

470 Manhattan Ave. LLC v Balsam
2020 NY Slip Op 33863(U)
November 23, 2020
Supreme Court, New York County
Docket Number: 156349/2019
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MELISSA ANNE CRANE PART IAS MOTION 15EFM

Justice

-----X

470 MANHATTAN AVE. LLC

Plaintiff,

- v -

BALSAM, HELAINE

Defendant.

-----X

INDEX NO. 156349/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 32, 48, 49, 50, 51, 52, 53, 54, 56

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

These Article 78 petitions (Index Nos. 156349/2019 and 160119/2019) are consolidated for disposition, and are disposed of in accordance with the following decision and judgment.

The two related petitions challenge the respondents' actions regarding the use and classification of a building petitioner owns under the Loft Law (Multiple Dwelling Law [MDL], article 7-C). One application (Index No. 156349/2019) seeks an order in the nature of mandamus, compelling respondents Helaine Balsam, as Executive Director and General Counsel of the New York City Loft Board (Loft Board), and the Loft Board, to send petitioner's decoverage application to the Loft Board for a final order. The other petition (Index No. 160119/2019) challenges a September 19, 2019 Loft Board determination, denying petitioner's appeal of the Board's decision to hold petitioner's decoverage application temporarily in abeyance. Petitioner contends that its building

must be removed from Loft Law coverage (Article 7C of the New York Multiple Dwelling Law), because it is a combustible wood-frame structure and as such is statutorily ineligible for residential use or coverage.

Petitioner 470 Manhattan Ave, LLC is the owner of a three-story interim multiple dwelling (IMD) located at 18-22 Eckford Street, Brooklyn, New York (the Building), which it registered in May 2016 as an eight unit IMD (Index 156349/2019, NYSCEF Doc. No. 33, answer, ¶ 56). In October 2016, petitioner amended its registration to include an additional unit, for a total of nine units. The Building has a Certificate of Occupancy dated September 24, 1953 for use as a “factory” from the cellar to the third floor (*id.*).

On January 26, 2017, petitioner filed an alteration type 1 permit application (ALT-1 permit application) with the New York City Department of Buildings (DOB) to convert the first through third floors of the Building into residential use under the Loft Law (*id.*, ¶ 57). In August 2017, petitioner filed a narrative statement with the respondent Loft Board, pursuant to Title 29 of the Rules of the City of New York (29 RCNY) § 2-01(d) (*id.*). The narrative statement process provides IMD tenants/occupants with an opportunity to review and comment on the owner’s construction plan for converting the building to legal residential use (see Index No. 156349/2019, NYSCEF Doc. No. 47, respondents’ memo of law, at 3 & n1). Petitioner also filed plans in July/August 2017 indicating that the construction classification of the Building was Class 4, frame construction (Index No. 160119/2019, NYSCEF Doc. No. 43, tenants’ joint answer at 1).

The Loft Board held several conferences with petitioner and the tenants of the Building, and the construction classification was never discussed at these conferences (Index No. 160119/2019, NYSCEF Doc. No. 31, answer, ¶ 92).

At the same time, petitioner was engaging in the plan examination process with the DOB for its ALT-1 permit application (Index No. 156349/2019, NYSCEF Doc. No. 33, answer, ¶ 59). In January 2018, petitioner filed plan/work applications with the DOB, stating in one application, a construction classification of Class 4, frame construction, and in another, a classification of Class 6, heavy timber (*id.*, answer, ¶ 60). On February 22, 2018, a DOB plan examiner issued an objection to petitioner's plan to convert the Building to residential, noting that a wood-frame building, like the subject Building, cannot be erected or converted to contain more than three residential units (*id.* and attached exhibit C, NYSCEF Doc. No. 36). On April 11, 2019, the DOB disapproved petitioner's ALT-1 permit application, because the September 24, 1953 Certificate of Occupancy states that the Building is a Class 4, Wood Frame building under the 1938 Building Code, and thus, it is legally ineligible for residential use and conversion under New York Building Code § 26-254 and Multiple Dwelling Law (MDL) §§ 56 (1), 193, and 277(a)(1) (Index No. 160119/2019, NYSCEF Doc. No. 1, petition, ¶ 18; see NYSCEF Doc. No. 5 at 2-4).

