

**LETTER OF OBJECTION SENT TO HPD’S TAX INCENTIVE PROGRAM  
WITHIN THE 45 DAY APPLICATION REVIEW PERIOD  
ON THE MATTER OF HAP INVESTMENTS, LLC ELIGIBILITY  
FOR A 421-a PARTIAL TAX EXEMPTION**

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**Community Board 12, Manhattan  
530 West 166<sup>th</sup> Street – Sixth Floor  
New York, NY 10032**



George Fernandez Jr., Chair  
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## Community Board 12M

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May 9<sup>th</sup>, 2014

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HARD COPY TO FOLLOW

Ms Elaine R. Toribio

Tax Incentive Program Director

NYC Department of Housing, Preservation and Development

100 Gold Street

Room 3-Z1

New York NY 10038

Dear Ms.Toribio:

**RE: CB12, M Housing and Human Services Committee's Objections to the Eligibility of Applicant HAP Investors LLC d/b/a 167<sup>th</sup> Street Mazal, LLC for a Partial Tax Exemption (TIP #50298)**

To fulfill our legal obligation under the NYC Charter, Community Board 12, Manhattan (CB 12, M) bylaws, and the current 421-a Partial Tax Exemption Laws (421-a) as codified in the Rules of the City of New York Chapter 6 of Title 28 (Section 6.03) and the Public Officials Open Meetings Law (Article 7 100 -113) a public hearing was called with due and timely notice and held in our offices on May 1st, 2014. The purpose and scope of that hearing was to review documents, receive testimony and obtain answers so as to make a final determination on these findings and either approve or object to the preliminary certification of the 421a online application before us. The application submitted was processed by your Tax Incentive Program within the NYC Department of Housing, Preservation, and Development (HPD).

The jurisdiction and initial responsibility for conducting that public hearing was assigned to the board's Housing and Human Services Committee (HHS).

The applicant is HAP Investments LLC d/b/a 167<sup>th</sup> Street Mazal, LLC and the Application Number is 50298.

The property is located at 446-448 West 167th Street (B/L 2111/97, 99) on two lots that has been vacant for over three years and an application for mergers and appportionment has been submitted to the NYC Department of Finance (DOF).

**The committee makes the following findings and determinations and strongly objects to the applicant's eligibility unanimously.** It will present two resolutions on this matter to the full board that also has strong support from the public and the elected officials who attended.- The applicant failed to attend this public meeting and confirmed one day in advance that there would be no representation from his organization.

Findings and determination.

#### *A. Eligibility*

To make a determination on this applicant's eligibility the key question the HHS Committee had to answer first was:

*Can an 'as-of-right' developer purchase and use vintage and offsite negotiable certificates of eligibility {NCOE} under the current 421-a Partial Tax Exemption Program administered by HPD and DOF and not build affordable housing onsite?*

The HHS Committee performed an exhaustive search for information, critically reviewed the applicant's documents, conducted an extensive research on the 421-a Partial Tax Exemption Laws, weighed the implications of board's past resolutions on land use issues and considered the high need for building onsite affordable housing in our community. We were also challenged by the dilemma and inconsistencies inherent in the rules, procedures, standards, and their administration or the lack thereof in this law to make a correct determine on this eligibility.

Given those limitations and to the public's and the elected official's disappointment in our community district the answer to that key question is yes.

However, on parallel or subjacent legal grounds, if not a higher one based on the NYC Charter, the Open Meetings Law, post hoc analysis of a predetermined and defective application, community board policy on land use, the critical need for affordable housing in our district, and resolutions were approved at a public hearing that supported a position of objecting to the applicant's eligibility the answer to that key question is no.

It should be noted that the HHS Committee has no objections to any “as of right” developer’s willingness to build residential housing within the law, the uniform land use review process (ULURP) and within our community district. We have continuously made objections and resolutions to HPD on a developer’s request to use public benefits for luxury or fair market housing without the minimum community setbacks of 20:50 as established by law in exchange for building affordable housing units or higher ones established by board resolutions.

