

Matter of Pels

OATH Index No. 2481/11 (June 20, 2012)
[Loft Bd. Dkt. No. TR-0833]

Loft tenant who created a residential occupancy in her loft unit prior to the window period but lived in the unit only intermittently during the window period, while maintaining a residence in Michigan, was found to be a protected occupant under MDL 281(5). ALJ also found that Loft Board rule 2-08(j), which prevents tenant from being excluded from coverage because of prior existing incompatible uses, was not *ultra vires*.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
MARSHA PELS
Applicant

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This application, filed on November 12, 2010 and indexed by the Loft Board as TR-0833, is brought by Marsha Pels (“applicant” or “Pels”), tenant of an interim multiple dwelling (“IMD”) building located at 93-99 Commercial Street, Brooklyn, block 2472, lot 400 (“99 Commercial Street” or “the premises”), who seeks a finding that her unit is an IMD unit covered by the Loft Law under the new Loft Law amendments, Section 281(5) of Article 7-C of the Multiple Dwelling Law, and that she is the protected occupant of the unit. On January 18, 2011, respondent 99 Commercial Street, Inc. (“owner”) filed an answer generally denying the allegations and asserting defenses to applicant’s claims.

A hearing was scheduled and held before me on January 4, 5, and 26, 2012. Post-trial briefing was scheduled with briefs submitted on March 6 (“App. Br.”), April 10 (“Resp. Opp. Br.”), and April 25, 2012 (“Reply Br.”), at which time the record was closed. During the course of briefing, this tribunal issued a memorandum decision, dated March 8, 2012, on applicant’s motion for summary judgment. *Matter of Pels*, OATH Index No. 2841/11, mem. dec. (Mar. 8, 2012) (granting part of applicant’s motion and dismissing defense asserting that the structure on

the premises constitutes more than one building for Loft Law purposes, and denying summary judgment as to the defense of inherently incompatible uses) (“*Pels* Mem. Dec.”).¹ That decision sets forth the procedural history of this case, which is incorporated by reference and will not be repeated here.

PRELIMINARY MATTERS

A number of pretrial motions were submitted. Respondent moved to dismiss the application because petitioner had failed to serve the application on all “affected parties,” including commercial tenant Guy Corriero, as required by Loft Board rule 1-06(a). The motion must be denied. Petitioner cured the error by serving Mr. Corriero well before trial and respondent failed to show any prejudice. See *Matter of Tenants of 51-55 W. 28th Street*, OATH Index No. 2877/09, mem. dec. at 2 (June 26, 2009), *adopted*, Loft Bd. Order No. 3580 (June 17, 2010) (party seeking pretrial dismissal has the burden of establishing that the relief sought must be denied as a matter of law and the burden is “particularly high” in Loft Board cases where the OATH ALJ makes recommended findings which are submitted for final decision to the Loft Board); *Dep’t of Correction v. Raphael*, OATH Index No. 1117/90 at 2-3 (Aug. 16, 1990) (motion to dismiss denied where pleading error was cured in advance of trial and respondent showed no prejudice). Mr. Corriero served an answer on September 27, 2011, and was able to participate in pretrial motions and in all aspects of the trial which commenced in January 2012.

Mr. Corriero’s primary concern is that he currently requires access to Pels’ unit in order to access his own unit, which is directly behind hers (Tr. 425, 461). In his answer, he seeks among other things “a guarantee that access to my space will not be restricted in any way” (Ans.). While it is clear that some reconfiguration of the space would have to take place in order to provide independent access to his unit, this is not a matter upon which the tribunal saw fit to rule in this coverage application. The matter will more appropriately be addressed through the narrative statement and legalization process.

Respondent also moved, on October 9, 2011, to compel an inspection of Pels’ loft unit and for discovery of her federal income tax records. In her papers in opposition, Pels argued both were irrelevant to this coverage proceeding. I found inspection of the unit unnecessary as

¹ Summary judgment having been granted, respondent’s defense that the building constitutes a horizontal multiple dwelling (Ans. ¶13) is dismissed. For the same reason, respondent has no basis to assert as a defense the approval (later withdrawn) by the Department of Buildings to remove part of the building where Pels’ unit is located (Ans. ¶20). This defense also should be dismissed.

the owner and his architect had conducted an inspection of the unit in January 2011, after being served with Pels' coverage application. Furthermore, discovery of Pels' business deductions as sought by respondent is irrelevant to the matter to be determined in this coverage application, which is the residential character of the loft unit. After hearing argument by the parties by conference call, I denied the motion.

ANALYSIS

To qualify for Loft Law coverage under MDL 281(5), a building must (i) at any time, have been occupied for manufacturing, commercial, or warehouse purposes, (ii) lack a certificate of occupancy permitting residential use in the qualifying unit on June 21, 2010, and (iii) been occupied as the residence or home of any three or more families living independently from one another for a period of 12 consecutive months during the period commencing January 1, 2008, and ending December 31, 2009. MDL § 281(5) (defining "interim multiple dwelling"). In 1987, the owner registered the building with the Loft Board as an IMD under MDL 281(4) along with 16 residential units (*Pels* Mem. Dec. at 3); in 2008 and 2009, approximately 22 residential units were registered (Pet. Ex. 1). Unit 1H where applicant resides is not registered and the owner disputes that Pels is a residential occupant entitled to coverage. Therefore, Pels seeks to prove that her unit is covered and that she is the protected occupant.

To establish coverage under MDL 281(5), a qualifying unit must (1) not be located in a basement or cellar, (2) have at least one entrance that does not require passage through another residential unit to obtain access to the unit, (3) have at least one window opening onto a street or a lawful yard or court as defined in the zoning resolution for such municipality, and (4) be at least 550 square feet in area. *See also* 29 RCNY § 2-08(a)(4)(iii). The owner asserts as a defense the absence of these factors but put on no evidence that Pels' unit is located in a basement or cellar, that it does not have at least one entrance that does not require passage through another residential unit, or that the unit is less than the minimum of 550 square feet. The plans drafted by respondent's architect, Christoph Riedner, Petitioner's Exhibit 2, helps establish all three as a matter of fact. At trial, respondent disputed that the unit had a window that opened onto a lawful yard or court. The trial record shows that the unit has several windows that open onto a lawful court, as defined in the New York City Zoning Resolution.² Thus, the defense

² John Peachy, a licensed architect since 1977 with a specialty in loft conversions and buildings under Loft Board jurisdiction, visited the Pels unit in September and December 2011 and offered testimony on these points (Tr. 28,

must be dismissed (Ans. ¶16).

