

ORDER

NEW YORK CITY LOFT BOARD

In the Matter of the Application of

110 BRIDGE STREET TENANTS

Loft Board Order No. 4914

Docket No.: TR- 1077

**RE: 100 -110 Bridge Street
aka 158 York Street
Brooklyn, New York**

IMD NO.: NONE

ORDER

The New York City Loft Board ("Loft Board") accepts in part and rejects in part the Report and Recommendation of Administrative Law Judge Faye Lewis dated November 9, 2018 ("Report").

BACKGROUND

On May 1, 2013, the following tenants ("Tenants") filed an application seeking Article 7-C coverage for their units located 100 Bridge Street, Brooklyn, New York ("Building") and protected occupancy status for themselves.

Name	Unit
Malia Jensen ¹	4A
Jonathan Weiss and Cynthia Van Elk	4B
Curtis Mitchell	4C
James Thirlwell	4D
John McCormick	4E

The Loft Board docketed the application as TR-1077.

On June 5, 2013, 110 Bridge Realty Corp. ("Owner"), the owner of the Building, filed an answer opposing the application.

The Loft Board transferred the case to the Office of Administrative Trials and Hearings ("OATH"), which assigned the case to Administrative Law Judge Faye Lewis. During 2015, 2016 and 2017 ALJ Lewis held a twenty-three day trial, which primarily focused on the issue of whether the Building contained actively and currently pursued commercial uses which were inherently incompatible with residential use.

In her Report and Recommendation ("Report"), ALJ Lewis found the Building and units met all of the requirements for coverage with the exception of the exclusion for inherently incompatible uses. She found that the building contained two uses that were inherently incompatible with residential use. Therefore, she recommended that the coverage application be denied. As to protected occupancy, she recommended that four out of the five applicants be protected occupants. For the reasons stated below, we reject the recommendation to deny coverage and find that the Building and the units are Interim

¹ Prior to issuance of the Report, Jensen withdrew her application. See, ALJ Ex. 1, Tr. at 2909. However, at the end of the trial and in their post-trial brief, the other tenants sought a determination that Jensen's unit, Unit 4A, is an IMD unit. Tenant's Post-Trial Letter Brief at 1. ALJ Lewis did not make any findings or recommendations regarding Unit 4A in her report and recommendation other than to state that Ms Jensen withdrew her claim for coverage and protected occupancy by stipulation. As Owner did not interpose any objection to Tenant's claim and the record contains sufficient evidence on which the Board can make a finding, the coverage of Unit 4A is included in this decision.

Multiple Dwellings ("IMD"). In addition, we accept the recommendation as to protected occupants, but only based upon the analysis of the "recent interpretation" stated in the Report. *See Report* at 40-41.

ANALYSIS

Article 7-C Coverage Under MDL § 281(5)

In 2010 and again in 2013, the New York State Legislature amended Article 7-C of the Multiple Dwelling Law ("MDL") to expand the definition of an IMD. As previously enacted, coverage under MDL § 281(5) required the building:

- to have been occupied for residential purposes as the residence or home of any three or more families living independently from one another for a period of twelve consecutive months during the period commencing January first, 2008 and ending December 31, 2009;
- to have been, at any time, occupied for manufacturing, commercial, or warehouse use,
- to lack a residential certificate of occupancy, and
- to not contain an actively and currently pursued inherently incompatible use as set forth in use groups fifteen through eighteen of the New York City Zoning Resolution.

In addition, under the MDL and current Loft Board rules, the three residential units occupied during the Window Period had to also meet the following eligibility criteria:

- not be located in a basement or cellar
- have an least one entrance that does not require passage through another residential unit to obtain access to the unit
- have at least one window opening onto a street or a lawful yard or court as defined in the zoning resolution and
- be at least 400 square feet.

See, MDL § 281(5) and section 2-08(d)(1) of Title 29 of the Rules of the City of New York ("29 RCNY"). *See also*, *Matter of Gubelmann*, Loft Board Order No. 4671 (May 18, 2017).

In 2019, the Legislature amended the Loft Law again. Relevant to this case, the amendment changed the exclusion in MDL § 281(5) relating to inherently incompatible uses to apply only to uses in use group eighteen of the New York City Zoning Resolution. *See*, Chapter 41 of the Laws of 2019, § 1. Furthermore, the amendments took effect immediately and applied to applications pending approval. *See* Chapter 41 of the Laws of 2019, § 11.

The Building is a Multiple Dwelling

Based upon the 2019 amendments, the Building does not contain inherently incompatible uses

In her Report, Judge Lewis indicated that the Building contained two non-alcoholic beverage processing facilities both of which fell into Use Group 17B. *See Tr.* at 666 and 715. She heard extensive testimony and wrote an in depth analysis, ultimately concluding that these two uses constituted High-Hazard Group H occupancies pursuant to section 307.1 of the Building Code. *See*, 29 RCNY § 2-08(k)(iii). She based this conclusion on the fact that the two facilities used and stored corrosive cleaning chemicals for their vats in excess of the maximum amounts allowed under the statute.

However, based on the 2019 amendments, the Board need not reach the issue of whether Judge Lewis was correct in her analysis because the amendments eliminated uses in Use Group 17 from the exclusionary provision pertaining to inherently incompatible uses. As there is no dispute that these commercial uses fall into Use Group 17B, there are no inherently incompatible uses in the Building that would prohibit coverage. The Loft Board therefore rejects this portion of Judge Lewis' analysis as unnecessary.

Window Period Occupancy

Unit 4A

In the September 2014 agreement settling Malia Jensen's claim for coverage under the Loft Law, the parties agreed that Jensen, "is the tenant of Unit 4A in the Building who originally moved in as a subtenant...in 2003 and who became the tenant without a lease in 2006. The parties further agreed that Unit 4A was "residentially occupied and physically altered to reflect...residential use, including the installation of a full kitchen, a full bathroom, a bedroom and a living area...since at least prior to January 1, 2008. See, ALJ 1 (Agreement) at 1. Furthermore, during the trial, the parties stipulated that the Jensen unit was residentially occupied since at least before January 1, 2008. See Tr. at 2912. Based upon these statements, the Board concludes Unit 4A was residentially occupied during the 2008-2009 window period.

As to the other units, Judge Lewis found that all of the applicants resided in their units for twelve consecutive months during the 2008-2009 window period. We agree.

Unit 4B

Owner contested window period occupancy of this unit stating that Jonathan Weiss and his wife, Cynthia Van Elk only used the unit sporadically during the window period. See *Owner's Post-Trial Memorandum of Law* at 41. Therefore, the unit was not residentially occupied. The Board finds that Judge Lewis correctly rejected this argument.

Mr. Weiss moved into the unit in 1992 pursuant to a lease with Mr. Eisenberg. See Pet. Ex. 18 (Lease). He made extensive renovations including the installation of kitchen and bathroom. See, Tr. at 330. Although he moved to Amsterdam from 1999 to 2000, he returned to the unit and made further renovations, necessitated by damage caused by subletters. See, Tr. at 331. He occupied the unit with Ms. Van Elk and a roommate, Mr. Vengrow from 2001 through 2009. See, Tr. at 339-340. During the window period, he and Ms. Van Elk slept and ate in the unit along with Mr. Vengrow. On weekends, Mr. Vengrow's son joined them. See, Tr. at 352. They also rented out the loft for photo shoots and stored audio equipment manufactured by Mr. Weiss's company. *Id.* This testimony was supported by the testimony of other tenants and friends, documents, including leases with the rental company that referred to the space as "someone's home," as well as numerous photographs. See, Tr. at 233 (Vengrow), Tr. at 295-99 (Wyatt), Tr. at 308-14 (Ballman), Pet. Ex. 29 (Lease for photo shoot) and Pet. Ex. 20 (Window period photographs).

Owner's contest to residential use centers around another property the couple owns in New Tripoli, Pennsylvania. Owner argues that the couple resided in Pennsylvania during the window period and only used the loft commercially. However, although many documents, official and personal, list the Pennsylvania property as the home address for Mr. Weiss and Ms. Van Elk, Judge Lewis credited their testimony, the testimony of the other witnesses and the photographs as establishing residential occupancy during the window period. See, Report at 74. We see no reason to overturn these findings. The evidence amply supports the finding that the couple maintained two residences during the window period with Ms. Van Elk spending slightly more time in Brooklyn and Mr. Weiss spending slightly more time in Pennsylvania. In addition, the record supports Judge Lewis's finding that Mr. Vengrow resided in the unit during the window period and that his occupancy alone would be enough to establish residential occupancy during the window period.² See, Report at 74.

The Board thus finds that Unit 4B was residentially occupied during the window period.

Unit 4C

The record shows that Curtis Mitchell, the prime lessee of the entire space since 1984, used the lower portion of the unit as his art studio. See, Pet. Ex. 114, (Assignment of Lease), Tr. at 2131. The lower portion contained a toilet and a slop sink, but did not contain a kitchen. Mr. Mitchell converted the upper portion of the loft to a residence, with a kitchen and full bath. See, Tr. at 2130. He resided in the upper portion from 1983 until 1993. See, Tr. at 2064. From 2003 until 2011, Mr. Mitchell subleased the upper portion of the space to Robert Martin and Carrie Brunt. See, Tr. at 160, 164. When they left, Mr.

² In fact, Owner never mentions Mr. Vengrow in its Post-Trial Memorandum of Law.

Mitchell subleased the upper portion of the unit to Jason Hu and Dominique Nisperos. See, Tr. 2195. In August of 2013, Mr. Mitchell moved into the lower portion of the unit because he and his wife were separating. See, Tr. at 2196. Also in August of 2013, Mr. Hu and Ms. Nisperos filed a coverage application for the upper portion of the unit, which they called the "mezzanine." However, in November of 2013, they sold any rights they may have had to Mr. Mitchell and withdrew their coverage application. See, Pet. Ex. 123. In December of 2013, when Mr. Hu and Ms. Nisperos vacated, Mr. Mitchell moved back into the upper portion of the loft. In August of 2014, his family joined him. See, Tr. at 2085.

Based on these undisputed facts, the Board finds Unit 4C was residentially occupied during the window period.

Unit 4D

The record shows that James Thirlwell has continuously resided in Unit 4D since 1982 pursuant to a lease agreement with Mr. Eisenberg. See, Pet. Ex. 83. His testimony was supported by a 2005 magazine article showing photos of Mr. Thirlwell in the loft, as well as official records from government agencies and utility and insurance bills. See, Pet. Ex. 109 (Article), 104 (Driver's License), 106 and 107 (Utility Statements) and 105 and 107 (Insurance Documents). Although some of these documents bear a post office box as the address, Judge Lewis credited Mr. Thirlwell's explanation that he used the post office box because mail service at the building was irregular and unreliable. We agree.

The Board finds that Unit 4D was residentially occupied during the window period.

Unit 4E

The record shows that John McCormick has continuously resided in Unit 4E since 2006. See, Tr. at 121. His testimony was corroborated by several witnesses, including his brother (Tr. at 85), Ms. Jensen (Tr. at 11-12), Mr. Weiss (Tr. at 394-395) and Mr. Thirlwell (Tr. 1771 and 1774). When he originally moved in, he was a subtenant of Ms. Jensen, who introduced him to Frank Eisenberg, the building owner. See, Tr. 119-120 and 124. Although Mr. McCormick did not receive mail at the building during the window period and used a different address on his 2007 taxes, we accept Judge Lewis' finding that Mr. McCormick did this because Ms. Jensen told him that Mr. Eisenberg did not want him to have a mailbox at Bridge Street because the building did not have a residential certificate of occupancy. See, *Report* at 44.

The Board finds that Unit 4E was residentially occupied during the window period.

The Units Meet the Other Criteria for Coverage

During the course of the trial, the parties stipulated to the following:

1. The units are not located in a basement or cellar;
2. The units do not require access through other units;
3. All of the units except the Mitchell unit contained a full bathroom and a full kitchen throughout the window period;
4. All of the units have windows that open onto a street or lawful yard or court;
5. All of the units exceed 400 square feet in area³;

See, Tr. at 2912.

As to Unit 4C, the Mitchell unit, as discussed above, the record shows that this unit has an upper and lower portion, both of which are in excess of 400 square feet. See, Tr. at 2913. As noted, the upper portion contains a full kitchen and full bath. It may be accessed through the lower portion via an interior stair and door. However, it may also be accessed through a door on the roof. See, Tr. at 198-199.

³ For the Jensen unit, the parties stipulated that the unit exceeded 550 square feet.

Owner argues that the lower portion of the space should not be covered because it was not residentially occupied during the window period. Judge Lewis found that while the loft was two discrete spaces during the window period, the entire unit has been used as a live/work space by Mr. Mitchell since December, 2013. Therefore, the Loft Board should cover the entire unit. We agree.

Where the Loft Board has declined to cover commercial portions of spaces, the commercial and residential spaces were wholly separate. See, *Matter of Kahn*, Loft Board Order No. 0778 (June 16, 1988), *aff'd Dalo v. NYC Loft Bd.* 157 A.D.2d 461 (1st Dep't, 1990). However, this unit contains an interior stair between the two spaces and as of December 2013, Mr. Mitchell uses the entire area. See, Tr. at 2196. The situation is analogous to when a prime lessee seeks to recover subdivided space pursuant to 29 RCNY § 2-09(c)(5)(iv). Under that rule, a prime lessee can recover subdivided space up to 60 days following the finding of coverage by a Loft Board order. See also, *Matter of Halaby, et al*, Loft Board Order No. 2057 (Feb. 21, 1997) (prime lessee of third and fourth floors subdivided space and then bought fixtures from fourth floor tenant and moved into fourth floor, using the third floor as a work space. Board found the third and fourth floors constituted a single unit consisting of living and work areas). See also *Matter of Allweis et al*, Loft Board Order No. 4898 (Sept. 19, 2019). Therefore, if the space was still subdivided, Mr. Mitchell would have a right to recover the upper portion and occupy both portions as one space. However, since he has already recovered the upper portion of the unit, the Board finds that Unit 4C is one unit consisting of both the art studio in the lower portion and the residence in the upper portion.

Based on the record, the Board finds that Units 4A, 4B, 4C, 4D and 4E meet all of the criteria for coverage under MDL §281(5) and should be covered.

Protected Occupancy Claims

Protected occupancy determinations under the Loft Law are governed by Section 2-09(b) of Title 29 of the Rules of the City of New York ("29 RCNY"). That section provides in applicable part, "(1) Except as otherwise provided herein, the occupant qualified for protection ... is the residential occupant in possession of a residential unit, covered as part of an IMD." 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, *Matter of Pak*, Loft Board Order No. 4334 (Nov. 20, 2014), *Matter of Gallo*, Loft Board Order No. 4349 (Jan. 15, 2015), *Matter of Schuss*, Loft Board Order No. 4393 (May 21, 2015), *Matter of Marriner-Smith*, Loft Board Order No. 4426 (Sept. 17, 2015) and *Matter of Mignola*, Loft Board Order No. 4509 (Apr. 21, 2016).

In the Report, Judge Lewis found that issues relating to protected occupancy were governed by section 2-09(b)(1) of the Loft Board's rules. See *Report*, 39-40. We reject this portion of the order as inconsistent with the plain language of the rule as well as Loft Board precedent. See, *Matter of Tenants of 79 Lorimer Street*, Loft Board Order No. 4688 (Sept. 21, 2017). We accept the portion of Judge Lewis's order which analyzed the protected occupancy claims⁴ pursuant to what she deemed "the Loft Board's recent interpretation." See *Report* at 40-41.

Mr. Weiss is the Protected Occupant of Unit 4B and Ms. Van Elk is Not the Protected Occupant

Owner argues Mr. Weiss is not a protected occupant because he only used the unit sporadically during the window period. See *Owner's Post Trial Memorandum of Law* at 41. However, 29 RCNY § 2-09(b)(4) is phrased in the present tense. Prime lessees must prove "that the residential unit covered as part of an IMD is his or her primary residence." Thus, the Board must consider whether the record as a whole supports a finding that Mr. Weiss uses the unit as a primary residence. See, *Matter of Saladino, et al*, Loft Board Order No. 4714 (Nov. 30, 2017), *Reconsideration denied* Loft Board Order No. 4820 (Nov. 15, 2018). Furthermore, even if primary residence during the window period was required, as discussed above, the record shows that Mr. Weiss's use during the window period was more than sporadic.

Post-window period, the record shows that although he spends some time in Pennsylvania, Mr. Weiss uses Unit 4B as his primary residence. Mr. Weiss provided documentary evidence such as official

⁴ There is no claim for protected occupancy for Unit 4A as Jensen withdrew her claim with prejudice.

documents and a calendar, begun in 2012, on which he recorded where he was on any given day. See Pet. Ex. 39 and 40 (Driver's License and Voter Registration) and Pet. Ex. 157 (Calendar). The calendar shows that since 2013, Mr. Weiss spent a majority of his time in Unit 4B. *Id.*

Even Owner's tax expert testified that Mr. Weiss's 2013, 2014 and 2015 tax returns indicated he residually occupied Unit 4B to a certain extent. See, Tr. at 2861. Furthermore, to the extent Owner argues the holding in *Ansonia Assoc. v. Unwin*, 130 A.D.3d 453 (1st Dep't 2015) precludes awarding protection because Mr. Weiss used a different address on his taxes, we agree with Judge Lewis that the case does not apply to a determination of protected occupancy under the Loft Law. See *Matter of Allweis et al*, Loft Board Order No.4898 (Sept. 19, 2019). We therefore find Mr. Weiss qualifies as the protected occupant of Unit 4B pursuant to 29 RCNY § 2-09(b)(4).

As to Ms. Van Elk, the Board finds she is not a protected occupant. Where the prime lessee qualifies for protection, the prime lessee is the protected occupant to the exclusion of other residential occupants, including a spouse. However, the spouse may have succession rights. See *Matter of Mignola*, Loft Board Order No. 4509 (Apr. 29, 2016).

Mr. Mitchell is the Protected Occupant of Unit 4C

Owner argued Mr. Mitchell is not entitled to protected occupancy because he did not reside in the unit during the window period. For the reasons stated above in reference to Unit 4B, the Board finds this argument lacks merit.

29 RCNY § 2-09(a) defines a prime lessee as "the party with whom the landlord entered into a lease... for use and occupancy of a portion of an IMD, which is being used residually, regardless of whether the lessee is currently in occupancy or whether the lease remains in effect." Pursuant to 29 RCNY § 2-09(b)(4) prime lessees must prove "that the residential unit covered as part of an IMD is his or her primary residence."

Based on the definition, Mr. Mitchell is still a prime lessee. Thus, the question is whether the record as a whole supports a finding that he uses the unit as a primary residence. The board finds that it does. In support, Mr. Mitchell offered testimony, which the ALJ credited, as well as official documents such as tax returns (Pet. Ex. 124, 125 and 126). Thus, he is the occupant qualified for protection for Unit 4C pursuant to 29 RCNY § 2-09(b)(4).

Mr. Thirlwell is the Protected Occupant of Unit 4D

Owner disputed Mr. Thirlwell's claim of protected occupancy because Mr. Thirlwell resides in the United States pursuant to an O-1 or artist's visa which must be renewed every three years. See, *Owner's Post-Trial Memorandum of Law* at 64-65, Tr. at 1775. However, Judge Lewis found, and we agree, that the holder of an O-1 visa does not have to maintain a residence in another country in order to maintain the visa. See *Tenant Letter*, October 25, 2017.

As to Owner's claim that Mr. Thirlwell was estopped from claiming he resided at 110 Bridge Street based on *Ansonia v. Unwin*, 130 A.D.3d 453 (1st Dept. 2015) and *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415 (2009), we agree with Judge Lewis that the court in *Ansonia* and the court in *Mahoney-Buntzman* "did not have before it the peculiar context in which loft coverage and protected occupancy cases...arise: where tenants live for years illegally in buildings without a residential certificate of occupancy, often with the full knowledge and acquiescence of the owner."

We also agree that Owner's reading of the cases would increase the scope of the holding in *Ansonia*. Mr. Thirlwell reported rental property income from a roommate and later, from another property on St. Mark's Avenue in Brooklyn. These deductions are consistent with his occupancy at 110 Bridge Street. And his use of his accountant's address or his PO Box on his corporate returns (Pet. Ex. 95-99 and 102) does not mean Mr. Thirlwell did not reside in Unit 4D at 110 Bridge Street. The corporation is a separate entity and on at least one of the returns the address for the corporation and Mr. Thirlwell is listed as 110 Bridge. (Pet. Ex. 100).

As the prime lessee using the unit as a primary residence, the Loft Board finds Mr. Thirlwell is the protected occupant of Unit 4D pursuant to 29 RCNY § 2-09(b)(4).

Mr. McCormick is the Protected Occupant of Unit 4E

As to Mr. McCormick, Judge Lewis found that he never had a lease or rental agreement with the Owner but the Owner knew Mr. McCormick lived in the building as Ms. Jensen's subtenant. See, Tr. at 124. Mr. McCormick paid his rent to Ms. Jensen. Furthermore, although his name was on a lease for a rent stabilized apartment in a different building, it is undisputed that only his brother lived in that apartment. See, Report at 41.

As a residential occupant in possession of the unit, Mr. McCormick is the protected occupant of Unit 4E pursuant to 29 RCNY 2-09(b)(1).

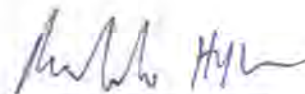
CONCLUSION

The Loft Board finds that the building known as 100-110 Bridge Street is an IMD building consisting of units 4A, 4B, 4C, 4D and 4E. The Loft Board also finds that Jonathan Weiss, Curtis Mitchell, James Thirlwell, and John McCormick are the protected occupants of their respective units.

In accordance to 29 RCNY § 2-05, the Loft Board directs Owner to register the Building as an IMD under MDL § 281(5) with five IMD units and Jonathan Weiss, Curtis Mitchell, James Thirlwell, and John McCormick as the protected occupants of their respective units, 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 units 4A, 4B, 4C, 4D and 4E as IMD units;
- list Jonathan Weiss, Curtis Mitchell, James Thirlwell, and John McCormick as the protected occupants of their respective units; and
- collect applicable registration fees and late fees, if any.

DATED: November 21, 2019



Renaldo Hylton
Chairperson

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

Board Members Dissenting: Carver,

Board Members Absent, Hernandez, Schachter

DATE LOFT BOARD ORDER MAILED: **DEC 03 2019**

Opinions from November 21, 2019 Calendar

#6, 110 Bridge Street, TR-1077

Opinion of Chuck DeLaney:

As the tenant representative on the Loft Board, I voted in favor of the proposed order in this case. I agree that all five units should be registered as IMD units. I take issue with only one aspect of this order, namely the finding that only Jonathan Weiss is a protected occupant of Unit 4B, denying the other applicant, his wife, Cynthia Van Elk, protected occupant status. In the Report and Recommendation from OATH Judge Lewis, she notes, "Under the Loft Board's long-standing precedent, both Mr. Weiss and Ms. Van Elk both qualify for protected occupancy. However, under the Loft Board's recent interpretation of its rules governing protected occupancy, only Mr. Weiss qualifies for protected occupancy."

Judge Lewis is correct in noting that the Loft Board has changed its interpretation of the rules governing protected occupancy. This started in the *Matter of Schuss*, Loft Board Order No. 4393 (2015), where it was determined that because only the husband signed the lease with the owner, a married couple who moved into the loft at the same time and both lived there throughout the window period were not both covered. Instead, the Board looks only to the signer of the lease and refuses to acknowledge other residents as protected occupants, offering the fig-leaf that "However, the spouse may have succession rights." This is wrong. It divides families. It should be changed, either by having this approach overturned in court or having the Board come to its senses and revert to its prior practice.

Other than this single issue, the order is correct in acknowledging the five units to be covered and the other protected occupants are correctly identified.



OFFICE OF
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TRIALS AND HEARINGS

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FIDEL F. DEL VALLE
COMMISSIONER AND
CHIEF ADMINISTRATIVE LAW JUDGE

FAYE LEWIS
ADMINISTRATIVE LAW JUDGE
212-933-3013

November 9, 2018

Hon. Rick E. Chandler, P.E.
Commissioner
New York City Department of Building
280 Broadway, 7th Floor
New York, New York 10007

Re: *In the Matter of Tenants of 110 Bridge Street,*
OATH Index No. 377/14
Loft Bd. Dkt. No. TR-1077
Premises: 110 Bridge Street
Brooklyn, New York

Dear Commissioner Chandler:

The above-referenced Loft Board coverage and protected occupancy application was referred to this Tribunal for adjudication. My Report and Recommendation is enclosed for your review and final action.

Upon taking final action in this matter, please have your office send a copy of your decision to the Office of Administrative Trials and Hearings so that we may complete our file.

Very truly yours,

Faye Lewis
Administrative Law Judge

FL: kk

Encl.

c: Helaine Balsam, Esq.
Robert Petrucci, Esq.
David Brody, Esq.
Kathleen Kelliher, Esq.
Jason Frosch, Esq.

Matter of Tenants of 110 Bridge Street

OATH Index No. 377/14 (Nov. 9, 2018)

[Loft Bd. Dkt. No. TR-1077, 110 Bridge Street, Brooklyn, N.Y.]

Petitioners' coverage and protected occupancy application should be denied because of the existence of commercial uses which are inherently incompatible with residential use. All other prerequisites for coverage are established and, under the Loft Board's recent interpretation of its rules, four out of the five remaining applicants are the protected occupants of their units.

