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

**November 19, 2009**

The meeting began at 2:10 p.m. The attendees were Chairperson Robert LiMandri; Elliott Barowitz, Public Member; Gina Bolden-Rivera, Public Member; Elizabeth Lusskin, Public Member; LeAnn Shelton, Public Member; Elena Ferrera, Fire Department's Representative (filling in for Mr. Ronald Spadafora); Matthew Mayer, Owners' Representative and Chuck DeLaney, Tenants' Representative.

## CHAIRPERSON'S INTRODUCTION

**Chairperson LiMandri** introduced himself and welcomed those present to the November 19, 2009 public meeting of the New York City Loft Board.

**Chairperson LiMandri** also welcomed and introduced Ms. Juliet Neisser, the Associate General Counsel of the Department of Buildings; previously Legal Director of the NYC Environmental Control Board.

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## VOTE ON OCTOBER 15, 2009 MINUTES

**Mr. DeLaney** observed that the minutes have been condensed to meet the two week deadline to make them available to the public. **Mr. Delaney** suggested adding a certain amount of more detail on the minutes, especially on pertinent information such as corrections made in prior minutes or presentations, which are worth being memorialized, for the people reading the minutes. **Mr. DeLaney** further stated that it is mentioned in the October minutes that corrections were made in the September minutes without detailing what they were.

A Board discussion followed in which

- Staff explained that changes to the minutes are reflected in a CD which is available to the public if requested under the Freedom of Information Law (FOIL).

- **Mr. DeLaney** said that we should allow the public to follow the changes and corrections through documents rather than listening to an entire CD to see if there is any substance made to the minutes.

- **Chairperson LiMandri** suggested that correction of typos be reflected in the minutes by saying for example: "The corrections on page 4 were made by Ms. Shelton and were administrative and corrected accordingly." If it is something more substantive, we would elaborate on it.

- **Ms. Shelton** added that Mr. DeLaney's concern was that there would be no way of knowing which version was in the record. And how would the Board know that they were reading the correct version of the minutes.

- **Mr. LiMandri** responded that with the modern technology there are numerous ways to show the changes made to prior meeting and asked Ms. Alexander to report on how corrections are made and maintained and how a reader would know which version of the minutes had been made available pursuant to the Foil request.

**Motion:** Ms. Shelton moved to accept the October 15, 2009 minutes. Mr. DeLaney seconded the motion.

**Members concurring:** Barowitz, Bolden-Rivera, DeLaney, Ferrera, Chairperson LiMandri, Lusskin, Mayer, Shelton (8)

Adopted by the Loft Board on November 19, 2009.

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## REPORT OF THE EXECUTIVE DIRECTOR

**Ms. Alexander** reported the following:

- She met with the technical unit of the Department of Buildings and the Steering Committee of the Department of Buildings.

- To date, the Loft Board had collected a total amount $793,362.56 in registration, fines and late fees for the 2010 fiscal year.

- There are 27 buildings in the A category with a certificate of occupancy of which 21 buildings have a removal application (LE case) pending; 218 buildings in the B category in which 101 buildings have 7-B status; 57 Buildings in the C category and 5 buildings in the D category in which one is in litigation.

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## REPORT OF THE DIRECTOR OF HEARINGS

**Ms. Cruz reported as follows:**

- A chart comparing the buildings removed between 2005 and 2009 demonstrated that if the removal application on the November calendar were granted, the Board will have removed 29 buildings in 2009.

- Although the number of the buildings removed in 2006 is higher than the number of buildings removed in 2009, Ms. Cruz explained that there was a

significant backlog of removal cases in 2005. There were 103 A buildings pending in November 2005. Now there are only 26.

- In response to a request by the Board at the October meeting, **Ms. Cruz** explained the four major areas of the application process: the filing stage, the pre-OATH stage, the OATH processing and the post-hearing/post-settlement stage.

