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BOARD OF STANDARDS AND APPEALS

MEETING OF: **October 21, 2024**
CALENDAR NO.: **2023-40-A**
PREMISES: **99-111 Sutton Street, Brooklyn**
Block 2658, Lot 26

ACTION OF BOARD — Application granted.

THE VOTE TO APPROVE —
Affirmative: Chair Chanda, Vice-Chair Scibetta, Commissioner Ottley-Brown, Commissioner Sheta, and Commissioner Yoon.....5
Negative:.....0

THE RESOLUTION —

I. The Appeal

This is an application brought by the New York City Department of Buildings ("DOB") requesting the modification of certificate of occupancy no. 320285188F, effective May 29, 2012, which permitted 48, Class A apartments (10 in the basement, 8 on the 1st floor, 8 on the 2nd floor, 8 on the 3rd floor, and 14 on the 4th floor) and accessory storage at the subject Premises. DOB seeks to modify the certificate of occupancy to remove the ten units in the basement level.

A public hearing was held on this application on December 11, 2023, after due notice by publication in *The City Record*, with continued hearings on April 15, 2024, June 10, 2024, and September 9, 2024, and then to decision on October 21, 2024. Vice-Chair Scibetta performed an inspection of the site and surrounding areas.

II. The Location

The Premises are located on the west side Sutton Street, between Norman Avenue and Nassau Avenue, in an M1-2 zoning district, in Brooklyn. With approximately 140 feet of frontage along Sutton Street, 100 feet of depth, and 14,000 square feet of lot area, the Premises are currently occupied by a 5-story, manufacturing building with residential use.

III. Premises History

On November 30, 2000, the property owner filed DOB Job No. 301091734 (the "2008 Job") seeking to convert an existing factory

building into 31 Interim Multiple Dwellings ("IMD") and change its use from manufacturing to residential. DOB approved an audit on October 22, 2002, and per the DOB plans dated January 16, 2006, the basement had both bedrooms, recreational space and accessory uses. A certificate of occupancy numbered 301091734F and effective November 19, 2008, permitted, under the New York City Loft Law, 7 units on the 1st floor, 8 units on the 2nd floor, 8 units on the 3rd floor, and 8 units on the 4th floor, as well as storage and an accessory recreation room in the basement. According to the approved plans for that job, however, there were six separate storage and recreation rooms, each the lower half of a duplex apartment that extended onto the first floor, but the 2008 certificate of occupancy excluded the portions of the bedrooms that were located in the basement.

On March 25, 2011, the Premises' owner filed Application No. 320285188F4, an Alteration-1 job proposing "to obtain a corrected C of O, revising the IMD status to Class "A" apartments, as required by agency." The application listed the job type as "Alteration Type 1, OT (No Work)." In March 2011, an architect[1], acting as a representative of the Premises' owner, filed DOB Job No. 320285188 ("the 2011 Job"), for a no-work application to legalize the subdivision of the original 31 units into 48 with 10 of the new units on the lowest level of the Premises, in the footprint of what had been the lower halves of the 6 duplex units. On July 5, 2011, the Premises' owner filed DOB Job No. 320285188 (the "2012 Job") as a no-work application to convert 31 IMD units to 48 Class A dwelling units, and this job was audited and accepted on February 23, 2012. However, the plans submitted with the 2011 Job showed that three-piece bathrooms, full kitchens, and partition walls had already been installed in each of the ten cellar units.[2]

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[1] Mr. Robert Scarano is the architect who represented the Premises' owner by filing this application and submitted affidavits in the application before the Board in support of the Premises' owner's claims. In *Scarano v. City of New York*, 86 A.D.3d 444 (2011) 926 N.Y.S.2d 38, 2011 N.Y. Slip Op. 05932, the New York Supreme Court Appellate Division held agreed with an Administrative Law Judge and the NYC Department of Building's determination that Mr. Robert Scarano's actions in submitting misleading photographs, falsely certifying that all objections had been resolved, and claiming entitlement to extra floor area resulting from a nonexistent community facility are supported by substantial evidence and warrant the finding that DOB can no longer rely on him to submit honest paperwork, and there was sufficient evidence that it could no longer rely on Mr. Scarano to submit honest paperwork as a professional architect.