So with these differing eligibility outcomes above the HHS Committee was challenged to reconcile the answers to that key question and decided to review the history of the law and the effects on these negotiable certificates of eligibility on affordable housing.

*B. Effects of certificates of eligibility on affordable housing.*

The HHS Committees understanding and according to Rules of the City of New York Title 28, §6-01 (c) is that a Negotiable Certificate is a “document issued by the HPD which certifies” that the bearer is entitled to the benefits of the 421-a Partial Tax Exemption Law for a specified number of units within the geographic exclusion area, provided that “all program requirements have been met”.

The massive revision of the 2007 law (initiated by former Mayor Michael Bloomberg, HPD's Task Force, and the City Council to address many loopholes and inefficiencies) took effect as of December 28, 2007 and banned the issuance of any new negotiable certificates of eligibility, However, it did not ban the sale and the transfer of affordable housing credits for old/vintage ones. There have been several other modifications in the law that include The Rent Act of 2011, signed by the Governor Andrew Cuomo in June 24, 2011, an extension of the 421-a Program to June 15, 2015, and Chapter 4 of the Laws of 2013, signed by the Governor on January 30, 2013. All this tinkering have resulted in a more nexus of laws given investment or capital potential, sales, payment of loans, guarantees, leverages, bonds, flipping, and other fiduciary behavior that can occur in the real estate marketplace.

A classic example of how these negotiable certificates may be used is One57 that purchased some 795 NCOEs for millions of dollars for the luxury housing it built and the tax incentives it acquired as a savings for its investors or condos. In a letter to the Governor in 2013 several NYS legislative protested this excess and called for the legislation to be rescinded since no affordable housing units was ever going to be built or set asides.

HPD has also been a participant for better or worst in these real estate market activities as it controls these NCOE by sanctioning their use.

An examination of an independent auditors report from Raich Ende Malterl and Company, LLP for the Doe Fund, Inc clearly shows how “Bruckner by the Bridge HDC property was used to funnel the sale of these negotiable certificates by HPD and others. NOTE: NCOE were sold to HAP Investments, LLC and the applicant by The Doe Fund, LLC and HPD. The report states the following:

*“Atlantic Development Group, LLC shall develop, finance, and construct a residential apartment building on the property containing approximately 419 units of affordable housing, commercial space, and parking. The Doe Fund, Inc has agreed to participate in the development of the project. The financing will be provided by the New York City of Housing Deployment Corporation through its sale of tax exempt bonds, and the proceeds from the sale of low income tax credits, and 421-a Negotiable Certificates. ...”*

**further on the report states:**

*“Pursuant to the HPD Written Agreements, HPD issued master 421-a negotiable certificates to the Doe Fund, Inc. Atlantic Development Group, LLC, entered into contracts with developers to sell the Certificates and use the proceeds to retire debt occurred in connection with construction of this project. Atlantic Development Group has assigned to the Doe Fund, Inc the contracts to sell the certificates. The Doe Fund, Inc. shall sell the Certificates and loan the proceeds from the sale to the Bruckner By the Bridge, LLC. The loan is secured by a pledge of members’ membership interest in Bruckner By the Bridge, LLC. The proceeds from the sale of corticated are anticipated to be approximately \$33,200,000. The term of the loan is 40 years. The loan calls for interest of 0.5% per annum to accrue. And payable out of cash flow with all unaccrued interest paid on the maturity date...”*

**and still further on the report states:**

*“Sales of 421-a Certificates total in \$20,752,000 closed through December 2011 and additional sales of approximately \$3,285,500 are anticipated to close by February 2012....”*

This would bring a grand sales total of \$24,067,500.

An HPD Assistant HPD Commissioner involved in the Bruckner By the Bridge project approved the sale of Negotiable Certificates to this applicant now seeking approval to be eligible for a 421-a Partial Tax Exemption in our community district where no onsite affordable housing units will be built as a consequence. This transferee arrangement seems

like a case of robbing 'Peter to pay Paul' except that our district continues to get the short end of the stick or no piece of the stick at all.

