

# ***Dep't of Buildings v. 527 East 86<sup>th</sup> Street, Brooklyn***

OATH Index No. 2238/09 (Oct. 23, 2009)

Undisputed evidence established that property zoned for residential use was being used as a commercial parking lot, truck depot, and junkyard. Respondent did not establish prior, non-conforming legal use. Closure recommended.

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## **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF BUILDINGS**

*Petitioner*

*- against -*

**OWNERS, OCCUPANTS AND MORTGAGEES OF  
527 EAST 86<sup>th</sup> STREET, BROOKLYN, NEW YORK**

*Respondents*

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## **REPORT AND RECOMMENDATION**

**JOAN R. SALZMAN**, *Administrative Law Judge*

This proceeding was referred to this tribunal pursuant to section 28-212.1 of the New York City Administrative Code (the "Padlock Law"). Petitioner alleges that the yard of the premises at 527 East 86th Street, in Brooklyn, also known as Block 7965, Lot 33, located in an R5 residence district, is being used impermissibly for the storage of commercial vehicles, as a public parking lot, a trucking terminal, and a salvage yard, and for the manufacture of ice. Petitioner seeks an order of closure, pursuant to the Padlock Law, to abate the claimed nuisance. *See* Admin. Code § 28-212.5.

The hearing was held before me on July 10, 2009. Petitioner presented documentary evidence, consisting of inspection reports, tax and zoning maps, the certificate of occupancy, and the testimony of a building inspector to show that the present use is unauthorized. Represented by counsel, respondent *Ciro J. Faiella* ("respondent"), on behalf of himself and of his brother, *Joseph Faiella*, the other owner-respondent, who did not appear at the hearing due to illness (Tr. 4), argued that the present use of the yard as a commercial parking lot constitutes a permissible prior non-conforming use. In support of this argument, respondent introduced witness

testimony, affidavits, photographs, business records and zoning maps. Respondent disputed that ice manufacturing occurred on his property. Both sides filed post-trial briefs on August 21, 2009, at which time the record was closed.

As discussed below, I find that the owner's use and occupancy of the yard of the premises as a commercial parking lot, trucking terminal and junkyard violates the applicable zoning resolutions, and recommend closure of the yard.

### **ANALYSIS**

The controversy in this case centered on the use of respondent's lot for commercial parking of trucks and large storage containers and trailers. It is undisputed that the lot is used as a parking lot (Tr. 111). At the hearing, petitioner presented five inspection reports dating from October 9, 2008, through May 14, 2009 (Pet. Exs. 1-5). These reports<sup>1</sup> contain photographs of respondent's property, some of which photos show five trailers combined and converted into an office and used by workers as a work station, as locker rooms and lunch or break rooms (Tr. 62), and for storage, commercial tractor-trailers, a van, trucks, commercial dump trucks, a forklift, mobile and stationary wooden pallets used for unloading trucks (Tr. 78-79), metal containers and 45-gallon metal drums on the lot (Pet. Ex. 1-5). Also shown in the reports were several passenger and commercial vehicles, miscellaneous salvage auto parts, tires, equipment, pieces of lumber, a mobile container, a metal dumpster, storage bins on wheels used for storage of ice packs (Tr. 67), containers used to store ice packs, and a metal shed with a fence around it. Petitioner's witness, Nigel Sampson, was the Department's inspector who completed each of these reports. He testified initially that ice was being manufactured or processed on the property, but then clarified on questioning that the ice was made (frozen) on an adjacent property, not owned by respondent (Tr. 72-73), pushed onto respondent's lot in the form of ice packs, in crates, and then packed into black zippered bags (Tr. 19, 24-25; Pet. Ex. 4). He also observed 10 to 15 workers on the property (Tr. 25).

Respondent denied that ice was manufactured on his property. Rather, he testified, the lot is used by Zone Chefs, now known as Chef's Diet, a business that cleans bags for prepared

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<sup>1</sup> Respondent disputed some of the photos and contended that some of them did not show his property, but rather, his neighbor's property (Tr. 64-80). I have confined the discussion here to items that were, without dispute, on respondent's lot.

foods on respondent's lot, and stores already made ice packs there (Tr. 61-66). He also testified that he rents the office building on his property to Chef's Diet, which uses the trailers on the lot to clean the food bags. Chef's Diet gets its food from another site nearby (Tr. 72-73), and pays rent to respondent for the office and for the trailers on his property (Tr. 71). Some of the trucks at issue come onto the lot to unload ice packs (Tr. 62-63). The Department does not challenge the use of the business office on the property (Tr. 167-68, 180), but does seek to terminate the parking of dump trucks, commercial trucks, forklifts, and the use of large storage trailers on the lot, as well as the junkyard and auto parts storage.

I find that the property is not being used impermissibly for ice manufacturing, which falls within Use Group 17, a manufacturing use not permitted in a residential district (Pet. Ex. 11). Petitioner's own witness, Inspector Sampson, stated that the ice was being frozen on another property, not respondent's (Tr. 24-25). One of the pictures presented by petitioner even shows the freezers where the ice is made on the neighboring property (Pet. Ex. 5 at 16; Tr. 69-70). Respondent's testimony that Chef's Diet used his property only to clean food bags and store ice packs and that there was no freezer or ice manufacturing on his property was unrebutted (Tr. 61-64). The evidence adduced by petitioner is insufficient to establish the use of the lot for the manufacture of ice. Without documentary and additional proof of the Chef's Diet business, the Department would not stipulate based on respondent's testimony alone that Chef's Diet rented the building and part of the lot. The Department offered no alternative theory that any current use of part of the lot by Chef's Diet to clean and package bags of diet food with ice packs came under any other specific Use Group that might relate to the diet food supply business, within the meaning of the Zoning Resolution. Accordingly, that portion of the Amended Petition alleging impermissible ice manufacturing should be dismissed.