Under MDL 281(5), an IMD must not be located in an industrial business zone established pursuant to chapter 6D of title 22 of the NYC Administrative Code. There was no evidence that the building is located in an industrial business zone. In addition, under MDL 281(5), the IMD must not contain “a use actively and currently pursued” that the Loft Board has determined to be inherently incompatible with residential use. I find here that in accordance with the applicable Loft Board rule, applicant is not foreclosed from coverage due to prohibited uses, as more particularly addressed below.

According to Pels, she originally leased Unit 1H in 1985 as a sculpture studio. She did not begin using it as a residence until 1993. From 1985 to 1993, Pels also leased a penthouse apartment at 99 Commercial Street that she used as her residence (Pet. Ex. 16). In 1993, she sublet the penthouse apartment while away teaching at the University of Iowa; in anticipation of her move, she added a bedroom to the loft unit so she could return during the teaching year and have someplace to sleep (Tr. 234-35). After her work in Iowa ended, she returned to 99 Commercial Street but was unable to regain possession of the penthouse from the sublessee, so she moved into the loft unit full time. Pels has lived in Unit 1H ever since. Based upon the record evidence set forth below, I find that she was the residential occupant of the unit for the entire 2008-2009 window period.

Indicia of Independent Living and Conversion

To establish the residential nature of a loft unit during the window period, the applicant must show “sufficient indicia of independent living” to demonstrate the unit’s use as a family residence as well as some physical conversion of the unit. *See Matter of South 11th Street Tenants Assoc. & Matter of Lid Fla Realty Corp.*, OATH Index Nos. 1242/96-1244/96 at 39-40 (Mar. 30, 1999), *adopted*, Loft Bd. Order No. 2397 (Apr. 29, 1999) (hereinafter “*South 11th Street*”) (citing *Franmar Infants Wear, Inc. v. Rios*, 143 Misc.2d 562 (App. Term, 1st Dep’t

32, 34, 42, 48). He testified that the windows in the Pels unit open onto a lawful court or yard in accordance with the applicable law and rules (Tr. 35). He cited its characteristics: it is roughly 20 feet wide at its narrowest point by approximately 100 feet long; it is open from its lowest point to the sky and surrounded by walls on at least three sides, and it is permissible for it to be enclosed by the lot line on one side (Tr. 93-94). Using photographs of Pels’ unit taken from the courtyard outside, and from inside the unit (Pet Exs. 6J, 6K), he identified the windows and a doorway that look onto the courtyard (Tr. 37-38). He noted the windows (clerestory windows) are about 12 feet from the floor of the unit and pointed out their location on the Riedner plans (Pet. Ex. 2, Tr. 43, 84, 85). He added that other units in the building also derive their light and air and status of compliance with Article 7B from this courtyard. Respondent offered no evidence to contest these facts.

1989); *see also* 29 RCNY § 2-08(a)(3). Pels met her burden of establishing both conversion of the space and sufficient indicia of independent living by a preponderance of the credible evidence.

She testified that, aside from the studio space, the loft originally also had an office with a telephone and desk, and a bathroom with a shower. In 1993, she converted the office to her bedroom and closet (Tr. 236-37). She also broke through the wall of a communal bathroom located in the hallway outside her unit and took over the sink, toilet and urinal, and converted that space into a complete bathroom with a toilet, sink and shower (Tr. 238). In 1997, along with her partner Tim Casey, they installed a kitchen, stove, refrigerator, and cabinets (Tr. 241). In 1999, they performed further renovation that included adding walls and an office with bookshelves and updating the electrical lines (Tr. 241, 352).

Tim Casey testified that he moved in with Pels in 1996 and lived there with her for 10 years. During that 10-year period, he had a painting studio, Pels had a sculpture studio, and they jointly used the living space which consisted of a bedroom, bathroom, living room, kitchen and library. He spent the Summer of 1999 renovating the space: installing desks and bookshelves outside the bedroom, installing partial-height walls to separate the living area from his work studio, installing cabinets in the kitchen, installing an additional doorway inside the living area, and constructing storage for his paintings (Tr. 135-36). He said the alterations took two months to complete and cost about \$2,000, which he and Pels paid (Tr. 175). Casey identified photographs of the unit that included the kitchen with its appliances and cabinets and a door to the bedroom (Pet. Ex. 18A), the living area and its entryway including two of the walls he constructed (Pet. Ex. 18B), the bedroom (Pet. Ex. 18C), the closet inside the bedroom and entrance to the bathroom (Pet. Ex. 18D), the bathroom with sink, shelving and air conditioner (Pet. Ex. 18E), the living area and library outside the bedroom including shelves he built (Pet. Ex. 18F, Tr. 141-45).

Mr. Casey estimated the size of the loft unit as approximately 2,000 square feet, with his studio occupying 800 square feet, Pels' studio occupying 1,000 square feet, and the living area occupying 200 square feet (Tr. 176-77).³ Pels testified that the living space accounts for about 600 of the 2,400 square feet in the unit; the rest currently comprises her sculpture studio (Tr. 360-61).

³ The Riedner plans indicate the loft unit is actually larger, at 2,434 square feet (Pet. Ex. 2, Tr. 178).

Dennis McConkey, Pels' neighbor at 99 Commercial Street, testified that he first saw her living space more than five years ago and the space contained a bedroom, bathroom and kitchen at that time (Tr. 205-07). The living area had a large round dining table, coffee table, sofa, easy chairs, and a wall of bookshelves with a built-in desk. The bedroom had a bed; the bathroom had a double sink and toilet; and the kitchen had a refrigerator, stove, and cabinets. He had visited just the day before the hearing and there had been no change to the kitchen and living room from five years earlier (Tr. 215). He was last in the bedroom and bathroom about a year ago (Tr. 213-14). He said he knows that Pels lives there because she has to pass his loft to get to her own and she does so several times a day. The two talk several times a week and walk their dogs together.

