

MINUTES OF PUBLIC MEETING
New York City Loft Board Public Meeting Held at
22 Reade Street, 1st Floor
Spector Hall

March 18, 2010

The meeting began at 2:05 p.m. The attendees were Chairperson Robert LiMandri; Elliott Barowitz, Public Member; Gina Bolden-Rivera, Public Member; LeAnn Shelton, Public Member; Matthew Mayer, Owners' Representative and Chuck DeLaney, Tenants' Representative. Chief Ronald Spadafora, Fire Department's Representative was absent.

CHAIRPERSON'S INTRODUCTION

Chairperson LiMandri introduced himself and welcomed those present to the March 18, 2010 public meeting of the New York City Loft Board.

VOTE ON FEBRUARY 18, 2010 MINUTES

There were no corrections on the minutes by the Board.

Motion: Mr. Barowitz moved to accept the February 18, 2010 minutes. Mr. DeLaney seconded the motion.

Members concurring: Barowitz, Bolden-Rivera, DeLaney, Chairperson LiMandri, Mayer, Shelton (6)

Member absent: Chief Spadafora (1)

Adopted by the Loft Board on March 18, 2010

REPORT OF THE EXECUTIVE DIRECTOR

Ms. Alexander reported on the Legalization Status spreadsheet distributed to the Board and provided an explanation on the changes. **Ms. Alexander** also gave an update in the Jay Street Article 78 appeal case.

In response to a question raised by a Board member at the previous meeting whether under proposed Loft Board rule 2-01.1, the Executive Director had authority to assess penalties, **Ms. Alexander** reported that the Law Department had advised her that the Loft Board has authority, by rule, to delegate its power to assess penalties to the Executive Director.

Mr. Delaney requested a progress report on the status of the hiring process of the Project Manager.

Ms. Alexander took this opportunity to introduce the new Project Manager, Faiqa Ahmad.

Chairperson LiMandri requested that Ms. Ahmad introduce herself.

Ms. Ahmad stated that she graduated from Pakistan as an Architect and received her Masters Degree at NYIT as an Urban Planner. Upon completion of her degree, she worked at two construction companies before coming to the Loft Board.

REPORT OF THE DEPUTY GENERAL COUNSEL

Ms. Cruz reported that there are 49 cases in the Hearings Unit including the cases on the March agenda. Of those, 20 are removal cases and 29 are non-removal cases. The breakdown of the non-removal cases is as follows: 8 are presently pending at OATH; 9 are post hearing or settlement; 2 applications are involved in an informal conference; 2 are rent adjustment applications; 1 application is on hold pending a revised settlement; 3 are in the answer period and the remaining 4 applications are on the March agenda.

Ms. Cruz stated that the status of the removal cases is as follows: 11 cases require additional information about the status of certain units; 3 cases have other cases pending; 2 are pending corrections to the C of O; 4 are being reviewed for a future meeting.

Ms. Cruz reported that there are 6 A buildings with no LE pending.

DISCUSSION ON PROPOSED RULE 29 RCNY §§ 1-01 AND 1-02 OF THE RULES

After further discussion by the Board, **Chairperson LiMandri** tabled the votes on the proposed rules for additional corrections and amendments.

DISCUSSION AND VOTE ON CASES

MASTER CALENDAR

Case #1.	Legend Corp.	42 West 28 th Street	LB-0173	LA/LA
----------	--------------	---------------------------------	---------	-------

PROPOSED ORDER

NEW YORK CITY LOFT BOARD

<i>In the Matter of the Application of</i> LEGEND CORP.	Loft Board Order No. Docket No. LB-0173 RE: 42 West 28th Street New York, New York IMD No. 10329
-----------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------

ORDER

The New York City Loft Board ("Loft Board") accepts in part and rejects in part the Report and Recommendation ("Report"), dated June 12, 2008, of Administrative Law Judge Joan R. Salzman.

BACKGROUND

On March 29, 2007, Legend Corp., the owner of the building ("Owner") located at 42 West 28th Street, New York, New York ("Building") filed an application seeking an abandonment finding for the interim multiple dwelling units on the second, third, fourth and fifth floors ("Units") in the Building. The Owner listed the affected parties as "unknown." In a letter dated March 30, 2007, the Loft Board's staff explained that it would not process the application because the application did not include the affected parties.

On June 15, 2007, after reviewing the Loft Board files, the Owner filed an amended application listing the last known occupants of all the Units at the Building's address. The Owner listed Kathleen

McKearney, the former occupant of the second floor unit, Gary Falk, the former occupant of the third floor unit, Maude Schuyler (Clay), the former occupant of the fourth floor unit and Tobias Mostel, the former occupant of the fifth floor unit ("Tenants") as affected parties. A commercial tenant on the first floor was also listed. On June 22, 2007, the Loft Board served the application on the affected parties. The Loft Board did not receive any answers.

The amended application was transferred to the Office of Administrative Trials and Hearings, which assigned the matter to Judge Salzman for adjudication. In a letter dated October 26, 2007, Judge Salzman inquired about the Owner's efforts to locate the current addresses for the Tenants and requested an explanation as to why the application is not time-barred. In letters dated November 14, 2007 and December 18, 2007, the Owner's counsel explained that in addition to the search of the Loft Board records, subsequent to the filing of the amended application, he conducted several internet searches for each of the Tenants, the prior owner, the managing agent and the prior owner's attorneys. He also explained that he sent letters to various individuals and companies requesting any information they may have about the Tenants. As a result of the searches, the Owner's attorney found an additional nine people who may have been tenants in the Building.

On December 19, 2007, Judge Salzman referred the matter back to the Loft Board for the Owner to file a second amended application which included the newly discovered information about the Tenants and other individuals who may have been tenants in the Building.

