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COURT OF APPEALS

STATE OF NEW YORK

AURORA ASSOCIATES LLC,

Appellant,

-against-

NO. 5

RAFFAELLO LOCATELLI,

Respondent.

20 Eagle Street
Albany, New York
January 6, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Ellen S. Kolman
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 5, the matter
2 of Aurora Associates v. Locatelli.

3 Counsel?

4 MR. GOLDSMITH: Yes, thank you.

5 If it pleases the court, my name is Joseph
6 Goldsmith. I represent the appellant, Aurora Associates,
7 and I am requesting to reserve two minutes for reply.

8 CHIEF JUDGE DIFIORE: Two minutes, sir?

9 MR. GOLDSMITH: Yes.

10 CHIEF JUDGE DIFIORE: Thank you.

11 MR. GOLDSMITH: Can you hear me?

12 CHIEF JUDGE DIFIORE: Yes, we can hear you, but
13 just do try to maintain a higher level than ordinary of
14 your voice.

15 MR. GOLDSMITH: Yes. No problem.

16 So I am here to talk about a loft unit in
17 Manhattan that underwent a purchase of rights of fixtures,
18 improvements, pursuant to Multiple Dwelling Law 286(6) and
19 286(12). The question for this court is what happens
20 afterwards with respect to rent regulation.

21 Right now - - -

22 JUDGE WILSON: So - - -

23 CHIEF JUDGE DIFIORE: Counsel, I have a question
24 for you.

25 MR. GOLDSMITH: Yes.



1 CHIEF JUDGE DIFIORE: So because the unit that is
2 at issue here is registered and it's covered by the Loft
3 Law - - -

4 MR. GOLDSMITH: Right.

5 CHIEF JUDGE DIFIORE: - - - that makes it an
6 interim multiple dwelling. And given that the rent
7 stabilization law applies to housing accommodations in
8 Class A or Class B multiple dwellings, and those are, you
9 know, of course, made subject to rent stabilization by the
10 ETPA, why isn't an interim multiple, an IMD - - - an
11 interim multiple dwelling unit like yours beyond the reach
12 of the rent stabilization law?

13 MR. GOLDSMITH: I - - - I agree with you that it
14 is beyond the reach of the rent stabilization law and code.
15 There is a separate section - - -

16 CHIEF JUDGE DIFIORE: Go ahead. Go ahead.

17 MR. GOLDSMITH: There's a separate section of
18 rules and regulations under the Loft Law that governs this
19 particular unit, how it is to be used and maintained, and
20 what the rents are that may be collected and charged for
21 this particular - - -

22 CHIEF JUDGE DIFIORE: So do we stop there?

23 MR. GOLDSMITH: I would like to stop there. I
24 believe that that is the end of it, that those regulations
25 under the Loft Law are what controls. As long as the owner



1 and the tenants live and comply with the terms of the Loft
2 Law, those are the rules and regulations upon which they
3 have - - -

4 JUDGE WILSON: So let me ask you about that.

5 MR. GOLDSMITH: Yes.

6 JUDGE WILSON: The unit was registered under the
7 Loft Law in 1983.

8 MR. GOLDSMITH: Yes.

9 JUDGE WILSON: And as of 2016, it still had no C
10 of O.

11 MR. GOLDSMITH: That is correct.

12 JUDGE WILSON: And there are rules in the Loft
13 Law that have timetables that require completion for
14 various things and obtaining a C of O within a much shorter
15 period of time than 39 years.

16 MR. GOLDSMITH: Correct.

17 JUDGE WILSON: Okay. So let me ask you one other
18 thing. Is it your understanding that under the Loft Law or
19 regulations promulgated by the city, the purchase under,
20 let's say, (12), although it could be (6) and (12); doesn't
21 matter - - - the purchase of the fixtures and of the rights
22 relieved you of the Loft Law regulations regarding rent but
23 left you subject to the remainder of the Loft Law?

24 MR. GOLDSMITH: That is correct.

25 JUDGE WILSON: Including your inability to evict



1 a current tenant?