On May 8, 2019, petitioner filed a decoverage application with respondent Loft Board, seeking to have the Building removed from Loft Law coverage based on the DOB's disapproval of petitioner's ALT-1 permit application (Index No. 160119/2019,

NYSCEF Doc. No. 1, petition, ¶ 17). Petitioner contends that DOB's determination that the wood-frame building construction makes the Building ineligible for Loft Law coverage, supports its decoverage application, as well as the fact that such construction presents a fire-safety hazard for more than three tenants (*id.*, petition, ¶ 19). Respondent Loft Board received the decoverage application, assigning it an application docket number LN-0028 (*id.*, petition, ¶ 20).

On May 17, 2019, counsel for some of the tenants emailed Balsam, requesting that the decoverage application be held in abeyance, and that the Loft Board staff schedule a narrative conference to discuss the status of the legalization plans for the Building (*id.*, petition, ¶ 21; see NYSCEF Doc. No. 7). Petitioner opposed the tenants' request by email (*id.*, petition, ¶ 22; see NYSCEF Doc. No. 8). Tenants' counsel asserted that they should be allowed to make proposals to resolve the DOB's objections based on the construction classification, and petitioner responded that the construction classification bars the Building's legalization under the Loft Law (*id.*, petition, ¶ 24; see NYSCEF Doc. Nos. 10, 11, and 12).

On May 23, 2019, Balsam issued the administrative determination by the Loft Board holding petitioner's decoverage application in abeyance, tolling the tenants' time to answer until the legalization issue is resolved, and directing petitioner to serve revised plans for the Building on the tenants (the Administrative Determination) (*id.*, petition, ¶ 25; NYSCEF Doc. No. 4, administrative determination). Respondent Loft Board stated that, under 29 RCNY § 2-01(d)(2)(x), an owner who amends its legalization plan is

required to file two copies with the Loft Board along with a detailed amendment to the narrative statement, listing the changes, and once that occurs, the tenants have 45 days to file an alternate plan with DOB, if DOB review is required (Index No. 160119/2019, NYSCEF Doc. No. 4, administrative determination, at 1-2). It recounted that petitioner initially filed plans and a narrative statement, listing the construction classification of the Building as Class 4, frame construction. It filed another set in April 2018, changing the construction classification to Class 6, Heavy Timber, but then filed yet another set of plans, changing back to Class 4, but that these last plans were not filed with the Loft Board until the decoverage application was filed, and petitioner did not serve an amended narrative statement on the tenants or the Loft Board (*id.* at 2). The Loft Board found that petitioner's amendment changing the Building's construction classification raised an issue of fact affecting whether petitioner can legalize the Building. It noted that, under 29 RCNY § 2-01(d)(2)(x), tenants are afforded the opportunity to contest amended plans for the work affecting the use of their units by filing an alternate plan with DOB. It reasoned that "[e]ven though the change to the plans could result in no legalization work at all, being unable to legalize the Building due to the disputed construction classification will affect the residential occupants' use of their units" (*id.* at 3). It determined that the tenants should be entitled to address with the DOB the issue of fact raised by petitioner's change of the construction classification within the context of the narrative statement process, which had already begun in this case. The Loft Board suspended the tenants' time to answer the decoverage application until the alternate plan process is concluded,

and indicated that if an answer by the tenants was necessary at that time, the Loft Board would issue a notice setting the answer deadline (*id.*).

On June 21, 2019, petitioner appealed the Administrative Determination (the Appeal) (Index No. 160119/2019, NYSCEF Doc. No. 14, appeal). It contended that Balsam's grant of an unauthorized and unsupported email application by the tenants, holding the decoverage application in abeyance indefinitely, usurped the Loft Board's authority, and misconstrued legal and factual matters underlying the decoverage application (*id.*). It urged that the Building is a combustible, wood frame structure that is statutorily ineligible for residential use and conversion, and that Balsam's refusal to let the Loft Board determine the decoverage application exceeds her authority and thwarts the very purpose of the Loft Law by perpetuating a dangerous fire-safety condition (*id.* at 2). It argued that the change back to the Class 4 construction classification was necessitated by the fact that the Building's classification was established by the 1953 certificate of occupancy and by how the Building is constructed, and that this legal and factual reality barred the Building's residential use and conversion, citing MDL §§ 56(1), 193, and 277(a)(1), and NY Building Code § 26-254 (*id.* at 7-8). It maintained that the DOB's disapproval based on the construction classification cannot be second-guessed by the narrative statement process, and no alternate plan filing by the tenants could alter the DOB's disapproval (*id.* at 9).

