Matter of Tenants of 224-228 North 7th Street

OATH Index No. 1720/14 (Nov. 4, 2015)
[Loft Bd. Dkt. No. TR-1143]

Tenant-applicants seek coverage of loft units and protected status for themselves. Owner agreed to register three units and their occupants but disputed that two other units had qualifying windows. ALJ finds that petitioners proved coverage of these units under MDL 281(5).

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TENANTS OF 224-228 NORTH 7TH STREET
Applicants

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This coverage application is brought by Various Tenants of 224-228 North 7th Street ("petitioners"), the occupants of five units in the building located at 224-228 North 7th Street, Brooklyn, who seek a finding that the building is an interim multiple dwelling ("IMD") covered by the Loft Law under section 281(5) of the Multiple Dwelling Law ("MDL"), and that they are the protected occupants of covered units. The applicants are Robert Berger aka Robert Castle and Alejandra Orozco, Unit A; Alex Pasternak, Unit B; Mathew Amonson, Unit F; Katrin Altekamp, Unit G; and Maxine Nienow, Unit #1. Respondent Northside Workshops, Inc., is the property owner.

During the course of pre-trial settlement conferencing, the owner agreed to register three units and their respective occupants: Mathew Amonson and Ai Ito (Unit F), Katrin Altekamp (Unit G), and Luz Maxine Nienow (Unit #1). The parties agreed that Units F, G, and #1 meet all of the requirements of MDL 281(5). The parties further agreed that Units A and B meet all coverage requirements, except as to the existence of qualifying windows, and that Robert Berger and Alejandra Orozco would qualify as the protected occupants of Unit A, and Alex Pasternak

would qualify as the protected occupant of Unit B.[1] Thus, the only question at the trial was whether Units A and B have qualifying windows.

Trial was conducted on September 3, 2015, with petitioners offering the testimony of Mr. Amonson and experts Alexander Neratoff and Bryan Mark Winter. Respondent called Harry Meltzer as its expert. The record was closed on September 28, 2015, to allow for written closing submissions.

For the reasons set forth below, petitioners' coverage application should be granted as to all five units.

ANALYSIS

The subject premises, located at Block 2329 and Lot 13 in an R6-B zoning district, is "built full," a phrase indicating the building takes up the entire lot, with the exterior walls resting on the lot line (Tr. 17, 19, 34, 101). Petitioners concede the windows are on the lot line (Tr. 93). According to a diagram and satellite photograph of the subject and adjacent properties (Pet. Ex. 1A), the north side of the building faces the street, the south side faces Lots 37, 38, 39 and 40, and the east side faces Lot 16. Red lines placed on the diagram and satellite photograph indicate the location of the windows (Tr. 93). There is no yard or court on the premises. These facts are undisputed.

Although respondent disputes the units have windows at all because they are made of glass block, I use the term for purposes of description. Unit A has one window on the south wall adjacent to Lot 37 and two windows on the east wall adjacent to Lot 16. Unit B has one window on the south wall adjacent to Lot 38. Each unit has two skylights that can be opened.

The question is whether the units have qualifying windows within the meaning of MDL 281(5), which requires that an IMD unit have:

> at least one window opening onto a street or a lawful yard or court as defined in the zoning resolution for [the] municipality, . . .

MDL § 281(5). Petitioners contend that all windows and skylights in the units qualify under the statute. Respondent contends that the windows -- if they are windows -- are non-qualifying lot line windows, and the skylights do not qualify as windows.

[1] These agreements were communicated in an email exchange marked into the record as ALJ Ex. 1, rather than by formal stipulation.

