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May 23, 2017

Honorable Eric T. Schneiderman
Attorney General of the State of New York
120 Broadway
New York, New York 10271-0332

Re: 200 Amsterdam Avenue

Dear General Schneiderman:

I write on behalf of Landmark West!, an award-winning, non-profit community organization dedicated to preserving the character of the Upper West Side, and the many Upper West Side residents greatly concerned about the proposed 668 foot tall tower – the tallest structure north of 60th Street – at 200 Amsterdam Avenue.

To understand how such a monstrous, out-of-place building could be constructed on the Lincoln Towers block, Landmark West! and the Committee for Environmentally Sound Development engaged George Janes & Associates, a certified planner, which produced the enclosed comprehensive zoning analysis.

The zoning analysis demonstrated that the developer plans to achieve mega-tower's height by use of open space of Lincoln Towers' residents.

A 1987 Lincoln Towers Offering Plan has confusing descriptions of development rights which the Sponsor, a Mendik-Raynes entity, claimed to reserve.

The enclosed 823 Park Avenue Tenants Ass'n v. Abram decision discusses a similar Mendik-Raynes conversion of 823 Park Avenue and the Department of Law's "Disclosure Concerning Reservation of Air Rights and Development Rights" memorandum, holding that a development rights reservation, without details as to its use or combination with rights of other properties, violates the Martin Act.

The Department of Law did not appeal the 823 Park holding, but incorporated it in the enclosed (continuing effective) March 10, 2008 Real Estate Finance Bureau Memorandum, which directs:

> an offering plan may not be accepted if the sponsor reserves development rights without "specifying exactly what it intends to do with those rights";
>
> the provision of a "worst case scenario" does not comply with the Martin Act; and

> "a sponsor must . . . decide whether it will be building any additional structure and, if it intends to do so, must give all information required [for a newly constructed cooperative or condominium]".

Given the 823 Park holding and the REFB Memorandum, we do not understand how Lincoln Towers' space can be used for the 200 Amsterdam Avenue mega-tower.

Since construction of the mega-tower will begin soon, we request an immediate Department of Law review and would be pleased to meet with whomever you designate to answer questions and provide further information.

Thank you for your anticipated assistance in dealing with this matter of great importance to the residents of the Upper West Side.

Respectfully submitted,

David Rosenberg

cc: Hon. Bill DeBlasio, NYC Mayor
Hon. Scott Stringer, NYC Controller
Hon. Rick Chandler, NYC Building Commissioner
Hon. Gale A. Brewer, Manhattan Borough President
Hon. Jerrold Nadler, U.S. Congressmember
Hon. Brad Hoylman, NYS Senator
Hon. Linda Krueger, NYS Senator
Hon. Linda Rosenthal, NYS Assemblymember
Hon. Richard Gottfried, NYS Assemblymember
Hon. Melissa Mark Viverito, City Council Speaker
Hon. David Greenfield City Council Land Use Committee, Chair
Hon. Benjamin J. Kallos, City Council Governmental Operations Committee, Chair
Hon. Mark Levine, City Council Parks Committee Chair
Hon. Helen Rosenthal, Council Member, District 6
Manhattan Community Board 7
Committee for Environmentally Sound Development
Landmark West!
Municipal Art Society
Human Scale NYC
New York Landmarks Conservancy
Historic Districts Council
George M. Janes & Associates
Urban Strategies LLC

DR/cac

823 Park Ave. Tenants Ass'n v. Abrams

Supreme Court of New York, New York County

January 27, 1988, Decided

Index No. 3688/87

Reporter
1988 N.Y. Misc. LEXIS 894 *

In the Matter of the Application of 823 PARK AVENUE TENANTS ASSOCIATION, JUDITH LEDERER, MERCIA BROSS and DAVID REDDEN, Petitioners, For a judgment pursuant to Article 78 of the CPLR, -against- ROBERT ABRAMS, as Attorney General, 823 PARK AVENUE PARTNERSHIP, and STEINER, CLATEMAN AND ASSOCIATES, INC., Respondents.