On June 26, 2019, petitioner filed a petition (Index No. 156349/2019), which was later amended on September 19, 2019, seeking an order in the nature of mandamus

compelling the Loft Board to immediately refer its decoverage application to the Loft Board for a final order removing the Building from Loft Board jurisdiction and Loft Law coverage (Index No. 156349/2019, NYSCEF Doc. Nos. 1 and 16).

On August 1, 2019, all nine tenants filed a joint answer to the Appeal, and on August 9, 2019, petitioner filed a response to the tenants' answer (Index No. 156349/2019, NYSCEF Doc. No. 33, answer, ¶¶ 65-66).

On September 19, 2019, the Loft Board denied the Appeal (Loft Board Order) (Index No. 160119/2019, NYSCEF Doc. No. 44, Loft Board Order at 2). It found that the Loft Board and DOB records showed that petitioner "had not been consistent in its description of the Building's construction classification" (*id.* at 2). One application indicated a Class 4 classification and another application stated a Class 6 Heavy Timber construction classification. It further found that neither the Loft Board nor the tenants received any notice of the DOB plan examiner's objection, petitioner did not file an amended narrative statement and legalization plan, and it did not serve revised plans as directed by the Loft Board (*id.*). The Loft Board held that Balsam did not usurp the Board's authority, because Loft Board staff have the authority to investigate claims raised in applications, and may conduct informal conferences and request additional evidence or memos related to claims raised (*see* 29 RCNY § 1-06[j][1]). It found that the parties had already significantly invested in the narrative process and, rather than take the extreme step of filing a decoverage application, petitioner should have brought the DOB's objection, which was not a matter of public record, to the attention of the tenants and Loft Board staff, giving them the chance to investigate and discuss the novel claims resulting

from the objection (NYSCEF Doc. No. 44, at 3). The Loft Board also held that the relief sought of immediate referral of the decoverage application to the Loft Board for a final order was premature. If the petitioner and the tenants disagree about the Building's classification, the Loft Board will initiate an alternate plan dispute application pursuant to 29 RCNY § 2-01(d)(2)(xi)(B)(b), and then both the decoverage and the alternate plan application will be referred for adjudication before an administrative law judge whose recommended decision then will be presented to the Loft Board for a final order (*id.*). The Loft Board ordered its staff to commence the alternate plan dispute application process pursuant to Loft Board Rules (*id.*).

On October 15, 2019, respondents Balsam and the Loft Board answered the mandamus petition (Index No. 156349/2019), denying the material allegations, and setting forth various affirmative defenses, including that petitioner fails to establish a clear and absolute right to the relief sought, and the Loft Board's determination was rational, not arbitrary or capricious, nor an abuse of discretion (Index No. 156349/2019, NYSCEF Doc. No. 33, respondents' answer).

On October 17, 2019, petitioner filed its second petition (Index No. 160119/2019, NYSCEF Doc. No. 1), seeking review of the Loft Board Order, contending that it violated lawful procedure, constituted errors of law and was arbitrary and capricious.

On December 16, 2019, respondent Loft Board answered the second petition, denying the material allegations, and asserting again that its determination was rational, and not arbitrary or capricious, nor an abuse of discretion (Index No. 160119/2019, NYSCEF Doc. No. 31).

DISCUSSION

Both petitions are denied and the proceedings are dismissed.