With respect to the other uses of the lot, petitioner presented zoning maps dated 1961, 1962, and 2006, showing that the entire lot has been zoned as "R5," a residential district since 1961 (Pet. Exs. 7-9). The certificate of occupancy, dated December 17, 1959, shows that the permitted uses of the property are as a residence for one family and as a restaurant with parking spaces for two cars (Pet. Ex. 10). Petitioner also presented the Index of Uses of the Zoning Resolution, which shows that public parking lots (Use Group 12), commercial storage (Use Group 16), trucking terminals (Use Group 16), salvage storage (Use Group 18), and junkyards

(Use Group 18), are commercial or manufacturing uses not allowed in residence districts zoned R5 (Pet. Ex. 11).

Respondent conceded that the lot was being used as a commercial parking lot and argued that this use was permitted as a prior non-conforming use. The defense of prior non-conforming use is an affirmative defense that must be proved by the respondent. *Town of Ithaca v. Hull*, 174 A.D.2d 911 (3d Dep't 1991); *Dep't of Buildings v. 132 Newel Street*, OATH Index No. 1184/94 at 2 (Dec. 16, 1994). In order to establish this defense, respondent must show that the current use predated the 1961 Zoning Resolution, was legal when it was established and has continued on the premises since that time without an impermissible change or interruption of the use for a period of two or more years: A “non-conforming” use is *any lawful use*, whether of a building or other structure or of a tract of land, which does not conform to any one or more of the applicable use regulations of the district in which it is located, either on December 15, 1961 or as a result of any subsequent amendment thereto.” Zoning Resolution Art. I, ch. 2, § 12-10 (eff. Dec. 15, 1961) (emphasis supplied); Art V, ch. 2, § 52-61 (eff. Oct. 7, 1976); *Town of Virgil v. Ford*, 160 A.D.2d 1073 (3d Dep't 1990); *Dep't of Buildings v. 120 St. Marks Place*, OATH Index No. 648/09 at 4-5 (Apr. 27, 2009), *aff'd*, Comm'r Dec. (Apr. 30, 2009) (zoning ordinances reflect overriding public policy aimed at reasonable restriction of non-conforming uses, which are detrimental to a zoning scheme, and eventual elimination of such uses); *Dep't of Buildings v. 2788-2790 Grand Concourse*, OATH Index No. 2242/99 at 2 (Oct. 22, 1999), *aff'd*, Comm'r Dec. (Jan. 21, 2000), *aff'd sub nom. Ulloa d/b/a New Globe Mini Market v. Visconti*, Slip Op., Index No. 7618/00 (Sup. Ct. Bx. Co. May 18, 2000).

In this case, respondent has not established that the lawful use of his lot for commercial parking predated 1961 and continued without an impermissible change or interruption of that use for a period of two years or more.

An amended district map of the area, dated May 27, 1953, showed that as of that date, more than half of respondent's property fell within a manufacturing district (Resp. Ex. A). The parties stipulated that at that time, 84 feet of the property were zoned for manufacturing and the other 75 feet had always been zoned as residential (Tr. 48, 55). This was so from 1953 until 1961, when the lot was rezoned in its entirety for residential use. Respondent testified that the property had been used as a commercial parking lot since the 1950's; he stated that he

remembered his mother and his grandfather renting out the lot, and he presented business records in the form of rent ledgers showing his rentals of this lot for truck parking to various entities from 1976 through 2009 (Tr. 56-57, 82-83; Resp. Ex. B). Many of the renters apparently had some connection to trucking food (Resp. Ex. B).

The Department stipulated that the lot was used for truck rentals without interruption from 1976-2009 (Tr. 60).<sup>2</sup> The question presented, therefore, is narrowed to whether respondent was able to prove a legal use, not conforming to the current residential zoning regulations, of his lot for commercial truck rental, without interruption for two years since about 1955, when respondent's uncle claims there were trucks on the lot (Colicchio: Tr. 144). The defense depended on: a neighbor's testimony, which, if credited despite conspicuous errors in his affidavit, was that he saw trucks on the lot from 1968-1999 (Pagano: Tr. 135-41); respondent's recollection, which goes back only to about 1962, when he was six years old; photographs of the property that are inadequate to show the pre-1961 use of the lot; and the recollection of respondent's 81-year-old uncle. With respondent's photographic evidence unreliable and the affidavits he submitted from other neighbors summary, inconsistent and riddled with errors, the years-long gaps in the proof between 1955 and 1968 or 1976, are sought to be filled by respondent's uncle's testimony. For the reasons set forth below, I find the gaps in the credible proof fatal to the defense of prior non-conforming use, and that the uncorroborated testimony of interested witnesses (respondent and his uncle) do not amount to a preponderance of the evidence.

