

2011 amendment to § 1-06
Published in City Record on : June 28, 2011
Effective on : July 28, 2011

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 1-06 of Title 29 of the Rules of the City of New York to change, among other things, the service requirements of the applications brought before the Loft Board and to conform the Loft Board's rules regarding applications 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 June 2, 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 June 2, 2011.

Statement of Basis and Purpose

The proposed rule:

- Describes the filing requirements for applications filed with the Loft Board,
- Requires applicants to serve copies of applications on the affected parties,
- Describes the proper method of service of the application,
- Describes the proper method of service and filing of an answer,
- Reduces the number of applications needed to be filed with the Loft Board,
- Describes procedure to request an extension to file an answer,
- Clarifies the legal standard required for the applicant,
- Describes when the administrative record for the case is closed, and
- States that a tenant's beneficiary to the estate is an affected party to an abandonment application.

"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.

§1-06 Applications to the Loft Board.

(a) (1) All applications to the Loft Board concerning coverage, hardship claims, rent adjustments, fixture fee disputes, exemption, and any other matters within the purview of the Loft Board under Article 7-C of the Multiple Dwelling Law (“MDL”), must [shall] be submitted [at] to the Office of the Loft Board, on [such] forms [as may be prescribed] approved by the Loft Board, together with [such] any additional information as may be required. The forms may not be altered or re-typed. Except as otherwise described in the Loft Board rules, the [The] applicant must [shall] submit [12] 5 copies of the application, [plus one for each affected party,] and shall be required to list, to the best of his or her knowledge, all affected parties when filing [his or her] the application. The failure of an applicant to list all of the affected parties on an application may result in a delay in processing the application, or return of the application to the applicant as incomplete.

(2) Affected Parties. (i) Affected parties for coverage, harassment and hardship claims shall include: owners[;], all tenants of record in the building, including residential, commercial and manufacturing tenants[;], and all occupants of the building [in question], if different from tenants of record. [Affected parties for harassment claims shall include the owner and all residential tenants or occupants of the building in question.] (ii) In addition to the parties listed in (i) above, affected parties for abandonment claims pursuant to section 2-10 of these rules shall also include the current occupant of the unit alleged to be abandoned, the previous occupant alleged to have abandoned, and the unit and the previous occupant’s beneficiary to the estate, if applicable. (iii) For all other categories of applications, affected parties shall include the owner and such occupants as are necessary for a final resolution of the claim[s] asserted in the application.

(3) The applicant may only have one claim per application. The application shall contain facts and arguments relevant to the claim raised in the application. The applicable application fee stated in § 2-11 of the Loft Board rules is due upon submission of the application. The application will not be considered filed, or be processed, until the application fee is received.

(b)(1) Service of the Application on the Affected Parties. Before filing the application with the Loft Board, the applicant [The staff of the Loft Board] shall serve [all] each affected [parties]party with a copy of the application and the instruction sheet for filing an answer by [regular] first-class mail[, retaining records attesting to such services.] Except as set forth in subparagraph (b)(4) below, a United States Post Office-stamped copy of the certificate of mailing constitutes proof of service of the application to the affected parties.

(2) Filing Applications with the Loft Board. The application and accompanying documents may be submitted to the Loft Board by (i) hand delivery, or (ii) regular mail. Applications will be considered filed on the day they are received by the Loft Board during business hours, as defined in subparagraph (e) below. The applicant’s filing with the Loft Board must include: (i) 5 copies of the application, at least one of which must have an original signature; (ii) one copy of the instruction sheet sent to each affected party; and (iii) proof of service of the application to the affected parties (the United States Post Office-stamped copy of the certificate of mailing). Except as set forth in subparagraph (b)(4) below, if any of the documentation required by this section is not filed at the time the application is filed with the Loft Board, the application will be considered incomplete. The Loft Board may return the application and the application fee, if applicable, to the applicant without further notice.