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## DISCUSSION AND VOTE ON CASES

## RECONSIDERATION CALENDAR

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|---|---|---|---|---|
| Case #1. | The Mapama Corporation | 545 Broadway | R-0329 | LA/LA |

## PROPOSED ORDER

**NEW YORK CITY LOFT BOARD**

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| ***In the Matter of the Application of*** | Loft Board Order No. |
| | Docket No. R-0329 |
| **THE MAPAMA CORPORATION, AS OWNER OF 545 BROADWAY, NEW YORK, NEW YORK** | RE: 545 Broadway<br>New York, New York |
| | IMD No. 10521 |
| | **Challenged Order No. 3502 (Docket No. TM-0066)** |

ORDER

The New York City Loft Board ("Loft Board") accepts the Report and Recommendation of Executive Director Lanny R. Alexander, dated November 5, 2009 ("Report").

This application, filed on May 28, 2009, by the Mapama Corporation, ("Owner") the owner of 545 Broadway, New York, New York ("Building"), seeks reconsideration of Loft Board Order No. 3502[1] ("Order"), which granted Mary Carol Newmann and Robert Newmann ("Tenants"), the occupants of the sixth floor rear unit 24-hour access to passenger and freight elevator service.

We find that Owner has failed to establish that the Loft Board committed an error of law in finding the Owner's restriction on Tenants' use of the elevator was not legally justified, and has failed to establish any denial of due process in connection with the Loft Board's finding.

[1] *Matter of Mary Carol Newmann and Robert Newmann*, Loft Bd. Order No. 3502 (April 23, 2009).

Accordingly, the application seeking reconsideration of LBO 3502 is denied for the reasons stated in the attached Report.

DATED: November 19, 2009

Robert D. LiMandri
Chairman

DATE LOFT BOARD ORDER MAILED:

**NEW YORK CITY LOFT BOARD**

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| ***In the Matter of the Application of*** | Loft Board Order No. |
| **THE MAPAMA CORPORATION, AS OWNER OF 545 BROADWAY, NEW YORK, NEW YORK** | Docket No. R-0329<br><br>RE: 545 Broadway<br>New York, New York<br><br>IMD No. 10521<br><br>**Challenged Order No. 3502 (Docket No. TM-0066)** |

**Lanny R. Alexander, Executive Director**

On May 28, 2009, the Mapama Corporation, ("Owner") the owner of 545 Broadway, New York, New York ("Building"), filed the instant application for reconsideration. The Loft Board docketed the application as R-0329. The Owner seeks reconsideration of Loft Board Order No. 3502[2] ("Order"), which accepted the findings of OATH Judge Zorgniotti "(Report") and granted Mary Carol Newmann and Robert Newmann ("Tenants"), the occupants of the sixth floor rear unit of the Building, 24-hour access to passenger and freight elevator service.

## I. Background

The Building has a substantial litigation history concerning the nature and extent of elevator service the Owner is required to provide. The relevant history is:

- A 1984 application filed with by the Loft Board to determine if the Owner was required to provide elevator service to Tenants. The Tenants sought access to the elevator which serviced the rear side of the Building, facing Mercer Street ("Mercer Street Elevator"). The Loft Board docketed this application as BM-0001.

[2] *Matter of Mary Carol Newmann and Robert Newmann*, Loft Bd. Order No. 3502 (April 23, 2009).

- In 1985, Jay and Deborah Nadelson, ("Nadelsons") filed a diminution of services application due to the lack of elevator service. The Loft Board docketed this application as TM-0003 and initially consolidated it with the Tenant's application (BM-0001), but in Loft Board order No. 686, the Loft Board severed the two applications.

- After a hearing and two Supreme Court actions between the Tenants, the Nadelsons and the Owner, the Loft Board issued Loft Board Order No. 769, dated June 16, 1988, in BM-0001. The Loft Board ordered that the Owner to provide "legal use of freight elevator from 8:00 am to 5:00 pm, Monday through Friday".