Notice: NOT APPROVED BY REPORTER OF DECISIONS FOR REPORTING IN STATE REPORTS.

Judges: **[*1]** HON. IRMA VIDAL SANRAELLA, J.S.C.

Opinion by: IRMA VIDAL SANRAELLA

Opinion

HON. IRMA VIDAL SANRAELLA

By order to show cause, dated February 18, 1987, petitioners bring this action for an order: 1) annulling a certain memorandum concerning air rights dated April 14, 1986, issued Jay the Attorney General's Office; 2) annulling the Attorney General's acceptance for filing of the plan to convert 823 Park Avenue, New York, New York to condominium ownership and; 3) tolling the running of the exclusive period of 90 days for tenants to purchase their apartments pending this proceeding.

A temporary restraining order (TRO) tolling the exclusive period to purchase was granted. Pursuant to stipulations so ordered by the Court on July 9, and October 2, 1987, the instant application was withdrawn without prejudice and has now been reinstated for determination while continuing the TRO.

In light of the papers and arguments received this matter would appear to be one of first impression. The factual allegations are as follows:

Petitioners are tenants and their association of tenants in occupancy at 823 Park Avenue, New York, New York ("the building"). Respondent Robert Abrams is the Attorney General of the State of New York. **[*2]** Respondent 823 Park Avenue Partnership ("sponsor") is the sponsor of the plan to convert the building to condominium ownership pursuant to *Article 23-A of the General Business Law* ("GBL")

known as the Martin Act. Respondent Steiner, Clatesnan and Associates, Inc. is the sponsor's selling agent.

On June 24, 1985, the sponsor submitted to the Attorney General a proposed offering plan in which sponsor retained air and development rights for possible development of additional stories on top of the existing structure.

On December 16, 1985, the proposed offering plan was reacted for filing due to certain deficiencies including a blanket reservation of air rights.

On April 14, 1986 the Attorney General's office issued a memorandum entitled "Disclosure Concerning Reservation of Air Rights and Development Rights" after communications between the sponsor, its counsel and the Attorney General concerning the Building's air rights which petitioner refers to as a "policy statement" by the Attorney General which reads as follows:

> "A number of recently submitted conversion plans contain broad reservations by sponsors of air and developmental rights (in the building which is being converted). The reservation **[*3]** of such rights may enable the sponsor to build a substantial addition to the building, at great inconvenience and discomfort to residents, and with significant financial repercussions to purchasers. Hence it is not adequate disclosure to simply reserve such rights. An open reservation of air and development rights is, therefore, not acceptable.
>
> AIR RIGHTS
> A sponsor who is reserving the right to transfer the air rights of the wilding being converted to adjoining buildings. must disclose that the building cannot be expanded. The maximum amount of space or the maximum number of stories that may be added to adjoining properties should also be disclosed.
>
> DEVELOPMENTAL RIGHTS (SAMS CONDO/COOP
> If the proposed new construction will be a part of the condo or coop being created by the offering plan, disclosure In conformity with Parts 18.7 and 23.7 is required. Also included should be share allocations and percentage of common interest being assigned to the new, as well as to the existing units.
>
> DEVELOPMENTAL RIGHTS (LOLLIPOP)
>
> If a sponsor is reserving the right to expand in some fashion the size of the wilding being converted and the new construction fill not be a part of the converted coop or condo, **[*4]** full disclosure will be required of the parameters of what is possible. A definite decision and description of the construction must be made before effectiveness.
>
> The black book must contain, at a minimum, the worst case scenario

of:

1) the extent and location of construction;

2) the number and use of units to be added;

3) time frame within which construction will be completed;

4) facilities to be shared with the existing structure and the impact, if any, on the proposed budget; and

5) engineering and/or legal opinion with regard to zoning requirements stating that the broadest possible construction is permissible.

