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# Illegal Lofts in New York City: Have the Equities Been Balanced

## **Cover Page Footnote**

Columbia University School of Law, J.D., 1983; Associated with the law firm of Kramer, Levin, Nessen, Kamin & Frankel, New York, N.Y

# ILLEGAL LOFTS IN NEW YORK CITY: HAVE THE EQUITIES BEEN BALANCED?

Jay Facciolo\*

## I. Introduction

In New York City today, tens of thousands of people,<sup>1</sup> primarily tenants, are illegally<sup>2</sup> occupying lofts.<sup>3</sup> These tenants have signed commercial leases,<sup>4</sup> often long-term leases at rents far below the current market rate. The changing economics of loft buildings<sup>5</sup> has led to serious conflicts between landlords and tenants. Landlords have sought to evict tenants before their leases expire,<sup>6</sup> refused to renew their leases<sup>7</sup> or demanded higher rental rates upon renewal.<sup>8</sup> Tenants have withheld rent for extended periods.<sup>9</sup> These conflicts have been taken to the courts,<sup>10</sup> and legislation recently enacted in New York State attempts to resolve these issues for at least some tenants and landlords.<sup>11</sup> At the same time, New York City has been concerned about this tenant-landlord conflict, as well as the overall impact on the city's economy of both legal and illegal conversions of loft buildings from manufacturing or commercial to residential use.<sup>12</sup> The city has taken an active role in seeking statutory solutions to these problems, but it is yet unclear whether the city's efforts have been successful.<sup>13</sup>

### A. The Loft Building

A "loft" building is a multi-story nonresidential building, usually with more than one tenant.<sup>14</sup> In Manhattan, loft buildings were built

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1. See *infra* note 65.

2. See *infra* notes 61, 62 and accompanying text.

3. See *infra* notes 14-25 and accompanying text.

4. See *infra* notes 156-58 and accompanying text.

5. See *infra* notes 58, 59 and accompanying text.

6. See, e.g., *infra* notes 211-23 and accompanying text.

7. See, e.g., *infra* note 290.

8. *Id.*

9. See, e.g., *infra* notes 191-205 and accompanying text.

10. See *infra* notes 149-329 and accompanying text.

11. See *infra* notes 366-420 and accompanying text.

12. See *infra* note 39 and accompanying text.

13. See *infra* note 427 and accompanying text.

14. L. Kahn, *The Loft Building in the Central Business District of Manhattan*

in three waves: 1870 through 1900, 1900 through World War I, and 1920 through 1931.<sup>15</sup> In 1934, a real property inventory showed that 39.3% of all rentable loft building floor space existing at that time had been constructed prior to 1895.<sup>16</sup> By 1957, the percentage of pre-1895 loft buildings had dwindled to 2.9%<sup>17</sup> due to demolition of older loft buildings.<sup>18</sup> These pre-1895 lofts were built south of 14th Street, concentrating in areas near Broadway, Canal Street, and the Hudson and East Rivers.<sup>19</sup> After 1900, industry, led by the apparel manufacturers, began to spread north of 14th Street.<sup>20</sup> In Manhattan, 32.8% of the loft space in 1934 had been constructed between 1895 and 1914.<sup>21</sup> Loft construction then slowed down until the 1920's, at which time a final burst of loft construction occurred, almost all of which was north of 14th Street.<sup>22</sup>

The changes in the structural characteristics of loft buildings coincided approximately with the three waves of their construction. The typical pre-1895 loft building is "five stories high, situated on a lot 25' x 100,' with the building covering 90 percent of the land."<sup>23</sup>

1-6 (June 1963) (Pratt Institute planning thesis) [hereinafter cited as Kahn]. A loft building has few or no interior bearing walls. "As such, it is basically a hollow structural shell with reinforced floors and a maximum of rentable floor space. It is not unusual, particularly on the upper floors, to have an entire floor with no partitions at all, except possibly for a small office." *Id.* at 51. The term "loft" is commonly used to refer both to the individual floors in such a building and to the entire building itself. Where a distinction is necessary, this article will use "loft living unit" to refer to a single floor or part of a floor converted to a residence and "loft building" to refer to an entire building.

15. *Id.* at 12-27.

16. *Id.* at 34.

17. *Id.* at 32.

18. *Id.* at 33.

19. *Id.* at 16, 28-30.

20. *Id.* at 22-25. Other industries have moved at other times. The textile wholesalers established themselves in the late 1800's in the Worth Street area. I. Wagner, A Policy Approach for Loft Living in Lower Manhattan 40-42 (October 1975) (the Graduate School of Architecture and Planning, Columbia University, M.S. thesis) [hereinafter cited as Wagner]. In the 1950's, the vast majority of these firms relocated to mid-Manhattan. *Id.* at 47.

21. Kahn, *supra* note 14, at 34. This had increased to 40.8% by 1957. *Id.* at 32. Clearly, the pre-1895 buildings suffered the most demolition. *Id.* at 33.

22. *Id.* at 35. As of 1934, 20.6% of floor area had been constructed during the 1920's. *Id.* at 34. This grew to 40% by 1957. *Id.* at 32.

23. C. RAPKIN, SOUTH HOUSTON INDUSTRIAL AREA 144 (1963) [hereinafter cited as RAPKIN]. These older loft buildings

are of ordinary wood-joist construction, with the floors of rough wood or cement . . . [and] are carried by brick-bearing walls. Where the span between the walls is too big, the floors are supported in the center by cast-iron columns, wedged between floor and ceiling, and not actually an integral part of the structure.

Kahn, *supra* note 14, at 51; see also RAPKIN, *supra*, at 145-47.

During the second phase, which occurred after 1895, the supporting cast-iron columns used in larger loft buildings were made more uniform in thickness and thereby became safer.<sup>24</sup> Finally, the third phase, which occurred prior to World War I, saw the appearance of a more modern form of loft, built on a steel frame with an enclosed stairway and concrete floors.<sup>25</sup>

## B. History of Loft Conversions<sup>26</sup>

In the late 1950's and early 1960's, artists began to move into smaller loft buildings<sup>27</sup> that manufacturers were beginning to vacate.<sup>28</sup>

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24. RAPKIN, *supra* note 23, at 145. Before 1895, the foundry process produced hollow columns of uneven thickness which often resulted in insufficient thickness at some points on the columns. *Id.* This lack of uniformity can be particularly dangerous in fires. *Id.*

25. Kahn, *supra* note 14, at 51; RAPKIN, *supra* note 23, at 145.

26. A conversion occurs when a loft building or loft floor once used for commercial and/or industrial purposes is remodeled or "converted" to accommodate a resident. The usual lack of any interior walls in a loft, *see* Kahn *supra* note 14, makes for easy conversions and unusual space arrangements. *Id.* at 52. At the minimum, a conversion involves installing a full bathroom and a kitchen; at a maximum, a loft floor may be converted into luxury housing. *See* S. ZUKIN, LOFT LIVING: CULTURE AND CAPITAL IN URBAN CHANGE 61-62 (1982) [hereinafter cited as ZUKIN].

27. D. Diether, SoHo and NoHo Background 1 (Nov. 1975) (memorandum from the Zoning Chairman, Manhattan Borough President's Community Board No. 2) [hereinafter cited as Diether]. Artists began to move from Greenwich Village as they started doing artwork on a larger scale and as rents began to rise. *Id.* Artists first moved into SoHo (the area on the west central side of Manhattan and south of Houston Street) and into NoHo (the area in the center of Manhattan and north of Houston Street). *Id.*; Kahn, *supra* note 14, at 72 (noting that artists had moved into loft buildings around the Bowery, from Houston to 8th Street). As rents in SoHo increased, artists began to move into loft buildings in Tribeca (the triangle below Canal Street on the west side of Manhattan). Wagner, *supra* note 20, at 11.

28. Diether, *supra* note 27, at 1. As industries became more mechanized, the small floors of many loft buildings did not give manufacturers a large enough contiguous area to carry out efficient manufacturing. *Id.*; *see also* K. FORD, HOUSING POLICY AND THE URBAN MIDDLE CLASS 3 (1978) (estimating that any building with an area per floor of under 7,500 square feet is unlikely to attract a new business) [hereinafter cited as FORD]; RAPKIN, *supra* note 23, at 64-79; J. Bailinson, Regulating Loft Conversion in New York City: Better Late than Never 12 (Spring 1981) (Princeton University senior thesis) [hereinafter cited as Bailinson]. By 1977, larger buildings were also being converted. DEPARTMENT OF CITY PLANNING, CITY OF NEW YORK, RESIDENTIAL RE-USE OF NON-RESIDENTIAL BUILDINGS IN MANHATTAN 33-34 (1978) [hereinafter cited as RESIDENTIAL RE-USE].

Rapkin's discussion of the problems of operating in multi-story buildings is particularly illuminating. *See* RAPKIN, *supra* note 23, at 64-79. Vertical buildings were constructed initially because powered elevators were in use before horizontal conveyors or powered industrial trucks. *Id.* at 68. Horizontal movement had to

Not only were these manufacturers beginning to move out of smaller loft buildings, they were also beginning to move out of Manhattan,<sup>29</sup> primarily in search of larger, single-floor facilities.<sup>30</sup>

Shortly thereafter, non-artists also<sup>31</sup> began moving into loft buildings. They were in search of lower rents for larger spaces<sup>32</sup> in a

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be done by the comparatively slow means of hand trucks and hand carrying. *Id.* In addition, the machines used in light manufacturing needed a central source of power until electric motors were reduced in size. *Id.* at 69. Multi-story operations today create problems with the layout of individual departments, *id.* at 69-71, and with managing and supervising operations. *Id.* at 78.

29. Bailinson, *supra* note 28, at 11, 41.

30. *Id.* at 40-41. The areas of Manhattan with the smallest buildings also have the greatest number of conversions. RESIDENTIAL RE-USE, *supra* note 28, at 7; REAL ESTATE BOARD OF NEW YORK, INC., RESIDENTIAL USE OF MANHATTAN LOFT BUILDINGS: ANALYSIS AND RECOMMENDATIONS 14 (1975) [hereinafter cited as RESIDENTIAL USE]; Wagner, *supra* note 20, at 13.

31. In 1977, one study found that slightly more than one half of illegal loft tenants were not artists. FORD, *supra* note 28, at 25. Other estimates indicate that in the late 1970's twenty-five to thirty percent of loft residents in SoHo were not artists. VOLUNTEER LAWYERS FOR THE ARTS, SPECIAL SPACE: A GUIDE TO ARTISTS' HOUSING AND LOFT LIVING 92 (1981) [hereinafter cited as SPECIAL SPACE]. It is estimated that twenty-five to fifty percent of the loft occupants in SoHo are not artists. Bailinson, *supra* note 28, at 40.

The pace of the movement in the mid-1970's was measured in two areas of Manhattan—Tribeca and Midtown South (Manhattan between 14th and 34th Streets and 5th and 8th Avenues). RESIDENTIAL USE, *supra* note 30, at 14 (Midtown South); Wagner, *supra* note 20, at 12 (Tribeca). Surveys of both areas used reverse telephone directories, in which listings are by addresses rather than surnames, to find telephones listed to loft building addresses. *Id.* Telephone numbers that were obviously used for business were excluded, but the surveys' estimates are probably conservative since not all loft residents would have a listed phone. RESIDENTIAL USE, *supra* note 30, at 14 (Midtown South); Wagner, *supra* note 20, at 12 (Tribeca). The Tribeca study found that in August 1972 there were, in the sample area, 46 loft buildings (27% of the total number of buildings) that had 198 tenants, 99 of whom were residents. *Id.* at 13. By June 1975, 65 loft buildings had residents, and 173 out of 231 telephones (75%) were registered to residents. *Id.* The Midtown South area showed a similar increase. RESIDENTIAL USE, *supra* note 30, at 14. In August 1972, 115 buildings had residents and there were 267 residential telephone listings, which accounted for 32% of all area listings. *Id.* By June 1975, 151 buildings (19% of all loft buildings) had residents, and 495 out of 996 listings (49%) were for residents. *Id.*

32. In 1977 a typical newly converted apartment had 610 square feet and rented for \$393 per month. FORD, *supra* note 28, at 6. A typical illegal loft had 2,343 square feet and rented for \$390 per month. *Id.* at 7; see ZUKIN, *supra* note 26, at 142 ("living lofts were still a bargain by middle-class standards until 1971"). The illegal loft tenant had to invest an average of \$5,248 in improvements to make the loft livable, which was not necessary for residents of converted apartments. FORD, *supra* note 28, at 6, 7. But over a five-year lease, such improvements would cost only \$104 a month. The typical illegal loft dweller, who might well have had a five-year lease, see *infra* note 156 and accompanying text, thus paid 26% more in rent for 384% more space.

tight housing market<sup>33</sup> and sought the glamour of living in the same style as artists and of sharing their neighborhoods.<sup>34</sup> Although not all of these new loft tenants were illegal, the overwhelming majority were illegal, and many continue to be so under present laws.<sup>35</sup>

The history of conversions of loft buildings is, in New York City, predominantly a history of conversions in Manhattan. The vast majority of New York City's loft buildings are in Manhattan,<sup>36</sup> despite the fact that only a little over fifty percent of the city's total industrial space is in Manhattan.<sup>37</sup> This Article discusses *loft* conversions because they have been the predominant type of illegal conversion to date;<sup>38</sup> however, other types of industrial and commercial buildings have also been illegally converted.

There has been much discussion of the impact the conversion of lofts from commercial and industrial to residential uses has had on Manhattan's commercial and industrial tenants. This issue is an important one for New York City.<sup>39</sup>

The conventional view is that loft building owners welcomed the artist pioneers and later non-artists because they occupied space not otherwise rentable.<sup>40</sup> The proponents of this view maintain that, even

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33. See CITY PLANNING COMMISSION, CITY OF NEW YORK, LOFTS: BALANCING THE EQUITIES 41 (1981) (in Manhattan south of 59th Street, where most lofts are located, there is only a 1% residential vacancy rate) [hereinafter cited as BALANCING THE EQUITIES]; N.Y. Times, Mar. 2, 1982, at B1, col. 6 (city-wide vacancy rate in apartments fell 30% from 1978 to 1981; vacancy rate in Manhattan was 1.9% in 1981).

34. See ZUKIN, *supra* note 26, at 58-125.

35. See *infra* notes 297, 386 and accompanying text.

36. RESIDENTIAL USE, *supra* note 30, at 33 (Table E shows that 4,222 of the 4,662 loft parcels in New York City in 1975 were in Manhattan).

37. RESIDENTIAL RE-USE, *supra* note 28, at 31.

38. See *supra* notes 27-28, 30 and accompanying text.

39. In 1958, 533,100 people were employed in loft buildings in Manhattan below 59th Street; this constituted 26.1% of the total labor force employed in Manhattan south of 59th Street. Kahn, *supra* note 14, at 60. Although no comparable figures are available for the 1970's or 1980's, in 1978, manufacturing firms in Manhattan employed 297,000 people, or 53% of all manufacturing employees in New York City, wholesaling firms employed 173,000 people and warehousing and trucking firms employed 11,000. DEPARTMENT OF CITY PLANNING, CITY OF NEW YORK, PRELIMINARY REPORT: MANHATTAN LOFT CONVERSION PROPOSAL 11 (September 1980) [hereinafter cited as PRELIMINARY REPORT]. In comparison, in Manhattan below 59th Street in 1958, 527,500 were employed in manufacturing and 233,900 in wholesaling. Kahn, *supra* note 14, at 64. Each of these industries continues to depend upon loft buildings for space. See BALANCING THE EQUITIES, *supra* note 33, at 40-41. The year 1982 was the first year in which more people in New York City were employed in finance than in manufacturing. N.Y. Times, Mar. 22, 1983, at B1, col. 1 (488,000 compared with 463,000).

40. RESIDENTIAL USE, *supra* note 30, at 1; see Bailinson, *supra* note 28, at 13 (decline in manufacturing caused by factors other than conversion itself); MAYOR'S

with the early influx of artists, during the first half of the 1970's there was a thirty-five percent vacancy rate in loft buildings. Furthermore, the annual rental for lofts was typically one to two dollars per square foot; this approximated the rents charged in the 1950's.<sup>41</sup> Vacancies were purportedly so high that competition between commercial and residential tenants for loft space was impossible.<sup>42</sup>

Although an understanding of the political economy of loft conversions could be important in formulating judicial or legislative approaches,<sup>43</sup> the conventional wisdom on the subject has not been properly evaluated. The demand for residential tenants has been credited to the vacancy rates of the 1960's and early 1970's, and the vacancies themselves have been explained by the movement of industry out of Manhattan. This movement, however, might have been created first in order to establish vacancies,<sup>44</sup> rather than the vacancies preceding the movement. The lack of any real debate over the issues has greatly contributed to the absence of any clear explanation of the processes underlying widespread loft conversions. Therefore, the conventional view has triumphed with little dissent.<sup>45</sup>

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TASK FORCE ON LOFT CONVERSION, CITY OF NEW YORK, ACTION PLAN 2-3 (1978) (ample space is available in New York City for rent by industry) [hereinafter cited as ACTION PLAN]. In addition, many loft buildings were demolished. The number of lofts in Manhattan dropped from over 9,200 in the late 1950's to fewer than 5,400 in the late 1970's; the newly vacant space was often used for office skyscrapers. Bailinson, *supra* note 28, at 34. But by the early 1970's, the office market in Manhattan was saturated. *Id.*

41. Bailinson, *supra* note 28, at 34.

42. RESIDENTIAL USE, *supra* note 30, at 18.

43. The New York courts have, until recently, tended to favor the tenants in cases involving landlords and tenants of illegal loft buildings. *See infra* notes 146-315 and accompanying text. The result has been that "these decisions protect residential loft tenants at the expense of the landlord—and imply the eviction of any remaining manufacturing tenants. The courts have pushed loft building owners who are inclined to rent lofts for living rather than manufacturing to go all the way to a 'legal' residential conversion." ZUKIN, *supra* note 26, at 170. If one assumes that manufacturing is dying a natural death in Manhattan, there is nothing problematic about this result. On the other hand, a resurgence of small manufacturing in Manhattan may well require a more neutral stance in battles between landlords and illegal tenants. In these battles, no one currently represents the small manufacturers.

The executive and legislative branches at both the city and state level have explicitly claimed to be taking the manufacturers' interests into account when proposing and passing the laws upon which New York City's seven-point program, *see infra* notes 85-87 and accompanying text, is based. *See* BALANCING THE EQUITIES, *supra* note 33, at 1-2. Since the causes behind the movement of manufacturers out of Manhattan are so poorly documented, one can only speculate as to the legislative solutions that might have been tried at both the state and local levels.

44. *See* ZUKIN, *supra* note 26, at 13-14.

45. The small businesses that have been displaced have not had the political strength nor the will to press their interests forcefully, *id.* at 25-26, while loft

This triumph has not been so complete that alternative theories have not developed. A second view maintains that residential conversion had a substantial impact on commercial tenants, driving many of them out of lofts and ultimately, out of business.<sup>46</sup> Sharon Zukin,<sup>47</sup> the most deliberative of those holding this second view, attempts to place the development of the market for residential lofts in the context of larger developments in the American political economy. Her thesis is that those she calls the "patrician elite" have sought since World War II to "deindustrialize" Manhattan, *i.e.*, to make Manhattan an area of exclusively "high-rent housing and even higher-rent offices."<sup>48</sup> Zukin points to a number of crucial events in the process of deindustrialization. The first, the 1961 rezoning, rezoned much of the center of Manhattan from manufacturing to commercial districts, thereby allowing conversions to residential use as of right<sup>49</sup> and making any new lease to an industrial tenant in a newly zoned commercial district technically illegal.<sup>50</sup> The second, the 1965 plan presented by the Downtown-Lower Manhattan Association under David Rockefeller's chairmanship, envisioned transforming Manhattan south of Houston Street.<sup>51</sup> Zukin asserts that by 1965, ownership of loft buildings began to shift to new

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tenant groups, of course, must favor residential conversion, even if they think it should be reserved for favored groups such as artists. *Id.* at 124.

46. ZUKIN, *supra* note 26, at 33-34. Zukin surveyed a random sample of loft buildings in the areas in which some conversion had occurred. *Id.* at 34. Lists of businesses that had moved from the buildings were compiled and indicated that, while 22% of all moves in 1963-68 occurred because of residential conversion carried out by landlords, in 1973-78 this factor accounted for 33% of the moves. Further, the percentage of moves initiated by landlords during these periods, motivated by the desire for residential conversion increased from 45% to 81%. *Id.* at 33-35. *But cf.* Wagner, *supra* note 20, at 31-32 (in Worth Street area most firms had already left by time of survey, but random sampling showed only one of twelve commercial loft occupants interviewed felt threatened by artists moving into area).

47. Ms. Zukin is an associate professor of sociology at Brooklyn College, and author of *Loft Living*. See ZUKIN, *supra* note 26.

48. *Id.* at 25.

49. See *infra* note 66.

50. ZUKIN, *supra* note 26, at 41-42.

51. This plan included constructing a giant office complex (which became the World Trade Center), several housing projects extending into the East and Hudson Rivers, an expressway across Manhattan at Broome Street, and middle-income housing and a sports arena replacing what is now SoHo. *Id.* at 44-45. This plan incorporated a number of proposed projects dating back to 1940. *Id.* at 45. As a result of packaging these proposals together, new mortgages, mortgage assignments and tenant turnovers increased dramatically, although vacancies did not necessarily increase in the same proportion. *Id.* at 46-47. Rapkin confirms that the proposed construction of the Lower Manhattan Expressway across Broome Street "[f]or many years . . . made it difficult to rent space in that section of the area as it became vacant." RAPKIN, *supra* note 23, at 248-49.

owners.<sup>52</sup> Initially, they were small investors, including owner-occupants, who were taking advantage of the comparatively low prices at which loft buildings could be purchased.<sup>53</sup> After 1975, these new owners increasingly consisted of professional developers.<sup>54</sup> Replacing small business with middle- and upper-middle-class residents who work in the elite's businesses,<sup>55</sup> these new owners fulfilled the patrician elite's vision.

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52. ZUKIN, *supra* note 26, at 48. Rapkin found that two-thirds of the 1962 owners of loft buildings in SoHo had owned the buildings for a decade or longer; and 40% of the owners were found in the buildings themselves, as they used part or all for their own business. RAPKIN, *supra* note 23, at 226.

53. ZUKIN, *supra* note 26, at 129. Zukin, relying on RAPKIN, *supra* note 23, at 237-39, points out that institutional lenders, the most important of which were the savings banks and savings and loan associations, dramatically decreased the amount they lent for first mortgages on SoHo loft buildings. ZUKIN, *supra* note 26, at 39. This disinvestment in loft buildings was paralleled by disinvestment in the railroads on which the companies that occupied lofts depended to move their goods. *Id.* at 39-40.

Zukin does not develop this crucial point in any detail. She fails, for example, to link this lack of new mortgage money to the patrician plans she discusses. After all, there were valid independent economic reasons, which Zukin details, for institutions to refuse to lend to loft building owners. *Id.* at 40. What Zukin's approach does suggest is a question Rapkin raised about the effect of the lack of new mortgage money:

The contraction in the availability of mortgage money is undoubtedly a consequence of the inability of the area to keep pace with general trends in real estate prices, which have risen 25 percent since 1950, substantially less than the increase experienced in other sections of Manhattan Island. It is possible, however, that this tightening of mortgage funds has retarded price rises which might have taken place were mortgage money freely available.

RAPKIN, *supra* note 23, at 243-44.

The dearth of new mortgage money, when combined with the effects of the 1965 plan, *see supra* note 51 and accompanying text, led to a "devalorization" of loft buildings in lower Manhattan. *See ZUKIN, supra* note 26, at 48. This devalorization allowed small investors to invest in loft buildings. *See id.* at 45-46. Zukin's hypothesis is that the very first small investors, the artists, became the means by which the patrician elite, after the defeat of its 1965 plan, moved to carry out its primary goal: the deindustrialization of Manhattan. *Id.* at 111-12. By romanticizing loft living, the artist pioneers helped pave the way for the large-scale conversions that drove small business from Manhattan. *Id.* at 111-25, 173-92. *See generally* N.Y. Times, Mar. 27, 1983, § 8, at 1, col. 1 (developer of luxury condominium loft building in SoHo explained that "[t]his building is not so much for artists . . . as for people who want the life style of an artist").

54. ZUKIN, *supra* note 26, 130-33.

55. *See id.* at 175-76. Zukin relied heavily on Chester Rapkin's classic study of the future SoHo, which was entitled *South Houston Industrial Area*, to show the stability of SoHo before 1965. *Id.* at 36-37. Rapkin found that only 5.7% of the total gross floor area in loft buildings was vacant, RAPKIN, *supra* note 23, at 248, and concluded that demand for loft space by manufacturers was high. *Id.* at 256. He found that the low rent was the most important reason that firms located

While agreeing with the conventional view that a high vacancy rate was responsible for the initial wave of conversions,<sup>56</sup> the New York City Planning Commission has now adopted a position that seeks to meet "the twin goals of industrial preservation and housing opportunity."<sup>57</sup> With a decline in the vacancy rate in loft buildings in Manhattan to approximately two percent, a rate similar to vacancy rates in the industrial areas of other New York City boroughs, together with a stabilization of the manufacturing industry, competition for space among residential, commercial and industrial users became keen.<sup>58</sup> New York City has sought both to protect industry and to guarantee some illegal residential loft tenants the protection of the law.<sup>59</sup> The current trend, which was commented on as early as 1981, is to convert loft buildings to offices, rather than residences.<sup>60</sup>

### C. Illegal and Legal Lofts

A residential loft is illegal when its use does not conform with those allowed in its district under the New York City Zoning Resolution<sup>61</sup> and no attempt to obtain a variance has been

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in SoHo. *Id.* at 117. Further, these low rents resulted from market forces, not rent control. *Id.* at 258. Not only were rents low, but assessed valuation, which closely approximated market value in SoHo at the time, had risen more slowly since World War II in SoHo than in other parts of Manhattan. *Id.* at 19. Combined, these factors provided an "incubator" for small, entrepreneurial business. *Id.* Paradoxically, the low market values of SoHo buildings provided fodder for speculation and housing development which destroyed the area's ability to operate as an incubator for manufacturers. See ZUKIN, *supra* note 26, at 129. This vision of a golden age for small manufacturers in Manhattan must be tempered by the realization that New York City's process of deindustrialization began right after World War II, not in the mid-1960's. *Id.* at 23-27; *cf.* Kahn, *supra* note 14, at 135 (vacancy rates in loft buildings below Canal Street increased from 2.6% to 10.5% of gross floor space between 1947 and 1961, while vacancies in the areas that became known as SoHo and NoHo increased from 0.1% to 4.1%).