Windows

The Zoning Resolution defines a "yard" as "that portion of a zoning lot standing open and unobstructed from its lowest level to the sky along the entire length of the lot line, from the lot line for a depth or width set forth in the applicable district yard regulations." NYC Zoning Resolution § 12-10. Petitioner's expert Alexander Neratoff[2] testified that the four windows in Units A and B are qualifying windows under the Zoning Resolution because they face the lawful yards of the adjacent lots (Tr. 35). DOB Property Profiles for Lots 16, 37, and 38[3] indicate the buildings on these properties are residential, classified as walk-up apartment houses (Pet. Exs. 3, 4, 5; Tr. 20). Apartment houses are required to have rear yards of 30 feet in depth (Tr. 20, 22). Neratoff testified that the rear yards on Lots 16, 37, and 38 are all lawful yards of 30 feet in depth, and Units A and B have windows that open onto those yards (Tr. 23).[4]

Petitioners contend the statute does not require a "lawful yard" to occupy the same zoning lot as the IMD (Tr. 37). The contention is consistent with this tribunal's recent decision in *Matter of Doris,* OATH Index Nos. 2542/14 & 2543/14 (July 10, 2015), and with the plain language of MDL 281(5) which does not allude to any such requirement. The OATH recommendation in *Matter of Doris* is pending Loft Board review.

Respondent's expert Harry Meltzer[5] did not dispute the lawfulness of the yards on Lots 16, 37, and 38. He acknowledged that a rear yard is required on those lots because of the residential use (Tr. 106). He disputed, however, that the glass block configurations in Units A and B are "windows," and said that lot line windows do not qualify for coverage.

Interior photographs of Unit A (Pet. Exs. 1B, 1C) show two large windows made of glass block (48 inches by 63 inches) located on the east wall of the building facing Lot 16 (see "B" below), and a smaller window (25 inches by 25 inches) on the south wall that faces Lot 37 (see "A" below). The two large glass block windows have small insets that open to the outside (see

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[2] Mr. Neratoff is an architect licensed by the state of New York since 1980. He has a practice specialty in loft conversions and was qualified as an expert on zoning and the Multiple Dwelling Law (Tr. 10, 13). Mr. Neratoff, who did not visit the premises, offered testimony based upon documentation he obtained from publicly available files of the Department of Buildings ("DOB"), the city zoning map, and satellite and other photographs of the premises (Tr. 13; Pet. Exs. 1, 2).

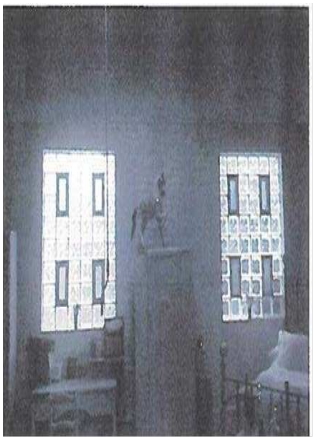
[3] The addresses for Lots 16, 37, and 38 are, respectively, 230 North 7th Street, 201 North 6th Street, and 199 North 6th Street (Pet. Exs. 3, 4, 5).

[4] Mr. Neratoff noted, according to his examination of the DOB files for the adjacent lots, that there was no objection to the yards. There was an unrelated complaint for unpermitted construction of a small building or shed in the rear yard of Lot 38. He said the absence of Certificates of Occupancy was not unusual given the age of the buildings (Tr. 23).

[5] Mr. Meltzer, a licensed architect since 1968, was qualified as an expert in Loft Law conversions (Tr. 95, 97).

"C" below) (Tr. 43). The record does not indicate of what material the smaller window is made or whether it opens. Neratoff testified while looking at the photograph that it "does not seem to be glass block" though it was "very hard to tell" (Tr. 43).

A



B

C

The window in Unit B, for which there was no photograph, also is made of glass block. The record does not indicate the size of the window; Mr. Amonson testified that it was not openable (Tr. 89). Describing his January 2015 observation of Unit B, Meltzer said there was no "window" but an area of glass block on the south wall that faced Lot 38 (Tr. 98-99).