[2] The 2011 Job passed this audit with the record citing "BC" [sic, 2008 Administrative Code] sections 28-118 and 28-104, and the plan examiner asking, "Where did the additional dwelling units come from?" given that the 2011 application was a no-work filing and the 2008 CO did not authorize any dwelling units in the "basement." Subsequently, in February 2012, the 2011 Job passed its final inspection with DOB, and there is no record of a response to these inquiries.

Effective May 29, 2012, DOB issued certificate of occupancy no. 320285188F ("the 2012 certificate of occupancy"), permitting 48, Class A apartments (10 in the basement, 8 on the 1st floor, 8 on the 2nd floor, 8 on the 3rd floor, and 14 on the 4th floor) and storage.

In 2022, the Premises' owner filed a narrative statement with the NYC Loft Board, seeking to legalize 15 additional units, and as a part of this filing, the Loft Board reviewed prior filings for the Premises, at which point it became aware of the 10 dwelling units in the basement.[3] On March 17, 2023, DOB notified the Premises' owner by letter that it believed the 2012 certificate of occupancy was issued in error, and requested that the owner respond within 30 days to explain why the 2012 certificate of occupancy should not be revoked. A subsequent copy of this same letter was emailed to the Premises' owner on April 6, 2023, and DOB contends that it has received no such response in opposition to the revocation of the certificate of occupancy.

A. Interagency Review

By letter dated April 15, 2024, the New York City Fire Department (FDNY) states that the Bureau of Fire Prevention inspected the Premises on December 13, 2023, and found the following conditions:

> Upon arrival, we immediately identified an illegal lock on the front gate obstructing the path of egress leading from the basement level to the street level and a dumpster with trash obstructing the path of egress on the left side of the building. We continued around the left side of the building and identified through one of the windows, construction was being done in one of the apartments with no permits posted from the Department of Buildings.
>
> We gained access to the building and began conducting a full building inspection of the Premises starting with the basement, during our inspection of the basement we identified multiple fire code violations from storage of combustible waste obstructing the path of egress, materials stored to close to sprinkler deflector heads, missing exit identification signs and sprinkler valve room without proper identification.
>
> During our inspection of the basement, we met with Superintendent Mr. Nunez. We informed him we were conducting a full building inspection he granted us access to the electrical

[3] At the time of decision for this resolution, the NYC Loft Board's review of narrative statement has not been completed. The Premises' owner has commenced suit against the Loft Board in Kings County Supreme Court, Index No. 512768/2023, alleging the Loft Board's delay will cause it significant economic harm.

room and sprinkler valve room where we identified a large amount of combustible storage near the boiler and throughout the sprinkler valve room, sprinkler system was operation with all valves in the open position.

We asked Mr. Nunez which apartment construction was being done in, and he informed us no construction as being done. It wasn't until we showed him pictures we took of the room that he showed us apartment 5 was under construction with no DOB permits posted.

While conducting our inspection of the building we identified that each floor had an excessive amount of apartment doors fronting on the public hallways. According to the building's certificate of occupancy issued by the Department of Buildings, the building should have a total of 48 dwelling units – 10 in the basement, 8 on the 1st floor, 8 on the 2nd floor, 8 on the 3rd floor, and 14 on the 4th floor.

We identified a total of 64 apartment doors, 11 in the basement, 12 on the 1st floor, 12 on the 2nd floor, 14 on the 3rd floor, and 15 on the 4th floor.

While conducting our inspection of each floor, we also identified multiple fire code violation from illegal locks on the roof access latch, floors not properly labeled with identification markings, and no re-entry access on the secondary egress stairwell.

Upon completion of our inspection, we issued 4 FDNY summons and violations identified and sent a referral to the Department of Buildings for construction work in apartments without permits, the path of egress leading from 1st floor of the building to street was inaccessible due to the removal of the staircase and adding a handicap lift, laundry with flex pipe on gas dryers in the basement and extra apartments on each floor contrary to the certificate of occupancy.