Respondent presented eight photographs to support his testimony (Resp. Ex. C). However, the photographs do not show a continuing use of the lot for commercial parking. To the contrary, the photos leave years-long gaps and respondent, through his memory, was unable to fill those gaps in the history of the use of the lot. One photograph, dated 1954, two years before respondent was born -- the only one said to show the lot before the 1961 changes in the Zoning Resolution rezoned the entire lot for residential use -- shows an egg truck, belonging to respondent's uncle (though respondent was not sure of this fact), parked on the sidewalk in front of a building (Resp. Ex. C at 1; Tr. 80-81, 114-15). The copy of this photo is dated 1954. (All the photos are copies of the originals produced at the trial and show the dates, copied by hand,

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<sup>2</sup> The Department's stipulation covered 1976-2008, and the undisputed rent ledgers actually extend into 2009. Thus, the only undisputed period of continuous use of the lot as a trucking terminal was 1976-2009.

from those found on the backs of the original family photos [Tr. 94-96]). Respondent's uncle, Louis Colicchio, testified that he owned the egg truck shown in the photograph and that the photograph shows his truck parked on the sidewalk, not in the lot (Tr. 158, 160). He stated that he has parked his egg truck in his nephew's lot *gratis* since 1955 (Tr. 144-46, 158). He also noted that based on the photograph, he was not sure whether the truck was parked in front of 523, 525 or 527 East 86<sup>th</sup> Street (Tr. 158). As the location of the truck in the photograph is not even in the lot and the owner of the truck in the photograph stated that he had not parked in the lot that day, and in fact did not start parking his truck in the lot until the next year, the photograph does not support respondent's defense.

There were then years-long gaps in the photographic record in that the next photos are from 1962 and later, and thus cannot show uses legally established before 1961. The photograph dated 1962/63, depicts two cars on the lot and two "bushel trucks" holding fruit (Tr. 84-85, 117; Resp. Ex. C at 2). Four of the photographs are dated 1966; two of these show one parked car on the lot, one shows two parked cars on the lot, and the last does not show any parked vehicles as it is limited to the front of the residence and restaurant (Resp. Ex. C at 3, 4, 5, 8). Although respondent testified that he was in these pictures marked 1966, the one showing a boy at a pool table depicts a significantly smaller and younger boy than the boy standing with his mother in another photo, suggesting that respondent's assignment of 1966 to all four photos is incorrect (Tr. 84, 87; Resp. Ex. C). A photograph dated 1975 shows a swimming pool and one car parked on the lot (Resp. Ex. C at 6). Another photograph dated 1975 shows the pool, two parked cars, a short trailer on the lot and a commercial truck, which respondent testified, was on his neighbor's lot (Resp. Ex. C at 7; Tr. 90-91, 123-24), again, tending to show that commercial truck parking was not a continuing use on respondent's property. Respondent testified that the trailers currently on his lot are located where the pool in the photographs used to be (Tr. 83).

Instead of reinforcing his defense, the photographs presented by respondent tend to disprove continuous use of the property as a commercial parking lot. The photographs dated 1966 show a mostly empty lot or grassy yard with at most two passenger cars on it (Resp. Ex. C at 3-5, 8). This is consistent with the 1959 certificate of occupancy, which allows the lot to be used to park two cars (Pet. Ex. 10). The fact that the lot is devoid of commercial vehicles in these daytime photographs, though not conclusive, suggests that there was not a continuous

commercial parking use. Thus, the photographs undercut respondent's argument that commercial parking was a prior non-conforming use.

In addition, respondent presented six affidavits of neighbors describing the use of the lot. The affidavits respondent presented were unpersuasive; they contained very limited information and lacked detail. Four of the affidavits appear to be forms containing virtually the same wording, with blanks, which the affiants completed by hand, inserting their addresses and the dates that they lived at the addresses given, stating that since they lived "down the street from 527 East 86<sup>th</sup> Street," the property "was used as a restaurant and for truck parking" (Resp. Ex. D). The dates range from 1940 through present day. The other two affidavits are from individuals who did not live nearby, but frequently visited their relatives who did. Mary Pagano, swore in her affidavit that she lived on "East 93th [*sic*] St.," incorrectly described as "down the street from" respondent's property on East 86<sup>th</sup> Street (Resp. Ex. D).

Only one of the affiants, John Pagano, a delivery driver, born in 1954, testified at the hearing. He testified that his affidavit was incorrect on salient points (Tr. 135, 138-39). For example, though his affidavit stated that he had lived on East 86<sup>th</sup> Street since 1955, "down the street from 527 East 86<sup>th</sup> Street," he testified that in fact, he did not live there; his brother did. It does not appear that Mr. Pagano made a deliberate misrepresentation in the affidavit. More likely, he signed an affidavit prepared for his signature and did not take care to check it for accuracy when he signed it. Mr. Pagano had actually lived a couple of blocks away, on 85<sup>th</sup> Street, not "down the street" from the lot at issue, until 1985 (Tr. 135, 138-39). He testified that he worked across the street from the lot and noticed buses and trucks parking there from 1968 through 1999, when he left his job (Tr. 136). His testimony, unlike his affidavit, in which he claimed knowledge from 1955, when he was one year old, is limited to observations *after* 1961 and does not fill the gaps in the non-conforming use defense here.

None of the other affiants appeared at trial to verify the information on their form affidavits. Each of the affidavits contains inaccurate information. Sworn in June or July 2009, all the affidavits state that the restaurant has been at 527 East 86<sup>th</sup> Street since the affiants had lived or visited nearby. One affiant, Elizabeth Arciuolo, swore on June 29, 2009, that she visited her aunts several times a year at 523 and 525 East 86<sup>th</sup> Street and ate at the restaurant at 527 East 86<sup>th</sup> Street frequently from 1959 to the present day (Resp. Ex. D). But the restaurant was closed

in the early 1980's. Each of the affiants claims to have observed the use of the building on the lot as a restaurant in the timeframes listed in the affidavits: 1959-present, 1958-present, 1953-1992, 1940-2000, 1955-1995, and 1959-2007. These timeframes flatly contradict the testimony of Mr. Faiella, who stated that the restaurant opened sometime between 1956 and 1960 (he could not recall because he was so young then),<sup>3</sup> and closed in the early 1980's, after his mother got cancer (Tr. 100, 109-111; 113). While this tribunal may admit hearsay in the form of affidavits, such hearsay must be scrutinized carefully to determine its reliability. *Dep't of Buildings v. 838 Sixth Avenue*, OATH Index No. 2260/09 at 5 (July 29, 2009). When hearsay is inconsistent with more reliable evidence, it may be rejected altogether. *See, e.g., Dep't of Correction v. Michaels*, OATH Index No. 1870/01 at 7 (Nov. 15, 2001), *aff'd*, Comm'r Dec. (Dec. 13, 2001). Due to the inconsistencies between the affidavits and the in-court testimony, as well as the glaring errors and lack of detail in the affidavits, I find that they lack the necessary indicia of reliability and, therefore, do not support respondent's defense.

The testimony of Mr. Faiella was unpersuasive in that his memory was spotty when it came to the relevant uses of the lot in the 1950's, when he was a young boy. He could not recall where his lot ended and his neighbor's property began and claimed he did not know the dimensions of his lot (Tr. 67, 108). He conceded that he did not know when his mother began collecting rents for parking on the lot because he has only been making his living this way for 15-20 years, suggesting that the ledgers from 1976 to 1989 had been made not by him, but by his mother, and he does not remember: "I don't know if it was -- like I said, I only got the books [when] I did. I don't know what she did and my grandfather" (Tr. 100-01). Thus, it is plausible from this testimony that the truck parking began after the 1961 amendments to the Zoning Resolution and that the 1976 ledgers of respondent's mother and grandfather mark the start of the truck depot business on this lot. As he was born in 1956 (Tr. 81), Mr. Faiella's recollections of property usage prior to 1961 were understandably vague. He testified that the lot had been used for commercial parking since the 1950s. When questioned about how he knew about the parking, Mr. Faiella stated that his uncle, Mr. Colicchio, had told him trucks were parked there starting in 1958, though Mr. Colicchio testified that the year was 1955 (Tr. 112; 144). Respondent also stated that he remembered trucks being parked there about 1960, but had no

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<sup>3</sup> The Certificate of occupancy indicates that there was a restaurant on the property in 1959 (Pet. Ex. 10; Tr. 113).

recollection of his own before that (Tr. 112-13). Asked about the history of truck parking on the lot, respondent testified, “the family used it before -- you know, before I was born, I guess, I assume” (Tr. 97). He did not know the history of how his family may have begun to rent the lot for truck parking, how they got the first trucks into the lot (Tr. 112-13). Mr. Faiella testified that he could remember as far back as the time period when he was five or six years old (Tr. 83), leaving a gap in his testimony of more than two years, assuming the claimed original use in 1955, until 1961 or 1962 (not 1960, as he asserted, inconsistently), or an original commercial use in 1940, as claimed by Ms. Pagano in her affidavit.

Considering that the commercial parking lot represents his principal livelihood (he also rents out the building on the lot), Mr. Faiella is a witness with a strong financial interest in piecing together a history of his family’s continuous commercial use of his lot. His testimony about one particular customer appeared highly implausible. Respondent testified that trucks marked “T & L Creative Salads” in the October 9, 2008 inspection report (Pet. Ex. 1) were not parked on his property because they were photographed by Inspector Sampson on the 87<sup>th</sup> Street side of the lot (Tr. 103). But in an effective cross-examination, counsel for the Department directed respondent’s attention to the books of his business (Tr. 106-08), which show that T & L is a significant client of his, and has been renting parking space on his lot every year for more than 20 years, from 1986 to 2009, including in October 2008, when the inspector took this photograph. T & L has been paying respondent \$900 a month in rental fees since 2006 (Resp. Ex. B), among the higher rental fees paid by his many customers, according to his books. This testimony made little sense and cast a bit of doubt on the reliability of his testimony overall.

Born in 1928, respondent’s uncle, Mr. Colicchio, testified that he has lived on East 86<sup>th</sup> Street next to the lot at issue, since 1955 (Tr. 142). While living there, Mr. Colicchio has had several businesses, including a grocery business, for which he sold fruits and vegetables, a car wash, a business of building machines used in car washes, and an egg delivery business, for which he has used a used 1940 Dodge panel truck, a 1993 Dodge Caravan, a 1999 Monterey van, and a station wagon (Tr. 143-45, 160). Mr. Colicchio testified that he has parked his vehicles in respondent’s lot since 1955 (Tr. 144-45). He has not paid rent for the storage of these vehicles (Tr. 145). His brother-in-law, a mechanic, had also stored his bulldozer on the lot for two or

three years while he overhauled it (Tr. 160). Mr. Colicchio stated that, to his knowledge, the property has been used as a truck parking lot since 1955 (Tr. 146, 151, 160).

In respondent's favor, Mr. Colicchio testified that respondent's family "had trucks and used the land for vans" (Tr. 151). He said he recalled this use from about 1955, when he took up residence, next door on East 86<sup>th</sup> Street, to the present (Tr. 144). He remembered the neighborhood in the 1950's as a "commercial area"; across the street, there were a "bushel place" and a junk lot that sold auto parts (Tr. 148). Asked if he remembered any specific trucks, he testified, "Yes, there were all kinds of trucks" (Tr. 160), but did not elaborate with any specifics. He added, "they rented a section. It was used for commercial stuff"; "And they -- that was *his* living" (Tr. 150-51), referring to respondent, not to respondent's ancestors. He also said that the lot was for "[a]nybody that wanted to park there" (Tr. 156), but gave no details.

I found Mr. Colicchio's testimony about the use of the lot sketchy. Mr. Colicchio testified that since 1955, he has stored various vehicles on the lot. He did not specify in which years particular vehicles of his were stored there, and it was not clear that he had stored commercial vehicles on the lot continuously without interruption. He did say that his current use of the lot was to store his station wagon and Monterey van with machinery he builds (Tr. 143, 145, 161). His vehicles were not shown to be commercial vehicles and the photographs taken by the building inspector on May 14, 2009, show Mr. Colicchio's station wagon parked on a different lot (Pet. Ex. 5; Tr. 162)<sup>4</sup>. His testimony that respondent has been parking trucks there was vague and at times contradictory<sup>5</sup> (Tr. 146, 156-65). He also did not mention or explain that his sister-in-law or father-in-law (respondent's mother and grandfather) had used the lot for commercial parking before respondent took over in the 1980's (Tr. 141-65). Though I found Mr. Colicchio sincere, the vagueness and confusion of his testimony suggest that he does not clearly remember enough details about the lot to substantiate that it has been used continuously for

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<sup>4</sup> Though Mr. Colicchio had testified that he always parked his car on respondent's lot (Tr. 162), when asked to explain the picture, he stated, to the contrary, that he always parks behind his own building too (Tr. 165). This is not to say that he was untruthful on this point, although the Department tried to use this confusion as a basis to discredit his testimony overall. The gist of this particular testimony was that he and his family have lived on this block for decades and he parks as he pleases behind any of the lots as a member of the family. I find that this passage in Mr. Colicchio's testimony did not tend to prove commercial truck parking, as it was about Mr. Colicchio's station wagon.

<sup>5</sup> For example, Mr. Colicchio testified that he had a big tractor-trailer that he parked on the lot, but he later stated that he did not have a tractor-trailer (Tr. 156-157). He also stated that he parked his fruit truck on the lot from 1955 up until today, but later stated that he no longer had the fruit truck; he ended that business in 1960 (Tr. 160-61).

commercial parking since the 1950's; it was not clear whether he was really recalling his own vehicles from the 1950's that he parked on the lot free of charge and respondent's rentals to commercial truckers from later decades.

There was no explanation of how the family came to rent space to trucks, what kind of products the truckers hauled, or any bit of detail that would have given life to the defense theory. Mr. Colicchio spoke at length about the family restaurant, but not about respondent's mother and grandfather accepting rent money for trucks or particular kinds of trucking businesses. Mr. Colicchio himself did not have an arm's length business arrangement with respondent, and he parked his own trucks and vehicles on the lot rent-free (Tr. 144), so that was not a formal commercial use of the lot. He knew without equivocation that respondent was parking trucks there (Tr. 146), but respondent only took up this work 15-20 years ago (Tr. 100-01), leaving substantial doubt about decades-long gaps in the use history.

We have held that in a non-conforming use case, some specificity is required, and the defense cannot be based upon a general impression of a historical use of the property. *Dep't of Buildings v. 232 Mount Hope Place, Bronx*, OATH Index No. 1207/94 (Oct. 28, 1994), *aff'd*, Comm'r Dec. (Nov. 1, 1994); *Dep't of Buildings v. 133-18 78<sup>th</sup> Street, Queens*, OATH Index No. 1874/02 at 6 (Nov. 18, 2002), *aff'd*, Comm'r Dec. (Nov. 27, 2002) (lack of specificity as to prior use defeats defense of legal, prior non-conforming use); *Dep't of Buildings v. 1750 Westchester Avenue, Bronx*, OATH Index No. 1943/99 at 7 (Oct. 26, 1999), *aff'd*, Comm'r Dec. (Apr 21, 2000) (even though witnesses were "generally credible," they offered "vague, sketchy and indefinite testimony as to the use of the property prior to 1961" zoning change; general testimony in terms of dates was insufficient, and non-conforming use defense failed).

Mr. Colicchio's earnestness is not in question, but he is an interested witness and was unable single-handedly to overcome the significant flaws in respondent's other proofs. He cried during the cross-examination, stating that he cares about his nephew: "I don't want him to lose his land" (Tr. 159). This testimony was genuine and moving. The difficulty, however, is that respondent's uncle's testimony alone, on this record, was vague and unsupported as to the business use of the lot over the last 54 years, and whether the use was ever limited to the 84 feet of property that was zoned for manufacturing use in 1953. Respondent's proof, does not amount to a preponderance of the evidence, which was weak: the photographs were inconclusive or

proved the contrary of continuous commercial use before 1961; the affidavits were erroneous; respondent himself gave unconvincing and dubious testimony about the T & L salad trucks found and photographed by the inspector; and Mr. Pagano's testimony was limited to a period covering only 1968 to 1999 (Tr. 136).

A preponderance has been defined as "the burden of persuading the trier of fact that the existence of the fact is more probable than its non-existence." Prince, *Richardson on Evidence* § 3-206 (Lexis 2009) (citation omitted); *Dep't of Buildings v. Stallone Testing Laboratories, Inc.*, OATH Index No. 362/10, at 7 (Aug. 26, 2009), *aff'd*, Comm'r Dec. (Aug. 27, 2009); *United States v. Ross*, 251 F. Supp. 175 (S.D.N.Y.), *aff'd*, 368 F.2d 455 (2d Cir. 1966) (taxpayer was interested witness who failed to meet his burden to prove by a fair preponderance that tax assessment was incorrect); *Buchner v. Pines Hotel, Inc.*, 87 A.D.2d 691 (3d Dep't 1982), *aff'd*, 58 N.Y.2d 1019 (1983) (trial court properly rejected defense limiting liability of defendant because court need not have credited testimony of interested witness, the son-in-law of owners of defendant hotel, where defendant had the burden of establishing its defense by a preponderance of the credible evidence). No disinterested witnesses from the neighborhood, either individuals or business owners were presented who could provide their observations as to the years in controversy, 1955-1968 (depending on whether Mr. Pagano's testimony is credited) or 1955-1976 (the date the rent records begin), and other than Mr. Pagano, none of the affiants appeared at the hearing to corroborate or explain the imprecise testimony.

Respondent did not establish when the truck parking on the lot actually began, leaving this important point a matter of guesswork. Even assuming the supposed commencement of a legal use in 1940, the earliest date claimed, in the affidavit of Mary Pagano, sworn to July 9, 2009 (Resp. Ex. D), there was no reliable evidence of continuous use of the premises for truck parking since 1940, and thus there are gaps of significantly more than two years in the proof until the first reliable and undisputed records, the rent ledgers from 1976-2009. The same kind of gaps flow from Mr. Colicchio's recollection that goes back to 1955; he was unable to offer specific details of the uses of the property since 1955 (Tr. 142, 144-46).

Even if respondent had shown that the lot had been continuously used for commercial parking, he did not prove that such use was legally created. In order to be legal, a use must have been in compliance with both the zoning requirements and the certificate of occupancy. *Dep't of*

*Buildings v. 132 Newel Street*, OATH Index No. 1184/94 at 3-4 (Dec. 16, 1994); *see also* Zoning Resolution, Art. II, § 2; Art. V, §22 (as amended through Nov. 1, 1960). In this case, respondent has submitted proof of neither.

Nor did respondent show that any supposed commercial uses before 1961 were confined to the commercial portion of the lot and legal in that sense. If the commercial uses were on the residential segment of the lot before 1961, they were contrary to the certificate of occupancy and the zoning regulations. If they were on the commercial portion of the lot, they were contrary to the 1959 certificate of occupancy. Respondent requests that he be allowed to continue operating his truck depot on the 84-foot portion of the lot zoned manufacturing in 1953 (Resp. Mem. at 15). Given the burdens that would fall upon respondent to rearrange his means of earning a living if the entire lot is closed, I have given serious consideration to this request. However, respondent has failed to show by a preponderance of the credible evidence that there was a continuing, legal, non-conforming use established since the undisputed 1953 zoning map allowing manufacturing use on 84 feet of the property, without an interruption of two years' time, and I am, therefore, unable to recommend a partial closure of the lot.

With respect to the zoning district, the parties stipulated that prior to 1961, 84 feet of the lot was zoned for manufacturing and the other 75 feet had been zoned as residential in 1953 (Tr. 48, 55; Resp. Ex. A). At no time did respondent assert that this meant use of the entire lot for commercial parking was legal. In fact, respondent stated the opposite, that "commercial uses were legal in a portion of the premises prior to 1961" (Resp. Mem. at 7). There was no indication in this record that respondent had ever sought a variance or followed the procedures to obtain one. Had he or his family sought and obtained a variance, they might have won the right to extend the trucking rental use no more than 25 feet into the 75-foot portion of the lot

previously zoned residential.<sup>6</sup> Thus, even prior to the 1961 zoning amendments, with 84 feet in a manufacturing zone and 75 feet in a residential zone on the lot according to the 1953 zoning map, even with a variance, commercial parking would have violated the zoning regulations on at least 50 feet of the property. Respondent presented no evidence in relation to the particular location of the parking lot within the property and thus has not established that it ever fully complied with the zoning regulations.

It is undisputed that the current use is not in compliance with the certificate of occupancy. Dated 1959, the certificate of occupancy lists the permitted uses of the property as: a residence for one family and as a restaurant with parking spaces for two cars (Pet. Ex. 10). Clearly, the use of the lot for commercial parking falls outside these permitted uses.

While respondent disputes that the certificate of occupancy negates the legality of his use, I find this argument unavailing. Respondent relies on *City of New York v. Victory Van Lines, Inc.*, 69 A.D.2d 605 (2d Dep't 1979), and *Matter of Kennedy v. Zoning Board of Appeals*, 205 A.D.2d 629 (2d Dep't 1994), to support his argument that a certificate of occupancy is a mere technicality which will not preclude protection of a non-conforming use. In *Victory Van Lines*, however, the Court considered whether the use of a lot by a moving company with the trucks incidental thereto was a prior non-conforming use when the location had been previously zoned as a business district and the certificate of occupancy covered the warehouse but not the parking of the trucks. 69 A.D.2d at 607-8. In finding the parking of those trucks legal, the Court distinguished commercial parking lots, which were specifically addressed in 1948 by a Department of Buildings regulation requiring a certificate of occupancy for use of a vacant lot for commercial parking; but the Court found that there was no law that would have put a reasonable person on notice that a certificate of occupancy would be required in order to park

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<sup>6</sup> The pre-1961 zoning regulations discuss the use of a lot that falls within two zoning districts. According to the Zoning Resolution, "after public notice and a hearing, and subject to appropriate conditions and safeguards," the Board of Standards and Appeals may "determine and vary the application of the use district regulations herein established in harmony with their general purpose and intent as follows . . . Where a district boundary line divides a lot in single ownership at the time of passage of this resolution, [the Board of Standards and Appeals may] permit a use authorized in either portion of such lot to extend to the entire lot, but *not more than 25 feet beyond the boundary line* of the district in which such use is authorized." Zoning Resolution, Art. II, § 7(b) (as amended through Nov. 1, 1960) (emphasis supplied). As of November 1, 1960, the language of this provision had been unchanged since it was adopted on July 25, 1916. In the current Zoning Resolution, the language has been changed, but the relevant substance remains the same; an authorized use applicable to more than 50% of the lot area may be extended into the smaller area of the lot, but no more than 25 feet beyond the district boundary. Zoning Resolution, Art. VII, ch. 7, § 77-11 (as amended through Oct. 17, 2007).

moving vans on the premises of a moving and storage company. *Id.* at 608. The parking of company trucks on the lot was, in effect, an accessory use. Thus, the Court concluded that it would be a denial of due process to deny the non-conforming use. *Id.* at 609. The holding in *Victory Van Lines* is inapposite because here, the legality of the non-conforming use was not established from its creation and the use of the lot for commercial parking conflicted with the certificate of occupancy. *Victory Van Lines* teaches that commercial parking such as the use of the lot at issue here does require a certificate of occupancy permitting that specific use.<sup>7</sup>

Likewise, *Matter of Kennedy* is distinguishable from the facts here. In that case, a building owner had been using his property as a residence and as an artist's office/studio prior to the requirement of a certificate of occupancy. 205 A.D.2d 629. Though the owner had requested a certificate of occupancy, the Building Inspector wrote him a letter stating that a certificate of occupancy was not required as the property pre-existed any requirement for one and that the uses were legal. *Id.* at 630. After the area was re-zoned, a new Building Inspector sought, 10 years later, to terminate the use by arguing that the lack of a certificate of occupancy negated the non-conforming use defense. *Id.* The Court found that "[a] use which is otherwise lawfully maintained may be continued as a non-conforming use although the user failed to procure or renew a license, certificate, or other permit required by law. . . . The failure to obtain a license does not render the use unlawful in the sense intended by zoning ordinances which preserve existing lawful uses." *Id.* at 631 (citations omitted). While this proposition has been repeated in

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<sup>7</sup> Neither side developed the point that if Chef's Diet were renting the building on this lot from respondent as a business office, the makeshift trailers on the lot could be used by that occupant as a use "accessory" to the business office (Tr. 167-72). Although respondent's counsel mentioned in closing at the hearing that respondent was seeking to maintain only the use of the lot for truck parking, and briefly contended that the trailers were an accessory use to the Chef's Diet business office rental (Tr. 172), when given a full opportunity to brief the issue with the benefit of the transcript, neither side provided any illumination of the issue. Neither party explained how the trailers used as lockers and lunchrooms might or might not constitute an "accessory use" to a business office under section 12-10 of the Zoning Resolution. An "accessory use" is "a use which is clearly incidental to, and customarily found in connection with, [the] principal use." Zoning Resolution, Art. I, ch. 2, § 12-10 (eff. Aug. 27, 1998); *Dep't of Buildings v. 103-20 34th Avenue, Queens*, OATH Index No. 1696/96 (June 13, 1996). The principal controversy here was about the commercial truck parking. Although respondent testified that he rents the building to Chef's Diet, he did not present any rent records to document this rental, even though he kept and produced for the record detailed rent ledgers for the truckers to whom he rented parking space, including the monthly rental amounts for more than 30 years. Nor were the customary uses incidental to a business office of a diet food purveyor established. The Department did not challenge the claimed use of the building as an office, but at the same time, it did not accept, and stated it had seen no proof, by inspection of the building or otherwise, that Chef's Diet is in fact renting that building, and argued that even if Chef's Diet were properly using the building, it was not entitled to park trailers on the property (Tr. 167-68). Accordingly, I decline to find, on this sparse record that the trailers on the lot were permissible uses accessory to a business office for sale of diet food.

cases where no certificate of occupancy allowing the particular use at issue had been obtained, it has not been applied where a certificate of occupancy had been obtained and was subsequently violated. *See, e.g., Rubin v. Wallace*, 63 A.D.2d 763 (3d Dep't 1978); *Costa v. Callahan*, 41 A.D.3d 1111, 1114 (3d Dep't 2007); *Stephentown Concerned Citizens v. Herrick*, 246 A.D.2d 166, 170 (3d Dep't 1998). Thus, the reasoning of *Matter of Kennedy* and its progeny does not apply to this case because the prior owner here obtained a certificate of occupancy in 1959.

Respondent contends that the zoning resolution should be strictly construed against the municipality seeking to enforce it (Resp. Mem. at 10), but the controlling case law is to the contrary when it comes to non-conforming uses. In *Off Shore Restaurant Corp. v. Linden*, 30 N.Y.2d 160, 164 (1972), the Court of Appeals articulated an important exception to the general principle espoused by respondent here that zoning ordinances are to be strictly construed in favor of the property owner. That principle of statutory construction loses its force when it comes to the specialized regulation of non-conforming uses: "the courts do not hesitate to give effect to restrictions on nonconforming uses . . . . It is because these restrictions flow from a strong policy favoring the eventual elimination of nonconforming uses . . . ." (citations omitted). *See generally Toys "R" Us v. Silva*, 89 N.Y.2d 411, 417, 422 (1996). Both sides acknowledge this important policy of curtailing non-conforming uses, by citation to the 1961 Statement of Legislative Intent in the Zoning Resolution, Article V, chapter 1, section 51-00 (as restated in 1965), entitled, "Purpose of Regulations Governing Non-Conforming Uses and Non-Complying Buildings":

The zoning districts established in this Resolution (as set forth in the district regulations in Articles II, III and IV and on the zoning maps) are designed to guide the future use of the City's land by encouraging the development of desirable residential, commercial and manufacturing areas with appropriate groupings of compatible and related uses and thus to promote and to protect public health, safety and general welfare.

As a necessary corollary, in order to carry out such purposes, non-conforming uses which adversely affect the development of such areas must be subject to certain limitations. The regulations governing non-conforming uses set forth in this Chapter are therefore adopted in order to provide a gradual remedy for existing undesirable conditions resulting from such incompatible non-conforming uses, which are detrimental to the achievement of such purposes. While such uses are generally permitted to continue, these regulations are designed to restrict further investment in such uses, which would make them more permanent establishments in inappropriate locations.

Finally, respondent asserts that the City, having done nothing to enforce the Padlock Law against this property for decades, should be estopped from enforcing that law now. The controlling law, again, is to the contrary. The Court of Appeals rejected the estoppel defense in a zoning case even though the Department of Buildings had issued a building permit and then revoked it as having been erroneously issued only after substantial construction had been completed. The Court of Appeals held that “estoppel is not available against a local government unit for the purpose of ratifying an administrative error,” *Parkview Associates v. City of New York*, 71 N.Y.2d 274, 282 (1988) (citation omitted). *Accord Schorr v. New York City Dep’t of Housing Preservation and Development*, 10 N.Y.3d 776, 779 (2008) (“It is well settled that ‘estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties’”) (citations omitted). The owner in *Parkview Associates* was forced to demolish the constructed portions of the upper floors of a building. The court ruled that it is settled that “a municipality . . . is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches.” 71 N.Y.2d at 282 (citation omitted). The Court held further: “. . . [E]stoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results. . . .” *Id.*

The reasoning of the above-cited precedents defeats respondent’s claim that he has a “vested right,” citing *People v. Miller*, 304 N.Y. 105 (1952),<sup>8</sup> due to earlier lack of enforcement by the Department, to continue using the residentially zoned lot for commerce. An analogous claim of “vested rights” and severe economic loss was rejected in *Parkview Associates*. There was no vesting of rights where the permit was invalid when issued and not in compliance with the law. *Parkview Associates*, 71 N.Y.2d 274. Similarly here, there could be no vesting of rights in an illegal use of the property. While respondent’s related contention that he will face serious

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<sup>8</sup> *Miller* holds that in New York, “existing nonconforming uses will be permitted to continue, despite the enactment of a prohibitory zoning ordinance, if, and only if, enforcement of the ordinance would, by rendering valueless substantial improvements or businesses built up over the years, cause serious financial harm to the property owner.” 304 N.Y. at 109. This line of authority, however, does not come into play here for two reasons, one legal and one factual: (1) respondent has failed to show a continuing, uninterrupted, non-conforming use that was legal at the time the use began, see *New York v. Bilynn Realty Corp.*, 118 A.D.2d 511, 513-14 (1st Dep’t 1986) (distinguishing *Miller*); and (2) respondent does have his office rental business, and there was no showing that he cannot make use of the property to make a living by other, lawful means. The Department does not challenge respondent’s rental of the building on the property as an office; and respondent could take steps to make lawful use of the lot or otherwise dispose of it. There was no showing that padlocking this lot against commercial uses would render the property “valueless.”

financial loss because this truck parking is his principal livelihood certainly inspires much sympathy for his difficult circumstances, the settled law compels the outcome here. *Id.* As in 2788-2790 *Grand Concourse*, OATH 2242/99 at 4, “the argument for estoppel in the instant case is far less compelling than that in *Parkview Associates*, since here the Department of Buildings has issued no approval which respondent has relied upon but has simply refrained from prosecuting a continuing zoning violation.”

Finally, there have been impermissible changes of use on the lot, such as the addition of junk salvage (Use Group 18, a different use from those of the trucking terminal and parking lot), and there was no proof of the junkyard use prior to 1961. *Dep’t of Buildings v. 120 St. Marks Place*, OATH Index No. 648/09 at 9 (Apr. 27, 2009), *aff’d*, Comm’r Dec. (Apr. 30, 2009).

As respondent has not shown a legally created, continuous use of the property as a commercial parking lot predating the current zoning regulations, he has not proved that his use of the property constitutes a prior, legal, non-conforming use.

### **FINDINGS AND CONCLUSIONS**

1. The premises are not being used for impermissible ice manufacturing.
2. The premises, zoned residential, are being used as a commercial parking lot, truck depot, and junkyard, in violation of the Zoning Resolution, the certificate of occupancy, and the Padlock Law. The impermissible uses of the lot render it a public nuisance under that law.
3. Respondent did not establish that the use of the lot for parking commercial trucks qualified as a prior, legal non-conforming use.

**RECOMMENDATION**

I recommend that the Commissioner issue an order of closure for the yard of the premises pursuant to section 28-212.1 of the New York City Administrative Code, and that such closure be effected in a manner that will not interfere with access to any residence or to the office building, the use of which the Department did not challenge.

Joan R. Salzman  
Administrative Law Judge

October 23, 2009

SUBMITTED TO:

**ROBERT D. LIMANDRI**  
*Commissioner*

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