The evidence shows that Pels made many physical improvements to the unit, creating a large, highly functional residence within her loft unit in 1993 which she has upgraded it and used as her living quarters ever since, while using the rest of the loft as her studio work space. Thus, she has proven a physical conversion of the unit that reflects its residential use as well as "sufficient indicia of independent living." *Compare South 11th Street*, OATH Index Nos. 1242/96-1244/96 at 47 (residential use established where the tenant had conducted a physical conversion of the unit that included establishing living and working space, enclosing the living area, and installing a bathtub, mail slot and shelves, the accumulation of which changed the character of the space from commercial to residential), *with Loft Realty Co. v. Aky Hat Corp.*, 123 Misc.2d 440, 445 (Civ. Ct. N.Y. Co.), *aff'd*, 131 Misc.2d 541 (App. Term, 1st Dep't 1984) (considering the size of the living space, court found that setting aside a "very small space" for an employee to live in does not bring the employee within Loft Law protection); *Anthony v. NYC Loft Bd.*, 122 A.D.2d 725, 727 (1st Dep't 1986) (where the loft was occupied only intermittently during the window period and the residential use was incidental to the commercial use, there was no conversion to independent living); *Franmar*, 143 Misc.2d at 563-64 (no conversion to residential use where the tenant made no physical improvements to adapt the premises for living purposes and had no bathroom, sink or kitchen inside the loft); *Matter of Tenants of 323-325 W. 37th Street*, OATH Index No. 692/06 at 19 (May 18, 2007), *adopted in part, modified in part*, Loft Board Order No. 3457 (Sept. 18, 2008), *application for reconsideration granted in part and denied in part*, Loft Bd. Order No. 3496 (Apr. 23, 2009) (not established where the bath facilities were rudimentary, there was no true "bedroom" but a "hangout" space in the back of the unit with a bed in it, and a \$20 couch purchased for seating suggested a transient nature to the unit –

not a true conversion of the space to a residential dwelling). The unit is of substantial size and Pels' living quarters are significant in proportion to the overall size. The living quarters contain a full bedroom, full bathroom, and kitchen and living area with built in desk and shelves, all the things one would expect to have in an apartment. She lives in the loft from day to day, with her neighbor describing their routine of walking their dogs together.

Respondent asserts Pels' installation of residential improvements without consent of the owner in its defense (Ans. ¶19). The defense should be dismissed; even if true that the owner did not consent to the modifications, the lack of consent is not a defense to coverage.

Occupancy of the Loft Unit During the Window Period

Irrespective of what indicia of residential living are contained in the unit, the owner contends that Pels did not occupy the unit for 12 consecutive months during the window period, as required under MDL 281(5), because she was living in Michigan at the time.

Pels has been a sculptor and college professor since 1974 (Tr. 230). During the 2008 to 2009 window period, Pels was living in Detroit, Michigan, after accepting an appointment to a full time teaching position at the College for Creative Studies (Pet. Ex. 29). She decided against subletting her loft unit while away in Detroit and, instead, she retained occupancy by leaving most of her belongings in the loft and returning during school breaks to produce her art show, to work on her own sculpture, and to check up on her father who was ill (Tr. 243). Thus, Pels lived in Detroit from December 2007 until May 2010, during the period of her appointment at the college, and returned to full time occupancy of her loft unit afterward (Tr. 444).⁴ The question is whether this "dual" occupancy prevents her from establishing status as a protected occupant.

When she moved to Michigan in January 2008, Pels traveled there with her pickup truck, her cat and dog, some of her sculpture, her teaching books, half of her clothes, a set of cooking items and dishware (Tr. 245). The rest of her belongings she left in Unit 1H, including most of her tools, most of her sculpture, half of her books, half of her clothes, all of her furniture, and almost all of her household goods and personal possessions such as plants, photographs, mementos, and knickknacks (Tr. 245).

⁴ Pels made a conscious decision not to sublet her loft unit while she was away in Detroit, she said, due to her loss of the penthouse apartment she had previously leased. She had sublet that apartment in the Summer of 1993 when she left New York to chair the Sculpture Department at the University of Iowa (Tr. 265-71). She testified that her subtenant stole from her, failed to pay rent, threatened her, and refused to relinquish the apartment when she returned, causing her to move into the loft unit and occupy it full time. Kevin Kennedy now resides in that penthouse apartment.

She paid taxes in Michigan in 2008 and 2009, as her accountant advised, because her sole source of income was in Michigan (Tr. 245-46). She paid taxes in New York in 2007 and 2010 (Pet. Ex. 19). She changed her car insurance and registration to Michigan because she brought her truck with her, and she changed it back to New York when she returned in 2010 (Tr. 247). She said she voted in the 2008 presidential election in Michigan because she could not fly home to vote in November because of her teaching schedule (Tr. 418). She maintained her bank account during this time at the Greenpoint Brooklyn branch of JPMorgan Chase Bank (Pet. Ex. 27). Her health care proxy and her will both list her address at 99 Commercial Street as her home (Pet. Exs. 25, 26). Her New York State driver's licenses issued in 2002 and 2010 both list 99 Commercial Street as her home address (Pet. Ex. 20). She produced several gas utility bills listed in her name at 99 Commercial Street for the period November 2007 through March 2011 (Pet. Ex. 31). The electric utility bills for the period December 2006 through March 2011, were listed in her name and that of William Tucker, a prior tenant (Pet. Ex. 30 at 6, 7, 8). She said the electric bill has been in both her and Tucker's names since he lived there in the early 1990's (Tr. 420-22). She is responsible for the electric bill but she collects contributions for the bill from other artists who also use her studio. In 2008 and 2009, since the gas and electric bills cover both her space and Mr. Corriero's unit, he sometimes paid the bills while she was away (Tr. 422-23).

