

ORDER

NEW YORK CITY LOFT BOARD

In the Matter of the Application of

**STAVIT ALLWEIS, RIA KATZ AND
NACHSON PELEG**

Loft Board Order No. 4898

Docket No. TR-1170

**RE: 199-201 North 8 Street
Brooklyn, New York**

IMD No. None

ORDER

The New York City Loft Board ("Loft Board") accepts the Report and Recommendation of Administrative Law Judge Alessandra F. Zornioiti dated January 18, 2017 ("Report").

BACKGROUND

On February 18, 2014, Stavit Allweis, Nachson Peleg ("Tenants") and Ria Katz, occupants of the second floor ("Unit") in the building located at 199-201 North 8 Street, Brooklyn, New York ("Building") filed an application seeking Article 7-C coverage of the entire Unit including the rear hallway, as well as the third floor east, the third floor west, the third floor rear, the fourth floor front, and the fourth floor rear of the Building pursuant to § 281(5) of the Multiple Dwelling Law ("MDL") and protected occupant status.

On March 13, 2014, One Double Nine Dashing, LLC ("Owner"), the owner of the Building, filed an answer.

The Loft Board transferred the application to the Office of Administrative Trials and Hearings ("OATH"), which assigned the matter to Administrative Law Judge Alessandra F. Zornioiti for adjudication. Prior to the commencement of the hearing, the parties stipulated that the Building met most of the eligibility requirements for coverage and other relevant facts including:

- the third floor east, the third floor west and the fourth floor units of the Building were residentially occupied for at least twelve consecutive months during the period commencing January 1, 2008 and ending December 31, 2009 ("window period") and had been fixtured for residential use;
- the front portion of the Unit was fixtured for residential use during the window period;
- the Building lacks a residential certificate of occupancy;
- the units have at least one window opening onto a street or a lawful yard or court as defined by the Zoning Resolution; and
- the units are greater than 400 square feet in area.

See, Tr. 7-10. The parties also agreed that there was only one unit on the 4th floor and the coverage claim for the third floor rear unit was withdrawn. At the start of trial, Ria Katz withdrew her protected occupancy claim, but remained an applicant for purposes of coverage.

A seven-day trial was held between May 3 and September 22, 2016. During the trial, Tenants and Ms. Katz submitted voluminous documentary and testimonial evidence pertaining to the residential use and commercial activity of the Unit. Owner submitted documentary evidence, testimony from Eric Baum, the Building manager who also lives in the fourth floor unit, and testimony from Michael Gillen, a CPA qualified as an expert to interpret tax returns. At the conclusion of the trial, both parties submitted post trial-briefs and replies.

In her Report, Judge Zornioiti found that:

1. the commercial activity of the Unit during window period does not preclude coverage of the Unit;
2. the commercial activity in the Unit does not limit the coverage to only the front part of the Unit.
3. during the window period, the rear hallway was used residentially and is part of the Unit; and
4. the tax returns filed by Tenants do not preclude a finding of coverage of the Unit;

See, Report at 31. Based on her findings, Judge Zorngiotti recommended the Loft Board grant Tenants' coverage and protected occupancy application. Judge Zorngiotti also recommended the Loft Board deem Ms. Katz's protected occupancy claim withdrawn. For the reasons stated below, we agree.

ANALYSIS

1. The Unit, Including the Rear Hallway, is an IMD Unit.

Tenants and Ms. Katz seek coverage of the front, middle, and rear portions of the Unit and the rear hallway. Owner argues that only the front portion of the Unit should be covered because Tenants used the remainder of the Unit for commercial purposes and the rear hallway is a public space. See, Owner's Post-Trial Brief at 37-49, 57. Owner also argues that case law precludes Tenants from claiming residential occupancy of the Unit during the window period because Tenants deducted the majority of rent for the Unit as a business expense and listed a different address as their residence on their window period tax returns. See, Owner's Post-Trial Brief at 15, 22-29. However, for the reasons stated by Judge Zorngiotti, we accept the recommendation that with the exception of the front public hallway, the rear stairwell, the elevator, and the elevator mechanical room, the Unit is eligible for coverage including the front, middle and rear portions and the rear hallway.

a. Commercial Activity of the Unit Does not Preclude Coverage.

We accept Judge Zorngiotti finding the entire Unit has been used for mixed residential and commercial purposes and that Tenants' commercial activity was incidental to their residential use. See, Report at 11. The Loft Board has found that commercial use of portions of a residential unit do not preclude coverage under Article 7-C. See, *Matter of Ashbaugh*, Loft Bd. Order No. 824 (Oct. 6, 1988) (Coverage granted where owner failed to show commercially used space was a separate unit from the residentially used space). Here, the door between the front living room area and the middle area was never locked. Tenants used the door leading to the middle portion of the unit as their primary entrance into the Unit and Tenants used the rear portion of the Unit for personal art projects. Furthermore, we accept Judge Zorngiotti's finding that the rear hallway should be covered because the occupants of the Unit had exclusive use of the area during the window period as a means of egress and for storage of personal items.

b. Tenants' Tax Returns do not Preclude Coverage of the Unit.

Owner argues that the coverage application must be denied pursuant to *Ansonia v. Unwin* and its progeny. See, *Ansonia v. Unwin*, 130 A.D.3d 453 (1st Dep't 2016). In *Ansonia*, the landlord established a rent stabilized apartment was not tenant's primary residence by submitting tenant's federal income tax returns on which tenant deducted the entire rent for the apartment as a business expense. *Id.*

Relying on *Ansonia*, Owner argues Tenants are precluded from claiming they residentially occupied the Unit during the window period because they deducted the majority of rent for the Unit as a business expense on their window period tax returns. See, Owner's Post-Trial Brief at 22-29. However, we agree with Judge Zorngiotti that it is not surprising that Tenants did not list the Unit as their residence on their tax returns because the Building did not have a residential certificate of occupancy and was not under the protection of the Loft Law. We agree that Tenants provided sufficient proof at the hearing of residential occupancy of the Unit during the window period. Tenants also proved that Owner was aware of Tenants' residential occupancy during the window period as Owner's principal lived on the fourth floor of the Building.

Owner also argues Tenants are precluded from claiming the Unit is their primary residence because Tenants listed a different address on their window period tax returns. See, Owner's Post-Trial Brief at 22-29. However, the MDL does not require tenants to prove primary residency for purposes of coverage. See, *Vlachos v. NYC Loft Bd.*, 70 N.Y.2d 769 (1987) (Court found there is no requirement that residentially occupied units be the primary residences of their tenants for Loft Law coverage). See also, *Matter of Gurkin*, Loft Bd. Order No. 4186 (Oct. 17, 2013) (for purposes of coverage, window period tenants need to be residentially occupying the space and it need not be their primary or only residence).

2. *Tenants are the Protected Occupants of the Unit.*

In opposing Tenants' protected occupancy claim, Owner makes two arguments. First, Owner argues that Tenants sold their Article 7-C rights to the Unit. See, Owner's Post-Trial Brief at 51-56. Second, Owner also argues that case law precludes Tenants from claiming primary residency of the Unit as required by Title 29 of the Rules of the City of New York ("29 RCNY") § 2-09(b)(4). However, we agree with Judge Zorogniotti that Owner's sale of rights argument is meritless and Tenants are the protected occupants of the Unit pursuant to 29 RCNY § 2-09(b)(4).

a. There was no Sale of Rights for the Unit.

Owner argues Tenants' protected occupancy claim should be denied because Tenants sold their Article 7-C rights to the Unit. See, Owner's Post-Trial Brief at 51-56. We disagree. On November 15, 2010, Tenants agreed that the October, November, and December rent would be a draw down on the security deposit, the rent would increase in 2011 and the remainder of the security deposit would be used as the last two month's rent. Tenants also agreed they would vacate the Unit and return the vacant Unit to Owner, but did not specify a vacate date. Although Tenants need not vacate the unit to execute a valid sale of rights, there was no mention of the sale of Article 7-C rights in the agreement. See, *Matter of Broderson*, Loft Bd. Order No. 4868 (May 16, 2019). Furthermore, the reduction of the security deposit for payment of rent is not consideration for Article 7-C rights when there was no vacate date in the agreement and Tenants remained in the Unit paying a higher monthly rent.

b. Tenants Proved the Unit is Their Primary Residence.

Pursuant to 29 RCNY § 2-09(b)(4), the prime lessee is deemed the residential occupant entitled to protection under Article 7-C if the prime lessee can prove that the residential unit covered as part of an IMD is his or her primary residence. See, RCNY § 2-09(b)(4). Tenants became the prime lessees of the Unit pursuant to a lease dated November 1, 1999 between Tenants and Owner. Based on the rule, Tenants must prove the Unit is their primary residence in order to obtain protected occupancy status¹.

Owner argues that Tenants are not entitled to protected occupancy pursuant to *Ansonia*. See, *Ansonia v. Unwin*, 130 A.D.3d 453 (1st Dep't 2016). Owner argues Tenants cannot claim the Unit is their primary residence because their tax returns from 2008 through 2011 deducted the majority of rent for the Unit as a business expense and listed a different home address. See, Owner's Post-Trial brief at 22-24, *Ansonia v. Unwin*, 130 A.D.3d 453 (1st Dep't 2016), *Mahoney-Buntzman v. Buntzman*, 12 NY3d 415, 422 (Ct. of App. 2009). However, as stated above, we agree that Tenants established the Unit is their primary residence through evidence including bank statements and voter registration that date back to the beginning of the window period. Furthermore, Tenant's 2014 and 2015 tax returns listed the Unit as their residence and Tenants took no rent reductions for business expenses. See, Tenants' 2014, 2015 taxes

¹ In the Report, Judge Zorogniotti questioned why the Loft Board began to require that prime tenants seeking protected occupancy status prove the unit is their primary residence. See, Report at 23-29. As explained in *Matter of Tenants of 79 Lorimer*, after the 2010 amendment, the Loft Board adopted a more disciplined approach to analyzing protected occupancy claims by adhering to the plain language of 29 RCNY § 2-09(b). See, *Matter of Tenants of 79 Lorimer Street*, Loft Bd. Order No. 4688 (Sept. 21, 2017).

returns. As Tenants established that they are prime lessees of the Unit and it is also their primary residence, Tenants are the protected occupants of the Unit pursuant to 29 RCNY § 2-09(b)(4).

CONCLUSION

The Loft Board deems Ms. Katz's protected occupancy claim withdrawn without prejudice.