On January 22, 2008, the Owner filed a second amended application listing fourteen affected parties. The nine additional parties were Alexander D. Webb and Susan O'Conner, who the record shows attempted to purchase the fixtures of unit 2 and 3; Anthony Campisi; Andrew Holbrooke and Viviane Holbrooke; Woon S. Hwang; Steven Kobrosky; Hyuk K. Kwon; Kyung S. Lee; Barbara J. Sirota and Miryona Suh, all from unknown units. The Loft Board served the application on all of the parties and, again, no answers were received. On March 12, 2008, the Loft Board's staff referred the application back to Judge Salzman. On May 8, 2008, the scheduled hearing date, no one appeared for the Tenants or the other affected parties. Judge Salzman heard counsel's explanation of his search for affected parties and then accepted the case on the papers submitted.

In her Report, Judge Salzman found that the application was timely and that the Owner proved by a preponderance of the evidence that the Units were abandoned. We disagree with Judge Salzman's analysis of the sufficiency of the evidence and find that the Units were not abandoned.

ANALYSIS

A. The Relevant Abandonment Rule

In her Report, Judge Salzman found that the applicable version of the abandonment rule was the rule in effect prior to the October 8, 2006 amendment. We agree.

In 2006, the Loft Board made changes to Title 29 of the Rules of the City of New York ("RCNY") § 2-10(f) (the abandonment rule) which became effective on October 8, 2006. The changes to sections 7 and the new paragraphs of (3) and (8) of the rule apply to abandonment applications filed more than six months after the effective date of the rule or April 8, 2007. The initial filing of the abandonment application was March 29, 2007. The initial filing was within the six-month grace period. Therefore, the prior abandonment rule applies. The filing of an amended application on June 15, 2007 does not change the applicable rule, but merely relates back to the original application.

We accept Judge Salzman's determination that the relevant abandonment rule was the rule in effect at the time of the initial filing.

B. The Abandonment Application

1. The Abandonment Rule

Pursuant to 29 RCNY § 2-10(f)(2), as in effect on March 29, 2007, abandonment is the voluntary relinquishment of possession of a unit and all rights relating to a unit with intention of never resuming possession or of reclaiming the rights surrendered.

Section 2-10(f)(3) lists nine factors the Loft Board may consider in deciding whether a unit has been abandoned:

- (1) the length of time since the occupant allegedly abandoned the unit;
- (2) whether the occupant owed rent as of the time the occupant allegedly abandoned the unit and whether court proceedings to attempt to collect this rent have been initiated;
- (3) whether the occupant's lease for the unit has expired;
- (4) whether the occupant provided notice of an intent to vacate or requested permission to sublet the unit for a specific period of time;
- (5) whether the unit contained improvements which were made or purchased by the occupant and whether the occupant was reimbursed for those improvements;
- (6) whether any prior harassment findings have been made by the Loft Board concerning the occupant(s) of the unit or whether any harassment application remains pending;
- (7) whether any violations or notices to appear pursuant to the Loft Board's Minimum Housing Maintenance Standards have been issued;
- (8) whether the owner has made affirmative efforts to locate the occupant to attempt to purchase rights pursuant to Multiple Dwelling Law § 286(12) or improvements pursuant to Multiple Dwelling Law § 286(6); and
- (9) whether an inspection of the unit by the Loft Board staff indicates that the unit is presently vacant.

Although 29 RCNY § 2-10(f)(2) defines an abandonment as the voluntary relinquishment of possession of a unit and all rights relating to a unit with intention of never resuming possession or of reclaiming the rights surrendered; this portion of the rule does not stand alone. Under 29 RCNY § 2-10(f)(3), the Loft Board considers nine factors in making a determination of abandonment. To consider the definition without the nine factors would mean that any time a tenant voluntarily moved from an IMD unit, such move would constitute an abandonment and would suffice to deregulate the unit. Such an interpretation of the abandonment rule would be inconsistent with § 286 of the Multiple Dwelling Law. While there is no requirement to consider evidence on all nine factors, definitive evidence must be provided on at least some of the factors. See, *Matter of 20 Beaver Street, LLC*, Loft Board Order No. 3436 (May 15, 2008).

One of the purposes of the abandonment rule is to ensure that an owner has the opportunity to deregulate the unit in the event that a tenant deprives him of the opportunity to execute a sale of rights form and agreement (factor 4). Evidence that a tenant gave notice to the building owner or left without owing rent arrears suggests the termination of one landlord/tenant relationship in a way that creates the opportunity for the seamless creation of another. Thus, where there is evidence that an owner receives notice, no abandonment can be found.

By contrast, a tenant who departs without notice to the owner or owing arrears may evidence the type of relinquishment captured by the abandonment concept. See, *Matter of 67 Vestry LLC*, Loft Board Order 3476 (November 20, 2008) (the Loft Board denied the abandonment application when tenant vacated the unit on notice to the owner, owed no rent to the owner and did not install any fixtures). Compare, *Matter of Sansone and Mandara*, Loft Board Order No 1955 (April 25, 1996) (Loft Board granted the abandonment application when the tenant left during negotiations to pay rent arrears without notice to the owner); *Matter of Twenty-Nine Second LLC*, Loft Board Order No. 2625 (April 24, 2001) (Loft Board granted the abandonment application when tenant owed rent to the owner, left without notice and the unit did not contain fixtures of value).