2 MR. GOLDSMITH: That is - - - that is incorrect.

3 JUDGE WILSON: So why?

4 MR. GOLDSMITH: So the - - - you have the
5 ability, once you purchase the rights and fixtures, to
6 deregulate it pursuant to rent regulation under the Loft
7 Law, but you still have the obligation to legalize the unit
8 for residential use - - -

9 JUDGE WILSON: Sure, but you haven't done that,
10 right?

11 MR. GOLDSMITH: Haven't done that.

12 JUDGE WILSON: Okay.

13 MR. GOLDSMITH: The Loft Board and the Loft Law
14 has rules, regulations, penalties - - -

15 JUDGE WILSON: Right.

16 MR. GOLDSMITH: - - - that they can enforce
17 against the owner for that failure.

18 JUDGE WILSON: But doesn't the Loft Law contain
19 anti-eviction protections for tenants?

20 MR. GOLDSMITH: For tenants who are not - - -
21 whose unit has not been subject to a sale pursuant to 286.

22 JUDGE WILSON: Where does it say that, though?
23 Doesn't the regulation issued by the city at 210(d)(2) say
24 the only thing you're relieved of is the rent regulation
25 requirements that are imposed by the Loft Law and that you



1 remain subject to all of the other requirements of 7-C?

2 MR. GOLDSMITH: So the prohibition against
3 evictions are for tenants that are protected under the Loft
4 Law's rent regulation aspect. The - - - the other aspects
5 of the Loft Law that are still in play after a purchase of
6 rights and fixtures under (6) and (12) are with respect to
7 the legalization of the building.

8 The Loft Law - - - the Loft Board has promulgated
9 cases, and I cite, I mean, maybe, ten, fifteen cases in my
10 briefs - - - about how after the purchase of rights and
11 fixtures that's a free-market tenant, that's a free-market
12 unit subject to rent increases that are agreed upon by the
13 parties, subject to lease terms that are agreed upon by the
14 parties, subject to eviction if the tenancy is not
15 subsequently renewed by the parties.

16 Because there is no form of continued occupancy
17 right under rent regulation, and because there is no right
18 to set increases that are tied to what the Loft Board's
19 rent regulations provide, an owner and a tenant who don't
20 come to terms on a lease renewal in a unit that's already
21 been rent deregulated that way is subject to eviction for
22 holdover.

23 JUDGE CANNATARO: But Counsel, you know, to me,
24 the troubling implication of Judge Wilson's question is
25 that when you have an extraordinarily long conversion



1 process like you have here, and then you have a sale of
2 fixtures and rights, there's a long period where the most
3 powerful aspects of the Loft Law protection don't apply
4 because now there's been a sale and a subsequent tenant,
5 and the ETPA provisions, which are supposed to be the
6 ultimate goal of the conversion process, also don't apply.

7 So you've got a kind of quasi-deregulated
8 apartment as a - - - as a beneficial - - - to you - - -
9 side effect of not doing the conversion in a timely manner.

10 MR. GOLDSMITH: Well, I think that are two
11 different answers to that, the first one being the
12 legislature in enacting the rules, and the Loft Board in
13 enacting its rules provide for penalties for an owner who
14 does not comply with the timetables for legalizing the unit
15 and obtaining a certificate of occupancy. Those penalties
16 are monetary. They're also - - - involve denial of permits
17 that you can get for the Department of Buildings.

18 JUDGE CANNATARO: Has this building been
19 penalized?

20 MR. GOLDSMITH: I'm sorry?

21 JUDGE CANNATARO: Has the owner been penalized
22 for not doing the conversion on time or not - - -

23 MR. GOLDSMITH: Over the last, you know, thirty-
24 something years, yes. I don't recall the last time
25 monetarily.



1 With respect to permits, they need to get Loft
2 Board permission to pull - - - to apply and get any permit
3 to do construction in the building. Whether it be the
4 ground floor retail, or whether it be any of the units in
5 the building, they need Loft Board permission for that
6 permit. And the Loft Board, in its rules and regulations,
7 provide that an owner who is not compliant with the
8 timetables for legalizing the unit can have those permits
9 denied. Plus, rents that may be collected by the other IMD
10 - - - or from the other IMD tenants in the building are not
11 capable of being collected on the Loft Board's rules
12 because they're outside the timetable for legalizing.

