Matter of Cayler

OATH Index No. 443/12 (Sept. 14, 2012)

Loft owner found to have failed to meet 14 code compliance timetables and fined $14,000.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TOM CAYLER, CLARICE MARSHALL, DOUGLAS KELLEY, DANIEL SCHNEIDER, CHARLOTTE PFAHL, and ARIC ZAGON
Applicants

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a tenant-initiated application for a finding that Shabbat, LLC, the owner of the building at 517-525 West 45th Street, Manhattan ("the building"), has failed to comply with the Loft Law deadlines for legalization, as set forth in section 284 of the Multiple Dwelling Law ("MDL") (the "Loft Law"), and title 29 of the Rules of the City of New York ("RCNY"), section 2-01(a), 29 RCNY § 2-01(a) (Lexis 2012). The applicants seek fines of $1,000 for each deadline allegedly violated. Additionally, pursuant to 29 RCNY section 2-01.1(b)(iii), effective May 21, 2010, applicants seek fines of $1,000 per day from the date that the owner was served with notice of the tenants' application,[1] for the owner's failure to exercise all reasonable and necessary action to obtain a certificate of occupancy.

With minor exceptions, the owner does not dispute that legalization timetables have not been met. The owner contends, however, that there is an "impossibility of performance" preventing it from meeting the deadlines (Respondent-Owner's Post-Hearing Memorandum, May 17, 2012 at 18, 20). In sum, the owner asserts that because the building is located in the Special Clinton District of New York, it must obtain a Certificate of No Harassment ("CONH") from the Department of Housing Preservation and Development ("HPD") in order to make a

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[1] The tenants rely upon an older version of the rule, current at the time that they filed their application. Effective September 7, 2011, the rule was amended to provide for daily fines of up to $17,500. 29 RCNY § 2-01.1(Lexis 2012). For the purpose of this decision, citations will be to the older version of the rule, effective May 21, 2010.

material alteration on the building, and that it was denied a CONH due largely to the actions of the prior owner. Moreover, the owner claims that it can not obtain a Certification of Cure Compliance ("the Cure") because it can not comply with requirements of the Zoning Resolution requiring that it devote 28 percent of residential space to low-income housing, with liens on the property subordinated to the Cure. The owner also asserts that even it would be financially infeasible to do so without cooperation from the IMD tenants, which it has been unable to secure. Thus, the owner contends that the application should be dismissed, or in the alternative, that it should be assessed fines for missing only eight legalization deadlines, all prior to the time that it took ownership of the building (Respondent-Owner's Post-Hearing Memorandum at 18, 20). Further, the owner contends that Rule 2-01.1(b)(iii), providing for daily fines of up to $1,000, is inapplicable to tenant-initiated code compliance proceedings (Respondent-Owner's Supplemental Post-Hearing Memorandum, July 19, 2012).

The applicants counter that the owner's inability to obtain a CONH stems from its own acts of harassment, in addition to that of the prior owners, that its difficulties in effectuating the Cure are largely self-created as a result of excessive debt which it placed on the building, and that the tenants' unwillingness to accede to the owner's offers to give up part of their space in exchange for rent concessions does not excuse the owner's failure to meet legalization timetables. Moreover, the applicants assert that the only defense or mitigation available to the owner is the lack of sufficient funds, as set forth in Loft Board Rule 2-01(c), 29 RCNY § 2-01(c) (Lexis 2012), and that the owner has failed to meet the requirements set forth in the rule to demonstrate the lack of sufficient funds (Petitioners' Supplemental Post-Trial Brief, July 20, 2012).

Following a two-day hearing, the parties submitted legal memoranda. The record was re-opened for supplemental briefing on the issue of whether section 2-01.1(b)(iii) applies in the absence of a Loft Board-initiated enforcement proceeding. For the reasons set forth below, I find that the owner violated 14 code compliance deadlines and should be fined $14,000. Further, I find that Rule 2-01.1(b)(iii) is inapplicable to this proceeding and therefore do not recommend the imposition of additional daily fines.

ANALYSIS

Legalization to date

The building in question is an interim multiple dwelling ("IMD"), situated within the Clinton Special Zoning District. On December 11, 1987, the prior owner filed an IMD registration statement for the building, stating that the registration was filed pursuant to the 1987 amendments to the Loft Law, and on March 9, 1988, the Loft Board issued an IMD registration number for the premises (Pet. Exs. 2). Thus, with the exception of Aric Zagon (who did not live in the building at the time), the applicants' units became subject to the Loft Law on March 9, 1988, under the 1987 amendments to the Loft Law, which extended coverage to certain buildings regardless of prior zoning requirements (L. 1987 ch. 466 (eff. July 27, 1987)); Pet. Ex. 2).

The owner assumed title to the building on February 15, 2007 (Tr. 69; Resp. Ex. A). On September 14, 2011, the owner entered into a stipulation with Mr. Zagon consenting to Loft Law coverage of his unit under Section 281(5) of the Loft Law (Pet. Ex. 3). Section 281(5), effective June 21, 2010, covers certain buildings which were occupied residentially by three or more families from January 1, 2008 through December 31, 2009.

On September 30, 1992, an alteration application for the building was filed with the New York City Department of Buildings ("DOB"), for job number 100495193, the "change of use and occupancy into res. [residential] I.M.D. units as per Article 7-C" (Pet. Ex. 4b). On August 22, 1995, DOB issued a work permit for the building. That permit expired and was reissued a number of times before its ultimate revocation on June 6, 2005. Specifically: the permit was issued August 22, 1995, expired April 11, 1996, reissued December 6, 1996, expired December 6, 1997, reissued May 27, 1998, expired May 27, 1999, reissued June 27, 2000, expired July 3, 2000, reissued December 28, 2000, expired July 3, 2001, reissued August 1, 2001, expired July 3, 2002, reissued October 22, 2004, and finally, expired and was revoked on June 6, 2005 (Pet. Ex. 4a).