Pels was questioned closely about the amount of time she spent in the loft unit in 2008 and 2009. Tracking her ATM use from her monthly bank statements gave some indication of what time Pels spent at her loft unit in New York (Tr. 398-415, Resp. Ex. P), although it is possible that she could have been in New York and not used the ATM. Nonetheless, none of her ATM transactions were at New York locations in January or February 2008, which suggested she did not come home during those months (Tr. 400-01). The ATM records appeared to indicate that she spent a week in New York in March 2008. She testified that she was using her studio to prepare for her art show in June, July and August 2008 (Tr. 443), and the records reflected transactions only conducted in New York. She appeared to spend a week in New York in September and only a few days here in October 2008 (Tr. 405-07). In November, she remained in Michigan. The December bank records were missing. She spent two weeks in New York over the holidays, which included part of December 2008 and part of January 2009. February and March 2009 appeared to be spent in Michigan. She said she escorted her students

to New York in April 2009, and appears to have spent a few days in the city (Tr. 410). In May 2009, there was one transaction in New York. She spent much of June and July in Michigan in 2009, and spent August in New York (Tr. 412-13). The next several months she spent in Michigan, returning home for the holidays in mid-December 2009 (Tr. 415). Under the circumstance, the contacts described here are more than sufficient to find that Pels residentially occupied her unit for 12 consecutive months during the window period. Respondent's defense asserting that Pels did not "live in" or use the unit for residential purposes during the window period should be dismissed (Ans. ¶17).

The record indicates that, while away, Pels allowed two artists to rent part of her studio space. They each paid for \$500 per month to use the space (Tr. 486, 505). Both artists testified that they never made any residential use of the unit (Tr. 488, 506). They used the space for their art and left. Pels said no one was allowed to use the unit as a residence during her absence (Tr. 417), thus reserving residential use of the unit for herself. The evidence showed that Pels had rented out studio space even when she lived in the unit full time. Such use and income producing activity does not undermine Pels' entitlement to coverage, however, since loft use is understood to be inherently multi-purpose, which is "much of the impetus" for the passage of Article 7-C. *See Matter of Muschel*, Loft Bd. Order No. 33, Loft Bd. Rptr. 27, 29 (Nov. 23, 1983).

Under MDL 281(5), the IMD must be "occupied for residential purposes as the residence or home of any three or more families living independently from one another for a period of twelve consecutive months during the period commencing January [1, 2008,] and ending December [31, 2009]." According to MDL 4(1), the word "occupied" must be construed as if followed by the words "or is intended, arranged or designed to be used or occupied." Even though she was not residing in her loft unit at 99 Commercial Street full time, Pels did "occupy" the unit in accordance with the Multiple Dwelling Law. First, the residential conversion that created her bedroom, bathroom, living room and kitchen occurred long before the window period and it remained intact during the entire window period. Second, her personal belongings remained in the unit the entire time, thus maintaining the residential nature of the space, enabling her residential use of the space whenever she could get home, and evidencing her "inten[t], arrange[ment], or design[er]" for the loft unit to continue to be used or occupied residentially. Third, not only did she return to the unit regularly during this time, but she also had the intent to

return permanently and did in fact return to live in the unit on a permanent basis after her job in Michigan ended. Last, Pels continued to pay rent during this time. The fact that she sublet her studio space to other artists while she was away does not diminish the inherent character of the residential space; indeed, the studio use underscores the character of the loft unit as a live-work space.

The owner's contention that Pels is not entitled to coverage because she was not an *actual resident* of the unit during the window period is inapt. Respondent contends that MDL 4(1) does not apply here and cites two cases in support, *143 Fulton LLC v. Hyatt*, 14 Misc.3d 1223(A), 2007 N.Y. Slip Op. 50133(U) (Sup. Ct. N.Y. Co. 2007) and *Laermer v. NYC Loft Board*, 184 A.D.2d 339 (1st Dep't 1992). *143 Fulton LLC*, where the court found the tenants were not entitled to coverage because they were not in possession during the window period, is clearly distinguishable because the tenants there did not move onto the premises until *after* the window period. 14 Misc.3d 1223(A). Here, Pels lived in the unit long before the window period and maintained her belongings there during the entire window period. Similarly, in *Laermer*, the court held that the unit was not covered because it could not be established "that anyone lived in the apartment on April 1, 1980," a date on which occupancy was required under the statute. 184 A.D.2d at 340. Here, Pels did indeed occupy the unit, as evidenced by her conversion of the space into living quarters and by virtue of having left most of her belongings there. Despite the fact that Pels moved to Michigan for two and a half years for work, registered and insured her car in Michigan, paid taxes in Michigan and registered to vote there, and spent most of her time there during the window period, I find that she continued to occupy her loft at 99 Commercial Street by treating the unit as her place of residence during the entire window period, maintaining most of her belongings there, returning to the unit periodically to spend time there, paying her rent, and receiving her mail there. In addition, and significantly, she demonstrated that she had every intention to return to 99 Commercial Street and eventually did, returning to live there full time at the end of her engagement in Michigan. Her residence in Detroit was at most temporary. This evidence is sufficient to establish her occupancy during the window period. *See Murray Warren Assoc. v. NYC Loft Bd.*, 182 A.D.2d 361 (1st Dep't 1992) (upholding Loft Board's finding that loft unit was primarily residential within the meaning of MDL 281(1)(iii) where loft occupant had moved out of the unit into his parent's home before the statutory window period, but the only physical change made to the premises was the removal of a bed and clothes locker

and he continued to sleep in the unit nightly while spending weekends at his parent's home).

Any different interpretation of these facts would prevent tenants who have "itinerant occupations" from being able to protect their rights to residential space. With this concern in mind, a court has found that absence from an established home, even for a lengthy period of time, does not by itself prove an intent to change primary residence, noting a "legion of litigated cases concerning seamen, soldiers, baseball players and the like" that have held that individuals "engaged in itinerant occupations do not lose their domicile by virtue of their constant travel." See *Coronet Properties Co. v. Brychova*, 122 Misc.2d 212, 213-14 (Civ. Ct. NY Co. 1983), *aff'd*, 126 Misc.2d 946 (App. Term, 1st Dep't 1984) (citing vol. 17, *Domicile and Residence*, § 32 et seq. and 25 Am. Jur. 2d, *Domicile*, § 46). In *Coronet Properties*, a professional singer and voice instructor who, due to her extensive professional travel schedule, had occupied her apartment an average of only three days per month in the preceding several years, properly considered that apartment to be her primary residence. Thus, the court found that consideration of what constitutes a "primary residence" includes not only the amount of time spent on premises, but also the location of one's prized personal possessions and an "intent to reuse [the apartment] when [one's] professional life allows." 122 Misc.2d at 213.