56. See BALANCING THE EQUITIES, *supra* note 33, at 42.

57. *Id.* at i (preface).

58. See *id.* at 40-41. The decline in the vacancy rate in Manhattan was approximately two percent. *Id.* There were similar vacancy rates in the industrial areas of the other boroughs. *Id.*

59. See *infra* notes 85, 86 and accompanying text.

60. BALANCING THE EQUITIES, *supra* note 33, at 43; Oser, *New Life on the Way for Site at Fifth Ave. and 42nd St.*, N.Y. Times, Oct. 14, 1981, at B5, col. 1 (renovated office space rents for as much as \$12 per square foot per year).

61. The body of the current New York Zoning Resolution was first adopted by the Board of Estimate in 1961, see BALANCING THE EQUITIES, *supra* note 33, at 25, pursuant to the authority granted by the state legislature. See N.Y. GEN. CITY LAW § 20(24), (25) (McKinney 1968 & Supp. 1986). The Zoning Resolution creates zoning districts and prescribes the permitted uses of buildings within each.

successful,<sup>62</sup> and/or when a building, the use of which has been changed from industrial or commercial to residential, does not have the proper multiple-dwelling certificate of occupancy.<sup>63</sup> As of 1977,

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BALANCING THE EQUITIES, *supra* note 33, at 2-5. The three basic uses are commercial, residential, and manufacturing. *Id.* The goals of the Zoning Resolution are carried out "by a set of controls [for each district] which define (1) permitted land uses, (2) applicable bulk standards such as height, setback and permitted floor area, (3) permitted residential density." Laber & Kretchmer, *New Legislative Acts Set Flexible Standards for Legal Conversions*, N.Y.L.J., Nov. 16, 1977, at 25, col. 4, at 37, col. 2 [hereinafter cited as Laber & Kretchmer].

62. See *infra* notes 66 & 79.

63. All buildings must have a certificate of occupancy, whether they are multiple dwellings and residential buildings or commercial and industrial buildings. N.Y. CITY ADMIN. CODE §§ C26-121.2 to -121.5 (Williams 1978 & Supp. 1985-86). No change may be made in the "use of an existing building which is inconsistent with the last issued certificate" unless a new certificate is issued. *Id.* § C26-121.5.

In deciding illegal loft cases, the courts have developed a doctrine that loft buildings with three or more loft living units are de facto multiple dwellings. See *infra* notes 163-240 and accompanying text. No multiple dwelling, which is defined as the "residence or home of three or more families living independently of each other," N.Y. MULT. DWELL. LAW § 4.7 (McKinney 1974), can be occupied "in whole or in part" until the New York City Department of Buildings issues a certificate of occupancy for the building. *Id.* § 301.1; see also N.Y. CITY CHARTER §§ 645(b)(3) (Williams Supp. 1985-86), 1804(4)(c) (Williams 1976 & Supp. 1985-86). To obtain a certificate of occupancy, a multiple dwelling must comply with the Multiple Dwelling Law ("MDL"), the New York City Building Code and "all other applicable law." See N.Y. MULT. DWELL. LAW § 301.1 (McKinney 1974).

The MDL applies to "all cities with a population of three hundred twenty-five thousand or more," *id.* § 3.1 (McKinney Supp. 1986), and is intended to guarantee minimum levels of health and safety in multi-family buildings. Some sections of the MDL have been particularly difficult for former loft buildings to meet—for example, sections 26 and 31 "establish light and air standards and require, among other things, (1) a thirty foot rear yard for all interior lots, (2) a 10% ratio of window area opening to total floor area for all living rooms, and (3) a maximum permitted distance of thirty feet" from any wall to window in any living room within a one bedroom or non-fireproof unit. Laber & Kretchmer, *supra* note 61, at 37, col. 1.

The New York City Building Code is a large tome of some 500 pages. N.Y. CITY ADMIN. CODE §§ C26-100.1 to -1912.1 (Williams 1978 & Supp. 1985-86). The Building Code applies "to the construction, alteration, repair, demolition, removal, maintenance, occupancy and use of new and existing buildings in the city of New York . . ." *Id.* § C26-100.3. Specific provisions of the Building Code govern the issuance of certificates of occupancy. *Id.* §§ C26-121.1 to -121.12. The Building Code is enforced by the Commissioner of Buildings, except for certain provisions which are enforced by the Fire Commissioner. *Id.* § C26-100.6.

Variations concerning certain light, air, and safety sections of the MDL may be granted by the Board of Standards and Appeals if it can be shown that compliance "causes any practical difficulties or any unnecessary hardships" and that substantial compliance is achieved by alternative means. N.Y. MULT. DWELL. LAW. § 310.2 (McKinney 1974 & Supp. 1986). But this variance procedure can be expensive and time consuming. Laber & Kretchmer, *supra* note 61, at 37, col. 1. The Board of Standards and Appeals also can grant variances to the Building Code. N.Y. CITY ADMIN. CODE § C26-100.7 (Williams 1978).

over ninety percent of loft conversions were illegal;<sup>64</sup> the total number of conversions, both legal and illegal, constituted slightly under twenty-five percent of all loft buildings in Manhattan's industrial areas.<sup>65</sup> Most conversions have occurred in districts where residential use is allowed "as of right,"<sup>66</sup> so that violation of the Zoning Resolution has not been the primary cause of illegality.<sup>67</sup>

The lower costs associated with illegal conversions, and the problems New York City has had with enforcing the law, have accounted for the popularity of illegal conversions, in which residential certificates of occupancy are not sought. Conversions, whether legal or illegal, have a cost advantage over new housing: as of 1977, construction costs were about one-third lower for conversions,<sup>68</sup> while

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64. RESIDENTIAL RE-USE, *supra* note 28, at 8.

65. *Id.* This study covered buildings south of 59th Street which had three or more residential units. *Id.* The number of converted buildings is therefore understated because buildings with only one or two residences were omitted. The total number of new dwelling units was approximately 10,000. *Id.* at 9. There has not yet been an update of the Department of City Planning's study. See RESIDENTIAL RE-USE, *supra* note 28. Exactly how many people currently live in illegal lofts is a matter of considerable uncertainty, with estimates ranging upwards of 50,000. See ZUKIN, *supra* note 26, at 6.

66. Residential "use" is permitted in six of the eight types of commercial districts; manufacturing "use" is not permitted without a variance in any of the eight types. N.Y. CITY ZONING RES. § 32-10 (1981). In commercial districts, no bulk zoning standards were applied to a building converting from a non-conforming to a conforming use (*i.e.*, from manufacturing to residential use) before the April 9, 1981 amendments to the Zoning Resolution. *Id.* § 52-31. Where a building in a commercial district was changing from commercial use to residential use, *i.e.*, from one conforming use to another conforming use, the new construction standards in Article II, Residence District Requirements, applied. *Id.* § 34-10.

As of April 9, 1981, Article I, Chapter 5, *id.* §§ 15-00 to -582 (1982), was added to the Zoning Resolution to make easier the residential conversion of existing non-residential buildings in certain community districts of Manhattan by allowing new dwelling units to meet the special standards of Article I, rather than of Article II (the generally applicable Residence District Regulations). *Id.* § 15-00(a) (1981). Article II regulates, for example, "the density of population and the bulk of buildings in relation to the land around them and to one another . . . [and] access of light and air to windows." *Id.* § 21-00(d), (f).

In theory, these regulations could have presented serious difficulties for a conversion before Article I, Chapter 5, was added. A variance was required for a conversion to meet the Zoning Resolution new construction requirements such as a 30 foot rear yard. PRELIMINARY REPORT, *supra* note 39, at 21. Variances, however, have been easy to obtain, *see infra* note 79 and accompanying text, and the practical effect before the April 1981 amendments was that "in reality the only [housing] standards which appl[ie]d to conversions [were] those in the Multiple Dwelling Law, and the Building Code except in the [Lower Manhattan Mixed Use] District." *Id.* at 22.

67. RESIDENTIAL RE-USE, *supra* note 28, at 9.

68. *Id.* at 41. The cost of newly constructed industrial loft space in the early 1960's would have been \$12 to \$15 per square foot, exclusive of land, while

the market rents that could be charged did not differ between new housing and conversions.<sup>69</sup> In addition, illegal conversions are easier for the developer to finance than legal ones because the tenants raise the capital to make their own spaces habitable.<sup>70</sup> The developer also has the option of selling the spaces if he does not wish to rent them.<sup>71</sup> Illegal conversion also shelters the building from a higher tax assessment.<sup>72</sup> Since compliance with the Multiple Dwelling Law ("MDL") and the Building Code<sup>73</sup> can be expensive,<sup>74</sup> once a developer has decided to invest only a minimal amount of capital in a building, he will not seek the Building Code compliance necessary to obtain a residential certificate of occupancy.

The startling economic advantages to a landlord of illegal conversions over legal conversions were illustrated in a 1979 study which examined rental, but not cooperative, loft living units.<sup>75</sup> The building and improvement cost of an illegal residential rental loft building was \$7.00 per square foot and the return was over thirty-five percent on a twenty-five percent equity investment for a partial conversion and one hundred percent for a complete conversion. In contrast, the cost for a legal residential rental loft building was \$56.00 per

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rehabilitated industrial loft space in SoHo would have had a median cost of \$3.10 per square foot. RAPKIN, *supra* note 23, at 209, 231.

69. RESIDENTIAL RE-USE, *supra* note 28, at 41.

70. MAYOR'S TASK FORCE ON LOFT CONVERSIONS, CITY OF NEW YORK, ACTION PLAN 3 (1978) [hereinafter cited as TASK FORCE]. Tenant financing is particularly attractive when financing is difficult for the developer to obtain. RESIDENTIAL RE-USE, *supra* note 28, at 44. Tenant financing also allows the developer to keep his carrying costs down. *Id.* The use of tenant financing has greatly inflated the values of potentially convertible properties because the developer needs relatively small amounts of capital before he can rent or sell units. TASK FORCE, *supra*, at 4. A loft building selling for \$30,000 in 1960 could be selling for \$250,000 in 1971. SPECIAL SPACE, *supra* note 31, at 123 n.50.

71. The price for a typical residential loft cooperative increased 1,500% from 1970 to 1980. Bailinson, *supra* note 28, at 37. Typical loft rents rose 500%, compared to a rise for one-bedroom or two-bedroom apartments during the same period of 316%. *See id.*

72. H. Shostal, Special Zoning District for Lower Manhattan's Industrial Zones 2 (Oct. 23, 1975) (memorandum from the Mayor's Office of Lower Manhattan Development, City of New York).

73. For a discussion of the MDL and the Building Code, see *supra* note 63.

74. *See* RESIDENTIAL RE-USE, *supra* note 28, at 46. Another reason why certificates of occupancy are not obtained by developers is that the procedure for obtaining a residential certificate of occupancy was not designed for the typical construction pattern of an illegal loft building. *Id.* at 52.

75. PRELIMINARY REPORT, *supra* note 39, at 18. The study did not consider the return possible from selling converted cooperative loft living units. *Id.* at 83 n.10.

square foot, and even with a J-51 tax abatement,<sup>76</sup> returned slightly over seventeen percent.<sup>77</sup>

New York City's ineffective enforcement of the laws exacerbates the problem of illegal loft conversion. The Buildings Department, which is responsible for policing illegal lofts, is buried under a blizzard of 40,000 backlogged violations involving all types of housing.<sup>78</sup> Further, in the few cases in which New York City has taken an active role in opposing conversions that violated the Zoning Resolution, the developers have been able to gain variances.<sup>79</sup>

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76. J-51 is a real estate tax incentive program administered by New York City for eligible building owners who rehabilitate existing structures. N.Y. ADMIN. CODE tit. J, § J-51-2.5 (Williams Supp. 1985-86). The tax benefit consists of a real property exemption and a tax abatement. The tax exemption freezes the tax assessment of the property at the level existing before an owner makes an improvement. *Id.* § J-51-2.5(b) (Williams Supp. 1985-86). The tax abatement permits an owner to decrease the amount of tax imposed upon the property. *Id.* § J-51-2.5(c) (Williams Supp. 1985-86). For an in-depth analysis of J-51 see Note, *New York City's J-51 Program: Controversy and Revision*, 12 FORDHAM URB. L. J. 103 (1983-84).

77. PRELIMINARY REPORT, *supra* note 39, at 18. However, this was substantially more than industrial rental space would have returned. *Id.*

78. Bailinson, *supra* note 28, at 44-45. Budget cuts have left the Buildings Department with too few inspectors; the penalties that can be imposed are low, especially in relation to potential profits. *Id.* at 45. Traditionally, Building Code and zoning compliance has been voluntary; an eviction proceeding brought by the city is the only remedy for use that does not conform to zoning requirements. Laber & Kretchmer, *supra* note 61, at 37, col. 3.

79. Bailinson, *supra* note 28, at 45-47. Variance applications are first reviewed by the community board of a zoning district if the variance involves land in only one district, or by the community boards and borough board if the application involves more than one district. N.Y. CITY CHARTER § 668.a.1 (Williams 1976 & Supp. 1985-86). The procedures in section 668 are an amplification of those provided in the uniform land use review procedure section of the New York City Charter *Id.* § 197-c.

Community boards, which review most applications for zoning variances for loft conversions, are composed of the city council members for the area, who do not vote on the board, and not more than 50 persons appointed by the borough president. *Id.* § 2800.a. The community board makes a recommendation to the Board of Standards and Appeals ("BSA"). The recommendation does not bind the BSA, which makes the actual decision on the application. *Id.* § 668.a.4. See generally N.Y. GEN. CITY LAW § 81 (McKinney Supp. 1986) (mandating creation of BSA as forum for appeals on zoning enforcement and for such other zoning matters as City Council provides).

The BSA is a six-member body appointed by the Mayor; two members must be registered architects and two must be licensed engineers. NEW YORK CITY CHARTER § 661.a, .b (Williams 1976). If the decisions of the BSA are appealed, they may be reviewed by the City Board of Estimate, but the review is limited to "whether the decision of the board of standards and appeals under each of the specific requirements of the zoning resolution was supported by substantial evidence before the board of standards and appeals." *Id.* § 668.c.

Community boards and the BSA often reach contradictory decisions. Between 1969 and 1979, the community board in the community district which includes SoHo, NoHo and Greenwich Village, approved thirty-nine applications and rejected twenty-one. Some developers were discouraged at this stage, but those developers who went to the BSA had complete success, getting fifty-one variances for fifty-one applications. ZUKIN, *supra* note 26, at 156-57.

The BSA is guided by a list of five findings, as set forth in the Zoning Resolution, which it must make before granting a variance, *e.g.*, that unique physical conditions of the lot would cause "practical difficulties or unnecessary hardship" in complying with the use provisions or bulk provisions of the Zoning Resolution. N.Y. CITY ZONING RES. § 72-21(a)-(e) (1981). In light of these required findings, one can easily imagine a BSA turning down variances in the 1970's and being less sympathetic to the new investor and the speculator landlords. In reality, the BSA has almost always granted the variances, often basing its findings on the ground that a loft building which cannot meet the zoning requirements for a new building is a "unique condition which would result in hardship [for the landlord] if compliance with the zoning were required." PRELIMINARY REPORT, *supra* note 39, at 22.

By the end of 1979, of the 132 loft conversion applications submitted since 1971, 89 had been granted by the BSA, 3 had been withdrawn, and 40 were still pending. Bailinson, *supra* note 28, at 46. The only obstacle to getting a variance has been the cost. In 1977, fees for professional services ran as high as \$10,000, RESIDENTIAL RE-USE, *supra* note 28, at 47; this, of course, encouraged illegal conversions in some situations.

The courts' great deference to the BSA has thwarted the few attempts other city entities have made to enforce the Zoning Resolution. In *City of New York v. Singer Studio Corp.*, N.Y.L.J., Oct. 29, 1979, at 6, col. 4 (Sup. Ct. N.Y. County 1979), New York City brought suit against a developer, alleging that residential conversion would violate the Zoning Resolution and that the developer had not obtained the legally required building permits and certificates of occupancy. This was an unusual action for the City to bring, one that was brought only because of the "outrageous illegality" of the project, Bailinson, *supra* note 28, at 45-46, and because of pressure on the City from the commercial and manufacturing tenants who were being forced out. *See* Letter from Hi-Style Hat Co. to Sandy Hornick (Mar. 9, 1978) (Hi-Style Hat was a tenant in Singer building and Mr. Sandy Hornick is on the staff of the City Planning Commission).

The court did not grant an injunction because an appeal by the developer for a variance was pending before the BSA, although the court did continue the temporary restraining order. *Singer Studio*, N.Y.L.J., Oct. 29, 1979, at 6, col. 5. The BSA approved the variance, even though "there was testimony from numerous sources [that] the developers had violated several laws. Witnesses also testified that viable businesses had been evicted to facilitate the conversion." Bailinson, *supra* note 28, at 46. The City then appealed the case. *Id.* at 53 n.27.

In *West Broadway Assoc. v. Board of Estimate*, N.Y.L.J., June 7, 1979, at 11, col. 5 (Sup. Ct. N.Y. County 1979), the New York City Planning Commission and Community Planning Board No. 1 took an appeal to the Board of Estimate of a variance granted by the BSA that would have allowed conversion of an eleven story loft building. *Id.* at 11, col. 5. When the Board of Estimate overturned the grant of the variance, the building owner brought an article 78 proceeding. Looking to the language of section 668 of the New York City Charter, the court limited the Board of Estimate's review to the traditional limited nature of a review of administrative agency action and found that the Board had exceeded its jurisdiction. *See id.* at 12, col. 1; *accord In re Hellmuth Building Co.*, N.Y.L.J., Sept. 11, 1981, at 5, col. 2 (Sup. Ct. N.Y. County 1981) (court construed "unique physical condition" requirement of section 72-21 of Zoning Resolution,

Not all loft conversions, of course, are illegal. A market has developed for relatively conventional apartments created out of converted loft buildings.<sup>80</sup> As the 1970's progressed, this market became more active.<sup>81</sup> Accurate figures are unavailable on the number of residents in these new apartment buildings but there may be more residents in legal conversions than in illegal conversions.<sup>82</sup> The development of a "loft lifestyle," growing out of the earlier illegal conversions and the declining rate of new apartment construction, helped to spark this more slowly developing legal market.<sup>83</sup>

Thus, conversions have created two kinds of problems: (1) the generic problems common to both legal and illegal lofts,<sup>84</sup> and (2) the problems unique to illegal lofts. This article focuses on the

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and held that "'[u]niqueness' does not require that only the parcel in question and none other, [sic] be affected by the specific condition which creates the hardship." (citing *Douglaston Civic Ass'n v. Klein*, 51 N.Y.2d 963, 416 N.E.2d 1040, 435 N.Y.S.2d 705 (1980)). The Board of Estimate argued that the condition must not be so prevalent in the district so that if all parcels were granted variances "the zoning of the district would be materially changed." *Id.* In the alternative, the Board of Estimate contended that even if the traditional standard were the standard of review, the BSA's decision was not supported by substantial evidence. *Id.* The court reviewed the evidence for each of the five findings the BSA had made pursuant to section 72-21 of the Zoning Resolution. *Id.* Particularly revealing was the court's handling of section 72-21(c), which requires a finding "[t]hat the variance, if granted, will not alter the essential character of the neighborhood or district." N.Y. CITY ZONING RES. § 72-21(c) (1981). The court held that, since residential use was not prohibited in the district, and since the only zoning prohibition of conversion was on the size of the building in question, the essential character of the district would not be changed. *Hellmuth Bldg. Co.*, *supra* at 5, col. 3. The City Planning Commission pointed out that of 99 buildings in the area that were prohibited by their size from converting, only four had been converted to residential use. Bowden, *City Rules in Favor of Mixed Uses*, Wash. Market Rev., June 1979, at 13, col. 1 [hereinafter cited as Bowden]. But the court's reasoning, which focuses on the fact that residential use was permitted in the district, would apply to any commercial district. See *supra* note 66 and accompanying text. It may have been important to the decision that even if the Board of Estimate's position had been upheld, the building would have been a functioning, albeit illegal, residential building, as residents were planning to move in whether or not there was a variance. Bowden, *supra*, at 13, cols. 1, 4.

80. ZUKIN, *supra* note 26, at 6, 19.

81. RESIDENTIAL RE-USE, *supra* note 28, at 9. Only one legal conversion occurred prior to 1965: from 1965 to 1972 there were one to four legal conversions a year; in 1973 there were six legal conversions; each subsequent year the number doubled until it reached 36 in 1976; and in the first eight months of 1977 there were fourteen legal conversions. *Id.*

82. FORD, *supra* note 28, at 6-7, 100-05.

83. *Id.* at 78-81, 140-43.

84. The most important of these generic problems has been the competition for loft space between commercial and industrial uses and residential uses. See *supra* note 58 and accompanying text.

unique problems of illegal lofts, which have spawned almost all the case law. The fact that many conversions have been legal, however, cannot be forgotten, especially when discussing the legislative responses in the last several years to loft conversions.

#### D. New York City's Program

In the late 1970's the executive branch of New York City created a seven-point program to deal with existing illegal conversions and to guide future legal conversions in Manhattan. The City explicitly articulated two concerns: preventing residential conversion from hurting the city's economy by driving out manufacturing<sup>85</sup> and guaranteeing the protection of the law to illegal residential tenants.<sup>86</sup> The City Planning Commission summarized the seven-point program as follows:

1. Zoning map amendments which reflect land use changes since the 1961 zoning ordinance.
2. Zoning text changes which establish standards for recycled buildings.
3. Zoning text changes requiring, as a condition of conversion, relocation assistance for displaced industrial firms which relocate within New York City. These benefits will be funded by developers who convert to residential use.
4. State legislation recognizing the residential status of illegal loft dwellers and providing a framework for legalization.
5. Removal of the tax incentive programs of J-51 and 421 used for residential conversion in Manhattan's loft districts reserved for business uses.
6. A special mayoral office for loft enforcement to create the proper deterrent to new illegal conversions and to monitor the legalization of existing illegal conversions. This office combines inspection and prosecutorial functions, and gives the City a strong zoning and code enforcement capability which it heretofore lacked.
7. Amendments to Article 7-B of the Multiple Dwelling Law to simplify the standards for recycled buildings.<sup>87</sup>

All of these seven points have been implemented.

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85. BALANCING THE EQUITIES, *supra* note 33, at 1.

86. One problem is the possibility of an injury or fatality in loft living units or in loft buildings that do not meet the MDL and Building Code. *Id.* at 43. Although this is a potentially serious problem, the City, in its most authoritative study to date, did not focus on this issue. *Id.* It only discussed one example of such occurrences. *Id.* The other problem is landlord and tenant conflicts which do not fall within the statutes regulating residential units. This is the primary focus of Section III of this Article.

87. *Id.* at 1-2. The overall goal of these plans is not to stop conversion but, rather, to minimize the damage to manufacturing. *See id.* At least one commentator

### E. The Unresolved Problems of Loft Conversion

Although the seven-point program was conceived and presented as a unified program, this Article will examine in detail only the fourth point—the residential status legislation; the other aspects of the City's program have been ably covered by other commentators.<sup>88</sup> In addition, this Article will discuss the case law that developed in response to the problems of landlords and tenants, case law that profoundly influenced the shaping of the residential status legislation.

New York City's program legalizes only some of the present illegal residential lofts. Therefore, case law remains important to illegal residential loft tenants. The premise of the City's program is that new illegal conversions can be prevented through proper enforcement efforts.<sup>89</sup> It is not clear, however, whether the city has committed

doubts that the city can both keep manufacturing and allow substantial conversion. Bailinson, *supra* note 28, at 25. He sees the choice as one "between the poor who work in and depend on the loft industries and the people who would move in to convert the lofts into residences—the 'new elite.'" *Id.* Bailinson thinks that the City's housing officials and the real estate interests have made a decision in favor of the "upper-income, white collar workers . . . [who are] essential to the growth and vitality of the city's service economy," *id.* at 25, that is the sector of the New York economy that has grown most vigorously since the 1950's. *Id.* at 13-16; *accord* ZUKIN, *supra* note 26, at 52-57 (Zukin, of course, places the decision further back in time than Bailinson, and sees it as having helped to create the growth in the City's service economy, rather than being merely a reaction to such growth).

88. See, e.g., Bailinson, *supra* note 28 (especially strong on zoning); BALANCING THE EQUITIES, *supra* note 33 (same); Lehner & Sweet, *Conversions of Residential Cooperatives, Lofts* (pts. 1 & 2), N.Y.L.J., Dec. 24, 1980, at 1, col. 2, N.Y.L.J., Dec. 26, 1980, at 1, col. 2 (especially strong on article 7-B of the Multiple Dwelling Law); Lehner, Sweet & Allen, *City Proposes Remedies for Illegal Conversions of Lofts to Residences*, N.Y.L.J., Nov. 15, 1978, at 23, col. 5 (same) [hereinafter cited as Lehner, Sweet & Allen]; Laber & Kretchmer, *supra* note 61 (same). See generally SPECIAL SPACE, *supra* note 31 (good general introduction to loft living).

89. "The key to effective enforcement is both delineation of realistic manufacturing zones [through zone map changes] reflecting industrial strength and the allocation by the City of additional enforcement capability organized and deployed in such a way as to secure the maximum impact." BALANCING THE EQUITIES, *supra* note 33, at 49.

The mayor established the Mayor's Office of Loft Enforcement on October 1, 1980, which is expected to stop illegal conversions. Bailinson, *supra* note 28, at 130. In addition, an Industrial Loft Advisory Council, as defined by the April 9, 1981 amendments to the Zoning Resolution, N.Y. CITY ZONING RES. § 12-10 (1981), consisting of industry and union representatives, has been established. The City Planning Commission thinks the Council will function as an "early warning system regarding possible future disruptions in the City's economy." BALANCING THE EQUITIES, *supra* note 33, at 5.