On March 15, 2005, prior to the permit's revocation, DOB issued a plan examiner's audit for the application, which indicated that the audit was failed because of various objections, including the lack of a CONH (Pet. Ex. 5c). On August 9, 2005, DOB issued a stop work order (Pet. Ex. 5b) and violation (Pet. Ex. 5a) to the prior owner, because of the latter's "failure to provide all required information to demonstrate compliance with all applicable law for related

application . . . 100495153" (Pet. Ex. 5a). On January 31, 2008, the owner applied for a CONH, which HPD denied on April 8, 2010 (Pet. Ex. 10).

It is undisputed that the owner has not achieved 7-B compliance or obtained a certificate of occupancy. Yonah Friedman, the owner's managing agent, acknowledged that there has been no construction since the denial of the CONH in 2010 (Tr. 113). The owner does not currently have an alteration permit (Tr. 225).

Applicable Code Compliance Deadlines

With regard to all tenants but Mr. Zagon, the applicants assert that the owner should be fined for violating the deadlines that applied as a result of the 1987 amendments to the Loft Law, and for violating most of the deadlines under the 1992, 1996, 1999, and 2007 amendments to the Law. With regard to Mr. Zagon, the applicants contend that the owner should be fined for missing three deadlines under the 2010 amendments (as set forth in section 284(1)(vi) of the Multiple Dwelling Law). This is separate from the applicants' additional contention that the owner should be assessed daily fines under RCNY section 2-01.1 (b)(iii).

As a preliminary matter, the law no longer provides for fines for missing the deadlines under the 1987 amendments. In contending that the owner should be fined for missing 1988, 1989, and 1990 deadlines for filing an alteration application, obtaining a building permit, achieving Article 7-B compliance, and obtaining a certificate of occupancy (Petitioners' post-trial brief at 4), the applicants rely upon the deadlines set forth in 29 RCNY §§ 2-01(a)(1)(iii), 2-01(a)(2)(iii), 2-01(a)(3), and 2-01(a)(4). However, these regulations were subsequently amended to provide for new deadlines, from 1992 forward, which incorporated amendments to the Multiple Dwelling Law. 29 RCNY §§ 2-01(a)(5)-2-01(a)(8). The current Multiple Dwelling Law sets forth owner obligations for compliance, including obligations under the original Loft Law, but does not require an owner to meet the 1988, 1989, and 1990 deadlines relied upon by the applicants. Instead, the law references deadlines under the 1992 amendments (MDL § 284(1)(ii)), 1996 amendments (MDL § 284(1)(iii)), 1999 amendments (MDL § 284(1)(iv)), and 2010 amendments (MDL §§ 284(1)(v), (vi)). Thus, under current law, there is no basis for imposing fines upon the owner for missing the superseded 1988, 1989, and 1990 compliance deadlines.

Loft Board precedent supports this conclusion. As Judge Spooner has noted, the Loft Board has held that that owners may be fined for missing deadlines under previous amendments, so long as those amendments are still incorporated in the Multiple Dwelling Law, because "the New York State Legislature's decision not to repeal any of the subdivisions referring to the superseded deadlines" has been interpreted as evincing "an intent to allow prosecution of owners for missing those deadlines." *Matter of Jawitz,* OATH Index No. 1776/05 at 5 (Nov. 15, 2005), *adopted,* Loft Bd. Order No. 3100 (Sept. 21, 2006), *citing Loft Bd v. Grand Morgan Realty Corp.,* Loft Bd. Order No. 2438 (Nov. 1, 1999); *Matter of 266 Eton Holding Corp.,* Loft Bd. Order No. 2648 (June 28, 2001); *Matter of Hall,* OATH Index No. 1082/02 (Sept. 6, 2002), *adopted in part, rejected in part,* Loft Bd. Order No. 2760 (Nov. 19, 2002). Conversely, the Loft Board has declined to impose fines for deadlines that no longer exist in the Multiple Dwelling Law, finding that when deadlines set forth in prior amendments have been replaced in the law by subsequent deadlines, this indicates that "the state legislature did not intend for the interim deadlines to remain enforceable." *Hall,* Loft Bd. Order 2760.

Although the applicants alleged that the owner violated the deadlines set forth in section 284(1)(vi) of the Multiple Dwelling Law, as pertains to Mr. Zagon, they did not allege that the owner violated section 284(1)(v) of the Multiple Dwelling Law. Section 284(1)(v) extended the deadlines for achieving compliance with fire and safety standards and obtaining a certificate of occupancy. These extended deadlines are also applicable to the owner.

The remaining issue, as to which code compliance deadlines apply, is the applicability of 29 RCNY §2-01.1(b)(iii), under which the applicants seek daily fines, commencing on the date that the tenants' application was served upon the owner. The applicants posit that the Loft Board notified the owner by mail of the proceeding "some time in late June, 2011," and therefore ask for fines from June 29, 2011 to date (Letter from Seth Miller, Esq. to Lisa Gallaudet, Esq., March 1, 2012). However, the Loft Law file that was transmitted to this tribunal (ALJ Ex. 1) indicates that the application was served on the parties on June 25, 2011. Thus, if Rule 2-01.1(b)(iii) were to be found applicable to this proceeding, June 25, 2011 would be the date on which daily fines would begin to accrue.