13 Those are all the penalties that the Loft Board
14 has and the - - - and the legislator as put for someone who
15 doesn't legalize in a timely fashion. And there are
16 reasons why - - -

17 JUDGE RIVERA: Counselor, if I can interrupt you.
18 I'm on the screen. Hello. Happy New Year. Sorry.

19 MR. GOLDSMITH: Happy New Year.

20 JUDGE RIVERA: Thank you. So am I to understand
21 from what you just said that your view is in a free-market
22 economy that has these high rents, that those penalties
23 outweigh what an owner might otherwise see as a cost-
24 benefit analysis where those "penalties", financial and
25 otherwise, are outweighed by some other free market benefit



1 that they're going to get by - - - by delaying decades the
2 actions that they're supposed to take in a timely manner
3 under the act? Is that - - - I just want to make sure I'm
4 understanding you correctly. Is that sort of the core of
5 the argument? That no landlord would - - - that I think
6 some of the questioning is suggesting that whether it's
7 just, you know, some failure that has nothing to do with
8 intentionality, there is otherwise potentially an
9 incentivizing of the owner not to comply with the law and
10 not to pursue what is the legislative goal here.

11 MR. GOLDSMITH: Well, I don't know that it's a
12 cost-benefit analysis. There are - - - there are a lot of
13 reasons why a unit in a building ultimately doesn't obtain
14 its certificate of occupancy in the timetable that the Loft
15 Law provides.

16 The conversion from a commercial to a residential
17 building while the building is occupied by rent-regulated
18 tenants is a cumbersome process.

19 JUDGE WILSON: Forty - - - forty years?

20 MR. GOLDSMITH: I can't - - - I can't speak to
21 the particulars of what the problem was with this building.

22 JUDGE WILSON: It did remove the original
23 tenants, the Lombardis, so you had a vacant apartment at
24 that point, right, before it was rented to Mr. Chen?

25 MR. GOLDSMITH: Yeah, but it's not apartment-



1 specific, right? Like, you have to get a certificate of
2 occupancy permitting residential use for all the IMD units
3 in the building. And though Lombardi vacated the unit and
4 there was a period of vacancy, you know, after Lombardi,
5 the rest of the building still had to obtain the necessary
6 items for conversion, like - - - and just examples, like
7 sprinkler systems, fire escapes, egress, you know, bathroom
8 fixtures. Like, there's a - - - there's a lot that goes
9 into it, and it's collaborative with the tenants and with
10 the Loft Board all coming to agreement - - -

11 JUDGE WILSON: So did - - - did you - - -

12 MR. GOLDSMITH: - - - on these terms. And if
13 there is ultimately a dispute among- - -

14 JUDGE WILSON: Did you - - - did your client ever
15 ask for extensions based on good-faith efforts?

16 MR. GOLDSMITH: I - - - I believe so, but not in
17 recent years.

18 JUDGE WILSON: Did they ever get any?

19 MR. GOLDSMITH: I'm sorry.

20 JUDGE WILSON: Did they ever receive any
21 extensions?

22 MR. GOLDSMITH: The last one I think they got was
23 many, many, many years ago.

24 JUDGE WILSON: Is any of that in the record?

25 MR. GOLDSMITH: No. No.



1 JUDGE WILSON: Okay.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 JUDGE RIVERA: Well, let me ask you this. Why -
4 - - why should what you're talking about, let's - - - let's
5 assume for one moment the cumbersome process doesn't - - -
6 it's not that the landlord is trying to game that system -
7 - - or the owner, excuse me. Why is it that should fall on
8 - - - on the other side of this equation? Why should the
9 negative aspects of that fall on someone other than the
10 owner? Why shouldn't you bear that burden? Because that
11 would incentivize you to move this forward.

12 MR. GOLDSMITH: Well, there is a burden, but the
13 burden is not perpetual rent regulation under two different
14 rent schemes that conflict with each other.

15 You know, whatever the penalties are, the - - -
16 the Loft Board has them and the owner will - - - will feel
17 the burden of those penalties. But the penalty is not to
18 cast a net of a second form of rent regulation onto the
19 unit when it conflicts with the first form of rent
20 regulation, the first form of rules that - - - that apply
21 to this particular building. And that's the interpretation
22 of the Second Department, you know, where the Second
23 Department says this is Loft Law, this is a Loft Law unit.
24 There is no rent stabilization that comes on - - - on top
25 of it.



1 CHIEF JUDGE DIFIORE: Thank you, Counsel.
2 Counsel?

3 MR. FAJARDO: Good afternoon, Your Honors. Ed
4 Fajardo, De Lotto & Fajardo. I am here for Respondent
5 Raffaello Locatelli. May it please the court.

6 When we boil down the legal issues in this matter
7 to their essence, we're debating what the ramifications
8 were back in 1998 when the landlord purchased the fixtures
9 from a prior tenant. At that point, the landlord was at a
10 crossroads. The landlord had two legal avenues it could
11 pursue.

12 JUDGE GARCIA: Counsel? Counsel, I'm sorry.
13 Understood, but let me just follow up on something Judge
14 Wilson asked your colleague here.

15 It seems to me, reading the civil court decision,
16 that this is a 232-a petition action, and the sole issue
17 down there, at least the sole issue that seems to have been
18 decided by the court was whether or not you have some type
19 of rent control protection that would prohibit this 232-a
20 action from going forward, right?

21 MR. FAJARDO: Absolutely.

22 JUDGE GARCIA: So below, did you ever claim that
23 outside of that rent protection status, that there was
24 something else in the Loft Law that would prevent you from
25 being evicted under a 232-a?



1 MR. FAJARDO: Upon the purchase of the fixtures.
2 The unit, at that point, unless it was rented for
3 commercial purposes - - -

4 JUDGE GARCIA: No, no. Could you just answer my
5 question. In the proceeding below, did you claim any other
6 protection other than the rent control provisions in
7 response to the 232-a action?

8 MR. FAJARDO: The rent-stabilize provisions, Your
9 Honor - - -

10 JUDGE GARCIA: Right.

11 MR. FAJARDO: - - - yes. Absolutely.

12 JUDGE GARCIA: What was - - -

13 MR. FAJARDO: And the point - - - and the point
14 is that this building is a building that predates 1974.
15 There's no dispute, none whatsoever, that the apartment is
16 capable of being legalized, and the landlord has failed to
17 do that.

18 So Loft Board - - - as we've already discussed,
19 the goal of Loft Board is to transition a rent
20 stabilization, not to escape it. However - - -

21 JUDGE GARCIA: So what in - - - what in the Loft
22 Law are you pointing to outside the rent stabilization
23 provisions either under the Loft Board Law - - - under the
24 Loft Law or under the ETPA, what other provision would be a
25 defense to the 232-a action?



1 MR. FAJARDO: No. The rent-stabilization
2 provision - - -

3 JUDGE GARCIA: Okay.

4 MR. FAJARDO: - - - the rent-stabilization code,
5 the Emergency Tenant's Protection Act are, at this
6 juncture, what protects this particular tenant.

7 JUDGE GARCIA: Understood. Thank you.

8 MR. FAJARDO: Yeah. Absolutely. In other words
9 - - - and I think again, I'm going to go back to what the
10 landlord did in 1998 and the predicament that the landlord
11 put itself into.

12 The landlord could have easily rented the
13 apartment for commercial purposes, and there would be no
14 issue. But instead, instead of choosing that avenue, the
15 landlord had a second legal avenue that they could take.
16 They could have gone about legalizing the apartment,
17 getting a certificate of occupancy, and renting it for
18 residential purposes.

19 The landlord chose nuther - - - neither of those
20 two options. Instead, the landlord plowed ahead, went
21 offroad, and just rented the apartment as a - - - as a
22 residential unit without bothering to - - - to ever
23 legalize it.

24 JUDGE CANNATARO: Counsel, the - - - the landlord
25 did what the landlord did, and now we're in a situation,



1 forty years later, where, technically, this is still an IM
2 - - - IMD building, and you're seeking the application of
3 the ETPA which seems to me to be kind of almost answered by
4 Wolinsky. So could you tell me how you get around
5 Wolinsky?

6 MR. FAJARDO: Sure. Actually, I think Wolinsky -
7 - - what Wolinsky said was that if an apartment is
8 incapable of being legalized, then rent stabilization will
9 not apply. But Wolinsky itself - - - if you look at 2 N.Y.
10 3d on page 493, Wolinsky actually states, "Such illegal
11 conversions are not expressly exempted from the ETPA
12 coverage". That language is already in Wolinsky.

13 So Wolinsky, to me, is I am not here to - - -

14 JUDGE CANNATARO: Is this an illegal conversion?

15 MR. FAJARDO: Well, it's not - - - yes, because
16 the - - -

17 JUDGE CANNATARO: Deleterious. You could use
18 many adjectives, but is it really illegal?

19 MR. FAJARDO: It's illegal because a C of O does
20 not provide for residential use at this juncture. And
21 eventually, the landlord needs to get to the point where it
22 has a legal certificate of occupancy for residential use if
23 that's what it intends to do with the building. So yes, in
24 that regard, it's an illegal conversion. And Wolinsky says
25 that that illegal conversion is not expressly exempted by



1 the ETPA.