[Instructions on the procedures for filing an answer shall be enclosed in each mailing.]

(3) Service shall be deemed to be completed [five] 5 calendar days after the date of mailing.

(4) Waiver of Service for Indigent Persons. An applicant may request a waiver from the Loft Board staff of the requirement to serve all affected parties on the basis of indigence. Upon completion of the application, the applicant must submit 5 copies of the application, at least one of which must have the original signature, plus 1 copy for each affected party listed on the application. In addition, the application must be accompanied by a written request that the Loft Board staff, rather than the applicant, serve each affected party due to the applicant’s indigence. The request must be accompanied by an affidavit setting forth the amount and all sources of applicant’s income, any property owned and the value thereof, and any other facts that would be

helpful to the Loft Board staff in determining whether the request should be approved. If the Loft Board staff approves the request, it shall notify the applicant in writing, and serve each affected party with a copy of the application and instruction sheet by regular mail. If the Loft Board staff denies the request, it shall notify the applicant in writing and return the copies of the application submitted for each affected party so that the applicant may serve the affected parties in accordance with the procedure set forth in subparagraph (b)(2).

(c) (1) Answer Period. An affected [A] party who has been served with a copy of [an] a Loft Board application shall have [30 days] the answer period established in the relevant Loft Board rules from the date on which service of the application was completed to file an answer with the Loft Board, with proof of service upon the applicant. Except as otherwise provided in the Loft Board rules, the answer period shall be 30 calendar days after service of the application on the affected party is deemed complete pursuant to (b)(3) of this rule.

(2) The answer shall contain facts and arguments relevant to the issues raised in the application.

(d) Service of Answer on the Applicant. Service of the answer must be delivered upon the applicant [may be done in person or] by (1) first-class mail, at the address of the applicant specified in the application, or (2) by facsimile transmission to the applicant at a fax number designated by the applicant or the applicant's attorney. If service of the answer upon the applicant is accomplished by facsimile transmission, service of the answer will be considered [deemed] complete on the day of the facsimile transmission, provided that [when] the [respondent] affected party mails, by regular mail, a second copy of the answer to the applicant, or his or her attorney, within 3 calendar days of date of the facsimile transmission.

(e) Filing the Answer with the Loft Board. Five copies, including [The] the original answer and any accompanying documents, and proof of service of the answer on the applicant, may be submitted to the Loft Board [board] at any time up to and including [on] the date that the answer is due either [personally] by (1) hand delivery, [by] (2) mail, or [by] (3) facsimile transmission at the fax number designated for the Loft Board. Proof of service of the answer on the applicant constitutes an affidavit of service on the Loft Board's approved form, if served by hand delivery or first-class mail, and a facsimile receipt, if served by fax. Hand delivered answers and the accompanying documents will be considered filed on the day they are delivered to the Loft Board only if they are delivered during business hours. For purposes of this rule, "business hours" shall be defined as 9:00am to 4:00pm on Monday through Friday, except for federal, state or city holidays.

(f) [The answering party shall also submit to the Board 12 additional copies of the answer and any accompanying documents with proof of service of the answer upon the applicant.] If the answer and any accompanying documentation is submitted to the Loft Board by facsimile transmission, service of the answer will be deemed filed [complete as of] on the date of facsimile transmission if the required documentation described in subparagraph (e) above is [original answer, accompanying documents and proof of service required herein are] submitted to the Loft Board [personally] by (1) hand delivery, within 3 calendar days of the date of the facsimile transmission, or [by] (2) mail, postmarked within 3 calendar days of the date of the facsimile transmission. Failure to submit the original answer signed by the affected party, any accompanying documents and proof of service within 3 calendar days to the Loft Board [as required herein] following facsimile transmission of such documents will constitute a default and the [respondent] affected party will then be subject to the procedures outlined in § 1-06(i) [21] of these rules.