Rule 2-01.1(b)(iii), upon which the applicants rely, is part of Rule 2-01.1, which provides a framework for the Loft Board to take enforcement action when an owner has not taken "reasonable and necessary action to legalize [a] building." Rule 2-01.1(a)(i) sets forth factors for

the Loft Board or its staff to consider in determining whether an owner has taken all reasonable and necessary action to obtain a certificate of occupancy. Rule 2-01.1(a)(ii) requires an IMD owner who has not been issued a final certificate of occupancy to file monthly reports with the Loft Board, which may be used as evidence "in connection with a Loft Board determination as to whether the owner has exercised all reasonable and necessary action to obtain a certificate of occupancy." Rule 2-01.1(b)(i) provides for inspections by Loft Board staff to determine if the owner has taken reasonable and necessary action to obtain a certificate of occupancy. Rule 2-01.1(b)(ii) provides that at any time before the issuance of the residential certificate of occupancy, "the Loft Board may initiate an enforcement proceeding against an owner for failure to take all reasonable and necessary action to obtain a residential certificate of occupancy." The rule further provides that, within 30 calendar days of delivery of "the notice of proceeding" by hand, or 35 calendar days of the mailing of "the notice," the owner has the right "to present to the Loft Board or its representative . . . a response that includes information as to why that notice should be withdrawn and/or information regarding mitigating factors the owner wishes the Board to consider in connection with [the] Board's determination of the amount of the fine."

Rule 2-01.1(b)(iii) states that hearings will be conducted by OATH administrative law judges. The provision relied upon by the applicants reads:

> When the OATH Administrative Law Judge makes a finding that the owner has not exercised all reasonable and necessary action to obtain a certificate of occupancy, he or she shall also recommend a fine of up to $1,000 for every day that the owner did not exercise all reasonable and necessary action to obtain a certificate of occupancy. Such fine may accrue from the date of delivery by hand or posting by mail *of the notice of an enforcement proceeding,* and may continue to accrue until the owner demonstrates compliance with this section.

29 RCNY § 2-01.1(b)(iii) (emphasis added).

The Court of Appeals has noted, "[i]n matters of statutory and regulatory interpretation . . . 'courts should construe unambiguous language to give effect to its plain meaning.'" *Nostrom v A.W. Chesterton Co.*, 15 N.Y.3d 502, 507 (2010) (citations omitted). Here, the plain and unambiguous language of Rule 2-01.1(b)(ii) provides that daily fines will be imposed for an owner's failure to exercise reasonable and necessary action to obtain a certificate of occupancy, and that the fines will accrue from the date of delivery or mailing of "the notice of an

enforcement proceeding." It is true, as applicants point out, that nothing in Rule 2-01.1(b)(iii) states that an enforcement proceeding is one that is initiated by the Loft Board. However, Rule 2-01.1(b)(iii) must be read together with the other sections of Rule 2-01.1, most notably, Rule 2-01.1(b)(ii), which states that the Loft Board may bring "an enforcement proceeding" against an owner who has not obtained a certificate of occupancy. Rule 2-01.1(b)(iii) tracks the language in 2-01.1(b)(ii) by stating that daily fines accrue from the date of delivery or mailing of "the notice of an enforcement proceeding."

In short, Rule 2-01.1(b)(iii) permits the Loft Board to impose fines after a decision in a Loft-Board initiated enforcement proceeding. Fines accrue from the date of mailing or service of the "notice of an enforcement proceeding." There is nothing in Rule 2-01.1(b)(iii) that even remotely suggests that the Loft Board has the power to impose such daily fines in a tenant-initiated non-compliance application such as this, which seeks a finding that the owner has failed to comply with code compliance timetables and was commenced by the filing of a "general application," for a "legalization timetable violation" (ALJ Ex. 1). Such tenant-initiated proceedings are governed by Rule 2-01(c), subsection two of which provides that an owner who has been found by the Loft Board to have violated the code compliance rules "may be subject to a civil penalty not to exceed $1,000 for each violation." 29 RCNY § 2-01(c)(2)(Lexis 2012).

Accordingly, Rule 2-01.1(b)(iii), under which the applicants seek daily fines commencing from when they were notified of the tenants' application, is inapplicable to this proceeding.

In sum, the deadlines that are applicable to this proceeding are, for all applicants but Mr. Zagon, the deadlines set forth in Sections 284(1)(ii), (iii), (iv) and (v) of the Multiple Dwelling Law. Regarding Mr. Zagon, the applicable deadlines are set forth in Section 284(1)(vi) of the Multiple Dwelling Law.

Which Deadlines were Violated

Section 284(1)(ii) of the Multiple Dwelling Law provides that an owner who has not complied with the original compliance deadlines set forth in section 284(1)(i) is nonetheless "deemed in compliance" so long as the owner has filed an alteration application by October 1, 1992, taken "all reasonable and necessary action" to obtain an alteration permit by October 1,

1993, achieved compliance with fire and safety protection standards by April 1, 1995 (or within 18 months from obtaining an approved alteration permit, whatever is later), and taken "all reasonable and necessary action" to obtain a certificate of occupancy as a class A multiple dwelling by October 1, 1995 (or within six months from achieving compliance with fire and safety standards, whichever is later).

Sections 284(1)(iii), (iv), and (v), incorporating subsequent amendments of the law, similarly deem the owner in compliance with the law even if the owner has not complied with prior deadlines, so long as the owner has filed an alteration application and achieved compliance and fire safety protection standards by certain prescribed dates, and has taken "all reasonable and necessary action" to obtain an alteration permit and a certificate of occupancy

Under subsection 284(1)(vi), which the parties agree applies only to Mr. Zagon's unit, the owner must file an alteration application and achieve compliance with fire and safety protection standards by certain dates, and take "all reasonable and necessary action" to obtain an alteration permit and a certificate of occupancy.