Prior to effectiveness sponsor must amend plan to indicate exactly what sponsor will do. Sponsor must also offer recission if proceeding with any development whatsoever."

On November 12, 1986 the Attorney General accepted for filing the Offering non-eviction plan now in issue. The building was twelve stories plus a penthouse. There are three apartments on each floor except the penthouse floor which has two apartments. Each penthouse apartment has a terrace. No other apartments have terraces. The black book or plan, as accepted provides in part as follows:

"The purpose of this Offering **[*5]** Plan is to set forth all the material terms of the offering for the benefit of prospective purchasers.

* * *

The Sponsor will retain the Excess Development Rights and air rights for the property. An owner of such rights essentially owns the air space above the building. As a result, an owner of such rights can construct additional floors in this space upon obtaining necessary approvals, or can sell these rights to neighboring property owners who can use there rights to obtain necessary approvals to increase the floor area ratios (bulk) of neighboring structures. The Excess Development Rights are transferable.

Prior to declaring the Plan effective, however, the Sponsor will amend the plan to disclose that the Sponsor, will either: (a) commit to constructing up to approximately five and one-half additional stories or 15,000 square feet above the Condominium (this property will be subjected to a separate Condominium Declaration and is referred to in this Plan as the Hickory Condominium); or (b) elect not to retain the above Access Development Rights and air rights to the Property. In the event the Sponsor elects not to retain such rights, the entire property, including any and all Excess **[*6]** Development Rights and air rights, will be subjected to the Declaration of Condominium. The aforesaid amendment that the Sponsor will file prior to declaring the Plan effective will offer each purchaser the right to rescind their purchase agreement for a period of fifteen (15) days after the presentation of said amendment.

In the event the Sponsor commits to construct the new Hickory Condominium said condominium will encroach approximately fifteen feet on the terraces of Penthouse Units A and B along the entire Park Avenue side of the Units. As part of such construction, the remaining portions of the Penthouse Unit A and B terraces will be enclosed by masonry, brick and glass to effectively make each of these Units two bedroom apartments. The Exhibit 3 Power of Attorney, which each purchaser of a Unit will be required to execute in favor to the-Sponsor and the Board of Managers, specifically authorizes the Sponsor to amend the Condominium's recorded Declaration and filed 'floor plans to reflect the changes to Penthouse Units A and B following such construction. The percentage interests in the common elements appurtenant to the two Penthouse units will not be effected by the elimination **[*7]** of a portion of the terraces and enclosure of the balance.

* * *

RIGHTS OF EXISTING TENANTS

* * *

(C) As disclosed at page 2, Penthouses A and B are being offered for sale subject to the development plans for the Hickory Condominium which will result in the elimination of portions of the terraces and enclosure of the balance of the terraces at no additional cost to the purchasers. In the event the tenants of the two Penthouse Units decide not to purchase their Units, the Sponsor will negotiate appropriate amendments to the terms of their leases with them to facilitate the construction of the Hickory Condominium. While the sponsor has discussed its proposal with the tenants of the two Penthouse Units and believes that they will agree to enter into appropriate lease modifications, no binding agreements have yet been executed. In the event lease negotiations with the Penthouse tenants prove unsuccessful, the Sponsor will turn to the appropriate regulatory agencies and to the Courts for the relief necessary to proceed with the construction of the Hickory Condominium."

The plan also contains proposed agreements and conditions Concerning the inter-relationship and reciprocal arrangements between **[*8]** the building and the proposed Hickory Condominium project. Otherwise, the plan presents the usual professional opinions, reports, projections, disclosures and certifications required by law. No issues have been raised with respect to these matters.

Based upon the foregoing facts which are not in dispute, petitioners challenge the Attorney General's memorandum on the ground it allows sponsors to withhold material facts and terms of the

offering in violation of GBL 352-e(1)(b) and Title 13 New York Code of Rules and Regulations Part 19.1(c)(1) ("NYCRR") ("Regulations").

Petitioners also challenge the Attorney General's acceptance of the plan on the ground it fails to comply with the memorandum even if it is found proper and for sponsor's failure to fully disclose its building plans and the physical condition of the building. In addition, petitioners allege a violation of GBL 352 eeee(1)(b) on the ground that acceptance of the plan for filing allows the sponsor to treat tenants in a discriminatory manner.

In support of the petition, an affidavit is submitted setting forth background for the Attorney General's memorandum and detailing petitioners' objections to it and the plan as accepted. In opposition, the Attorney **[*9]** General has submitted an answer together with a memorandum of law and an affidavit by Assistant Attorney General Nancy Kramer explaining the circumstances and purposes for which the memorandum in issue was prepared. The only opposition submitted by the sponsor and its selling agent is in the form of an attorney's affirmation the thrust of which is directed at the injunctive relief sought to toll the running of the exclusive period to purchase.

According to petitioners' supporting affidavit the reservation of rights first presented in the proposed offering plan (the so-called "red herring") would entitle the sponsor to retain excess development rights (air rights) with the option of 1) constructing additional floors on top of 823 Park Avenue or 2) selling the rights to a developer or neighboring building owner or 3) just holding the rights. The future use was not disclosed. The sponsor reserved complete control. The red herring further provided that if the sponsor eventually decided to use the air rights it could construct an additional five and a half stories which would be a separate condominium.

Counsel for petitioners opposed the blanket reservation of air rights due to lack of disclosure **[*10]** and the vague discussion of the future use of the air rights. Apparently, the Attorney General's Office agreed. The proposed plan was found deficient and rejected.

Petitioners claim that after a prolonged review process, conducted without notice to. petitioners' counsel, and much persuasion Jay the sponsor, the Attorney General reversed its determination that blanket reservations violated the Martin Act and the Regulations. Petitioners next claim the Attorney General then adopted a new position on air rights as found in the memorandum of April 14, 1986. According to petitioners, the memorandum permits a sponsor to exercise complete dominion over the air rights when the sponsor compiles with meaningless, minimal and speculative disclosure requirements.

In an effort to comply with the memorandum, the sponsor amended the proposed plan. The plan, as amended, was accepted for filing over petitioners' objections that sponsor failed to make full disclosure regarding the air rights.

Petitioners urge that under the memorandum, sponsors still have a et reservation of rights despite the Attorney General's initial position against it. They argue a blanket reservation still exists because the sponsor **[*11]** is not required to make a definitive commitment to go forward with the construction. The memorandum only requires the sponsor to set forth "the parameters of what is possible." Petitioners thus contend the sponsor can propose construction and build something else.

Petitioners state there are many tenants in the building who would base their decision to purchase on whether and what kind of construction will occur.

Further, petitioners argue the right of recession does not remedy the initial lack of sufficient information. Under the memorandum, a sponsor has until the date of effectiveness of the plan to disclose its intent to proceed with construction. By that date, tenants who decided not to purchase based upon the potential for construction, will have lost their right to purchase due to the expiration of the exclusive period.

Petitioners assert the memorandum is void for violation of the Martin Act in that it relieves sponsors of their statutory obligation to disclose the facts impacting on the offer.

Alternatively, petitioners argue, even if the memorandum is valid, the sponsor has not complied with it and the Attorney General should not have accepted it for filing. Further, tenants **[*12]** argue the sponsor must obtain approvals from the Buildings Department and the Landmarks Commission before the plan can be accepted for filing. Another argument raised is sponsor's failure to disclose the terms relative to the penthouse tenants. Finally, tenants argue the plan is inadequate because it fails to disclose the true physical condition of the building.

In her affidavit, Assistant Attorney General Kramer states the memorandum was written for two reasons: to alert the staff in the Real Estate Financing Bureau to the fact that a broad reservation of air and development rights as those recently submitted in a number of conversion plans is not an adequate disclosure and to describe the minimum disclosure on the topic to assist reviewing attorneys in determining compliance with the Martin Act and the regulations promulgated thereunder. Ms. Kramer also states the memorandum was neither intended to nor does 'it embody any new "policy" and places no limits on, the explicitness of such disclosure.

The essential allegations of the petition

are denied in the Attorney General's answer and one affirmative defense of failure to state a cause of action is asserted. The Attorney General maintains **[*13]** the petitioners' challenge to the memorandum is misdirected because the initial case-by-case determination of the particular information to be detailed remains, as it must, in the hands of the individual attorney reviewing a given plan. The Attorney General takes the position the only issue presented is whether acceptance of the plan was arbitrary or capricious.

The sponsor contends the plan makes a full and complete disclosure as required by the Martin Act and Regulations regardless of the validity of the Attorney General's memorandum.

Initially, it is noted that no copy of the red book originally rejected by the Attorney General has been submitted. Thus, no comparison can or should be made between the accepted and rejected versions.

'*GBL 352-e.1.(a)* provides it shall be illegal to make a public offering of interest in real estate unless the offering statement has first been filed with the department of law. *Subdivision (a)* provides the offering must obtain, inter alia, the detailed terms of the transaction, a description of the property and the nature of the interest. Pursuant to *subdivision (b)* the offering must set forth "such additional information as the Attorney General may prescribe...as will afford potential investors, **[*14]** purchasers and participants an adequate basis upon which to found their judgment and shall not emit any material fact or contain any untrue statement of material facts."

Whether or not the Attorney General's memorandum is deemed a "policy", it must, for purposes of this proceeding, be viewed as a rule established by the Attorney General's Office to gauge whether a reservation of air rights contorts with the statutory mandated disclosure requirements. The regulations cited by petitioners were promulgated by the Attorney General under the statutory authority of the Martin Act. For purposes of this proceeding, the relevant sections of the Regulations require the same minimum disclosure as that established in and by the Martin Act.

Upon careful review of the record presented, the Court finds there is merit to the first, second and third causes of action alleged in the petition. To the extent the memorandum seeks to alert staff that broad reservations are unacceptable, the memorandum cannot be faulted. To the extent the memorandum seeks to describe a minimum level of disclosure on the topic of air rights, the memorandum does not ensure the standard of disclosure required but allows something **[*15]** less.

To be sure, the offering statement is filed simply for information purposes. (

Phoenix Tenants *Ass'n v. 6465 Realty Co., 119 AD2d 427, 500 N.Y.S.2d 657*). The filing requirement mandates a statement of minimum material facts considered necessary by the legislature for the purpose of affording potential investors, purchasers and participants an adequate basis upon which to found their judgment to implement the public policy embodied in the statute.

There is no question that the Attorney General has the exclusive responsibility of passing on the sufficiency of the offering statement and either accepting it for filing, prior to a public offering, or rejecting it and issuing a notice of deficiency. (*Apfelberg v. East 56th Plaza, Inc., 78 AD2d 606, 432 N.Y.S.2d 176*; *Matter of Whalen v. Lefkowitz, 36 NY2d 75, 324 N.E.2d 536, 365 N.Y.S.2d 150*; *Matter of Greenthal & Co. v. Lefkowitz, 32 NY2d 457, 299 N.E.2d 657, 346 N.Y.S.2d 234*, *41 AD2d 818, 342 N.Y.S.2d 415* aff'd.). The question of what constitutes an adequate disclosure is at the heart of this proceeding.

A policy memorandum or rule issues by the Attorney General may be challenged and annulled if found arbitrary or capricious or in violation of the Martin Act. (See 1235 Park Avenue Associates v. Abrams, NYU, 1/4/87, p.7, c.2).

The Attorney General's acceptance for filing is the proper subject of an Article 78 proceeding and the scope of review is limited to whether acceptance was arbitrary and capricious. *Gonkjur Associates v. Abrams, 82 AD2d 683, 443 N.Y.S.2d 69*, aff'd. *57 NY2d 853, 442 N.E.2d 58, 455 N.Y.S.2d 761*; **[*16]** *160 West 87th St. Corp. v. Lefkowitz, 76 Misc. 2d 297, 350 N.Y.S.2d 957*; *Schumann v. 250* Tenants *Corp., 65 Misc. 2d 253, 317 N.Y.S.2d 500*).

Here, the offering plan in issue offers for sale a thirteen story building that may or may not be underneath another five and a half story building or one that may contain up to 15,000 square feet and be subject to a separate condominium declaration. The air rights may or may not be conveyed to sane unspecified neighboring property owner who may or may not increase the floor area ratios of their neighboring structure.

The Attorney General's memorandum as formulated allows the sponsor to make this offering as long as the sponsor, prior to declaring the plan effective, amends the plan to disclose exactly what it intends to do. The memorandum allows this reservation of intent provided tenants who subscribe are given a right of recission.

The right of recission does not remedy the lack of adequate disclosure. The informational purposes of the Martin Act are served only when the material terms of the offer are fully disclosed in advance of the time when a decision to purchase must he made. The reservation of intent is the reservation of a material term, especially in this case where the intent to build and disclose

what will he built are critical [*17] to an undertaking of the terms of the transaction and hence the description of the property and the nature of the interest being offered.

While the Court is mindful that a sponsor is the master and maker of his offering (*DeChristoforo v. Shore Ridge Associates, 126 Misc. 2d 339, 482 N.Y.S.2d 411*), the Martin Act nevertheless requires full and complete disclosure of all that is capable of being disclosed. Obviously, the sponsor cannot disclose or represent matters of which it has no knowledge or control. The statute does not require it. On the other hand, surely, the legislature did not intend that purchasers be obligated to decide whether to commit themselves to a major investment before knowing what it is they are getting. The question becomes this: Do purchasers get units of a condominium consisting of twelve stories and a penthouse or (possibly, but not definitely), units in the subjacent thirteen stories of an eighteen and a half story bifurcated lollipop?

The memorandum allows the sponsor to include in the plan an uncertain scheme of events precluding an informed decision regarding purchase. Prospective purchasers must decide to buy or not before knowing whether or who will build what.

The Attorney General's memorandum suggests that the amendment prior [*18] to sponsors declaration of effectiveness coupled with the right of recission will remedy this non-disclosure. No rationale is offered or found as to how a right of recission might remedy this lack of disclosure. If a tenant chose not to subscribe for fear that construction might proceed presenting too disturbance, physical danger, or financial risk, the tenant will have lost right to purchase even if the construction never proceeds. There is no right option, only out. To earn the right of recission one must agree to commit resources and effort in subscribing and preparing for a possible closing. If there were a full and complete disclosure as required by the Martin Act, there would be no need for a right of recission.

Neither the Attorney General nor the sponsor offers any explanation as to why the sponsor's intent to proceed with construction (let alone what is to be constructed), cannot be stated simply and clearly for consideration by tenants during their statutory mandated exclusive period to buy. If the sponsors decision to commit to construction is somehow tied to the number of tenants who subscribe, the sponsor should state the fact. If the decision is based upon some other [*19] circumstance or contingency the sponsor should state the fact. Absent a statement of what will trigger the sponsors decision to proceed, the memorandum condones a blanket reservation of rights. Accepting petitioners' description of the broad reservation first rejected as deficient, the non-commital reservation in issue is

still too broad because it fails to afford potential purchasers with an adequate basis upon which to found their judgment at the time needed. Learning the facts after the fact is inadequate per se. There is nothing magical that will occur in the period between the time when the subscriptions must be executed and the declaration of effectiveness is made, except that the sponsor will know the identity and number of subscribers. The only logical conclusion that can be reached from this is that the sponsor knews its intent but refuses to make it known. Notwithstanding the right of recission, by allowing a preconceived non-disclosure of an essential term of the offering, the memorandum must be annulled as contrary to the Martin Act and Regulations.