Bailinson notes that the effect of the program will be to make conversions more expensive. See Bailinson, *supra* note 28, at 141; *accord* Oser, *New Life on the Way for Site at Fifth Ave. and 42nd St.*, N.Y. Times, Oct. 14, 1981, at B5, cols. 1, 4 (developer who had been planning to convert loft building to residence

the necessary financial resources to the effort. Moreover, the basic economic forces that have made illegal conversions attractive have not changed,<sup>90</sup> nor has it become any more politically viable to evict illegal tenants.<sup>91</sup>

## II. The Statutory Law to June 1982

The statutory response to loft tenants has fallen into three main categories: (1) changes in the New York City Zoning Resolution; (2) bills to amend the MDL to facilitate conversions by easing, for conversions only, the statutory health and safety requirements; and (3) bills to provide residential status for tenants of illegal lofts.<sup>92</sup>

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before the April 9, 1981 Zoning Resolution amendments now plans office conversion instead). This conclusion assumes that conversions will conform to the law.

The economic aspects of loft buildings are changing from what they were in the early 1970's. What the effect will be on illegal conversion is unclear. The first trend is a low rate of vacancy in loft buildings—less than 2% from 1979 to 1981. *BALANCING THE EQUITIES*, *supra* note 33, at 40-41. The second trend helps explain this rate: offices are beginning to compete with manufacturing for loft space. Bailinson, *supra* note 28, at 143. The third trend also helps explain the low vacancy rate: manufacturing demand for loft space has been reviving, especially in buildings with 4,000 square feet or more per floor. *REAL ESTATE BOARD OF NEW YORK, INC., PROSPECTS FOR LOFT BUILDINGS IN THE 1980'S: A RESPONSE TO THE CITY PLANNING DEPARTMENT'S ADAPTIVE RE-USE PROPOSALS 3 (1981)* [hereinafter cited as *REBNY RESPONSE*]. Now that loft buildings have other profitable uses aside from residential conversion, the overall rate of conversion may well decline. But there is no reason that increased non-residential demand should lead to legal conversion rather than illegal conversion.

One effect of the increased demand and prices in Manhattan has been to encourage residential conversion outside of Manhattan. See *BALANCING THE EQUITIES*, *supra* note 33, at 5, 56. Manhattan had 54.9% of the industrial space in New York City as of the late 1960's, *RESIDENTIAL RE-USE*, *supra* note 28, at 31, so that there were fewer opportunities for conversion outside Manhattan; nonetheless, the opportunities are plentiful. The City Planning Commission has already begun to study some of these areas. *BALANCING THE EQUITIES*, *supra* note 33, at 56.

90. See *supra* notes 68-77 and accompanying text.

91. In the early 1960's, when there were perhaps 3,000-5,000 artists living in lofts, ZUKIN, *supra* note 26, at 6, the New York City Buildings Department evicted some 100 artists. *Id.* at 49-50. The City did not have the political will to carry through this eviction program; rather, the City created the Artists-in-Residence program. See *id.* For a description of the program, see *infra* note 117.

92. In this regard, two important executive agency actions were the designation of SoHo as a historic district by the New York City Landmarks Preservation Commission in 1973 thereby preventing demolition or significant change of approximately 500 buildings, *SPECIAL SPACE*, *supra* note 31, at 31, and the creation of a special school district for much of SoHo by the New York City Board of Education in 1975. ZUKIN, *supra* note 26, at 154. This special school district allows SoHo parents to choose the elementary school to which they will send their children. *Id.* This choice, in practice, allows parents to pick the West Village over the "typically inner city schools" which their children would otherwise attend. *Id.*

Although proponents of these measures have seen these statutory responses as part of a unified plan to deal with illegal loft residences,<sup>93</sup> the primary focus of this Article will be on the residential status bills. This is the area in which substantial debate about the basic substance and purpose of the statute continues; the other two types of statutory response are already represented by substantial histories of legislation and revision.<sup>94</sup>

### A. Zoning

In 1971, the Zoning Resolution<sup>95</sup> was first amended to take account of the special needs of artists. This change took place three years after a group representing SoHo artists<sup>96</sup> made the initial request. The changes allowed artists certified by the New York City Department of Cultural Affairs to occupy joint living-working spaces in buildings in the SoHo manufacturing zone.<sup>97</sup> Such joint living-working activity was defined by the amendment as a "special manufacturing use."<sup>98</sup> There were maximum size requirements for the buildings<sup>99</sup> and a minimum size requirement of 1200 square feet for each joint living-work unit where there was more than one such unit per floor.<sup>100</sup> Joint living-working quarters could be integrated vertically with industrial uses,<sup>101</sup> but, depending on the size of the building, commercial and joint living-working quarter uses were restricted on the first two floors of a building.<sup>102</sup> In 1976, the territory covered by these amendments was extended to include NoHo<sup>103</sup> and the maximum size of eligible buildings was expanded to 5000 square feet,<sup>104</sup> except along Broadway, where it was 3600 square feet.<sup>105</sup>

In 1977, the Lower Manhattan Mixed Use District was created, encompassing the areas that became known as Tribeca. The mixed

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93. See *supra* notes 85-87 and accompanying text.

94. See *infra* notes 95-148 and accompanying text.

95. See *supra* note 61.

96. BALANCING THE EQUITIES, *supra* note 33, at 26.

97. N.Y. CITY ZONING RES. §§ 42-01, -14D.1 (1981).

98. *Id.* § 42-14D.1 (1981).

99. SPECIAL SPACE, *supra* note 31, at 35.

100. N.Y. CITY ZONING RES. § 43-17.

101. *Id.* § 42-01 (1981).

102. *Id.* §§ 42-14D.1(d), -14D.2 (1981).

103. SPECIAL SPACE, *supra* note 31, at 34-35.

104. *Id.* at 35.

105. N.Y. CITY ZONING RES. § 42-14D.1(b). Zoning district M1-5A is the area of SoHo west of Mercer Street and north of Broome Street; Zoning district M1-5B includes the rest of SoHo, and NoHo. N.Y. CITY ZONING RES. ZONING MAPS 12a & 12c.

use district amendment evolved from the concepts of the SoHo and NoHo amendments. It created a mixed-use zoning district where not only artists, but tenants in general could live,<sup>106</sup> and standards for as of right residential conversions.<sup>107</sup> Most notable among the standards for as of right residential conversion were the maximum size restriction of 5000 square feet on the size of convertible buildings,<sup>108</sup> and the strict housing quality controls—stricter than those in article 7-B.<sup>109</sup>

The most recent amendments to the Zoning Resolution were approved by the Board of Estimate on April 9, 1981.<sup>110</sup> Density standards for conversions, formerly as stringent as those for new residential buildings, were replaced with new standards tailored to conversions;<sup>111</sup> the light and air provisions of article 7-B were made applicable to conversions;<sup>112</sup> the boundaries of manufacturing zones were reduced;<sup>113</sup> a new type of zoning district, the mixed-use district, was created;<sup>114</sup> SoHo and NoHo remained legally open only to artist residents;<sup>115</sup> a relocation assistance program for commercial and manufacturing tenants displaced by residential conversions was established;<sup>116</sup> the Artist-in-Residence (AIR) program was statutorily sanc-

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106. Laber & Kretchmer, *supra* note 61, at 37.

107. N.Y. CITY ZONING RES. §§ 111-10, -11 (1983); *see supra* note 66.

108. N.Y. CITY ZONING RES. § 111-103 (1983); *see supra* note 66.

109. Laber & Kretchmer, *supra* note 61, at 37. *See generally infra* notes 133-48 and accompanying text (discussing article 7-B).

110. BALANCING THE EQUITIES, *supra* note 33, at 1 (Supp. 1981).

111. N.Y. CITY ZONING RES. §§ 15-11, -111 (1983).

112. N.Y. CITY ZONING RES. § 15-112 (1982); BALANCING THE EQUITIES, *supra* note 33, at 70.

113. BALANCING THE EQUITIES, *supra* note 33, at 50-52, 145-48. Although the amount of protected manufacturing space was reduced by only 7.5 million square feet, the new mixed-use zones contain space currently occupied by industry that is now convertible. Because conversion to residential use in these commercial zones remains as of right, considerably more than 7.5 million additional square feet is available for legal conversion. Bailinson, *supra* note 28, at 109-11.

114. BALANCING THE EQUITIES, *supra* note 33, at 51-52, 58-61. Four types of mixed-use districts were created in which residential conversion was allowed but was subjected to limits. *Id.* at 58-61. Of particular importance is the requirement that a specified amount of equivalent space must be preserved for commercial or manufacturing uses either in the building to be converted or in any comparable building in the mixed-use district. N.Y. CITY ZONING RES. § 15-211 (1983). The preservation is to be accomplished by a deed restriction running with the land. *Id.* § 15-214 (1983). *See generally* BALANCING THE EQUITIES, *supra* note 33, at 14 (Supp. 1981) (reprinting a Mar. 10, 1981 memo from the Office of Counsel, City Planning Commission, captioned "Validity and Enforcement of Restrictive Covenants," required by the zoning resolution).

115. BALANCING THE EQUITIES, *supra* note 33 at 53.

116. N.Y. CITY ZONING RES. §§ 15-50 to -58 (1983).

tioned;<sup>117</sup> “sandwiching” of residential and non-residential uses in the same building was allowed;<sup>118</sup> and a new variance procedure for mixed-use zones was established.<sup>119</sup> The new density and light and air standards were made applicable to Manhattan Community Districts one through six,<sup>120</sup>—substantially all of Manhattan south of 59th Street.<sup>121</sup> SoHo, NoHo, and Tribeca, however, remained under their own special zoning provisions.<sup>122</sup> The only important application of the April 9, 1981 amendments to these zoning districts was in subjecting conversions to the relocation assistance program<sup>123</sup>—one

117. *BALANCING THE EQUITIES*, *supra* note 33, at 53, 63. The Artists-in-Residence (“AIR”) program was originally created in 1961 by agreement among a number of New York City agencies and the Artist Tenants Association. *SPECIAL SPACE*, *supra* note 31, at 59. The current participants must be certified as artists by the Department of Cultural Affairs. *Id.* at 57. Four criteria are used in granting certification of an artist: (1) The applicant must be “engaged in the fine arts, creative arts or performing arts regularly and on a professional basis,” “professional” referring not to “financial remuneration,” but rather to the “nature of the commitment” of the applicant; (2) the applicant must be “serious” and “consistent” in his or her commitment; (3) the applicant must be “currently engaged” in his or her “art form;” and (4) the applicant must need a “large loft space” for his or her art form. Application for Artist Certification, Artist Certification Committee, Department of Cultural Affairs (undated). The tenants then sign commercial leases, but the tenant may not be evicted for living in an AIR unit. *SPECIAL SPACE*, *supra* note 31, at 59. In order to participate, the artist also must submit to the Department of Buildings an application signed by the building’s landlord. *Id.* at 59-60. The requirements for this application vary by zoning district, *id.*, but no building may have more than two AIR units. N.Y. CITY ZONING RES. § 12-10(c) (1981).

The 1981 zoning amendments were the first legislative recognition of any kind of the AIR program, which was based on the 1961 agreement, not a statute. The 1981 amendments provide AIR with a statutory status by adding to the definition of “accessory use.” “(c) living or sleeping accommodations in connection with *commercial or manufacturing uses*, including living or sleeping accommodations in connection with [a studio].” *Id.* § 12-10 (1981) (emphasis added).

118. N.Y. CITY ZONING RES. § 15-022 (1983). Before section 15-022 was added to the zoning resolution, non-residential uses in commercial districts could not be located over residential units in some commercial districts or above the first floor in others. *Id.* § 32-42 (1982).

119. *BALANCING THE EQUITIES*, *supra* note 33, at 54-55; N.Y. CITY ZONING RES. § 74-782 (1983). Now, in the mixed-use districts, property owners cannot seek a variance from the Board of Standards and Appeals until they have first tried to obtain a special permit from the City Planning Commission. *BALANCING THE EQUITIES*, *supra* note 33, at 54. If the special permit is denied, the BSA will have the record of the Commission’s proceeding before it. *Id.* at 54-55. This new procedure is intended to discourage the ready granting of variances, for which the BSA is infamous. See *supra* note 79 and accompanying text.

120. N.Y. CITY ZONING RES. §§ 15-00, 15-23 (1983).

121. CITY PLANNING COMMISSION, CITY OF NEW YORK, MAP OF MANHATTAN COMMUNITY DISTRICTS (Jan. 1977).

122. N.Y. CITY ZONING RES. § 15-01 (1983).

123. *Id.* § 51-012.

of the most important provisions of the 1981 zoning amendments.<sup>124</sup> Since contributions to the program are mandatory for owners planning to convert loft buildings to residential use,<sup>125</sup> conversions will become more expensive and may be discouraged.<sup>126</sup> These changes were part of the city's ambitious seven-point plan,<sup>127</sup> and once they were passed only the residential status legislation element of the seven-point plan remained to be enacted.<sup>128</sup>

The New York City Department of City Planning, in an early study of the conversion process,<sup>129</sup> stated that the Tribeca Mixed Use District "was intended to give the general public the opportunity to create loft residences in compliance with all regulations and zoning requirements."<sup>130</sup> Neither the Tribeca nor the SoHo and NoHo amendments, however, did anything to halt illegal conversion in those districts.<sup>131</sup> The success of the latest zoning amendments is still being tested, but it seems unlikely that they will be responsible for any greater degree of compliance with statutory requirements, such as the Zoning Resolution, than previous efforts. After all, the basic economic and political forces that encouraged illegal conversion remain constants in the city.<sup>132</sup>

## B. Article 7-B & Article 27

Article 7-B, first added to the MDL in 1964,<sup>133</sup> was a recognition by the New York State Legislature of the special needs of New York City artists.<sup>134</sup> As stated in the legislative findings:

It is hereby declared and found that persons regularly engaged in the arts require larger amounts of space for the pursuit of

124. *Id.* § 15-51; *see* §§ 15-52 to -58. Conversions north of 59th Street and in other boroughs must provide similar benefits if J-51 tax benefits, *see infra* note 147, are applied for. N.Y. CITY ADMIN. CODE § J51-2.5(z) (Williams Supp. 1985). Section J51-2.5(z) was added pursuant to authority granted to the city by the state. N.Y. REAL PROP. TAX LAW § 489 (McKinney 1984 & Supp. 1986).

125. N.Y. CITY ZONING RES. § 15-51 (1983).

126. *See* N.Y. Times, Oct. 14, 1981, at B5, col. 4.

127. *See supra* notes 85-87 and accompanying text.

128. *See infra* notes 330-425 and accompanying text.

129. RESIDENTIAL RE-USE, *supra* note 28.

130. *Id.* at 39.

131. Laber & Kretchmer, *supra* note 61, at 37. *See generally supra* notes 62-83 and accompanying text (discussing the incidence and advantages of illegal conversion).

132. *See supra* notes 68-79 and accompanying text.

133. SPECIAL SPACE, *supra* note 31, at 21.

134. Article 7-B was restricted to cities in New York of "more than one million persons," N.Y. MULT. DWELL. LAW § 277 (McKinney 1974 & Supp. 1986), of which New York City is the only example.

their artistic endeavors . . . that the financial remunerations to be obtained from pursuit of a career in the arts is [sic] generally small, [and] that as the result of such limited financial remuneration persons regularly engaged in the arts generally find it financially impossible to maintain quarters for the pursuit of their artistic endeavors separate and apart from their places of residence . . . .<sup>135</sup>

In addition to finding that artists have special needs, the state legislature found that artists "enhanced" the "cultural life" of New York City.<sup>136</sup> To encourage conversions for artists, article 7-B imposes less restrictive health and safety standards than does the balance of the Multiple Dwelling Law. The article, however, is not effective without supporting local zoning ordinances.<sup>137</sup> New York City did not enact the local zoning ordinances necessary to give effect to article 7-B until 1971, when the SoHo amendments in the Zoning Resolution were passed.<sup>138</sup>

As originally enacted in 1964, article 7-B was quite restrictive. Its application was limited not merely to spaces occupied by artists who had been certified by the Department of Cultural Affairs,<sup>139</sup> but even more narrowly to only those artists in the "visual fine arts."<sup>140</sup> Furthermore, article 7-B forbade mixing manufacturing and residential uses in the same building and allowed commercial use only in the cellar or ground floor.<sup>141</sup> Finally, although the MDL health and safety regulations were eased, fire-protection rules remained major obstacles to compliance.<sup>142</sup>

In 1965, 1968, and 1971, article 7-B was amended,<sup>143</sup> and in 1977 a fully revised version was passed.<sup>144</sup> Article 7-B no longer applied solely to the joint living-working quarters of certified artists. It applied now to "general residential purposes" as well, although as

135. *Id.* § 275 (McKinney Supp. 1986).

136. *Id.*

137. Section 277 of article 7-B provides that units may be occupied "except as otherwise required by the local zoning law or resolution." *Id.* § 277. Therefore, if there is a conflict between article 7-B and the local zoning resolution, the local zoning resolution overrides article 7-B. *Id.* This was explicitly acknowledged in the 1980 revisions to the Legislative Findings. *Id.* § 275 (McKinney Supp. 1986).

138. SPECIAL SPACE, *supra* note 31, at 27.

139. Laber & Kretchmer, *supra* note 61, at 37.

140. 1964 N.Y. Laws ch. 939, § 276.

141. *Id.* § 277.

142. Fire protection rules are stringent and converting a loft in conformity with them is expensive. SPECIAL SPACE, *supra* note 31, at 23.

143. *Id.* at 24.

144. *Id.* at 24-25.

a precondition to the availability of article 7-B, the building must have been occupied "for loft, commercial, institutional, public, community facility or manufacturing purposes" at "any time prior" to January 1, 1977.<sup>145</sup> A number of different, optional standards for light, air, egress, and fire safety were provided,<sup>146</sup> so that most projects would be able to comply with the MDL without resorting to a variance granted by the Board of Standards and Appeals.<sup>147</sup>

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145. N.Y. MULT. DWELL. LAW § 277 (McKinney 1974 & Supp. 1986). Prior to 1964, the law required the building to have been "occupied *exclusively* for" such purposes, *id.* (McKinney 1974) (emphasis added), which rendered article 7-B unavailable to buildings partially converted before 1977.

146. Laber & Kretchmer summarize the amended article's approach to minimal light and air standards as an example of the new options it creates:

In place of minimum rear yard requirements of thirty feet for any mid-block residential building, under the new law, to provide adequate light and air, it suffices that the dwelling unit faces upon a street, *or* a court *or* a rear yard, without requiring that every building have a rear yard.

Laber & Kretchmer, *supra* note 61, at 37, col. 2 (emphasis added).

147. *Id.* For a discussion of the variance procedure and its problems, see *supra* note 63 and accompanying text.

There have been other legislative measures, most notably J-51, section 352-ee, and section 235-d.

Section J-51-2.5 of the New York City Administrative Code was first passed in 1955 to encourage the rehabilitation of existing housing. RESIDENTIAL RE-USE, *supra* note 28, at 39. "Tax incentives were offered to encourage owners of older multiple dwellings to install central heating, to replace inadequate plumbing facilities and to eliminate hazardous conditions." *Id.* An alternative tax exemption provision is found in section 421-a of the Real Property Tax Law, which is available only if no other tax exemption is concurrently being used. N.Y. REAL PROP. TAX LAW § 421-a(c)(i) (McKinney 1984). In 1976, an important amendment to J-51, which extended the program to the "conversion of non-residential buildings and to buildings with one or two dwelling units over commercial space," became effective. RESIDENTIAL RE-USE, *supra* note 28, at 40. In 1976, 68 of 87 conversions were eligible for J-51 benefits. *Id.* at 9. Of those eligible, 66.6% applied, and 90.9% of those applying received benefits. *Id.* There has been some controversy about the importance of J-51 in encouraging legal loft conversions. Zukin writes that:

[t]he general effects of J-51 on the loft market were, first, to insert a new category of loft-apartments at typical upper-middle-income rents beside the more marginal submarket of convert-it-yourself loft space and, second, to spread residential conversion into neighborhoods where the zoning resolutions of 1971 and 1976 did not permit loft living.

ZUKIN, *supra* note 26, at 56; *cf.* PRELIMINARY REPORT, *supra* note 39, at 83 n.10 (placing less importance on J-51 tax benefits). Zukin asserts that the 1975 amendments to J-51 had the effect of making conversions of large buildings, rather than the previous upgrading of smaller buildings, eligible for tax abatements, and thus encouraged large-scale conversions. ZUKIN, *supra* note 26, at 56. The New York City Department of City Planning speculates that the "elimination of J-51 tax benefits would [not] necessarily preclude legal loft conversion. It is likely that developers would pay less for buildings since this is a changeable cost and building improvements are not." PRELIMINARY REPORT, *supra* note 39, at 83 n.10.

Restrictions on J-51 tax exemption and abatements, passed in May, 1981, Korngold, *How Changes in J-51 Law Affect Loft Conversions to Apartments*, N.Y.L.J.,

Article 7-B was recodified as Article 27 to the Arts and Cultural Affairs Law as of December 31, 1983.<sup>148</sup> The content of Article 27 is identical to that of article 7-B, except for the numbering of the sections. As the case law discussed in this Article refers to the old article 7-B, all references herein will be to article 7-B and not article 27.

### III. The Case Law

While the city and state governments have dealt hesitatingly with the zoning<sup>149</sup> and statutory issues<sup>150</sup> concerning illegal loft residences, the courts have not had such a luxury. Since 1975, a steady stream of landlords and tenants have sought the intervention of the courts, and the courts have created a body of case law that will continue to provide the only protection to an indeterminate number of illegal tenants not covered by the new article 7-C.<sup>151</sup> The highest state court

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June 17, 1981, at 1, col. 3, set up in Manhattan a minimum tax zone, a tax abatement exclusion zone, and a zone in which all J-51 benefits are excluded. *Id.* at 3, col. 1. And in the Spring of 1983, the future of the J-51 program was unclear. The New York State Assembly was willing to extend the program, N.Y. Times, Apr. 17, 1983, at 39, col. 1, while the New York State Senate was less enthusiastic, N.Y. Times, Mar. 29, 1983, at B4, col. 1.

The addition of section 352-ee to the General Business Law prevents the New York State Attorney General from accepting for filing any cooperative or condominium offering or prospectus that involves conversion of non-residential space to residential space unless certain requirements are filled. N.Y. GEN. BUS. LAW § 352-ee (McKinney 1978). The most important requirement makes acceptance dependent upon the submission of building plans approved under section 300 of the MDL. N.Y. GEN. BUS. LAW § 352-ee.1(i) (McKinney Supp. 1982). The Building Department will not approve building plans under section 300 until zoning approval has been obtained. Lehner, Sweet & Allen, *supra* note 88, at 32. This new requirement should discourage illegal conversions which, between 1975 and 1978, could be filed with the New York Attorney General, even though they were illegal. Laber & Kretchmer, *supra* note 61, at 38. Cooperative sales had occurred before 1975 without any offering plan being filed with the Attorney General. *Id.*

In 1978, the Legislature added section 235-d to the Real Property Law. N.Y. REAL PROP. LAW § 235-d (McKinney Supp. 1986). This is an anti-harassment provision applicable to any alleged harassment of a tenant in a building used at any time for "manufacturing or warehouse purposes," so long as there was no certificate of occupancy in effect when the alleged harassment occurred. N.Y. REAL PROP. LAW § 235-d.1, 235-d.3 (McKinney Supp. 1986). Absent section 235-d, harassment by a landlord would be a common law tort in New York State. *See* 34 N.Y. JUR. *Torts of the Landlord* § 304 (1964).

148. 1983 N.Y. Laws 876, § 1. Sections 27.01, .03, .05 and .07 of article 27 are sections 275, 276, 277 and 278, respectively of article 7-B.

149. *See supra* notes 95-132 and accompanying text.

150. *See supra* notes 133-48 and accompanying text; *infra* notes 316-98 and accompanying text.

151. Article 7-C is the residential status legislation for illegal loft residents passed

to decide an issue of substance has been the appellate division. The New York Court of Appeals, the state's highest court, has yet to do more in the area of illegal lofts than to deny appeals.

The lower courts have balanced the competing interests of landlord and tenant, stressing the importance of determining the landlord's role in the conversion process.<sup>152</sup> Where the landlord has known of the conversion and encouraged it, courts have found that converted buildings with three or more residential tenants are de facto multiple dwellings;<sup>153</sup> that the tenants, therefore, have rights under the MDL; and that, where there are six or more residential tenants in a de facto multiple dwelling,<sup>154</sup> the tenants are protected by the Rent Stabilization Law.<sup>155</sup>

The typical loft tenant in the cases discussed below had signed a nonresidential loft lease for a long term, at a low rent;<sup>156</sup> the lease restricted the uses of the loft to those allowed by the law<sup>157</sup> or to a specified nonresidential use such as an artist's studio.<sup>158</sup> In many of the cases in which the substantive law has developed,<sup>159</sup> the tenants themselves had invested a substantial sum of money or

by the New York State Legislature in June, 1982. See *infra* notes 383-424 and accompanying text.

152. See *infra* notes 241-57 and accompanying text.

153. See *infra* notes 163-240 and accompanying text.

154. See *infra* notes 274-304 and accompanying text.

155. N.Y. CITY ADMIN. CODE §§ YY51-1.0 to -7.0 (Williams 1975 & Supp. 1985-86).

156. See, e.g., *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 479-80, 425 N.Y.S.2d 926, 927-28 (Sup. Ct. App. T. 1st Dep't 1979), *aff'd mem.*, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1980).

157. See, e.g., *Ellis v. Cordes*, N.Y.L.J., Jan. 15, 1979, at 14, col. 5 (N.Y.C. Civ. Ct. N.Y. County 1979).

158. See, e.g., *Lipkus v. Pikus*, 99 Misc. 2d 518, 519, 416 N.Y.S.2d 694, 695 (Sup. Ct. App. T. 1st Dep't), *aff'd mem.*, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep't 1979), *appeal dismissed*, 51 N.Y.2d 874, 414 N.E.2d 399, 433 N.Y.S.2d 1019 (1980).