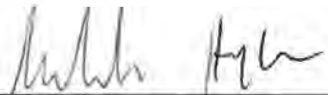
The Loft Board finds the Building to be an IMD pursuant to MDL § 281(5), containing four covered units: the Unit, two units on the third floor, and one unit on the fourth floor. The Unit includes the front, middle and rear portions of the second floor and the rear hallway. The front public hallway, the rear stairwell, the elevator, and the elevator mechanical room, all on the second floor, are not covered.

Tenants are the protected occupants of the Unit.

The Loft Board hereby directs Owner to register the covered units with the Loft Board within 30 days of the mailing date of this Order. If Owner fails to register and pay the applicable fees within 30 days of the mailing date of this Order, the Loft Board directs the staff to:

- Issue an IMD registration number for the Building;
- List the units as IMD units and Tenants as the protected occupants of the Unit; and
- Collect applicable registration fees and late fees if any.

DATED: September 19, 2019



Renaldo Hylton
Chairperson

Board Members Concurring: Barowitz, Roche, Hernandez, DeLaney, Torres, Hylton

Board Member Recused: Roslund

Board Members Absent: Carver, Schachter

DATE LOFT BOARD ORDER MAILED: **SEP 27 2019**

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Matter of Allweis

QATH Index No. 2569/14 (Jan. 18, 2017)

[Loft Bd. Dkt. No. TR-1170; 199 N. 8th St., Bklyn., N.Y.]

In coverage and protected occupancy proceeding, petitioners demonstrated that second floor unit was residentially occupied during the applicable window period. As occupants currently in possession, petitioners also qualify for protected occupancy. Moreover, under the Loft Board's new interpretation of its protected occupancy rules, the prime tenants established that the second floor unit is currently their primary residence. Case law holding that tenants can be evicted for non-primary residency when their prior tax returns indicated that they did not reside in their rent-regulated units does not apply. The application as amended should be granted.

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

In the Matter of
STAVIT ALLWEIS, NASCHON PELEG & RIA KATZ
Petitioners
-against-
ONE DOUBLE NINE DASHING, LLC
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORNIOTTI, *Administrative Law Judge*

This application was filed by Stavit Allweis, Naschon Peleg, and Ria Katz on February 18, 2014, pursuant to Article 7-C, section 281 of the Multiple Dwelling Law ("Loft Law" or "Article 7C of the MDL" or "MDL") and title 29 of the Rules of the City of New York ("RCNY" or "Loft Board Rules"). Petitioners seek a finding that the building known as 199 North 8th Street, Brooklyn, New York ("Building") is an interim multiple dwelling ("IMD"), that the second floor was residentially occupied during the applicable window period, and that Ms. Allweis and Mr. Peleg are the protected occupants of that unit (ALJ Ex. 1). The Building owner, One Double Nine Dashing LLC, filed an answer in opposition (ALJ Ex. 2). Jennifer Weber is

the sole member of One Double Nine Dashing LLC (Pet. Ex. 13). She lives on the fourth floor of the Building with her domestic partner, Eric Baum. Mr. Baum manages the Building.

Following unsuccessful settlement conferences, a seven-day trial was held between May 3 and September 22, 2016. Both parties submitted voluminous documentary evidence. Petitioners testified and called Mr. Beswick, Mr. Holmberg, and Ms. Mangroo, friends and employees who are familiar with their use of the second floor. Respondent called Mr. Baum, who has lived in the Building since at least 1998, and Mr. Gillen, an attorney who was qualified as an expert on the interpretation of tax returns (Tr. 690).

At the start of the trial, Ms. Katz, who is Ms. Allweis' cousin and has lived in the rear bedroom on the second floor since 2010, withdrew her request for protected occupancy but remained an applicant for purposes of coverage (Tr. 7-14).

Also at the start of the trial, respondent argued that the Building is a horizontal multiple dwelling ("HMD") with an incompatible commercial or manufacturing use, that tax returns filed by Ms. Allweis and Mr. Peleg stating they lived at another address and used the second floor for commercial purposes preclude a finding of coverage and protected occupancy, and that, in any event, the majority of the second floor should be excluded from coverage because it was occupied for commercial purposes or is a public area. Subsequently, respondent withdrew the HMD/incompatible use assertion and the related exhibits (Tr. 744-45). The record was held open until December 8, 2016, for the filing of additional documents and closing statements.

To prevail, petitioners must prove their case by a preponderance of the evidence. 29 RCNY § 1-06(i)(4) (Lexis 2016). For the reasons below, petitioners demonstrated that the Building is an IMD, that the commercial use of the second floor during the applicable period does not preclude coverage because it was a commercial/residential mixed-use space, that the entire second floor including the rear hallway was residentially occupied by petitioners, that the tax returns filed by Ms. Allweis and Mr. Peleg do not preclude a finding of coverage or protected occupancy, and that they are the protected occupants of the second floor unit.

Thus, the application, as amended, should be granted.

ANALYSIS

In 2010, the state legislature passed amendments to the Loft Law, which added section 281(5) to the MDL. L. 2010, Ch. 135 § 1 (eff. June 21, 2010) (adding MDL § 281(5)); L. 2010, Ch. 147 § 1 (eff. June 21, 2010) (amending MDL § 281(5)). Amended section 281(5) defines an IMD as a building that: (1) at any time was occupied for commercial purposes; (2) lacks a certificate of occupancy pursuant to section 301 of this chapter; (3) is not owned by a municipality; and (4) was occupied for residential purposes by three or more families living independently from one another for a period of 12 consecutive months during the period commencing January 1, 2008, and ending December 31, 2009 ("window period"), "provided that the unit" (i) is not located in a basement and has at least one entrance that does not require passage through another unit to obtain access to the unit, (ii) has at least one window opening onto a street or yard, and (iii) is at least 400 square feet in area. MDL § 281(5) (Lexis 2016).

The following is not in dispute. The Building has four stories and had a prior commercial use. There is a 1945 certificate of occupancy listing each floor as a factory, office, or storage (Resp. Ex. LL). The units on the second, third, and fourth floors are larger than 400 square feet in area, they do not require passage through another unit for egress, and each unit has at least one window opening onto a street. During the 2008-2009 window period, the third floor had two units and the fourth floor had one unit that were residentially occupied (Tr. 7-10). Thus, the Building qualifies as an IMD with three units on the third and fourth floors that were residentially occupied during the applicable period.

It was also undisputed that Mr. Peleg and Ms. Allweis, who are married, have lived on the second floor since before the window period (Tr. 736-37; Pet. Ex. 13) and that the unit is over 4000 square feet in area (Tr. 751; Pet. Ex. 66). There are two issues that are contested. First, how much of the second floor was utilized for a business during the window period and whether this area and the rear hallway should be excluded from coverage. Second, whether the joint federal tax returns filed by Mr. Peleg and Ms. Allweis stating that they lived at 46 Grand Street in Brooklyn and used the second floor of the Building for their business preclude, as a matter of law, coverage and protected occupancy.

To the extent resolution of these issues rely on a determination of witness credibility, this tribunal has looked to witness demeanor, the consistency of a witness's testimony, supporting or

corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience in determining credibility. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Both parties had compelling financial motives to lie: petitioners to obtain Loft Law protection for a large rent-regulated unit in a prime location in Brooklyn; and respondent to defeat the application, evict petitioners, and gain possession of the entire second floor unit. There is a long history of hostility and distrust between the parties relating to respondent's ownership of the Building. Ms. Allweis and Mr. Peleg claimed that in 1998, after Mr. Baum moved into the Building, they agreed to purchase it together from the prior owner but that Mr. Baum and Ms. Weber, "bought it out from under them" (Tr. 169, 292). Mr. Peleg and Ms. Allweis sued (Resp. Ex. H). The case settled with Ms. Allweis, Mr. Peleg, and their then-business receiving a one-year "Standard Form Loft Lease" dated November 1, 1999, for the "Second Floor Loft" at a rent of \$3,250 per month. The lease provided for seven one-year renewals through November 1, 2007. Ms. Allweis and Mr. Peleg also gave respondent a \$20,000 security deposit (Tr. 181-83, 192; Pet. Ex. 16). Petitioners did not leave after the expiration of the last renewal in November 2008.

On November 15, 2010, Mr. Peleg and Mr. Baum signed a handwritten agreement that "no other party to remain at vacate [sic] of the premises – all of 2nd floor." The agreement also provided that payment of the October, November, and December rent would be a draw down on the deposit thereby leaving a \$9,750 deposit that "would represent second and last months [sic] rent if you stay on a 5293.\$ [sic] months status." The agreement further stated that the rent in 2011 would be \$5,293.88 plus \$490.00 for heat "per month till end of 2nd floor vacate ODND [owner] will give 2,043. [sic] at end of stay + deposit" (Tr. 181-83, 189, 192, 210 424-29, 426-29; Resp. Ex. J). Petitioners did not vacate but instead pursued their rights under the Loft Law by filing the instant coverage and protected occupancy application in February 2014.

Mr. Peleg, Ms. Allweis, and Mr. Baum were partisan witnesses whose credibility was undermined by prior inconsistent statements. Ms. Allweis and Mr. Peleg made false sworn statements under penalty of perjury in their tax filings regarding the commercial and residential use of the second floor. Similarly, Mr. Baum's statements were inconsistent with statements

made by Ms. Weber on behalf of respondent in various documents and court proceedings alleging that the second floor was occupied residentially, not commercially (Pet. Exs. 8, 10, 12-15, 61-65, 71, 73-74). Given the party witnesses' motives and inconsistent statements, their disputed testimony was not credited unless it comported with common sense and/or was corroborated by other credible, independent proof.

The Commercial Uses Do Not Preclude Coverage of the Entire Second Floor

For a unit to qualify as a covered residence under the Loft Law, "it must possess sufficient indicia of independent living to demonstrate its use as a family residence." *Anthony v. NYC Loft Bd.*, 122 A.D.2d 725, 727 (1st Dep't 1986). The determination of coverage requires a case-by-case analysis of the indicia of residential use. *Matter of 333 PAS CoO Tenants Group*, OATH Index No. 968/08 at 7 (June 30, 2009), *adopted*, Loft Bd. Order No. 3552 (Nov. 19, 2009). As noted in *Matter of South 11th Street Tenants Association*, OATH Index Nos. 1242/96, 1243/96, 1244/96 at 39-40 (Mar. 30, 1999), *adopted*, Loft Bd. Order No. 2397 (Apr. 29, 1999), "no one factor is dispositive . . . the regulations defining a residential unit were deliberately left open-ended to allow for a more flexible approach to coverage determination."

