

MEMORANDUM

TO: REF ATTORNEYS and LEGAL ASSISTANTS

DATE: 3/10/88

FROM: NANCY KRAMER/MARY SABATINI DISTEPHAN *msd*

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

1. RESERVATION OF DEVELOPMENT RIGHTS

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

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

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

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

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

## 2. TRANSFER OF DEVELOPMENT RIGHTS

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

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

NK/MSD:dc