159. Illegal loft cases of primarily procedural or remedial importance include *Childress v. Lipkus*, 72 A.D.2d 724, 443 N.Y.S.2d 63 (1st Dep't 1979) (tenants motion for preliminary injunction to restrain holdover proceeding denied by supreme court because tenants could raise legal and equitable claims as defenses in civil court); *Duane Thomas Loft Tenants Ass'n v. Sylvan Lawrence Co.*, 117 Misc. 2d 360, 458 N.Y.S.2d 792 (Sup. Ct. N.Y. County 1982) (preliminary injunction to restrain holdover proceedings granted to tenants when tenants had already brought action in supreme court for reformation of lease and declaratory judgment); *Ehrman v. Consolidated Edison Corp.*, N.Y.L.J., Jan. 29, 1982, at 6, col. 4 (N.Y.C. Civ. Ct. N.Y. County 1982) (tenants in de facto multiple dwelling with six or more apartments may bring action pursuant to article 7A of Real Property Actions and Proceedings Law); *Bowditch v. 57 Laight St. Corp.*, 111 Misc. 2d 255, 443 N.Y.S.2d 785 (Sup. Ct. N.Y. County 1981) (plaintiffs granted summary judgment for possession of premises for non-payment against defendant corporation, which had rented loft building for art studio and residences); *Lovell v. 56 E. 11th Realty*

amount of time in converting the building to residential use,<sup>160</sup> or had paid "fixture fees" to previous tenants for prior conversions.<sup>161</sup> Courts have never explicitly relied on the investments that tenants had made in their living units when ruling in favor of tenants. Nevertheless, the influence of this financial factor on the courts cannot be ignored.<sup>162</sup>

### A. De Facto Multiple Dwellings

The doctrine of the de facto multiple dwelling arose in the procedural context of the summary proceeding,<sup>163</sup> where a landlord attempted to evict a tenant either for non-payment of rent (a "non-payment proceeding"),<sup>164</sup> for violation of a restrictive use lease clause, or for violation of the New York City Zoning Resolution or the MDL (both the lease violation and illegal use proceedings are "hold-over proceedings").<sup>165</sup>

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Corp., N.Y.L.J., July 15, 1981, at 11, col. 1 (N.Y. Civ. Ct. N.Y. County 1981) (declaratory judgment that building was de facto multiple dwelling and that residential units were subject to Rent Stabilization Law granted to tenants); *Mercer St. Lofts, Inc. v. Teti*, N.Y.L.J., June 1, 1979, at 5, col. 2 (Sup. Ct. N.Y. County 1979) (preliminary injunction denied to landlord to restrain tenants from performing further conversion work or continuing their residence), *aff'd mem.*, 78 A.D.2d 783, 435 N.Y.S.2d 204 (1st Dep't 1980). These cases are beyond the scope of this Article.

160. *E.g.*, *Gordon & Gordon v. Madavin, Ltd.*, 108 Misc. 2d 349, 350, 441 N.Y.S.2d 148, 149 (Sup. Ct. App. T. 1st Dep't 1981) (landlord must condone or encourage the tenant's conversion to residential use).

161. 108 Misc. 2d at 350, 441 N.Y.S.2d at 150; *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 479, 425 N.Y.S.2d 926, 927 (Sup. Ct. App. T. 1st Dep't 1979), *aff'd mem.*, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1980).

162. For decisions in which the courts' discussions of the facts stress the substantial investment of time and money by the tenants, *see, e.g.*, *Madavin*, 108 Misc. 2d at 350, 441 N.Y.S.2d at 149-50; *Mandel*, 102 Misc. 2d at 479, 425 N.Y.S.2d at 927.

163. N.Y. REAL PROP. ACTS. LAW § 711 (McKinney 1977 & Supp. 1986). Summary proceedings, called "special proceedings" in New York State, allow the landlord to proceed swiftly against a tenant rather than to pursue the slow common law remedy of ejectment. *See generally* C. BERGER, *LAND OWNERSHIP AND USE* 377-78 (3d ed. 1983). In New York State, ejectment is termed an "action to recover possession of real property," and is codified at N.Y. REAL PROP. ACTS. LAW §§ 601-61 (McKinney 1979 & Supp. 1982). Mere breach of a covenant, such as that to pay rent, does not give rise to an ejectment action unless the lease provides that the breach terminates the lease and allows the landlord to re-enter. 13 CARMODY *WAIT* § 89:115 (2d ed. 1966). An ejectment action may be maintained against a holdover tenant. *Id.* § 89:118.

164. "A special proceeding may be maintained under this article upon the following grounds: . . . 2. The tenant has defaulted in the payment of rent . . . ." N.Y. REAL PROP. ACTS. LAW § 711.2 (McKinney 1979).

165. "A special proceeding may be maintained under this article upon the following grounds: . . . 5. The premises, or any part thereof, are used or occupied

*Mintz v. Robinson*<sup>166</sup> was the first case to imply that a converted building might be a de facto multiple dwelling. The court specifically held that a living loft building occupied prior to January 1, 1964<sup>167</sup> "exclusively for manufacturing purposes, or commercial purposes, or both, and which is now occupied by artists for residential purposes and for the pursuit of the artist's artistic endeavors," is subject to the registration requirements of § 325 of the MDL.<sup>168</sup>

. . . for any illegal trade or manufacture, or other illegal business." N.Y. REAL PROP. ACTS. LAW § 711.5 (McKinney 1979). The New York courts refer to a section 711.5 special proceeding as a "holdover proceeding." *E.g.*, *Nationwide Record Storage v. Greenberg*, N.Y.L.J., Dec. 12, 1978, at 11, col. 6 (N.Y.C. Civ. Ct. N.Y. County 1978). Some commentators have used the term "illegal use" to characterize a special proceeding under section 711.5 and "holdover" to characterize a special proceeding under section 711.1 of the New York Real Property Actions and Proceedings Law. *E.g.*, J. RASCH, *NEW YORK LANDLORD AND TENANT* § 1106 (2d ed. 1971) [hereinafter cited as RASCH]; *see also infra* note 278 (discussing section 711.1). A section 711.1 proceeding can be brought when a tenant remains in possession after the lease expires. *See infra* note 278.

166. 81 Misc. 2d 447, 366 N.Y.S.2d 547 (N.Y.C. Civ. Ct. Kings County 1975).

167. Before its amendment in 1977, article 7-B of the MDL gave artists permission to occupy buildings for both "residential purposes" and the "pursuit of the artists' artistic endeavors" when the buildings were used for manufacturing and/or commercial purposes prior to January 1, 1964. N.Y. MULT. DWELL. LAW § 277 (McKinney 1974), *amended by* N.Y. MULT. DWELL. LAW § 277 (McKinney Supp. 1983).

168. 81 Misc. 2d at 449, 366 N.Y.S.2d at 550. Section 325 provides:

1. Every owner of a multiple dwelling . . . shall file in the department a notice containing his name, address and a description of the premises, . . . and also the number of apartments . . . and the number of families occupying the apartments . . . .

2. In any city of over one million which, by local law, requires the registration of owners of multiple dwellings and which prescribes penalties, remedies, and sanctions to be imposed for the violation of such local registration requirements, no rent shall be recovered by the owner of a multiple dwelling who fails to comply with such registration requirements until he complies with such requirements.

N.Y. MULT. DWELL. LAW §§ 325.1, .2 (McKinney 1974 & Supp. 1986).

The applicable "local law" is the New York City Administrative Code. Section D26-41.01 requires registration and the Code provides in section D26-41.21-b that:

[a]n owner who is required to file a statement of registration under this article and who fails to file as required shall be denied the right to recover possession of the premises for non-payment of rent during the period of non-compliance, and shall, in the discretion of the court, suffer a stay of proceedings to recover rents, during such period. In any action to recover possession under section 711 of the real property actions and proceedings law, the owner shall set forth his registration number issued by the department, and shall allege that he has filed a statement of registration . . . .

N.Y. CITY ADMIN. CODE § D26-41.21-b (Williams 1977).

The landlord in *Mintz* had brought a summary proceeding to evict the tenants for nonpayment of rent.<sup>169</sup> The tenants argued that the building was a multiple dwelling, that registration as a multiple dwelling is an essential element of a summary proceeding, and that the landlord's action should be dismissed because the building was not registered.<sup>170</sup> The court accepted this argument. First, the court found that there were three tenants in the building, "living independently of each other, occupying three dwellings,"<sup>171</sup> and that "ordinarily" three or more tenants were statutorily sufficient to make a building a multiple dwelling.<sup>172</sup> The court did not rely, however, on the number of tenants. It found that the defendant tenant Robinson, was an artist certified by the New York City Department of Cultural Affairs, and that joint living and working in this building was permitted under article 7-B of the Multiple Dwelling Law.<sup>173</sup> The building, however, did not have the registration number<sup>174</sup> which section 278 of article 7-B<sup>175</sup> requires.<sup>176</sup>

By focusing on the landlord's failure to register the building as a multiple dwelling, a failure the landlord can attempt to rectify, the *Mintz* holding provided limited protection for even the certified

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169. *Mintz*, 81 Misc. 2d 447, 366 N.Y.S.2d 547. One of the puzzling questions about *Mintz* is why it was tried in Kings County, instead of in the New York County Civil Court. The record does not reveal any reason. Presumably the building was in New York County (Manhattan); in 1975, the date of the case, the only area in New York City for which the zoning amendment necessary to give article 7-B effect had been passed was in SoHo in Manhattan. See BALANCING THE EQUITIES, *supra* note 33, at 26, 27. Venue in a summary proceeding is in the county where the real property is located, N.Y. CITY CIVIL COURT ACT § 303 (McKinney 1963), but venue may be waived. *Id.* § 306. This must have occurred in *Mintz*.

170. *Mintz*, 81 Misc. 2d at 447, 366 N.Y.S.2d at 548.

171. *Id.*

172. *Id.* at 448, 366 N.Y.S.2d at 548.

173. *Id.* For a discussion of article 7-B, see *supra* notes 134-47 and accompanying text.

174. See *supra* note 168 and accompanying text.

175. "In addition to the provisions of this article [7-B], the following enumerated articles . . . shall . . . apply to such buildings: Article . . . 8. Requirements and remedies [which includes sections 301 and 302]. 9. Registry of names and service of papers [which includes section 325]." N.Y. MULT. DWELL. LAW § 278 (McKinney Supp. 1986). Two later Appellate Term cases affirmed the *Mintz* holding that registration of a multiple dwelling is an essential element of a summary proceeding and extended it to all multiple dwellings, not just article 7-B dwellings. *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 425 N.Y.S.2d 926 (Sup. Ct. App. T. 1st Dep't 1979), *aff'd mem.*, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1980); *155 Wooster Street Assocs. v. Bengis*, N.Y.L.J., July 2, 1979, at 12, col. 1 (Sup. Ct. App. T. 1st Dep't 1979).

176. *Mintz*, 81 Misc. 2d at 447, 366 N.Y.S.2d at 548.

artist.<sup>177</sup> Moreover, the *Mintz* holding offered no protection to non-artists because of the court's reliance on the special circumstances that the tenant was an artist occupying a joint living-working space under article 7-B. This became clear in *McClelland v. Robinson*,<sup>178</sup> in which neither of the tenants was a certified artist.<sup>179</sup>

The tenants in *McClelland* were sued by the landlord for non-payment of rent.<sup>180</sup> The court found that the landlord either "knew" that the tenants "intended to use the premises . . . for residential purposes," or that he at least "deliberately" avoided clarifying the situation once the tenants informed him they were going to so use the premises.<sup>181</sup> The court balanced the landlord's actions against the tenants' knowledge that "the right to reside in the premises was, at the least, questionable."<sup>182</sup> Given the tenants' "illegal conduct"

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177. H. STULTS & R. EISENBERG, RIGHTS OF RESIDENTIAL LOFT TENANTS 27 (1979). Unlike the provisions creating standards for a certificate of occupancy, see *supra* note 63, the statutory provisions imposing a registration requirement, N.Y. CITY ADMIN. CODE § D26-41.01 to -41.25 (Williams 1977 & Supp. 1985), do not on their face require compliance with the MDL, the Zoning Resolution or the Building Code. In practice, however, the Building Department only issues registration numbers when a building is "legally" occupied. See *Corbin v. Harris*, 92 Misc. 2d 480, 481, 400 N.Y.S.2d 309, 310 (Sup. Ct. Kings County 1977). Summary proceedings continue to fail because buildings do not have a registration number. *E.g.*, *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 480, 425 N.Y.S.2d 926, 928 (Sup. Ct. App. T. 1st Dep't), *aff'd mem.*, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1979); *Laight Coop. Corp. v. Kenny*, 105 Misc. 2d 1001, 1003, 430 N.Y.S.2d 237, 239 (N.Y.C. Civ. Ct. N.Y. County 1980).

178. 94 Misc. 2d at 309, 405 N.Y.S.2d at 164 (N.Y.C. Civ. Ct. N.Y. County 1978).

179. *Id.* at 309, 405 N.Y.S.2d at 163. In 1968 the definition of "artist" in section 276 of the article 7-B was amended to encompass not only people in the "fine arts" but also people in "the performing or creative arts." 1968 N.Y. Laws 900. Commercial artists were excluded because it was thought that they did not need large amounts of space to work in. SPECIAL SPACE, *supra* note 31, at 24. Architects would seem to be excluded from the definition of "artist" and thus not even be potentially certifiable. This point was not raised, however, in *McClelland*.

180. *McClelland*, 94 Misc. 2d at 309, 405 N.Y.S.2d at 163.

181. 94 Misc. 2d at 309-10, 405 N.Y.S.2d at 164.

182. *Id.* at 310, 405 N.Y.S.2d at 164. The court looked to the lease and the circumstances surrounding the negotiation of the lease in determining that the tenants must have known that the "right to reside" was "questionable." *Id.* The lease was a Real Estate Board Form of Loft Lease, which provided that the premises were to be used as "[a] studio and for no other purpose." *Id.* at 309, 405 N.Y.S.2d at 164. This Loft Lease also stated that the "[t]enant will not at any time use or occupy the demised premises in violation of the certificate of occupancy issued for the building of which the demised premises are a part." THE REAL ESTATE BOARD OF NEW YORK, INC., STANDARD FORM OF LOFT LEASE § 15 (1973). This provision, though not mentioned by the court, would further support its conclusion.

in converting the loft,<sup>183</sup> the landlord was not estopped from suing for nonpayment.<sup>184</sup> Furthermore, the tenants could not, by their own illegal conduct, create the claim that the building was a de facto multiple dwelling.<sup>185</sup> Therefore, the tenants could not prevent the landlord's collection of rent on the basis that the building lacked a certificate of occupancy.<sup>186</sup> Finally, the court noted that a landlord may not waive his right to remove a tenant for "residing there in violation of law,"<sup>187</sup> and granted judgment for the landlord. The

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183. 94 Misc. 2d at 310, 405 N.Y.S.2d at 164. The tenants did not obtain the landlord's written permission to alter the premises, as required by paragraph 3 of the lease, nor did they obtain approval from the appropriate city agencies for the remodeling. *Id.* The tenants, therefore, did not come to the court with "clean hands." *Id.*

184. *Id.* The tenants argued that because the landlord had knowingly allowed them to convert their premises to residences, he was estopped from asserting that they lacked written permission to make the conversion. *Id.* at 309, 405 N.Y.S.2d at 164.

185. *Id.* at 310, 405 N.Y.S.2d at 164.

186. The tenants argued that the building lacked a multiple dwelling certificate of occupancy, necessary for a summary proceeding. *Id.* at 309, 405 N.Y.S.2d at 164. The tenants cited section 325 of the MDL and section D26-41.01 of the New York City Administrative Code. *Id.* See generally *supra* note 168 (discussing section 325 of the MDL).

187. *McClelland*, 94 Misc. 2d at 310, 405 N.Y.S.2d at 164 (citing *RASCH*, *supra* note 165, § 1114). A more careful reading of sections 1107 and 1108 of *RASCH* would have revealed to the *McClelland* court that the general New York rule is that the violation justifying dispossession for illegal use "must be a violation of statutory law dealing with health, morals, or welfare or safety of the public." *RASCH*, *supra* note 165, § 1107. Furthermore, "if it is the landlord's obligation to comply with the statutory requirement [obtaining a residential certificate of occupancy], then the landlord's failure to comply with the law cannot be made the basis for transforming a perfectly legitimate business or occupancy into an unlawful one." *Id.* § 1108. A distinction must be made between a use which is illegal per se, see N.Y. REAL PROP. ACTS. LAW § 711.5 (McKinney 1981 & Supp. 1983) (operating a bawdy house); cf. N.Y. PENAL LAW §§ 230.0-40, 240.45 (McKinney 1980 & Supp. 1986) (prostitution and criminal nuisance), and a use which is illegal only because no residential certificate of occupancy has been obtained or because the use constitutes a zoning violation. See *RASCH*, *supra* note 165, §§ 25, 28-30. A landlord can successfully void a lease only when the use is "unlawful under all circumstances," *id.* § 25, not when the illegal use can be corrected. *Id.* §§ 28, 30. By analogy, one would expect that a landlord should be able to maintain an illegal use proceeding only in the same circumstances.

In a non-payment proceeding brought when the tenant stops paying rent, often in protest against inadequate services, *SPECIAL SPACE*, *supra* note 31, at 75, 76, one can easily understand why the courts do not discuss the waiver issue, even if they accept the *McClelland* analysis. Although this is an eviction proceeding, the tenant can avoid the eviction by depositing with the court the rent and any court costs at any time before the judge has issued an official warrant of eviction to the city marshal. See N.Y. REAL PROP. ACTS. LAW § 751 (McKinney 1981).

The tenant in the typical non-payment illegal loft case, therefore, does not have

*McClelland* approach has found some judicial support,<sup>188</sup> but, in general, the case law has been more pro-tenant.

In *Lipkis v. Pikus*<sup>189</sup> (*Lipkis I*), Judge Cohen presented one of

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to cure the underlying illegality of residence itself to avoid eviction; all he has to do is pay the rent. This situation is distinguished from those in which eviction is delayed to give the tenant a reasonable time to correct the violation. In the typical non-payment proceeding, the landlord is seeking to collect the rent, not to evict the tenant for an illegal use. One would expect the typical court to be less sympathetic to a landlord who wants to collect money rather than cure the underlying illegality.

On the above reasoning, one would expect landlords to have a much stronger claim for a holdover proceeding than for a non-payment proceeding against an illegal loft resident under a *McClelland* analysis, even though *McClelland* was a non-payment case. In general, however, the courts have not followed the *McClelland* analysis and landlords have not been markedly more successful in evicting tenants in holdover proceedings than in non-payment proceedings. Reasons for this include the fact that courts are hesitant to evict tenants when the illegal residential conversion occurred with the landlord's knowledge and encouragement and at a considerable cost in time and/or money to the tenant. See *supra* note 162. These circumstances are typical in illegal loft cases.

188. *Tarkington Assoc. v. Spilner*, N.Y.L.J., June 8, 1978, at 10, col. 3 (Sup. Ct. App. T. 1st Dep't 1977), is in accord with the approach of *McClelland*. In *McClelland*, the landlord allegedly had no residential certificate of occupancy, 94 Misc. 2d at 309, 405 N.Y.S.2d at 164, while in *Tarkington* the landlord was alleged not to have registered the building as a multiple dwelling. *Tarkington*, N.Y.L.J., June 8, 1978, at 10, col. 3 (Sup. Ct. App. T. 1st Dep't 1977).

In *Tarkington*, the tenant's rights in the premises were extinguished when the building was sold at a foreclosure sale. *Id.* *Tarkington Associates* in turn purchased the building from the purchaser and served a thirty-day notice terminating the tenant's month-to-month tenancy. *Id.* The tenant raised the defense that the building was a de facto multiple dwelling. *Id.* However, as the "tenant alone, without participation or written permission of petitioner's predecessor in interest, and without sanction of the municipality," *id.* (emphasis added), had converted her loft to a residence; and since her lease had provided that she could use it as an "'art studio only to the extent permitted by law,'" *id.*, she could not use the landlord's failure to register the building as a defense to the holdover proceeding. *Id.* Moreover, the court noted that the tenant was not a certified artist, although it appears from the opinion that she might have been an artist, albeit an uncertified artist. *Cf. id.* (tenant leased space for use as an "art studio").

The tenant, in addition to citing the MDL and the New York City Administrative Code, see *supra* notes 167-68, also cited the New York City Civil Court Rules to establish that without a registration statement, the landlord could not maintain a summary proceeding against tenants in a de facto multiple dwelling:

In every summary proceeding brought to recover possession of real property, pursuant to section 711 of the Real Property Actions and Proceedings Law, the petitioner shall allege either (1) that the premises are not a multiple dwelling, or; (2) that the premises are a multiple dwelling and pursuant to the Administrative Code, Article 41, there is a currently effective registration statement on file . . . . The petitioner shall also allege . . . the multiple dwelling registration number . . . .

N.Y. CITY CIV. CT. PRAC. R. § 2900.21(f) (superseded and recodified at McKinney 1986 New York Rules of Court § 208.42(g) (22 NYCRR § 208.42(g)).

189. 96 Misc. 2d 581, 409 N.Y.S.2d 598 (N.Y.C. Civ. Ct. N.Y. County 1978), modified, 99 Misc. 2d 518, 416 N.Y.S.2d 694 (Sup. Ct. App. T. 1st Dep't), *aff'd*,

the most thoughtful and complete considerations of the problem of illegal lofts offered by any court, considerably expanding the protection the courts offer to loft tenants. The opinion, however, is flawed by a major inconsistency in its reasoning. As a result, the opinion yields a strained result.<sup>190</sup> The tenants in *Lipkis I* were all certified as artists by the New York City Department of Cultural Affairs,<sup>191</sup> and thus were entitled under article 7-B to occupy joint living-working lofts.<sup>192</sup> When the landlord brought a nonpayment proceeding, the tenants raised the defense that the buildings were de facto multiple dwellings and that the landlord, lacking an effective multiple dwelling registration statement and residential certificate of occupancy, could not maintain this summary proceeding.<sup>193</sup>

The court found that the landlord both knew of and "encouraged" the tenants' use of the premises as residences.<sup>194</sup> This conduct had, in effect, modified the commercial leases that had been signed, making their terms those of residential leases.<sup>195</sup> This modification, in addition to the presence of three tenants in each of the buildings in question, led the court to hold that these were multiple dwellings.<sup>196</sup>

In its opinion, the *Lipkis I* court distinguished *Tarkington Associates v. Spilner*<sup>197</sup> and *McClelland v. Robinson*<sup>198</sup> on the ground

72 A.D.2d 697, 421 N.Y.S.2d 825 (1979), *appeal dismissed*, 51 N.Y.2d 874, 414 N.E.2d 399, 433 N.Y.S.2d 1019 (1980).

190. See *infra* notes 200, 201 and accompanying text.

191. 96 Misc. 2d at 586, 409 N.Y.S.2d at 601.

192. *Id.* at 584-85, 409 N.Y.S.2d at 600. See generally *supra* notes 133-47 and accompanying text (discussing article 7-B).

193. 96 Misc. 2d at 587, 409 N.Y.S.2d at 601.

194. *Id.* at 589-90, 409 N.Y.S.2d at 602-03.

195. *Id.* at 590, 409 N.Y.S.2d at 603 (citing *Nationwide Record Storage v. Greenberg*, N.Y.L.J., Dec. 12, 1978, at 11, col. 6 (N.Y.C. Civ. Ct. N.Y. County 1978)); see *infra* notes 206-23 and accompanying text. Judge Cohen clarified the statutory reasoning behind *Nationwide*. First, he paraphrased the definition of "multiple dwelling" in the MDL as "'a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of one another.'" 96 Misc. 2d at 588, 409 N.Y.S.2d at 602; see N.Y. MULT. DWELL. LAW § 4.7 (McKinney 1974). Then Judge Cohen looked to the definition of "occupied:" "Wherever the word or words 'occupied,' 'is occupied,' 'used' or 'is used' appear, such word or words shall be construed as if followed by the words 'or is intended, arranged or designed to be used or occupied.'" 96 Misc. 2d at 588, 409 N.Y.S.2d at 602; see N.Y. MULT. DWELL. LAW § 4.1 (McKinney 1974). A landlord, aware of and consenting to a conversion to a residence, thus "intended, arranged or designed" that the building be "occupied."

196. 96 Misc. 2d at 590, 409 N.Y.S.2d at 603.

197. N.Y.L.J., June 8, 1978, at 10, col. 3 (Sup. Ct. App. T. 1st Dep't 1977). See generally *supra* note 188.

198. 94 Misc. 2d 308, 405 N.Y.S.2d 163 (N.Y.C. Civ. Ct. N.Y. County 1978). See generally *supra* notes 178-88 and accompanying text.

that the *Lipkis I* tenants had not converted commercial space into residences, as had the tenants in the two earlier cases. Instead, the *Lipkis I* tenants had occupied "substantially habitable" premises converted by previous tenants and offered to them by the landlord.<sup>199</sup> The court overlooked that one tenant, Pikus, had made the conversion himself.<sup>200</sup> When the court discussed Pikus, it looked to the same factors it had looked to with respect to the other tenants and held that Pikus' building was a multiple dwelling, as were the other buildings.<sup>201</sup>

The *Lipkis I* court held that the landlord was barred from collecting any of the rent for which he had sued because he had not obtained a residential certificate of occupancy for his buildings.<sup>202</sup> This was a drastic remedy; the landlord was forced to obtain a residential certificate of occupancy, a process that can be time-consuming and expensive,<sup>203</sup> while being deprived of any rental income with which

199. 96 Misc. 2d at 590, 409 N.Y.S.2d at 603.

200. *Id.* at 586, 409 N.Y.S.2d at 601.

201. *Id.* at 595-96, 409 N.Y.S.2d at 606. Judge Cohen rejected an argument by the landlord that Pikus could not use his own illegal occupancy to establish the multiple dwelling status of the building. *Id.* at 597, 409 N.Y.S.2d at 607. Making a distinction similar to that made in *Nationwide*, see *infra* notes 206-17 and accompanying text, Judge Cohen noted that the landlord was seeking not removal of the tenants, but only payment of rent. 96 Misc. 2d at 596, 409 N.Y.S.2d at 607. *Lipkis I*, then, raised, but did not answer, the question of whether the courts should draw a distinction between holdover proceedings and non-payment proceedings. *Id.* at 597, 409 N.Y.S.2d at 607.

202. 96 Misc. 2d at 594, 409 N.Y.S.2d at 605. Judge Cohen, in support of this proposition, cited not only section 325.2 of the MDL and section D26-41.21-b of the New York City Administrative Code, but also sections 301 and 302 of the MDL, which provide:

No multiple dwelling shall be occupied in whole or in part until the issuance of a certificate by the department that said dwelling conforms in all respects to the requirements of this chapter, to the building code and rules and to all other applicable law . . . .

