SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

STELLA QUINATOA and ANA CABRERA, on behalf of themselves and others similarly situated,	:	
Plaintiffs,	:	
-against-	:	Index No. 151132/2018
HEWLETT ASSOCIATES, LP; KALED MANAGEMENT CORPORATION; CITY OF NEW YORK; MARIA TORRES SPRINGER; JACK JIHA,	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO CITY DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

For over four decades, the landlord of a residential apartment building in Queens has enjoyed substantial tax benefits under New York's 421-a and J-51 tax programs without discharging its obligations under either. Both programs are designed to incentivize the development and rehabilitation of affordable housing. They do so by granting the landlord significant tax breaks in exchange for compliance with various rent stabilization requirements. Beginning as early as 1984, the landlord has systematically flouted these requirements, overcharging the tenants of rent-regulated units to the tune of hundreds of thousands of dollars.

The landlord has succeeded in doing so for a simple reason: there has been no cop on the beat. As set forth in the Complaint, by failing to hold the landlord to the benefit of its bargain, the City of New York (the "City") has conferred substantial tax breaks on the landlord with no corresponding benefit, in violation of Section 51 of the New York General Municipal Law ("GML") and Article VIII, Section 1 of the New York Constitution (the "Gift Clause"). The City's motion to dismiss (the "Motion") tests whether this failure can continue without remedy.

The City has apparently sensed opportunity in the long-running nature of the landlord's noncompliance, asserting two time-based bases for dismissal. Specifically, the City argues (1) that the claim against the City is "moot" because the 421-a benefits enjoyed by the landlord allegedly expired in 1984; and (2) that the claim is time-barred because it is governed by the four-month statute of limitations for Article 78 proceedings challenging administrative determinations, and the certificate of eligibility for the landlord's J-51 benefits expired in 2006. Each theory is baseless. First, the Complaint does not seek to enjoin or recover the 421-a tax benefits received many decades ago by the landlord; the 421-a allegations are included to demonstrate the landlord's persistent disregard for New York's rent stabilization requirements and the City's flagrant,

decades-long failure to enforce them.[1] Second, the four-month statute of limitations governing Article 78 proceedings does not apply to Plaintiffs' claim against the City because such proceedings are designed for challenges to formal administrative determinations, not the kind of regulatory inaction alleged here; and in any event, Plaintiffs seek injunctive relief against City conduct that is occurring today, not an administrative determination that was made in 2006.

The City's contention that the Complaint fails to state a cause of action against the City fares no better. The City advances two basic challenges: (1) that Plaintiffs have failed to state a GML § 51 claim because they have not alleged fraud or corruption; and (2) that they also have failed to allege a Gift Clause violation because the J-51 program itself is intended to further a public purpose. These theories are equally meritless. As to the first, the case law is clear that an allegation of fraud or corruption is not necessary to a GML § 51 claim; allegations of "waste" premised on "illegal conduct" are also actionable, and courts have held that violations of the Gift Clause satisfy the illegality requirement. As to the second, Plaintiffs are not challenging the J-51 program *per se*, but rather the City's administration of it. And the law is clear that the provision of economic benefits to individuals in the absence of a statutory or contractual obligation to do so—an obligation that was unquestionably absent here given the landlord's persistent flouting of its rent stabilization obligations—is an impermissible gift under the New York Constitution.

In sum, there is no credible time-based challenge to Plaintiffs' Complaint, as the City's nonfeasance continues to this day. Nor is there a viable merits-based challenge given that the City has been transferring real money in the form of tax benefits to the landlord in the absence of any statutory or contractual obligation to do so. The Motion should accordingly be denied.

[1] The 421-a allegations are also relevant to the damages suffered by Plaintiffs, as the rent that should have been charged during the applicable time period is determined in part by reference to preexisting regulatory obligations.

FACTUAL BACKGROUND

The Trafalgar Apartments are located at 42-52 Union Street in Flushing, Queens. A residential apartment building, the Trafalgar Apartments were constructed in 1973 and contain 113 units. (¶ 36.) The Emergency Tenant Protection Act of 1974 ("ETPA"), Rent Stabilization Law ("RSL"), and Rent Stabilization Code ("RSC") (together, the "Rent Stabilization Laws") limit the rent that landlords can charge and require landlord to register rents annually. See N.Y.C. Admin. Code § 26-517(f).