Assuming arguendo, that the memorandum upheld the statutory level disclosure, acceptance of the plan for filing must be annulled **[*20]** for failure of the plan to comply with the memorandum. The memorandum calls for certain disclosures which are not found in the plan as filed. The memorandum states a sponsor who is reserving the right to transfer the air rights to adjoining buildings must disclose that the building cannot be expanded. No such disclosure is found. The memorandum requires an engineering and/or legal opinion regarding zoning requirements stating that the broadest possible construction is permitted. No such disclosure is found, The memorandum states prior to effectiveness the sponsor must amend the plan to indicate exactly what sponsor will do. In the plan, the sponsor states "prior to declaring the Plan effective, however, the sponsor will amend the plan to disclose that the sponsor will either commit to construction of five and a half stories or 15,000 square feet or elect not to retain the excess development rights. The memoranda seeks an exact indication of what sponsor will do. Sponsor states it will prepare an amendment disclosing its election to exercise one of several options retained under its blanket reservation of rights. The express reservation of the right to transfer the air rights to neighboring **[*21]** property owners is not addressed in connection with the amendment. Also, it is noted neither the memorandum nor the plan addresses whether a neighboring property owner who acquires the air rights must, and if so when disclose exactly what it intends to do. Finally, the memorandum states the sponsor must offer recission if proceeding with any development whatsoever. The right of recission offered in the plan does not conform to the right required in the memorandum. The plan offers recission within the fifteen day period after the amendment is presented. The plan fails to offer recission if proceeding. Instruction may not proceed for months or years after the sponsor commits to construction and declares the plan effective. if recission offered were as called for in the memorandum,

subscribers would not be limited to recission within 15 days of the amendment. The memorandum, as it is written, requires a right of recission quite different from that offered in the plan. The memorandum requires, in addition to other things, an "engineering and/or legal opinion with regard to zoning requirements stating the broadest possible construction is permissible." No such opinions are found in the **[*22]** plan. For these reasons, the acceptance of the plan by the Administrative Attorney is arbitrary and capricious and, thus, the plan must be annulled.

Both the memorandum and the plan are out of harmony with the statute. The ownership and use of the air rights over a building is a valuable asset as is the ownership and use of land under a building. In the case of *2 Fifth* Avenue Tenants *Association v. May-Cartton Associates, 119 AD2d 436, 500 N.Y.S.2d 664*, the sponsor expressly reserved title to the land beneath the building with a 99 year lease to the cooperative corporation. Here, sponsor seeks to reserve the air rights with no commitment as to future use. If, in 2 Fifth Avenue, the sponsor offered the building with the reservation that the land may or may not be included in the sale, neither the property nor the interest in it could be described sufficiently to satisfy the statute, In 2 Fifth Avenue, the land was reserved because such rights have value. The failure and refusal to state, in advance, whether that value will be included in the sale is contrary to the informational purposes of the Martin Act.

Potential investors, purchasers and participants have a right and are entitled to knew the nature and extent of those assets included and those assets excluded from a public **[*23]** offering. With such knowledge, there can be no date basis upon which to evaluate whether an offering makes sense, The motions that must be made concerning the best and worst race scenarios became convoluted and cannot be intelligently assessed.

Acceptance must be annulled as well for failure of disclosure as to the material terms in connection with the lease amendments for the penthouse units. The sponsor states in the plan that it has discussed its proposal with the penthouse tenants but the nature of the proposal is nowhere found. Also, sponsor states it believes the penthouse tenants will agree to appropriate lease modifications. Nowhere does sponsor disclose the basis for its belief or the nature of anticipated lease modifications. Whether these modifications are appropriate is anyones guess. There is no information. The proposed modifications should be disclosed. Absent such disclosure there is no way this Court, the Attorney General's Office or any potential purchaser can determine whether this offering is being made in good faith without fraud and free from discriminatory repurchase agreements

or other discriminatory inducements expressly proscribed by statute and regulations. **[*24]** (See generally, *Karpf v. Turtle Bay House Company, 127 Misc. 2d 154, 485 N.Y.S.2d 173*).