Relevant Statutory Provisions

Article 7-C of the Multiple Dwelling Law (MDL), known as the “Loft Law,” was promulgated in 1982, and regulates the residential occupancy of commercial space which was unlawfully converted and without compliance with various building codes. It was enacted to protect the public health, safety, and general welfare by requiring illegally converted spaces to meet minimum standard of housing maintenance of health, safety and fire protection (MDL § 280). It requires owners of interim multiple dwelling to comply with the MDL by obtaining residential certificates of occupancy (MDL § 284). The Loft Law “is to be liberally construed to spread its beneficial effects as widely as possible” (*Matter of 902 Assoc. v New York City Loft Bd.*, 229 AD2d 351, 352 [1st Dept 1996], citing *Matter of Assoc. of Commercial Prop. Owners v New York City Loft Bd.*, 118 AD2d 312, 318 [1st Dept 1986], *affd* 71 NY2d 915[1988]; see *Ostrer v Schenck*, 41 NY2d 782, 785-786 [1977]). Section 282 of the MDL establishes the Loft Board, providing that its duties include determining “interim multiple dwelling status and other issues of coverage” (MDL § 282[1][i]). Section 284 of the MDL establishes a schedule that a building owner must comply with to obtain the residential certificate of occupancy.

The Loft Board has issued rules and regulations governing its powers and procedures under the Loft Law, pursuant to Section 1-02 of Title 29 of the Rules of the City of New York. “[T]he Loft Board’s interpretation of its own regulations should be upheld if not irrational or unreasonable” (*Matter of 902 Assoc. v New York City Loft Bd.*,

229 AD2d at 352). The courts defer to the governmental agency responsible for the administration of its governing statute, and the agency is afforded wide latitude in interpreting its own regulations so long as it is supported by a rational basis (*see id.*; *see also Matter of Gruber [New York City Dept. of Personnel-Sweeney]*, 89 NY2d 225, 231 [1996]).

Section 1-06 of Title 29 of the Rules of the City of New York (29 RCNY), entitled “Applications to the Loft Board,” provides, in subsection (a)(1) and (2) that “all applications to the Loft Board concerning coverage, . . . and any other matters within the purview of the Loft Board under Article 7-C of the [MDL] must be submitted to the Office of the Loft Board, on forms approved by the Loft Board,” and that affected parties, such as tenants/occupants, may answer applications by the applicant/owner (29 RCNY § 1-06). Under subsection (i), entitled “Extensions to File an Answer,” the affected party must file a written request for an extension to file an answer, explaining the reasons for the requested extension; this request can be mailed, faxed or hand-delivered to the Loft Board; and the applicant may file an opposition to the extension request. The “Loft Board may accept, reject or modify the proposed deadline” (29 RCNY § 1-06[i]).

Subsection (j) of 29 RCNY § 1-06, provides that the Loft Board staff has the power to investigate claims raised in applications, may conduct conferences, and may request that the parties provides additional evidence or memoranda regarding the application. Under subsections (m), (n), (o) and (p), the staff or the administrative law judge assigned to the case “shall prepare a written report and recommendation;” the Loft

Board may accept, reject, remand, defer or modify any disposition; it may, by a majority vote, conduct a denovo hearing or inquest on an application; and a copy of the Loft Board's final order shall constitute a final agency determination (29 RCNY §§ 1-06 [m], [n], [o] and [p]).

Under 29 RCNY § 1-09, the Loft Board “on its own initiative may commence appropriate proceedings or investigations pursuant to its powers or duties under Article 7-C of the [MDL], including, but not limited to, findings, determinations or enforcement proceedings concerning coverage”

Section 2-01(d) provides the rules for the narrative statement process, the legalization plan, the resolution of tenant/occupant objections, and the certification of estimated future rent adjustments. It requires the owner/applicant to file and serve legalization plans in a specified manner, sets forth the requirements of a narrative statement, gives the tenants/occupants an opportunity to review the owner/applicant's narrative statement and legalization plan and to make objections, and provides for narrative statement conferences. Subsection (d)(2)(viii) provides that tenants/occupants may file an alternate plan application with the DOB if the owner/applicant's alteration application and legalization plan “unreasonably interferes with the occupant's use of the unit and the alternate plan requires a review by DOB.” It sets forth the requirements for serving such application on the owner and other occupants, serving a narrative statement on the owner and other occupants describing objections to the owner's plan, and filing all with the Loft Board (29 RCNY § 2-01[d][2][viii]). If the DOB has objections to the

tenant's/occupant's alternate plan, the tenant/occupant must take all reasonable actions to cure such objections within 45 calendar days of notice of the objections from the DOB (29 RCNY § 2-01[d][2][ix]). Subsection (d)(2)(x) provides that if the owner amends the legalization plan initially submitted to the Loft Board, it “must file two copies of any amended plans with the Loft Board, along with a detailed amendment to the narrative statement listing the changes” which must be served on the tenants/occupants, and the amended plans with proof of service must be filed with the Loft Board. It further provides that:

“Within 40 calendar days of the Loft Board’s notice of the revised plan, any occupant who has not previously done so, may file with the DOB an alternate plan application for work affecting the occupant’s use of the unit, if DOB review is required or may file comments opposing the owner’s revised plan with the Loft Board.”

