New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 262—NO. 64
MONDAY, SEPTEMBER 30, 2019

ASK THE FORMER REGULATOR

Expert Analysis

Martin Act Amendments: Threshold for Effective Offering Plan

By **Erica F. Buckley**

Question: I understand the Martin Act was amended, and now you need 51 percent to declare an offering plan effective in a rental-to-cooperative or -condominium conversion. Can you explain how to reach the 51 percent? Also, doesn't this effectively end conversions?

Answer: Yes, it is true that the Housing Stability and Tenant Protection Act (the Act) included amendments to the Martin Act, with one of the most-controversial changes being the threshold for declaring an offering plan effective. 2019 N.Y. Laws, Ch. 36, Part N. Unfortunately, I am not able to answer this question with any level of certainty because the Department of Law has not yet promulgated regulations on the 51 percent requirement. However, I can discuss the changes and provide an example of what declaring an offering plan effective would look like under a strict interpretation of the new law, with the caveat that it is purely hypothetical without regulations in place.

Overview of Changes to the Martin Act on Effectiveness

To start, let's go over the change in the language. First and foremost, the changes have done away with eviction plans. Therefore, the only way you can convert a rental property to cooperative or condominium status is through a non-eviction plan. Second, to declare a non-eviction plan effective, you now need tenants to enter into purchase agreements for at least 51 percent of all dwelling units in a building, with potentially no offset for vacant units or units occupied by senior citizens and disabled persons who have elected non-purchasing tenant status, unless permitted by Attorney General regulations. Third, the legislature struck language providing that non-tenant purchasers may count toward the non-eviction plan effectiveness threshold.

Therefore, on its face, it appears as though only tenants in occupancy on the date the offering plan is accepted for filing count toward the threshold. However, the Act does empower the Attorney General to promulgate implementing regulations and to issue waivers as long as such waivers comply with the intent of the Martin Act. Here is an excerpt of the current statute:

> The plan may not be declared effective until written purchase agreements have been executed and delivered for at least fifty-one percent of all dwelling units in the building or group of buildings or development subscribed for by bona fide tenants in occupancy on the date a letter was issued by the attorney general accepting the plan for filing for which purchase agreement shall be executed and delivered pursuant to an offering made without discriminatory repurchase

On its face, it appears as though only tenants in occupancy on the date the offering plan is accepted for filing count toward the threshold.

ERICA F. BUCKLEY *is the practice leader for the cooperative and condominium team at Nixon Peabody. She is the former chief of the Real Estate Finance Bureau at the New York Attorney General's office. This column is for informational purposes only and is not a substitute for agency guidance from the Department of Law.*

agreements or other discriminatory inducements.

N.Y. Gen. Bus. Law §352-eeee(2)(c)(i).

Protections for Seniors And Disabled Persons

The Act also amended the Martin Act to provide protections explicitly for senior citizens and disabled persons in a non-eviction plan. Under the amended law, senior citizens and disabled persons can elect to become non-purchasing tenants at the time of submission or at the time of acceptance for filing of an offering plan to the Attorney General. Previously, this right was afforded in non-eviction plans by Attorney General regulations only. This is important because notwithstanding the fact that the prior statute did not explicitly provide a right for seniors and disabled persons to elect non-purchasing tenant status in non-eviction plans, the Attorney General interpreted the statute in a way that empowered them to provide these protections through rule-making to carry out the intent of the Martin Act. As a reminder, the intent of the Martin Act's conversion provisions is to stabilize neighborhoods and encourage homeownership while protecting tenants who do not participate in the conversion process. See 1982 N.Y. Laws, Ch. 555 §1. Therefore, the prior regulatory change to protect senior citizens and disabled persons in a non-eviction plan fell squarely within the statutory goal of protecting tenants who do not participate in the conversion process.

The 51 Percent Threshold

Figuring out the units that a sponsor must use to calculate the 51 percent base is tricky without rules, but a review of how the Attorney General calculated the 51 percent for eviction plans is instructive. Historically, the Attorney General promulgated regulations and guidance about how the 51 percent threshold could be reached for an eviction plan. See 13 NYCRR Parts 18 and 23 and Mary Sabatini DiStephan, Applicable Statutes and Attorney General Regulations in "Condominiums, Cooperatives & Homeowners' Associations: A Practical Practice Guide," New York State Bar Association (Oct. 27, 1988). Under the now-obsolete regulations for eviction plans, the threshold was calculated by counting the number bona fide tenants in occupancy on the filing date who agreed to purchase and dividing from that count a denominator consisting of the total number of units minus the vacant units and units occupied by senior citizens and disabled persons.

As reasoned by the Appellate Division, First Department, and citing the legislative history of the Martin Act, "… the broad senior citizen's exemption without regard to income or length of residence (General Business Law §352-eeee [1] [c]), was adopted to mitigate the evil of forcing non[-]purchasing tenants from their homes in a tight rental market." See *Church St. Apt. v. Abrams*, 139 A.D. 2d 280 (1988). Therefore, if a senior citizen or disabled person has elected non-purchasing tenant status, they arguably meet an objective of the Martin Act—the protection of tenants who do not participate in the conversion process. This is also why they are deducted from the denominator: because they are not participating in the offering. This is important because the recent amendments to the statute fail to explicitly carve out senior citizens and disabled persons from the definition of a non-eviction plan, which means the Attorney General has to decide whether it was the intent of the legislature to exclude them.