(g) All applications, answers and other proofs requested by the Loft Board's staff or the Loft Board shall be verified or affirmed. Failure to do so may result in rejection of the documents. Whenever the Loft Board [Rules Relating to Loft Board Procedures for Conducting Business and Considering Applications or its subject matter] rules require that a document be filed with the Loft Board, it is required that the document be received by the Loft Board. If the Loft Board's [Rules of Internal Board Procedures or its subject matter] rules require that a document be filed with the Loft Board within a prescribed time period, that document must be received [by the Board] within the specified time period. If any deadline set by the Loft Board rule is not a business day, the deadline will be extended to the next business day. A business day is defined as 9:00am to 4:00pm on Monday through Friday except for federal, state or city holidays.

(h) Amended Pleadings. [Any] An applicant or affected party may submit amended pleadings at any time [as of right] up to and including the date of the first scheduled conference [in the case]. The applicant must use the Loft Board's approved form for amended applications. An amended application must be served on all affected parties and filed with the Loft Board in the same way as described in subparagraph (b) above. An amended answer must be filed with the Loft Board and served on the applicant in the same way as described in subparagraphs (c) and (d) above. The Administrative Law Judge, Loft Board staff member or hearing examiner assigned to the case will afford the applicant or [respondent] affected party [the] an opportunity to respond to amended pleadings submitted on the date of the first scheduled conference. Thereafter, amended pleadings may be submitted only if permitted by the Loft Board's staff, hearing examiner or the Administrative Law Judge assigned to the case.

(i) Extensions to File an Answer. An affected party must file a written request with the Loft Board for an extension to file an answer. The request must be filed with the Loft Board before the end of the applicable answer period. The extension request must explain the reasons for the extension request, and may be mailed, faxed or hand delivered to the Loft Board's office, with an affidavit of service affirming the request was also served upon the applicant by regular mail, hand delivery or facsimile transmission.

If the applicant wishes to oppose the request for additional time to file an answer, the applicant may file opposition papers with the Loft Board within 7 calendar days following service of the extension request. The opposition papers must include the reasons why the request should be denied and must describe how the applicant will be prejudiced if additional time is granted to file an answer.

After the 7 calendar day opportunity to file opposition papers passes, the Executive Director or designated staff member may issue a decision for the extension request. If the applicant does not oppose the extension, a joint statement may be filed to the Loft Board recommending a reasonable deadline for the answer. The Loft Board staff may accept, reject or modify the proposed filing deadline.

(1) Defaults. If an affected party [a respondent] fails to file an answer to any application within the applicable time period in the Loft Board rules and fails to file a timely request for an extension [30 days after the date on which service of the application is completed], the [respondent] party will be in default and will be barred from filing an answer [at a later date] or offering any evidence in its defense. The [respondent's] affected party's defensive case will not be heard as a result of its failure to file an answer. The Loft Board's staff, the Loft Board's hearing examiner or the Administrative Law Judge assigned to the case will advise the [respondent] affected party in writing of the default and that an inquest will be held unless the [respondent] party moves for relief from the default as specified in [paragraph 2] § 1-06(i)(2) below. This provision will not apply where an extension to file an answer has been requested or granted before the expiration of the [30-day] answer period.

(2) An affected [A] party who is barred from filing an answer will have 30 calendar days after the mailing date [of mailing] of the default determination[,] to move for relief from the default determination[, and]. The party submitting the motion must establish before the Loft Board's staff, the Loft Board's hearing examiner or Administrative Law Judge assigned to the case that good cause existed for the failure to file an answer. Any motion for relief from a default determination must be received by the Loft Board's staff, the Loft Board's hearing examiner or the Administrative Law Judge assigned to the case, with proof of service as defined in § 1-06(e) on [to all affected parties] the applicant, within the specified time period. Good cause can be established by proof of a reasonable explanation for failure to file an answer and a summary of a non-frivolous [the] defense to be presented in the case[, which establishes it not to be frivolous]. The Administrative Law Judge, the Loft Board staff or the Loft Board's hearing examiner assigned to the case may allow the applicant to file opposition papers to the motion to vacate the default determination. Where the [respondent] affected party fails to file an answer and no timely motion to [open] vacate the default determination has been received by the Administrative Law Judge, Loft Board's staff or Loft Board's hearing examiner, the case will proceed and [respondent] any party in default will not be permitted to file an answer or present its defensive case.

