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# NEW YORK CITY'S J-51 PROGRAM: CONTROVERSY AND REVISION

## I. Introduction

New York City administers a real estate tax incentive program for eligible building owners who rehabilitate existing structures. This incentive is popularly referred to as the J-51 program (J-51).<sup>1</sup> The tax benefit consists of a real property tax exemption and tax abatement. The tax exemption freezes the tax assessment of the property at the level existing before an owner makes an improvement.<sup>2</sup> The tax abatement permits an owner to decrease the amount of tax imposed upon the property.<sup>3</sup>

Various problems and abuses have arisen within the program which have emphasized the need for major reforms. The cost of the program to the City has become excessive.<sup>4</sup> It has been suggested that the loss of tax revenue over the life of the program could total over \$2 billion.<sup>5</sup> There also has been a disproportionate concentration of J-51 benefits in the borough of Manhattan and in wealthy neighborhoods.<sup>6</sup> Furthermore, the conversion of commercial structures into residential units has resulted in a loss of manufacturing space.<sup>7</sup> Finally, arson has

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1. N.Y. ADMIN. CODE tit. J, § J51-2.5 (Supp. 1982).

2. "[A]ny increase in the assessed valuation of real property shall be exempt from taxation for local purposes . . ." for a specified number of years depending upon the nature of the rehabilitation. N.Y. ADMIN. CODE tit. J, § J51-2.5(b) (Supp. 1982). An exemption provides "immunity from a general burden, tax or charge." BLACK'S LAW DICTIONARY 513 (5th ed. 1979). For a discussion of the exemption benefit see *infra* notes 69, 73, 120-24 & 127-39 and accompanying text.

3. "The taxes . . . may be abated each year . . . [by a given percentage] of the reasonable cost of eligible conversions, alterations or improvements . . ." N.Y. ADMIN. CODE tit. J, § J51-2.5(c) (Supp. 1982). "Abatement of taxes relieves property of its share of the burdens of taxation after the assessment has been made and the tax levied." BLACK'S LAW DICTIONARY 4 (5th ed. 1979). For a discussion of the abatement benefit see *infra* notes 71-2, 125-26, 127-34, 140-48 and accompanying text.

4. New York Public Interest Research Group, *How Am I Doing? Business and Real Estate Tax Breaks in New York City*, 1, 5 (1982) [hereinafter cited as *Tax Breaks*]. For further discussion of the excessive cost of J-51 see *infra* notes 245-49 and accompanying text.

5. N.Y. Times, Mar. 4, 1981, at B8, col. 1. At hearings before a committee of the City Council, Council President Carol Bellamy recommended targeting J-51 benefits to "areas in which the residents' incomes are generally at or below the city's median income." *Id.* at col. 3.

6. City of New York, President of the Council, J51 Draft, 3, (February 1981) [hereinafter cited as *J51 Draft*]. See also *infra* notes 250-52 and accompanying text.

7. City of New York, Comptroller, *J-51 Tax Abatement and Tax Exemption Housing Benefits: Emerging Policy Issues, with a Focus on Conversion*, 29 (1980) [hereinafter cited as *Emerging Policy Issues*]. See *infra* notes 256-57 and accompanying text for a discussion of the effect of J-51 on manufacturing space.

been used to remove tenants from single-room-occupancy hotels.<sup>8</sup> Critics have asserted that the program has resulted in tenant abuse and the loss of jobs and affordable housing.<sup>9</sup>

Recently, a controversy developed concerning proposed reforms of the program. A broad-based coalition of city and state legislators, neighborhood-based nonprofit housing development groups, charities and labor organizations formed the Coalition to Reform J-51.<sup>10</sup>

The Coalition, which has advocated major reform, proposed (1) limiting the dollar amount of eligible improvements; (2) eliminating benefits for the conversion of single-room-occupancy hotels; (3) denying benefits to landlords who harass tenants to empty a building; and (4) eliminating benefits for the conversion of industrial or commercial buildings to residential use.<sup>11</sup> Proponents of J-51, most notably the New York City Mayor's office, were pleased with J-51 in its un-

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8. City of New York, Arson Strike Force, Memorandum 24 (April 30, 1982).

The Arson Strike Force released another report in September 1983 in which single-room-occupancy (SRO) conversions were not studied because of the small number of conversions from July 1980 to June 1981. City of New York, Arson Strike Force, *A Study of Government Subsidized Housing Rehabilitation Programs and Arson: Analysis of Programs Administered in New York City, 1978-81*, September 2, 1983, at 82. However, a "higher than expected incidence of suspicious fires prior to rehabilitation in existing Class A residential buildings . . ." was reported. *Id.* at 92. For a definition of class A multiple dwellings see *infra* note 66. The term "existing dwelling" is defined *infra* note 197.

9. N.Y. Times, Dec. 16, 1980, at B1, col. 6.

10. The Coalition to Reform J-51 is a group which has offered criticism of the program. Its members include: New York City Councilmembers Ruth Messinger, Edward Wallace, Miriam Friedlander, Stanley Michels, Carol Greitzer, and Henry Stern; New York State Senators Manfred Ohrenstein, Franz Leichter, Leon Bogues, Thomas Bartosciewicz, Major Owens and Martin Connor; New York State Assemblymembers Alexander B. Grannis, Herman Farrell, Jerrold Nadler, Richard Gottfried, Albert Vann, Frank Barbaro, Steven Sanders, Daniel Feldman, Rhoda Jacobs, Helene Weinstein, Edward Sullivan, John Dearie, Alan Hevesi, Ralph Goldstein, Vincent Marchiselli, Gloria Davis, Paul Viggiano, Andrew Jenkins; the New York Public Interest Research Group (NYPIRG), the Association of Neighborhood Housing Developers, the Community Service Society, the Archdiocese of the City of New York, Catholic Charities, D.C. 37, the New York State Tenant and Neighborhood Coalition, the Metropolitan Action Institute, the Coalition for the Homeless, MFY Legal Services, New Yorkers for Equitable Development, the SRO Tenant's Rights Coalition; and various nonprofit community housing development groups. Coalition to Reform the J-51 Program, Press Release, Coalition Announces Council Legislation to Reform J-51 Calls on Administration to Support Measure, Aug. 25, 1982 [hereinafter cited as *Coalition Press Release*].

The membership of the elected officials reflects those listed on the press release of August 25, 1982. However, it should be noted that some of the officials are no longer in office.

11. *Id.* at 2-3. For further discussion of criticism of the program see *infra* notes 242-77 and accompanying text.

amended form.<sup>12</sup> As a result, there were difficulties in reaching agreement on the nature and extent of reform.<sup>13</sup> However, after almost one year of negotiation and three failures to reach an accord,<sup>14</sup> the New York State Legislature finally agreed to a revision at the end of the 1983 legislative session.<sup>15</sup> The key amendment fundamentally affects the method of calculating the exemption portion of the tax incentive for private, nongovernmentally assisted rehabilitation.<sup>16</sup> In addition, all of the major suggestions for reform offered by the Coalition to Reform J-51 have been implemented in the new law.<sup>17</sup>

During the year of intermittent negotiation in the Legislature, the legal status of J-51 was uncertain. The State enabling legislation<sup>18</sup>

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12. N.Y. Times, Feb. 25, 1983, at B3, col. 4. (“[T]he Koch administration is lobbying for extension of the program . . .”). See *infra* notes 278-309 and accompanying text for a discussion of support for J-51 in its unamended form.

13. N.Y. Times, Feb. 24, 1983, at B3, col. 1. (“[C]ritics of the program—led in the city by Councilwoman Ruth W. Messinger of Manhattan, and in the Legislature by Assemblyman Richard N. Gottfried—have been urging passage of legislation that would curtail the city’s freedom to offer tax relief as it chooses”).

14. Failure to renew the program in June 1982 was attributed to tension between legislators who sought to curb the abuses of J-51 and the City administration. “The critics of J-51 sought three basic amendments: (1) no conversions of single-room-occupancy dwellings; (2) penalties against landlords who harass tenants to get them out of buildings; and (3) a major cut in tax rewards for luxury renovation (since the City desperately needs moderate-income housing, not more high-rent apartments)”. Schanberg, *Catch-51 Is Alive*, N.Y. Times, July 6, 1982, at A17, col. 2. The City administration argued that the concessions requested were excessive. Apparently, the City was amenable to the first two amendments but an agreement could not be reached on the third and most significant amendment. *Id.*

In December 1982, and March 1983, failure to extend J-51 was attributed to the inability of the two houses of the legislature to compromise on how to revise the program. N.Y. Times, Apr. 3, 1983, § 4 (Week in Review) at 6E, col. 3. “Generally, the Democratic-controlled Assembly wants to prevent the city from offering benefits for the conversion of buildings into luxury housing, while the Republican-led Senate would prefer that the city have the widest possible latitude in dispensing tax incentives.” *Id.*

15. N.Y. Times, June 23, 1983, at B3, col. 5 (discussing the announcement of agreement in Legislature on J-51). For a discussion of these revisions see *infra* notes 116-65 and accompanying text.

16. N.Y. Times, July 3, 1983, § 8 (Real Estate) at 5, col. 1 (emphasizing the effect of the revision of J-51 on gut rehabilitations of buildings). For a discussion of this revision see *infra* notes 120-24 and accompanying text.

17. See *supra* notes 10 & 11 and accompanying text for a discussion of the Coalition’s suggestions. For a discussion of the new provisions of J-51 see *infra* notes 116-65 and accompanying text.

18. N.Y. REAL PROP. TAX LAW § 489(1)(a) (McKinney 1982).

Enabling legislation confers power upon governmental officials permitting them to enact and enforce the particular statute. BLACK’S LAW DICTIONARY 472 (5th ed. 1979).

For a compilation of state laws offering property tax exemptions or abatements to nonpublic bodies for construction or renovation of residential, commercial or industrial property, see International Association of Assessing Officers, URBAN PROPERTY TAX INCENTIVES: STATE LAWS (Research and Information Series, Aug. 1978).

expired in June, 1982 and was not renewed during the 1982 legislative session because the negotiators were unable to reach an agreement.<sup>19</sup> Uncertainty regarding the form and date of the program's extension caused lending institutions to cease funding rehabilitation projects whose financing depended upon J-51 benefits.<sup>20</sup> Passage of the revised law in June, 1983 assures that loans will be available once again.<sup>21</sup>

This Note will provide an historical analysis of J-51 with an emphasis on the major amendments from 1979-1981<sup>22</sup> as well as the 1983 revisions in the state enabling legislation.<sup>23</sup> The recent controversy

19. "Much remains confused about the negotiations in Albany except that they collapsed . . . and the Legislature went home for the summer without reviving the J-51 program whose State enabling legislation had expired on June 1." Schanberg, *Catch-51 Is Alive*, N.Y. Times, July 6, 1982, at A17, col. 2. See *supra* note 14 and accompanying text.

20. The New York City Department of Housing Preservation and Development (HPD) released a list of 40 projects for which a consortium of banks stopped processing loan applications. HPD Commissioner Anthony B. Gliedman referred to this list as "the tip of the iceberg" and said that "if we act quickly and responsively, the majority of these projects won't be affected . . ." N.Y. Times, Feb. 25, 1983, at B3, col. 4.

21. Michael D. Lappin, president of the New York City Community Preservation Corporation stated that for example, "[w]e have a \$7.5 million loan in Queens for the Metropolitan Houses that has 16 buildings and 624 units . . ." and that upon passage of the new law financing will be arranged. N.Y. Times, June 23, 1983, at B3, col. 4.

22. For the period 1979-1982, the major amendments are:

1. The creation of the new category referred to as moderate rehabilitation. N.Y. ADMIN. CODE tit. J, § J51-2.5(a)(6) (Supp. 1982).

2. The reduction in the abatement for nonresidential conversion in Manhattan. *Id.* § J51-2.5(c).

3. The creation of a minimum tax zone. *Id.* § J51-2.5(d)(6).

4. The creation of a tax abatement exclusion zone. *Id.* § J51-2.5(d)(7).

5. A requirement that relocation benefits be paid to small businesses that are forced to move and remain in the city. *Id.* § J51-2.5(z).

For a discussion of these amendments see *infra* notes 61-98 and accompanying text. A thorough analysis of J-51 prior to 1978 has been performed by Professor Griffith. Griffith, *Revitalization of Inner City Housing Through Real Property Tax Exemption and Abatement: New York City's J-51 to the Rescue*, 18 URB. L. ANN. 153 (1980).

23. The major 1983 amendments are:

1. The tax exemption is no longer automatic. 1983 N.Y. Laws Ch. 401, § 6 subdiv. 11(c), 206th Session (McKinney 1983) [hereinafter cited as *Chapter 401*].

2. The tax abatement has been reduced by 25%. *Id.* § 6 subdiv. 11(b).

3. There are many exceptions and waivers to the exemption and abatement limitations. *Id.* § 6 subdiv. 11(a)(1)(A)-(D), (2), (3); 11(b)(1)-(4); 11(c)(5)(A)(i)-(ii), (B)-(E); 113(2)(a)(2)(3).

4. Single-room-occupancy buildings are excluded from J-51 unless the project is assisted by government funding. *Id.* § 6 subdiv. 13.

5. Industrial structures cannot be converted to residential use if a zoning use variance is required unless explicitly permitted by the City Council. *Id.* § 6 subdiv. 14.

6. A section has been added which provides for the denial of benefits to owners who have been convicted of harassment. *Id.* § 6 subdiv. 12.

concerning the 1983 reforms will be examined<sup>24</sup> and recommendations will be offered for the future implementation of the program.<sup>25</sup> Finally, this Note will conclude by supporting the extension of the program as amended, which incorporated the suggestions designed to curtail existing abuses and to return the program to its original purpose.<sup>26</sup>

## II. The J-51 Program

### A. The Nature and Purpose of Tax Incentives

A tax incentive is a "tax expenditure which induces certain activities or behavior in response to the monetary benefit available . . . ."<sup>27</sup> Tax incentives are founded on public policy for the benefit of the public in general.<sup>28</sup> An incentive is designed to implement a desired social

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7. The City Council has been granted the authority to limit or condition J-51 benefits. *Id.* § 6 subdiv. 15.

8. The City must hire an independent consultant firm to perform a cost-benefit analysis of J-51. *Id.* § 12. For a discussion of these revisions see *infra* notes 116-65 and accompanying text.

24. See *infra* notes 240-309 and accompanying text.

25. See *infra* notes 310-54 and accompanying text.

26. See *infra* text following note 354 (conclusion).

27. Surrey, *Tax Incentives As a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 711 (1970) (arguing that the tax incentive is a less efficient means of achieving the desired goal as opposed to a direct expenditure).

28. *Goodwill Club of Amsterdam, New York v. City of Amsterdam*, 31 Misc. 2d 1096, 222 N.Y.S.2d 896 (Sup. Ct. Montgomery County, 1961). In this case, a club for women and girls was denied a real property tax exemption because it was not organized expressly for "charitable, benevolent or educational purposes" as was required by section 420 of the New York Real Property Tax Law. *Id.* at 1096, 222 N.Y.S.2d at 896. "The grant of an exemption from taxation rests upon the theory that such exemption will benefit the body of the People and not upon any idea of lessening the burdens of the individual owners." *Id.* at 1099, 222 N.Y.S.2d at 899; "Exemption . . . presupposes a liability, and is properly applied only to a grant of immunity to persons or property which otherwise would have been liable to assessment. Furthermore, the right to immunity is not inherent in the person or the property exempted, but exists only by grant supported on grounds of public policy." *Washington Chocolate Co. v. King County*, 152 P.2d 981, 984, 21 Wash.2d 630, 635 (1944) (corporation engaged in manufacturing chocolate made from imported cocoa sought to void county levy and assessment of ad valorem taxes because cocoa was stored in original package) (quoting 61 C.J. TAXATION § 382). Exemption from taxation is an exercise of legislative grace. *United Artists Theatre Circuit, Inc. v. State Tax Comm'n*, 76 A.D.2d 995, 995, 429 N.Y.S.2d 299, 300 (3d Dep't 1980) (mem.), *rev'd*, 52 N.Y.2d 1013, 420 N.E.2d 93, 438 N.Y.S.2d 295 (1981) (admissions to motion picture theaters are exempt from sales tax). See also *Association of the Bar of New York v. Lewisohn*, 34 N.Y.2d 143, 313 N.E.2d 30, 356 N.Y.S.2d 555 (1974) (statute upheld enabling local governments to terminate tax exemptions for certain

groups). The right to immunity from taxation is not inherent in the person or property. *Washington Chocolate Co.* 152 P.2d at 984, 21 Wash.2d 635. See also *American Bible Soc'y v. Lewisohn*, 48 A.D.2d 308, 369 N.Y.S.2d 725, *aff'd*, 40 N.Y.2d 78, 351 N.E.2d 697, 386 N.Y.S.2d 49 (1976); *The American Bible Society*, which was organized primarily for missionary purposes, lost its tax exemption pursuant to a valid amendment of New York City local law. *Id.* The Court of Appeals upheld the validity of the statute, as the Legislature was seeking to broaden the city's tax base. 40 N.Y.2d 78, 351 N.E.2d 697, 386 N.Y.S.2d 49. Therefore, the Legislature has great freedom in selecting the subjects of taxation and in granting and modifying exemptions. See *Association of the Bar of New York v. Lewisohn*, 34 N.Y.2d 143, 156, 313 N.E.2d 30, 37, 356 N.Y.S.2d 555, 564 (1972). See also *Mohonk Trust v. Board of Assessors of Town of Gardiner*, 47 N.Y.2d 476, 484, 392 N.E.2d 876, 880, 418 N.Y.S.2d 763, 767 (1979). Mohonk Trust, the petitioner, contended that the real property which it held in trust as an environmental wilderness area was eligible for exemption from real property taxes under § 421 of the New York State Real Property Tax Law. *Id.* at 479, 392 N.E.2d at 878, 418 N.Y.S.2d at 765. The court agreed with the petitioner, concluding that a trust which holds real property is qualified under § 421 for a tax exemption. *Id.* at 484-85, 392 N.E.2d 880, 418 N.Y.S.2d at 767. The statutory requirement that the property be held for a charitable use is satisfied by the purpose of this trust. *Id.* at 484, 392 N.E.2d at 880, 418 N.Y.S.2d at 767.