The 421-a program, named by reference to Section 421-a of the New York Real Property Tax Law ("RPTL"), was established by the New York State Legislature in 1971. (¶ 25.) Buildings in a unit covered by the 421-a tax exemption are subject to rent stabilization for the entire period during which the property is receiving tax benefits. See RPTL § 421-a(2)(f). (¶ 27.) After the enactment of Section 489 of the RPTL in 1955, New York City adopted Section J51-2.5 (now Section 11-243) of the Administrative Code (the "J-51 program"). The J-51 program provides owners with real property tax exemption and abatement benefits to offset the cost of residential major capital improvements. (¶¶ 29-30.) As a condition of receiving benefits pursuant to the J-51 program, a building owner must provide its tenants with the protections of the Rent Stabilization Laws. *See* N.Y.C. Admin. Code §§ 11-244, 26-504(c).

For years, the Landlord Defendants[2] have received tax benefits in varying amounts through the 421-a and J-51 programs—benefits which are under the law intrinsically linked to the Landlord Defendants' obligation to maintain properly rent stabilized and regulated apartments. (¶¶ 38-39.) However, the Landlord Defendants have systematically violated their obligations under the Rent Stabilization Laws in connection with the Trafalgar Apartments, all while reaping substantial tax

[2] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Complaint.

benefits under the 421-a and J-51 programs. They have done so in at least three respects: (i) by failing to register the rents charged and collected at the Trafalgar Apartments; (ii) by failing to provide tenants at the Trafalgar Apartments with notice in their leases and/or lease renewals that their units were subject to the Rent Stabilization Laws; and (iii) by charging tenants at the Trafalgar Apartments rents well in excess of lawfully permitted rents. (¶ 40.)

DHCR records indicate that, as early as 1984, when the Trafalgar Apartments were subject to the 421-a program, the Landlord Defendants failed to register rents for at least some of the subject units. The Landlord Defendants' failure to register continued with respect to other units over a period of decades. (¶ 41.) Most recently, under the J-51 program, which has applied since the Landlord Defendants applied for J-51 benefits in 2008, all 113 units at the Trafalgar Apartments were and are required to be registered as rent stabilized. Since that time, the Landlord Defendants have failed to register in accordance with Rent Stabilization Laws nearly a hundred units at the Trafalgar Apartments. (¶ 42.) Nonetheless, the Landlord Defendants continue to enjoy the tax exemption to this day. (¶ 47.)

During the same time period, the Landlord Defendants have failed to provide tenants with legally required notice, whether in the initial leases or in subsequent lease renewals, that the Trafalgar Apartments are subject to the Rent Stabilization Laws and that any deregulation is not permitted to occur until the expiration of the last lease entered into during the applicable tax benefit period. (¶ 43.) As a result, the Landlord Defendants have received hundreds of thousands of dollars in rent income to which they were not lawfully entitled. (¶ 48.)

The Landlord Defendants have already admitted to their noncompliance. (¶ 49.) In an August 2017 letter sent to Plaintiffs and other tenants of the Trafalgar Apartments, the Landlord Defendants stated that the recipient's apartment was subject to rent stabilization, and admitted that

the recipient's rights as occupants of rent stabilized units "were not memorialized" in previous leases. (¶ 50.) The Landlord Defendants purported to offer compensation for the overcharge, but the amount offered did not accurately reflect the amount of the overcharge. (¶¶ 52-53.) Accordingly, the overcharge remains unremedied.