There is no dispute that Pels' career as a sculptor and college professor since 1974 frequently took her away from her New York home for extended periods (Tr. 230, 242). She has taught at Bennington College, Sarah Lawrence College, and Pratt University, and in Europe. In the Fall of 1996, she was a Visiting Professor at the College of William and Mary for ten weeks; in the Spring of 1997, she was a Fellow at the State University of New York in Albany for two months; and in 1997 and 1998, she was a Fulbright scholar in Germany. After each academic engagement, she returned to her loft apartment at 99 Commercial Street.

It should be noted that an occupant need not prove the unit is his or her "primary residence" to establish a basis for coverage. See *Vlachos v. NYC Loft Bd.*, 70 N.Y.2d 769, 770 (1987) (there is no requirement that residentially occupied units be primary residences of their tenants for Loft Law coverage); *BOR Realty Corp. v. NYC Loft Bd.*, 129 A.D.2d 496 (1st Dep't), *aff'd*, 70 N.Y.2d 720 (1987); *S. Axelrod Co. v. Mel Dixon Studio, Inc.*, 122 Misc.2d 770 (Civ. Ct. N.Y. Co. 1983) (a fashion photographer with a permanent home outside of NYC established entitlement to Loft Law coverage where he used his loft as both a work studio and a part time residence). Loft Board rule 2-09(b)(2) sets forth the basis for finding a lawful residential

occupant of a loft unit eligible for coverage under the Multiple Dwelling Law even when not the prime lessee, so long as the occupant took possession before the first date of the applicable window period:

If the residential occupant in possession of a covered residential unit is not the prime lessee, the lack of consent of the landlord to a sublet, assignment or subdivision establishing such occupancy shall not affect the rights of such occupant to the protections of Article 7-C, provided that such occupant was in possession of such unit prior to June 21, 1982, or prior to July 27, 1987 for an IMD unit subject to Article 7-C solely by reason of MDL §281(4) and the rules issued pursuant thereto.

29 RCNY § 2-09(b)(2). A recent proposal has updated the rule to include the window period dates for MDL 281(5). See Proposed Changes to Section 2-09 of the Loft Board's rules at http://www.nyc.gov/html/loft/downloads/pdf/2-09_as_of_5.3.12.pdf.

Although respondent denies that it is making a primary residence argument, the argument it does make is indistinguishable, and I find it without merit. In *Kaufman v. American Electrofax Corp.*, 102 A.D.2d 140 (1st Dep't 1984), where the First Department dismissed a holdover petition filed against a loft tenant who had rented the unit under a commercial lease and then converted a portion of the premises to residential occupancy without notifying the landlord, while also maintaining a separate primary residence. In holding for the tenant, the court rejected the notion that a loft tenant had to defend against allegations that his residential occupancy had been "surreptitious." 102 A.D.2d at 141.⁵ The court declared that the statute required neither the

⁵ The First Department gives careful consideration to the history and purpose of the Loft Law:

To read the statute so as to require that a residential occupancy must have been "open" and with the landlord's knowledge and acquiescence in order to obtain the benefits of the statute, is to read into the statute a meaning and purport that is not expressed therein. The history of the legislation and its background as reflected in the legislative finding under section 280 of the Multiple Dwelling Law indicate that the purpose thereof is to legalize otherwise illegal occupancies. Nothing in the statute relates to consent by the landlord or whether the conversion was done in a surreptitious manner. Nor is there anything in the statute, albeit such provisions are contained in other statutes, requiring that the premises must have been the primary residence of the occupant before he will be entitled to the protection of the statute.

The legislation was remedial, designed to eliminate and remove the long-standing conflict and problems involved in the conversion of commercial lofts by tenants for residential purposes, by legalization of these heretofore illegal lofts to the extent that they violated the commercial occupancy clauses of the tenant's lease. The Legislature intended to afford protection where such lofts

consent of the landlord nor primary residency in the loft unit. *See, e.g., 545 Eighth Avenue Assocs. v. NYC Loft Bd.*, 232 A.D.2d 153 (1st Dep't 1996) (29 RCNY § 2-09(b)(2) provides coverage for a residential occupant in possession of a covered residential unit, even if the occupant is not a prime tenant and even if the landlord did not consent to a sublet, assignment or subdivision, as long as the occupant was in possession prior to July 27, 1987; thus, covered occupancy was not dependent upon landlord's knowledge or consent).

In addition, the fact that Pels resides in the unit pursuant to what the owner claims is a commercial lease does not extinguish her right to seek coverage as a residential occupant. "Protected occupancy flows from the status of the parties and of the unit rented, not from the label placed on the lease or rental agreement. Consequently, absent the removal of a unit from coverage pursuant to the statute or Loft Board regulations, the issuance of a post-June 21, 1982, lease by a [landlord] will confer Article 7-C protection on the residential occupant of an IMD unit." *Matter of Andrew Bradfield, LLC*, OATH Index No. 1345/03 at 3-4 (Nov. 18, 2003), *aff'd in part, modified in part*, Loft Bd. Order No. 2845 (Feb. 19, 2004) (quoting *Matter of Law*, Loft Bd. Order No. 1319, 13 Loft Bd. Rptr. 313, 333 (Mar. 26, 1992)). Therefore, if an owner leases an IMD unit with its attributes of independent living intact and the tenant actually uses the unit as a residence, Rule 2-09(b)(3) does not require the owner's explicit consent to that residential use to confer Loft Law coverage; consent to the occupancy alone is sufficient. The lease itself implies consent. *Matter of Tenants of 323-325 W. 37th Street*, OATH Index No. 692/06, mem. dec. at 5 (Oct. 27, 2006).

Respondent asserts as a defense the owner's lack of knowledge and consent to Pels' residential use of the unit (Ans. ¶18). This defense should also be dismissed.

Impermissible Conversion of Unleased Premises

The owner separately contends that Pels is not a protected occupant because she is only able to establish indicia of independent living by having impermissibly converted space outside

qualified as *de facto* multiple dwellings, *i.e.*, commercial premises converted to residential use, albeit they lacked a residential certificate of occupancy and were in violation of the lease use clauses. It is precisely such premises that were afforded a protected status under law. If the legislative intent was to legalize only those lofts which had been converted in an open manner with the landlord's acquiescence and knowledge, the legislation would have so stated.