The due process and equal protection clauses of the fourteenth amendment provide that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. art. XIV, § 1. These clauses limit the State's broad power to grant tax exemptions. *Bar Ass'n v. Lewisohn*, 34 N.Y.2d at 156, 313 N.E.2d at 37, 356 N.Y.S.2d at 564. However, "neither the due process clause nor the equal protection clause imposes any rigid limitations upon the State's broad power to devise reasonable tax policies." *Id.* See generally L. Tribe, *The American Constitutional Law* §§ 16-1—16-5 at 991-1000 (1978) for further discussion of the equal protection clause.

These limitations provide that an exemption which arbitrarily favors a particular class in a community and has no support on grounds of public policy is impermissible. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959).

[T]here is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule has often been stated to be that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

*Id.* See also *Goodwill Club of Amsterdam, New York v. City of Amsterdam*, 31 Misc.2d 1096, 1099, 222 N.Y.S.2d 868, 899 (Sup. Ct. Montgomery County 1961).

For a discussion of the limitations on state and local power see Tribe, *supra*, § 6-16, at 354-55. In *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968), for example, the Supreme Court held that a New Jersey statute unconstitutionally denied equal treatment by refusing a property tax exemption to non-profit corporations which owned property in New Jersey but which were not incorporated there. The Court concluded that the plaintiff television stations had not received equal treatment, as the inequality in taxation was based solely on a difference in residence. *Id.* at 120.

By contrast, if the facts justify the "reasonableness" of a legislature's tax policy, then the policy must be upheld. See *Akari House, Inc. v. Irizzary*, 81 Misc.2d 543, 550, 366 N.Y.S.2d 955, 964 (Sup. Ct. N.Y. County 1975) (tax abatement for purpose of neighborhood revitalization justifiable for the public good). For example, in *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1958), the Supreme Court upheld the

policy,<sup>29</sup> such as providing aid to encourage industrial and business activity and socially desirable nonbusiness activity.<sup>30</sup> For example, the Internal Revenue Code provides a tax incentive to private investors who rehabilitate existing property.<sup>31</sup> The purpose of the provision is to "supply adequate rental housing for persons of low or moderate income."<sup>32</sup>

A method utilized by some states and municipalities to encourage private investors to construct and rehabilitate low and moderate income housing is the abatement of taxes.<sup>33</sup> Tax abatement programs are approached in one of two ways: (1) exempting the rehabilitated property from taxation for a specified number of years<sup>34</sup> or (2) freez-

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validity of an Ohio statute which exempted from taxation merchandise belonging to nonresidents if the merchandise was held in the warehouse for the sole purpose of storage. Under Ohio law, a tax was assessed against the appellant, Allied Stores, based on the average value of the merchandise that the corporation had stored in its four Ohio warehouses. *Id.* at 524. The appellant objected to the assessment of this tax, claiming that it held the merchandise for storage. *Id.* Since nonresidents would be exempted from taxation under a different statute, the appellant argued that it had been denied equal protection of the laws as guaranteed by the fourteenth amendment. *Id.* The Supreme Court found that the purpose of the statute was to encourage certain needed industries to locate within Ohio by providing tax exemptions for them, and not others, and that this purpose was not arbitrary, nor a violation of equal protection. *Id.* at 528. The Court stated that the discrimination against the residents was neither "invidious nor palpably arbitrary" because it was based upon a set of facts that reasonably can be conceived to constitute a distinction, or difference in state policy, which the State is not prohibited from separately classifying for purposes of taxation by the equal protection clause. *Id.* at 530.

29. Surrey, *supra* note 27, at 707.

30. *Id.* at 705.

31. I.R.C. § 167(k) (1981 Supp.). A depreciation deduction is provided for expenditures incurred in the rehabilitation of low-income rental housing. *Id.* § 167(k)(1). For an evaluation of § 167(k) see Nemann, *The Value of Tax Incentives As a Means of Encouraging the Rehabilitation of Low-Income Housing*, 41 U. CIN. L. REV. 151 (1972).

32. Nemann, *infra* note 31 at 152-53. I.R.C. § 167(k) (1981 Supp.) is entitled "Depreciation of Expenditures to Rehabilitate Low-Income Rental Housing." Low-income rental housing is defined as "any building the dwelling units in which are held for occupancy on a rental basis by families and individuals of low or moderate income . . ." *Id.* § 167(k)(3)(B).

33. *Recent Developments in Urban Redevelopment*, 21 URB. L. ANN. 317, 329 (1981) [hereinafter cited as *Recent Developments*].

34. *Id.* at 329. The municipality levies a service charge in lieu of taxes. *Id.* at 329-30. See, e.g., OHIO REV. CODE ANN. § 1728.11 (1978).

The community urban redevelopment corporation entering into a financial agreement with a municipal corporation other than an impacted city shall make payment to the county treasurer on or before the final date for payment of real estate taxes in the county for each half year of a semi-annual service charge in lieu of taxes . . . .



ing the assessment of the property at the rate charged prior to the rehabilitation or construction.<sup>35</sup>

## B. The History of the J-51 Program

### 1. Pre-1970

A severe post-World War II shortage of moderate rental housing in New York City emphasized the need for legislative intervention in the form of a tax incentive program for private building owners.<sup>36</sup> In 1946, the New York State Legislature enacted section 5-c of the New York Tax Law, the statute from which the current J-51 program is derived.<sup>37</sup> To increase the supply of moderate rental housing, a tax exemption and tax abatement program was provided to owners who rehabilitated "vacant apartments in old law tenements."<sup>38</sup> The Legislature conferred "broad and flexible powers" upon local governments to enact laws encouraging "the renovation of existing structures to make them more habitable."<sup>39</sup> Determination of the value of the

At the end of thirty years for one, two, or three family residential dwelling units and twenty years for all other uses of the improvements from the date of the executions of a financial agreement . . . the tax exemption . . . ceases and any other property of the corporation as well as the land shall be assessed and taxed according to general law. . . .

*Id.*

35. The abatement subsidy is often insufficient to offset rehabilitation expenses. Therefore, owners may find it necessary to increase rents. To avoid this problem, some statutes provide an indirect reimbursement to owners for their investments by increasing the subsidy to include an abatement of existing taxes. *Recent Developments*, *supra* note 33 at 330. *See, e.g.*, N.Y. REAL PROP. TAX LAW § 489(2) (McKinney 1982).

With respect to conversions, alterations or improvements eligible to receive the benefits of subdivision one of this section, any such local law or ordinance may also provide that the duration and amount of abatement of taxes on such property, including the land, may be separately established for each of the categories of eligibility described in paragraph a of subdivision one of this section.

*Id.*

36. N.Y. Legis. Ann., at 213 (1946).

There are about 27,000 vacant apartments in old law tenements in New York City which are boarded up or vacant. It would be uneconomic to destroy them by tearing them down. Properly rehabilitated, they have years of future usefulness . . . Private initiative should be encouraged to rehabilitate them, particularly in this housing emergency.

*Id.*

37. N.Y. Legis. Ann., at 206, 214 (1946) (ch. 321 adding § 5-c to the N.Y. TAX LAW and repealing § 263 of the Multiple Dwelling Law).

38. N.Y. Legis. Ann. at 214.

39. *Id.* at 206.

exemption or abatement and of the conditions for eligibility was left to the municipalities.<sup>40</sup>

In 1955, section 5-h was added to the New York Tax Law.<sup>41</sup> This provision, which also provided a real property tax exemption and tax abatement<sup>42</sup> was intended to encourage owners to salvage existing buildings and upgrade cold water flats to provide housing for lower income families.<sup>43</sup> The legislature again left the implementation of the statute to the municipal governments.<sup>44</sup> Pursuant to this enabling legislation, New York City enacted Section J41-2.4<sup>45</sup> of the Administrative Code, a tax exemption and tax abatement program for the alteration and improvement of existing substandard dwellings.<sup>46</sup> The program's aim was to eliminate unhealthy or dangerous conditions and to replace inadequate sanitary facilities.<sup>47</sup> Section J41 expanded gradually to include incentives for upgrading existing residential multiple dwellings, even if they were not substandard.<sup>48</sup> Section J41 was renamed section J51 in 1963.<sup>49</sup>

## 2. 1970-1981

The early 1970's in New York City were characterized by the loss of both businesses and residents.<sup>50</sup> By the mid-1970's, many commercial

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40. *Id.*

41. N.Y. Legis. Ann., at 267 (1955) (adding § 5-h the N.Y. Tax Law).

42. 1955 N.Y. Laws ch. 410 (codified at N.Y. TAX LAW § 5-h (McKinney 1966)).

43. N.Y. Legis. Ann., at 267-68 (1955) ("it is believed that, inasmuch as new housing is not being produced at a fast enough pace to provide decent, safe and sanitary homes for lower income families, some provisions must be made to encourage owners to alter and improve salvageable buildings").

44. *Id.* The law was permissive, providing applicable localities with the option of making the tax benefits available and the power to decide which properties would receive the benefits. *Id.*

45. New York, N.Y. [1955] Local Laws 118.

46. New York, N.Y. [1955] Local Laws 118. *See infra* text accompanying note 181 for a discussion of the program's original purpose.

47. New York, N.Y. [1955] Local Laws 118.

48. New York, N.Y. [1975] Local Laws 60 (codified at N.Y. ADMIN. CODE tit. J, J51-2.5(b) (Supp. 1982)). *See also* Griffith, *supra* note 22 and accompanying text at 156.

49. In 1960, J41-2.4 was amended by adding a new section, J41-2.5. New York, N.Y. [1960] Local Laws 50. Renumbered, ch. 100, § 1346, [1963] N.Y. Laws (McKinney).

Local Law 39 cited the section as J51-2.5. New York, N.Y. [1963] Local Laws 39 codified at N.Y. ADMIN. CODE tit. J, § J51-2.5(g) (Supp. 1982).

50. Citizens Housing and Planning Council, Report to the Conference: Summary Recommendations, (Dec. 1, 1982) (J-51 Committee) at 1 [hereinafter cited as *Report to the Conference*].

and manufacturing buildings had become obsolete and underoccupied.<sup>51</sup> As a result, J-51 was expanded in 1976 to include benefits for the conversion of nonresidential structures into residential multiple dwellings.<sup>52</sup>

J-51 can be applied to either unoccupied or occupied structures.<sup>53</sup> The program is available where a nonresidential building is converted into a residential multiple dwelling or where a residential building is rehabilitated.<sup>54</sup> A residential rehabilitation can be a substantial or gut rehabilitation where "a new building is created in the shell of the old."<sup>55</sup> Alternatively, rehabilitation can take place in an occupied multiple dwelling.<sup>56</sup>

Prior to 1975, no limit was imposed on the amount of rehabilitation work which an owner could abate per dwelling unit.<sup>57</sup> An amendment in that year placed a 90% limit per apartment on abatable costs.<sup>58</sup> This restriction was intended to avoid tax breaks for luxurious altera-

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It's important to remember that the early 1970s were very hard on the city and its dwellers. The real estate market in much of New York was collapsing. Both businesses and residents were fleeing once strong areas. To avoid taxes on underutilized properties, owners were razing buildings even in prime areas like Wall Street. Thousands of owners were walking away from buildings in formerly sound residential neighborhoods, abandoning them to the city rather than paying property taxes. Banks redlined whole sections of the city, refusing mortgage loans even to prominent developers working in sound neighborhoods. The legacy of those days is still with us.

*Id.*

See also Vitullo-Martin, *Victims of J-51's Defeat*, N.Y. Times, Sept. 4, 1982, at A21, col. 3 (arguing that residents of modest income will be hurt most by Legislature's failure to extend J-51 and referring to real estate problems in New York City in the early 1970's).

51. See, e.g., Oser, *Teitelbaum Using European Funds in Apartment Venture*, N.Y. Times, Jan. 21, 1977, at A17, col. 3 (discussing the conversion of an office building into an apartment house using J-51).

52. See New York, N.Y. [1975] Local Laws 60 codified at N.Y. ADMIN. CODE tit. J, § J51-2.5(b)(2) (Supp. 1982).

53. N.Y. ADMIN. CODE tit. J, § J51-2.5(b) (Supp. 1982).

54. *Id.* This provision has been restricted by the 1983 amendments to the state enabling legislation. Under the new law, a nonresidential building cannot be converted to residential use if a zoning use variance is required unless permitted by the City Council. See *infra* note 156 and accompanying text.

55. Oser, *The J-51 Tax Incentives: A Program Under Fire*, N.Y. Times, June 13, 1982, § 8 (Real Estate), at 14, col. 4 (discussing the J-51 controversy and how the program has been amended to date).

56. N.Y. ADMIN. CODE tit. J, § J51-2.5(b)(5) (Supp. 1982).

57. New York, N.Y. [1975] Local Laws 60 (amending N.Y. ADMIN. CODE tit. J, § J51-2.5(c) (Supp. 1982)). See *infra* notes 74-78 and accompanying text for a discussion of abatable cost.

58. N.Y. ADMIN. CODE tit. J, § J51-2.5(c) (Supp. 1982).

See *infra* notes 74-78 and accompanying text for a discussion of abatable cost.

tions and improvements,<sup>59</sup> a result which would have contravened the legislative intent to provide housing for low income families.<sup>60</sup>

In 1979, the abatement and exemption provisions of J-51 were amended.<sup>61</sup> This change affected two categories of eligible work. First, a new category referred to as a "moderate rehabilitation"<sup>62</sup> was created. In this category, work is performed in an occupied building and benefits are more extensive than for conversions or rehabilitations of unoccupied buildings.<sup>63</sup> A moderate rehabilitation<sup>64</sup> of a substantially occupied<sup>65</sup> class A multiple dwelling<sup>66</sup> entitles the owner to a 100% abatement of the certified reasonable costs<sup>67</sup> of alterations.<sup>68</sup> In addition, the exemption period was extended from 12 years for all

59. "Only the work necessary to create a habitable unit is abatable. If a higher standard is preferred, the owner assumes the extra cost over the liveable level." Griffith, *supra* note 22, at 170-71.

60. See *supra* note 43 for a discussion of the intent of the legislature.

61. New York, N.Y. [1979] Local Laws 77 (codified at N.Y. ADMIN. CODE tit. J, § J51-2.5(c) (Supp. 1982)).

62. N.Y. ADMIN. CODE tit. J, § J51-2.5(a)(6) (Supp. 1982).

63. See N.Y. ADMIN. CODE tit. J, § J51-2.5(b), (c) (Supp. 1982).

64. Under the statute, moderate rehabilitation is defined as:

a scope of work which (a) includes a building-wide replacement of a major component of one of the following systems: (1) Elevator, (2) Heating, (3) Plumbing, (4) Wiring, (5) Window—and (b) has a certified reasonable cost of not less than \$2500, exclusive of any certified reasonable cost for ordinary repairs, for each dwelling unit in existence at the commencement of the rehabilitation; except that the Department of Housing Preservation and Development may establish a minimum certified reasonable cost to be greater than \$2500 per dwelling unit pursuant to subdivision m of this section.

N.Y. ADMIN. CODE tit. J, § J51-2.5(a)(6) (Supp. 1982).

65. Substantially occupied "shall mean an occupancy of not less than 60 per cent of all dwelling units immediately prior and during rehabilitation, except that the Department of Housing Preservation and Development may establish higher percentages of occupancy pursuant to subdivision m of this section." *Id.* at § J51-2.5(a)(7).

66. "A 'multiple dwelling' is 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 each other." N.Y. MULT. DWELL. LAW § 4(7) (McKinney 1974). "A 'class A' multiple dwelling is a multiple dwelling which is occupied, as a rule, for permanent residence purposes. This class shall include tenements, flat houses, maisonette apartments, apartment houses . . ." *Id.* § 4(8)(a).