- The Owner and the Tenants both filed Article 78 petitions challenging Order No. 769. The Owner challenged the order to provide elevator service and the Tenants challenged the Board's decision to limit the Tenants' use of the elevator to business hours only. In a decision dated June 7, 1989, the Supreme Court remanded the case to the Loft Board for clarification of the meaning of "legal use of the freight elevator" in Order No. 769. The Supreme Court also advised the Loft Board that in the event that it construes the terms "rental agreement" and "mutual agreement" to include actual services provide on June 21, 1982, then the Board shall hold a hearing and take evidence on the actual use of the elevator as there is a factual dispute on that issue.

- In a letter dated July 31, 1992, the Tenants requested "a delay" in the remanded hearing. According to the letter, the Tenants had had unfettered access to the elevator for "the past twenty months." They believed that the service would continue and that a hearing would not be necessary because the elevator issue would be resolved in the Loft Board's narrative statement process. *See, Report* at 5-6.

On April 29, 2008, the Tenants filed an application seeking a finding of diminution of services based on the Owner's refusal to provided unfettered elevator service. The Tenants allege that they had unfettered access to the elevator for freight and passenger purposes from November 1976 to July 1981 and from 1989 through May 2007. The Tenants argued that the Owner's current schedule of elevator service - Monday through Friday from 8:00am to 5:00pm - constitutes a diminution of services. *See*, Application.

On April 23, 2009, the Loft Board issued Loft Board Order No. 3502, accepting Judge Zorgniotti's findings and recommendation and granting Tenants' application for a finding of diminution of services. The Loft Board directed the Owner to provide immediate access to, and use of, the elevator to the Tenants and if necessary to file amended legalization plans reflecting such elevator service.

## II. Introduction

Under the Loft Board's Rules, 29 Rules of the City of New York ("RCNY") § 1-07(a), there are four circumstances under which an application for reconsideration may be granted:

1. Allegations of denial of due process or material fraud in the prior proceedings;
2. An error of law;
3. An erroneous determination based on a ground that was not argued by the parties at the time of the prior proceedings and that the parties could not have reasonably anticipated would be the basis for a determination; and
4. Discovery of probative, relevant evidence which could not have been discovered at the time of the hearing despite the exercise of due diligence.

The Owner's reconsideration application contains three main arguments some of which it repeats in slightly different forms in the various subheadings. Specifically, Owner argues that the Order constitutes a denial of due process and errors of law because: 1) the Loft Board misapplied 29 RCNY § 2-04 (c); 2) Loft Board Order 769 is binding; and 3) the Loft Board relied upon Administrative Law Judge Zorgniotti's report, which contained numerous factual errors. To the extent that the Owner claims that Administrative Law Judge Zorgniotti's report contained numerous factual errors, such the weighing of evidence and assessing credibility is under the purview of the OATH judge and it is not one of the circumstances to be considered under 29 RCNY§ 1-07(a). Therefore, I decline to review those findings here.

## III. Analysis

### A. Diminution of Services under 29 RCNY § 2-04 (c)

There are two Loft Board regulations that govern the provision of elevator service. The first, Title 29 of the Rules of the City of New York ("RCNY") § 2-04(b)(9) provides that, "(t)he landlord shall not diminish nor permit the diminution of legal freight or passenger elevator service and shall cause said service to be maintained in good working order." Unlike other basic services described in § 2-04(b), like heat and water, elevator service is not considered a minimum housing service if the building did not have an elevator, or where the elevator is not legal. Because, as the Owner points out, the Building's elevator is not "legal," the Loft Board did not apply this section of its rules in Order No. 3502.