Kaufman, 102 A.D.2d at 142-43; *accord Little West 12th St. Realty, L.P. v. Inconiglios*, 23 Misc. 3d 28 (App. Term, 1st Dep't 2009) (landlord's conclusory allegations denying knowledge of or consent to the residential use of the premises were insufficient to defeat summary judgment).

of the leased premises into her living space (Resp. Opp. Br. at 6-7).

Pels' original 1985 lease describes the leased premises as "the southwest quadrant of the space known as the 'big room'" (Pet. Ex. 15A, Resp. Ex. S1). The lease attaches a diagram that shows the leased premises as a rectangular area with few distinguishing characteristics (Pet. Ex. 15A at 7). It is undisputed that Pels' living room and kitchen ("LR/kitchen") are contained within this rectangular area (Pet. Ex. 2, Resp. Exs. W1, W2). There is also no dispute that adjacent to the rectangular area is an area in which Pels constructed a bedroom and bathroom in 1993, which constitutes part of her current living space (Tr. 276, Pet. Ex. 32). For demonstration purposes, I have created a post-trial exhibit based upon the Riedner plans; it is annexed to this Report and Recommendation and marked "ALJ Exhibit 2." The space currently occupied as Pels' bedroom is marked on ALJ Exhibit 2 and described herein as "Area A." Her current bathroom is marked "Area B."

Pels contends that subsequent lease renewals authorized her legal use of Area A which was originally an office and bathroom that she converted into a bedroom and closet in 1993 (Tr. 276). This space is designated "BR" on the Riedner plans (Pet. Ex. 2). Pels testified without contradiction that the office area originally included a bathroom containing a toilet, sink and shower (Tr. 282, Pet. Ex. 32). She argues that she is expressly authorized to occupy Area A by the leases she signed after 1993, the time of her first renovation. Indeed, her 1993 lease offers a new description of the leased premises as "the west side-south area of 59 x 70 room divided into a 59 x 30 space with office and toilet of approx 2000 sq ft center of building first floor" (Pet. Ex. 15C, Resp. Ex. S3). Similarly, all successive leases from 1996 through 2006 define the leased premises as including an "office + toilet area" (Pet. Exs. 15E-15G, Resp. Exs. S4-S6, Tr. 298).

Respondent attempted to dispute the meaning of the "office + toilet" reference in the leases. Although he could not recall discussions about the 1993 lease, Kevin Kennedy said he advised his father Martin Kennedy during the negotiation of Pels' 2000 and 2004 leases to include the phrase "with office and toilet" in the leases, but he denied knowing what the phrase meant (Tr. 547-48). He conceded that the rectangular area on the diagram attached to the leases made no mention of an office or toilet (Tr. 549), which would suggest the office and toilet were outside of that area; instead, he denied there was any office or toilet area and stated that the "entire space is an office. The entire space is a studio," as if an office and a studio were the same thing (Tr. 648). They are not. A sculpture studio – which the leases all acknowledge as the

intended use – is not an office.

Although Kevin Kennedy denied that the leased premises include Area A (Tr. 618), he offered no credible basis for challenging the explicit wording in the leases, nor a credible alternative interpretation of the wording. Moreover, he did not enter into the leases with Pels; his father did. Since Kevin Kennedy demonstrated no knowledge of the configuration of Pels' space before the 1993 renovation and did not negotiate her 1993 lease, he offered no basis for his stated "belief" that the office and toilet were within the rectangular area outlined in the attachment to the leases (Tr. 649) rather than the adjacent Area A that Pels described. I credited the explicit statements in the leases and the testimony by Pels, Corriero and others of Pels' use of the space in Area A (Tr. 470). The leases from 1993 to present acknowledge Pels' right to the "office + bathroom" – space that now comprises her bedroom and closet. Thus, I find that the portion of the premises originally referred to as "office + bathroom" were converted to a bedroom and closet and is properly part of the leased premises.

Respondent disputes Pels' claim to another area of the building which both parties agree is outside of the leased premises. This area, which I have marked "Area B" on ALJ Exhibit 2, is adjacent to Area A. Pels concedes that Area B had been a communal bathroom used by other tenants in the building when she appropriated it by breaking through a wall in her unit and bricking up the public entrance (Tr. 238, 276-82, 286). She marked the location of the modification she made on the Riedner plans (Pet. Ex. 2, Tr. 287). This modification now contains her bathroom which, along with Area A, comprises a larger bedroom suite.

Pels contends that, although Martin Kennedy did not give her express permission to perform the modification that appropriated a formerly public bathroom to her exclusive use, he was aware she was performing the modification at the time she did the work and he acquiesced, even giving her some assistance. She testified that Martin Kennedy saw her break through the wall – work that was quite noisy and took place over several days – and he gave her a toilet to install as her own (Tr. 238-39, 284-86, 348-49, 446). Moreover, after she converted the communal bathroom to her own use, Mr. Kennedy built another communal bathroom on the public corridor (Tr. 286). She also testified that Mr. Kennedy called suppliers he knew to get a discount for her, although she paid for the materials herself (Tr. 346-47). She produced two receipts from L & H Home Maintenance Supply from June 1993 which indicated "Mr. Kennedy" as customer (Pet. Ex. 17).

The owner contends that it would be “inequitable” to allow Pels to “surreptitiously” annex common area in the building in order to establish the indicia of independent living required by the Loft Law (Resp. Opp. Br. at 6).

First of all, there was no evidence of surreptitiousness. Given the description of Martin Kennedy as a generally attentive landlord who spent time in the building and responded to his tenants’ needs, it was not believable that he was be utterly unaware of Pels blasting through a masonry wall to appropriate common space. Moreover, Pels credibly testified to Mr. Kennedy’s actual knowledge of the modification. Although Kevin Kennedy disputed it in his testimony, he offered no evidence to contradict it. Most notably, there was no testimony from Martin Kennedy, whose knowledge and observations Pels had placed in issue at the trial. Martin Kennedy did not appear at the hearing, was never called as a witness, and no explanation was offered for his absence.