The occupant may object only to items that represent a change from the owner’s prior submissions (29 RCNY § 2-01[d][2][x]). Under subsection (d)(2)(xi)(B)(b), the Loft Board may initiate a proceeding to determine whether the owner’s legalization plan and alteration application “would result in an unreasonable interference with the occupant’s use of the unit” (29 RCNY § 2-01[d][xi][B][b]).

Pursuant to section 2-01(e) of the Loft Board Rules, an owner may apply to the Loft Board to remove a building and all registered units within that building from coverage under the Loft Law (29 RCNY § 2-01[e]). Prior to seeking decoverage, an owner and all affected occupants should “make every effort to reach accommodations

that would permit every covered residential unit to be made code compliant.” The rule provides, in part:

“(e) Code compliance for nonconforming units. If the DOB has issued an objection to the owner's alteration application because an IMD unit cannot be brought into compliance under appropriate building codes, provisions of the MDL or the Zoning Resolution because of its size, design, or location within the building, the owner and affected occupant(s) should make every effort to reach accommodations that would permit every covered residential unit to be made code compliant. If the owner and affected occupant are unable to reach a resolution about how to legalize the unit, either the owner or the residential occupant may apply to the Loft Board for a determination as to whether the unit can be made code compliant. In processing such an application the Loft Board may, following a hearing, or if a fact finding hearing is not necessary, the Executive Director may:

(1) Order the owner to apply for a non-use related variance, special permit, minor modification, or administrative certification, where the granting of such an application would make compliance possible; or

(2) Order the owner to alter the unit, or to redesign residential units and common area space into a configuration that would allow the legal conversion of the unit to residential use; or

(3) Revoke the unit's Article 7-C coverage, if these remedies are unavailing.

If the Executive Director or the Loft Board orders (1) or (2) above, a specific date for compliance shall be provided and the occupants will be required to cooperate to achieve code compliance in accordance with the requirements of this section”

(*id.*).

Mandamus Petition (Index No. 156349/2019)

In its mandamus petition, petitioner seeks an order compelling the Loft Board to immediately refer its decoverage application to the Loft Board for a final order removing the Building from Loft Board jurisdiction and coverage. Mandamus is an extraordinary remedy used to compel an administrative body or officer to perform a duty enjoined or required by law (*see Alliance to End Chickens as Kaporos v New York City Police Dept.*,

32 NY3d 1091, 1093 [2018], *cert denied* -- US --, 139 S Ct 2651 [2019]; *Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d 88, 96 [1981]). It is available only where there is a clear legal right to the relief sought and “the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion” (*Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d at 96; *see Alliance to End Chickens as Kaporos v New York City Police Dept.*, 152 AD3d 113, 117 [1st Dept 2017], *affd* 32 NY3d 1091). It does not depend on the petitioner’s entitlement to prevail on the substantive claim, but on the nature of the duty to be commanded, that is, whether it is a mandatory, non-discretionary act (*Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY2d at 9; *Alliance to End Chickens as Kaporos v New York City Police Dept.*, 152 AD3d at 117). “A ministerial act is best described as one that is mandated by some rule, law or other standard and typically involves a compulsory result” (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 152 AD3d at 117; *see New York Civ. Liberties Union v State of New York*, 4 NY3d 175,184 [2005]). Conversely, a discretionary act involves the exercise of reason to reach a decision “which could typically produce different acceptable results” (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 152 AD3d at 117).

Mandamus cannot be used to compel an administrative body to reach a specific result regarding a decision that turns on the exercise of its judgment or discretion (*id.*). It may only be issued “to compel a public officer to execute a legal duty; it may not direct how the officer shall perform that duty” (*Alliance to End Chickens as Kaporos v New*

York City Police Dept., 32 NY3d at 1093 [internal quotation marks and citations omitted]; *see Klostermann v Cuomo*, 61 NY2d 525, 539-540 [1984]).

