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VIA EMAIL

New York City Loft Board
280 Broadway, 1st Floor
New York, New York 10007

**Re: Response to Notice of Public Hearing and Opportunity to Comment
on Proposed Change of Loft Board Rules and Regulations**

Dear Sirs/Madams:

I am submitting this letter on behalf of this firm and its client base - owners, managers, net lessees of Interim Multiple Dwellings and buildings claimed to be Interim Multiple Dwellings. My background with the Loft Law is a forty-year involvement with the Loft Board. This includes litigation, assisting with legalization of loft buildings, and the full panoply of possible issues raised by the Loft Law.

This letter specifically focuses on the proposed legalization regulations, including proposals for alternate plans discussed at pp. 53-57 of the published proposal and the term "Responsible Parties" includes the following:

- "A response to the proposed sliding scale for time allowed for tenants to file alternate plans or comments proposing owners legalization plans" (See introductory language p.3); and
- Inconsistent/inappropriate use of defined terms in legalization regulations and elsewhere.

**A SLIDING SCALE FOR ALTERNATE PLAN SUBMISSIONS
EXTENDS PERIOD OF NON-COMPLIANCE**

The narrative process, at its best, is a difficult process and with respect to buildings of any size, given the slow pace of the Department of Buildings and the number of buildings in the narrative process at the Loft Board. From filing of plans to certification, the process seldom takes less than a year. In that context, the narrative process is often a negotiation



process in which, although the Loft Board can require tenants to respond and define objections in writing at an earlier time in the process before certification is requested so as to limit or earlier resolve alternate plans issues.

That does not happen. As such, tenants are able to argue and continue objections, rather than being required to provide a resolution or even alternate plans prior to the completion of the narrative process. No proposal is made for speeding-up the process.

Rather, the proposed regulations propose to lengthen the legalization process further. Depending on the size of the building, the forty-five (45) days for period for filing is extended up to seventy-five (75) days depending on the size of the building and includes a new subparagraph (d) that an additional thirty (30) days may be requested. In other words, the filing of alternate plans, not the resolution of those plans, is proposed to take as much as one hundred five (105) days. No particular reason is given why so long a time period is necessary, particularly given the Loft Board's mandate to move these buildings through legalization, including requiring the taking of all "necessary and reasonable" actions. Subsequent proposed sections suggest other structural issues.

Subparagraph (D) provides that an individual "occupant" may file alternate plans that "does not affect any other units or common areas". Per subparagraph (E) that same occupant can file alternate plans that affect other units and common areas. There is no rationale, assuming that this "occupant" is in a building containing more than fifteen (15) units, why that individual occupant should have up to one hundred five (105) days to file plans, which would be limited to that unit or a relatively smaller area of the building.

Past that, one of the larger difficulties with alternate plans is how long it takes for them to resolve. Subsection (x) on pp. 57-58 does nothing to foreshorten that, continuing the requirement that the occupant take all "necessary and reasonable actions" to cure such objections within forty-five (45) days.¹ There is no statement as to consequences for failure to timely cure such objections nor what constitutes a necessary and reasonable approach to the issue. This is a continuation of a problem that exists throughout the alternate plans process. The resolution of the objections often takes years, during which an owner continues to be out of compliance and during which tenants may withhold rent with impunity.

Without naming buildings, I am working on at least one building that has competent architects representing all parties in which the alternate plan process has now extended

¹ There may be a simple textual error in this proposed amendment as well. Proposed subsection (xii)(b) on page 59 refers to a "forty-five (45) day period provided for in subparagraph (x) above." That subparagraph (x) provides for the forty (40) day period for an occupant to file an Alternate Plan Application, not a forty-five (45) day period.



for more than four years, including the Department of Buildings regularly losing applications including CCD1 appeals from objections to the alternate plans. During that time the Owner has been unable to start legalization.

These proposed amendments are supposed to protect all parties and to further enable the process of legalization of these buildings as required. MDL § 280 recognizes the implicit danger of these non-legalized buildings. Instead, the proposed legalization regulations will exacerbate the problem without resolving any of the difficulties of legalization.

**INCONSISTENT USE OF DEFINED TERMS IN LEGALIZATION REGULATIONS
AND WHY “RESPONSIBLE PARTY” IS A BAD IDEA**

The problem with the term “Responsible Party” is that it expands the Loft Board’s regulations beyond the “Owner” as defined in MDL§4(39) and beyond the language used in Multiple Dwelling Law Article 7-C to define “Owner” rights and responsibilities, and which has been traditionally relied upon by the Loft Board in promulgating its regulations and decisions. Likewise, it suggests a series of rights and abilities at the Department of Buildings which are contrary to the Building Code.

Subsection 3(b) of the proposed regulations (p.41) concerning extension of time to comply with the amended code compliance timetable, states that the persons who can make such an application are the Owner and the New Owner. However, elsewhere in the proposed legalization regulations, obligations that were formerly for the Owners are now for the Owner or “Responsible Party”. For instance:

- p. 45 sub¶(2)(i)(sub¶2) has the “Owner” or “Responsible Party” amending alternation applications, and the use of this joint term continues throughout;
- p. 50 sub¶59(xii) Loft Board Certification: this section references “Owners” or “Responsible Parties” who have filed plans and actions to be taken to obtain certification, notwithstanding that that the Department of Buildings only allows plans to be filed by “Owners”, defined as “Any person, agent, firm, partnership, corporation, or other legal entity having a legal or equitable interest in, or control of the premises” Admin Code 28-101.5.