Although the intent of the Martin Act is clear, the amount of discretion the Attorney General will exercise is not. As discussed above, the threshold for a non-eviction plan now seems to be even more stringent than the threshold for an eviction plan. Unless the Attorney General does what they have done in the past, which is exercise common sense discretion in interpreting the law, this will bring conversions to a standstill, just as it did in 1974 when the threshold was 35 percent. See Alan S. Iser, "Law Hampers the Switch of Rental Housing to Co-ops," *N.Y. Times*, April 30, 1976, at B5. For illustrative purposes, see the following example for how the law theoretically may work:

The sponsor of a 100-unit free-market rental building would like to convert it to condominium status. At the time of submission of the offering plan to the Attorney General, 90 of the 100 units are rented to bona fide tenants. The sponsor will provide a copy of the offering plan to each of the 90 tenants on the submission date to the Attorney General. For purposes of our example, let's assume that 10 senior citizens elect non-purchasing tenant status, and therefore the base of 90 tenants becomes 80 tenants. Also, because the Attorney General has imposed a quiet period, which is not articulated in the

statute itself, the sponsor cannot talk to any tenant in the building until the offering plan is accepted for filing unless a CPS-11 is granted. See N.Y. Office of the Attorney General, Cooperative Policy Statement #11 (last visited Sept. 15, 2019).

Assuming the Attorney General continues to issue CPS-11 treatment on occupied conversion plans, the sponsor can solicit interest from outsiders on vacant apartments, but the sponsor is only able to accept a reservation agreement with a nominal reservation fee. Moreover, given the requirement that only tenants in occupancy be counted for purposes of meeting the 51 percent requirement, an outside purchaser would also need to move into the building in advance of purchasing, which may not be an ideal for the outside purchaser. It's also unclear whether the Attorney General would recognize these outside purchasers as bona fide tenants in occupancy, especially if their continued occupancy is conditioned on closing.

Fast-forward the two-and-a-half years it takes the Attorney General to review an occupied conversion plan. The building that was 90 percent occupied on the submission date of the offering plan is now only 60 percent occupied on the date the offering plan is accepted for filing, with vacancies due to tenants moving out or, in some cases, tenants not being offered renewals upon lease expiration—something that is legally permissible for market-rate units. Moreover, of the 60 remaining tenants, 10 have elected non-purchasing tenant status and are not participating in the conversion process. However, to declare the offering plan effective, the sponsor must sell 51 percent of the total residential units to tenants (i.e., 51 units); an impossibility in this typical scenario unless vacant units and those units occupied by non-purchasing tenants are excluded from the denominator. Even then, it still might not be possible to garner enough support among the existing tenants in occupancy to meet the excessively high threshold of 51 percent needed to declare the offering plan effective.

Therefore, assuming this is how the amendments to the Martin Act work, conversions are seemingly a de facto impossibility, resulting in a moratorium on them. See *Seawall Associates v. City of New York*, 74 N.Y.2d 92 (1989). The only way conversions might be possible is if the Attorney General agrees to deduct vacant units and other units occupied by non-purchasing tenants from the denominator, as was the case in eviction plans, and if regulations are adopted to permit waivers to ameliorate the scenario outlined above.

What's Next?

There are obviously other areas of concern with the new language in the Martin Act, as well as questions of whether it will ever be possible to convert a rental to cooperative or condominium status again in the future. Other than the changes we see today as a result of the Act, the last substantive change to the conversion provisions of the Martin Act was in 1982. Those changes were shared in advance, heavily debated, and implemented after all stakeholders had a chance to state their positions. There clearly were compromises, but there also were reasonable additions to the statute that made sense, such as being able to declare a non-eviction plan effective with the use of non-tenant purchasers with an intent to occupy their units. After all, tenants were given a 90-day exclusive period to purchase (by regulation), but sponsors had 15 months to declare an offering plan effective.

Nothing in the legislative history of the statute supports the idea that tenants must continue to be solicited throughout the entire 15-month period, nor is there anything to support the idea that non-tenant bona fide purchasers should be excluded from meeting the intent of the statute. This is not to say that the 1982 version of the law was without faults, but those faults stemmed from a changing housing landscape, and the change to the effectiveness threshold arguably does nothing to address present concerns. It also flies in the face of the goal of creating more homeownership in New York. But then again, the Martin Act has unfortunately been a statute subject to shifting political winds, and therefore time is likely to address the recent changes, if history tells us anything. See Vincent Di Lorenzo, "Legislative Chaos: An Explanatory Study," 12 *Yale Law & Pol. Rev.* 425 (1994).

"This column is for informational purposes only and is not a substitute for agency guidance from the Department of Law."