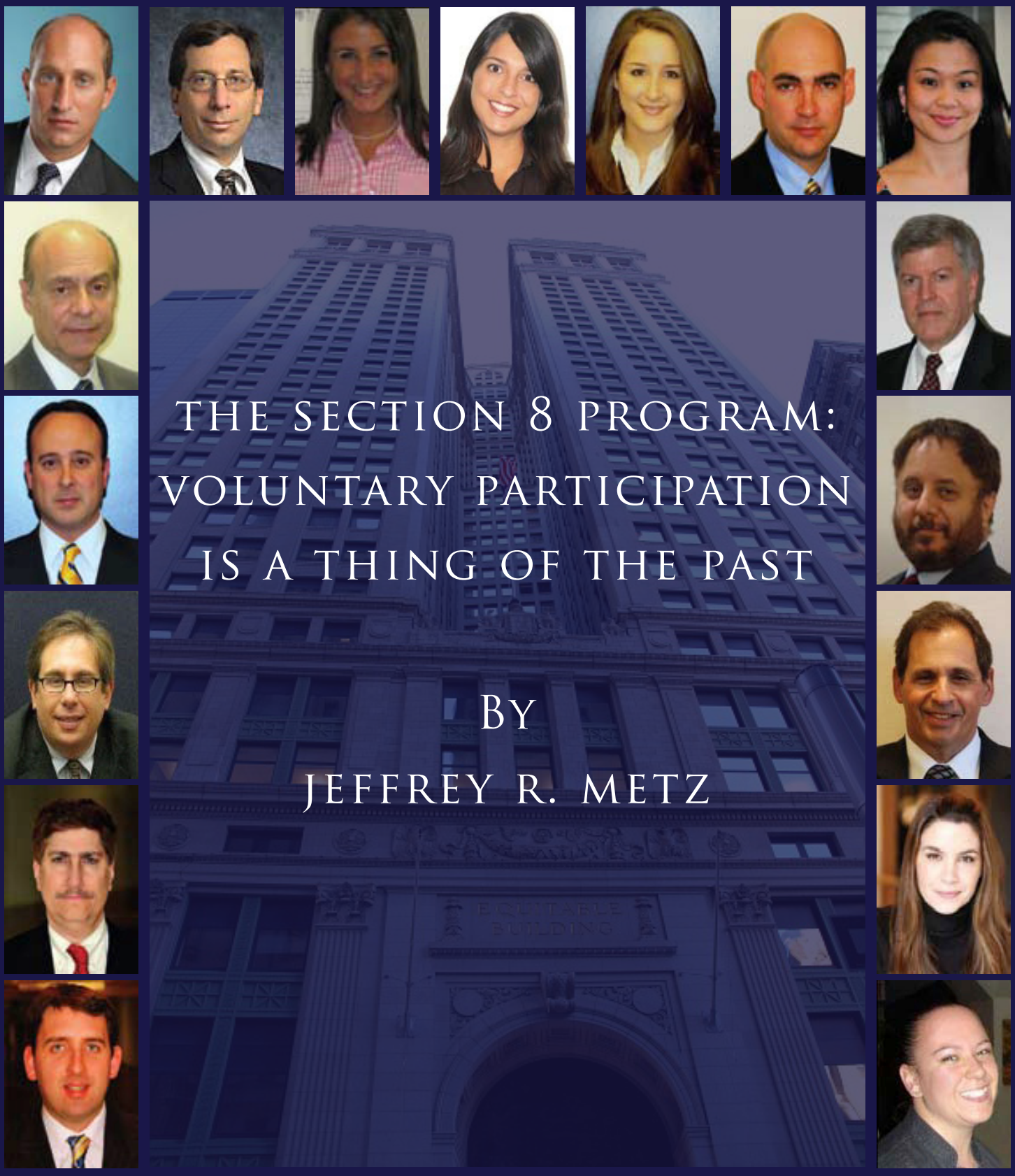

THE SECTION 8 PROGRAM: VOLUNTARY PARTICIPATION IS A THING OF THE PAST

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WE GET RESULTS

THE SECTION 8 PROGRAM: VOLUNTARY PARTICIPATION IS A THING OF THE PAST

By: Jeffrey R. Metz

In the past eighteen months, the judiciary and the City Council have carved out protections for tenants qualifying for what is commonly known as the Section 8 Program[1]. That this requires owners, large and small, to lose a significant amount of control over those to whom they rent, or have previously rented to on a non-Section 8 basis, and to face difficulties with the bureaucracies that administer the program on the local level have fallen on deaf ears. In getting to this state of affairs, the question thus arises: have the judicial and legislative branches been guided by sound legal principles, or, more pragmatically, have they been guided by the notion that the societal burden of housing the less fortunate should be shifted to the property owner whom they believe can best bear the burden. Predictably, as with most issues, the answer rests with what side of the ideological fence you are on.

The Section 8 Program

Section 8 of the United States Housing Act of 1937 was enacted "[f]or the purpose of aiding low-income families [to] obtain decent and affordable housing."[2]

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[1] Section 42 U.S.C. §1437f

[2] Mother Zion Tenant Assoc. v. Donovan, ___ A.D.3d ___, 2008 Slip Op. 07576 (1st Dept).

Under the program, tenants make rental payments based upon their income and ability to pay. The shortfall is covered by the Department of Housing & Urban Development ("HUD") in the form of "assistance payments."[3] To effectuate such payments, HUD enters into contribution contracts with local housing authorities (PHAs)[4]who, in turn, make the assistance payments to the owner.

As the Court of Appeals explained:

> The Section 8 system (Tenant Based Assistance: Housing Choice Voucher Program) is a federal program that provides housing assistance to eligible low-income families by giving subsidies to landlords who rent apartments to them (see 42 USC §1437f). Once NYCHA has issued a Section 8 voucher to an eligible family, and the family has found a landlord willing to accept it, the landlord and NYCHA must sign a Housing Assistance Payments (HAP) contract (see 24 CFR 982.451). The HAP contract specifies the terms of the landlord's participation in the Section 8 program. Section 8 tenants make rental payments based on their ability to pay, and NYCHA issues subsidy payments to the landlords to cover the balance of the agreed rent.[5]