(3) Following the issuance of a [final] Loft Board [determination] order, [a respondent] an affected party who has not moved for relief from a default [judgment] determination as set forth in

[paragraph 2] subparagraph (2) above and is aggrieved by the default determination may move to reopen the proceeding by filing an application for reconsideration with the Loft Board within 30 calendar days [of] following the [date of] mailing date of the [final determination] order. Such application will be granted only if the Loft Board, [in its discretion,] finds that the [respondent] affected party has established (i) extraordinary circumstances for the failure to file [the] an answer and (ii) substantial likelihood of success on the merits.

(4) [In a case in which the respondent is barred from filing an answer, the] An applicant must present a *prima facie* case at a hearing or inquest [before the hearing examiner] demonstrating entitlement to the relief sought in the application whether or not an answer has been filed for the application. The applicant must prove his/her case by a preponderance of the evidence for the relief requested in the application.

(j) (1) The [staff of the] Loft Board staff may [shall] investigate claims raised in applications and may conduct informal conferences, upon 15 calendar days notice to the applicant and all affected parties who have filed an answer, to settle disputes or clarify issues. As part of its investigation, the staff may request that the parties furnish additional evidence or memoranda relevant to the application and request appropriate [books] ledger, documents and other records relevant to the issues in dispute.

(2) Hearings. (i) All parties shall be afforded an opportunity for a hearing within a reasonable time. [,] The Loft Board shall provide at least [upon] 15 calendar days notice to the applicant and all affected parties who have filed an answer. The notice of hearing shall include a statement of the nature of the proceeding and time and place it will be held, [,]; the legal authority and jurisdiction under which the hearing is to be held, [and] a reference to the particular sections of law and rules involved, [,]; and a short and plain statement of the matters to be adjudicated.

(ii) The Executive Director or designated staff member, shall determine whether an informal conference or a [the] hearing shall be conducted before a staff hearing examiner, a Loft Board's staff member or before an Administrative Law Judge at the Office of Administrative Trials and Hearings (OATH). All [such] hearings shall be conducted in accordance with procedures set forth in [this section] these rules. OATH's rules of practice, whether procedural or substantive, may only apply to Loft Board cases if the issue is not the subject of any rule in Title 29 of the Rules of the City of New York. Where a hearing is conducted at OATH, the Administrative Law Judge shall submit recommended findings of fact and a recommended decision to the Loft Board, which shall make the final findings of fact and decision. Where a hearing is conducted by a Loft Board's staff hearing examiner, such a hearing will be conducted by a staff hearing examiner who is assigned solely to adjudicative duties, who may take testimony under oath and consider affidavits and other proofs. Formal rules of evidence shall not apply to such hearings, except that effect shall be given to the rules of privilege recognized by law. All [such] hearings shall be electronically recorded, and a duplication of the [tape] recording or transcript of the proceedings shall be available to any party upon [application] request and agreement to pay the fee assessed for the duplication. At the hearing, the parties shall be afforded the opportunity to be represented by counsel, to issue subpoenas or to request that a subpoena be issued, to call witnesses, to cross-examine opposing witnesses and to present oral and written arguments on the law and facts.

(3) Parties shall be advised of their right to representation by counsel [at all stages of the administrative proceedings] and of their right to cross-examine witnesses at hearings.

(4) When a party fails to furnish documents requested by the [staff] Administrative Law Judge, the Loft Board, or its staff, [the Loft Board] or fails to submit to examination or cross-examination, inferences adverse to his or her position may be drawn by the fact-finder from such refusal.