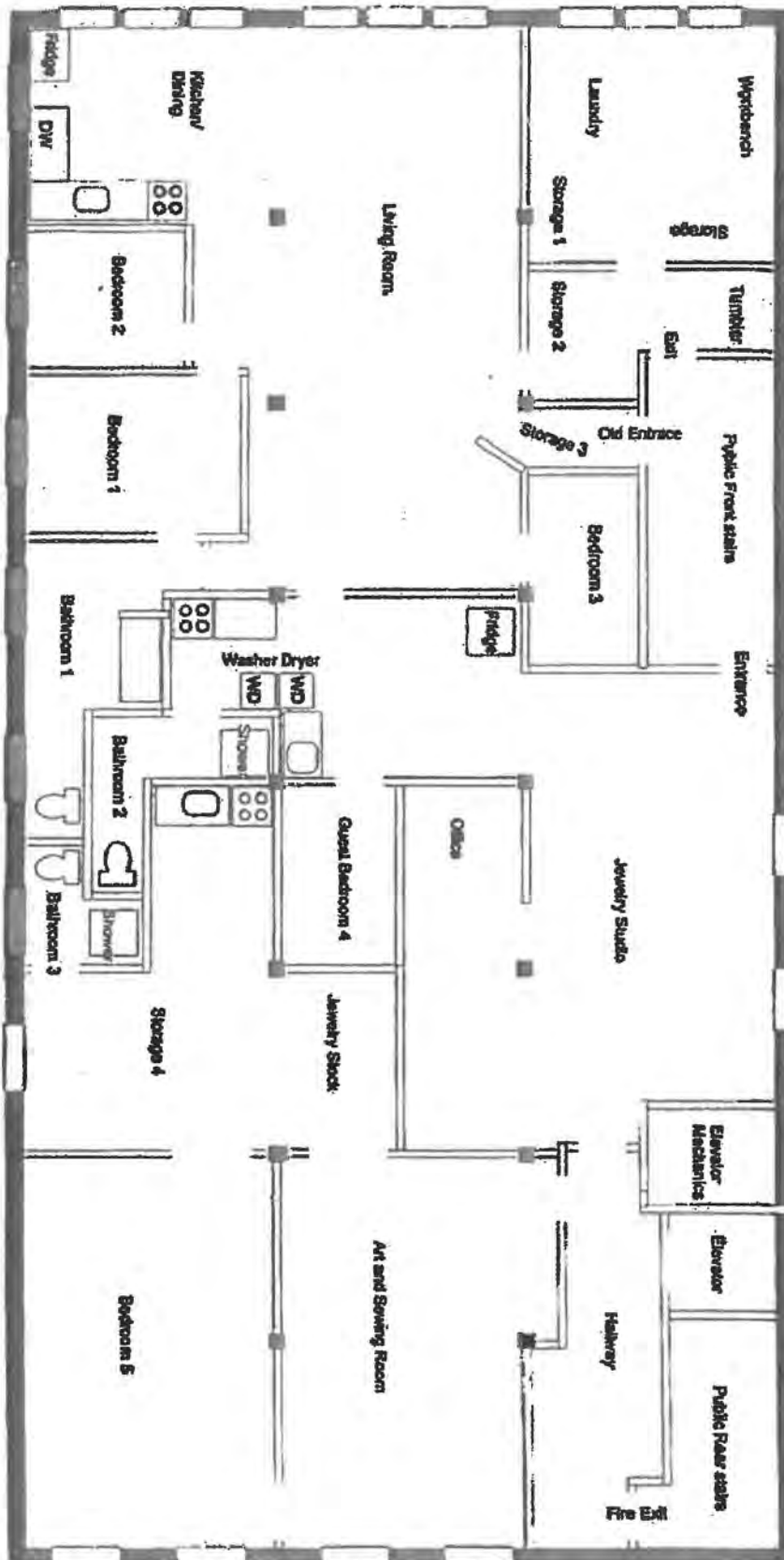
Most of petitioners' case focused on residential occupancy on the second floor. Late in the trial, Mr. Baum, acknowledged that Ms. Allweis and Mr. Peleg have resided there continuously since before the window period (Tr. 736-37). Thus, the extensive proof on residential occupancy of the second floor by Ms. Allweis and Mr. Peleg need not be summarized except to provide context for their disputed use of the second floor for commercial purposes.

Ms. Allweis and Mr. Peleg described in detail, with accompanying photographs and a floor plan, their 20 plus years of living and working in the second floor unit. Ms. Allweis testified that in 1992 she and her prior husband moved into the front unit of the second floor that faces North 8th Street. At the time the space was raw and they renovated it for living by adding a kitchen, a bathroom, new floors, and insulation. The rest of the second floor was commercial (Tr. 129-30). There were two entrances to their unit from the front public hallway, one to the living room and the other to a corner room that also had a door to the living room (Tr. 229, 246; Pet. Exs. 2-3; Resp. Ex. A).

Ms. Allweis testified that by the time Mr. Peleg moved in with her in 1996, other tenants were living in the middle and rear units on the second floor and that each had their own kitchen and bathroom (Tr. 131, 287-88; Pet. Exs. 2-3). Mr. Peleg testified that the rear unit's entrance was from the rear stairwell because there was no direct access from the front. The middle unit had an entrance from the front hallway but there was also a door in the back that went to the rear hallway used by the rear unit (Tr. 757-59, 764-67; Pet. Ex. 2-3, 67; Resp. Ex. A).

Mr. Peleg testified that when he moved into the front unit, he started a jewelry business. Ms. Allweis is an employee and has always been involved in the creative work while he handles everything else (Tr. 184, 193, 289, 333-35). Initially, the jewelry making occurred in the front corner room which included a separate area for a stone tumbler. In 1997 Mr. Peleg and Ms. Allweis took over the rest of the second floor and moved the jewelry studio to the center unit but left the tumbler where it was. They rented the rear unit to new residential tenants. Their two children were born on the second floor in 1999 and 2000 (Pet. Ex. 5). In preparation for their arrival, Mr. Peleg and Ms. Allweis added bedrooms to the front portion of the loft in 1998. In 2000 or 2001, they stopped renting out the rear unit and used it for personal and business purposes (Tr. 129-32, 166, 287-95, 292-93, 246, 299-300, 304-06, 756).

Petitioners and their witnesses indicated that the overall layout and use of the second floor has not changed much between 2001 and the present (Tr. 32, 53, 66, 95-96, 135, 143, 148, 288, 299-300, 304, 307-12). Below is a plan (Pet. Ex. 2) that identifies how petitioners claim the second floor was utilized.



Petitioners and their witnesses testified that after jewelry production was moved in 1997 from the front corner room to the center unit, the front room was no longer used for business purposes except to cut glass and polish stones in the tumbler. The room became an all-purpose room for the storage of boxes, clothing, bicycles, and unused appliances. It was also used for ironing and is where petitioners' cat is fed and the litter box is stored. Mr. Peleg also used part of the room as a work bench where he keeps tools and does projects. At one point the children had a sandbox in the front room and they sometimes used it for birthday parties where they would do "messy" things like make volcanoes (Tr. 53, 62, 74-75, 106, 122-23, 132-39, 234-35, 300, 304-06, 371-73; Pet. Exs. 3(J), (K)).

Mr. Baum testified that when he was on the second floor during the window period for maintenance issues he saw commercial uses (Tr. 718-19) and that the front corner room was a workroom for the jewelry business. He observed business articles being stored in the front room, there was no ironing board as shown in petitioners' photographs, and the room was used for glass cutting and the tumbler (Tr. 728-30).

Petitioners and their witnesses also testified that when the jewelry studio was relocated from the front corner room to the center unit, Mr. Peleg and Ms. Allweis created a doorway between the front unit living room and the kitchen in the center unit (Tr. 60-65, 89-90, 95, 102-05, 132-33, 144, 232, 247, 261, 267, 289, 307, 314; Pet. Exs. 2; 3(E), (T)-(W)). The door between the jewelry studio and the living room was never locked (Tr. 65, 107, 285). Once this opening was created, the family stopped using the "old" entrance to the living room and started using the entrance to the studio. For unexplained reasons, Mr. Baum painted shut the old entrance door to the living room in 2000 and that area was used for storage. The door was cut open in 2015 by Mr. Peleg (Tr. 52, 127, 230, 304-08, 397; Pet. Ex. 55).

Petitioners and their witnesses testified that Mr. Peleg and Ms. Allweis also moved their washer and drier to the center unit kitchen and converted one of the center unit bedrooms into Mr. Peleg's office where he does both personal and work business. The other bedroom became a guestroom and has been used continuously for that purpose. From the spring of 2009 until 2012, Mr. Peleg's mother lived in the guestroom (Tr. 55, 73, 96-98, 100, 105, 107, 124, 146-48, 239-42, 252, 287-88, 308-09, 313-14, 370). Family members, guests, and roughly four employees

working in the jewelry studio (Tr. 80) have always used the center unit bathroom (Tr. 84, 91, 96, 106, 312-13, 370).

Mr. Baum testified that during the window period he never saw a bed in the center unit when Mr. Peleg's mother was supposedly living there (Tr. 726-27).

Petitioners and their witnesses testified that the kitchen in the center unit has always been used by employees as well as the family to store dog and cat food and items that do not fit in the front refrigerator, like a giant birthday cake (Tr. 84, 144, 262). The shelving in that area has always held business and household supplies (Tr. 84-85, 145, 273, 284-85; Pet. Ex. 3(Z); Resp. Exs. C, R). Similarly, the center unit stove is sometimes used by the family (Tr. 369; Resp. Ex. T), while the stove in the front is sometimes used to bake jewelry (Tr. 227-28). Mr. Peleg also cut holes in the walls so that their cat could move around the entire second floor if a door was closed (Tr. 138; Pet. Ex. 3(T)).

Petitioners and their witnesses testified that after Mr. Peleg and Ms. Allweis took over the rear unit in 2001, they used it for personal and business activities. Ms. Allweis has always maintained a studio there for painting, sewing, and other personal art projects. Some of the open areas have also been used as a stockroom and shipping area for the jewelry business. Ms. Katz moved into the rear corner room in 2010. Ms. Allweis had used that bedroom as a production studio for her graphic novel between 2008 and 2009. The rear kitchen and bathroom were not used during the window period. In 2007 or 2008, Mr. Baum removed the toilet in the bathroom because of rat infestation. He placed the toilet inside the shower rendering both the shower and the toilet unusable (Tr. 29, 63-64, 86-87, 99, 106, 148-50, 210, 215-23, 228-29, 294-95, 310-12; Pet Exs. 3(GG), (HH); Resp. Exs. O, P).