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

In the Matter of
TENANTS OF 110 BRIDGE STREET
Petitioner
-against-
110 BRIDGE REALTY CORP.,
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a Loft Law coverage application involving the building located at 110 Bridge Street in Brooklyn ("the building"). The application was filed on May 1, 2013, under section 281(5) of the Multiple Dwelling Law ("MDL" or "Loft Law"), as amended on June 21, 2010, and title 29 of the Rules of the City of New York ("RCNY" or "Loft Board Rules"). MDL § 281(5) (Lexis 2018); 29 RCNY §§ 2-08, 2-09 (Lexis 2018). Petitioners, Jonathan Weiss, Cynthia Van Elk, Malia Jensen, John McCormick, Curtis Mitchell, and James Thirlwell, seek a finding that the building is an interim multiple dwelling ("IMD"), that their units are covered IMD units, and that they are the protected occupants of their units. Respondent, 110 Bridge Realty, which owns the premises and whose principal is Frank Eisenberg, opposes the application. Respondent asserts that the coverage application must be denied because there are uses actively and currently pursued in the building which are inherently incompatible with residential use.

Trial was held over 23 days throughout 2015, 2016, and 2017, during which both parties presented extensive documentary evidence and witness testimony, including the testimony of expert witnesses on the incompatible use issue. The record closed after post-trial briefs were submitted.

As set forth below, I find that petitioners' coverage application should be denied because there are commercial uses actively and currently pursued in the building which are inherently incompatible with residential use. Petitioners established all the other prerequisites for coverage of their respective units, and for findings of protected occupancy, except that under the Loft Board's recent interpretation of its rules, Ms. Van Elk would not be the protected occupant of her unit.

ANALYSIS

INCOMPATIBLE USE

Respondent contends as a threshold matter that the coverage application must be denied because the building contains two commercial uses which are incompatible with residential use.

The building, located at the corner of Bridge and York Streets in Brooklyn, is a four-story brick structure, with an attached one-story section composed of a mixture of steel, concrete and masonry, or brick. The building is fully sprinklered (Pet. Ex. 46 at 2-4; Pet. Ex. 47 at 1). Petitioners allege that the fourth floor of the building is residentially occupied. It is not disputed that as of June 21, 2010, and continuing on May 1, 2013, the filing date of the application, the building had two commercial occupancies, 3V and Dynamic, involving the manufacture and bottling of non-alcoholic beverages. 3V, located on the first floor, has been in business since about 1984. Dynamic Health, located in the basement, part of the first floor, and the second floor, was in business from about 2001 until late 2015 or early 2016, when it was bought out by another bottling company, known as Seychelles. In addition to making non-alcoholic beverages, Dynamic also produced edible supplements (Tr. 1506; Pet. Ex. 46 at 3; Pet. Ex. 47 at 1).

Section 281(5) of the Loft Law excludes from coverage units that are in buildings which contain inherently incompatible uses:

The term "interim multiple dwelling" as used in this subdivision shall not include . . . units in any building . . . that, at the time this subdivision shall take effect . . . also contains a use actively and

currently pursued, which use is set forth in use groups fifteen through eighteen, as described in the zoning resolution of such municipality in effect on June twenty-first, two thousand ten, and which the loft board has determined in rules and regulations is *inherently incompatible with residential use* in the same building, provided . . . that if a building does not contain such active uses at the time this subdivision takes effect, no subsequent use by the owner of the building shall eliminate the protections of this section for any residential occupants in the building already qualified for such protections.

Mult. Dwell. Law § 281(5) (emphasis added). In other words, the incompatible use must be “actively and currently pursued” as of June 21, 2010; an incompatible use begun after this date does not preclude coverage. The law is designed to prevent a building owner “from belatedly introducing a use to the premises with the intent of thwarting the law.” *Matter of Gallagher*, OATH Index Nos. 2594/11 & 2596/11 at 13 (Aug. 16, 2012).

Under the Loft Board’s regulations, the applicant seeking coverage has the burden of establishing by a preponderance of the evidence “that there are no commercial, manufacturing or industrial uses in the non-residential units that are inherently incompatible with residential use . . . as of June 21, 2010 *and* continuing at the time of the submission of an application for coverage by any party.” 29 RCNY § 2-08(q) (emphasis added). Thus, for a commercial incompatible use to preclude coverage, it must exist both on June 21, 2010, and on the date that the coverage application is filed. If there is no incompatible use when the coverage application is filed, residential occupants’ rights to coverage are not impaired.

Additionally, the Loft Board’s regulations define uses within use groups 15 to 18 of the Zoning Resolution as inherently incompatible with residential use in the same building, if the use “is or should be classified as High-Hazard Group H occupancy as set forth in Section 307 of the New York City Building Code.” 29 RCNY § 2-08(k) (iii) (Lexis 2018).

Thus, reference to the Building Code is essential to resolving the issue raised by the parties. The parties disagree over whether the 2008 or 2014 Building Codes should apply. The definition of high-hazard use is almost identical in the two codes, but there is some difference in other relevant definitional sections. Respondent contends that the 2014 Building Code applies. Respondent acknowledges that the “general rule” is that when a statute incorporates another, “independent” statute by reference, the incorporated statute at the time of the incorporation applies (Resp. Reply Br. at 3). Respondent contends, however, that because the Building Code is

“part of a body of related regulations,” amendments to the Building Code should apply (*Id.* at 5). Petitioner urges that the 2008 Building Code should apply, because the Loft Board’s rules and the Building Code are “separate and distinct,” with the Loft Board regulations promulgated under the authority of a state statute (Petitioners’ Sur-Reply Br. at 3).

Petitioners’ argument is more persuasive. The Building Code and the Loft Board’s rules are distinct from each other. The fact that both relate to housing does not make them less so. The Loft Board regulations establish a range in time from which to determine whether a commercial use is inherently incompatible with residential use: June 21, 2010, the date of the amended Loft Law, continuing to the date of the parties’ coverage application. Given these reference points, it makes sense to use the version of the Building Code in effect at the time of the application filing date to determine whether a high-hazard use exists that could preclude coverage.

Section 307.1 of the Building Code defines a High-Hazard Group H occupancy as including, “among others,” the use of a portion of a building “that involves the manufacturing, processing, generation or storage of materials that constitute a physical or health hazard in quantities in excess of those found in Tables 307.7(1) and 307.7(2).” Table 307.7(1) sets forth the “Maximum Allowable Quantity (“MAQ”) Per Control Area of Hazardous Materials Posing a Physical Hazard.” Table 307.7(2) sets forth the “Maximum Allowable Quantity Per Control Area of Hazardous Materials Posing a Health Hazard.” Thus, a commercial use is a High-Hazard Group H occupancy if the amounts of hazardous substances in a “control area” exceed the MAQ. *See Matter of Gallagher*, OATH Index Nos. 2594/11 & 2596/11 at 18-19 (Aug. 16, 2012) (finding that a belt factory would not be inherently incompatible with residential use because the amounts of adhesives and flammable liquids at the premises did not exceed the applicable MAQs in Tables 307.7(1) and 307.7(2)).

Both petitioners’ and respondent’s experts concluded that the commercial use at Dynamic and 3V falls within use group 17 (Pet. Ex. 46 at 4; Pet. Ex. 47 at 9). Use group 17 encompasses the bottling and manufacture of non-alcoholic beverages (Zoning Resolution App. A: Index of Uses).¹ Thus, the issue, under Section 281(5) of the Loft Law and Section 2-08 of the Loft

¹ In its brief, respondent “preserves its position” that a portion of the use may fall within use group 18, “should that distinction become relevant due to a change in law” (Resp. Post-Trial Br. at 11). However, respondent does not indicate what uses would fall within use group 18. Nor was there any evidence that would suggest that the commercial tenancies fall within use group 18.

Board's regulations, is whether, as of June 21, 2010, continuing through May 1, 2013, the commercial uses of 3V and Dynamic were incompatible with residential occupancy of the building because they constitute High-Hazard Group H occupancies under section 307 of the Building Code.

Regulatory Framework: Building Code

The parties dispute whether the operation of the bottling companies constituted a High-Hazard Group H occupancy under Section 307 of the New York City Building Code. The dispute focuses on whether 3V and Dynamic use corrosive liquids in open systems in excess of the MAQ for a control area.

Tables 307.7(1) and 307.7(2) provide different MAQs for hazardous materials depending on whether they are kept in "storage," used in "open systems," or used in "closed systems." If a hazardous material is both stored and used, its MAQ may not exceed the MAQ for storage within a control area (Table 307.7(1), n. b, Table 307.7(2), n. d).

An "open system" is defined as "[t]he use of a solid or liquid hazardous material involving a vessel or system that is continuously open to the atmosphere during normal operations and where vapors are liberated, or the product is exposed to the atmosphere during normal operations." Examples of open systems for solids and liquids are "dispensing from or into open beakers or containers, dip tank and plating tank operations." BC § 307.2. By contrast, a "closed system" is defined as "[t]he use of a solid or liquid hazardous material involving a closed vessel or system that remains closed during normal operations where vapors emitted by the product are not liberated outside of the vessel or system and the product is not exposed to the atmosphere during normal operations; and all uses of compressed gases." Examples of closed systems include "product conveyed through a piping system into a closed vessel, system or piece of equipment." BC § 307.2.

"Control areas," to which the MAQs are pegged, are defined as spaces within a building "that are enclosed and bounded by exterior walls, fire walls, fire barriers and roofs, or a combination thereof, where quantities of hazardous materials not exceeding the maximum allowable quantities per control area are stored, handled, or used, including any dispensing." BC § 307.2.

The tables further classify hazardous materials, and the MAQ per control area for hazardous materials, based upon the type of material, including "combustible liquids,"

"flammable gas," "flammable liquid," and "flammable solid," among others. Table 307.7(2) classifies materials as "corrosive," "highly toxic," or "toxic." Both tables permit a doubling of the MAQ for hazardous substances, except for liquefied petroleum gas and flammable liquid motor fuel, for a fully-sprinklered building such as the one in issue (Table 307.7(1), fn. d.; Table 307.7(2), fn. c).

A corrosive material is defined in the Building Code either as "[a] material that causes full thickness destruction of human skin at the site of contact within specified periods of time," when tested by certain method, or as a liquid which has "a severe corrosion rate on steel or aluminum" based on other enunciated criteria. BC § 307.2.

Factual Overview

The parties relied heavily upon expert testimony and reports. Petitioners called Robert Malanga, a professional engineer, while respondent presented William Lahti, a chemical engineer, and John Peachy, an architect. Mr. Malanga and Mr. Lahti visited the building on multiple occasions, took photographs, wrote detailed reports, and tested chemicals or arranged for testing to determine if they were corrosive. Their testimony was extensive. Mr. Peachy gave more limited testimony about structural and other building issues relating primarily to the issue of how many control areas are located within the building. Petitioner also presented the testimony of John Aucoin, the previous sanitation supervisor at Dynamic, while respondent called Orlando Pennant, the production manager at 3V. They described the operation of the respective businesses, including the use of various chemicals in manufacturing and cleaning.

Overview of 3V

Mr. Pennant explained 3V's manufacturing and cleaning process, as follows. 3V makes flavored syrup (Tr. 961). Raw ingredients for the syrup are blended into a finished product in three large batch tanks which are 250, 750, and 1000 gallons each (Tr. 963; Resp. Ex. R2). Each tank is used to make a separate batch of product. The tanks are stainless steel with lids that can be opened. The tanks also have mixers on top with shafts that run through the tank lid. When the tanks are closed, there are gaps between the tank lids and mixer shaft that remain. Thus, the tanks are not "vapor tight" (Tr. 965).

As part of the manufacturing process 3V uses lactic acid, which is contained within a product called Galacid Excel 88 ("Galacid") (Tr. 966). Galacid is stored on site in a 55-gallon drum in a separate room. Typically, there are two drums in storage, sometimes three, with one

drum used for manufacturing (Pet. Ex. 968, 1005). About five gallons of Galacid is transferred from the open drum into a bucket using manual siphoning pumps (Tr. 969). The bucket is then carried to the mixing tanks and poured in (Tr. 969). Mr. Pennant estimated that approximately 50 pounds of Galacid – contained within the five-gallon bucket – is used in making a 1700 gallon batch of product (Tr. 1005).

The batch tanks are cleaned and sanitized after each use (Tr. 970). Some days only one tank is used, other days all three tanks are used, and sometimes tanks are used multiple times on the same day (Tr. 970-71). The cleaning process takes about an hour and the sanitizing process takes an additional 15 or 20 minutes (Tr. 980). During cleaning and sanitizing, the tops of the tanks are open (Tr. 979). The tanks are first washed down with water to remove residue from the cleaning products, which Mr. Pennant termed the “prewash” stage (Tr. 971). As a second step, 100 gallons of water is batched in each tank, and a product called Circhlor Plus is added to the water at a target concentration of two to three gallons of chemical per 100 gallons of water, creating a type of “soap” used to clean the tank (Tr. 971).² Circhlor Plus is stored in 55-gallon drums; typically two drums are kept on location, one of which is used in cleaning and one of which is stored, unopened (Tr. 973). Circhlor Plus is dispensed from its drum into a bucket via a manual or hand pump which has a tube extending into the drum (Tr. 988). Once out of the drum, the chemical is carried in an open bucket to the batch tank, where it is mixed with water (Tr. 972). The Circhlor Plus/water solution is circulated for 15 to 20 minutes. The mixture is then drained and the batch tank rinsed with fresh water (Tr. 972).

As a final step in the cleaning process, a sanitizer called Oakite Sanitizer 4 is added to the drum, at a ratio of about eight ounces of sanitizer to 100 gallons of water (Tr. 973). In 2016, 3V was in the process of phasing out Oakite Sanitizer 4 in favor of a product called FiSan Oxy Sanitizer (Tr. 981-82). At least two five-gallon containers of the FiSan sanitizer are stored on site in the chemical room (Tr. 993). The sanitizer is poured directly from the five-gallon container into the batch tank (Tr. 988).

3V also uses a chemical called Fichlor Foam to “blanket . . . all the walls, the floors, all the external services and equipment” (Tr. 985, 979-80). Fichlor Foam is an “updated version” of a product called Hypofoam, which 3V originally used for cleaning (Tr. 984). Fichlor Foam is mixed with water in a mixing station, at a ratio of about four to six percent foam to water. The

² On occasion 3V makes more than 100 gallons of solution, when they need to clean all the equipment (Tr. 979).

mixture is aerated using a nozzle at the end of a hose, producing about 20 to 30 gallons of foam (Tr. 985, 995, 1004). Fichlor Foam usually comes in 55-gallon drums; at the time of his testimony, Mr. Pennant had one drum on hand (Tr. 993-94). The foam is siphoned from the 55-gallon drum into a five-gallon container (Tr. 990). Typically, Mr. Pennant uses one five-gallon container of Fichlor Foam each week (Tr. 996, 1007).

Finally, 3V uses Circhlor Plus to clean utensils over a utility sink, titrating the Circhlor Plus at a 2 to 3 percent solution in a final mixture of 10 to 15 gallons (Tr. 982). Mr. Pennant or his staff bring a five gallon bucket of Circhlor Plus to the utility sink, siphon the chemical from the bucket into the water, and manually adjust the concentration of chemical to water (Tr. 989).

In handling Circhlor Plus, FiSan Sanitizer, or Fichlor Foam, 3V staff use personal protective equipment, including chemical resistant gloves, goggles, a rubber apron, water resistant boots, and sometimes a face shield (Tr. 975, 977).

Mr. Pennant's testimony about the type of concentrated chemicals used by 3V was largely un rebutted and was corroborated by respondent's expert, Mr. Lahti, who inspected the premises on October 30, 2013 and prepared an inventory listing Galacid Excel 88 (lactic acid), Circhlor Plus, Hypofoam, and Oakite Sanitizer 4 (replaced by FiSan sanitizer). Mr. Lahti testified that the chemicals are kept in 55-gallon drums (Tr. 676). The inventory is contained in Mr. Lahti's May 20, 2014 report (Pet. Ex. 47, at Ex. 14).³

Mr. Lahti also testified about the cleaning process at 3V, based upon his observations and several conversations with a 3V employee named Herschel (Tr. 780). His testimony was largely consistent with Mr. Pennant's except as to the quantity of Fichlor Foam produced. While Mr. Pennant testified that about 20 to 30 gallons of foam is produced, Mr. Lahti testified that that when the Fichlor Foam and water mixture was aerated, the ensuing product was "anywhere from 50 to 100 gallons" (Tr. 713, 715).

Petitioner's expert, Mr. Malanga, who inspected the building on three occasions, did not prepare his own inventory. Instead, he relied upon Mr. Lahti's inventory to prepare his initial report (Tr. 571-72). Mr. Malanga testified that he did not observe Hypofoam during his site visit (Tr. 1313), which was consistent with Mr. Pennant's testimony that 3V had switched over to Fichlor Foam. Mr. Malanga, however, disputed Mr. Pennant's testimony that Fichlor Foam

³ Mr. Lahti's inventory showed 110 gallons of Oakite sanitizer 4, in 55-gallon drums, as of October 30, 2013 (Resp. Ex. HHH).

came in 55-gallon drums, asserting that he had "observed" a five-gallon "drum" "in use" (Pet. Ex. 73). On this point, I found Mr. Pennant's testimony more reliable. Mr. Malanga's observation of a five-gallon "drum" was consistent with Mr. Pennant's testimony that Fichlor Foam is taken from a 55-gallon drum, and then siphoned into a five-gallon container.

Overview of Dynamic

Mr. Aucoin, currently director of process engineering at Seychelles Organics Inc., was sanitation supervisor at Dynamic starting in 2011 (Tr. 1029). His testimony was unrebutted. He explained the product manufacturing and batch tank cleaning processes at Dynamic (Tr. 1036). According to Mr. Aucoin, Dynamic has three batch tanks in which product was made: one tank was 250 gallons and the other two were 750 gallons (Tr. 1044). All three tanks had lids which could be opened, with a mixer on top with a shaft that ran through the tank. Because of the shaft, even when the lids were closed, the tanks are not completely sealed (Tr. 1045). Every day at least one tank is used. And "perhaps" three times a week all tanks are used at the same time (Tr. 1049-50). The tanks are cleaned every day that they were used (Tr. 1049). "Rarely," when production was at a very high volume involving multiple batches of product, cleaning would take place more than once a day, between batches (Tr. 1059).

The products used in cleaning the drums are Gardoclean, Oakite detergent sanitizer, CFC foam, and sometimes, Oakite FiSan CIP acid. CFC foam cleaner is used to clean the floors. Gardoclean and Oakite FiSan CIP acid is delivered in 46-gallon storage drums, while Oakite Detergent Sanitizer comes in a drum between 46 gallons and 55 gallons.⁴ CFC foam cleaner, by contrast, comes in five gallon containers. Gardoclean is the main "cleaning agent" and was the first step in the cleaning process (Tr. 1047, 1033). Gardoclean, like Oakite FiSan CIP acid and Oakite Detergent Sanitizer, is transferred from its drum into a smaller container (a "jerry can") via a pump, and then dispensed into water in the batch tank (Tr. 1034). The jerry can is capped once filled and uncapped just before it is poured into the drum (Tr. 1042-43). Mr. Aucoin or his staff disperse about a gallon and a half of Gardoclean, at a dilution rate of about one percent, into about 150 gallons of water (Tr. 1037). Oakite Detergent Sanitizer is used after the Gardoclean (Tr. 1047). A "very minute quantity" of the sanitizer is poured in about 150 gallons of water, at a dilution rate of a quarter of an ounce to one gallon. The mixture is then applied inside the tank

⁴ Mr. Aucoin did not recall the precise size of the drum, testifying that it was "at least 46 gallons" and "no larger than 55" gallons (Tr. 1048), and "may be" 50 gallons (Tr. 1033).

with a spray ball to kill microbes (Tr. 1034). About once a week, or once every few days, FiSan CIP acid, diluted in 150 gallons of water, is used to neutralize the Gardoclean and "remove any residual scale" (Tr. 1047). The dilution rate is between one to two percent, or about two and a quarter gallons of acid to 150 gallons of water (Tr. 1033, 1038). The cleaning process takes about an hour while the sanitizing process takes about fifteen or twenty minutes (Tr. 980).

Dynamic uses a mixture of the CFC foam cleaner and water to clean the floors. The foam is mixed in a mop bucket with water at a 1 % or 1.5 % solution (Tr. 1034-1035). The total amount of foam cleaner, in dilution, is about 2¼ gallons (Tr. 1038). Mr. Aucoin would use the foam cleaner daily, and sometimes more than once in a day, depending on need (Tr. 1055).

Generally, Mr. Aucoin orders 12 containers of chemicals at a time: seven drums of Gardoclean; two drums of Oakite FiSan CIP acid; one drum of Oakite detergent sanitizer, and two or three containers of CFC foam (Tr. 1032, 1033, 1046-48). Chemicals which Dynamic uses on a daily basis are kept in a storage room on the second floor; chemicals not used daily are stored in the basement (Tr. 1045). Mr. Aucoin's general practice is to open one drum at a time, except for the smaller, five gallon containers of foam cleaner (Tr. 1061).

Like Mr. Pennant, Mr. Aucoin testified that he and his staff use personal protective equipment. For Gardoclean and FiSan CIP acid, this includes goggles and/or face shields, gloves, and sometimes organic respirator vapor masks (Tr. 1039). The sanitizer is used in such small quantities that he encourages but does not require his staff to use personal protective equipment (Tr. 1047). Personal protective equipment is not required for the foam cleaner (Tr. 1055).

Mr. Lahti's inventory of cleaning products at Dynamic (Pet. Ex. 47 at Ex. 5) listed Gardoclean 41700F, Oakite Detergent Sanitizer LF2, Oakite FiSan CIP Acid, and Oakite CFC foam cleaner, consistent with Mr. Aucoin's testimony. Although Mr. Aucoin did not remember the precise volume of the drum of Oakite Detergent Sanitizer, in the inventory Mr. Lahti stated that the sanitizer drum held 55 gallons.

As with 3V, Mr. Malanga did not inventory the chemicals at Dynamic, instead relying upon Mr. Lahti's inventory in his initial report (Tr. 489).

Issues in Dispute

The parties dispute whether 3V and Dynamic use corrosive liquids in open systems in excess of the MAQ. The MAQ for corrosive liquids in open system use at 3V is 200 gallons

under Table 307.7(2) of the Building Code. However, the MAQ for corrosive liquids used in open systems at Dynamic's second floor factory is 150 gallons, because a second floor control area may have a quantity of hazardous substances not to exceed 75% of the MAQ. BC Table 307.7(2), n. a; BC Section 414.2.

Respondent contends that the chemicals used by 3V and Dynamic for cleaning are corrosive, and that Galacid, used by 3V in manufacturing, is also corrosive. According to respondent, the chemicals are corrosive both in concentrated liquid form in the drums and when mixed with water in the batch tanks at 3V and Dynamic. Respondent also contends that once a storage drum of corrosive chemicals has been opened, the entire amount of chemicals within the drum remains in use in an open system, not just the chemicals that have been transferred out of the drum into open containers.

Based on this, respondent asserts that at 3V: (1) the mixture of Circhlor Plus and water exceeds the applicable MAQ for corrosives used in open systems; and (2) the concentrated chemicals (Circolor Plus, Fichlor Foam, Galacid Excel 88, and FiSan OxySanitizer), together with the diluted mixture of Circhlor Plus and water, exceed the applicable MAQ for open system corrosive liquids. As to Dynamic, respondent contends that: (1) the mixtures of Gardoclean R1700F and water, and Oakite FiSan CIP Acid and water, together with the concentrated chemicals stored at Dynamic (Gardoclean, Oakite Detergent Sanitizer, Oakite FiSan Acid, and Oakite CFC Foam Cleaner), exceed the applicable MAQ for corrosives used in open systems. Respondent further claims that that Dynamic's second floor occupancy and 3V's first floor occupancy are within a single control area, that the quantities of corrosive liquids used should therefore be aggregated, and that the total exceeds the MAQ for corrosives used in open systems in a control area.

In their post-trial brief, petitioners do not dispute respondent's characterization of the concentrated chemicals as corrosive, except for Galacid, which they characterize as an irritant. Petitioners also "assume" (see Pet. Post-Trial Br. at 11) that the concentrated chemicals in solution are corrosive. But petitioners contend that the cleaning solutions should not be included in the calculation of hazardous materials because they are only used for short periods of time and are not dangerous to any tenants. Further, petitioners argue that that the cellar, first floor, and second floor of the building are separate control areas and that the chemicals in each control area do not exceed the MAQ for open system use of corrosive liquids. Petitioners dispute

respondent's assertion that the drums or containers of chemicals remain "open" when not in active use.

Does 3V and Dynamic's use of Circhlor Plus, Gardoclean, and Oakite FiSan acid, diluted in water, exceed the MAQ for open system use of liquid corrosives?

The parties do not dispute that Circhlor Plus, diluted in water, is used to clean the batch tanks at 3V, and that Gardoclean R1700F and Oakite FiSan CIP Acid, diluted in water, are used to clean the batch tanks at Dynamic. Petitioners acknowledge that the cleaning of the tanks is an "open system" within the meaning of section 307.2 of the Building Code (Tr. 707). The tanks are open during cleaning and the chemicals used for cleaning are "exposed to the atmosphere." BC § 307.2 ("definitions"). The batch tanks are comparable to a dip tank operation, which is one of the examples provided in the Building Code as an open system. *Id.*

At issue is whether these chemicals, diluted in water, are corrosive materials, and whether, as used at 3V and Dynamic, they exceed the MAQ in table 307.7(2) of the Building Code for open system use of corrosives in a control area, which is 200 liquid gallons in a sprinklered building.

As set forth below, I find that Circhlor Plus, Gardoclean R1700F, and Oakite FiSan CIP acid, diluted in water at 3V and Dynamic, are corrosive; 3V's use of Circhlor Plus in water exceeds the MAQ for open system use of corrosive liquids in a control area; and Dynamic's use of Gardoclean R1700F in water and Oakite FiSan CIP acid in water exceeds the MAQ for open system use of corrosive liquids in a control area. I further find that petitioners' contention that the cleaning solutions should not be counted toward the MAQ is unsupported by the Loft Board's regulations.

Is Circhlor Plus, diluted in water at 3V, corrosive?

According to Mr. Pennant, 3V's production manager, about 100 gallons of Circhlor Plus/water solution is produced each time a tank is cleaned. The dilution rate of Circhlor Plus to water is between two to three percent. Petitioners do not dispute that the diluted solution is corrosive but assert that it is only "mildly corrosive" (Pet. Post-Trial Br. at 13).