A window, Meltzer testified, must provide light, ventilation, and egress from the apartment, and the glass block provided neither egress nor ventilation (Tr. 100, 102). Absent contrary proof, I find that all four windows in Units A and B are made of glass block. Two of them open by way of small insets, so it is not true that none of the windows provide ventilation. Under Meltzer's analysis, which incorporates the legalization standards for light, ventilation, and egress, a window would have to meet the requirements of Article 7-B of the Multiple Dwelling Law to qualify for coverage under Article 7-C, even though the premise has been rejected in cases that have held that legalization issues may not be used by owners to avoid Loft Law coverage. *See Katz v. NYC Loft Board*, 163 A.D.2d 207, 209 (1st Dep't 1990), *aff'd*, 78 N.Y.2d 1018 (1991) (units that contained less than the mandated minimum square footage required by the Zoning Resolution were not precluded from coverage because the issue is deferred until the subsequent legalization proceeding); *Matter of Gurkin*, OATH Index No. 489/12 at 21 (Dec. 14, 2012), *adopted*, Loft Bd. Order No. 4186 (Oct. 17, 2013). The Loft Board recently declined to adopt such arguments, as they were asserted in *Matter of Schuss,* OATH Index No. 2066/12 (Mar. 25, 2013), *adopted in part, rejected in part*, Loft Bd. Order No. 4393 (May 21, 2015).

Schuss is a case of first impression in which the Loft Board found that a qualifying window under MDL 281(5) is not required to be "operable or provide light and air for a finding of coverage." Loft Bd. Order No. 4393 at 1, 3; *see also Matter of Doris,* OATH 2542/14 & 2543/14 at 8 ("a potential legalization issue is not a bar to coverage under the Loft Law") *citing Matter of 902 Assocs.*, Loft Bd. Order No. 1555 (May 4, 1994), *aff'd*, 229 A.D.2d 351 (1st Dep't 1996). In *Schuss*, respondent's expert testified at the trial before Judge Addison about "light and air problems" in the unit and "obstacles to legalization" in connection with the windows. OATH 2066/12 at 10. Focusing on the Loft Law's remedial purpose, the Loft Board declined to apply strict legalization standards to the coverage determination, instead "adopting the broader interpretation of a window 'opening onto'" a lawful yard or court as the equivalent of "facing" the yard or court. Loft Bd. Order No. 4393 at 3. Ultimately, the Loft Board found that all the unit windows that faced the street qualified: two of them did not open at all and the third, a small transom, "only open[ed] a few inches." *Id*.; OATH 2066/12 at 11. *Schuss* is a clear rejection of the notion that legalization requirements are coextensive with coverage.

Judge Addison arrived at the same conclusion in *Matter of Gallagher,* OATH Index Nos. 2594/11 & 2596/11 (Aug. 16, 2012), a coverage case that received no final review by the Loft Board because the owner had by then registered the building. Judge Addison stated, "While it may seem practical that coverage of a unit should also be predicated on its ability to be legalized, the Legislature did not enunciate an intent to have coverage of otherwise qualified units be conditioned on the requirements of Article 7-B." *Id*. at 23. She found that, "[b]y omitting reference to Article 7-B in section 281(5) of the MDL, the Legislature signaled its intent to continue to keep coverage distinct from legalization, even in light of the more restrictive language of the section." *Id*. at 24. The reasoning in *Gallagher* and the Loft Board's holding in *Schuss* are consistent.

I therefore find no merit to respondent's contention that the glass block windows are not windows unless they meet legalization standards for light, ventilation, and egress. Notably, section 281(5) does not require a particular size or transparency of window for purposes of coverage. *See Schuss*, OATH 2066/12 at 11 (arguments as to size of the window and its extension go to the adequacy of light and air provided, which is a post-coverage legalization concern; Loft Law does not impose minimum light requirements -- "articulate how much light and air a window should provide" -- as the Building Code does for legalization). My own

observation of the photograph entered into the trial record (see below) is that the three windows in Unit A allow a significant amount of light into the space.