2. Burden of Proof and Due Diligence

The Loft Board has held that in an abandonment application, it is an owner's burden to prove by a preponderance of the evidence that the occupants abandoned the unit. *1314 Development, LLC*, Loft Board Order No. 3483 (January 15, 2009) (the Loft Board denied the abandonment application because the owner failed to meet its burden). The Loft Board has rejected abandonment claims where the owner has failed to meet this burden. See, *Matter of L & F Realty Corp.*, Loft Board Order No. 3478 (November 20, 2008) (the Loft Board denied the abandonment because the owner failed to provide sufficient evidence to support a finding of abandonment); *Matter of 117 Hester Realty LLC*, Loft Board Order No. 3139 (January 18, 2007) (the Loft Board denied the application because the owner failed to provide sufficient proof that the tenants vacated voluntarily).

According to the record here, Owner's counsel claims to have made a diligent search to find former owners and tenants of the Building. He states in both his affirmation dated January 18, 2008 and during the inquest, that he searched the Lexis-Nexis person locator database for the names of people connected with the Building's address and attempted to locate the prior owners through their prior attorneys. Yet, he says, his inquiry yielded only an address for Tobias Mostel from a prior attorney; and the Lexis-Nexis search yielded only the addresses for Mr. and Mrs. Holbrook, both of whom still reside in New York State, and nothing more. See, Affirmation of Eric J. Shimanoff, dated January 18, 2008 ("Affirmation"), ¶¶ 12-44, Transcript.

But, a review of the record belies a finding of due diligence. Exhibit 2, Exhibit C, of the Amended Application, which appears to be examples of the Lexis-Nexis ALLFIND search is completely irrelevant as it provides no proof of a search for any of the Tenants. Exhibit 2, Exhibit D, which contain searches of the person locator using the building address shows that Owner's counsel ran searches of the names of some of the people connected to the Building address, but no searches for the residential tenants Clay, Falk, or McKearney. Nor did he attempt to contact Arthur Rhine, attorney for Mr. Webb and Ms. O'Conner, the parties who attempted to purchase the fixtures for Units 2 and 3, and whose firm name and address is listed in the record. Further, his statement that he was unable to locate any other affected party or obtain relevant information is unconvincing given that at the very least a Google search should have revealed the whereabouts of Maude Schuyler Clay, a well-known artist.

Moreover, where, as here, the Owner alleges that the IMD occupants vacated prior to his purchase of the building, and claims a dearth of information; it is incumbent upon it to make a more concerted effort to contact previous owners and tenants to obtain relevant information concerning the circumstances surrounding the departure of the unit's occupants. It may be sufficient to send out notices to satisfy due process requirements; but merely sending out notices and nothing more is insufficient when an owner needs to discover relevant information to support his burden of proof. Thus, Owner should have conducted a more diligent search for information to support the abandonment application by reaching out to the Mostel family, who would seem to be findable and contacting the Holbrooks who are former tenants and might have information about the building or that could lead to finding the other Tenants.

3. There Can Be No Finding of Abandonment

For the reasons explained below, there can be no finding of abandonment. The Owner failed to provide any information for units 4 and 5, to prove they were abandoned. There is, moreover, sufficient evidence to demonstrate that units 2 and 3 were not abandoned.

There is no information in the record about the exact length of the time since the Tenants allegedly abandoned their Units (factor 1). The record contains leases for the second, third and fourth floor units. The leases held by Mrs. McKearney, Mr. Falk and Ms. Clay were entered into in 1982, 1981, and 1980 respectively. According to a letter dated March 14, 1983, Mr. Mostel, who lived in the fifth floor unit, had no lease and no rental obligation to his father for the use of the unit. All of the leases had expired (factor 3). In September 1996, when the Owner acquired title of the Building, the Units were not residentially occupied. See, Choi Affidavit dated February 16, 2007.

Factor four of the abandonment rule involves the pivotal issue of the tenant's notice to the owner about her/his intent to vacate. The abandonment rule provides IMD owners the opportunity to deregulate a unit in the event that a tenant vacates without notice and deprives him of the opportunity to execute a sale of rights form and agreement. Where the owner receives notice, no abandonment can be found. If the owner had notice of the tenant's departure then it had an opportunity to execute an agreement to purchase the Article 7-C rights and simply failed to do so. An owner's decision not to purchase a tenant's Article 7-C rights and deregulate the unit at the time of the Tenant's departure can not be changed later by the filing of an abandonment application based on the departure of the same tenant. The Loft Board did not promulgate the abandonment rule for this purpose.

The evidence here shows that the tenants of the second and third floor units filed a Sales of Improvements Disclosure Form for both Units 2 and 3. While the evidence is silent as to whether the previous owner or a third party purchased the improvements to these units, it nevertheless demonstrates that these tenants provided the then-owner with the requisite notice of their intent to vacate the unit (factor 4). Having done so, we find that the tenants of the second and third floor units did not abandon their respective unit.

According to the record, the Board had not issued a harassment finding against the Owner or any previous owner of the Building (factor 6). However, the Owner admitted that minimum housing standards complaints were reported to the Loft Board in the 1980's (factor 7). See, Email from Eric Shimanoff to Judge Salzman on April 30, 2008. The Loft Board's staff inspected the Units on October 14, 2007 and found that the entire building was being used for commercial purposes (factor 9).

While the Owner proved that the Loft Board had not issued a harassment order against the previous owner, the Loft Board has held that this is simply inadequate for a finding of abandonment because the absence of a harassment order does not prove that the Tenants were not harassed into leaving their Units. Indeed, in *Matter of 117 Hester Realty LLC*, the Loft Board found that the departure of several protected tenants without an explanation to be "significantly unusual to raise a question whether the tenants departed voluntarily" even in the absence of a harassment order. See, *Matter of 117 Hester Realty LLC*, Loft Board Order No. 3139 (January 18, 2007). See also, *20 Beaver Street LLC*, Loft Board Order No. 3436 (May 15, 2008) ("the crux of the matter is the reason for Tenant's leaving the Unit"). Based upon this information, it is impossible to determine whether the Tenants left voluntarily pursuant to 29 RCNY § 2-10(f).