In view of the foregoing findings and conclusions, unnecessary to address any other issues raised. Accordingly the application granted to the extent indicated.

Settle judgment in accordance with the foregoing decision.

Dated: January 27, 1988

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STATE OF NEW YORK DEPARTMENT OF LAW — OFFICE OF ATTORNEY GENERAL ROBERT ABRAMS

MEMORANDUM

TO: REF ATTORNEYS and LEGAL ASSISTANTS DATE: 3/10/88

FROM: NANCY KRAMER/MARY SABATINI DiSTEPHAN MSD

RE: Air and Development Rights (Replaces memo of 1/30/87 "Disclosure of Concerning Reservation of Air/Development Rights")

1. RESERVATION OF DEVELOPMENT RIGHTS

A recent court decision has clarified the parameters of adequate disclosure when sponsors retain air and development rights in a "lollipop" situation. In 823 Park Avenue Tenants Association v. Abrams, et al., a decision of January 27, 1988, Justice Irma Santaella annulled this office's memorandum of April 11, 1986 (which was later replaced by a similar memorandum of January 30, 1987) because it allowed sponsors to wait until declaring the plan effective to disclose fully exactly what development would take place. The decision makes clear that the Attorney General cannot accept for filing any plan in which the sponsor "reserves" air and development rights without specifying exactly what it intends to do with those rights. Pursuant to the court's decision, a final determination, rather than a "worst case scenario", must be presented in the black book. Otherwise, as Justice Santaella wrote, there will be "preconceived non-disclosure of an essential term of the offering" in violation of the Martin Act.

In conformance with this decision, a sponsor must, from now on, decide whether it will build any additional structure and, if it intends to do so, must give all the information required by the newly constructed and vacant condominium and cooperative regulations of the Department of Law before the plan can be accepted for filing. See 13 NYCRR Parts 20.7 and 21.7. For coops and condos, the budget must reflect expenses associated with the new construction, including appropriate back-up documentation, as required by Parts 20 or 21. This disclosure must be made whether the sponsor is reserving the right to add to the existing building(s) and such addition will be part of the subject condo or coop or is reserving the right to build when the new construction will not be part of the converted coop or condo (the "lollipop" situation). Approved building plans and specs for the new construction must be obtained before the black book can issue.

When developmental rights are reserved, for the same condo or coop or for a lollipop, an expert's statement concerning the impact of the renovation or construction on essential services should be included in the plan. It should contain statements on:

a) daily schedule for times when construction will occur;
b) security to be furnished during construction period;
c) handling of construction debris;
d) insurance and liability during construction period; and
e) access to building.

A problem arises with outstanding plans -- those accepted before January 27, 1988 which contain only "worst case scenario" disclosure in lollipop situations. These plans should be amended to disclose exactly what the sponsor will do with the retained air and development rights. In addition, a major point of the 823 Park Avenue decision is that rescission is an inadequate remedy because it does not make whole those tenants who might have bought if they knew the final offer, but did not. For that reason, please make sure that any plans accepted with the worst case scenario only include a 30-day exclusive period for all non-purchasing tenants at the original price offered to tenants after the sponsor discloses its exact plan for the air and development rights. Such amendment would be considered a "substantial" amendment triggering the exclusive purchase period.

2. TRANSFER OF DEVELOPMENT RIGHTS

A sponsor who is reserving the right to transfer the developmental rights to adjoining buildings must disclose that the building undergoing conversion cannot be expanded. The maximum amount of space or the maximum number of stories that may be added to adjoining properties should also be disclosed.

If you have any questions, please see either of us.

NK/MSD:dc