In acknowledging that Circhlor Plus is corrosive, petitioners rely upon the results of "Corrositex" testing performed by InVitro International on Circhlor Plus diluted in water at two and three percent (Pet. Exs. 159-160). Corrositex testing predicts the corrosive potential of a chemical compound or mixture on skin by calculating the time it takes for the chemical to

permeate a synthetic biobarrier (Pet. Ex. 159 at 4). As respondent's expert, Mr. Lahti, summarized, the Corrositex testing used "one of the DOT [United States Department of Transportation] approved protocols" (Tr. 1964), referenced in section 307.2 of the Building Code, which defines a corrosive material by how quickly it destroys human skin (or for liquids, how quickly it destroys steel or aluminum). Section 307.2 cites section 173.137 of the Code of Federal Regulations, which references OECD Test Guideline 435, which provides an "In Vitro Membrane Barrier Test Method for Skin Corrosivity." The Corrositex testing used the method enunciated in OECD Test Guideline 435 (Pet. Exs. 159, 160). The Corrositex testing also followed the standards set forth by the United Nations Globally Harmonized System of Classification and Labeling of Chemicals ("GHS") (Pet. Ex. 159, at 4). Petitioner's expert, Mr. Malanga, did not dispute the methodology underlying the Corrositex testing (Tr. 1459).

The Corrositex testing established that diluted Circhlor Plus, used at 3V to clean the batch tanks, is mildly corrosive. The testing showed that Circhlor Plus, diluted in water at a two percent ratio, took between 55 and 57 minutes to destroy a synthetic biobarrier. Based on this result, Circhlor Plus 2% was categorized as "Corrositex Category 2," UN Packing Group III, which is only "mildly corrosive." If the diluted Circhlor Plus had taken more than 60 minutes to permeate the biobarrier, it would have been designated as "noncorrosive." (Pet. Ex. 159). Additional Corrositex testing showed that Circhlor Plus, diluted in water at a three percent ratio, took between 40 and 41 minutes to permeate the synthetic biobarrier. Circhlor Plus 3% was designated as Corrositex Category 2, UN Packing Group III, mildly corrosive (Pet. Ex. 160).

In their brief, petitioners did not rely upon Mr. Malanga's testimony that the diluted combination of Circhlor Plus and water was not corrosive. However, for purposes of a complete record, that testimony, which I did not find persuasive, is summarized. Mr. Malanga based his conclusion by taking pH readings of Circhlor Plus in concentrate and using a mathematical formula to calculate the pH of the concentrate in water (Pet. Exs. 66, 67; Tr. 1232-35, 1243-45).⁵ He concluded that the Circhlor Plus/water solution in the batch tank would have a pH ranging from 12.201 to 12.477 (Pet. Exs. 66-67; Tr. 1263-64). According to Mr. Malanga, the diluted mixture is not corrosive under 40 CFR section 261.22, which states that a solid waste is corrosive

⁵ Mr. Malanga also considered the published pH for Circhlor Plus, listed on the product's technical information sheet as 13.5 for the concentrated solution (Resp. Ex. T). He testified that he used his tested pH readings of 13.9 and 14.0 because they were the highest pH numbers reported (Tr. 1263-64).

if its pH is less than or equal to 2 or greater than or equal to 12.5 (Tr. 1254-55). Mr. Malanga's reliance upon the solid waste standard was erroneous. "Solid waste" is defined to include certain "discarded materials," including abandoned materials (i.e., those disposed of, burned or incinerated"), sham recycled materials, "inherently waste-like materials," or certain military munitions. 40 CFR § 261.2 (a)(1), (a)(2)(i). As Mr. Malanga acknowledged, the combination of Circhlor Plus and water is not a solid waste (Tr. 1257).

Are Gardoclean R1700F and Oakite FiSan CIP acid, diluted in water at Dynamic, corrosive?

According to Mr. Aucoin, about a gallon and a half of Gardoclean is mixed into 150 gallons of water into the batch tank, at a dilution rate of about one percent (Tr. 1037). Once or twice a week, Oakite FiSan CIP acid is also mixed with water at a dilution rate of between one to two percent, and used to neutralize the Gardoclean. About two gallons (or two and a quarter gallons) of the FiSan CIP acid is mixed into about 150 gallons of water, also at a dilution rate of about one to two percent.

Corrositex testing was not performed on either of these substances, even though it is a DOT protocol referenced in the Building Code. Instead, both parties asserted that the pH values of the substances in dilution are determinative. However, they relied upon different pH values and argued that different standards should be used in determining whether the pH indicated a corrosive liquid.

Petitioner's expert, Mr. Malanga, compared his pH readings, derived through use of the mathematical formula referenced above, to the solid waste standards, and concluded that under the solid waste standards, neither of the substances, when diluted in water at Dynamic, was corrosive (Pet. Exs. 66, 67). Mr. Malanga's reliance upon the solid waste standard was, as noted, erroneous.

Respondent asserts that in the absence of Corrositex testing, pH value of chemicals in dilution could be analyzed under the United Nations' GHS standards (Resp. Ex. FFF; Tr. 2025). The testimony of respondent's expert, Mr. Lahti, supported this conclusion. Mr. Lahti concluded that it was rational to rely upon the GHS standards, because "[t]he GHS system is virtually identical to the DOT [system]" system (Lahti: Tr. 2025). The DOT was one of the major agencies which drafted the GHS standards for the UN (Tr. 2025). Mr. Malanga did not rebut this testimony.

Moreover, the GHS standards and the Building Code define "corrosion" similarly, based upon its destructive impact upon human skin (GHS standard 3.2.1, Resp. Ex. FFF at 121). Although the GHS standards establish a "tiered" approach for testing and evaluation of skin corrosion and irritation, with a preference for "[e]xisting human or animal experience," they also permit consideration of pH in the absence of such data (Section Resp. Ex. FFF at 121, 122). A pH of less than or equal to two, or greater than or equal to 11.5, may be sufficient to determine that a substance is corrosive (Resp. Ex. FFF at 122, Section 3.2.2.2, Figure 3.2.1).

In the absence of Corrositex testing, I find that it is reasonable to rely upon the pH criteria enunciated in the GHS standards which were substantially similar to the DOT standards referenced in the Building Code.

The question then becomes which pH readings to compare to the GHS standards.

Mr. Malanga attempted to take actual pH readings from the concentrated chemicals at the building, using a portable pH meter. This attempt, however, was not successful. Mr. Malanga acknowledged that his pH readings for both substances were "likely erroneous" because the values were so different from what would be expected and because a representative from the manufacturer told him afterwards that the solutions had probably "crystallized," which "ended up fouling the electrode" in the pH meter (Tr. 1242; Pet. Ex. 66 at 5, 7). Although Mr. Malanga could have re-tested, cleaning the electrodes would have required about two hours, which he concluded was not feasible (Tr. 1242).

Mr. Malanga instead relied upon the published pH value for Gardoclean and the published pH values for the two "reportable chemicals" within Oakite FiSan acid as a basis from which to derive the pH for the chemicals diluted in water (Tr. 1275). As to Gardoclean, Mr. Malanga referred to the technical information sheet, which showed pH in "working concentration" as "[g]reater than 13." He used an initial pH value of 13 to calculate that the derivative pH of Gardoclean in one percent solution was 11. Similarly, he used an initial pH value of 14 to calculate that the derivative pH of Gardoclean in two percent solution was 12 (Pet. Exs. 66, 67). Under the GHS standards, the two percent solution would be corrosive but the one percent solution would not be corrosive.

I did not find Mr. Malanga's calculations for Gardoclean to be persuasive. Mr. Malanga relied upon a technical information sheet which stated that Gardoclean had a pH of more than 13. Yet he used a pH of 13, not more than 13, to calculate the pH for Gardoclean in one percent

solution. Moreover, the pH value of over 13 that was shown on the technical information sheet was for pH in "working concentration," diluted at 1% to 20% by volume (Pet. Ex. 56). There seems to be no reason for Mr. Malanga to interpret the pH value as he did. Accordingly, I find the published pH value for Gardoclean in working concentration on the technical information sheet (over 13) to be more reliable than the pH values of 11 and 12 that were derived by Mr. Malanga. Using the published pH reading of over 13, I find that Gardoclean at one percent solution, used at Dynamic, to be corrosive under the applicable GHS standards.

As to Oakite FiSan CIP acid, Mr. Malanga testified that he utilized the lowest published pH readings for each of the "two reportable chemicals" contained within the product, which are phosphoric acid (1.5 pH) and nitric acid (1.0 pH) (Tr. 1275; Pet. Ex. 66). He explained that he took these numbers from "generic material safety data sheets" ("MSDS") for products that were about 85 percent phosphoric acid and 80 percent nitric acid (Tr. 1276). He used these pH values, he testified, because he could not find a published MSDS online for FiSan CIP acid (Tr. 1278).⁶ Applying the same mathematical formula described, Mr. Malanga calculated the following derivative pH for each acid at two percent concentration: for phosphoric acid, 3.1999; and for nitric acid, 2.6999 (Pet. Exs. 66, 67). These pH levels are not corrosive under the GHS standards.

Respondent urges that Mr. Malanga's values should be discounted in favor of the pH values shown on the technical information sheet for Oakite FiSan CIP acid (Resp. Post-Trial Br. at 21). The technical information sheet shows a pH of "approximately 1 to 10% by volume" at "working concentrations" (Resp. Ex. P1). The normal working concentration is .5 to 100 % by volume "depending on application" (Resp. Ex. P1). According to Mr. Lahti, this means that the pH of the mixture remains at one until the concentration of acid to water reaches ten percent, at which point the pH "typically" becomes higher than one (Tr. 776). Thus, one to two percent FiSan CIP acid in concentration, used at Dynamic, would have a pH of one, which is corrosive under the GHS standards.

⁶ Mr. Malanga testified that respondent provided petitioners with only the first page of the MSDS (Tr. 1278). Although respondent initially introduced only the first page of the MSDS into evidence (Resp. Ex. P), it later produced the full document (Resp. Ex. P2). Mr. Malanga acknowledged that he did not recall whether he tried to obtain the full MSDS from respondent (Tr. 1278-79). The MSDS for FiSan CIP acid shows the pH of the concentrated liquid as less than 2.5 and characterizes it as a "corrosive acid" and a "corrosive material" (Resp. Ex. P2).

I found the data on the technical information sheet to be more reliable than the pH extrapolated by Mr. Malanga. Although Mr. Malanga used the pH of what he termed to be the "reportable chemicals" for Oakite FiSan CIP acid, the MSDS for FiSan CIP Acid shows the "weight percent" values for phosphoric acid at between 5 to 10 percent and for nitric acid at between 20 and 30 percent. The MSDS refers to other "[u]nidentified ingredients," but does not list them because they are not considered hazardous under federal regulations (Resp. Ex. P2 at 1). The technical information sheet for FiSan CIP acid describes the chemical composition of the product as consisting of three ingredients, the two acids identified by Mr. Malanga as well as nonionic surfactant (Resp. Ex. P1). Mr. Malanga's analysis did not consider any other ingredients.

Further, Mr. Malanga's analysis relied upon questionable assumptions. He asserted that the pH value stated in the technical information sheet Oakite FiSan CIP acid was "an obvious error" (Tr. 863) because pH is "never expressed in terms of percentage" (Tr. 862). Mr. Lahti provided a more convincing explanation of the published value, testifying that it indicated pH of one percent up until the ratio of the chemical in solution reaches ten percent. Using the published pH value of one percent, I find that Oakite FiSan CIP acid, diluted between one and two percent, used at Dynamic, to be corrosive under the applicable GHS standards.

In sum, the evidence establishes that diluted Gardoclean R1700F and diluted Oakite FiSan acid, used at Dynamic to clean the batch tanks, are corrosive.

Does 3V's and Dynamic's use of diluted Circhlor Plus, Gardoclean, and FiSan CIP acid each exceed the MAQs for corrosive liquids?

Respondent contends that the first and second floors together comprise one control area, as discussed below. But respondent asserts that even if the first floor is considered to be its own control area, the MAQ for corrosive liquids is exceeded based on 3V's use of diluted Circhlor Plus to clean its tanks. The record supports respondent's contention.

Mr. Pennant's testimony established that the batch tanks at 3V are cleaned whenever they are used. When only one tank is cleaned, 100 gallons of diluted Circhlor Plus solution is produced. This falls well below the permissible MAQ for corrosive liquids on the first floor in a sprinklered building, which is 200 liquid gallons. However, on some days all three tanks are cleaned, and some tanks are cleaned more than once a day. When three or more tanks are cleaned, approximately 300 gallons of diluted Circhlor Plus in water are produced. Additionally,

Circhlor Plus is mixed with water in an open bucket at the same two to three percent concentration to create a 10 to 15 gallon mixture which is used to clean utensils in a sink. Thus, the total amount of 2 to 3 percent Circhlor Plus diluted in water at 3V ranges from 100 gallons to 315 gallons daily. This exceeds the applicable MAQ of 200 liquid gallons in a control area.

Similarly, respondent asserts that even if Dynamic's second-floor factory is considered its own control area, the MAQ for open system corrosive use is exceeded by Dynamic's use of cleaning solutions (Gardoclean and Oakite FiSan CIP acid) in addition to Oakite Detergent Sanitizer LF and Oakite CFC Foam Cleaner. The evidence establishes that Dynamic's use of cleaning solutions alone exceeds the MAQ for corrosive liquids. As at 3V, Dynamic's batch tanks are cleaned whenever they are used. Only 150 gallons of Gardoclean in dilution is used to clean a single batch tank. However, about three days a week, all three tanks were used, and on those days 450 gallons of Gardoclean in dilution is used. About once a week, FiSan CIP acid is also used to clean the tanks; 150 gallons of diluted FiSan CIP acid is used for every tank cleaned. The quantities of Gardoclean and FiSan CIP acid in dilution exceed the MAQ of 150 liquid gallons for corrosive liquids in open system use on the second floor.

Petitioners contend, however, that the cleaning solutions mixed in the batch tanks, including Circhlor Plus and Gardoclean, should not be included in the calculation of whether the MAQ of corrosive liquids is exceeded (Pet. Post-Trial Br. at 13). Petitioners advance six arguments in support of their contention. First, petitioners assert that 3V and Dynamic are "typical non-alcoholic beverage makers," which the Building Code classifies as "Factory Industrial F-2 Low-Hazard Occupancy." As petitioners highlight, under section 306.3 of the Building Code, "beverages; nonalcoholic" is considered a "Factory Industrial F-2 Low-Hazard Occupancy," defined as "Factory Industrial uses that involve the cleaning, laundering, fabrication, or manufacturing of noncombustible materials which during finishing, packing or processing do not involve a significant fire hazard." In his report (Pet. Ex. 46 at 35), Mr. Malanga concluded that the occupancy of the building was Factory/Industrial use group F-2/D-2 (Low Hazard) for the bottling operations, and Storage use group S-1 (Moderate Hazard) for the "associated storage spaces" (Pet. Ex. 46 at 35). Mr. Lahti, in his reports as well as his testimony, disputed this characterization, asserting that under section 307.1 of the Building Code, the occupancy classification is High-Hazard Group H occupancy (Pet. Ex. 47).

I am not persuaded by petitioners' argument. The Loft Law and implementing regulations establish specific and narrow criteria for determining whether an incompatible commercial use exists in a building. Section 2-08(k)(iii) of the Loft Board's rules precludes coverage if the building is or should be classified as a High-Hazard Group H occupancy under section 307 of the Building Code. Section 307.1 of the Building Code defines a High-Hazard Group H occupancy as involving the "manufacturing, processing, generation, or storage of materials that constitute a physical or health hazard in quantities in excess of those found in Tables 307.1(1) and 307.7(2)." Petitioners' argument, which relies upon different sections of the Building Code than those specified in the Loft Board rules as controlling, is not persuasive.

Petitioners' remaining arguments are, essentially, that the chemicals used for cleaning, when diluted in vast quantities of water in the batch tanks, are not dangerous and should not bar coverage. Petitioners assert that the solutions are made in the batch tanks and drained directly from the batch tanks, and are never moved or transported. Petitioners contend that, "[a]s with any corrosive, any harm only occurs from direct contact," that it would be "virtually impossible" for any residential tenants to come into contact with the corrosives, that the cleaning solutions are only "mildly corrosive," and that they are "used and disposed of in a short period of time" (Pet. Post-Trial Br. at 13). Finally, petitioners assert that even if the beverage makers constitute a high-hazard occupancy, there is "no risk" to the residential tenants because there is a "required fire separation" between the commercial and residential areas (Pet. Post-Trial Br. at 13).

I agree with many of petitioners' contentions. The cleaning solutions, once used, are drained directly from the batch tanks. The diluted Circhlor Plus solution is only "mildly corrosive," according to the Corrositex testing, and the diluted liquid is only used for fifteen or twenty minutes at a time, per batch tank. The cleaning process at Dynamic also takes about an hour for each batch tank, and the sanitizing process takes an additional 15 or 20 minutes. And the potential for destruction of human skin from a corrosive requires contact with the chemical, so it seems unlikely that there would be risk to tenants residing on the upper floors from the use of the cleaning chemicals in solution within the batch tanks.

But petitioners' arguments do not comport with the Loft Law and Loft Board's regulations. The Loft Board's regulations do not provide for consideration of such factors as the possibility of actual harm, the degree of corrosivity, or the amount of time that corrosive chemicals are in open system use. They define an inherently incompatible commercial use as a

High-Hazard Group H occupancy under section 307 of the Building Code. Section 307 states that a high-hazard use is established when the MAQs set forth in tables 307.7(1) and 307.7(2) are exceeded. The minutes of a 2011 Loft Board public hearing into the proposed regulations note at least one member's concern that the "use group" rules would not adequately consider the impact of the commercial use on the health and safety of residential occupants in the building. Minutes of Public Meeting, March 10, 2011 at 2 ("Discussion of Proposed Amendment to, 'Use Group' Portion of § 2-08), published at http://www.nyc.gov/html/loft/downloads/pdf/minutes_03_10_11.pdf.

Petitioners highlight the legislative history underlining the 2010 amendment to the Loft Law which added the incompatible use exemption. In particular, petitioners note the Assembly Memorandum to the bill, which states that the chapter amendment was drafted to prevent lofts with "insurmountable safety concerns" from being covered under the Loft Law (Pet. Post-Trial Br. at 3, *citing* Assembly Mem., Bill Jacket, L. 2010, ch. 147, Assembly Bill 11567). Petitioners contend that the use of corrosive chemicals in the batch tanks do not constitute an "insurmountable" safety concern and that, therefore, the "literal language" in the Loft Board's regulations "need not be adhered to" since it would produce a result inconsistent with the statute (Pet. Post-Trial Br. at 13-14). I disagree. There is no need to look to the legislative history when the language of a regulation or statute is clear, as it is here. *Anonymous v. Molik*, 2018 N.Y. LEXIS 1593 at 10-11 (2018); *Yong-Myun Rho v. Ambach*, 74 N.Y.2d 318, 321-22 (1989); McKinney's Cons Laws of NY, Book 1, *Statutes* §§ 76, 94.

Moreover, the Assembly Memorandum to which petitioners refer was submitted in support of the entire amendment to the Loft Law, which added multiple coverage exemptions, including whether a unit was located in a basement or cellar. The language relating to "insurmountable safety concerns" could well apply to one of these coverage exemptions. By contrast, the very next sentence in the Memorandum – after the sentence relating to insurmountable safety concerns – refers specifically to incompatible use, stating that the chapter amendments would provide greater protections to tenant safety "by determining if their buildings contain unsafe industrial activities."

In sum, I am not persuaded by petitioners' arguments that, under the current law and rules, the quantity of corrosive liquids in dilution at Dynamic and 3V cannot not count toward the MAQ for corrosives in open use. I find that 3V's and Dynamic's use of these corrosive

liquids for cleaning the batch tanks exceeds the MAQ for open system use per control area. This establishes a high-hazard occupancy under section 307.1 of the Building Code and precludes coverage.

The parties' remaining contentions relating to incompatible use are discussed below.

Should the concentrated liquid chemicals in drums at 3V and Dynamic be considered as part of the calculation of liquid corrosives used in open systems?

In addition to the diluted chemicals, respondent contends that the concentrated liquid chemicals in the drums at both 3V and Dynamic are corrosive, are in open system use once the drums were opened, and should be counted as part of the total amount of corrosives in determining whether the MAQ is exceeded. Respondent asserts that the chemicals include: (1) at 3V: Circhlor Plus, Hypofoam/Fichlor Foam, Galacid Excel 88 (lactic acid), and FiSan Oxy Sanitizer; and (2) at Dynamic: Gardoclean, Oakite Detergent Sanitizer LF 2, Oakite FiSan CIP acid, and Oakite CFC foam cleaner. Respondent contends that, except for FiSan Oxy Sanitizer, which was used in a five-gallon open drum, the concentrated chemicals at 3V were used in 55-gallon "open drums" (Pet. Post-Trial Mem. at 19). Respondent asserts that at Dynamic, Oakite Detergent Sanitizer LF2 and Oakite FiSan CIP acid are used in 46-gallon open drums, that Oakite Detergent Sanitizer LF2 is used in a 55-gallon drum, and that Oakite CFC Foam Cleaner is used in at least one five-gallon container (Resp. Post-Trial Br. at 20).

With the exception of CFC Foam cleaner and FiSan Oxy Sanitizer, which were delivered to the factories in five-gallon containers, the liquid chemicals were siphoned or pumped out of their drums into smaller containers. Petitioners contend that during the siphoning, only the chemicals that were transferred out of the drums were in an open system. The chemicals in the drums, petitioners assert, were not part of the open system. Respondent's position on whether the drums were part of an open system during the siphoning was not clear. Respondent asserts, however, that once the siphoning was concluded, the drums remained in an open system because they were not closed vapor-tight. Thus, respondent asserts, the entire contents of the drums should be counted as part of the calculation of corrosive liquids used in open systems.

The first issue to be determined is whether the concentrated chemicals in the drums at 3V and Dynamic are corrosive liquids.

Are the concentrated chemicals in the drums at 3V corrosive?

The evidence shows that the chemicals which respondent highlighted as in use at 3V are corrosive, but that one of these chemicals – FiSan Oxy Sanitizer – should not be considered in calculating whether the MAQ for liquid corrosives was exceeded because it was probably not in use in 2010. Thus, only Circhlor Plus, Fichlor Foam, and Galacid Excel 88 should be considered as determining whether the corrosive liquids in the drums at 3V were used in open systems.

The safety data sheet (“SDS”) for FiSan Oxy Sanitizer states that it is a category 1A corrosive under the GHS standards (Resp. Ex. U). But it is likely that Oakite Sanitizer 4, not FiSan Oxy Sanitizer, was in use on June 21, 2010, the effective date of the 2010 amendments to the Loft Law, as well as on May 1, 2013, the application filing date. In January 2016, Mr. Pennant explained, he was “in the process” of “phasing out the Sanitizer 4 and actually going full scale with the FiSan Oxy Sanitizer” (Tr. 981-82). The evidence did not demonstrate that Oakite Sanitizer 4, in use before 2016, is corrosive. The SDS for Oakite Sanitizer 4 indicates that it is a “corrosive material” (Resp. Ex. V at 8), but also indicates that it has a pH of between 6 and 8 (Resp. Ex. V at 5). Thus, under the GHS standards, it is not corrosive. Because incompatible use is pegged to the level of hazard in existence from June 21, 2010 to the filing date of a coverage application, the quantities of FiSan Oxy Sanitizer that 3V currently uses should not be considered.

Corrositex testing demonstrated that Circhlor Plus in one and two percent solution was corrosive (Pet. Exs. 159, 160). The dilution of a chemical reduces the corrosivity (Malanga: Tr. 1298). Therefore, because diluted Circhlor Plus was corrosive, Circhlor Plus concentrate that is not diluted in water is also corrosive.

The safety data sheet (“SDS”) for Fichlor Foam indicates that its pH is greater than 12.5, and that its GHS classification is category 1A, which demonstrates that it is corrosive (Resp. Ex. W).⁷

Petitioners argued that Galacid Excel 88 is not corrosive because the DOT characterized it as a non-corrosive material in a 1997 letter to a transportation policy consultant with a Washington, D.C. law firm (Pet. Post-Trial Br. at 12). This letter indicated that “the lactic acid product, as tested, is not a corrosive material” (Pet. Post-Trial Br. at 12, Pet. Ex. 158). Petitioner

⁷ The MSDS for Hypofoam, which Mr. Pennant testified was replaced by Fichlor Foam, also indicates that the liquid is a corrosive, with a pH between 12.5 and 13.5 (Resp. Ex. III).

also contended that a MSDS for Galacid (Pet. Ex. 71) and the label on a drum of Galacid Excel 88 (Pet. Ex. 68) shows that it was an irritant. An irritant has a lower skin corrosion value than a corrosive (Malanga: Tr. 1293).

Petitioners' arguments are not persuasive. Mr. Malanga testified that he could not find a MSDS for Galacid XL 88 (Tr. 1456). At trial, however, respondent produced a MSDS for "lactic acid 88% and lactic acid 88% USP," which described the product as a corrosive (Resp. Ex. S). The MSDS for Galacid upon which petitioners rely appears to be for a different product, because it indicates that it is composed of lactic acid between 20 to 90 percent (Pet. Ex. 71). Further, Mr. Lahti testified that the MSDS for Galacid (Pet. Ex. 71) should not be relied upon because it states that its "content and format are in accordance with [an] EEC Commission Directive. . .," which meant that testing was done as part of the EEC protocol, not the DOT protocol (Tr. 1678).