The record lacks any information for the fourth floor unit except to show that the Unit was leased to Maude Clay in 1980. Having failed to provide any other information, the Owner does not meet his burden of proving abandonment of the fourth floor unit. The current commercial use of the unit does not affect the analysis under the abandonment rule. The owner converted the unit back to commercial use without compliance with the procedure for such conversion of space covered by Article 7-C.

Similarly, fifth floor unit, there can be no finding of abandonment for the fifth floor unit. The only documentary evidence regarding this unit is two sentences in a letter dated March 10, 1983 to the Loft Board from the then-owner's counsel. The letter states that Mr. Mostel, the son of the owner, did not have a lease or a rental obligation. We find that this information is insufficient to support a finding of abandonment. Again, the current use of the unit is irrelevant to whether Mr. Mostel abandoned the unit.

Finally, Judge Salzman's reliance on *Matter of Sabbagh*, Loft Board Order No. 2333 (November 24, 1998) is misplaced. The evidence presented in *Sabbagh* provided more information than the evidence presented here. In *Sabbagh*, the record showed that the minimum housing violations were corrected by the owner and the tenant vacated in 1990. Here, as noted above, the Owner provided no information about the approximate departure of the Tenants and admitted that minimum housing standards complaints were reported to the Loft Board. Without more information about when and why the Tenants vacated and the nature of the violations, which is not part of the record here, there is no way to know whether the Tenants vacated due to the housing conditions reported to the Loft Board.

In some instances the Loft Board has ordered a remand where it believes further inquiry would clarify an outstanding factual issue. Here, however, there is no necessity to do so. Nevertheless, the Owner may wish to consider attempting to locate and contact Maude Clay, Kathleen McKearney, and the Estate of Gary Falk in order to ascertain if these Tenants sold their rights to the Units to the prior owner. It would not alter the fact that these Units were not abandoned, but these Tenants may have their sale of rights agreement or provide an affidavit about the sale of rights that occurred at the time of their departure. The proof of sale of rights, in what ever form, together with a Declaration of Intent, would permit the Owner to legally convert those Units to commercial use.

Accordingly, the Owner's abandonment application is denied.

DATED: March 18, 2010

Robert D. LiMandri
Chairperson

DATE LOFT BOARD MAILED:

AMENDED ORDER

NEW YORK CITY LOFT BOARD

In the Matter of the Application of

LEGEND CORP.

Loft Board Order No. 3563

Docket No. LB-0173

**RE: 42 West 28th Street
New York, New York**

IMD No. 10329

ORDER

The New York City Loft Board ("Loft Board") accepts in part and rejects in part the Report and Recommendation ("Report"), dated June 12, 2008, of Administrative Law Judge Joan R. Salzman.

BACKGROUND

On March 29, 2007, Legend Corp., the owner of the building ("Owner") located at 42 West 28th Street, New York, New York ("Building") filed an application seeking an abandonment finding for the interim multiple dwelling units on the second, third, fourth and fifth floors ("Units") in the Building. The Owner listed the affected parties as "unknown." In a letter dated March 30, 2007, the Loft Board's staff explained that it would not process the application because the application did not include the affected parties.

On June 15, 2007, after reviewing the Loft Board files, the Owner filed an amended application listing the last known occupants of all the Units at the Building's address. The Owner listed Kathleen McKearney, the former occupant of the second floor unit, Gary Falk, the former occupant of the third floor unit, Maude Schuyler (Clay), the former occupant of the fourth floor unit and Tobias Mostel, the former occupant of the fifth floor unit ("Tenants") as affected parties. A commercial tenant on the first floor was also listed. On June 22, 2007, the Loft Board served the application on the affected parties. The Loft Board did not receive any answers.

The amended application was transferred to the Office of Administrative Trials and Hearings, which assigned the matter to Judge Salzman for adjudication. In a letter dated October 26, 2007, Judge Salzman inquired about the Owner's efforts to locate the current addresses for the Tenants and requested an explanation as to why the application is not time-barred. In letters dated November 14, 2007 and December 18, 2007, the Owner's counsel explained that in addition to the search of the Loft Board records, subsequent to the filing of the amended application, he conducted several internet searches for each of the Tenants, the prior owner, the managing agent and the prior owner's attorneys. He also explained that he sent letters to various individuals and companies requesting any information they may have about the Tenants. As a result of the searches, the Owner's attorney found an additional nine people who may have been tenants in the Building.

On December 19, 2007, Judge Salzman referred the matter back to the Loft Board for the Owner to file a second amended application which included the newly discovered information about the Tenants and other individuals who may have been tenants in the Building.

On January 22, 2008, the Owner filed a second amended application listing fourteen affected parties. The nine additional parties were Alexander D. Webb and Susan O'Conner, who the record shows attempted to purchase the fixtures of unit 2 and 3; Anthony Campisi; Andrew Holbrooke and Viviane Holbrooke; Woon S. Hwang; Steven Kobrosky; Hyuk K. Kwon; Kyung S. Lee; Barbara J. Sirota and Miryona Suh, all from unknown units. The Loft Board served the application on all of the parties and, again, no answers were received. On March 12, 2008, the Loft Board's staff referred the application back to Judge Salzman. On May 8, 2008, the scheduled hearing date, no one appeared for the Tenants or the other affected parties. Judge Salzman heard counsel's explanation of his search for affected parties and then accepted the case on the papers submitted.

In her Report, Judge Salzman found that the application was timely and that the Owner proved by a preponderance of the evidence that the Units were abandoned. We disagree with Judge Salzman's analysis of the sufficiency of the evidence and find that the Units were not abandoned.