Next, respondent contends, consistent with Meltzer's testimony, that these lot line windows do not qualify because they do not open onto a yard or court located on the same zoning lot (Tr. 102). The windows could be blocked at any time if the adjacent landowners decided to fill their currently existing yards by building to the property line, blocking the light and air currently provided by the windows. Nothing in the Loft Law or Zoning Resolution would prevent a property owner from doing so (Tr. 103). The R6-B zoning district permits a residential building to have a store or community facility on the ground floor, which would allow the owner to build full and expand the first floor to the lot line (Tr. 106-07). Although a light and air easement may be obtained from the adjacent property owner, there is no guarantee one would be granted (Tr. 105). For these reasons, Meltzer said, the DOB does not approve lot line windows for residential light and air purposes. Moreover, without a right to enter the adjacent property, petitioners have no access to those yards and would not have proper egress.

Neratoff disputed this and said the Zoning Resolution does not require access to a yard for lighting and ventilation purposes, and a lawful yard is not defined by access to it (Tr. 43-44).

Another of petitioner's experts, Brian Mark Winter,[6] a former DOB deputy borough commissioner, stated that lot line windows would not be counted for light and air purposes in the absence of operable skylights or a zoning lot combination (Tr. 75). He testified that, in Brooklyn, architects of buildings on "very deep lot[s]" are adept at obtaining approval of skylights as a legal window for top-floor interior bedrooms, as long as they meet size and openability factors (Tr. 60).

Although windows have always been integral to the legalization of IMDs through Article 7-B requirements regarding light, ventilation, and egress, windows were newly introduced as a requirement of coverage by the 2010 amendments to the Loft Law. At present, the nettlesome question of what constitutes a qualifying window under MDL 281(5) has only one Loft Board precedent, *Matter of Schuss*. As noted, the question of qualifying windows was addressed in *Matter of Gallagher* and *Matter of Doris* and is pending Loft Board review in *Doris*. In *Matter of Doris*, Judge Casey found that lot line windows qualified under the statute where they opened onto the lawful yard of an adjacent property, in particular, noting that the plain language of the statute does not require the yard to share the same zoning lot with the IMD. OATH 2542/14 & 2543/14 at 7.

Respondent posits that petitioners cannot prevail because the windows and yards do not share the same zoning lot, citing *Gallagher* in support of its contention that a yard must be "accessible to and usable by all persons" that occupy the respective dwelling units, and arguing this would be impossible when the window and yard are on different zoning lots (Resp. Brief ("Br.") at 5, quoting NYC Zoning Resolution § 12-10). In *Gallagher* the two spaces under review included a five-foot space obstructed by a wrought iron grill and a 12-inch "sliver of space" between the window and lot line. OATH Index Nos. 2594/11 & 2596/11 at 28. Conducting an extensive zoning analysis, Judge Addison found these spaces were insufficient as inner courts because they were "neither accessible [to] nor usable by the residential occupants of the building," *id*. at 28, 29, citing a standard set forth in the Zoning Resolution's definition of "open space" which includes by reference courts and yards. Zoning Resolution § 12-10. With respect to section 281(5), she said the requirement of at least one window opening onto a lawful yard or court "is intended to ensure some filtering of light and air into the units. But the very

[6] Mr. Winter, a licensed architect since 1997, was qualified as an expert in DOB procedures and plans approvals (Tr. 53).