Thus, the Section 8 relationship is not merely a bilateral landlord-tenant relationship but rather a tripartite relation of (i) landlord-tenant/federal program (ii)

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[3] See 42 U.S.C. §1437f[a]

[4] The PHAs that adminster the program in New York City are: (i) the New York City Housing Authority ("NYCHA"); (ii) New York City Department of Housing Preservation & Development ("HPD"); and (iii) the State Division of Housing & Community Renewal ("DHCR").

[5] Rosario v. Diagonal Realty, LLC, 8 N.Y.3d 755, 761 (2008)

tenant-federal program and (iii) landlord-federal program. The tenant and landlord enter into a lease agreement; the tenant and the agency administering the Section 8 program enter into a contract; and, the landlord and the administering agency enter into a Housing Assistance Payments (HAP) Contract.[6]

The HAP contract consists of three parts. As is relevant here, part B of the HAP contract specifically provides that it is a separate contract between the PHA and the owner.[7] It runs concurrently with the lease between the landlord and the tenant.[8] Significantly, it "terminates automatically if the lease is terminated by the owner or the tenant."[9] Underscoring that it is separate and distinct from the lease agreement between the owner and the tenant, the HAP contract provides:

> The family is not a party to or a third party beneficiary of Part B of the HAP Contract. The family may not enforce any provision of Part B, and may not exercise any right or remedy against the owner or PHA under Part B.[10]

Part C of the HAP contract contains a tenancy addendum which must be attached to the lease if any tenant participates in the program.[11] It sets forth the

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[6] Pelham v. Formisano, 5 Misc.3d 695, 700 (Cty. Ct. New Rochelle, 2004)

[7] Form HUD – 52641(3/2000) ref. Handbook 7420.8 at para. 1(a)

[8] Id at para. 4(a)

[9] Id at para. 4(b)(1)

[10] Id at para 12(a)

[11] Form HUD – 52641-A (1/2007) ref. Handbook 7420.8

duties and obligations of the landlord and tenant with respect to the other provisions of the HAP contract. It states that the tenant "shall have the right to enforce the tenancy addendum against the owner."[12] It also provides that Federal Law is controlling:

> Conflict With Other Provisions Of Lease
>
> a. The terms of the tenancy addendum are prescribed by HUD in accordance with Federal law and regulation, as a condition for Federal assistance to the tenant and tenant's family under the Section 8 voucher program.
>
> b. In case of any conflict between the provisions of the tenancy addendum as required by HUD, and any other provisions of the lease or any other agreement between the owner and the tenant, the requirements of the HUD-required tenancy addendum shall control.[13]

Thus, "[t]he tenant and the owner may not make any changes in the tenancy addendum" and "[i]f there is any conflict between the tenancy addendum and any other provisions of this lease, the language of the tenancy addendum shall control."[14] *Critically, there is no language in the HAP contract or the addendum that restricts an owner's right to opt-out of the Section 8 program at the expiration of a term of a HAP contract*.

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[12] Id at para. 2(b)

[13] Id at para. 17

[14] Id. at paras. 15, 2

The Heretofore Voluntary Nature of the Section Program

The intent of the United States Congress in enacting the Section 8 program was to make landlord participation voluntary.[15] As one Court put it: "[t]hat 42 U.S.C. §14237f does not mandate landlord participation in the Section 8 program is undisputed."[16] Another Court observed: "[s]ince its inception, a hallmark of the Section 8 program has been its voluntary aspect….[where]…[n]o landlord is required to participate…or to take a Section 8 tenant."[17]

In that regard, 42 U.S.C §1437(d)(1)(A) states that, "the selection of tenants shall be the function of the owner." The implementing Code of Federal Regulations further provides at 24 CFR §982.302(b) in pertinent part that:

> If the family finds a unit and the owner is willing to lease the unit under the program, the family may request PHA approval of the tenancy.

Similarly, 24 CFR §982.302(b) provides that an owner is responsible for:

> (i) Performing all management and rental functions for the assisted unit, including selecting a voucher holder to lease the unit and deciding if the family is suitable for tenancy of the unit.

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[15] Salute v. Stratford Greens Garden Apts., 134 F.3d 293 (2d Cir. 1998)

[16] Franklin Tower One LLC v. N.M., 157 N.J. 602, 615 (N.J. 1999)

[17] 30 Eastchester LLC v. Healy, 2002 WL 553709 (Cty Ct. New Rochelle, 2002)

That Congress views the program as a voluntary one for owners is illustrated by its 1998 express repeal of two provisions it had enacted in 1987. The first was known as the "take one, take all" provision. As the name implies, if an owner chose to rent to one Section 8 tenant, he then had to accept all subsequent Section 8 applicants. Thus, by removing the owner's choice to limit his participation in the program (after he had accepted the first Section 8 tenant), the "take one, take all" provision so conflicted with normal market practices that it was discouraging owners from accepting their first Section 8 tenant.

The second provision was known as "endless lease" provision. It provided that at the end of a lease term, the landlord could not refuse to renew a Section 8 lease "except for serious or repeated violations of the terms and conditions of the lease, for violation of applicable Federal, State or local law, or for other good cause."

This provision, in particular, had owners up-in-arms. As the Senate Report from the Committee on Banking Housing & Urban Affairs noted:

> The Committee bill recognizes that the lease conditions under the current section programs have deterred private owners from participating in the programs because they require owners to treat assisted residents differently from unassisted residents. The Committee bill reforms the lease conditions to make the new

> voucher program operate as much like the unassisted market as possible.[18]
>
> * * *
>
> Some program requirements have constrained the ability of owners to make rational business decisions…The Committee bill transforms section 8 to make the program operate like the unassisted market as much as possible…[19]

The sole purpose and effect of the repeal, one Court instructed, "was to clarify the seminal issue of who will participate in the program itself -- that is to specify that a landlord may, at the end of the lease term, decide to forego the burden and benefits of its Section 8 participation, just as a tenant may make a similar decision."[20]

Rosario v. Diagonal Realty, LLC

In light of this background, can an owner in New York City opt out of the Section 8 program if a tenancy is subject to the Rent Stabilization Law?[21] In Rosario v. Diagonal Realty LLC, [22]the Court of Appeals answered in the negative.