1.a. If any dwelling or structure be occupied in whole or in part for human habitation in violation of section three hundred one, during such unlawful occupation . . . .

b. No rent shall be recovered by the owner of such premises for said period, and no action or special proceeding shall be maintained therefore, or for possession of said premises for non-payment of such rent.

N.Y. MULT. DWELL. LAW §§ 301(1), 302(1)(a), (b) (McKinney 1974). See generally *supra* note 63 (discussing residential certificate of occupancy). Sections 301 and 302 turn on whether the building has a residential certificate of occupancy, while section 325 turns on whether the building has a multiple dwelling registration statement. See generally *supra* notes 168, 177 (discussion of registration statements and method of obtaining them).

203. See *supra* note 63 and accompanying text. In addition to the holdings discussed in the text of this article, the *Lipkis I* court found that the statutorily implied warranty of habitability under section 235-b of New York's Real Property

to pay for repairs or additions. In holding that the building was a de facto multiple dwelling the court made all the MDL provisions applicable to joint living-working quarters,<sup>204</sup> rather than relying on the *Mintz* court's narrow application of article 7-B.<sup>205</sup> Finally, the *Lipkis I* decision supplied both non-certified artists and non-artists with the same argument formerly available only to certified artists—that their buildings are de facto multiple dwellings.

In *Nationwide Record Storage, Inc. v. Greenberg*,<sup>206</sup> the New York County Civil Court took an approach different from that taken in *McClelland*<sup>207</sup> or *Lipkis I*. The landlord in *Nationwide* brought a holdover proceeding to remove several tenants for "continuous illegal occupancy."<sup>208</sup> The landlord conceded that he "procured, knew of and consented to the occupancies for residential purposes,"<sup>209</sup> a concession similar to the finding of fact in *McClelland*.<sup>210</sup> The landlord, through his concessions, was held to have leased more than two lofts as residences; therefore, the building, was found, in dictum, to be a de facto multiple dwelling.<sup>211</sup>

Law covered these tenants, although there was not enough evidence to determine the damages. In regard to the damages the court did note, however, that the "forfeiture of rent adequately compensates the tenants for [any] damages. . . ." 96 Misc. 2d at 597, 409 N.Y.S.2d at 607.

204. Section 278 does not make the general provisions of article three of the MDL applicable to joint living-working quarters. See N.Y. MULT. DWELL. LAW § 278 (McKinney Supp. 1983). Article three includes such provisions as section 78, which mandates that a multiple dwelling be kept in "good repair," *id.* § 78, and section 79, which requires that a multiple dwelling be provided with a certain level of heat at certain times. *Id.* § 79.

205. See *supra* notes 166-77 and accompanying text.

206. N.Y.L.J., Dec. 12, 1978, at 11, col. 6 (N.Y.C. Civ. Ct. N.Y. County 1978).

207. *McClelland v. Robinson*, 94 Misc. 2d 308, 405 N.Y.S.2d 163 (N.Y.C. Civ. Ct. N.Y. County 1978).

208. N.Y.L.J., Dec. 12, 1978, at 11, col. 6.

209. *Id.*

210. 94 Misc. 2d at 309-10, 405 N.Y.S.2d at 164.

211. N.Y.L.J., Dec. 12, 1978, at 12, col. 1. The decision in *Nationwide* actually rested on the narrower ground of the landlord's failure to present evidence to support his allegation that the tenancy was illegal. *Id.* As Judge Sinclair wrote, "Other than testimony by the [landlord], unsupported by documentary or other evidence, that the building was a commercial one, no proof of non-compliance with the applicable laws was before the court." *Id.* A report of search by the Department of Rent and Housing Maintenance of the Housing and Development Administration showed that the building was not a multiple dwelling; but the report was dated March 2, 1973, and, therefore, did not cover the period subsequent to the commencement of this action. *Id.* In order to establish illegal residential use the landlord was required to prove that the "physical condition of the premises" did not satisfy one or more provisions of the MDL, the Zoning Resolution, or the New York City Administrative Code. The landlord failed to do so. *Id.* The *Nationwide* court went on to note that even if there were a violation, the landlord

The *Nationwide* court rejected the landlord's argument that the tenants could not "bootstrap" themselves into being residents of a de facto multiple dwelling when their own "unlawful conduct" was responsible for conferring this designation upon the building.<sup>212</sup> This argument had been successful in *McClelland*,<sup>213</sup> but was rejected here because of the landlord's concessions, "which effect[ed] a modification of the leases to provide for residential as well as commercial occupancies."<sup>214</sup> Finally, the court held that, because the building was a de facto multiple dwelling,<sup>215</sup> the landlord had to have filed a multiple dwelling registration statement in order to maintain a summary proceeding for illegal use, and that the landlord could not collect rent because of the lack of a certificate of occupancy.<sup>216</sup> According to the court, the landlord's only remedy would have been an action in ejectment.<sup>217</sup>

Although the *Nationwide* court rejected a number of arguments which had enabled the landlord to prevail in *McClelland*, it may be the procedural circumstances that explain the different results. While *Nationwide* involved a holdover proceeding in which the landlord sought to remove the tenants,<sup>218</sup> *McClelland* involved a nonpayment proceeding.<sup>219</sup> If the landlord had won in *Nationwide*, the tenant would have had to vacate the premises.<sup>220</sup> Conversely, in *McClelland*, although the landlord prevailed, the tenant could have

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must also prove that the violation did not readily lend itself to correction. *Id.* See generally RASCH, *supra* note 165, §§ 1109, 1112 (landlord has burden of proving that premises are in continuous and permanent illegal use).

212. N.Y.L.J., Dec. 12, 1978, at 12, col. 1.

213. 94 Misc. 2d at 310, 405 N.Y.S.2d at 164.

214. N.Y.L.J., Dec. 12, 1978, at 12, col. 1.

215. *Id.*

216. *Id.*

217. *Id.* at 12, col. 2. See generally *supra* note 163-64 (discussion of ejectment). There are only two published New York cases in which a landlord brought an ejectment action against loft residents. See *Symons v. Nickson*, N.Y.L.J., Jan. 20, 1982, at 11, col. 5 (Sup. Ct. App. T. 1st Dep't 1982); *Trans World Maintenance Serv. v. Rodd*, 113 Misc. 2d 201, 448 N.Y.S.2d 977 (Sup. Ct. N.Y. County 1982). As both cases turned on the application of Chapter 889, see *infra* notes 330-37 and accompanying text, the courts never discussed the issue of whether ejectment is an appropriate remedy if a summary proceeding cannot be brought. One attorney has reported that as of February 1983, dozens of loft ejectment actions were pending in New York Supreme Court. Remarks of Attorney Alan Liebman at the Forum of the Association of the Bar of the City of New York on "Lofts Revisited: Were the Equities Balanced?" (Feb. 7, 1983).

218. N.Y.L.J., Dec. 12, 1978, at 11, col. 6.

219. 94 Misc. 2d at 309, 405 N.Y.S.2d at 163.

220. See *supra* note 187.

paid the back rent and thus avoided eviction.<sup>221</sup> The *Nationwide* court acknowledged this difference, stating that a tenant cannot avoid a lease merely because the landlord has no certificate of occupancy, unless the tenant can show that the landlord has placed the tenant at hazard of his health or safety by the violations of the MDL.<sup>222</sup> “Conversely [however,] the landlord’s failure to comply with law or to obtain a certificate of occupancy cannot be made the basis for transforming an ‘apparently’ legitimate occupancy into an unlawful one . . . .”<sup>223</sup>

Clearly, the court was concerned with the equities of the situation: neither the landlord nor the tenant should be allowed to abrogate the implied residential lease purely for his or her own reasons. *Nationwide*, then, represented less of a tenants’ victory than did *Lipkis I*. It represented a third approach, differing from that of either *McClelland* or *Lipkis I*—it rested on the procedural posture of the landlord’s cause of action. The reasoning of *Nationwide* seemed to favor a *McClelland* result in a nonpayment proceeding and a *Lipkis I* result in a holdover proceeding.<sup>224</sup> Thus, the case law at this point in its development was thoroughly confused.

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221. *Id.*

222. N.Y.L.J., Dec. 12, 1978, at 12, col. 1 (citing *Herzog v. Thompson*, 50 Misc. 2d 488, 270 N.Y.S.2d 469 (N.Y.C. Civ. Ct. N.Y. County 1966)).

223. *Id.*

224. *Ellis v. Cordes*, N.Y.L.J., Jan. 15, 1979, at 14, col. 5 (N.Y.C. Civ. Ct. N.Y. County 1978), is another case supporting the *McClelland* approach. Here the landlord brought a nonpayment proceeding. *Id.* The court found that the building was not a de facto multiple dwelling. *Id.* at col. 6. In considering what penalties might be imposed on the landlord if the building were a multiple dwelling, the court read section D26-41.21 of the New York City Administrative Code, *supra* note 168, uniquely, holding that when a building lacked a certificate of occupancy or registration number, the court might, *at its discretion*, allow or not allow a proceeding to recover rent. *Ellis*, N.Y.L.J., Jan. 15, 1979, at 14, col. 6 (emphasis added). It is clear from the Code, however, that section D26-41.21 on its face grants this discretion only when a registration number is missing. N.Y. CITY ADMIN. CODE § D26-41.21-b (Williams 1977). Moreover, section 302.1.b of the MDL, on its face, does not allow rent to be collected when a certificate is lacking. N.Y. MULT. DWELL. LAW § 302.1.a, b (McKinney 1974); *see supra* note 202.

The court went considerably beyond the factual finding that the building was not a de facto multiple dwelling. *Ellis*, N.Y.L.J., Jan. 15, 1979, at 14, col. 5. It held that even assuming the building was a de facto multiple dwelling for which the landlord did not have either a certificate of occupancy or a multiple dwelling registration statement, the tenant must “prove that he was inconvenienced or that his health and safety were in danger” as a result of the absence of the certificate or registration before he could raise the lack of the certificate or registration in the proceeding. *Id.* at col. 6. In the instant case, the tenant could not raise these issues because, as in *McClelland*, the tenant must have known from the terms of

One possible additional factor, beyond the procedural context, explaining the diverse case law which had developed by this time is the different types of tenants involved in each case. While the courts generally have been more sympathetic to artists living in illegal lofts,<sup>225</sup> the only court to have explicitly relied on this fact was the court in *Mintz v. Robinson*.<sup>226</sup> In fact, other courts have even held against artists.<sup>227</sup>

This developing split in authority in the New York Civil Court was partially resolved by the appellate term in *Lipkis v. Pikus*<sup>228</sup> (*Lipkis II*), which adopted an approach close to that of the *Nationwide* court by paying particular attention to the equities of the specific illegal loft situation.<sup>229</sup> The appellate term reversed *Lipkis I* in part, directing final judgment for the landlord but ordering the

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the lease, which was a commercial loft lease, and from the "surrounding circumstances of the negotiations" that his residency in the loft was at best "questionable." *Id.* To allow the tenant to raise these defenses against the landlord, absent any inconvenience or danger to health and safety would be to allow the tenant to "unjustly enrich" himself. *Id.* at 15, col. 6.

225. Whether the tenants in *Nationwide* were artists is not explicit, but the fact that they signed leases which allowed them to use the premises for "commercial art production" suggests that they were. N.Y.L.J., Dec. 12, 1978, at 11, col. 6. The occupations of the tenants in *Ellis v. Cordes*, however, cannot even be inferred.

226. 81 Misc. 2d 447, 448-49, 366 N.Y.S.2d 547, 548-50 (N.Y.C. Civ. Ct. Kings County 1975).

227. *E.g.*, *Tarkington Assocs. v. Spilner*, N.Y.L.J., June 8, 1978, at 10, col. 3 (Sup. Ct. App. T. 1st Dep't 1977).

228. *Lipkis v. Pikus*, 99 Misc. 2d 518, 416 N.Y.S.2d 694 (Sup. Ct. App. T. 1st Dep't 1979), *modifying* 96 Misc. 2d 581, 409 N.Y.S.2d 598 (N.Y.C. Civ. Ct. N.Y. County 1978), *aff'd*, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep't 1979), *appeal dismissed*, 51 N.Y.2d 874, 414 N.E.2d 399, 433 N.Y.S.2d 1019 (1980).

229. *Id.*, 99 Misc. 2d at 521, 416 N.Y.S.2d at 697. The importance of the procedural stance of the case, a nonpayment proceeding, in explaining *Lipkis II* is clear from two later appellate term decisions, heard by the same panel of judges (only one of whom was involved in the *Lipkis II* decision) but reaching two different conclusions. In *Krax Pepipatie Apanu Stu Krokodrilos Tus Platos, Ltd. v. Van Hentenryck*, N.Y.L.J., Jan. 22, 1981, at 11, col. 1 (Sup. Ct. App. T. 1st Dep't 1981), the landlord brought a holdover proceeding. The landlord was not allowed to recover possession as he did not allege that the building had a multiple-dwelling registration number. The appellate term wrote that this rule "refers to every summary proceeding . . . There is no persuasive reason to distinguish between nonpayment and holdover proceedings in this context . . ." *Id.* (emphasis in original).

The words "in this context" may explain why the same panel, five months later, came to an opposite conclusion in a nonpayment proceeding. See *Mayeri Corp. v. Starr*, N.Y.L.J., June 1, 1981, at 7, col. 2 (Sup. Ct. App. T. 1st Dep't 1981). The lower court had dismissed the nonpayment proceedings because the owner had not proven that the buildings were not subject to rent control, rent stabilization, or the Emergency Tenant Protection Act. *Id.* The appellate term wrote that "[a]lthough a residential certificate of occupancy has yet to be obtained, if it should be determined after a hearing of tenants' defenses that petitioner is entitled to a final judgment, a final judgment should be entered pursuant to *Lipkis v. Pikus*." *Id.* (citation

tenants to pay their back and future rent to the clerk of the civil court.<sup>230</sup> Enforcement of the judgment, however, was stayed until the landlord obtained a certificate of occupancy.<sup>231</sup> Upon obtaining it, the landlord could move to vacate the stay and to receive the escrowed rent fund.<sup>232</sup>

Significantly, the appellate term upheld the trial court's approach to determining what constituted a de facto multiple dwelling.<sup>233</sup> The

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omitted). The appellate term in these two cases had not allowed landlords of buildings without certificates of occupancy and registration numbers to bring successful holdover proceedings, but it had allowed them to bring partially successful nonpayment proceedings. *But cf.* *Gordon & Gordon v. Carvajal*, N.Y.L.J., Feb. 8, 1980, at 6, col. 6 (N.Y.C. Civ. Ct. N.Y. County 1980) (in nonpayment proceeding where landlord did not give "active encouragement" to conversion, held that there was no de facto multiple dwelling and landlord was granted possession).

The *Krax* court's conclusion that there is "no persuasive reason to distinguish between nonpayment and holdover proceedings," *Krax*, N.Y.L.J., Jan. 22, 1981, at 11, col. 1, is not at all clear from reading the MDL itself. Sections 302 and 325 prevent the landlord from recovering rent when the building does not have a residential certificate of occupancy, N.Y. MULT. DWELL. LAW § 302.1.b (McKinney 1974), and when the building does not meet local registration requirements. N.Y. MULT. DWELL. LAW § 325.2 (McKinney 1974). Neither section by its language, restricts holdover as opposed to nonpayment proceedings.

The local registration requirements in New York City prevent the landlord from recovering possession for nonpayment of rent when the building does not have a registration statement on file. N.Y. CITY ADMIN. CODE § D26-41.21.b (Williams 1977). Section D26-41.21.b goes on to state that "[i]n any action to recover possession under section 711 of the real property actions and proceedings law, the owner shall set forth his registration number issued by the department, and shall allege that he has filed a statement of registration. . . ." *Id.* If this sentence is read in conjunction with the sentence on recovering possession for nonpayment of rent, then holdover proceedings also would not be covered by section D26-41.21.b.

The final authority cited by the courts in summary proceedings cases is the Rules of Practice of the New York City Civil Court. The Rules require that in "every summary proceeding," the petitioner must allege either that the building is not a multiple dwelling or that the building has a "currently effective registration statement on file." N.Y. CITY CIV. CT. PRAC. R. § 2900.21(f) (superseded and recodified at McKinney's 1986 New York Rules of Court § 208.42(g) (22 NYCRR § 208.42(g))).

It is not clear why the courts have construed the Administrative Code to cover all summary proceedings, and not just nonpayment proceedings, when section D26-41.21.b seems to address only repayment proceedings. *See, e.g.,* *Krax Pepipatie Apanu Stu Krokodrilos Tus Platos, Ltd. v. Van Hentenryck*, N.Y.L.J., Jan. 22, 1981, at 11, col. 1 (Sup. Ct. App. T. 1st Dep't 1981). Justice Sandler, dissenting in *Corris v. 129 Front Co.*, 85 A.D.2d 176, 447 N.Y.S.2d 480 (1st Dep't 1982), recognized that the MDL and the Administrative Code provide "separate legal impediment[s]" to a landlord's recovery of rent. *Id.* at 183, 447 N.Y.S.2d at 485. Justice Sandler, however, did not discuss the holdover versus non-payment proceedings issue.

230. 99 Misc. 2d at 519, 416 N.Y.S.2d at 695.

231. *Id.*

232. *Id.*

233. *Id.* at 520, 416 N.Y.S.2d at 696; *accord* *Mandel v. Pitkowsky*, 102 Misc.

appellate term, however, was unwilling to give the tenants a windfall of rent-free occupancy by holding that the MDL prevented the landlord from collecting rent.<sup>234</sup> The court reasoned that although the landlord "was aware of and directly encouraged the conversions . . . tenants knew, or should have known, by the very terms of their leases as well as the surrounding conditions, that their occupancy was illegal."<sup>235</sup> The court reasoned further that these types of conversions were occurring "wholesale," and that the MDL had not been intended to deal with such widespread, illegal conversion.<sup>236</sup> To avoid the inequitable result of giving the tenants occupancy rent-free,<sup>237</sup> the court created its unique ruling which required the tenants to pay rent to the civil court until the landlord obtained a certificate of occupancy. This forced the tenants to pay rent and it also encouraged the landlord to bring the building up to MDL standards.<sup>238</sup>

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2d 478, 479, 425 N.Y.S.2d 926, 928 (Sup. Ct. App. T. 1st Dep't 1979), *aff'd mem.*, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1980).

234. 99 Misc. 2d at 520, 416 N.Y.S.2d at 696.

235. *Id.*

236. *Id.* at 520-21, 416 N.Y.S.2d at 696.

237. *Id.* at 520, 416 N.Y.S.2d at 696. Unrebutted testimony that the buildings "substantially complied with many of the minimum standards" of the MDL and that there was no proof that the premises were "a threat to the health and/or safety of the tenants" weighed heavily with the appellate term. *Id.* at 520, 416 N.Y.S.2d at 696; *accord* *Ellis v. Cordes*, N.Y.L.J., Jan. 15, 1979, at 14, col. 5 (N.Y.C. Civ. Ct. N.Y. County 1978); *McClelland v. Robinson*, 94 Misc. 2d 308, 405 N.Y.S.2d 163 (N.Y.C. Civ. Ct. N.Y. County 1978). Judge Cohen, in the civil court, had rejected the landlord's arguments about substantial compliance with the MDL, holding that the MDL is a punitive statute in this regard, meant to prevent a landlord from renting illegal residences. *Lipkis I*, 96 Misc. 2d at 593, 409 N.Y.S.2d at 605. Judge Riccobono of the appellate term, dissenting, agreed with Judge Cohen that the statute should be read literally, and that the landlord should not be able to collect rent until he had a residential certificate of occupancy for his buildings. *Lipkis II*, 99 Misc. 2d at 521, 416 N.Y.S.2d at 697 (Riccobono, J., dissenting).

238. *Id.* at 519, 416 N.Y.S.2d at 695. *Lipkis v. Pikus* returned to the Appellate Term at the beginning of 1982. *Lipkis v. Pikus*, N.Y.L.J., Jan. 20, 1982, at 11, col. 1 (Sup. Ct. App. T. 1st Dep't 1982). The court found that the tenants were not paying their rent to the civil court, as the appellate term had ordered. *Id.* Further, the landlord had been unable to get a residential certificate of occupancy, but this failure was caused partially by the refusal of the tenants to allow the landlord access to the premises. *Id.* Stressing the defaults in payment, the court held that the landlord could enforce the "possessory judgments" that the appellate term had granted in 1979. *Id.* The judgments were entered and a warrant of eviction issued on January 22, 1982. *Lipkis v. Pikus*, N.Y.L.J., Oct. 25, 1982, at 6, col. 4 (Sup. Ct. App. T. 1st Dep't 1982). A series of appeals ensued and on August 16, 1982 the civil court by *ex parte* order stayed the execution of the warrant pending an examination of the applicability of the newly passed article 7-C. *Id.* The appellate term held that the judgment became final before article 7-C was

*Lipkis II*, although requiring tenants to pay rent when their buildings did not have residential certificates of occupancy, represented a considerable advance in legal protection for tenants by upholding the doctrine of the de facto multiple dwelling.<sup>239</sup> It not only induced landlords to bring their buildings up to MDL standards,<sup>240</sup> but it implicitly recognized that tenants in buildings that met the requirements of a de facto multiple dwelling were residential tenants with certain rights. Some of these rights have been spelled out in later cases.

### 1. Landlord's Knowledge and Encouragement

In *Lipkis II*, the appellate term focused on the landlord's role in the conversion process, and supported the trial court's finding that the landlord "was aware of and directly encouraged the conversions."<sup>241</sup> Looking to the landlord's knowledge and encouragement as the two crucial elements for evaluating his role, the court left open the questions of what constitutes "encouragement" and whether knowledge alone, without encouragement, was sufficient to hold that a building is a de facto multiple dwelling.

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passed and that, even if the judgment had not been final, "there is nothing in the new loft law which now affords relief to the tenants in these adjudicated proceedings." *Id.*

239. The civil court has taken several approaches to keeping the *Lipkis I* pro-tenant approach alive, in evident disregard of *Lipkis II*. See *infra* notes 260-64 and accompanying text.

240. The published cases have not involved section 302-a of the MDL, which is a puzzling fact. In brief, section 302-a provides that a tenant in any action to recover rent or to regain possession for nonpayment may raise, as a defense, that the building has a "rent impairing" violation. N.Y. MULT. DWELL. LAW § 302-a.3.c (McKinney 1974). "Rent impairing" violations are defined as conditions that the Housing and Development Administration, Office of Code Enforcement, believes constitute "a fire hazard or a serious threat to the life, health or safety of occupants thereof." *Id.* § 302-a.2.a. In some cases the tenant could not raise the "rent impairing" violation defense because he himself had "caused the violation." *Id.* § 302-a.3.e. But some "rent impairing" violations, such as the lack of a sprinkler system or a legal second fire egress, are outside the control of any single tenant. See generally RASCH, *supra* note 165, § 1320 (reprinting the list of conditions that the Housing and Development Administration, Office of Code Enforcement considers to be rent impairing).

A finding that a building is a "fire hazard or in a continued dangerous condition or detrimental to life or health" also would cause the building to be subject to rent control. N.Y. CITY ADMIN. CODE Y51-3.0.e.1(b) (Williams 1975 & Supp. 1985-86). This statutory argument could provide an alternative ground for residential loft tenants not covered by article 7-C, see *infra* note 422 and accompanying text, to seek statutory protection for their tenancies and statutory regulation of their rents. See *infra* notes 274-75 and accompanying text (rent control).

241. 99 Misc. 2d at 520, 416 N.Y.S.2d at 696.

*Gordon & Gordon v. Carvajal*<sup>242</sup> presents the most restrictive interpretation of "encouragement" in a published opinion to date. The *Carvajal* court held that "absent some active participation by the landlord and encouragement to the tenant to convert, it is ruled that mere 'knowledge' that a tenant has converted a loft to residential use leaves too broad a range of speculation unresolved."<sup>243</sup> Although the landlord's managing agent came to the loft several times during its residential conversion, and despite the landlord's lack of protest, the landlord's actions did not, according to *Carvajal*, constitute evidence of actual encouragement of the conversion.<sup>244</sup> The tenant was an artist and "[a]n artists [sic] studio may be expected to look less like a commercial and industrial operation than, say, a shop where machines are operated."<sup>245</sup> Nor was the use by the tenant of the landlord's plumber to install a kitchen and bathroom sufficient evidence of encouragement of residential conversion.<sup>246</sup> The court reasoned that the lease required the tenant to make minor repairs, which the landlord could have believed his plumber was doing.<sup>247</sup>

The landlord's mere knowledge of the conversion was insufficient to cause the buildings to be designated de facto multiple dwellings. The tenant had "filled one courtroom bench with prospective witnesses" (these witnesses were other tenants) who could testify that the landlord was "well aware of" the residential conversions in his building,<sup>248</sup> and produced a Buildings Department inspector to verify that the conversions had occurred.<sup>249</sup> Nevertheless, the court found this evidence useless unless the plaintiff tenant could also show that the landlord had "actively participated in altering, transforming the lofts as a residential conversion."<sup>250</sup>

Under this decision, a landlord could attempt to avoid the restrictions of the de facto multiple dwelling doctrine by avoiding any overt act of encouragement. In this way, the landlord could maintain more control over the loft building, while having full knowledge that the building would be converted to residences.<sup>251</sup>

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242. N.Y.L.J., Feb. 8, 1980, at 6, col. 6 (N.Y.C. Civ. Ct. N.Y. County).

243. *Id.* at 7, cols. 1-2.

244. *Id.* at 7, col. 1.

245. *Id.*

246. *Id.*

247. *Id.* at 6, col. 6; *id.* at 7, col. 1.

248. *Id.* at 7, col. 1.

