

Amendment to § 2-01 to add a section regarding failure to take all reasonable and necessary steps.

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 2-01 of Title 29 of the Rules of the City of New York, to add a section under which the Loft Board may penalize an owner for its failure to take reasonable and necessary actions to obtain a final certificate of occupancy as required in § 284(1) of the Multiple Dwelling Law.

Written comments regarding these proposed rules may be sent to the New York City Loft Board, 100 Gold Street, 2<sup>nd</sup> Floor, New York, New York 10038 to the attention of Edith Nicolas on or before **April 15, 2010**. A public hearing will be held on, April 15, 2010 at 22 Reade Street, First Floor, New York, New York, commencing at 2:00 p.m. Persons seeking to testify are requested to notify Ms. Nicolas at the foregoing address or by telephone at (212) 566-5663. Persons who request that a sign language interpreter or other form of reasonable accommodation for assistance be provided at the hearing are asked to notify Ms. Nicolas by **April 9, 2010**. 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.

Section 2-01 of Title 29 of the Rules of the City of New York is amended, and a new section 2-01.1 is added, to read as follows:

**2-01.1 Failure to Take Reasonable and Necessary Action to Legalize Building.**

*(a) Definition of Reasonable and Necessary Action.*

Reasonable and necessary action to obtain a certificate of occupancy, as used in § 284(1) of the Multiple Dwelling Law, means deliberate, diligent, and consistent action from the beginning of Article 7-C coverage through the issuance of a final residential certificate of occupancy for the IMD, or the issuance of a final certificate of occupancy for the residential portions of the IMD to legalize the building. Failure to take reasonable and necessary action to obtain a certificate of occupancy is a violation of this section.

(i) In deciding whether an owner has been taking all reasonable and necessary actions to obtain a certificate of occupancy pursuant to subdivision (a) above, the Loft Board may consider but not be limited to the following factors:

- (A) Whether the owner has filed an alteration application with the New York City Department of Buildings (“DOB”).
- (B) Whether the owner has timely cleared all DOB objections to obtain the alteration permit.
- (C) Whether the owner timely obtains a permit after issuance of the Loft Board Certification.
- (D) Whether the permit is in effect.
- (E) Whether the owner has timely engaged a contractor to perform the work necessary to obtain a certificate of occupancy.
- (F) Whether there is any stoppage of work due to reasons within the owner’s control.
- (G) Whether the owner has timely cleared all DOB objections and violations as required for obtaining a certificate of occupancy.
- (H) Whether the owner has timely scheduled all DOB inspections required for obtaining a certificate of occupancy.

(ii) Monthly Reports about Legalization Projects.

- (A) Any IMD owner who has not been issued a final certificate of occupancy must file with the Loft Board a monthly report relating to the legalization projects in the building on the prescribed Loft Board form. In the case of IMD buildings owned by a cooperative or a condominium, the board is responsible for the filing of the monthly report. The report is due every first of the month.
- (B) The report must be signed by the owner of the IMD building and a registered architect or professional engineer.
- (C) The information provided in the report may be used as evidence in connection with a Loft Board determination as to whether the owner has exercised all reasonable and necessary action to obtain a certificate of occupancy.
- (D) The Executive Director may issue a fine not exceeding \$1,000 for failure to file the legalization report for each report not filed on the 1<sup>st</sup> of the month.

(E) The filing of a false statement in the monthly report may result in civil penalties not exceeding \$1,000 for each false statement in the monthly report.

(iii) An owner may not delegate its obligation to exercise reasonable and necessary action to obtain a certificate of occupancy.

(b) Failure to take all reasonable and necessary actions toward obtaining a certificate of occupancy.

(i) Inspections. (a) Staff employed or assigned to the Loft Board shall be authorized to conduct inspections at the direction of the Loft Board or Executive Director to determine if the owner is taking all reasonable and necessary action to obtain a certificate of occupancy. (b) Such inspections may be used by the Loft Board in determining when a penalty for failure to take all reasonable and necessary actions toward obtaining a certificate of occupancy, pursuant to a hearing determination by an OATH Administrative Law Judge, abates.

(ii) At any point prior to the issuance of the residential certificate of occupancy, the Loft Board may initiate an enforcement proceeding against an owner for failure to take all reasonable and necessary action to obtain a final certificate of occupancy even where the next legalization deadline for the owner to achieve as set forth in Section 2-01 et seq. of Title 29 of the Rules of the City of New York and/or § 284(1) of the Multiple Dwelling Law for the building has not passed. The owner has the right to present to the Loft Board or its representative, within 30 calendar days of delivery of the notice of proceeding by hand or 35 calendar days of the posting of the notice by mail, a response that includes information as to why that notice should be withdrawn and/or information regarding mitigating factors the owner wishes the Board to consider in connection with Board's determination of the amount of the fine. If applicable, the owner shall file an extension application pursuant to § 2-01(b).

(iii) Hearings. Hearings will be conducted by OATH Administrative Law Judges, who will determine whether the owner has made a diligent, consistent and good faith effort to legalize the IMD as required by Article 7-C of the Multiple Dwelling Law. Such hearings shall be conducted in accordance with the rules and procedures governing OATH so long as they do not conflict with the Loft Board Rules as detailed in Loft Board rule §1-06.

When the OATH Administrative Law Judge makes a finding that the owner has not exercised all reasonable and necessary action to obtain a certificate of occupancy, he or she shall also recommend a fine of up to \$1,000 for every day that the owner did not exercise all reasonable and necessary action to obtain a certificate of occupancy. Such fine may accrue from the date of delivery by hand or posting by mail of the notice of an

enforcement proceeding, and may continue to accrue until the owner comes into compliance with this section.