2 What the Second Department has said is that there
3 are situations where whether it be for zoning - - - and I
4 guess, presumably, for zoning - - - that it is impossible
5 to legalize a unit. That - - - those are not the facts of
6 this case. In fact, the landlord has said time and again,
7 including in today's argument that they still, even though
8 it's taken forty years, they're working towards
9 legalization.

10 So there's no issue that this apartment will
11 eventually end up with a residential C of O. So in that
12 regard - - -

13 JUDGE WILSON: Let me see if I can - - - I have a
14 couple facts I want to see if I can straighten out.

15 Mr. Locatelli was paying market rent up through
16 2016?

17 MR. FAJARDO: He was.

18 JUDGE WILSON: And did he - - - did he - - - was
19 his tender of rent refused at the point of eviction?

20 MR. FAJARDO: It was. At the time that the
21 landlord tendered a thirty-day notice of termination, at
22 that juncture, the landlord then rejected the tenant's
23 tender of rent.

24 JUDGE WILSON: Okay. And Mr. Locatelli had filed
25 a counterclaim for back rent, which he has abandoned,



1 essentially, right?

2 MR. FAJARDO: No, Judge. What was filed was a
3 counterclaim for rent overcharge.

4 JUDGE WILSON: Right. Sorry.

5 MR. FAJARDO: And that wasn't abandoned. It
6 wasn't - - - it was not awarded.

7 JUDGE WILSON: Well, you didn't - - - right, and
8 you didn't seek to appeal it, right. So that's not before
9 - - -

10 MR. FAJARDO: We did. Leave was not granted.

11 JUDGE WILSON: Right.

12 MR. FAJARDO: Leave was not granted.

13 JUDGE WILSON: So - - -

14 MR. FAJARDO: It wasn't abandoned, but that's law
15 of the case. There's no rental - - -

16 JUDGE WILSON: It's not here. His claim for any
17 sort of money is not here?

18 MR. FAJARDO: His claim for a rent overcharge is
19 not before the court.

20 JUDGE WILSON: So from your perspective, the
21 claim that is here is, can he remain in the apartment or
22 not.

23 MR. FAJARDO: As a rent-stabilized tenant,
24 correct, Judge.

25 JUDGE WILSON: Well, rent stabilized or paying



1 the rent he was paying?

2 MR. FAJARDO: Excuse me?

3 JUDGE WILSON: Well, he was paying a market rent
4 of 4,250, right?

5 MR. FAJARDO: Right. So that rent will
6 presumably have to be - - - at some point, the landlord has
7 to go to DHCR and go about applying - - -

8 JUDGE WILSON: And that's - - -

9 MR. FAJARDO: - - - for whatever the valid rent
10 would be.

11 JUDGE WILSON: And that's after legalization?

12 MR. FAJARDO: It could be - - - yes, it would be
13 in conjunction with legalization. Absolutely. You would
14 legalize, and then go to DHCR and then say to DHCR what the
15 rent should be pursuant to DHCR's parameters.

16 JUDGE WILSON: Okay. Got it.

17 MR. FAJARDO: Yeah. So again, I think Wolinsky
18 is law. I'm not trying to circumvent Wolinsky in any way.
19 I actually think it applies. I think if this court - - -
20 and I don't presume to say that it's this court's job to
21 necessarily find harm if there is any discrepancy between
22 the Second and the First Department. But again, I think
23 what the Second Department has said doesn't apply to this
24 case. The Second Department says, you have - - - by the
25 way, there's a - - - there's a case in the Second



1 Department, the Berry case, where they said - - - and this
2 is Second Department all the way up, not lower court - - -
3 said rent stabilization did apply because, again, in that
4 situation, the apartment was able to be legalized. It's
5 only when an apartment cannot be legalized that then I
6 think it would be appropriate for a landlord to say rent
7 stabilization does not apply.

8 Again, there's no one going to dispute - - - I
9 mean, you can't possibly have a legal fair-market unit if
10 you don't even have a certificate of occupancy for that
11 unit. Makes no sense. There's no precedent that says
12 that. And if this court were to somehow rule that way, it
13 would be a terrible precedent.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.
15 Counsel?

