

Respondent, owner of the cited premises, appeals from a recommended decision finding a Class 2 violation of Section 28-105.12.2 of the Administrative Code of the City of New York (Code) for work that does not conform to approved construction documents and/or approved amendments. In the summons, the issuing officer (IO) affirmed on December 6, 2016 “Noted: on roof level observed one room has been constructed including roof & ceiling. Room size approx 20' W x 20' L x 8' H and connected to existing penthouse contrary to approved plan under job #103858906.”

The hearing

At the hearing, the IO testified that the apartment on the roof appeared to have a room extension not found on the approved construction documents kept in Petitioner’s records. In support, he offered the details of the cited permit application, approved on August 10, 2014, for the horizontal enlargement of the first-floor apartment and interior renovation of the first and fourth floors, as well as photographs of the approved plans and the rooftop apartment. He drew lines on a photograph of the plans to show where the extension he observed on the roof should have been.

Respondent’s representative did not dispute that the entire rooftop apartment was not on the plans. He argued that he should not be responsible because the rooftop apartment pre-existed his purchase of the building in 2003. He testified that there were no plans for the building when he purchased it, but his insurance company required that plans be filed with Petitioner, the Department of Buildings. He stated that in 2004, hired a licensed architect, who drew and filed self-certified plans. He admitted that the architect drew the plans “poorly” and that they included mistakes.

The hearing officer credited that the rooftop apartment observed pre-existed Respondent’s purchase, but also determined that it did not conform to the approved plans filed by Respondent’s architect, and sustained the violation.

Issue presented on appeal

The issue on appeal is whether it is a defense to a Code Section 28-105.12.2 charge that the non-conforming work pre-existed Respondent’s purchase of the building.

Applicable law

Code Section 28-105.12.2 provides that “[a]ll work shall conform to the approved construction and submittal documents, and any approved amendments thereto. Changes and revisions during the course of construction shall conform to the amendment requirements of this code.”

The appeal

On appeal, Respondent’s attorney acknowledges that the architect drew the rooftop apartment inaccurately on the plans. He reargues that Respondent established a defense by proving that the rooftop apartment pre-existed Respondent’s purchase of the building. He further contends that if Respondent has to file corrected plans as a result of this violation, Petitioner could invoke previously inapplicable obligations that would cause Respondent significant financial burden.

For the first time on appeal, Respondent submits a copy of the 2004 permit. Per Section 6-19(b) of Title 48 of the Rules of the City of New York, the Board will not consider any evidence not presented to the hearing officer.

Petitioner did not answer the appeal.

The Board's determination

Having fully reviewed the record, the Board finds that the hearing officer's decision is supported by the law and a preponderance of the evidence and denies the appeal. It is undisputed that the approved plans filed under the application cited on the summons did not show a room in the rooftop apartment. It is not a defense to a charge of Code Section 28-105.12.2 that the non-conforming work was done prior to Respondent's purchase of the premises. As owner of the cited premises in which the non-conforming work exists, Respondent may be held in violation of the cited statute, even if he did not perform the work. *NYC v. Robert DiGennaro* (Appeal No. 1200071, May 31, 2012). Further, Respondent's representative admitted that his architect filed the plans after Respondent purchased the premises. As for Respondent's claim of burdens Petitioner will impose once new plans are filed, the Board has no authority to review Petitioner's enforcement practices.

Accordingly, the Board affirms the hearing decision sustaining a Class 2 violation of Code Section 28-105.12.2 and imposing a civil penalty of \$500.

Additional information from OATH records (not in original decision)

| Master NOV # | Name of Respondent's counsel or other authorized representative (if any) |
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| 35167890N | JOEL TURNEY LLC |