With regard to the rear hallway, Mr. Peleg testified that when he and Ms. Allweis took over the second floor in 1997, the rear hallway was part of the rear unit and the door from the rear staircase was locked and served as the entrance to that unit. They used the rear hallway in the same manner as the prior tenants, *i.e.* as a hallway and for storage. The door between the rear hallway and the center unit was a "rickety wooden door" that never had a workable lock (Tr. 757-59, 764-66, 769).

Mr. Peleg testified that they had access to the elevator that opened onto the rear hallway from 1997 to 2004. Around 2004 the elevator started having functional issues and, due to the

acrimonious relationship with owner, they stopped using it. In order for the owner to get access to the mechanical room located next to the elevator, Mr. Baum needed to speak to Mr. Peleg. There is a sliding door that covers the elevator door on the second floor that has not been open since 2005 or 2006 (Tr. 759-63; Pet. Ex. 3(MM)).

Mr. Baum testified that at one time he had a key from the rear staircase to the rear hallway and that the owner always considered the hallway a public space because it provides access to the elevator and mechanical room. Recently, Mr. Baum noticed that the lock on the door from the rear staircase to the hallway had been changed. Mr. Baum also asserted that the elevator was in service until 2009 and that sometime after 2010 the lock was changed. Mr. Baum told petitioners to remove their items from the rear hallway because it was an exit. In June 2016, there was a fire inspection and Mr. Peleg cleared the area. Mr. Baum testified that the prior tenants of the rear and middle units had locked doors from the rear hallway and that the door from the rear staircase is a metal push door. Mr. Baum further testified that he has accessed the mechanical room without petitioners (Tr. 770-77).

Petitioners seek coverage of the second floor except for the front public hallway, the rear staircase, and the elevator mechanical room (Tr. 769-70). Respondent claims that only the front portion originally occupied by Ms. Allweis and Mr. Peleg residentially should be covered because the remainder of the second floor, including the front corner room, was used for commercial purposes during the window period. Moreover, the rear hallway is a public hallway.

The Loft Board has held that separate spaces used exclusively for commercial purposes cannot be covered as an IMD unit. See *Dalo v. NYC Loft Bd.*, 157 A.D.2d 461 (1st Dep't 1990), *aff'd*, *Matter of Kahn*, Loft Bd. Order No. 778, 7 Loft Bd. Rptr. 108 (June 16, 1988); *Matter of George*, Loft Bd. Order No. 542 (Mar. 12, 1987). In *Kahn* the Loft Board stated: "It is axiomatic . . . that the Loft Law provides coverage only for units used residentially." 7 Loft Bd. Order Rptr. at 110. The Board declined to cover an area used for wood-working, where the residential and wood-working areas had separate entrances to a common hallway. Similarly, in *George*, the Board declined to cover an entire floor where the front had been used as a dance studio and was completely separate from the rear residential unit.

Unlike these cases, the record here shows that since 2001, the entire floor has been occupied as one unit without any borders to divide the residential and commercial uses into

separate and independent spaces. The door to the front living space was painted shut between 2000 and 2015 by Mr. Baum and from 1997 to the present, access to the front living area was primarily through the jewelry studio. Thus, limiting coverage to the pre-1997 living space in the front third of the second floor is not justified. *Matter of Ashbaugh*, Loft Bd. Order No. 824 (Oct. 6, 1988) (exclusive commercial use of a portion of a residential unit did not preclude coverage where residence was not set apart from commercial space); *Matter of Brooks*, Loft Bd. Order No. 981 (Jan. 4, 1990) (where part of loft was used as a yoga studio and other portions as a residence, entire loft covered due in part to the lack of independent entrances from public hall); 29 RCNY § 2-08(a)(3) ("living independently" requires a "separate entrance providing direct access to the residential unit from a street or public area, such as a hallway, elevator, or stairway").

Moreover, the credible evidence supports a finding that since 2001 the second floor has been used for mixed commercial and residential purposes. Mixed commercial and residential use does not bar a finding that an entire unit should be considered residential for coverage purposes, so long as the residential use is the primary use of the unit. *See* 29 RCNY § 2-08(l) (Lexis 2016); *Matter of Boyers*, OATH Index Nos. 1338/12, 1381/12 & 1403/13 (Feb. 10, 2014), *adopted in part, rejected in part*, Loft Bd. Order No. 4302 (Sept. 18, 2014).

Factors considered in determining whether a residential use is incidental or primary include the percentage of the space and the amount of time the unit is used residentially. *See, e.g., Franmar Infants Wear, Inc. v. Rios*, 143 Misc.2d 562 (1st Dep't, App. Term 1989) (where only a small corner space, approximately five feet by eight feet, of a 625 square foot artist's studio was used residentially, space remained commercial); *Loft Realty Co. v. Aky Hat Corp.*, 123 Misc.2d 440, 445 (Civ. Ct. N.Y. Co.), *aff'd*, 131 Misc.2d 541 (App. Term, 1st Dep't 1984) (where tenant used approximately two percent of a unit residentially, and the rest as a hat factory, unit not covered because residential use was incidental to commercial use); *Matter of Pels*, OATH Index No. 2481/11 at 7 (June 20, 2012) *adopted*, Loft Bd. Order No. 4161 (June 20, 2013) (noting that the applicants' "living quarters are a significant in proportion to the overall size"); *Matter of Addis*, OATH Index Nos. 1574/02, 1575/02 (Nov. 25, 2002), *adopted*, Loft Bd. Order No. 2772 (Jan. 9, 2003) (insufficient residential use where commercial tenant slept in loft only a few nights per month); *Matter of Bal*, Loft Bd. Order No. 2175 (Oct. 30, 1997), *aff'd sub nom, Amann v. NYC Loft Bd.*, 262 A.D.2d 234 (1st Dep't 1999) (where applicant occupied two

units, sleeping in one and using the other primarily for storage, unit used for storage not covered despite fact that applicant occasionally used it for cooking on a hotplate).

The tenants' purpose for occupying the unit is also considered. For example, in *Anthony*, 122 A.D.2d at 727-28, the court found that a unit leased as a dance studio was not covered where the tenant resided there due only to the need to prepare for dance performances. *See also Matter of Tenants of 323-325 W. 37th Street*, OATH Index No. 692/06 at 18-19 (May 18, 2007), *adopted in part, modified in part*, Loft Board Order No. 3457 (Sept. 18, 2008), *application for reconsideration granted in part and denied in part*, Loft Bd. Order No. 3496 (Apr. 23, 2009), *aff'd*, 79 A.D.3d 488 (1st Dep't 2010) (unit leased by a museum display company was primarily commercial, despite a refrigerator and stove in the lunch area and the tenants' creation of a "hangout space" with a couch and a bed that was used only occasionally by one tenant during periods of marital discord).

Here, it was undisputed that Ms. Allweis and Mr. Peleg have lived with their two children on the second floor since before the window period and that this has always been their only home. While they were living in the front unit, Mr. Peleg started a jewelry business and utilized the front corner room to make jewelry. After Ms. Allweis and Mr. Peleg took over the entire second floor in 1997, they moved the jewelry business to the center unit. The record supports a finding that after this move, the front room became an all-purpose room and that any commercial uses, such as cutting glass and polishing stones in the tumbler, were incidental to the residential use including the storage of boxes, clothing, bicycles, and appliances, as a work bench for Mr. Peleg's tools and projects, as a play area for the children, for ironing, and for the family cat's food and litter box. Mr. Baum's self-serving, unsupported testimony that the room was used "exclusively" for commercial purposes was contrary to the weight of the evidence.

The record also supports a finding that, while the center unit was used for the jewelry business, it was also used residentially during the window period. The credible testimony of petitioners, as corroborated by their witnesses and documentary evidence, demonstrates that since 1997: primary access to the front living space was through the jewelry studio, the family's washer and drier were located near the center unit kitchen, and the nearby shelving was used for residential and business items. Petitioners' credible and consistent evidence further supports a finding that one of the original bedrooms in the center unit has always been used as a guestroom.

Mr. Baum's claim that he never saw a bed there was incredible. It makes sense that petitioners would have a guestroom in their large loft for visiting friends and family and that it would not be located in the front area that had no room for such an accommodation. Petitioners and their witnesses also credibly testified that the bathroom and kitchen in the center unit were used by employees of the jewelry business and family members. Given that the rear bathroom has been unusable since at least 2008, it makes sense that a family of four and their guests would use a second bathroom when necessary. The credible, undisputed evidence further demonstrates that the second bedroom in the center unit was used as Mr. Peleg's office for personal and business purposes. Finally, the work area in center of the unit needed to be crossed to connect the front and rear residential uses of the second floor. Thus, the commercial uses in the center part of the unit, while significant, do not make these areas ineligible for coverage.

With regard to the rear unit, the undisputed credible evidence demonstrates that during the window period the majority of the space was used by Ms. Allweis for her personal art projects. The commercial uses, such as storage and shipping area for the jewelry, were incidental to the residential uses and had to be crossed to access the residential areas.

Finally, the evidence demonstrates that before, during, and after the window period, the rear hallway was used exclusively by petitioners as means of egress to the rear staircase and elevator as well as for the storage of personal items. While it seems likely that the rear hallway was originally configured as a public area with entrances to the center and rear units, since 2001 there has only been one tenant on the second floor. The rear hallway is not utilized by any other tenants in the Building for entry and egress to other floors. The fact that the inoperable elevator and mechanical room are located within the rear hallway that would be part of the covered loft should not be an impediment to coverage. *Matter of McIntosh*, OATH Index No. 604/02 at 24 (Oct. 15, 2002), *adopted*, Loft Bd. Order No. 2763 (Nov. 19, 2002) (except for boiler room, basement is part of 1st floor unit).

In its post-trial brief, respondent argued for the first time that the November 15, 2010, agreement between Mr. Peleg and Mr. Baum constituted a sale of rights under Loft Law section 286(12). This claim is without merit. MDL section 286(12) provides in relevant part that "subsequent to the effective date [of the Loft Law] an owner and residential occupant may agree to the purchase by the owner of such person's rights to the unit."