Rather, the Loft Board relied upon 29 RCNY § 2-04(c), which applies to questions of whether the Owner must continue to provide a service specified in a lease or rental agreement, or offered and received by mutual agreement. Under this section, an owner of an Interim Multiple Dwelling ("IMD"):

> " … shall maintain and shall continue to provide those services to residential occupants specified in the lease or rental agreement. … There shall be no diminution of services. Nothing contained in these rules allows the reduction in the prior services supplied by mutual agreement where those services exceed the services mandated by § 2-04(b). …"

Simply put, according § 2-04(c), an owner may not reduce those services to residential occupants which are specified in a prior lease/rental agreement or reduce those services (including in this instant elevator service) that were supplied by mutual agreement where those services exceed those mandated in § 2-04(b). Thus, in the lease, the Owner contracted to provide elevator service only during specified hours. Moreover, the evidence shows that the Owner actually provided 24-hour access to the elevator for both freight and passenger purposes between 1990 and 2007. Therefore, any time restriction on elevator use is a diminution of services. *See, In the Matter of Nadelson*, Loft Board Order No. 686

(November 5, 1987) (the Loft Board imposed a time restriction because the lease did not require the service and the Nadelsons did not prove that they had access to freight elevator during non-business hours); *In the Matter of 25 Jay Street Tenants Ass'n*, Loft Board Order No. 3418 (March 20, 2008) (Loft Board ordered 24 hour passenger and freight elevator service for the tenants upon a showing that the owner provided these services after lease had expired).

In addition, the evidence adduced at the hearing showed that between 1990 and 2007 the Tenants and their guests had unfettered access to the elevator on the Mercer side of the Building. Specifically, the documentary evidence, which included letters to the Loft Board, dated July 31, 1992, and to the Owner, dated January 30, 1993, confirmed the Tenants' unfettered access to the elevator. The Owner's letter, dated December 20, 2004, shows that the Owner knew about the Tenants' use of the elevator outside of business hours and it did nothing to curtail such use until May 2007. The reasons given in the Tenants' request to delay the hearing for the Loft Board-initiated diminution of services case - BM-0001 supports their claim that they had unfettered access to the elevator. Based upon the plain language of § 2-04(c), the Loft Board correctly found the last lease in effect for the Unit required that the Owner to provide elevator service.

Owner erroneously argues that the Loft Board improperly ordered Tenants be given unfettered use of the elevator because the elevator is not "legal." While § 2-04 (b)(9) provides that, the landlord shall not diminish nor permit the diminution of legal freight or passenger elevator service and shall cause said service to be maintained in good working order, § 2-04(c) does not. But because the Loft Board did not rely on § 2-04 (b)(9), the issue of whether the elevator service was legal is not a determining factor.

Rather, the Loft Board relied upon § 2-04(c), which mandates that owners continue to provide those services to residential occupants specified in the lease or rental agreement or by mutual agreement, and which does not require that the use be legal. Owner has an obligation under the Loft Law to "legalize" the residential use of the IMD units in the Building by obtaining a residential certificate of occupancy. This includes bringing the elevator up to the various New York City codes. However, it does not limit Owner's responsibility to provide use of the elevator until such time as it meets the codes.

The Loft Board did not err in relying on the plain language of § 2-04(c), in finding that the Tenants and their guests are entitled to 24-hour access to passenger and freight elevator service.

**B. Loft Board Order 769 is Not Binding Precedent**

Loft Board Order No. 769, which required the Owner to provide elevator service from 8:00 am to 5:00 pm, is not binding precedent for this application. The Tenants appealed Order No. 769, and the Supreme Court remanded the case to the Loft Board for clarification and, instructed that if the Loft Board construed the terms, "rental agreement" or mutual agreement" to include actual services provided after the expiration of the lease regardless of whether such services were provided on June 21, 1982, it was to hold a hearing and take evidence on the actual use of the elevator as there was a factual dispute on that issue.