The Landlord Defendants' decades-long flouting of their obligations under the Rent Stabilization Laws—all while enjoying the tax benefits of the 421-a and J-51 programs—has been enabled by the City Defendants' continued failure to enforce the obligations imposed by those programs. (¶ 54.) At a hearing in 2017 for proposed legislation authorizing the New York City Department of Housing and Development ("HPD") to audit buildings receiving benefits under the 421-a program, HPD and New York City Department of Finance officials admitted to the existence of widespread non-compliance and detailed their efforts to reform their systems for oversight, including mailing revocation letters to landlords who were not in compliance. (¶¶ 56-57.) As a result of this systematic failure to enforce the Rent Stabilization Laws, the City Defendants have effectively conferred benefits on New York City landlords, including the Landlord Defendants, totaling tens of millions of dollars without receiving any corresponding benefit. (¶ 58.)

Plaintiffs are tenants of the Trafalgar Apartments. As relevant to this Motion,[3] they argue that, by conferring substantial economic benefits on the Landlord Defendants in the face of their noncompliance with the Rent Stabilization laws, the City has violated GML § 51 and the Gift Clause of the New York Constitution. (¶ 125.) Accordingly, on their own behalves and on behalf of a class of others similarly situated, Plaintiffs seek injunctive relief ordering the cessation of the illegal payment of J-51 benefits to the Landlord Defendants. (¶ 127.)

[3] A separate motion to dismiss has been filed by the Landlord Defendants. (Dkt. No. 19.) Plaintiffs' response to that motion to dismiss is due on July 16, 2018. (Dkt. No. 28.)

LEGAL ARGUMENT

I. THE STANDARDS GOVERNING THE CITY'S MOTION

On a motion to dismiss pursuant to CPLR § 3211, the pleading is "to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). Courts must "accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every favorable possible inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss must be denied. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002).

II. PLAINTIFFS' CLAIM AGAINST THE CITY DEFENDANTS IS NEITHER MOOT NOR TIME-BARRED.

The City asserts two time-based defenses to Plaintiffs' claim against the City: first, that the claim is "moot" as it relates to the 421-a tax program because the City ceased providing benefits under that program in or about 1984; and second, that the claim is subject to a four-month statute of limitations governing Article 78 proceedings and runs afoul of that statute of limitations because the Trafalgar Apartments' certificate of eligibility for the J-51 program was issued in 2006. Neither argument provides a basis for dismissal.

The City's "mootness" theory concerning the 421-a program is premised on a fundamental misreading of the Complaint. Plaintiffs do not seek to enjoin the City's provision of tax benefits to the Landlord Defendants under the 421-a program, which concededly ended decades ago. Rather, Count Four of the Complaint quite deliberately seeks cessation only of the J-51 benefits that are currently ongoing. (¶¶ 123-124.) The Complaint's allegations concerning the Landlord Defendants' non-compliance with the rent stabilization requirements imposed by the 421-a

program serve a different purpose: (1) to demonstrate the City's flagrant failure to enforce the Rent Stabilization Laws over the course of decades (which is relevant to the Gift Clause violation); and (2) to establish a predicate for damages, as the Landlord Defendants' liability for their systematic overcharging of the tenants of the Trafalgar Apartments is calculated in part on what rents should have been during the time period of the 421-a program. (¶¶ 40-48.) Because Plaintiffs neither seek to enjoin nor recover past tax benefits enjoyed by the Landlord Defendants pursuant to the 421-a program, the City's mootness challenge should be rejected.

The City's argument that the claim is time-barred by a four-month statute of limitations governing Article 78 proceedings is likewise baseless. As an initial matter, to the extent the Motion is claiming that this action should have been brought as an Article 78 proceeding,[4] that position is plainly incorrect. New York law specifically allows tenants to bring rent overcharge claims in state court and does not require a tenant to first seek relief from the Department of Housing and Community Renewal ("DHCR"). *See* N.Y. Comp. Codes R. & Reg. tit. 9. § 2506.1 ("Unless a tenant shall have filed a complaint of overcharge with the division which complaint has not been withdrawn, nothing contained in this section shall be deemed to prevent a tenant or tenants, claiming to have been overcharged, from commencing an action or interposing a counterclaim in a court of competent jurisdiction for damages equal to the overcharge and the penalty provided for in this section."). Indeed, New York courts regularly hear rent overcharge cases. *See, e.g.*, *Rockaway One Co. v. Wiggins*, 35 A.D.3d 36, 42 (2d Dep't 2006) ("Such decisions [on rent overcharge claims] are the normal business of the courts."); *see also Dugan v. London Terrace*

[4] The Motion is ambiguous in this regard. Although the City's position appears to be only that the statute of limitations governing Article 78 proceedings should apply to this state court action, it also suggests that the "proper procedure" for Plaintiffs' claim against the City is a "special proceeding pursuant to CPLR Article 78" (Mot. at 5), and cites authority for the proposition that "the proper procedure for challenging [a city agency's] failure to enforce the law is an Article 78 proceeding" (*id.* at 6).