definition of an inner court indicates that only the zoning lot on which the units are located and vertical open space on the same lot must be considered." OATH Index Nos. 2594/11 & 2596/11 at 29. Thus, her analysis operated from the premise that the IMD and *inner court* must be on the same zoning lot because of the definitions of court and inner court. A court is defined as "an open space other than a side or rear yard, *on the same lot* as a dwelling." MDL § 4(32) (Lexis 2015) (emphasis added). *Gallagher* did not address the question of a window that overlooked a yard -- on the same or adjacent premises. Respondent hopes to extend the *Gallagher* analysis to this case by asserting that the 2010 amendments were "intended to restrict coverage claims to only those units that contain at least one legal window which provides legal light, air and a means of access/egress for the unit in which it is located" (Resp. Br. at 5), and none of the windows do so here because two of them do not open at all and the two that do open are too small to provide egress or access to the yard (Resp. Br. at 4). Respondent goes even further, stating that it is "the very clear intent of the Legislature to require at least one legal window to sustain a coverage finding" (Resp. Br. at 6). If the Legislature had intended the coverage determination to include a determination of the legality[7] of the window in an IMD unit, it could have stated that directly and section 281(5) does not.

Respondent correctly points to the legislative history of MDL 281(5) which alludes to a concern that loft units not be covered when they were impossible to legalize because of "insurmountable safety concerns" existing in the unit. NYS Senate Bill No. S8377A, Int. Memo in Support, available at http://www.nysenate.gov/legislation/bills/2009/s8377a. In cross examination, respondent's counsel frequently asked about access to the yards and egress, to implicate safety concerns. Earlier enactments of the Multiple Dwelling Law have addressed safety by requiring that IMD owners meet fire and safety standards to legalize IMD units. MDL § 284(1)(i) (Lexis 2015) ("The owner of an interim multiple dwelling . . . shall achieve compliance with the standards of safety and fire protection set forth in article seven-B of this chapter for the residential portions of the building within eighteen months from obtaining such alteration permit or eighteen months from such effective date, whichever is later . . . ."). Notably, safety and fire protection are specified in MDL 284 but the standards for air and light are not mentioned. Even with the acknowledged attention to safety and fire protection set forth

[7] Even the term "legal window" would require definition since, according to Winter, the term may relate to light and air, or habitability, or other things (Tr. 70).

in the Loft Law, there is no plain language statement that such requirements are necessary predicates for coverage. Despite the breadth of regulation regarding windows, yards, and courts set forth in the Zoning Resolution, section 281(5) makes no reference to specific zoning provisions. It would therefore follow that the legislature must have intended the Loft Board to provide guidance.[8]

As for the claim that coverage requires compliance with the standards for light, ventilation, and egress -- or even safety and fire protection -- the Loft Board has already indicated that legalization and coverage are to be addressed separately. *Schuss*, Loft Bd. Order No. 4393 at 1, 3; *see also Katz*, 163 A.D.2d at 209. In the absence of a legislative intent that the two be conflated, the Loft Board is tasked with finding practical solutions that will give breath to the spirit of the 2010 amendments. The record here does not prove that these units cannot be made compliant with safety and fire protection (or other legalization) standards. If adjustments to these windows are necessary to meet those standards, the legalization process is meant to address it. *See Application of Kilik*, Loft Bd. Order No. 401, 4 Loft Bd. Rptr. 21, 22 (Aug. 21, 1986) ("Problems in legalizing the space for residential purposes are to be resolved in the course of the legalization process; they do not themselves serve as a defense to coverage"). The subject building is one of a number of former factories in the area (Tr. 56). Such large commercial and manufacturing buildings typical of this area of Brooklyn[9] are not endowed with full-sized rear yards, which are a residential prerogative.