FDNY summons: 014096264Z

- VC11 – Provide secondary exit stairwell with re-entry access on each floor
- VC12 – Maintain a minimum of 18 inches clearance between sprinkler head deflectors and the top of the storage in basement
- VC14 – Maintain all fire doors for apartments and exit in good working order, all doors should self-close

FDNY Summons: 014096265K

- VC6 – Provide directional signs in basement showing path of egress direction from basement to first floor stairs
- VC6 – Provide approved type of floor identification signs on each floor
- VC7 – Provide a sign for sprinkler valve room that's constructed of durable materials permanently installed and conspicuously located

FDNY Summons: 014096266M

- VC8 HK-5 – Remove all combustible waste and/or materials being stored throughout sprinkler valve room and from being stored near boiler
- VC8 HK-1 – Remove all combustible waste and/or materials being stored throughout sprinkler valve room from being stored near boiler
- VC8 HK-1 – Remove all combustible waste[…] and/or materials being stored throughout basement in path of egress

FDNY Summons :014096267Y

- VC9 EG-21-03 – Remove dumpster and other obstructions from blocking path of egress on side of building and always maintain accessible
- VC EG-2-06 – Remove lock on gate door l[e]ading from basement emergency exit to street and always maintain path of egress accessible
- VC9 EG-21-06 – Remove illegal lock on roof access latch and always maintain accessible.

IV. Jurisdiction

A. The Board's Appellate Jurisdiction under the New York City Charter

Pursuant to Charter § 666(6)(a), the Board is empowered "[t]o hear and decide appeals from and review, [. . . .] except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or of a deputy commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of section six hundred forty-two or section six hundred forty-five of this charter."

Further, Charter § 645(b)(3) states, in relevant part: "[w]ith respect to buildings and structures, the [DOB] commissioner shall have the following powers and duties exclusively, subject to review only by the board of standards and appeals as provided by law: [. . ..] to issue

certificates of occupancy for any building or structure situated in the city . . .." subject to provisions.

B. Relevant Codes, Laws, and Rules [4]

Charter § 2-08(a)(2)(ii):

> In addition to the criteria set forth in subparagraph (i) of 29 RCNY § 2-08(a)(2), in order for a Residential Unit to qualify for coverage under Art. 7-C pursuant to [Multiple Dwelling Law] MDL § 281(4), such residence or unit must have been occupied by a Family Living Independently for residential purposes on May 1, 1987, since December 1, 1981, and occupied for residential purposes since April 1, 1980, regardless of whether the Building is located in a geographical area in which the Zoning Resolution permits Residential Use as of Right, or through Grandfathering, or because the Building is located in a Study Area.

Charter § 28-118.17 permits:

> The [DOB] commissioner is authorized to request, in writing, pursuant to section 645 of the New York city charter that the board of standards and appeals or a court of competent jurisdiction revoke, vacate, or modify a certificate of occupancy issued under the provisions of this code whenever the certificate is issued in error, or on the basis of incorrect information provided to the department, or the nonconforming use reflected on the certificate of occupancy is no longer permitted pursuant to article V of the New York city zoning resolution. This section shall not be construed to apply to interim certificates of occupancy and other temporary certificates of occupancy.

Multiple Dwelling Law ("MDL") Article 7-C, § 281 Interim Multiple Dwelling

1. Except as provided in subdivision two of this section, the term "interim multiple dwelling" means any building or structure or portion thereof located in a city of more than one million persons which (i) at any time was occupied for manufacturing, commercial, or warehouse purposes; and (ii) lacks a certificate of compliance or occupancy pursuant to section three hundred

[4] Here, DOB represents that, although the definitions in the NYC Building Code, Zoning Resolution, Housing Maintenance Code, and NYS Multiple Dwelling law diverge from one another regarding cellar, grade plane, base plane, and curb level, DOB determines which source is most relevant to the certificate of occupancy in question. The Board defers and relies upon DOB's statement that because the Premises are a Loft Law building under Article 7C of the MDL, the MDL's definition of "cellar" controls.

one of this chapter; and (iii) on December 1, 1981 was occupied for residential purposes since April 1, 1980 as the residence or home of any three or more families living independently of one another.