Gardens, L.P., 34 Misc. 3d 1240(A) (Sup. Ct. 2011), *aff'd,* 101 A.D.3d 648 (1st Dep't 2012) (DHCR does not have exclusive jurisdiction over rent overcharge claims). Accordingly, there is no question that Plaintiffs brought this action in a proper forum.

To the extent the City's argument is that this action is ***akin to*** an Article 78 proceeding, and thus should be subject to the four-month statute of limitations governing such proceedings, that argument also fails because this action does not challenge an administrative determination. The purpose of an Article 78 proceeding is to challenge a "final and binding" determination made by the City. *See Habracha Assocs. v. Michetti,* 212 A.D.2d 709, 710 (2d Dep't 1995). For a determination to become "final and binding," the petitioner must receive "actual notice of the determination." *Id.*; *see also In re Adventist Home v. Bd. of Assessors of Livingston,* 83 N.Y.2d 878 (1994); *Biondo v. N.Y. Bd. Of Parole,* 60 N.Y.2d 832 (1983). Upon such notice, the petitioner is afforded four months to challenge the determination by means of an Article 78 proceeding. *See N.Y. Ass'n of Cntys. v. Axelrod*, 78 N.Y.2d 158 (1991).

Aware of this legal framework, the City seeks to frame Plaintiffs' claim under GML § 51 and the Gift Clause as an attack on an administrative determination made by the City—specifically, "HPD's determination to provide 421-a or J-51 benefits to the subject buildings, or its determination not to revoke such benefits." (Mot. at 6.) But this framing fundamentally misconstrues Plaintiffs' legal theory against the City. The Complaint does not allege that the Trafalgar Apartments were not initially eligible for the 421-a and/or J-51 tax programs; to the contrary, the Complaint specifically alleges that the Trafalgar Apartments ***were*** properly subject to those programs, and that the Landlord Defendants failed to comply with their obligations under them. Nor is there any allegation that the City somehow made an administrative determination not to revoke the benefits enjoyed by the Landlord Defendants pursuant to the 421-a and/or J-51

tax programs.[5] Far from being premised on some discrete administrative determination, Plaintiffs' claim against the City is based on its systematic failure over a period of decades to enforce the rent stabilization requirements governing the Trafalgar Apartments (and other rent-stabilized buildings), causing tens of millions of dollars in aggregate tax benefits to flow to non-compliant landlords with no corresponding benefit to the City. (¶¶ 54-58.)

The cases cited by the City only underscore the basic irrelevance of the Article 78 procedure and its attendant statute of limitations. (*See* Mot. at 5-6.) For instance, in *XYZ Two Way Radio Servs. v. City of New York*, No. 5693/2015, 2015 N.Y. Misc. LEXIS 3263 (Sup. Ct. 2015), plaintiffs sought to enforce an "administrative determination" by the New York Taxi and Limousine Commission to classify and treat taxi and Uber passengers differently. Plaintiffs did so by concurrently bringing an Article 78 proceeding for a mandamus and a state court action for a declaratory judgment. The court dismissed the state court action as duplicative of the Article 78 proceeding, which it found was an adequate means of compelling enforcement of the TLC's administrative determination. *Id.* at *5. Here, no such administrative determination is at issue.[6]

In any event, regardless of which statute of limitations applies, there is no timeliness issue here because the City's conduct challenged by Plaintiffs is ***ongoing to this day***. As alleged in the Complaint (¶¶ 40-48), the Landlord Defendants continue to receive tax benefits under the J-51 program without properly complying with their rent stabilization obligations. Indeed, the Landlord Defendants have ***admitted***, but failed to remedy, their non-compliance. (¶¶ 49-53.) Thus,

[5] To the extent any such determination was made, Plaintiffs have no knowledge of it and certainly did not receive any notice of it, as would be required for the determination to have become "final and binding" and thus trigger the statute of limitations governing Article 78 proceedings.

