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THE HDFC COALITION

The voice of HDFC Shareholders since 1992!

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December 23, 2017

Dear HDFC cooperative homeowners and supporters of affordable homeownership:

As we fight to preserve the DAMP real estate tax exemption that keeps HDFCs affordable and against the unlawful proposed new Regulatory Agreement at the City level, and fight against NY State Senate Bill S6543 that would give permanent control of our private homes to HPD, the HDFC Coalition is often asked: "What exactly is an HDFC cooperative? What legal rights and restrictions apply to HDFC co-ops? Is HPD's proposal for HDFC co-ops legally sound?"

We are therefore pleased to provide you with the attached copy of a **"Review and Analysis of the City of New York's Proposed Changes to the HDFC Program" by Steven Siegel, Esq.** This just-released paper, prepared in response to a request from the HDFC Coalition, reviews the City's 2016-2017 proposal against the real history and legal status of HDFC cooperatives.

We hope that you will share this letter and legal paper with other HDFC shareholders and your Community Board, New York City Council Member, NY State Senator and State Assembly Member so that they may better understand HDFC co-ops and why our fight is so important.

Key points w discuss with your elected officials (some of these points are also in the paper):

- Decades ago the City sold run-down, abandoned buildings to today's HDFC homeowners who invested their own money and decades of "sweat equity" repairing them. Often, the City sold the buildings with dozens of housing violations, leaky roofs, missing windows, non-working elevators and failing boilers. Against all odds, HDFC shareholders saved their buildings and restored whole neighborhoods. In the process, *the City benefitted not only from the resultant restoration of the surrounding real estate tax base, but also through the direct taking by HPD of 40% of HDFC apartment sale profits for 25 years.* HPD's modest program to get rid of these properties and create over 1,200 HDFCs has paid off quite handsomely for the City.
- To stay affordable, most HDFCs need the "DAMP" real estate tax exemption that doesn't expire until 2029 and is written into many property deeds of HDFCs, so revocation would be a breach of contract by the City. *Preventing the City Council from revoking or amending the original DAMP tax exemption is one of our most important fights*, as it stops sudden tax hikes on HDFCs, and makes any new HPD proposals truly optional so that each HDFC can determine what would work best for them. *HDFCs need multiple options, not one-size-fits all.*
- Less than 1% of HDFC apartments sell in a given year while 100% of HDFC shareholders must pay the maintenance, so ***HDFC affordability is monthly charges paid by residents, not sale prices, and this is why the DAMP tax exemption is so important for HDFCs.*** If HDFCs

can't or won't sign HPD's draconian proposed new Regulatory Agreement, *why would HPD then want to revoke the DAMP tax exemption to raise the "rent" and punish 75,000 HDFC residents who actually live in HDFCs, because the City desires to lower sale prices of HDFC apartments that aren't even up for sale because HDFC cooperators almost never sell?*

- Conventional "market-rate" NYC co-ops get a 17.5% to 28.1% tax discount with no income or price restrictions at all, while many HDFCs with low assessments *get no actual benefit* from the DAMP tax exemption and pay 100% real estate tax. *It is unjust that many HDFCs get little or no tax break while all normal co-ops do.*
- HPD has refused to impose price caps for over 35 years. A sudden attempt to do so now, and take equity earned honestly from low/moderate/middle-income families who sought to achieve the American Dream of homeownership by repairing buildings the City was desperate to be rid of, is *plain and simply wrong and not progressive policy.*
- Price caps would make HDFCs limited-equity co-ops, which they are presently not. Our research has shown that *banks would suddenly decline to lend* for apartment sales because Fannie Mae will not hold limited-equity share loans from banks.
- HPD has for decades used the income guideline of 165% AMI for HDFCs with expired restrictions, and for many new HDFC co-ops created by HPD. In 2017, 165% AMI is equal $141,735 for a family of three and is defined as middle income.
- HDFCs are affordable and sell for below market rate. Data from recent sales shows that 32% were below $100,000 and 75% were below $326,000. This year, a banker described to us an HDFC co-op selling in Brooklyn for $300,000 while a similar apartment nearby sold for $1.3 million, so *the HDFC apartment was $1 million less than the market rate co-op apartment!*
- Key parts of HPD's proposal for HDFCs are *violations of the Business Corporation Law (BCL)*, such as HPD-approved "monitors" and "carve-outs" that would make apartment shares of original residents worth less than the shares of newer residents.
- HPD does not have permanent control of HDFCs. *HDFC restrictions expire* as they do with many other housing programs. If HPD actually could control HDFCs forever, the City would not have drafted NY State Senate Bill S6543, *which* ***we strongly oppose*** *because it is a dangerous, likely unconstitutional attempt to grant HPD permanent control of HDFC co-ops.*

Most HDFC cooperatives don't want or need a "one-size-fits-all" heavy-handed Regulatory Agreement that would hobble autonomy, viability and affordability, and *an unintended consequence of HPD's proposal could be HDFCs deciding to leave the HDFC program.* Why harm HDFC co-ops and their families who saved their buildings and communities while achieving the American Dream?

HDFCs need real **options** to remain affordable, **not unlawful mandates**. *Please see http://www.hdfccoalition.org/proposal for our proposals intended to better help HDFC cooperatives!*

Don't forget: We must all keep organizing, and your elected officials need to hear from YOU!
And please join the HDFC Coalition mailing list so we can keep you informed. Just click here.

Review and Analysis of the City of New York's
Proposed Changes to the HDFC Program

Steven Siegel, Esq.[1]

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[1] Of Counsel, Cullen and Dyckman, LLP. J.S.D., Columbia Law School, 2008; J.D., New York Law School, 1992. This paper was prepared in response to a request from the HDFC Coalition, an organization that advocates on behalf of owners of HDFC co-ops. The views expressed in this paper are solely my own and do not necessarily represent the positions of the HDFC Coalition or its members. I gratefully acknowledge the invaluable research assistance and editorial suggestions of John McBride. I also acknowledge the helpful comments of Andrew Stern, Esq. and Emma Lupu, Esq. Publication date: December 20, 2017. Contact: sns26@caa.columbia.edu.

<u>**Executive Summary**</u>

This paper reviews the City of New York's proposed changes to housing development fund corporations ("HDFCs").

By way of background, HDFCs are a type of multifamily housing organized under New York law. In New York City, most HDFCs are owned by their residents in the cooperative form of ownership ("HDFC co-ops" or "HDFCs"). By statute, HDFC co-ops are subject to various restrictions, including a limitation on the income of the co-op residents.

Tens of thousands of resident-shareholders of HDFCs played an important role in the stabilization and preservation of New York City's housing stock in the period following the City's fiscal crisis of the 1970s and 80s. The City's large-scale creation of HDFC co-ops was a major policy innovation and was an important part of the City's response to the housing crisis of that era. In the late 1970s the City was confronted with the virtual collapse of the private multifamily rental housing market in large areas of Manhattan, the Bronx and Brooklyn. The result was the City's acquisition – through tax foreclosure – of tens of thousands of apartments in very poor condition. Some units were vacant and burned-out; other units were occupied by tenants who received few, if any, services. The city previously had re-conveyed these buildings to the private sector though auction. However, in the depths of the fiscal crisis of the late 1970s, the City found that the auction option was no longer viable because of the moribund condition of the private housing market. Because of a dearth of options, the City began to manage the properties and also to fashion a variety of innovative programs to upgrade the buildings and ultimately to convey the buildings to either community organizations or to the tenants themselves. In this crucible the HDFC program was born.

In some occupied City-owned buildings, tenants were given the opportunity to self-manage the building under City ownership. If the trial period of self-management was successful, the City used the HDFC corporate form as a means to convey the buildings to the tenants. The tenants received their apartments at a nominal price. The tenants became cooperators. The City in some cases provided limited below-market interest financing to the new HDFCs to help the cooperators improve their buildings.

The City's experiment -- a desperate response to an unprecedented fiscal and housing crisis -- proved to be one of New York's most enduring housing success stories. All government and community stakeholders benefitted from the large-scale creation of HDFCs. The City benefitted by reducing its enormous portfolio of tax-foreclosed apartment buildings at a time when the buildings were a substantial burden to the City and when there was little in the way of a private market for these properties. The residents benefitted by the preservation and upgrading of their own buildings and by becoming homeowners for the first time. And the surrounding communities benefitted by the stabilization of the neighborhood, the upgrading of housing and the by the transformation of a rental community into a homeowning community.

Today, there are 1,048 HDFCs in New York City containing approximately 25,000 apartments. It would be reasonable to estimate that approximately 75,000 New Yorkers make their homes in HDFC co-ops.

When the City creates an HDFC co-op, it requires the co-op enter into a time-limited restrictions governing the use of the property. These restrictions are often generically referred to as "resale restrictions" – a term of convenience that I will use throughout this paper to describe a broad range of land-transfer and corporate documents used by the City in order to impose time-limited restrictions on HDFCs. At the inception of the HDFC program in the early 1980s, the duration of these resale restrictions was 10 years. Beginning in 1986, the City extended this period to 25 years for newly incorporated HDFCs. Beginning in 2003, the City required newly created HDFCs to enter into a document that was titled a "regulatory agreement" in addition to the various land-transfer and corporate documents. Today, of the 1048 HDFC co-ops, 207 are subject to regulatory agreements. A substantial percentage of the balance (841 HDFCs) is no longer subject to the City resale restrictions that were imposed as part of the creation of the HDFC co-op.

For as long as the City-imposed resale restrictions remain in effect, an HDFC is subject to a detailed scheme of regulations imposed by the City pursuant to State law. In general, City-imposed restrictions pertain to such important issues of governance as income limitations for purchasers, succession rights, sublet rights, flip taxes, the City's consent as a precondition to the sale of an HDFC building and the City's consent to the dissolution of an HDFC. As previously noted, these City-imposed restrictions remained in effect for a fixed term, such as ten years for most 1980s-era HDFCs and 25 or 30 years for HDFCs created beginning in the late 1980s and thereafter.