67. Certified reasonable cost is the "reasonable cost of a conversion, alterations or improvements certified by the Office to be eligible for the benefits of the Act pursuant to the procedures set forth . . . in these Rules and Regulations." City of New York, Department of Housing Preservation and Development, J-51 Tax Exemption and Tax Abatement, Rules and Regulations tit. 1, § 1.3(6). Office is defined as "the Office of Development of the Department of Housing Preservation and Development . . ." *Id.* § 1.3(23). Act is defined as Section J51-2.5. *Id.* § 1.3(1).

68. N.Y. ADMIN. CODE tit. J, § J51-2.5(c) (Supp. 1982).

other work to 32 years for moderate rehabilitations.<sup>69</sup> The second category of work affected was nonresidential conversions in Manhattan, for which the abatement was reduced to 50%.<sup>70</sup> Thus, an *abatement* generally is limited to 90% of the reasonable costs of improvement unless the work constitutes a moderate rehabilitation for which a 100% abatement is provided; or a nonresidential conversion in Manhattan, for which a 50% abatement is allowed.<sup>71</sup> The abatement period cannot exceed 20 years.<sup>72</sup> By contrast, the *exemption* portion of the tax benefit generally is limited to 12 years with a 32 year exemption permitted for moderate rehabilitations.<sup>73</sup>

The amount of rehabilitation abatable is the specified percentage of the reasonable cost of the eligible alteration, improvement or conversion depending upon the category of work.<sup>74</sup> The determination of what constitutes reasonable cost is made by the New York City Department of Housing Preservation and Development (HPD).<sup>75</sup> To determine reasonable cost, two schedules were developed by HPD: the Rehabilitation Schedule and the Itemized Cost Breakdown Schedule.<sup>76</sup> The schedules contain lists of the items of work eligible for J-51

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69. N.Y. ADMIN. CODE tit. J, § J51-2.5(b) (Supp. 1982).

70. *Id.* § J51-2.5(c). For a discussion of the effect of J-51 on manufacturing space in New York City, see *infra* notes 256-57 and accompanying text.

71. N.Y. ADMIN. CODE tit. J, § J51-2.5(c) (Supp. 1982). These provisions are still effective. However, the 1983 amendments of the state enabling legislation have modified the tax abatement. See *infra* notes 125-34 & 140-48 and accompanying text.

72. N.Y. ADMIN. CODE tit. J, § J51-2.5(c) (Supp. 1982).

73. *Id.* § J51-2.5(b). These provisions are effective for work that is not subject to the 1983 revisions of the tax exemption. See *infra* notes 127-34 and accompanying text. Work which is *not* subject to the new law is covered by J-51 in its unamended form. *Id.*

74. N.Y. ADMIN. CODE tit. J, § J51-2.5(c) (Supp. 1982). See *supra* notes 68 & 71 and accompanying text for a discussion of the abatement provision.

75. HPD administers the J-51 program. N.Y. ADMIN. CODE tit. J, § J51-2.5(f) (Supp. 1982). HPD was created in 1977 to succeed the Housing and Development Administration (HDA). New York, N.Y. [1977] Local Laws 29 repealing and reenacting N.Y. Charter, ch. 61.

76. City of New York, *Department of Housing Preservation and Development, J-51 Tax Exemption and Tax Abatement*, Rules and Regulations tit. 7 (1980). The Rehabilitation Schedule describes the procedures for determining dollar limits for rehabilitations of or conversions to class A multiple dwellings. *Id.* §§ 7.2, 7.3.

*Dollar Limit Procedure for Rehabilitation of a class A multiple dwelling.*

(1) Determine the average Room Count in the units in existence after the rehabilitation.

(2) Determine the Cost Limit Per Unit for a unit with an average Room Count as determined pursuant to 1 above (Add together the Base Cost and the Aggregate Room Adjustment of a unit with such average Room Count).

benefits.<sup>77</sup> Reasonable cost also must take into account the actual costs incurred.<sup>78</sup>

From 1955 to 1981, there were no area limitations imposed upon J-51 benefits, because the City considered it politically unwise to restrict the benefits to specified neighborhoods.<sup>79</sup> Thus, benefits could be

(3) Determine the Dollar Limit by multiplying the Cost Limit Per Unit, as determined pursuant to 2 above times the number of dwelling units in existence prior to the rehabilitation.

*Id.* § 7.2.

*Dollar Limit Procedure for a Conversion to a class A multiple dwelling.*

(1) Determine the Aggregate Room Adjustments as defined herein for each unit in existence after the rehabilitation. (If the Aggregate Room Adjustment is obtained by multiplying the Room Adjustment times the number of Additional Rooms, it will be necessary to first determine the Room Count in each unit in existence after the rehabilitation).

(2) Add the Aggregate Room Adjustment, if any, for each unit and the Base Cost to obtain the Cost Limit Per Unit for each unit created by the conversion.

(3) Determine the Dollar Limit by multiplying the Cost Limit per unit times the number of units.

*Id.* § 7.3.

The Itemized Cost Breakdown Schedule contains a list of the maximum allowance for items which are eligible for J-51 benefits. *Id.* § 7.4.

For example:

<u>Item</u>	<u>Allowance</u>
gypsum board ceiling	\$130 per room
bi-fold closet door	\$ 75 per bi-fold
storm door	\$ 80 each
storm window with screen	\$ 55 each

*Id.* § 7.4.

The applicant's certified reasonable cost [a specified percentage] of which may be tax abated, is the lesser of the allowable reasonable cost for each item of work as calculated pursuant to the Itemized Cost Breakdown Schedule, or the applicant's documented actual cost of each eligible item of work, or the dollar limit of abatable cost as computed pursuant to the Rehabilitation Schedule.

Griffith, *supra* note 22, at 186.

77. City of New York, Department of Housing Preservation and Development, *J-51 Tax Exemption and Tax Abatement*, Rules and Regulations tit. 7, § 7.4 (1980). For example, elevators, windows, bathtubs, and electrical wiring are eligible for benefits. *Id.*

78. *Deull v. Housing and Dev. Admin.*, 40 A.D.2d 803, 803, 338 N.Y.S.2d 122, 124 (1st Dept. 1972) (mem.) (court remanded to Housing and Development Administration (HDA) its determination of reasonable cost, as HDA, in processing petitioner's application for tax abatement apparently disregarded actual cost).

79. Choosing among competing neighborhoods generates intense political pressure and friction which frequently makes the selection of a neighborhood something less than rational. Once an area is revitalized and no longer requires assistance, it is politically difficult, if not impossible,

obtained in any area, if the owner complied with the statute. In 1981, the Mayor, in response to criticisms<sup>80</sup> regarding J-51's bias toward high income areas,<sup>81</sup> recommended changes which were subsequently implemented by the City Council.<sup>82</sup> These changes designated a minimum tax zone in Manhattan,<sup>83</sup> where no abatements are permitted on land portion of the property.<sup>84</sup> Thus, the owner must pay the land portion of the property tax.<sup>85</sup> In addition, a tax abatement exclusion zone, in which no abatements are permitted, was instituted in Manhattan.<sup>86</sup> The exemption, however, continues at present levels.<sup>87</sup> Fur-

to have the area undesignated. Refurbishing one or a few areas and excluding others would be discriminatory; the need for preservation help was city-wide.

Griffith, *supra* note 22, at 166.

80. See, e.g., *J51 Draft*, *supra* note 6 at 3(6).

81. N.Y. Times, Apr. 7, 1981, at A1, col. 1 (discussing Mayor's proposal for restrictions on J-51 tax abatements in a designated area of Manhattan); N.Y. Times, Mar. 4, 1981, at B8, col. 1 (Commissioner of Department of Housing Preservation and Development defends J-51 at hearings before City Council committee).

82. New York, N.Y. [1981] Local Laws 38 (codified at N.Y. ADMIN. CODE tit. J, § J51-2.5(d)(4)-(7) (Supp. 1982)).

83. N.Y. ADMIN. CODE tit. J, § J51-2.5(d)(6) (Supp. 1982). The minimum tax zone is described as:

BEGINNING at Central Park West and 86th Street; thence easterly along 86th Street to the East River; thence southerly along the easterly boundary of New York county to 23rd Street; thence westerly along 23rd Street to Third Avenue; thence southerly along Third Avenue to 14th Street; thence westerly along 14th Street to Broadway; thence southerly along Broadway to Houston Street; thence westerly along Houston Street to West Street; thence northerly along West Street to 14th Street; thence easterly along 14th Street to 9th Avenue; thence northerly along Ninth Avenue to 57th Street; thence westerly along 57th Street to the Hudson River; thence northerly along the westerly boundary of New York county to 72nd Street; thence easterly along 72nd Street to Central Park West; thence northerly along Central Park West to 86th Street and Central Park West, which is the place of beginning.

*Id.*

It primarily encompasses the midtown area and the east side of Manhattan. The minimum land tax on projects on the East Side is not expected to have significant impact on reducing J-51 costs. *J-51 Draft*, *supra* note 6, at 3(8). It is not expected to yield additional revenue nor slow the growth of the total cost of J-51. *Id.* The result will probably be a shift in J-51 activity from the East Side to the areas where full benefits are still awarded. *Id.*

84. N.Y. ADMIN. CODE tit. J, § J51-2.5(d)(4) (Supp. 1982) ("the benefits of this section shall not be applied to abate or reduce the taxes upon the land portion of such real property, which shall continue to be taxed based upon the assessed valuation of the land and the applicable tax rate at the time such taxes are levied . . .").

85. *Id.*

86. *Id.* § J51-2.5(d)(7). The exclusion zone is described as:

BEGINNING at the intersection of 96th Street and Central Park West; thence easterly to Park Avenue; thence southerly along Park Avenue to the intersection of Park Avenue and 72nd Street; thence easterly along 72nd

thermore, the City Council enacted a requirement that developers pay relocation benefits to small businesses that are forced to move due to a conversion that is aided by J-51, provided that the business remains in the city.<sup>88</sup>

In summary, as of 1981, the major provisions of J-51 included a 12-year exemption from an increase in property taxes as the result of the conversion or rehabilitation of a building.<sup>89</sup> However, a 32-year exemption<sup>90</sup> from increased property taxes was permitted where the work constituted a moderate rehabilitation<sup>91</sup> of a substantially occupied<sup>92</sup> class A multiple dwelling.<sup>93</sup> In addition, an annual abatement

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Street to York Avenue; thence northerly along York Avenue to the Franklin Delano Roosevelt Drive; thence north-westerly along the Franklin Delano Roosevelt Drive to as far as 96th Street; thence easterly to the easterly border of New York county; thence southerly along such border to 34th Street; thence westerly along 34th Street to 8th Avenue; thence northerly, along 8th Avenue and Central Park West as far as 96th Street, which is the place of beginning. Additionally, the following North/South and East/West thoroughfares shall be included in the tax abatement exclusion zone: 96th Street between Central Park West and the East River; 86th Street between Central Park West and East River; 79th Street between West End Avenue and the East River; 72nd Street between West End Avenue and the East River; West End Avenue from 72nd Street to 86th Street; and Riverside Drive from 72nd Street to 96th Street.

*Id.*

This zone primarily encompasses the midtown area and the east side of Manhattan between 96th and 34th Streets, including some sections of 96th, 86th, 79th Streets and Riverside Drive. The abatement exclusions are expected to have a minimal impact. *Tax Breaks*, *supra* note 4, at 14.

They are located primarily in wealthy or speculative neighborhoods, where property values and assessments are rising dramatically, and as assessments rise so do the amount of the exemptions. Thus while the recently enacted legislative changes will moderate the rate of increase in J-51 tax expenditures, it will not reverse or eliminate what has become a massive revenue drain on the City budget.

*Id.*

87. See N.Y. ADMIN. CODE tit. J, § J51-2.5(d)(5) (Supp. 1982).

[T]he benefits of this section shall not be applied to abate or reduce the taxes upon such real property, which shall continue to be taxed based upon the assessed valuation of the land and the improvements and the applicable tax rate at the time such taxes are levied; provided, however, that the foregoing limitation shall not deprive such real property of any benefits of exemption from taxation of an increase in assessed valuation to which it is entitled pursuant to this section . . . .

*Id.*

88. *Id.* § J51-2.5(z).

89. *Id.* § J51-2.5(b)(7).

90. *Id.*

91. See *supra* note 64 for the definition of "moderate rehabilitation."

92. See *supra* note 65 for the definition of "substantially occupied."

93. See *supra* note 66 for the definition of "class A multiple dwelling."



of not more than 8 1/3% of the certified reasonable cost (CRC) of the work performed is allowed.<sup>94</sup> The abatement period cannot exceed 20 years.<sup>95</sup> For most abatements, the total amount abatable is limited to 90% of the CRC.<sup>96</sup> However, work which constitutes a moderate rehabilitation of a substantially occupied class A multiple dwelling is entitled to a 100% abatement of the CRC.<sup>97</sup> In addition, the total abatement is 50% for the conversion of non-residential buildings in Manhattan.<sup>98</sup>

### C. The Effect of J-51's Uncertain Legal Status: June 1982-June 1983

The State enabling legislation, § 489 of the Real Property Tax Law, expired on June 1, 1982.<sup>99</sup> Extension of the program was thwarted when negotiations between the City and legislative critics collapsed before the Legislature recessed in July, 1982.<sup>100</sup> As a result, the legal status of J-51 was unclear from June, 1982 through June, 1983. The confusion revolved around the program's date of expiration.<sup>101</sup> New

94. N.Y. ADMIN. CODE tit. J, § J51-2.5(c) (Supp. 1982). See *supra* note 67 for a discussion of certified reasonable cost.

95. N.Y. ADMIN. CODE tit. J, § J51-2.5(c) (Supp. 1982).

96. *Id.*

97. *Id.*

98. *Id.*

99. N.Y. REAL PROP. TAX LAW § 489(1)(a) (McKinney Supp. 1982). See *supra* notes 18, 39 & 40 and accompanying text.

100. N.Y. Times, July 6, 1982, at A1, col. 3. See *supra* note 19 and accompanying text for a discussion of the collapse of negotiations at the end of the 1982 legislative session.

101. N.Y. REAL PROP. TAX LAW § 489(1)(a) (McKinney Supp. 1982) states:

Any city to which the multiple dwelling law is applicable, acting through its local legislative body or other governing agency, is hereby authorized and empowered, to and including June first, nineteen hundred eighty-two, to adopt and amend local laws or ordinances providing that any increase in assessed valuation of real property shall be exempt from taxation for local purposes to the extent that such increase results from [specified alterations, improvements and conversions].

*Id.*

"[S]uch conversion, alterations or improvements . . . if started after July first, nineteen hundred seventy-seven . . . shall in any event be completed prior to December thirty-first, nineteen hundred eighty-four . . ." *Id.* § 489(1)(a)(5). One interpretation of these two provisions suggests that in 1977, the project completion date was amended to December 31, 1984. In addition, pursuant to the 1977 change in the enabling legislation, the City amended J-51 and provided a December 31, 1984 expiration date. Schwartz and Korngold, *J-51's Uncertain Future Slows Major Renovations*, 188 N.Y.L.J. 35 (1982).

"Opponents of J-51 interpreted the 1977 legislation as cutting off the program on June 1, 1982. This was clearly a misreading of the statute which rather than merely hint or suggest an earlier cut-off date, is explicit in setting such date as December 31, 1984." *Id.* at 35 col. 2. The 1983 revision of § 489 amends § 489(1)(a) to read:

York City Corporation Counsel contended that the program would continue to exist until 1984, because the June 1, 1982 date was not J-51's expiration date.<sup>102</sup> Rather, Corporation Counsel interpreted June 1, 1982 as the last date upon which the City Council could amend J-51 in the absence of the extension of the enabling legislation.<sup>103</sup> Despite the uncertainty over the significance of the June 1st expiration date, the State Legislature, in December, 1982 and March, 1983, failed to approve an extension of the enabling legislation.<sup>104</sup> Therefore, it became evident that June 1, 1982 was considered to be J-51's date of expiration. Moreover, the 1983 amendments,<sup>105</sup> with several exceptions, are deemed to have been in effect since June 1, 1982.<sup>106</sup>

The impact of the failure to extend the program was that a consortium of banks refused to process loan applications for projects which had an April 1, 1983 deadline for loan closings.<sup>107</sup> J-51 was considered by lenders to be dependable in its unamended form.<sup>108</sup> As a result, banks were willing to rely on the benefit's reliable status.<sup>109</sup> However, when the form and date of the extension became unknown, lenders stopped providing housing loans.<sup>110</sup>

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Any city to which the multiple dwelling law is applicable, acting through its local legislative body or other governing agency, is hereby authorized and empowered, to and including June first, nineteen hundred *eighty-six*, to adopt and amend local laws or ordinances providing that any increase in assessed valuation of real property shall be exempt from taxation for local purposes, *as provided herein*, to the extent such increase results from [specified alterations, improvements and conversions].

Chapter 401 *supra* note 23, § 1.

102. City of New York, Op. Corp. Counsel, 18-82, at 2 (1982).

103. *Id.* "The only legally significant event that occurred on June 1, 1982 was the end of the City Council's authority to further amend the law or adopt new local legislation having the same purpose." Schwartz & Korngold, *supra* note 101, at 35 col. 2.

