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Re: Ex Parte Closing Orders in Nuisance Abatement Proceedings

Dear Counsel,

Thank you for your letter of April 2, 2015 in which you outline concerns surrounding the City's commencement of Nuisance Abatement Proceedings pursuant to New York City Administrative Code Section 7-701, et. seq. and, in particular, the City's applications for *ex parte* closing orders. Please know that the City shares your goal of ensuring that the nuisance abatement process is conducted in a way that stops the use of property in violation of law and addresses quality of life issues, while at the same time protecting innocent tenants who did not condone, and may not even have been aware of, the illegal activity taking place around them.

To that end, I have discussed the issues you raised with the New York City Police Department's Civil Enforcement Unit. It is significant that relief under the Nuisance Abatement Law, including the issuance of a temporary closing order, is not granted until a Supreme Court judge has reviewed the motion papers and the evidence and is satisfied that there is clear and convincing evidence that a nuisance exists. Further, it is the Police Department's practice not to enforce temporary closing orders against uninvolved parties, children, the elderly or infirm. Instead, such persons are permitted to remain housed within the residence. In these situations the

assigned attorneys subsequently inform the judges who have issued the closing orders that individuals were not removed from the residence.

With respect to the use of "Jane Doe" and "John Doe" in the captions of Nuisance Abatement actions, I am advised that this practice was initiated over 10 years ago after civil liberties organizations voiced concerns about the inclusion of tenants' names in these captions. This practice is not meant in any way to hide information or mislead the court, but rather to protect the reputation of tenants who are uninvolved in the criminal activity by not having their names linked to a proceeding designed to eradicate criminal activity.

In an effort to avoid redundant proceedings, the Police Department will make an effort to design a mechanism to obtain from NYCHA a list of all of their pending eviction cases, which will then be cross-referenced against potential Nuisance Abatement cases. In situations where this cross-referencing reveals that NYCHA has commenced an eviction proceeding and that proceeding has resulted in either an eviction or an agreement by the tenant not to allow the offender back into the apartment, the Police Department will not commence a Nuisance Abatement Proceeding. Unfortunately, because NYCHA eviction proceedings do not provide a mechanism for injunctive relief and typically take a significant amount of time to conclude, it is likely that the Police Department will continue to commence Nuisance Abatement cases and seek temporary closing orders in order to protect the community from ongoing criminal activity. In addition, while case load and staffing constraints make it difficult to process Nuisance Abatement cases as quickly as would be ideal, the Police Department is making efforts to improve its information technology in order to expedite case processing. Indeed, I am advised that the timing of the case mentioned in your letter is not typical and was delayed due to other events taking place in the City prior to its filing.

Thank you again for taking the time to bring your concerns to our attention.

Sincerely,

Zachary W. Carter

ZWC:ay

April 2, 2015

Mr. Zachary W. Carter
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

RE: Ex Parte Closing Orders in Article 7 Proceedings

Dear Mr. Carter:

We are writing to address concerns our offices have had for some time concerning the City's use of Temporary Restraining Orders in "public nuisance" proceedings brought by the NYPD's legal department pursuant to Article 7 of the NYC Administrative Code. We believe the NYPD's actions, which result in the eviction of vulnerable tenants without prior due process, raise serious constitutional issues that we hope the new Administration will address.

As you may be aware, Article 7 authorizes the City to commence "public nuisance" cases in Supreme Court, seeking orders sealing residential premises based on alleged histories of illegal activity. Originally used primarily to close illegal commercial establishments, such as gambling houses or movie theaters that were centers for AIDS transmission, these actions are now used by the City hundreds of times each year to evict occupants of residential apartments. Unlike proceedings commenced under the Bawdy House Law (RPAPL 715), in Article 7 actions the City can obtain *ex parte* sealing orders that evict the tenant and her family *before* the tenant can have any hearing in court whatsoever.