Second, it is not clear that the law requires the tribunal, as a remedy for the improper annexure of unleased premises, to disregard the incidents of independent living that existed in that space during the window period. The primary issue in coverage is the occupant’s use of the premises, not the precise boundaries of the demised premises, which is directly addressed in the legalization process.

The Loft Board has found that an owner’s acquiescence to an extension of the leased premises is insufficient to redraw the boundaries of the premises for legalization purposes. *See, e.g., Matter of Minjak Co.*, Loft Bd. Order 181, 2 Loft Bd. Rptr. 47, 48 (Mar. 6, 1985) (tenant’s “continued sole use of the roof since the inception of his tenancy; apparently with the acquiescence of the landlord” could not be interpreted as an extension of the leased premises); *Matter of Sultan*, OATH Index Nos. 1314/98-1315/98 at 6 (Aug. 18, 1998), *adopted*, Loft Bd. Order No. 2323 (Oct. 27, 1998) (tenants’ claim of entitlement to continued use and occupancy of hoistway space taken without landlord’s consent was “plainly problematic” in light of Loft Board precedent); *Matter of Domingo*, OATH Index No. 1125/98 at 24 (May 21, 1999), *rev’d on other grounds*, Loft Bd. Order No. 2453 (Dec. 13, 1999), *aff’d sub nom Domingo v. NYC Loft Bd.*, Sup. Ct. N.Y. Co. Index No. 107058/00 (May 1, 2000), *aff’d*, 246 A.D.2d 337 (1st Dep’t 1998) (tenant claims that demised premises included roof space and storage areas by “[t]he mere fact that the tenants occupied those areas openly, in some cases with the knowledge and acquiescence of the landlord, was not enough to establish” entitlement in legalization). In a

legalization proceeding, a tenant must show that the disputed part of the premises “was included explicitly, or by rules of interpretation, in the lease description of the demised premises.” *Matter of Minjak Co.*, 2 Loft Bd. Rptr. at 48. Thus, while the legalization process will determine Pels’ ability to retain possession of Area B, I find the manner in which she appropriated the space an improper basis for denying her coverage. That is, respondent offers no legal basis for refusing to consider all of the premises that Pels actually occupied during the window period, and the manner in which she occupied them. Moreover, it should be noted that Pels had the use of a bathroom in Area A before she converted Area B into a bathroom. Thus, the annexure of Area B did not make it possible for her to have a bathroom; it merely enabled her to have a larger bathroom.⁶

The Rules Regarding Inherently Incompatible Uses

In denying Pels’ motion for summary judgment, in part, in a Memorandum Decision issued on March 8, 2012, this tribunal asked the parties to address two issues relevant to her entitlement to coverage: (i) whether she is required to prove there were no inherently incompatible uses in the building on June 21, 2010, as a precondition to coverage, considering an apparent conflict between two Loft Board rules (Rule 2-08(g) and Rule 2-08(j)), and (ii) whether MDL 281(5) extends coverage to a single unit located in an IMD previously registered under an earlier provision of the Loft Law. *See Pels Mem. Dec.* at 15. The parties have addressed these questions in their post-trial briefs.

Multiple Dwelling Law 281(5) prohibits an IMD unit from being located in a building that contained on June 21, 2010, any use that is “inherently incompatible” with residential use. It states in pertinent part:

The term ‘interim multiple dwelling’ . . . shall not include . . . units in any building that, at the time this subdivision shall take effect, also contains a use actively and currently pursued, which use is set forth in use groups fifteen through eighteen, as described in the zoning resolution of such municipality in effect on June [21, 2010], and which the loft board has determined in rules and regulation is inherently incompatible with residential use in the same building, provided that if a building does not contain such active uses at the time this subdivision takes effect, no subsequent use by the owner of the building shall eliminate the protections of this section for

⁶ As a defense, respondent asserts that the unit is incapable of being legalized for residential use (Ans. ¶15). Its post-trial papers fail to address this argument, which is not readily apparent to me. I recommend its dismissal as a defense.

any residential occupants in the building already qualified for such protections.

MDL § 281(5). The owner contends that several commercial units at 99 Commercial Street contained such uses and asserts as a defense that Pels' unit cannot be covered because it is located in a building that contains inherently incompatible uses.

In her summary judgment motion, Pels argued that Loft Board rule 2-08(j) prevents her from being excluded from coverage because of any prohibited activity that might have existed in the building on June 21, 2010, because her unit is located in an IMD building registered under MDL 281(4). The rule provides that:

A unit eligible for coverage pursuant to MDL § 281(5), which is located in a building registered as an IMD under MDL §§ 281(1) or (4), shall not be excluded from Article 7-C coverage on the basis that any prohibited activity in use groups 15 through 18 existed in the building on June 21, 2010.

29 RCNY § 2-08(j) (emphasis added); *see also* 29 RCNY §§ 2-08(m), (q) (similarly, excepting units eligible for coverage that are located in buildings registered as IMDs under MDL 281(1) or (4)). In her post-trial papers, Pels argues that the rule is consistent with the Loft Law, and is not *ultra vires*. It is not disputed that 99 Commercial Street is an IMD registered under MDL 281(4) with several residential units. Applicant contends that Rule 2-08(j) was promulgated to give effect to the legislative purpose of MDL 281(5), and it would be illogical to deny coverage to units located in a prior registered IMD since “there can be no incompatible use issue in a building that is already an IMD” (Reply Br. at 14). Moreover, a guiding principle of interpretation applied to the Loft Law is that its rules should be “liberally construed to spread its beneficial effects as widely as possible.” *Matter of 902 Associates v. NYC Loft Bd.*, 229 A.D.2d 351, 352 (1st Dep’t 1996). Unless the rule is arbitrary, applicant argues, it may not be invalidated (Reply Br. at 12). *See NYS Assoc. of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991).

By contrast, the owner contends that Rule 2-08(j) must be invalidated as *ultra vires* because it eliminates the explicit provision of MDL 281(5) which requires a showing that there were no inherently incompatible uses on June 21, 2010 (Resp. Opp. Br. at 9). The caselaw establishing that an administrative agency violates its rulemaking authority when it promulgates rules that are inconsistent or “out of harmony” with the plain meaning of the statutory language

is fully set forth in this tribunal's earlier Memorandum Decision in this case and will not be repeated here. *Pels* Mem. Dec. at 10-12.