In the document signed after the effective date of the Loft Law, Mr. Peleg agreed to have all occupants vacate the second floor but no time frame was provided. Moreover, the parties agreed to allow petitioners to pay three month's rent from the \$20,000 deposit, leaving the owner with a deposit of \$9,750 consisting of two months of rent. There is nothing to show that this agreement was a contemplation of a sale of rights within the meaning of the MDL. There is no evidence that the parties explicitly agreed to or understood that the owner was purchasing the occupants' existing or future rights to the unit under the Loft Law. There is also no proof that this sale was filed with the Loft Board as required. 29 RCNY § 2-10. All that was agreed was that petitioner would draw down a portion of their security deposit to pay three months of rent, possibly move out at some future date, and, if not, to pay a higher rent. Petitioners did not move out and paid a higher rent.

Respondent's reliance on *Matter of Zabari*, Loft Bd. Order No. 1899 (Jan. 4, 1996) for the proposition that a tenant may implicitly waive their Loft Law rights is without merit. On appeal the First Department rejected as "arbitrary and capricious" the Loft Board's finding of implied waiver of rent regulation where an occupant negotiated a lease containing no mention of the Loft Law and agreed to pay more than the maximum regulated rent. *See Zabari v. NYC Loft Bd.*, 245 A.D.2d 200 (1st Dep't 1997); *see also Matter of Wood*, Loft Bd. Order No. 1266 (Nov. 21, 1991) (below market rate lease extension did not show that tenant waived rent regulation); *Matter of Klein*, OATH Index No. 300/06 at 7-8 (May 3, 2006), *adopted*, Loft Bd. Order No. 3460 (Oct. 16, 2008) (deregulation or waiver of rights cannot be inferred from the payment of higher than regulated rent where there never was any discussion concerning the sale of rights or improvements or payments for those rights); *McIntosh*, OATH No. 604/02 at 16-17 (interpreting the First Department's holding in *Zabari* as a rejection of implicit waiver of rent regulation).

In sum, the preponderance of the credible evidence demonstrates that the second floor was utilized as a typical live-work situation that the Loft Law was designed to cover. As Ms. Allweis explained, her "studio" can mean anything such as when she bakes "props" in the kitchen and that art production can occur in the living room as well as other parts of the loft (Tr. 219-20, 224-25). With the exception of the front public hallway, the rear stairwell, the elevator, and the elevator mechanical room, the second floor is eligible for coverage.

Tax returns filed by Ms. Allweis and Mr. Peleg do not preclude coverage or protected occupancy

Respondent argues that the application for coverage and protected occupancy must be dismissed based upon case law holding that tenants can be evicted for non-primary residency when their tax returns indicate that they did not reside in their rent-regulated units. Here, Mr. Peleg and Ms. Allweis filed five sets of tax returns indicating that they did not live in the Building and used the second floor for their business.

It is not disputed by respondent that Ms. Allweis and Mr. Peleg have, in fact, resided on the second floor since 1996. However, from 2008 through 2012 they filed joint federal tax returns stating that they lived at 46 Grand Street, Brooklyn, New York and deducted rent for the second floor as an expense for their business (Pet. Exs. 22; Resp. Exs. K-N, AAAAAA). In 2013, Ms. Allweis and Mr. Peleg filed a joint federal tax return stating that they lived on the second floor of the Building and deducted rent for their business also located there (Pet. Ex. 23). Their business, Handmade Group Corp. ("Handmade") also deducted rent for the second floor on federal tax filings in 2012 and 2013 (Pet. Exs. 30, 31).

Tax returns for the years 2014 and 2015 indicate that Ms. Allweis and Mr. Peleg resided in the Building and that they did not take any business deductions for rent paid. Handmade's tax returns for these same years claimed business rent deductions (Pet. Exs. 24-25, 32-33).

Below is a chart showing the tax year and the percentage of rent deducted by Ms. Allweis and Mr. Peleg on their personal federal tax returns as a business expense from 2008 to 2015, with comments.¹

Tax Year	% of Rent Deducted	Comments
2008	91.39% or 91.77%	parties disagreed about amount of rent paid
2009	80.33%	
2010	48.21% or 64.28%	petitioners included rent paid out of \$20,000 security deposit, respondent did not
2011	69.08%	
2012	0%	100% business deduction taken by Handmade
2013	81.94%	132.23% business deduction also taken by Handmade

¹ The parties disagreed over some of the amounts of annual rents paid and each provided their own charts with their figures and percentages of the deductions (ALJ Exs. 3, 4).

2014	0%	45% business deduction taken by Handmade
2015	0%	53.33% business deduction taken by Handmade

In 2015 Ms. Allweis and Mr. Peleg filed amended tax returns for the years 2011 to 2013, changing their residential address from 46 Grand Street to the second floor of the Building and/or removing all their business deductions for rent paid on the second floor (Tr. 696-97; Pet. Exs. 26-27; ALJ Exs. 3, 4). As a result, Ms. Allweis and Mr. Peleg paid additional taxes to the Internal Revenue Service ("IRS") (Pet. Ex. 43). At the same time, Handmade amended its tax returns for the years 2012 and 2013 and took a 45% deduction for the rent paid (Pet. Exs. 35-36; Resp. Exs. TTTTTT, AAAAAA). Mr. Gillen, respondent's tax expert, testified that the time for filing an amended tax return is three years from the due date of the original filing. Since the amendment to the 2011 tax return was filed more than three years after the original filing, it was not processed by the IRS (Tr. 695-96).

Mr. Gillen testified that he reviewed the tax returns filed by Ms. Allweis and Mr. Peleg and opined that the IRS would view their 2008 and 2009 tax returns as reflecting that they lived at 46 Grand Street and used the second floor unit solely for commercial purposes. Their returns and related forms stated that: they lived elsewhere, they used the second floor unit for a business, and they deducted nearly all of that rent for their business. The returns made no reference to any residential use of the second floor unit and suggested that it was used exclusively for business purposes (Tr. 691-95, 698-99, 710-11).

Mr. Peleg explained his reason for using 46 Grand Street as the family's address on their tax returns filed between 2008 and 2012. He testified that, in 2007, he discussed with Mr. Beswick the possibility of moving into Mr. Beswick's building at 46 Grant Street because of the problems he and Ms. Allweis were having with respondent. Mr. Beswick's building was vacant and uninhabitable without heat, water, or electricity. Mr. Peleg and Mr. Beswick entered into a verbal agreement whereby Mr. Peleg's time and materials invested in renovating the building would be reimbursed in the form of a rent reduction over a five-year period. Mr. Peleg and Mr. Holmberg performed renovation work over the course of several years, but there were numerous delays and problems. As a result, Mr. Peleg and his family never moved into 46 Grand Street.

Mr. Peleg's testimony was corroborated by Mr. Beswick and Mr. Holmberg (Tr. 34-37, 42-50, 210, 316-22; Pet. Ex. 1).

Mr. Peleg testified that starting in 2008 he told his accountant to list 46 Grand Street as his residence and to take rent paid for the second floor as a business expense. Mr. Peleg stated that he used the Grand Street address as his residence, even though he and Ms. Allweis were not living there, because they were in a "predicament" in that they were living in an illegal situation on the second floor of the Building and because they were hoping to move to Grand Street shortly. When asked to explain how he came up with the specific rent deductions, Mr. Peleg was unable to do so. He stated that he is an artist, that he had no time to immerse himself in the tax preparation, that he is often too exhausted from all the work he has to do, and that tax returns are very complicated (Tr. 336-39, 411-19, 446-48, 494-96, 502-16, 634-41).²

Mr. Peleg and Ms. Allweis claimed that even though they knew they were signing the tax returns under penalty of perjury, they never bothered to read them carefully. Ms. Allweis testified that she was busy with her creative work and raising a family and trusted her husband to do what was right. Mr. Peleg stated that he tried to do his best with the tax returns and that he trusted his accountant to prepare the tax returns correctly (Tr. 197, 450-57, 481-83, 507, 519-21).

Mr. Peleg claimed that, when he started having doubts about moving to 46 Grand Street, which was also around the time that he began the Loft Law application, he realized that he had made mistakes in the filing of the previous tax returns. As a result he amended the 2011, 2012, and 2013 tax returns, paid the additional taxes and penalties, and started filing personal tax returns with the Building's address and separate business tax returns with the business rent deductions (Tr. 343-59, 429-32, 483-84, 635-36).

A. Coverage Cannot be Defeated by the 2008 and 2009 Tax Returns

As discussed above, all of the statutory criteria set forth in MDL section 281(5) for establishing residential occupancy of the second floor between 2008 and 2009 have been satisfied. At issue is whether Ms. Allweis' and Mr. Peleg's 2008 and 2009 federal tax returns

² In addition to filing their taxes with the 46 Grand Street address, Ms. Allweis and Mr. Peleg testified that they used the same address for various family members' voter registrations, to receive mail, Mr. Peleg's driver's license, life insurance, bank statements, and other family members' tax returns (Tr. 187-88, 376, 412-14, 627-28, 670-75; Resp. Exs. I, W, X, Z, OOOOO, VVVVV, WWWWW).

stating that they lived at 46 Grand Street and used the second floor for their business, preclude a finding of Loft Law coverage. In support of this argument, respondent relies on *Ansonia Assocs. v. Unwin*, 130 A.D.3d 453 (1st Dep't 2015) and *Goldman v. Davis*, 49 Misc.3d 16 (App. Term, 1st Dep't 2015).

These cases involved non-primary residency holdover proceedings brought by landlords against the lessors of rent-stabilized apartments. In awarding the landlord possession of the rent regulated unit in *Ansonia*, the First Department held that the evidence established the apartment was not the tenant's primary residence because, in the tenant's prior federal income tax returns, the tenant deducted the entire rent for the apartment as an expense of her S Corporation. The Court noted the tenant's argument that the apartment was her primary residence was "contrary to declarations made under the penalty of perjury on income tax returns" that is, that she does not occupy the apartment for personal use. The Court rejected the tenant's argument, under the Rent Stabilization Code that "no single factor shall be solely determinative" and concluded that the tenant "may not claim primary residence because that claim is 'logically incompatible' with the position she asserted on her tax returns." *Ansonia*, 130 A.D.3d at 454. See also *Brookford, LLC v. DHCR*, 142 A.D.3d 433, 435 (1st Dep't. 2016) (where the First Department further explained its holding in *Ansonia* to include that the instructions on the tenant's tax returns "specifically disallowed the deduction of rent for dwellings occupied by any shareholder for personal use.").