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[8] The legislative history of the 2010 amendments tells us that the new window requirement was introduced as a Chapter Amendment submitted by the Bloomberg administration. *See* Mayor's Approval Memo, July 6, 2010 Bill Jacket, L. 2010, Ch. 135 (Assembly Bill 11567 "addresses health and safety concerns by excluding units that . . . do not have a window opening onto a lawful yard or street"); *see Matter of Schuss*, Loft Bd. Order No. 4393 at 5 (DeLaney Op.) (chapter amendment sought to add "conditions that would be grounds for exclusion from Loft Law coverage."). The chapter amendment has been criticized in a Loft Board order dissent as poorly conceived. *See id.* (DeLaney Op.) ("The provision that seeks to exclude units from coverage that lack a window rather than making the situation a legalization issue (which would still provide an option to remove a unit from coverage if it cannot be legalized) is evidence that the exclusionary language of 281.5 was not well thought out and not particularly well drafted."). Experts in the field report that Zoning Resolution requirements (such as for light and air or egress) are commonly addressed by owners, architects, and engineers jointly, in a practical fashion that allows adjustments or refinements to be made to a structure in order to meet legalization requirements. By contrast, here respondent asks us to pre-judge whether an existing window will meet legalization standards, while petitioners seek the opportunity to resolve problems with legalization in the normal course, during which the matter of Unit B having only one window that does not open might be solved, according to their expert, by the existence of an openable skylight that would provide "habitable light and ventilation" (Tr. 73). Winter said a bedroom with only a lot line window would not be considered habitable, but a bedroom with a lot line window and a skylight would (Tr. 70).

[9] *See, e.g., Matter of American Package Co. Inc.*, OATH Index Nos. 2206/13 & 2207/13 at 2 (Nov. 15, 2013) (noting that 26 units are registered IMDs and another is pending adjudication); *Matter of Tenants of 13-15 Thames Street*, OATH Index Nos. 210/13, 211/13 & 218/13 (Mar. 21, 2013), *adopted in part, rejected in part and remanded*,

Thus, respondent's restrictive reading of the statute could substantially limit the number of covered units in such buildings, and allow only a fraction of the available units -- those that face the street. Such an interpretation seems inconsistent with the remedial nature of the Loft Law. *See, e.g., Assoc. of Commercial Property Owners, Inc., v. NYC Loft Board*, 118 A.D.2d 312, 318 (1st Dep't 1986), *aff'd*, 71 N.Y.2d 915 (1988).

The Loft Board has already determined in *Schuss* that a window need not be openable to qualify for coverage, so long as it faces a street, yard, or court. *Schuss*, Loft Bd. Order No. 4393 at 3. As in *Matter of Doris*, the windows here all face lawful yards. I therefore find that the lot line windows in Units A and B are qualifying windows that face lawful yards, albeit of the adjacent properties. *Doris*, OATH 2542/14 & 2543/14 at 7. Petitioners have proved their entitlement to coverage.

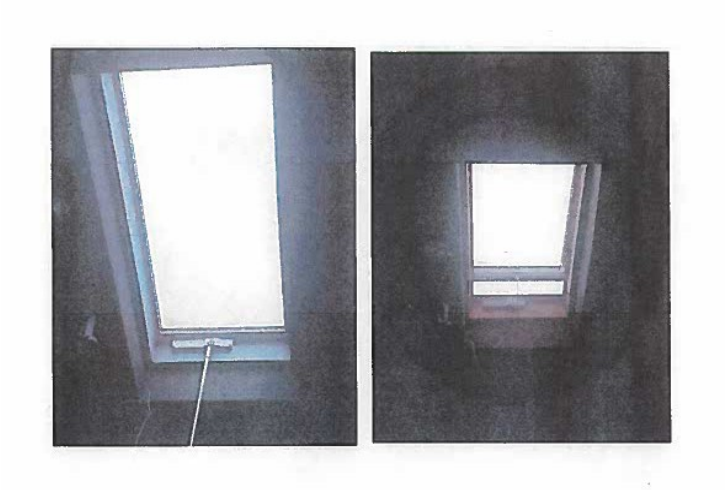
Skylights

Although the above analysis finds that the units' windows qualify for coverage, the following is an analysis of the skylights, which are also offered by petitioners as a basis for meeting the qualifying window requirement.[10]

It is undisputed that Units A and B have two skylights each; they are in the ceiling and they are openable. Photographs of the skylights were entered into the trial record (Pet. Exs. 1B, 1D, 1E, 1H). In Unit A, they are approximately 23 inches by 52 inches (Pet. Ex. 1D) (see below); the dimensions of the Unit B skylights were not provided, although they appear to be the roughly same size. Petitioners' expert testified that the skylights provide legal light and air and should therefore qualify as windows under MDL 281(5). Winter testified that, while skylights and windows are not considered to be the same legally, they are "equivalent for a number of uses in the building code and zoning" (Tr. 67-68). He said they provide both light and ventilation.