The evidence relating to the DOT letter and the placarding shown in the photograph of Galacid Excel 88 (Pet. Ex. 68) was more muddled. Mr. Lahti indicated that he spoke with the manufacturer for Galacid and learned that the DOT based its 1997 conclusions on overseas testing that was not conducted under the DOT protocol. He believed this explained why the MSDS for Galacid (Pet. Ex. 71) listed the product as an irritant (Tr. 1968, 2031-32). The label on a drum of "Galacid Excel 88," stored at 3V, also had a black "X" on a red background, which is the symbol for an irritant (Pet. Ex. 68; Tr. 1293). Mr. Malanga acknowledged, however, that DOT classifies substances as corrosives, but not as irritants (Tr. 1290). The decision to placard something as a corrosive or an irritant is made by the shipper of a hazardous material (Tr. 1292).

The most dispositive evidence as to Galacid – and the reason why petitioners' arguments that it is not a corrosive were ultimately not persuasive – is that in May 2016, respondent arranged for Corrositex testing to be performed on a sample of Galacid Excel 88 taken from 3V. The testing demonstrated that Galacid Excel 88 was corrosive, "packing group II" (Resp. Ex. SS; Tr. 1964-65). As noted, Corrositex is a DOT- approved protocol referenced under Section 307 of the Building Code. Mr. Malanga confirmed that packing group II is a corrosive classification (Tr. 1488).

Are the concentrated chemicals in the drums at Dynamic corrosive?

The record shows that, at Dynamic, Gardoclean R1700F, Oakite CFC Foam Cleaner, and Oakite FiSan CIP acid are corrosive.

The technical information sheet for Gardoclean R1700F (Pet. Ex. 56) shows that its pH at working concentration is greater than 13 (with normal working concentration 1 to 20 percent by volume). The technical information sheet does not indicate the pH of Gardoclean in concentrated form. Mr. Malanga testified, however, that diluting a chemical in water reduces the corrosivity by moving the pH of the chemical closer to 7, which is the pH of water (Tr. 1298). Thus, the pH of the concentrated, undiluted Gardoclean exceeds the pH of the diluted Gardoclean. The undiluted Gardoclean is more corrosive than the diluted product.

The technical information sheet for Oakite CFC foam cleaner indicates that its pH in concentrated form is 13.3 (Pet. Ex. 53), which is corrosive under the GHS standards.

The MSDS for Oakite FiSan CIP indicates that its pH is less than 2.5 and lists it as a corrosive material and corrosive acid (Resp. Ex. P2). The technical information sheet shows that its pH at working concentrations is approximately 1 to 10 percent by volume, which Mr. Lahti persuasively testified means that the product's pH is 1 when it is diluted up to 10 percent of its total volume. A pH of 1 is corrosive under the GHS standards. The undiluted product is more corrosive.

The evidence is insufficient to establish that Oakite Detergent Sanitizer LF2 is corrosive. The technical information sheet for Oakite Detergent Sanitizer LF 2 (Pet. Ex. 52) shows the pH of the sanitizer in working concentrations (1 fluid ounce to 6 gallons of water) as below 2.8, but does not show the pH of the undiluted sanitizer. The pH of the diluted solution is higher (closer to 7) than the pH of the undiluted sanitizer. It is not clear, however, that the pH of the undiluted sanitizer would be 2.0 or below, which is necessary under the GHS standards to classify it as a corrosive.

Are the concentrated corrosive liquids in the drums at 3V and Dynamic in open system use?

The record, consisting largely of the credible testimony of Mr. Pennant and Mr. Aucoin, establishes that 3V purchased 55-gallon drums of Circhlor Plus, Galacid Excel 88, and Fiechlor Foam.⁸ Dynamic purchased 46 gallon drums of Gardoclean and Oakite FiSan CIP acid and five-gallon containers of Oakite CFC Foam Cleaner. 3V bought multiple drums of Circhlor Plus and Galacid Excel 88, used only one drum of each chemical at a time, and kept the other drums in storage. Likewise, Dynamic purchased multiple drums of Gardoclean and Oakite FiSan CIP acid

⁸ Mr. Lahti's chemical summary indicates that Hypofoam was also purchased in 55-gallon drums (Resp. Ex. HHH).

and multiple containers of Oakite CFC Foam Cleaner, but opened only one drum of Gardoclean and Oakite FiSan CIP acid at a time.

At 3V, Galacid, Circhlor Plus, and Fichlor Foam were all siphoned from their drums into smaller buckets. The buckets were used to carry the chemicals either to the batch tanks for mixing (Galacid and Circhlor Plus) or to a utility sink to be mixed with water and used for cleaning (Fichlor Foam). Similarly, at Dynamic, Gardoclean and Oakite FiSan CIP acid were siphoned into smaller buckets, which were used to carry the solutions to the batch tanks. Although Mr. Aucoin did not specifically address the issue, Oakite CFC Foam Cleaner was delivered in small five-gallon containers, which suggests that it may have been poured directly into a bucket to be mixed with water and used to clean the floors.

Mr. Lahti testified that the drums are closed when they are delivered. The drums are opened by unscrewing the bung hole cap. The bung hole is a two inch hole in the top of a drum with threads that can be capped and uncapped (Tr. 764). Once the bung cap is unscrewed, the chemicals in the drum are exposed to the air and the drums become part of an open system. When the bung cap is screwed back on, however, the drum no longer is part of an open system, but is either "closed" or in storage (Tr. 753).

According to Mr. Lahti, there were three different types of pumps used to transfer the chemicals out of the drums to smaller containers: two different types of siphon pumps and one piston pump (Tr. 756-57). He identified an illustration of a siphon pump (Pet. Ex. 51) as one of the siphon pumps that he saw at 3V (Tr. 757). He also recalled seeing a piston pump in use at 3V (Tr. 761). The illustration of the siphon pump shows that it has a large tube which is seated in the middle of a drum in the bung hole (Pet. Ex. 51). Mr. Lahti testified that a siphon pump is operated by manually moving the upper part of the pump up and down to draw fluid into the tube, which starts the siphoning. The siphoning continues without any further pumping and stops only when the red cap which is part of the suction pump is unscrewed (Tr. 758-59). By contrast, someone needs to move the shaft of a piston pump up and down for it to work (Tr. 761).

Mr. Lahti's testimony about what happens during the transfer of liquid from a drum to a smaller container was equivocal. He testified that during the transfer of liquid from a drum to a smaller container, the liquid in the drum is in an open system because the chemicals are dispersed into a smaller container that is open to the air (Tr. 677). But he also acknowledged that the siphon pump itself is a closed system "during the action of siphoning" (Tr. 759). Once the

siphoning is completed, “the siphon is broken and again it is an open system from the tube all the way down into the drum.” This suggests that during the siphoning, the product remaining in the drum is not in use in an open system.

Mr. Malanga testified unequivocally that only the product that is transferred from the drum into an open container is in use in an open system. Any remaining product within the drum “is still contained in a closed container” (Tr. 636). This interpretation is consistent with the definition of “open system” use in the Building Code, which requires that the vessel or system that is involved is “continuously open to the atmosphere during normal operations,” so that “vapors are liberated,” or that the product be “exposed to the atmosphere.” BC § 307.2.⁹

Based upon the experts’ testimony, I find that during siphoning, only that portion of the chemicals transferred out of the drum into smaller open containers are in use in an open system.

The remaining question is whether the drums remain in an open system once siphoning is completed. Mr. Lahti testified that an open system existed “all the way down into the drum” once the siphoning concluded. He believed that the entire amount of corrosive liquid remaining in the drum was in use in an open system because the siphon tube is “open to the atmosphere” and the vent cap “should be left open to the atmosphere as well” (Tr. 761). He produced photographs which he had taken at 3V in October 2015, showing drums with the siphon pumps still attached (Resp. Ex. N1, N2). One of these photographs shows that the siphon tube was not securely seated in the bung hole (Resp. Ex. N2). Thus, the drum was not air-tight (Tr. 678). Mr. Lahti testified that these photographs represented drums that he saw in October 2015, as well as during his initial inspection in October 2013 (Tr. 67-79).

Mr. Aucoin testified that at Dynamic, he would place a plastic cap with a small slit over the threaded cap of the drum cap, so as to “minimize” the contact to the air (Tr. 1041). But even with a small slit, the drum would still not be air-tight. Further, Mr. Lahti testified that piston pumps – one of which was operational at 3V – cannot be seated tightly within a bung hole. He said that because a drum only has one bung hole, when liquid is drawn out of the drum through a

⁹ The 2008 Building Code is applicable to this case, as discussed above. But the definition of “open system” in the 2014 Code, which respondent contended was applicable, is substantially similar: “The use of a . . . liquid hazardous material in equipment or a vessel or system that remains open during normal operation such that vapors are emitted during the operation of such equipment, vessel or system, and the material is exposed to the atmosphere during such operation.” Moreover, the 2014 Building Code provided the same examples of open systems as the 2008 Code: “dispensing from or into open beakers or containers, dip tank, and plating operations.” These containers are clearly “open” to the atmosphere.

piston pump, a vacuum is created within the drum (Tr. 763). Thus, the bung hole must be left partially open to allow for ventilation (Tr. 763).

Mr. Malanga disputed Mr. Lahti's testimony that the pumps at the building only have one bung hole. He testified that he "personally observed" the drums in storage and in use at both 3V and Dynamic, and saw that they had two bung holes, which is "standard" in the industry (Tr. 870, 880-81). Referring to a photograph on his laptop which petitioners' counsel represented had been produced in discovery,¹⁰ Mr. Malanga testified that drums of Gardoclean and FiSan CIP acid which were stored at Dynamic each had two bung holes on top (Tr. 880-82). Thus, according to Mr. Malanga, a manual drum pump could be installed tightly in one bung hole and a vent could be put in the other bung hole to allow air in but not let product out (Tr. 883). This testimony undercut Mr. Lahti's testimony that piston pumps cannot be securely seated in the drums because the drums only have one bung hole.

Mr. Lahti's testimony established that he saw drums at 3V that, once opened and attached to a siphon pump, had been maintained at 3V without the siphon pump being securely seated in the bung hole. This left the drums open to the air. However, this seemed to be a careless method of using the siphon pump, which is designed to be seated in the bung hole. This practice, moreover, seems contrary to the manufacturers' instructions on the MSDS for many of the chemicals used at 3V and Dynamic. As petitioners' counsel noted, these MSDS, upon which both Mr. Aucoin and Mr. Pennant relied, indicate that the drums should be kept "closed" when "not in use" (Pet. Post-Trial Br. at 11; Resp. Ex. S at 2 (Galacid: lactic acid 88%); Resp. Ex. T at 3 (Circhlor Plus); Resp. Ex. W at 4 (Fichlor Foam); Pet. Ex. 56 at 2 (Gardoclean); Resp. Ex. P2 at 3 (FiSan CIP Acid; Resp. Ex. V at 5)). Thus, the practice of leaving drums with the siphon pump loosely seated in the bung hole should not provide a basis for counting the entire contents of the drum as in use in an open system when there is no actual pumping or siphoning taking place.

Mr. Lahti asserted, however, that even if the siphon pumps were securely seated in the bung hole, the drums remained in use in an open system so long as the siphon pump was attached, because the siphon tube was open to the atmosphere and the vent cap should also be

¹⁰ This photograph was not entered into evidence (Tr. 881, 882). It was part of a series of photographs produced by petitioners in discovery. Mr. Malanga showed the photograph to counsel for respondents during his testimony (Tr. 879-80). Respondent's counsel did not dispute Mr. Malanga's testimony that the photograph showed two drums, each with two bung holes (Tr. 880).

left open to the atmosphere. I did not find this persuasive. Mr. Lahti did not explain why the vent cap needed to be left open. He acknowledged that when the vent cap is screwed back on, the drum is closed. Keeping the drums closed when chemicals are not being transferred out of it is consistent with the manufacturers' safety instructions on the MSDS. Keeping the drums open, by contrast, appears to be an errant practice inconsistent with safety standards.

Respondent contended throughout the trial that the incompatible use inquiry is strictly limited to assessment of whether substances in use or storage at the building exceeded the MAQ under the Building Code. Thus, respondent asserted, inquiry into whether a commercial tenant could change the way it did business (such as using a different type of siphon pump that is air-tight when not in use) is not permissible.¹¹ I do not reach this issue. The issue is not whether the commercial tenants should be forced to use a different type of pump. The issue is whether in calculating the hazard level in use, practices which are inconsistent with law, regulations, or manufacturers' safety instructions should be discounted. It is not reasonable to rely upon an errant or irregular practice – such as leaving the vent cap to the drum open – in calculating the level of hazard.

I conclude that only the amount of corrosive liquids that is actually transferred out of the drums into smaller containers should be counted in calculating whether the MAQ for liquid corrosives used in open systems is exceeded.

What quantities of concentrated corrosive liquid are in open system use at 3V and Dynamic?

At 3V, the corrosive liquids used are Galacid, Fichlor Foam, and Circhlor Plus. As Mr. Pennant testified, both Galacid and Fichlor Foam are siphoned into five gallon containers. The bucket of Galacid is poured into a tank every time a batch of syrup was made. Depending on how many and how frequently the drums were used, the amount of Galacid in use ranges from five gallons to 15 gallons or more every day. Mr. Pennant testified that he usually uses one container of Fichlor Foam in a week; thus, five gallons of concentrated Fichlor Foam is used daily in open systems. Mr. Pennant also testified that Circhlor Plus is added to water in the batching tanks at a target concentration of two to three gallons of concentrate per 100 gallons. The amount of Circhlor Plus used in open systems was therefore between 2 gallons and 9 gallons

¹¹ Petitioners' counsel asserted that siphon pumps for flammable liquids could easily be used at 3V and Dynamic at minimal cost (Pet. Post-Trial Br. at 12; Tr. 870-72). Mr. Malanga testified that this type of pump is similar to pumps used at gasoline stations and creates a closed system once pumping is completed (Tr. 839-40).

every day, and more if a tank was used more than once in a day. In sum, the amount of concentrated, undiluted liquid corrosives used in open systems at 3V is as high as 29 gallons per day (assuming that each tank was cleaned only once a day – more frequent cleaning, which sometimes occurred, would result in more chemicals being used). The 29 liquid gallons of concentrated corrosives in use should be added toward the amount of diluted Circhlor Plus used at 3V, which by itself exceeded the MAQ of 200 liquid gallons of liquid corrosives used in open systems in a first-floor control area in a sprinklered building.

At Dynamic, the concentrated chemicals used are GardoClean, FiSan CIP Acid, and Oakite CFC Foam Cleaner. Mr. Pennant testified that he sometimes opens two five-gallon containers of Oakite CFC Foam Cleaner at a time: thus, the amount of Oakite CFC Cleaner in open system use ranges between five and 10 gallons. About a gallon and a half of Gardoclean concentrate is used at a time; assuming three tanks are used, 4 ½ gallons of liquid concentrated corrosives are used daily in open systems. About 2 ¼ gallons of FiSan CIP acid is used about once a week to clean the tanks – at 3 tanks, this equals 6 ¾ gallons of concentrated FiSan CIP acid. In all, therefore, assuming that each tank was only cleaned once a day, the amount of concentrated, undiluted liquid corrosive used in open systems at Dynamic is as high as 21 ¼ gallons. This is in addition to the amount of diluted Gardoclean and FiSan CIP acid used at Dynamic each day, which by itself exceeded the MAQ of 175 liquid gallons for corrosive liquids in open system use in a second floor control area in a sprinklered building.

Do 3V and Dynamic constitute a single control area such that the quantities of concentrated liquid corrosives used at both should be aggregated to determine whether they exceed the MAQ?

The parties dispute whether 3V and Dynamic's factories, on the first and second floor constitute separate control areas or a single control area.

As noted, control areas are defined as spaces within a building "that are enclosed and bounded by exterior walls, fire walls, fire barriers, and roofs, or a combination thereof . . ." BC § 307.2. The Code defines MAQ by control area as a way of containing risk from the rest of the building (Lahti: Tr. 667). Control areas on the first and second floor must have a one-hour fire resistant fire barrier. BC § 307, tables 307.7(1) and 307.7(2), n. a; BC § 414.2, Table 414.2.2. Although the definition of control areas does not include floors, Mr. Peachy, an architect

testifying for respondent, indicated that floors could serve to separate control areas if they were "fire barriers" (Tr. 1729).

Mr. Malanga concluded that the building has five separate control areas, with the basement and each of the upper floors being a separate control area (Tr. 493). He believed that the fire rating between the floors was "at least" two hours, if not more, because the building is constructed with "thick heavy concrete slab[s]" (Tr. 492, 525, 888). He also concluded that, because of the thickness of the masonry, the stair shafts were two-hour rated with one and a half-hour rated doors (Tr. 492-93, 525).

Mr. Lahti "didn't do any specific study on the fire separation" so he did not really know what the fire separations in the building were between floors (Tr. 783). As to the elevators, he testified without explanation that he did not think the openings to the elevators "have any ratings on them, if anything, maybe 15 minutes" (Tr. 783). Yet both Mr. Lahti and Mr. Peachy concluded that the entire building was comprised of one control area, because: (1) the fireproofing throughout the building has deteriorated due to the age and use of the building; and (2) the elevator shaft is open to all the floors (Lahti: Tr. 668-69; Peachy: Tr. 805).

A "draft" Landmark Preservation Commission report on the building states that it was constructed in 1908-1909 of reinforced concrete (Res. Ex. OO; Malanga: Tr. 1392). The building is "fireproof" (Res. Ex. OO at 3). Yet there is some evidence that the concrete on the floors and ceilings has degraded over the years.

Mr. Malanga initially testified that when he walked through the building, he did not see "any evidence of . . . deterioration that would compromise the fire . . . resistant integrity . . . of the floors or the walls" (Tr. 887). On cross-examination, however, he acknowledged that there were some "through penetrations of the concrete floor that were not properly fire stopped or had incorrect material passing through. There were some minor cracks, very few . . . there was an area where a door may have had a missing filler plate or something that you had a hole through the floor of the door" (Tr. 1350). Mr. Malanga acknowledged reviewing testimony about leakage of fluids in the building (Tr. 1352). Mr. Aucoin testified that in 2011, 3V had complained almost daily that liquid was leaking from Dynamic's second floor factory into 3V's first floor space. In response, Mr. Aucoin grouted and sealed the floors and replaced plumbing and drains, so that by October 2015, the complaints about leaking had diminished to about once a month (Tr. 1056).

Mr. Malanga also acknowledged that concrete is “a porous material” which can “absorb moisture” and “deteriorate” when it gets wet (Tr. 1427, 1429). However, if “maintained or painted or coated,” concrete “doesn’t necessarily have to” deteriorate (Tr. 1429). When asked if the penetration of water from the second to the first floor meant that there is really only one control area comprising both floors, Mr. Malanga conceded that the fire resistance rating of the first floor could be compromised if the building were not properly maintained (Tr. 1352-53). He highlighted, however, when he researched violations issued against the building, none involved problems with fire doors, penetrations and rated assemblies, or decay and cracks in the concrete or mortar (Tr. 1651-52).¹²

Mr. Lahti testified that “some chunks” of fireproofing and “some concrete here and there” have fallen off in the basement (Tr. 782). Mr. Peachy gave much more extensive testimony. He said that he inspected the building three times in 2014 and 2015 and saw that the concrete, “throughout the manufacturing areas of the building,” was in “poor condition” (Tr. 1709). He noted that the building had been used to make ice cream,¹³ then to bottle milk, then to manufacture nonalcoholic beverages, all of which “entail a lot of use [of] water,” and in the case of 3V and Dynamic, liquid cleaning solutions (Tr. 1709, 1957). All of this water, Mr. Peachy asserted, degraded the concrete in the building and caused the reinforcing steel to rust and expand, leading to a “break in the bond” between the steel and the concrete. This exposed the steel and the rebars, causing “a break in the . . . fire barrier that was intended to separate the floors” (Tr. 1709). In addition, when piping and other equipment has been attached to the ceiling, fireproofing was removed and has not always been replaced (Tr. 808).

Respondent submitted various photographs taken by Mr. Peachy. The photographs show damage to ceilings and floors, including damage near floor drains and pipe installation as well as damage to fireproof beams that were added to the original construction (Tr. 1731-37; Resp. Exs. YY1-YY9). Mr. Peachy testified that the photographs are illustrative of conditions throughout the building involving degradation of concrete and structural fireproofing (Tr. 1736-37).

Mr. Peachy conceded that some rooms may still have a two-hour rated fire ceiling. But he concluded that because of the decay in fireproofing, “compartmentalization of the building by

¹² Mr. Malanga testified that he could not access all the violations; the website only permitted him access to 33 violations of the 41 that were identified; to access the other violations, which were older, he would have had to make a FOIL request or visit DOB to inspect the actual records, which he felt was unnecessary (Tr. 1651-52).

¹³ According to the Landmarks Preservation Report, the building, originally known as the “Thomson Meter Company Building,” was next known as the “New York Eskimo Pie Corporation Building” (Resp. Ex. OO at 1).

floors has been voided" (Tr. 809). He acknowledged, however, that the compartmentalization may not have been completely voided, although he did not think that the building, in its existing condition, would qualify for a certificate of occupancy (Tr. 809). He testified that to maintain the degraded fireproofing, respondent would have to make building-wide repairs that would require exposing the concrete and probably applying some type of concrete, plaster weld or cementitious mix. However, once that was done, maintaining the fireproofing would be "ordinary maintenance" (Tr. 1955).

The record demonstrated that at least some of the fireproofing in the building has deteriorated, which is likely to have adversely affected the fire rating of the floors. It is not clear, however, that the fire barriers between the first and second floor have deteriorated below a one-hour rating. Mr. Malanga testified that the concrete was so thick that the fire rating was well above two hours. Mr. Lahti acknowledged that he did not really know what the current fire rating of the floors was. Even if the amount of fireproofing was significantly reduced, the record did not establish that the end result was to void the control area between the floors, as Mr. Lahti and Mr. Peachy contended.

In addition to disagreeing about the amount and impact of degraded fireproofing, the parties disputed whether the use of the elevator creates a single control area throughout the building. Mr. Malanga testified that the vertical opening for the freight elevator is considered to be a shaft, and that the fire rating of the shafts for this building were "clearly beyond two hours" (Tr. 888). According to Mr. Malanga, when the building was constructed, the applicable codes required a freight elevator to have a three-hour fire resistant rating as well as one and a half hour rated door assemblies (Tr. 888). Mr. Malanga testified that this standard exceeds the current code requirement and that the codes anticipate that one door on a shaft will be open (Tr. 888). The two-hour rating to which Mr. Malanga referred is double the rating required under the Building Code to establish a separate control area. BC § 307, tables 307.7(1) and 307.7(2), n. a; BC § 414.2, Table 414.2.2.

By contrast, Mr. Peachy testified that the way in which the elevator is used establishes one control area throughout the building. He explained that the elevator cab has doors on either side which open onto the floors. The doors are bi-parting doors. They can be closed only from inside the cab using interior interlock structures, which are horizontal bars which lock into the side wall of the cab (Tr. 1720, 1721). The elevator cab also has mesh protective screening on its

top as well as on the sides where there are no doors (Tr. 1719). Photographs of the elevator (XX1-XX3) corroborate Mr. Peachy's testimony about the design of the elevator cab. In addition, several of the photographs, taken from the inside of the elevator, show what Mr. Peachy described as sheet rock and studs on the outside of the cab, beyond the cab doors (Tr. 1719; Pet. Ex. XX2 at 5, 8). These photographs were taken from inside the cab. Because the interlocking device was not secured, the doors were partially open, so that the sheet rock was visible (Tr. 1719). Other photographs are of the closed shaftway doors, seen from outside the elevator (Resp. Ex. XX1, top row right).

Mr. Peachy testified that the elevator doors cannot be opened from the outside of the elevator because the elevator door does not have a hole where an arm key could be inserted (Tr. 1725). If the door is accidentally closed, the elevator service contractor would need to either pry open the doors and manipulate the lock from outside the shaft or operate the cab from a controller in the elevator room (Tr. 1725). According to Mr. Peachy, Mr. Eisenberg said that one of the elevator doors is "always left open" (Tr. 1725). Thus, according to Mr. Peachy, except for when the elevator door is accidentally shut, "there is at least one door open in the . . . shaft way" (Tr. 1725). Mr. Peachy concluded that "because the . . . predominant use . . . of the elevator is to have the doors open even when the elevator is not . . . in use . . . there's an open shaft defeating the . . . segregation of the floors" (Tr. 1727).

Mr. Peachy's testimony that one of the shaftway doors to the elevator was usually left open, while hearsay, made sense in light of his testimony that the elevator door can only be opened from inside the elevator. This testimony was not credibly rebutted. Mr. Malanga initially testified that one could manually open and close the elevator doors, from "inside or outside" (Tr. 1661). But when questioned about how the doors are opened from the outside, he acknowledged that he did not recall because he "didn't pay that much attention to it" (Tr. 1661).

The record did not establish, however, that the shaftway doors were open at the same time on every floor in the building. Mr. Lahti acknowledged that the elevator does not move unless the elevator doors are closed on that floor. To arrive at the next floor, a passenger must open the door to exit the elevator (Tr. 785). Mr. Lahti's testimony was supported by Mr. Aucoin's observation that at Dynamic, the shaftway doors were generally closed (Tr. 1053). Mr. Aucoin also testified that although the elevator cab has doors on both sides, a passenger could

not exit through the back door, as it opens onto some sort of wall. Egress to and from the elevator was only through one side of the elevator.¹⁴

Thus, as petitioners' counsel noted in his brief, the shaftway doors, if left open, are only open on the floor on which the elevator is parked at (Pet. Post-Trial Br. at 8). This undercuts Mr. Peachy's conclusion that the use of the elevator creates an open shaft to each of the floors in the building, destroying the segregation of the floors by control area.

In sum, the evidence relating to deteriorating fireproofing and to the use of the elevator does not indicate that the fireproofing deteriorated to less than the one-hour fire barrier needed to create a separate control area. The record supports petitioner's contention that the first and second floors should each be considered a single control area. Accordingly, the quantities of liquid corrosives on the floors should not be aggregated to determine if the MAQ is exceeded.