ANALYSIS

A. The Relevant Abandonment Rule

In her Report, Judge Salzman found that the applicable version of the abandonment rule was the rule in effect prior to the October 8, 2006 amendment. We agree.

In 2006, the Loft Board made changes to Title 29 of the Rules of the City of New York ("RCNY") § 2-10(f) (the abandonment rule) which became effective on October 8, 2006. The changes to sections 7 and the new paragraphs of (3) and (8) of the rule apply to abandonment applications filed more than six months after the effective date of the rule or April 8, 2007. The initial filing of the abandonment application was March 29, 2007. The initial filing was within the six-month grace period. Therefore, the prior abandonment rule applies. The filing of an amended application on June 15, 2007 does not change the applicable rule, but merely relates back to the original application.

We accept Judge Salzman's determination that the relevant abandonment rule was the rule in effect at the time of the initial filing.

B. The Abandonment Application

1. The Abandonment Rule

Pursuant to 29 RCNY § 2-10(f)(2), as in effect on March 29, 2007, abandonment is the voluntary relinquishment of possession of a unit and all rights relating to a unit with intention of never resuming possession or of reclaiming the rights surrendered.

Section 2-10(f)(3) lists nine factors the Loft Board may consider in deciding whether a unit has been abandoned:

- (10) the length of time since the occupant allegedly abandoned the unit;
- (11) whether the occupant owed rent as of the time the occupant allegedly abandoned the unit and whether court proceedings to attempt to collect this rent have been initiated;
- (12) whether the occupant's lease for the unit has expired;
- (13) whether the occupant provided notice of an intent to vacate or requested permission to sublet the unit for a specific period of time;
- (14) whether the unit contained improvements which were made or purchased by the occupant and whether the occupant was reimbursed for those improvements;
- (15) whether any prior harassment findings have been made by the Loft Board concerning the occupant(s) of the unit or whether any harassment application remains pending;
- (16) whether any violations or notices to appear pursuant to the Loft Board's Minimum Housing Maintenance Standards have been issued;
- (17) whether the owner has made affirmative efforts to locate the occupant to attempt to purchase rights pursuant to Multiple Dwelling Law § 286(12) or improvements pursuant to Multiple Dwelling Law § 286(6); and
- (18) whether an inspection of the unit by the Loft Board staff indicates that the unit is presently vacant.

Although 29 RCNY § 2-10(f)(2) defines an abandonment as the voluntary relinquishment of possession of a unit and all rights relating to a unit with intention of never resuming possession or of reclaiming the rights surrendered; this portion of the rule does not stand alone. Under 29 RCNY § 2-10(f)(3), the Loft Board considers nine factors in making a determination of abandonment. To consider the definition without the nine factors would mean that any time a tenant voluntarily moved from an IMD unit, such move would constitute an abandonment and would suffice to deregulate the unit. Such an interpretation of the abandonment rule would be inconsistent with § 286 of the Multiple Dwelling Law. While there is no requirement to consider evidence on all nine factors, definitive evidence must be provided on at least some of the factors. See, *Matter of 20 Beaver Street, LLC*, Loft Board Order No. 3436 (May 15, 2008).

One of the purposes of the abandonment rule is to ensure that an owner has the opportunity to deregulate the unit in the event that a tenant deprives him of the opportunity to execute a sale of rights form and agreement (factor 4). Evidence that a tenant gave notice to the building owner or left without owing rent arrears suggests the termination of one landlord/tenant relationship in a way that creates the opportunity for the seamless creation of another. Thus, where there is evidence that an owner receives notice, no abandonment can be found.

By contrast, a tenant who departs without notice to the owner or owing arrears may evidence the type of relinquishment captured by the abandonment concept. See, *Matter of 67 Vestry LLC*, Loft Board Order 3476 (November 20, 2008) (the Loft Board denied the abandonment application when tenant vacated the unit on notice to the owner, owed no rent to the owner and did not install any fixtures). Compare, *Matter of Sansone and Mandara*, Loft Board Order No 1955 (April 25, 1996) (Loft Board granted the abandonment application when the tenant left during negotiations to pay rent arrears without notice to the owner); *Matter of Twenty-Nine Second LLC*, Loft Board Order No. 2625 (April 24, 2001) (Loft Board granted the abandonment application when tenant owed rent to the owner, left without notice and the unit did not contain fixtures of value).

2. Burden of Proof and Due Diligence

The Loft Board has held that in an abandonment application, it is an owner's burden to prove by a preponderance of the evidence that the occupants abandoned the unit. *1314 Development, LLC*, Loft Board Order No. 3483 (January 15, 2009) (the Loft Board denied the abandonment application because the owner failed to meet its burden). The Loft Board has rejected abandonment claims where the owner has failed to meet this burden. See, *Matter of L & F Realty Corp.*, Loft Board Order No. 3478 (November 20, 2008) (the Loft Board denied the abandonment because the owner failed to provide sufficient evidence to support a finding of abandonment); *Matter of 117 Hester Realty LLC*, Loft Board Order No. 3139 (January 18, 2007) (the Loft Board denied the application because the owner failed to provide sufficient proof that the tenants vacated voluntarily).

According to the record here, Owner's counsel claims to have made a diligent search to find former owners and tenants of the Building. He states in both his affirmation dated January 18, 2008 and during the inquest, that he searched the Lexis-Nexis person locator database for the names of people connected with the Building's address and attempted to locate the prior owners through their prior attorneys. Yet, he says, his inquiry yielded only an address for Tobias Mostel from a prior attorney; and the Lexis-Nexis search yielded only the addresses for Mr. and Mrs. Holbrook, both of whom still reside in New York State, and nothing more. See, Affirmation of Eric J. Shimanoff, dated January 18, 2008 ("Affirmation"), ¶¶ 12-44, Transcript.