In awarding the owner possession of the rent regulated unit, the Court in *Goldman* stated that it was "constrained by" *Ansonia* and that the tenant's federal tax returns showing the tenant deducted the entire rent for an apartment as an expense of her S Corporation precluded a finding that it was her primary residence. *Goldman*, 49 Misc.3d at 17-18.

In upholding the owners' right to evict the tenants for non-primary residency, *Ansonia* and *Goldman* relied on *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009), where the Court of Appeals held that a party may not assert a position contrary to a position taken in an income tax return. There, the Court stated that it "cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns." 12 N.Y.3d at 422.

For a number of reasons, the holdings in *Ansonia* and *Goldman*, involving tenants' right to occupy their rent regulated units, do not apply to the issue of building or unit coverage under the Loft Law. The apartments in *Ansonia* and *Goldman* were covered under a regulatory scheme where the prime lessees were on notice that primary residency was a legal requirement for renewal of their leases for rent stabilized units. Loft Law coverage involves a regulatory scheme where the status of an illegally occupied unit or building is determined based on specific criteria in the MDL, not the right of an individual to occupy that unit. Furthermore, the public policy considerations in *Mahoney-Buntzman*, to disallow parties from asserting a position in legal proceedings that contradict declarations made on their tax returns are different from the public policy considerations underlying the Loft Law, namely, to bring residentially occupied commercial buildings into compliance with applicable laws and codes.

When the Loft Law was enacted in 1982, the Legislature created the "IMD" classification of formerly commercial loft spaces that were being occupied residentially with the mandate of legally converting them to safe and legal residential use. Once a building or a unit is covered by the Loft Law it becomes rent regulated and the owner is required to legalize it under Article 7-B of the MDL and obtain a residential certificate of occupancy. MDL § 284 (Lexis 2016).

In enacting the Loft Law, the Legislature was cognizant of the illegality of these tenancies pending a Loft Law coverage proceeding and declared, "It shall not be a ground for an action or proceeding to recover possession of a unit occupied by a residential occupant qualified for the protection of [the Loft Law] that the occupancy of the unit is illegal or in violation of provisions of the tenant's lease or rental agreement because a residential certificate of occupancy has not been issued for the building, or because residential occupancy is not permitted by the lease or rental agreement." MDL § 286(1). Similarly, the Legislature expressly permitted continued occupancy of an IMD unit "[n]otwithstanding any other provision of the [MDL] or any other law, code, rule or regulation." MDL § 283.

In many buildings located outside the geographic areas subject to the Loft Law, landlords were aware of and were complicit in tenants' use of their commercial units for residential purposes. Thus, it is not surprising that a tenant, living in an illegal situation, would choose not to list that dwelling as a primary residence on his or her tax returns even under the penalty of perjury. In the instant case, long before the Loft Law was amended in 2010 to allow for

coverage of the Building, the owner was aware of petitioners' residential use of the second floor, the owner's principal was also living on another floor without a residential certificate of occupancy, and the owner also made representations in various court proceedings, insurance and mortgage records, and legal documents, including tax *certiorari* petitions, that the Building and in particular the second floor was occupied residentially (Pet. Exs. 10, 12-13, 15, 61-65, 73-74).

In reviewing coverage applications, a tenant's address on a window period tax return that is different from the address of the applied for unit has not been a basis for denying coverage. *Matter of Gurkin*, OATH Index No. 489/12 at 16 (Dec. 14, 2012), *adopted*, Loft Bd. Order No. 4186 (Oct. 17, 2013); *see also Madeline d'Anthony Enterprises, Inc., v Sokolowsky*, 101 A.D.3d 606, 607 (1st Dep't 2012) (for purposes of establishing coverage, "a unit need not be the sole residence of the occupant during the window period."); *Matter of Boyers*, OATH Index Nos. 1338/12, 1381/12, 1403/13 at 22-24 (Feb. 10, 2014), *adopted in part, rejected in part*, Loft Bd. Order No. 4302 (Sept. 18, 2014) (tax returns not dispositive but are factors to consider).

Similarly, the Courts, the Loft Board, and this tribunal have never required that an applicant prove primary residency of the window period occupants to cover a unit or building under the Loft Law. *Vlachos v. NYC Loft Bd.*, 70 N.Y.2d 769, 770 (1987); *BOR Realty Corp. v. NYC Loft Bd.*, 70 N.Y.2d 720 (1987); *Matter of Mirviss*, OATH Index No. 617/96 (Mar. 19, 1996), *adopted*, Loft Bd. Order No. 1958 (Apr. 25, 1996); *see also Little West 12th St. Realty L.P. v. Inconiglios*, 19 Misc.3d 508, 516-17 (Civ. Ct. of City of N.Y. 2008) ("initial determination regarding Loft Law coverage depends on whether three or more units were occupied for residential purposes during the window period, not on whether they were occupied as the primary residences of their tenants."); *Pitties v. NYC Loft Bd.*, 201 A.D.2d 388, 389 (1st Dep't 1994) (deducting rent as business expenses on a tax returns "does not mandate a finding that the premises was used for business purposes within the meaning of the Loft Law."); *Kaufman v. American Electrofax Corp.*, 102 A.D.2d 140, 142 (1st Dep't 1984) (unit covered by Loft Law even though occupant maintained a separate primary residence).

Instead, the legalization mandate under the Loft Law for the coverage of a building or a unit is based upon the specific elements set forth in MDL section 281. In *Matter of Jo-Fra Properties, Inc.*, 27 A.D.3d 298, 299 (1st Dep't 2006), the First Department rejected an owner's assertion that Loft Law coverage was barred as a result of the tenant's long delay in seeking such

coverage making legalization a physical impossibility and fiscal hardship to the owner. The Court held that Loft Law "coverage under a rent regulatory scheme is governed by statute and may not be created or destroyed by laches, waiver and estoppel."

Adopting respondent's quasi-estoppel theory set forth in *Ansonia* and *Goldman* to coverage of the second floor unit would also be inconsistent with the remedial nature of the Loft Law. As stated by the First Department in *Association of Commercial Property Owners v. NYC Loft Bd.*, 118 A.D.2d 312, 318 (1st Dep't 1986): "Given the choice of two interpretations of the Loft Law, one restricting coverage and one broadening it, the remedial nature of the legislation forcefully argues for the adoption of the latter course . . . To the extent the Loft Law is restricted in its coverage, the purpose of the law is defeated."

Notably, the tenants' declarations on their tax returns in *Ansonia* and *Goldman* had no legal effect on the rent regulated status of their units.³ Similarly, the declarations of Mr. Peleg and Ms. Allweis on their tax returns have no legal effect on the eligibility of the second floor unit for coverage.

Even assuming that the tax returns filed by Ms. Allweis and Mr. Peleg undermined their application for coverage, they cannot preclude other occupants from asserting a coverage claim. Ms. Katz, an occupant of the second floor and an applicant for coverage, offered evidence as to the residential occupancy of the second floor that is not disputed by respondent.

Respondent's motion to dismiss Ms. Katz as an applicant was denied at the start of the trial because respondent failed to show that she did not have standing to pursue coverage (Tr. 10-14). There is no requirement in the Loft Law or the Loft Board's Rules that an occupant in a unit must be an applicant for both coverage and protected occupancy. Respondent's reliance on *Matter of Kelleher*, Loft Bd. Order No. 4171 (Oct. 17, 2013), adopting, OATH Index No. 270/12 (Mar. 19, 2012), was misplaced. There, the Loft Board held that an applicant had no standing to pursue a coverage application because she had been evicted for the non-payment of rent and was no longer in possession of the subject unit. Here, Ms. Katz is in possession of the unit and has an

³ The eviction of a tenant from a rent-regulated unit for non-primary residence does not automatically render the rent regulated apartment deregulated. Deregulation generally occurs based on rents and occupants' incomes reaching certain levels. See 9 Admin. Code §§ 26-504.1, 16-504.2, 25-504.3 Lexis 2016); see also New York State Division of Housing and Community Renewal ("DHCR") Fact Sheet #1 at 4: Rent Stabilization and Rent Control at <http://www.nysdcr.org/Rent/FactSheets/orafac1.pdf>.

interest in it being covered: as a family member, she may have succession rights pursuant to Loft Board Rule 2-08.1(c). 29 RCNY § 2-08.1(c).

As there is no dispute that the second floor was occupied residentially during the 2008-2009 window period for 12 consecutive months and that all the statutory criteria of MDL section 285(1) have been met, it should be covered under the Loft Law.

B. Ms. Allweis and Mr. Peleg qualify for protected occupancy

The more difficult questions to resolve are whether *Ansonia* and *Goldman* apply to the issue of protected occupancy, and, if so, whether the tax returns filed by Ms. Allweis and Mr. Peleg, stating that they lived at 46 Grand Street and used the second floor for their business, preclude them from being the protected occupants of that unit.

Under section 2-09(b)(1) of the Loft Board Rules, the current occupant in possession of an IMD is presumptively protected: "Except as otherwise provided herein, the occupant qualified for protection under Article 7-C is the residential occupant in possession of a residential unit, covered as part of an IMD." Thus, under this rule, Ms. Allweis' and Mr. Peleg's long-term residential occupancy would be sufficient to establish that they are the protected occupants under section 2-09(b)(1) of the Loft Board Rules as the prime lessees in possession of the second floor since prior to 2008. 29 RCNY § 2-09(b)(1) (Lexis 2016).

Notably, under Loft Board Rule section 2-09(b)(2) Ms. Katz would also qualify as a protected occupant because she has lived in the unit since before June 21, 2010 (Tr. 104-07). 29 RCNY § 2-09(b)(2) ("If the residential occupant in possession of a covered unit is not the prime lessee, the lack of consent of the landlord . . . does not affect the rights of such occupant . . . provided that such occupant was in possession of such unit prior to . . . June 21, 2010").

However, because Ms. Allweis and Mr. Peleg are the prime lessees, Ms. Katz withdrew her application for protected occupancy based on the Loft Board's holding in *Matter of Various Tenants of 357 Bowery*, Loft Bd. Order No. 4350 (Jan. 15, 2015). There, the Board found that a residential occupant who was never a prime lessee is not "automatically" protected where a prime lessee asserts a right of protected occupancy. The Board held, without citation to any legal authority beyond a new interpretation of its protected occupancy rules, that, because the prime

lessee was in possession, he was the sole occupant entitled to protection, and that the life partner could have succession rights pursuant to 29 RCNY section 2-08.1(c).

