Respondent, premises owner, appeals[1] from a recommended decision and order finding a Class 1 violation of Section 28-118.3.2 of the Administrative Code of the City of New York (Code) for occupancy contrary to that allowed by the certificate of occupancy (C of O) or Department of Buildings (DOB) records. Respondent's temporary certificate of occupancy (TCO) authorized the following occupancies: cellar, for storage and boiler room; mezzanine, as accessory to first-floor cabaret; first floor, as a cabaret; second floor, as a retail store. In the notice of violation (NOV), the issuing officer (IO) cited his observation on October 13, 2011 of the following illegal occupancies: cellar, entertainer's lounge, dressing and locker room, dining area; mezzanine and first floor, adult establishment; and second floor, part of "Lace" (the adult establishment).

The hearing

At the hearing,[2] the IO testified, in support of the NOV, as to his observation that the cited floors and areas of the premises were being used as an adult establishment. Additionally, as to the second floor, he testified that he observed the presence of a bar, sitting area, and bathrooms, all of which were used as part of the adult establishment. He did not observe a store, the use authorized in the TCO. The IO further testified that he observed patrons using the bathrooms and semi-clad females on the mezzanine level. Petitioner, DOB, also introduced into evidence, without objection, several photographs taken by the IO at the time of his observations which depict the conditions described in his testimony.

Respondent did not dispute the charge that the cited floors and areas were being used as described by the IO, but argued that approved alteration plans allowed the change in occupancy of the premises from a cabaret to an adult establishment.[3] Respondent also argued that the premises could not be considered an "adult establishment" as that term is normally understood because, as approved by the alteration plans, pursuant to the 60/40 rule,[4] less than 40% of its space was being used as such.

In her decision, the administrative law judge (ALJ) upheld the violation, without addressing the 60/40 rule or the cited adult establishment occupancy, because she found that the second floor's use as a lounge and the cellar's use as dressing rooms and an entertainer's lounge constituted illegal occupancies. The issues on appeal are whether (1) the cited occupancies were legal because they conformed to approved

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[1] Respondent's appeals of companion NOVs (nos. 34923990P, 34923991R) heard at the same time are addressed in separate decisions (Appeal nos. 1200530, 1200531).

[2] Hearing on the instant NOV and four related NOVs was consolidated.

[3] At the hearing, Respondent asserted that it was altering the cabaret, authorized on the first floor, and mezzanine, as accessory to the cabaret, to an adult establishment and that both the old and new uses fell within the same zoning Use Group 12 (as well as, as stated in the TCO, occupancy group F-4). It did not specifically address the changes in use or occupancy groups of the cellar and second floor.

[4] The 60/40 rule typically applies to adult book stores. An "adult book store" is one type of adult establishment and is, as defined in Section 12-10 of the Zoning Resolution, a book store that offers for sale or rent printed or visual material, a "substantial portion" of which consists of adult printed or visual material. *See NYC v. Scott Liroff* (ECB Appeal No. 1100844, December 15, 2011). ***[See note at end.]***

alteration plans; and (2) a challenge to the classification of the violation, raised for the first time, should be considered.

The law

Code Section 28-118.3.1 provides:

> No building, open lot or portion thereof hereafter altered so as to change from one occupancy group to another, or from one zoning use group to another, either in whole or in part, shall be occupied or used unless and until the commissioner has issued a certificate of occupancy certifying that the alteration work for which the permit was issued has been completed substantially in accordance with the approved construction documents and the provisions of this code and other applicable laws and rules for the new occupancy or use.

Code Section 28-118.3.2 provides:

> No change shall be made to a building or open lot or portion thereof inconsistent with the last issued certificate of occupancy or, where applicable, inconsistent with the last issued certificate of completion for such building or open lot or which would bring it under some special provision of this code or other applicable laws or rules, unless and until the commissioner has issued a new certificate of occupancy.

Section 12-10 of the Zoning Resolution of the City of New York (ZR) defines an "adult establishment," in pertinent part, as "a *commercial* establishment which is or includes an adult book store, adult eating or drinking establishment, adult theater, or other adult *commercial* establishment, or any combination thereof."[5] In addition to applicable ZR regulations for uses listed in a permitted use group, adult establishments are subject to special provisions set forth in ZR Sections 32-01 and 42-01.

The appeal

On appeal, Respondent argues that (1) use of the premises was legal because it complied with the approved alteration plans and the law; and, for the first time, (2) the violation is not a Class 1 violation.

Petitioner did not answer the appeal.

The Board's determination

The Board denies the appeal. Respondent's use of the premises as an adult establishment was contrary to the TCO and constituted a violation of Code Section 28-118.3.2, notwithstanding that such use may have conformed to its alteration plans. Though DOB approved those plans, Respondent still needed to obtain an amended TCO or final C of O, certifying substantial completion of the work and reflecting change to use as an adult establishment. In its appeal, Respondent concedes that its

[5] "Commercial" is italicized in the original.

TCO does not reflect or conform to the alteration plans approved for the premises and "will be when finalized into a permanent CO." However, Code Sections 28-118.3.1 and 28-118.3.2, read together, require that the use and occupancy of a building or portion thereof conform to the last-issued C of O or DOB record of occupancy, unless they fall within the same occupancy group and zoning use group and do not bring the premises under a different special provision of the Code or other applicable law or rule. Thus, to establish a violation of Code Section 28-118.3.2, Petitioner need only show that a portion of the premises was used in a manner contrary to the existing TCO and that such use fell within a different occupancy or use group or special provision of the Code or applicable law or rule.

Here, Petitioner has shown that the second floor, authorized for use as a retail store (a commercial occupancy group),[6] had a bar, sitting area, and bathrooms and was used as part of the adult establishment (occupancy group F-4).[7] Petitioner has also shown that the cellar, authorized for storage (occupancy groups B1, B2, or commercial, according to the TCO), had an entertainer's lounge, dressing and locker room, and dining area (occupancy group F-4). On this record, Petitioner established that uses of portions of the premises fell within different occupancy groups from those authorized by the TCO.

On appeal, Respondent refers to the ALJ's dismissal of a related NOV (no. 34923988X) charging a Code Section 28-105.12.2 violation for work that does not conform to approved construction documents. The ALJ dismissed that NOV because she found that the work fell within Respondent's approved construction plans for a place of assembly. However, the performance of construction work in conformity with approved plans does not allow the altered premises to be occupied or used in accordance with those plans absent a TCO or final C of O, certifying substantial completion of the work, as required in Code Section 28-118.3.2.

Respondent challenges, for the first time on appeal, the designation of the violation as Class 1. However, at no time during the hearing did Respondent raise any objection to the violation's classification. Because this challenge was not raised at the hearing, the Board declines to consider it for the first time on appeal.

Accordingly, the ALJ's recommended decision and order is affirmed.

Ed. Note: Footnote 2 references *NYC v. Scott Liroff* (ECB Appeal No. 1100844, December 15, 2011). Pursuant to a stipulation of settlement of an Article 78 proceeding brought by Respondent, this decision was vacated.

[6] *See* Code Sections 27-245 through 27-248 for storage occupancy groups and 27-237, Table 3-1 for a listing of occupancy groups.

[7] Even if the Board were to accept Respondent's assertion that the premises is not an "adult establishment" because, under the 60/40 rule, less than 40% of the space was being used as such, the premises is still being used as a place of assembly for an eating and drinking establishment or restaurant and falls within assembly occupancy group F-4. This occupancy group is only authorized for the first floor cabaret and mezzanine, as accessory to the cabaret, and not for the cellar and second floor. *See* Code Section 27-254 for assembly occupancy groups.