The Loft Board never issued a final order in the case. Based on the Tenants' letter dated July 31, 1992, the Loft Board apparently deemed the application moot because, according to

the Tenants, the Owner was already providing them unfettered elevator service. The current application is an entirely new application. And, because the Loft Board construes § 2-04(c) to included actual services provided after the expiration of the lease, a hearing was held and evidence presented as to the actual use of the elevator. For the reasons stated by Judge Zorgniotti, the Owner's defenses of estoppel, res judicata and collateral estoppel are equally unavailing. For the same reasons the Owner has not established any denial of due process.

Accordingly, the Loft Board grants the Tenants' application for a finding of diminution of services. The Loft Board directs the Owner to provide immediate access to, and use of, the elevator to the Tenants and their guests and if necessary, to file amended legalization plans reflecting such elevator service within 90 days of the mailing of this Order.

**Conclusion**

For the foregoing reasons, I recommend that the instant application docketed as R-0327, challenging the May 1, 2009 Loft Board Order No. 3502, be denied.

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Lanny R. Alexander
Executive Director

Dated: New York, New York
November 5, 2009

# AMENDED ORDER

**NEW YORK CITY LOFT BOARD**

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| ***In the Matter of the Application of*** | Loft Board Order No. 3537 |
| | Docket No. R-0329 |
| **THE MAPAMA CORPORATION, AS OWNER OF 545 BROADWAY, NEW YORK, NEW YORK** | RE: 545 Broadway<br>New York, New York |
| | IMD No. 10521 |
| | **Challenged Order No. 3502 (Docket No. TM-0066)** |

ORDER

The New York City Loft Board ("Loft Board") accepts the Report and Recommendation of Executive Director Lanny R. Alexander, dated November 5, 2009 ("Report").

This application, filed on May 28, 2009, by the Mapama Corporation, ("Owner") the owner of 545 Broadway, New York, New York ("Building"), seeks reconsideration of Loft Board Order No. 3502[3] ("Order"), which granted Mary Carol Newmann and Robert Newmann ("Tenants"), the occupants of the sixth floor rear unit 24-hour access to passenger and freight elevator service.

We find that Owner has failed to establish that the Loft Board committed an error of law in finding the Owner's restriction on Tenants' use of the elevator was not legally justified, and has failed to establish any denial of due process in connection with the Loft Board's finding.

Accordingly, the application seeking reconsideration of LBO 3502 is denied for the reasons stated in the attached Report.

DATED: November 19, 2009

Robert D. LiMandri
Chairman

DATE LOFT BOARD ORDER MAILED:

[3] *Matter of Mary Carol Newmann and Robert Newmann*, Loft Bd. Order No. 3502 (April 23, 2009).

**NEW YORK CITY LOFT BOARD**

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| ***In the Matter of the Application of*** | REPORT AND RECOMMENDATION |
| **THE MAPAMA CORPORATION, AS OWNER OF 545 BROADWAY, NEW YORK, NEW YORK** | Docket No. R-0329<br><br>RE: 545 Broadway<br>New York, New York<br><br>IMD No. 10521<br><br>**Challenged Order No. 3502 (Docket No. TM-0066)** |

**Lanny R. Alexander, Executive Director**

On May 28, 2009, the Mapama Corporation, ("Owner") the owner of 545 Broadway, New York, New York ("Building"), filed the instant application for reconsideration. The Loft Board docketed the application as R-0329. The Owner seeks reconsideration of Loft Board Order No. 3502[4] ("Order"), which accepted the findings of OATH Judge Zorgniotti "(Report") and granted Mary Carol Newmann and Robert Newmann ("Tenants"), the occupants of the sixth floor rear unit of the Building, 24-hour access to passenger and freight elevator service.

## I. Background

The Building has a substantial litigation history concerning the nature and extent of elevator service the Owner is required to provide. The relevant history is:

- A 1984 application filed with by the Loft Board to determine if the Owner was required to provide elevator service to Tenants. The Tenants sought access to the elevator which serviced the rear side of the Building, facing Mercer Street ("Mercer Street Elevator"). The Loft Board docketed this application as BM-0001.