In that case, the tenant entered into possession on an ordinary rent stabilized basis. Approximately twelve years into the long-term (30 years)

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[18] S. REP. 105-21, p.36

[19] Id.

[20] Pelham v. Formisano, 5 Misc.3d 695, 698 (Cty., Ct. New Rochelle, 2004)

[21] N.Y.C. Admin. Code (§26-501 et. seq.)

[22] 8 N.Y.3d 755 (2007)

tenancy, the tenant obtained Section 8 benefits and the landlord agreed to participate in the program. The owner was also receiving what are commonly known as "J-51" benefits.[23] The J-51 law contains a broad anti-discriminatory provision prohibiting owners from declining to rent to a prospective tenant because of his receipt of Section 8 benefits. N.Y.C. Admin. Code §11-243(k) states in pertinent part:

> No owner of a dwelling to which the benefits of this section shall be applied . . . shall directly or indirectly deny . . . the use of, participation in, or being eligible for a governmentally funded housing assistance program, including, but not limited to, the Section 8 housing voucher program and the Section 8 housing certificate program. . . of any of the dwelling accommodations in such property…

In 2003, the landlord informed NYCHA that it was electing to opt out of the Section 8 program with respect to Rosario. Further, it refused to accept a subsidy payment and then sued Rosario for nonpayment of rent.

Rosario, and others, commenced a declaratory judgment action against certain owners for a declaration that the owners could not opt out of the Section 8 program.

Before the Supreme Court, the tenants argued that (i) that the Section subsidy was a material term of a rent stabilized lease and under the Rent

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[23] N.Y.C. Admin. Code §11-243(k)

Stabilization Code, they must be offered a renewal lease on the same terms and conditions as the prior lease which contained the Section 8 subsidy and (ii) because the landlords were receiving J-51 benefits, they were prohibited from engaging in discriminatory practices against the tenants and therefore were required to accept the subsidy.

The owners countered by arguing that the renewal provisions of the Rent Stabilization Law conflict with and are pre-empted by the Federal repeal of the endless lease provision. Moreover, they contended that the J-51 anti-discrimination provision applied solely to initial rentals, not to existing tenancies.

The Supreme Court found for the tenants[24] and the Appellate Division affirmed.[25] On further appeal, the Court of Appeals similarly affirmed, finding in the main, that "a landlord's prior acceptance of a Section 8 subsidy is a term of a lease that must be continued on a renewed lease."[26] That Rosario was not a Section 8 beneficiary when she first signed her lease was, according to the Court, of no legal moment. It wrote:

> But 9 NYCRR 2522.5(g)(i) makes no mention of a tenant's initial lease. It requires that the renewal lease "be on the same terms and conditions as the expired lease" –not necessarily on the original lease. "Expired

[24] 9 Misc.3d 681 (Sup. Ct., N.Y. Co. 2005)

[25] 32 A.D.3d 739 (1st Dept. 2006)

[26] 8 N.Y.3d at 761

> lease" -- means that the lease will have just expired when the renewal lease is to become effective.[27]

The high court then went on to give decidedly short shrift to the owners' preemption argument finding that there was no express or implied preemption of federal law and ruling that: "We conclude that it was not the intent of Congress, when it created the so-called endless lease rule, to remove state and local law protections afforded to Section 8 recipients."[28]

To be sure, the Court of Appeals soundly rebuffed the owners' position and the United States Supreme Court has declined to entertain the case.[29] The tenor of the Court's opinion appears to indicate that the bundle of property rights which accompanies ownership must give way to house the less fortunate especially when considering that "assistance payments" will always make up a given shortfall.

Kosoglyadov v. 3130 Brighton Seventh, LLC[30]

If Rosario left open any question regarding the enforceability of the anti-discrimination provisions of the "J-51" law, it was put to rest in Kosoglyadov. There, the tenants entered into possession without Section 8 benefits and became

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[27] 8 N.Y.3d at 762

[28] 8 N.Y.3d at 764

[29] Sec 128 S.Ct. 1069 (2008)

[30] ____ A.D.2d____, 2008, WL4260831 (2d Dept. 2008)

eligible for a voucher thirteen years into the tenancy. The owner had obtained J-51 benefits in the interim. When the tenants demanded that the landlord accept their Section 8 voucher, and the landlord declined, the tenants brought a suit alleging, *inter alia,* that the landlord's refusal to accept her Section 8 subsidy violated the anti-discrimination provisions of the J-51 law.