Loft. Bd. Order No. 4225 (Jan. 16, 2014), *on remand*, *Matter of Stone*, OATH Index No. 1945/14 (June 4, 2015) (Loft Board accepts recommendation that buildings located at 13 and 15 Thames Street, a former "brick factory building," constitute a horizontal multiple dwelling with six units).

[10] While the Report and Recommendation provides a comprehensive review of all legal claims asserted by the parties, the Loft Board may render decision on one or all such claims. A Loft Board decision to *decline review* of an issue because another issue renders it *unnecessary to do so* should be distinguished from a decision to "reject" substantively a recommended finding. *See, e.g., Schuss*, Loft Bd. Order No. 4393 at 3 (without analysis or contrary finding, Board "rejects" judge's analysis of the rear windows upon determining the front windows qualified for coverage).



Neratoff conceded that skylights are not windows and that they face the sky -- not a street, yard, or court (Tr. 38-39). However, he said the skylights in Units A and B "qualify as window equivalents" under section 1205.5 of the 1968 Building Code since they "open to the sky" (Tr. 27). They are openable from the inside, and therefore are a source of ventilation (Tr. 28). Thus, under section 277 in Article 7-B, the "skylights are what would make these units legalizable for residential use" because they are "a permitted source of light and air for residential units" under the Multiple Dwelling Law (Tr. 24, 29). Section 1205.5 of the 1968 Building Code[11] ("natural ventilation sources") provides that: "Such ventilating openings shall open to the sky or a public street, space, alley, park, highway, or a right of way, or upon a yard, court, plaza, or space above a setback, where such yard, court, plaza, or space above a setback is located on the same lot and is of the dimensions required by the applicable provisions of the zoning resolution." (Tr. 26). *See* MDL § 277(6)(b).

Meltzer opined that a skylight is not a window under the statute, because it does not face a street, yard, or court (Tr. 100-01). In a reversal of its argument on the glass block windows, respondent contends that coverage, not legal sources of light and air under Article 7-B, is the appropriate issue before the tribunal. The statute calls specifically for a "window" and a window is not a skylight; skylights are not provided for in MDL 281(5) (Tr. 36). Had the legislature wanted to allow for skylights, or other sources of light, it could have done so in the 2010 amendments or in the five years since. On the other hand, the policy reasons for permitting skylights is compelling considering Neratoff's testimony that skylights are a permissible way to

[11] Section 1205.5 of the 1968 Building Code has been renumbered as section 27-749 of the City Administrative Code (Lexis 2015).

legalize a unit, particularly since the legislative history would not counsel against covering units that would have no problem being legalized.

Petitioners' argument on the matter of skylights is precisely the opposite of its argument regarding windows. Petitioners argue here that a "literal interpretation" of the statute is contrary to the intent of the Loft Law overall, that the intent of MDL 281(5) was to allow for legal windows even if they face areas other than "a street, or lawful yard or court," and the omission of such alternatives was an unintentional oversight (Tr. 32). Petitioners cited no part of the legislative history that supports their contention. Petitioners offer a "liberal reading of the statute that would consider skylights as a window equivalent for purposes of coverage because [they] are a legal means of providing light and ventilation" (Pet. Brief ("Br.") at 2). Thus, petitioners contend, since Articles 7-B and 7-C are *in pari materia* and must be "read together" (Pet. Br. at 4), the tribunal should consider the light and ventilation provided by the skylights and the fact that they often suffice for purposes of legalization when no windows are present. The tribunal, they contend, should not consider the omission of the word "skylight" from 281(5) to be intentional, as it would be at odds with the legislative purpose underlying the coverage restrictions newly adopted in 281(5), which is to avoid covering units that cannot be legalized (Pet. Br. at 4-5). To the contrary, skylights aid in the legalization of a unit, rather than hinder it. Thus, the drafters' concern that loft units with "insurmountable safety concerns" not be covered under the law is not pertinent here, and the tribunal should eschew the unintended result created by an overly literal reading of the statute (Pet. Br. at 5).