249. *Id.*

250. *Id.*

251. The breadth of a landlord's potential power is particularly startling in *Carvajal*, because the tenant signed his first lease in 1973 and the nonpayment

In *Gordon & Gordon v. Mandavin, Ltd.*,<sup>252</sup> a case involving the same landlord a year later, the appellate term took a more liberal view of what constitutes encouragement and knowledge on the landlord's part, holding that "[t]he owner's position that *changes of this magnitude* were accomplished surreptitiously, and that its agents were not apprised that families were openly living in this building for a period of years, is untenable and scarcely believable."<sup>253</sup> The only evidence of the landlord's encouragement mentioned by the court was that some tenants obtained "rent concessions" to be used for buying hot water heaters and for other "conversion expenses," and that the tenants had testified that the landlord had assured all of them that they could reside in their lofts even though they had commercial leases.<sup>254</sup>

Although there was more evidence of encouragement in *Mandavin* than was offered in *Carvajal*, the evidence was still minimal.<sup>255</sup> The *Mandavin* court stressed the "knowledge and approval" of the landlord, rather than his encouragement.<sup>256</sup> The court held that the landlord cannot bring a holdover proceeding years after the conversion "when all concerned necessarily *knew* from the inception of these leases that the premises would be" residentially occupied.<sup>257</sup>

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proceeding was not commenced until sometime after July 1, 1979. *Id.* at 6, col. 6; *id.* at 7, col. 2. The court held that as this was not a de facto multiple dwelling, the tenant would have no defenses against a holdover proceeding when his lease expired. *Id.* at 7. A landlord, by this court's reasoning, may thus ignore an illegal use for six years, then successfully institute a holdover proceeding, and win.

252. *Gordon & Gordon v. Madavin, Ltd.*, 108 Misc. 2d 349, 441 N.Y.S.2d 148 (Sup. Ct. App. T. 1st Dep't 1981).

253. *Id.* at 350, 441 N.Y.S.2d at 150 (emphasis added). The landlord based his argument on *155 Wooster Assocs. v. Bengis*, N.Y.L.J., July 2, 1979, at 12, col. 1 (Sup. Ct. App. T. 1st Dep't 1979), where the court distinguished its finding in *Tarkington Assocs. v. Spilner*, N.Y.L.J., June 8, 1978, at 10, col. 3 (Sup. Ct. App. T. 1st Dep't 1978), that the landlord had not given his consent to the conversion. *155 Wooster St. Assocs.*, N.Y.L.J., July 2, 1979, at 12, col. 2. In *155 Wooster St. Assocs.*, two of the landlord's partners lived in the building and a third had a studio there, so that the argument based on surreptitiousness was of no avail to the landlord. By placing so much stress on the "knowledge" component of the test, rather than on "encouragement," and by holding that *Tarkington Assocs.* "should be limited strictly to its facts" of surreptitious conversions, *id.*, the appellate term in *155 Wooster St. Assocs.* also foreshadowed its eventual approach in *Madavin*. See *supra* note 252 and *infra* notes 254-57 and accompanying text.

254. 108 Misc. 2d at 350, 441 N.Y.S.2d at 149.

255. After all, the installation of a hot water heater and other conversions carried out in *Madavin* could have been, as the court in *Carvajal* reasoned, to improve a commercial space as well as a residential space. N.Y.L.J., Feb. 8, 1980, at 7, col. 1.

256. 108 Misc. 2d at 350, 441 N.Y.S.2d at 150.

257. *Id.* (emphasis added). In *Madavin*, the landlord had instituted a holdover proceeding while the tenants' leases were still in force. *Id.* at 349, 351, 441 N.Y.S.2d

## 2. Warranty of Habitability

*Lipkis I*<sup>258</sup> held that the statutorily implied warranty of habitability applied to de facto multiple dwellings.<sup>259</sup> This issue has arisen in two other civil court cases, but it has never been considered by a higher New York court. The result of one case favored tenants, while the result of the other favored landlords.

*Lipkis v. Silleck*,<sup>260</sup> the first case, used the warranty of habitability to circumvent the holding of *Lipkis II*<sup>261</sup>—that the tenants were required to continue paying their rent by depositing it with the civil court until the landlord obtained a residential certificate of occupancy.<sup>262</sup> In this case, the landlord brought a nonpayment proceeding

at 149, 150. *Carvajal* involved a nonpayment proceeding, N.Y.L.J., Feb. 8, 1980, at 6, col. 6, but the *Carvajal* court held that its reasoning would also apply to a holdover proceeding for an expired lease. *Id.* at 7, col. 2. Although the *Carvajal* reasoning should also logically apply to holdover proceedings alleging illegal uses, the *Carvajal* court could have dealt differently with such a situation. See generally *supra* notes 188, 224 & 229.

The *Madavin* court was also influenced by Chapter 889, see *infra* notes 331-37 and accompanying text, and observed that such remedial legislation was not meant to operate wholly prospectively. 108 Misc. 2d at 351, 441 N.Y.S.2d at 150. The *Madavin* court went on to hold that even assuming arguendo that the Loft Protection Act "is not appropriately applied here, we would reverse the final judgments and dismiss the petitions for the reasons earlier stated in this decision. By so holding, we decide these cases in a manner consistent with what is now the expressed public policy of this State." 108 Misc. 2d at 352, 441 N.Y.S.2d at 151.

On the related question of whether an owner who buys a building that had been converted to residential use prior to his ownership may bring a holdover proceeding, the appellate term has held that he may not. *Sixty-four Fulton St. Assocs. v. Dwyer*, N.Y.L.J., May 21, 1981, at 7, col. 1 (Sup. Ct. App. T. 1st Dep't 1980). Even though the new landlord brought these proceedings within three months of taking title, arguing that it "had not been a party to the conversion process," the landlord was held to have taken title "subject to the character of the tenancies necessarily known to it and subject to rights existing in the tenants." *Id.* at cols. 1-2.

258. *Lipkis v. Pikus*, 96 Misc. 2d 581, 409 N.Y.S.2d 598 (N.Y.C. Civ. Ct. N.Y. County 1978), *modified*, 99 Misc. 2d 518, 416 N.Y.S.2d 694 (Sup. Ct. App. T. 1st Dep't), *aff'd*, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep't 1979), *appeal dismissed*, 51 N.Y.2d 874, 414 N.E.2d 399, 433 N.Y.S.2d 1019 (1980).

259. See *supra* note 203.

260. N.Y.L.J., Dec. 27, 1979, at 7, col. 3 (N.Y.C. Civ. Ct. N.Y. County).

261. *Lipkus v. Pikus*, 99 Misc. 2d 518, 416 N.Y.S.2d 694 (Sup. Ct. App. T. 1st Dep't), *aff'd*, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep't 1979), *appeal dismissed*, 51 N.Y.2d 874, 414 N.E.2d 399, 433 N.Y.S.2d 1019 (1980).

262. *Id.* at 519, 416 N.Y.S.2d at 695. *Laight Coop. Corp. v. Kenny*, 105 Misc. 2d 1001, 430 N.Y.S.2d 237 (N.Y.C. Civ. Ct. N.Y. County 1980), is another example of an imaginative end run around *Lipkis II*. *Laight* involved a nonpayment proceeding. Judge Freedman relied on *Mandel v. Pitkowsky*, 102 Misc. 2d 478, 425 N.Y.S.2d 926 (Sup. Ct. App. T. 1st Dep't 1979), *aff'd mem.*, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1980), citing it for the proposition that a landlord cannot maintain

against the tenants. The court, after endorsing the reasoning of *Lipkis I* which did not allow the landlord to collect any rent, and after stating that were it not "constrained" by *Lipkis II*, it would not have allowed the landlord to collect any rent,<sup>263</sup> then turned to the warranty of habitability issue. The court held that the warranty applied to a de facto multiple dwelling and that the landlord had breached the warranty.<sup>264</sup> While the total amount of overdue rent was \$3150, the court held the tenant was due \$2955 for his counterclaim on the warranty and, therefore, the tenant was required to pay only \$195.<sup>265</sup> The court thus forgave the tenant almost ninety-four percent of his overdue rent. The formula used by the court presumably would have continued to apply until the landlord began to provide the necessary services and to repair the damage to the building's roof, as legally required of the owners of multiple dwellings.

In practical terms, the *Silleck* court brought about the same result as the *Lipkis I* court. In *Lipkis I*, the landlord could collect no rent, while in *Silleck*, he could collect only negligible rent. In both cases, the landlord's ability to collect the full amount of the rent was contingent on his bringing the building into compliance with the Multiple Dwelling Law.

In *Lipkis v. Krugman*,<sup>266</sup> a case involving the same building as did *Silleck*, the court interpreted the Real Property Law as restricting the application of the warranty of habitability. The court noted that section 235-b,<sup>267</sup> which provides for the warranty, had not become

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a summary proceeding without a multiple dwelling registration number. 105 Misc. 2d at 1002, 430 N.Y.S.2d at 238. Judge Freedman ignored the fact that *Mandel* arose as a holdover proceeding case. *Mandel*, 102 Misc. 2d at 479, 425 N.Y.S.2d at 927. She also ignored the appellate term's requirement in *Lipkis II* that the tenants pay rent to the civil court, 99 Misc. 2d at 519, 416 N.Y.S.2d at 695, even though at least one building in *Lipkis II*, 47 Walker Street, did not have a registration number. *See id.* at 519-20, 416 N.Y.S.2d at 696. By reading *Mandel* literally and without considering its procedural context, and ignoring the *Lipkis II* decision, Judge Freedman was able to reach a result very similar to that of *Lipkis I*: the tenants were relieved completely from rent obligations, at least until the landlord obtained a registration number. *Laight*, 105 Misc. 2d at 1004, 430 N.Y.S.2d at 239.

It should be noted that *Laight* also stands for the proposition that a cooperative's board of directors is to be treated the same as any other landlord when judging whether it can bring a summary proceeding and whether the warranty of habitability applies. 105 Misc. 2d at 1003, 430 N.Y.S.2d at 239.

263. N.Y.L.J., Dec. 27, 1979, at 7, col. 4.

264. *Id.*

265. *Id.*

266. 111 Misc. 2d 445, 444 N.Y.S.2d 342 (N.Y.C. Civ. Ct. N.Y. County 1981).

267. N.Y. REAL PROP. ACTS. LAW § 235-b (McKinney Supp. 1986).

effective until August 1, 1975. Since the leases in question were signed before this date, the tenants did not have the statutorily implied warranty of habitability.<sup>268</sup> Even under the *Krugman* approach, however, the warranty is available to tenants under leases signed after August 1, 1975. As a result, a cause of action for breach of the implied warranty of habitability in de facto multiple dwellings, at this point, seems to be firmly established.

### 3. *The Effect of Subsequent Vacancies upon a Prior Determination of De Facto Multiple Dwelling Status*

One issue on which there is a split in the lower New York courts "is whether a building previously found to be a de facto multiple dwelling continues as such even if subsequently one or more units are vacated, leaving fewer than three residential units remaining."<sup>269</sup> In *Mintz v. Banks*,<sup>270</sup> a nonpayment proceeding involving a building with two resident artists and a vacant loft that had previously been used as a residence, the appellate term held that "[s]ince the vacant loft can and may be used for commercial rather than residential purposes, the premises do not come within the definition of multiple dwelling."<sup>271</sup> *Ropla Realty Corp. v. Ulmer*, however, explicitly rejected *Mintz*.<sup>272</sup> The *Ropla* court held that a landlord cannot alter

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268. *Krugman*, 111 Misc. 2d at 447-48, 444 N.Y.S.2d at 344. One interesting fact about this holding is that although the same building, 71-73 Franklin Street, was involved in both cases, Judge Nason does not comment on Judge Cahn's ruling on the issue of the warranty of habitability in *Silleck*. The two cases can be reconciled on the grounds that in *Krugman*, the case against the tenant *Silleck*, who had been the only defendant in *Silleck*, and three of the other four tenants, was dismissed because of a deficiency in the landlord's pleading. *Id.* at 446, 444 N.Y.S.2d at 344. Thus, Judge Nason's holding, although in apparent conflict with Judge Cahn on the warranty of habitability, had the same practical effect for *Silleck*—*Silleck* remained in possession of his dwelling unit.

In addition, the cases may be reconcilable on the facts of *Silleck's* lease. *Silleck* appears to have signed his lease in August 1975. N.Y.L.J., Dec. 27, 1979, at 7, col. 3. As this is only an allegation in the complaint, it is not entirely clear that it is true. But if the date is correct, then both judges could, consistently with their own rationales, have found *Silleck's* lease to contain an implied warranty of habitability.

269. *Ropla Realty Corp. v. Ulmer*, 110 Misc. 2d 619, 620, 442 N.Y.S.2d 889, 890 (N.Y.C. Civ. Ct. N.Y. County 1981) (emphasis omitted).

270. N.Y.L.J., April 19, 1976, at 10, col. 2 (Sup. Ct. App. T. 2d Dep't).

271. *Id.* The *Mintz* opinion had not made clear that the vacant loft had been residentially occupied. The *Ropla* opinion, however, clarifies this; in fact, the vacant loft was a registered AIR loft. 110 Misc. 2d at 621, 442 N.Y.S.2d at 891.

272. 110 Misc. 2d at 621, 442 N.Y.S.2d at 891 (N.Y.C. Civ. Ct. N.Y. County 1981).

the de facto multiple dwelling status of a building "by simply refusing to rent vacant loft space."<sup>273</sup>

### B. "De Facto" Rent Stabilization

The finding that a building is a de facto multiple dwelling does not fully protect a tenant when his lease expires. Unless the tenant is covered by the Rent Control<sup>274</sup> or Rent Stabilization Laws,<sup>275</sup> a New York City landlord has complete discretion as to whether to offer the tenant a new lease.<sup>276</sup> Furthermore, the landlord may impose any level of rent increase.<sup>277</sup> In addition, the landlord may bring a summary proceeding against a holdover tenant, a proceeding which would not necessarily be deterred by sections 302 and 325 of the MDL.<sup>278</sup> Conversely, a tenant protected by the Rent Control or Rent

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273. *Id.* at 622, 442 N.Y.S.2d at 891; *accord* Gilbert v. Roel Realty Co., N.Y.L.J., Jan. 27, 1982, at 6, col. 3 (Sup. Ct. N.Y. County). The *Ropla* court was influenced by the "suspicion" that the landlord would rerent the loft dwelling unit, presumably for higher rents. 110 Misc. 2d at 622, 442 N.Y.S.2d at 891. The differing results may be partially explained by the more hesitant protection the courts have offered tenants in nonpayment proceedings (*Mintz*) as compared to holdover proceedings (*Ropla*). See *supra* notes 188, 224 & 229.

274. N.Y. CITY ADMIN. CODE §§ Y51-1.0 to -17.0 (Williams 1975 & Supp. 1985-86). See generally N.Y. UNCONSOL. LAWS §§ 8605, 8606 (McKinney 1974 & Supp. 1986) (granting New York City authority to pass local rent control laws).

275. N.Y. CITY ADMIN. CODE §§ YY51-1.0 to -8.0 (Williams 1975 & Supp. 1985-86). See generally 8200 Realty Corp. v. Lindsay, 27 N.Y.2d 124, 135, 261 N.E.2d 647, 653, 313 N.Y.S.2d 733, 741 (1970) (rent stabilization law does not violate specific statutory authority for local rent control laws).

276. 33 N.Y. JUR. *Landlord & Tenant* § 14 (1964).

277. 34 N.Y. JUR. *Landlord & Tenant* § 283 (1964).

278. "A special proceeding may be maintained under this article upon the following grounds: 1. The tenant continues in possession of any portion of the premises after the expiration of his term . . ." N.Y. REAL PROP. ACTS. LAW § 711.1 (McKinney 1979).

Sections 302 and 325 of the MDL only prohibit a landlord whose building lacks a residential certificate of occupancy and registration statement from bringing a nonpayment proceeding. N.Y. MULT. DWELL. LAW §§ 302.1.b, 325.2 (McKinney 1974 & Supp. 1986). These two sections, 302.1.b and 325.2, do not address section 711 summary proceedings in general. Section D26-41.21(b) also prevents landlords who fail to file a certificate of registration from collecting rent. N.Y. CITY ADMIN. CODE § D26-41.21(b) (Williams 1977). Section 2900.21(f) of the New York Civil Court Rules does not cover holdover proceedings, since it was issued to implement section 325 of the MDL. N.Y. CIV. CT. PRAC. R. § 2900.21(f) (superseded and recodified at McKinney's 1986 New York Rules of Court § 208.42(g) (22 NYCRR § 208.42(g)).

Stabilization Laws is entitled to a lease renewal<sup>279</sup> at an increase set by a government agency.<sup>280</sup>

Residential loft buildings are not covered by the Rent Control Law because "[h]ousing accommodations created by a change from a non-housing use to a housing use" after 1947 generally are not covered by the Rent Control Law.<sup>281</sup> The Emergency Tenant Protection Act,<sup>282</sup> however, allows "each city, town or village" within certain areas of New York State, including New York City, to determine whether there exists a local "public emergency requiring the regulation of residential rents for all or any class or classes of housing accommodations" whose rents were not already regulated.<sup>283</sup> Pursuant to this authority, the New York City Council declared an emergency covering all classes of housing eligible under the Emergency Tenant Protection Act for regulation but not excluding any classes.<sup>284</sup>

The Rent Stabilization Law, a local New York City law,<sup>285</sup> has incorporated, since 1974, the declaration of public emergency required by the Emergency Tenant Protection Act.<sup>286</sup> The Rent Stabilization Law, unlike the Rent Control Law, can cover residential loft buildings with six or more units. The Rent Stabilization Law applies "to class A multiple dwellings not owned as a cooperative or as a condominium, containing six or more dwelling units,"<sup>287</sup> if the dwelling units were completed after February 1, 1947<sup>288</sup> or have been removed from rent control.<sup>289</sup>

*Mandel v. Pitkowsky*<sup>290</sup> extended the Rent Stabilization Law to

279. N.Y. CITY ADMIN. CODE § Y51-6.0 (Williams 1975 & Supp. 1985-86); N.Y. CITY ADMIN. CODE § YY51-6.0 (Williams 1975 & Supp. 1985-86).

280. N.Y. CITY ADMIN. CODE §§ Y51-5.0, YY51-5.0 (Williams 1975 & Supp. 1985-86).

281. *Id.*; § Y51-3.0.e.2(i)(1).

282. *See supra* note 281; N.Y. UNCONSOL. LAWS §§ 8621-34 (McKinney 1974 & Supp. 1986).

283. *See supra* note 282; N.Y. UNCONSOL. LAWS §§ 8623a, 8634 (McKinney 1974 & Supp. 1986).

284. *See supra* note 283; N.Y. CITY ADMIN. CODE §§ YY51-1.0 to -1.0.1 (Williams 1975 & Supp. 1985-86).

285. *See supra* note 284; N.Y. CITY ADMIN. CODE § YY51-1.0 (Williams 1975 & Supp. 1985-86).

286. *See supra* note 285.

287. *Id.*; N.Y. CITY ADMIN. CODE § YY51-3.0 (Williams 1975 & Supp. 1985-86). "A 'class A' multiple dwelling is a multiple dwelling which is occupied, as a rule, for permanent residence purposes." N.Y. MULT. DWELL. LAW § 4.8.a (McKinney 1974).

288. N.Y. ADMIN. CODE § YY51-3.0.a (Williams 1975 & Supp. 1985-86).

289. *Id.* § YY51-3.0.a.(2).

290. 102 Misc. 2d 478, 425 N.Y.S.2d 926 (Sup. Ct. App. T. 1st Dep't 1979), *aff'd mem.*, 76 A.D.2d 807, 429 N.Y.S.2d 550 (1st Dep't 1981). This was a holdover

cover de facto multiple dwellings.<sup>291</sup> The number of tenants in the building involved in *Mandel* is unclear from the facts—there were at least four, and possibly six.<sup>292</sup> Without discussing the exact number of tenants, the appellate term held that the enactment of the Emergency Tenant Protection Act of 1974 had brought de facto multiple dwellings under the Rent Stabilization Law.<sup>293</sup> A year later, in *Poutinen v. Civello*<sup>294</sup> the same court explicitly limited the holding of *Mandel* to situations where the building has six or more dwelling units.<sup>295</sup>

Unlike the well-litigated territory of de facto multiple dwellings, the issue of de facto rent stabilization is just emerging. It is a crucial issue for loft residents because they are affected by the rising popularity of lofts as residences and as offices.<sup>296</sup> The *Poutinen* approach creates a problem for many of these loft residents because they do not live in buildings with six or more residences.<sup>297</sup> It is quite possible

summary proceeding brought by the landlord to evict tenants whose commercial leases had expired. The tenants had “balked” at paying 300% rent increases. 102 Misc. 2d at 479, 425 N.Y.S.2d at 927. The tenants had “invested substantial sums” in converting their lofts for living and had occupied these lofts for twelve years. *Id.* at 479, 425 N.Y.S.2d at 927.

291. *Id.* at 479, 425 N.Y.S.2d at 928.

292. *Id.* at 479, 425 N.Y.S.2d at 926 (list of defendants).

293. *Id.* at 480, 425 N.Y.S.2d at 928. This “holding” was technically dictum, as the court itself pointed out, because the landlord’s petition would have been dismissed anyway for lack of a multiple dwelling registration number. *Id.* In reaching its conclusion on the applicability of rent stabilization, the court emphasized the long duration—12 years—of the tenants’ residence. *Id.* The protection afforded tenants by the Emergency Tenant Protection Act, however, does not relieve them of the obligation to pay rent. *See id.* at 481, 425 N.Y.S.2d at 928; *accord Mayeri Corp.*, N.Y.L.J., June 1, 1981, at 7, col. 2 (Sup. Ct. App. T. 1st Dep’t).

294. N.Y.L.J., Dec. 15, 1980, at 7, col. 3 (Sup. Ct. App. T. 1st Dep’t 1980). The loft tenant’s lease had expired and he was thus a month-to-month tenant. *Id.* He then entered into an agreement with the landlord to terminate the landlord and tenant relationship. *Id.* The tenant raised a number of contractual defenses to the agreement, all of which the *Poutinen* court rejected. *Id.* at cols. 3-4.

295. *Id.* There were at least three tenants involved in this case, as three actions were decided at the same time. *Id.* The tenant had argued that there was a lack of consideration for the agreement to terminate his tenancy. But the court held that there was no need for consideration as he was only a month-to-month tenant and he was not covered by rent stabilization, with its statutory guarantee of lease renewal. *Id.* The court cited section 8625.a.(4)(a) of the Emergency Tenant Protection Act to support its holding. *Id.* Section 8625.a.(4)(a) provides that a declaration of emergency may not be made concerning “housing accommodations in a building containing fewer than six dwelling units. . . .” N.Y. UNCONSOL. LAWS § 8625.a.(4)(a) (McKinney Supp. 1986).

296. *See supra* notes 55-58 and accompanying text.

297. DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, CITY OF NEW YORK, RESIDENTIAL STATUS LEGISLATION FOR LOFT HOUSING IN THE CITY OF NEW YORK 5 (1981) [hereinafter cited as LOFT HOUSING]. A further limitation on the

that residents of illegal lofts will be deprived of their homes at the expiration of their leases, even after they have spent substantial sums of money converting the spaces to residences or compensating the previous tenants for their expenditures,<sup>298</sup> and even where the conversions or payments were made with the landlord's knowledge and encouragement.<sup>299</sup>

In construing the MDL and the Rent Stabilization Law, the courts have looked to the explicit requirements of the statutes themselves to fix the number of independent families or residential dwelling units necessary to invoke the de facto multiple dwelling<sup>300</sup> or rent stabilization doctrines.<sup>301</sup> There is apparently no way to construe the Rent Stabilization Law as covering buildings with fewer than six units.<sup>302</sup> To extend the protection of rent stabilization to tenants in

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de facto rent stabilization doctrine was developed in *Lipkis v. Krugman*, N.Y.L.J., Aug. 26, 1981, at 11, col. 6 (N.Y.C. Civ. Ct. N.Y. County). Here the court held that "the creation of a residential unit out of a unit previously used solely for commercial purposes constitutes a substantial rehabilitation of the space in question" and that if such rehabilitation is carried out after January 1, 1974, "such unit is not subject to the rent stabilization law." *Id.* The court arrived at this conclusion by examining section 8625.a.(5) of the Emergency Tenant Protection Act, which excludes from its coverage "housing accommodations in . . . buildings substantially rehabilitated as family units on or after January first, nineteen hundred and seventy-four." *Id.* As the Emergency Tenant Protection Act had been the grounds upon which the *Mandel* court relied in bringing that particular de facto multiple dwelling under rent stabilization, 102 Misc. 2d at 480, 425 N.Y.S.2d at 928, the *Krugman* court's interpretation of the statute is an important issue for future resolution.

On the facts, *Mandel* and *Krugman* are not in conflict, since the tenants in *Mandel* had occupied their premises as residences since at least 1968. *Id.* Moreover, the *Mandel* court stressed this lengthy residence in writing its opinion. *Id.* This emphasis on the length of residence, plus the clear support in the language of the Emergency Tenant Protection Act for the *Krugman* court's holding and the requirement that buildings contain six or more dwelling units to be covered, as held in *Poutinen*, see *supra* note 295, may well make the de facto rent stabilization doctrine of minimal usefulness to many illegal loft tenants.

298. See *supra* notes 160-62 and accompanying text.

299. The *Poutinen* opinion did not suggest that any evidence concerning the tenant's expenditures had been considered. Moreover, although the procedure in the civil court below is not clearly explained, the landlord, evidently, had brought a holdover proceeding against the tenant. The tenant and landlord then signed a settlement agreement to terminate the lease and, before signing, one of the landlords advised the tenant, in writing, to seek legal counsel if he had any questions. *Poutinen v. Civello*, N.Y.L.J., Dec. 15, 1980, at 7, col. 3 (Sup. Ct. App. T. 1st Dep't 1980). Here, the landlord acted in good faith toward his tenant; this will not always be the situation in the future. One can only wonder what the result in the case would have been had the tenant expended much time or money in conversion or had the landlord not acted in good faith.

300. See *supra* notes 164-240 and accompanying text.

301. See *supra* notes 275-99 and accompanying text.

302. See *supra* note 292-95 and accompanying text.

buildings with fewer than six units, the courts would have had to create a common law doctrine, rather than relying on existing statutes. Although there is no direct evidence of thought processes of the New York's courts, it is not difficult to understand their hesitancy in moving quickly and radically on such complicated issues.<sup>303</sup>

The state legislature, however, took this burden from the courts by enacting article 7-C of the Multiple Dwelling Law. Rent stabilization was thereby extended to cover converted loft buildings with three or more dwelling units.<sup>304</sup> The state legislature thus extended the pioneering innovations of the courts.

