate of incorporation says "except as
3 otherwise provided by statute." One vote per
4 shareholder except as otherwise provided by statute.
5 Where do we look? BCL. 612(a) says one vote per
6 share except as otherwise provided in the certificate
7 of incorporation, and the certificate of
8 incorporation leads you directly to the BCL 1001 and
9 to HPD regulations.

10 CHIEF JUDGE LIPPMAN: I think Judge
11 Ciparick's description of circular is certainly true
12 here.

13 MR. MCCONNELL: You're going straight
14 through, Your Honor. Certificate of incorporation
15 says otherwise provided by statute.

16 JUDGE GRAFFEO: There's another clause in
17 1001.

18 MR. MCCONNELL: And mainly because, Your
19 Honor, if I may on that point. And that is because
20 we have a - - - pardon me for interrupting, Your
21 Honor - - - is you have a specific statute. The
22 specific statute, i.e., dissolution controls.
23 There's no conflict between 612(a). And if there
24 were a conflict between 612(a) with its exception,
25 with the certificate of incorporation, nonetheless,

1 you look at the specific statute that controls here.

2 CHIEF JUDGE LIPPMAN: Judge Graffeo.

3 JUDGE GRAFFEO: Why can't the two statutes
4 work together, because 1001 says "shares entitled to
5 vote thereon"? Why doesn't that mean you look at the
6 certificate of incorporation to figure out which
7 shares are entitled to vote, and it would be the
8 first share?

9 MR. MCCONNELL: It would not, Your Honor,
10 because that would - - - the certificate also says
11 that there should be only one class of stock. That's
12 it, one class of stock. If some shares are entitled
13 to vote on an issue and other shares are not, when
14 the statute calls for per share vote, you would then
15 create two classes of stock. That's what this court
16 held in FeBland.

17 JUDGE GRAFFEO: So we have to determine
18 that 1001 takes precedence over 612?

19 MR. MCCONNELL: What the determination is,
20 is it's not a question of overruling or whatever, it
21 is the more specific statute that should apply.

22 CHIEF JUDGE LIPPMAN: Okay, counselor.
23 Thanks, you'll have your rebuttal.

24 MR. MCCONNELL: Thank you, Your Honor.

25 CHIEF JUDGE LIPPMAN: Counselor.

1 MR. DEARING: Thank you, Your Honor,
2 Richard Dearing for the Attorney General.

3 The shareholders of East Midtown Plaza face
4 a transformative choice. It's a choice whether to
5 leave - - -

6 CHIEF JUDGE LIPPMAN: He says but there's
7 no securities involved. There are no new stock
8 certificates.

9 MR. DEARING: There are no new stock
10 certificates. The law goes - - -

11 CHIEF JUDGE LIPPMAN: So of what importance
12 are they? Your adversary says that the form
13 controls.

14 MR. DEARING: Your Honors have said
15 precisely the opposite in All Seasons Resorts dealing
16 with a closely analogous, but a question out of the
17 Martin Act says it's economic reality, it's substance
18 over form.

19 And this is a key difference - - - if I may
20 just address the statement from my adversary that
21 there are hundreds of years of structuring
22 transactions to minimize burdens. That might be true
23 under tax statutes, under commercial statutes. What
24 we're dealing with here is an antifraud disclosure
25 protection.

1 JUDGE SMITH: Well, suppose these things -
2 - - suppose I buy a condo instead of a co-op, is that
3 within the Attorney General's jurisdiction?

4 MR. DEARING: If you buy - - - yes. Condo
5 and co-op are both - - -

6 JUDGE SMITH: Condominiums are treated as
7 co-operative interests in real property?

8 MR. DEARING: Yes, condos and co-ops are
9 both cooperative interests in real property.

10 The key here is that this choice - - - this
11 shareholder vote is transformative. They're leaving
12 a comprehensive regulatory regime for affordable
13 housing under Mitchell-Lama, a hugely successful
14 regime of affordable housing. People are clamoring
15 to get in there.

16 CHIEF JUDGE LIPPMAN: But even though it's
17 hugely successful, so many of these have turned over
18 into a private type organization.

19 MR. DEARING: They have started to turn and
20 those that have - - -

21 CHIEF JUDGE LIPPMAN: Right, but - - -

22 MR. DEARING: - - - have filed offering
23 plans under the Martin Act.

24 CHIEF JUDGE LIPPMAN: But that seems to be
25 - - - how old is the Mitchell-Lama law?

1 MR. DEARING: Mid-fifties originally
2 enacted.

3 CHIEF JUDGE LIPPMAN: But that seems to be
4 a trend. After all of these years many of them are
5 being privatized, even given the successes.