2. Notwithstanding the definition set forth in subdivision one of this section, the term "interim multiple dwelling" includes only (i) buildings, structures or portions thereof located in a geographical area in which the local zoning resolution permits residential use as of right, or by minor modification or administrative certification of a local planning agency, (ii) buildings or structures which are not owned by a municipality, (iii) buildings, structures or portions thereof within an area designated by the local zoning resolution as a study area for possible rezoning to permit residential use, or (iv) buildings, structures or portions thereof which may be converted to residential use pursuant to a special permit granted by a local planning agency. In the case of classes of buildings specified by paragraphs (iii) and (iv) of this subdivision and those buildings specified by paragraph (i) of this subdivision which require a minor modification or administrative certification, however, the provisions of subdivision one of section 284 of this article regarding compliance with this chapter shall not be applicable, but the other provisions of this article shall be applicable. Upon rezoning of any such study area or the granting of any such special permit, minor modification or administrative certification to permit residential use of any such building or portion thereof, subdivision one of section 284 of this article shall be applicable, with the timing of compliance requirements set forth in such section commencing to run upon the effective date of such rezoning or permit approval. If such rezoning does not permit residential use of the building or a portion thereof, or if a special permit, minor modification or administrative certification is denied, such building shall be exempt from this article.
3. In addition to the residents of an interim multiple dwelling, residential occupants in units first occupied after April 1, 1980 and prior to April 1, 1981 shall be qualified for protection pursuant to this article, provided that the building or any portion thereof otherwise qualifies as an interim multiple dwelling, and the tenants are eligible under the local zoning resolution for such occupancy. A reduction in the number of occupied residential units in a building after December 1, 1981 shall not eliminate the protections of this article for any remaining residential occupants qualified for such protections. Non-residential space in a building as of the effective date of the act which added this article shall be offered for residential use only after the obtaining of a residential certificate of

occupancy for such space, and such space shall be exempt from this article, even if a portion of such building may be an interim multiple dwelling.

4. Interim multiple dwellings shall also include buildings, structures or portions thereof that had residential occupants on May 1, 1987 in units occupied residentially since December 1, 1981 that were occupied for residential purposes since April 1, 1980 and those units shall be qualified for protection pursuant to this article, provided that the building or any portion thereof meets the requirements set out in subdivision one of this section, regardless of whether the buildings, structures or portions thereof meets the requirements set out in paragraphs (i), (iii) and (iv) of subdivision two of this section.
5. Notwithstanding the provisions of paragraphs (i), (iii) and (iv) of subdivision two of this section, but subject to paragraphs (i) and (ii) of subdivision one of this section and paragraph (ii) of subdivision two of this section, the term "interim multiple dwelling" shall include buildings, structures or portions thereof that are located in a city of more than one million persons which were 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, provided that the unit: is not located in a basement or cellar and has at least one entrance that does not require passage through another residential unit to obtain access to the unit, has at least one window opening onto a street or lawful yard or court as defined in the zoning resolution for such municipality, and is at least four hundred square feet in area. The term "interim multiple dwelling" as used in this subdivision shall not include (i) any building in an industrial business zone established.

MDL § 4(37), defines “cellar” as an enclosed space having more than one-half of its height below the curb level, and MDL § 4(33) defines “curb level” as the level of the curb at the center of the front of the building.

Z.R. § 12-10 defines “curb level” as the mean elevation of the curb; “base plane” as being between the curb level; and the “street wall line” level as the mean elevation of the natural grade at the street wall line.

Z.R. § 15-024 Special bulk regulations for certain pre-existing dwelling units and joint living -work quarters for artist:

(a) The minimum size, *yard* and density requirements of Sections 15-111 (Number of permitted dwelling units) and 43-17 (Special Provisions for Joint Living-Work Quarters for Artists in M1-5B Districts) may be replaced by the requirements of this Section for *dwelling units* and *joint living-work quarters for artists*:

1. existing on September 1, 1980, for which a determination of *residential* or *joint living-work quarters for artists* occupancy has been made pursuant to paragraph (b) of Section 15-021 (Special use regulations), paragraph (b) of Section 42-314 (Use regulations in certain M1-1, M1-5 and M1-6 Districts), paragraph (c)(2) of Section 42-315 (Use regulations in M1-5B Districts); or
2. that are registered Interim Multiple Dwellings or are found covered by the New York City Loft Board pursuant to Article 7C of the New York State Multiple Dwelling Law; or
3. that the Loft Board determines were occupied for *residential use* or as *joint living-work quarters for artists* on September 1, 1980.

(b) Unless required by the Loft Board for the legalization of Interim Multiple Dwelling Units in the implementation of Article 7C of the New York State Multiple Dwelling Law, *dwelling units* or *joint living-work quarters for artists* described in paragraph (a) and existing on such dates may not be divided subsequently into units or quarters of less than 1,200 square feet.

[Emphasis original].

Z.R. § 41-11

These [manufacturing] districts are designed for a wide range of manufacturing and related uses which can conform to a high level of performance standards. Manufacturing establishments of this type, within completely enclosed buildings, provide a buffer between Residence (or Commercial) Districts and other industrial uses which involve more objectionable influences. New residences are excluded from these districts, except for…

(c) dwelling units in M1-1D, M1-2D, M1-3D, M1-4D and M1-5D Districts, where authorized by the City Planning Commission, both to protect residences from an undesirable environment and to ensure the reservation of adequate areas for industrial development.

V. Arguments on Appeal

A. DOB's Arguments

In this subject application, DOB seeks to modify the current certificate of occupancy for the subject Premises because it contends that the Zoning Resolution (1) forbids new dwelling units (Use Group II) in the subject M1-2 zoning district, *see* Z.R. § 41-11, with limited exceptions that do not apply here, and, (2) does not exempt the Premises from this use prohibition on the basis of pre-existing non-conformance because there was no lawful dwelling unit occupancy in the basement. First, DOB states that the basement dwelling units were not authorized by the Loft Law or the 2008 certificate of occupancy, which states the basement is used for "storage and [an] accessory recreation room." Moreover, DOB points to MDL § 281(5), which does not allow residences in the basement, and although these basement dwelling units were included on the 2012 certificate of occupancy, they are not lawfully existing, thereby making the issuance of the 2012 certificate of occupancy an error because neither the Zoning Resolution nor the Loft Law permit the creation of ten, new dwelling units in the basement. DOB further clarifies that subdividing existing units permitted by the Loft Law does not automatically create additional, permissible units under the Loft Law. Specifically, DOB states that IMD units in an existing IMD Building cannot be subdivided to create additional units without complying with the specific conditions spelled out in Loft Board's Rule 29 RCNY § 2-08(g)(1)(ii):

> In a [b]uilding, structure, or portion thereof that meets the criteria of … MDL § 281(4), and these rules, thereby qualifying as an IMD Building, the Occupant or Occupants of any additional unit residentially occupied during a period of 12 consecutive [m]onths between January 1, 2008 through December 31, 2009, in the IMD Building may also be covered under Art. 7-C provided that such additional unit meets the criteria set forth in MDL § 281(5) and as further delineated in these rules, including [other criteria the Department does not dispute].

Thus, if a residential unit or portion thereof is located in a basement or cellar, then it does not meet the criteria of MDL § 281(5). Therefore, DOB concludes that as a result, per 29 RCNY § 2-08(g)(1)(ii), these units cannot qualify as additional units in an MDL § 281(4) IMD building.

Notably, DOB points out that the body in charge of loft units, the Loft Board, has never extended coverage to the basement apartments as independent units. In support, DOB submitted a Loft Board Registration Renewal Invoice, dated October 4, 2000, shows 31 dwelling units, matching the ones identified on the 2008 certificate of

occupancy. In addition, DOB submitted a March 16, 2017 Loft Board Order, in which the Loft Board noted that "In 2012, Owner obtained a certificate of occupancy for 48 units…. Ten of these units were in the basement and are not IMD space;" and a Loft Board Registration Renewal Invoice dated June 23, 2022, which shows that the Premises have registered many additional units for Loft Law coverage, all of which are on the first floor or above.