But, a review of the record belies a finding of due diligence. Exhibit 2, Exhibit C, of the Amended Application, which appears to be examples of the Lexis-Nexis ALLFIND search is completely irrelevant as it provides no proof of a search for any of the Tenants. Exhibit 2, Exhibit D, which contain searches of the person locator using the building address shows that Owner's counsel ran searches of the names of some of the people connected to the Building address, but no searches for the residential tenants Clay, Falk, or McKearney. Nor did he attempt to contact Arthur Rhine, attorney for Mr. Webb and Ms. O'Conner, the parties who attempted to purchase the fixtures for Units 2 and 3, and whose firm name and address is listed in the record. Further, his statement that he was unable to locate any other affected party or obtain relevant information is unconvincing given that at the very least a Google search should have revealed the whereabouts of Maude Schuyler Clay, a well-known artist.

Moreover, where, as here, the Owner alleges that the IMD occupants vacated prior to his purchase of the building, and claims a dearth of information; it is incumbent upon it to make a more concerted effort to contact previous owners and tenants to obtain relevant information concerning the circumstances surrounding the departure of the unit's occupants. It may be sufficient to send out notices to satisfy due process requirements; but merely sending out notices and nothing more is insufficient when an owner needs to discover relevant information to support his burden of proof. Thus, Owner should have conducted a more diligent search for information to support the abandonment application by reaching out to the Mostel family, who would seem to be findable and contacting the Holbrooks who are former tenants and might have information about the building or that could lead to finding the other Tenants.

3. There Can Be No Finding of Abandonment

For the reasons explained below, there can be no finding of abandonment. The Owner failed to provide any information for units 4 and 5, to prove they were abandoned. There is, moreover, sufficient evidence to demonstrate that units 2 and 3 were not abandoned.

There is no information in the record about the exact length of the time since the Tenants allegedly abandoned their Units (factor 1). The record contains leases for the second, third and fourth floor units. The leases held by Mrs. McKearney, Mr. Falk and Ms. Clay were entered into in 1982, 1981, and 1980 respectively. According to a letter dated March 14, 1983, Mr. Mostel, who lived in the fifth floor unit, had no lease and no rental obligation to his father for the use of the unit. All of the leases had expired (factor 3). In September 1996, when the Owner acquired title of the Building, the Units were not residentially occupied. See, Choi Affidavit dated February 16, 2007.

Factor four of the abandonment rule involves the pivotal issue of the tenant's notice to the owner about her/his intent to vacate. The abandonment rule provides IMD owners the opportunity to deregulate a unit in the event that a tenant vacates without notice and deprives him of the opportunity to execute a sale of rights form and agreement. Where the owner receives notice, no abandonment can be found. If the owner had notice of the tenant's departure then it had an opportunity to execute an agreement to purchase the Article 7-C rights and simply failed to do so. An owner's decision not to purchase a tenant's Article 7-C rights and deregulate the unit at the time of the Tenant's departure can not be changed later by the filing of an abandonment application based on the departure of the same tenant. The Loft Board did not promulgate the abandonment rule for this purpose.

The evidence here shows that the tenants of the second and third floor units filed a Sales of Improvements Disclosure Form for both Units 2 and 3. While the evidence is silent as to whether the previous owner or a third party purchased the improvements to these units, it nevertheless demonstrates that these tenants provided the then-owner with the requisite notice of their intent to vacate the unit (factor 4). Having done so, we find that the tenants of the second and third floor units did not abandon their respective unit.

According to the record, the Board had not issued a harassment finding against the Owner or any previous owner of the Building (factor 6). However, the Owner admitted that minimum housing standards complaints were reported to the Loft Board in the 1980's (factor 7). See, Email from Eric Shimanoff to Judge Salzman on April 30, 2008. The Loft Board's staff inspected the Units on October 14, 2007 and found that the entire building was being used for commercial purposes (factor 9).

While the Owner proved that the Loft Board had not issued a harassment order against the previous owner, the Loft Board has held that this is simply inadequate for a finding of abandonment because the absence of a harassment order does not prove that the Tenants were not harassed into leaving their Units. Indeed, in *Matter of 117 Hester Realty LLC*, the Loft Board found that the departure of several protected tenants without an explanation to be "significantly unusual to raise a question whether the tenants departed voluntarily" even in the absence of a harassment order. See, *Matter of 117 Hester Realty LLC*, Loft Board Order No. 3139 (January 18, 2007). See also, *20 Beaver Street LLC*, Loft Board Order No. 3436 (May 15, 2008) ("the crux of the matter is the reason for Tenant's leaving the Unit"). Based upon this information, it is impossible to determine whether the Tenants left voluntarily pursuant to 29 RCNY § 2-10(f).

The record lacks any information for the fourth floor unit except to show that the Unit was leased to Maude Clay in 1980. Having failed to provide any other information, the Owner does not meet his burden of proving abandonment of the fourth floor unit. The current commercial use of the unit does not affect the analysis under the abandonment rule. The owner converted the unit back to commercial use without compliance with the procedure for such conversion of space covered by Article 7-C.

Similarly, there can be no finding of abandonment for the fifth floor unit. The only documentary evidence regarding this unit is two sentences in a letter dated March 10, 1983 to the Loft Board from the then-owner's counsel. The letter states that Mr. Mostel, the son of the owner, did not have a lease or a rental obligation. We find that this information is insufficient to support a finding of abandonment. Again, the current use of the unit is irrelevant to whether Mr. Mostel abandoned the unit.