[6] The other cases cited by the City applying Article 78's four-month statute of limitations are equally off-point. *See Walton v. N.Y. Dept. of Corr. Servs.*, 8 N.Y.3d 186 (2007) (challenge to New York State Public Service Commission's administrative determination concerning treatment of prisoners' collect calls); *Riverview Dev. LLC v. City of Oswego*, 125 A.D.3d 1417 (4th Dep't 2015) (challenge to city council resolution authorizing governor to sell city-owned parking garage).

Plaintiffs seek "injunctive relief ordering the cessation of the entirely illegal payment of benefits [by the City] to the Landlord Defendants." (¶ 127.) The City's statute of limitations defense should accordingly be rejected. *See Capruso v. Village of Kings Point*, 23 N.Y.3d 631, 639 (2014) (in action to enjoin municipality's improper use of public park, ongoing use was continuous wrong and each daily offense constituted separate act for purposes of limitations period).

III. THE COMPLAINT STATES A CAUSE OF ACTION UNDER GENERAL MUNICIPAL LAW § 51.

The City argues that the Complaint fails to state a cause of action under GML § 51 because it lacks allegations of fraud or corruption by the City. But GML § 51 is not construed so narrowly. New York courts have held that violations of the Gift Clause—which are adequately pleaded here, as explained *infra*—are sufficient to satisfy the "illegality" element of a GML § 51 claim.

GML § 51 provides, in relevant part, that a taxpayer may maintain an action against "[a]ll officers, agents, commissioners and other persons…to prevent ***any illegal official act*** on their part of any such officers…or to ***prevent waste*** or injury to, or to restore and make good, any property, funds or estate of such county, town, village, or municipal corporation…" GML § 51 (emphasis added). Plaintiffs' claim against the City satisfies GML § 51 in two respects.

First, a violation of the Gift Clause constitutes an "illegal act" within the meaning of GML § 51. *See Landmark West! v. City of New York*, 9 Misc. 3d 563 (Sup. Ct. 2005) (Gift Clause violation may constitute predicate for GML § 51 claim); *see also Schulz v. Warren County Bd. of Sups.*, 179 A.D.2d 118, 121 n.2 (3d Dep't 1992) ("Petitioners' allegations that the subject contract violated the gift and loan clause of the State Constitution (N.Y. Const., art. VIII, § 1), County Law § 224 and/or the competitive bidding requirements of General Municipal Law § 103 clearly satisfy the illegal act requirement."). Second, the Complaint adequately alleges waste of public funds by the City—an independent and alternative basis for a GML § 51 claim. *See Schulz*, 179 A.D.2d at

121 ("[I]f a violation of the constitutional provision or the asserted portions of County Law § 224 is established, the effect would be an expenditure of public moneys for which no corresponding benefit is received, which likewise would constitute waste."). The City argues that a waste claim lies under GML § 51 only if the funds are expended for an "illegal purpose" (Mot. at 7), but there could be no more illegal purpose than one that is, as here, forbidden by the New York Constitution.

The cases cited by the City (Mot. at 7) are inapposite because they involve "technical or procedural irregularities," *Fisher v. Biderman*, 154 A.D.2d 155, 159 (1st Dep't 1990), not the kind of sustained constitutional breach alleged here.[7] Because the Complaint plausibly alleges an illegal act and waste within the meaning of GML § 51, it has stated a claim under that statute.

IV. THE COMPLAINT PLAUSIBLY ALLEGES A GIFT CLAUSE VIOLATION.

The City argues that the Complaint fails to state a cause of action under the Gift Clause because the J-51 program itself is designed to "serve a public purpose." (Mot. at 9.) Here, too, the City's argument misconstrues the nature of Plaintiffs' challenge. Plaintiffs are not mounting a facial attack on the constitutionality of the J-51 or 421-a programs, but rather alleging that the City's ***administration*** of those programs has conferred an impermissible gift on the Landlord Defendants. Those allegations plainly satisfy the requisites of a Gift Clause violation.