In addition to no longer bestowing protected occupancy status on tenants when there is a prime tenant in possession, the Loft Board broke from long-standing precedent regarding the proofs necessary for a prime tenant to establish protected occupancy in case law discussed below. The Loft Board now requires that prime tenants prove primary residency in their prospectively covered units.

In imposing the new primary residency requirement, the Loft Board relied on the first sentence of Loft Board Rule section 2-09(b)(4) that states the prime lessee "is deemed to be the residential occupant qualified for protection . . . if the prime lessee can prove that the residential unit covered as part of an IMD is his or her primary residence, even if another person is in possession." 29 RCNY § 2-09(b)(4) (Lexis 2016). The Loft Board did not discuss the following sentence of this section that provides, "If the prime lessee or sublessor fails to prove that such unit is his or her primary residence, any rights of such person to recover the unit are extinguished." Nor did it note the subsections of this rule that state a "prime lessee or sublessor must exercise, in a court of competent jurisdiction, his or her right to recover the unit upon the expiration or termination of the sublease under the terms of which the prime lessee or sublessor is the immediate overtenant, provided that the sublease was in effect on" the specified dates in the rest of the section. 29 RCNY § 2-09(b)(4)(i), (ii).

In the past, 29 RCNY section 2-09(b)(4) was a mechanism that allowed an out-of-possession prime lessee to go to a court of competent jurisdiction to evict a subtenant upon a showing that the unit is the prime lessee's primary residence. *See, e.g., Bishar v. Dukas*, 129 Misc.2d 652, 656 (Civ. Ct. N.Y. Co. June 24, 1985) (interpreting section 2-09(b)(4) as permitting a right to recovery by the prime lessee of existing IMD unit if the prime lessee can prove primary residency); *Matter of Smulka*, Loft Bd. Order No. 1914 at 10 (Feb. 29, 1996) (restating rule that section 2-09(b)(4) as permitting a right to recovery by the prime lessee of proposed IMD unit in coverage proceeding if the prime lessee can prove primary residency); *Matter of Sideri*, OATH Index No. 1637/95 at 8 (June 6, 1996), *adopted*, Loft Bd. Order No. 1988 (June 27, 1996) (under section 2-09(b)(4) any rights lost by the prime lessee's failure to demonstrate that the residential unit covered as part of an IMD is his or her primary residence may only be claimed by either the

landlord or by another person who has qualified for protection under the subletting regulations); *Matter of Jacobson*, Loft Bd. Order No. 304, 3 Loft Bd. Rptr. 42, 43 (Sept. 26, 1985) (Loft Board declined to adjudicate a prime lessee's claim of protected occupancy under 2-09(b)(4), stating that this issue "shall be more appropriately determined by a court of competent jurisdiction").

The Loft Board's novel interpretation that 29 RCNY section 2-09(b)(4) requires a prime lessee to prove primary residency in order to be a protected occupant appeared for the first time in *Matter of Pak*, Loft Board Order No. 4334 (Nov. 260 2014), *adopting in part, rejecting in part and remanding*, OATH Index No. 2447/13 (Oct. 9, 2014). In *Pak*, the Board adopted Judge Addison's finding as to unit coverage but remanded for a determination on the applicant's request for protected occupancy based on primary residency. The Board stated, *sua sponte*, "because Ms. Pak is the prime lessee of the Unit, the issue is whether the Unit is her primary residence." The Board relied on section 2-09(b)(4) without any discussion.

In *Matter of Gallo*, OATH Index No. 2401/13 (Oct. 10, 2014), *adopted in part, rejected in part*, Loft Board Order No. 4349 (Jan. 15, 2015), Judge Gloade found a prime lessee, with a documented residence on Long Island, to be a protected occupant under 29 RCNY section 2-09(b)(1) as a prime lessee currently in possession of her unit. In reaching this conclusion, Judge Gloade rejected the owner's argument that the prime tenant was required to establish that the unit was her primary residence under 29 RCNY section 2-09(b)(4), a provision that was inapplicable where the prime tenant was currently in possession of the unit. Some two months after *Pak*, the Board rejected Judge Gloade's finding, holding that the prime lessee was required to prove that the unit "is" her primary residence under section 2-09(b)(4) in order to have protected rights. The record showed that the unit had not been the prime tenant's primary residence since 1999/2000 and there was insufficient evidence to show that the prime tenant stayed regularly in the loft during the window period. Moreover, tax returns between 2007 and 2010 listed the prime tenant's address on Long Island. Because the prime lessee was not a primary resident of the loft, her protected occupancy application was denied. Subsequently, the Loft Board in Order No. 4426 (Sept. 17, 2015), denied the prime tenant's reconsideration application, stating that section 2-09(b)(4) applied to all prime lessees seeking protected rights.

In *Matter of Schuss*, Loft Bd. Order No. 4393 (May 21, 2015), *adopting in part, rejecting in part*, OATH Index No. 2066/12 (Mar. 25, 2013), the Board held that under 29 RCNY section 2-09(b)(4), the prime lessee of a unit, who had lived there since 1988 and whose proofs established that the unit "is" his primary residence, was the protected occupant.

Similarly in *Matter of Mignola*, Loft Bd. Order No. 4509 (Apr. 21, 2016), *adopting in part, rejecting in part*, OATH Index Nos. 2482/11, 2483/11, 2484/11, 240/12, 808/12, 809/12, 810/12 & 1616/12 (May 29, 2013), the Board held that, under 29 RCNY section 2-09(b)(4), prime lessees currently in possession of an IMD unit must prove that the unit "is" their primary residence in order to be found protected, although subtenants or statutory tenants do not need to supply such proof. As noted by Judge Lewis in *Matter of Saladino*, OATH Index Nos. 2412/13 & 1879/14 at 61 (May 20, 2016), the Loft Board's new interpretation of section 2-09(b)(4) creates the illogical result of imposing upon prime lessees the more stringent requirement of proving primary residence, which is not imposed on subtenants or statutory tenants who have never had leases. Judge Spooner also observed that the Loft Board's 2016 findings of primary residency in *Mignola* raised due process concerns because the issue was never litigated at the trial that took place in 2012, long before this requirement was articulated by the Board in 2014. *Matter of Tenants of 58 Grand Street, Brooklyn*, OATH Index No. 212/15 at 30 (June 24, 2016).

Most recently, in *Matter of Tenants of 979-987 Dean Street, Brooklyn*, OATH Index No. 1714/14 (Apr. 30, 2015), *adopted in part, rejected in part*, Loft Bd. Order No. 4533 (June 16, 2016), the Board again held that, under 29 RCNY section 2-09(b)(4), prime lessees currently in possession of an IMD unit must prove that the unit "is" their primary residence to be found protected. The Board looked to the factors set forth in the Rent Stabilization Law to determine primary residency in rent stabilized units, including the address used on tax returns, voting registrations, and driver's license, the number of days the tenant resided in the unit in the most recent calendar year, and whether the tenant subleased the unit. Using these factors, the Board found, based on tax returns, utility bills, and bank statements from 2008 and 2011, that each of the prime tenants "is" using the unit as the primary residence and, thus, a protected occupant. Notably, because the hearing was a default and the tenants produced documents from the window period, no recent documentation was available for the Loft Board to determine current primary residency.

Prior to *Pak*, the Courts, the Loft Board, and this tribunal never required that an occupant prove primary residence as a requirement for a determination of protected occupancy status. *See, e.g., Gurkin*, OATH No. 489/12 at 16-17, 23 (issue of tenant's second residence irrelevant to whether he was a protected occupant); *Matter of Pels*, OATH Index No. 2481/11 at 11-12 (June 20, 2012), *adopted*, Loft Bd. Order No. 4161 (June 20, 2013) (tenant who created residential occupancy in loft unit prior to the window period but lived in the unit intermittently during window period found to be a protected occupant); *Matter of MKF Realty Corp.*, Loft Bd. Order No. 2822 (Sept. 18, 2003) (rejecting argument that "the unit be proved to have served as the tenants' primary residence"); *Matter of Van Derbeek*, OATH Index No. 1972/01 (Feb. 13, 2002), *adopted*, Loft Bd. Order No. 2717 (Mar. 14, 2002) (issue of primary residence held irrelevant to both coverage of unit and to protected occupancy); *Matter of Dawe*, Loft Bd. Order No. 1403 at 12 (Mar. 3, 1993) (finding individual to be the protected occupant of second floor unit, based on proposition that "Article 7-C does not require that a residentially occupied unit be the primary residence of the tenant"); *Matter of Tenants of 141-151 South Fifth Street*, Loft Bd. Order No. 1300 (Jan. 30, 1992) ("It is well-established . . . that Cipriani need not establish that the loft was her primary residence in order to obtain IMD coverage or a finding of protected occupancy."); *see also 577 Broadway Real Estate Partners v. Giacinto*, 182 A.D.2d 374 (1st Dep't 1992) (outgoing tenant need not show primary residence to sell fixtures).

In fact, just eight months before *Pak*, the Loft Board reinforced the irrelevance of primary residency to a finding of protected occupancy in *Matter of Cohen*, OATH Index No. 2015/12 (Aug. 23, 2013), *adopted*, Loft Bd. Order No. 4261 (Mar. 20, 2014). In *Cohen*, the owner opposed a prime lessee's application for protected occupancy on the grounds that the unit was not his primary residence. Judge Addison rejected this challenge, stating that the issue of primary residence was not relevant to the application for protected occupancy and that the appropriate remedy for the owner would be to bring eviction proceedings in a "court of competent jurisdiction," as recognized in 29 RCNY section 2-08.1(a)(1). The Loft Board accepted Judge Addison's findings and noted that she "properly rejected the Owner's argument."

Loft Board Rule section 2-08.1(a)(1) provides:

- (a) Grounds for eviction. The landlord of an IMD registered with the Loft Board may bring eviction proceedings against the residential occupant of a unit in a court of competent jurisdiction on any of the following grounds:
 - (1) That the unit is not the primary residence of such residential occupant, except that where a lease or rental agreement is in effect between the landlord and such residential occupant, the landlord may not seek to evict such occupant until such lease or rental agreement is no longer in effect.