Here, petitioner is seeking an order directing how the Loft Board performs its duties. It is not challenging a mandated duty, but rather a discretionary act regarding how the Loft Board addresses a decoverage application filed when the parties were already in the middle of the narrative process. It is seeking to compel a particular outcome, that the Loft Board issue a final order of decoverage. The acts of determining when to send a decoverage application to the Loft Board, of whether to conduct hearings or other investigations, and of making a final order on such application involve the Board's judgment and discretion. Petitioner fails to present authority that it has a clear legal right to the issuance of a final order at this point in the application process (*see Matter of New York City Yacht Club v New York City Dept. of Bldgs.*, 172 AD3d 606, 606 [1st Dept 2019]).

The Loft Board has the discretion, that it exercised here, through its staff, including respondent Balsam, to initiate an alternate plan dispute application pursuant to 29 RCNY § 2-01(d)(2)(xi)(B)(b), and give the Building's nine tenants a chance to investigate the Building's construction classification and present an alternate plan, including to the DOB. Under the rules, the Loft Board appropriately required petitioner, as the owner/applicant to file amended plans and an amended narrative statement to reflect its revised plans with respect to the construction classification and the DOB's objection, under 29 RCNY § 2-01(d)(2)(x). Then, the Loft Board will refer both the

decoverage and the alternate plan application for adjudication before an administrative law judge. The parties will then have the opportunity to present their evidence. The judgment petitioner seeks in its mandamus petition would direct how the Loft Board performs its duties regarding this new development before the DOB, the decoverage application and the manner in which it conducts the narrative process. It fails to establish it has a clear legal right to the issuance of such a final order by the Loft Board (*see Matter of New York City Yacht Club v New York City Dept. of Bldgs.*, 172 AD3d at 606). Thus, mandamus to compel is not available.

Appeal of Loft Board Order (Index No. 160119/2019)

The Loft Board Order of September 19, 2019, denying petitioner’s appeal of its May 23, 2019 administrative determination holding petitioner’s decoverage application in abeyance while the narrative process concludes was rational, and not arbitrary or capricious, nor any abuse of discretion. An administrative agency enjoys broad discretionary power when making determinations pursuant to its authority and in its area of expertise (*see Matter of Nelson v Roberts*, 304 AD2d 20, 23 [1st Dept 2003]). Judicial review of such determinations, pursuant to CPLR 7803(3), is limited to deciding whether a “determination was made in violation of lawful procedure, was affected by an error of law, constituted an abuse of discretion, or was arbitrary and capricious” (*Matter of Dom Ben Realty Corp. v New York City Loft Bd.*, 177 AD3d 731, 733-734 [2d Dept 2019]). “A court must uphold an agency's exercise of discretion unless it lacks a rational basis” (*Matter of 1234 Broadway, LLC v New York State Div. Hous. & Community Renewal*, 102 AD3d 628, 629 [1st Dept 2013]; *see Matter of Pell v Board of Educ. of Union Free*

School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]), and may not disturb underlying factual determinations (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 230-231). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*id.* at 231; *see Matter of Heintz v Brown*, 80 NY2d 998, 1001 [1992]). “[T]he courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or [to] choose among alternatives” (*Akpan v Koch*, 75 NY2d 561, 570 [1990] [internal quotation marks and citation omitted]).

Here, the Loft Board’s determination to deny the appeal and continue to require petitioner to engage in the narrative process with its tenants had a sound basis and was in accordance with the law and rules. The Loft Board’s Order clearly recounted that at the time petitioner filed its decoverage application, the parties had already invested significantly in the narrative statement process in which they are required to make every effort to reach code compliance for the units (*see* 29 RCNY § 2-01[e]). In its underlying May 23, 2019 administrative determination, the Loft Board stated that the tenants were objecting to petitioner’s decoverage application, requesting a narrative statement conference, and seeking an opportunity to file alternate plans based on the revised plans petitioner submitted to the DOB on March 27, 2019 (Index No. 156349/2019, NYSCEF Doc. No. 40 at 1). The tenants’ request for an extension of their time to answer the decoverage application was appropriately made in writing, and petitioner was given the opportunity to, and did, oppose that extension request also in writing. Under the rules,

the Loft Board could “accept, reject or modify the proposed deadline” (29 RCNY § 1-06[i]).