16 MR. GOLDSMITH: Yes. So the Loft Law actually
17 does provide that a unit may be used in violation of its
18 certificate of occupancy if it is covered by the Loft Law.
19 That's - - - that's a specific proclamation in - - - I
20 believe it's 2-10.

21 JUDGE WILSON: And if the owner's in compliance
22 with the Loft Law?

23 MR. GOLDSMITH: Then they're permitted to collect
24 rent.

25 JUDGE WILSON: No. As long as you're in



1 compliance?

2 MR. GOLDSMITH: If you're in compliance, you are

3 - - -

4 JUDGE WILSON: So - - -

5 MR. GOLDSMITH: - - - permitted to collect rent,
6 yes.

7 JUDGE WILSON: Is the building in compliance with
8 the Loft Law now?

9 MR. GOLDSMITH: It is not.

10 JUDGE WILSON: So your view is you're not allowed
11 to collect rent?

12 MR. GOLDSMITH: We - - - we are - - -

13 JUDGE WILSON: Legally?

14 MR. GOLDSMITH: I'm sorry?

15 JUDGE WILSON: Legally?

16 MR. GOLDSMITH: We're prohibited from collecting
17 rent, correct.

18 JUDGE WILSON: Okay.

19 MR. GOLDSMITH: But that doesn't make him subject
20 to rent regulation under the ETPA or rent stabilization.
21 It's however long this proceeding takes, he is not going to
22 pay rent. That's - - - that's the ramification of not
23 being into compliance.

24 JUDGE WILSON: So you don't really have a claim
25 for money now either. It's really all about can he stay or



1 must he go.

2 MR. GOLDSMITH: It is about can he stay or must
3 he go, correct. The lower court found even if he does
4 stay, even if he is covered, his rent is the market number
5 that - - - that we discussed, but the question for this
6 court is does he stay or does he go, and how do you
7 regulate these type of units citywide, statewide, right?
8 When you have conflicts amongst the Department, you know,
9 the owners and tenants need a firm set of rules of what
10 their requirements are.

11 And I think we were talking about Wolinsky
12 before. You know, Wolinsky actually was not an IMD, right.
13 In Wolinsky, the court found that it was not qualified for
14 the Loft Law, but they were deciding whether it was
15 qualified for rent stabilization. And in Wolinsky, they
16 said it is not qualified for rent stabilization. It is an
17 illegal unit. And if the legislature wanted to bestow rent
18 stabilization on these illegal units, there would be no
19 point for the Loft Law in the first instance. That's the
20 holding of Wolinsky.

21 But here, the First Department in this case is
22 trying to take that even further and say well, it's not one
23 or the other; now, we should have both.

24 JUDGE RIVERA: Counsel, if can interrupt?

25 Why - - - why - - - why isn't your adversary



1 correct in that interpretation that he advocates of
2 Wolinsky, which is, yes, what you've articulated is
3 correct, so long as there is no path to legalization? But
4 if there is, then a party can pursue that. Why isn't he
5 right about that?

6 MR. GOLDSMITH: Well, I think that that's a
7 separate issue if the unit is not subject to Loft Law
8 already. But since this unit is subject to Loft Law, it's
9 kind of a non sequitur.

10 JUDGE RIVERA: No, no, no. But if - - - even if
11 it is subject to Loft Law, if indeed there is yet another
12 path to legalization, why - - - why - - - why should the
13 Loft Law be exclusive? Where does it say that the Loft Law
14 is exclusive and supplants what might be another legal path
15 when - - - when the ultimate goal of the legislature would
16 be achieved through that other path?

17 MR. GOLDSMITH: The - - - the Loft Law actually
18 does not provide that the ultimate goal is to usher every
19 single unit into rent stabilization. The Loft Law actually
20 provides to usher those units into stabilization where
21 there is no buyout of rights and fixtures and improvements.
22 The Loft Law provides where there is, those units do not
23 get ushered into stabilization. So now, you have a
24 conflict where the Loft Law has specifically provided not
25 to usher this particular unit into stabilization, but you



1 have this other set of rules with the ETPA where they're
2 trying to recapture it for stabilization, and that - - -

3 JUDGE WILSON: That provision of the Loft Law, I
4 think, says something a little different than what you
5 said. And the way I read it, it says that if there's the
6 buyout, then the rent regulation provisions of the Loft Law
7 won't apply. But if there are other rent regulation
8 provisions that would apply, the Loft Law doesn't purport
9 to eliminate those. One specific is buildings that have J-
10 51s - - -

11 MR. GOLDSMITH: J-51s.

12 JUDGE WILSON: - - - would have other regulation
13 of their rents, and those - - - the Loft Law doesn't
14 disturb those even if there's a buyout. Do you disagree
15 with that?

16 MR. GOLDSMITH: I - - - I disagree because I
17 don't believe that they're referring to rent stabilization
18 in that section. The Loft Board has promulgated numerous
19 decisions that talk about it being the - - - the end-all of
20 rent regulation, and those - - - those are cited in my
21 brief. And it's the same way, like, you know, you - - -
22 with the rent - - -

23 JUDGE WILSON: So how do you read that portion of
24 the section that says - - - and I can read it to you, but
25 it's - - -



1 MR. GOLDSMITH: No, I can see it.

2 JUDGE WILSON: Right. That says if there's a
3 buyout, the provisions of the - - - the rent-regulation
4 provisions of the Loft Law don't apply.

5 MR. GOLDSMITH: Correct.

6 JUDGE WILSON: But if there are other provisions
7 that do apply, the Loft Law doesn't eliminate those.

8 MR. GOLDSMITH: I read it like you said it, Your
9 Honor, but - - -

10 JUDGE WILSON: But what are those - - -

11 MR. GOLDSMITH: - - - that means that the other
12 section has to specifically apply. And - - -

13 JUDGE WILSON: What are those other - - - so I
14 mean, there is a portion of the ETPA that says, pre '74
15 buildings, more than six units, regulation applies.

16 MR. GOLDSMITH: Except as - - - and then there's
17 a bunch of exceptions.

18 JUDGE WILSON: Yeah.

19 MR. GOLDSMITH: And one of the exceptions are
20 buildings that lack residential certificate of occupancy
21 that are commercial in nature in 1974. There is another
22 section that talks about units that are subject to buyouts
23 under 286(6) and (12) are not subject to regulation.
24 There's another section that says units that are subject to
25 a substantial rehab after 1974 are not subject to



1 regulation. And again, the DHCR has interpreted that
2 conversion of a commercial building to a residential
3 building after 1974 is - - - is a - - - is a substantial
4 rehab, you know, deregulating the unit.

5 So you have all of those exemptions within the
6 rent stabilization that require that these loft units not
7 get ushered in where they weren't meant to be ushered in in
8 the first instance, you know.

9 And again, the quote from Wolinsky is, had these
10 buildings been subject to rent stabilization, what would be
11 the point of the Loft Law? The Loft Law wouldn't be
12 needed. The rent regulation under the Loft Law wouldn't be
13 needed.

14 And now, by trying to put them on top of each
15 other, you - - - you run into problems where there are
16 conflicts. And Acevedo doesn't talk about this. Acevedo
17 only says - - - the word from Acevedo is, may revert if
18 otherwise qualified. But that was not - - - you know, they
19 were looking at cases when they were writing that decision
20 that were not units that were already IMDs. They were
21 looking at the decisions where you had units that - - -
22 whether they should be subject to rent stabilization, aside
23 from Loft Law.

24 And the problem arises, like, you know, this
25 court heard yesterday in the matter of Callen, where we



1 were talking about pathways, when - - - when people believe
 2 that there are multiple pathways, then - - - then they
 3 choose what pathway they think is best for them,
 4 notwithstanding what the public policy is.

5 You know, the Loft Board was up here yesterday
 6 talking about how they believe that the only pathway for
 7 legalizing these units and for rent regulation of these
 8 units was the Loft Law. And they wouldn't agree to the
 9 removal of - - - of an application that was before them so
 10 that the parties could enter into this side agreement for
 11 the units to be covered under rent stabilization. And
 12 that's the problem that's going to keep coming - - - keep
 13 coming up. They're both symptoms of the same disease,
 14 which is lack of clarity from - - - from the conflict
 15 between the departments here on what to do with these
 16 apartments after you have a sale pursuant to 286(6) and
 17 (12).

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 MR. GOLDSMITH: Thank you, Your Honor.

20 CHIEF JUDGE DIFIORE: You're welcome.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of Aurora Associates, LLC v. Locatelli, No. 5 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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