- In 1985, Jay and Deborah Nadelson, ("Nadelsons") filed a diminution of services application due to the lack of elevator service. The Loft Board docketed this application as TM-0003 and initially consolidated it with the Tenant's application (BM-0001), but in Loft Board order No. 686, the Loft Board severed the two applications.

- After a hearing and two Supreme Court actions between the Tenants, the Nadelsons and the Owner, the Loft Board issued Loft Board Order No. 769, dated June 16, 1988, in BM-0001. The Loft Board ordered that the Owner to provide "legal use of freight elevator from 8:00 am to 5:00 pm, Monday through Friday".

[4] *Matter of Mary Carol Newmann and Robert Newmann*, Loft Bd. Order No. 3502 (April 23, 2009).

- The Owner and the Tenants both filed Article 78 petitions challenging Order No. 769. The Owner challenged the order to provide elevator service and the Tenants challenged the Board's decision to limit the Tenants' use of the elevator to business hours only. In a decision dated June 7, 1989, the Supreme Court remanded the case to the Loft Board for clarification of the meaning of "legal use of the freight elevator" in Order No. 769. The Supreme Court also advised the Loft Board that in the event that it construes the terms "rental agreement" and "mutual agreement" to include actual services provide on June 21, 1982, then the Board shall hold a hearing and take evidence on the actual use of the elevator as there is a factual dispute on that issue.

- In a letter dated July 31, 1992, the Tenants requested "a delay" in the remanded hearing. According to the letter, the Tenants had had unfettered access to the elevator for "the past twenty months." They believed that the service would continue and that a hearing would not be necessary because the elevator issue would be resolved in the Loft Board's narrative statement process. *See, Report* at 5-6.

On April 29, 2008, the Tenants filed an application seeking a finding of diminution of services based on the Owner's refusal to provided unfettered elevator service. The Tenants allege that they had unfettered access to the elevator for freight and passenger purposes from November 1976 to July 1981 and from 1989 through May 2007. The Tenants argued that the Owner's current schedule of elevator service - Monday through Friday from 8:00am to 5:00pm - constitutes a diminution of services. *See*, Application.

On April 23, 2009, the Loft Board issued Loft Board Order No. 3502, accepting Judge Zorgniotti's findings and recommendation and granting Tenants' application for a finding of diminution of services. The Loft Board directed the Owner to provide immediate access to, and use of, the elevator to the Tenants and if necessary to file amended legalization plans reflecting such elevator service.

## II. Introduction

Under the Loft Board's Rules, 29 Rules of the City of New York ("RCNY") § 1-07(a), there are four circumstances under which an application for reconsideration may be granted:

5. Allegations of denial of due process or material fraud in the prior proceedings;
6. An error of law;
7. An erroneous determination based on a ground that was not argued by the parties at the time of the prior proceedings and that the parties could not have reasonably anticipated would be the basis for a determination; and
8. Discovery of probative, relevant evidence which could not have been discovered at the time of the hearing despite the exercise of due diligence.

The Owner's reconsideration application contains three main arguments some of which it repeats in slightly different forms in the various subheadings. Specifically, Owner argues that the Order constitutes a denial of due process and errors of law because: 1) the Loft Board misapplied 29 RCNY § 2-04 (c); 2) Loft Board Order 769 is binding; and 3) the Loft Board

relied upon Administrative Law Judge Zorgniotti's report, which contained numerous factual errors. To the extent that the Owner claims that Administrative Law Judge Zorgniotti's report contained numerous factual errors, such weighing of evidence and assessing credibility is under the purview of the OATH judge and it is not one of the circumstances to be considered under 29 RCNY§ 1-07(a). Therefore, I decline to review those findings here.