Second, 29 RCNY § 2-08(h)(1) states that, "Any unit that does not meet the statutory requirements for coverage set forth in MDL § 281, as further detailed in these rules, is not covered by Art. 7-C." Since they are not "residential units covered by [Article 7-C]," DOB posits that MDL § 283 does not apply to shield the subject units from the Zoning Resolution. Therefore, pursuant to Z.R. §§ 15-021(f) and 41-11 the cellar units are unlawful and the 2012 CO must be modified to remove those units from the CO.

Finally, DOB states that although the distinction between cellar and basement is immaterial to the issue of the legality of dwelling units in such level, the 2012 certificate of occupancy should be corrected to reflect that there is a cellar and not a basement. The Premises' owner argues that the question of whether the lowest floor of the Premises is a basement or cellar is not properly before the Board, and the existing classification as a "basement" should remain intact. Furthermore, the Premises' owner states that there are several methods for calculating the grade elevation of the basement and identified the "base plane method," which derives from the Z.R. § 12-10 definition of *basement*:

> A story partly underground but having less than one-half its clear height (measured from finished floor to finished ceiling) below the curb level: except that where the curb level has not been legally established, or where every part of the building is set back more than 25 feet from the street line, the height shall be measured from the adjoining grade elevation. *Where a base plane is used to determine building height, a basement is a story (or portion of a story) partly below the base plane, with at least one- half its height (measured from floor to ceiling) above the base plane* [Emphasis added].

Therefore, the Premises' owner concludes that a "basement" may be established where a "base plane" is used to determine building height. On the DOB-approved plans for the Premises, dated March 11, 2022, the base plane calculation is shown as 24.93' + 21.23' + 26.19' = 93.43 / 4 = 23.36', and, therefore, the proposed base plane is 23.36'. The Premises' owner contends that under Z.R. § 12-10, the base plane may be lower than curb level by including the elevation of the final grade adjoining the street wall, and that due in part to the open area ways along the Sutton Street frontage (at elevations of 21.23' and 21.08') that were included in the base plane calculation, the base plane was

established at 23.36', which rendered the lowest level as a "basement" and not a "cellar."

DOB retorts that whether the units were in a cellar or a basement, they were unlawful at the time the 2012 certificate of occupancy was issued and incorrectly described the lowest floor as a "basement." DOB retorts that, as per Z.R. § 12-10, a "basement" is a floor where half or more of its height, as measured from the finished floor to finished ceiling, is above either the curb level or a base plane. DOB continues to state that, similarly, a "cellar" is a floor where more than half its height is below either the curb level or the base plane. Assuming that the Premises' owner's calculation of 23.36 feet is correct, DOB states that the question then becomes whether half or more of the lowest floor is above the so-called base plane at 23.36 feet because, if so, the lowest floor is a basement. According to the Premises' survey, the "basement" floor elevation is 18.55 feet, whereas, according to the 2012 plans, the "basement" has a height of 8'-10". Furthermore, DOB calculates that adding half of the basement height (4'-5" or 4.42') to the elevation of the "basement" floor (18.55') yields 22.97', and viewed in cross-section, this elevation is halfway between the finished floor and finished ceiling. DOB concludes that because 23.36 feet is higher than 22.97 feet, more than 50% of the lowest floor is below the base plane as calculated and is properly categorized as a cellar.

B. Premises' Owner's Arguments in Opposition

In opposition to DOB's request to modify the 2012 certificate of occupancy for the subject Premises, the property owner argues that because the first floor/cellar duplexes were existing Loft Law units in 2008, the cellar portions became additional Loft Law units after the existing duplexes were bisected. The referenced language for basement and cellar units was made effective in June 2010 and added to the coverage requirements included in the expansion of the Loft Law as part of MDL § 281(5), thereby excluding basement and cellar units from coverage if the application was made under MDL § 281(5). Here, the Premises' owner notes that because MDL § 281(5) was (i) enacted in 2010 and (ii) applicable only to residential occupancy established between January 1, 2008 and December 31, 2009, and because the Loft Board and DOB legalized the IMDs based on residential occupancy prior to May 1, 1987, existing units in basements had previously been considered covered under the Loft Law pursuant to MDL § 281(1).

