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MEMORANDUM

(212) 566-1438

TO: The Loft Board

FROM: Ken Demario

RE: Draft Regulations on Subletting, Subdivision
and Assignments

DATE: April 27, 1983

The starting point for analysis of coverage under Article 7-C is whether the unit in question is covered under Section 281 and the Coverage Regulations as a qualifying or accreted unit. If the unit is covered, then the next question is who is the occupant entitled to the protections of Article 7-C. The draft regulations address this second issue, in cases of subletting and assignment.

Right to Occupancy and Protection of Article 7-C

The guiding principle of these draft regulations is that the occupant in possession of a unit covered as part of an IMD, is the person entitled to the protections of Article 7-C, with a few enumerated exceptions. The most important protection in the context of these regulations is that the occupant has the right to continued occupancy and ultimately to a lease when the unit attains a C of O. In the tangle of relationships, the party who loses the most is the prime lessee no longer in occupancy, who loses the right to repossess the leased space unless he or she can show that the leased premises are his or her primary residence. Further, where the prime lessee has retained only a portion of subdivided space as his or her residence, while subletting units created from the remaining space, he or she may not reclaim any of the subdivided space as a primary residence and thus loses the right to that space vis-a-vis the current occupant.

SUZANNE O'KEEFE
Executive Director

WILLIAM BERNSTEIN
Operations Director

In order to successfully establish a right to the unit in question as a primary residence, the prime lessee, not in possession, must have an existing lease or rental agreement with the landlord and a sublease agreement with the subtenant which terminated prior to the expiration of the prime lease. If there is no lease agreement in effect between the prime lessee and the landlord, then the only basis for occupancy is a statutory tenancy created by both the expiration of the old lease and passage of Article 7-C. The statutory tenant is the occupant in possession on the effective date of the statute and since a statutory tenant has no right to sublet or assign, all he or she can do is remain in occupancy. Only prime lessees with a lease in effect with the landlord have any right to sublet or assign under Section 226-b of the Real Property Law after June 21, 1982. (The regulations do not require that a sublease, assignment or subdivision prior to June 21, 1982 have been consented to by the landlord in order to be effective.)

Thus, any occupant who takes possession of a covered unit after June 21, 1982 will be protected only if one of the following three conditions exists:

1. He or she has a lease or rental agreement with the landlord;
2. He or she is the assignee of the prime lessee and the consent of the landlord was given to such assignment;
3. The landlord has been given the opportunity to purchase the fixtures at fair market value and has declined to do so.

Legalization and Cost of Legalization

The draft regulations are clear and straight forward on this question. The landlord is responsible for all legalization, regardless of whether he is in privity with the residential occupant qualified for protection or not.

The costs of legalization are to be passed on to such residential occupants.

In most instances, by the time legalization is completed, the assumption is that most leases between a landlord and a prime lessee, out of possession will have expired and privity will be established by operation of law between the landlord and the residential occupant. In the few instances in which a prime lease continues in effect beyond the commencement of legalization cost pass along, the prime lessee should be permitted to pass the legalization cost along to the occupant in possession or apportion it among occupants in subdivided units in accordance with Loft Board rules to be worked out.

Privity

The concept of privity - the existence of a direct contractual relationship between two parties - defines the relationships between the three major categories of parties in this situation: landlords, prime lessees, residential occupants in possession other than the prime lessee.

The draft regulations seek to avoid breaking any private contractual relationships. Where leases, subleases or other rental agreements, however denominated, remain in effect, their provisions will be given effect in terms of the rent to be paid and the services to be provided. Thus prime lessees who have leases in effect with landlords will remain responsible for payment of rent and will be entitled to collect rent from occupants in possession as long as their prime lease remains in effect. The ultimate goal is to have privity between the landlord and the residential occupants established and this will occur when all leases between prime lessees out of possession and landlords expire.

Services

The draft regulations provide simply that whoever is in privity with the residential occupant provides the services contracted for.

Rent

The rent provisions are fairly simple. Where leases or rental agreements are in effect, they establish the rent to be paid, by whom and to whom.

Where leases are no longer in effect new privity relationships are established by operation of law, the draft regulations disturb pre-existing rent levels as little as possible. Residential occupants other than prime lessees continue to pay the rent they were paying the prime lessee plus whatever additional increases are permissible under Loft Board regulations, when they enter into privity with landlords.

The only significant recalculation of rent under the draft regulations, occurs for the prime lessee who remains in possession of a portion of subdivided space for which he or she had a lease covering the entire space. When the lease between the prime lessee and the owner is no longer in effect, the prime lessee, as a residential occupant in possession pays rent based on the amount of space occupied by his or her unit as a percentage of the entire space previously leased to him or her. The legal rent becomes the proportionate percentage of the rent he or she was previously paying under the expired lease plus any additional increases permitted by the Loft Board guidelines. A simple example: Rent of \$1000 paid

by prime lessee to landlord under lease. Space subdivided into two equal-sized units. Subtenant in subdivided space pays rent of \$750 to prime lessee, leaving prime paying \$250 (the remainder of the \$1000 owed the landlord). At the expiration of the lease between the prime and the landlord, the subtenant enters into privity with the landlord and continues to pay \$750, plus permissible increases to the landlord. The prime lessee now pays 50% of the \$1000 rent of \$500 plus permissible increases to the landlord.