Finally, Judge Salzman's reliance on *Matter of Sabbagh*, Loft Board Order No. 2333 (November 24, 1998) is misplaced. The evidence presented in *Sabbagh* provided more information than the evidence presented here. In *Sabbagh*, the record showed that the minimum housing violations were corrected by the owner and the tenant vacated in 1990. Here, as noted above, the Owner provided no information about the approximate departure of the Tenants and admitted that minimum housing standards complaints were reported to the Loft Board. Without more information about when and why the Tenants vacated and the nature of the violations, which is not part of the record here, there is no way to know whether the Tenants vacated due to the housing conditions reported to the Loft Board.

In some instances the Loft Board has ordered a remand where it believes further inquiry would clarify an outstanding factual issue. Here, however, there is no necessity to do so. Nevertheless, the Owner may wish to consider attempting to locate and contact Maude Clay, Kathleen McKearney, and the Estate of Gary Falk in order to ascertain if these Tenants sold their rights to the Units to the prior owner. It would not alter the fact that these Units were not abandoned, but these Tenants may have their sale of rights agreement or provide an affidavit about the sale of rights that occurred at the time of their departure. The proof of sale of rights, in what ever form, together with a Declaration of Intent, would permit the Owner to legally convert those Units to commercial use.

Accordingly, the Owner's abandonment application is denied.

DATED: March 18, 2010

Robert D. LiMandri
Chairperson

DATE LOFT BOARD MAILED:

Members concurring: Barowitz, DeLaney, Chairperson LiMandri, Shelton (4)

Members Dissenting: Bolden-Rivera, Mayer (2)

Member Absent: Spadafora (1)

Case #2.	Aster Johnson	311 Church Street	LB-0174	MC/MC
----------	---------------	-------------------	---------	-------

PROPOSED ORDER

NEW YORK CITY LOFT BOARD

<p><i>In the Matter of the Application of</i></p> <p>ASTER JOHNSON</p>	<p>Loft Board Order No.</p> <p>Docket No. LB-0174</p> <p>RE: 311 Church Street New York, New York</p> <p>IMD No. 10659</p>
-------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------

ORDER

The New York City Loft Board (“Loft Board”) accepts the Report and Recommendation (“Report”) of Administrative Law Judge Kara J. Miller dated January 7, 2008.

BACKGROUND

On June 20, 2007, Aster Johnson of Manhattan Modern Management, the managing agent for the building located at 311 Church Street, New York, New York (“Building”), filed an application on behalf of the then-owner, 311 Church Street Associates (“Prior Owner”), seeking a finding that Peter Stroud (“Tenant”), the window period occupant abandoned the fifth floor unit (“Unit”) pursuant to Title 29 of the Rules of the City of New York (“29 RCNY”) § 2-10(f) of the Loft Board rules. The Loft Board did not receive any answers.

The Loft Board transferred the case to the Office of Administrative Trials and Hearings (“OATH”), which assigned the case to Administrative Law Judge Kara J. Miller for adjudication. In a letter dated November 1, 2007, Judge Miller provided the Owner with an opportunity to explain why the application was not time-barred under the amended abandonment rule. The Owner had until November 16, 2007 to file the explanation. In a letter dated November 15, 2007, the counsel for MVG Properties LLC (“New Owner”), the new owner of the Building, requested an extension of time to respond to Judge Miller’s letter and requested that the application be amended to reflect the New Owner. Judge Miller granted the extension request. In a letter dated November 30, 2007, the New Owner filed a response explaining that it bought the Building on September 7, 2007 and that as a new owner, it should not be held accountable for the Prior Owner’s failure to file the abandonment application prior to June 20, 2007.

On January 7, 2008, Judge Miller issued the Report recommending that the Loft Board dismiss the application because it is time-barred. See, Report at 5. Judge Miller found that the New Owner “steps into the shoes” of the Prior Owner and is imputed with the Prior Owner’s delay in filing the abandonment application. We agree.

ANALYSIS

Effective October 6, 2006, the Loft Board amended its abandonment rule in 29 RCNY § 2-10(f) to include, among other things, a statute of limitations for filing an abandonment application. The Loft Board established a new deadline for abandonment applications to prevent the loss of potential witnesses and evidence. See, Statement of Purpose dated September 1, 2006.

The statute of limitations contained in the new paragraph (3) states that:

[t]o be considered timely, an owner’s application alleging abandonment must be filed with the Loft Board within one year of the date of the owner knew or should have known that the IMD tenant vacated the unit.

Paragraph 9 of the rule states that the amendment in paragraph (3) applies only to those applications filed more than six months after the effective date of the amended rule. It gave IMD owners a six months grace period to file applications for units abandoned more than one year ago. The effective date of the amended rule was October 8, 2006. Therefore, the effective date of the statute of limitations for abandonment applications was April 8, 2007.

In the application, the Prior Owner alleged that Tenant abandoned the Unit "over 15 years ago." In correspondence dated November 30, 2007, the New Owner argued that Prior Owner did not know that the Tenant was the protected occupant of the Unit and that the application is not time-barred because it was filed within one year since it purchased the Building.

The Prior Owner's claim that it had no knowledge of Tenant's use of the Unit is unconvincing. The coverage order for the Building listed the Tenant as the occupant of the Unit during the window period. See, *Matter of Adams*, Loft Board Order No. 0037 (November 23, 1983). If the Prior Owner failed to do its due diligence when it purchased the Building, this failure is not a basis to set aside the statute of limitations imposed by the Loft Board rules.

We find that the Tenant vacated the Unit in 1983 and the Prior Owner missed the six month grace period provided to IMD owners to file abandonment applications under 29 RCNY § 2-10(f)(9). The purchase date for the New Owner is of no relevance. We agree with Judge Miller that the New Owner "steps into the shoes" of the Prior Owner.

Accordingly, the application is hereby dismissed because it is untimely.