In opposition to the tenants' motion for summary judgment, the owner indicated that the program was voluntary and that it chose not to volunteer because it would incur the following burdens:

- doubling of the managing company's work load by having to prepare both tenants' renewal leases each term and having to prepare and file additional paperwork with NYCHA for the same event;

- in the event that a tenant fails to submit documents to NYCHA, having to wait for the tenant to correct this situation before NYCHA will tender the rent subsidy, which could take months;

- subjecting the Owner to substantial additional delay and paperwork when commencing nonpayment proceedings against tenants;

- having to keep separate accounting books for both the tenant and NYCHA;

- submitting to annual inspections by NYCHA and being forced to supply tenants with services and maintenance above and beyond state and local housing and building codes; and

- paying for the additional administrative, legal fees, and apartment maintenance costs associated with these additional burdens.[31]

Among several other arguments, the landlord also contended that transforming Section 8 from a voluntary to a mandatory program would act as serious disincentive to owners to participate in the J-51 program, the purpose of which is to provide incentives to upgrade premises not to subject owners to the loss of control over whom they accept as tenants and the concomitant burdens of dealing with the PHA.

Equally if not more important, the owner argued that the anti-discriminatory provision of the J-51 law applied only to initial rentals and since the tenants had already been living in their unit for thirteen years, the owner never deprived the tenants of any dwelling accommodations.

As with Rosario, the owner's complaints fell on deaf ears. Citing to Rosario, the Appellate Division found that:

> Despite the voluntary nature of the Section 8 program at the federal level, state and local laws may properly provide additional protections for recipients of Section 8 rent subsidies even *if these protections could limit an owner's ability to refuse to participate in the otherwise voluntary program*.[32] (emphasis supplied)

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[31] See, Kosoglyadov v. 3130 Brigton Seventh LLC, Record on Appeal at R. 86-87

[32] 2008 WL 4260831 at *2

Therefore, the Court found that the tenants "established prima facie that the defendants discriminated against them in violation of the anti-discriminatory provision of the J-51 tax abatement law by refusing to accept the means of payment proffered by them solely because these means are obtained through a federal housing program".[33]

Both in Rosario and Kosoglyadov, the owners' concerns over the loss of control of their tenant populations and their disdain for another layer of bureaucracy found no traction whatsoever. Hence, it appears clear that the judiciary has determined that owners are better equipped to, and should therefore, bear the societal burden of dealing with housing for the less fortunate. That sentiment has now been expanded upon by the City Council which has enacted a significant amendment to the New York City Human Rights Law that leaves owners with no control over Section 8 recipients regardless of whether a tenant is stabilized or the owner receives J-51 benefits.

N.Y.C. Admin. Code §8-101, et seq.

In 2008, the City Council enacted Local Law 10 which amended N.Y.C. Admin. Code §8-101, et seq. (the "N.Y.C. Human Rights Law") to prohibit owners from rejecting or discriminating against present or potential tenants based upon any "lawful source of income," i.e. Section 8 vouchers.

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[33] Id

In so doing, the City Council overrode Mayor Bloomberg's veto of the bill. The Mayor's veto message[34] forcefully sated in pertinent part:

> The Civil Council's effort to protect tenants from "source of income discrimination" while well-intentioned, would force private landlords to participate in a public program even at a cost to their bottom lines and has the potential to result in increased rents in our most affordable housing stock. Intro. 61-A fails to recognize that the onus should be on the government to make the program more attractive for private sector participation, not the other way around. Furthermore, Intro. 61-A fails to address the City's housing crisis; it is a solution in search of a problem.

The Mayor further noted that Section 8 participation often results in business losses for owners:

> While we are seeing improvements to the Section 8 program, we must recognize that landlords participating in the program may incur costs for which they are not compensated. Even with the improvements that my administration is implementing, once a landlord agrees to a Section 8 voucher for a particular unit, the unit is taken off of the market while the necessary inspections and paperwork are completed. While HPD and NYCHA have made great efforts to reduce this time period, it is still an average of tree months. Rent is not collected on the unit during this time. The City must respect a landlord's decision not to forsake multiple months of rent by participating in the Section 8 program. In addition, once in the program, housing units are subject to annual inspections and subsidy payments may be suspended until violations are rectified.