For example, at 139-141 West 22nd Street, Manhattan, the Loft Board determined that since it was demonstrated that a store and basement were residentially occupied throughout the statutory window period, these spaces were covered by Article 7-C (*see* Loft Board Order No. 905). As such, the Premises' owner concludes that because each subsection of MDL § 281 applies to residential occupancy established during specified time periods, the subsequent application

resulting in the 2012 certificate of occupancy does not newly subject an existing IMD building to a provision adopted at a later time.

First, the Premises' owner states that DOB, as the applicant in this case, has the burden to produce any records relating to any audit at the subject Premises to aid the Board in its analysis based upon the materials reviewed by DOB in its determination and contends that DOB has failed to produce the necessary materials, thereby preventing the Board from properly accessing the record on this matter. Furthermore, the Premises' owner declares that, as a matter of policy, allowing DOB to proceed accordingly would encourage mishandling of applicant records and unfettered negligence. Here, the Premises' owner cites the United States District Court in *Davila v. Secretary of Health and Human Services*, 848 F. Supp. 1141, 1145 (S.D.N.Y. 1994):

> It would not be an acceptable outcome to rule that an administrative agency can defeat rights of a claimant to benefits simply by not diligently locating or reconstructing its records. At a certain point failure of a governmental agency, like any other party, to supply information which it can provide or reconstruct supports an inference that those materials if unearthed would contradict the position of the entity. *See*, *generally*, *Gray v. Great American Recreation Ass'n*, 970 F.2d 1081, 1082 (2d Cir. 1992); *United States v. Torres*, 845 F.2d 1165, 1169 (2d Cir. 1988).

The Premises' owner interprets the reasoning set forth by the court in *Davila* to support an inference that purported DOB records not supplied to the Board would support the issuance of the 2012 certificate of occupancy and that it is the burden of DOB to overcome this inference.

Moreover, the Premises' owner contends that DOB's application fails to (1) set forth the plain meaning of the Loft Law and (2) provide any analysis of the relevant sections of the MDL. Specifically, the Premises' owner contends that the recent Court of Appeals decision in *Aurora Assoc. LLC v. Locatelli*, 38 NY3d 112, 115-116 (2022) contains a discussion which demonstrates that the Loft Law was specifically created to provide a pathway to legalization:

> The Loft Law, Multiple Dwelling Law article 7-C, was enacted in 1982 to resolve the "serious public emergency . . . created by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws" (MDL § 280). The legislature found that "illegal and unregulated residential conversions" require "intervention of the state and local governments" to "establish a system whereby residential rentals can be reasonably adjusted so that residential tenants can assist in paying the cost

> of such legalization without being forced to relocate" (*id*.). The statute's goal was "to finally balance the equities of the conflicting interests in the development and use of loft space" and aimed to "provide[ ] a framework for the legalization of these dwellings consistent with the local zoning resolution of the City of New York" (Mem of Legis Rep of City of NY Off of Mayor, June 10, 1982, Bill Jacket, L 1982, ch 349 at 64, 70, 1982 McKinney's Session Laws of NY at 2479, 2484).