We have reviewed Article 7 filings involving residential premises in Brooklyn and other boroughs over a number of years, and have found that that the City routinely applies for and obtains *ex parte* closure orders in the majority of cases. Disturbingly, in virtually all of these actions, the offenses underlying the complaint occurred many months prior to the application for the TRO, but the City's papers misleadingly allege the existence of a continuing nuisance even though no subsequent criminal incidents have occurred. The City therefore sets forth no facts that would justify an immediate *ex parte* closure in advance of a hearing that is required to be scheduled within three days. Even more disturbingly, many of the tenants subject to these proceedings whom we have encountered have been elderly, disabled, or parents of minor children, and often are not the individuals subject to criminal proceedings related to the civil actions. In addition, although the City usually possesses information concerning the identities of the apartment occupants, it does not provide any of this information to the court, and names the occupants only as "John Doe." As a result, the courts routinely issue *ex parte* eviction orders against individuals of whose vulnerabilities they are unaware.

While we can agree that illegal businesses should be shut down for the benefit of the community, we are concerned that the harm caused by the City's indiscriminate and improper use of Article 7's *ex parte* procedures outweighs any possible benefit to the public. It should be only in the rarest cases that the City seeks an eviction prior to the return date of an Order to Show Cause.

The inappropriateness of the City's practice is underscored by the availability of alternate remedies that afford the tenants full due process, including Bawdy House proceedings commenced either by the landlord or the District Attorney, which require pre-eviction hearings in Housing Court, or administrative hearings in public housing projects

A very recent case illustrates the pernicious effects of the City's current use of Article 7. Our client was a 47-year-old resident of a public housing apartment in Queens, who had never been arrested and survived on SSI disability benefits. A search in March 2014 found marijuana and drug paraphernalia. Our client's twin sons were arrested and the same day pled to Disorderly Conduct violations, which were resolved through ACDs. NYCHA commenced a termination of tenancy proceeding against the mother on grounds of non-desirability in June 2014, and a due process hearing was recently concluded in that case.

Yet despite the pendency of NYCHA's proceeding, on February 26, 2015, the tenant was served with an Order to Show Cause, signed by Judge Kitzes of Queens County Supreme Court, which directed the immediate closing of her apartment pursuant to Article 7. The Order to Show Cause was filed by Corporation Counsel one day before the one-year Statute of Limitations expired, and the supporting affirmation misleadingly alleged that there was ongoing nuisance activity even though there has been no criminal activity and no other arrests since March 2014. Although the police elected not to enforce the closing order, our client was placed in fear of immediate eviction, which Corporation Counsel sought to exploit by demanding unconscionable settlement terms – a perpetual probation under which any violation *alleged* by the City at any time in the future would result in immediate eviction with no due process whatever.

In other cases where the City has enforced the closing order, our clients have fared even worse. In one case handled by our Queens office, the tenant had successfully resolved a NYCHA tenancy termination hearing, only to find herself evicted without prior notice pursuant to Article 7. It is entirely unclear why the NYPD legal staff would seek to commence such duplicative proceedings in buildings already covered by NYCHA's own anti-crime procedures. Similarly, in a Brooklyn case, the City obtained an *ex parte* sealing order against a disabled NYCHA tenant while he was incarcerated on minor charges – without even attempting to serve him in the City's own facility at Rikers Island. Upon his release from jail, he found himself locked out of his apartment, and would have been rendered permanently homeless if not for the assistance of our office.

Although some cases may present truly imminent dangers to the public, we urge your office to examine more carefully whether *ex parte* relief is essential in a particular case. Court Rule 202.8(f) requires applicants for *ex parte* relief to show why notice to the affected party will cause "significant prejudice." We believe that in many Article 7 cases, the letter and purpose of this rule are not being followed.

We also urge you to reconsider the unnecessary use of Article 7 proceedings that duplicate proceedings filed in Housing Court or in an administrative forum.

Thank you for your consideration of these important issues. We would be happy to meet with you or your staff to discuss them further.

Sincerely,

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