The Gift Clause prohibits the expenditure of "public funds . . . to individuals" in the absence of a "legal obligation on the part of the municipality, either statutory or contractual," to expend such funds. N.Y. Const. art. VIII, § 1; *see also In re Serafin M.*, 17 A.D.3d 596, 597 (2d Dep't

[7] For instance, in *Mesivta of Forest Hills Institute, Inc. v. City of New York*, 58 N.Y.2d 1014 (1983), the court dismissed a GML § 51 claim that sought to compel compliance with a statutory requirement under the Education Law—a far cry from the situation here, in which the City continues to dispense tax benefits to the Landlord Defendants in the absence of any statutory or contractual obligation to do so. *Betters v. Knabel*, 288 A.D.2d 872 (4th Dep't 2001), and *Gaynor v. Rockefeller*, 15 N.Y.2d 120 (1965), both involved nothing more than challenges to certain government contracts, without alleging any waste of municipal assets or other injury to the public. As for *Council of New York v. Giuliani*, 5 A.D.3d 330 (1st Dep't 2004), the court there held only that GML § 51 is "not a vehicle for correcting purely procedural irregularities by governmental bodies"—again, a far cry from the constitutional magnitude of the conduct at issue here.

2005) (City's payment of use and occupancy sum to landlord violated the Gift Clause due to the lack of a statutory or contractual obligation to make the payment); *In re Stephen B.*, 17 A.D.3d 584, 585, (2d Dep't 2005) (same). Therefore, before a city "shall give or loan any money or property to or in aid of any private corporation . . . [it] must have either a legal or an equitable obligation to pay public funds." *1963 Elmwood Ave., Inc. v. Tanzella*, 193 A.D.2d 1110, 1110 (4th Dep't 1993).

Under the circumstances alleged in the Complaint, which are assumed to be true for purposes of the Motion, the City had no such obligation. The J-51 and 421-a programs are premised on a quid pro quo: ***if*** the landlord of a building eligible for J-51 or 421-a benefits complies with the attendant rent stabilization requirements, ***then*** it will receive the tax exemption. *See Roberts v. Tishman Speyer Props., L.P.*, 62 A.D.3d 71, 75 (1st Dep't 2009) ("[T]he benefits of the J-51 program are limited to the owners of buildings that are subject to rent stabilization [or] rent control."), *aff'd*, 13 N.Y.3d 270 (2009); *N.-Driggs Holdings, LLC v. Burstiner*, 44 Misc. 3d 318, 325 (Civ. Ct. 2014) ("***In return for the [J-51] tax exemption***, landlords are required to submit the units for which they receive the exemption to the RSL for the duration of the tax-benefit period, even if the building would otherwise be exempt from rent regulation.") (emphasis added). That quid pro quo is at the center of the regulatory scheme. *See* Cadet-Osse, 21 McKinney's Cons. Laws of N.Y., Real Property Tax Law § 4:23 ("The J-51 program had been instituted to improve rental housing in New York City and to make that housing more affordable by allowing the benefits of city tax forgiveness to be passed through to tenants in the form of lower rents.").

As alleged in detail in the Complaint, beginning at least as early as 1984, the Landlord Defendants have systematically flouted those rent stabilization requirements at the Trafalgar Apartments, failing to register the rents of the building; neglecting to provide notice of the

building's rent-stabilized status and even misleading tenants as to that status when asked; and overcharging the tenants of the rent-regulated units by hundreds of thousands of dollars. (¶¶ 40-47.) Indeed, the Landlord Defendants have ***admitted*** their noncompliance. (¶ 50.) There was no basis, much less any statutory obligation, for the City to continue to provide tax benefits to the Landlord Defendants in the face of that noncompliance, and yet those benefits have continued unabated to this day. These allegations plainly state a Gift Clause violation. *See In re Serafin M.*, 17 A.D.3d 596, 597 (2d Dep't 2005); *1963 Elmwood Ave., Inc. v. Tanzella*, 193 A.D.2d at 1110.