However, an HDFC with an expired City-imposed restrictions nevertheless remains subject to Article 11 of the Private Housing Finance Law (PHFL) (the statute under which all HDFCs are incorporated) as well as to various governing documents, such as its Certificate of Incorporation, deed restrictions, proprietary lease and by-laws. Most importantly, State law requires an HDFC to develop housing for “persons of low income” for as long as the corporation continues in existence. *See* PHFL § 573(3)(a).

For many years the New York City Department of Housing Preservation and Development (HPD) has taken the position that it possesses the authority under State law to regulate the income of shareholders in HDFCs with expired resale restrictions. HPD has maintained that HDFCs with expired resale restrictions may not allow purchases of apartments by households exceeding 165 percent of the Area Median Income. *See, e.g.*, City of New York, Department of Housing Preservation and Development, *Fact Sheet For Cooperative HDFC Shareholders*, http://www1.nyc.gov/assets/hpd/downloads/pdf/Owners/hdfc-coop-fact-sheet.

Most City-sponsored HDFCs receive a partial real estate tax exemption -- known as the DAMP tax exemption. The DAMP tax exemption imposes a cap on the assessed value of HDFCs -- currently, $10,374 per apartment in an HDFC building.[2] In a 20-unit HDFC, the DAMP tax exemption caps the assessed value of the HDFC at $207,480 and thereby effectively caps the HDFC’s resulting real restate liability (at a current tax rate of 12.892%) at $26,748. A condition of the DAMP tax exemption is that the HDFC remain an HDFC for the duration of the tax exemption. The DAMP tax exemption is scheduled to run until 2029.

[2] Note, however, that some HDFCs do not receive *any* actual benefit from the DAMP tax exemption, because these HDFCs’ assessed valuations fall below the above-referenced cap on assessed valuation.

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Against this backdrop of established law and policy, the City is presently considering a proposal to re-regulate HDFCs – including HDFCs with expired resale restrictions. Under the proposal, HDFCs would be offered a new "regulatory agreement." *See* City of New York, Department of Housing Preservation and Development, *Proposed Regulatory Agreement*, http://www1.nyc.gov/assets/hpd/downloads/pdf/Owners/hdfc-coop-regulatory-agreement. If the HDFC signs the regulatory agreement, it would be entitled to a higher tax exemption than the present HDFC DAMP tax exemption. If the HDFC declines to sign the new regulatory agreement, it would forfeit the existing DAMP tax exemption (which had not been scheduled to expire until 2029).[3]

HPD's proposed new regulatory agreement contains a plethora of new conditions and limitations on the governance and management of HDFCs. For example, the new regulatory agreement requires HDFCs to hire an HPD-approved "third-party monitor." The stated purpose of the monitor is to enforce various "affordability controls" set forth in the new regulatory agreement. The compensation of the monitor is paid from HDFC maintenance fees. Furthermore, under the new regulatory agreement, incoming shareholders in the HDFC are subject to not only a limitation on income but also a limitation on assets. The new regulatory agreement also imposes a sales price cap an all HDFC apartments. All shareholders are subject to restrictions on subletting and to owning other property within a 100-mile radius of New York City. A flip tax of 30 percent is imposed on all apartment sales.

Most HDFCs understand that if they continue to receive the benefits of the DAMP tax

[3] The alteration of the DAMP tax exemption (including forfeiture of the tax exemption for those HDFC co-ops that decline to sign the new regulatory Agreement) would require the passage of legislation by the City Council.

exemption then they must remain subject to the HDFC program and subject to income limitations established by HPD (currently 165 percent of Area Median Income). However, many HDFCs vigorously oppose the City's proposal to unilaterally revoke the DAMP tax exemption unless the HDFC "voluntarily" subjects itself to a new draconian regulatory regime that was not part of their original regulation. That is blatantly unfair.[4]

The City's proposal is not just unfair; it is unlawful. As previously noted, the core of the City's proposal is the revocation or conditioning of the DAMP tax exemption on HDFC's "agreement" to subject itself to a new and unprecedented legal regime. However, the City itself served as the sponsor on all HDFC cooperatives and in many cases expressly promised each HDFC the benefit of a partial tax exemption running through 2029. To promise the benefit of a tax exemption and then to unilaterally rescind that benefit (unless the HDFC agrees to an entirely new and draconian legal regime) amounts to a unilateral breach of contract.

Furthermore, the City's proposed regulatory agreement violates several provisions of the

[4] Also unfair is the City's practice (that applied to HDFCs that were established in the late 1980s through the mid-1990s) of requiring HDFC homeowners to turn over 40 percent of their resale profits to the City. *See Resale Policy Seminar*, Brooklyn Law School Legal Services Corp., March 30. 2011, at 13 (unpublished paper). For each of these HDFCs, this requirement remains in effect for 25 years. In effect, the City's resale profit-sharing requirement means that the City itself has diverted a substantial portion of the equity appreciation that otherwise would have either inured to the benefit of the HDFC homeowners or to the HDFC itself (by way of a flip tax) for use in making essential building improvements or augmenting the HDFC's reserve fund.

Ironically, the City's present proposal to impose price caps on HDFC resales comes on the heels of decades in which the City itself drew on HDFC funds for its own purposes and thereby implicitly endorsed equity appreciation of HDFC apartments. One is forced to recall the old adage, "Do as I say, not as I do." Furthermore, HPD presently seeks to impose caps on HDFC apartment resale prices just at a time when the City's resale profit sharing requirements -- applicable to many HDFCs -- are set to expire. For years HDFC shareholders reasonably relied on the stipulated expiration date of the City's 25-year resale profit-sharing requirement. The City's proposed resale price caps puts the kibosh on an implicit promise made to HDFC shareholders.

Business Corporation Law ("BCL").[5] For example, the proposed regulatory agreement imposes a requirement of monitors to oversee and approve key decisions of HDFCs. This would appear to conflict with BCL §701 on its face, as the statute provides that the board of directors of a corporation be the final decision maker of the entity. Another example would be the imposition of price caps on some apartments, but not others within the same corporation. This would seem to violate BCL §501(c), which requires that each share be equal to every other share of the same class. Price caps that affect some shares and not others would presumably violate such a requirement.

The City's proposal, if implemented, is likely to have far-reaching unintended consequences. By way of background, most HDFC co-ops would much prefer to stay in the HDFC Program and continue to receive the DAMP tax exemption and continue to provide much needed affordable housing in their communities However, if the City's current proposal were to be adopted and HDFCs (with expired resale restrictions) were given the choice of a draconian new regulatory regime versus losing the existing DAMP tax exemption altogether, it is likely that some HDFCs would reach the conclusion that they have nothing to lose by opting out of the HDFC program.[6]

Stated succinctly, given the stark choice imposed by the City between (on the one hand) an unnecessary and unwanted new regulatory regime that was in no way a part of the representations that were made by the City to HDFC shareholders at the time of the purchase of their apartments or (on the other hand) the forfeiture of the DAMP tax exemption, some HDFC co-ops might decide that opting-out of the HDFC statute is their best option. Notably, all

[5] The vast majority of HDFC co-ops are incorporated under the BCL as well as under the PHFL.

[6] I am informed by the HDFC Coalition that it does not seek this outcome. On the contrary: the HDFC Coalition strongly favors HDFC co-ops remaining as HDFCs.

conventional co-ops in New York City are entitled to receive tax abatements from the City simply by virtue of their status as co-ops. An HDFC co-op with a forfeited DAMP tax exemption could well conclude that it is better off as a conventional co-op.[7]

To be clear: I am not advocating "opting out" as something that HDFC co-ops should do -- but merely stating that this is one likely outcome of the City's ill-considered proposal. Such an outcome would be ironic indeed. The City's proposal -- far from ensuring the continuing availability of affordable housing through HDFCs -- may actually have the unintended consequence of inducing precisely the opposite effect (at least with respect to some HDFCs located in middle-income and upper-income neighborhoods).

That is not all. A precondition to an HDFC adopting the City's proposed new regulatory

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[7] Notably, HDFCs that receive the DAMP tax exemption are not eligible to receive real estate tax abatements that apply to most conventional cooperatives and condominiums. *See* City of New York, Department of Finance, *Cooperative and Condominium Tax Abatement*, available at www.nyc.govc/site/finance benefits/landlords-coop-condos (stating that a co-op -- in order to receive a conventional co-op tax abatement -- cannot be an HDFC co-op). However, an HDFC co-op that opted out of the HDFC form of incorporation and thereafter became a conventional co-op would become eligible to receive real estate tax abatement that is available to virtually all conventional co-ops – *regardless of the income of the residents.* Currently, a conventional cooperative or condominium that is assessed at $50,000 per unit or less is eligible for a tax abatement of 28.1 percent. A conventional cooperative or condominium that is assessed above $60,000 per unit – without any upper limit to assessed value – is subject to a 17.5 percent tax abatement. In other words, a high-end luxury co-op or condominium is eligible for a substantial tax abatement.

The upshot: An HDFC that elected to opt out of the HDFC form of incorporation and thereafter become a conventional co-op would become eligible for a substantial tax abatement that is applicable to virtually all conventional co-ops -- but not to HDFCs – *and which has no income restrictions whatsoever.* That fact will certainly influence the decision-making of those HDFCs that do not desire to be subjected to a proposed draconian regulatory regime imposed by the City and that otherwise would prefer to remain as an HDFC under the present regulatory regime and thereby continue to receive the DAMP tax exemption. Unfortunately, the City has proposed that remaining as an HDFC under the status quo regulatory regime is **not** an option. In light of this – and in light of the availability of a 28 percent tax abatement available only to conventional co-ops – it could be expected that many HDFC co-ops will elect to opt-out out of the HDFC form of governance and become a conventional co-op.

agreement is a supermajority vote of the HDFC shareholder in favor of adoption. As a practical matter, obtaining a supermajority vote on *any* issue -- let alone an issue as complex and as contentious as drastically altering the management structure of the co-op -- is a difficult undertaking. For many HDFCs, obtaining the requisite supermajority shareholder approval will amount to an insurmountable hurdle. In turn, those HDFCs that fail to approve the new regulatory agreement will lose their DAMP tax exemption and, in many cases, will thereby face a substantial hike in real estate taxes and the resulting economic distress. In other words, this economic fallout (directly attributable to HDFCs that are unable or unwilling to achieve supermajority shareholder approval of re-regulation) would be a likely consequence of the City's proposed HDFC re-regulation policy.

The ironies and disparities of the City's policy are striking. A millionaire living in a Park Avenue co-op is entitled to receive the City's conventional co-op tax abatement -- which carries no income restriction whatsoever. Yet the City -- by its proposal to re-regulate HDFCs -- threatens to eliminate the HDFC tax exemption unless an HDFC signs a new regulatory agreement that would have the effect of imposing a draconian level of regulation on HDFC that is neither needed nor desired by most HDFCs. And if the HDFC is either unwilling or unable to achieve the necessary supermajority approval, the HDFC would then receive no real estate tax benefit *whatsoever* – even though a wealthy owner of a conventional co-op is entitled to receive a 17.5 percent tax abatement from the City (which applies when a conventional co-op or condo is assessed above $60,000 per unit). Suffice it to say that the foregoing tax and housing policies are in direct conflict with the City's stated goals of promoting and preserving affordable housing.

For decades HDFCs and their resident-shareholders reasonably relied on the present system of regulation. Most importantly, HDFCs relied on the DAMP tax exemption which was granted in 1989 and which was scheduled to run until 2029. For the City to now unilaterally revoke the DAMP tax exemption (twelve years earlier than scheduled) -- unless HDFCs subject themselves to new and unprecedented regulation -- is not only unlawful. It is also an unconscionable economic assault against 75,000 New Yorkers who live in HDFCs and who have preserved and protected a vital part of the City's affordable housing stock for over three decades.

In substance, the City's proposal appears premised on the unstated assumption that HDFCs are little more than an alternative form of public housing that is subject to perpetual governmental control and in which the HDFC owners are actually renters and the City is actually the landlord. That is a gross misreading of the governing statute. It is also a unilateral repudiation of nearly forty years of HDFC self-governance as well as HPD's own prior policies.

For these reasons the City's proposal to re-regulate HDFCs should be rejected.

I. Historical background and purpose of the HDFC Program

A. Legislative history of Article XI of the Private Housing Finance Law (*i.e.*, the HDFC enabling act)

In 1966, the New York Legislature enacted Article XI of the Private Housing Finance Law. See L.1966, c. 500 (codified at PHFL §§570-582) (hereafter "the HDFC Act" or "Act"). The Act created a special type of corporation referred to as a Housing Development Fund Company (or, alternatively, "Housing Development Fund Corporation") (hereafter "HDFC"). Under the Act, HDFCs are limited to providing housing for low-income persons.

Among the Act's provisions are the following:

> ● The HDFC must have "been organized exclusively to develop a housing project for persons of low income" PHFL § 573(3)(a)
>
> ● "All income and earnings of the corporation shall be used exclusively for corporate purposes, and no part of the net income or net earnings of the corporation shall inure to the benefit or profit of any private individual, firm, corporation or association." PHFL § 573(3)(b)
>
> ● An HDFC co-op "shall be operated exclusively for the benefit of the persons or families who are entitled to occupancy in such housing project by reason of ownership of shares in such corporation." PHFL § 573(4)

Although the Act restricts HDFCs to providing housing to low-income persons, the Act does not expressly define the term, "low income."[8]

[8] Note, however, that the Act does define the term "low-income" **if and only if** an HDFC is subject to a regulatory agreement with either the State Housing agency (DHCR) or the City housing agency (HPD). In that event, the Act provides that "[d]wellings in any such project shall be available for persons or families whose probable aggregate annual income does not exceed six times the rental (including the value or cost to them of heat, light, water and cooking fuel) of the dwellings to be furnished such persons or families, except that in the case of persons or families with three or more dependents, such ratio shall not exceed seven to one." PHFL § 576.

Most HDFCs that were incorporated prior to 2003 were not subject to a "regulatory agreement" but were subject to contract-based income restrictions that incorporated by reference the language of PHFL § 576. A substantial percentage of those pre-2003 HDFCs are no longer

The Act contains a statement of findings and purposes. The express purpose of the Act is (among other things) "to provide temporary financial and technical assistance to enable such [HDFCs] to participate more effectively in existing municipal, state and federal assistance programs and to make more effective use of other sources of financing which may be available for housing of persons and families of low income." PHFL § 571. Thus, the legislative history underlying the Act emphasized that the Legislature intended the scope of Article XI to be "temporary" in effect -- rather than constituting a permanent program of governmental regulation and control of housing subject to the Act.

Consistent with this express legislative purpose, the Act – at its inception in the 1960s – "enabled the State and City to provide **start-up funding** to non-profit housing organizations for the development of Mitchell Lama middle income housing." Larry McGaughey, *New HPD Regulatory Agreement for HDFCs*, unpublished paper presented at the Council of New York Cooperatives, November 13, 2016, at 2 (emphasis added). The HDFC mechanism was then used as an interim financing device prior to the completion of construction of middle-income housing. According to one commentator, "[w]hen the new construction [of the Mitchell Lama project] was completed, the permanent mortgage was entered into and HDFC funding was repaid, and in many cases the HDFCs ended and were replaced by a Mitchell-Lama corporation."[9] *Ibid*. Thus, it would appear that the early use of the HDFC form of incorporation did not contemplate perpetual governmental control of the corporation and perpetual dedication of the HDFC real

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subject to those contract-based income restrictions. When the HDFC is not subject to a regulatory agreement or contract-based restrictions, the foregoing definition of "low-income" is inapplicable. For further discussion of this issue, *see* Part IC, *infra*.

[9] In turn, the regulatory regime governing Mitchell-Lama housing is *itself* temporary in effect. By statute, Mitchell-Lama housing is permitted by statute to go private after 20 years. <u>See</u> PHFL § 35(2).

estate for purposes of providing low-income housing.

A major substantive provision of the Act is the establishment of a State "housing development fund." PHFL § 574. The Act also established a counterpart municipal "housing development fund." PHFL § 574-a. The State and City housing developments are controlled, respectively, by the State and City housing commissioners. In turn, the Act authorizes the State and City housing commissioners to make non-interest bearing advances from their respective funds to HDFCs. PHFL § 575.

An HDFC -- in order to qualify for an advance from one of the aforementioned funds -- is required to enter into a "regulatory agreement" with the State or the City (as the case may be). PHFL 576. Importantly, an HDFC that has entered into to a regulatory agreement is subject to other and further statutory requirements than an HDFC that is not subject to a regulatory agreement. These additional statutory requirements for "regulated" HDFCs are discussed at length in Part IC below.

B. Historical background to the City's creation of HDFC cooperative housing beginning in the late 1970s: The housing crisis of the 1970s and 80s and the City's decision to transfer tax-foreclosed housing to the tenants in occupancy and to establish housing cooperatives organized under the HDFC Act

Although Article XI was authorized in 1966, it would appear that this form of housing was not widely used in New York City for the first decade after the enactment of the Act. However, in the late 1970s, the severe economic circumstances then affecting the City and its housing stock caused the City to embark on a major new housing initiative that employed the HDFC form as a mainstay in what may be fairly characterized as an emergency program of housing preservation.

The City's fiscal and economic crisis of the 1970s hit the multifamily private housing sector particularly hard. By the mid-1970s, the City's private housing market virtually ceased to exist in many low- and moderate-income neighborhoods. There were many causes for this housing crisis, including New York's loss of population, increasing poverty, bank redlining and the city government's brush with bankruptcy. *See generally* David Reiss, *Housing Abandonment and New York City's Response*, N.Y.U. Rev. L. & Soc. Change 783 (1996); *Housing Policy in New York City: A Brief History*, Furman Center for Real Estate and Urban Policy, Working Paper 06-01 at 2-3; John Krinsky, *Managing New York City's Rental Housing Catastrophe: The Once and Future Potential of Tax Foreclosed Properties*, Metro Politics, October 20, 2015, at 1-2. Whatever the cause of the crisis, the reality was plain for all to see: Housing abandonment was rampant; disinvestment was pervasive; arson was endemic, bank financing was unavailable and city services were in sharp decline.

The loss of the private housing market in many areas of the City led to housing abandonment and tax foreclosure on an unprecedented scale. As a consequence, the City of New York became the landlord of last resort for over 100,000 vacant and occupied apartments in the City's poorest neighborhoods. *See Housing Policy in New York City*, at 2.

The tax-foreclosed city-owned housing is commonly referred to as "*in rem* housing" -- named for the type of legal proceeding that allows the City to take title to a property for nonpayment of real estate taxes. In effect, the City's *in rem* housing stock in the 1970s and 80s became a new form of public housing. However, unlike traditional public housing, the City's *in rem* housing stock of the 1970s and 80s consisted of small multifamily buildings in scattered locations. The *in rem* housing stock itself was usually were very old, in poor condition and desperately in need of repair and upgrading.

Prior to the 1970s, when the city took title to a building for nonpayment of taxes, it usually sold the building off at a public auction to a private investor. The purpose of this policy was to restore the building to the tax rolls as soon as possible. However, given the dismal economic climate of the 1970s and given the unsavory conduct of many real estate speculators during this bleak period, that traditional policy proved to be ineffective and even counterproductive. All too often, real estate speculators purchased city-owned buildings at auction, then collected as much rent as possible without paying taxes or making necessary repairs. As a consequence, the City was required to institute *in-rem* proceedings and re-take the very same building that it had recently sold. *See* Krinsky, at 1; Reiss, at 783. To add insult to injury, the building was then in even worse shape then when the city had last owned the building. Moreover, from the point of view of the building's tenants, living conditions at the building became even more desperate.

Against this backdrop of a housing crisis in which traditional solutions had proven ineffective, the City fashioned a new set of policies in an effort to take control of its own burgeoning *in-rem* portfolio. Most important of these new *in-rem* housing policies was the establishment of the Tenant Interim Lease (TIL) program. The purpose of the TIL Program was "to develop economically self-sufficient low-income cooperatives where tenants purchase their apartments for $250." Under the program, tenant associations enter into a lease with the City to maintain and manage the buildings in which they live. The City provided training to tenant associations in building management, maintenance, and financial recordkeeping. Throughout the first years of the TIL program in the 1980s, the City lacked the resources in the 1980s to upgrade the TIL buildings during the period in which the buildings remained in City ownership.

At the conclusion of the interim lease, the City generally transferred the building to the tenants. Ownership was in the form of a cooperative corporation. The cooperative corporation was incorporated pursuant to Article XI of the PHFL. In other words, title to the building was vested in a housing development fund corporation.

In the early 1980s the City rapidly adopted the TIL program – combined with HDFC co-ops -- as a model for preservation and disposition of its *in-rem* housing stock at a time when there was no interest from private developers and when the sheer volume of buildings far outstripped local nonprofits' capacities. Using the TIL/HDFC model, tens of thousands of tenants took control of their buildings after the for-profit owners abandoned them. Their efforts were instrumental in stabilizing many low-income neighborhoods throughout New York City. *See* Reiss, at 783; *Housing Policy in New York City: A Brief History*, at 5; Krinsky, at 2.

New York courts have repeatedly recognized that a principal purpose of the TIL/HDFC programs -- from their inception onward -- was to relieve the city of its fiscal burden of owning and managing *in-rem* tax foreclosed housing and to stabilize financially distressed neighborhoods. *See, e.g., 502 W. 135th St. Tenants Ass'n v. Zimroth*, 160 A.D.2d 453, 453–54, 554 N.Y.S.2d 127 (1990) (holding that the TIL program was established by the City to "promote and assist the purchase and management by the tenants of deteriorated and abandoned buildings acquired by the city in *in rem* proceedings"); *172 E. 122 St. Tenants Ass'n v. Schwarz,* 73 N.Y.2d 340, 345, 537 N.E.2d 1281, 1283 (1989) (same).

Another purpose of the City's HDFC program was to empower community residents by affording them the opportunity to own their own homes and stabilize their communities. When the HDFC program began in 1981, Mayor Edward Koch presided at a City Hall ceremony celebrating the turnover of deeds of certain Harlem buildings to their tenants. The Mayor proclaimed:

> This means that these properties are no longer the wards of the city. They will go back on the tax rolls. It means that the people, the tenants will control their own destiny.

> ["Harlem Group and Tenants Get City Buildings," New York Times, August 9, 1981, http://www.nytimes.com/1981/08/09]

Thus, the City's HDFC program was founded on two important principles: (1) to relieve the city of its fiscal burden of owning and managing *in-rem* tax foreclosed housing; and (2) to empower the residents of HDFCs to stabilize their communities and "chart their own destinies." As we shall see, the City -- in its proposal to re-regulate HDFCs -- has seemingly forgotten the promises that were made to community residents at the very inception of the HDFC program.

C. City-sponsored HDFCs and resale restrictions authorized by Section 576 of the Act

An important feature of City-sponsored HDFCs is the City's use of its authority under the Act to enter into a "regulatory agreement" with the HDFC. Under PHFL § 576, either the State or the municipal "supervisory agency" (*i.e.*, HPD) may enter into a regulatory agreement with an HDFC if the agency advances public funds to the HDFC.

Under PHFL 576, every HDFC regulatory agreement must provide that:

- Households must meet income eligibility guidelines, which is defined by statute as six times the annual rent plus six percent of the shareholder's "original investment" in the HDFC. *See* PHFL § 576(1)(b).

- Profits must be used only for capital improvements or to reduce rent/maintenance. Dividends cannot be paid to owners. *See* PHFL § 576(1)(c), (d).

- The property may not be sold or transferred without HPD approval for so long as the regulatory agreement remains in effect and/or unless and until any funds or mortgages owed to the City are paid in full. *See* PHFL § 576(1))(e).

- The HDFC may not be dissolved without HPD approval for so long as the regulatory agreement remains in effect and/or unless and until any funds or mortgages owed to the City are paid in full. *See* PHFL § 576(1)(e).

Thus, under Section 576 of the Act, the City's authority to impose on HDFCs certain key restrictions remains in effect only for so long as a regulatory agreement remains in effect. Put differently, the City's authority to impose Section 576 restrictions (including restrictions on dissolution of HDFCs and on the sale and disposition of HDFC property) is limited to only those HDFCs that are subject to a regulatory agreement and does not extend to HDFCs in which a regulatory agreement or mortgage is no longer in effect.

The City applied its Section 576 authority to post-*in rem* HDFCs in two ways: *i.e*. (1) the terms of the Section 576 "regulatory agreement" were incorporated into various HDFC incorporation documents and in the deed conveying title to the property;[10] and (2) the regulatory agreement was incorporated into mortgage documents when the City made loans to HDFCs to finance capital improvements. In each case the City imposed resale restrictions that had a fixed term. At the inception of the HDFC program in the early 1980s, city-sponsored resale restrictions imposed by the sale documents expired in ten years. By the late 1980s, city-sponsored resale restrictions imposed by the sale documents ran for 25 years. Furthermore, resale restrictions that were made a part of city-sponsored rehabilitation loans to HDFCs ran for the life of the loan -- i.e., usually 15 to 25 years.

Thus, the City used PHFL § 576 as a means to impose additional terms and conditions (including resale restrictions) on the operation of the HDFC for a fixed term following the establishment of the housing cooperative or during the life of a City-sponsored loan to the HDFC. For the vast majority of HDFCs, these PHFL §576 restrictions have expired.[11]

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[10] As previously noted, when the City first created HDFCs in the 1980s, the City did not require a newly created HDFC to enter into a document that was formally titled a "regulatory agreement." Instead, the City required the newly-created HDFC to enter into certain documents (such as deeds and certificates of incorporation containing limited-term controls over shareholder income and dissolution of the corporation. Beginning in 2003, the City required newly created HDFCs to enter into a document that was formally titled a "regulatory agreement" consistent with PHFL §576.

[11] HPD reports that of the 1048 HDFC co-ops, 207 are subject to regulatory agreements. A substantial percentage of the balance (841 HDFCs) is no longer subject to the City resale

D. City-sponsored HDFCs and partial real estate tax exemptions authorized by Section 577 of the Act.

Under PHFL §577, the City is authorized to grant partial real estate tax exemptions to HDFCs. Pursuant to this authority, the City in 1989 enacted a partial tax exemption for most city-sponsored HDFCs. The tax exemption is generally referred to as the "Division of Alternative Management Programs" tax exemption, or "DAMP tax exemption." The tax exemption runs for forty years and will expire in 2029.

In general, the DAMP tax exemption is the same as the exemption that is applicable to one- and two-family houses. The exemption began in 1989 with a taxable assessed valuation capped at $3,500 per apartment. In subsequent years the exemption increases by 6% per annum, but by no greater than 20 percent over five years. In some cases, HDFCs receive no tax benefit, because their real estate taxes are less than the tax cap.

In City tax year 2017-18, the DAMP tax exemption imposes a cap on the assessed value of HDFCs of $10,374 per apartment in an HDFC building. Thus, in a 20-unit HDFC, the DAMP tax exemption caps the assessed value of the HDFC at $207,480 and thereby effectively caps the HDFC's resulting real restate liability (at a current tax rate of 12.892%) at $26,748.

A condition of the DAMP tax exemption is that the HDFC remain an HDFC for the duration of the tax exemption. The DAMP tax exemption is scheduled to run until 2029.[12]

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restrictions that were imposed as part of the creation of the HDFC co-op. *See* City of New York, Department of Housing Preservation and Development, *Preserving Affordable Home Ownership: HDFC Coops and Our Community*, http://www1.nyc.gov/assets/hpd/downloads/pdf/Owners/hdfc-coop-december-shareholderforum.

[12] HDFCs that receive the DAMP tax exemption are not eligible to receive real estate tax abatements that apply to most conventional cooperatives and condominiums. Currently, a conventional cooperative or condominium that is assessed at $50,000 per unit or less is eligible for a tax abatement of 28.1 percent. A conventional cooperative or condominium that is assessed above $60,000 per unit – without any upper limit to assessed value – is subject to a 17.5 percent

PHFL §577 does not require the imposition of controls on HDFCs as a condition of receipt of the DAMP tax exemption. This stands in contrast to the PHFL provision (i.e., Section 576) governing HDFC regulatory agreements -- which requires various controls on sales and ownership as a condition of the HDFC's receipt of funds under the regulatory agreement. [13]

The City has adopted the position that all HDFCs -- including HDFCs in which the regulatory agreement or City-imposed resale restrictions have expired -- are subject to limitations on the income of purchasers of HDFCs. The City's position is that HDFCs with expired City-imposed resale restrictions are subject to an income limitation for new purchasers of 165% of area median income ("AMI"). According to the City, this is a "statutory requirement." As previously noted, although the City has no express authority under the PHFL to define "low income" with respect to HDFCs that are not subject to a regulatory agreement or other City-imposed resale restrictions, a court is likely to conclude that the City has implicit authority to regulate an HDFC (that is not subject to a regulatory agreement or City-imposed resale restrictions) for so long as the HDFC receives a DAMP tax exemption.

E. The legal status of HDFCs that were incorporated in the 1980s and the 1990s and that are no longer subject to a regulatory agreement with the City

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tax abatement. In other words, a high-end luxury condominium is eligible for a substantial tax abatement. Because the DAMP tax exemption and the conventional cooperative tax abatement operate using a different benefit mechanisms (i.e., a cap on tax liability versus an absolute reduction in tax liability), it is difficult to compare the value of the nest benefit to similarly situated buildings. However, in at least some cases, the value of the DAMP tax exemption is roughly equivalent to a counterpart tax exemption that is available to most of the City's private co-ops and condos virtually without limitation as to affordability of the units.

[13] Note, however, that PHFL §576(2) requires that an HDFC subject to a regulatory agreement and also receiving a tax exemption will continue to be subject to the regulatory agreement (and the resale restrictions contained therein) for so long as the tax exemption remains in effect. This section only applies to HDFCs that are subject to regulatory agreements – as distinct from other forms of City-imposed resale restrictions (*e.g.*, restrictions imposed by way of language in HDFC deeds and certificates of incorporation). Today, of 1048 HDFC co-ops, only 207 are subject to regulatory agreements.

Today, there are 1,048 HDFCs in New York City containing approximately 25,900 apartments. It would be reasonable to estimate that approximately 75,000 New Yorkers make their homes in HDFCs.

Of the 1048 HDFCs, 207 are subject to regulatory agreements. A substantial number of non-regulated HDFCs date from the 1980s and 1990s. These older HDFCs are no longer subject to City resale restrictions that expired after either ten years or 25 years following the incorporation of the HDFCs.

For as long as a particular City-imposed resale restrictions remained in effect, an HDFC is subject to a detailed scheme of regulations imposed by the City pursuant to PHFL 576. In general, HPD resale restrictions govern such important issues of HDFC governance as income limitations for purchasers, succession rights, sublet rights, flip taxes, HPD consent as a precondition to the sale of an HDFC building and HPD consent to the dissolution of an HDFC. Upon the expiration of the City-imposed restrictions, the HDFC is no longer subject to these externally imposed regulations.

However, an HDFC with an expired regulatory agreement nevertheless remains subject to Article 11 of the PHFL as well as to various governing documents, such as its Certificate of Incorporation, deed restrictions, proprietary lease and by-laws. Most importantly, an HDFC is required to provide housing for “persons of low income," PHFL § 573(3)(a).

As previously noted, the term, “low income,” as used in the PHFL (outside of the context of a regulatory agreement) is undefined. Nor is it clear that HPD possesses the requisite statutory authority to define “low-income” with respect to HDFCs when the HDFC is no longer subject to a regulatory agreement. Nothing in the PHFL expressly confers authority on HPD to regulate HDFCs that are no longer subject to resale restrictions.

Indeed, the history of HPD's regulation of HDFCs reveals HPD's own view (until recently) that it lacks clear and unambiguous regulatory authority over HDFCs after the expiration of resale restrictions. As one commentator has observed:

> The prevailing narrative is that as prices have risen HDFCs and their shareholders have perverted the intent of the HDFC coop program which was always intended to preserve their coop apartments for low income occupancy in perpetuity." In fact, this has been the goal of most advocates and many shareholders in HDFC buildings, but it has never been the program of HPD. Many of the changes being proposed [in connection with the City's recent proposal to re-regulate HDFCs] have been on the table since day one with HPD and not adopted. **In particular, HPD has steadfastly refused to impose sales price caps for 35 years. The program has not been designed to preserve apartments for low income occupancy in perpetuity.**
>
> [Larry McGaughey, "New HPD Regulatory Agreement for HDFCs," unpublished paper presented at the Council of New York Cooperatives, November 13, 2016, at 7 (emphasis added)].

In any event (and as further described below), the plain text of the governing statute allows an HDFC cooperative to opt-out of the HDFC statute after the expiration of a regulatory agreement with HPD (and provided further that the HDFC elects to no longer receive the DAMP tax exemption).

F. The plain text of the PHFL allows an HDFC cooperative to opt-out of the PHFL legal regime after the expiration of a regulatory agreement with HPD (and provided the HDFC elects to no longer receive the DAMP tax exemption) -- but most HDFC co-ops do not want or seek this outcome and the HDFC Coalition does not favor this outcome.

The PHFL expressly confers power on the HPD Commissioner to grant or withhold consent to the disposition of HDFC property and to the dissolution of an HDFC *but does so only if the HDFC is subject to a regulatory agreement with HPD.* Section 576 of the PHFL provides:

> 1. Every housing development fund company as a condition precedent to receiving an advance pursuant to this article, shall enter into an agreement with the commissioner or with the supervising agency, as the case may be, to be regulated as follows:…
>
> e. **The property or franchises of the corporation may not be disposed of**

> **without the consent of the commissioner or the supervising agency, as the case may be, nor may the corporation be dissolved *unless payment in full is made of remaining balances of principal and interest due and unpaid on any mortgage or mortgages,*** of any advances made from the fund pursuant to this article and of any and all expenses incurred in effecting such dissolution.

The statute is clear: the HPD Commissioner's authority to control HDFCs (including granting or withholding consent to HDFC dissolution and granting or withholding consent to the conveyance of HDFC real property) remains in effect only for so long as the HPD regulatory agreement remains in effect. Once the regulatory agreement expires, nothing in the HDFC statute prevents an HDFC from undertaking voluntary dissolution or from conveying a building to a different form of cooperative corporation owned by the same shareholders as the HDFC.

However, as previously noted, although the PHFL does not require the imposition of controls on HDFCs as a condition of receipt of the tax exemption, a court is likely to conclude that the City has inherent discretion to impose such controls for so long as an HDFC continues to receive the tax exemption.

Not only is the statute clear on its face: the resale restrictions of HDFCs dating from the 1980s and 90s contained an express prohibition against the sale of the building from the HDFC to another entity (such as another form of cooperative corporation) only for a fixed period.[14]

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[14] In particular, the resale restrictions entered into by and between the City and 1980s and 1990s-era HDFCs expressly state that the HPD Commissioner's authority to consent to the transfer of real estate held by HDFC remains in effect only for the a fixed term. At the inception of the City's HDFC program, this period was ten years. By the late 1980s, the City extended this period to 25 years for newly incorporated HDFCs.

For example, a typical 1980s-era HDFC Certificate of Incorporation states the following with respect to the scope and duration of the HPD Commissioner's powers to control the conveyance of HDFC property:

> Notwithstanding any other provision contained herein, the following restrictions upon the use and sale of the housing project (the building) as a whole and upon the transfer of shares allocated to individual units shall apply:

A. For **ten years** from the date of the conveyance of title to the building to the Corporation by the City of New York:

1. The building shall provide housing for persons and families of low income as defined in Section 576 of Article XI of the Private Housing Finance Law;

2. **The building shall not be sold or otherwise disposed of without the prior written approval of the Commissioner of HPD.**

Similarly, a typical 1980s-era City-drafted deed (conveying real property to the newly incorporated HDFC) states:

> (2) The HDFC covenants and agrees not to sell, transfer, exchange or otherwise dispose of or lease all or substantially all of the Premises for **ten (10) years** from the date of this Deed without prior written approval of the Commissioner of the City's Department of Housing Preservation and Development.
>
> (3) The HDFC covenants and agrees to operate the Premises solely as a housing project for persons or families of low income as defined in Section 576 of Article XI of the Private Housing Finance Law **for ten (10) years from the date of this Deed.**

Thus, the resale restrictions entered into by and between the City and 1980s and 1990s-era HDFCs expressly state that the HPD Commissioner's authority to consent to the transfer of real estate held by the HDFC remains in effect only for the term of the regulatory agreement. Furthermore, the Resale restrictions state that the HDFC has agreed "to operate the Premises solely as a housing project for persons or families of low income as defined in Section 576 of Article XI of the Private Housing Finance Law," *and that this agreement remains in effect only for the term of the regulatory agreement.*

There is, however, one major ambiguity in the aforementioned governing documents. The above standard-form HDFC Certificate of Incorporation is not a model of clarity with respect to the issue of the duration of the Commissioner's powers over the HDFC. Although Article X of the Certificate of Incorporation (quoted above) makes clear that the Commissioner's power over the HDFC is limited to ten years, a different provision of the Certificate of Incorporation (i.e., Article XII) inconsistently affords the HPD Commissioner authority to consent to the dissolution of the HDFC for a period of apparently unlimited duration (i.e., beyond the expiration of the regulatory agreement). Article XII states: "The Corporation cannot be dissolved without the written consent of the Commissioner of HPD." Article XII makes no reference to any time limitation on this power. However, Article XII – to the extent that it can be construed as affording a power to the Commissioner that is of unlimited duration – should not be given effect for many reasons.

First, Article XII should not be given effect because it is flatly consistent with both the Property Deed and another provision of the Certificate of Incorporation (i.e., Article X, which is quoted in the text above) that expressly limit the Commissioner's power over the HDFC to a term of ten

In 2015, the New York Attorney General issued an opinion to the effect that HDFC cooperatives could never opt-out of the PHFL and that they were subject to the perpetual regulation of the HPD Commissioner. See New York Attorney General, "*Guidance on Housing Development Fund Corporations Seeking to Transfer or Sell Property for, or Otherwise Convert Property to Market-Rate Use*" (hereafter "Guidance"). The Attorney General's Guidance is incorrect as a matter of law. The Attorney General's opinion ignores the plain text of the HDFC statute and its legislative history.[15]

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years. Significantly, Article X employs the language, "[n]otwithstanding any other provision contained herein." Hence, to the extent that there is any inconsistency between Article X and Article XII as to the duration of the Commissioner's powers, Article X is controlling.

Second, Article XII should not be given effect because it exceeds the HPD Commissioner's statutory authority under the PHFL. As more fully discussed in the text above, the PHFL § 576 grants to the HPD Commissioner the authority to withhold consent to the dissolution of a HDFC but only for so long as a regulatory agreement remains in effect. Thus, Article XII is unenforceable as applied to HDFCs with expired resale restrictions.

Third, Article XII should not be given effect because it violates the New York common law principle known as the rule against unreasonable restraints on the alienation of land. *See Metropolitan Transp. Authority v. Bruken Realty Corp.*, 67 N.Y.2d 156, 160-162 (1986) ("The rule against unreasonable restraints on alienation … forbid[s] owners to impose conditions on conveyances which block the grantee from freely disposing of the property"). The rule specifically bars "a naked provision in a deed or will to the effect that land conveyed in fee by the deed or will must not be alienated without the consent … of a designated person or persons." 56 *NY Jur. Estates, Powers, and Restraints on Alienation* § 505 (emphasis added). That is the precisely circumstance here. Of course, if the HPD Commissioner were accorded the statutory authority to withhold consent to the dissolution of an HDFC for a period of perpetual duration, then the common law rule must give way and the statute would govern. But, as discussed above, the Commissioner does not have such statutory authority allowing him to exercise perpetual control over HDFCs. Hence, the common law rule is applicable and Article XII is unenforceable for this reason alone.

[15] More particularly, the Attorney General's Guidance determined that, "any BCL HDFC considering amending its sole corporate purpose or transferring and/or selling its property must first consult with and obtain its particular approvals from its supervising agency." In support of this conclusion, the Attorney General relied on PHFL § 573(5), which provides, in relevant part,

> The secretary of state shall not file the certificate of incorporation of any such corporation **or any amendment thereto** unless the consent or approval of the commissioner or the supervising agency, as the case may be, is affixed thereon or attached thereto. Consent to the filing of such certificate of incorporation shall be based upon findings by the commissioner or supervising agency as to the character and competence of the sponsor." (emphasis added).

Under PHFL § 573(5), an amendment to a certificate of incorporation requires the consent of the Commissioner of HPD. The Attorney General's interpretation of the statute is premised on the view that an "amendment" to an HDFC certificate of incorporation implicitly includes and encompasses the dissolution of the HDFC.

However, there are four separate and distinct reasons why the Attorney General's broad construction of Section 573's consent to "amendment" (so as to include consent to dissolution) is erroneous under well-established principles of statutory construction.

First, as discussed in the text above, another provision of the PHFL (Section 576) expressly addresses the HPD Commissioner's authority to consent to the dissolution of an HDFC. That separate statutory provision – not Section 573 – is controlling as to the scope of the Commissioner's power to consent to the dissolution of an HDFC. By enacting PHFL § 576, the Legislature expressly conferred power on the HPD Commissioner to grant or withhold consent to the disposition of HDFC property and to the dissolution of an HDFC *but did so only if the HDFC was subject to a regulatory agreement with HPD.* Importantly, the HPD's Commissioner's power under PHFL § 576 does not apply if the HDFC is not subject to a regulatory agreement. Viewed in this light, the Attorney General's expansive construction of PHFL § 573 – wherein the Attorney General construes the term "amendment" so as to encompass "dissolution" with respect **to both regulated and unregulated HDFCs** – flies in the face of the legislative design of the PHFL and, in effect, nullifies the express "dissolution" provision contained in PHFL § 576 (which, as noted, limits the HPD Commissioner's power to consent to dissolution only to HDFCs that are subject to regulatory agreements with HPD). Under well-established principles of statutory construction, the Attorney General's interpretation of PHFL § 573 is properly rejected. *See Evans v. Newman,* 100 Misc. 2d 207, 210, 420 N.Y.S.2d 618, 621 (Sup. Ct.), *aff'd,* 71 A.D.2d 240, 423 N.Y.S.2d 59 (1979), *aff'd,* 49 N.Y.2d 904, 405 N.E.2d 707 (1980)("It is a fundamental rule of statutory construction that a statute is to be construed as a whole. A single sentence or phrase is not to be detached from the whole so as to be given a special meaning at variance with the general purpose and spirit of the enactment. All portions of the statute are to be harmonized and effect given to all provisions of the statute."); *People v. Santi,* 3 N.Y.3d 234, 244, 785 N.Y.S.2d 405, 818 N.E.2d 1146 (2004) ("[W]e must interpret a statute so as to avoid an unreasonable or absurd application of the law").

Second, the Attorney General erred in determining that the HPD Commissioner has authority under PHFL § 573 to withhold consent to the dissolution of an *unregulated* HDFC (by construing Section 573's authority to consent to an "amendment" of an HDFC's Certificate of Incorporation as implicitly encompassing authority to consent to the dissolution of the HDFC) because: (1) the New York Business Corporation Law (BCL) treats "amendment" and "dissolution" as entirely distinct concepts; (2) the BCL is directly applicable to HDFCs and governs the conduct of HDFCs no less than the PHFL governs the conduct of HDFCs; and (3) consequently, any construction of a provision of PHFL must incorporate by reference the substantive provisions of the BCL. In particular, under the BCL, the treatment of an "amendment" (to a certificate of incorporation) and a "dissolution" (of the corporation) are entirely distinct. For example, BCL Section 801 is a comprehensive statutory provision that governs all amendments to a BCL Certificate of Incorporation. Section 801 enumerates fourteen types of amendments – *none of which constitutes a dissolution of the BCL corporation.* By contrast, an entirely separate provision of the BCL -- Section 1001 -- governs dissolution of a BCL corporation. Furthermore, under the BCL, the filing procedures to effect amenments and corporate dissolution are also separate and distinct. BCL § 805(a) authorizes the filing (with the Secretary of State) of an amendment to a certificate of incorporation; BCL § 1003 authorizes a certificate of dissolution. As the foregoing makes clear, the terms "amendment" and dissolution" cannot be conflated as applied to corporations that are subject to the BCL and the PHFL (such as the vast majority of HDFCs). Yet that "conflation" is precisely the putative basis of the Attorney General's Guidance that deems an "amendment" under PHFL § 573 to also encompass a "dissolution" of an HDFC. The BCL – directly applicable to HDFCs – precludes this Attorney General's construction of PHFL § 573. The Attorney General's Guidance is erroneous for this reason alone. *See, e.g. Matter of Long v. Adirondack Park Agency*, 76 N.Y.2d 416, 420, 559 N.Y.S.2d 941, 559 N.E.2d 635 (1990) (holding that various ambiguous or conflicting provisions of statutes are to be construed so as to "harmonize[] all [of the] interlocking provisions").

Third, the resale restrictions entered into by and between the City and 1980s and 1990s-era HDFCs expressly state that the HPD Commissioner's authority to consent to the transfer of real estate held by the HDFC remains in effect only for the term of the restrictions. This point is discussed at length in note 13, *supra*. Thus, under the express terms of these documents, when the resale restrictions expire (which already has occurred in many cases), the Commissioner's power to withhold consent to the transfer of HDFC real property also expire as a matter of law. *See id.* Additionally, the resale restrictions' treatment of this issue constitutes additional evidence that the Attorney General's current construction of PHFL section 573 is erroneous, since the administering agency reached the opposite conclusion as to this issue.

Fourth, the City is currently promoting state legislation that would amend the statute governing HDFCs. *See* S. 6543 (2017). It is beyond the scope of this memorandum to discuss the merits of this proposed legislation. In the memorandum offered in support of the legislation, the City asserts that "**there is a great need for an amendment** to clarify that the corporate purpose of an HDFC – to provide affordable housing for persons and families of low income – **is perpetual in duration**." *See* City's Memorandum in Support of S. 6543 (emphasis added). The City's statement plainly undercuts the Attorney General's opinion that holds directly to the contrary: *i.e.*, that the current HDFC statute authorizes the City's perpetual regulation of HDFCs unless and until the HPD Commissioner consents to an HDFC co-op's request to dissolve or to transfer real property.

Parenthetically, although the Attorney General's Guidance is legally erroneous, the Guidance nevertheless constitutes a considerable roadblock to any HDFC that sought to exercise its

Although the plain text of the PHFL allows an HDFC cooperative to opt-out of the PHFL legal regime after the expiration of a regulatory agreement with HPD (and provided the HDFC elects to no longer receive the DAMP tax exemption), most HDFC co-ops do not want or seek this outcome and I am informed that the HDFC Coalition does not favor this outcome. Almost all HDFC co-ops would much prefer to stay in the HDFC Program and continue to receive the DAMP tax exemption and to continue to provide much needed affordable housing in their communities.

G. HDFC homeowners reasonably relied on language in their own resale restrictions that afforded to the HPD Commissioner control over the HDFC: (1) only for so long as a Regulatory Agreement remains in effect; and (2) only for so long as the DAMP tax exemption remains in effect.

As previously noted, the resale restrictions entered into by and between the City and 1980s and 1990s-era HDFCs expressly state that the HPD Commissioner's authority to consent to the transfer of real estate held by HDFC remains in effect only for the term of the regulatory agreement. In the 1980s this period was ten years. By the late 1980s, the City extended this period to 25 years for newly incorporated HDFCs. For a detailed discussion of the specific provisions of these resale restrictions, *see* note 14 on pages 24-25.