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[34] See Letter of Mayor Bloomberg to Hector L. Diaz dated February 29, 2008

The Mayor also reflected on the loss of control issue:

> The Section 8 program should work for both tenants and landlords…Intro. 61-A prohibits private owners from making sound business decisions regarding the disposition of their own property and mandates them to enter into a contract with a government agency they would otherwise never had to engage.

The Mayor concluded by stating that Intro. 61-A essentially "makes a voluntary government program involuntary…"But like the owner's arguments before the Courts, the Mayor's concerns regarding the costs and burdens to the landlords were overridden by the perceived benefits poor tenants would receive.

Section I of Local Law 10, contains the City Council's Legislative Intent. It could not have been any clearer:

> The Counsel hereby finds that some landlords refuse to offer available units because of the source of income of tenants, including current tenants, plan to use to pay the rent. In particular, studies have shown that landlords discriminate against holders of Section 8 vouchers because of prejudices they hold about voucher holders. This bill would make it illegal to discriminate on that basis.

In a Press Release issued on the override,[35] Council Speaker Quinn noted that the legislation would "not only increase access for people eligible for Section 8 vouchers to affordable housing, it will fully protect an individual's right to

[35] See, http://council.nyc.gov/hhml/releases/024_c32608_prestated__Sec8override.shtml

housing, regardless of their financial circumstances."[36] The Press Release also stated, almost as an afterthought, that because:

> small landlords may have difficulties with the administrative burden that can come to the Section 8 program, the legislation exempts landlords who own five or fewer units. However, rent controlled tenants who remain in these small properties would come under the protection of the law. The law applies to all housing accommodations, regardless of number of units in each, of anyone who owns at lease one property of six or more units.[37]

Local Law 10 has had an immediate impact on the judiciary.

Rizzuti Issacs v. Hazel Towers Co, L.P.[38]

In Rizzuti, the tenants commenced an action to compel the owner to accept their Section 8 vouchers. The owner was subject to J-51 benefits and according to the Court, the "tenants rely on the provision of J-51, Administrative Code §11-243 which prohibits landlord recipients of this subsidy to property owners from discriminating on the basis of Section 8.

The owner countered by arguing that the J-51 anti-discrimination provision "does not apply to tenant already in possession in contrast to incoming applicants."

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[36] Id

[37] Id

[38] N.O.R. Index No. 406514/07 (Sup. Ct., NY Co., Goodman, J.).

The Court never addressed this issue as it applied, apparently sua sponte, Local Law 10 and held that "the new protection (accorded by Local Law 10) expressly extends to tenants such as the plaintiffs herein, already in resident as well as incoming potential tenants."

Thus, by virtue of Local Law 10, a Section 8 recipient, regardless of whether he is rent regulated or not, and regardless of whether he is first applying for an apartment, or has previously occupied a unit as a non-Section 8 tenant, can dictate that the owner participate in, and not opt out of, the Section 8 program.

Given this state of affairs, certain owners believe that the treatment accorded to Section 8 tenants is as unfair as it is a violative of federal law.

This is especially true in light of a recent decision of the Appellate Division, First Department as well as one decided by the Supreme Court.

Mother Zion Tenant Assoc. v. Donovan[39]

Mother Zion dealt with another aspect of the Section 8 program, which the Appellate Division explained in the following manner:

> In order to entice owners to develop Section 8 housing, in the 1960s Congress enacted legislation offering developers below-market interest rates and mortgage insurance for 40-year mortgages (12 USC § 17151, §1715z-1; *see Forest Park II v Hadley,* 336 F3d 724, 728 [8th Cir 2003]). However, owners had a right to

[39] ____A.D.3d____, 2008, W.Y. Slip Op 07576 (1st Dept).