104. N.Y. Times, Apr. 3, 1983, § 4 (Week in Review), at 6, col. 1 (discussing the third failure of the Legislature to renew J-51).

105. For a discussion of the 1983 revisions see *infra* notes 117-65 and accompanying text.

106. Chapter 401, *supra* note 23, § 15.

107. N.Y. Times, Feb. 25, 1983, at B4, col. 4 (City released a list of 40 buildings that might not be rehabilitated due to J-51's uncertain status).

108. N.Y. Times, June 13, 1982, § 8 (Real Estate), at 7, col. 1. J-51's status as an "as-of-right" program contributed to its reliability. *Id.* An as-of-right program means that "(d)evelopers or owners who use it can get the benefit of foregone taxes without having to demonstrate to a reviewing body that the rehabilitation could not proceed without the benefits." *Id.*

109. *Id.*

110. N.Y. Times, Feb. 25, 1983, at B4, col. 4. Passage of the 1983 amendments assures that loans will be granted once again for eligible projects. N.Y. Times, June 23, 1983, at B3, col. 5, col. 6. For a discussion of the 1983 revisions see *infra* notes 116-65 and accompanying text.

#### D. 1983 Update: Revisions in the State Enabling Legislation

More than 14,000 buildings in New York City have received J-51 benefits<sup>111</sup> and more than 800,000 apartments have been upgraded or created<sup>112</sup> during the 28 years of the program's existence.<sup>113</sup> Since its enactment, the program has undergone modifications which have reflected changes in the City's need for residential housing.<sup>114</sup> For example, in 1976, J-51 was expanded considerably to include benefits for the conversion of hotels, factories and office buildings into apartments.<sup>115</sup>

After one year of negotiating the current changes, the Legislature reached an agreement with respect to the enabling legislation for J-51.<sup>116</sup> The 1983 revisions have amended New York City's authority to grant J-51 benefits.<sup>117</sup> The major change in the new law is that the exemption portion of the tax benefit is no longer automatic.<sup>118</sup> This

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111. N.Y. Times, Dec. 1, 1980, at B1, B10, col. 4. The New York City Comptroller has called for limiting J-51, which he claims has expanded to the point of providing excessive assistance to luxury housing in Manhattan. The Comptroller noted that the majority of benefits went to prime residential areas south of 96th Street and that the program has contributed to the loss of commercial properties, which have been converted into residential units. *Id.* at B10, col. 6.

112. N.Y. Times, Mar. 4, 1981, at B8, col. 1. The Commissioner of the Department of Housing Preservation and Development defended J-51, citing the number of units assisted which provide housing for middle class residents: "[w]ithout J-51, the cost to the people who want to convert would be prohibitive, . . .". *Id.* at B8, col. 3.

113. The J-51 program was enacted on December 30, 1955. New York, N.Y. [1955] Local Laws 118.

114. Griffith, *supra* note 22, at 156.

Originally, the 'J-51' program induced owners to upgrade cold water flats by installing central heating and hot water service. Over the years, the program expanded to further induce the upgrading and preservation of existing residential multiple-dwellings through the removal of unsafe and unsanitary conditions and the replacement of inadequate plumbing facilities.

*Id.* In the early 1970's, the city's commercial and housing market underwent major changes as businesses and residents left the city. *Report to the Conference, supra* note 50, at 1. As a result, J-51 was expanded to include the conversion of nonresidential structures into multiple dwellings. See New York, N.Y. [1975] Local Laws 60 (codified at N.Y. ADMIN. CODE tit. J, § J51-2.5(b) (Supp. 1982)). For a discussion of the history of J-51, see *supra* notes 36-110 and accompanying text.

115. New York, N.Y. [1975] Local Laws 60 (codified at N.Y. ADMIN. CODE tit. J, § J51-2.5(b) (Supp. 1982)). For a discussion of the revisions of these benefits see *infra* notes 155-56 and accompanying text.

116. N.Y. Times, June 23, 1983, at B3, col. 5. The 1983 revisions have extended the local enacting authority to June 1, 1986. *Chapter 401, supra* note 23, § 1.

117. For a discussion of the history of the enabling legislation see *supra* notes 41-46 and accompanying text.

118. See *infra* notes 122-24 and accompanying text for a discussion of the new exemption schedule.

was the most controversial J-51 reform.<sup>119</sup> It restricted the tax exemption<sup>120</sup> to eliminate benefits for luxury projects.<sup>121</sup> Work which has a post-completion assessed valuation per dwelling unit above \$38,000 is ineligible for the exemption benefit.<sup>122</sup> Projects with a post-completion increase in assessed valuation per dwelling unit under \$18,000 receive full benefits.<sup>123</sup> Work falling between \$18,000 and \$38,000 of increased assessed valuation per dwelling unit is eligible for reduced benefits on a sliding scale.<sup>124</sup> The abatement portion of the benefit

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119. See *infra* notes 270-77 and accompanying text for a discussion of the exemption reform controversy.

120. The method of calculating the exemption limitation is dependent upon the post-construction increase in assessed valuation per dwelling unit. *Chapter 401, note 23 supra*, § 6, subdiv. 11(c)(1)(a).

The amount of the increased assessed valuation that is exempt from taxation shall depend on the amount of the total assessed valuation per dwelling unit calculated by dividing the amount of the total assessed valuation of the property, . . . by the number of dwelling units in the building after completion of the conversion, alteration or improvement.

*Id.* For a discussion of the method of calculating the exemption benefit where no limitations are applicable see *infra* notes 213-20 and accompanying text. For a discussion of the proposed reforms of the exemption benefit see *infra* notes 270-77 and accompanying text.

121. N.Y. Times, July 3, 1983, § 8 (Real Estate) at 5, col. 1, col. 2. For a discussion of the criticism of J-51 for providing benefits for luxury renovations see *supra* note 111.

122. *Chapter 401 supra* note 23, § 6, subdiv. 11(c)(E). The nonrestricted exemption benefit is granted automatically to eligible buildings. See *supra* notes 89-93 and accompanying text.

123. *Id.* § 6, subdiv. 11(c)(1)(A). This category of work receives a 100% exemption. *Id.*

124. The statute provides:

[t]he amount of increased assessed valuation that will be exempt from taxation for buildings with total assessed valuation per dwelling unit of less than thirty-eight thousand dollars shall be calculated pursuant to the following formula: (A) any portion of total assessed valuation of the property attributable to the first eighteen thousand dollars of total assessed valuation per dwelling unit, to the extent it represents increased assessed valuation, shall be one hundred percent exempt; (B) any portion of total assessed valuation attributable to the next four thousand dollars of total assessed valuation per dwelling unit, to the extent it represents increased assessed valuation, shall be seventy-five percent exempt; (C) any portion of total assessed valuation attributable to the next four thousand dollars of total assessed valuation per dwelling unit, to the extent it represents increased assessed valuation, shall be fifty percent exempt; (D) any portion of total assessed valuation attributable to the next four thousand dollars of total assessed valuation per dwelling unit, to the extent it represents increased assessed valuation, shall be twenty-five percent exempt; (E) any portion of total assessed valuation attributable to the next eight thousand dollars of total assessed valuation per dwelling unit, to the extent it represents increased assessed valuation per dwelling unit, shall be fully taxable. Property with a total assessed valuation per dwelling unit of thirty-eight

continues to be limited by the certified reasonable cost of the rehabilitation or alteration as determined by local law.<sup>125</sup> Under the new law, all projects will receive the abatement, but the cap on the certified reasonable cost has been lowered by 25%.<sup>126</sup>

Although the 1983 amendments have altered J-51 significantly, there are many situations to which the reformed exemption and abatement benefits do not apply. Numerous exceptions and waivers preserve the program in its unamended form.<sup>127</sup> For example, work performed to eliminate dangerous conditions, conserve energy or con-

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thousand dollars or more shall not be eligible for a tax exemption under this section."

*Id.* § 6, subdiv. 11(c)(A)-(E).

The new J-51 exemption schedule works like a progressive income tax, providing a greater tax break to low, moderate, and middle-income projects and a lesser tax break to luxury projects. Under a progressive income tax, an individual's income is viewed as a series of layers each of which is taxed a bit more than its predecessor. Thus a person's income up to a certain amount is tax free, the next thousand dollars may be taxed at five percent, the next thousand at six percent, and so on. The total income tax owed is the sum of taxes owed in each of the layers that apply to the individual paying the tax.

The new J-51 exemption schedule acts in a similar manner, except that it substitutes assessed value per dwelling unit for income. The original average assessed value per dwelling unit in the building before commencement of construction is the starting point for calculating the exemption. As the developer rehabilitates a building, he adds to the building's average assessed value per dwelling unit and receives a certain percentage exemption for the particular piece of added value depending on the layer he is currently passing through. Thus if a developer adds assessed value per dwelling unit to a building up to \$18,000, he gets a 100 percent exemption from the resulting tax increase; if he adds another four thousand dollars, he receives a 75 percent exemption for that portion; and so on and so forth until he has completed his project. The total exemption he obtains is simply the sum of the individual exemptions awarded in each layer that he passed through as construction progressed.

Memo from Frank Domurad, Tax Reform Director of New York Public Interest Research Group (September, 1983) (Questions and Answers About J-51).

125. For a discussion of the certified reasonable cost of the improvement see *supra* notes 67, 74-78 and accompanying text.

126. *Chapter 401, supra* note 23, § 6, subdiv. 11(b). "(T)he amount of certified reasonable cost eligible for abatement under this section shall not exceed fifteen thousand dollars for a dwelling unit of three and one-half rooms . . . and a comparable amount for dwelling units of other sizes . . ." *Id.*

The former abatement benefit provided a \$17,000 base cost allowance for a 2½ room dwelling unit with a \$2400 additional cost allowance for each additional room. Thus, a 3½ room unit received an abatement for \$19,400. See *supra* note 76, *J-51 Tax Exemption and Tax Abatement*, Rules and Regulations, tit. 7, § 7.1 (1980).

127. See *supra* notes 89-98 and accompanying text for a discussion of the provisions of J-51 which apply to the exceptions and waivers.

form with landmark laws is not subject to benefit restrictions if the renovations fall into one of the following categories.<sup>128</sup> Work carried out with substantial governmental assistance or by a nonprofit philanthropic organization formed for the purpose of providing housing for low and moderate income persons<sup>129</sup> or assisted by specified governmental mortgage insurance<sup>130</sup> is eligible for a waiver. Loft improvements<sup>131</sup> and moderate rehabilitations of substantially occupied buildings<sup>132</sup> are additional exceptions. A waiver of benefit limitations also is permitted in a "neighborhood preservation area" designated as such by the New York City Planning Commission prior to June 1, 1983.<sup>133</sup> The City Council also has the authority to waive the benefit restrictions upon notification to and consultation with the affected area's community board.<sup>134</sup>

Additional waivers and exceptions to the exemption and abatement limitations permit a local housing agency to grant more generous benefits. For example, the *exemption* benefit may be modified or waived upon application by the property owner to the local housing agency.<sup>135</sup> The agency then notifies the local community board.<sup>136</sup> If

128. See Chapter 401, *supra* note 23, § 6, subdiv. 11(a)(1).

129. *Id.* § 6, subdiv. 11(a)(1)(A). The assistance may be in the form of "grants, loans or subsidies from any federal, state or local agency or instrumentality . . .". *Id.*

130. *Id.* § 6, subdiv. 11(a)(1)(B)(D).

131. *Id.* § 6, subdiv. 11(a)(3).

132. *Id.* § 6, subdiv. 11(a)(2).

133. *Id.* § 6, subdiv. 11(a)(1)(C). The neighborhood preservation area must be approved by the City Council. *Id.*

134. *Id.*

No such area or part thereof shall be approved by the city council until notice of the area or part thereof proposed to be approved is submitted to every community board with jurisdiction over the area or part thereof, and (i) every such community board has made and submitted to the city council comments as to the proposed approval, or (ii) forty-five days have elapsed since such notice was submitted to such community boards, whichever is earlier . . . .

*Id.*

135. *Id.* § 6, subdiv. 11(c)(5)(A).

136. *Id.* § 6, subdiv. 11(c)(5)(C).

Upon receiving an application under this subparagraph in proper form, the local housing agency shall immediately submit it to the community board for the area in which the project is located, which may, within forty-five days of receiving it and after a public hearing, make recommendations to the agency as to the application. The agency shall act on the application within sixty days of receiving it from the property owner in proper form, but not before expiration of the time for the community board to make its recommendations, unless the board has acted sooner.

*Id.*

the increase in benefits will increase the number<sup>137</sup> or quality<sup>138</sup> of apartments affordable to persons of low or moderate income, the exemption benefit can be altered.<sup>139</sup>

The *abatement* limitation may be increased in two situations. First, the City Council is authorized to grant a maximum abatement of 150% of the certified reasonable cost of the work, with a 12 1/2% annual abatement for no longer than 20 years.<sup>140</sup> This increase is permitted for projects which are: (1) substantially assisted by governmental funding or specified governmental insurance;<sup>141</sup> (2) performed by nonprofit philanthropic organizations formed for the purpose of providing low and moderate income housing;<sup>142</sup> (3) moderate rehabilitations of substantially occupied buildings;<sup>143</sup> (4) property situated in census tracts in which 75% of the people earn 50% or less than the median household income of that city.<sup>144</sup> Second, the abatement may be increased up to 25% above the certified reasonable cost for a unit.<sup>145</sup> To obtain this waiver the property owner must apply to the local housing agency, which must determine that the increased cost is necessary.<sup>146</sup> The waiver may be granted if the increase is determined to be necessary to eliminate unsafe conditions,<sup>147</sup> to conserve energy,<sup>148</sup> or to comply with applicable law.<sup>149</sup>

Additional revisions include the restriction of benefits for single-room-occupancy buildings (SROs)<sup>150</sup> and industrial conversions<sup>151</sup> and a provision regarding the harassment of tenants by owners.<sup>152</sup> An express authorization which permits the City Council to further limit

137. *Id.* § 6, subdiv. 11(c)(5)(A)(i).

138. *Id.* § 6, subdiv. 11(c)(5)(A)(ii).

139. Persons of low or moderate income are defined as "persons who would qualify for housing subsidies pursuant to section two hundred thirty-five of the national housing act, as amended, at one hundred thirty-five percent of the income limitations provided herein." *Id.* § 6, subdiv. 11(c)(5)(B).

140. *Id.* § 3, subdiv. 2(a)(2), (3). In no consecutive twelve month period can the abatement exceed the amount of taxes due. *Id.* § 3, subdiv. 2(a)(1).

141. *Id.* § 3, subdiv. 2(a)(2), (3).

142. *Id.*

143. *Id.* § 3, subdiv. 2(a)(2).

144. *Id.* § 3, subdiv. 2(a)(3).

145. *Id.* § 6, subdiv. 11(b).

146. *Id.* § 6, subdiv. 11(b).

147. *Id.* § 6, subdiv. 11(b)(2).

148. *Id.* § 6, subdiv. 11(b)(3).

149. *Id.* § 6, subdiv. 11(b)(1), (4).

150. *Id.* § 6, subdiv. 13. For a discussion of this provision see *infra* note 155 and accompanying text.

151. *Id.* § 6, subdiv. 14. For a discussion of this provision see *infra* note 156 and accompanying text.

152. *Id.* § 6, subdiv. 12(b)(2). For a discussion of this provision see *infra* notes 158-62 and accompanying text.

J-51 has been enacted<sup>153</sup> and the City is required to hire an independent consultant firm to perform a cost-benefit analysis of J-51.<sup>154</sup> SRO conversions are ineligible for J-51 benefits regardless of the use of the building after construction unless the work is performed with governmental assistance.<sup>155</sup> Industrial conversions to residential use are no longer eligible for benefits where such work requires a zoning use variance, unless the City Council expressly permits this by amendment to the applicable local law.<sup>156</sup>

Prior to the current revisions, J-51 contained no provisions for dealing with the harassment of tenants by building owners. However, a section of the law now denies J-51 benefits to an owner who has been convicted of harassment.<sup>157</sup> The harassment provision requires that property owners file an affidavit with the local housing agency<sup>158</sup> listing all owners of record and owners of a substantial interest.<sup>159</sup> Benefits will be denied if any of these individuals have been convicted of harassment or unlawful eviction of tenants within the previous five

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153. *Id.* § 6, subdiv. 15. For a discussion of this provision see *infra* note 164 and accompanying text.

154. *Id.* § 6, subdiv. 12.

155. *Id.* § 6, subdiv. 13. This provision applies to work which was started on or after July 1, 1982. *Id.* § 15, subdiv. 1. Another tax benefit that assists SRO conversions and improvements is available. N.Y. Real Prop. Tax Law, § 488-a (McKinney 1982). The legislation reforming the enabling legislation for J-51 also expanded the SRO benefit program to include benefits for the conversion of many types of structures into SROs. See *Chapter 401, supra* note 23, § 11(iv). Furthermore, the exemption period was extended from ten to fifteen years. *Id.* § 10.

