

2011 amendment to § 2-01.1
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NEW YORK CITY LOFT BOARD

NOTICE OF ADOPTION OF FINAL RULE

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.

The New York City Loft Board intends to amend section 2-01.1 of Title 29 of the Rules of the City of New York to change, among other things, the fine amount to conform the Loft Board's rules regarding fines to the Loft Board to the amendments made to Article 7-C of the Multiple Dwelling Law, effective as of June 21, 2010.

A duly noticed public hearing was held on July 7, 2011, affording the public opportunity to comment on the proposed amendments as required by Section 1043 of the New York City Charter. Written Comments were accepted through July 7, 2011.

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.

The proposed amendment to the rule:

- 1) Increases penalties imposed against owners who do not take reasonable and necessary action to obtain a final residential certificate of occupancy in accordance with § 284 of the Loft Law; and
- 2) Provides the ECB with the authority to conduct hearings and impose penalties for failure to exercise all reasonable and necessary action to obtain a residential certificate of occupancy.

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this Board, unless otherwise specified or unless the context clearly indicates otherwise.

New matter in the following rule is underlined and deleted material is in [brackets].

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

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

(1) Reasonable and necessary action to obtain a certificate of occupancy, as used in § 284(1) of the Multiple Dwelling Law (“MDL”), 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 building, or the issuance of a final certificate of occupancy for the residential portions of the IMD building [to legalize the building]. Failure to take reasonable and necessary action to obtain a residential certificate of occupancy issued pursuant to MDL § 301 is a violation of this section.

(i) Factors to consider. 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 or its staff 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]building permit for the alteration.

(C) Whether the owner timely obtained[s] a building permit after issuance of the Loft Board [C]certification pursuant to § 2-01(d)(2)(ix).

(D) Whether the building permit for the alteration that [application] the Loft Board certified pursuant to § 2-01(d)(2)(ix) is in effect.

(E) Whether any other current permit to further the legalization of the residential spaces is in effect.

[(E)](F) Whether the owner has timely engaged a contractor to perform the work necessary to obtain a certificate of occupancy.

[(F)](G) Whether there [is]has been any stoppage of work due to reasons within the owner's control.

[(G)](H) Whether the owner has timely cleared all DOB objections and violations as required for obtaining a certificate of occupancy.

~~[(H)]~~(I) 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 residential certificate of occupancy issued pursuant to MDL § 301 for the IMD units must file with the Loft Board a monthly report relating to the legalization projects in the building on the ~~[prescribed]~~ approved Loft Board form, as available on the Loft Board's website or at the offices of the Loft Board. 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 on the first business day of 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 final residential certificate of occupancy.

(D) The Executive Director may issue a fine ~~[not exceeding \$1,000]~~ of up to \$17,500 for failure to file the legalization report for each report not filed on the ~~[1st]~~ first business day of ~~[the]~~each month.

(E) The filing of a false statement in the monthly report may result in ~~[civil penalties]~~ fines of up to \$17,500 ~~[not exceeding \$1,000]~~ for each false statement in the monthly report.

~~[(iii)]~~ (2) An owner may not delegate its obligation to exercise reasonable and necessary action to obtain a final residential certificate of occupancy for the IMD units.

~~(b) Failure to [t]Take all [r]Reasonable and [n]Necessary [a]Action toward [o]Obtaining a Final Residential [c]Certificate of [o]Occupancy.~~

~~[(i)]~~(1) *Inspections.*

~~[(a)]~~ (i) Staff employed or assigned to the Loft Board ~~[shall be]~~ is 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 final residential certificate of occupancy

issued pursuant to MDL § 301. If an inspection report is prepared, the report is considered a record kept in the regular course of the Loft Board's business and is deemed prima facie proof of the facts contained therein.

[(b)](ii) Such inspections may be used by the Loft Board in determining when a penalty for failure to take all reasonable and necessary action[s] toward obtaining a certificate of occupancy, pursuant to a hearing determination by an OATH Administrative Law Judge, or an ECB hearing officer, abates.