6 MR. DEARING: I think that's fair to say,
7 and we're not - - -

8 CHIEF JUDGE LIPPMAN: Not unusually, I
9 guess, is my only point.

10 MR. DEARING: Not unusual, but the key is
11 that - - -

12 JUDGE CIPARICK: And you have no problem
13 with the privatization.

14 MR. DEARING: No.

15 JUDGE CIPARICK: You just want it to be
16 done.

17 MR. DEARING: Precisely. We have no
18 problem with it. Everyone acknowledges that the
19 matter must be put to the shareholders - - -

20 CHIEF JUDGE LIPPMAN: So what's wrong with
21 what they're doing, tell us?

22 MR. DEARING: Well, what's -- well, first,
23 I just want to say that what we're saying is that
24 there must be full disclosure under the Martin Act -
25 - -

1 CHIEF JUDGE LIPPMAN: Right.

2 MR. DEARING: - - - so that shareholders
3 can make an evaluation. I'll get to - - - what's
4 wrong specifically here - - -

5 CHIEF JUDGE LIPPMAN: Yes.

6 MR. DEARING: - - - is the voting question,
7 which I'll get to in a minute. Frankly - - -

8 CHIEF JUDGE LIPPMAN: Go ahead.

9 MR. DEARING: - - - it's much less
10 important than this question - - -

11 CHIEF JUDGE LIPPMAN: Go ahead.

12 MR. DEARING: - - - which is do Mitchell-
13 Lama tenants deserve full and informed disclosure so
14 that they can make a meaningful choice?

15 CHIEF JUDGE LIPPMAN: Why didn't they have
16 disclosure here?

17 MR. DEARING: They had it up until the
18 point where the voting rule - - - the attempt to
19 declare the plan effective on a rule that was
20 different from the one disclosed and different from
21 what is legally required.

22 I'm asking a prior question, which is - - -

23 JUDGE SMITH: Is this really a disclosure
24 problem or is the problem they didn't get the votes?

25 MR. DEARING: I think it's both, Your

1 Honor, and here's why.

2 JUDGE SMITH: Well, I don't - - - I'm not
3 getting this picture of these Mitchell-Lama tenants
4 sitting in ignorance of what's going on. It's just a
5 question of whether they got the votes or not.

6 MR. DEARING: But the bottom line is this
7 is really running a campaign. When you run a
8 campaign you have to know how you judge who wins or
9 loses. It wasn't properly disclosed. Voting is
10 different - - -

11 CHIEF JUDGE LIPPMAN: What did - - - what
12 did they do that was deceptive or not disclosed?

13 MR. DEARING: What they did was they said -
14 - - HPD said this vote needs to be done by two-thirds
15 of apartments; we reserve the right to challenge it,
16 but they don't say anything more. They sit back,
17 they wait until the vote happens, they get two - - -

18 JUDGE SMITH: Isn't the sensible way to
19 read that they say that, and we might want - - -
20 we're not sure they're right and if it becomes an
21 issue we'll find out? What's deceptive about that?

22 MR. DEARING: Well - - -

23 JUDGE SMITH: They're keeping the promise
24 that they made of litigating that issue.

25 MR. DEARING: Well, there's more than just

1 deceptive under the Martin Act. There's appropriate
2 disclosure. And our position is the voting rule - -
3 - the bottom line rule is going to determine - - -

4 CHIEF JUDGE LIPPMAN: Has HPD been
5 consistent?

6 MR. DEARING: I don't know of any
7 inconsistency on HPD's part. They're reading kind of
8 - - -

9 CHIEF JUDGE LIPPMAN: They've always said
10 that it's two-thirds of the apartment?

11 MR. DEARING: I don't know. I'm not aware
12 of any instance in which they've said that it's two-
13 thirds of shares - - -

14 CHIEF JUDGE LIPPMAN: They say that their
15 regulation trumps and their regulation says - - -

16 MR. DEARING: The real answer - - - this is
17 simple on voting. It's real simple. Start - - - if
18 this is a dissolution, what counsel called a
19 significant economic event, start with BCL 1001. It
20 says what you need is two-thirds of the votes of
21 shares entitled to vote. 612(a) says, how do you
22 count votes; one vote per share unless the
23 certificate of incorporation says a different rule.
24 What does their certificate of incorporation say?
25 One vote for apartment. That's the end of the story

1 - - -

2 JUDGE JONES: But he says unless otherwise
3 provided by - - -

4 MR. DEARING: But there is no statute
5 providing otherwise. The statutes lead you to the
6 certificate of incorporation, not the other way
7 around.

8 CHIEF JUDGE LIPPMAN: He says it leads you
9 to 1001.

10 MR. DEARING: I know, but their argument is
11 all about what trumps what, but there is no trumping.
12 These are all in harmony.