Although not necessary for this finding, petitioners also contend that respondent has an ongoing obligation to maintain the building, including to fire-stop all penetrations with appropriate materials, and that respondent's failure to do so or to remedy any defects in the elevator should not be held against petitioners (Pet. Post-Trial Br. at 10). Petitioners argue that respondent cannot rely upon deteriorated or inadequate conditions caused by its own failure to maintain to demonstrate a breach in fire safety.

Petitioners' argument is convincing. Section 28-301.1 of the Building Code, "Owner's Responsibilities," states that all "safeguards" that "are required in a building by the provisions of this code, the 1968 building code, or other applicable laws or rules, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working condition." (Pet. Ex. 79 at A-51). Section 703.1 of the Fire Code states that "[t]he required fire-resistance rating of fire-resistance-rated construction (including walls, fire stops, shaft enclosures, partitions and floors) shall be maintained . . ." and that any penetration for pipes, electrical conduit, wires, ducts and the like "shall be protected with approved methods capable of resisting the passage of smoke and fire" (Resp. Ex. RR at 69).

The 1906 Building Code, which was in use when the building was built, does not directly refer to "fire separations" or "control areas" (Malanga: Tr. 1396, 1399; Resp. Ex. PP). But it requires that every building over 75 feet, with exceptions, be constructed in a "fireproof" manner

¹⁴ Mr. Aucoin also recalled a secondary roll-up vinyl door that could be used to access the factory, but not to access the elevator (Tr. 1053-55).

(section 105, Resp. Ex. PP at 77) and imposes requirements for the construction of concrete floors, including the thickness of the concrete to be used (section 106, Resp. Ex. PP at 78-79). The 1906 Code also specifies that fireproof floors are to be tested by being subjected to “the continuous heat of a wood fire below” at not less than 1700 degrees Fahrenheit for not less than four hours (section 106, Resp. Ex. PP at 77-82). Mr. Malanga testified, persuasively, that this “is the equivalent . . . of . . . a four hour fire resistance rating” (Tr. 1571). Thus, respondent is required to maintain the fire rating of the building under the Building Code and Fire Code.

The Loft Board regulations governing incompatible use limit consideration to whether a high-hazard use exists under the standards articulated in the Building Code. It follows that the standards articulated in the Building Code – such as the owner’s responsibility to maintain the fire rating of the building – should be considered in assessing the number of control areas. The owner’s failure to comply with maintenance standards should not provide a basis from which to conclude that a control area comprising multiple floors has been breached.

Similarly, noncompliant conditions relating to the elevator should not determine the number of control areas. Mr. Peachy testified that although the elevator was legal when the building was built, it would have to be updated under current code: “The openings in the elevator shaft would have to be fireproofed and [made] self-closing” (Tr. 1728). Maintenance issues relating to the lack of vestibules and the lack of an opportunity to use a broken arm key would have to be resolved (Tr. 1728).

Petitioners’ argument that lax maintenance by an owner should not result in a finding of increased hazard is compelling. To hold otherwise would lead to an illogical result. Owners would be able to defeat coverage claims by delaying maintenance or repairs of fire-barriers that segregate a building into separate control areas. This is surely not the intent behind the 2010 amendments to the Loft Law, which were designed to enhance, not reduce, building safety.

Summary: Incompatible Use

Under the Loft Law and Loft Board’s regulations, units in a building are not eligible for coverage if, from June 21, 2010, to the filing date of a coverage application, the building contains a commercial use which is inherently incompatible with residential use. The use is incompatible if it falls within use groups 15 to 18 of the Zoning Resolution and is or should be classified as High-Hazard Group H occupancy under section 307 of the Building Code. The

record establishes that the commercial occupancies of 3V and Dynamic, which fall within use group 17, constitute a high-hazard use incompatible with residential occupancy because the quantities of corrosive liquids used in open systems at both 3V and Dynamic exceed the MAQ for each of their control areas. The corrosive liquids in open system use consist of both the liquid concentrated chemicals mixed with water to clean the batch tanks and the concentrated chemicals taken from the drums and poured or siphoned into open containers in the factories. The corrosive liquids used in open systems do not include the liquids remaining in the drums.

As this is the first major case involving incompatible use under the 2010 amendments, several observations are warranted. First, the amount of time and money required of the litigants to hire experts, conduct testing, and litigate the matter was enormous. The Loft Board, which is part of the Department of Buildings, may wish to consider some alternate procedure in which an independent expert employed by the Department conducts his or her own assessment of risk when the applicants first file their application, before the case is sent to OATH. That expert could then testify, if need be, at any OATH proceeding. This would also have the benefit of permitting the development of a clearer record predicated upon an unbiased expert assessment, rather than a battle between two dueling experts, each paid by a party to the litigation.

Moreover, the regulations place the burden of proving a lack of incompatible commercial use upon the applicant. This does not make sense. Usually, the burden of proof is imposed upon the party with access to the relevant information. Prince, Richardson on Evidence § 3-209 (Lexis 2018). Here, unless the applicants work in the commercial businesses, they are unlikely to know whether chemicals used in the businesses present a high-hazard occupancy under the technical standards in the Building Code. Even though the regulations tag the incompatible use to the effective date of the 2010 amendments through the filing date of the coverage application, the applicants will likely not have access to the businesses until after the case is filed and an OATH judge orders access for purposes of inspection.

Finally, the applicants all claim to reside on the fourth floor of the building. The commercial tenancies are on the first and second floor. As the second part of this decision discusses, the applicants have established that they have residentially occupied their units for a long time, with the knowledge of the owner. It is not clear that the use of corrosive liquids on the first and second floor of the building poses any actual safety risk to the tenants. As discussed above, the narrow scope of the regulations does not provide for an assessment of such actual risk,

only an assessment of whether high-hazard occupancy is established under Section 307 of the Building Code because the MAQs for hazardous chemicals per control area are exceeded. Consideration should be given to developing a more equitable manner of assessing incompatible use, consistent with the legislative purpose behind the 2010 amendments to ensure the safety of the residential tenants. Assembly Mem., Bill Jacket, L. 2010, ch. 147, Assembly Bill 11567.

As this is a report and recommendation, subject to consideration by the Loft Board as well as possible appeal to the courts, the parties' remaining contentions as to coverage and protected occupancy are discussed below.

OTHER COVERAGE AND PROTECTED OCCUPANCY ISSUES

The remaining issues relate to whether the petitioners' units were residentially occupied during the window period and whether the petitioners are the residential occupants of their units qualified for protection.

To qualify as an IMD under the Multiple Dwelling Law, a building must have been occupied "as the residence or home of any three or more families living independently from one another for a period of twelve consecutive months during the period commencing" January 1, 2008, and ending December 31, 2009 (the "window period"). MDL § 281 (5).

For a unit to qualify as a covered residence, it must have been residentially occupied for 12 consecutive months during the window period, and in addition, must: (i) not be located in a basement or cellar; (ii) have at least one entrance that does not require passage through another residential unit to obtain access to the unit; (iii) have at least one window opening onto a street or a lawful yard or court as defined in the zoning resolution for such municipality; and (iv) be at least 400 square feet in area. MDL § 281(5); *see also* 29 RCNY § 2-08(a)(4)(iii).

Here, six applicants filed for coverage. Applicant Malia Jensen withdrew her claim for coverage and protected occupancy by stipulation (ALJ Ex. 1). The remaining applicants are Jonathan Weiss, Cynthia Van Elk, John McCormick, Curtis Mitchell, and James Thirlwell. Mr. Weiss and Ms. Van Elk are married and their claims relate to unit 4B. Mr. McCormick, Mr. Mitchell, and Mr. Thirlwell seek findings of coverage and protected occupancy with regard to units 4E, 4C, and 4D, respectively.

The parties stipulated that none of the disputed units is in a basement or cellar and none require access through another unit. They also stipulated that all of the units with the exception

of the Mitchell unit contained a full bathroom and a full kitchen throughout the window period, have windows that open onto a street or lawful yard or court, and are in excess of 400 square feet in area. The parties also agreed that Ms. Jensen's unit, 4A, was residentially occupied since at least before January 1, 2008, is over 550 square feet, has lawful windows, and is not located in a basement or cellar (ALJ Ex. 1).

Stipulations as to the Mitchell unit, which contains an upper portion and a lower portion, differentiate between the two portions. The parties agree that the upper portion of the Mitchell unit had a full bath and a kitchen throughout the window period, has a conforming window, and is over 400 square feet in area. But as to the lower portion, the parties stipulated only that it meets the 400 square foot requirement and does not require access through a separate unit (Tr. 2912-13).

With the exception of Mr. Mitchell's unit, the remaining issues relating to coverage relate to whether the units were residentially occupied during the window period. An applicant must show "sufficient indicia of independent living" to demonstrate the unit's use as a family residence, as well as some physical conversion of the unit to a dwelling. *Franmar Infants Wear, Inc. v. Rios*, 143 Misc.2d 562, 563 (App. Term 1st Dep't 1989); *Anthony v. NYC Loft Bd.*, 122 A.D.2d 725, 727 (1st Dep't 1986) (cited in *Matter of Gallo*, OATH Index No. 2401/13 at 3 (Oct. 10, 2014), *adopted in part, rejected in part*, Loft Bd. Order No. 4349 (Jan. 15, 2015), *reconsideration denied*, Loft Bd. Order No. 4426 (Sept. 17, 2015)).

The determination of residential occupancy during the window period "requires a case by case analysis in which no one factor is determinative." *Matter of Boyers*, OATH Index Nos. 1338/12, 1381/12 & 1403/13 at 14 (Feb. 10, 2014), *adopted in part, rejected in part*, Loft Bd. Order No. 4302 (Sept. 18, 2014). Among the factors considered are "the presence of permanent improvements, such as bathrooms, bathing facilities, closets, and walls erected to separate living areas, and the presence of non-permanent items reflecting residential use such as refrigerators, stoves, and beds." *Id.*; see also *Matter of Pels*, OATH Index No. 2481/11 at 5-6 (June 20, 2012), *adopted*, Loft Bd. Order No. 4161 (June 20, 2013), *reconsideration denied*, Loft Bd. Order No. 4208 (Dec. 12, 2013) (installation of a kitchen, stove, refrigerator, cabinets, a desk and shelves, and the addition of walls to separate the living area and an additional doorway sufficient indicia of independent living and conversion).

Petitioners may prove residential occupancy through direct testimony as well as “indicia of residential living such as furniture, personal effects, and photographs of the unit being used residentially.” *Matter of Zhao*, OATH Index No. 2225/14 at 8 (Aug. 12, 2015), *adopted in part, rejected in part*, Loft Bd. Order No. 4445 (Nov. 19, 2015).

Circumstantial evidence of an applicant’s intent to make a unit his or her residence are also considered, including the receipt of mail at the unit, and whether the unit’s address is used for voter registration, bank and other financial records, tax returns, checks, driver’s license records, insurance documents, and similar purposes. *Matter of Ukai*, OATH Index Nos. 1394/14 & 1220/15 at 26 (Nov. 2, 2015), *adopted in part, rejected in part*, Loft Bd. Order No. 4686 (Sept. 21, 2017); *Matter of Gareza*, OATH Index Nos. 2061/12 & 760/13 at 8 (Dec. 12, 2012), *adopted in relevant part*, Loft Bd. Order No. 4243 (Feb. 20, 2014) (receiving mail at address, using the address on a bank account, and being registered to vote at address was evidence of residential use).

The remaining issues relate to protected occupancy, which is governed by section 2-09(b)(1) of the Loft Board rules. 29 RCNY § 2-09(b). Of the five applicants, all purport to have taken possession before June 21, 2010, and three of the five, Mr. Thirlwell, Mr. Mitchell, and Mr. Weiss, previously held leases to their units (Pet. Exs. 83, 114, 18). 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.” Under section 2-09(b)(2), occupants who are not prime lessees and take possession before June 21, 2010, do not require consent of the landlord for a sublet or assignment. Section 2-09(b)(3) is not applicable here, as it relates to tenants, including prime lessees with a lease currently in effect, who take possession on or after June 21, 2010.

Section 2-09(b)(4), originally promulgated in 1983, states that that a prime lessee, or sublessor who is not the prime lessee, is deemed to be the residential occupant qualified for protection if he or she can establish that the residential unit is “his or her primary residence, even if another person is in possession.” A “prime lessee” is defined as “the party with whom the landlord entered into a lease or rental agreement for use and occupancy of a portion of an IMD, which is being used residentially, regardless of whether the lessee is currently in occupancy or whether the lease remains in effect.” 29 RCNY § 2-09(a).

Two subsections to section 2-09(b)(4) state that that a prime lessee “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)(emphasis added). The import of this rule is to provide a prime lessee with a mechanism to go to court to recover the leased unit upon the expiration of a sublease. *Bishar v. Dukas*, 129 Misc. 2d 652, 656 (Civ. Ct. of City of New York 1985) (interpreting section 2-09(b)(4) as permitting a right to recover by the prime lessee); *Matter of Smulka*, Loft Bd. Order No. 1914 at 14 (Feb. 29, 1996) (same).

Nevertheless, the Loft Board has since 2014 ignored the plain language of Rule 2-09(b)(4), requiring a prime lessee to go to court to exercise his or her right to recover a unit from a sublessee, and has instead adopted a strained construction of the rule requiring that in order to prove protected occupancy, a prime lessee must establish that the unit is his or her primary residence. Further, according to the Loft Board’s recent analysis of section 2-09(b)(4), where a prime lessee is found to be the protected occupant “non-prime lessees are not entitled to protection.” *Matter of Tenants of 79 Lorimer Street*, Loft Bd. Order No. 4688 at 4 (Sept. 21, 2017). The Loft Board has stated that section 2-09(b)(4) is the only section of the rules to require a primary residence analysis. *Matter of McKenna*, Loft Bd. Order No. 4739 at 21 (Feb. 15, 2018), *adopting in part and rejecting in part, Matter of Blessing*, OATH Index Nos. 2313/15, 0011/16, 0012/16 & 0014/16 (Oct. 24, 2017).

As this tribunal has found, the Loft Board’s recent interpretation runs contrary to decades of Loft Board precedent and irrationally places a greater burden upon a prime lessee seeking protection than upon subtenants who are not required to establish primary residence. *See, e.g., Matter of Tenants of 151 Kent Avenue, Brooklyn*, OATH Index Nos. 532/17, 533/17 at 7-10 (Nov. 22, 2017); *Matter of Allweis*, OATH Index No. 2569/14 at 23-29 (Jan. 18, 2017); *Matter of Saladino*, OATH Index Nos. 2412/13 & 1879/14 at 62 (May 20, 2016), *adopted in part, rejected in part*, Loft Bd. Order No. 4714 (Nov. 30, 2017). As Judge Zornio has noted, “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 . . . pursuant to the Loft Board’s own rules. Thus, under its enabling statute, it is doubtful that the Loft Board has jurisdiction to adjudicate primary residency.” *Allweis*, OATH 2569/14 at 28.

Even though I believe the Loft Board's recent interpretation of 2-09(b)(4) to be incorrect, I am cognizant that the issue has not yet been addressed by the courts and that the Loft Board will issue a final decision in this case. Thus, for purposes of a full fact-finding, my decision will address protected occupancy both under prior precedent and under the Loft Board's recent interpretation of section 2-09(b)(4), as applied to prime lessees.

An analysis of the coverage and protected occupancy claims of each applicant follows.

John McCormick (4E)

Petitioners presented extensive testimony that John McCormick ("J. McCormick") has resided in unit 4E since 2006, including during the window period. Witnesses included J. McCormick, J. McCormick's brother, Kevin McCormick ("K. McCormick"), Ms. Jensen, and, to a lesser extent, Mr. Weiss and Mr. Thirlwell. J. McCormick also had a lease to a rent stabilized apartment at 240 Sullivan Street in Manhattan, including during the window period (Pet. Ex. 5 H, I). The evidence establishes, however, that J. McCormick moved out of 240 Sullivan Street in 2002 and has residentially occupied unit 4E since 2006. His brother, K. McCormick, has continued to reside in the Sullivan Street apartment.

J. McCormick testified that he moved into unit 4E in January 2006 and occupied a unit on the fourth floor facing northwest alongside Ms. Jensen's unit (Tr. 121-22). He continues to live in the unit (Tr. 119). Before moving to Bridge Street, Mr. McCormick had lived in five different apartments. In 1997, he lived in an apartment on Sullivan Street in Manhattan with his brother, K. McCormick, and his business partner (Tr. 120-21). J. McCormick left that apartment in 2002 and then lived in a series of three apartments in Brooklyn. He met Ms. Jensen in 2006 and she told him that she had a "subspace" that he could live in. He then moved into a temporary space about two blocks away from the Bridge Street building until Ms. Jensen's space was ready (Tr. 119-20, 131). J. McCormick testified that he does not pay rent for any space apart from unit 4E and does not own any property (Tr. 131).

After he moved into 4E, J. McCormick explained, he made a number of improvements to the space, including modifying walls to create an archway and a new bedroom, installing a sub-floor and pine flooring, adding a wood stove to the existing kitchen, and adding additional electrical fixtures and ceiling fans (Tr. 123-24). His unit currently includes a "complete kitchen" with a refrigerator and sink, a tub, toilet, and two large rooms (Tr. 123).

J. McCormick testified that Ms. Jensen introduced him to the building owner, Mr. Eisenberg, as the new tenant in her "sub-space" (Tr. 124). Their relationship was "very friendly" (Tr. 124). Mr. Eisenberg knew that he was living there and told J. McCormick to "just do what you want with the space" (Tr. 125). In the spring of 2006, J. McCormick helped Mr. Eisenberg build an office on the first floor (Tr. 125). J. McCormick testified that he refused payment for the construction work and instead asked to be allowed to live in the building for as long as he lived in New York. Mr. Eisenberg responded that "as long as [he was] alive," J. McCormick could live there (Tr. 131). J. McCormick would see Mr. Eisenberg in the hallway and parking lot regularly until 2010 and 2011 (Tr. 126).

Ms. Jensen and K. McCormick largely corroborated J. McCormick's testimony. Ms. Jensen explained that she lived at 110 Bridge from 2004 until she moved to the West Coast in 2014 (Tr. 8). Initially she was a subtenant of a man named "Reynolds" and then began paying rent directly to Mr. Eisenberg. Next to her unit on the west side was a unit that she described as a "subtenant apartment" (Tr. 10). The "subtenant apartment" was being used as a painting studio, but included a kitchen with a stove, a small refrigerator, and a bathroom with a shower and a toilet (Tr. 10-11). Mr. McCormick moved into that space in January 2006 (Tr. 11-12).

Ms. Jensen explained that she rented the "subtenant apartment" to J. McCormick knowing that he was "a builder and a capable person who could take on a rough space" (Tr. 10, 12, 13). When J. McCormick moved in, he took out walls, added a floor, made an arch, renovated the kitchen, and generally made it a "more aesthetically appealing living space" (Tr. 12). J. McCormick paid Ms. Jensen rent and she paid the owner (Tr. 14). She collected rent from him once a month at his apartment and would have tea with him there (Tr. 44). She would often hear his music and would see him carrying his old dog, "Kai," up and down the stairs (Tr. 13, 44). She would check on the dog for him around once a month (Tr. 44-45).

K. McCormick testified that J. McCormick moved out of his apartment on Sullivan Street in the spring of 2002 and moved in with his then-girlfriend in Greenpoint, Brooklyn (Tr. 84). K. McCormick did not recall any other addresses where J. McCormick lived in Brooklyn before Bridge Street. He believed that he thought his brother moved into Bridge Street in 2002, rather than 2006, as both J. McCormick and Ms. Jensen testified (Tr. 85). He visited 4E soon after J. McCormick moved in and saw that it had a full kitchen and bath (Tr. 85). K. McCormick explained that J. McCormick continues to live in 4E, and that J. McCormick's wife moved into

the unit in about 2013 (Tr. 85-86). K. McCormick also described several photographs taken shortly before trial, showing his brother, himself, and their father inside 4E (Pet. Exs. 4B, 4C).

Mr. Weiss and Mr. Thirlwell confirmed that J. McCormick lived in unit 4E. Mr. Weiss described J. McCormick's space, including a kitchen, bathroom, wood burning stove, and the bedroom alcove that J. McCormick built (Tr. 394-95). He testified that the unit was "[v]ery nicely done" with a lot of "industrial antiques" and "really nice cabinetry" in the kitchen (Tr. 395). He testified that he knew that J. McCormick lived there (and also had photo shoots there) because "he was there all the time" and he had a very old and sick dog who he carried either up to the roof or down to the street (Tr. 395). He also recalled J. McCormick putting his trash outside the front door because the elevator was monopolized by the commercial tenant – until the pile got so big that J. McCormick took the elevator at night to the dumpsters (Tr. 396).

Mr. Thirlwell testified that he met J. McCormick in the mid to late 2000s. Once J. McCormick moved in, according to Mr. Thirlwell, he "opened up the walls" to provide more light to the kitchen, created an archway that created a type of "split level floor" and appeared to create a bedroom area (Tr. 1773). Mr. Thirlwell described the kitchen and bathroom (Tr. 1773-74), and said that currently, J. McCormick, his wife, Vanessa, and their young child live in the space. He sees them often, walking in and out, and taking their dogs out (Tr. 1774).

There was extensive testimony and documentation relating to the Sullivan Street apartment. J. McCormick acknowledged that he first leased the rent-stabilized Sullivan Street apartment in 1998. He signed lease renewals for Sullivan Street from 2002 to 2013, even though he moved out in 2002 (Tr. 132; Pet. Ex. 5). K. McCormick also signed some of the lease renewals (Pet. Ex. 5B, 5C, 5D, 5G, 5K). K. McCormick used to work at J. McCormick's restaurant, where the brothers often signed the leases (Tr. 135).

In 2004 or 2005, J. McCormick explained, he put his brother's name on the renewal lease for Sullivan Street (Tr. 134). In connection with that, he recalled, albeit "vaguely," receiving a questionnaire asking about other tenants in the space who should be recognized on the lease (Tr. 134-35). At the time he believed that when someone has a rent-stabilized apartment a sibling could also be on the lease (Tr. 134).

Despite having his name on the lease for Sullivan Street, J. McCormick stressed that he moved out in 2002 and has not paid rent on 240 Sullivan Street since spring 2002. The last time he slept at Sullivan Street was "probably" for a month in 2003 or 2004 (Tr. 131). J. McCormick

spoke for years with a representative of the management company at Sullivan Street, so it "was understood" that he had moved out (Tr. 133). He told the landlord in writing that he had moved (Tr. 133, 134).

J. McCormick's 2007 state and federal income tax returns (Resp. Ex. C), 2007 driver's license renewal (Resp. Ex. D), cell phone records (Resp. Ex. ZZZ), and bank records (Resp. Ex. AAAA) all list his address as Sullivan Street. J. McCormick also registered to vote at 240 Sullivan Street and, as of 2015, had not changed his registration (Tr. 146). In 2008 and 2009, he owned two cars, one of which was registered in Narrowsburg, New York, where he had a summer house, and the other of which was registered at Sullivan Street (Tr. 144-45).

However, J. McCormick explained that he used the Sullivan Street address because Ms. Jensen told him he could not have a mailbox at Bridge Street (Tr. 140). Ms. Jensen told him that Mr. Eisenberg did not want him to use Bridge Street as his home address (Tr. 140, 142). J. McCormick explained that he did not want a post office box and did not think it was appropriate to use his business address for personal mail (Tr. 141). In 2013, after his Loft Board application was filed, J. McCormick installed a mailbox at Bridge Street and began to receive mail there. That same year is also when he first filed his taxes using the Bridge Street address (Tr. 141).

K. McCormick testified that he lives at the Sullivan Street apartment, photographs of which show a bedroom, living area, kitchen, and bathroom (Tr. 86; Pet. Ex. 3). He also testified that he pays the rent (Tr. 102-03). Cashier's checks from K. McCormick payable to "240 Sullivan St., LLC," dated between July 2012 to November 2013 (Pet. Ex. 7), corroborate his testimony, at least for this time period (Tr. 112; Pet. Ex. 7). K. McCormick admitted that he also had owed rent and that the landlord initiated non-payment proceedings, which were settled in April 2013 (Tr. 136-37; Resp. Ex. K). The stipulation of settlement shows that the named respondent in the case is J. McCormick, but that K. McCormick signed the stipulation, agreeing to pay \$3,750 to the landlord (Tr. 113; Resp. Ex. E). K. McCormick issued one cashier's check to the landlord for \$750 (Pet. Ex. 7). There is no record of the other check (Pet. Ex. 7).

On balance, I found J. McCormick and K. McCormick to be credible witnesses, corroborated by Ms. Jensen, Mr. Weiss, and Mr. Thirlwell. K. McCormick's testimony that his brother moved into the Bridge Street building in 2002 rather than 2006 was an apparent error, because K. McCormick did not recall the other addresses that J. McCormick testified he resided at after moving out of the Sullivan Street apartment in 2002. K. McCormick was otherwise

credible, recalling, for example, what his brother's apartment looked like when he first moved into the Bridge Street building.

As a whole, the witnesses' testimony established that J. McCormick has lived in unit 4E since 2006, including for 12 consecutive months during the window period, and that J. McCormick made permanent physical changes to the space, including altering the walls and floors, updating the electrical system, adding a woodstove, and building out a bedroom. *See Boyers*, OATH 1338/12, 1381/12 & 1403/13 at 14 (indicia of residential use includes presence of permanent improvements, such as bathrooms, closets, and walls separating living space, as well as non-permanent items such as refrigerators, stoves, and beds).

In making this finding, I have considered that J. McCormick remained on the lease for Sullivan Street after 2002 and that he used the Sullivan Street address on his 2007 tax returns and for other purposes such as utility bills and driving records. I find that J. McCormick and K. McCormick credibly testified about the circumstances under which J. McCormick remained on the lease for Sullivan Street. K. McCormick's testimony that he believed a rent-stabilized tenant could have his brother on the lease and added his brother to the renewal lease at some point was credible, particularly given the renewal leases containing K. McCormick's signature. The brothers' testimony was supported by other documentation, including the renewal leases including K. McCormick's signatures, rent renewal forms which K. McCormick signed, cashiers' checks for rent signed by K. McCormick, and the stipulation of settlement signed by K. McCormick to pay rent arrears.