> prepay the federal mortgages and exit the Section 8 program after 20 years (*see Forest Park II* at 728). Subsequent legislation required owners opting out of the Section 8 program to give one year's notice to the United States Department of Housing and Urban Development (HUD), the appropriate state and local agencies, and the affected tenants (*see* 42 USC § 1437f[c][8]; 12 USC § 4106), and provided for "enhanced voucher assistance" for tenants (42 USC § 1437f[t] and other incentives, including restructuring of mortgage debt and increased rents, to induce owners to remain in the Section 8 program or to enable tenants to remain in their apartments after an owner exits the program.[40]

Thus, the Court pointedly observed that: *"[t]he federal Section 8 program is a voluntarily one, based on incentives."*

The Court next explained that Local Law 79 (NYC Admin. Code §26-801 et. seq.) which the City Council passed, over mayoral veto on August 2005, provides:

> inter alia, that owners of "assisted rental housing," including Section 8 and Mitchell Lama programs, must provide tenants and HPD with one year's notice of intent to withdraw from such an assisted housing program (§26-802[a]; §26-801[f], and grants the tenants, through a tenant association or qualified entity approved by HPD, a right of first opportunity to purchase the building at an "appraised value" set by a three-member "advisory panel" or a right of first refusal to purchase at the price offered by a bona fide purchaser approved by HPD.

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[40] Id at * 1-2

Thus, the Local Law "forces on an owner to choose between remaining in Section 8 or offering to sell the building at a rate determined by appraisers."

The owner qualified and invoked the opt-out provision as of March, 2007. The tenants formed an association and notified HPD and the owner that they sought to invoke the right of first refusal. Both HPD and the owner contended the Local Law 79 was preempted by federal and state laws. The tenants then brought an action to declare that the owner must follow Local Law 79.

The Supreme Court rejected the tenants' position and the Appellate Division affirmed finding that Local Law 79 "actually conflicts with the federal regime of an entirely voluntary program…". [41]The Court further observed that "Local Law 79 was enacted, in part, with the aim of nullifying the federal provision allowing for an owner's voluntary withdrawal." And, for good measure, the Court found that "[p]etitioner's characterization of the Local Laws affording 'additional protections' does not disguise that actual conflict of federal laws."[42]

The Appellate Division cited to Rosario for the proposition that the repeal of the "endless lease" provision did not preempt application of state rent regulation laws requiring renewals on the same conditions "because legislative and regulatory language expressly contemplated that state and local laws would continue such

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[41] Id

[42] Id at *3-4

protections."[43] Yet, in the next breath, it went on to forcefully reject the notion that states have "an unfettered ability to impose restrictions greater than those imposed by federal law…".[44]

Prior to Mother Zion, the Supreme Court decided Real Estate Board of New York, Inc. v. City Council,[45] which, in addressing the Local Law 79, "reluctantly conclude[d] that to the extent that it applies to federal housing programs, Local Law 79 is preempted by federal housing laws."[46]

Whether Mother Zion and Real Estate Board (i) can be reconciled with Rosario and Kosoglyadov and (ii) foreshadows a viable challenge to Local Law 10 remains to be seen.

The Ideological Divide

For low income tenants and their advocates, the recent judicial decisions and the amendments to the New York City Human Rights Law are welcome developments that allow for greater freedom in the renting of apartments in New York City.

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[43] Id

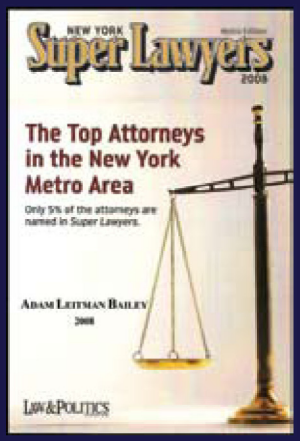
[44] Id

[45] 16 Misc.3d 530 (Sup. Ct., NY Co. 2007)

[46] 16 Misc.2d at 541

But for certain owners, who reject the notion that they be required to bear the societal burden or housing the less fortunate, this recent turn of events is highly disturbing. These owners believe that a tenant's impecuniousness should not wield a sword so mighty that they are forced to participate *in a voluntary program* against their wishes. Further, they believe that the judiciary and the City Council have no business dictating to whom they rent.

But, of course, as with most housing issues, the true state of events is dependent upon your point of view.



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