County of Oneida v. Estate of Kennedy, 189 Misc. 2d 689 (Sup. Ct. 2001), is instructive. There, the question presented was whether the City's assumption of the costs of demolition of property taken for nonpayment of real estate taxes violated the Gift Clause. The defendant argued that the City was liable for such costs based on a contractual provision which "conditionally provided that the City ***may*** seek reimbursement for any demolition performed." *Id.* at 699 (emphasis added). The court held that that provision violated the New York Constitution, ruling that the Gift Clause "mandates such a charge." *Id.* The court further observed that, where the City incurred costs absent an existing obligation, it "must make all reasonable efforts to be compensated" for those costs, and that "[t]o do any less would fly directly in the face of the State Constitution." *Id.* at 700. In so holding, the court rejected the defendant's argument that "the City's past practice of assuming the cost of demolition" meant that "the City was obligated to demolish, at its own expense, the [defendant's] structure." *Id*. at 698. Thus, *County of Oneida* makes clear that the touchstone of a Gift Clause violation is the existence (or lack thereof) of a statutory or contractual obligation to provide the benefit in question to an individual.

By contrast with *County of Oneida*, the cases relied upon by the City are entirely off-base. (*See* Mot. at 9.) For instance, although the court in *Landmark West!* observed that "[p]rojects

receiving public funding that serve a public purpose" do not violate the Gift Clause merely because "the funding provides an incidental benefit to a private individual," Plaintiffs do not argue to the contrary.[8] 9 Misc. 3d at 569. As noted above (at 12), Plaintiffs do not challenge the J-51 or 421-a programs themselves, nor do they take issue with the fact that those programs involve the provision of tax incentives to private landlords and real estate developers. The issue is not the tax breaks themselves, but the provision of those tax breaks in the face of the Landlord Defendants' (and other landlords') extensive noncompliance with those programs' rent stabilization requirements—noncompliance which eliminates any statutory obligation to confer those tax breaks. The other cases relied upon by the City focus on challenges to government acts where the benefit to the individual was merely "incidental,"[9] as contrasted with the challenge here—that the City's administration of the J-51 and 421-a programs violates the Gift Clause by providing the Landlord Defendants without receiving any corresponding benefit.[10]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order denying the Motion.

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[8] Moreover, as noted above (at 14), the *Landmark West!* decision supports ***Plaintiffs'*** position, as the court there concluded that the complaint adequately alleged a Gift Clause violation and that those allegations constituted adequate pleading of an "illegal act" under GML § 51. *See Landmark West!*, 9 Misc. 3d at 575.

[9] *See Lavin v. Klein*, 12 A.D.3d 244, 244-45 (1st Dep't 2004) (provision of insurance for school transportation providers furthered public purpose of obtaining school transportation; any private benefit was "incidental" to that purpose); *Tribeca Cmty. Ass'n v. N.Y. Urban Dev. Corp.*, 200 A.D.2d 536, 536-37 (1st Dep't 1994) (same); *In re of Civil Serv. Emps. Ass'n, Inc. v. Port Washington Union Free Sch. Dist.*, 835 N.Y.S.2d 856 (Sup. Ct. 2007) (assigning janitors to clear garbage left by students from private property immediately adjacent to school did not rise to level of unconstitutional gift despite private benefit).

[10] In the alternative, even if there were an obligation to continue to provide the J-51 tax benefits (there is not), to survive a Gift Clause challenge, the expenditure of funds must serve a public purpose. *See, e.g.*, *Schulz*, 179 A.D.2d at 121 (3d Dep't 1992) (searching for a public purpose and contractual obligation for the challenged payments). As set forth in the Complaint (*e.g.* ¶ 124), when the Landlord Defendants ceased to comply with their rent stabilization obligations, the primary public purpose of providing the tax benefits under the J-51 program—the development and rehabilitation of ***affordable*** housing—disappeared. Thus, for this independent reason, the Complaint states a cause of action under the Gift Clause.

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