It is undisputed that J. McCormick used the Sullivan Street address for his 2007 taxes, driver's license renewal, cell phone and other purposes. But J. McCormick explained that Ms. Jensen told him that Mr. Eisenberg did not want him to have a mailbox at Bridge Street. J. McCormick's testimony, although uncorroborated hearsay, was nonetheless believable because the building did not have a residential certificate of occupancy. There was therefore a reason for the owner to avoid documentation of its use for residential purposes.

Respondent's claim that the Bridge Street loft was not Mr. McCormick's primary residence during the window period does not bear on the issue of Loft Law coverage. To prove residential use for coverage purposes, an applicant does not need to establish that the unit was his or her primary residence during the window period. *Matter of Nabor*, OATH Index No. 2570/14 at 15 (May 29, 2015), *adopted*, Loft Bd. Order No. 4668 (Apr. 20, 2017), *mot. for*

reconsideration denied, Loft Bd. Order No. 4796 at 4 (Sept. 20, 2018) (“[A] finding of Article 7-C coverage for a unit is not dependent on whether the unit is used as a primary residence, but whether it was used for residential purposes during the Window Period”); *Allweis*, OATH 2569/14 at 20 (noting that “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.”); *Matter of Gurkin*, OATH Index No. 489/12 at 16 (Dec. 14, 2012), *adopted*, Loft Bd. Order No. 4186 (Oct. 17, 2013) (stating that “a unit need not be the sole residence of the occupant during the window period in order for it to count as a residentially occupied unit”); *see also 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).

In sum, the evidence establishes that J. McCormick residentially occupied unit 4E for 12 consecutive months during the window period.

The remaining issue as to J. McCormick is whether he should be deemed a protected occupant. Respondent asserted that he cannot be found to be a protected occupant because he held a rent-stabilized lease to Sullivan Street during the window period (Resp. Post-Trial Brief at 62). However, this alone does not defeat a claim for protected occupancy. *See Saladino*, OATH 2412/13 & 1879/14 at 54 (finding that “there is nothing in the Loft Board Rules which permits an otherwise eligible tenant to be denied protected occupancy status because he may hold a lease for a rent-stabilized apartment”). The case upon which respondent relies in support of its position is inapposite because the issue there was whether a tenant could maintain his rent-stabilized lease when he has a primary residence elsewhere. *See Rocky 116 L.L.C. v. Weston*, 186 Misc. 2d 251, 252-53 (App. Term, 1st Dep’t 2000) (declining to give effect to a non-primary residence waiver contained in a stipulation between a rent-stabilized tenant and his predecessor landlord and discouraging “[t]he practice of permitting tenants to stockpile rent-stabilized apartments”). As applied to J. McCormick, *Rocky 116 L.L.C.* would address whether he can maintain his rent-stabilized lease at Sullivan Street, not whether he can be deemed a protected occupant at Bridge Street.

There is no proof in the record of a lease or rental agreement between J. McCormick and the owner. Thus, under the Loft Board’s recent interpretation of section 2-09(b) of its rules, a primary residency requirement does not apply. Instead, J. McCormick’s protected occupancy should be assessed under section 2-09(b)(1), which states that, “[e]xcept as otherwise provided

herein, the occupant qualified for protection . . . is the residential occupant in possession of a residential unit.” Although J. McCormick credibly testified that Mr. Eisenberg knew of and approved his residential occupancy, under section 2-09(b)(2) of the Loft Board rules an applicant such as J. McCormick who is not a prime lessee and took possession of his unit before June 21, 2010 is entitled to protection so long as he “is in possession of” his unit -- regardless of whether the owner consented to their occupancy. *See, e.g., Matter of Stathis*, OATH Index No. 347/15 at 10-11 (July 12, 2016) (tenant in possession of loft unit who took occupancy prior to the effective date of the Loft Law was protected occupant even though she did not have a lease or rental agreement). The credible evidence establishes that J. McCormick has lived in unit 4E since 2006 and that he continues to do so. He is the residential occupant in possession of his residential unit. Thus, if the unit is covered he should be deemed the protected occupant.

James Thirlwell (4D)

Mr. Thirlwell provided testimony and documentary evidence to establish his residential occupancy at the building. He explained that he has lived in unit 4D since 1987 (Tr. 1810). Upon moving in, he paid a fixture fee to the existing tenant, whose last name was Lavery (Pet. Ex. 82), and executed a lease agreement with Mr. Eisenberg (Pet. Ex. 83). When he first moved in, the unit lacked a heating system and some of the walls were unfinished (Tr. 1751, 1761). There was a “rough bathroom” and “a kind of a kitchen layout,” as well as another room in the back of the loft which had another two toilets (Tr. 1751). Mr. Thirlwell was not sure whether the unit had a stove or refrigerator (Tr. 1751, 1761). After he moved in, Mr. Thirlwell cleaned and painted, sheet-rocked the walls, and installed his own stove and refrigerator. At first he used space heaters but over time he installed a new heating system. The work was ongoing for years (Tr. 1761). Mr. Thirlwell described the unit as “still a work in progress,” explaining, “I keep renovating as I go along” (Tr. 1762).

Mr. Thirlwell explained that he has been a professional musician since 1982, and provided an article from “Wire,” a British music magazine, written in 2005 (Tr. 1799). The article described Mr. Thirlwell’s loft space where he had been living “for the past two decades,” and included a photograph of him sitting in an open space with bookshelves, wall decorations, speakers, and a desk and chairs (Pet. Ex. 109). Photographs taken in 2008 and 2010 also show residential use, including friends gathered in a kitchen area with a refrigerator and island countertop, a living room space with a sofa and lamps, stairs leading to an upper level room,

bookshelves and art on the walls, and a work space with a desk, recording equipment and cabinets (Pet. Ex. 110; Tr. 1802-09).

In addition to the "Wire" article and the photographs of the loft, Mr. Thirlwell submitted a number of documents in which he represented, both during and after the window period, that unit 4D was his residential address. These documents include: a Social Security statement from October 2008 (Pet. Ex. 85); his New York State drivers' license from 2005 through 2011 (Pet. Ex. 86); federal and state tax returns from 2008 through 2013 (Pet. Exs. 87-92); Verizon and T-Mobile statements from January and July 2008, January and July 2009, January and July 2010, and January and March 2011 (Pet. Exs. 106, 107); and a renter's insurance bill from June 2008 (Pet. Ex. 108). On his 2014 and 2015 federal and state tax returns, Mr. Thirlwell listed a post office box as his home address (Pet. Exs. 93, 94). He explained that he uses the post office box as a mailing address (Tr. 1784).

Mr. Thirlwell described mail service at the building as irregular and unreliable. He currently has a mailbox in the downstairs hallway, but did not recall when he installed it (Tr. 1839). There are a number of mailboxes in the downstairs location, including, he believes, the mailbox for 3V, one of the commercial tenants. Before he installed his mailbox, his mail usually "landed up in a pile" under the mailboxes (Tr. 1859). In addition to the downstairs hallway, there used to be a mailbox on the landing between the third and fourth floor for "all the mail" (Tr. 1860). But that mailbox was unreliable because a lot of mail would get stolen. At another time the mail was received in the basement near Mr. Eisenberg's office and someone who worked for Mr. Eisenberg would collect the mail. In general, because of the commercial tenants, there have been a lot of people who "pass through the building" near the various mailboxes (Tr. 1861). At one point, he believes, Mr. Eisenberg recommended that he get a post office box (Tr. 1861).

Other witnesses confirmed that Mr. Thirlwell has been living in unit 4D. Ms. Jensen testified that from 2004 until she moved to Portland in 2014, she visited Mr. Thirlwell in his unit "with pretty solid regularity" (Tr. 26). They were friends and she stopped in to have tea or borrow CDs. He lived in the space and also worked there mixing sounds on his audio equipment. The apartment had a lot of CDs and video collections, along with art and other decorations (Tr. 26-27). J. McCormick also described Mr. Thirlwell's space, explaining that he had gone there in 2007 or 2008 to check on Mr. Thirlwell's cat while he was away. He characterized the unit as "a

feast for the eyes,” with “tons of audio equipment, mixing boards, beautiful crazy artwork, taxidermy . . . [a] million CDs and books and just a very creative, artistic space” (Tr. 130). J. McCormick did not recall the kitchen in detail because the rest of the apartment was so “overwhelming” but knew it was “fitted out” as a kitchen (Tr. 130).

Based on the witness testimony and documentary evidence, petitioner has established that unit 4D was residentially occupied for 12 consecutive months during the window period and that Mr. Thirlwell continues to occupy unit 4E. Thus, unless coverage is barred by a finding of incompatible use, the unit should be found to be a covered unit and Mr. Thirlwell should be deemed a protected occupant under section 2-09(b)(1) of the Loft Board rules, because he is the residential occupant in possession of the unit.

Mr. Thirlwell should also be found to be a protected occupant under section 2-09(b)(4) of the Loft Board rules. The undisputed evidence established that he resides at unit 4E. Respondent did not offer any evidence showing that Mr. Thirlwell has lived anywhere other than unit 4E since he first moved there in 1987.

Respondent asserts that Mr. Thirlwell cannot establish protected occupancy, for two reasons, the first of which relates to Mr. Thirlwell’s O-1 visa. Mr. Thirlwell testified that he holds this visa, which is an “artist visa,” allowing him to live and work here. He renews his visa every three years (Tr. 1775-76; Pet. Ex. 84). Respondent contends that the O-1 visa requires that Mr. Thirlwell maintain a permanent residence in another country (Resp. Post-Trial Br. at 65). Thus, respondent contends, unit 4D cannot be Mr. Thirlwell’s primary residence.

Respondent’s argument is misplaced. A tenant’s citizenship status should not affect whether or not he or she is a protected occupant under the Loft Law. *See Tenants of 357 Bowery*, OATH Index No. 1067/14 at 8 (Oct. 22, 2014), *adopted in relevant part*, Loft Bd. Order No. 4350 at 3 (Jan. 15, 2015) (“[A]tenant’s citizenship status is irrelevant to the issue of . . . protected occupancy status.”); *Matter of Cohen*, OATH Index No. 2015/12 at 3-5 (Aug. 23, 2013), *adopted*, Loft Bd. Order No. 4261 (Mar. 20, 2014).

These decisions were issued after the decision in *Katz Park Ave. Corp. v. Jagger*, 11 N.Y.3d 314, 316 (2008), upon which respondent relies (Resp. Post-Trial Br. at 64). In *Jagger*, the Court of Appeals held that, “at least in the absence of unusual facts,” a foreign citizen on a B-

2 tourist visa could not meet the primary residence requirement to maintain a rent regulated apartment in New York City.¹⁵

Mr. Thirlwell, however, holds an O-1 visa, not a B-2 tourist visa. As petitioners' counsel noted in a supplementary post-trial submission, a B-2 tourist visa is designed for "an alien . . . having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure." 8 U.S.C. § 1101(a)(15)(B). Holders of B-2 visas may only stay in the United States for one year and extend their stay in six-month increments. 8 C.F.R. § 214.2(b)(1) (Lexis 2018).

By contrast, an O-1 visa is for a foreign citizen who "has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim" 8 U.S.C.S. § 1101(a)(15)(0)(i). With an O-1 visa, residents like Mr. Thirlwell may "legitimately come to the United States for a temporary period as an O-1 non-immigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States." 8 C.F.R. § 214.2(o)(13). As set forth in the Foreign Affairs Manual, a State Department publication, "[t]here is not an overall time limit as to how long one may be present in the United States in total in an O-1 status...." 9 F.A.M. 402.13-9(a) (available at <https://fam.state.gov/>). Additionally, "[a]n applicant for an O-1 visa does not have to have a residence abroad which he or she does not intend to abandon." 9 F.A.M. 402.13-10(B)(a) (emphasis added). Respondent's argument mistakenly conflates the requirements for a B-2 tourist visa with the requirements for an O-1 visa.

Respondent's second contention is that Mr. Thirlwell is not a protected occupant because his federal tax returns are "logically incompatible" with his residential occupancy of the building (Resp. Post-Trial Br. at 65). Respondent asserts that the First Department's decision in *Ansonia Assocs. v. Unwin*, 130 A.D.3d 453 (1st Dep't 2015) precludes an applicant for protected occupancy from advancing claims that are logically incompatible with declarations made on his or her tax returns (Resp. Post-Trial Br. at 40).

As an initial matter, I am not persuaded that *Ansonia* applies to a determination of protected occupancy under the Loft Law. In *Ansonia*, the First Department reversed the denial

¹⁵ The Court left open the question of whether a tenant could show that "her principal dwelling place for immigration purposes is in one place, and her primary residence for rent regulation purposes in another," 11 N.Y. 3d at 317.

of summary judgment to an owner who was seeking an award of possession of a rent-stabilized apartment. The Court held that the rent-stabilized tenant was precluded from asserting primary residency, as required to remain in her apartment, because that claim was “logically incompatible” with the tenant’s deduction of her entire rent as a business expense on her corporate federal tax returns. 130 A.D.3d at 454. The Court highlighted specific instructions on the federal corporate tax returns for an S Corporation disallowing the deduction of rent “for a dwelling unit occupied by any shareholder for personal use.” *Id.* The Court found, therefore, that the tenant’s assertion of primary residency was “contrary to declarations made under the penalty of perjury on income tax returns,” *Id.*, citing *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009). The Court also noted that the tenant had “made no showing that would undermine [its] conclusion” that the tenant’s claim for primary residence was “logically incompatible” with her full deduction of rent. *Id.*

Respondent highlights that, in *Mahoney-Buntzman*, the Court of Appeals articulated a policy rationale for preclusion of claims that are inconsistent with statements made on tax returns (Resp. Post-Trial Br. at 35), stating, “We 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 tax returns.” 12 N.Y.3d at 422. But in *Mahoney-Buntzman*, the Court did not have before it the peculiar context in which loft coverage and protected occupancy cases such as this arise: where tenants live for years illegally in buildings without a residential certificate of occupancy, often with the full knowledge and acquiescence of the owner. *See Allweis*, 2569/14 at 19 (“In many buildings . . . landlords were aware of and were complicit in tenants’ use of their commercial units for residential purposes.”).

As petitioners’ counsel notes, there was ample testimony that the occupants of the building and Mr. Eisenberg colluded to hide their residential occupancy from building inspectors (Pet. Post-Trial Mem. at 21). Mr. Martin recalled a time when the building was being inspected and he and his partner had to move out temporarily to hide their residency (Tr. 187, 205). Mr. Weiss testified that Mr. Eisenberg would notify them when inspections were scheduled and provide a space in the basement that was inaccessible to anyone else for the tenants to hide their belongings (Tr. 400-01). Ms. Cypriano, who is Mr. Mitchell’s wife, similarly testified that whenever inspectors came to the building, they would have to hide some of their things in the basement, in space which Mr. Eisenberg provided (Tr. 2063). As noted in *Allweis*, the State

Legislature was aware of the illegality of loft tenancies and drafted the Loft Law to protect tenants who had been living illegally or in violation of their lease or rental agreement. *Id.*, citing MDL § 286(1).

Given the history of illegal loft occupancy in New York City and the legislative desire to legalize such occupancy and protect existing loft tenants, I am not persuaded that *Ansonia* should preclude tenants, including Mr. Thirlwell, from protected occupancy on the basis of statements on their tax returns which are purportedly inconsistent with primary residence. Respondent's theory of estoppel would make a range of conceivably incompatible claims on tax returns a bar to protected occupancy status. Such a prohibitive application of *Ansonia* to loft tenants' tax returns runs counter to the Loft Law's remedial purpose and should be rejected as the single dispositive factor in findings of protected occupancy. See *Association of Commercial Property Owners v. NYC Loft Bd.*, 118 A.D.2d 312, 318 (1st Dep't 1986) (urging interpretations of the Loft Law in keeping with its remedial purpose); *Matter of Gatien*, OATH Index Nos. 2121/13, 1033/14, & 2233/14 at 18 (May 13, 2016), *adopted*, Loft Bd. Order No. 4553 (Sept. 15, 2016) ("this tribunal and the Loft Board have declined to consider income tax returns dispositive of an applicant's residence, although they may be considered in assessing where one resides in fact"); *Boyers*, OATH 1338/12 at 23-24; *Matter of Muschel*, Loft Bd. Order No. 33, 1 Loft Bd. Rptr. 27, 30 (Nov. 23, 1983) ("testimony taken in connection [with a tax return] might very well lead to an analysis based on the tax laws, rather than Article 7-C, taking the inquiry away from the issue of residency").

Beyond this threshold issue, I believe that respondent's argument regarding Mr. Thirlwell would unreasonably expand the scope of *Ansonia*. *Ansonia* involved a rent-stabilized tenant who deducted the entire amount of her rent on a federal corporate tax return, the instructions for which expressly disallowed the deduction of rent for a dwelling unit occupied by a shareholder for personal use. By contrast, respondent relies largely upon Mr. Thirlwell's individual tax returns, highlighting two issues.

First, respondent focuses on a box that Mr. Thirlwell checked on the schedule E form for tax years 2008, 2009 and 2010, indicating that for the rental real estate property listed, he did not use the space for more than 14 days or 10% of the total days rented at fair rental value for the tax year (Pet. Exs. 87, 88, 89). Respondent also notes Mr. Thirlwell's 2011 return, on which he indicated that the rental real estate property in Brooklyn was used for 365 "fair rental days" (Pet.

Ex. 90).¹⁶ Respondent characterizes this selection as an admission that Mr. Thirlwell was not residing in the unit (Resp. Br. at 65-66). But Mr. Thirlwell testified that the rental income he reported was from a sublease to a roommate who lived in part of the unit with him (Tr. 1825-26). He denied that he meant by checking the box on the schedule E that he did not live in the loft (Tr. 1826). This testimony was credible considering that Mr. Thirlwell listed his home address as 110 Bridge Street on his individual tax returns through 2013 (Pet. Exs. 87-92). It appears that the rental real estate referenced in schedule E was the portion of the loft that was sublet to the roommate, not the entire loft. *See Saladino*, 2412/13 & 1879/14 at 51 (considering tenant's credible testimony that he did not live other than in loft unit during the window period, as well as other evidence that he lived in the loft, the checked box on schedule E of the 2008 return is "not determinative of his residential status").

Second, respondent argues that Mr. Thirlwell took deductions on his tax returns which are incompatible with use of unit 4D as his primary residence (Resp. Post-Trial Br. at 66-67). Mr. Thirlwell reported income for tax years 2008 through 2014 as deriving from royalties received and from rent received on what he testified was his sublease to a roommate in his Bridge Street apartment (Pet. Exs. 87-92).¹⁷ Mr. Thirlwell reported his income for tax year 2015 from royalties received and from rents from two properties, the Bridge Street unit and another property located on St. Mark's Avenue in Brooklyn (Pet. Ex. 93). On all of the returns, in order to determine the reported income on line 17 of Form 1040, Mr. Thirlwell completed a schedule E on which he calculated his deductible real estate loss. This was derived from first adding expenses for items relating to rental real estate, including repairs, taxes, utilities, depreciation, and maintenance, and subtracting that sum from the total amount of rent received. Particularly given the large amounts claimed for maintenance, the total expenses, when subtracted from the total rent received, resulted in a deductible real estate loss (*see* schedule E, lines 22 and 23). The deductible real estate loss was subtracted from the total amount of royalty income received to arrive at the total rental real estate and royalty income or loss, which was entered on line 17 of

¹⁶ Mr. Thirlwell's 2012 federal individual return, schedule E, shows the Brooklyn rental property was rented for 366 fair rental days (Pet. Ex. 91). The portion of the schedule E which requests such information is left blank on Mr. Thirlwell's 2013 and 2014 federal income returns (Pet. Exs. 92, 93).

¹⁷ Line 17 of the federal returns calls for a total income from "Rental real estate, royalties, partnerships, S Corporations, trusts etc..." (Exs. 87-92). The tax returns from 2008 through 2010 reported income on the schedule E from "Sublease Brooklyn NY" (Pet. Exs. 87-89). The tax returns from 2011 and 2012 reported rental income from a property in "Brooklyn, NY" (Pet. Exs. 90-91). The tax returns from through 2013 and 2014 reported rental income from "110 Bridge Street" (Pet. Exs. 92-93).

Form 1040 for tax years 2010 through 2013 (Pet. Exs. 87, 88, 89, 90, 91, 92). For tax years 2014 and 2015, the amount of total rental real estate and royalty income or loss was not entered on line 17 but was instead added to total partnership and S corporation income, which sum was entered on line 17 (Pet. Exs. 93, 94).

Mr. Thirlwell testified that his accountant prepared his returns based upon information that he provided (Tr. 1850, 1856). He gave the accountant "the numbers" and was not sure how the accountant prepared the returns (Tr. 1859).

Michael Gillen, the tax expert whom respondent called as a witness, testified only regarding Mr. Weiss and Ms. Van Elk's individual and corporate returns, not Mr. Thirlwell's. He also focused on Mr. Weiss and Ms. Van Elk's S corporation returns in asserting that the rent deductions claimed were incompatible with residential occupancy at Bridge Street for tax years 2008 through 2012 (Tr. 2855-58). Here, on the other hand, the deductions on which respondent focuses are taken on Mr. Thirlwell's individual tax returns.

It is not clear that the deductions on Mr. Thirlwell's tax returns are incompatible with his assertion that he resides at 110 Bridge Street. As noted, much of Mr. Thirlwell's reported rental real estate and royalty income loss stems from a large deduction for maintenance, as well as other expenses. This is a far cry from *Ansonia*, where the tenant deducted the entire amount of her rent on S corporation tax returns, in contravention of express instructions disallowing the deduction of rent for a unit occupied by a shareholder. This is an additional reason why *Ansonia* should not bar a finding that Mr. Thirlwell is a protected occupant.

Finally, respondent asserts that Mr. Thirlwell's corporate tax returns for Ectopic Ents, for which he is the sole shareholder, usually listed his accountant's address as the address for his corporation (Resp. Post-Trial Br. at 67). Mr. Thirlwell's corporate tax returns from 2008 through 2012 used his accountant's address (Pet. Exs. 95-99). In 2013, Mr. Thirlwell changed accountants and the new accountant reported the address of the corporation as 110 Bridge Street (Pet. Ex. 100). In 2014 and 2015, Ectopic Ents filed tax returns for an S corporation. The return for 2014 indicated that the address for Ectopic Ents was 110 Bridge Street and that the address for the shareholder, Mr. Thirlwell, was also 110 Bridge (Pet. Ex. 101). The return for 2015 showed the address for Ectopic Ents as the post office box which Mr. Thirlwell testified he had used (Pet. Ex. 102). However, in the portion of the 2014 return requesting each shareholder's identifying information, Mr. Thirlwell was listed, at 110 Bridge Street (Pet. Ex. 102).

The fact that Mr. Thirlwell's corporate tax returns for 2008 through 2012 use Mr. Thirlwell's accountant's address as the address of the corporation, and the 2015 corporate tax return uses Mr. Thirlwell's post office box, is not dispositive of whether Mr. Thirlwell residentially occupied and continues to residentially occupy 110 Bridge Street. Indeed, Mr. Thirlwell's S corporation returns for 2014 and 2015, unlike the corporate returns in *Ansonia*, do not include a deduction for rent as a business expense for the years 2009 through 2015.

For these reasons, *Ansonia* does not bar a finding that Mr. Thirlwell is the protected occupant of his unit. Rather, given the credible testimony and documentary evidence that Mr. Thirlwell continues to residentially occupy his unit, if his unit is covered, he should be deemed the protected occupant, under either section 2-09(b)(1) or section 2-09(b)(4) of the Loft Board rules.

Curtis Mitchell (4C)

Unit 4C has an upper mezzanine level and a lower studio level. The parties agree that during the window period, Mr. Mitchell used the lower studio level as an art studio and sublet the upper mezzanine space to Robert Martin and Carrie Brunt, who occupied it residentially (*see* Resp. Post-Trial Br. at 57; Pet. Post-Trial Br. at 24). Petitioners contend that Mr. Mitchell – who years before had lived in the entire loft – reoccupied the entire loft in December 2013, after his subtenants vacated (Pet. Post-Trial Br. at 25-26). Respondent acknowledges that Mr. Mitchell has a “viable claim” of residential occupancy in the building in December 2013 (Resp. Post-Trial Br. at 54).

Respondent asserts that the downstairs studio space was a “discrete” space that cannot be covered under the Loft Law because it was not residentially occupied during the window period (Resp. Post-Trial Br. at 54-57). Petitioners contend that the downstairs studio space was not “so separate” from the mezzanine area as to constitute a separate unit, and that regardless, because Mr. Mitchell and his family now use the entire unit as “a single live/work space,” IMD coverage of the upper portion is extended to the entire unit (Pet. Post-Trial Br. at 25-26). As set forth below, I find that the loft was essentially used as two discrete spaces during the window period, but that coverage should be extended to the entire unit because the unit has been used as an integrated whole since December 2013. I further find that Mr. Mitchell is the protected occupant of his unit.

Mr. Mitchell has been the prime lessee of unit 4C since 1984. When he moved into the unit in 1984, the prior resident, June Taylor, executed an assignment of lease and Mr. Mitchell and 110 Bridge executed a "Consent to Assignment." The lease to the unit was extended in 1990, through 1995 (Pet. Ex. 114; Mitchell: Tr. 2125-27).

Mr. Mitchell testified that from 1984 to 1993, he lived in the upper mezzanine area and worked in the lower studio area of the unit (Tr. 2124, 2134). When he first moved in, the fourth floor was one open space, with no walls, "ankle-deep water and knee-deep pipes" (Tr. 2129-30). Mr. Mitchell added electricity and plumbing, installed walls, fixed the hole in the roof, and built a staircase from the lower studio level of the unit to the upper mezzanine area. He also added a bathtub, sink, toilet, stove, refrigerator, and bed. Later, he installed gas service (Tr. 2129-31).