13 CHIEF JUDGE LIPPMAN: The certificate of
14 incorporation controls here, essentially, the bottom
15 line?

16 MR. DEARING: It ultimately ends up with
17 the certificate, and the certificate says one vote
18 for apartment.

19 I want to return, though, to the Martin Act
20 question - - -

21 CHIEF JUDGE LIPPMAN: Go ahead.

22 MR. DEARING: - - - because it's critically
23 important to understand what's going on in a
24 privatization. People are leaving this comprehensive
25 regime of affordable housing. As Your Honor said, on

1 the equity side they have limited equity ownership
2 under Mitchell-Lama. They get a return of money paid
3 in. They don't participate in upside appreciation of
4 the property. What they get in exchange is highly
5 subsidized and reduced carrying charges to carry that
6 interest in property through tax subsidies - - -
7 significant and generous tax subsidies and through
8 public subsidized financing.

9 And when they're confronting the question
10 whether to go to the private unregulated co-op, they
11 must decide whether those increased potential
12 carrying charges, taking away potentially the
13 affordability of the housing, is compensated for by
14 the equity participation.

15 JUDGE SMITH: Either way you slice it, the
16 great majority of them have decided we'd like the
17 money please, right?

18 MR. DEARING: That's right, but - - -

19 JUDGE SMITH: And is it -- I mean just
20 looking at the equities overall is it really fair to
21 let the majority - - - minority that is maybe more
22 than a third, depending on how you count, keep this
23 whole thing in limbo?

24 MR. DEARING: Well, that's to quibble with
25 the voting rule, but that's what the BCL requires.

1 We say when that voting rule is established by the
2 BCL it has to be disclosed properly, like everything
3 else.

4 JUDGE SMITH: Well, what's so bad about
5 their disclosing the Attorney General thinks this is
6 the rule, HPD thinks this is the rule, we're not so
7 sure. Who's deceived?

8 MR. DEARING: Well, I think the real answer
9 to that is when you're talking about the question,
10 where are you going to draw this bright line and
11 determine thumbs up, thumbs down, that needs to be
12 clear in advance and part of the reason is this is
13 like a campaign. The shareholders - - -

14 JUDGE SMITH: And they have to -- their
15 disclosure is inadequate unless they say in their
16 disclosure you're - - - that you're right and they're
17 wrong?

18 MR. DEARING: No, it's that before they
19 vote - - - if they're going to take the different
20 view, before they vote that needs to be established,
21 and they disclose that.

22 JUDGE SMITH: Well, so they can't say we
23 may take a different view, they have to say we will
24 take a different view?

25 MR. DEARING: No, the rule has to be

1 settled before the vote occurs. You can't come back
2 after the vote and use a rule different from the one
3 you told shareholders you would use.

4 CHIEF JUDGE LIPPMAN: What's the difference
5 in how they're going to vote in knowing that?

6 MR. DEARING: This is why, because it's a
7 campaign. Shareholders go around trying to recruit
8 people to their side of the issue, and it changes - -
9 -

10 CHIEF JUDGE LIPPMAN: Do they know how much
11 value your vote has, is that why?

12 MR. DEARING: Well, they do know, and they
13 know who has - - -

14 CHIEF JUDGE LIPPMAN: No, what I'm saying
15 is by - - -

16 MR. DEARING: Yeah.

17 CHIEF JUDGE LIPPMAN: - - - if they
18 disclose totally is the difference that the voter
19 knows how much weight they have in this fight?

20 MR. DEARING: That's precisely it. I mean,
21 by the same logic you don't even - - -

22 JUDGE SMITH: But what if nobody knows?

23 MR. DEARING: - - - need to tell them - - -

24 JUDGE SMITH: Nobody knows until we decide
25 it, so how can they disclose it? Why can't they just

1 disclose there's a dispute about this and the dispute
2 may become moot.

3 MR. DEARING: Well, the - - -

4 JUDGE SMITH: And at the time they do the
5 disclosure they don't know whether the two-thirds is
6 going to be different, whether it's by apartment or
7 by share.

8 MR. DEARING: That's fair, but I think it
9 should be another vote. If the rule is settled on a
10 different thing than the shareholders said were going
11 to be used there should be another vote under that
12 new rule.

13 JUDGE GRAFFEO: Isn't the dispute really
14 who wants to stay and who wants to go?

15 MR. DEARING: Well, I'm not sure if that's
16 the essence of the dispute. I do think it's
17 important - - -

18 JUDGE GRAFFEO: Well, is the lang - - - you
19 have had other offering plans submitted to the
20 Attorney General's office - - -

21 MR. DEARING: Yes, ma'am.

22 JUDGE GRAFFEO: - - - from Mitchell-Lama
23 projects.

24 MR. DEARING: Yes, Your Honor, we have.

25 JUDGE GRAFFEO: All right, is the term in

1 this certificate unusual?

2 MR. DEARING: No, they're common. This
3 particular term - - - you mean the one apartment per
4 - - - one vote per apartment rule.

5 JUDGE GRAFFEO: Yes.

6 MR. DEARING: It's common in Mitchell-
7 Lamas. We haven't seen it in any other kind of co-
8 operative, but they are common in Mitchell-Lamas.
9 And - - -

10 JUDGE GRAFFEO: So this is the first time
11 this is being litigated?

12 MR. DEARING: I think it's the first time
13 the difference - - -

14 JUDGE GRAFFEO: Is this the first - - -

15 MR. DEARING: - - - in counting is
16 dispositive.

17 JUDGE GRAFFEO: - - - privatization that's
18 involved this language in the certificate?

19 MR. DEARING: No, it's not the first
20 privatization that's involved that language. It's
21 the first one where it changes the outcome.

22 CHIEF JUDGE LIPPMAN: So what's the logic
23 as to why in Mitchell-Lamas it's generally the one
24 per apartment?

25 MR. DEARING: I think the real logic is

1 that this is - - - this is an attempt to build equity
2 ownership in low and middle income housing areas and
3 the idea was that it was - - - this is not a private
4 for profit enterprise. Who has more shares is not
5 the determinative factor. It is essentially - - -
6 it's a limited profit cooperative arrangement and
7 therefore it's an equitable voting regime.

8 JUDGE READ: Well, he made the - - -

9 MR. DEARING: That's the basic principal.

10 JUDGE READ: - - - he made the point
11 though, didn't he, that the bigger the apartment the
12 more live in it.

13 MR. DEARING: Right, there may be children
14 living there, but the bottom line is - - - it's not
15 completely true. The shares - - - some aspect of the
16 share allocation is based on size, but there are
17 other factors.

18 All I know, really, at the end of the day,
19 is that you see this exact language again and again
20 in Mitchell-Lama certificates of incorporation, and
21 you don't see them in private co-ops.

22 Just to briefly touch, again, I know I keep
23 coming back to it, but I think it's vitally important
24 - - -

25 CHIEF JUDGE LIPPMAN: Go ahead.

1 MR. DEARING: - - - and I want to make sure
2 it's understood. The basic disclosure of the
3 protections of the Martin Act must apply. Counsel
4 says it's the form; we can structure our way out of
5 an investor protection regime. This court has said
6 otherwise, it's the substance. I'll note on that
7 point, that intervenor's counsel says directly two
8 things that are significant.

9 One, it involves a dissolution. That's
10 what the statute says. Major corporate
11 transformation. He calls it, "A significant economic
12 transaction." There's dissenters' rights involved,
13 there's a choice put to these shareholders to make a
14 fundamental change in the nature of their ownership
15 interest and their homes. They should have received
16 - - -

17 JUDGE SMITH: But you know, people buy and
18 sell homes all the time without the Attorney
19 General's help. It's just that these happen to be in
20 co-operative apartments.

21 MR. DEARING: It's not that they happen to
22 be. There was a problem in the late 1950s in New
23 York with fraud, abuse, predatory practices in co-op
24 marketing and the Martin Act offering plan disclosure
25 protections were enacted for the specific reason of

1 addressing that problem.

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 MR. DEARING: Thank you very much.

4 CHIEF JUDGE LIPPMAN: Thank you, counselor.

5 Counselor?

6 JUDGE CIPARICK: Can you describe how HPD's
7 regulations changed over this period of time and why?

8 CHIEF JUDGE LIPPMAN: And were you or were
9 you not inconsistent?

10 MS. SCALZO: I'm sorry, Your Honor.

11 CHIEF JUDGE LIPPMAN: Were you or were you
12 not inconsistent in the position you've been taking.

13 MS. SCALZO: No, Your Honor. At the time
14 that the notice of intent was submitted to HPD, it
15 was received - - - it was not rejected at that time,
16 because the certificate of incorporation was not
17 examined at the time. There was not an inconsistent
18 interpretation. HPD did not take an interpretation
19 that - - -

20 JUDGE SMITH: You say it was just an error?

21 MS. SCALZO: Yes, Your Honor. The - - -
22 had the certificate of incorporation been examined at
23 that time, it would have been - - - the notice of
24 intent would have been rejected, because the
25 appropriate vote had not been reached.

1 JUDGE SMITH: Well, why did your rule say
2 vote by shares?

3 MS. SCALZO: HPD's rule did not say vote by
4 shares. The - - - at the time of - - -

5 JUDGE SMITH: Well, you used some language
6 that sounded a lot like that.

7 MS. SCALZO: The specific language of - - -
8 at that time - - - at the time of the notice - - -
9 that the notice of intent was submitted to HPD,
10 Section 314(i)(7) provided that dissolution required
11 approval of two-thirds of the outstanding shares of
12 the corporation as mandated by the Business
13 Corporation Law. That's one continuous phrase.

14 JUDGE SMITH: So why - - - and why did it
15 say that?

16 MS. SCALZO: As mandated by the Business
17 Corporation - - -

18 JUDGE SMITH: Before you get to that, why
19 did it say the first part? Why did it say two-thirds
20 of the outstanding shares of the corporation if it
21 didn't mean that?

22 MS. SCALZO: But it doesn't end at
23 outstanding shares of the corporation.

24 JUDGE SMITH: Okay. Okay, but can you - -
25 -

1 MS. SCALZO: - - - it continues as mandated
2 by the corp - - -

3 JUDGE SMITH: Okay, can you explain why
4 those words are in there?

5 MS. SCALZO: Because 1001 of the BCL is the
6 provision that controls dissolution. BCL 1001
7 requires that - - - requires a vote of two-thirds of
8 the votes of all outstanding shares entitled to vote
9 thereon.

10 The "entitled to vote thereon" language - -
11 -

12 CHIEF JUDGE LIPPMAN: So you were tracking
13 that language? Was that what you were doing?

14 MS. SCALZO: It's a reference to that
15 language. HPD's rule - - -

16 CHIEF JUDGE LIPPMAN: And then your view is
17 that "those entitled" qualifies that?

18 MS. SCALZO: The - - - yes, the "entitled
19 to vote thereon" refers to only those shares that are
20 entitled to vote. That brings us back to - - -

21 JUDGE GRAFFEO: You didn't have that
22 phraseology though in your rule.

23 MS. SCALZO: The entitled to vote thereon?

24 JUDGE GRAFFEO: Right.

25 MS. SCALZO: That phraseology was not in

1 the rule, but, again, we referenced the Business
2 Corporation Law, that's 1001. Since that is the
3 provision of the Business Corporation Law, that - - -

4 CHIEF JUDGE LIPPMAN: So you're saying
5 whatever it may sound like that that's not what it
6 meant?

7 MS. SCALZO: What was meant was as a
8 reference to 1001.

9 CHIEF JUDGE LIPPMAN: Okay.

10 MS. SCALZO: Now, BCL 1001 specifically
11 refers to the votes that - - - the shares that are
12 entitled to vote.

13 CHIEF JUDGE LIPPMAN: Right.

14 MS. SCALZO: And that brings us back to the
15 certificate of incorporation. The certificate of
16 incorporation, which was executed in 1968 and never
17 amended, unequivocally provided for one vote per
18 dwelling unit for all - - - any and all purposes
19 unless - - -

20 CHIEF JUDGE LIPPMAN: And you agree with
21 the Attorney General that most of these Mitchell-
22 Lamas that's what it provides?

23 MS. SCALZO: Although I don't know that
24 specifically, I - - - certainly now our - - - HPD's
25 rule does provide for that - - -

1 CHIEF JUDGE LIPPMAN: Okay.

2 MS. SCALZO: - - - and it's my
3 understanding that that is a common voting method.
4 But the certificate of incorporation required one
5 vote per dwelling unit for all purposes unless
6 otherwise provided by statute.

7 Now, the Appellate Division correctly
8 determined that there is no statutory exemption of
9 the one vote per dwelling.

10 JUDGE SMITH: Well, even if there - - - but
11 even if it were not otherwise required by statute, if
12 it were required by a binding regulation, then the
13 regulation would override the certificate of
14 incorporation, wouldn't it?

15 MS. SCALZO: Your Honor, it would not,
16 because HPD's rule is not a statute, but it - - -

17 JUDGE SMITH: I understand that. I'm not
18 interpreting the certificate of incorporation. I'm
19 saying whatever the certificate of incorporation says
20 if there's a binding valid regulation that says do it
21 this way, they got to do it this way. That's all
22 there is to it.

23 MS. SCALZO: There is no - - - the
24 petitioner has never identified any either statute or
25 binding regulation that required - - -

1 JUDGE SMITH: Well, they say that your
2 regulation is such a thing. They say your regulation
3 says vote by shares. You dispute the meaning of it.
4 Isn't that what - - - isn't that what the whole case
5 comes down to - - -

6 MS. SCALZO: We definitely disagree with -
7 - -

8 JUDGE SMITH: - - - or at least on this
9 issue?

10 MS. SCALZO: - - - that interpretation of
11 the rule - - - of HPD's rule.

12 CHIEF JUDGE LIPPMAN: But do you agree with
13 Judge Smith that the regulation would control if
14 that's what it means, as opposed to the statute or
15 the certificate of incorporation?

16 MS. SCALZO: Well, the certificate of
17 incorporation is definitely the central document
18 here.

19 CHIEF JUDGE LIPPMAN: Right, but what about
20 the answer to that question? What if HPD's rule
21 conflicted with the certificate?

22 MS. SCALZO: Well, I would say that the
23 certificate of incorporation is controlling. It's -
24 - -

25 CHIEF JUDGE LIPPMAN: So it's above and

1 beyond whatever your regulation says or doesn't say?

2 MS. SCALZO: Well, the certificate of
3 incorporation is in keeping with the Business
4 Corporation Law, and it specifically - - -

5 CHIEF JUDGE LIPPMAN: So your answer is
6 that the statute and the certificate of incorporation
7 control and your regulation doesn't, is that right or
8 wrong?

9 MS. SCALZO: I believe that they are all
10 consistent. That's why I think I'm having some
11 trouble with that.

12 CHIEF JUDGE LIPPMAN: I think - - - but the
13 judge's hypothetical was if yours - - - if yours did
14 say contrary to the certificate does your regulation
15 control?

16 MS. SCALZO: It would not since it's not a
17 statute, and the certificate of incorporation
18 specifically provides for one vote per dwelling
19 unless - - -

20 JUDGE SMITH: Well, but they - - - the
21 point we're making, I think, is the certificate of
22 incorporation can't - - - the corporation can't say,
23 well, we only obey statutes, we don't obey
24 regulations. If the statute - - - if the regulation
25 binds them, it binds them.

1 MS. SCALZO: Well the - - -

2 JUDGE SMITH: You say it doesn't bind them,
3 but I - - - I mean I don't quite - - - it seems to me
4 maybe you could concede the point that if the
5 regulation said what they say it says - - - you say
6 it doesn't - - - but if it said that it would be
7 binding.

8 MS. SCALZO: Again, though, Your Honor - -
9 -

10 JUDGE SMITH: Okay.

11 MS. SCALZO: - - - I keep coming back to -
12 - - though it's not - - -

13 JUDGE GRAFFEO: Let me try to get at this a
14 different way. From a practical standpoint, why is
15 your interpretation of the language of your earlier
16 regulation, why is that the better rule?

17 MS. SCALZO: The - - -

18 JUDGE GRAFFEO: In other words, why is
19 voting by apartments a better rule than voting by
20 shares? Does the agency have an opinion on that?

21 MS. SCALZO: Oh, well, HPD may believe that
22 that is a preferable method of voting, but that is
23 not - - -

24 JUDGE GRAFFEO: And why? That's - - -

25 MS. SCALZO: - - - the reason - - -

1 JUDGE GRAFFEO: And why?

2 MS. SCALZO: Well, for policy reasons that
3 were actually articulated later when the rule was
4 amended. However, that - - -

5 JUDGE GRAFFEO: Could you share those with
6 us? What are the policy reasons?

7 MS. SCALZO: To have - - - to enable each
8 dwelling unit to have an equal say in this type of
9 voting. But HPD's belief or feeling that that is a
10 preferable voting method is not what was guiding
11 here. It was the fact that the certificate of
12 incorporation provided for that.

13 CHIEF JUDGE LIPPMAN: Okay.

14 MS. SCALZO: If the certificate had not
15 provided.

16 CHIEF JUDGE LIPPMAN: Okay, counselor,
17 thanks.

18 MS. SCALZO: Thank you.

19 CHIEF JUDGE LIPPMAN: Counselor.

20 MR. MALLIN: Good morning, Your Honors, my
21 name is Barry Mallin. I'm here on behalf of the
22 intervenor-respondent East Midtown Plaza - - -

23 CHIEF JUDGE LIPPMAN: Counsel, you don't
24 want the building privatized - - - the Midtown
25 privatized, right?

1 MR. MALLIN: Well, the concern here - - -

2 CHIEF JUDGE LIPPMAN: Now, why not?

3 MR. MALLIN: Well, the concern here is
4 about the affordability - - - the continued
5 affordability of these apartments.

6 CHIEF JUDGE LIPPMAN: Your maintenance
7 charges will go up, is that what most of the people
8 in your - - -

9 MR. MALLIN: That's the concern here.

10 CHIEF JUDGE LIPPMAN: - - - group believe?

11 MR. MALLING: For example, we have a
12 situation where the operating budget is dependent on
13 the flip tax revenues from the sale of apartments.
14 So many people may or may not sell, but if these
15 revenues fall short that's going to have an impact on
16 - - -

17 CHIEF JUDGE LIPPMAN: Most of your people
18 want to stay in the building?

19 MR. MALLIN: They do. In fact - - -

20 CHIEF JUDGE LIPPMAN: And they're fearful
21 of what you're saying?

22 MR. MALLIN: They do, and they will feel -
23 - - they get to bear the burden of increased
24 maintenance costs if not enough people sell. If
25 there's not enough revenues from the flip taxes, the

1 operating budget has to then go up. They're going to
2 bear the burden of having to pay the increased
3 maintenance, and then being priced out of their
4 apartments, which for many of these people they've
5 been there for generations, and that's a real
6 concern.

7 CHIEF JUDGE LIPPMAN: Would you say it's a
8 fair summary that generally the people who are there
9 for less time generally are the ones who want to
10 privatize, and the people who have been there forever
11 kind of don't want change?

12 MR. MALLIN: I would say that's probably a
13 true statement; and there is that concern that the
14 benefits that they enjoy now, because of the
15 discussion about, you know, improvements needed in
16 the complex, well, the Mitchell-Lama co-ops are
17 entitled to certain low interest loans from various
18 government agencies.

19 So there is a mechanism if they remain in
20 Mitchell-Lama to take care of the building and to
21 maintain the affordability of - - -

22 CHIEF JUDGE LIPPMAN: Well, there are also
23 certain rules that go with it, right, that HPD has or
24 whatever?

25 MR. MALLIN: Yes, and they can - - -

1 CHIEF JUDGE LIPPMAN: That would be very
2 different under the - - -

3 MR. MALLIN: It would be absolutely
4 different here. There were would be loss of senior
5 citizen benefits - - -

6 CHIEF JUDGE LIPPMAN: Right.

7 MR. MALLIN: - - - there would be loss of
8 tax abatements. All of these have an impact on the
9 maintenance, and - - -

10 JUDGE JONES: Have your fears been realized
11 in the conversion of other Mitchell-Lamas?

12 MR. MALLIN: I'm sorry, Your Honor.

13 JUDGE JONES: Have the fears which you
14 described, about increase in maintenance, has that
15 happened in the conversion of other Mitchell-Lama co-
16 ops?

17 MR. MALLIN: Well, from what I hear that
18 has become an ongoing problem of maintaining budgets.
19 But the important point here is that you can disagree
20 on whether to go private or not, but we need that
21 disclosure. We need that information and that's why
22 the Martin Act is so important here.

23 JUDGE SMITH: Well, what is the information
24 you don't have?

25 MR. MALLIN: Well, we had - - - in this

1 case there was an offering plan that provided the
2 information. They're now disavowing the need for
3 that offering plan.

4 JUDGE SMITH: Oh, you're talking - - - you
5 mean you need the protection of the Attorney
6 General's jurisdiction - - -

7 MR. MALLIN: Absolutely.

8 JUDGE SMITH: - - - is what you're saying?

9 MR. MALLIN: Absolutely.

10 JUDGE SMITH: Okay.

11 MR. MALLING: Otherwise, we're going to
12 have more than 700 shareholders stumbling in the dark
13 without the necessary information that's needed to
14 determine whether to vote for privatization or not.
15 I don't understand from their position - - -

16 JUDGE SMITH: Of course, a lot of people
17 buy real estate, buy their homes, without having the
18 Attorney General - - - without reading an offering
19 statement for the Attorney General. Why are co-op
20 tenants different?

21 MR. MALLIN: Because the statute requires
22 an offering plan when they're a public offering of
23 securities in real estate involving co-operative
24 apartments.

25 JUDGE SMITH: And I think that's a correct

1 answer, but I guess what I was trying to get at is
2 what is the policy underlying the statute which makes
3 co-ops special or different from other real estate?

4 MR. MALLIN: Well, this is probably an
5 issue for the Attorney General, but I know that these
6 people are, for the most part, not sophisticated,
7 they don't understand all of the ramifications, and
8 they need that kind of disclosure here. And if
9 there's no disclosure I don't understand the argument
10 of appellant in how are these people going to get
11 that information that they need to make an
12 intelligent and well-founded decision.

13 CHIEF JUDGE LIPPMAN: Okay, counselor.
14 Thanks, counselor.

15 Rebuttal.

16 MR. MCCONNELL: Your Honors, one I should
17 like to speak to Justice - - - Judge Jones' inquiry
18 about what happens with other co-ops.

19 In this co-op a forty-five percent flip tax
20 is significant. I think it's the largest flip tax in
21 any of the buildings that have withdrawn out of the
22 Mitchell-Lama program. The estimate set forth in
23 that 740 page document, the reconstitution plan, the
24 estimates as to what maintenance will be if it does
25 withdraw from the Mitchell-Lama program are all set

1 forth. Those were never really disputed by anyone,
2 either by the Attorney General, HPD, or by the
3 intervenors who are against the withdrawal.

4 Secondly, Your Honor, with regard to that
5 exception which is in the certificate of
6 incorporation, if only one share per shareholder is
7 entitled to vote, then the exception is meaningless.
8 It's meaningless, because then any vote would have to
9 be by shareholder, but that's not what the
10 certificate says. That's not what the BCL says. In
11 certain instances such as dissolution, withdrawal
12 from the Mitchell-Lama program, two-thirds of the
13 shares are the determinative factor.

14 Lastly, Your Honor, the obverse to the
15 question that Judge Smith asked, and that is if the
16 Attorney General does indeed have jurisdiction, but
17 HPD is incorrect, AG's decision was solely based upon
18 the opinion of the HPD. It said that absent a
19 judicial determination that HPD was wrong we can't
20 accept this second amendment. Well, the obverse is
21 certainly true. If there's a judicial determination
22 that HPD's opinion was wrong, then the Attorney
23 General must accept that second amendment. The
24 offering - - - the reconstitution plan must go
25 forward and privatization must take place. Thank

1 you, Your Honor.

2 CHIEF JUDGE LIPPMAN: Okay, thanks,
3 counselor.

4 Counselor, rebuttal.

5 MR. RICHARDSON: Just a minute, Your Honor,
6 thank you. Just let me follow-up with what Mr.
7 McConnell said.

8 In rejecting the plan the Attorney General
9 submitted two documents. One was a letter in
10 response to the plan. That was drafted by Linda
11 Roots, the Assistant Attorney General in charge of
12 reviewing this for us at the AG's office. She gave
13 one and only one reason for rejecting the plan and
14 that was because it did not comply with the vote
15 count.

16 When this litigation started, Ms. Roots
17 submitted an affidavit. In her affidavit she said
18 the Attorney General rejected the plan for one and
19 only on reason, and that is because it did not comply
20 with the vote count. They never raised a
21 misrepresentation in any of those documents prior to
22 the time that this case got to the First Department.

23 JUDGE SMITH: Well, the only - - - as I
24 understand it the only misrepresentation they're
25 talking about, if there is a misrepresentation, is a

1 misrepresentation of how many votes are needed. I
2 mean isn't this - - - isn't this case - - - I
3 understand that in the great scheme of things whether
4 the Attorney General has jurisdiction is very
5 important, but still, doesn't the outcome of this - -
6 - the fate of this particular building turn on
7 whether the - - - on how you count the votes. If
8 you've got the votes, if you haven't got the votes,
9 that's all there is to it.

10 MR. RICHARDSON: I think in essence it
11 does, Judge, yes. And also, I would just like to
12 address very briefly the HPD's interpretation of its
13 rule. If it reads its rule the way they say they do,
14 it reads the rule out of existence. The rule says
15 two-thirds of the outstanding shares of the
16 corporation as mandated by the Business Corporation
17 Law or by any other document the corporation seems to
18 have.

19 CHIEF JUDGE LIPPMAN: Do you find their
20 reading at least plausible of what they're saying
21 they meant?

22 MR. RICHARDSON: Plausible?

23 CHIEF JUDGE LIPPMAN: Yeah.

24 MR. RICHARDSON: With all respect, Your
25 Honor, I do not.

1 CHIEF JUDGE LIPPMAN: They're referring to
2 the BCL, they use that term, and then they refer to
3 the BCL.

4 MR. RICHARDSON: But then they stop. Let's
5 not go read any - - -

6 CHIEF JUDGE LIPPMAN: And all - - -

7 MR. RICHARDSON: - - - more into the BCL.

8 CHIEF JUDGE LIPPMAN: Again, I understand
9 your argument too, but I'm saying the argument is
10 that they're kind of tracking that language, but
11 maybe didn't do it particularly artfully.

12 MR. RICHARDSON: I think the argument works
13 perfectly if what you say is the HPD rule said two-
14 thirds of the outstanding shares as mandated by the
15 Business Corporation Law and what it meant was the
16 super-majority provision, the two-thirds, because
17 that is as mandated by the BCL.

18 If you keep reading the BCL, then it reads
19 the entire thing out of existence. It says, well,
20 then your certificate of incorporation can do
21 whatever it wants, and it is - - - fundamentally with
22 respect to the vote, Your Honor, we played by HPD's
23 rules, and at the end of the day they changed the
24 rules and said we couldn't do it the way we wanted
25 to.

1 CHIEF JUDGE LIPPMAN: Thank you, counselor.

2 Thank you.

3 MR. RICHARDSON: Thank you.

4 CHIEF JUDGE LIPPMAN: I thank all of you.

5 Appreciate it.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Jessica B. Cahill, certify that the foregoing transcript of proceedings in the Court of Appeals of East Midtown Plaza Housing Company, Inc. v. Andrew M. Cuomo, et al., No. 187 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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