The Building Code only permits alteration applications by an “owner or authorized agent”. As such, the Loft Board is proposing legalization regulations that are diverge from Building Code requirements.



In discussing “proposed rule amendments at p. 3, Sec. 4, the Loft Board notes that the revisions of the narrative process are aimed at “owners” and uses the term “owners” with respect to filing for extensions. As defined in the proposed rules §1-12 “definitions”, the terms “Owner” and “Responsible Party” have distinctly different meanings where “owner” means the “owner or owners of the freehold of the premises”, whereas the “responsible party” includes the owner “or one who holds a lesser estate therein...”

The term “Responsible Party” is expansive and includes numerous parties who are not owners and have no ability to file with the Department of Buildings, including “a lessee” and “any other person directly or indirectly in control of the dwelling”. This definition, while paying lip service to MDL§4(44), is also expansive past what Article 7-C provides. Further, it renders the regulations inconsistent, since it places the responsibility on parties who cannot have responsibility and suggests that individual tenants, estates of dead tenants, agents working for commercial tenants, and anyone else who has an inclination to do so can file legalization plans, be responsible for compliance in an owner’s position, or otherwise have responsibility in the process. This can only lead to confusion and delay.

Two examples of this elsewhere in the proposed regulations are salient. First, under the proposed 2-08(s), the actions of a “Responsible Party” could be used as evidence of protected occupancy status: “the Loft Board may find the individual to be a Protected Occupant only if the individual resided in the unit with the consent of the Owner or Responsible Party.” Under the proposed definition, an illegal subtenant installed, without an Owner’s knowledge or consent, could claim protected occupancy rights based on actions by persons having no relationship to the Landlord or Owner.

Second, the proposed § 2-09(b)(3)(i) provides “When the Landlord or Responsible Party and residential Occupant are in Privity, the Landlord is responsible for meeting the minimum housing maintenance standards established by the Loft Board in 29 RCNY § 2-04.” This proposed amendment makes it so that even if the Landlord, (for example a squatter given access by another tenant) that occupant could impose obligations on the Landlord without owner’s knowledge or taking any action.

The definition of “Responsible Party” also allows the possibility that an owner and a “Responsible Party” could have divergent visions of legalization and the decisions to be made in that regard, a problem for which a remedy is not provided in the proposed rules. The proposed §2-01(a)(10)(v) provides that an “Owner or Responsible Party may, pursuant to MDL§287, elect to comply with other local building codes or provisions of the MDL that provide alternative means of meeting the fire and safety standards...” Where

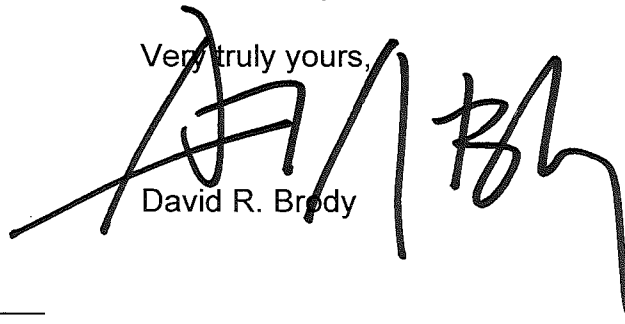


the rules provide for such discretion, it should be clear which party has that discretion and that ought only be the Owner.²

There is also a conflict with the inclusion of “Responsible Party” as a potential “Affected Party” in the proposed regulations. “Responsible Party” is included in the proposed definition of “Affected Party” (“Affected Party means the Owner or Responsible Party and the Occupants necessary to decide a claim asserted in an Application or proceeding as further described in § 1-21(b) below”). Until now, only the Owner and tenants/occupants have been considered affected parties; expanding this definition to include the catchall “Responsible Party” creates the possibility that a determination could be rendered on a Loft Board application without the owner’s presence. Conversely, this also could create significant delays by allowing the various entities defined as “Responsible Parties” to insert themselves into Loft Board proceedings with no benefit to tenants or the legalization process generally. Under the proposed §1-21(b), the distinction is even less clear, as the proposed rules include “any Responsible Party, if applicable”, as an affected party with respect to applications for coverage, harassment, hardship, abandonment, protected occupancy, reconsideration, and any other type of Loft Board application.

The purpose of the legalization regulations is to require owners and those acting as Owners in the more formal sense of the word be responsible for legalization. The approach taken in the proposed regulations simultaneously dilutes that concept and also provides inconsistent guidance because the term is not used consistently and is without regard to Department of Building requirements (BC 105.2 which limits permit applications to the “Owner or authorized agent”). There the term “owner” is defined as any person, agent, firm, partnership, corporation, or other legal entity having a legal or equitable interest in, or control of the premises. Again, the “Responsible Party” concept conflicts with what is permitted at the Department of Buildings and who may file legalization plans expands the scope of to whom the Loft Board may look as being responsible for, or having rights regarding legalization. The term creates problems without solving problems.

Very truly yours,



David R. Brody

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² Similarly, under the proposed §1-17(b)(2), the “Loft Board may release personal information about a unit to the current Owner of a Building or to the current Occupant of a unit or other “Responsible Party”. The breadth of the definition of “Responsible Party” makes this provision a landmine for confidentiality issues, where such parties presumably have no way to obtain such information absent an appropriate consent.