So even if we found the current NCOE that HAP Investments , LLC/167th Street Mazal LLC , purchased for 39 units each invalid, via a potential conflict of interest claim they could satisfy any future 421a requirement by purchasing vintage NCOE's from another broker or investment group whose sale HPD would probably still approve.

It is estimated that there are still some 4,000 of these vintage, grandfathered, or post 2008 NCOE's in circulation. Unanswered is the question whether the same NCOE can be re-sold over and over again.

All these activities of approving the transfer of NCOE's as credit in effect from others who actually built affordable housing elsewhere has-been done without public participation in the preliminary awarding process of these certificates as required by NYS Open Meetings Law (Public Officials Law – Article 7 §100 to §113 or NYC Code - Article 7: Open Meetings Law).

The HHS Committee of Community Board 12, M is placed in the post hoc analysis position to reconcile a virtual *fait accompli* to this award of a preliminary certificate of eligibility that received a pass rating on an online application. HPD has further required acceptance of the applicant's approval by sanctioning and giving the applicant a negotiable certificate of eligibility through approval of a sale it had under its control and custody. As stated earlier by allowing the award of this NCOE the deck is stacked against the board where it is unable to make any objections as related to onsite building of affordable housing units in our community. This approval process given its predictable outcome violates the Rules of the City of New York Chapter 6 of Title 28 (Section 6.03) since it does not allow an impartial or fair review of an application when a community board conducts a public hearing.

In addition, the online application for a "Preliminary Certificate of Eligibility for a 421a Tax Exemption" itself is also defective. Not only can an applicant answer "N" or "N/A" for every question related to building affordable housing and get online approval as a "pass" rating, but also attaching a NCOE to the application makes little sense as it is an outright approval that the applicant satisfies the affordable housing component of the project. Consequently, aside from violating the open meeting laws HPD's action in this entire process is both arbitrary and capricious and any substantive evidence under review and submitted by them is questionable.

**Given the way HPD has set up the application process and the community board's legal responsibilities of holding a fair and open public hearing under the City Charter and the Open Meetings Law required by all NYC agencies the HHS is compelled to consider only if building "illusionary" affordable housing units or the paper transfer or sale of another developer's offsite housing's credits was equivalent or the same as building onsite affordable housing units in our community. The HHS Committee finds no specific language or expressed justification in the 421-a Partial Tax Exemption Law that such transfers are universally or materially equivalent or the same as building an affordable housing units onsite. As such this activities might be considered an overreach of authority.**

**The fact no new NCOEs are no longer issued further supports the committee's claim above. Unfortunately, the fact that old/vintage ones are still used or repurposed from borough to borough allows their circulation to have the same effect as if they were still new negotiables.**

**Lack of Affordable Housing in Washington Heights and Inwood.**

**It has been reported and substantiated in the most recent census that the lack of affordable housing options in Washington Heights and Inwood is driving residents out of the neighborhood. In fact, the number one ranking and priority in NYC's annual capital budget request by Community Board 12, M for in the past four years has been affordable housing.**

**While the Department of Housing and Preservation has preserved or built 129,221 affordable housing units across the city during his tenure, only 139 of the 43,922 new units and 1,363 of the 85,299 units preserved were in Washington Heights and Inwood.**

**This information and recommendations were communicated to HPD's former Commissioner in 2012 and supported in a white paper issued by the "Community United for True Affordable Housing", a coalition of Upper Manhattan elected officials, community leaders and developers.**

**At his rate former mayor's promise and goal to build and preserve 165,000 affordable units by 2014 and to focus more attention on Upper Manhattan will not be met. Consequently, HPD's sale of negotiable certificates of eligibility to any qualified developer with no option to build onsite affordable housing units here is not a positive direction towards that goal.**