In sum, the current deadlines, as applicable to all units but Mr. Zagon's, require the owner to do the following by the following dates:

October 1, 1992	file an alteration application (MDL § 284(1)(ii))
October 1, 1993	take all "reasonable and necessary action" to obtain an alteration permit (MDL § 284(1)(ii))
April 1, 1995	come into compliance with fire and safety standards (MDL § 284(1)(ii))
October 1, 1995	take all "reasonable and necessary action" to obtain a certificate of occupancy (MDL § 284(1)(ii))
October 1, 1996	file an alteration application (MDL § 284(1)(iii))
October 1, 1997	take all "reasonable and necessary action" to obtain an alteration permit (MDL § 284(1)(iii))
April 1, 1999[2]	come into compliance with fire and safety standards (MDL § 284(1)(ii))

[2] The April 1, 1999 deadline is, alternatively, within 12 months from obtaining an alteration permit, whichever is later. N.Y.Mult. Dwell. Law § 284(1)(iii) (Lexis 2012).

June 30, 1999[3]	take all "reasonable and necessary action" to obtain a certificate of occupancy (MDL § 284(1)(iii))
Sept. 1, 1999	file an alteration application (MDL §§ 284(1)(iv), v))
March 1, 2000	take all "reasonable and necessary action" to obtain an alteration permit (MDL §§284(1)(iv), (v))
May 1, 2002[4]	come into compliance with fire and safety standards (MDL § 284(1)(iv))
May 31, 2002[5]	take all "reasonable and necessary action" to obtain a certificate of occupancy (MDL § 284(1)(iv))
June 1, 2012[6]	come into compliance with fire and safety standards (MDL § 284(1)(v))
July 2, 2012[7]	take all "reasonable and necessary action" to obtain a certificate of occupancy (MDL § 284(1)(v))

The deadlines as applicable to Mr. Zagon's unit are:

March 21, 2011	file an alteration application (MDL § 284(1)(vi))
June 21, 2011	take all "reasonable and necessary action" to obtain an alteration permit (MDL § 284(1)(vi))
December 21, 2011[8]	come into compliance with fire and safety standards (MDL § 284(1)(vi))
June 21, 2013	take all "reasonable and necessary action" to obtain a certificate of occupancy (MDL § 284(1)(vi))

[3] The June 30, 1999 deadline is, alternatively, within 3 months from achieving compliance with fire and safety standards, whichever is later. N.Y.Mult. Dwell. Law § 284(1)(iii) (Lexis 2012).

[4] The May 1, 2002 deadline is, alternatively, within 12 months from obtaining a permit, whichever is later. N.Y.Mult. Dwell. Law § 284(1)(iv) (Lexis 2012).

[5] The May 31, 2002 deadline is, alternatively, within one month from achieving compliance with fire and safety standards, whichever is later. N.Y.Mult. Dwell. Law § 284(1)(iv) (Lexis 2012).

[6] The June 1, 2012 deadline is, alternatively, within 12 months after obtaining a permit, whichever is later. N.Y.Mult. Dwell. Law § 284(1)(v) (Lexis 2012).

[7] The July 2, 2012 deadline is, alternatively, within one month from achieving compliance with fire and safety standards, whichever is later. N.Y.Mult. Dwell. Law § 284(1)(v) (Lexis 2012).

[8] The December 21, 2011 deadline, is alternatively, within 18 months from obtaining a permit, whichever is later. N.Y.Mult. Dwell. Law § 284(1)(vi) (Lexis 2012).

The parties do not dispute that the prior owner met the October 1, 1992 deadline to file an alteration application. Beyond the alteration application deadline, however, it is apparent that the prior owner and owner have not complied with the legalization timetables. A work permit for the building was not obtained until August 21, 1995, which was ultimately revoked on June 6, 2005. Thus, the October 1, 1993 deadline to obtain an alteration permit was not met.

The applicants contend that the revocation of the alteration permit in 2005 should be retroactive to 1995, making the owner non-compliant with the 1997, 1999, 2000, and 2002 deadlines for obtaining a work permit. In support, the applicants cite *Matter of Connors,* OATH Index Nos. 2002/04 & 2004/04, *adopted,* Loft Board Order No. 2886 (Nov. 18, 2004). *Connors*, like this case, involved a tenant-initiated application for a finding of non-compliance with the legalization deadlines. Although the owner had obtained a certificate of occupancy in 2000, the Supreme Court concluded that the certificate of occupancy should be nullified because the building had failed to meet numerous required fire and safety standards. *Connors,* OATH 2002/04 at 4, citing *Byrne v. Bd. of Standards & Appeals,* Index No. 115735/2001, slip op. at 5 (Sup. Ct. N.Y. Co. 2002), *aff'd,* 5 A.D.3d 261 (lst Dep't 261). Based upon the Supreme Court's decision, Administrative Law Judge McFaul concluded that the owner had missed the 2002 deadline for obtaining a valid certificate of occupancy.

Alternatively, the applicants note that the building permit had lapsed for significant periods of time from 1996 through 2004, and assert that, during these periods, the building was not in compliance with required legalization deadlines (Petitioners' Post-Trial Brief at 5, n. 3). As the applicants note, this tribunal has previously found an owner out of compliance during times that a permit had elapsed, prior to being renewed. *See Matter of Jawitz,* OATH Index No. 1776/05 at 5 (Nov. 5, 2005), *adopted,* Loft Board Order No. 3152 (Feb. 15, 2007).