156. *Id.* § 6, subdiv. 14.

157. *Id.* § 6, subdiv. 12. A conviction for harassment may be based upon the following evidence: a long term rain leakage problem; inadequate building security; abuse of the tenants by the landlord. In *re Belnord Holding Corp. v. Joy*, 52 N.Y.2d 945, 946, 419 N.E.2d 871, 423 N.Y.S.2d 3 (1981). In addition, a determination of harassment has been affirmed where the acts of the owners "included failure to supply regular and adequate heat and hot water, failure to make proper plumbing and electric repairs and failure to clean, light and secure the public hallways and entrances." In *re Felin Assocs., Inc. v. Altman*, 41 A.D.2d 825, 342 N.Y.S.2d 752 (First Dept. 1973) *affd w/out opn* 34 N.Y.2d 895, 316 N.E.2d 718, 359 N.Y.S.2d 283 (1974).

158. *Chapter 401, supra* note 23, § 6 subdiv. 12(a), (b) (affidavit must be filed if an exemption is applied for or where the certified reasonable cost per dwelling unit of conversion exceeds \$7500). The filing must occur no later than thirty days before work is to begin. *Id.* § 6, subdiv. 12(b). This is referred to as the "cut-off date". *Id.* § 6, subdiv. 12(b). The affidavit must state that none of the owners have been convicted of harassment or illegal eviction of tenants before the cut-off date and must reflect any change in the required information. *Id.* § 6, subdiv. 12(b)(2), (3).

159. *Id.* § 6, subdiv. 12(b)(1). Substantial interest is defined as "ownership of an interest of ten per centum or more in the property or entity owning the property or sponsoring the conversion, alteration or improvements." *Id.* § 6, subdiv. 12(e).



years<sup>160</sup> if a required affidavit has not been filed<sup>161</sup> or if an affidavit contains a material omission or wilful misrepresentation of fact.<sup>162</sup>

The enabling legislation now explicitly authorizes the City Council "to restrict, limit or condition the eligibility, scope or amount of the benefits under the local law in any manner, provided that the local law may not grant benefits beyond those provided" by the statute.<sup>163</sup> Furthermore, the City must hire an independent consultant firm to conduct a cost-benefit analysis of J-51.<sup>164</sup> The results must be submitted to the Governor, State Comptroller and the Legislature by November 30, 1984.<sup>165</sup>

## E. Statutory Intent of J-51

### 1. Basic Principles of Statutory Construction

There are two basic policies which guide the interpretation of a New York State tax exemption statute. First, a tax exemption statute must be construed strictly against the taxpayer seeking its benefit.<sup>166</sup> This construction differs from the general rule that construes a tax

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160. *Id.* § 6, subdiv. 12(b)(2), (c)(3). The benefit is denied unless the finding of harassment, which occurred within the five years prior to the cut-off date, is reversed on appeal. *Id.* § 6, subdiv. 12(c)(3). "[A]ny such finding after the cut-off date shall not apply to or affect" the benefit for the property covered by the affidavit. *Id.* § 6, subdiv. 12(c)(3).

161. *Id.* § 11, subdiv. 12(c)(1).

162. *Id.* § 11, subdiv. 12(c)(2).

163. *Id.* § 11, subdiv. 15.

164. *Id.* § 12.

165. *Id.* The new law also requires the Commissioner of the New York City Department of Housing Preservation and Development to submit to the Mayor a study with proposals for the deterrence of arson in residential buildings. *Id.* § 13. For a discussion of the study which linked the use of arson to empty tenants from buildings which were subsequently renovated with the use of J-51 benefits see *infra* notes 265-67 and accompanying text.

166. *Linden Hill No. 2 Cooperative Corp. v. Tishelman*, 107 Misc.2d 799, 803, 435 N.Y.S.2d 936, 939 (Sup. Ct. Queens County 1981) *aff'd* 87 A.D.2d 577, 450 N.Y.S.2d 404 (2d Dept 1982) (mem.), citing *Association of the Bar of New York v. Lewisohn*, 34 N.Y.2d 143, 313 N.E.2d 30, 356 N.Y.S.2d 555 (1974).

*Linden Hill* is a case which decides a J-51 issue. For a discussion of the facts of *Linden Hill*, see *infra* notes 221-25 and accompanying text. *Association of the Bar of New York v. Lewisohn*, 34 N.Y.2d 143, 313 N.E.2d 30, 356 N.Y.S.2d 555 (1974) refers to another tax exemption program, § 421 of the Real Property Tax Law. N.Y. REAL PROP. TAX LAW, § 421 (McKinney 1982). In *Lewisohn*, the Court of Appeals upheld a statute enabling local governments to terminate tax exemptions for certain groups. *Lewisohn*, 34 N.Y.2d 143, 313 N.E.2d 30, 356 N.Y.S.2d 555. The court stated that the legislature clearly intended "to stem the erosion of municipal tax bases by permitting local governments to terminate exemptions for nonprofit organizations

statute in favor of the taxpayer and against the taxing authority.<sup>167</sup> Second, the burden of proving entitlement to an exemption falls upon the party asserting it.<sup>168</sup> The trend in interpreting real property tax exemptions has been to restrict benefits.<sup>169</sup> Thus, the petitioning taxpayer must satisfy a difficult burden of proof.

The State enabling legislation for J-51 empowers New York City and its agencies to determine the practices and procedures of J-51.<sup>170</sup> The New York City Department of Housing Preservation and Development (HPD) is one of the administrative agencies in New York City which has the authority to change the interpretation of J-51.<sup>171</sup> The judgment of an administrative agency which is authorized by statute to determine the rules and regulations of a tax exemption program should not be altered when a reasonable difference of opinion arises between the judgment of the agency and that of the court.<sup>172</sup> However, the agency must explain or promulgate any change of policy or statutory construction to afford applicants an opportunity to present their cases and to apprise future applicants of what items will be

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other than those conducted exclusively for religious, educational, charitable, hospital or cemetery purposes." *Id.* at 155-56, 313 N.E.2d at 36, 356 N.Y.S.2d at 563-64.

167. *Linden Hill No. 2 Cooperative Corp. v. Tishelman*, 107 Misc.2d 799, 803, 435 N.Y.S.2d 936, 939 (Sup. Ct. Queens County 1981) *aff'd* 87 A.D.2d 577, 450 N.Y.S.2d 404 (2nd Dept 1982) (mem.), (stating general rule and citing *Voorhees v. Bates*, 308 N.Y. 184, 124 N.E.2d 273 (1954)).

168. *Linden Hill No. 2 Cooperative Corp.*, 107 Misc.2d at 803, 435 N.Y.S.2d at 939 (citing *F.O.R. Holding Co. v. Board of Assessors of Town of Clarkstown*, 45 A.D.2d 875, 357 N.Y.S.2d 875 (2nd Dept 1974) (mem.)).

169. *Id.*

170. N.Y. REAL PROP. TAX LAW § 489(I)(a) (McKinney 1982).

Any city to which the multiple dwelling law is applicable, acting through its local legislative body or other governing agency, is hereby authorized and empowered, to . . . adopt and amend local laws or ordinances providing that any increase in assessed valuation of real property shall be exempt from taxation for local purposes . . . .

*Id.* "With respect to conversions, alterations or improvements eligible to receive the benefits of subdivision one of this section, any such local law or ordinance may . . . provide that the duration and amount of abatement of taxes on such property, . . . may be separately established for each of the categories of eligibility described . . . ." *Id.* § 489(2).

171. N.Y. ADMIN. CODE tit. J, § J51-2.5(f) (Supp. 1982). Pursuant to its authority, HPD has adopted rules and regulations to enable the department to determine and certify the reasonable cost of J-51 projects. *See supra* notes 67, 68, 76 & 77 and accompanying text. In addition, "[e]ach agency or department to which functions are assigned . . . may adopt and promulgate rules and regulations for the effectuation of the purpose of this [law]." *Id.* § J51-2.5(m).

172. *Linden Hill No. 2 Cooperative Corp. v. Tishelman*, 107 Misc.2d 799, 803, 435 N.Y.S.2d 936, 939 (Sup. Ct. Queens County 1981).

entitled to certification.<sup>173</sup> Only the legislature, however, can make substantive restrictions.<sup>174</sup>

## 2. Interpretation of the Statutory Intent of J-51

Although the J-51 program has been in effect for 28 years and has granted hundreds of millions of dollars in tax benefits, the reported case law interpreting J-51 is minimal.<sup>175</sup> The cases interpreting J-51 emphasize that the courts look beyond mere statutory conformance.<sup>176</sup> Compliance with the legislative intent of J-51 is of paramount importance.

The underlying purpose of J-51 was to provide an incentive to owners to upgrade existing substandard buildings.<sup>177</sup> Initially, the statute only applied to existing substandard buildings.<sup>178</sup> Currently, a building must be in existence, but the category of eligibility has been expanded to include other than substandard structures.<sup>179</sup> In addition,

173. *Punnett v. Evans*, 26 A.D.2d 396, 274 N.Y.S.2d 800 (1st Dept. 1966). The appellant, Punnett, appealed a decision of the New York City Housing and Redevelopment Board that denied him J-51 benefits for the reasonable costs of installing a heating system. *Id.* at 396, 274 N.Y.S.2d 800. The respondent, the New York City Housing and Redevelopment Board (HRB), contended that the benefits would issue only where no heating system existed prior to installation or where the system therein was unsafe. *Id.* at 398, 274 N.Y.S.2d at 803. The appellant argued that the denial was arbitrary as other applicants were granted benefits for similar work. *Id.* at 397, 274 N.Y.S.2d at 802. HRB answered by asserting its authority to change its policy to comply with the statute. *Id.* at 397, 274 N.Y.S.2d at 802. The court agreed with the appellant stating:

[u]nquestionably, respondent has the power and the duty to correct what it believes to have been an erroneous interpretation of the governing statute or even an unwise policy . . . . But it is quite another matter when the 'new construction' or 'new policy' is not asserted, articulated, or applied at the administrative level but is inaugurated instead in the midst of ensuing judicial proceedings.

*Id.* at 398, 274 N.Y.S.2d at 803.

174. *In re Prince Wooster Corp.*, N.Y.L.J., July 9, 1982, at 7, col. 5, (Sup. Ct. N.Y. County 1982). For a discussion of the case see *infra* notes 234-38 and accompanying text.

175. This was noted by the court in *111 Fourth Ave. Assocs. v. Fin. Admin. of New York*, 101 Misc. 2d 950, 952, 422 N.Y.S.2d 558, 559 (Sup. Ct. N.Y. County 1979).

176. See *infra* notes 181-238 and accompanying text for a discussion of recent J-51 cases. This Note will emphasize the major J-51 decisions since 1978. Professor Griffith has performed a thorough analysis of J-51 prior to 1978. See Griffith, *supra* note 22.

177. N.Y. Legis. Ann. at 267-68 (1955). See also *supra* note 43 and accompanying text.

178. New York, N.Y. [1955] Local Laws 118.

179. N.Y. ADMIN. CODE tit. J, § J51-2.5(b) (Supp. 1982). For a discussion of eligible structures see *infra* notes 187-89 and accompanying text.

the tax incentive must serve as the inducement for the rehabilitation work.<sup>180</sup> As the result of challenges to several statutory provisions, the reported cases have construed (1) "substandard"; (2) "inducement"; (3) "existing multiple dwelling" and (4) the actual method of computing the J-51 exemption.

### A. Substandard Building

The original purpose of J-51 was to encourage alteration and improvement, and "to correct fire and health hazards, of salvageable buildings for lower income families."<sup>181</sup> Thus, only those buildings which were deemed to be substandard were eligible for the tax benefit. The substandard building issue was considered in *Alwalt Realty Corp. v. Boyland*.<sup>182</sup> The petitioner was denied J-51 benefits for not complying with the purpose of the program.<sup>183</sup> The respondent, the New York City Tax Commission, alleged that prior to alteration, the petitioner's building was not substandard because the necessity of eliminating hazardous conditions had not been demonstrated.<sup>184</sup> Furthermore, the post-rehabilitation rentals clearly were not set at levels which lower income families could afford.<sup>185</sup> Therefore, a building which, prior to alteration, did not contain dangerous conditions, was not deemed to be substandard and was not eligible for J-51 benefits.

The form of the statute, at the time *Alwalt* was decided, provided a tax benefit for "improvements to existing dwellings to eliminate presently existing dangerous conditions."<sup>186</sup> Today, J-51 also provides benefits for other categories of work. Benefits are provided for moderate rehabilitations of substantially occupied buildings.<sup>187</sup> The current provisions also provide benefits for the conversion of nonresidential struc-

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180. See *infra* notes 190-95 and accompanying text for a discussion of the inducement issue.

181. N.Y. Legis. Ann. (1955) at 267-68. See also *supra* note 43 and accompanying text.

182. 5 Misc.2d 1061, 160 N.Y.S.2d 504 (Sup. Ct. N.Y. County 1957).

183. *Id.* at 1062, 160 N.Y.S.2d at 506. The petitioner, Alwalt Realty, alleged that he had spent \$93,000 to improve a substandard multiple dwelling. The tax commission denied relief on the ground that the building was never substandard. *Id.* The court could not resolve the merits of the case, as the petitioner erroneously instituted this proceeding when his possible administrative remedies had not been exhausted. *Id.* at 1063, 160 N.Y.S.2d at 507.

184. *Id.* at 1062, 160 N.Y.S.2d at 506.

185. *Id.* at 1062, 160 N.Y.S.2d at 506 ("By evicting all former occupants and converting from 12 large apartments to 46 one, two and three-room units the property was decontrolled and present rentals are between \$75 and \$125 monthly, plainly not for lower income families").

186. New York, N.Y. [1955] Local Laws 118.

187. Chapter 401, *supra* note 23 § 2(5).

tures into apartments where no zoning use variance is required, except if the variance is approved by the City Council.<sup>188</sup> Single-room-occupancy hotels may be converted into apartments under J-51 if the project receives governmental assistance.<sup>189</sup> Thus, because J-51 has been expanded to include categories other than substandard buildings, it appears that the requirement that a building be substandard is no longer a major impediment to qualifying for J-51 benefits.

## B. Inducement

The Legislature clearly intended that J-51 should encourage owners to improve their property.<sup>190</sup> Therefore, courts have denied benefits where the program did not serve as an inducement to performance of the work. For example, in *Becksmad Gardens Inc. v. Appleby*,<sup>191</sup> the petitioner had received a mortgage loan and tax exemption from New York City to rehabilitate substandard buildings.<sup>192</sup> Work was completed in 1971, but the petitioner did not apply for J-51 benefits until 1973.<sup>193</sup> The respondent, HPD, asserted that the grant of an exemption would result in a "tax windfall" for the petitioner.<sup>194</sup> The court agreed with HPD, and denied the exemption, holding that to grant the petitioner's request would be contrary to the legislative intent of J-51.<sup>195</sup> Based upon judicial construction and legislative intent, it may be concluded that for benefits to issue, J-51 must serve as the inducement for the work.

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188. *Id.*, § 6, subdiv. 14.

189. *Id.*, § 6, subdiv. 13.

190. N.Y. Legis. Ann., at 267-68 (1955). *See also supra* note 43 and accompanying text.

191. 93 Misc.2d 866, 403 N.Y.S.2d 644 (Sup. Ct. N.Y. County 1978), *aff'd*, 67 A.D.2d 839 (1st Dept. 1979). *See also* *Harby Realty Corp. v. Gilroy*, 17 Misc.2d 76, 188 N.Y.S.2d 1034 (Sup. Ct. N.Y. County 1958). In *Harby*, the court held that rehabilitation work which began prior to the effective date of the program was not eligible for J-51 benefits. *Id.* at 77, 188 N.Y.S.2d at 1035-36. The effective date of the program was March 1, 1958. *Id.* at 77, 188 N.Y.S.2d at 1035. The court stated that J-51 could not have been the inducement for the improvements. *Id.* at 77, 188 N.Y.S.2d at 1036. Moreover, "[t]he statute was not intended to give an unexpected windfall to the landlord who, previous to its enactment, filed plans for extensive alterations and conversions. Its sole purpose was to encourage salvaging premises for temporary decent housing." *Id.*

192. *Becksmad Gardens Inc. v. Appleby*, 93 Misc. 2d 866, 403 N.Y.S.2d 644 (Sup. Ct. N.Y. County 1978), *aff'd*, 67 A.D.2d 839 (1st Dept. 1979). *Becksmad Gardens* also was granted a 50% tax exemption for 30 years, which was increased to 80% upon completion of the work. *Id.* at 867, 403 N.Y.S.2d at 645.

193. *Id.* at 868, 403 N.Y.S.2d at 645.

194. *Id.* at 868, 403 N.Y.S.2d at 646.

195. *Id.* (legislative intent of J-51 was "to induce landowners to improve their buildings . . .").