### C. *Corris*

In *Corris v. 129 Front Co.*,<sup>305</sup> the appellate division issued an opinion whose importance ranks with *Lipkis II* and *Mandel*. The *Corris* court, in dictum, suggests a "more flexible view" regarding the principles of *Lipkis II* and *Mandel*.<sup>306</sup> This suggestion has begun to influence the lower courts to reach decisions which are less pro-tenant.<sup>307</sup>

The tenants in *Corris* withheld their rent, which led the landlord of the de facto multiple dwelling to limit the provision of services<sup>308</sup> to those provided for in the lease—"essentially limiting his obligation to furnish heat, hot water and elevator services only to business hours."<sup>309</sup> The supreme court had granted the tenants an injunction directing the landlord to provide services; simultaneously, the supreme court directed the tenants to pay all rent due.<sup>310</sup> The appellate division affirmed the supreme court order insofar as the grant of the injunction directing the landlord to provide services; but the appellate division modified the order by making the payment of rent by the tenant a condition of enforcing the injunction.<sup>311</sup> The effect of this holding was to overrule *Lipkis II*, at least in the context of an

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303. See generally *Corris v. 129 Front Co.*, 85 A.D.2d 176, 184, 447 N.Y.S.2d 480, 485 (1st Dep't 1982) (Sandler, J., dissenting in part) (describing "perplexing" legal problems involving illegal lofts).

304. See *infra* notes 386, 395 and accompanying text.

305. 85 A.D.2d 176, 447 N.Y.S.2d 480 (1st Dep't 1982).

306. *Id.* at 179; 447 N.Y.S.2d at 482.

307. *E.g.*, *Lipkis v. Pikus*, N.Y.L.J., Oct. 25, 1982, at 6, col. 3 (Sup. Ct. App. T. 1st Dep't 1982); *Eli Haddad Corp. v. Coco*, N.Y.L.J., July 14, 1982, at 11, col. 1 (N.Y.C. Civ. Ct. N.Y. County 1982).

308. 85 A.D.2d at 181-82, 447 N.Y.S.2d at 484 (Sandler, J., dissenting in part).

309. *Id.* at 177, 447 N.Y.S.2d at 481.

310. *Id.* at 176-77, 447 N.Y.S.2d at 481.

311. *Id.* at 178, 180, 447 N.Y.S.2d at 483.

action in equity: although he “candidly acknowledged” that he had no certificate of occupancy and that he had not filed the multiple dwelling registration statement required by the New York City Administrative Code,<sup>312</sup> the landlord in *Corris* nevertheless was allowed to collect rent directly.

Justice Sandler wrote a well-reasoned separate opinion in *Corris* in which he concurred in part and dissented in part.<sup>313</sup> He pointed out that the majority decision in effect held “out an inducement to landlords to violate the law.”<sup>314</sup> If the landlord had brought a nonpayment proceeding, he could not have directly received rent under *Lipkis II* and *Mandel*; but if the landlord withheld legally mandated services and drove the tenants to seek an injunction, then he could directly receive rent as a precondition to the equitable enforcement of his obligations to provide residential services.<sup>315</sup> Justice Sandler agreed with the majority that the landlord was entitled to current rent,<sup>316</sup> but argued that “it is necessary to modify that aspect of the *Lipkis* and *Mandel* rule that denies such landlords [as the defendant in *Corris*] the right actually to receive rents in [Real Property Actions & Proceedings Law] 711 proceedings until they secure a certificate of occupancy.”<sup>317</sup>

Justice Sandler’s dissent focused on the fact that just as the lack of a certificate of occupancy should not be a block to recovering rent, neither should the lack of a registration statement.<sup>318</sup> Ultimately, however, Justice Sandler’s position was no clearer than that of the majority. Pleading a lack of information on the “complicated social and economic problems presented,” Justice Sandler wrote:

In the present state of judicial knowledge, and subject to the enlightenment that may be provided by future cases, I am inclined to favor a more flexible approach that would vest trial courts with the discretionary power, depending on the balance of factors presented in individual cases, to pursue varying approaches.<sup>319</sup>

He thus advocated removing any of the rules established by previous cases because, “[i]f there are presently apparent general principles that would yield on a consistent basis wholly satisfactory responses

312. *Id.* at 181, 447 N.Y.S.2d at 484.

313. *Id.* at 181, 447 N.Y.S.2d at 483.

314. *Id.* at 182, 447 N.Y.S.2d at 484 (Sandler, J., dissenting in part).

315. *Id.* at 181-82, 447 N.Y.S.2d at 484 (Sandler, J., dissenting in part).

316. *Id.* at 181, 447 N.Y.S.2d at 483 (Sandler, J., dissenting in part).

317. *Id.* at 182, 447 N.Y.S.2d at 484 (Sandler, J., dissenting in part).

318. *Id.* at 183, 447 N.Y.S.2d at 485 (Sandler, J., dissenting in part).

319. *Id.* at 182, 447 N.Y.S.2d at 484 (Sandler, J., dissenting in part).

to these problems, I am not aware of them.”<sup>320</sup> At least one court has used *Corris* as authority in rendering a pro-landlord decision. In *Eli Haddad Corp. v. Coco*,<sup>321</sup> a nonpayment proceeding, Judge Lane found that the landlord had not carried his burden of proving that the building was not a de facto multiple dwelling and that “[a]ccordingly pursuant to statutory and decisional law, the petition should be dismissed or, even if granted, enforcement should be stayed.”<sup>322</sup> However, Judge Lane used *Corris* as authority for granting final judgment for possession in spite of the “statutory and decisional law” he had cited.<sup>323</sup>

#### D. The Future Direction of the Case Law

*Corris* apparently has established that “a landlord and a tenant have reciprocal obligations, the landlord to furnish space and services, the tenant to pay rent. Tenants in converted premises should obviously have essential services. On the other hand, it is economically impossible for landlords to continue to render such services indefinitely without receiving rent.”<sup>324</sup> The meaning of this, however, will not become clear until a body of civil court and appellate term cases builds up.

Certainly, the precedential value of *Lipkis II* and *Mandel* has been diminished, and courts may ignore the obstacles in the MDL and the New York City Administrative Code to a landlord’s efforts to collect rent when he has not obtained a certificate of occupancy and/or registration statement.

The effect the new article 7-C<sup>325</sup> will have on the case law is not yet clear. One panel of appellate term justices held, in *Mordant*

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320. *Id.* at 184, 447 N.Y.S.2d at 485 (Sandler, J., dissenting in part).

321. N.Y.L.J., July 14, 1982, at 11, col. 1 (N.Y.C. Civ. Ct. N.Y. County 1982).

322. *Id.*

323. *Id.*; cf. *Trans World Maintenance Serv., Inc. v. Rodd*, 113 Misc. 2d 201, 205, 448 N.Y.S.2d 977, 980 (Sup. Ct. N.Y. County 1982) (ejectment action dismissed “without prejudice to landlord instituting such proceeding as it deems advisable to recover rent” on “authorization” provided in *Corris* for “more ‘flexible approach’”). Judge Lane in *Eli Haddad* took into account the following factors in granting possession: only 4 out of the 24 units were residential; the building was in a manufacturing zoning district; the tenants had only a “modest investment” in the loft dwelling unit; and the landlord “tolerated with knowledge but did not encourage or promote” residential conversion. *Eli Haddad Corp. v. Coco*, N.Y.L.J., July 14, 1982, at 11, col. 1.

324. 85 A.D.2d at 178, 447 N.Y.S.2d at 482; accord *Mordant Assoc. v. Duval*, N.Y.L.J., Oct. 20, 1982, at 6, col. 1 (Sup. Ct. App. T. 1st Dep’t 1982) (citing *Corris* for the proposition that “[t]enants residing in converted lofts, like all tenants generally, are entitled to essential services, with the proviso that they fulfill their reciprocal obligation to pay rent”).

325. See *infra* notes 383-420 and accompanying text.

*Assocs. v. Duval*,<sup>326</sup> that “[n]ow that a regulatory scheme is in place singularly addressed to the phenomenon of converted lofts, it should be followed in adjudicating the rights and obligations of landlords and tenants.”<sup>327</sup> Another panel of appellate term justices, however, deciding a case in which chapter 889<sup>328</sup> applied, entertained the notion that the doctrine of de facto rent stabilization might simultaneously apply as well.<sup>329</sup>

#### IV. Residential Status Legislation

##### A. Chapter 889

The statutory predecessor of article 7-C, which passed the New York state legislature on June 21, 1982, was chapter 889, section six.<sup>330</sup> This statute expired on June 30, 1981.<sup>331</sup> Section six of chapter 889 codified the case law in broad terms. It applied to a unit in a multiple dwelling formerly used for nonresidential purposes when the owner “knew or had reason to know at the inception of the tenancy” that the unit would now be used for residential purposes, or when the landlord accepted rent from the residential tenant for a period of three consecutive months.<sup>332</sup> If a section six tenant’s

326. N.Y.L.J., Oct. 20, 1982, at 6, col. 1 (Sup. Ct. App. T. 1st Dep’t 1982).  
327. *Id.*

328. See *infra* notes 330-37 and accompanying text.

329. *Mayeri Corp. v. Starr*, N.Y.L.J., June 1, 1981, at 7, col. 2 (Sup. Ct. App. T. 1st Dep’t 1981). The argument that the *Mandel* doctrine remains applicable even where article 7-C would seem explicitly to apply is in fact being made in the courts. Alan Liebman, Esq., Remarks at the Forum of the Association of the Bar of the City of New York on “Lofts Revisited: Were the Equities Balanced?” (Feb. 7, 1983).

330. 1980 N.Y. Laws 889, § 6.

331. See generally STATE EXECUTIVE DEPARTMENT, HOUSING—CONVERSION OF RECYCLED BUILDINGS IN NEW YORK CITY 2. This is a relatively uninformative memorandum written to explain Chapter 889. Some unsystematic attempts had been made earlier in the New York City Council to deal with the problems of illegal lofts. *E.g.*, The Council of the City of New York, Int. No. 618 (Apr. 10, 1979) (landlord of a building with loft living unit had to apply for residential certificate of occupancy; once certificate was obtained, lease was “deemed by operation of law” to be residential and tenant received all residential tenant legal rights, including warranty of habitability).

332. 1980 N.Y. Laws 889, § 6(a). This provision seems to have been written with the approach of *Gordon & Gordon v. Madavin, Ltd.*, 108 Misc. 2d 349, 441 N.Y.S.2d 148 (Sup. Ct. App. T. 1st Dep’t 1981), in mind, see *supra* notes 252-57 and accompanying text, going beyond even the knowledge and encouragement standard of *Lipkis v. Pikus*, 99 Misc. 2d 518, 416 N.Y.S.2d 694 (Sup. Ct. App. T. 1st Dep’t), *aff’d*, 72 A.D.2d 697, 421 N.Y.S.2d 825 (1st Dep’t 1979), *appeal dismissed*, 51 N.Y.2d 874, 414 N.E.2d 399, 433 N.Y.S.2d 1019 (1980). See *supra* notes 228-40 and accompanying text. The disjunctive second condition for applying section 6 is even more far-reaching than the first condition: the landlord has only to have

lease expired at any time after June 11, 1980 and before June 13, 1981,<sup>333</sup> the tenant was entitled to a new lease of at least a year's duration at a rental increase of no more than eleven percent.<sup>334</sup> Finally, section six provided that: "[i]t shall not be a ground for an action or proceeding to recover possession of a dwelling unit, covered by this section, that the occupancy . . . is illegal or in violation of provisions of the tenant's lease . . . because a residential certificate of occupancy . . . has not been issued for the building . . . ."<sup>335</sup>

Chapter 889 imposed a moratorium on tenant evictions and a limit on rent increases, both on terms favorable to the tenant. Such a simple statute made the task of the courts easier.<sup>336</sup> Chapter 889,

"accepted rent" from a tenant occupying "such unit for residential purposes for any period of three successive months." 1980 N.Y. Laws 889, § 6(a)(ii). The theory behind section 6(a)(ii) might well have been that knowledge could be imputed to a landlord after three months of accepting rent.

333. 1980 N.Y. Laws 889, §§ 8, 9.

334. *Id.* § 6(b).

335. *Id.* § 6(c). Once again section 6 codified a trend in the case law making an implicit distinction between holdover and nonpayment proceedings. *See generally supra* notes 189, 224, & 229 and accompanying text. The courts had been willing to allow the landlord to enforce actions for rent against the tenant but not to evict him physically for illegal occupancy. *Id.*

336. Several cases concerning chapter 889 were decided by the courts. *Symons v. Nickson*, N.Y.L.J., Jan. 20, 1982, at 11, col. 5 (Sup. Ct. App. T. 1st Dep't 1982) (1980 Act applied in ejectment proceeding); *Dovman v. Yahashi*, 109 Misc. 2d 484, 442 N.Y.S.2d 349 (Sup. Ct. App. T. 1st Dep't 1981) (chapter 889 constitutional); *Trans World Maintenance Serv., Inc. v. Rodd*, 113 Misc. 2d 201, 448 N.Y.S.2d 977 (Sup. Ct. N.Y. County 1982) (landlord must offer new lease to loft resident whose lease expired between June 11, 1980 and June 30, 1981).

The most important case arising under chapter 889 was *Callis v. Fifth Ave. Corp.*, N.Y.L.J., Nov. 25, 1981, at 11, col. 3 (Sup. Ct. N.Y. County 1981), *modified*, 91 A.D.2d 565, 457 N.Y.S.2d 48 (1st Dep't 1982). In this case the tenants made a motion for an injunction restraining the landlord from evicting the tenants. *Id.* The motion was denied because the court found that the tenants were not likely to succeed in claiming the protection of chapter 889. *Id.* The court insisted on reading the Act in "conjunction" with article 7-B, and found that the Act "principally concern[ed] itself" with the article. *Id.* How the court arrived at this statutory construction is not clear.

Perhaps the court looked to the title of chapter 889: "An act to amend the multiple dwelling law . . ." 1980 N.Y. Laws 889. Part of chapter 889 concerned itself with minor amendments to article 7-B. If this was the court's reasoning, it overlooked that the title covered amendments to both the MDL and the Real Property Law before adding "and to provide for continued occupancy by certain residential loft tenants in such cities." *Id.* Chapter 889 was meant to accomplish three purposes; the court's reasoning would have been more defensible if the phrase "and to provide for" were linked directly to the first phrase about the MDL and if "and" were changed to "including."

The tenants were found not to be certified artists, and since their motion for an injunction had been based on the claim that chapter 889 protected artists, it

however, was not a final statutory solution to the illegal loft problem because it was merely a moratorium and provided no mechanism by which illegal loft residences might be brought into compliance with the law. In addition, it was not extended in the spring and summer of 1980.<sup>337</sup>

## B. Predecessor Bills to Article 7-C

The state legislature did not agree, until June 21, 1982, on a bill that would bring many loft tenants out of their legal limbo and make them residents protected by rent stabilization whether or not they had signed commercial leases, and that would encourage landlords to bring their buildings into compliance with the MDL and the New York City Building Code.<sup>338</sup>

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was dismissed. *Callis v. Fifth Ave. Corp.*, N.Y.L.J., Nov. 25, 1981 at 11, col. 4 (Sup. Ct. N.Y. County 1981), *modified*, 91 A.D.2d 565, 457 N.Y.S.2d 48 (1st Dep't 1982). The court did hold, however, that if the tenants' "bona fide" claim was to the protection of chapter 889 on the basis of "general residential" use, their claim would have been permitted by article 7-B. *Id.*; *accord* *Pilgreen v. 91 Fifth Ave. Corp.*, N.Y.L.J., Dec. 2, 1981, at 7, col. 1 (Sup. Ct. N.Y. County 1981), *modified*, 91 A.D.2d 565, 457 N.Y.S.2d 48 (1st Dep't 1982) (related case with same landlord and same justice but different tenant). The tenants argued, in the alternative, that they were protected by article 7-B in their "general residential" use, but the court found that this was not a "bona fide" claim. N.Y.L.J., Nov. 25, 1981, at 11, col. 3.

*Callis* was explicitly criticized in *Trans World Maintenance Serv., Inc. v. Rodd*, 113 Misc. 2d 201, 204, 448 N.Y.S.2d 977, 979 (Sup. Ct. N.Y. County 1982). The *Trans World* court held that chapter 889 was not to be read in conjunction with article 7-B. *Id.* at 204, 448 N.Y.S.2d at 979. Further, even if the tenants alleged that they were using the premises for "joint living-work quarters," they did not have to prove that they were artists as defined in section 276 of the MDL. *Id.* at 204-05, 448 N.Y.S.2d at 980. "The language of the statute is clear and there is nothing in its legislative history. . . that indicates any intent to limit its applicability as was done in *Callis v. Fifth Ave. Corp.*" *Id.* at 204, 448 N.Y.S.2d at 979-80.

337. One reason for the failure to extend the Act may have been that New York City promised a comprehensive bill in January and did not introduce it until June; even then, the bill did not have support from most interested parties. New York State Tenant & Neighborhood Coalition, the 1981 Legislative Session: Tenant Protection Laws 25 (n.d.) [hereinafter cited as NYSTNC].

Another possible reason for the failure is the resistance many legislators felt to the protection being offered to tenants of buildings with fewer than six units. *Id.* at 26. Many legislators feared that the provision of such strong statutory protection for fewer than six tenants might be a precedent for a general extension of the Rent Stabilization Law to cover buildings housing fewer than six tenants as well. *Id.*

A one-year extension of chapter 889 passed the Assembly, but never made it out of the Senate Committee. *Id.* A final effort in the October session to have the bill discharged from the Senate Committee to the floor of the Senate was defeated. *Id.* at 27.

338. N.Y. MULT. DWELL. LAW §§ 280-87 (McKinney Supp. 1982).

The New York City Department of Housing Preservation and Development (HPD) was given the responsibility of drafting a law to resolve the problems of illegal loft residents,<sup>339</sup> and by May 1981, it had drafted a bill which was introduced in the state assembly that June.<sup>340</sup> When this bill did not pass, HPD completed, by December, 1981, a revised version.<sup>341</sup> HPD's conscious policy in developing the bills was to incorporate and build "on the precedents already established in decisional law."<sup>342</sup> HPD's bills gave residential status to all buildings that the courts had brought under the de facto multiple dwelling doctrine,<sup>343</sup> *i.e.*, buildings with three or more dwelling units. The proposals also brought these buildings under rent stabilization, thereby extending the case law that had limited rent stabilization to buildings with six or more units.<sup>344</sup>

The initial bill, A.8830, praised loft conversions in its Legislative Findings as having a "salutory effect" on neighborhoods and on the city's economy, provided such conversions were "properly regulated."<sup>345</sup> This general pro-conversion policy translated into a pro-tenant orientation. The bill turned on a definition of an "interim

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339. Bailinson, *supra* note 28, at 132. A comprehensive bill regulating loft conversions had been introduced in the state legislature as early as 1978. The Council of the City of New York, Res. No. 235 (May 1, 1978) (this proposed resolution was very critical of the state legislation, noting that the proposed legislation would have encouraged illegal conversions by applying only to buildings applying for J-51 tax abatements).

340. A. 8830, 1981-82 Sess. (June 8, 1981). The original bill HPD proposed on May 29, 1981 was identical to the bill that was introduced except for some changes in lettering and numbering. A. 8830 was introduced by the Committee on Rules without any legislative sponsors because no group supported it. NYSTNC, *supra* note 337, at 25.

341. New York City Dept. of Housing Preservation and Development, An Act to Amend the Multiple Dwelling Law (Dec. 16, 1981) [hereinafter cited as the Dec. 16, 1981 Bill]. This bill was a slightly rewritten version of a proposed bill submitted by HPD on December 9, 1981.

342. NEW YORK CITY DEPT. OF HOUSING PRESERVATION AND DEVELOPMENT, RESIDENTIAL STATUS OF ILLEGAL LOFT CONVERSIONS I (September 1980) [hereinafter cited as ILLEGAL LOFT CONVERSIONS]. Not all city agencies have been as favorably disposed toward the doctrines the courts have created as has HPD. The Legislative Representative of the City of New York, Office of the Mayor, wrote that "[t]his residential status bill is vital to the zoning enforcement interests of New York City. The Mayor's Office of Loft Enforcement is now attempting to prevent new illegal conversions of loft space. This process may become more difficult if the courts continue to thwart attempts by the City to maintain the integrity of its zoning resolution by making rulings contrary to the intent of the City as reflected in local zoning." M. Boepple, Memorandum in Support 7 (Dec. 21, 1981) (written in support of the Dec. 16, 1981 Bill).

343. See *supra* notes 164-240 and accompanying text.

344. See *supra* notes 274-304 and accompanying text.

345. A. 8830, 1981-82 Sess. (June 8, 1981), § 2 (§ 280).

multiple dwelling.”<sup>346</sup> In the districts where the Zoning Resolution did not permit residence as of right, *i.e.*, in manufacturing zones in New York City,<sup>347</sup> interim multiple dwelling status would not have been granted.<sup>348</sup> In other districts, residence in an interim multiple dwelling would have been permitted regardless of any other statutes.<sup>349</sup>

The owner of a building to which the bill applied was obligated to take the measures necessary to obtain a certificate of occupancy as a class A multiple dwelling,<sup>350</sup> but had a limited option to restore a building to commercial or manufacturing uses if there were fewer than six residential units.<sup>351</sup> The tenant of an interim multiple dwelling was shielded from any “action or proceeding to recover possession” of a unit based on the claim that the occupancy was “illegal or in violation of provisions of the tenant’s lease” if the illegality arose from the lack of a certificate of occupancy or the presence of a restriction on use in the lease.<sup>352</sup> Once an owner had obtained a certificate of occupancy, the unit was brought under the Rent Stabilization Law by an amendment to the Emergency Tenant Protection Act<sup>353</sup> and the initial legal regulated rent was calculated.<sup>354</sup> The only

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346. *Id.* § 2 (§ 281).

347. *See supra* note 66.

348. A. 8830, 1981-82 Sess. (June 8, 1981), § 2 (§ 281). Here the HPD proposal was less favorable to tenants than the courts have been, because the courts have never explicitly considered the impact that zoning might have on declaring a building a *de facto* multiple dwelling.

349. *Id.* § 2 (§ 283).

350. *Id.* § 2 (§ 284). The owner must also follow a series of timed steps before obtaining the certificate. *Id.* If the owner does reconvert, he must pay the tenant the “fair market value of any improvements made by such tenant, and reasonable moving costs.” *Id.* (cross referencing to § 2 (§ 284.1(d)).

351. *Id.* § 2 (§ 285.4).

352. *Id.* § 2 (§ 286.1(a)).

353. *Id.* § 5.

354. *Id.* § 6.e.(1),(2). The rent was based on the July 1, 1979 rent plus a legally stipulated percentage increase in accordance with the age of the current lease. For example, if the latest lease had been signed on or after July 1, 1978, the lease rental would have been increased 11%; if it had been signed on or after July 1, 1970 and before July 1, 1971, the increase would have been 52%. HPD may have been trying to adjust for the twin facts that most loft leases are for more than one or two years and that rents under a lease would have been much lower than the market value in 1981 if the lease had been signed early in the 1970’s. *See supra* notes 56-58, & 157 and accompanying text. But ILLEGAL LOFT CONVERSIONS, *supra* note 342, at 6-7, mentions only a concern with the equitable distribution of the legalization costs between landlord and tenant, a motivation which one commentator identifies as HPD’s only motive. Bailinson, *supra* note 28, at 136.

One organization of building owners summarized A. 8830’s potential impact on rents, and persuasively showed that landlords would not have received anywhere near market rentals after the statutory rent adjustment. REBNY RESPONSE, *supra*

allowable rent increase, over the initial legal rent, was \$2000 per unit annually for the costs of bringing the building into compliance with the MDL and the Building Code.<sup>355</sup> The tenant would receive a rent abatement for all fixtures for which he had paid and that complied with the applicable laws and codes.<sup>356</sup> Finally, the bill contained a provision under which a landlord could have applied to a locally designated "judicial or quasi-judicial body" to attempt to show that obtaining a residential certificate of occupancy would cost more than "the market value of the building as if vacant after such certificate was obtained;" and if this finding were made, the owner could reconvert the building to manufacturing or commercial uses.<sup>357</sup>

The most pro-tenant features<sup>358</sup> of HPD's initial proposal were the provision for a minimal rent adjustment upon legalization<sup>359</sup> and the extension of rent stabilization, which had applied only to non-loft buildings with six or more dwelling units, to converted buildings with as few as three units.<sup>360</sup> The December 16, 1981 revised HPD

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note 89, at 8. The REBNY estimated that the HPD formula in section 6(e) of A. 8830 would have led to a range of residential rents of \$2 to \$3.80 per square foot, without considering the rent reductions for which tenants would be eligible under section 6.e.(3)(a). *Id.* REBNY contrasted this range of rents to contemporary commercial rents for similar spaces (\$3.25 to \$4.00 per square foot) and contemporary legal residential loft rentals (\$4.00 per square foot and up). *Id.* It summarized its objections by writing that "[t]he proposal would therefore create a class of statutory tenants with rents far below market level and place them in a system of rent regulation which would assure continued depressed rentals in these spaces." *Id.*

355. A. 8830, 1981-82 Sess. (June 8, 1981), § 6.e.(2)(b).

356. *Id.* § 6.e.(3)(a).

357. *Id.* § 2 (§ 285.2). If the owner does reconvert, he must pay the tenant's "reasonable moving costs" and the "fair market value" of any improvements. *Id.* (cross referencing to § 2 (§ 284(d))).

358. Bailinson writes that:

Privately, HPD and other city officials admit that the burden [of legalization costs] is being placed most heavily on the landlords. They feel that the property owners have enjoyed substantial profits from residential tenants to whom they have not had to supply residential services. Some of these profits from past years will have to go to pay legalization costs.

Bailinson, *supra* note 28, at 136. Bailinson's study was based heavily on interviews.