The reasoning in *Connors* is persuasive. Although the prior owner obtained a building permit in 1995, the permit never should have been issued, because the owner of a building within the Special Clinton Zoning District must apply for and obtain a CONH from HPD prior to making a "material alteration" in the building. Zoning Resolution § 96-109(b). This is a fundamental responsibility for owners within the Clinton District. Thus, following this tribunal's reasoning in *Connors,* I find that the 2005 revocation of the permit was retroactive to its issuance, and therefore the 1997, 1999, 2000, and 2002 deadlines for obtaining a building permit were not met.

I do not find, as the applicants contend, that the owner failed to meet the September 1, 1999 deadline to file an alteration application. The owner filed its alteration application in time to meet the October 1, 1992 deadline. Thus, subsequent amendments to the Loft Law which extended the time to file an alteration application do not apply to the owner, as it had already complied with the alteration application requirement. What the applicants essentially argue is that, as of 2007, when the Legislature re-imposed the September 1, 1999 alteration application deadline, the owner was required to file a new alteration application, based upon language in a stipulation entered into in 2006 ("the Stipulation"), by the tenants and the prior owner, to resolve a pending harassment/undue interference case (Pet. Ex. 6b). That language required the owner to amend its plans to reflect changes made by the tenants' architect, without creating a specific deadline (Pet. Ex. 6b, at ¶ 29).

It appears that the owner complied with the terms of the 2006 Stipulation by amending its plans and filing them with the Loft Board on July 17, 2006 (Pet. Exs. 7, 8; Tr. 204). Thus, the tenants' contention that the owner did not comply with the terms of the Stipulation because they failed to file the plans with DOB, a requirement not contained in the Stipulation, is unfounded.

More broadly, even if the owner had failed to comply with the terms of the Stipulation, the Stipulation is a private contract between the parties. The Loft Board did not approve the terms of the Stipulation; rather, it deemed the application discontinued with prejudice, noting that the case had been settled and the parties had agreed to discontinue the application with prejudice (Pet. Ex. 6a). It is the State Legislature, not private parties, which sets code compliance deadlines under Article 7-C of the Multiple Dwelling Law. To interpret a stipulation between private parties as creating a separate, enforceable code compliance violation subject to a $1,000 fine by the Loft Board would impermissibly usurp the legislative function and would constitute an *ultra vires* exercise of the Loft Board's authority. *See Nur Ashki Jerrahi Community v NYC Loft Bd.*, 80 A.D.3d 323, 327 (1st Dep't 2010) ("The Loft Law … is a governmental residential regulatory scheme"); *Thorgeirsdottir v. NYC Loft Bd.,* 161 A.D.2d 337 (lst Dep't 1990) (". . . an administrative agency may only promulgate rules to implement a law as enacted; it has no authority to fashion any rule out of harmony or in conflict with the statute").

However, it is undisputed that the 1999, 2002, and 2012 deadlines (April 1, 1999, May 1, 2002, June 1, 2012) to come into compliance with fire and safety standards have not been met, and that the building has not yet obtained a certificate of occupancy. It is also clear that the

owner did not file an alteration application after consenting to coverage for Mr. Zagon in September 2011.

Yet, at least as to the building permit deadlines and the certificate of occupancy deadlines, the standard is whether the owner has taken all "reasonable and necessary action" to get a building permit and a certificate of occupancy. The owner argues that, at least since 2007, it has made good faith, continuing efforts to obtain a CONH and/or obtain a Certificate of Cure Compliance so that it can legalize the building, and has been unable to do so due to matters beyond its control. Thus, the owner asserts, it faces an "impossibility of performance," which should excuse its failure to obtain a building permit and certificate of occupancy. Put another way, the owner contends that it has taken "reasonable and necessary" steps since 2007 to comply with these legalization requirements, and thus should not be found to have violated any legalization deadlines after 2007.

The Owner's Attempts From 2007 on to obtain a CONH or waiver of a CONH, and/or Effectuate the Cure

Under the Zoning Resolution, when a building owner applies for a CONH, HPD must investigate whether there is reasonable cause to believe that harassment occurred within the inquiry period consisting of the preceding 15 years. Zoning Resolution § 96-110 (a) (8). If HPD determines that there is harassment and denies the application for a CONH, DOB will not issue a permit for a material alteration, unless the owner comes into compliance with the Cure provisions of the Zoning Resolution and HPD certifies compliance with the Cure. Zoning Resolution §96-110(b)(1).

Yonah Friedman, the owner's managing agent, acknowledged that the owner knew when it took title to the building in February 2007 that a CONH would be needed for legalization (Tr. 71). The owner had "every intention" of legalizing the building (Tr. 235) and believed that the tenants would not oppose the issuance of a CONH. The owner's belief was based upon language in the 2006 Stipulation which provided:

> In the event that the Owner is required to apply and applies for a . . . CONH in order to legalize the building . . . the Tenants will support such application, including consenting that said application be granted and will assist the Owner in taking such steps as are necessary to foreshorten that application process as to cause the issuance of the CONH. With respect to any further applications

> for . . . [CONH], other than that which may be required for obtaining of proper Certificate of Occupancy, the Tenants will assist the Owner in taking the steps necessary to obtain such CONH and to foreshorten the application process, so long as there are no future instances of harassment occurring after the date of this Stipulation's execution. In the event that the Tenants allege that there are such acts of harassment . . . the parties will first attempt to resolve their differences, and failing that, the Tenants shall be entitled to such rights and remedies as exist at law.

(Pet. Ex. 6b, ¶ 33).