From 1984 to late 1986, Mr. Mitchell lived in the unit with his former wife. In 1988, after his divorce, Ms. Cypriano moved in (Mitchell: Tr. 2132; 2135-36; Pet. Ex. 116). Ms. Cypriano confirmed that she lived in the unit starting in 1988; the unit looked very "rough," with a large studio space downstairs and a "long staircase" to a "u-shaped loft above" (Tr. 2062). They lived in the upper mezzanine portion of the unit, which had a bathroom, kitchen, dining area, and sleeping space (Mitchell: Tr. 2131, 2133; Cypriano: Tr. 2062, 2065). Mr. Mitchell used the downstairs portion of the space as his art studio (Mitchell: Tr. 2133). They installed insulation in a hallway on the upper mezzanine to make the space warmer in winter, and removed the insulation in the warmer months (Cypriano: Tr. 2064, 2111-12; Mitchell: Tr. 2247). Photographs taken during this time show their use of the space (Pet. Ex. 115A-H; Cypriano: Tr. 2068-74; Mitchell: Tr. 2134-35).

Mr. Mitchell's friend, Joseph Fyfe, testified that he visited the unit around 1988 and described the lower studio space, as well as the upper mezzanine with a kitchen, bathroom, bed, and "some kind of living area" (Tr. 268-70). Other tenants in the building similarly described the upper living area and lower studio area (Jensen: Tr. 32-33; Weiss: Tr. 391-92; Thirlwell: Tr. 1762-63; Cypriano: Tr. 2062). According to Mr. Mitchell, during this time he had a good relationship with Mr. Eisenberg, who would visit the unit about twice a year and have tea (Tr. 2147-48).

In 1993, Mr. Mitchell and Ms. Cypriano moved to 37 King Street in Manhattan to live, because Ms. Cypriano wanted to be in a safer area (Cypriano: Tr. 2076). They lived at King Street until 1997, after which they bought a two bedroom cooperative apartment on West 22nd

Street in Manhattan (Mitchell: Tr. 2141, 2143; Pet. Ex. 118). Despite moving elsewhere to live, they continued to pay rent and utilities directly to Mr. Eisenberg for the unit on Bridge Street, and sublet the upper mezzanine area while Mr. Mitchell used the lower studio area to work in (Mitchell: Tr. 2141-43; 2192-93; Cypriano: Tr. 2076-77; Pet. Ex. 122).

Mr. Mitchell testified that, from around 1994 to 2002, Edward Molina sublet the upper mezzanine portion of the unit. From 2003 to 2011, Mr. Martin and Ms. Brunk sublet the upper mezzanine portion of the unit. The subtenants resided in the upper mezzanine (Mitchell: Tr. 2149-50). Mr. Martin confirmed that he and Ms. Brunk moved to the upper mezzanine portion of the unit in January 2003, having executed a sublease agreement in November 2002 (Tr. 160; Pet. Ex. 9). They executed renewal sublease agreements in 2004, 2006, and 2008, ending on August 30, 2009 (Pet. Ex. 9). Under those agreements, Mr. Martin and Ms. Brunk paid rent and electrical bills by check directly to Mr. Mitchell (Pet. Exs. 9, 10). Mr. Mitchell continued to pay rent to the landlord, also by check, and testified that he paid all the taxes on the space as well (Tr. 2270, 2285, 2288, 2830; Resp. Ex. 000).

After Mr. Martin and Ms. Brunk moved out of the unit, Jason Hu and Dominique Nisperos began to residentially occupy the upper mezzanine portion. In August 2013, Mr. Hu and Ms. Nisperos filed their own coverage application, claiming the mezzanine as a single unit. But on November 4, 2013, they entered into a buy-out agreement with Mr. Mitchell, withdrawing their application and agreeing to vacate the premises by December 9, 2013 (Pet. Ex. 123).

Mr. Mitchell and Ms. Cypriano both testified that Mr. Mitchell returned to the Bridge Street apartment in 2013 because he and Ms. Cypriano were separating (Cypriano: Tr. 2082; Mitchell: Tr. 2196). Ms. Cypriano continued to use the King Street unit as an office and the lease for King Street was put in her name (Cypriano: Tr. 2078, 2080; Mitchell: Tr. 2143). According to Mr. Mitchell, for about six months while Ms. Nisperos and Mr. Hu were still occupying the upper mezzanine, he slept in a hammock in the lower studio level and used the bathroom sink and toilet on that level (Tr. 2262-63, 2300). By August 2013, Mr. Mitchell was living at Bridge Street seven nights a week (Cypriano: Tr. 2085; Mitchell: Tr. 2198). Once Mr. Hu and Ms. Nisperos vacated the upper mezzanine, Mr. Mitchell took over the entire apartment. In August 2014, Ms. Cypriano moved back to the Bridge Street unit with their son. The 22nd Street apartment has been sublet since March 2015 (Cypriano: Tr. 2085-86). Ms. Cypriano

continues to use the King Street unit as an office (Cypriano: Tr. 2078-79; Pet. Ex. 117). Mr. Mitchell and Ms. Cypriano now use the entire Bridge Street unit, with Mr. Mitchell having made a number of renovations to the mezzanine area after Ms. Nisperos and Mr. Hu vacated (Mitchell: Tr. 2230-43, 2325-26, 2249).

There was ample evidence about the physical configuration and use of the unit, both during the window period and afterwards. As noted, there were internal stairs leading from the studio space to the upper mezzanine. There was an internal door at the top of the stairs. Mr. Martin was not sure if there was a lock on the door and Mr. Mitchell testified that there was no lock (Martin: Tr. 199; Mitchell: Tr. 2297). The "primary entrance" to the upper mezzanine, however, was through a door on the fifth floor roof, to which Mr. Martin and Ms. Brunk had keys (Martin: Tr. 200, 204).

According to both Mr. Martin, he and Ms. Brunk generally entered their space – the upper mezzanine – through the rooftop door. When they went to the downstairs studio to talk to Mr. Mitchell, they exited through the rooftop door, walked down the steps to the fourth floor hallway, and knocked on the front door to his studio space (Tr. 198-99). Mr. Martin testified that the internal door between the upper mezzanine and lower studio was kept closed, and "hardly ever used" (Tr. 199). Mr. Mitchell, similarly, testified that once or twice a year, Mr. Martin and Ms. Brunk would knock on the internal door to access his studio space (Tr. 2293-95). Most of the time, however, they were "extremely respectful" of his need for privacy (Tr. 2298) and entered their unit through the door on the roof, which they accessed by walking up the "public stairwell" to the roof (Mitchell: Tr. 2296). Mr. Mitchell testified that he would use the internal steps if he wanted to talk to Mr. Martin or Ms. Brunk, but he would not enter their space without knocking (Martin: Tr. 199; Mitchell: Tr. 2297).

Numerous photographs illustrate the physical configuration of the unit during the window period, including photographs showing the fifth floor roof door (Resp. Exs. F1, F2). The photographs also depict the lower studio area with steps leading to the upper mezzanine and the internal door at the top of the steps (Pet. Exs. 16A-E; Resp. Exs. A1, A2, A5, G). To the right of the internal door (Resp. Ex. G) is a hallway area, which contains a number of vats. There is a partition in front of the vats in the hallway, which runs about three-quarters of the way to the ceiling (Pet. Exs. 16 A-C; Resp. Ex. A2). To the left of the internal door is a platform, with pieces of insulation running from the bottom of the platform up to what appears to be the

mezzanine ceiling (Resp. Ex. G). The platform is supported by pieces of wood that extend up from a storage area on the studio level (Pet. Ex. 16D; Tr. 2233).

Mr. Martin also described the layout of the upper mezzanine area in which he and Ms. Brunk lived. He testified that the mezzanine area “[p]rimarily consisted of two rooms” (Tr. 161). One room was one finished and insulated with a kitchen and bathroom; the other room was an unfinished and uninsulated space. The kitchen contained a range, refrigerator, countertop, cabinet and sink, and the bathroom contained a bathtub, toilet, shower, vanity, closet, and hot water heater (Tr. 161). The unfinished room was “completely walled” to the ceiling and had windows along three walls, but was more like a workspace or studio space (Tr. 161-62). The mezzanine hallway – which is visible in the photos at the top of the internal stairs – connected the two rooms. Mr. Martin confirmed that the hallway had a partition wall which did not go all the way to the ceiling and which also had old vats on one side (Tr. 161). Mr. Martin and Ms. Brunk insulated the unfinished room and moved their bedroom and office area there (Tr. 162). Photographs of the living space in the upper mezzanine show Ms. Brunk serving dinner in a dining area, as well as the living space with a kitchen and bathroom, Ms. Brunk and Mr. Martin sitting on a couch, and Ms. Brunk standing in front of a storage area with a dog (Pet. Ex. 17; Martin: Tr. 193).

Mr. Mitchell, Ms. Cypriano, and Mr. Martin explained that the lower studio area was used as an artists’ studio, with a workspace, storage spaces, and office space. It did not have a kitchen, but did have a bathroom with a toilet and slop sink, without a tub or shower (Martin: Tr. 209; Cypriano: Tr. 2094-95; Mitchell: Tr. 2231-35). Photographs of the lower studio space, taken from 2012 through 2014, show a large open area containing filing cabinets, open floor space, artwork, a chair, and a storage unit (Pet. Exs. 138A, B, D, E, Resp. Exs. A1, A2, A3).

Mr. Mitchell testified that once he took over the entire space in 2013, the improvements he made included removing the insulation panels in the mezzanine area and replacing them with a solid door, removing the partial wall on the mezzanine, changing the location of the internal staircase, and widening the mezzanine living space (Tr. 2230-43, 2324-26). Photographs from that time document the new staircase and the new wall and floor that were added to the mezzanine (Pet. Ex. 138C). Other photographs of the mezzanine show the kitchen and refrigerator, a bed and television, Mr. Mitchell’s son, and a garment rack for clothing (Pet. Exs. 140A, B, C, Resp. Ex. KKK).

The fact that part of a loft unit – here the downstairs studio – was used for solely commercial purposes does not preclude a finding that the entire loft is a covered IMD. See *Tenants of 58 Grand Street*, OATH Index No. 212/15 at 16-17 (June 24, 2016), *adopted*, Loft Bd. Order No. 4702 (Oct. 26, 2017) (citing cases). Rather, when a loft is divided into two different spaces, the issue is whether the two portions of the loft are configured in a way to permit the residential occupants to live “independently,” such as a physical separation between the areas or a separate entrance to each area. See 29 RCNY §§ 2-08(a)(3)(i) (“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”) and 2-08(a)(4)(iii)(B) (“residential unit” defined as having “a means of access from a street or public area, such as a hallway, elevator or stairway” and no “passage through another residence, or unit”).

In *58 Grand Street*, OATH 212/15, Judge Spooner found that an entire garage might be covered as an IMD unit even though it was separated into a rear residential portion and a front studio portion that was used for exclusively commercial purposes by non-residents. He stressed that the only access to the residential space was through the front studio portion of the garage. *Id.* at 16-18.

Two older cases, discussed by Judge Spooner in *58 Grand Street*, OATH 212/15 at 17, also concluded that units should be covered in their entirety despite having separate commercial areas. In *Matter of Ashbaugh*, Loft Bd. Order No. 824 (Oct. 6, 1988), *reconsideration denied*, Loft Bd. Order No. 935 (Aug. 17, 1989), the Loft Board covered an entire unit, even though it had been separated into three different areas: a large studio, used as a commercial art gallery, a smaller painting studio, used by the window period occupant, and a rear residential space. The Loft Board noted that the unit had a single entrance (from the front studio space) and no internal doors. The rear living space was separated from the rest of the space only by a partition with openings on either end. Thus, the Loft Board found that “[t]here are clearly insufficient indicia of independent living to establish that the rear space was a separate residential unit.” Loft Bd. Order No. 824 at 7.

Similarly, in *Matter of Brooks*, Loft Bd. Order No. 981 (Jan. 4, 1990), the Loft Board covered an entire fourth floor unit which consisted of a residential area as well as several rooms used primarily for a commercial yoga studio. The Board noted that the residential occupants would have had to walk through the yoga spaces to reach their “private quarters,” such that

"[t]he essentially public areas were not physically self-contained and separate from the residential areas." *Id.*

By contrast, when a unit has been configured into two physically distinct areas, the Loft Board has declined to cover the entire space as a single residential unit. Most recently, in *Matter of Gallo*, Loft Bd. Order No. 4349 (Jan. 15, 2015), *reconsideration denied*, Loft Bd. Order No. 4426 (Sept. 17, 2015), the Loft Board found that the fourth floor of a building was residentially occupied during the window period as two separate IMD units, one to the front of the building and the other to the rear, each with their own kitchen, bathroom and living space, their own entrance, and the passage from the front space to the rear locked. In other cases, the Loft Board has declined to cover the commercial portion of a loft as part of an IMD when the commercial and residential portions of the loft were physically separated and had separate entrances. See *Dalo v. New York City Loft Bd.*, 157 A.D.2d 461 (1st Dep't 1990), *aff'g*, *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), *reconsideration denied*, Loft Bd. Order No. 727 (Jan. 28, 1988).

In *Kahn*, the First Department stressed that the commercial and residential spaces were separated by a solid wall, that the commercial area and the residential area each had separate, locked entrances from the common hallway, and that there was no direct access between the two spaces. In *George*, similarly, the residential portion of the floor and the commercial dance studio were physically separated, first by a temporary partition consisting of a side wall from a bed, file cabinets, and a piece of sheetrock, and then by a solid wall constructed soon after the beginning of the window period. Later in the window period, a new door was installed providing the residential portion of the space direct access to the public hallway, which meant that the residential portion of the floor and dance studio each had a separate entrance from the public hallway.

Mr. Mitchell's unit, unit 4C, falls somewhere in the middle of the units described in 58 *Grand Street*, *Ashbaugh*, and *Brooks*, and the units described in *Gallo*, *Kahn*, and *George*. There are parts of the upper mezzanine that lack floor to ceiling walls. There are either partition walls or a temporary barrier made of insulated material. But there are other parts of the mezzanine, used by Mr. Martin and Ms. Brunk as their living quarters, including the bathroom and kitchen, that were finished and insulated, and the area that was initially uninsulated was fully walled. There was an internal staircase between the two units, with a door on top of the staircase. But

the studio area and the upper mezzanine had their own entrances, and the witnesses credibly testified that Mr. Martin and Ms. Brunk primarily used the rooftop door to enter and leave their apartment, rarely using the door on top of the internal staircase. That, together with the existence of partition walls to separate the two areas, tips the balance toward a finding that the upper mezzanine and studio area were each used independently.

Generally, the issue as to coverage depends on the configuration of the space during the window period. *Matter of Grant*, OATH Index No. 1864/10 (Nov. 17, 2010), *adopted*, Loft Bd. Order No. 4155 (June 20, 2013), *aff'd*, 145 A.D.3d 638 (1st Dep't 2016). In this instance, only the upper mezzanine was occupied residentially during the window period. However there is no doubt that the two spaces – the upper mezzanine and lower studio – were combined and used as an integrated whole after the window period, with the landlord's knowledge and acquiescence.

In such a circumstance, the covered status of the residentially occupied window period unit is extended to the combined unit. Judge Richard addressed the issue of recombination in *Matter of Tenants of 323-325 W. 37th Street*, OATH Index No. 692/06 at 25-26 (May 18, 2007), *adopted in part, modified in part*, Loft Bd. Order No. 3457 (Sept. 18, 2008), *application for reconsideration granted in part and denied in part*, Loft Bd. Order No. 3496 (Apr. 23, 2009). There, an applicant lived in a twelfth floor unit that met the prerequisites for coverage because it was residentially occupied during the window period. *Id.* at 24-25. However, after a commercial unit on the same floor was vacated, the applicant took over the entire twelfth floor, and made his home in the combined residential and commercial units. *Id.* at 24. The applicant sought coverage for the full twelfth floor unit. *Id.*

To assess the status of the combined unit, Judge Richard referred to comparable rent regulation cases which considered the tenant's intent to use the space as one unit and the landlord's knowledge of and acquiescence to that use. *Id.* at 25-26; *see also Sharp v. Melendez*, 139 A.D.2d 262, 265-66 (1st Dep't 1988) (two non-contiguous units were deemed to be a single residential unit subject to rent regulation where the tenant treated the nonadjacent units as his single residence); *9554 NY Apartment Assoc., LLC v. Hennessey*, 184 Misc. 2d 527, 530-31 (Civ. Ct. N.Y. Co. 2000) (two contiguous incomplete units were joined into a single primary residence). She concluded that the two combined twelfth floor units should be considered one covered unit because "when an owner grants occupancy of two units to a residential tenant who uses them as a single dwelling, the owner acquiesces in the protected status of the combined unit

when one of the two units is entitled to protected status under the Loft Law.” *Id.* at 26. The Loft Board agreed that the entire combined unit should be covered. Loft Bd. Order No. 3457 at 4. *Cf. Matter of Estrada*, OATH Index No. 533/18 (July 12, 2018) (two independent units created after window period not eligible for coverage where they existed during the window period as one unit).

Like the applicant in 323-325 W. 37th Street, Mr. Mitchell did not reside in the window period space – the upper mezzanine – during the window period, but afterwards occupied the entire unit as his live/work residence. Mr. Mitchell and Ms. Cypriano credibly testified that Mr. Mitchell returned to the unit in 2013 because of their separation, first sleeping in a hammock in the studio, and then taking over the entire apartment once Mr. Hu and Ms. Nisperos vacated. As shown by the buy-out agreement, their vacate date was December 9, 2013. Ms. Cypriano returned to the unit to reside in August 2014. Photographs document the renovations which Mr. Mitchell made to the mezzanine area after his subtenants moved out. The evidence also showed that Mr. Eisenberg has always treated the unit as one unit, having leased 4C as one unit (Pet. Ex. 114), made single utility calculations for the unit (Pet. Exs. 154, 155), and accepted a single rent check for the unit (Pet. Ex. 122; Mitchell: Tr. 2192-93).

In sum, the unit was always leased as a whole. There was some physical separation of the space during the window period, when it was essentially used as two discrete spaces, one residential, one not. However, after the window period, the unit has been used as one integrated whole. Under these circumstances, if the Loft Board concludes that coverage is not barred by the existence of an incompatible commercial use, unit 4C should be covered as one IMD unit.¹⁸

The remaining issue relates to protected occupancy. As noted earlier, the Loft Board’s recent interpretation of its rules is that a prime lessee such as Mr. Mitchell cannot be a protected occupant under Rule 2-09(b)(4) unless he or she establishes primary residency.¹⁹ Respondent

¹⁸ I do not reach the issue as to whether the entire unit, including the structure on the roof, can be legalized. See *Matter of Doris*, OATH Index Nos. 2542/14 & 2543/14 at 9 (July 10, 2015), *adopted in part, rejected in part*, Loft Bd. Order No. 4511 (Apr. 21, 2016), *reconsideration granted*, Loft Bd. Order No. 4555 (Oct. 20, 2016) (potential legalization issue relating to lot line window is not a bar to Loft Board coverage); *Matter of Gurkin*, OATH Index No. 489/12 at 21 (Dec. 14, 2012), *adopted*, Loft Bd. Order No. 4186 (Oct. 17, 2013) (“legalization issues are not to be used by owners to avoid Loft Law coverage”); see also *Katz v. NYC Loft Bd.*, 163 A.D.2d 207, 209 (1st Dep’t 1990), *aff’d*, 78 N.Y.2d 1018 (1991) (the fact that the units contain less than the mandated minimum square footage required by the applicable zoning resolution does not preclude coverage since that issue is deferred until the subsequent legalization proceeding).

¹⁹ Ms. Cypriano, who testified that she lives in the unit with Mr. Mitchell and has done so since moving back into the unit in August 2014, did not apply for coverage or protected occupancy.

asserts that the time period for determining primary residency is the window period through June 21, 2010 (Resp. Post-Trial Br. at 40-41), when it is undisputed that Mr. Mitchell did not reside in the unit. Further, although respondent acknowledges that Mr. Mitchell began to reside in the unit in late 2013 or early 2014, after Mr. Hu and Ms. Nisperos vacated the unit, it contends that Mr. Mitchell's "manipulation of documents" to list his address as 110 Bridge "does not qualify him for protected status" (Resp. Post-Trial Br. at 52-54). Finally, respondent asserts that under Loft Board rule 2-09(c)(5) ("Prime Lessee's Right to Recover Subdivided Space"), Mr. Mitchell cannot assert rights to the full unit. Respondents' arguments are unavailing.

As Judge Zoragniotti noted in *Allweis*, OATH 2569/14 at 27, when the Loft Board imposed a primary residency requirement upon prime lessees, it did not discuss the appropriate time frame for assessing the proof of primary residency – for example, during the window period, on the effective date of the 2010 amendments to the Loft Law, at the time of the protected occupancy application, the time of adjudication, or even the time of the issuance of the Loft Board order. But the Loft Board orders imposing the new primary residency requirement frame the issue of primary residency in the present tense: whether the unit "is" the primary residence of the prime lessee, which is the language contained in section 2-09(b)(4). *Id. See, e.g., Matter of Mignola*, Loft Bd. Order No. 4509 at 6-7 (Apr. 21, 2016), *adopting in part and reversing in part*, OATH Index Nos. 2482/11, 2483/11, 2484/11, 240/12, 808/12, 809/12, 810/12 & 1616/12 (May 29, 2013) (finding that prime lessees currently in possession of an IMD unit must each prove that the unit "is" their primary residence); *Matter of Schuss*, Loft Bd. Order No. 4393 at 3 (May 14, 2015) (concluding that a tenant "occupies" a unit as a primary residence); *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 at 4 (June 16, 2016) (finding that prime lessees must prove that their unit "is" their primary residence).

Thus, in *Allweis*, Judge Zoragniotti did not determine whether the applicants used their unit as their primary residence during the window period. She noted that the Loft Board did not articulate the new primary residency requirement until November 2014, after the applicants filed their application. She concluded that there was "no logical reason" to require the applicants to prove primary residency during the window period, the effective date of the 2010 amendments, or the time of filing of their application in 2014, because at those times they were not "on notice" of the Loft Board's new primary residency requirement, nor, like the rent-stabilized tenant in

Ansonia, residing in a rent-regulated unit for which primary residency was required. *See also Matter of Tenants of 151 Kent Avenue*, OATH Index Nos. 532/17, 533/17 at 16-17 (Nov. 22, 2017) (noting that Loft Board cases which discuss primary residency couch the issue in the present tense).

Moreover, as indicated in *151 Kent Avenue*, the Rent Stabilization Code, 9 NYCRR § 2524.4(c) (Lexis 2018), which is a related statute, enunciates factors to be considered for assessing whether an apartment is being occupied as a primary residence, including whether the tenant has occupied the apartment for an aggregate of 183 days “in the most recent calendar year, except for temporary periods of relocation.” Other factors include the address on the tenant’s official documents, including tax returns, motor vehicle registration, driver’s license, and voter registration. 9 NYCRR § 2520.6(u). Considering these factors, Judge Spooner concluded that one applicant had failed to demonstrate that his unit was his primary residence when he filed his application, “or thereafter,” and recommended that his application for protected occupancy be denied. *Id.* at 19.

The reasoning in *Allweis* and *151 Kent Avenue* is sound. The fact that Mr. Mitchell did not reside in the unit during the window period, or on June 21, 2010, should not be dispositive of whether he is currently the protected occupant of the unit. Nor should he be required to prove primary residence on the application filing date, which was May 1, 2013, before the Loft Board enunciated its new primary residency requirement for prime lessees.

As respondent acknowledges in its brief, Mr. Mitchell “began to reside in the Building” in late 2013 or early 2014, after his subtenants vacated as a result of their buyout agreement. The record establishes that unit 4C at 110 Bridge is Mr. Mitchell’s primary residence and has been since the end of 2013 or beginning of 2014. Mr. Mitchell and Ms. Cypriano credibly testified that they currently reside in the unit. Moreover, a multitude of documents, including government-issued records, list the loft as Mr. Mitchell’s address, beginning in 2013. These include: his and Ms. Cypriano’s joint tax returns from 2013, 2014, and 2015 (Pet. Exs. 124, 125, 126; Tr. 2199); W2s and tax reporting statements from 2013, 2014, and 2015 (Pet. Ex. 127; Tr. 2204-05); driver’s license and registration from 2014 (Pet. Ex. 128; Tr. 2210); automobile insurance policy documents from July 2013 forward (Pet. Ex. 129; Tr. 2215); New York State E-Z Pass account records from December 2013 and March 2015 (Pet. Ex. 130); renter’s insurance policy documents from 2015 (Pet. Ex. 132); health insurance forms from 2014 (Pet. Ex. 133); an

American Express statement from December 2013 (Pet. Ex. 134); brokerage statements from October 2013 through December 2014 (Pet. Ex. 135); doctor's bills from 2014 (Pet. Ex. 136); and a financial aid report from 2015 (Pet. Ex. 138).

Respondent notes that from 2008 through 2013, Mr. Mitchell's joint tax forms from 2008, 2009, and 2010 listed the King Street address (Resp. Exs. MMM, TTT, and UUU). But the fact that he reported Bridge Street as his address on many subsequent documents cannot be fairly characterized as the "manipulation of documents," as respondent would have it. Mr. Mitchell returned to Bridge Street to live about six months after the filing of petitioners' Loft Board application in 2013. I credit his testimony and that of Ms. Cypriano that his decision to do so was based upon their marital separation. But even if the filing of the Loft Board application played some factor in Mr. Mitchell's decision to relocate, Mr. Mitchell has resided in unit 4C since late 2013. The many documents which show Mr. Mitchell's current address as 110 Bridge Street, including the many official documents, lend weight to his contention that he resides at unit 4C, that it is his primary residence, and that he should be declared the protected occupant of the unit. *See Matter of Gatien*, OATH Index Nos. 2121/13, 1033/14, & 2233/14 at 15 (May 13, 2016), *adopted*, Loft Bd. Order No. 4553 (Sept. 15, 2016) ("An applicant's residential use of the unit may be established by evidence such as receipt of mail at the subject unit and use of the unit's address on official documents.").