As noted therein, the express language in both the HDFC deed and the Certificate of Incorporation set forth a fixed term for the duration of the HPD Commissioner's authority to

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statutory rights (including to convey HDFC property or dissolve) following the expiration of a regulatory agreement. This is not only because the Guidance places a cloud of uncertainty over any effort by an HDFC that seeks to invoke its right to "go private" – an uncertainty that could only be resolved through expensive litigation. It is also because the Attorney General possesses direct statutory authority to accept or reject cooperative offering plans -- and can exercise that authority by rejecting a cooperative offering plan submitted by former HDFC shareholders who seek to convert their HDFC co-op to a market-rate co-op. Indeed, the Attorney General, in his Guidance, has indicated that he will not accept a co-op offering plan under these circumstances unless the plan is accompanied by a consent from the HPD Commissioner (even if the HDFC is no longer subject to a regulatory agreement).

consent to the transfer of HDFC property and a fixed term for the Commissioner's authority to consent to HDFC dissolution. HDFC homeowners reasonably relied on language in their governing documents (including the HDFC Certificate of Incorporation and the property deed) that afforded to the HPD Commissioner control over the HDFC only for so long as these restrictions remained in effect.

Moreover, the entire 35-year history of the City's HDFC program further supports the conclusion that HPD's authority over HDFCs is *not* perpetual and, further, that HPD did not intend to assert heavy-handed regulatory authority over HDFCs after the expiration of resale restrictions. As one commentator has observed:

> The prevailing narrative is that as prices have risen HDFCs and their shareholders have perverted the intent of the HDFC coop program which was always intended to preserve their coop apartments for low income occupancy in perpetuity." In fact, this has been the goal of most advocates and many shareholders in HDFC buildings, but it has never been the program of HPD. Many of the changes being proposed [in connection with the City's recent proposal to re-regulate HDFCs] have been on the table since day one with HPD **and not adopted. In particular, HPD has steadfastly refused to impose sales price caps for 35 years. The program has not been designed to preserve apartments for low income occupancy in perpetuity.**
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> [Larry McGaughey, "New HPD Regulatory Agreement for HDFCs," unpublished paper presented at the Council of New York Cooperatives, November 13, 2016, at 7 (emphasis added)].

Thus, HDFC homeowners not only reasonably relied on the language in their own resale restrictions, they also relied on HPD's conduct over the past 35 years.

At least some long-term residents of HDFC buildings – many of whom have lived in their communities for decades in regulated buildings -- are entitled to realize at least some of the benefits of homeownership and "the American dream" (after a fixed period of years in the program) in the same way that tens of millions of other American homeowners have acquired a nest egg.[16] Indeed, every other form of government sponsored cooperative housing in New York is given the opportunity to opt-out of the program after a fixed period of years (usually 20 years), including, for example, residents of Mitchell-Lama middle-income co-ops and Redevelopment Companies.[17]

Any discussion of the HDFC residents' expectations would not be complete without acknowledging the history of the City's HDFC program -- which is forged as a direct response to the City's fiscal and housing crises of the 1970s and 80s. As previously noted in Part IB, <u>supra</u>, most City-sponsored HDFCs were created as a means to reduce its portfolio of tax-foreclosed apartment buildings that the City acquired in great numbers during that era as a result of the

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[16] As previously noted, most HDFC co-ops do not want or seek to opt-out of the HDFC legal form and I am informed that the HDFC Coalition does not favor this outcome. Instead, most HDFC co-ops would much prefer to stay in the HDFC Program and continue to receive the DAMP tax exemption and to continue to provide much needed affordable housing in their communities. Nevertheless, any decision to opt-out of the HDFC legal form is a legal decision reserved for individual HDFC co-ops based on cooperative democratic principles.

The HDFC Coalition strongly favors the establishment of City programs – such as an extension and augmentation of the DAMP tax exemption (that is presently scheduled to expire in 2029) – that provide substantial incentives for HDFC co-ops to remain in their current form.

[17] Limited-profit housing companies (popularly known as "Mitchell-Lama housing") are permitted by statute to go private after 20 years. <u>See</u> PHFL § 35(2). Limited-dividend housing companies (a program quite similar to the Mitchell-Lama program) also are permitted by statute to go private after 20 years. <u>See</u> PHFL § 96(1). Redevelopment companies are permitted to go private after the expiration of the tax exemption granted to the company. <u>See</u> PHFL § 123(1).

As more fully discussed in the text above, the HDFC Act (*i.e.*, Article XI of the PHFL) also allows HDFCs to go private but does so in a different way than the above-cited counterpart statutory provisions that govern other forms of government-assisted housing. The HDFC Act does not set forth a fixed term of years after which HDFCs may exercise their option to go private. Instead, the HDFC Act provides that the HPD Commissioner's authority to control HDFCs (including granting or withholding consent to HDFC dissolution and granting or withholding consent to the conveyance of HDFC real property) remains in effect only for so long as the HPD regulatory agreement remains in effect. <u>See</u> PHFL § 576(1)(e). Furthermore, an HDFC co-op that opts-out of the program would be required to forsake the DAMP tax exemption. *See* PHFL § 577.

collapse of the private multifamily housing market in large parts of Manhattan, the Bronx and Brooklyn. The buildings were in very poor financial and physical condition. The tenants of these buildings received their apartments at a nominal price. The tenants became cooperators. The City often provided limited below-market interest financing to the new HDFCs to help the cooperators improve their buildings.

Everyone benefitted. The City benefitted by reducing its enormous portfolio of tax-foreclosed apartment buildings at a time when the buildings were a substantial burden to the City and when there was little in the way of a private market for these properties. The residents benefitted by the preservation and upgrading of their own buildings and by becoming homeowners for the first time. And the surrounding communities benefitted from the stabilization of the neighborhood, the upgrading of housing and from the transformation of a rental community into a homeowning community.

II. In light of the legal structure and historical background of HDFCs, the City's pending proposal to re-regulate HDFCs (including HDFCs with expired resale restrictions) is unlawful, inequitable and counterproductive.

With this as background, we turn to consider and address the City's pending proposal to re-regulate HDFCs (including HDFCs with expired resale restrictions). As described below, the City's proposal is unjust, inequitable and counterproductive.

Under the proposal, HDFCs would be offered a new regulatory agreement. If the HDFC agrees to the regulatory agreement, it would be entitled to a higher tax exemption than the present HDFC DAMP tax exemption. If the HDFC declines to agree to the regulatory agreement, it would forfeit the existing DAMP tax exemption (which had not been scheduled to expire until 2029).

HPD's proposed new regulatory agreement contains a plethora of new conditions and limitations on the governance and management of HDFCs. For example, the new regulatory agreement requires HDFCs to hire an HPD-approved “third-party monitor.” The purpose of the monitor is to enforce various “affordability controls” set forth in the new regulatory agreement. The compensation of the monitor is paid from HDFC maintenance fees. Furthermore, under the new regulatory agreement, incoming shareholders in the HDFC are subject to not only a limitation on income but also a limitation on assets. The new regulatory agreement also imposes a sales price cap an all HDFC apartments. All shareholders are subject to restrictions on subletting and to owning other property within a 100-mile radius of New York City. A flip tax of 30 percent is imposed on all apartment sales.

To be clear: Most HDFCs understand that if they continue to receive the benefits of the DAMP tax exemption then they must remain subject to the HDFC program and subject to the pre-existing income limitations. However, HDFCs vigorously oppose the City’s proposal to unilaterally revoke the DAMP tax exemption unless the HDFC “voluntarily” subjects itself to a new draconian regulatory regime that was not part of their original regulation. That is blatantly unfair. [18]

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[18] Also unfair is the City’s practice (beginning in the late 1980s as applied to newly created HDFCs) of requiring HDFC homeowners to turn over 40 percent of their resale profits to the City. For each of these HDFCs, this requirement remains in effect for 25 years. In effect, the City’s resale profit-sharing requirement means that the City itself has diverted a substantial portion of the equity appreciation that otherwise would have either inured to the benefit of the HDFC homeowners or to the HDFC itself (by way of a flip tax) for use in making essential building improvements or augmenting the HDFC’s reserve fund.

Ironically, the City’s present proposal to impose price caps on HDFC resales comes on the heels of decades in which the City itself drew on HDFC funds for its own purposes and thereby implicitly endorsed equity appreciation of HDFC apartments. One is forced to recall the old adage, “Do as I say, not as I do.” Furthermore, HPD presently seeks to impose caps on HDFC apartment resale prices just at a time when the City’s resale profit sharing requirements -- applicable to many HDFC -- are set to expire. For years HDFC shareholders reasonably relied on the stipulated expiration date of the City’s 25-year resale profit-sharing requirement. The

The City's proposal is not just unfair; it is unlawful. As previously noted, the core of the City's proposal is the revocation or conditioning of the DAMP tax exemption on HDFC's "agreement" to subject itself to a new and unprecedented legal regime. However, the City itself served as the sponsor on most HDFC cooperatives and in many cases expressly promised each HDFC the benefit of a partial tax exemption running through 2029. To promise the benefit of a tax exemption and then to unilaterally rescind that benefit (unless the HDFC agrees to an entirely new and draconian legal regime) amounts to a unilateral breach of contract.[19]

Furthermore, the City's proposed regulatory agreement violates several provisions of the Business Corporation Law ("BCL").[20] For example, the proposed regulatory agreement

City's proposed resale price caps puts the kibosh on an implicit promise made to HDFC shareholders beginning in the 1990s.

[19] As previously noted in Part IE, *supra*, PHFL § 577 is the statutory basis for the DAMP tax exemption. PHFL § 577 does not require the imposition of controls on HDFCs as a condition of receipt of the DAMP tax exemption. This stands in contrast to PHFL provision governing HDFC resale restrictions – which requires various controls on sales and ownership as a condition of the HDFC's receipt of funds under the regulatory agreement. *See* PHFL § 576. Although the PHFL does not require the imposition of controls on HDFCs as a condition of receipt of the tax exemption, a court is likely to conclude that the City has inherent discretion to impose such controls for so long as an HDFC continues to receive the tax exemption.