Soon after taking ownership, the owner tried to obtain a waiver of the CONH requirement. By letter dated May 31, 2007, an attorney whom it had retained requested a waiver from DOB for the CONH (Tr. 75; Resp. Ex. B), asserting that the Zoning Resolution requiring the issuance of a CONH did not apply to interim multiple dwellings, that the work to be done was not a "material alteration," and that the Loft Law should pre-empt the local zoning law (Resp. Ex. B). By letter dated August 30, 2007, DOB denied that request, finding that the CONH requirement pertained to IMD buildings within the Special Clinton District, and that the requirement applied even though most of the work was completed prior to the permit application (Pet. Ex. 12c).

The owner then filed an Article 78 petition, seeking a determination that it was not required to obtain a CONH to legalize the building. In a decision dated November 21, 2008, Judge Herman Cahn denied the petition, finding that the CONH requirement was not irrational, and that the owner had failed to establish that the Zoning Resolution was pre-empted by the Loft Law (Pet. Ex. 9).

After the Article 78 was denied, the owner met with the tenants and the Executive Director of the Loft Board in November 2009. According to Mr. Friedman, the owner's representatives said they wanted to "revert back" to the 1999 plans (Resp. Ex. H), which DOB had already approved. They did not feel this would require a CONH and were seeking a waiver from the tenants to have those plans certified so they could proceed with legalization. They contemplated that a DOB inspector would inspect the building and compare it to the plans; if there were any discrepancies, the owner would file a post-approval amendment showing the change (Tr. 79, 198-99, 243, 244). After the meeting, the owner sent the 1999 plans to the tenants (Tr. 84).

On October 21, 2009, DOB approved the owner's post approval amendment to revert back to the prior approval of the 1999 plans (Tr. 89, 243; Pet. Ex. 4f). On November 24, 2009, an expeditor retained by the owner wrote to DOB requesting an appointment to expedite the process of obtaining a permit for the building (Resp. Ex. G).

Ultimately, however, the owner was unable to revert back to the 1999 plans. In approximately December 2009, HPD took the position that a CONH would still be required, since a material alteration on the building had already been completed (Tr. 85-86). Because of HPD's objection, the Loft Board did not re-certify the 1999 plans (Tr. 95). The 1999 plans (Resp. Ex. H) were never re-filed with DOB (Tr. 202).

Having lost its legal challenge in Supreme Court, and having failed to convince HPD that it could "revert back" to 1999 plans without obtaining a CONH, the owner filed an application for a CONH with HPD on January 31, 2008 (Pet. Ex. 11). On April 8, 2010, HPD denied the application, following a hearing before OATH which led to a determination by Administrative Law Judge Spooner that both, the former owner, Mr. Papaioannou, and Shabbat, LLC, the current owner, had committed harassment of the tenants. *Dep't of Housing Preservation & Development v. Jusewitz,* OATH Index No. 347/10 (Apr. 7, 2010). Judge Spooner noted that the current owner's harassment of the tenants included: statements by the owner threatening to get the tenants out; the continued failure to deal with boiler outages and a defective fire escape; the commencement of construction work without a permit; the filing of an access application against a tenant in bad faith; and false certificates of correction filed in 2007 that were intended to conceal the owner's failure to correct serious violations. *Jusewitz,* OATH 347/10 at 19. In issuing the final determination denying the application, HPD noted that while an application for a CONH for the building would not be accepted, "the owner may apply at any time for certification of compliance with the cure requirements" (Pet. Ex. 10).

Mr. Friedman testified that after HPD denied the CONH, the owner hired another law firm to explore the Cure (Tr. 95). The Cure requires that an owner must devote 28% of its residential floor space to low-income housing. All parties with an interest in the property must enter into a restrictive declaration agreeing to the use of the use of the space for this purpose. Zoning Resolution §§ 96-110(a)(3), 96-110(a)(11). If creditors' liens exist, they must be subordinated to the Cure. Zoning Resolution § 23-96(f). Mr. Friedman testified that 28 percent of the building's residential floor area is approximately 11,000 square feet (Tr. 97).

According to Mr. Friedman, the building is heavily in debt (Tr. 100). The owner took out a mortgage for $7.5 million when it bought the building ((Tr. 99; Pet. Ex. 16). The mortgage covered three properties owned by Shabbat, including the building, but the owner decided to use only income from the building to pay its debt (Tr. 104, 158). When the CONH was denied, the building was already in foreclosure by the lender, Mercury Credit Corp (Tr. 97). The owner signed a forbearance agreement with Mercury Credit Corp., stating that it would not interfere with the foreclosure and would make its monthly mortgage payments (Tr. 98: Resp. Ex. C). However, the owner stopped making its mortgage payments in 2010. On May 18, 2011, Mercury Credit Corp obtained a foreclosure judgment against the owner (Resp. Ex. D).

In addition, the City of New York placed a lien on the building for $ 750,000 in unpaid property taxes. The Bank of New York purchased the lien, and is also foreclosing on the building (Tr. 111). The law firm which previously represented the owner has a mortgage on the building (Tr. 159). There is also a personal debt mortgage of $130,000 between Nediva Schwartz, one of the owner's managing members, and Shimon Avrahami, the former managing agent for the building (Tr. 160; Pet. Exs. 17, 18).

According to Mr. Friedman, Mercury Credit Corp. has repeatedly objected to making its lien subordinate to the Cure (Tr. 138), as the Zoning Resolution would require.