29 RCNY § 2-08.1(a)(1). This rule was promulgated in 1984 and was designated section J(1)(a). When enacted, certain tenants challenged the rule as *ultra vires*. The rule was upheld as a valid exercise of the Loft Board's statutory duty because it embodied the same restrictions that applied to other rent-regulated tenants under the rule that "statutes in *pari materia* are to be construed together and 'as intended to fit into existing laws on the same subject unless a different purpose is clearly shown.'" *Lower Manhattan Loft Tenants v NYC Loft Bd.*, 66 N.Y.2d 298, 304 (1985).

Specifically, the rent stabilization and rent control laws relegate determinations of primary residence to courts of competent jurisdiction. 9 NYCRR § 2524.4(c); 9 NYCRR § 2200.2(f)(18). As a result, DHCR, the agency with jurisdiction to hear cases under the rent stabilization and rent control laws, does not have jurisdiction to adjudicate primary residence status. Admin. Code § 26-504(a)(1)(f) (Lexis 2016); *10 West 66th Street Corp. v. New York State Div. of Housing & Community Renewal*, 184 A.D.2d 143, 146-147 (1st Dep't 1992).

In imposing the new residency requirement in *Pak* and its progeny, the Loft Board never discussed the appropriate time frame for assessing the proof of primary residence, *i.e.*, during the window period, on the effective date of the Loft Law, at the time of the filing of the protected occupancy application, at the time of adjudication, or at the time of the issuance of the Loft Board Order. Nonetheless, the language in the various Loft Board Orders framed the question in the present tense, namely, whether the unit "is" the primary residence of the prime lessee which is the language found in 29 RCNY section 2-09(b)(4). Notably, these cases all involved units that were the subject of a coverage proceeding, not already registered IMD units. The adjudication of protected occupancy based on current primary residency was made at the same

time that the unit was deemed a covered unit pursuant to the Loft Board's Orders, long after the evidentiary trial was held.

At the time the Loft Board imposed the new requirement that prime tenants prove primary residency to be protected occupants, it never referred to the intent or the text of the Loft Law. When the Loft Law was enacted in 1982, it made no mention of primary residency. See *Kaufman*, 102 A.D.2d at 142 (There is nothing "in the statute, albeit such provisions are contained in other statutes, requiring that the premises must have been the primary residence of the occupant before he will be entitled to the protection of the statute.").

In 1992, the New York State Legislature amended the Loft Law to add, among other things, the phrase "provided that the unit is their primary residence" to MDL Section 286(2)(i). L 1992, ch. 227, § 2. Section 286(2)(i) now reads: "Prior to compliance with safety and fire protection standards of Article 7-B of this chapter, residential occupants qualified for protection pursuant to [the Loft Law] shall be entitled to continued occupancy, provided that the unit is their primary residence,"

The Legislature couched the primary residency requirement in MDL section 286(2)(i) in the present tense prior to the legalization of the unit. There is no suggestion anywhere in the Loft Law that the primary residency requirement was intended to apply before a building or a unit was covered by the Loft Law. The most logical interpretation of MDL section 286(2)(i) is that before there can be a residential occupant qualified for continued occupancy, there must be a covered unit subject to Article 7-C compliance. Thus, prior to the final adjudication of a combined coverage and protected occupancy application, it would be inappropriate to consider whether an applicant is the primary resident of the unit for which protected occupancy and coverage is sought. Rather, any evaluation of primary residence as a prerequisite for continued occupancy should begin after the unit is covered under Article 7-C of the MDL either by a final adjudication of coverage or by registration of the owner.

More importantly, nothing in Article 7C of the MDL authorizes the Loft Board to hear primary residence status, an adjudication typically done only in a court of competent jurisdiction (Housing Court) pursuant to the Loft Board's own rules. See 29 RCNY § 2-09(b)(4)(i); 29 RCNY § 2-08.1(a)(1). Thus, under its enabling statute, it is doubtful that the Loft Board has jurisdiction to adjudicate primary residency.

An administrative agency may only promulgate rules to implement a law as enacted; it has no authority to fashion any rule out of harmony or in conflict with its enabling statute. *Jones v. Berman*, 37 NY2d 42, 53 (1975). Indeed, an agency rule may be invalidated when found inconsistent with the applicable law. *Thorgeirsdottir v. NYC Loft Bd.*, 161 A.D.2d 337 (1st Dep't 1990) (invalidating a Loft Board rule that added a condition not found in the Loft Law); see also *Matter of Dube*, OATH Index No. 733/98 (Mar. 13, 1998), *vacated and remanded*, Loft Bd. Order No. 2335 (Nov. 24, 1998) (Loft Board regulation barring coverage applications after June 6, 1994, found *ultra vires* as it was "out of harmony" with the statutory scheme to bring unregulated loft dwellings under regulation); *Matter of Hoon On Corp.*, Loft Bd. Order No. 2040 (Nov. 21, 1996) (Loft Board rule that required owners register an IMD before being eligible to exercise their statutory right to purchase improvements from an outgoing tenant consistent with statutory registration mandate contained in MDL section 284(2)).

By requiring prime tenants to establish that their prospectively covered units are also their primary residences to be protected occupants, the Loft Board is conducting a *de facto* eviction proceeding since absent protected occupancy status, a lease in effect, or consent of the landlord, prime tenants would not be entitled to continued occupancy of their units. It thus appears that the Loft Board's new requirement of primary residency for prime lessees as articulated in *Pak* and its progeny may be inconsistent with the Loft Law, longstanding-case law, and the Board's own rules. Under the circumstances, it is suggested that the Loft Board reconsider its new interpretation of protected occupancy for prime lessees.

Because the Building in this case is not currently covered by the Loft Law, the Loft Board should not consider whether Ms. Allweis and Mr. Peleg are the primary residents of the second floor unit. They should be deemed protected occupants under RCNY section 2-09(b)(1) as occupants of a unit that is found covered.

Petitioner agrees that primary residency should not be considered in an application for protected occupancy. Respondent disagrees and argues that the Loft Board's current rulings in *Pak* and its progeny must be followed and that under *Ansonia* and *Goldman*, Ms. Allweis and Mr. Peleg are precluded from claiming protected occupancy of the second floor unit because they asserted on their tax returns that they lived at 46 Grand Street.

If the Loft Board adheres to its rulings on the primary residence status of prime lessees, and assuming the Board finds that the second floor is a covered unit, the following relevant facts are summarized for the next phase of the analysis.

Ms. Allweis and Mr. Peleg are the prime lessees and are currently in possession of the second floor unit. They have lived in the unit since well before the window period and it has been their only residence. The tax returns filed by Ms. Allweis and Mr. Peleg, under penalty of perjury, for the years 2008 through 2012 indicate that their residence was 46 Grand Street, that the second floor unit was utilized for their business, and that they took various deductions for rent paid as a business expense. The 2013 tax return indicate that the second floor was the home address of Ms. Allweis and Mr. Peleg and that they claimed 81.94% deduction for rent paid as a business. Following the filing of their Loft Board application on February 18, 2014, Ms. Allweis and Mr. Peleg filed tax returns for the years 2014 and 2015 that indicate the second floor unit was their residence and that they took no business deductions for rent paid.

Under the Loft Board's new primary residency requirements and the facts of this case, *Ansonia* and *Goldman* do not apply.

As discussed above, *Ansonia* and *Goldman* involved a rent regulated scheme where the prime lessees were required to be primary residents for continued occupancy of their rent-regulated units. By contrast, since 1996, Ms. Allweis and Mr. Peleg have lived in an illegal and non-regulated unit with no legal limitation upon their right to reside elsewhere. It was not until November 2014, after petitioners filed their Loft Law application, that the Loft Board first articulated the primary residency requirement for protected occupancy. There is no logical reason to require Ms. Allweis and Mr. Peleg to prove primary residency during the 2008-2009 window period, or on the 2010 effective date of MDL section 281(5), or at the time of the filing of their application in February 2014. At those times, they were not on notice of the Loft Board's new requirement, nor were they residing in a rent-regulated unit for which primary residency was required. Thus, the disputed tax returns showing that their residence was located at 46 Grand Street and that their business was located on the second floor have little bearing on the pivotal issue in this analysis, namely, their present primary residence status.

Ms. Allweis and Mr. Peleg demonstrated through credible testimony and documentary evidence, including tax records, insurance records, bank and credit card statements, driver licenses, and voter registrations, that since at least 2014 the second floor unit has been and is currently their primary residence (Pet. Exs. 4A, 25-26, 44-45, 53, 74).

Thus, under the most reasonable interpretation of the Loft Board's recent Orders linking protected occupancy to primary residency, Ms. Allweis and Mr. Peleg should be deemed the protected occupants of the second floor unit because it is their primary residence.

FINDINGS AND CONCLUSIONS

1. The Building is an IMD with three or more residentially occupied units on the second, third, and fourth floors.
2. The commercial use of the second floor during the window period does not preclude coverage of the unit.
3. During the window period the rear hallway was used residentially and should be part of the covered unit.
4. The tax returns filed by Ms. Allweis and Mr. Peleg do not preclude a finding of coverage of the second floor unit.
5. Ms. Allweis and Mr. Peleg are the protected occupants of the second floor unit.

RECOMMENDATION

The application, as amended withdrawing Ms. Katz's request to be named a protected occupant, should be granted.


Alessandra F. Zorziotti
Administrative Law Judge

January 18, 2017

SUBMITTED TO:

RENALDO HYLTON

Chair

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NOTICE

A party aggrieved by a determination of the Loft Board may file an application for reconsideration of the determination. Under 29 RCNY § 1-07(b), an aggrieved party must serve the reconsideration application on the affected parties to the prior proceeding. Service of the application shall be completed in accordance with 29 RCNY § 1-06. The aggrieved party must then file the application at the Loft Board's office along with proof of service and the required application fee. Under section 1-07(b), "(t)o be considered timely, a complete reconsideration application must be received by the Loft Board within 30 calendar days after the mailing date of the determination sought to be reconsidered."

Pursuant to 29 RCNY §1-07(d):

A Loft Board determination pursuant to section 1-06 if these rules shall be the final agency determination for the purpose of judicial review, unless a timely application for reconsideration of the determination has been filed. In such case, (i) if the Loft Board modifies or revokes the underlying order, such revocation or modification shall be deemed the final agency determination from which judicial review may be sought; (ii) if the Loft Board denies the reconsideration application, the underlying order shall be deemed the final agency determination; and (iii) if the Loft Board decided the reconsideration application by remanding the matter to the hearing officer for further proceeding, neither the underlying order nor the remand order shall constitute a final agency determination, and no judicial review may be sought until such time as the Loft Board issues a final agency determination following the remand.