Furthermore, because the Premises' owner reads the intent of the Loft Law as providing a mechanism for legalizing certain units in commercial buildings already used for residential purposes, not to generate additional illegal conversions, only buildings occupied for residential purposes during certain time periods in the past are eligible for Loft Law conversion (*See*, *generally*, MDL § 281 [1], [3]). Here, the Premises' owner posits that although occupancy of a multiple dwelling without a certificate of occupancy is generally prohibited by MDL § 301, the Loft Law permits "continued occupancy" of converted units in eligible buildings during the legalization process and protects tenants "from eviction by reason of illegal occupancy, violation of a lease provision prohibiting residential use, or the lack of a residential certificate of occupancy" (*Little W. 12th St. Realty L.P. v Inconiglios*, 19 Misc 3d 508, 513, 854 NYS2d 632 [Civ Ct, NY County 2008]; Multiple Dwelling Law §§ 283, 286 [1], [2]). Moreover, MDL § 284 sets out necessary steps for legalization, requiring that owners "take all reasonable and necessary action to obtain a certificate of occupancy as a Class A multiple dwelling" (*id*. § 284 [1]). Once owners have come into compliance with safety and fire protection standards, they "may apply to the loft board for an adjustment of rent based upon the cost of such compliance," at which point "the loft board shall set the initial legal regulated rent, and each residential occupant qualified for protection . . . shall be offered a residential lease" (*id*. § 286 [3]). (Internal citations omitted.)

In addition, the Premises' owner asserts that the Loft Law is controlling in the Board's determination of this matter and, in conjunction with the MDL, establishes the legality of the units in question with full protections under New York City Law and cites *Kaufman v. American Electrofax Corp.*, 102 AD2d 140, 143 (1st Dept. 1984) as setting forth the applicability of the Loft Law: "A residential unit qualifying under section 281 of the Multiple Dwelling Law is entitled to the full protection of the law, notwithstanding its otherwise illegal nature (Multiple Dwelling Law, § 283)."

Finally, as to whether the lower level is properly classified as a basement or a cellar, the Premises' owner argues that the issue is not properly before the Board and is, generally, immaterial to the question of residential use. Here, the Premises' owner states that it had

previously offered an alternative method for calculating the base plane that was utilized in plans submitted to and accepted by DOB and was not addressed throughout years of audits and submissions without an issued objection. The Premises' owner further notes that DOB's records would be material here, as calculations relating to basements are site-specific and based upon, among other things, grade elevations as set forth in surveys.

V. Board Review

After review of the materials in evidence, the Board, in its decision, clarifies that the question before it is limited to whether the law permitted the creation of ten dwelling units in the lowest level of the Premises between 2010 and 2012. The Board acknowledges the Premises' owner's argument regarding DOB's failure to present full records for its audit of the Premises but notes that such records or lack thereof cannot change the law. First, Z.R. § 42-11 forbids the creation of new dwelling units in an M1-2 district as of right, and Z.R. § 15-021(f) forbids the creation of new dwelling units in the subject manufacturing district, so, therefore, no new dwelling units can be created at the Premises as of right.

Neither party disputes that sometime after the issuance of the 2008 certificate of occupancy, the Premises' owner created ten new dwelling units at the lowest level at the Premises. The Board finds that, whether using DOB or the Premises' owner's calculation method, the lowest level within the building is more than half of a story below the base plane and is, therefore, a cellar. Furthermore, the Board finds that DOB has properly applied the Zoning Resolution definition of "base plane" when measuring and arrived at the correct outcome under the requirements of the Zoning Resolution.

Next, the Board concludes that the units could not have met the requirements of MDL § 281(5) in 2012 because it did not extend its protections to basement units until 2019 and, even now, does not cover cellar units. As a result, per 29 RCNY § 2-08(g)(1)(ii), the additional units in the lowest level do not qualify for Loft Law coverage, and because these residential units are not covered under Article 7-C, MDL § 283 provides no exception to allow residential units in the subject M1-2 zoning district.

VI. The Decision

Based upon the foregoing, the Board finds that the DOB request to modify the certificate of occupancy for the subject Premises shall be granted.

Therefore, it is Resolved, that the Board of Standards and Appeals does hereby *modify* the Department of Building certificate of occupancy

no. 320285188F, effective May 29, 2012, to remove the 10 dwelling units located within the cellar.

Adopted by the Board of Standards and Appeals, October 21, 2024.

CERTIFICATION

This copy of the resolution dated October 21, 2024 is hereby filed by the Board of Standards and Appeals on February 27, 2025.

Carlo Costanza
Executive Director