DATED: March 18, 2010

Robert D. LiMandri
Chairperson

DATE LOFT BOARD ORDER MAILED:

AMENDED ORDER

NEW YORK CITY LOFT BOARD

<p><i>In the Matter of the Application of</i></p> <p>ASTER JOHNSON</p>	<p>Loft Board Order No. 3564</p> <p>Docket No. LB-0174</p> <p>RE: 311 Church Street New York, New York</p> <p>IMD No. 10659</p>
-------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------

ORDER

The New York City Loft Board ("Loft Board") accepts the Report and Recommendation ("Report") of Administrative Law Judge Kara J. Miller dated January 7, 2008.

BACKGROUND

On June 20, 2007, Aster Johnson of Manhattan Modern Management, the managing agent for the building located at 311 Church Street, New York, New York ("Building"), filed an application on behalf of the then-owner, 311 Church Street Associates ("Prior Owner"), seeking a finding that Peter Stroud ("Tenant"), the window period occupant, abandoned the fifth floor unit ("Unit") pursuant to Title 29 of the

Rules of the City of New York (“29 RCNY”) § 2-10(f) of the Loft Board rules. The Loft Board did not receive any answers.

The Loft Board transferred the case to the Office of Administrative Trials and Hearings (“OATH”), which assigned the case to Administrative Law Judge Kara J. Miller for adjudication. In a letter dated November 1, 2007, Judge Miller provided the Owner with an opportunity to explain why the application was not time-barred under the amended abandonment rule. The Owner had until November 16, 2007 to file the explanation. In a letter dated November 15, 2007, the counsel for MVG Properties LLC (“New Owner”), the new owner of the Building, requested an extension of time to respond to Judge Miller’s letter and requested that the application be amended to reflect the New Owner. Judge Miller granted the extension request. In a letter dated November 30, 2007, the New Owner filed a response explaining that it bought the Building on September 7, 2007 and that as a new owner, it should not be held accountable for the Prior Owner’s failure to file the abandonment application prior to June 20, 2007.

On January 7, 2008, Judge Miller issued the Report recommending that the Loft Board dismiss the application because it is time-barred. See, Report at 5. Judge Miller found that the New Owner “steps into the shoes” of the Prior Owner and is imputed with the Prior Owner’s delay in filing the abandonment application. We agree.

ANALYSIS

Effective October 6, 2006, the Loft Board amended its abandonment rule in 29 RCNY § 2-10(f) to include, among other things, a statute of limitations for filing an abandonment application. The Loft Board established a new deadline for abandonment applications to prevent the loss of potential witnesses and evidence. See, Statement of Purpose dated September 1, 2006.

The statute of limitations contained in the new paragraph (3) states that:

[t]o be considered timely, an owner’s application alleging abandonment must be filed with the Loft Board within one year of the date of the owner knew or should have known that the IMD tenant vacated the unit.

Paragraph 9 of the rule states that the amendment in paragraph (3) applies only to those applications filed more than six months after the effective date of the amended rule. It gave IMD owners a six months grace period to file applications for units abandoned more than one year ago. The effective date of the amended rule was October 8, 2006. Therefore, the effective date of the statute of limitations for abandonment applications was April 8, 2007.

In the application, the Prior Owner alleged that Tenant abandoned the Unit “over 15 years ago.” In correspondence dated November 30, 2007, the New Owner argued that Prior Owner did not know that the Tenant was the protected occupant of the Unit and that the application is not time-barred because it was filed within one year since it purchased the Building.

The Prior Owner’s claim that it had no knowledge of Tenant’s use of the Unit is unconvincing. The coverage order for the Building listed the Tenant as the occupant of the Unit during the window period. See, *Matter of Adams*, Loft Board Order No. 0037 (November 23, 1983). If the Prior Owner failed to do its due diligence when it purchased the Building, this failure is not a basis to set aside the statute of limitations imposed by the Loft Board rules.

We find that the Tenant vacated the Unit in 1983 and the Prior Owner missed the six month grace period provided to IMD owners to file abandonment applications under 29 RCNY § 2-10(f)(9). The purchase date for the New Owner is of no relevance. We agree with Judge Miller that the New Owner “steps into the shoes” of the Prior Owner.

Accordingly, the application is hereby dismissed because it is untimely.

DATED: March 18, 2010

Robert D. LiMandri
Chairperson

DATE LOFT BOARD ORDER MAILED:

Members concurring: Barowitz, Bolden-Rivera, DeLaney, Chairperson LiMandri, Mayer, Shelton (6)

Member Absent: Spadafora (1)

Case #3.	103 West 27 th Street Realty, Inc.	103 West 27 th Street	LB-0175	MC/MC
----------	-----------------------------------------------	----------------------------------	---------	-------

Motion: Ms. Bolden-Rivera moved to accept the proposed order. Mr. Mayer seconded the motion.

Members concurring: Barowitz, Bolden-Rivera, DeLaney, Chairperson LiMandri, Mayer, Shelton (6)

Member absent: Chief Spadafora (1)

Case #4.	46 West 22 nd Street LLC.	46 West 22 nd Street	LB-0176	MC/MC
----------	--------------------------------------	---------------------------------	---------	-------

Motion: Ms. Shelton moved to accept the proposed order. Mr. Mayer seconded the motion.

Members concurring: Barowitz, Bolden-Rivera, DeLaney, Chairperson LiMandri, Mayer, Shelton (6)

Member absent: Chief Spadafora (1)

Chairperson LiMandri concluded the March 18, 2010 Loft Board public meeting and thanked everyone for attending. He announced that the next public meeting will be held at Spector Hall, 22 Reade Street, on Thursday, April 15, 2010 at 2:00 p.m.

The meeting ended at 3:30 p.m.