## III. Analysis

### A. Diminution of Services under 29 RCNY § 2-04 (c)

There are two Loft Board regulations that govern the provision of elevator service. The first, Title 29 of the Rules of the City of New York ("RCNY") § 2-04(b)(9) provides that, "(t)he landlord shall not diminish nor permit the diminution of legal freight or passenger elevator service and shall cause said service to be maintained in good working order." Unlike other basic services described in § 2-04(b), like heat and water, elevator service is not considered a minimum housing service if the building did not have an elevator, or where the elevator is not legal. Because, as the Owner points out, the Building's elevator is not "legal," the Loft Board did not apply this section of its rules in Order No. 3502.

Rather, the Loft Board relied upon 29 RCNY § 2-04(c), which applies to questions of whether the Owner must continue to provide a service specified in a lease or rental agreement, or offered and received by mutual agreement. Under this section, an owner of an Interim Multiple Dwelling ("IMD"):

> " … shall maintain and shall continue to provide those services to residential occupants specified in the lease or rental agreement. … There shall be no diminution of services. Nothing contained in these rules allows the reduction in the prior services supplied by mutual agreement where those services exceed the services mandated by § 2-04(b). …"

Simply put, according to § 2-04(c), an owner may not reduce those services to residential occupants which are specified in a prior lease/rental agreement or reduce those services (including in this instant elevator service) that were supplied by mutual agreement where those services exceed those mandated in § 2-04(b). Thus, in the lease, the Owner contracted to provide elevator service only during specified hours. Moreover, the evidence shows that the Owner actually provided 24-hour access to the elevator for both freight and passenger purposes between 1990 and 2007. Therefore, any time restriction on elevator use is a diminution of services. *See, In the Matter of Nadelson*, Loft Board Order No. 686 (November 5, 1987) (the Loft Board imposed a time restriction because the lease did not require the service and the Nadelsons did not prove that they had access to freight elevator during non-business hours); *In the Matter of 25 Jay Street Tenants Ass'n*, Loft Board Order No. 3418 (March 20, 2008) (Loft Board ordered 24 hour passenger and freight elevator service for the tenants upon a showing that the owner provided these services after lease had expired).

In addition, the evidence adduced at the hearing showed that between 1990 and 2007 the Tenants and their guests had unfettered access to the elevator on the Mercer side of the Building. Specifically, the documentary evidence, which included letters to the Loft Board, dated July 31, 1992, and to the Owner, dated January 30, 1993, confirmed the Tenants'

unfettered access to the elevator. The Owner's letter, dated December 20, 2004, shows that the Owner knew about the Tenants' use of the elevator outside of business hours and it did nothing to curtail such use until May 2007. The reasons given in the Tenants' request to delay the hearing for the Loft Board-initiated diminution of services case - BM-0001 supports their claim that they had unfettered access to the elevator. Based upon the plain language of § 2-04(c), the Loft Board correctly found the last lease in effect for the Unit required that the Owner to provide elevator service.

Owner erroneously argues that the Loft Board improperly ordered Tenants be given unfettered use of the elevator because the elevator is not "legal." While § 2-04 (b)(9) provides that, the landlord shall not diminish nor permit the diminution of legal freight or passenger elevator service and shall cause said service to be maintained in good working order, § 2-04(c) does not. But because the Loft Board did not rely on § 2-04 (b)(9), the issue of whether the elevator service was legal is not a determining factor.

Rather, the Loft Board relied upon § 2-04(c), which mandates that owners continue to provide those services to residential occupants specified in the lease or rental agreement or by mutual agreement, and which does not require that the use be legal. Owner has an obligation under the Loft Law to "legalize" the residential use of the IMD units in the Building by obtaining a residential certificate of occupancy. This includes bringing the elevator up to the various New York City codes. However, it does not limit Owner's responsibility to provide use of the elevator until such time as it meets the codes.

The Loft Board did not err in relying on the plain language of § 2-04(c), in finding that the Tenants and their guests are entitled to 24-hour access to passenger and freight elevator service.

**B. Loft Board Order 769 is Not Binding Precedent**

Loft Board Order No. 769, which required the Owner to provide elevator service from 8:00 am to 5:00 pm, is not binding precedent for this application. The Tenants appealed Order No. 769, and the Supreme Court remanded the case to the Loft Board for clarification and, instructed that if the Loft Board construed the terms, "rental agreement" or mutual agreement" to include actual services provided after the expiration of the lease regardless of whether such services were provided on June 21, 1982, it was to hold a hearing and take evidence on the actual use of the elevator as there was a factual dispute on that issue.

The Loft Board never issued a final order in the case. Based on the Tenants' letter dated July 31, 1992, the Loft Board apparently deemed the application moot because, according to the Tenants, the Owner was already providing them unfettered elevator service. The current application is an entirely new application. And, because the Loft Board construes § 2-04(c) to included actual services provided after the expiration of the lease, a hearing was held and evidence presented as to the actual use of the elevator. For the reasons stated by Judge Zorgniotti, the Owner's defenses of estoppel, res judicata and collateral estoppel are equally unavailing. For the same reasons the Owner has not established any denial of due process.

**Conclusion**

For the foregoing reasons, I recommend that the instant application docketed as R-0327, challenging the May 1, 2009 Loft Board Order No. 3502, be denied and clarify Loft

Board Order No. 3502 to explain that "unfettered access" includes access for Tenants and their guests.

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Lanny R. Alexander
Executive Director

Dated: New York, New York
November 5, 2009

**Motion:** Mr. DeLaney moved to approve the proposed order as amended. Mr. Mayer seconded the motion.

**Members concurring:** Barowitz, Bolden-Rivera, DeLaney, Ferrera, Chairperson LiMandri, Lusskin, Mayer, Shelton (8)

The following cases were voted on as a group.

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| Case #2. | Biggs Management Company, Inc. | 112 Stanton Street | FO-0615 | LA/LA |
| Case #3. | Arabara, LLC | 29 West 26th Street | FO-0616 | LA/LA |
| Case #4. | Greeting Card Publishers, Inc. | 195-197 Chrystie Street | FO -0617 | LA/LA |
| Case #5. | Board of Managers 41 North Moore Street Condominium | 41 North Moore Street | FO-0622 | LA/LA |
| Case #6. | Peter F. Matera | 187 Duane Street | FO-0623 | LA/LA |
| Case #7. | 35 West 36th Street Realty, LLC | 35 West 26th Street | FO-0629 | LA/LA |

**Motion:** Ms. Shelton moved to approve the proposed orders. Mr. Barowitz seconded the motion.

**Members concurring:** Barowitz, Bolden-Rivera, DeLaney, Ferrera, Chairperson LiMandri, Lusskin, Mayer, Shelton (8)

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| Case #8. | West Gramercy Associates, LLC | 54 West 22nd Street | LT-0009 | MC/MC |

**Motion:** Mr. DeLaney moved to approve the proposed order. Ms. Lusskin seconded the motion.

**Members concurring:** Barowitz, Bolden-Rivera, DeLaney, Ferrera, Chairperson LiMandri, Lusskin, Mayer, Shelton (8)

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| Case #9. | 33 Pas Co O Tenants Group | 333 Park Avenue South | TR-0769 | MC/MC |

The case was tabled

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|---|---|---|---|---|
| Case #10. | L & F Realty Corporation | 84 Broadway Brooklyn | LE-0475 | MC/MC |

**Motion:** Ms. Shelton moved to approve the proposed order. Mr. Barowitz seconded the motion.

**Members concurring:** Barowitz, Bolden-Rivera, DeLaney, Ferrera, Chairperson LiMandri, Lusskin, Mayer, Shelton (8)

**Chairperson LiMandri** concluded the November 19, 2009 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, January 21, 2010 at 2:00 p.m.

The meeting ended at 3:30 p.m.