Moreover, Mr. Friedman testified that the building would be unable to meet its operating expenses if it devoted 28 percent of the free-market residential space to low-income housing, because that would leave only 1,000 square feet of free-market rate residential housing (Tr. 110-12). In this case, he asserted, the rent roll could not possibly meet the building's expenses (Tr. 187). Monthly building expenses include the mortgage, property tax, fuel, insurance, water, superintendent's salary, management, electric utilities, elevator maintenance, exterminator, and legal fees (Tr. 102). For 2011, the total estimated annual cost of expenses for the building, including the mortgage, was $814,500 (Tr. 102: Resp. Ex. J). The annual residential and commercial rental income in 2011 was approximately $670,000 (Tr. 214-16; J1-J3), with the vast bulk of that from commercial and free-market rentals. The annual rent from the IMD tenants totaled only $44,536.80 (Resp. Ex. J2).[9] Recently, two free-market tenants became IMD tenants,

[9] This amount would have to be modified to reflect the two additional IMD tenants who became covered in 2011.

bringing the total number of IMD tenants to nine (Tr. 110). According to Mr. Friedman, approximately 11 tenants in the building are currently not paying rent (Tr. 248).

Mr. Friedman testified that he reached out to the IMD tenants repeatedly to see if they would agree to have their units included in the Cure, to no avail. He met with the tenants in June 2010 to explore that possibility, at meetings facilitated by Bob Kalin, a tenant organizer at Housing Conservation Coordinators (Tr. 115). Mr. Cayler, one of the tenants residing in the building and a member of the tenants' association, attended, as did some of the other tenants (Tr. 120). The tenants said they would discuss the general proposal with the rest of the tenants and asked the owner to provide a more specific and formal proposal (Tr. 122).

Mr. Friedman also contacted Jenna Breines, the Director of Inclusionary Housing/421-a Affordable Housing Programs at HPD, beginning in August 2010, to discuss the logistics of having a not-for profit organization manage the low-income housing space (Tr. 123). She suggested two not-for-profit organizations which might be able to administer the space, Phipps Housing and the Clinton Housing Development Corp. (Tr. 123; Resp. Ex. K). Mr. Friedman contacted Josephine Perrella, of Phipps Housing, who advised him that, generally, tenants must be income-qualified to participate in the Cure. However, she also mentioned two inclusionary buildings where the City accepted existing tenants "as is," without income verification (Tr. 124, 125, 126; Resp. Ex. L).

On September 23, 2010, the tenants served a Notice to Cure upon the owner, indicating that the owner was in default of the 2006 Stipulation by having failed to cure numerous violations and proceed with legalization. The Notice indicated that any responses should be sent to the tenants' attorney, Mr. Miller (Pet. Ex. 15).

On November 17, 2010, a meeting was held between the owner's attorney (then Jason Davidson, Esq.), Mr. Miller and Mr. Cayler (Tr. 133, 146). According to Mr. Friedman, Mr. Davidson said he wanted to set a new tone going forward and wanted to discuss how to legalize the building, but Mr. Miller was not cooperative and "berated" the owner's attorney (Tr. 137, 153, 232).

By letter dated November 24, 2010, Mr. Miller advised Mr. Davidson that the tenants were not interested in the owners' proposal, which he said involved selling their rights or space in exchange for money. He also stated that heat and hot water were terminated after the November 17 meeting and that the tenants would pursue any legal remedies available to them

unless there was a "meaningful plan" for addressing the conditions and status of the building (Pet. Ex. 14).

On January 26, 2011, Ms. Schwartz e-mailed each of the IMD tenants detailed offers proposing relocating them to a different unit, at 523 West 45th Street,[10] with one-third the square footage of their existing unit. The new unit would be renovated to the tenants' liking and the tenants would live rent free (Tr. 128-29; Resp. Ex. M).

After this, a meeting was held was held with some of the tenants, Mr. Kalin, and Ms. Schwartz. According to Mr. Friedman, the tenants agreed to consider proceeding with the proposal, but wanted $10,000 for an architect and $10,000 for an attorney to advise them. One of the tenants agreed to facilitate the meetings between the tenants and Ms. Schwartz. However, Mr. Friedman testified that apart from one telephone call months later, the tenants never followed up or made any counter-offer (Tr. 129). Management did not draw up blueprints to show the proposed relocation because the tenants never agreed to the proposal (Tr. 229).

In October 2011, Inclusionary Housing told the owner's attorney that the tenants could not be "grandfathered" as low-income tenants; rather, they would have to be income-qualified. HPD would need proof of income qualification (Tr. 127; Resp. Ex. O). According to Mr. Friedman, management requested financial information from the tenants, but never received it (Tr. 127, 137).

Mr. Friedman acknowledged that he has never sent HPD or the tenants a complete proposal for compliance with the Cure, because he can not meet the square footage requirement or the requirement that the square footage be debt-free. He would not send HPD a partial plan (Tr. 227-28).

The owner's defense of impossibility is without merit

The owner has asserted that it can not comply with its legalization obligations because there is an impossibility of performance. In support, the applicants cite two contract cases holding that performance under a contract which is made impossible by governmental action is excused. *Metpath, Inc. v. Birmingham Fire Ins. Co.,* 86 A.D.2d 407, 411 (lst Dep't 1982); *Campo v. Bd. of Education,* 211 A.D.2d 658, 659 (2d Dep't 1995). These cases are not

[10] The building address is 517-525 West 45th Street. As Mr. Friedman testified, the building is actually comprised of three buildings, two in the front, and one in the rear (Tr. 70).

applicable because this is not a contract case, but rather an administrative action initiated under a complex regulatory and legislative scheme.

Moreover, as a matter of fact, it can not be said that the owner's failure to legalize is due solely to governmental action. The 2006 Stipulation provided that the tenants would support the owner's application for a CONH, provided that the owner did not engage in "future instances of harassment" (Pet. Ex. 6b, ¶ 33). As Judge Spooner's decision in *Jusewitz,* OATH 347/10, amply illustrated, however, the owner engaged in multiple acts of harassment. This harassment was a direct and proximate cause of the denial of the CONH and the owner's subsequent inability to obtain an alteration permit. Thus, the owner may not be heard to claim that HPD and/or DOB, rather than its own actions as a landlord, are responsible for its failure to legalize.