(5) Where informal conferences conducted by an Administrative Law Judge or the Loft Board's staff [with the affected parties] result in the resolution of disputes to the mutual satisfaction of the parties, a stipulation of agreement shall be entered into by the parties and reviewed by the Executive Director. A summary report of such matters including the type of application, the issues presented and the resolution reached shall be made to the Loft Board, which may direct that a particular matter be reopened and remanded for further investigation. These cases shall appear on the summary calendar of the Loft Board's agenda. Upon [approval

by) issuance of an order [the Board of matters on summary calendar], such summary cases shall be deemed closed.

(k) (1) Parties may consent in writing to adjourn conferences or hearings with the approval of the Loft Board staff member, hearing examiner or Administrative Law Judge assigned to the case. No more than 2 consecutive consent adjournments will be permitted, except as noted in § 1-06(k)(2) below.

(2) Additional requests for adjournments must be made in writing to the Loft Board's hearing examiner, staff member or Administrative Law Judge assigned to the case, with notice to all affected parties or applicant, at least 5[2] calendar days before the date of the scheduled conference or hearing. The reason for the adjournment request must be provided at the time of the request. [Such] The adjournment will be granted at the sole discretion of the Loft Board hearing examiner, Loft Board staff member or Administrative Law Judge assigned to the case.

(3) When any party adjourns more than [two] 2 consecutive scheduled conferences or hearings, the Loft Board hearing examiner, Loft Board staff member or Administrative Law Judge may direct that the next scheduled hearing or conference be marked final. This notice shall be sent to the parties in writing.

(4) If an applicant does not appear for a conference or hearing which has been marked final against him/her, the application [will] may be dismissed for failure to prosecute unless the Loft Board hearing examiner, Loft Board staff member or Administrative Law Judge approves a written request for its reinstatement which must be made within 30 calendar days from the conference or hearing date. The written request for reinstatement must provide [upon] a showing of extraordinary circumstances which prevented the applicant's attendance at the hearing or conference.

(5) If [a respondent] an affected party does not appear for a conference or hearing marked final against him/her, the answer [will] may be stricken and the [respondent] affected party [will] may be barred from presenting its defensive case unless the Loft Board hearing examiner, Loft Board staff member or Administrative Law Judge assigned to the case approves a written request for its reinstatement, which must be made within 30 calendar days from the conference or hearing date. The written request for reinstatement must be served on the applicant and must provide [upon] a showing of extraordinary circumstances which prevented the [respondent] affected party's attendance at the hearing or conference.

(6) In a case in which an answer has been stricken or an affected party [the respondent] is barred from filing an answer and presenting its defensive case, the applicant must [then] present a *prima facie* case at an inquest before the assigned [a] hearing examiner, [or] Loft Board staff member or Administrative Law Judge, demonstrating entitlement to the relief sought in the application by a preponderance of the evidence.

(l) (1) If an applicant fails to appear at a hearing on due notice which has not been marked final against the applicant, his or her application [shall] may be dismissed without prejudice. If an affected party [a respondent] fails to appear for a hearing on due notice which has not been marked final against the [respondent] affected party, the Loft Board hearing examiner, Loft Board staff member or the Administrative Law Judge may [shall] conduct [, through one of its hearing examiners,] an inquest on the application. All such inquests shall be electronically recorded.

