Amendment to § 2-08 to add a section clarifying the use group exclusions for buildings seeking Article 7-C coverage under § 281(5) of the Multiple Dwelling Law.

NEW YORK CITY LOFT BOARD

NOTICE OF OPPORTUNITY TO COMMENT ON PROPOSED RULES

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN THE NEW YORK CITY LOFT BOARD by Article 7-C of the Multiple Dwelling Law and Mayor's Executive Order No. 129, dated May 22, 2009**,** and pursuant to and in accordance with the requirements of Section 1043 of the New York City Charter, that the New York City Loft Board intends to amend section 2-08 of Title 29 of the Rules of the City of New York, to identify the uses in Use Groups 15 through and including 18 that are deemed inherently incompatible with residential use in the same building.

Written comments regarding this proposed rule may be sent to the New York City Loft Board, 100 Gold Street, 2nd Floor, New York, New York 10038 to the attention of the Loft Board on or before January 14, 2011. A public hearing will be held on January 20, 2011 at 22 Reade Street, First Floor, New York, New York, commencing at 2:00 p.m. Persons seeking to testify are requested to notify the Loft Board at the foregoing address or by telephone at (212) 566-5663. Persons who require a sign language interpreter and persons who require a reasonable accommodation for a disability at the hearing are asked to notify the Loft Board by January 14, 2011. Persons may also submit comments on the proposed rule electronically through NYC RULES at www.nyc.gov/nycrules by January 14, 2011. Written comments and an audiotape of oral comments received at the hearing will be available for public inspection, within a reasonable time after receipt, between the hours of 10:00 a.m. to 4:00 p.m. at the offices of the Loft Board.

These rules were not published in the regulatory agenda because they were not anticipated.

[Section 2-08] of Title 29 of the Rules of the City of New York is amended by adding new subdivisions (j)-(s) to read as follows:

(j) The term "Interim Multiple Dwelling" ("IMD") as used in Multiple Dwelling Law § 281(5) shall not include any building in which a use described in subsection (k) of this section is being actively and currently pursued in any unit other than a residential unit of the building. The term "actively and currently pursued" shall refer to commercial, manufacturing or industrial use being conducted in the building on June 21, 2010.

(k) ***Uses in Use Groups Inherently Incompatible With Residential Use.*** Pursuant to Multiple Dwelling Law § 281(5), the following use groups are inherently incompatible with residential use in the same building:

(1) Those uses in Use Group 16A, Use Group 16C and Use Group 18 listed in Article XII Chapter 3 of the Zoning Resolution of the City of New York in effect on June 21, 2010 ("Zoning Resolution") at 123-223, as set forth in Appendix A to these Rules;

(2) Any use that falls within the uses set forth in Use Groups 15-17, other than those uses described in subparagraph (k)(1) of this Section, and any brewery in Use Group 18 of less than 10,000 square feet of floor area, listed in Article III Chapter 2 and Article IV Chapter 2 of the Zoning Resolution in effect on June 21, 2010, as set forth in Appendix B to these Rules, which:

(i) has or should have a New York City or New York State environmental rating of "A", "B" or "C" under Section 24-153 of the New York City Administrative Code for any process equipment requiring a New York City Department of Environmental Protection operating certificate;

(ii) is or should be required under the Community Right-to-Know Law, at Chapter 7 of Title 24 of the Administrative Code of the City of New York, to file a Risk Management Plan for Extremely Hazardous Substances;

(iii) is or should be classified as High-Hazard Group H occupancy as set forth in Section 307 of the New York City Building Code.

(l) ***Residential Unit:*** For the purposes of subsections (j) through (s), in addition to the definition of Residential Unit in § 2-08 (a) (4) above, a residential unit may contain a non-residential use that:

(1) is clearly incidental to or secondary to the residential use of the residential unit;

(2) is carried on within the residential unit, by one or more occupants of such residential unit;

(3) does not use more than 49 percent of the total floor area of a dwelling unit for the non-residential purposes; and

(4) has up to three non-residential employees.

(m) ***Owner's registration application.*** For all applications for registration filed pursuant to § 2-05, the owner seeking coverage under MDL § 281(5) must establish the non-residential uses in the building as of June 21, 2010 by submitting a certification to the Loft Board signed by a New York State licensed and registered architect or engineer that such commercial, manufacturing or industrial use is not an inherently incompatible use under subdivision (k).

(n) ***Rejection of owner's registration application.*** Where an owner files a registration application for coverage under MDL § 281(5) for a building that has or had a commercial, manufacturing or industrial tenant that was actively pursuing a use on June 21, 2010 that was inherently incompatible with residential use under subsection (k) above, the Executive Director shall determine that the building does not qualify for coverage and reject the registration application.

(o) **Revocation of IMD registration.** The Executive Director may, on written notice to the owner, revoke the IMD registration at any time for failure to meet the requirements set forth in the provisions of Multiple Dwelling Law § 281(5), and this rule, where:

(1) previously undisclosed facts, or misrepresentations or false statements as to material facts in the registration application or submitted documents regarding the information which was the basis for the Loft Board issuance of an IMD registration number are discovered, or

(2) the Loft Board issued an IMD registration number in error and conditions are such that the IMD registration number should not have been registered.

Such notice will inform the owner of the reasons for the revocation and that the owner has the right to present to the Executive Director or his or her representative within 10 business days of delivery of the notice by hand or 15 calendar days of the posting of the notice by mail, information as to why the registration should not be revoked.

(p) **Use after June 21, 2010.** A commercial, manufacturing or industrial tenant engaged in an inherently incompatible use as described in subdivision (k) after June 21, 2010 shall not disqualify a building from Article 7-C coverage that otherwise qualifies for coverage.

(q) **Tenant applications for coverage.** For all applications for coverage filed pursuant to § 1-06, the applicant seeking coverage under Article 7-C of the Multiple Dwelling Law must establish by a preponderance of the evidence the non-residential uses in the building as of June 21, 2010. If none of the inherently incompatible uses described in subdivision (k) of this section were actively pursued in the building on June 21, 2010 and the tenant has satisfied all of the other provisions of §281(5) the building shall qualify as an IMD.

(r) **Site visits.** The Executive Director may conduct, or designate a Loft Board staff member to conduct, a site visit to the building for which coverage under Article 7-C of the Multiple Dwelling Law is being sought. The building owner shall arrange for the Executive Director and/or the Loft Board's staff to have access to the non-residential spaces upon reasonable notice. The Executive Director, or his/her staff, may also conduct informal conferences regarding the owner's registration application. The Executive Director may request additional information from the owner, building tenants or government agencies about the non-residential uses in the building on June 21, 2010.

(s) ***Appeal of Decision***. If the Executive Director rejects the registration or revokes the IMD registration number issued after the filing of the registration application because a use listed in subdivisions (k) of this section was actively and currently pursued in the unit on June 21, 2010, the applicant may appeal the Executive Director's determination to the Loft Board in accordance with, and subject to the terms of the provisions in § 1-07.1.

Statement of Basis and Purpose:

Pursuant to § 282 of Article 7-C of the MDL ("Loft Law"), the Loft Board may promulgate rules to ensure compliance with the Loft Law. Given that the IMD buildings made eligible for coverage under MDL § 281(5) are not required to be located in areas that are zoned for residential use, the legislature dictated that the Loft Board determine whether each use set forth in groups 15 through 18, as defined in the zoning resolution, constitutes a use inherently incompatible with residential use; and amend their rules to ensure greater protection to the residential tenants by determining if buildings contain unsafe commercial, manufacturing or industrial activities. This proposed amendment to the rule clarifies what uses in Use Groups 15 through and including 18 are "inherently incompatible" with residential use. This amendment to the rule determines eligibility of a building to become an IMD, and is not for the purpose of determining eligibility for a Certificate of Occupancy. As a model for determining what uses in Use Group 15 through 18 are inherently incompatible with residential use, the Loft Board has used the criteria set out in the Special Mixed Use District regulations set out in Chapter 3 of Article XII of the NYC Zoning Resolution. The rational for the use of these regulations is that they reflect the careful assessment after study of the Department of City Planning of what commercial, manufacturing and industrial uses are compatible with residential use.

Dated: _____, 2010

Robert D. LiMandri

Chairperson