Nor may the owner be heard to claim that its failure to legalize is impossible because of the Zoning Resolution, which requires that it set aside 28 percent of residential space for low income housing. The owner would not need to meet the terms of the Cure if it had gotten the CONH in the first place, which would have been likely had it not harassed the tenants.

The owner also bears some responsibility for the fact that it does not have debt-free space. Most notably, when the owner bought the building, it took out a $7.5 million dollar mortgage, covering all three properties, while deciding to pay its debt only with income from this property. *See Eyedent v. Vickers Management,* 150 A.D.2d 202, 205 (lst Dep't 1989) (in requiring landlords to make repairs to their apartment buildings, rejecting landlord's claim of economic hardship, since any hardship was "self-inflicted").

Moreover, it is not entirely clear that it is impossible for the owner to effectuate the Cure, although it would require Mercury Credit and/or the Bank of New York agreeing to subordinate the loan to the Cure, or HPD agreeing to relax or waive this requirement. Mr. Friedman testified that he did not recall whether he had anything in writing from Mercury declining to subordinate the lien to the Cure (Tr. 190). He also did not recall whether he had any written correspondence from HPD in which HPD refused to waive or relax the requirement that the debt be subordinated to the restrictive declaration (Tr. 190-91).[11]

[11] Moreover, while Mr. Friedman asserted that the building could not meet its financial obligations if it devoted 28 percent of the free-market residential space to low-income housing, he also acknowledged that three of the free market units became vacant after April 2010, that the average lease term on the free-market rentals is one year, and that the sprinkler room, with over 1000 square feet, could be rented if legalized, as could the superintendent's office (Tr. 281, 220).

Additionally, while the owner claims that it is financially impossible to legalize the building, because the building will not generate enough income to meet its operating costs, an owner's financial inability to comply with statutory legalization requirements does not preclude a finding of noncompliance under the Multiple Dwelling Law. *See Matter of Thornley,* OATH Index No. 2180/07 at 5 (Sept. 28, 2007), *adopted in part, rejected in part,* Loft Bd. Order No. 3406 (Feb. 21, 2008); *Loft Bd. v. Berger,* Loft Bd. Order No. 2319 (Oct. 27, 1998), *Matter of Hartnett,* Loft Bd. Order No. 1269, 13 Loft Bd. Rptr. 188 (Nov. 21, 1991).

The Loft Board's regulations instead provide that documentation of insufficient funds may serve to mitigate fines once noncompliance is found:

> Upon demonstration by an owner of insufficient funds to proceed with code compliance, the Loft Board shall consider the lack of sufficient funds in mitigation of any fine to be imposed against the owner . . . To obtain the benefit of the defense of insufficient funds, an owner shall supply the Loft Board with an income and expense statement for the building verified by an independent certified public accountant, a written estimate of the cost of compliance with the cited deadline or requirement from a registered architect, and if the building does not provide sufficient funds for purposes of compliance then the owner shall also supply a letter from two separate banks or mortgage brokers refusing to offer sufficient funds to comply, accompanied by copies of the owner's applications for such funds, or if the lenders refuse to provide a written rejection, then the owner shall file an affidavit setting forth the basis for the owner's belief that the applications have been rejected.

29 RCNY §2-01(c)(3) (Lexis 2012). The owner has failed to meet this burden. It has not produced an architect's or accountant's statement, or a letter from any bank or mortgage broker, or its own affidavit, demonstrating that it applied for funds and was denied. There is no basis, therefore, for reducing the amount of fines to be imposed for the failure to meet deadlines.

Apart from this, there is no evidence that the owner ever sought an extension of the code compliance deadlines. *See* N.Y. Mult. Dwell. Law §§ 284 (i), (vi) (Lexis 2012); 29 RCNY § 2-01(b) (Lexis 2012). Mr. Friedman's assertion that he did not remember whether any extension had been sought (Tr. 191) was not credible. And Mr. Cayler testified that since April 2010, he had never been served with an application from the owner seeking an extension of any deadlines (Tr. 191, 194).

Nor may the owner shift blame for its failure to legalize to the IMD tenants. Mr. Friedman testified at length that he held two meetings with the IMD tenants to discuss their participation in the Cure and that Ms. Schwartz ultimately proposed relocating each of the IMD tenants to a different, much smaller unit in exchange for free rent. The tenants rejected these suggestions, which, if accepted, might have removed some of the impediments to Cure compliance (although the issue of the liens on the building would have remained unresolved). However, the tenants have statutory rights under the law, and they are under no obligation to waive them. The owner's obligation to legalize is non-delegable, *Thornley,* OATH 2180/07 at 6, and certainly does not extend to the tenants.

For all these reasons, the owner has failed to show that it took all "reasonable and necessary" action to obtain an alteration permit and certificate of occupancy, as required by the code compliance deadlines.

Findings and Recommendation

As stated above, I find that the owner failed to comply with 14 legalization deadlines: October 1, 1993, April 1, 1995, October 1, 1995, October 1, 1997, April 1, 1999, June 30, 1999, March 1, 2000, May 1, 2002, May 31, 2002, June 1, 2012, July 2, 2012, March 21, 2011, June 21, 2011, and December 21, 2011. Pursuant to Loft Board Rule 2-01(c)(2), a fine of $1,000 per violation, or $14,000 total, should be imposed.

Faye Lewis
Administrative Law Judge

September 14, 2012

SUBMITTED TO:

ROBERT D. LiMANDRI
Chairperson

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