State Shouldn't Make a Whole New Ball Game of Mitchell-Lama

Buyout provision repeal would be serious strike against affordable housing

It is the top of the ninth inning in Game 6 of this year's World Series. The Yankees are playing the Philadelphia Phillies in the new Yankee Stadium. The Yankees have had another great year and are ahead in the series, three games to two. They are in search of a record 27th World Championship. Mariano Rivera, the greatest closer in the history of baseball, is on the mound for the Yankees, facing Shane Victorino. The count is one ball and two strikes. The crowd is sensing victory. Rivera throws his cut fastball inside on Victorino's hands. He hits a weak ground ball to Robinson Cano at second base. The fans start to go wild in anticipation of yet another championship for my beloved Yankees (sorry, Met fans—I did root for you in 1969, 1973 and 1986, but, of course, did not in 2000). Cano fields the grounder and is about to throw the ball to Mark Teixeira at first base to end the game and the series for the Yankees.

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Columnist

Suddenly, Baseball Commissioner Bug Selig emerges from the stands waving his arms in the air. He has a microphone in his hand and stops the game to make an announcement. "Major League Baseball needs to make up a revenue shortfall with additional World Series games," Mr. Selig bellows into the microphone, "so this year we will be playing a best-of-13-games series; therefore, a team must win seven games in order to be champs." The fans and Yankee players are stunned. No one can believe that just as the game and the series was about to end, the rules have been changed.

This is, essentially, what far too many public officials are trying to do to residential multifamily building owners who participate in the Mitchell-Lama program. These owners have had the ability to "buy out" of the program virtually since the program began in the 1950s, and legislators are constantly trying to take this right away from them.

The disservice this does to owners of these properties is far more unfair than the above baseball analogy presents. The Yankees did, indeed, go into the 2009 season knowing that they would have to win two rounds of playoffs and then four World Series games in order to be champions. However, the players still would have played even if they knew the final series would be a best of 13 rather than a best of seven. They would have participated anyway, although players generally want to know the rules before the game begins.

Owners and developers of Mitchell-Lama properties were induced, perhaps seduced, into providing affordable housing based upon a contract that, very clearly, stated that after participating in the program for a period of time, they could opt out of the very cumbersome program. Not allowing owners the ability to exercise their contractual rights to buy out of their obligations is, to go back to a baseball analogy, tantamount to not paying the players after they have provided the services they agreed to provide at the beginning of the season.

In the early 1950s, the Joint Legislative Committee on Housing and Multiple Dwellings (the JLC), under the chairmanship of Senator MacNeil Mitchell, became concerned about the lack of affordable housing for middle-income families in New York State. These were people who earned too much money to qualify for public housing but made too little to afford the rents in new housing being produced. In 1955, with the flight to the suburbs going full blast and many city neighborhoods deteriorating from lack of money and municipal attention, the Mitchell-Lama bill was signed into law after its drafting by Senator Mitchell, along with New York Assemblyman Alfred Lama.

The purpose of the program was to encourage the building of moderate-income housing, to keep more middle-class families within the state's cities, and to help stabilize city neighborhoods. The law provided for the making of advantageous loans by the state, or by a city, to special statutory corporations, known as "limited-profit housing companies," for the construction (and later rehabilitation) of housing developments for families and people whose housing needs could not readily be met by the ordinary unaided marketplace. Rents in Mitchell-Lama buildings are set according to the development's expenses, and owners receive tax abetments for the life of their mortgages, resulting in low, affordable rent levels. Significantly, the "Policy and Purposes" section of the new law declared that, given the existing emergency conditions, a provision be made by which the private sector would be encouraged to invest in this type of housing.

Consistent with its mandate, the statute provided that stockholders in the new companies would be limited to a 6 percent annual return on their invested equity in each housing development and that the rents (or, in the case of cooperative projects, the carrying charges) of each development would be regulated by what is now known as the Department of Housing and Community Renewal (DHCR). In the case of a development aided by a municipal loan, the regulation would be by a municipal "supervising agency."