Although the City has the authority to revoke the DAMP tax exemption in a particular case by reason of an HDFC's noncompliance with the PHFL, the City lacks the authority to revoke the tax exemption for other reasons -- such as the HDFC's refusal to sign an entirely new Regulatory Agreement. In other words, the City's proposed conditioning of the continuation of *the present DAMP tax exemption* on the execution of an entirely new Regulatory Agreement constitutes a blatant violation of the promises and covenants that the City entered into in its capacity of co-op sponsor to each individual HDFC.

HDFCs that were created after the 1989 DAMP tax exemption came into being in reliance on the promise of a forty-year DAMP tax exemption. In turn, the City gained a valuable benefit from these HDFCs, which managed themselves, payed taxes, and provided thousands of units of affordable housing. Consequently, a contract was created and revocation of the DAMP tax exemption would constitute a breach of that contract.

[20] The vast majority of HDFC co-ops are incorporated under the BCL as well as under the PHFL.

imposes a requirement of monitors to oversee and approve key decisions of HDFCs. This would appear to conflict with BCL §701 on its face, as the statute provides that the board of directors of a corporation be the final decision maker of the entity.[21] Another example would be the imposition of price caps on some apartments, but not others within the same corporation. This would seem to violate BCL §501(c), which requires that each share be equal to every other share of the same class. Price caps that affect some shares and not others would likely violate such a requirement.[22]

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[21] BCL § 701 provides:

> Subject to any provision in the certificate of incorporation authorized by paragraph (b) of section 620 (Agreements as to voting; provision in certificate of incorporation as to control of directors) or by paragraph (b) of section 715 (Officers), **the business of a corporation shall be managed under the direction of its board of directors**, each of whom shall be at least eighteen years of age. The certificate of incorporation or the by-laws may prescribe other qualifications for directors. [emphasis added].

The City's proposed appointment of an HDFC "monitor" runs afoul of BCL § 701. Quite simply, the management of an HDFC and the direction to management by an HDFC's board of directors is incompatible with an arrangement by which an outside party -- not appointed by a court -- may review and disapprove major corporate decisions, such as the hiring of a managing agent, applications for the purchase of shares, elections of directors, and the enforcement of the HDFC's rights under the proprietary lease. Under the BCL, these decisions are reserved exclusively for the corporation's board of directors.

[22] BCL § 501 provides:

> (c) Subject to the designations, relative rights, preferences and limitations applicable to separate series and except as otherwise permitted by subparagraph two of paragraph (a) of section five hundred five of this article, **each share shall be equal to every other share of the same class.** With respect to corporations owning or leasing residential premises and operating the same on a cooperative basis, however, provided that (1) liquidation or other distribution rights **are substantially equal per share**, (2) changes in maintenance charges and general assessments pursuant to a proprietary lease have been and are hereafter fixed and determined on **an equal per-share basis or on an equal per-room basis or as an equal percentage of the**

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The City's proposal, if implemented, is likely to have far-reaching unintended consequences. As previously noted, most HDFC co-ops would much prefer to stay in the HDFC Program and continue to receive the DAMP tax exemption and to continue to provide much needed affordable housing in their communities. However, if the City's current proposal were to be adopted and HDFCs (with expired resale restrictions) were given the choice of a draconian new regulatory regime versus losing the existing DAMP tax exemption altogether, it is likely that at least some HDFCs would reach the conclusion that they have nothing to lose by opting out of the HDFC program.[23]

Stated succinctly, given the stark choice imposed by the City between (on the one hand) an unnecessary and unwanted new regulatory regime that was in no way a part of the representations that were made by the City to HDFC shareholders at the time of the purchase of their apartments or (on the other hand) the forfeiture of the DAMP tax exemption, some HDFC

> **maintenance charges**, and (3) voting rights are substantially **equal per share** or the certificate of incorporation provides that the shareholders holding the shares allocated to each apartment or dwelling unit owned by the corporation shall be entitled to one vote in the aggregate regardless of the number of shares allocated to the apartment or dwelling unit or the number of shareholders holding such shares, shares of the same class shall not be considered unequal because of variations in fees or charges payable to the corporation upon sale or transfer of shares and appurtenant proprietary leases that are provided for in proprietary leases, occupancy agreements or offering plans or properly approved amendments to the foregoing instruments. [emphasis added]

Each HDFC shareholder has been issued shares of the same class pursuant to the HDFC's Certificate of Incorporation. The City's proposal to fix the prices of shares of the same class at different levels, with certain exceptions, is a direct violation of BCL § 501. As such, this aspect of the City's proposed regulatory agreement is likely to be held void and unenforceable.

[23] I am informed by the HDFC Coalition that it does not seek this outcome. On the contrary: the HDFC Coalition strongly favors HDFC co-ops remaining as HDFCs.

co-ops might decide that opting-out of the HDFC statute is their best option. Notably, all conventional co-ops in New York City receive tax abatements from the City simply by virtue of their status as co-ops. An HDFC with a forfeited DAMP tax exemption could well conclude that it is better off as a conventional co-op. [24]

To be clear: I am not advocating "opting out" as something that HDFC co-ops should do -- but merely stating that this is one likely outcome of the City's ill-considered proposal. Thus, the City's proposal -- far from ensuring the continuing availability of affordable housing through HDFCs -- may actually have the unintended consequence of inducing precisely the opposite effect (at least with respect to some HDFCs located in middle-income and upper-income neighborhoods).

[24] Notably, HDFCs that receive the DAMP tax exemption are not eligible to receive real estate tax abatements that apply to most conventional cooperatives and condominiums. *See* City of New York, Department of Finance, *Cooperative and Condominium Tax Abatement*, available at www.nyc.govc/site/finance benefits/landlords-coop-condos (stating that a co-op -- in order to receive a conventional co-op tax abatement -- cannot be an HDFC co-op). However, an HDFC co-op that opted out of the HDFC form of incorporation and thereafter became a conventional co-op would become eligible to receive real estate tax abatement that is available to virtually all conventional co-ops – *regardless of the income of the residents.* Currently, a conventional cooperative or condominium that is assessed at $50,000 per unit or less is eligible for a tax abatement of 28.1 percent. A conventional cooperative or condominium that is assessed above $60,000 per unit – without any upper limit to assessed value – is subject to a 17.5% tax abatement. In other words, a high-end luxury condominium is eligible for a substantial tax abatement.

The upshot: An HDFC that elected to opt out of the HDFC form of incorporation and thereafter become a conventional co-op would become eligible for a substantial tax abatement that is applicable to virtually all conventional co-ops -- but not to HDFCs – *and which has no income restrictions whatsoever.* That fact will certainly influence the decision-making of those HDFCs that do not desire to be subjected to a proposed draconian regulatory regime imposed by the City and that otherwise would prefer to remain as an HDFC under the present regulatory regime and thereby continue to receive the DAMP tax exemption. Unfortunately, the City has made clear that remaining as an HDFC under the status quo regulatory regime is **not** an option. In light of this – and in light of the availability of a 28 percent tax abatement available only to conventional co-ops – it could be expected that many HDFC co-ops will elect to opt-out out of the HDFC form of governance and become a conventional co-op.

That is not all. A condition precedent to an HDFC adopting the City's proposed new regulatory agreement is a supermajority vote of the HDFC shareholder in favor of adoption. As a practical matter, obtaining a supermajority vote on *any* issue – let alone an issue as complex and as contentious as drastically altering the management structure of the co-op – is a difficult undertaking. For many HDFCs, obtaining the requisite supermajority shareholder approval will amount to an insurmountable hurdle. In turn, those HDFCs that fail to approve the new regulatory agreement will lose their DAMP tax exemption and, in many cases, will thereby face a substantial hike in real estate taxes and resulting economic distress. In other words, this economic fallout (directly attributable to HDFCs that are unable or unwilling to achieve supermajority shareholder approval of re-regulation) would be a likely consequence of the City's proposed HDFC re-regulation policy.

The ironies and disparities of the City's policy are striking. A millionaire living in a Park Avenue co-op is entitled to receive the City's conventional co-op tax abatement –which carries no income restriction whatsoever. Yet the City – by its proposal to re-regulate HDFCs – threatens to eliminate the HDFC tax exemption if an HDFC declines to sign a new regulatory agreement that imposes a draconian level of regulation on HDFC that is neither needed nor desired by most HDFCs. And if the HDFC is either unwilling or unable to achieve the necessary supermajority approval, the HDFC would then receive no real estate tax benefit *whatsoever* – even though a millionaire in a Park Avenue is entitled to receive a 17.5% tax abatement from the City (which applies when a conventional co-op or condo is assessed above $60,000 per unit). Suffice it to say that the foregoing tax and housing policies are in direct conflict with the City's stated goals of promoting and preserving affordable housing.

For decades HDFCs reasonably relied on the present system of regulation. Most importantly, HDFCs relied on the DAMP tax exemption which was granted in 1989 and which was scheduled to run until 2029. For the City to now unilaterally revoke and repudiate the DAMP tax exemption (twelve years earlier than scheduled) -- unless HDFCs subject themselves to new and unprecedented regulation -- is not only unlawful. It is also an unconscionable economic assault against 75,000 New Yorkers who live in HDFCs and who have preserved and protected a vital part of the City's affordable housing stock for over three decades.

The City must not and cannot use the threat of the loss of the DAMP tax exemption as a cudgel to compel HDFCs to enter into a new level of regulation that HDFCs themselves do not want and do not need. Rather, the DAMP tax exemption must continue through 2029 – as promised by the City to all HDFCs back in 1989 – and without new conditions or limitations involuntarily imposed by the City. HDFCs will continue to operate in accordance with the existing HPD guidelines in shareholder income (*i.e.*, a limitation on the income for new purchasers of 165% of area median income).

This approach preserves affordable housing -- and is fair and equitable to the HDFC owners who have given so much to their co-ops, to their communities and to the City.