### C. Existing Multiple Dwellings

J-51 provides benefits for "alterations or improvements to existing dwellings."<sup>196</sup> The issue of what constitutes an existing dwelling<sup>197</sup> has been the subject of controversy. In *Martell's Restaurant Corp. v. Housing and Development Administration*,<sup>198</sup> a building constructed as a multiple dwelling but not used as such immediately prior to alteration was found to be eligible for J-51 benefits.<sup>199</sup> The court held that a loose construction of the term "existing dwelling" is consistent with the intent of the Legislature to encourage alterations.<sup>200</sup> In a recent case, however, a denial of benefits was held to be reasonable where the building in question had been constructed as a private home and was so classified prior to conversion.<sup>201</sup> Furthermore, to qualify for J-51 benefits, the structure must actually have "existed."<sup>202</sup> An existing dwelling is defined as a class A multiple dwelling<sup>203</sup> or one or two dwelling units that are located above a commercial space.<sup>204</sup> In *Caiola v. Department of Housing Preservation and Development*,<sup>205</sup> the undisputed facts demonstrated that the appellant misrepresented the value of an allegedly existing structure when no building existed at all.<sup>206</sup> The court found that a "rubble foundation, a party wall and an independent wall two stories in height" did not constitute an existing structure.<sup>207</sup> Thus, if the structure does not satisfy the definition of an "existing dwelling," J-51 benefits will not be issued.

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196. N.Y. ADMIN. CODE tit. J, § J51-2.5(b)(7) (Supp. 1982).

197. The definition of an existing dwelling is:

except as hereinafter provided in subdivision d, a class A multiple dwelling or a building consisting of one or two dwelling units over space used for commercial occupancy in existence prior to the commencement of alterations for which tax exemption and abatement is claimed under the terms of this section and for which a valuation appears on the annual record of assessed valuation of the city for the fiscal year immediately preceding the commencement of such alterations and improvements.

*Id.* § J51-2.5(a)(2).

198. 64 Misc. 2d 991, 316 N.Y.S.2d 340 (Sup. Ct. N.Y. County 1970), *aff'd*, 37 A.D.2d 691, 323 N.Y.S.2d 389 (1st Dept 1971).

199. *Id.* at 992-93, 316 N.Y.S.2d at 342.

200. *Id.* ("the statute should be interpreted to encourage conversions rather than to circumscribe the activity with narrow, limited, strictly structured construction").

201. *In re 24 West 70th Street Apartment Corp.*, N.Y.L.J., Apr. 2, 1980, at 6, col. 4 (Sup. Ct. N.Y. County 1980).

202. N.Y. ADMIN CODE tit. J, § J51-2.5(b)(7) (Supp. 1982).

203. See *supra* note 66 for the definition of class A multiple dwelling.

204. See *supra* note 197 for the definition of an existing dwelling.

205. 79 A.D.2d 503, 433 N.Y.S.2d 451 (1st Dept. 1980) (mem.).

206. *Id.* at 504, 433 N.Y.S.2d at 453. The misrepresentation was found to be deliberate. *Id.*

207. *Id.* at 503, 433 N.Y.S.2d at 453.

#### D. Computation of the J-51 Exemption

The extent of the J-51 exemption is determined by the increase in assessed valuation resulting from the qualified rehabilitation of a building.<sup>208</sup> The reasonable cost of alterations and improvements serves as the basis for computing the increase.<sup>209</sup> Currently, there are two formulas for calculating the J-51 exemption. First, the recently enacted exemption limitation computes the tax exempt increase in assessed valuation by dividing the post-completion total assessed valuation of the property by the total number of apartments in the building.<sup>210</sup> A sliding benefit scale with an upper dollar limit then is applied to the per-apartment figure.<sup>211</sup> In general, this formula is applied to private non-subsidized gut rehabilitations.<sup>212</sup>

Second, the original J-51 exemption formula has been retained for properties which are not subject to exemption limitations.<sup>213</sup> The original method of computation determines the tax exemption by subtracting the assessed valuation before construction from the assessed value after construction.<sup>214</sup> The statute does not specify an exact date to apply when claiming the assessed value of the property before construction, therefore, the courts have provided the answer.<sup>215</sup>

The issue of the correct assessed valuation date was decided in *111 Fourth Avenue Associates v. Finance Administration of the City of New York*.<sup>216</sup> The court was presented with three different assessed valuation dates: the date physical construction began, the date of the petitioner's purchase of the property and the date construction was completed.<sup>217</sup> The court established a computation procedure by ex-

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208. *Chapter 401, supra* note 23 § 1.

209. N.Y. ADMIN. CODE tit. J, § J51-2.5(b) (Supp. 1982). *See also* Deull v. Housing and Dev. Admin., 40 A.D.2d 803, 338 N.Y.S.2d 122 (1st Dept. 1972) (mem.). In *Deull*, the petitioner challenged the City's determination of the reasonable cost of improvements made in the petitioner's building. *Id.* at 803, 338 N.Y.S.2d at 124. The court construed the J-51 legislation to "entitle the property owner to an abatement of taxes on the basis of the reasonable cost of the alterations and improvements to dwellings." *Id.* at 803, 338 N.Y.S.2d at 124.

210. For a discussion of this revision see *supra* notes 121-24 and accompanying text.

211. *See supra* notes 122-24 and accompanying text for a discussion of the new exemption provision.

212. N.Y. Times, July 3, 1983, § 8 (Real Estate) at 5, col. 1, col. 5.

213. For a discussion of properties to which the exemption limitations do not apply see *supra* notes 127-34 and accompanying text.

214. *See infra* note 219 and accompanying text.

215. *111 Fourth Avenue Associates v. Fin. Admin.*, 101 Misc. 2d 950, 422 N.Y.S.2d 558 (Sup. Ct. N.Y. County 1979).

216. *Id.*

217. *Id.* at 951, 422 N.Y.S.2d at 559.

aming the valuation date issue in the context of J-51's other provisions.<sup>218</sup> The court-mandated procedure entails subtracting the assessed valuation of the property immediately before improvement from the assessed valuation after improvement.<sup>219</sup> The dollar difference in valuation is the J-51 exemption.<sup>220</sup>

In addition to the valuation date controversy, the nature of the tax exemption remains unclear. Courts have reached varying conclusions concerning whether a court-ordered reduction in the assessed valuation of real property in a tax certiorari proceeding affects only the taxable portion of the property or whether the reduction can serve as the basis to proportionally reduce the J-51 exemption. In *Linden Hill No. 2 Cooperative Corp. v. Tishelman*,<sup>221</sup> the petitioner sought judicial review of the total assessed valuation of his property and was awarded a tax reduction based on this review.<sup>222</sup> The New York State Supreme Court in Queens County held that this reduction should be computed proportionally on the taxable and exempt portions of the property.<sup>223</sup> The court found a rational basis in law and fact for the Department of Finance's decision to reduce the J-51 exemption.<sup>224</sup> The court was not persuaded by the petitioner's construction of the statute, whereby the property owner would be awarded a higher exemption if the assessed valuation of the property was decreased.<sup>225</sup>

By contrast, in *600 West 183rd Street Corp. v. Tishelman*,<sup>226</sup> the Supreme Court in the New York County concluded that the J-51

218. *Id.* at 953, 422 N.Y.S.2d at 560.

219. *Id.* at 953, 422 N.Y.S.2d at 560.

220. *Id.* at 953, 422 N.Y.S.2d at 560.

221. 107 Misc.2d 799, 435 N.Y.S.2d 936 (Sup. Ct. Queens County 1981), *aff'd*, 87 A.D.2d 577, 450 N.Y.S.2d 404 (2nd Dept. 1982) (mem.).

222. *Id.* at 800, 435 N.Y.S.2d at 937.

223. *Id.* at 802, 435 N.Y.S.2d at 937. The court stated that its holding does not contravene the legislative intent of J-51. *Id.* at 804, 435 N.Y.S.2d at 939.

Landowners who improve their buildings pursuant to the provisions of the applicable statute will still get their exemption. However, petitioner, having sought judicial review of the total assessed valuation of his property, and having obtained the result he desired in the tax certiorari proceeding, cannot now be heard to say that part of his property is not subject to revaluation.

*Id.*

224. *Id.* at 802-04, 435 N.Y.S.2d at 939-40.

Section 726 of the Real Property Tax Law is clear that if the total tax assessment is reduced, the new assessment replaces the original assessment. Since the J-51 exemption is computed on the basis of the difference between the tax assessment of the year prior to the improvement, applying section 726 of the Real Property Tax Law would proportionally reduce the amount of the exemption, at least for the purpose of a tax refund.

*Id.* at 802, 435 N.Y.S.2d at 938-39.

225. *Id.* at 804, 435 N.Y.S.2d at 939.



exemption is a fixed sum which cannot be proportionally reduced by reference to a court-ordered reduction in assessed building value in a tax certiorari proceeding.<sup>227</sup> The court held that tax certiorari proceedings are independent of a J-51 tax exemption or tax abatement determination.<sup>228</sup> The court stated that the statutory history and language of both section 489 of the Real Property Tax Law<sup>229</sup> and section J51-2.5 of the New York City Administrative Code<sup>230</sup> are consistent with the conclusion that the value of a J-51 benefit is a single process, independent of yearly review.<sup>231</sup> The court asserted that to hold otherwise would contravene the legislature's intent to encourage improvements without building owners fearing a tax increase.<sup>232</sup>

In a 1982 decision, the same court applied a similar analysis to an attempt by the New York City Tax Commission to increase a building's tax assessment.<sup>233</sup> In *In re Prince Wooster Corp.*,<sup>234</sup> the Commission's ruling, which increased a building's assessment, was voided.<sup>235</sup> The court disagreed with the Commission's interpretation that the J-51 exemption is a proportion of the assessed property value.<sup>236</sup> The court emphasized the clarity of the language of section 489 of the Real Property Tax Law, which states that building assessments will not rise for 12 years.<sup>237</sup> The court acknowledged that the nature and scope of

226. 108 Misc.2d 780, 441 N.Y.S.2d 846 (Sup. Ct. N.Y. County 1980).

227. *Id.* at 783, 441 N.Y.S.2d at 848.

228. *Id.* at 782, 441 N.Y.S.2d at 847 (J-51 proceedings "do not involve in the slightest the question of the correctness of the assessed valuation").

229. N.Y. REAL PROP. TAX LAW § 489 (McKinney 1982).

230. N.Y. ADMIN. CODE tit. J, § J51-2.5 (Supp. 1982).

231. 600 West 183rd St. Corp. v. Tishelman, 108 Misc.2d 780, 783, 441 N.Y.S.2d 846, 848 (Sup. Ct. N.Y. County 1980). "The placing of assessed valuation upon real property is a yearly process and involves considerations that go to make market value, but arriving at the value of a J51 exemption is a one-time process that involves the narrow determination of increase in assessed value as a result of qualified rehabilitation." *Id.*

232. "Although tax exemption statutes should be construed strictly against the taxpayer seeking the benefit of the exemption, a J51 exemption should be interpreted to encourage conversions." *Id.* at 784, 441 N.Y.S.2d at 848 (citing *Martell's Rest. Corp. v. Housing and Dev. Admin.*, 64 Misc.2d 991, 316 N.Y.S.2d 340 (Sup. Ct. N.Y. County 1970), *aff'd*, 37 A.D.2d 691, 323 N.Y.S.2d 389 (1st Dept. 1971).

233. *In re Prince Wooster Corp.*, N.Y.L.J., July 9, 1982, at 7, col. 2 (Sup. Ct. N.Y. County 1982).

234. *Id.*

235. The court found the increase in the assessed value of the building to be an unauthorized attempt by the City to raise revenue. *Id.* at 7, col. 4.

236. *Id.* at 7, col. 5.

237. *Id.* at 7, col. 4.

The City would have this court believe that for 34 years it has labored under a misinterpretation of law; that section 489(9) does not mean what

J-51 are controversial, but stated that cutbacks and restrictions are to be determined by the Legislature.<sup>238</sup> The disparity between the New York County and Queens County decisions illustrates the need for a consistent approach to the issue of whether the J-51 exemption is a fixed sum.<sup>239</sup>

### III. The Controversy Over the Proposed Reforms

Both critics<sup>240</sup> and supporters<sup>241</sup> of the J-51 program favored its extension. The major areas of contention related to the nature and extent of reform and the methods of eliminating abuse of the program. The principal source of disagreement concerned attempts to limit the exemption to exclude benefits for luxury units.

#### A. Criticism

Critics have emphasized that J-51 is a tax expenditure program.<sup>242</sup> In this type of program, a tax incentive, as opposed to a direct grant, is offered to induce the implementation of a desired social policy.<sup>243</sup> The major criticisms of J-51 have been offered by the Coalition to Reform J-51<sup>244</sup> (the Coalition), which has focused on five major areas

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it says viz., building assessments will not rise during the twelve-year period in which a J51 exemption is in effect. In support of its percentage analysis approach, the City does not proffer one scintilla of legislative history to establish that the intent of the legislature was anything other than the plain meaning of the statute.

*Id.*

238. *Id.* at 7, col. 5. For a discussion of the controversy regarding the reform of J-51, see *infra* notes 240-309 and accompanying text.

239. In its 1983 reform of J-51, the legislature did not resolve this matter which applies only to projects which are *not* subject to the newly imposed exemption limitations. Telephone conversation, July 15, 1983, with Richard Gottfried, Assistant Majority Leader of the New York State Assembly. The City stated that it would draft proposed changes, although these were not submitted. *Id.* The new law addresses this issue but only with respect to projects which *are* subject to the exemption limitations. *Chapter 401, supra* note 23, § 5 subdiv. 9. The law provides that the exemption proportion is not a constant figure, but that the proportion of the total assessed valuation which is exempt remains constant. *Id.*

240. See *supra* note 10 and accompanying text for a list of the members of the Coalition to Reform J-51.

241. See *infra* notes 278-309 and accompanying text for a discussion of support for J-51 in its unamended form.

242. *Tax Breaks, supra* note 4, at 5. The government can opt to spend public monies in two ways. The first, a direct expenditure, entails a specific appropriation of funds for a particular program in the annual budget. The second option, a tax expenditure, is a method of supporting a program by providing tax incentives to a select group of taxpayers. *Id.*

243. Surrey, *supra* note 27, at 705, 707.

244. See *supra* note 10 for a list of the Coalition's members.

of abuse. First, the Coalition has pointed to the alarming growth rate of J-51.<sup>245</sup> Past and current commitments of the J-51 program cumulatively cost the City over \$1 billion<sup>246</sup> of which \$655.6 million is in the form of deferred costs.<sup>247</sup> Furthermore, it is conservatively estimated that by the end of fiscal year 1984, cumulative costs will have grown to between \$1.65 billion and \$2 billion.<sup>248</sup> Deferred costs are estimated to have grown between \$1 billion and \$1.3 billion.<sup>249</sup> Second, critics have noted the disproportionate concentration of J-51 benefits in the borough of Manhattan and in wealthy neighborhoods.<sup>250</sup> In 1980, 65% of the completed J-51 projects were in Manhattan.<sup>251</sup> During 1977-79, one third of the completed projects were located in lower Manhattan and the east or west side of Manhattan.<sup>252</sup> Third,

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245. *Tax Breaks*, *supra* note 4, at 5. The report, published in 1982, found that tax expenditures in the form of property tax abatements and exemptions are the fastest growing spending program in the City budget over the past four years. *Id.* at 1, 5. During that period, the J-51 program rose 95%. *Id.* at 6. Although direct City expenditures for vital services (e.g., fire, police, education) have risen by an average of 25% over the past four years, the revenue losses from all of the tax expenditures have risen 156%. *Id.* at 1, 11, 12.

In [fiscal year] 1982 alone, well over \$200 million in tax expenditures will go to four economic development programs . . . [including] two housing development programs—J-51 and 421a—without a shred of budgetary authorization. By contrast, the Office of Economic Development, and Housing Preservation and Development will spend with the City Council's and Board of Estimate's blessing only \$54 million for direct expenditures in the same areas.

*Id.* at 11.

246. J-51 Draft, *supra* note 6, at 2. The exact figure is \$1,059.9 million. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 3, 10.

251. *Id.* at 3.

252. *Id.* In an attempt to correct the "misunderstanding" that the J-51 program has primarily benefited luxury housing in Manhattan, the Mayor's office has emphasized the program's restrictions. City of New York, Office of the Mayor, J-51 Activity in Your Borough, 1-2, June 14, 1982. With the restrictions, J-51 activity has grown in low and moderate income neighborhoods north of 96th Street. *Id.* "There has been real growth in other boroughs. The dollar value of abatements in the Bronx has more than quadrupled in three years, in Brooklyn and Queens it has quadrupled over four years. These boroughs now receive, respectively, 15%, 27% and 6% of the total dollars abated City-wide." *Id.* "Anthony B. Gliedman, the Commissioner of Housing Preservation and Development, says that five years ago, 75% of the tax dollars foregone under the J-51 program were from central Manhattan. 'Today we are under 40%' he said, demonstrating the relative growth in the incentive's use in Brooklyn, Queens, the Bronx and Staten Island compared with Manhattan." N.Y. Times, June 13, 1982, § 8 (Real Estate), at 7, col. 2, col. 5.