Respondent's final argument, relating to Loft Board rule 2-09(c)(5), is unpersuasive. Rule 2-09(c)(5)(v) enunciates requirements that apply when a prime lessee seeks to recover a portion of subdivided space that has been used as his or her primary residence, including that the prime lessee has occupied the "entire demised premises" space as his or her primary residence for at least one year before the subdivision of the unit. Respondent asserts that this rule prohibits Mr. Mitchell from recovering the upper mezzanine, because he was not a residential occupant of the upper mezzanine until December 2013 and that he failed to recover the space before November 12, 2013. But respondent ignores that Mr. Mitchell resided in the unit – "the entire demised premises" – from 1984 through 1993. That part of the unit was used as his art studio does not mean that the loft functioned as two discrete units. *Matter of Jacobs*, Loft Bd. Order No. 484, 4 Loft Bd. Rptr. 132, 133 (Oct. 16, 1986), upon which respondent relies (Resp. Post-Trial Br. at 60-61), is inapposite. In that case, the prime lessee was never the residential occupant of a portion of the subdivided space; rather, he occupied a fifth floor unit, which had its

own lease, and was seeking to “recover” a fourth floor unit. Here, on the other hand, Mr. Mitchell used the unit as a typical work/live space, residing in the upper mezzanine while working in the lower studio level, with internal steps between the studio and the mezzanine.

Moreover, respondent’s reference to November 12, 2013, is mistaken. When a lease is no longer in effect, the prime lessee’s right to recover the space expires on November 12, 2013, or if the unit is not subject to Article 7-C on the effective date of this amended rule, 60 days following the finding of coverage by a Loft Board order, a finding of coverage by a court of competent jurisdiction, or issuance of an IMD registration number . . . , whichever is earlier. 29 RCNY § 2-09(c)(5)(iv)(C). Mr. Mitchell’s unit has not yet been found to be an IMD. The November 12, 2013, deadline is irrelevant. Mr. Mitchell has until 60 days following a finding of coverage to “recover” the space. But, at this point, there is nothing to recover. The space is no longer subdivided. It is used as one unit. Mr. Mitchell occupies the entire unit, and has done so since his subtenants vacated in December 2013.

For all these reasons, if unit 4C is covered, Mr. Mitchell should be found to be the protected occupant of the unit. He should be deemed protected under Rule 2-09(b)(1) as “the residential occupant in possession of a residential unit.” See *Tenants of 323-325 W. 37th Street*, OATH 692/06 at 26 (finding prime lessee of combined unit the protected occupant of that unit); see also *Matter of Various Tenants of 357 Bowery*, Loft Bd. Order No. 4350 (Jan. 15, 2015) (finding that prime lessee in possession was the sole residential occupant entitled to protection); *Matter of Gareza*, Loft Bd. Order No. 4243 at 3-4 (Feb. 20, 2014) (“Tenants are the occupants entitled to Loft Law protection pursuant to § 2-09(b)(1) because they are the prime lessees of . . . their respective units and are in possession of their respective units.”). He is also qualified for protection under the Loft Board’s new interpretation of Rule 2-09(b)(4), as the prime lessee who uses the unit as his primary residence.

Jonathan Weiss and Cynthia Van Elk (4B)

The parties dispute whether Mr. Weiss and Ms. Van Elk resided in unit 4B between 2008 and 2010. Respondent contends that the unit was not their primary residence at that time and that their occupancy of unit 4B was too sporadic to qualify the unit for coverage.

As a preliminary matter, primary residence is not a prerequisite for coverage. See *Nazor*, OATH 2570/14 at 15; *Allweis*, OATH 2569/14 at 19, 21; *Gurkin*, OATH 489/12 at 16. The issue of coverage (apart from incompatible use) is simply whether the unit was residentially occupied

for 12 consecutive months during the window period. Here, there was ample testimonial and documentary evidence to establish residential occupancy during the window period, including the testimony of Mr. Weiss, Ms. Van Elk, and their additional window period occupant, Jack Vengrow.

Mr. Weiss testified that he moved into the unit in 1992 after executing a lease agreement with Mr. Eisenberg (Tr. 328-39; Pet. Ex. 18). At the time, the space was very raw and Mr. Weiss performed a significant amount of construction, including demolishing walls, building a bedroom, kitchen, and large bathroom, and updating the electrical, plumbing, and heating systems (Tr. 329-30). Photographs from this period show residential elements such as a bathroom with houseplants, a kitchen, and a dining area with a woodstove (Pet. Ex. 19A-19D).

From 1999 to 2000, Mr. Weiss lived in Amsterdam with Ms. Van Elk, who later became his wife, and sublet the unit with Mr. Eisenberg's consent. The subtenants made major renovations without his permission, destroying the bathroom and kitchen. They did not pay utilities and owed about six months of rent (Weiss: Tr. 340; Van Elk: Tr. 2409-10, 2413). Upon moving back into the loft, Mr. Weiss made substantial renovations to fix the damage, with the assistance of a friend, Mr. Vengrow, who was a "master builder" (Weiss: Tr. 339). Mr. Vengrow moved into the unit as a roommate in 2001 because he needed a new place to live after the September 11, 2001 terror attacks and because of a custody dispute (Weiss: Tr. 339; Vengrow: Tr. 226-28). The renovations that he completed included a bedroom for himself and his son (Van Elk: 2412; Weiss: Tr. 339-40). Ms. Van Elk also moved into unit 4B in 2001, by which time Mr. Vengrow was already living there (Van Elk: Tr. 2405, 2409).

Mr. Vengrow lived in unit 4C from 2001 to 2009 (Vengrow: Tr. 230; Weiss: Tr. 339-40, Van Elk: Tr. 2413). He also had a home in Pennsylvania, where he and his son would sometimes stay (Weiss: Tr. 355; Van Elk: Tr. 2414). Mr. Vengrow testified that he was working during this period for a construction company in New York City, five days a week (Tr. 231). As a result he would spend "five to seven" nights a week sleeping in the unit, but would sometimes spend weekends in Pennsylvania (Vengrow: Tr. 232-33). He explained that his son stayed at the loft over the weekend sometimes and then on Wednesday nights; it averaged about two nights a week (Tr. 236). Mr. Weiss estimated that Mr. Vengrow's son was at the loft "very frequently," every week or every other week (Tr. 355), while Ms. Van Elk estimated that he was there "mostly on the weekends" (Tr. 2414).

Mr. Weiss and Mr. Vengrow described the living situation as “communal,” with the group sharing meals and spending time together (Vengrow: Tr. 234, 236, Weiss: Tr. 357-58). Mr. Vengrow described his daily routine with Mr. Weiss and Ms. Van Elk as “groggy mornings,” followed by coffee, followed by his going to work, and then going home where Mr. Weiss would make dinner and Ms. Van Elk would cook and he “didn’t have to do things” (Tr. 234). His son referred to Mr. Weiss and Ms. Van Elk as “Uncle Jonathan and Aunt Cynthia,” so it was “a family situation basically” (Tr. 236).

Ms. Van Elk recalled the communal situation as well, although she stressed that Mr. Vengrow liked to “talk a lot,” and that it was “very hard,” with just one bathroom, and Mr. Vengrow “puttering around in the kitchen,” so that she was relieved when he moved out in 2009 (Tr. 2417).

Mr. Weiss testified that he and Ms. Van Elk “were living” in the loft during the window period. They were “sleeping there, eating there” (Tr. 352). Mr. Weiss was working on some food-related projects related to the internet or television, and Ms. Van Elk was trying to develop her photography career (Tr. 352). They kept personal items in the loft, including clothes, his library, “a very well equipped kitchen,” toiletries in the bathroom, and high-end audio reproduction equipment, such as speakers, amplifiers, and turntables (Tr. 352). The audio equipment was manufactured by Mr. Weiss’s business, Oswald’s Mill Audio (“OMA”), in Pennsylvania (Tr. 342).

Mr. Weiss explained that he and Ms. Van Elk also used the loft to store audio equipment and that they rented out the space starting in about 2002 or 2003 for commercial photo shoots that usually lasted a few days. The photoshoots were coordinated through an agency called Location Department, which executed location agreements between Mr. Weiss, Ms. Van Elk, and OMA for use of the loft space (Pet. Exs. 28, 29, 30; Tr. 341-42, 416-18). These agreements, including those executed from 2008 through 2010, included language specifying that the location “is a RESIDENCE, SOMEONE’S HOME, PLEASE TREAT IT AS SUCH” (Pet. Ex. 28-30)(emphasis in the original).

Photographs taken in 2002 document the improvements to the loft, including a renovated dining area and kitchen, a room with a new cement floor, and a new room created by adding two barn-type sliding doors and a partition wall (Tr. 334-36; Pet. Ex. 19F-G). Photographs taken in 2008 and 2009 document the window period use of the space, showing the open kitchen and

dining area with an island countertop and a dining table, a woodstove, an enclosed bedroom containing an antique Chinese bed, a large open living area with a sofa and chairs, many antique pieces of furniture, and art on the walls (Tr. 343-51; Pet. Ex. 20A-K). Other photographs show the two additional bedrooms for Mr. Vengrow and his son, Mr. Vengrow and his son in the apartment, including in a dining area around Christmas-time, and a birthday party for Mr. Vengrow's son in 2007 or 2008 (Weiss: Tr. 353-55; Van Elk: Tr. 2421; Pet. Ex. 21A-D). Additional photographs taken by Ms. Van Elk in 2008 and 2009 document social gatherings in the loft with friends, as well as a photoshoot in the loft (Tr. 2423-26; Pet. Ex. 26A-G).

A number of Mr. Weiss and Ms. Van Elk's friends testified in detail about visiting the loft during the window period for parties, meals, and other social occasions, as well as to bring potential customers who were interested in Mr. Weiss's audio equipment (Wyatt: Tr. 297-99; Ballman: Tr. 309-12). They described the furnishings in the loft, including the "well-established kitchen" (Tr. 296) and multiple bedrooms, including the bedroom with the antique Chinese bed (Tr. 297, 309).

In addition to the loft, Mr. Weiss and Ms. Van Elk have a second residence in New Tripoli, Pennsylvania (Tr. 326-27). The New Tripoli residence is a four-story 10,000 square foot stone mill house ("mill"), which, according to Mr. Weiss, the only known example of its type in North America (Tr. 365). Mr. Weiss's family purchased the mill in 1997 (Tr. 364). The mill was a "complete ruin" (Weiss: Tr. 365), without electricity, a septic system, plumbing or heating. It needed extensive work to be livable, including masonry work to make sure that the building would not collapse, sandblasting of all the wooden floors, installation of 65 windows, repair and insulation of the roof, installation of electrical, plumbing, and heating systems, and the addition of a bathroom on the third floor (Tr. 365). The "heavy structural work" was done in the late 1990s, followed by mechanical work in the early and mid-2000s (Tr. 366). Because there were no bathrooms, when Mr. Weiss and Ms. Van Elk initially stayed in the house, they were essentially "camping" in a sleeping bag or mattress on the floor (Tr. 367). But by the late 1990s or early 2000s, the house had been renovated to include a bathroom and functional kitchen (Tr. 367). Mr. Weiss and Ms. Van Elk bought the mill from his family in 2005 (Tr. 364).

Following significant renovations, the mill contained a large open living room space, three bedrooms, an office, bathroom, and a kitchen (Weiss: Tr. 365, 367-68, 386; Pet. Ex. 24).

The mill is used residentially, but also for occasional photoshoots and storage for OMA (Weiss: Tr. 386, Van Elk: Tr. 2415).

Mr. Weiss testified that from 2008 to 2009, he stayed at the loft "less than half the time" and at the mill in Pennsylvania "a bit more," because he was starting his company in Pennsylvania and had a lot of work to do there. By contrast, Ms. Van Elk was spending more time in New York City and less time in Pennsylvania because she was focused on her photography career (Tr. 385). Ms. Van Elk, too, confirmed that she spent more time in New York City during this period to work on her photography career and that Mr. Weiss spent "a bit more time in Pennsylvania, just dealing with the business" (Tr. 2417). She testified that she had no other home in New York City other than the loft at 110 Bridge Street (Tr. 2418). Ms. Van Elk also testified that the mill was difficult to heat in the winter and gets very cold, so she preferred to be in New York City (Tr. 2418).

Mr. Weiss's friend, Robin Wyatt, explained that he got together with Mr. Weiss and Ms. Van Elk about 50% of the time in New York and 50% in Pennsylvania (Tr. 299). Another friend, Matthew Ballman, believed that when he saw Mr. Weiss, about 80% of the time it was in New York, because it was too cold in Pennsylvania (Tr. 314).

Respondent contends that during the window period, Mr. Weiss and Ms. Van Elk lived in the mill in Pennsylvania and used the Bridge Street Loft commercially. Respondent relies on a number of personal documents on which Mr. Weiss and Ms. Van Elk listed their Pennsylvania address, as well as tax forms on which they stated that Pennsylvania was their residence and deducted the rent at Bridge Street as a business expense. Mr. Weiss and Ms. Van Elk's joint 2008, 2009, and 2010 personal income tax returns list New Tripoli, Pennsylvania as their home address (Tr. 368; Pet. Ex. 22). During these same years, Mr. Weiss's company, OMA, deducted the rent for unit 4B as a business expense on its S corporation federal tax returns (Weiss: Tr. 1080; Pet. Ex. 23). Respondent's tax expert, Mr. Gillen, testified that he reviewed the returns and concluded that from 2008 to 2010, OMA, which paid rent to 110 Bridge, claimed 100 percent of that rent payment as a business expense or as commercial use on its corporate tax returns (Gillen: Tr. 2849-50). In his opinion, the tax returns showed that Mr. Weiss and Ms. Van Elk did not reside in New York before 2011 (Tr. 2847).

Respondent also relies on Mr. Weiss and Ms. Van Elk's "E-Z Pass," an automated toll paying system, to argue that they were predominantly living in Pennsylvania during the window

period. Records pulled from Mr. Weiss and Ms. Van Elk's E-Z Pass account document when a vehicle was driven through the Holland Tunnel or through a toll bridge in Pennsylvania (Tr. 1149-50; Pet. Ex. 34). In its post-trial submission, respondent used these records to create a calendar of days that Mr. Weiss and Ms. Van Elk were purportedly in Brooklyn, based on times that their vehicle drove in and out of New York City (Resp. Post-Trial Br., Appendix A). Respondent claims that many of these trips correlated with photoshoots in the unit, showing that the unit was being used only for commercial purposes. But Ms. Van Elk and Mr. Weiss testified that the E-Z Pass records did not necessarily capture every time that they were both out of New York City. For example, one of them would take the bus to Pennsylvania, often Ms. Van Elk, and sometimes one person would drive to Pennsylvania, while the other person stayed in Brooklyn at the loft (Weiss: Tr. 438; Van Elk: Tr. 2541-42).

Respondent further highlights a number of Mr. Weiss and Ms. Van Elk's official documents, which, during the window period, listed their Pennsylvania address. These include: Mr. Weiss's driver's license, which was not changed to show the Bridge Street address until 2011 (Weiss: Tr. 447; Pet. Ex. 39); Mr. Weiss's voter registration forms, which also did not show the Bridge Street address until 2011 (Tr. 447; Pet. Ex. 40); Mr. Weiss's car registration documents, showing that his cars were registered in Pennsylvania in 2008 and 2009 (Weiss: Tr. 437); E-Z Pass records for two accounts of Mr. Weiss, showing his mailing address in New Tripoli (Pet. Ex. 34); and Ms. Van Elk's naturalization certificate, showing she was admitted in 2009 in a ceremony in Philadelphia, Pennsylvania (Resp. Ex. CCCC).

Additionally, credit card statements for 2008 list Mr. Weiss's address as the New Tripoli account and show many purchases relating to food, gasoline, auto parts, and woodworking in Pennsylvania (Resp. Ex. JJ). However, they also show a number of purchases of wine in New York City, along with some parking meter fees paid in New York City, and expenditures at a number of different stores, including bookstores, drugstores, and supermarkets (Resp. Ex. JJ). Mr. Weiss and Ms. Van Elk's bank accounts for the window period are for OMA's business and reflect the business post office box address in Pennsylvania (Resp. Exs. BB, DD, DD). Ms. Van Elk acknowledged that their mechanic is in Pennsylvania (Tr. 2602), her doctor and dentist are in Pennsylvania, and her husband's doctors during the window period were in Pennsylvania (Tr. 2606).

Respondent seems to assert, based upon Mr. Gillen's testimony, that Mr. Weiss and Ms. Van Elk's unit should not be subject to coverage (Resp. Post-Trial Br. at 41). But *Ansonia*, at most, relates to protected occupancy, and should not apply to preclude a finding of coverage.²⁰ *Matter of Jo-Fra Props., Inc.*, 27 A.D.3d 298, 299 (1st Dep't 2006) ("coverage under a rent regulatory scheme is governed by statute and may not be created or destroyed by laches, waiver and estoppel"); *Allweis*, OATH 2569/14 at 19 (finding *Ansonia* inapplicable to the issue of building or unit coverage under the Loft Law, because "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."); see also *Pittis v. NYC Loft Bd.*, 201 A.D.2d 388, 389 (1st Dep't 1994) ("[S]imply because the [tenants] may have deducted the rent as business expenses on their tax returns does not mandate a finding that the premises was used for business purposes within the meaning of the Loft Law.").

Moreover, the documents which respondent highlight do not defeat coverage. They corroborate Ms. Van Elk and Mr. Weiss's testimony that they had two homes, one in Pennsylvania, the other at the loft. I credited their testimony that Ms. Van Elk spent more time at Bridge Street during the window period, to work on her photography career, and that Mr. Weiss spent more time at the mill in New Tripoli, to work on his business. I also noted Ms. Van Elk's candid testimony that she enjoyed spending more time at the loft in 2009 once Mr. Vengrow vacated. Ms. Van Elk and Mr. Weiss's testimony was corroborated by other witnesses, most particularly, Mr. Vengrow, and by documentary evidence consisting of many photographs of the loft.

I did not find respondent's reliance on the E-Z pass records to be compelling. Rather, I credited Ms. Van Elk's testimony that she often travelled by bus, sometimes paying by cash and sometimes by credit card (Tr. 2677-81). I did not find it surprising that one would fail to have a precise recollection of one's individual dates of travel many years later, much less remember how one paid for any particular bus ticket.

Nor did I find that the use of the loft for photoshoots was inconsistent with residential occupancy. Mr. Weiss and Ms. Van Elk clearly staged the space so that it would be attractive for

²⁰ As discussed at 52, above, I am not convinced that *Ansonia* should apply to bar a finding of protected occupancy under the Loft Law, given that the very purpose of the Loft Law was to protect tenants who had been living illegally or in violation of their lease or rental agreement.

location shoots, but that does not mean that they did not live there. This is particularly evident by the language in the location agreements proclaiming in upper case letters that the shoot location was a "residence, someone's home," and should be treated as such.

In sum, the fact that as a couple, Mr. Weiss and Ms. Van Elk went back and forth between the loft and the mill house, appearing to split their time between the residences, does not mean that the loft was not occupied residentially during the window period. The residential use was far from "sporadic," as respondent asserts in its brief (Resp. Post-Trial Br. at 49). Rather, the occupancy was of a continuous, ongoing nature.

In addition, there was un rebutted testimony that Mr. Vengrow resided at the loft in 2008, until some point in 2009. That in itself is sufficient to establish unit coverage. *See, e.g., Madeline D'Anthony Enters., Inc. v. Sokolowsky*, 101 A.D.3d 606, 609 (1st Dep't 2012) (court properly considered affidavits of former tenants, detailing residential use for coverage purposes; tenants were not seeking protected occupancy status).

For these reasons, unless coverage is barred by the existence of an incompatible commercial use, unit 4B should be covered as an IMD.

The final issues relate to protected occupancy. There is ample evidence that both Ms. Van Elk and Mr. Weiss currently both reside at the loft, although they also spend time at the mill in New Tripoli. Their state and federal tax returns from 2015 list Bridge Street as their home address (Pet. Exs. 145, 46, 147, 148). The Bridge Street address has appeared on Mr. Weiss's voter registration and driver's license since 2011 (Pet. Exs. 39, 40). Mr. Gillen, respondent's tax expert, testified based upon his review of the tax returns that in 2013, 2014, and 2015, OMA deducted between 40 and 45 percent of the rent which it paid to 110 Bridge as a business expense (Tr. 2862). Thus, he concluded that Mr. Weiss was "residing there [at 100 Bridge] from a tax perspective to a certain extent during '13, '14, and '15" (Tr. 2861).

Additionally, Mr. Weiss began keeping a calendar in 2012 to document his residency, at the suggestion of his attorney (Tr. 2867; Pet. Ex. 157). He never kept a calendar previously, nor did Ms. Van Elk. He used a calendar application on his Apple computer to indicate on a daily basis whether he was in New York, Pennsylvania, or elsewhere. Where applicable, he would indicate his schedule for the day. He printed out hard copies of the calendar and made notes on top to indicate the number of days he was in New York, Pennsylvania, or a different location. Mr. Weiss also made handwritten hatch marks for each date, pink to indicate that he was in New

York and a darker color to indicate he was in Pennsylvania. He testified that if he was unsure as to any particular day, he checked records such as credit card and bank statements, E-Z pass statements, and alarm system records to make sure that he was accurate (Tr. 2867-69). In his opinion the calendar was "very accurate" (Tr. 2869). According to Mr. Weiss's tally, from June 2012 through March 2017, he was in New York City about 820 days, in Pennsylvania about 500 days, and out of state about 200 days (Tr. 2869). Mr. Weiss's testimony concerning the calendar was not rebutted. A review of the calendar by month establishes that at least from mid-2013 forward, Mr. Weiss spent the majority of his time in New York City (Pet. Ex. 157).

This tribunal has found that a prime lessee and a non-prime lessee can both be the protected occupants of their units, so long as they are residential occupants in possession and otherwise satisfy the requirements of Rule 2-09(b). See *Tenants of 79 Lorimer Street*, OATH Index No. 1020/16 at 12 (Mar. 23, 2017), *adopted in part, rejected in part*, Loft Bd. Order No. 4688 (Sept. 21, 2017). As Judge Gloade noted, nothing in the MDL or in the plain language of the Board's rules "suggests that section 2-09(b)(4) [pertaining to prime lessees] overrides or conflicts with 2-09(b)(1), (2), or (3)." *Id.* at 9. Thus, under long-standing Loft Board precedent, if the unit 4B is covered, Mr. Weiss, who is the prime lessee, and Ms. Van Elk, who is not the prime lessee, would both be presumptively protected under section 2-09(b)(1) of the Loft Board rules, as each is a "residential occupant in possession of a residential unit."

However, the Loft Board has rejected this interpretation, instead finding that "Non-Prime Lessees are Ineligible for Protection When Prime Lessees Use the IMD Units as Their Primary Residence." *Lorimer*, Loft Bd. Order No. 4688 at 4; see also *Mignola*, Loft Bd. Order No. 4509 at 6-7 (Apr. 21, 2016). Although this result does not appear to have a convincing legal basis, under the Loft Board's current interpretation of its rules, only Mr. Weiss, as the prime lessee, would be eligible for protected occupancy, and only if he is the primary resident of his unit.

As discussed above, a determination of primary residency should focus upon whether the unit "is" the primary residence of the prime lessee, which is the language contained in section 2-09(b)(4) of the Loft Board rules. Thus, the window period tax returns upon which respondent rely to argue that *Ansonia* bars a finding of protected occupancy are not determinative. Rather, the tax returns from 2013 – the application filing date – forward are more relevant, and they do not support respondent's preclusion argument. The totality of the testimonial and documentary

evidence instead suffices to establish that the unit is currently Mr. Weiss's primary residence and has been so since at least mid-2013.

In sum, if unit 4B is covered, Mr. Weiss and Ms. Van Elk should be found to be the protected occupants of the unit under section 2-09(b)(1) of the Loft Board rules. However, under the Loft Board's recent interpretation of section 2-09(b)(4) of its rules, only Mr. Weiss is qualified for protection.

FINDINGS AND CONCLUSIONS

1. The building at 110 Bridge Street, from June 21, 2010 through the date of filing of petitioners' coverage application, contains a commercial use falling within use group 17, which is inherently incompatible with residential use within the meaning of section 281(5) of the Loft Law and section 2-08 of the Loft Board rules, because the use "is or should be classified as High-Hazard Group H occupancy" under section 307 of the New York City Building Code.
2. Unit 4E, occupied by John McCormick, otherwise qualifies for coverage and Mr. McCormick otherwise qualifies for protected occupancy.
3. Unit 4D, occupied by James Thirlwell, otherwise qualifies for coverage and Mr. Thirlwell otherwise qualifies for protected occupancy.
4. Unit 4C, occupied by Curtis Mitchell, otherwise qualifies for coverage and Mr. Mitchell otherwise qualifies for protected occupancy.
5. Unit 4B, occupied by Jonathan Weiss and Cynthia Van Elk, otherwise qualifies for coverage. Under the Loft Board's long-standing precedent, both Mr. Weiss and Ms. Van Elk both qualify for protected occupancy. However, under the Loft Board's recent interpretation of its rules governing protected occupancy, only Mr. Weiss qualifies for protected occupancy.

RECOMMENDATION

The Loft Board rule governing a finding of incompatible use establishes rigid criteria based upon a determination of high-hazard occupancy under section 307 of the Building Code. Based on those criteria, a high-hazard occupancy exists in the building which was actively and currently pursued as of June 21, 2010, continuing at the time of submission of petitioners' application for coverage. This establishes a commercial use which is inherently incompatible with residential use, precluding a finding of coverage.



Faye Lewis
Administrative Law Judge

November 9, 2018

SUBMITTED TO:

RICK D. CHANDLER, P.E.
Commissioner

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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.