[(ii)](2) *Enforcement Proceedings.* At any point prior to the issuance of the final residential certificate of occupancy issued pursuant to MDL § 301, the Loft Board may initiate an enforcement proceeding against an owner for failure to take all reasonable and necessary action to obtain a final residential certificate of occupancy even where the next legalization deadline for the owner to [achieve]meet, as set forth in § 2-01 et seq. of Title 29 of the Rules of the City of New York [and/]or § 284(1) of the MDL, [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 Loft Board to consider in connection with [Board's] its determination of the amount of the fine to impose. If applicable, the owner [shall] may file an [extension] application for an extension of the code compliance deadlines pursuant to § 2-01(b) of these rules.

[(iii)](3) *Hearings.* Hearings will be conducted by OATH Administrative Law Judges or ECB hearing officers, who will determine whether the owner has made a diligent, consistent and good faith effort to [legalize] obtain a residential certificate of occupancy for the IMD building as required by Article 7-C of the MDL [Multiple Dwelling Law]. [Such hearings] Hearings conducted by OATH [shall] must be conducted in accordance with the rules and procedures governing OATH so long as they do not conflict with the Loft Board [R]rules, as detailed in Loft Board rule § 1-06.] Hearings conducted by an ECB hearing officer must be conducted following the procedures of ECB hearings.

When the OATH Administrative Law Judge or ECB hearing officer [makes a] issues a decision finding that the owner has not exercised all reasonable and necessary action to obtain a final residential certificate of occupancy, he or she shall also recommend a fine of up to [\$1,000] \$17,500 for every day that the owner did not exercise all reasonable and necessary action to obtain a certificate of occupancy. Such fine [may] accrues 30 calendar days from the date of delivery by hand or 35 calendar days from posting by mail of the notice of an enforcement proceeding, and may continue to accrue until the owner [comes into] demonstrates compliance with this section.

~~[(iv)]~~(4) Defenses. 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 final residential 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)]~~(5) Mitigating Factors For Fines. 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:

- (i) Within [thirty] 30 calendar days after the date of the notice, the owner has begun to take reasonable and necessary action to obtain a certificate of occupancy; or
- (ii) 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)]~~(6) Evidence of violation not requiring hearing. [(A)]

(i) Failure to file an alteration application to convert the IMD units to residential units within the later of:

(A) [Three] 3 months of the effective date of this rule, or

(B) [within six] 6 months from receipt of a Loft Board Order granting IMD status to a building or the issuance of an IMD registration number to the owner, or

(C) 6 months from a finding of Article 7-C coverage by a court of competent jurisdiction

[shall] constitutes 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)]~~(ii) Where the Loft Board has issued certification pursuant to § 2-01(d)(2)[(vii)(A)](ix) of these rules, and an owner has failed to obtain an alteration permit within [three] 3 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)](iii) 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)](iv) Failure to maintain a temporary certificate of occupancy for the residential portions of the IMD building, 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)](7) Upon finding a violation pursuant to paragraph [(vi)](6) 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] \$17,500 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 the[that] notice should be withdrawn and/or information regarding mitigating factors pursuant to paragraph [(v)](5) of this subdivision the owner wishes to be considered in connection with Executive Director's determination of the amount of the fine to be imposed.

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] \$17,500 for every day that the owner has not exercised all reasonable and necessary action to obtain a certificate of occupancy. Unless the owner first demonstrates compliance with this section, [S]such fine [may] begin to accrue 30 calendar days after delivery by hand or 35 calendar days after the posting of the notice by mail and [may] continue to accrue until the owner [comes into] demonstrates compliance with this section. If necessary, the owner [shall] may file an [extension] application for an extension of the code compliance deadlines, pursuant to § 2-01(b).

[(viii)](c) *Reporting Obstacles in Legalization Process.* If an owner encounters an obstacle in the legalization process outside of its control, the owner [shall] must state that obstacle in the monthly reports filed with the Loft Board. Additionally, the owner must 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 for an extension of the code compliance deadlines 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)](d) *Access to IMD Units.* 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)] (e) *Subsequent Enforcement Proceedings.* Where the OATH Administrative Law Judge or ECB hearing officer [Loft Board or the Executive Director] issues [an order] a decision finding that the owner has failed to exercise all reasonable and necessary action to obtain a certificate of occupancy, such [determination] decision [shall] does not bar the OATH Administrative Law Judge or ECB hearing officer [Loft Board] from subsequently [making] issuing another such [determination] decision after three months.