Unable to formulate an equally successful solution to the affordable-housing problem, legislator after legislator, beginning in 1985, have proposed bill after bill attempting to eliminate an owner's ability to buy out of the Mitchell-Lama program. It is incomprehensible that the very catalyst that created the incentive for the private sector to get involved, and made the program the success it was, is so flippantly used as vote-getting fodder by those either in office or running for a political position.

Initially, these limited-profit housing companies were prohibited from voluntarily dissolving (thereby freeing themselves of government regulation) for a period of 35 years, and then only with the consent of the state housing commissioner or the supervising agency. As you can imagine, with these restrictions, there were very few takers for the new program. This surprised the JLC, because they felt the low-interest rate loans and municipal tax breaks would be enough to stimulate private-sector interest.

Realizing that tangible changes had to be made to Mitchell-Lama if it was going to meet its objectives, in 1959 and again in 1960 the law was modified to allow for voluntary withdrawal from the program after 20 years (this was subsequently modified to 35 years in 1987). This became a permanent and essential element of the program that was needed to encourage the private sector to invest in these highly regulated companies.

Immediately, there was a flood of applications from prospective sponsors, and there was a spurt of affordable units created throughout the state. The program was, by any measure, an extremely successful initiative. In fact, it is thought to be one of the most successful programs of its type in the country.

Most of the city's Mitchell-Lama housing units were constructed between 1965 and 1975. The program marks one of the few times affordable housing was built on a large scale in New York by private owners, the other times being the tenements of the 1880s and the outer-borough building boom of the 1920s. According to the comptroller's office, statewide, 427 rental and cooperative Mitchell-Lama projects with 168,609 units were constructed. Of these, 139,004 units in 270 developments were built in New York City.

The creation of affordable units under Mitchell-Lama has dropped significantly since the early 1980s due to the escalation in construction and operating costs. These increased costs (even with tax-exempt financing, real estate tax exemptions and limited profits) pushed rents beyond the range of affordability for middle-income families. The final straw for the program may well have been the Tax Reform Act of 1986, which retroactively devalued the federal income tax benefits granted in 1969 by creating the passive loss rules.

Owners opting to buy out of the program have been a concern of affordable-housing advocates. By the end of 2008, 40,080 housing units in 99 New York City projects had left Mitchell-Lama, representing 29 percent of the units constructed in the city under the program. For an owner to buy out, they essentially have to prepay their mortgages and make sure all of their obligations have been satisfied. No two buyouts are alike because each buyout is affected by the deeds, covenants and other legal documents of that development.

What happens to the rents in a development post-buyout is determined by when it was first occupied. Rental developments don't fall under rent-stabilization laws if they were occupied after Jan. 1, 1974. However, tenants and owners can voluntarily negotiate a Landlord Assistance Program agreement, which governs how quickly rents can rise. Also, if the buildings received federal funds for construction pursuant to "236" or "221(d)(3)" while under Mitchell-Lama, tenants who qualify may receive enhanced vouchers called "sticky vouchers" (so named because tenants can use them anywhere in the U.S.) from the federal government to cover rent increases.

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As owners buy out of the program, New York receives significant real estate tax revenue and, given that many of these properties are sold, transfer taxes and transactional fees. This money could be set aside to bolster new programs aimed at creating affordable housing.

However, the only real solution to the current critical shortage of affordable housing is for government to reestablish its credibility with the private sector and use every tool and incentive at its disposal to, once again, encourage private developers to build or rehabilitate affordable rental, cooperative or condominium units. (Governor Paterson last week signed legislation updating Mitchell-Lama, but it dealt with administrative issues primarily.)

Repeal or extension of the 35-year voluntary dissolution provisions of the Mitchell-Lama program would seem to be a giant step in exactly the wrong direction. After all, we don't want Bud Selig telling us the Yankees are not the 2009 World Champions!

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