(2) [Where a respondent] If an affected party fails to appear for a hearing and an inquest is held, the conclusions of which are adverse to his or her contentions, the [respondent] affected party may move to [re-instate the matter] vacate the default within 30 calendar days [of] after the mailing date [of the mailing] of the [final determination] report and recommendation, upon good cause shown. Good cause can be established by proof of a reasonable explanation for the affected party's failure to appear on the date of the hearing and a summary of the non-frivolous defense to be presented at the hearing[, which establishes it not to be frivolous]. Failure to provide a reasonable explanation for the affected party's failure to appear at the hearing and a summary of the non-frivolous defense may result in the denial of the request to vacate the default. [After 30 days, any]Any motion to [reopen] vacate the default received 30 or more calendar days after the mailing date of the report and recommendation will be denied as untimely, except that the Executive Director may grant such motion, in her/his discretion, if extraordinary circumstances for the non-appearance [and further delay can be shown,] and a substantial likelihood of success on the merits can be shown.

(m) The staff of the Loft Board or the Administrative Law Judge assigned to the case shall prepare [written reports of all hearings and inquests conducted by staff examiners and shall submit such reports to the Board.] a written report and recommendation for all cases appearing on the reconsideration/appeals and master calendars. The report and recommendation must be submitted to the Loft Board. [These reports] The report and recommendation shall be based exclusively on the administrative record of the case.

For an application seeking removal from the Loft Board's jurisdiction, the administrative record is deemed closed on the date the Loft Board issues its order in the case. In a case that involves a hearing and where the Administrative Law Judge or Loft Board staff examiner must issue a report and recommendation, the administrative record is deemed closed at the conclusion of the hearing unless otherwise stated by the Administrative Law Judge or staff hearing examiner. The administrative record includes all pre-trial motions, testimony, documentary evidence presented at a hearing, post-trial briefs and any other evidence accepted by the Administrative Law Judge or hearing examiner. The report and recommendation issued to the Loft Board by the Administrative Law Judge or the Loft Board staff member [They] shall include:

(1) a description of the application, and the names of the parties, their counsel and other persons affected by the application;

(2) a summary of the facts disputed, and the facts found during any investigation and of testimony and other proofs taken at the hearing or inquest;

(3) copies of the application and of all affidavits, memoranda, and briefs submitted by the parties;

(4) a [staff] recommendation to the Loft Board regarding disposition of the application, with a summary of the factual and legal bases for such recommendation. A copy of all written recommended decisions shall be mailed forthwith to each party.

(n) Except as otherwise stated in the Loft Board rules, [All] all final determinations regarding the disposition of any application filed with the Loft Board and brought to a hearing or inquest [shall] may be made by the Loft Board. The Loft Board may [adopt] accept, reject, remand, defer or modify the disposition recommended by the Loft Board's staff member, hearing examiner or Administrative Law Judge employed by OATH. Pending its final determination, the Loft Board or the Chairperson may direct the staff to provide it with additional information regarding the application, with copies of any relevant documents not included in the staff report, and with a transcript of the hearing or inquest. Pursuant to § 1046(f) of the City Administrative Procedure Act, when [When] a recommended decision or a final [decision] order is [entered] issued by the Loft Board, it shall be [mailed forthwith to each party] sent, together with the report and recommendation, by regular mail within a reasonable time following the issuance of the order, to the applicant and each of the affected parties.

(o) The Loft Board may, by a vote of a majority of the Loft Board members [as specified in paragraph 3 of these rules], conduct a *de novo* hearing or inquest on an application. The provisions on the taking of evidence, as set forth in §1-06([e]j), *supra*, shall apply to hearings conducted by the Loft Board. All such proceedings shall be electronically recorded.

(p) The report and recommendation [of] by the Loft Board's staff or [administrative law judge] Administrative Law Judge on each application shall be [promptly] referred to the Loft Board. A copy of the Loft Board's [determination, including an] order and [any supporting opinion] the report and recommendation shall be mailed to the applicant and all affected parties who filed an answer. A [determination of the] final Loft Board order shall constitute a final agency determination for purposes of commencement of the running of the statute of limitations for the filing of [an] a petition pursuant to Article 78 of the [C.P.L.R. petition] Civil Practice Law and Rules challenging the Loft Board's [determination] order, unless a timely application for reconsideration has been filed in accordance with [(see) § 1-07 of these rules].