(iv) To defend a Loft Board proceeding for failure to exercise all reasonable and necessary action to achieve compliance, an owner must show that it engaged in deliberate, diligent and consistent action to achieve a certificate of occupancy, and must document its or its agents' efforts to obtain the residential certificate of occupancy and any impediments to compliance outside of the owner's control.

(v) Mitigating factors that may be considered regarding the amount of the fine imposed on the owner may include but are not limited to the following: 1) within thirty days after the date of the notice, the owner has begun to take reasonable and necessary action to obtain a certificate of occupancy; or 2) the owner's failure to take reasonable and necessary action towards obtaining a certificate of occupancy were for reasons beyond the owner's control. Examples of such circumstances beyond the owner's control include, but are not limited to, a requirement for a certificate of appropriateness for modification of a landmarked building, a need to obtain a variance from the Board of Standards and Appeals or the denial of reasonable access to an IMD unit.

(vi) Evidence of violation not requiring hearing. (A) Failure to file an alteration application within three months of the effective date of this rule or within six months from receipt of a Loft Board Order granting IMD status to a building shall constitute a rebuttable presumption that the owner is not engaged in taking reasonable and necessary action to obtain a residential certificate of occupancy or a certificate of occupancy for the residential portions of the building.

(B) Where the Loft Board has issued certification pursuant to § 2-01(d)(2)(vii)(A) of these rules, and an owner has failed to obtain an alteration permit within three months from the date of such certification or from the effective date of this rule, whichever is later, such failure to obtain the permit shall constitute a rebuttable presumption that the owner is not engaged in taking reasonable and necessary action to obtain a residential certificate of occupancy or a certificate of occupancy for the residential portions of the building.

(C) Where an alteration permit has been issued in connection with the legalization of the residential portions of an IMD building, the failure to maintain the permit in effect until the issuance of a final residential certificate of occupancy or a certificate of occupancy for the residential portions of the building shall constitute a rebuttable presumption that the owner is not engaged in taking reasonable and necessary action to obtain a residential certificate of occupancy or a certificate of occupancy for the residential portions of the building.

(D) Failure to maintain a temporary certificate of occupancy for the residential portions of the IMD, if one was previously issued, shall constitute a rebuttable presumption that the owner is not engaged in reasonable and necessary action to obtain a residential certificate of occupancy.

(vii) Upon finding a violation pursuant to paragraph (vi) of this subdivision, the Loft Board's Executive Director may issue a notice to the owner stating an intent to find the owner in violation of its obligation to exercise all reasonable and necessary action. The Loft Board's Executive Director may issue a fine of up to \$1,000 for every day that the owner does not exercise all reasonable and necessary action to obtain a certificate of occupancy. The owner has the right to present to the Loft Board's Executive Director or his or her representative within 30 calendar days of delivery of the notice by hand or 35 calendar days of the posting of the notice by mail, a response that includes information as to why that notice should be withdrawn and/or information regarding mitigating factors pursuant to paragraph (v) of this subdivision the owner wishes to be considered in connection with Executive Director's determination of the amount of the fine. Following the receipt of a timely response from the owner, the Executive Director may either withdraw the notice or may impose a fine of up to \$1,000 for every day that the owner has not exercised all reasonable and necessary action to obtain a certificate of occupancy. Such fine may begin to accrue 35 calendar days after the posting of the notice by mail and may continue to accrue until the owner comes into compliance with this section. If necessary, the owner shall file an extension application pursuant to § 2-01(b).

(viii) If an owner encounters an obstacle in the legalization process outside of its control, the owner shall notify the Loft Board in writing within fourteen calendar days of the date the owner knew or reasonably should have known of the obstacle, or if necessary, the owner shall file an extension application pursuant to § 2-01(b). An owner's failure to timely notify the Loft Board of an obstacle in the legalization process outside of the owner's control shall create a rebuttable presumption that there was no obstacle to the legalization process that was outside of the owner's control.

(ix) The tenant's failure to provide access is not deemed outside of the owner's control if the owner has not within a reasonable time filed an access application pursuant to § 2-01(g)(3) of the Loft Board rules.

(x) Where the Loft Board or the Executive Director issues an order finding that the owner has failed to exercise all reasonable and necessary action to obtain a certificate of occupancy, such determination shall not bar the Loft Board from subsequently making another such determination after three months.

Statement of Basis and Purpose:

Pursuant to section 284 of Article 7-C of the Multiple Dwelling Law (“MDL” or “Loft Law”) and section 2-01 of Title 29 of the Rules of the City of New York (“Rules”), owners whose buildings are registered as interim multiple dwellings (“IMDs”) are required to take all reasonable and necessary action to obtain a certificate of occupancy as a class A multiple dwelling for the residential portions of the building or structure within the time period set forth therein. Section 2-01.1 defines reasonable and necessary action to obtain a certificate of occupancy and augments the Loft Board’s ability to enforce MDL § 284 and section 2-01 of the Rules. In 1982, when the legislature promulgated the Loft Law, it anticipated that all IMD buildings would achieve legalization within ten years. Unfortunately delays in this process have reached a point where the Loft Board must augment its enforcement ability to ensure that those buildings that have not yet obtained a certificate of occupancy take all reasonable and necessary actions to do so. The Board is therefore constrained to clarify the violation and incorporate into its rules the penalty for each violation for failure to take all reasonable and necessary action to obtain a certificate of occupancy.

Dated: February 18, 2010

Robert D. LiMandri  
Chairperson