The City's claims have been contradicted. New York Public Interest Research Group, *The Rich Get Richer J-51 Tax Breaks In New York City 1981-1982*, (1982)

the Coalition has asserted that low and moderate income tenants have been displaced by J-51 conversions.<sup>253</sup> Fourth, the critics have maintained that J-51 has been used disproportionately by a few large real estate developers.<sup>254</sup> One out of every six dollars in J-51 benefits, totalling \$148 million, has gone to ten Manhattan real estate developers.<sup>255</sup> Finally, the critics have argued that J-51 has contributed to the erosion of the City's manufacturing base.<sup>256</sup> Conversions of industrial and commercial space into residential housing, using J-51, have forced many businesses to relocate or cease operation.<sup>257</sup>

Furthermore, because J-51 was an "as-of-right" program,<sup>258</sup> owners who availed themselves of the program did not have to demonstrate that without the incentive the rehabilitation work would not have been performed.<sup>259</sup> As a result, critics asserted that rehabilitation

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[hereinafter cited as *The Rich Get Richer*]. The report states that "Manhattan continues to be granted the lion's share of J-51 tax breaks, receiving \$188 million or 67 percent of the city-wide total for projects approved in FY [Fiscal Year] 1982." *Id.* at 1.

[The result of this preferential treatment of Manhattan is that] the City has chosen to subsidize Manhattan housing projects at a rate three times higher than Brooklyn, three and a half times higher than in the Bronx, and six times higher than in Queens. In short, every indication is present that the vast bulk of J-51 tax breaks continue to flow to those high income neighborhoods that need public subsidies for housing the least.

*Id.* at 16-17.

253. *Coalition Press Release*, *supra* note 10, at 2. See e.g., N.Y. Times, July 18, 1982, at A27, col. 5 (after legislature failed to extend J-51 in June, 1982, City maintained its position regarding the vital necessity for J-51; critics, however, charged that J-51 has encouraged unscrupulous owners to force low-income tenants out of their homes).

254. *Tax Breaks*, *supra* note 4, at 16.

255. *Id.* at 1, 3, 16. See *The Rich Get Richer*, *supra* note 252 at 1. In fiscal year 1982, ten Manhattan real estate developers received almost one third of the J-51 benefits granted. *Id.*

256. *Emerging Policy Issues*, *supra* note 7, at 29 ("representatives of various industry groups, e.g., garment manufacturers, meat processors and printers, charge that J-51 conversions have forced viable businesses out of their locations, resulting in increased costs of doing business, relocation of the firms outside of New York City or termination of the businesses").

257. N.Y. Times, July 12, 1979, at D17, col. 1. "We are concerned that the incentives for conversion from nonresidential to residential use should not be so excessive that they displace viable businesses," the Mayor said." *Id.* N.Y. Times, July 19, 1978, at D1, col. 3 (discussing how J-51 has affected small businesses). In 1981, J-51 was amended adding a requirement that developers pay relocation benefits to small businesses under specified conditions. New York, N.Y. [1981] Local Laws 41 (codified at N.Y. Admin. Code tit. J, § J51-2.5(z) (Supp. 1982)).

258. For a definition of an "as-of-right" program see *supra* note 108.

259. N.Y. Times, June 13, 1982, § 8 (Real Estate), at 7, col. 1 (discussing the pros and cons of J-51 with respect to proposed reforms).

would have taken place without the tax incentive.<sup>260</sup> Critics argued that the tax benefits imposed substantial costs on the taxpayers<sup>261</sup> and that despite repeated requests, the City has never performed a program evaluation or cost-benefit analysis.<sup>262</sup> Moreover, the New York City Council President has opined that the City will not recover its lost revenues through the increased property taxes eventually resulting from the alterations and conversions.<sup>263</sup>

Without a program evaluation, critics asserted, the abuses and true costs are more easily hidden and ignored.<sup>264</sup> A report by the New York City Arson Task Force (Task Force) focused on a previously hidden abuse of J-51.<sup>265</sup> The Task Force has linked the use of arson to remove tenants from buildings, particularly single-room-occupancy hotels, to facilitate the conversion of the hotels into apartments eligible for J-51 benefits.<sup>266</sup> The occurrence of suspicious fires prior to conversion suggested an abuse which is encouraged by the tax benefit.<sup>267</sup>

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260. *Id.*

261. *Tax Breaks*, *supra* note 4, at 5 (end result of use of tax expenditures "has been an overall loss of tax revenues available for programmatic appropriations and a slow but steady decline in public control over the expenditure of public money"). *See also supra* note 245 and accompanying text; N.Y. Times, Apr. 29, 1981, at B3, col. 5 (Gerald Finch, assistant professor of political science at Columbia University, stated: "[y]ou still have to worry about the city giving away its tax base for the future'").

262. "Neither [Housing Preservation and Development] nor any other City agency has assessed the program's accomplishment of its objectives. . . ." State of New York, Office of the Comptroller, *Tax Incentives Under the J-51 Program of New York City*, Audit Report NYC-11-80, at MS-4 (June 19, 1980). "The Office of Management and Budget, Department of Finance, or other appropriate agency should prepare an annual report on J-51. The report should itemize past, present and future costs, describe recent trends in program growth, and analyze the geographic distribution of benefits." *J-51 Draft*, *supra* note 6, at 4. Under the new law, the City is required to hire an independent consultant firm to conduct a cost-benefit analysis of J-51. *See supra* notes 164-65 and accompanying text.

263. It is highly unlikely that the City's long-range revenue gains from J-51 will outweigh the short-term costs of exemptions and abatements. Indeed, when the effects of inflation are factored into cost-benefit calculations, even the most optimistic assumption possible leaves benefits of \$359.1 million short of costs. Under the most pessimistic assumption, the City's loss grows to \$957.6 million.

*J-51 Draft*, *supra* note 6, at 3.

264. *See supra* notes 262-63 and accompanying text for a discussion of the need for a program analysis.

265. City of New York, Arson Strike Force, Memorandum (April 30, 1982). *See also supra* note 8 and accompanying text.

266. *Id.* at 24.

267. *Id.* at 18. The 1983 revisions require the Commissioner of the Department of Housing Preservation and Development to submit to the Mayor an arson study of residential buildings. *See supra* note 165. For a discussion of the diminution of single-room-occupancy hotels and its effect on the problem of homelessness, see Note, *Homelessness in a Modern Urban Setting*, 10 FORDHAM URB. L.J. 749 (1982).

Based on the perceived abuses of J-51, the Coalition to Reform J-51<sup>268</sup> advocated the immediate extension of the program, incorporating reforms which the Coalition felt would stem the program's "community-destroying abuses".<sup>269</sup> Initially, the Coalition requested four major reforms:<sup>270</sup> (1) the placement of a \$15,000 cap per apartment on eligible improvements to cut tax incentives for luxury units; (2) the elimination of benefits for the conversion of single-room-occupancy buildings to eliminate the growing problem of tenant displacement; (3) the elimination of benefits for the conversion of industrial or commercial buildings to residential use to slow the loss of manufacturing space; and (4) the denial of benefits to landlords who harass tenants to remove them from buildings.

The request to exclude benefits for renovation work which exceeds a certified reasonable cost of \$15,000 per unit caused considerable conflict between the Coalition and the City.<sup>271</sup> City officials contended that tenants, especially in middle-class areas throughout the city, would have suffered most from the loss of J-51 benefits, not real estate developers.<sup>272</sup> The Coalition, however, asserted that a \$15,000 cap, based on the certified reasonable cost of eligible improvements, usually represents slightly more than 50% of construction costs.<sup>273</sup> Thus, the actual cap is for \$30,000 of work per unit in hard construction costs.<sup>274</sup>

As a result of the disagreement regarding the \$15,000 cap, an alternative reform was proposed by the New York State Assembly.<sup>275</sup> Under the alternative, the exemption would be based on the increase

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268. See *Coalition Press Release*, *supra* note 10.

269. *Coalition Press Release*, *supra* note 10, at 3.

270. *Id.* at 2-3. The cap would not apply to "publicly assisted projects, projects by non-profit philanthropic organizations, projects by any company incorporated or assisted pursuant to the private housing finance law . . ." *Id.* at 3. For a discussion of the reforms enacted during the 1983 Legislative session see *supra* notes 116-65 and accompanying text.

271. N.Y. Times, July 18, 1982, at A27, col. 5. The City praised the existing J-51 program and warned against its lapse, while critics called for major reforms. *Id.* The City could not agree to the \$15,000 cap, contending that it would render the program valueless. *Id.*

272. *Id.*

273. *The Rich Get Richer*, *supra* note 252 at 22 ("for Manhattan projects approved in FY 1982, claimed or hard construction cost amounted to \$163 million while approved or certified reasonable cost was \$85 million, a little more than 50 percent").

274. *Id.*

275. N.Y.S. Assembly 2495-A, 206th Sess. § 6, subdiv. (11)(c)(1) (1983) [hereinafter referred to as *Assembly Bill*].

in assessed valuation that results from the rehabilitation work. A proportion of the post-construction increase in assessed valuation would be eligible for J-51 according to a sliding scale with an upper limit on the assessed value.<sup>276</sup> This formula became the basis of the method that finally was agreed upon by the legislature.<sup>277</sup>

## B. Support

The major supporter of J-51 in its unamended form has been the City Administration.<sup>278</sup> In February, 1983, the City advocated a straight extension of the existing state enabling legislation.<sup>279</sup> This straight extension was favored by supporters who considered the J-51 program to be an outstanding success, and credited the J-51 program with contributing significantly to the revitalization of New York City.<sup>280</sup> The vast number of apartments upgraded or created is considered to evidence the program's success.<sup>281</sup> According to the New York City Mayor's Office, J-51 is the only program which continually assists middle income residents.<sup>282</sup> Of greater importance was the expectation that the need for tax incentives would grow, as federal assistance for housing rehabilitation had been reduced.<sup>283</sup> The sharp cut in

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276. Work with a total post-construction assessed value per dwelling unit above \$34,000 would have been ineligible under this proposal. *Id.*

277. For a discussion of the new exemption limitation formula see *supra* notes 120-24 and accompanying text.

278. See N.Y. Times, Feb. 24, 1983, at B3, col. 1. "The Koch administration has sought unsuccessfully since last summer to have the program extended. It has argued that the program is needed to insure the continuing rehabilitation of the city's deteriorating housing stock." *Id.*

279. N.Y. Times, Feb. 25, 1983, at B4, col. 4. "The Koch administration is lobbying for extension of the program, known as J-51 . . ." *Id.*

280. "The J-51 program is more than 25 years old, and has been an outstanding success doing what it was designed to do." Memorandum in Support from Margaret L.W. Boepple (May 27, 1972) (discussing New York City Mayor's support of J-51) [hereinafter cited as *Memorandum in Support*]. "No city program has done as much to further housing improvement in New York City over the last 20 years [as the J-51 tax incentive]. In fiscal year 1980, for example, 70,000 housing units were improved or created" under J-51. N.Y. Times, June 13, 1982, § 8 (Real Estate) at 7, col. 1. See also Griffith, *supra* note 22 at 156; Alpert, *Property Tax Abatement: An Incentive for Low Income Housing*, 11 HARV. J. ON LEGIS. 1 (1973) (property taxes may act as a disincentive to new construction and rehabilitation); *supra* note 50 and accompanying text.

281. *Memorandum in Support*, *supra* note 280 at 2 (to date, under J-51, more than 800,000 apartments have been upgraded or created, primarily for middle income residents).

282. *Id.*

283. *Id.* ("almost all of the housing production programs that originate from Washington have been eliminated"). See also *Recent Developments*, *supra* note 33,

federal aid coupled with high interest rates underscored the importance of J-51 and the need for its continuance.<sup>284</sup>

The New York City Mayor's Office has stated that the J-51 program is both "viable and locally adaptable."<sup>285</sup> The City has amended the program to correct weaknesses and change points of emphasis to meet the needs of the changing housing market.<sup>286</sup> For example, in the 1970's, when the City experienced a loss of businesses and residents, the program was expanded to include the "recycling" of obsolete commercial and industrial buildings into residential units.<sup>287</sup> A decade

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at 322 ("Reagan Administration's federal budget reduction policy will force state and local governments to continue utilizing innovative financing mechanisms"). *But see* Surrey, *supra* note 27, at 734-35. Professor Surrey disfavours the use of tax incentives, finding them inferior to and less equitable than direct subsidies. *Id.*

284. Oser, *Rehabilitation Incentive Is at a Legislative Crossroads*, N.Y. Times, Feb. 13, 1983, § 8 (Real Estate), at 7, col. 1 ("since direct Federal subsidies have been cut back sharply and interest rates are still high, J-51 is the only mechanism by which government currently encourages new investment in existing multifamily housing"). *See generally* City of New York, General Obligation Bonds (Jan. 14, 1983).

The Reagan Administration has pursued a course of action that has reduced Federal support to states and localities. On August 13, 1981, the President signed the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35 (the "1981 Reconciliation Act"), which, among other things, provided for reductions in Federal expenditures for the Federal 1982 fiscal year of approximately \$35 billion with additional reductions in the Federal 1983 fiscal year. The loss of Federal aid to the City's Expense Budget for the 1982 fiscal year as determined on the basis of the provisions of the 1981 Reconciliation Act and Federal 1982 fiscal year appropriations was approximately \$325 million . . . .

The impact on the City of the 1981 Reconciliation Act is estimated at \$497 million in the 1983 fiscal year. The Omnibus Reconciliation Act of 1982 (Public Law 97-253), the Tax Equity and Fiscal Responsibility Act of 1982 (Public Law 97-248) and the various appropriations bills that have been enacted will cause the City to lose an additional \$9 million in Federal revenues in the 1983 fiscal year. These reductions will result in a loss to the City's Expense Budget of \$506 million of Federally related revenues. The loss as a result of Federal budget reductions in mandated programs for which the City must provide funds to cover the Federal shortfall in the 1983 fiscal year is estimated at \$2 million, which is substantially less than the shortfall projected under the President's original budget proposals for 1983. The City has reduced its reserve for additional Federal reductions to \$5 million for the 1983 fiscal year and \$10 million for each of the 1984 through 1986 fiscal years. When Congress adjourned on December 23, 1982, it had either adopted individual appropriation bills or provided for funding under a Continuing Resolution for those appropriation bills which had not passed both Houses of Congress.

*Id.* at 34.

285. *Memorandum in Support*, *supra* note 280 at 1.

286. *Id.*

287. *See supra* notes 50-52 and accompanying text for a discussion of J-51's expansion in response to the needs of the housing market in the 1970's.



later the need was for a contraction of benefits due to a loss of manufacturing space and an over-concentration of benefits in Manhattan.<sup>288</sup> The 1981 amendments to J-51 responded by restricting benefits in a specified area of Manhattan and shifting the use of the tax incentive to other boroughs.<sup>289</sup> HPD has indicated that Brooklyn is the borough most actively using J-51 tax abatements<sup>290</sup> while Manhattan is second.<sup>291</sup> With respect to the exemption portion of the program, the HPD Commissioner stated that a measurement and comparison among the boroughs is difficult, if not "pointless."<sup>292</sup> The Commissioner explained that "[a]n exemption is a hypothetical loss that assumes the project would have been built anyway. If the job wouldn't have happened without J-51, the loss is zero."<sup>293</sup> J-51 is an as-of-right program, and therefore, greater activity in Manhattan does not decrease the benefits available for the outer boroughs.<sup>294</sup>

Supporters have disagreed with the critics who argued that the J-51 program was unnecessary because much of the rehabilitation work would have proceeded without the incentives.<sup>295</sup> There is no accurate method of measuring what work would have been performed.<sup>296</sup> The history of New York City from 1970-78,<sup>297</sup> however, reveals that there was little investment in or rehabilitation of real property.<sup>298</sup> This phenomenon was accompanied by redlining by some banks.<sup>299</sup> As J-51

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288. See *supra* notes 250-57 and accompanying text for a discussion of criticism of J-51 regarding the disproportionate concentration of benefits in Manhattan and the erosion of manufacturing space.

289. Memo from Margaret L.W. Boepple to the New York Delegation (June 14, 1982) (discussing J-51 program activity in the boroughs of New York City). "The proportion of J-51 benefits granted in Manhattan has steadily decreased. In FY '78, central Manhattan was the site of an estimated 25% of the units receiving benefits and 75% of the dollars abated. Recent estimates indicate that central Manhattan is getting 15% of the units and less than 40% of the dollars abated." *Id.* at 1. There is evidence to contradict these estimates and show that, in fact, the J-51 activity in Manhattan has not decreased to 40%. See *supra* note 252 and accompanying text.

290. N.Y. Times, Feb. 25, 1983, at B3, col. 4.

291. *Id.*

292. *Id.* at col. 5.

293. *Id.* "Supporters of the program say it costs little, if anything, because the city is simply forgiving taxes on improvements that would not have been made otherwise." N.Y. Times, July 6, 1982, at A1, col. 3.

294. *Report to the Conference, supra* note 50, at 9.

295. *Id.* at 6.

296. *Id.*

297. *Id.* See also *supra* note 50 and accompanying text.

298. *Report to the Conference, supra* note 50, at 6.

299. *Id.*

began to encourage investment, the City implemented reforms in the program to eliminate benefits for work that could occur without incentives.<sup>300</sup>

One report has demonstrated the positive effects of J-51 by reviewing a tax block on the upper west side of Manhattan both "before" and "after" J-51 was used.<sup>301</sup> The data given depicts the total assessed value and tax payments before rehabilitation and after the 12 year exemption period when the buildings were placed on the tax rolls at their new and higher assessed value.<sup>302</sup> All of the eight buildings located on this tax block now are assessed at higher values and are paying higher taxes.<sup>303</sup> For example, the assessed value in one building increased from \$28,000 to \$103,400 with tax payments rising from \$1,551.20 to \$9,254.30.<sup>304</sup>

The City essentially has failed to respond specifically to many of the criticisms of J-51. One area in which the Mayor has offered a specific response concerns the matter of single-room-occupancy hotel conversions. Following the release of the Arson Strike Forces<sup>305</sup> study in July, 1982, which found that single-room-occupancy hotels were more likely to be the target of arson where J-51 benefits were sought by owners, the Mayor immediately expressed support for efforts to eliminate tax benefits for conversion of these facilities.<sup>306</sup> Two weeks later, the Mayor announced his intention to submit an amendment to the Legislature, asking that the amendment be made retroactive to July 1, 1982.<sup>307</sup> In his statements of July and August, 1982, regarding J-51

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300. *Id.* See also *supra* notes 80-87 and accompanying text for a discussion of the 1981 changes which imposed area limitations upon J-51 benefits.

301. *Report to the Conference, supra* note 50, at 12. The report referred to block 1201 located on West 87th and 88th Streets in the West Side Urban Renewal Area. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. City of New York, Arson Strike Force, Memorandum 24 (April 30, 1982).

306.

The City supports state legislation to remove all SRO conversions from the J-51 program, not because I necessarily believe that those benefits are inappropriate for SRO facilities, but because their inclusion threatens the continuation of the J-51 program as a whole . . . . Removing SROs from the purview of J-51 will permit us to focus on the far more significant remainder of the J-51 program, which must be extended soon if desperately-needed rehabilitation throughout the city is to continue.

City of New York, Office of the Mayor, Statement by Mayor Edward I. Koch, 190-82 at 2 (July 21, 1982); N.Y. Times, July 22, 1982, at B1, col. 5.

307. City of New York, Office of the Mayor, Statement by Mayor Edward I. Koch, 209-82 (August 12, 1982). This request was granted. See *Chapter 401 supra* note 23, § 1 15(1).

benefits and SROs, the Mayor did not discuss other J-51 reform proposals.<sup>308</sup> His position may be summed up as follows: “[i]t is time to remove the SRO issue from the debate—and from the program—and get on with the business of furthering the city’s most successful housing rehabilitation program.”<sup>309</sup>

#### IV. Recommendations

The J-51 program was expanded considerably in the mid-1970’s to accommodate the economic and housing problems of New York City.<sup>310</sup> The purpose of the program was to increase the supply of housing for low and moderate income residents.<sup>311</sup> The program was never intended to subsidize luxury housing,<sup>312</sup> displace lower and moderate income tenants<sup>313</sup> or erode the City’s manufacturing base.<sup>314</sup> The negative effects which have developed have been addressed by the Legislature.<sup>315</sup>

The reforms proposed by the Coalition to Reform J-51 and enacted by the Legislature reflect the direction which the program should take. However, these restrictive changes could prove to be detrimental to the City’s rental housing market. With high interest rates<sup>316</sup> and sharply reduced federal aid for housing rehabilitation,<sup>317</sup> J-51 is an

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308. See City of New York, Office of the Mayor, Statement by Edward I. Koch, 190-82 (July 21, 1982); City of New York, Office of the Mayor, Statement by Mayor Edward I. Koch, 209-82 (August 12, 1982).

309. City of New York, Office of the Mayor, Statement by Mayor Edward I. Koch, 190-82 at 1 (July 21, 1982).

310. See *supra* notes 50-52 and accompanying text for a discussion of the expansion of J-51 in response to the needs of the housing market.

311. See *supra* note 43 and accompanying text for a discussion of the intent of J-51.

312. “Most recently, J-51 has tended to serve the luxury end of the housing spectrum, with a major portion of the tax benefits flowing to Manhattan particularly for conversion of industrial/commercial space to residential use.” See *Emerging Policy Issues*, *supra* note 7, at 36.

313. *Coalition Press Release*, *supra* note 10, at 2.

314. See *supra* notes 256-57 and accompanying text for a discussion of the effect of J-51 on manufacturing space.

315. See *supra* notes 117-65 and accompanying text for a discussion of the 1983 reforms of J-51.

316. N.Y. Times, Feb. 13, 1982, § 8 (Real Estate), at 7, col. 1.

317. *Id.*

The 1983-1986 Financial Plan assumes that all existing Federal and State categorical grant programs will continue at present levels unless specific legislation provides for their termination. However, if the present trend towards retrenchment in Federal spending continues, certain revenue sources in the City’s budget, including CETA and Community Development, could be adversely affected. The Plan projects increases in aid

important tool for encouraging urban development. Therefore, the City should act immediately to implement the newly required cost-benefit analysis<sup>318</sup> of J-51 to ascertain its necessity and cost-effectiveness. The study should emphasize the City's land assessment procedures,<sup>319</sup> the needs of particular neighborhoods and boroughs and real estate financing in New York City.<sup>320</sup>

The most controversial proposed reform concerned the method of limiting the exemption portion of J-51. The initially proposed \$15,000 cap per unit would have denied benefits to any building for which the costs of renovation exceeded this limit.<sup>321</sup> Whether J-51 would be available could not be ascertained until the work was in progress or completed because construction costs, particularly for rehabilitation work, cannot be predicted accurately.<sup>322</sup> With the imposition of a \$15,000 cap, banks might disregard the J-51 benefit when lending money to the owner.<sup>323</sup> Buildings would not be eligible for J-51 until the work was completed and a lender must be reasonably certain of the benefit before granting a loan. Lending institutions would not rely

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where increased costs are projected for existing Federal and State categorical grant programs.

A major component of Federal categorical aid to the City is the Community Development program which expires in August 1984. Pursuant to Federal legislation, Community Development grants are provided to cities primarily to aid low and moderate income persons by improving housing facilities, parks and other capital improvements, by providing certain social programs and by promoting economic development. These grants are based on a formula that takes into consideration such factors as population, housing overcrowding and poverty.

City of New York, General Obligation Bonds 33 (Jan. 14, 1983). *See also supra* note 280.

318. *See supra* note 164 and accompanying text for a discussion of this requirement.

319. *See Report to the Conference, supra* note 50, at 14 ("the city's assessment system is grossly inequitable throughout the city . . ."). *See also* Griffith, *supra* note 22, at 165-66 ("tax assessment programs are subject to the vagaries of a municipality's tax assessment policies and to individual assessments which frequently do not accurately reflect neighborhood stability, economic return or investment potential").

320. *See* N.Y. Times, Dec. 5, 1982, § 8 (Real Estate), at 7, col. 1. "If history is any guide, the incoming Cuomo administration and State Legislature will have to face the issue of what government can do to stimulate housing production. In recent months, the state government has acted to help home builders obtain below-market mortgage money. But initiatives to stimulate rental development in cities like New York have been lacking in recent years." *Id.*

321. *See supra* note 270 and accompanying text for a discussion of this proposal.

322. *Report to the Conference, supra* note 50, at 11. "[W]e believe the [\$15,000] cap would work badly in practice. . . it could not be determined until well into construction that benefits would be denied . . ." *Id.*

323. *Id.*

on a benefit that was unpredictable, and therefore would reduce or eliminate their loans for J-51 projects.

The procedure finally employed in revising J-51 is a sliding scale to limit the exemption to the increase in assessed valuation per dwelling unit after completion for private nonsubsidized gut rehabilitations or conversions.<sup>324</sup> Projects with a post-rehabilitation assessed value per dwelling unit greater than \$38,000 are ineligible for J-51.<sup>325</sup> This proposal can present a serious problem with respect to the certainty of financing if the dollar limit is too low. This problem has been avoided, however, by targeting the limit to actual assessed valuations for similar, already completed projects.<sup>326</sup> The targeting provides a reliable yardstick for measurement because, for a gut rehabilitation, the total assessed valuation after completion bears a strong relationship to construction costs.<sup>327</sup> However, the dollar limitations imposed should be revised annually to reflect changes in the cost of construction. It is imperative that the dollar limits be generous enough to reduce uncertainty at the upper levels of the benefit cap.

The method used to limit J-51 before the 1976 changes<sup>328</sup> in the program may have provided a simpler solution to bring J-51 back to its original purpose. This previous method set a maximum level of assessed valuation. Property assessed above that level was excluded from J-51.<sup>329</sup> However, the maximum value under such a formula should be based on the land portion rather than the building portion of the total assessed valuation. This procedure can realize the goals of J-51 because land values vary greatly in different areas of the city.<sup>330</sup> The land value, in contrast to the structure, does not appreciate as significantly when a neighborhood is upgraded through rehabilitation.<sup>331</sup> In addition, a property assessor is under an obligation to assess

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324. See *supra* notes 121-24 and accompanying text for a discussion of the new exemption schedule.

325. See *supra* note 124 and accompanying text for a discussion of the new exemption schedule.

326. Telephone conversation with Richard Gottfried, Assistant Majority Leader of the New York State Assembly (July 15, 1983).

327. *Id.*

328. New York, N.Y. [1975] Local Laws 60 (codified at N.Y. ADMIN. CODE tit. J, § J51-2.5 (Supp. 1982)). "The J-51 statute in existence in 1975 attempted to prevent its applicability to high income areas by making ineligible all properties having a total assessed valuation prior to rehabilitation of seventy dollars or more for each square foot of lot area." Griffith, *supra* note 22, at 165.

329. Griffith, *supra* note 22, at 165.

330. Telephone conversation with William Block, Assistant Commissioner, New York City Department of Finance, Real Property Assessment Bureau, Equalization, Planning and Exemption Division (Feb. 9, 1983).

331. *Id.*

the land consistently throughout an area.<sup>332</sup> Therefore, as a rule, any increase in assessed value after rehabilitation is attributed primarily to the structure and not to the land.<sup>333</sup> As an area is being upgraded, land values will remain relatively stable until the area-wide reassessment is performed.<sup>334</sup> Thus, once an area is upgraded and reassessed above the J-51 maximum it can be concluded that the program is not applicable. This alternative should be reviewed using the cost-benefit analysis. If the newly enacted exemption limitation cannot be implemented in a satisfactory manner, the land value assessment approach should be utilized.

There was little disagreement regarding limiting J-51 benefits for the conversion of SROs.<sup>335</sup> The new law permits the use of J-51 only where the conversion is substantially assisted by governmental funds.<sup>336</sup> In addition, the current reform expanded section 488-a of the Real Property Tax Law,<sup>337</sup> a rehabilitation program for buildings used for single-room occupancy. The tax exemption period was extended from 10 to 15 years.<sup>338</sup> Therefore, while J-51 benefits for SROs were limited, the expansion of section 488-a should encourage the upgrading of SRO units for lower and middle income tenants.

The loss of manufacturing space to residential conversions was another negative aspect of J-51.<sup>339</sup> The controversy concerning the loss of manufacturing space began to subside with the imposition of area restrictions in Manhattan.<sup>340</sup> Earlier legislative proposals did not contain restrictions on industrial conversions.<sup>341</sup> However, the final revisions address the potential for significant problems through the elimi-

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332. *Id.* The statutory duties of a property assessor are set forth in N.Y. ADMIN. CODE tit. E, § E17-8.0 (1976).

333. Telephone conversation with William Block, *supra* note 330.

334. *Id.*

335. *See supra* notes 305-09 and accompanying text for a discussion of the Mayor's support of this limitation.

336. *See supra* note 155 and accompanying text for a discussion of this provision.

337. N.Y. REAL PROP. TAX LAW, § 488-a (McKinney Supp. 1982). This is another tax benefit that assists SRO conversions and improvements. *Id.* The legislation reforming the enabling legislation for J-51, also expanded the SRO benefit-program to include benefits for the conversion of many types of buildings into SROs. *Chapter 401, supra* note 23, § 11(iv).

338. *Chapter 401, supra* note 23, § 10. The tax *abatement* benefit remains at a maximum of 10% for fifteen years. N.Y. REAL PROP. TAX LAW, § 488-a(4) (McKinney Supp. 1982).

339. *See supra* notes 256-57 and accompanying text for a discussion of this problem.

340. N.Y. ADMIN. CODE tit. J, § J51-2.5(i)(5) (Supp. 1982).

341. *See Assembly Bill, supra* note 275.

nation of zoning use variances unless expressly authorized by the City Council.<sup>342</sup>

It is distressing that until the 1983 revisions were enacted, J-51 lacked any provision denying benefits to an owner who was found guilty of tenant harassment. This was changed by the requirement that owners file an affidavit certifying that no owner or owners of the property have been convicted of harassment within five years of a specified cut-off date.<sup>343</sup> If there has been a conviction, no benefits will issue.<sup>344</sup> However, there is no retroactive withdrawal of benefits.<sup>345</sup> The elusive nature of the crime of harassment makes it difficult to devise fair procedures for the subsequent denial of benefits. Moreover, lending institutions will not depend upon a benefit which is subject to denial. However, there is no excuse for permitting an owner who is convicted of harassment to receive benefits for the building in question even if the conviction occurs after the cut-off date. J-51 benefits should be revoked retroactively where a conviction of harassment is issued. This proposal is reasonable in light of several unamended and still effective provisions of J-51. Past and future benefits may be reduced or revoked if the applicant knowingly or willfully misrepresents or omits a material matter.<sup>346</sup> Another cause for revoking benefits retroactively is the non-payment of real property taxes or water and sewer charges.<sup>347</sup> Benefits can be withdrawn prospectively only if the building receiving them is used exclusively as a hotel or for commercial purposes.<sup>348</sup>

Furthermore, there are three aspects of the newly enacted program which should be monitored to ensure that the intent of the Legislature, to return J-51 to its original purpose, is not thwarted. First, the pre-certification process should be evaluated periodically because of the great discretion to waive exemption limitations that is vested in the Commissioner of the New York City Department of Housing, Preservation and Development.<sup>349</sup> Second, the City Council has the authority to designate certain neighborhoods in which exemption lim-

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342. See *supra* note 156 and accompanying text for a discussion of this revision.

343. See *supra* notes 158-59 and accompanying text for a discussion of the harassment provision.

344. See *supra* note 160 and accompanying text.

345. See *supra* note 160 and accompanying text.

346. N.Y. ADMIN. CODE tit. J, § J51-2.5(l) (Supp. 1982).

347. *Id.* § J51-2.5(u).

348. *Id.* § J51-2.5(r).

349. See *supra* notes 135-39 and accompanying text. "[I]t is unclear how broadly the city's housing officials will be inclined to seek waivers for special locations." N.Y. Times, July 3, 1983, § 8 (Real Estate) at 5, col. 1.

itations would not apply.<sup>350</sup> This procedure should be observed to ensure that the exceptions do not permit a continuation of the earlier abuses of J-51. Third, the manner of computing J-51 benefits may continue to encourage arson.<sup>351</sup> Therefore, the required arson study<sup>352</sup> should be carefully reviewed to ascertain whether further reform is necessary.

Finally, there is a necessary reform which was not addressed during the 1983 legislative session. There are conflicting court decisions regarding whether J-51 is a fixed sum or whether it is subject to a proportional reduction pursuant to tax certiorari proceedings. In New York County, J-51 is regarded as a fixed sum.<sup>353</sup> By contrast, in Queens County the courts have interpreted J-51 to be subject to a proportional reduction on the taxable and exempt portions of the property after judicial review.<sup>354</sup> The Legislature should clarify this matter to ensure that J-51 benefits are applied uniformly throughout the city.

### V. Conclusion

There is no doubt that the underlying policies of J-51 have been accomplished as the program has changed and grown over the past twenty-eight years. Clearly, the program has been adapted to meet the complex needs of New York City's residential housing market. The newly enacted reforms are consistent with the program's flexible statutory history. Economic conditions have changed the housing market once again and the tax incentives have demonstrated several deleterious effects which contravene the original legislative intent of the program. Therefore, the current revisions were necessary to correct the abuses and return the program to its original purpose of providing adequate housing for moderate and lower income families. This goal may be realized by eliminating the award of financial incentives for rehabilitation work performed in specified geographic areas and for the benefit of economic groups for which this type of assistance cannot be justified by considerations of social policy.

*Debra S. Vorsanger*

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350. See *supra* notes 133-34 and accompanying text for a discussion of this provision.

351. Village Voice, July 12, 1983, at 5, col. 1.

352. See *supra* note 165 for a discussion of the required arson study. See also notes 265-67 and accompanying text.

353. See *supra* notes 226-38 and accompanying text for a discussion of the New York County cases.

354. See *supra* notes 221-25 and accompanying text for a discussion of the Queens County case.