359. How much it will cost to bring a unit up to statutory standards has been the subject of continuing debate. Estimates range from \$10,000-\$15,000 per unit (New York City) to \$25,000-\$30,000 (Real Estate Board of New York). *Id.* at 137. Bailinson criticizes A. 8830 for being an inflexible approach because each building will have its own unique problems in meeting the MDL and Building Code standards, as these are conversions and not newly erected buildings. *Id.* at 138. Any set formula for rent increases, therefore, is inappropriate in Bailinson's view. *Id.*

360. The REBNY objected strenuously to this as creating an "entirely new class of regulated residential buildings." REBNY RESPONSE, *supra* note 89, at 7. HPD

bill ("December 16, 1981 Bill")<sup>361</sup> provided a number of concessions to landlords:<sup>362</sup> (1) it gave them more time to obtain a residential certificate of occupancy; (2) it relaxed the proposed standards that had to be met in reconverting the building to commercial and manufacturing uses; and (3) it created more generous terms upon which the landlord could recover legalization costs.<sup>363</sup> The December 16, 1981 Bill simultaneously retained the most important tenant protection—interim multiple dwellings were covered under the Emergency Tenant Protection Act and the Rent Stabilization Law.<sup>364</sup>

The difference in approach is clear after reviewing the Legislative Findings sections of the May and December versions of the bill. Where the initial bill gave qualified support to conversions as a positive good,<sup>365</sup> the December 16, 1981 Bill had no such language.<sup>366</sup> The initial bill was intended to prevent "the exaction of unjust, unreasonable and oppressive rents and to forestall profiteering, [sic] speculation,"<sup>367</sup> while the December 16, 1981 Bill intended to establish "a system whereby residential rentals can be reasonably adjusted so that residential tenants can assist in paying the cost of such legalization without being forced to relocate."<sup>368</sup>

With all the extensions possible under the initial bill, the owner had to obtain a residential certificate of occupancy within two years, which could be extended to three years for "good cause shown."<sup>369</sup>

itself acknowledged that one of the reasons A. 8830 did not pass was "fear" on the part of state legislators that the extension of rent stabilization to loft buildings with fewer than six tenants might be "a precedent for a general extension of rent regulation to all such housing." LOFT HOUSING, *supra* note 297, at 5; *cf. supra* note 337 (similar fears raised regarding chapter 889).

361. Dec. 16, 1981 Bill, *supra* note 341.

362. See generally A. 8074, 1981-82 Sess. (Mar. 31, 1981), for an instructive contrast to the provisions of the HPD bill as it had evolved. A. 8074 was a bill introduced by three assemblymen, of whom Paul Viggiano of Manhattan was the most active. A. 8074 did not restrict "interim multiple dwelling" to buildings which met local zoning resolutions, *id.* § 3 (§ 282), and contained no provision similar to section 2 (§ 285.4), *supra* note 351, which allows the owner in limited circumstances to reconvert the building to commercial or manufacturing uses. In one significant way, however, A. 8074 was much more fair to landlords than was A. 8830: it allowed a landlord to apply for a rent increase of 5% to be paid each year for ten years to cover 50% of the costs of obtaining a residential certificate of occupancy. A. 8074 § 10(e)(2)(b). HPD adopted this type of approach in its December, 1981 proposed bill. See *infra* note 373 and accompanying text.

363. See *infra* notes 370-73 and accompanying text.

364. Dec. 16, 1981 Bill, *supra* note 341, § 1 (§§ 286.3, 286.13).

365. See *supra* note 345 and accompanying text.

366. Dec. 16, 1981 Bill, *supra* note 341, § 1 (§ 280).

367. A. 8830, 1981-82 Sess. (June 8, 1981), § 2 (§ 280).

368. Dec. 16, 1981 Bill, *supra* note 341, § 1 (§ 280).

369. A. 8830, 1981-82 Sess. (June 8, 1981), § 2 (§ 284.1(a)).

The December 16, 1981 Bill, however, granted the owner up to three years, which could be extended to five years for "good cause shown."<sup>370</sup> The December 16, 1981 Bill allowed the owner to apply for exemption from the Bill and to reconvert the building to non-residential uses if residential use would have an "unreasonably adverse impact on a non-residential conforming use tenant within the building" or if the "cost of compliance render[ed] legal residential conversion infeasible."<sup>371</sup> The initial bill allowed reconversion only when legalization would cost more than the market value of the building after a residential certificate of occupancy was obtained.<sup>372</sup> Under the December 16, 1981 Bill, the landlord could apply for rent adjustments to recover the full costs, including financing, or obtaining a residential certificate of occupancy.<sup>373</sup> This provided a more generous rental to the owner than the initial bill which limited rent increases for legalization to \$2000 per year.<sup>374</sup>

The most important pro-tenant change in the December 16, 1981 Bill was a new provision that allowed the fixtures in a unit to be

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370. Dec. 16, 1981 Bill, *supra* note 341, § 1 (284.1(i)). HPD explained this change by the need "to accommodate owners with limited resources and in consideration of today's very difficult borrowing situation." LOFT HOUSING, *supra* note 297, at 10.

371. Dec. 16, 1981 Bill, *supra* note 341, § 1 (285.2). The test of "cost infeasibility" is also more pro-landlord than the test prescribed in A. 8830. The test in the December 16, 1981 bill is a "reasonable return on the owner's investment." *Id.* If the owner does reconvert, he must "file an irrevocable recorded covenant . . . that the building will not be re-converted to residential [use]" for fifteen years. *Id.* This requirement is meant to prevent a landlord from first reconverting to rid a building of its old residential tenants and then either re-renting or selling the space at higher current market rates to new residential tenants, or selling the building to a new owner for such purposes. LOFT HOUSING, *supra* note 297, at 11.

372. *See supra* note 357 and accompanying text.

373. Dec. 16, 1981 Bill, *supra* note 341, § 1 (286.5).

374. *See supra* note 355 and accompanying text. HPD noted that "[t]he major capital improvements approach, notwithstanding its complications, appears to be one that is perceived as fairer than a blanket approach by both owners and tenants." LOFT HOUSING, *supra* note 297, at 8. The original HPD proposal did not include the idea of "an individual building-by-building pass-through of costs" because of the fear of excessive paperwork. *Id.* at 7.

Another advantage to such an approach is that to the extent the tenant has done the work required for a certificate of occupancy, or can agree with his landlord to do the work, the landlord will not be entitled to an adjustment in rent. Dec. 16, 1981 Bill, *supra* note 341, § 1 (§ 286.6). The owner has a right of first refusal. If the owner buys the improvements, he may remove the unit from the provisions of the bill requiring rent regulation, provided there were fewer than six residential units in the building when the Bill became effective. Dec. 16, 1981 Bill, *supra* note 341, § 1 (§ 286.6).

sold, with a once per unit limitation, to an incoming tenant by the tenant who made or purchased the improvements.<sup>375</sup> Tenants thus were to be provided with an opportunity to recover their often substantial investments without having to bargain with building owners.<sup>376</sup> Moreover, if the number of dwelling units dropped below three, the protections of the December 16, 1981 Bill continued for the other residents.<sup>377</sup> In a major addendum, the December 16, 1981 Bill would have created a "special loft unit," the "loft board," to administer the Bill and to resolve disputes between owners and tenants.<sup>378</sup>

Both of HPD's proposed bills suffered from one fundamental flaw: their protection was limited to buildings in which at least three units were occupied as residences on a specified cutoff date.<sup>379</sup> Of course, there may be many tenants living in illegal loft buildings with less than three units.<sup>380</sup> In addition, since New York City envisions its seven-point program<sup>381</sup> as restraining future illegal conversions, it is of the opinion that there is no need to deal legislatively with illegal conversions occurring after a specified date. The reasoning is, at best, of dubious validity, as illegal conversions may well continue on a large scale.<sup>382</sup> These two problems have been carried over into the bill that was eventually enacted.

### C. Article 7-C

The December 16, 1981 Bill was introduced in the 1982 state

375. Dec. 16, 1981 Bill, *supra* note 341, § 1 (§ 286.6).

376.

The resolution of the fixture issue is one of the most difficult issues within a comprehensive loft package. Both owners and tenants have very strong feelings with regard to the issue. The tenants have often invested substantial amounts of time and money in improving the raw space which they initially leased. There may, however, be little correlation between the cost of residential amenities and the cost of legalization.

LOFT HOUSING, *supra* note 297, at 8. Without such a provision, a tenant could have ended up paying an increased rent under the Dec. 16, 1981 Bill and losing his or her investment upon moving.

377. Dec. 16, 1981 Bill, *supra* note 341, § 1 (§ 281.3). Once again the legislation has codified a judicial holding. See *supra* notes 270-73 and accompanying text.

378. Dec. 16, 1981 Bill, *supra* note 341, § 1 (§ 282).

379. The cutoff date was the effective date of the bill in A. 8830, and April 1, 1980 in the December 16, 1981 Bill. A. 8830, 1981-82 Sess. (June 8, 1981), § 2 (§ 281.3); Dec. 16, 1981 Bill, *supra* note 341, § 1 (§ 281.1(iii), .3).

380. Cf. *supra* notes 30, 31 (smaller loft buildings more likely to be converted than large loft buildings).

381. See *supra* notes 85-87 and accompanying text.

382. See *infra* note 427.

legislature session<sup>383</sup> and, without significant amendment, was approved on June 21, 1982, effective immediately.<sup>384</sup> This Bill, as had the previous bills, created a new article 7-C of the Multiple Dwelling Law.

### 1. Coverage

Article 7-C covers those buildings defined as "interim multiple dwellings."<sup>385</sup> An "interim multiple dwelling" is a New York City building "which (i) at any time was occupied for manufacturing, commercial, or warehouse purposes;" (ii) lacks a multiple dwelling certificate of occupancy; and (iii) as of December 1, 1981 had been "occupied for residential purposes" since April 1, 1980 by "any three or more families living independently of one another."<sup>386</sup> A building cannot be an interim multiple dwelling in any geographical area where the Zoning Resolution does not permit conversion as of right, with the important exception of buildings in areas designated by the Zoning Resolution<sup>387</sup> as study areas for "possible rezoning to permit residential use."<sup>388</sup> The legalization requirements of article 7-C,<sup>389</sup> however, do not apply to buildings in study areas.<sup>390</sup>

Significantly, until the owner obtains a residential certificate of occupancy, non-residential space in an interim multiple dwelling may not be converted to residential use and the provisions of article 7-C do not apply to such space.<sup>391</sup> Finally, a reduction below three in the number of residential units in an interim multiple dwelling after December 1, 1981 does not "eliminate the protections of this article for any remaining residential occupants qualified for such protections."<sup>392</sup>

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383. Artworkers News, Feb. 1982, at 45, col. 1.

384. 1982 N.Y. Laws 349, § 3. This bill was immediately effective. *Id.*

385. *See* 1982 N.Y. Laws 349.

386. N.Y. MULT. DWELL. LAW § 281.1 (McKinney Supp. 1986).

387. Currently, these areas consist of manufacturing districts in Brooklyn Community Boards 1, 2, 6 and 7; manufacturing districts in Queens Community Boards 1, 2 and 3; and all manufacturing districts in Manhattan between 17th and 59th Streets, and Ninth and Twelfth Avenues. LEGISLATIVE REPRESENTATIVE, CITY OF NEW YORK, LOFTS—LEGALIZATION OF INTERIM MULTIPLE DWELLINGS, *reprinted in* 1982 N.Y. Laws 349, § 281.2 [hereinafter cited as 1982 City Memorandum].

388. N.Y. MULT. DWELL. LAW § 281.2 (McKinney Supp. 1986).

389. *See infra* notes 410-15 and accompanying text.

390. N.Y. MULT. DWELL. LAW § 281.2 (McKinney Supp. 1986).

391. *Id.* § 281.3. If it is enforced, this provision may severely restrict future conversions.

392. *Id.* There is a nice ambiguity here. What exactly are "protections" for a tenant? They probably embrace the legalization requirements of section 281.1, which

## 2. Tenant Protections

Under article 7-C, a landlord cannot evict a tenant because either the building lacks a residential certificate of occupancy,<sup>393</sup> or the lease is allegedly violated because of the lack of a certificate of occupancy. Rents are governed by the existing lease and, when it expires, by guidelines set by the Loft Board.<sup>394</sup> Once the building is in compliance with article 7-B, tenants will come under rent stabilization.<sup>395</sup>

## 3. Owner Protections

Although a landlord's right to evict a tenant for illegal occupancy is restricted, the landlord may now bring an action for possession due to nonpayment even if he does not have the certificate of occupancy required by sections 302 and 325 of the MDL.<sup>396</sup> The owner also may apply to the Loft Board<sup>397</sup> for an exemption from article 7-C if "obtaining a legal residential certificate of occupancy would cause an unjustifiable hardship" because of either (1) an "unreasonably adverse impact on a non-residential conforming use tenant" in the building or (2) a cost of compliance which "renders legal residential conversion infeasible."<sup>398</sup> The test for "unreasonably adverse impact" is whether "residential conversion would necessitate displacement"<sup>399</sup> of the non-residential tenant while "infeasibility"

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will protect the tenant against living in a dwelling that does not meet the Building Code or MDL standards. *See id.* § 280 (legislative findings speaking of these dangers). But a court could construe "protections" to cover only section 286(1), which permits occupancy in interim multiple dwellings even if there is no residential certificate of occupancy. After all, the argument would go, the state legislature cannot have meant that a landlord should have to go to the expense of meeting even the relatively flexible standards of article 7-B for a single residential tenant.

393. *Id.* § 286.1.

394. *Id.* § 286.2.

395. *Id.* § 286.3.

396. *Id.* § 285.1. Although the state legislature must have intended that such actions be allowed in all circumstances, by not explicitly providing that local laws and rules such as sections 2900.21 of the Civil Court of the City of N.Y. Rules of Practice (superseded and recodified at McKinney 1986 New York Rules of Court § 208.42(g) (22 NYCRR § 208.42)) and D26-41.21 of the N.Y. City Administrative Code are preempted by article 7-C, tenants still could attempt to use those sections to thwart an action for possession for nonpayment. *See supra* notes 169-71 & 190 and accompanying text.

397. *See infra* notes 417-20 and accompanying text.

398. N.Y. MULT. DWELL. LAW § 285.2 (McKinney Supp. 1986).

399. *Id.* § 285.2(d). There obviously are many specific fact situations that the Loft Board will have to deal with under this provision. Any imaginative landlord who wants to get rid of his tenants will be able to create a residential conversion plan which would require displacing a nonresidential tenant.

is measured by a "reasonable return on the owner's investment not maximum return on investment."<sup>400</sup>

To prevent owners from abusing this exemption by evicting present tenants who are paying lower than market rents and rerenting at market rents, the landlord must give an "irrevocable recorded covenant" that once the building has been returned to nonresidential uses it will not be reconverted to residential use for fifteen years.<sup>401</sup> All exemptions also must be applied for within nine months of the establishment of the Loft Board,<sup>402</sup> which will further limit the ability of landlords to harass tenants. Finally, if the Loft Board approves an exemption, it "may fix reasonable terms and conditions for the vacating of residential occupancy."<sup>403</sup>

#### 4. *Fixtures*<sup>404</sup>

Under article 7-C a residential tenant may sell to an incoming tenant "any improvements" he has made to the unit or purchased from a former tenant.<sup>405</sup> The improvements may only be sold once per unit.<sup>406</sup> The landlord must be given a right of first refusal for the improvements at the "fair market value."<sup>407</sup> Upon purchase of the improvements by the landlord, any unit in a building with fewer than six residential units that is under rent regulation solely because of article 7-C and that is not receiving J-51 tax benefits is exempted from article 7-C rent regulation.<sup>408</sup> In a building with six or more residential units, the unit with purchased improvements may be rented at the then market rate but subsequently is subject to rent regulation.<sup>409</sup>

#### 5. *Legalization*

In order to receive the protection of article 7-C, the landlord must bring an interim multiple dwelling unit into compliance with article

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400. *Id.* § 285.2(c).

401. *Id.* § 285.2.

402. *Id.* The Loft Board had been in existence for almost four months by the end of January 1983. N.Y. Times, Jan. 23, 1983, § 8, at 1, col. 2.

403. N.Y. MULT. DWELL. LAW § 285.2 (McKinney Supp. 1986).

404. *Id.* § 286.6.

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.* Presumably, these different treatments are given to units in loft buildings with different numbers of units since a major goal of article 7-C is to protect tenants' investment in loft conversions, and not to provide a permanent new category of rent-stabilization units. See *supra* note 360.

7-B of the MDL<sup>410</sup> by December 21, 1984.<sup>411</sup> By June 21, 1985, a residential certificate of occupancy must be obtained, although the Loft Board may extend the June 21, 1985 deadline by two years if the building is in compliance with article 7-B and "good cause" for the extension is shown.<sup>412</sup> The landlord is required to pay the initial cost of compliance with article 7-B and to obtain a residential certificate of occupancy,<sup>413</sup> but he may obtain a rent adjustment to cover the "reasonable" cost of obtaining such a certificate.<sup>414</sup> This "reasonable" cost, which includes the cost of financing the improvements, will be paid by the residential tenants over either a ten or a fifteen year amortization period.<sup>415</sup>

#### 6. Cooperative & Condominium Conversions<sup>416</sup>

Under article 7-C, an eviction plan cannot be filed until a residential certificate of occupancy is filed and all residential tenants are offered one, two or three year leases. In a non-eviction plan, the sponsor must remain responsible for all work necessary to obtain a certificate of occupancy. Moreover, the same statutory protections available to rent stabilized tenants in general are made applicable to tenants in interim multiple dwellings. These changes provide loft tenants with the assurance that legal conversions will not be used as a means of circumventing the tenant protections built into article 7-C.

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410. N.Y. MULT. DWELL. LAW § 284.1(i)(C) (McKinney Supp. 1986). Absent this provision, many of the tenant's improvements could be held to be fixtures, and thus removable only with the landlord's permission. See RASCH, *supra* note 165, § 508. In addition, the commercial leases signed by many loft tenants provide that all fixtures and alterations become the landlord's property. See, e.g., REAL ESTATE BOARD OF NEW YORK, INC., STANDARD FORM OF LOFT LEASE § 3 (1973); see also RASCH, *supra* note 165, § 514 ("It is entirely competent for a landlord and a tenant to contract that any and all property placed upon or attached to the demised premises shall belong to the landlord upon termination of the lease.").

411. N.Y. Times, Jan. 23, 1983, § 8 at 1, at col. 3. Under section 284.1 of article 7-C, there are two other interim deadlines: (1) the owner must have filed an alteration permit by March 21, 1983, and (2) the owner must have taken all "reasonable and necessary action" to get an approved alteration permit by June 21, 1983. See N.Y. Times, Jan. 23, 1983, § 8, at 1, col. 3 (dates derived from statutory provisions, given above).

412. N.Y. MULT. DWELL. LAW § 284.1.

413. *Id.* § 286.5.

414. *Id.*

415. *Id.* The ten-year period applies if interest and service charges are not amortized by the tenants, the fifteen-year applies if they are amortized. *Id.*

416. *Id.* § 286.9.

### 7. Loft Board<sup>417</sup>

Article 7-C provides that the mayor is to appoint a four- to nine-member Loft Board consisting of representatives of "the public, the real estate industry, loft residential tenants, and loft manufacturing interests, and a chairperson."<sup>418</sup> The Loft Board is to make determinations on interim multiple dwelling status, landlord hardship applications, rent adjustments and guidelines, housing maintenance standards during legalization, and fair market value of tenant-made improvements and moving costs.<sup>419</sup> The Loft Board shall promulgate rules and regulations to carry out these duties.<sup>420</sup>

### 8. Problems with Article 7-C

The most problematic aspect of article 7-C is that, because of the date of conversion, geographical location, and other factors, several types of residential loft tenants are not covered. These tenants include legal Artists-in-Residence, tenants in buildings for which a residential certificate of occupancy was obtained before the enactment of article 7-C, residential tenants who moved into units converted after April 1981, tenants in loft buildings with fewer than three residential units, non-artists and uncertified artists in SoHo and NoHo, tenants in city-owned buildings and, in the new mixed-use zoning districts in buildings that did not meet the requirements for preservation of commercial space,<sup>421</sup> those tenants who did not apply to be "grandfathered."<sup>422</sup> No one has any idea how many tenants are included in these categories. Without article 7-C, some of these

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417. *Id.* § 282.

418. *Id.* The Mayor has appointed four public members, a chairman, and one member each for tenants, landlords, and industry. N.Y. Times, Jan. 23, 1983, § 8, at 1 & 14, cols. 2 & 3.

419. N.Y. MULT. DWELL. LAW § 282.

420. *Id.*

421. N.Y. CITY ZONING RES. § 15-215 (1983).

422. See generally Artworkers News, Feb. 1982, at 45, col. 1. The legislative representative of New York City, in writing in support of article 7-C, stated that "[t]he bill when enacted will take a 'snap shot' of those people eligible for protection under this article. The bill is directed at protecting those loft pioneers of the arts community that have played such an important role in the development of loft areas." 1982 City Memorandum, *supra* note 387, at A-284. The legislative representative ignores the thousands of non-artists which article 7-C will protect. See *supra* note 387 and accompanying text. The legislative representative's statement will not encourage the courts to read the particular provisions or general legislative intent of article 7-C expansively.

tenants, such as Artists-in-Residence, are not illegal, but all of them lack the substantial tenant protections provided by article 7-C.<sup>423</sup>

If article 7-C is enforced, it together with the April 1981 zoning amendments will forever prevent the loft market from meeting the demand for relatively inexpensive housing and will relegate it to meeting only the needs of Manhattan's gentry. The Loft Board has already approved substantial rent increases, even before landlords have brought their buildings into compliance with article 7-B.<sup>424</sup> The costs of compliance with article 7-B are substantial. Rents in loft living units, therefore, can be expected to continue climbing steeply, pricing loft living units out of the reach of any but the upper-middle class and the rich.<sup>425</sup>

### V. Conclusion

The economic forces that have made for illegal conversions<sup>426</sup> in New York City show no signs of abatement. It is not any more likely in the 1980's than it was in the 1970's that the New York City government will evict thousands of illegal loft tenants. Therefore, New York City is left with the option of trying to prevent illegal conversions from ever occurring by strictly enforcing the zoning law and Building Code. Such enforcement may prove futile.<sup>427</sup>

Although the problem of illegal conversion has been studied intensively by New York City since at least 1977,<sup>428</sup> and has led to

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423. See *supra* notes 393-95 and accompanying text.

424. For loft dwelling unit leases that expire before the unit is brought under rent stabilization, the Loft Board on December 21, 1982, approved rent increases from seven to thirty-three percent, depending on how long ago the last increase was imposed. N.Y. Times, Dec. 21, 1982, at B8, col. 1.

425. See generally *supra* notes 410-15 and accompanying text.

426. See *supra* notes 68-77 and accompanying text.

427. The Mayor's Office of Loft Enforcement claims to have prevented more than 50 illegal conversions in Manhattan and two in Brooklyn in the last two years; furthermore, it claims to know of no illegal conversions in Manhattan it has not prevented. Carl Weisbrod, Chairman of the Loft Board, remarks at the Forum of the Association of the Bar of the City of New York on "Lofts Revisited: Were the Equities Balanced?" (Feb. 7, 1983) [hereinafter cited as *Equities*]. Others take a less sanguine view of the enforcement efforts, especially in boroughs other than Manhattan, in particular Brooklyn and Queens, where much residential conversion activity is going on. Chuck Delaney, Tenant Representative on the Loft Board, *Equities, supra* (illegal conversions in Brooklyn have doubled since 1980); see also The Phoenix, April 27, 1978, at 14, col. 1 (description of conversions on the Brooklyn waterfront between Brooklyn and Manhattan bridges). It should be remembered, however, that more than 50% of New York City's industrial space is in Manhattan. See *supra* notes 36-39 and accompanying text.

428. The first major study was published in 1978. RESIDENTIAL RE-USE, *supra* note 28.

a flurry of legislative action,<sup>429</sup> these reforms do not promise to solve the problems. The courts will continue to have a major role to play in mediating the often conflicting interests of landlords and residential tenants. For many of those who live in illegal lofts,<sup>430</sup> the courts will continue to be a forum for conflict resolution, a forum whose rules are unclear and currently changing.

Residential conversion of industrial loft buildings is not a phenomenon unique to New York City; the troubling social and legal issues it raises have surfaced in cities as diverse as Seattle, Berkeley, and Boston.<sup>431</sup> Nor is residential conversion the only widespread flaunting in New York City of the Zoning Resolution, the MDL, and the Building Code. There is currently a problem in the boroughs outside Manhattan, where one- or two-family houses are being illegally converted to three-family houses.<sup>432</sup> These conversions have generated their own case law, which seems to exist in isolation from the illegal loft cases, although there are many similarities in the basic landlord and tenant conflicts that arise.<sup>433</sup> New York City's experience with illegal lofts does not encourage optimism about the ability, in general, of either statutory or case law to channel such challenges to zoning and housing laws into legal uses.

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429. See *supra* note 92 and accompanying text.

430. See *supra* notes 61, 62 and accompanying text.

431. Truslow, *The Artist's Loft Movement: Its Impact on Urban Zoning Codes and Economic Repercussions* 27-29 (May 25, 1979) (Boston University Law School paper); cf. N.Y. Times, July 18, 1982, § 8, at 10, col. 1 (discussing residential conversion of industrial loft buildings in suburbs surrounding New York City).

432. N.Y. Times, Feb. 27, 1983, § 8, at 16, col. 1.

433. E.g., *Coulston v. Telescope Prods.*, 85 Misc. 2d 339, 378 N.Y.S.2d 553 (Sup. Ct. App. T. 1st Dep't 1975); *Glatzer v. Malkenson*, N.Y.L.J., March 31, 1978, at 12, col. 5 (Sup. Ct. Kings County 1978); *Corbin v. Harris*, 92 Misc. 2d 480, 400 N.Y.S.2d 309 (Sup. Ct. Kings County 1977); *Stanley Assocs. v. Marrero*, 87 Misc. 2d 1011, 386 N.Y.S.2d 953 (N.Y.C. Civ. Ct. Queens County 1976). *Stanley Associates* and *Coulston* both rely on a theory that in a nonpayment proceeding, the MDL does not prevent recovery of rent if a certificate of occupancy is lacking because "[s]ection 302 is a penal statute in derogation of the common law and should be strictly construed so that a landlord is not deprived of rent due for the use and occupation of his property." *Coulston*, 85 Misc. 2d at 340, 378 N.Y.S.2d at 554; accord *Stanley Associates*, 87 Misc. 2d at 1013, 386 N.Y.S.2d at 955. In *Corbin* and *Glatzer*, ejectment actions succeeded in evicting tenants whose residence was illegal, even though in both cases the building was found to be a de facto multiple dwelling. *Corbin*, 92 Misc. 2d at 483-84, 400 N.Y.S.2d at 311-12; *Glatzer*, N.Y.L.J., Mar. 31, 1978, at 12, col. 5.