The Loft Board found that the plans and narrative statement petitioner initially filed in the summer of 2017 with the Loft Board listed a construction classification of Class 4, frame construction. Then it filed another set of plans, in April 2018, with the DOB changing the classification to Class 6, Heavy Timber; and it filed yet another set of plans with DOB changing the classification back to Class 4. In addition, these last plans were not filed with the Loft Board or served on the tenants until the decoverage application (*id.* at 2). It was reasonable for the Loft Board to conclude, based on these plan amendments, that issues of fact were raised as to whether petitioner can legalize the Building. Under 29 RCNY § 2-01(d)(2)(x), it was appropriate for the Loft Board to afford the tenants the opportunity to address this issue of fact with the DOB in the context of the narrative statement process. Also, petitioner failed to serve an amended narrative statement on the residential tenants. Nor did it file one with the Loft Board, in violation of Loft Board rule 29 RCNY § 2-01(d)(2)(x). Thus, it was rational, rather than an abuse of its discretion, for the Loft Board to direct petitioner to serve and file its revised plans and an amended narrative statement, and to direct its staff to commence the alternate plan dispute application process pursuant to Loft Board Rules.

On appeal, the Loft Board also reasonably determined that petitioner should have brought the DOB objection to the attention of the tenants and the Loft Board staff. Whether or not that DOB objection was a matter of public record, the parties had been

well involved in the narrative process, and that development was important to the legalization process.

If the Loft Board immediately determined the petitioner's decoverage application, it would have effectively cut off the tenants' right to participate in the legalization process and investigate the issues raised about the construction classification of the Building (*see* 29 RCNY §§ 2-01[d][2][x]). If the parties cannot agree about the construction classification, under rule 29 RCNY § 2-01(d)(2)(xi)(B)(b), the Loft Board may initiate an alternate plan dispute application, and both that and the decoverage application would get referred for adjudication before an administrative judge at the Office of Administrative Trials and Hearings (OATH) (*see* 29 RCNY § 1-06[j][2]). As the Loft Board rules further provide, the petitioner, as owner, "should make every effort" to legalize non-conforming units before the Executive Director may, if appropriate, decover a unit, or, like the instant case, all units (*see* 29 RCNY § 2-01[e]). To require immediate consideration of, and a final order on, petitioner's decoverage application, without permitting the tenants the opportunity to address the DOB's objection, would usurp the Loft Board's discretion to order alternatives to decoverage (*see Matter of 902 Assoc. v New York City Loft Bd.*, 229 AD2d at 352).

Contrary to petitioner's contentions, MDL § 282 does not direct the Loft Board to immediately address a decoverage application where: (1) it determined that the parties were in the midst of the narrative statement process, (2) it found inconsistencies in petitioner's specification of the Building classification on its applications, and (3) the

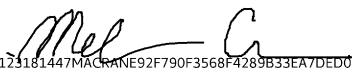
tenants were not informed of those changes or of the DOB’s plan examiner’s determination.

To the extent that petitioner challenges Balsam’s authority to hold the decoverage application temporarily in abeyance, under 29 RCNY § 1-06(j)(1), the Loft Board’s staff has the authority to “investigate claims raised in applications and hold informal conferences . . . to settle disputes or clarify issues.” The staff may also request additional evidence or memoranda (29 RCNY § 1-06[j][1]), and extensions may be accepted, rejected or modified (29 RCNY § 1-06[i]). Therefore, Balsam’s actions were within her authority and discretion under the rules. The petition challenging the Loft Board Order of September 19, 2019 is denied.

Accordingly, it is

ORDERED and ADJUDGED that the mandamus petition (Index No. 156349/2019) is denied and the proceeding is dismissed; and it is further

ORDERED and ADJUDGED that the petition challenging the Loft Board Order dated September 19, 2019 (Index No. 160119/2019) is denied and the proceeding is dismissed.


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<u>11/23/2020</u>			
DATE		MELISSA ANNE CRANE, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE