

December 20, 2013

LOFT LAW OCCASIONAL NOTE

FREIGHT ELEVATORS IN LOFT BUILDINGS

This article focuses on an unexpected difficulty encountered by owners of small loft buildings who are attempting to legalize these buildings pursuant to the 2008 Building Code and the Loft Law. Most of these smaller loft buildings (four stories or less) have a freight elevator and no passenger elevators. If the freight elevator was operable on June 21, 2010 and the tenants had use of that elevator pursuant with the owner's permission or pursuant to a lease, the Loft Board's Regulations require the service to be maintained: "The landlord must not diminish nor permit the diminution of legal freight or passenger elevator service."

These buildings are being legalized pursuant to the 2008 Building Code (unless the owner had and maintained a permit under the prior code). Recently for safety reasons, the New York City Department of Buildings has issued construction code determinations that, pursuant to the 2008 Code, these elevators can no longer remain as freight elevators stating:

However, in reviewing the application for construction document approval for [legalization] that will "catch up" this building with the applicable provisions of the Building Code, the Department will not authorize a freight-only elevator that serves [residential] occupancies (unless there is also an elevator that meets all the safety requirements for passenger elevator...). As such the applicant may make one of two elections:

- (a) Remove and permanently seal (or repurpose) the freight elevator such that there is no elevator in the building – but only if the Loft Board approves such removal upon a review of

- existing services afforded to the IMD tenants in accordance with the Loft Board rules; or
- (b) Upgrade the existing freight elevator to comply with the passenger elevator standards...

The question at the Loft Board is whether a landlord is required to provide an enhanced service – i.e., a passenger elevator – since the freight elevator service which has been provided is no longer legally permitted. Without having digested all of the case law on the issue, there is one case from the early 1990s which determined that an owner could not be required to upgrade a freight elevator to a passenger elevator in legalization where the elevator was a **legal** freight elevator. The freight elevator was required to remain as such. While the context is somewhat different, there is a logic to the idea that, while an owner may not diminish services, neither may he be required to provide a different enhanced service.

If an owner simply disables the freight elevator, the tenants will likely claim that the owner has diminished services provided to the tenants, notwithstanding that it is a service the owner can no longer legally provide. A finding of diminution of services by the Loft Board can result in daily fines (on the first violation a fine of \$750 to \$1000 plus \$125 per day while the violation continues).

The safe approach to determining whether the owner can discontinue freight elevator service requires the owner to amend the legalization plans and to give the tenants notice of that intention by way of an amended narrative statement (a Loft Board term of art).

This will likely result in the tenants filing alternate plans and/or an undue interference application with the Loft Board. Pending resolution of the plans and/or the tenants' application, the freight elevator should remain in service so the landlord runs no risk of a diminution of services claim.

If the owner is allowed to disable the freight elevator, that cost may be passed to the tenants as part of the legalization costs for the building. If the owner decides to convert the freight elevator to a passenger elevator in legalizing the building, some of those costs may be passed to the tenants by way of a Loft Board formula that divides the allowable portion of the cost of the elevator upgrade among the building's tenants over a ten-year period (much like a temporary MCI increase).

On the other hand, if the landlord is permitted to dismantle the freight elevator and is not required to upgrade, once the building has a proper Certificate of Occupancy and transfers out of Loft Board coverage and into rent stabilization, the landlord has the option of installing a passenger elevator and applying for MCI increases (which are permanent) for those costs.

As shown, there are a number of issues to be considered when a loft building owner is told that he can no longer have a freight elevator, which issues only increase if there are remaining commercial tenants in a building who require a freight elevator. The first judicial or administrative resolution of what is required in discontinuing freight elevator service will educate everyone concerning what happens when a required service ceases to be legal.

For more information, please contact David Brody, dbrody@borahgoldstein.com, (212) 965-2662.

This is the second in what will be a number of occasional writings/musings for owners of loft buildings and those who are involved with their management and conversion. If you would like to receive these messages electronically, please send an email to Christine Eschenauer, Marketing Specialist, ceschenauer@borahgoldstein.com

This message has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice.