Dep't of Buildings v. Caliendo

OATH Index No. 733/18 (Sept. 25, 2019), *adopted*, Comm'r Dec. (Oct. 4, 2019), **appended**

Petitioner established that respondent, a licensed architect: submitted six professionally certified applications that displayed negligence, incompetence, or lack of knowledge of applicable laws; submitted two certified applications within a 12-month period containing errors that resulted in revocation of an associated permit; and failed two audits within six months. Petitioner failed to prove allegations that one of the professionally certified applications respondent filed displayed negligence, incompetence, or lack of knowledge of applicable laws. Twelve-month suspension of respondent's professional certification privileges recommended.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF BUILDINGS
Petitioner
- against -
GERALD CALIENDO
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

This proceeding was referred by the Department of Buildings ("petitioner" or "Department"), pursuant to the New York City Administrative Code and the Department's rules. Admin. Code § 28-104.2.1.3.2 (Lexis 2019); 1 RCNY § 21-02(c)(2) (Lexis 2019). The third amended petition alleges that between November 2013 and January 2016, respondent Gerald Caliendo, a licensed architect, filed seven professionally certified applications in which he demonstrated negligence, incompetence, or a lack of knowledge of applicable laws; he knowingly or negligently submitted professionally certified applications or documents not in

compliance with all applicable laws; he professionally certified two applications within 12 months containing errors that resulted in permit revocations; and he failed two audits within six months that resulted in permit revocations. Petitioner seeks to exclude respondent from its programs for professional self-certification and limited supervisory review privileges (ALJ Ex. 4).

At a six-day trial, petitioner relied on documentary evidence and testimony from three witnesses. Respondent presented documentary evidence, testified on his own behalf, and presented the testimony of two witnesses. The record closed upon the submission of written summations (ALJ Exs. 5, 6).

For the reasons below, I find that the charges should be sustained, except that petitioner failed to prove negligence, incompetence, or lack of knowledge of applicable laws regarding one of the professionally certified applications.

ANALYSIS

Background

The Department permits design professionals such as architects to certify that their applications and associated documents conform to applicable laws. Such professionally certified applications undergo limited review. *See* Admin. Code § 28-104.2.1. An advantage of the professional certification process is that a permit for the work is issued immediately, whereas under the standard plan examination process, a permit is not issued until the plans have been reviewed by the Department and all corrections have been made (Tr. 717-19).

A design professional who submits applications or plans that display "negligence or incompetence with regard to, or lack of knowledge of, the Building Code ("Code"), the Zoning Resolution, the Department's regulations, or other applicable laws, rules, or regulations" may be excluded or suspended from the Department's limited supervisory check or professional certification program. 1 RCNY § 21-02(a)(1); Admin. Code § 28-104.2.1.3.2(i). In addition, the Administrative Code provides that the Department shall "exclude, suspend or otherwise condition" the participation of a design professional who, within a twelve-month period, "submits two professionally certified applications" containing errors that result in revocation of an associated permit or that otherwise demonstrate incompetence or a lack of knowledge of applicable laws. Admin. Code § 28-104.2.1.3.2(ii). The Department's rules further provide for

exclusion from the professional certification program where a design professional failed two audits within six months that resulted in revocation of the associated permits. 1 RCNY § 21-02(a)(14).

Respondent is an architect who was licensed by New York State in 1989. He founded an architectural firm in 1993 and has filed about 5,000 applications with the Department (Tr. 658-60). Respondent employs about 45 people in his firm (Tr. 698). Respondent considers himself a general practitioner in that he has filed applications before the Department for all kinds of buildings, as well as applications for variances and zoning changes before other agencies. However, the majority of respondent's practice involves applications for new buildings (Tr. 660). According to respondent, between ten and 20 percent of the applications that he has filed have been professionally certified (Tr. 663).

Petitioner alleges that respondent displayed negligence, incompetence, or lack of knowledge of applicable laws in seven professionally certified applications he submitted to the Department. Petitioner further alleges that respondent submitted two certified applications for construction document approval within a 12-month period containing errors that resulted in revocation of associated permits, and that he failed two Department audits within a six month period that resulted in revocation of the associated permits (ALJ Ex. 4).

Charge I: Negligence, Incompetence, or Lack of Knowledge of Applicable Laws and Regulations

Petitioner bears the burden of establishing the charges by a preponderance of the credible evidence. Preponderance has been defined as "the burden of persuading the triers of fact that the existence of [a] fact is more probable than its non-existence." Prince, Richardson on Evidence § 3-206 (Lexis 2008) (citations omitted); *see also Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986); *Dep't of Buildings v. Trombettas,* OATH Index No. 2325/15 at 5 (Jan. 29, 2016), *adopted*, Comm'r Dec. (Feb. 11, 2016).

This tribunal has held that to satisfy its burden as to allegations of negligence, incompetence, or lack of knowledge of applicable laws, petitioner must prove that the respondent's professionally certified filings failed to display the competence and accuracy that average design professionals would exercise, including familiarity with the Zoning Resolution and Building Code. *Dep't of Buildings v. Masucci*, OATH Index No. 2469/16 at 3-4 (May 9,

2017), *adopted*, Comm'r Dec. (May 24, 2017); *Dep't of Buildings v. Ali*, OATH Index No. 2751/15 at 13 (Mar. 16, 2016), *modified on penalty*, Comm'r Dec. (Mar. 21, 2016); *Dep't of Buildings v. Fernando*, OATH Index No. 2423/10 at 3 (Sept. 9, 2010), *adopted*, Comm'r Dec. (Sept. 14, 2010).

To prevail, it is not enough for petitioner to demonstrate that a professionally certified application contained errors or resulted in objections. "Negligence, incompetence, or unfamiliarity with the law and rules can be proved by presenting unrebutted evidence or by showing errors that are so glaringly obvious that no reasonable professional would commit them." *Masucci*, OATH 2469/16 at 4. *See also Dep't of Buildings v. Schnall*, OATH Index No. 2750/15 at 14-15 (Feb. 10, 2017), *modified on penalty*, Comm'r Dec. (Feb. 21, 2017) (respondent was negligent in filing application when there was no evidence that he had a good faith basis to believe that the proposed residential use of the building comported with applicable law); *Dep't of Buildings v. Velasquez*, OATH Index No. 1557/10 at 10-11 (Nov. 24, 2010), *modified on penalty*, Comm'r Dec. (Dec. 2, 2010) ("obvious errors," including failure to divulge a mapped street and failure to provide for dual egress or sprinklers, constitute a failure to exercise a professional standard of care); *Ali*, OATH 2751/15 at 14, 20 (engineer failed to refute allegations that filings were "false or negligent," including failure to provide certificate of no harassment for single room occupancy building and false statements regarding no change in egress or occupancy).

Professional negligence, incompetence, or lack of knowledge of the laws and rules can also be established with credible testimony regarding the expected standard of care for design professionals. *See, e.g.*, *Fernando*, OATH 2423/10 at 6 (evidence established that engineer did not exercise professional standard of care and showed unfamiliarity with fire and safety standards, where plan examiner testified that she had worked with numerous design professionals and respondent displayed an unusual "lack of interest," did not talk during meetings, and referred all questions to a filing representative who was not an architect or engineer); *Dep't of Buildings v. Fekete*, OATH Index Nos. 1118/07 & 1119/07 at 9-12, 19 (Oct. 26, 2007), *modified on penalty*, Comm'r Dec. (Jan 15, 2008), *modified sub nom. St. Clair Nation v. City of New York*, 60 A.D.3d 468 (1st Dep't 2009), *rev'd*, 14 N.Y.3d 452 (2010) (engineer who submitted suspicious photographs that had been altered by another party without carefully reviewing the photographs and detecting flaws failed to exercise professional standard of care;

petitioner presented credible testimony regarding engineer's professional code and need for site visits).

Petitioner's witness, Neil Adler, offered knowledgeable and convincing testimony about the prevailing standard of care for design professionals. Adler has served as the Chief Plan Examiner in the Special Enforcement Team ("SET") unit since 2015. He earned a bachelor of science degree in civil engineering and is a licensed professional engineer in New York State. Adler joined the Department as a plan examiner in 2005 and was promoted to Chief Plan Examiner for Staten Island, then Brooklyn. He served in that capacity until he was appointed to his current position (Tr. 15-17). Adler has performed at least a thousand standard plan examinations, which entail review of documents and plans submitted by an applicant for compliance with the applicable codes and regulations, including the Building Code, Zoning Resolution, and Multiple Dwelling Law ("MDL") (Tr. 17). He has also supervised thousands of plan examinations in his role as Chief Plan Examiner.[1]

Adler testified that in the standard plan examination process, a plan examiner reviews documents submitted by the applicant, including the application form, drawings, and other required forms. The plan examiner reviews the applicant's scope of work as described in the application to determine if the drawings submitted with the application correspond to the scope of work and the other information provided in the plans. If the plan examiner finds deficiencies or noncompliance with applicable laws, he or she issues objections and the applicant is notified. The applicant can meet with the plan examiner to try to resolve those objections (Tr. 29).

Rather than undergo a standard plan examination, design professionals may choose to professionally certify their applications. The applicants must select this option at the initial filing of the application. Applicants prepare their drawings and submit documents that include a mandatory professional certification statement. Professionally certified applications are not routinely reviewed by a plan exam examiner and the Department relies on design professionals to be truthful and accurate in their professionally certified applications (Tr. 30, 34).

Adler testified that the professional certification form design professionals must file with every professionally certified application states that the applicant has "exercised a professional

[1] Petitioner requested that Adler be qualified as an expert witness in the area of code compliance, filing plans, plan examination, and plan audits, to which respondent objected. I reserved decision on the application at the trial (Tr. 18-20, 24). I find it appropriate to qualify Adler as an expert in the Department's procedures and practices for filing plans, plan examination, plan audits, and in the area of code compliance.

standard of care, in certifying that the filed application is complete and in accordance with applicable laws, including the rules of the Department of Buildings as of this date" (Tr. 35; Pet. Ex. 1). It further states that the applicant is "aware the Commissioner will rely upon the truth and accuracy of this statement" (Pet. Ex. 1). Design professionals must sign the form and affix their professional seal. In addition, the owner of the premises must sign the form to acknowledge that he or she is aware that the application has been professionally certified (Tr. 35-37; Pet. Ex. 1).

According to Adler, the professional standard of care means that the applicant "will perform his duties with the knowledge, skill and care commonly associated with those . . . licensed design professionals conducting their work in the same jurisdiction at the same time" (Tr. 36). He stated that to meet this standard of care, the applicant must understand the scope of work and research the building to determine what laws are applicable to the scope of work, then prepare plans and drawings and file the application with the Department (Tr. 36-37). If the scope of work involves laws or regulations with which the applicant is unfamiliar, the applicant can perform research or hire someone familiar with those laws or regulations (Tr. 37-38). When design professionals prepare applications, the professional standard of care requires that they thoroughly review their applications for accuracy, including all design documents and necessary forms (Tr. 40).

Professionally certified applications may be reviewed by the Department as part of its mandate to audit 20 percent of such applications or if it receives a complaint about a specific application. The applications are reviewed under the version of the Code that the design professionals selected in their applications and it is important that design professionals select the correct version of the Code in their applications (Tr. 31). If the auditor finds noncompliance with applicable laws, the auditor issues objections and notifies the applicants in a letter of intent to revoke the permit. After the auditor issues a letter of intent to revoke, the applicant may seek to resolve the objections by meeting with the auditor and amending the plans to show compliance or by persuading the auditor that the objections are incorrect (Tr. 32-33, 64-65).

The applicant may also appeal the objections. The appeals process entails seeking a determination from the borough commissioner's office by submitting the appropriate form. For code-related questions, the applicant would use a Construction Code Determination form ("CCD1"). A Zoning Resolution Determination form ("ZRD") is used for zoning issues (Tr. 34-

35, 64-65). The borough commissioner issues a determination accepting, approving with conditions, or denying the appeal. The applicant can appeal the borough commissioner's decision to the Department's Technical Affairs Unit, and can appeal an unfavorable determination from that unit to the Department's first deputy commissioner (Tr. 33).

If the objections are not resolved, the Department revokes the permits and approvals associated with the application (Tr. 32). However, even after revocation of the permits and approvals, the applicant may still resolve the audit and show compliance, at which point the revocation would be reversed with issuance of a letter of rescission (Tr. 65).

Design professionals who have questions about their design or the Department's interpretation of matters related to their applications can seek guidance before they file their initial applications by applying to the borough commissioner's office for a pre-determination (Tr. 34). Design professionals may also appeal the decision on the pre-determination in the same manner as they would appeal a regular determination issued by the borough commissioner's office (Tr. 34).

A plan work application ("PW1"), a form prepared by the applicant, identifies the building, application type, work types being applied for, and the scope of work (Tr. 40). According to Adler, reasonably competent design professionals start preparing a PW1 by gathering information about the building, such as the construction and occupancy classification, using resources available through the Department and, if the building is a multiple dwelling, through the Department of Housing Preservation and Development ("HPD") (Tr. 41).

A PW1 is used to file various types of applications, including a new building application; an Alteration Type 1 ("Alt-1") application, which would generate a Certificate of Occupancy ("C of O") for an existing building; and an Alteration Type 2 ("Alt-2") application, which is for work that does not affect the C of O of an existing building (Tr. 42).

Adler testified that a new C of O is required anytime the work changes the use, occupancy, or construction classification of a building (Tr. 42). As part of their due diligence, reasonable and competent design professionals research the legal occupancy of a building before filing an application (Tr. 42). The legal occupancy of a building is listed on its C of O. If, however, the building does not have a C of O and is a multiple dwelling, that information is usually available through I-Cards which are maintained by HPD (Tr. 43).

If there is a change in occupancy of the building, Adler explained, the applicant must file an Alt-1 application, which would generate a new C of O. He stated that "it would not be proper" to file an Alt-2 application when the plans show a change in occupancy and that the applicant is responsible for determining whether the application contains such a change (Tr. 43). Adler opined that reasonable and competent design professionals must know the proper type of application to file when there is a change in occupancy of a building (Tr. 43-44).

In terms of egress, the applicant must conduct research to determine the proper version of the Building Code under which to file the application and the egress provisions that are applicable to that code (Tr. 44). The applicant would conduct a site visit to determine if the existing conditions comply with the egress requirements of the version of the building code he or she selected (Tr. 44).

According to Adler, a reasonable and competent design professional must personally review the application for accuracy and completeness before signing and affixing his seal and is responsible for errors in the filed document (Tr. 45).

Based on the evidence presented, petitioner established that for six of the seven applications at issue, respondent's professionally certified filings demonstrated negligence, incompetence, or lack of knowledge of applicable laws and regulations. The specific allegations are as follows.

Specification 1: 387 Suydam Street, Brooklyn

Petitioner alleges that respondent was negligent, incompetent, or lacked knowledge of the applicable laws in that he filed an application for work at 387 Suydam Street, Brooklyn, that violated applicable laws. Specifically, petitioner alleges that: (1) the submitted plans show structural alterations by the construction of new interior stairs in violation of section 52-22 of the Zoning Resolution because the building is non-conforming and structural alterations are not permitted; (2) the plans show renovations including an increase in the number of habitable rooms in violation of section 52-21 of the Zoning Resolution, because they are not incidental alterations or repairs and are thus not permitted in a non-conforming use building; (3) the application violates MDL section 56(5) in that the building is a frame dwelling and the submitted plans show an increase in the number of rooms; and (4) the application violates sections 27-733 and 27-749

of the Building Code in that lot line windows may not be used to satisfy mandatory light or ventilation requirements (ALJ Ex. 4).

In December 2015, respondent filed a PW1 for an Alt-2 application for interior renovation work using the Department's professional certification procedure (Pet. Ex. 2; Tr. 112). The application described the interior renovation work as removal of interior non-load bearing partitions; installation of new interior partitions; removal of existing and installation of new kitchens, bathrooms, and plumbing. The application stated there would be no change to use, egress, or occupancy (Pet. Ex. 2). Respondent requested that the plans be reviewed under the 1968 Building Code (Pet. Ex. 2). In addition, he filed a professional certification form that stated he "exercised a professional standard of care in certifying" that the application was "complete and in accordance with applicable laws" (Pet. Ex. 3).

Jose Gomez, who works as an enforcement specialist in the Department's SET unit, was assigned to audit the Suydam Street application (Tr. 61). He has been a Department employee for 30 years and holds a professional engineer license (Tr. 110-11, 134). Gomez reviewed respondent's filings, disapproved the application, and issued objections to the application on July 27, 2016 (Pet. Ex. 4). After Gomez issued his objections, the Department issued a notice of intent to revoke the approval and permit for the application on August 1, 2016. The approvals and permit were revoked by letter dated December 9, 2016, and petitioner ordered that work cease at the site (Tr. 114; Pet. Exs. 4, 5).

Gomez testified that the building that is the subject of the application is a residential building located in a manufacturing district (Tr. 125; Pet. Ex. 2). Residential buildings are not permitted as of right in a manufacturing district, but are permitted as a non-conforming use where the buildings were constructed and existed as residential buildings when the district's zoning changed to manufacturing (Tr. 125). The building at Suydam Street is a non-conforming use and, as such, it is subject to additional zoning requirements that are set forth in Article Five of the Zoning Resolution (Tr. 125-26).

Interior stairs

Chapter 2 of Article Five of the Zoning Resolution prohibits structural alterations in non-conforming use buildings, with some exceptions, but permits repairs to structural and non-structural parts, as well as incidental alterations. NYC Zoning Resolution ("ZR") §§ 52-21, 52-22. Petitioner alleges that the submitted plans show prohibited structural alterations to a non-

conforming use building by the construction of new interior stairs. Respondent, however, contends that the work reflects repairs to the stairs or permitted incidental alterations.

Gomez defined structural alterations are those that affect load-bearing columns, beams, and joists (Tr. 126-27). He testified that the plans indicate structural alterations to the building as they called for demolition of interior stairs and construction of completely new stairs (Tr. 129; Pet. Ex. 6).

The existing stairs consisted of a single run stair between each floor in the building, with a public hall, while the proposed stairs show double-run stairs with a landing between floors. According to Gomez, the alteration is structural work because it affects the floor joists and stairs and completely changes the stairs to a new one (Tr. 129-30; Pet. Ex. 6). Gomez concluded that this constitutes structural work and is not permitted in non-conforming use buildings under the Zoning Resolution (Tr. 129-30).

Respondent maintained that the plans reflect repair of the existing stairs, not a prohibited structural alteration. However, much of his testimony regarding Suydam Street focused on a pre-determination respondent filed regarding a different aspect of the project. According to respondent, before filing the application he submitted a pre-determination request, seeking the Department's interpretation regarding the owner's desire to replace a rear fire escape (Tr. 667-68). After his pre-determination was denied, respondent met with the Borough Commissioner, who told respondent that based on his proposal to add a wall to his plans, respondent should file the job with the new wall. Respondent subsequently filed the application using the professional certification procedure because he was already behind schedule on the job (Tr. 668). Respondent noted that the objections to his filing included items that had been referenced in the denial of the pre-determination, including the alleged change in egress and structural alteration (Tr. 669).

Ronald Livian, a licensed professional engineer, testified on respondent's behalf. Livian worked at the Department for over 17 years in various capacities, including as chief plan examiner, deputy borough commissioner, and deputy commissioner for technical affairs (Tr. 581, 584). Livian was qualified as an expert as to the Building Code, zoning matters, and Multiple Dwelling Law, as well as an expert regarding the Department's policies and procedures and plan examinations (Tr. 587).[2]

[2] However, I advised counsel that the appropriate weight to be given to Livian's testimony with regard to the Department's policies and procedures regarding review, auditing and plan examination would be guided by the scope of his testimony as to subject matters that arose after he ceased working for the Department (Tr. 587).

Although Livian testified that changing the stairs to add a landing would involve structural work "because it changes the openings in the floor," he unconvincingly characterized this change as an incidental alteration that is permitted under section 52-22 (Tr. 590-91). Livian explained that language in section 12-10, the "definitions" section of the Zoning Resolution, allows for code compliance improvements in exits and livability of the building (Tr. 591). He opined that the objection regarding the interior stairs should not have been issued because it could have been resolved under the provision that allows for incidental alterations (Tr. 592).

Similarly, Ronald Ogur, another expert witness who testified on respondent's behalf, maintained that the Zoning Resolution permits incidental structural alterations in non-conforming use buildings to improve livability of the space (Tr. 849-50, 852). Ogur, who is licensed by New York State as an engineer, was qualified as an expert witness regarding the Zoning Resolution, Building Code, Housing Maintenance Code ("HMC"), and MDL as well as with general procedures for filing applications with the Department (Tr. 845-48). As will be discussed specifically below, Ogur provided little support for his opinions, incorrectly summarized applicable codes and laws, and at times seemed unfamiliar with the particular aspects of the applications about which he testified. Furthermore, Ogur's financial relationship with respondent, which accounts for about 10 percent of Ogur's work, raises questions about the reliability of Ogur's testimony (Tr. 887-88). Accordingly, his testimony was generally afforded little weight.

Respondent's argument that the work on the stairs is permitted as an incidental alteration is unpersuasive. The definition of "incidental alterations" in the Zoning Resolution expressly distinguishes between changes or replacements to structural and non-structural parts of the building. The definition provides that permitted changes or replacement to structural parts are "limited to the following examples or others of similar character or extent." The examples that follow are: a) making windows or doors in exterior walls, b) replacement of building facades, and c) strengthening load-bearing capacity in not more than 10 percent of the total floor area to accommodate specialized machinery or equipment. ZR § 12-10. In contrast, changes to non-structural parts of the building include, "without limitation to the following examples," alterations of interior partitions to improve livability, minor additions on the exterior of a residential building, alteration of interior non-load-bearing partitions, and replacement of, or minor changes in, the capacity of utility pipes, ducts, or conduits. ZR § 12-10.

Respondent's argument that alteration of the stairs is a permitted incidental alteration, is not convincing for two reasons. First, respondent relies on the portion of the definition in the Zoning Resolution that pertains to non-structural alterations, which is puzzling because respondent's own experts testified that work on the stairs involve a structural alteration (Livian: Tr. 590, 592; Ogur: Tr. 849-50). Second, the subsection upon which respondent relies expressly states that it applies to "alteration of *interior partitions* to improve livability" and respondent offered no authority for extending its reach to also encompass stairs. ZR § 12-10(a)(1) (definition of "Alterations, incidental or to alter incidentally") (emphasis added).

Respondent's alternate argument, that the work was a permissible repair undertaken to comply with the requirements of the HMC, is similarly unconvincing. Respondent insisted that the work on the interior stair was a repair, not a structural change. He testified that the HMC is applicable to the building and mandates that older buildings be repaired. According to respondent, "the law should not be construed as to suggest that you can't repair a stair in a defective building" (Tr. 679-80). He also argued that to the extent the work is structural, the Zoning Resolution's non-conforming use regulations permit structural work if undertaken to comply with the HMC by doing necessary repairs. According to respondent, "it's without question, that you are allowed to repair and replace a stair that's damaged over years" (Tr. 680-81).

The issue is not whether respondent is permitted to repair and replace the stairs, but whether his application to do so satisfied applicable laws and regulations, which it did not. There are exceptions to the prohibition on structural alterations to non-conforming use buildings in the Zoning Resolution. Respondent's argument is, in essence, that the changes to the stairs fall within one that permits structural alterations that are made "in order to comply with requirements of law." ZR § 52-22. However, respondent offered no evidence that work to the stairs was limited to repairs, much less that it was undertaken to bring the stairs into compliance with the HMC or other laws. Indeed, respondent did not identify with any specificity the legal requirements that necessitated the work on the stairs. Moreover, Gomez credibly testified that none of the exceptions, including the one based on compliance with legal requirements, applied to the work on the stairs (Tr. 130). Gomez explained that the existing interior stairs were in compliance with the Building Code; thus the work did not fall within that exception as the alterations were not made to comply with the law (Tr. 130-31).

Respondent's contention that he merely repaired the stairs and that he did so to comply with the HMC is not believable: Gomez credibly testified that the stairs were not merely repaired, but were removed and redesigned (Tr. 237-78). The evidence establishes that the plans called for the existing stairs to be replaced by stairs that are of a different configuration.

In sum, respondent's professionally certified application show structural alterations in a non-conforming use building by construction of new interior stairs in violation of section 52-22 of the Zoning Resolution.

Increase in the number of rooms

Petitioner alleges that the professionally certified plans show renovations that increase the number of habitable rooms in violation of section 52-21 of the Zoning Resolution. Petitioner contends that the increase in the number of rooms is not an incidental alteration, as defined in section 52-21 of the Zoning Resolution, and is therefore not permitted. Petitioner further alleges that because the building is a frame multiple dwelling, an increase in the number of rooms violates MDL section 56(5), which prohibits alteration or conversion of a frame multiple dwelling so as to increase the number of rooms.

Gomez testified that in the course of his audit, he determined that the plans depicted an increase in the number of rooms from four on the existing first floor, to five on the proposed first floor. Gomez explained that the plans depicting the existing first floor show three rooms on the left side of the drawing and a kitchen on the right side. In contrast, the proposed first floor plans, depict three bedrooms, a kitchen, and a living/dining room, for a total of five rooms (Tr. 142-44; Pet. Ex. 6). The kitchen was considered a separate room because its dimensions exceeded 79 square feet (Tr. 212). On cross-examination, Gomez testified that the proposed second floor plans show a similar increase in the number of rooms because the existing floor plan depicts four rooms and a space that does not meet the minimum dimensions of 70 square feet for a habitable room specified in the MDL (Tr. 214-21; Pet. Ex. 6).

The MDL applies here, Gomez testified, because the building is a three-family frame multiple dwelling structure. A "frame" building is one that it is constructed from combustible material, such as wood (Tr. 139, 141-42). Although frame buildings are not permitted as dwellings for more than two families, the building here was grandfathered in and permitted to serve as a three-family dwelling because it predated the original enactment of the MDL (Tr. 140-41). The MDL prohibits increase in the number of rooms in such buildings (Tr. 141).

Respondent maintained that the proposed plans did not reflect an increase in the number of rooms because the kitchen on the first floor does not count as a room. However, respondent's evidence is not compelling.

Livian testified that it was a "gray area" as to whether the proposed plans reflected an increase in the number of rooms and that Gomez should have questioned the plans instead of issuing an objection (Tr. 593). He testified that the existing first floor plans indicate four rooms, including a kitchen, and that there is an additional room about which there was a question as to whether it was a habitable room or a closet or storage, because it is less than the minimum size (Tr. 594). Livian acknowledged that the proposed first floor plans showed three bedrooms, a kitchen and living room (Tr. 594). However, he stated that because the kitchen, which is more than 80 square feet, opens into the living room and there is no separation between the two spaces such as a drop arch or door, the kitchen and living room could be considered a "super kitchen." He maintained that as such, the kitchen/living room space could be interpreted as either one or two rooms (Tr. 594). Although Livian testified that the Department had issued a memorandum about super kitchens, he acknowledged that it did not define super kitchen (Tr. 594, 813).

Respondent offered no evidence to support Livian's contention that the space could be a "super kitchen," nor was the memorandum about which Livian testified offered into evidence. From his testimony, it seemed that even respondent was not convinced that Livian's super kitchen contention had merit. Notably, when asked whether he agreed with Livian's assertion that the space could be considered a super kitchen, respondent glibly responded "Yeah. Why not?" (Tr. 784-85).

With regard to the second and third floors, Livian testified that there was no increase in the number of rooms. According to Livian, as depicted on the existing plans, a space with two windows directly in front of the stairs counted as a room. Therefore, he testified, the existing second and third floor plans show five rooms, as do the proposed plans, which reflect that a proposed bedroom would be created by adding the space from that small room to other space on those floors (Tr. 594-95; Pet. Ex. 6).

In contrast to Gomez's testimony, Livian initially testified that the MDL does not contain a minimum room size applicable to the building because it was built before 1929 (Tr. 595-98). However, he appeared to retreat from this assertion in the face of MDL section 214(1), which requires that each apartment in tenements erected after 1901 have at least one living room of at

least 120 square feet and that every other room except a kitchen be at least seventy square feet (Tr. 814-15). Livian, however, insisted that MDL provisions specifying the minimum size of rooms is contained in MDL sections 30 and 31 (Tr. 815).

Respondent's other witness, Ogur, made a somewhat different argument: he maintained that while the MDL does not allow an increase in the number of rooms in a frame multiple dwelling, such an increase is allowed under laws applicable to tenement housing (Tr. 850). This law applies, Ogur testified, because the building was built before 1929 (Tr. 851). He maintained that tenement housing laws permits increase in the number of rooms in a covered building without limitation so long as certain fire protection measures are taken (Tr. 850). However, he pointed to no specific authority to support his contention and neither did respondent in its written summation. Further, there is no evidence as to what fire protection measures are required and whether they were taken.

In short, petitioner proved that respondent's plan for the first floor included an increase in the number of rooms, which is prohibited in the premises.

With respect to the second and third floors, however, petitioner failed to adduce evidence to support its argument that the plans reflected an increase in the number of rooms because a small space depicted in the existing floor plans is not a legal room. Although Gomez was credible in his testimony that he determined that the space did not satisfy the MDL requirements for a room in terms of its dimensions, petitioner offered no definitive evidence as to the actual dimensions of the disputed space. Gomez testified that he reached his conclusion that the space was not a habitable room based upon the "the scale that was provided and on the dimensions that [he] came out to from this drawing that was provided" (Tr. 219-20). The evidence in this record regarding the basis for Gomez's conclusion is deficient.

Lot-line windows

Because respondent had requested that the plans be reviewed under the 1968 Building Code, Gomez reviewed the plans under that code (Tr. 144-45; Pet. Ex. 2). The proposed plans show two living/dining room windows that are located at the lot line, which coincides with the exterior wall of the building (Pet. Ex. 6; Tr. 145-46).

Building Code sections 27-733 and 27-749 require that natural light and ventilation be provided by windows or other openings that face or open to the sky, or a public street, space, alley, park, highway, or right of way, or upon a yard, court, plaza, or space above a setback,

when such yard, court, plaza, or space above a setback is located upon the same lot and is of the dimensions required by the applicable provisions of the zoning resolution. Gomez testified because the exterior wall is located on the lot line, the windows cannot satisfy these requirements (Tr. 144-46).

Respondent offered no testimony to refute Gomez's testimony. Instead, Livian testified that he did not see a "major violation," meaning that the proposed plans did not create new lot line windows to be used for new light and air provision, and thus were not increasing the degree of non-compliance (Tr. 600-01). In essence, Livian acknowledged that the violation existed, but sought to minimize its significance.

Accordingly, petitioner's unrefuted evidence established that respondent's plans impermissibly proposed using lot line windows to satisfy light and air requirements.

In sum, petitioner established that respondent submitted plans showing impermissible structural alterations to stairs in a non-conforming use building in violation of the Zoning Resolution; renovations that impermissibly increased the number of habitable rooms on the first floor of the building in violation of the Zoning Resolution and MDL; and lot line windows being used to satisfy mandatory light or ventilation requirements in violation of sections 27-733 and 27-749 of the Building Code. These errors establish that respondent failed to exercise appropriate professional judgment in that he submitted an application that reflected multiple violations of applicable law. Respondent argued that the charge regarding this specification reflects "differing opinions" between professionals (Resp. Mem. at 22). This tribunal has found that because of the complexity of zoning and building laws, reasonable professionals may disagree as to their meaning. *See Velasquez*, OATH 1557/10 at 10. Here, however, the proven violations reflect more than a difference of opinion: they demonstrate that respondent lacked competence or knowledge of the applicable law regarding permitted alterations in non-conforming use buildings so that he relied on a patently inapplicable provision regarding the interior stairs and increase in the number of rooms on the first floor. Further, the unrebutted evidence shows that respondent used lot line windows to satisfy light and air requirements. Accordingly, Charge I, Specification 1 should be sustained.

Specification 2: 24-10 36th Avenue/35-53 24th Street Queens

Petitioner alleges that respondent was negligent, incompetent, or lacked knowledge of the applicable laws in that he filed an application for work at 24-10 36th Avenue, an address also known as 35-53 24th Street, that reflected violations of the Administrative and Building Codes (Tr. 149-50; Pet. Ex. 9).

The building is a commercial building located in a residential district and, although commercial uses are not permitted as of right in residential districts, the C of O for the building indicates that the Board of Standards and Appeals ("BSA") granted a variance permitting the commercial use (Tr. 150-51; Pet. Ex. 10). The C of O indicates that permitted use and occupancy for building are: storage warehouse, distribution and maintenance of stapling, packaging, and fastening machines, as well as truck loading, offices and sales rooms, with loading and parking in the rear of the property (Pet. Ex. 10).

In late 2013,[3] respondent filed a PW1 for an Alt-2 application to do interior renovation work at the premises using the Department's professional certification procedure. The PW1 was filed with a professional certification form bearing respondent's seal (Pet. Exs. 7, 8). The scope of the work indicated in the PW1 application, which was submitted with 15 pages of plans, was "interior renovation including but not limited to: removal of existing partitions and demolition of one stair, erect new partitions, install one passenger elevator, build new stair, provide new finishes as per architectural drawings" (Pet. Exs. 7, 12). The application was approved on December 23, 2013 (Pet. Ex. 13). Respondent filed post-approval amendments to the application ("PAAs"), on February 7, 2015, April 9, 2016, and December 13, 2016 (Pet. Ex. 13). In addition, respondent filed amended plans (Pet. Ex. 14). Gomez audited the application, which he disapproved on December 30, 2016 (Pet. Ex. 11). Petitioner issued an intent to revoke approvals and permit letter dated January 9, 2017 (Pet. Ex. 11).

Petitioner alleges that the approved professionally certified application and plans show violations of the applicable laws. Petitioner specifically alleges that: 1) the application violates section 28-118.3 of the Administrative Code in that the submitted plans show a change in use and occupancy of the premises that requires an approved Alt-1 application to obtain a new C of O, instead of an Alt-2 application; 2) the application violates section 28-101.4.3 of the

[3] The third amended petition alleges that the Alt-2 application was filed on or about December 19, 2013; however, the professional certification form that accompanies the PW-1 is dated September 20, 2013 (ALJ Ex. 4; Pet. Ex. 8).

Administrative Code in that the proposed change in occupancy requires that the entire building be accessible for people with physical disabilities, but an entrance from the street to the meeting hall is not accessible; 3) the application violates section 27-280 of the Building Code in that columns in the cellar and first floor do not have proper fire protection (ALJ Ex. 4).

Change in use and occupancy

According to Gomez, his review of this application revealed that the amended plans showed a change in use and occupancy of the building from a storage warehouse to a school with training, video, and computer rooms (Tr. 163, 332). Specifically, the C of O, dated January 2, 1958, indicates that the first floor of the premises is to be used for an office, sales room, and rear parking for cars (Tr. 164; Pet. Ex. 10). In contrast, the amended plans indicated that the first floor would consist of a meeting room, conference room, warming pantry, and offices (Tr. 163-64; Pet. Ex. 14). Similarly, the C of O indicates that the basement is to be used for storage warehouse, distribution and maintenance of stapling and packaging and fastening machines, and truck loading (Pet. Ex. 10). The amended plans, however, show a training room, classrooms, and a computer room (Pet. Ex. 14). Gomez testified that the amended plans reflect a change in use and occupancy of the building because they show uses for the building that are "completely different" from those in the C of O (Tr. 164, 328-29).

In support of its contention that there was a change in use and occupancy, petitioner submitted an Additional Information ("AI1") form that respondent filed with DOB, which is used to provide more information about an application (Pet. Ex. 20; Tr. 370). The AI1, which is undated, bears the Alt-2 application number as well as the address of the premises. The building is described as consisting of trade business with a training room at the basement level and offices and a meeting room on the first floor. The AI1 states that because of the nature of the trade work, installing fiberglass insulation, the owner requests permission to construct showers in the basement locker rooms so that workers can clean themselves after performing the work (Pet. Ex. 20; Tr. 370-73). Submitted with the AI1 is a letter from the owner of the premises, dated March 24, 2015, that indicates the building is to be used as a trade school (Pet. Ex. 20).

Gomez concluded that the amended plans filed with respondent's professionally certified Alt-2 application depict a change in use and occupancy of the building, for which respondent was required to get an approved Alt-1 (Tr. 165; Pet. Exs. 7, 8, 14). Gomez

determined that respondent had filed an Alt-1 application for the same building before he filed the PAAs, but it was not approved (Tr. 165-66).

Respondent testified that he filed Alt-1 and Alt-2 applications for work at this location. He filed the Alt-1 on or about October 11, 2013, intending to change use of the building from a storage warehouse to a union hall and trade school (Tr. 756-57, 763). Such a change required BSA approval because the new use was a non-conforming use different from the one for which BSA had already given approval (Tr. 757; Pet. Ex. 10). According to respondent, after he filed the Alt-1 application, he "immediately" filed an application at BSA for the new use (Tr. 702). After filing the Alt-1 in October 2013, respondent filed the Alt-2 in December 2013 to perform interior work that consisted of removing and erecting partitions (Tr. 702, 759). When he filed the Alt-2, the Alt-1 had not yet been approved (Tr. 766). On cross-examination, respondent acknowledged that the BSA application was filed in April 2016, two and a half years after he filed the Alt-1 application (Tr. 758).

Respondent acknowledged that the C of O did not mention classrooms, computer rooms, training rooms, meeting halls, or conference room, all of which are depicted on his plans (Tr. 765-766; Pet. Ex. 14). He agreed that the application he filed at BSA for the premises specifically referenced the construction of a trade school and union hall (Tr. 767). Nonetheless, he argued that there can be no change in use and occupancy and no violation until and unless the building is actually occupied, which it was not (Pet. Mem. at 15; Tr. 703, 705).

Respondent testified that the plans depict the creation of new rooms by showing walls to delineate spaces (Tr. 761-62; Pet. Ex. 14). However, he disputed that this changed the use of the building. He stated that "[b]y definition of the word use is to use. And this is an Alt-2 application. And we're not using the building under the Alt-2. You don't use the building until you get the [C of O], or the job is signed off" (Tr. 762). Respondent further explained that if he "mislabeled" a room according to its future use, that does not mean the use is a present use under the Alt-2 because the work that is proposed in the description of the scope of work on the Alt-2 is merely to erect partitions, not to change the use of the building (Tr. 762). When asked if the rooms reflected on the plans were consistent with creating a union hall and training school, respondent said "possibly" and explained that "until you get BSA approval you do not know what's going to happen with this building . . . . if the BSA [application] is not approved, obviously, they have to use these rooms for the use that was currently on the CO" (Tr. 763).

Respondent explained that he filed Alt-1 and Alt-2 applications because of the length of time it would take to receive BSA approval. According to respondent, because the building is vacant while the Alt-1 application is pending, filing an Alt-2 application before BSA approval gives "a head start type of things [sic] without changing use, because the building's empty" (Tr. 703). Respondent maintained that filing the Alt-2 before the BSA proceeding is concluded enables work to be performed under the Alt-2 application while awaiting decision on the Alt-1 application to change the use and occupancy of the building. According to respondent, doing so would not change the use because the building remains empty while the Alt-2 work is performed (Tr. 703).

Respondent's expert, Ogur, agreed that filing Alt-1 and Alt-2 applications for work at the same building is an accepted practice that allows for work under the Alt-2 while awaiting approval for the Alt-1 application (Tr. 864-65).

Respondent's other expert, Livian, supported respondent's contention, with qualification. Livian testified that until about 2014, when the Department changed its policy, it was common practice to file both Alt-1 and Alt-2 applications for the same building (Tr. 602, 832). However, when filing both Alt-1 and Alt-2 applications for the same job, the two applications must cross-reference each other (Tr. 603). Further, as a safeguard to avoid discrepancies between the applications, it was the Department's policy not to sign off on one application unless the other application was also signed off and completed (Tr. 603, 833). The Alt-2 application for this job contains the cross reference to the Alt-1 application, as well as the BSA matter number referenced on the C of O (Tr. 604; Pet. Exs. 7, 10).

Livian's testimony was lukewarm in its endorsement of respondent's position that there was no change in the use of the building. When asked if a plan examiner would be correct in assuming that there was a change in use of the building based on the interior work reflected in the Alt-2 application, Livian testified that a plan examiner would be correct to raise the issue (Tr. 835). He added that the applicant must take safety precautions, such as indicating on the Alt-2 application that the building would not be occupied until the Alt-1 application is filed and concluded that if the architect took safeguards to ensure that the building remains vacant, there is no issue regarding a change in use reflected in the Alt-2 application (Tr. 835-36).

The import of Livian's testimony is he acknowledged that respondent's Alt-2 application reflected a change in use of the building. His suggestion that there are safeguards that an

applicant can employ to ensure that the building is not actually used until the Alt-1 application to obtain a new C of O has been approved is no defense. In any event, respondent offered no evidence that all the safeguards Livian outlined were in place.

Moreover, although respondent's evidence was largely devoted to his contention that he was permitted to file the Alt-1 and Alt-2 applications for the same building, that is not the basis of the charge here.

Section 28-118.3.2 of the Administrative Code prohibits changes to a building that are inconsistent with the last issued C of O unless the Department has issued a new or amended C of O. Where a building has been altered so as to change it to a different use or occupancy group, section 28-118.3.1 prohibits use or occupancy of that building unless the Department has issued a C of O certifying that the alteration work has been completed substantially in accordance with the applicable laws and rules. Petitioner established that respondent submitted professionally certified plans showing change in use and occupancy of the premises that are inconsistent with the last issued C of O. Those changes were submitted as an Alt-2 application instead of under an Alt-1 application to obtain a new C of O.

Respondent did not deny that it was his intent to change the use of the premises to one that is not consistent with the C of O. Instead, he insisted that there is no violation because there is no change in use until the building is occupied. This argument is unpersuasive.

Gomez credibly and persuasively testified that a violation occurs when an applicant files a plan and indicates an intended use of premises that is inconsistent with the C of O (Tr. 341-43).

"Use" is defined in the Building Code as "the purpose for which a building, structure, or space is occupied or utilized, unless otherwise indicated by the text. Use (used) shall be construed as if followed by the words "or is intended, arranged, or designed to be used." Admin. Code § 27-232. "Occupancy" is defined as "[t]he purpose or activity for which a building or space is used or is designed or intended to be used." *Id.*. The definitions of "use" and "occupancy" look to the purpose or activity for which a building is intended, designed, or arranged to be used. Here, it is undisputed that the design and intended use of the building as reflected in respondent's plans was as a union hall and trade school.

Respondent's reliance on *Di Milia v. Bennett*, 149 A.D. 2d 592 (2nd Dept 1989) to support his argument is misplaced (Resp. Mem. at 23). In *Di Milia*, the Department denied an application to amend plans that were filed for a one-family house where the design and

arrangements in the amended plans would make the home easily convertible into an illegal, non-conforming two-family home. The court held that DOB improperly denied the permit based on a possible future illegal use. Here, however, the issue is not of a possible future illegal use, but of the intended use set forth in the Alt-2 application that is inconsistent with the C of O. *See 9th & 10th Street, LLC v. Bd. of Standards and Appeals*, 10 N.Y.3d 264, 267 (2008) (Court of Appeals declined to extend *Di Milia* where there is reason to doubt that the proposed use of the premises would be lawful, noting that "municipal authorities are not required to let the property owner build the building and see what happens"). The intended use of the building as trade school and union hall, as delineated in the professionally certified Alt-2 application and related documents that respondent filed with the Department, reflects a use that is inconsistent with the C of O.

Finally, respondent's argument is undermined by his mischaracterization of time between when he filed the Alt-1 application and the BSA application. He initially claimed to have "immediately" filed the BSA application, only to later acknowledge that over two years elapsed between the Alt-1 application and his BSA filing. This undercuts respondent's claim that he filed two separate applications because the BSA approval process is lengthy and he wanted to get a head start on the work while the BSA process was progressing. That two years elapsed before respondent filed the BSA application indicates he was not as concerned about time as he maintained. Further, respondent's testimony suggests an effort to make an end-run around DOB's procedures in order to get a "head start" on work that would change the use and occupancy of the building under an Alt-2 application instead of an approved Alt-1. It also suggests that he was less concerned about BSA's determination because his change in the use of the building would have been effectuated by the time BSA issued its ruling.

Accordingly, petitioner established that respondent filed an Alt-2 application that reflects a change in the use and occupancy of the building as alleged.

Change in occupancy that requires that building be accessible

Under section 28-101.4.3 of the Administrative Code, entitled "Optional Use of the 1968 building code for work on prior code buildings," owners of "prior code buildings" may choose to have work performed under the 1968 Building Code or, where the 1968 Building Code permits

it, under pre-1968 codes.[4] Among enumerated exceptions to that provision, however, is section 28-101.4.3(5), which provides that where there was a change in the main use or dominant occupancy of a building, facilities for people with physical disabilities must be provided in accordance with Chapter 11 of the Building Code, subject to provisions for prior code buildings. Chapter 11 requires that all public entrances to a building, which are entrances other than service entrances, be accessible. 2008 BC §§ 1102.1, 1105.1. Petitioner contends that respondent's plans included an entrance from the street to the building that did not satisfy the applicable accessibility requirements.

Gomez testified that because respondent's amended plans show a change in the use of the building, he reviewed the application to determine whether it satisfied accessibility requirements under the 2008 Code, the code that was in effect at the time the application was filed (Tr. 166). He further testified that the building is a "hereafter erected" building, meaning that it is treated as a new building, and must be accessible to people with physical disabilities (Tr. 166). In addition, because respondent requested the application to be reviewed under the 1968 Building Code, he reviewed it under that code (Tr. 168; Ex. 7). According to Gomez, the 1968 and 2008 codes are "basically the same" in that both require that all public entrances to a building be accessible (Tr. 167). Gomez determined that the plans did not meet the applicable accessibility requirements because of steps at a public entrance on the 36th Avenue side of the building (Tr. 167-68; Pet. Ex. 14).

Ogur agreed that the entrance to the building on 36th Avenue was not accessible, but insisted that it was not required to be accessible (Tr. 866, 878). He testified that only the primary entrance to the premises was required to be accessible under the 1968 Building Code (Tr. 865-66). He identified an entrance from 24th Street that goes to the elevator as the primary entrance and described it as "perfectly acceptable for handicapped accessibility" (Tr. 866).

Respondent provided no support for Ogur's contention that only a building's "primary" entrance must be accessible, nor did respondent otherwise meaningfully dispute this allegation. Moreover, Ogur's contention appears to be based upon a misapprehension of the applicable law. Ogur speculated that the 1968 Building Code required accessibility only at the "primary"

[4] A "prior code building" is defined as a "(i) building or structure in existence prior to July 1, 2008 or one for which a lawful building permit was issued for the erection of such building or structure prior to July 1, 2008. (ii) A building or structure erected in accordance with the 1968 building code under a lawful building permit issued for the erection of such building or structure on or after July 1, 2008 in accordance with section 28-101.4.2 of this code." Ad. Code § 28-101.5.

entrance, but could not identify a particular provision (Tr. 865). Later, he conceded that when the dominant use of a building is changed, as is the case here, public entrances to the building must be accessible (Tr. 878-79). In sum, petitioner established that respondent's plans failed to meet accessibility requirements.

Lack of proper fire protection

Respondent requested that the application be reviewed under the 1968 Building Code. However, according to Gomez, the plans were not in compliance with that Code's requirements for fire protection (Tr. 168; Pet. Ex. 7). In reviewing the application, Gomez determined that the existing columns of the building were not fire protected, as is required under the Code (Tr. 169; Ex. 14). Specifically, the plans indicate that existing steel columns were to remain in the training room in the basement, but those columns were not fire protected. The only fire rated columns depicted in the entire plans were located in the meeting room on the first floor (Pet. Ex. 14; Tr. 169-74).

Respondent presented no evidence to refute Gomez's credible testimony that the professionally certified plans failed to comply with the Code's fire protection requirements. *See Masucci*, OATH 2469/16 at 4 (unrebutted evidence may establish negligence, incompetence, or lack of knowledge of the law and rules).

In sum, petitioner established that respondent submitted plans that violated accessibility and fire safety provisions in the applicable laws. These are not minor violations, but concern life and safety. Respondent's failure to make a door accessible and to include fire protection are significant and obvious errors that demonstrate negligence, incompetence, or unfamiliarity with applicable laws. Similarly, respondent filed an Alt-2 application that reflected a change in use and occupancy of the building, a departure from the standard of care of a reasonable professional. Charge I, Specification 2 should be sustained.

Specification 3: 1299 Putnam Avenue, Brooklyn

On or about January 5, 2016, respondent filed an Alt-1 application using the Department's professional certification procedure for work to erect partitions, convert a six single room occupancy building to a six unit family dwelling, replace and relocate existing plumbing fixtures, and install new plumbing fixtures. Respondent's application was approved on March 25, 2016 (Pet. Ex. 21). However, it failed a Department audit and was revoked.

Petitioner alleges that the professionally certified application violated applicable laws because: 1) a second means of egress was not provided from the apartments on the front portion of the second and third floors, in violation of section 27-365 of the Building Code; and 2) the plans show the stair enclosure is made of combustible material, which is not permitted in construction class II-B buildings and violates section 27-282 of the Building Code.

Lack of second means of egress

Eleanora Korkhov, a registered architect and an Enforcement Audit Specialist in the Department's SET unit, has worked for the Department for over 16 years. She audited the Putnam Avenue application, which she disapproved on August 30, 2016. The approval and work permit associated with the application were revoked on March 8, 2017, and a stop work order was issued (Tr. 380-81, 384; Pet. Exs. 22, 23).

Korkhov testified that although she was unable to locate the PW1 in the Department's files, the application was filed electronically and the information the applicant entered into the Department's electronic system is reflected in the application details form (Tr. 382-84; Pet. Ex. 21). The application details form for the Putnam Avenue project indicate that an Alt-1 application was filed on January 5, 2016, and that respondent was the applicant of record. The application details form indicates that the filing was professionally certified (Pet. Ex. 21; Tr. 384).

Korkhov reviewed the application under the 1968 Building Code because respondent requested review under that code (Tr. 388, 390; Pet. Ex. 21). She testified that because the building is constructed of combustible materials, the 1968 Code requires two means of egress from each floor (Tr. 391). In reviewing respondent's plans, Korkhov determined that the proposed third floor reflected only one qualifying exit (Tr. 391-92; Pet. Ex. 24). She explained that the apartments in the existing building were arranged as "railroad" apartments, meaning that each floor had two apartments that ran from the front to the rear of the building. Each apartment had access to an interior stair and a fire escape located on the rear of the building (Tr. 392; Pet. Ex. 24). However, respondent's proposed floor plan rearranged the apartments so that one apartment was at the front of the building while the other was located at the rear. As reconfigured, one apartment had access to the interior stair and the fire escape on the rear of the building, while the other had access to only the interior stair as a means of egress (Tr. 392; Pet. Ex. 24 at A-400.00, A-500.00). Further, Korkhov testified that the rear fire escape does not

qualify as an exit under the 1968 Code (Tr. 392). The proposed work reflected in respondent's application removed access to the rear fire escape from the front apartment, leaving access only to the interior stair as a means of egress.

After Korkhov disapproved the application, she met with respondent to discuss her objections, including those relating to egress (Tr. 393-94). Respondent submitted amended plans showing that a fire escape had been added to the front of the building. However, that fire escape was also not a proper means of egress under the 1968 Code (Tr. 400; Pet. Ex. 24A). Respondent subsequently agreed to amend his application to comply with the 1938 Code (Tr. 401, 553-54).

Respondent did not dispute this allegation. He testified that two means of egress are required and admitted that the plans he professionally certified and filed with the Department did not show adequate egress on the upper floors because there was no fire escape on the front of the building. He further testified that although he reviewed the plans, he did not notice the missing fire escape (Tr. 791-92). However, although respondent agreed that adequate means of egress is a fire and life safety issue, he sought to minimize the significance of his error, noting "[t]o err is human" (Tr. 795). In addition, in his written summation, respondent noted that he submitted an amended plan to correct the error (Resp. Mem. at 25).

Stair enclosure made of combustible material

Korkhov further testified that respondent indicated in his application that the building is construction classification II-B, indicating that the exterior walls and shafts, including stairway shaft, are required to be made of non-combustible materials, while the floors and roof can be made of combustible materials (Tr. 401). The 1968 Building Code requires that the staircase enclosure for class II-B buildings be made of non-combustible material. In reviewing the plans, Korkhov concluded that the original plans respondent submitted showed that the stair enclosure is made of dry wall assembly with wood studs, which are combustible. She testified that steel studs should have been used (Tr. 401-03; Pet. Ex. 24).

Respondent offered no evidence to refute petitioner's credible evidence. Instead, while respondent conceded that his work on the Putnam Avenue job fell below his standards, he argued that there is no evidence that the errors "were out of the ordinary or reflected a departure from the standard of care" (Resp. Mem. at 25).

Respondent is mistaken. As respondent acknowledged, adequate means of egress is a fundamentally important fire and safety issue (Tr. 792). Yet, he failed to detect the lack of a

second means of egress on plans that he reviewed. He further testified that there were parts of the building that "could never comply with the '68 Code" and that it was "inadvertent" that he checked off review under the 1968 Code, which was a "critical" item on the PW1 (Tr. 712). Similarly of concern is that the stair enclosure in respondent's plan was made of combustible material. Respondent's failure to detect such significant errors falls below the standard of care expected of a reasonable professional. *See Masucci*, OATH 2469/16 at 4; *Velasquez*, OATH 1557/10 at 10-11.

As part of his defense to the charges, respondent described Korkhov's testimony as "contrary to law and reason," and urged that it be disregarded in its entirety "given the obvious bias" against respondent (Resp. Mem. at 2-3, 5). Respondent's contention that Korkhov was biased is without support. She testified in a straightforward, professional manner that demonstrated her knowledge and experience, without any manifestation of animus or bias against respondent.

Respondent argued that petitioner applied an "impossible professional standard of review" to his applications (Resp. Mem. 2-3). He took issue with Korkhov's testimony that professionally certified applications must be 100 percent code-compliant when they are submitted, arguing that she applied a standard of perfection for professionally certified applications (Resp. Mem. at 2, 5-6; Tr. 556-57). Korkhov explained that she has reviewed hundreds of professionally certified applications, and all of them have failed audit because she is assigned to review applications that were flagged for major non-compliance with applicable laws (Tr. 469-71, 559-63). She later clarified her testimony, stating that her 100 percent code-compliance standard applies to her review of applications for compliance with major egress, fire protection, zoning and accessibility laws, not to minor administrative errors (Tr. 567). Applications with minor violations are not assigned to her unit (Tr. 571).

Respondent's contention that petitioner applied an unreasonable standard to his application is unpersuasive. Korkhov testified that she has disapproved all the professionally certified applications she audited because they were not fully compliant with the applicable laws, as is required for such applications. This does not reflect application an impossible professional standard for the audits, as respondent claims. Instead, Korkhov's testimony is consistent with the requirement of the professional certification program that the design professional ensure that the filed application is complete and in accord with applicable laws. Korkhov explained that she

only audits applications where major non-compliances have already been identified as part of a pre-screening process. Because Korkhov is assigned to audit applications that have already been flagged for noncompliance, it is unsurprising that those applicants fail the audit. Moreover, Korkhov does not have the final word, as there are multiple avenues of internal appeals, yet, nothing in the record shows that the revocations issued after her audits have been rescinded. That Korkhov disapproved all of the applications she audited does not establish that Korkhov applied an unreasonable standard of review.

In sum, petitioner established that respondent's professionally certified plans failed to include a second means of egress as required by the 1968 Building Code and included a stair enclosure that was made of combustible materials. This falls below the standard of care for design professionals. *See Ali*, OATH 2751/15 at 13 (certifying applications and plans with obvious and significant errors, including failing to provide required sprinklers and egress, constitutes failure to exercise a professional standard of care). This specification should be sustained.

Specification 4: 668 Amsterdam Avenue, New York[5]

On May 21, 2014, respondent filed a PW1 for an Alt-2 application to do renovation work at the premises using the Department's professional certification procedure (Pet. Exs. 25, 26). The application was for work in a ground floor retail space that was to be a restaurant (Tr. 686-87). The job was described in the PW1 application as "erect interior partitions, and minor plumbing changes" (Pet. Ex. 25). The approved application failed audit on May 15, 2017, and the approval and work permit associated with the application were revoked on November 3, 2017, and a stop work order was issued (Pet. Exs. 28, 29; Tr. 406-12).

Petitioner alleges that respondent was negligent, incompetent, or lacked knowledge of the law in that he filed a professionally certified application for work at 668 Amsterdam Avenue that violated applicable laws. Specifically, petitioner alleges that the application reflects violations of the building code as follows: (1) the plans do not show two exits from the cellar, in violation of section 27-366 of the Building Code; (2) the plans show that exit from cellar storage is through a kitchen, which violates section 27-368 of the Building Code; (3) the exit doors do not swing

[5] The building is also referred to as 676 Amsterdam Avenue and 202-204 West 93rd Street (Tr. 405-06; Pet. Exs. 25, 26, 28, 29).

open in the direction of egress, in violation of section 27-371(g) of the Building Code; and (4) the plans show two exit doors on the first floor that are not a sufficient distance apart under Building Code section 27-365 (ALJ Ex. 4).

Single exit from cellar and egress is through kitchen

Korkhov, who audited the Amsterdam Avenue application, reviewed the application under the 1968 Code as requested by respondent in the PW1. The proposed plans show a cellar that was to be used as part of the restaurant located on the first floor, with the kitchen on the first floor (Tr. 412-15, 493; Pet. Exs. 25, 30).

Korkhov determined that the proposed plans show a single exit from the cellar leading up to the first floor commercial kitchen. This is not an acceptable means of egress, she testified, because the 1968 Code prohibits exits that go through a kitchen (Tr. 412-15; Pet. Ex. 30 at A-005.02). In addition, the 1968 Code requires two means of egress because the building has a footprint over 2,500 square feet and the cellar is commercially occupied (Tr. 414, 487-88). She concluded that there were no qualified exits from the cellar depicted on respondent's professionally certified plans (Tr. 415).

Respondent testified that he initially filed an application for a café, then for a bagel shop, at the building. The bagel shop application was disapproved after an audit (Tr. 687). When respondent's application was audited, both entities had already gone out of business and respondent did not have a client to represent during the audit (Tr. 688). He maintained that he could not withdraw the application because he had already received a permit and one cannot withdraw an application for which a permit has been issued (Tr. 688).

Respondent admitted that his plans do not show two means of egress from the cellar, but he insisted that it was not required (Tr. 733). According to respondent, only one means of egress is required where "there is no occupancy" in the space, as was the case in the cellar. The single required egress, he testified, is included in the plans as the egress from the cellar to the first floor kitchen (Tr. 733; Pet. Ex. 30). Respondent admitted that having an egress through a kitchen is not permitted under the 1968 Code, but insisted that the building is a multiple dwelling/tenement and that under a pre-1968 Code, two means of egress are not required (Tr. 733-34).

Ogur testified that two exits from the cellar were not required, but did not provide a cogent explanation for his conclusion. As to the remaining alleged violations, his testimony shed

little light on the issues raised, other than his belief that the plans should have been reviewed under 1938 Code (Tr. 870-71).

Respondent's arguments are unpersuasive. Respondent contended that as there was no occupancy in the cellar, two means of egress from the cellar were not necessary. However, Korkhov credibly testified that the proposed plans show the cellar being used as accessory storage and a bathroom (Tr. 487-90; Pet. Ex. 30). She testified that under the 1968 Code, because people will be in the storage area, it "has occupancy" and egress must be provided for the estimated occupant load (Tr. 490-91). In support of this contention, petitioner referenced section 27-358 of the Building Code, which provides that a "storage room" shall have occupancy of one person for every 200 square feet (Pet. Mem. at 40). Respondent's argument that the cellar storage space depicted in the proposed plans, which included a bathroom, did not have occupancy is unpersuasive. The cellar storage was designed for use as an accessory to the kitchen, meaning that it was contemplated that people would occupy that space. Accordingly, exit facilities should have been provided for the cellar storage space consistent with the requirements of the Code.

As for the required number of means of egress, the 1968 Code requires "at least two independent exits, remote from each other, from every floor of a building . . ." Admin. Code 27-366. It is undisputed that respondent's plan included only one means of exit from the cellar and that the egress was through the kitchen, which respondent admitted is not allowed under the 1968 Building Code (Tr. 733-34). Respondent's argument that an exit through the kitchen was permitted under the 1938 Code is unavailing because respondent requested that his application be reviewed under the 1968 Code. Respondent's reliance on the 1938 Code after having requested that his application be reviewed under the 1968 Code suggests that respondent was negligent in selecting the 1968 Code, or lacked knowledge as to which Code was appropriate for this application.

Exit door swings in wrong direction and are too close to each other

Petitioner alleges that the plans show two exit doors at the first floor that are not a sufficient distance apart and, therefore, violate 1968 Code.

Korkhov testified that two means of egress from the first floor restaurant were required under the 1968 Code, which provides that egress requirements from the room or space is to be calculated based on the estimated "occupant load" or the proposed occupant load, whichever is

greater (Tr. 497).[6] Here, the estimated occupant load was more than the proposed occupant load, which meant that egress had to be provided for the estimated occupant load (Tr. 497). To determine the estimated occupant load, Korkhov divided the area of the space, excluding the kitchen, boilers, and bar area, by 12 square feet, which is the allowance per person reflected in the 1968 Code. From her calculations, Korkhov determined that the first floor restaurant could accommodate more than 75 people, which meant that two means of egress are required from that floor (Tr. 495, 497-98).

The plans filed with the application show two exterior doors. However, petitioner contends that they do not comply with the 1968 Code's egress requirements which, according to petitioner, requires that the exits be a distance of no less than 30 feet apart (Tr. 415; Pet. Ex. 30). Based on measurements indicated on the plans, Korkhov estimated that the distance between the doors was less than 20 feet. She further noted that as depicted on the plans, one of the exit doors swings inside, contrary to the requirement in the 1968 Code that exit doors swing in the direction of egress (Tr. 415; Pet. Ex. 30).

Respondent disputed Korkhov's contention that two means of egress were required from the first floor restaurant. He agreed that occupancy for the eating and drinking space was 72 people, and the occupancy for the kitchen was 4 people (Tr. 734). Thus, the total number of people to egress from the kitchen and restaurant space was 76. However, respondent maintained that two means of egress were not necessary because the kitchen is a separate space from the dining area and there is adequate egress through the double doors depicted on the plans (Tr. 735-36). He considered the kitchen a separate space from the dining area because they were separated by walls and a drop arch, so he did not add them together (Tr. 734-35). With respect to calculating egress requirements based on the occupant load, respondent testified that he "probably" calculated the square footage relative to the number of people, but maintained that it was not necessary to use the greater number (Tr. 744-45). He explained that his plans included three doors that were adequate egress for over 300 people (Tr. 734-35, 744).

As for the allegation concerning the distance between the two doors depicted on the plans, respondent acknowledged that if two exits are required, they must be at least 30 feet apart

[6] "Occupant load" is "The number of occupants of a space, floor or building for whom exit facilities shall be provided." Admin. Code § 27-232. Occupant load "shall be established either (1) by the actual number of occupants for whom each occupied space, floor, or building . . . is designed, or (2) by using the appropriate occupant-area ratio from table 6-2, whichever is larger. The occupant load of any space shall include the occupant load of all spaces that discharge through it in order to gain access to an exit." Admin. Code § 27-358.

from each other (Tr. 737). He said that to calculate the distance between exits, one must go around obstructions and, doing so, the distance from the double door to the single door would be over 30 feet (Tr. 737-38). Respondent testified that the single door can be used as a means of egress even though it swings into the space, because it is for less than 75 people (Tr. 739). However, he acknowledged that travel distance, which he defined as "the distance from the furthest point of the space to the door," is not reflected on his plans (Tr. 740-41). According to respondent, a reasonable and competent professional would not necessarily indicate distances on the plans and the dimensions he indicated on his plans were "adequate," which he deemed the same as putting "complete" dimensions on the plans (Tr. 740-41).

Similarly, Livian testified that two means of egress are not required because an occupancy of less than 75 people does not require two means of egress (Tr. 649). However, his reasoning for his conclusion was unclear (Tr. 649-50).

Livian testified that the occupant load is determined by dividing the total area of the space by 12 square feet per person or by counting the tables and chairs, whichever is greater (Tr. 649, 652). However, an applicant may request that occupant load be based on the actual occupancy, which request must be reviewed by a borough commissioner. In certain situations, he stated, the borough commissioner may recognize an exemption, such as when there is space that should not be considered occupiable space as part determining the occupant load, and permit use of the lower number as the occupant load (Tr. 650). There is no evidence that respondent sought such an exemption. As for the exit doors, Livian testified that they have the capacity to accommodate 300 people and satisfy the occupant load (Tr. 653-54). He said the only issue is the requirement that if the occupant load is more than 75 people, two separate doors are required (Tr. 654).

Finally, Livian testified that the plans show a handicapped entry door that qualifies as a second door, "except that it's swinging in the wrong direction" (Tr. 654).

Respondent's contention that only one means of egress from the first floor was required because occupancy of the restaurant was less than 75 people is unconvincing. In calculating the occupant load, respondent excluded the four occupants in the kitchen, which he deemed a separate area (Tr. 736). However, it appears from the plans that to exit the kitchen, those occupants would have to pass through the restaurant space, as would the two occupants in the area designated as "registers" (Pet. Ex. 30). Under the 1968 Code, the occupant loads of those

spaces must be included in determining the occupancy load for the entire space. Admin Code § 27-358 ("The occupant load of any space shall include the occupant load of all spaces that discharge through it in order to gain access to an exit"). Therefore, the total actual occupant load for the first floor reflected on the plans exceeded 75, requiring two means of egress.

Petitioner established that an exit door depicted in respondent's plans does not swing open in the direction of egress in violation of section 27-371(g) of the Building Code, which requires that exit doors swing in the direction of exit travel.

However, petitioner failed to establish that the two exit doors on the first floor depicted in respondent's plans are not a sufficient distance apart. Section 27-365 of the 1968 Code requires "at least two door openings, remote from each other and leading to exits, from every room or enclosed space in which the total occupant load exceeds the number of persons listed in [the table]". The parties did not dispute that the applicable number of persons for the space here is 75 or that if two exits are required, they must be at least 30 feet apart. Korkhov testified that based on the plans she estimated the distance between the doors to be about 20 feet (Tr. 415), but did not elaborate as to how she reached that determination. Petitioner bears the burden of proof. Because the plans lack specific measurements for all the dimensions, testimony as to the basis for such a determination would have been useful.

In sum, petitioner demonstrated that respondent's application included plans that failed to include two exits from the cellar and the exit that was included was through the kitchen. Petitioner also established that an exit door depicted on the plan did not swing in the direction of egress travel. Respondent's errors demonstrated negligence, incompetence, or unfamiliarity with the applicable laws. Although two exits were required from the first floor, petitioner failed to prove that the doors depicted on respondent's plans were not at least 30 feet apart. This specification should be sustained to the extent that is consistent with the foregoing.

Specification 5: 583 Bergen Street, Brooklyn

Petitioner alleges that respondent was negligent, incompetent, or lacked knowledge of the applicable laws in that he filed an application for work at 583 Bergen Street that violated the Building Code. Specifically, petitioner alleges that: (1) the professionally certified application violates section 28-118.3 of the Administrative Code in that the submitted plans show work that will increase the amount of floor area by more than 110 percent, which is work that must comply

with the 2014 Building Code and must be filed under an Alt-1 application to obtain a new C of O, not an Alt-2 application; 2) the application violates section 27-375(i)(1) of the Building Code in that the cellar stairs are not enclosed; and 3) the application violates section 27-366 of the Building Code in that the required exits are not provided from each floor.

In October 2015, respondent filed a PW1 for an Alt-2 application for interior renovation work using the Department's professional certification procedure (Tr. 421-22; Pet. Exs. 31, 32). He requested that the application be reviewed under the 1968 Code (Tr. 428-29; Pet. Ex. 31). The job description was "filing alteration type 2 for interior renovation to include removal of interior non-load bearing partitions, installation of new interior partitions, renovation of existing kitchens and bathrooms and plumbing as per plans. No change to the use, egress or occupancy. No incease [sic] to bulk." After respondent's application was approved, Korkhov audited the application and disapproved it on May 24, 2017. The approval and permit were revoked by letter dated November 9, 2017, and petitioner ordered that all work at the location cease (Tr. 419-20; Pet. Exs. 33, 34).

According to Korkhov, the scope of the work described on the PW1 was inconsistent with the plans filed with the application. The plans showed a "complete gut rehabilitation of the building, including demolition and replacement of all floors," structural work that included partial demolition and reconstruction of the stairs. The application, however, only described removal of non-load bearing partitions and renovations of existing kitchens and bathrooms (Tr. 422; Pet. Ex. 31).

Increase in amount of floor area

The plans depict the premises as an existing three-story building with a cellar (Pet. Ex. 35). "C-joists" are steel beams that run the width of the entire floor underneath the flooring (Tr. 526-30). In reviewing the structural floor plans respondent filed with the application, Korkhov determined that they reflected new C-joists throughout the floor plan, which she understood to mean that new floors were to be installed on the first, second, and third floors of the building (Tr. 423, 526). Korkhov based her conclusion on a notation on the structural floor plan which indicated that new C-joists would be placed "12" OC [12-inches on center]," which she interpreted to mean that a new joist would be placed at each 12-inch intervals on the floors on the first, second, and third floors (Tr. 421-24, 526-27; Pet. Ex. 35 at S-001.00). Korkhov concluded that the existing joists had been wooden ones because the building is a tenement erected before

1901 (Tr. 575-76). Replacing the wooden joists with steel joists, she testified, requires that the existing floors be demolished (Tr. 423-24, 527, 575-76). On cross-examination, however, Korkhov testified that it is possible to repair or replace four C-joists without having to repair or replace all of them, but insisted that respondent's plans reflected that all the joists were to be replaced (Tr. 528). When pressed to show where on the plans removal of all the floor joists was indicated, Korkhov testified that the plans are deficient because they do not show all the demolition work contemplated in the plans (Tr. 529).

The 2014 Building Code defines "[f]loor surface area" as "the gross square foot area of all horizontal floor and roof surfaces, including roofs of bulkheads and superstructures, of a building or structure at any level, including cellar, attic and roof." Admin. Code § 28-101.4.5.2. Korkhov testified that "existing floor surface area" is the surface area of floors, roofs, and cellars that remain and is not being demolished during construction (Tr. 426-27). She maintained that in calculating the floor surface area, she did not include the first, second, and third floors in existing floor surface area because the application shows that they were to be demolished and replaced during the construction (Tr. 427). Therefore, only the cellar and roof were included in existing floor surface area (Tr. 427). For "proposed floor surface area," Korkhov included all floor surface area in the three-story building, including the cellar, roof, and the first, second, and third floors (Tr. 427). Korkhov determined the percentage increase in the floor surface area by subtracting the existing floor surface area from the proposed floor surface area, dividing that figure by the existing floor surface area, and converting that number to a percentage (Tr. 427) as reflected below:

$$\frac{\text{Proposed floor surface area (5 floors)} - \text{existing floor surface area (2 floors)}}{\text{Existing floor surface area to remain (2 floors – cellar and roof)}} = \frac{3}{2} = 1.5 = 150\%$$

Korkhov concluded that respondent's plans depict a 150 percent increase in the floor surface area of the building (Tr. 427).

Korkhov testified that section 28-101.4.5 of the 2014 Building Code mandates that if alterations to the building increase the existing floor surface area by more than 110 percent, the entire building must be constructed to comply with the 2014 Building Code as if it was a new building. To do so requires an Alt-1 application, which would generate a new C of O (Tr. 428-

29).[7] However, respondent's PW1 was for an Alt-2 application, even though respondent had the option of selecting Alt-1 "to meet New Building requirements (28-101.4.5)" on the PW1 (Tr. 429; Pet. Ex. 31). Korkhov concluded that the application violated section 28-118 of the Administrative Code, because a new C of O was required (Pet. Ex. 33)

According to respondent, section 28-101.4.5 is unclear as to whether the 110 percent increase in floor surface area applied to replacement floor as opposed to additional floor area (Tr. 694). He insisted that when he prepared the plans, his understanding was that the provision applied when the plans called for additional floor surface area (Tr. 695). Noting that the project was for gut rehabilitation of an existing building in a landmark district, respondent testified that there were cracked floor joists in the building and some of them had to be replaced. Respondent maintained that his plans were not for a complete replacement of the entire floor structure of the building, but to replace some of the joists, because "the landlords, the new owners, they want to save every dime and they only replace what's absolutely necessary to, to replace" (Tr. 696). Respondent inspected the building, identified approximate locations where he felt joists had to be replaced, and indicated those four locations on the plans (Tr. 696-97). Respondent maintained that joists can be replaced without removing the entire floor (Tr. 779).

As for the structural floor plans (Pet. Ex. 35 at S-001.00), respondent testified that they reflect his intent to replace only four joists, not the entire floor (Tr. 777-78). The notation "12" OC [12 inches on center] means that every 12 inches on the center of the beam, and "typ" indicates that the "typical," meaning that the change is typical of changes made on each floor (Tr. 779).

Respondent's explanation was not credible. It is difficult to believe that the proposed removal of four joists was typical, meaning that it applies to all floors, because that suggests that the same number of joists had to be replaced at the same locations on all the floors. Instead, it is more likely than not that respondent's plans were to reflect replacement of all the existing wooden joists with steel C-joists at 12 inch intervals on the first through third floors.

[7] Section 28-101.4.5 provides "Notwithstanding sections 28-101.4.3 and 28-102.4.3 or any other provision of this code that would authorize alterations of prior code buildings in accordance with the 1968 building code or prior codes, where the proposed work at the completion of construction will increase the amount of floor surface area of a prior code building by more than 110 percent, over the amount of existing floor surface area, such entire building shall be made to comply with the provisions of this code as if it were a new building hereafter erected."

Nevertheless, the evidence establishes that there was such confusion about how increase in floor surface area should be calculated, that the Department issued a bulletin dated May 18, 2016, setting forth its interpretation of the rule (Pet. Ex. 36). Korkhov testified that the Department issued Building Bulletin Number 12 of 2016 to clarify how floor surface area is to be calculated with respect to section 28-101.4.5 (Tr. 424; Pet. Ex. 36). However, she maintained that she did not rely on the bulletin, which was issued after the respondent submitted his application, in making her determination (Tr. 514-15; Pet. Ex. 36).

Respondent's application was filed in 2015, well before the Department issued the May 2016 bulletin. Therefore, respondent did not have access to the Department's clarification of how floor surface area should be determined. Asserting that respondent was aware of this interpretation before he filed his application, petitioner pointed out that in February 2015, respondent attended a seminar at which it was clarified that replacement of floors was to be included when calculating increase in floor surface area (Pet. Mem. at 22; Tr. 769-70). Respondent, however, maintained that the conference was not an official Department interpretation (Tr. 772-73). Respondent is correct. Moreover, even though respondent may have attended the conference, petitioner put forward no evidence as to the nature of the conference or to the substance of any information or material that was provided during the conference. It was not until after respondent submitted his application that the Department issued its clarification that set forth the Department's interpretation of the rule. Given this chronology, respondent should not be held responsible for knowing of the Department's clarification of its method for calculating floor surface area when he filed the application.

Petitioner established that respondent's professionally certified plans show removal of all the wooden joists and their replacement with steel joints, and that doing so would require demolition and replacement of the floors. However, the circumstances here indicate that the method for calculating floor surface area was not clear, and the Department did not issue a bulletin that clarifies the standard for making such calculation until after respondent had filed its application. Therefore, it is plausible that respondent did not interpret section 28-101.4.5 to require that he file an Alt-1 application for a new building. Accordingly, petitioner did not prove that respondent acted negligently, incompetently, or lacked knowledge of the applicable laws and regulations.

Required exits from each floor

Korkhov reviewed the application's egress plans under the 1968 Code, the code review requested in the PW1, and under the 2014 Code (Tr. 429). The 1968 Code requires two interior stairs from each floor, but the plans only show one interior stair running from the cellar to the roof of the three-story building on the proposed floor plans (Tr. 430-31; Pet. Ex. 35).

The plans also indicate that an existing fire escape at the rear of the building is to remain in place. However, Korkhov concluded that what had been labeled as a fire escape was, in fact, a fire balcony, which is a balcony connecting two buildings that allows escape from any floor of one building through a window to the balcony of the adjacent building (Tr. 431). A "fire escape" is required to have stairs between the balcony and each floor (Tr. 431). The plans did not indicate stairs between the balconies on each floor, but showed that the balconies extend into the adjacent property. Because fire balconies are not permitted under the 1968 or 2014 Code, Korkhov concluded that the premises lacked the requisite means of egress (Tr. 431-32; Pet. Ex. 35).

Respondent's testimony lacked credibility regarding the allegation that he mislabeled a fire balcony as a fire escape. After defining a fire balcony as a fire escape that connects to another building, he insisted that his plans show a fire escape, but one that provides egress through an adjacent building (Tr. 781). He testified that although there is a technical difference between a fire balcony and a fire escape, fire escape is a generic term (Tr. 781-82). Respondent insisted that he did not change egress or occupancy, and argued that section 27-120 of the 1968 Code permits application of the MDL. When asked whether his plans comply with the 1968 Code, under which he requested that they be reviewed, respondent did not answer the question, but stated that the Code allows him to apply the MDL, and that the MDL "overrules" the Code (Tr. 782).

Consistent with respondent's testimony, Ogur testified that the 1968 Code provides that the owner of the premises has the option to elect to comply with the MDL in lieu of the 1968 Code because the building is a multiple dwelling erected before 1968 (Tr. 857). In addition, Ogur testified that because the PW1 does not have a box to check off if the applicant wants the application reviewed under the MDL, it is appropriate to select the 1968 Code on the form when the applicant wants review under the MDL (Tr. 855-57). Ogur concluded that it was not a violation of the 1968 Code's egress requirements because that code is not applicable. Instead, he

testified, the single interior stair and the "party wall fire escape," presumably the fire balcony, are satisfactory under the MDL (Tr. 857).

Respondent's argument is unpersuasive. To support his argument, respondent referenced section 27-120 of the 1968 Code (Tr. 782). That section provides:

> At the option of the owner, regardless of the cost of the alteration or conversion, an alteration may be made to a multiple dwelling or a building may be converted to a multiple dwelling in accordance with all requirements of this code or in accordance with all applicable laws in existence prior to December sixth, nineteen hundred sixty-eight, provided the general safety and public welfare are not thereby endangered.

Admin. Code § 27-120. Neither party meaningfully addressed the import of this provision in its closing memoranda. On its face the provision seems to permit alteration of a multiple dwelling under the 1968 Code or under pre-1968 laws, so long as doing so would not endanger safety and welfare. Respondent failed to identify any MDL provision under which the fire balcony is permitted under the circumstances here, and thus, offered no basis to determine whether there was any tension between the MDL and the Code.

When considered in its totality, respondent's testimony is self-serving and unconvincing. For example, when asked if the fire balcony is an acceptable means of egress under the 1968 Code, he stated that the MDL "overrules" the 1968 Code (Tr. 782). In contrast, when testifying about the 1968 Code's egress requirements with respect to his Putnam Avenue application, respondent testified that in case of a discrepancy between the Code and the MDL, the stricter standard applies (Tr. 797-98). Similarly, respondent's suggestion that he selected review under the 1968 Code because there was no option for review under the MDL was not credited as there is no evidence that respondent made any efforts to indicate on his application that MDL review was appropriate. Respondent's argument appeared to be one manufactured as a defense to the proceedings.

In sum, petitioner established that respondent requested that his application be reviewed under the 1968 Code, and the plans failed to include two means of egress from each floor as is required in section 27-366 of that code.

Cellar stairs not enclosed

Finally, petitioner alleges that respondent's application violates section 27-375(i)(1) of the Building Code in that the cellar stairs are not enclosed. That section provides that interior stairs are to be enclosed with construction that complies with specified fire resistance ratings. Admin. Code § 27-375(i)(1). Petitioner, however, offered no evidence on its direct case to support this allegation. On cross-examination, Korkhov testified that the MDL, as well as the 1968 Code, require that the stair be enclosed, but did not elaborate (Tr. 537-38). Indicative of the paucity of evidence regarding this allegation, petitioner failed to discuss this allegation in its closing memorandum. Accordingly, petitioner failed to meet its burden as to this allegation.

Petitioner established that respondent demonstrated negligence or incompetence in that his plans mislabeled a fire balcony as a fire escape and failed to provide for two means of egress from each floor. Because of the critical importance of adequate egress to fire safety, it is reasonable to expect that the average design professional would ensure that his plans were accurate and complied with the applicable laws in that regard. Accordingly, this specification is sustained to the extent that is consistent with the foregoing.

Specification 6: 164 Lefferts Place, Brooklyn

In December 2015, respondent filed a PW1 for an Alt-2 application for interior renovation work using the Department's professional certification procedure (Pet. Exs. 37, 38). The job was described in the PW1 as "interior renovations, erect and remove partitions and plumbing work on an existing two family dwelling. No change to use occupancy or egress." (Pet. Ex. 37). After the application was approved, it failed a Department audit on May 24, 2017, and the permit was revoked on September 18, 2017, and petitioner ordered that work cease at the location (Pet. Exs. 39, 40).

The Department contends that the approved application violated applicable law, specifically: 1) the application violates section 28-104.7.1 of the Administrative Code because the construction documents contain numerous errors and omissions and are not sufficiently clear to indicate the entire nature and extent of the scope of work; 2) the application violates section 28-118.3.3 of the Administrative Code in that it indicated relocation and reconfiguration of the interior stairs changed the egress, which requires an Alt-1 application to obtain a new C of O; 3) the doors from the apartments open directly into the stair enclosure in violation of Building Code

section 27-375(j); 4) the application violates Building Code section 27-375(k) because the stairs do not extend to the roof; 5) the application violates Building Code section 27-366 in that the plans do not show two exits from all floors, including the cellar; 6) the application violates Building Code section 27-368 in that the fire escape is not a permitted means of access or egress under the 1968 Code; 7) the application violates Building Code section 27-364 in that the vertical exit[8] in the rear yard does not extend to an open exterior space and a portion of the vertical exits above grade are not separated from the portion below grade by required fire rating construction and doors; 8) the application violates section 27-280 of the Building Code in that the columns and girders in the cellar are not of one-hour fire rated construction; and 9) violates the section 23-44 of the Zoning Resolution in that laundry machines are not permitted obstructions in the rear yard (ALJ Ex. 4).

The petition alleges that the application documents reflect numerous errors and omissions. Specifically, that the scope of work on the PW1 indicates an existing two-family dwelling, but the professionally certified plans show a four-family dwelling; the plans indicate that the application is for a one-to-three family dwelling, while the plans show a four-family dwelling; the existing conditions and proposed work are not clearly identified; building sections and elevations that do not match floor plans; fuel, gas, air conditioning and ventilation plans are not complete; energy analysis does not match scope of work filed in the application; the list of drawings does not match the number and designation of drawings; and a list of required control inspections is not provided (ALJ Ex. 4).

Korkhov, who audited the application, detailed the errors and omissions she identified in the course of her audit. She testified the job is described in the PW1 as a two-family dwelling, but the plans show a four-family dwelling (Tr. 445; Pet. Ex. 37, 41). The job description on the PW1, which indicates only interior work, is inconsistent with the plans, which show a number of exterior renovations. The plans show a new exterior wall and balconies at the rear of the building, new skylights or bulkheads on the roof of the building, and alteration to the fire escapes, and the placement of four laundry machines in the rear yard, which is exterior renovation not reflected on the PW1 (Tr. 445-50; Pet. Exs. 37, 41).

[8] Section 27-232 of the Code defines a "vertical exit" as "a stair, ramp, or escalator serving as an exit from one or more floors above or below the street floor."

In addition, Korkhov testified that the plans were not labeled properly, making it hard for her to audit the application because she had to determine which drawings were part of the project. She noted that although the job description on the PWI indicated that the building is a two-family dwelling, the submitted plans show an existing building with ten rooming units. She further testified that the "list of drawings" reflected on the plans identifies seven drawings, although nine are included with the application. In addition, several drawings identified in the list were not included in the set of drawings filed with the application. According to Korkhov, the list of drawings is "very important" because if defines the scope of the project and an applicant is expected to accurately list the drawings that are included with their application (Tr. 450-52; Pet. Ex. 41).

Additional errors noted by Korkhov include that the location and sizes of the fire escapes depicted on the building elevations did not match those on the floor plans. For example, the drawing of the front elevation shows that the width of the fire escape on the second floor is almost equal to that of the entire building and encompasses three windows, while the floor plan shows the escape as only encompassing two windows (Tr. 452-56; Pet. Ex. 41). While no fire escapes are depicted on the front of the building as existing conditions, they are shown on the plans as proposed conditions. Addition of fire escapes is considered a "major change in egress" and would have to be filed under an Alt-1 (Tr. 452-53; Pet. Ex. 41). In addition, Korkhov testified that the drawings of the existing front elevation and proposed rear elevation show fire escape stairs at a 45-degree angle, while the details of the fire escape shown on a different drawing depict the fire escape stairs at a 60-degree angle (Tr. 457; Pet. Ex. 41).

Korkhov identified other errors. She testified that a drawing (Pet. Ex. 41 at A-006.01) shows construction of a new rear wall starting from the first floor, while the floor plans on other drawings (Pet. Ex. 41 at A-004.03 and A-004.04) do not indicate that portions of the rear wall are new. Korkhov explained that these items should be consistent in depicting the scope of the alteration because different laws may apply depending on scope of the work (Tr. 458-59). There is a discrepancy as to the type of heating system in the building because the drawings show a boiler room in the cellar with four new boilers and a furnace (Pet. Ex. 41 at A-003.04), but a gas riser diagram shows four hot water heaters, not boilers, and a furnace in the cellar (Tr. 459-60; Pet. Ex. 41). In addition, the gas riser diagram depicts a furnace and gas risers on each floor, but the floor plans do not (Tr. 459-60).

With respect to the other alleged violations in the application documents, Korkhov testified that the plans show a new interior stair, which changed egress so that it did not comply with the 1968 Code, which requires two means of egress from each floor (Tr. 460). In addition, according to Korkhov the plans do not show fire-rated separation between the portion of the stairs between the cellar and the portion leading to the two floors, as required by the Code (Tr. 461; Pet. Ex. 41).

The plans show doors from the apartments opening directly to the stair without an intervening public hall (Tr. 461; Pet. Ex. 41). According to Korkhov, this is not permitted under the 1968 Code, which requires that apartment doors open to a public hallway. Further, the doors from the stair enclosure swing into the apartment, contrary to the 1968 Code, which requires that the doors swing in the direction of egress (Tr. 461-63).

Korkhov also testified that respondent's drawings depict obstructions in the rear yard that are prohibited under section 23-44 of the Zoning Resolution. She testified that the drawings show four unenclosed laundry machines in the rear yard, one or more of which is located within 30 feet of the rear lot line and therefore would not be permitted in that yard under that provision (Tr. 463-64; Pet Ex. 41).

Respondent admitted that there were errors on this application and offered no meaningful challenge to petitioner's evidence. In fact, he testified that the "application is not typical of my office quality of job" and admitted that he is not particularly proud of the application (Tr. 730).

Describing the discrepancy between the PW1 and the plans regarding whether the building was a two or four family as "an inadvertent error," respondent seemed to attribute the mistake to his staff (Tr. 706). Respondent explained that his staff consists of about 45 people, 12 to 15 of whom are project managers. The project managers typically review the project with respondent and prepare the applications. Respondent acknowledged that someone else in his firm drafted the plans and surmised that he did not carefully review the application to detect the mistake and that the application may have been filed without a "final check" (Tr. 706, 726). As for the laundry machines depicted in the rear yard, respondent offered no evidence in support of his contention, first asserted in his written summation, that the plans mislabeled air conditioning condensers as laundry machines. Respondent described Korkhov's testimony as "extraordinary for the lack of common sense," as if to suggest that she should have figured out his mistake (Resp. Mem. at 28).

Respondent admitted that "there wasn't [sic] the perfect set of drawings" and "I do think that it's, it was somewhat inadequate" (Tr. 727). Yet, in the next breath, he sought to minimize the seriousness of the errors about which Korkhov testified. He asserted that there were "no life safety issues" and that "[t]he building wasn't going to fall down" (Tr. 727). However, respondent ultimately acknowledged that the plans he professionally certified contained errors regarding a fire escape, which raise life and safety concerns (Tr. 728).

Petitioner failed to present testimonial evidence to elaborate on several of its allegations, such as its claims regarding stairs that do not extend to the roof, the deficient vertical exit in the rear yard, and the inadequate fire-rated construction in the cellar. Nonetheless, its evidence establishes respondent's professionally certified application was replete with serious errors and failed to comply with applicable law. Many of the errors were glaringly obvious and respondent's admission that he may not have been careful in reviewing the application before it was filed establishes his negligence.

Therefore, Charge I, Specification 6 should be sustained, except that petitioner failed to prove its allegations that the stairs that do not extend to the roof, the vertical exit in the rear yard are deficient, and fire-rated construction in the cellar did not comply with the Building Code.

Specification 7: 34-10 12th Street, Queens

Petitioner alleges that respondent was negligent, incompetent, or lacked knowledge of the applicable laws in that the application for work at 34-10 12th Street violated applicable laws. Specifically, petitioner alleges that: 1) the application violates section 52-21 of the Zoning Resolution in that the proposed parapet wall is not an incidental alteration and is not a permitted alteration in a building occupied by a non-conforming use; 2) it violates section 52-41 of the Zoning Resolution in that the parapet wall creates additional floor area, which is an enlargement that is not permitted in a building occupied by a non-conforming use; and 3) the application violates sections 28-118.3 and 28-118.4 of the Administrative Code because the mezzanine shown on the approved plans is not on the C of O and the application should have been filed as an Alt-1 to obtain a new C of O (ALJ Ex. 4).

Respondent filed a PW1 for an Alt-2 application under the Department's professional certification procedure in November 2013 (Pet. Ex. 15). The job was described as "to construct [four-foot] high parapet wall on an existing 1 story legal non-conforming

manufacturing/warehouse (U. G. 16 & 17). Also to install a double door on the front of the building as per plans" (Tr. 177; Pet. Ex. 15). Gomez audited the approved application and issued a disapproval with objections on October 18, 2016. The approval and associated work permits were revoked by letter dated May 5, 2017, and respondent was ordered to stop work at the site (Tr. 178; Pet. Exs. 17, 18).

The 12th Street building, described in a C of O dated February 17, 1964, as a "factory, office, warehouse," is a non-conforming use building because it is for commercial and manufacturing uses but located in a district zoned for residential use. Although commercial and manufacturing uses of the building are not permitted in the residential district, the BSA approved the non-conforming use as a factory/office/warehouse (Tr. 178; Pet. Ex. 16).

New parapet wall is not an incidental alteration and creates additional floor area

Gomez testified that the PWI submitted with respondent's application shows proposed construction of a four feet high parapet wall on the one-story building (Tr. 177; Pet. Ex. 15). Gomez reviewed the application for compliance with the Zoning Resolution and identified violations relating to the parapet wall. He concluded that the parapet is not an incidental alteration because it is not listed in the Zoning Resolution definition of incidental alterations, nor was it a type of alteration permitted on non-conforming use building (Tr. 183).

Besides Ogur's unconvincing and unsupported testimony that the parapet wall was not a structural alteration because it does not support the roof or floor and, if it is removed, the building will remain standing (Tr. 867), respondent offered little evidence to refute the allegation that the parapet wall is not an incidental alteration. Nevertheless, petitioner failed to meet its burden regarding this allegation.

As discussed above, the Zoning Resolution prohibits structural alterations in non-conforming use buildings, with some exceptions, but permits repairs to structural and non-structural parts, as well as incidental alterations. ZR § 52-21, 52-22. Although section 12-10 of the Zoning Resolution provides examples of the "changes or replacements in the *non-structural* parts of the building" that constitute "incidental alterations," the provision expressly states that the examples are not intended to be an exhaustive list. ZR § 12-10 (emphasis added). The examples of incidental alterations to non-structural parts of the building provided in the definition include alteration of interior partitions to improve livability; minor addition on the exterior of a residential building, such as an open porch; alteration of interior non-load-bearing

partitions; replacement or minor changes in pipes, ducts, or conduits. In contrast, although changes or replacement of "*structural* parts of a building" are included in the definition of incidental alterations, those are expressly limited to the examples provided in the definition or others of a similar characteristic. ZR § 12-10 (emphasis added). The examples provided in the definition are: making windows or doors in exterior walls, replacing the building façade, and strengthening load-bearing capacity to accommodate special machinery or equipment.

Petitioner did little to support its contention that the parapet wall is not an incidental alteration and is therefore prohibited on a non-conforming use building. It argued that the parapet wall did not "meet the requirements of the definition" of incidental alteration, but failed to account for the language in the definition that leaves room for changes or replacements of non-structural parts of the building, in addition to those expressly listed in the definition, that would fall within the definition (Pet. Mem. at 52). Thus, petitioner failed to establish that respondent was negligent, incompetent, or lacked knowledge of applicable law because he included the parapet wall as a proposed alteration to a non-conforming use building.

With respect to the allegation that the parapet wall increased the floor area and therefore constituted an impermissible enlargement of a non-conforming use building, petitioner's argument was unconvincing.

According to Gomez, he determined that because the parapet wall on the roof is over three feet, eight inches high, it must be included when calculating the floor area, meaning the sum of the gross area of the building (Tr. 183-84; Pet. Ex. 19). Section 12-10 of the Zoning resolution defines "enlargement" as an addition to the floor area of an existing building or the expansion of an existing use. He concluded that because the parapet wall increases the floor area of a non-conforming use building, it is prohibited under the Zoning Resolution as an enlargement to such a building (Tr. 183-85).

Respondent admitted that the parapet wall was four feet high, but denied that it increased the floor area of the building (Tr. 753). According to respondent, to be considered part of the floor area, the space enclosed by the parapet wall must be "usable space, such as a restaurant [or] patio" (Tr. 753). He described the roof as accessible by crawling through a hatch and occupied by mechanical equipment and stated that the parapet was "voluntary" addition, to prevent a mechanic working on the equipment from falling off the roof (Tr. 701, 753-54). Respondent

maintained that the applicable law provides that if the space is not occupied space, then the wall can be four feet (Tr. 756).

Livian agreed with respondent's contention. He testified that the parapet wall depicted on respondent's plans does not create floor area on the roof in violation of the Zoning Resolution (Tr. 611, 820). Relying on the provision of the Zoning Resolution that excludes from the definition of floor area "floor space in open or roofed bridges, breeze ways or porches, provided that not more than 50 percent of the perimeter . . . is enclosed," Livian testified that installation of the parapet wall on the roof would not be included in the floor area because it is not occupied as deck, porch, or terrace, is not enclosed by parapet wall, and the plans do not show access to the roof (Tr. 610-11, 820).[9]

Petitioner failed to establish that the parapet wall depicted in respondent's application increased the floor area. Petitioner contends that the four foot parapet "met the ZR § 12-10(f) definition of 'floor area' because it exceeded 3-feet, 8-inches in height" (Pet. Mem. at 52).[10] It is true that to be included in the definition of floor area requires that the parapet be greater than 3-feet, 8 inches to constitute an enclosure, but the definition relied upon by petitioner applies to "floor space in open or roofed terraces, bridges, breeze ways, or porches." Petitioner did not establish that the area on the roof qualifies under this part of the definition. In sum, petitioner did not establish that the parapet wall on the roof increased the floor area of the building so as to constitute an enlargement to a non-conforming use building.

Mezzanine on the approved plans not on C of O

As part of his audit of the application, Gomez reviewed the 1964 C of O, which indicates that the building is a one-story structure. However, the proposed plans depict stairs that lead to a mezzanine, which is not shown on the C of O (Tr. 185-86; Pet. Ex. 19 at A-003-00). According to Gomez, the addition of any level, including a mezzanine, must be indicated on a C of O (Tr. 186). He maintained that the application was filed as an Alt-2, but should have been filed as an

[9] Livian testified that in reaching his conclusion he relied on Section 12-10 of the Zoning Resolution, which provide that floor area of a building shall not include "floor space in open or roofed bridges, breeze ways or porches, provided that not more than 50 percent of the perimeter of such bridge, breeze way or porch is enclosed, and provided that a parapet not higher than 3 feet, 8 inches, or a railing not less than 50 percent open and not higher than 4 feet, 6 inches, shall not constitute an enclosure" (Tr. 610-11).

[10] The material difference between the provision of the Zoning Resolution Livian relied upon, section 12-10 – Floor Area (f), and the one cited by petitioner, section 12-10(o)(5), is that they draw a distinction based how much of the perimeter of the area is enclosed. Therefore, excluded from "floor area" is floor space where less than 50 percent of the perimeter of the bridge, breezeway, or porch is enclosed (ZR § 12-10 – Floor Area (o)(5)), while included in "floor area" is space where more than 50 percent of the perimeter is enclosed (ZR § 12-10 – Floor Area (f)).

Alt-1 because the mezzanine is not included on the C of O and it was necessary to get a new C of O that included the new mezzanine level under an Alt-1 application (Tr. 186).

On cross examination, Gomez testified that "mezzanine' is not defined in the Zoning Resolution (Tr. 363). Based on a definition contained in Code, Gomez defined a mezzanine as "a floor that is between one level of a story and the next level above, or the roof" that is accessible (Tr. 364-66).

With respect to the mezzanine, respondent testified that before he started work on the job, he visited the site and saw a storage space above a room (Tr. 701, 745-46). He maintained that the space was "unfortunately designated" as a mezzanine on the drawing, when it was a storage area above a room with a ladder (Tr. 745-46). He insisted that although the space was designated as a mezzanine, his interpretation was that the space was "a storage space, not a mezzanine, because . . . it is less than a ceiling height in that area" (Tr. 752). Although the mezzanine/storage area was not included on the C of O, respondent surmised that it most likely was present at the premises before his involvement in the job and was "previously legal" (Tr. 748).

Similarly, Ogur described the mezzanine as a storage area (Tr. 868). However, he acknowledged that the space could constitute floor area "if it had head room exceeding certain height" (Tr. 869).

According to Livian, mezzanines are to be considered part of the floor area unless they are used for mechanical spaces or if the height is less than five feet under the current Zoning Resolution (Tr. 613). He testified that the plans depict a storage mezzanine and because the height appears to be over five feet, it would be considered part of the floor area (Tr. 614). Because the mezzanine is considered part of the floor area, he asserted, the plans should undergo a zoning analysis, including review of the BSA case that is referenced in the C of O for the premises, to determine whether the mezzanine is an existing condition (Tr. 615). Livian maintained that reliance on the C of O in auditing the application was insufficient because the mezzanine may not have been included in the C of O because before 1968, mezzanines were not always shown on the C of O as there were no requirements for what had to be included in the C of O (Tr. 615-17, 821-22). Similarly, Ogur described the mezzanine as a storage area (Tr. 868). However, he acknowledged that the space could constitute floor area "if it had head room exceeding certain height" (Tr. 869).

Petitioner submitted plans for the premises that were approved in 1975, which do not show a mezzanine (Pet. Ex. 42; Tr. 827-28). However, Livian testified that those plans should not be used to determine whether there was a mezzanine in the building in 1975 because the underlying application related to installation of a spray booth, not to a mezzanine (Tr. 828).

Respondent insisted that the purpose of his application was to create a parapet wall, not the mezzanine. Although he readily acknowledged having observed the structure that he labeled a mezzanine on his plans during a visit to the building, respondent rejected the suggestion that he was responsible addressing the discrepancy between the C of O and what he observed (Tr. 748-49).

Petitioner contends that respondent was required to file the application as an Alt-1 to get a new C of O, not as an Alt-2. This is because, having determined that the mezzanine at the building was not reflected in the C of O, respondent was required to "legalize" the mezzanine so that it was included in the C of O (Tr. 186). Yet, other than a general citation to sections 28-118.3 and 28-118.4 of the Administrative Code in the petition and Gomez's testimony restating his objection, petitioner did not elaborate on its contention that respondent's acts regarding the mezzanine deviated from the standard of care for design professionals. Notably, petitioner's closing memorandum fails to address its allegation regarding the mezzanine other than to summarize testimony.

In sum, petitioner failed meet its burden of proof to establish that respondent's application regarding the 12th Street building demonstrated negligence, incompetence, or lack of knowledge of the law. Accordingly, Charge I, Specification 7 should be dismissed.

Based on the evidence presented, petitioner established that for six applications at issue, respondent's professionally certified filings demonstrated negligence, incompetence, or lack of knowledge of applicable laws and regulations.

Charge II: Knowingly or negligently submitting professional certification of an application and/or construction documents that are not in compliance with all applicable law

Petitioner alleges, based on the same facts asserted in Charge I, that respondent violated section 28-104.2.1.3.2(i) of the Administrative Code by knowingly or negligently submitting professionally certified applications or construction documents for seven applications that are not in compliance with all applicable laws. This charge is premised upon the same facts as those

alleged in Charge I and should be sustained only to the same extent as the charges were sustained in Charge I, without additional penalty. *See Masucci*, OATH 2469/16 at 20-21.

Charges III and IV: Submitting two professionally certified applications for construction document approval within twelve months containing errors that result in revocation of an associated permit or otherwise demonstrate incompetence or lack of knowledge of applicable laws

Petitioner alleges that between November 22, 2013, and May 21, 2014, respondent submitted professionally certified applications for jobs at Amsterdam Avenue, New York (Specification 4) and 12th Street in Queens (Specification 7), which contained errors that resulted in audit failures and revocation of permits or that otherwise demonstrated respondent's lack of competence or knowledge of applicable laws, in violation of section 28-104.2.1.3.2(ii) of the Administrative Code.

Similarly, Petitioner alleges that between August 31, 2015 and January 5, 2016, respondent submitted professionally certified applications for jobs at Suydam Street, Brooklyn (Specification 1), Putnam Avenue, Brooklyn (specification 3); Bergen Street, Brooklyn (Specification 5), Lefferts Place, Brooklyn (specification 6) that contained errors that resulted in resulted in audit failures and revocation of permits or that otherwise demonstrated respondent's lack of competence or knowledge of applicable laws.

Section 28-104.2.1.3.2, entitled "Mandatory sanctions," provides that petitioner "shall, after the opportunity for a hearing [at this tribunal], exclude, suspend or otherwise condition" a design professional's participation in a program that permits limited review of professionally certified documents where the design professional "submits two professionally certified applications for construction document approval within an 12-month period containing errors that result in revocation of an associated permit or that otherwise demonstrate incompetence or lack of knowledge of applicable laws." Admin. Code § 28-104.2.1.3.2(ii). A finding of incompetence or neglect is not required under the subsection, which is triggered by two permit revocations within a 12-month period. *See Masucci*, OATH 2469/16 at 21.

The evidence here establishes that on November 22, 2013, respondent submitted a professionally certified application for work at 12th Street (Specification 7) and on May 21, 2014, he submitted a professionally certified application for work at Amsterdam Avenue

(Specification 4) (Pet. Exs. 15, 25, 26). Both applications resulted in revocation of associated permits (Pet. Exs. 18, 29).

The evidence also establishes that respondent submitted professionally certified applications as follows: on December 14, 2015, for work at Suydam Avenue (Specification 1) (Pet. Exs. 2, 3), on January 5, 2016 for work at Putnam Avenue (specification 3) (Pet. Ex. 21); on October 22, 2015, for work at Bergen Street (Specification 5) (Pet. Exs. 31, 32), and on December 1, 2015, for work at Lefferts Place (specification 6) (Pet. Exs. 37, 38). All four applications were filed within a 12-month period and resulted in revocation of associated permits.

Respondent argued that this charge should not be sustained because "the record shows that such revocations were and are not final" (Resp. Mem. at 3). Respondent's argument suggests that he met with DOB auditors in an effort to resolve the objections, but was not permitted to "cure or correct" them, so he should not be held responsible under this provision. *Id.* However, respondent identified no specific factual or legal support his contention with respect to the multiple audit failures in issue. Moreover, even if respondent was able to resolve some of the objections, he produced no evidence to establish that the revocations were rescinded.

Accordingly, Charges III and IV should be sustained.

Charges V and VI: Failed two department audits that resulted in revocation within six months

Petitioner alleges that between July 27, 2016 and October 18, 2016, respondent's professionally certified applications for Suydam Street (Specification 1), Putnam Avenue (Specification 3), and 12th Street (Specification 7) failed audits, resulting in permit revocations. In addition, petitioner alleges that between May 15, 2017 and May 24, 2017, respondent's professionally certified applications for Amsterdam Avenue (Specification 4), Bergen Street (Specification 5), and Lefferts Place (Specification 6), had audit failures resulting in revocations.

The Department's rules provide that it may exclude an architect or engineer from its limited supervisory check or professional certification program if it finds that the design professional has, within six-months, failed two audits that have resulted in revocations. 1 RCNY § 21-02(a)(14). The sanctions may be imposed based on two failed audits within the requisite time-period, without a showing of incompetence or neglect. *See Masucci*, OATH 2469/16 at 21.

Petitioner established that respondent failed three audits between July 27, 2016 and October 18, 2016, which resulted in revocations (Pet. Exs. 4, 5, 17, 18, 22, 23), and failed three audits between May 15, 2017 and May 24, 2017 (Pet. Exs. 28, 29, 33, 34, 39, 40) that also resulted in revocations.

Accordingly, Charges V and VI should be sustained.

FINDINGS AND CONCLUSIONS

1. Respondent's submissions to the Department regarding 387 Suydam Street, Brooklyn, displayed negligence or incompetence with regard to, or lack of knowledge of applicable laws and regulations in violation of 1 RCNY § 21-02(a)(1) as alleged in Charge I, Specification 1, except as to allegations regarding increase in the number of habitable rooms.

2. Respondent's submissions to the Department regarding 24-10 36th Avenue/35-53 24th Street, Queens, displayed negligence or incompetence with regard to, or lack of knowledge of applicable laws and regulations in violation of 1 RCNY § 21-02(a)(1) as alleged in Charge I, Specification 2.

3. Respondent's submissions to the Department regarding 1299 Putnam Avenue, Brooklyn, displayed negligence or incompetence with regard to, or lack of knowledge of applicable laws and regulations in violation of 1 RCNY § 21-02(a)(1) as alleged in Charge I, Specification 3.

4. Respondent's submissions to the Department regarding 668 Amsterdam Avenue, New York, displayed negligence or incompetence with regard to, or lack of knowledge of applicable laws and regulations in violation of 1 RCNY § 21-02(a)(1) as alleged in Charge I, Specification 4, except as to the allegation regarding two exit doors not far enough apart.

5. Respondent's submissions to the Department regarding 583 Bergen Street, Brooklyn, displayed negligence or incompetence with regard to, or lack of knowledge of applicable laws and regulations in violation of 1 RCNY § 21-02(a)(1) as alleged in Charge I, Specification 5, except as to the allegations regarding increase to the floor area and unenclosed cellar stairs.

6. Respondent's submissions to the Department regarding 164 Lefferts Place, Brooklyn, displayed negligence or incompetence with regard to, or lack of knowledge of applicable laws and

regulations in violation of 1 RCNY § 21-02(a)(1) as alleged in Charge I, Specification 6, except as to the allegations regarding stairs not extending to the roof, vertical exits, and lack of proper fire rated construction in cellar.

7. Petitioner failed to prove that respondent's submissions to the Department regarding 34-10 12th Street, Queens, displayed negligence or incompetence with regard to, or lack of knowledge of applicable laws and regulations in violation of 1 RCNY § 21-02(a)(1) as alleged in Charge I, Specification 7.

8. Charge II is duplicative of Charge I and should be sustained only to the extent that specifications in Charge I are sustained.

9. Petitioner proved that respondent twice submitted two professionally certified applications for construction document approval within a twelve-month period containing errors that resulted in revocation of an associated permit, in violation of Administrative Code § 28-104.2.1.3.2(ii), as alleged in Charges III and IV.

10. Petitioner proved that respondent twice failed two audits within six months that resulted in revocation of permits, in violation of 1 RCNY § 21-02(a)(14), as alleged in Charges V and VI.

RECOMMENDATION

At trial, petitioner's counsel stated that the Department is seeking to require that respondent submit his plans for full plan examination, which would be "an appropriate level of oversight." Department's counsel therefore requested that respondent lose his professional certification and limited review privileges (Tr. 11). Petitioner did not specify whether it is seeking revocation or suspension of the privileges and failed to clarify the relief it is seeking in its written summation, other than to state that a licensed professional found to have demonstrated the charged negligence or incompetence "may be excluded or suspended from the Department's limited review and Professional Certification programs." (Pet. Mem. at 2). Based upon the proven charges, I find a twelve-month suspension of respondent's professional certification and limited supervisory review privileges appropriate.

Professional certification is a privilege for the design professionals, who benefit from limited review of their work. At the same time, the Department has a significant interest in protecting the public by ensuring that design professionals exercise appropriate care when they

professionally certify their work. It therefore relies on design professionals who participate in the professional certification program to submit applications that are clear, accurate, complete, and in compliance with applicable laws.

Penalties for a design professional's failure to exercise a professional standard of care range from attaching conditions to or suspending privileges to exclusion from participation in the program. *See* Admin. Code. § 28-104.2.1.3.2. Permanent exclusion from the Department's professional certification program has generally been reserved for the most serious cases involving false statements in filings submitted to the Department or where there is no mitigation. *See Dep't of Buildings v. Katerinis*, OATH Index No. 2193/17 (Mar. 5, 2019) (revocation of filing privileges recommended for engineer who made material false statements on filings submitted under the Department's limited review program); *Fernando*, OATH 2423/10 at 7 (exclusion from participation in limited supervisory review and professional certification programs recommended where engineer submitted five professionally certified applications that demonstrated negligence, incompetence, or lack of familiarity with applicable law and the respondent, who failed to appear at trial or demonstrate any mitigation); *Dep't of Buildings v. Scarano*, OATH Index No. 2571/08 (Mar. 1, 2010) (exclusion from professional certification program recommended where architect knowingly made false statements in two filings). In contrast, where there is no intent to deceive or there is mitigation, a lesser penalty has been recommended. *See Masucci*, OATH 2469/16 (six-month suspension imposed where architect submitted two professionally certified applications that demonstrated negligence, incompetence, or lack of knowledge of the law and respondent's liability was mitigated by petitioner's conduct).

Respondent has been a licensed architect for 40 years and has been an active member of his profession and community through participation in various professional and civic organizations (Tr. 659, 661-64). He has filed over 5,000 applications with the Department. He testified, without objection, that prior to this proceeding, he has not been the subject of any disciplinary proceedings (Tr. 707). Yet, despite respondent's long and seemingly unblemished disciplinary history, the Department demonstrated that respondent submitted multiple applications that did not meet the applicable standard of care. However, as no intentional misconduct was charged, a penalty short of permanent exclusion is warranted.

Respondent testified that he ceased participating in the professional certification program in November 2017 and has only submitted applications that are subject to full review since then because he does not believe it worth the risk of being scrutinized under what he clearly views as a more onerous standard when professionally certified applications are audited (Tr. 666; Resp. Mem. at 30). Respondent may elect to surrender his privileges to the Department; however, under the circumstances here, and consistent with precedent, I believe a penalty other than permanent exclusion from the professional certification program is appropriate.

Accordingly, I recommend that respondent's limited supervisory review and/or professional certification privileges be suspended for twelve months.

Astrid B. Gloade
Administrative Law Judge

September 25, 2019

SUBMITTED TO:

MELANIE E. LA ROCCA
Commissioner

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October 4, 2019

[redacted]

Dear Mr. Caliendo:

I have completed my review of the Report and Recommendation ("R&R") of Administrative Law Judge Astrid B. Gloade ("Judge Gloade"), in OATH Case Index No. 733/18, dated September 25, 2019. Judge Gloade presided at a hearing on charges and specifications that were served upon you on September 14, 2017 and amended on January 22, 2018. The hearing was held over six days between March 2018 and July 2018.

The petition filed by the Department of Buildings ("Department") on January 22, 2018 contained VI Charges relating to seven (7) specifications. In her R&R, Judge Gloade found that "...for six of the seven applications at issue, respondent's professionally certified filings demonstrated negligence, incompetence or lack of knowledge of applicable laws and regulations." (R&R, p. 8). Ultimately, with the exception of Specification seven (7) and a few individual violations in Specifications four (4) and five (5) in charges I and II, Judge Gloade sustained every charge sought in the Department's petition. The sustained specifications reflect a major failure of the professional standard of care, especially for a professional who has been licensed for 30 years. The violations included multiple egress deficiencies, lack of proper firestopping, and inadequate light, air and ventilation, among other major life and safety defects. The specifications also detailed your attempt to circumvent Department procedures by converting the use of a building under an Alteration 2, without first obtaining required approval from the Board of Standards and Appeals and obtaining an amended Certificate of Occupancy, as well as your negligence in proposing structural alterations of a non-conforming Zoning use building.

Judge Gloade explained the importance of the Department's limited review programs and the seriousness of relying on professionally certified applications that do not comply with the codes and rules. "Professional certification is a privilege for the design professionals, who benefit from limited review of their work. At the same time, the Department has a significant interest in protecting the public by ensuring that design professionals exercise appropriate care when they professionally certify their work. It therefore relies on design professionals who participate in the professional certification program to submit applications that are clear, accurate, complete, and in compliance with applicable laws." (R&R, p. 53-54)

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Judge Gloade found that your arguments and explanations were "unpersuasive" (R&R, p. 11 and 30), "not believable" (R&R, p. 13), "mistaken" (R&R, p. 26), "not credible" (R&R, p. 36), and "self-serving and unconvincing" (R&R, p. 39). As an example, in Charge I, Specification 6, you admitted in testimony that "there were errors on this application" and "...the 'application is not typical of my office quality of job' and admitted that he is not particularly proud of the application." (R&R, p. 43) Further, "...'there wasn't [sic] the perfect set of drawings' and 'I do think that it's, it was somewhat inadequate.' Yet in the next breath, he sought to minimize the seriousness of the errors...He asserted that there were no 'life safety issues' and that '[t]he building wasn't going to fall down...' However, respondent ultimately acknowledged that the plans he professionally certified contained errors regarding a fire escape, which raise life and safety concerns." Judge Gloade found that your "professionally certified application was replete with serious errors and failed to comply with applicable law. Many of the errors were glaringly obvious and respondent's admission that he may not have been careful in reviewing the application before it was filed establishes his negligence." (R&R, p. 44)

Additionally, Judge Gloade consistently found that you "failed to exercise appropriate professional judgement," (R&R, p. 16) "demonstrated negligence, incompetence, or unfamiliarity with the applicable laws," (R&R, p. 33), and you filed plans that were "a departure from the standard of care of a reasonable professional (R&R, p. 24). As a glaring example, in Charge I Specification 2, Judge Gloade found your job application and testimony "...suggests an effort to make an end-run around DOB's procedures in order to get a 'head start' on work that would change the use and occupancy of the building under an Alt 2 application instead of an approved Alt 1. It also suggests that he was less concerned about BSA's determination because his change in the use of the building would have been effectuated by the time BSA issued its ruling." (R&R, p. 22)

I hereby adopt Judge Gloade's findings of fact and find you in violation of the provisions of law cited in the OATH Petition, and sustained by Judge Gloade. **Accordingly, I hereby exclude you from the Department's programs for limited supervisory check. You may not file applications and plans with the Department pursuant to the New York City Administrative Code §28-104.2.1, the "Professional Certification of Applications and Plans" process [Buildings Bulletin 2016-010], and any other professional certification or limited supervisory check procedures currently in effect or which may be instituted in the future. Additionally, you may not conduct final inspections under "Directive 14 of 1975," Buildings Bulletin 2018-008, and any other final inspection procedures currently in effect or which may be instituted in the future.**

Effective immediately, the Department will not accept any professionally certified application submitted by you or in satisfaction of a requirement of the Codes or of

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a rule of any agency. This determination applies to both new and previously filed applications.

After one (1) year from the date of this Order, you may seek reinstatement of the privileges recited above by submitting a written request to me. A decision to grant reinstatement is at my sole discretion. In the event such privileges are restored, you shall be placed on probation in accordance with Administrative Code Section 28-104.2.1.3.2.1.

Sincerely,

[redacted]

Melanie E. La Rocca
Commissioner

cc:

Astrid B. Gloade
Administrative Law Judge
[redacted]

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