Having considered the foregoing arguments, I conclude that Rule 2-08(j) is not *ultra vires*, or inconsistent with the Loft Law's prohibition against inherently incompatible uses. As an initial matter, the Loft Board was given under MDL 281(5) the authority to interpret what uses are inherently incompatible with residential use. MDL § 281(5) ("and which the loft board has determined in rules and regulation is inherently incompatible with residential use in the same building"). Rule 2-08(j) addresses the fact that in a building where residential use has existed at least since 1987, there cannot be uses that are "inherently" incompatible with residential use. Thus, the rule gives effect to the legislative purpose without creating the "absurd" result of requiring review of uses that have co-existed with residential use in the building for many years.

This tribunal's concern that 2-08(j) might be *ultra vires* (*see Pels* Mem. Dec. at 12) was aided by the observation that the Loft Board rules appeared to be contradictory. That is, several rules, like 2-08(j), provide that coverage applicants located in buildings already registered as IMDs under MDL 281(1) or (4) need not prove that inherently incompatible uses did not exist in June 2010 (*see* Rules 2-08(m), (q)), while Rule 2-08(a)(4)(iii) made no exception. While Rule 2-08(a)(4)(iii)(F) may be subject to further review by the Loft Board, it does not make infirm Rule 2-08(j) whose meaning is clear and consistent with the legislative purpose of MDL 281(5).

The tribunal therefore sees fit to revise its finding that MDL 281(5) does not allow the promulgation of rules that "exempt" certain coverage applicants from having to prove there were no inherently incompatible uses existing in the building on June 21, 2010 (*Pels* Mem. Dec. at 12). Indeed, use of the word "exempt" may be an inartful characterization of the rule. Instead, I find that Rule 2-08(j) is not *ultra vires* as it rationally eliminates an area of proof that is inconsistent with the purpose of the legislation. Since prior registered IMDs are deemed by their owners to be residential by nature (in this case the owner did so more than 20 years ago), there may be no uses that are "inherently" incompatible with residential use.

I therefore find that *Pels* "shall not be excluded from Article 7-C coverage on the basis that any prohibited activity in use groups 15 through 18 existed in the building on June 21, 2010" (29 RCNY § 2-08(j)). The defense asserted by respondent on this basis (Ans. ¶14) must be dismissed.

Finally, I asked the parties to consider whether MDL 281(5) extends coverage to a single

unit located in an IMD previously registered under an earlier provision of the Loft Law (*Pels* Mem. Dec. at 15). In this case, 99 Commercial Street was registered as an IMD under MDL 281(4) and the owner has registered approximately 20 residential units in the building (Pet. Ex. 1). The question is whether the legislature intended the new law to award coverage to single units located in buildings that were covered under older versions of the law. To be sure, the law does not address this question explicitly.

The legislative history, which includes statements that could be interpreted either way, is inconclusive. The tribunal noted in *Matter of Taylor* and *Matter of Grundon* portions of the legislative history that indicated the intended impact of the new law would be to “expand[] the current Loft Law to include approximately 300 buildings or about 3600 additional units that were not covered by the original Loft Law.” Majority Counsel and Program, June 7, 2010, Bill Jacket, L. 2010, Ch. 135; *see also* Annotated Calendar, June 8, 2010 Bill Jacket, L. 2010, Ch. 135 (“This legislation expands the current Loft Law to include approximately 200-400 buildings or about 3600 additional units that were left out of the original Loft Law”). *See Taylor*, OATH Index No. 2051/11 at 7-8 (Sept. 9, 2011); *Grundon*, OATH Index Nos. 2445/11 & 2446/11 at 6-7 (Nov. 16, 2011). There are also passages, however, that suggest the legislature was concerned with increasing the number of units, not only the number of new buildings. *See* Annotated Calendar, June 8, 2010 Bill Jacket, L. 2010, Ch. 135 (“This bill would extend tenant protections and other provisions under the current loft law to many units that were converted after 1987.”) (*cited in Taylor*, OATH Index No. 2051/11 at 7-8). Indeed, it is unclear whether or to what extent the legislature debated the question of buildings versus units; certainly no conclusion is indicated.

Applicant argues here that the question is whether anything in the statute bars adding qualifying units in this way, given that nothing in the law bars it and the Loft Board rule is in harmony with the statute (App. Br. at 19). Respondent argues the unit cannot be deemed an accreted unit because the statute does not provide for it (Resp. Opp. Br. at 13). It is true that the provision for what are now referred to as accreted units, set forth under MDL 281(3), was not updated by the 2010 amendments. Thus, there is no explicit provision for them.

I find that, reading the plain meaning of MDL 281(5), applicant may establish that three or more units were residentially occupied during 12 consecutive months during the 2008-2009 window period. Given the owner’s 1987 registration of the building and registration in 2008 and 2009 of at least 20 residential units (Pet. Ex. 1), and proof of Pels’ residential occupancy of Unit

1H for 12 consecutive months during the window period, I find that applicant has met her burden here.

FINDINGS AND CONCLUSIONS

1. 99 Commercial Street is a registered IMD under MDL 281(4) with more than 20 registered units.
2. Pels has residentially occupied her loft unit, Unit 1H, since 1993.
3. Pels residentially occupied the unit for 12 months consecutively during the 2008-2009 window period.
4. Unit 1H is a covered unit and Pels is the protected occupant of the unit, under MDL 281(5).
5. Loft Board rule 2-08(j) is not *ultra vires*.
6. In accordance with Loft Board rule 2-08(j), Pels need not prove there are no inherently incompatible uses in the building in order to establish her entitlement to coverage.
7. There is nothing in the Loft Law that prohibits a unit from being covered under MDL 281(5) because it is located in a building registered under MDL 281(1) or (4).

RECOMMENDATION

I recommend that the Loft Board grant applicant's coverage application.

Tynia D. Richard
Administrative Law Judge

June 20, 2012

SUBMITTED TO:

ROBERT D. LIMANDRI
Chair

APPEARANCES:

ROBERT PETRUCCI, ESQ.
Attorney for Petitioner

BRIAN KENNEDY, ESQ.
Attorney for Respondent