**Given all these findings the HHS Committee of Community Board 12, determined that the applicant does not meet the eligibility standards to build affordable housing our community and reap the public benefits of a 421-a Partial Tax Exemptions that would only accrue to its investors and we find that the NCOE approved by HPD is an attempt to support the**

**applicant's determination not to build affordable housing in our community. It would not be in the public's best interest to support an online application that is patently defective and where relief could otherwise had been obtained if only the applicant had wish to appear in person at the public hearing and present testimony.**

#### **Additional Problems with the 421a Law**

**The HHS Committee's findings are one of the many problems with the 421a Tax law today. It was originally created as a quasi economic development and stimulus model established under the John Lindsay administration and later morphed by gimmicks into a law for building more affordable housing units. It has cost the taxpayers on our city over \$1 billion dollars in tax revenues according to several studies by the Independent Budget Office. As expressed in our public hearing members of the public and elected officials felt short changed since there is no direct public benefit to our community for the millions of dollars in tax revenue lost that could have otherwise be used here for onsite building of affordable housing.**

**A major issue of concern is what will happen now to the other HAP projects at West 187 Street and further up on the old Quadriad site they also purchased? Will they use the same mechanism there as well? Will other as of right developers now seize upon the opportunity to use NCOE's to build luxury housing on scare land in our community and erase the chance for building affordable units? Does the de Blasio administration's new ten year plan for 200,000 more affordable housing units spell the end of the need for 421a's or the continued sale of these corticated?**

#### **Objections, Requests, and Recommendations.**

**First, in a sworn affidavit HAP states that his company will be building affordable housing units onsite under penalty of law. Clearly, they are not as evidenced by their answers on affordable housing in the application and information on their website.**

**Next, under the 421-a law HPD is specifically given the authority for the promulgation of rules and procedures. It can call for a moratorium and review of these vintage certificates if no onsite affordable housing is being built from their award or transfer sale and if the transferee fails to meet the 20:50 set asides as a bare minimum. The problem in this case is that HPD itself sold HAP the NCOE as an administrator in the HDC units it built in the Bronx ("Bruckner by the Bridge") as explained earlier.**

**Third, there are no written or published rules and procedures on what are the clear and concise criteria and standards to be used for community boards to determine eligibility for preliminary certificates of eligibility, certificates of eligibility or negotiable certificates of**

eligibility. HPD is charged with writing and publishing those rules for all parties and has not done so. The HHS Committee would also like to know just how many of these vintage certificates are still in circulation or available for purchase and the bearers of these agreements? We would also like to know how many NCOE have been sold, transferred and or approved by HPD since 2007 to date and what is the entire revenue generated from these NCOE sales? Finally, the committee would like to know what is their borough wide and community district distribution?

Please be advised that our elected officials present at this meeting or their staff also objected to the applicant's eligibility and will formally follow-up with HPD on this matter.

Finally, if these NCOE's are used in a community where there is a clear need for affordable housing and where HPD for whatever reason has historically not built sufficient units then a Department of Justice investigation could be justified following a complaint any resident could submit as this situation could be viewed as a possible violation of the Fair Housing Act and HUD laws. Clearly, if the use of NCOE in inclusionary zones results in the building of more luxury housing and not one affordable housing unit then such an continuing action not only is illusory, but creates a pattern of discrimination to a class of individuals if carried out *ad nauseam*.

We will be sending you a more detailed brief based on all these findings and await any further discussion and decisions you may want to have on this matter as required by law. In the meantime, should you have any questions please contact the community board. Thank you for your attention in advance.

Sincerely,

*George Fernandez, Jr*

George Fernandez, Jr.

Chair, Community Board 12, M

*Richard Lewis*

Richard Lewis

Chair, Housing and Human Services Committee

cc: Honorable Bill De Blasio, Mayor  
Commissioner Vickie L. Been, HPD  
Honorable Gale A. Brewer, Manhattan Borough President  
Elected Officials and Agencies