It is not disputed that these skylights open onto the sky (Tr. 27). *See Matter of American Package Co. Inc.*, OATH Index Nos. 2206/13 & 2207/13 (Nov. 15, 2013), *accepted in part and rejected in part*, Loft Bd. Order No. 4380 (Mar. 19, 2015), *reconsideration denied*, Loft Bd. Order No. 4427 (Sept. 17, 2015) (hereinafter "*American Package*"). In *American Package*, Judge Casey found that skylights are not windows within the meaning of MDL 281(5) at least in part because "they face the sky," rather than a lawful yard or court. OATH 2206/13 & 2207/13 at 4. The question has not been reached by the Loft Board, which did not opine on the skylight issue in *American Package*, instead rendering decision on a procedural ground. Loft Bd. Order Nos. 4380, 4427 (owner's contest of coverage application dismissed by Loft Board as untimely; subsequent motion for reconsideration denied).

Petitioners here offered evidence similar to that in *American Package*, with the notable exception that the skylights in Units A and B are all openable. Petitioners' expert in both cases testified that the skylights provide legal light and air and should therefore qualify as windows under MDL 281(5). The contention was rejected by Judge Casey who reasoned that he could not "look beyond an unambiguous statute to consider the legislative history or intent" of the statute. OATH 2206/13 & 2207/13 at 4, *citing Meltzer v. Koenigsberg*, 302 N.Y. 523, 525 (1951). I concur with this reasoning.

It is well established that a liberal reading of the Loft Law is encouraged so as to spread the benefits of this remedial legislation as widely as possible. *See, e.g., Assoc. of Commercial Property Owners, Inc.*, 118 A.D.2d at 318; *Matter of Schuss*, Loft Bd. Order No. 4393 at 2. It is also true that, fundamentally, "a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature," *N.Y. County Lawyers' Assn. v. Bloomberg*, 19 N.Y.3d 712, 721 (2012), and not to enlarge it. And the strongest indicator of intent is the plain language to which the tribunal must defer. *Doctors' Counsel v. NYC Employees' Retirement System*, 71 N.Y.2d 669, 674-75 (1988). Petitioners have offered no legislative history to support the contention that skylights were intended in this legislation. It would be a reach to apply a literal reading of MDL 281(5) as to lawful yards yet reject it as to skylights. I have therefore rejected the argument.

I find that the skylights in units A and B do not qualify as windows under MDL 281(5) as they do not "open onto a street, court, or yard." They open onto the sky.

While I do not find that a skylight is a window for purposes of Loft Law coverage, there is no prohibition to considering the fact that these skylights produce light and ventilation which may be relevant to a determination of whether the units should be covered.

FINDINGS AND CONCLUSIONS

1. The windows in Units A and B are qualifying windows within the meaning of MDL 281(5), as they all look onto "a lawful yard," as defined in the Zoning Resolution.

2. The skylights in Units A and B are not windows within the meaning of MDL 281(5).

RECOMMENDATION

I recommend that petitioners' application to cover Units A and B and for protected occupancy be granted. The remaining applications that seek coverage and protected occupancy under the Loft Law for Units F, G, and #1 should also be granted.

Tynia D. Richard
Administrative Law Judge

Nov. 4, 2015

SUBMITTED TO:

RICK D. CHANDLER, P.E.
Commissioner/Chair

APPEARANCES:

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