

Respondent, a registered architect, appeals from a recommended decision and order finding him in violation of Section 28-104.7.1 of the New York City Construction Code (Code) for submitting professionally certified building alteration plans that do not conform with applicable laws and rules. In the Notice of Violation (NOV) the issuing officer (IO) states that Respondent's plans for a three-story home violated Code Section 28-104.7.1 for failing to provide a 30 foot rear yard required by Zoning Resolution (ZR) Section 23-47, increasing the degree of non-compliance of the home's floor area, and providing a deck of combustible materials within three feet of the property line in violation of ZR Section 23-44 and Department of Building (DOB) OPPN #4/03.¹

At the hearing, Petitioner stated that Respondent submitted self-certified plans in October 2006 that depict a rear yard of 1'-8", although a 30'-0" rear yard is required in the subject zoning district; and with a wood deck encroaching into the rear yard to a depth within three feet of the lot line, in violation of (DOB) OPPN #4/03 and ZR 23-44. Petitioner additionally stated that a basement enlargement to create a second bathroom increases the degree of non-compliance of the subject home. Respondent testified that the home complied with the zoning requirements because it was built in the 1930's, before the adoption of the 1961 Zoning Resolution and because the rear yard and bathroom enlargement did not increase the home's preexisting non-compliance. Respondent offered the alteration plans into evidence to show that an existing 69 sq. ft. wood deck was being replaced with a 43 sq. ft. deck and the floor area, lot coverage and open space met zoning requirements. Respondent also testified that the owner had agreed to cover the wood deck with non-combustible material, as indicated on revised plans submitted to DOB. Respondent further contended that DOB had violated its own procedures by auditing the plans more than ten days after their approval. Petitioner did not dispute the age of the home, but contended that the plans nonetheless violated Code Section 28-104.7.1 because the alteration plans failed to comply with current zoning requirements and argued that there is no time limit to DOB's ability to audit plans for compliance with relevant statutes. The administrative law judge (ALJ) found that Respondent's alteration plans violated Code Section 28-104.7.1.

On appeal, Respondent contends, as he did at the hearing, that the alteration plans comply with the Zoning Resolution and that DOB violated its procedures by auditing them more than ten days after the issuance of permits. Also, for the first time on appeal, Respondent argues that he cannot be found in violation of Code Section 28-104.7.1 because the statute did not become effective until July 2008, nearly two years after the filing that is alleged to violate it.

¹ Respondent was also charged on the same date with violating Section 28-104.7.1 for labeling a three-fixture basement bathroom as an accessory use. The appeal of the ALJ's decision in that case is addressed in ECB Appeal No. 1000534 (Nov. 18, 2010).

Respondent did not answer the appeal.

Code Section 28-104.7.1 requires that all construction documents submitted to DOB be complete and clear and “show in detail that they conform to the provisions of this code and other applicable laws and rules.”

While the Board normally does not consider arguments submitted for the first time on appeal, it notes that it is a fundamental precept of law that a statute may not be applied retroactively to conduct that preceded its adoption. Code Section 28-104.7.1 was adopted in July 2008, while Respondent’s alleged violations arise from his 2006 submission of self-certified alteration plans. On this record, the Board finds that Code Section 28-104.7.1 is therefore being applied retroactively. The Board need not address Respondent’s additional arguments. Nevertheless, it notes that Petitioner’s interpretation of the Zoning Resolution is incorrect as it applies to the subject building. According to ZR Section 54-41, as much as 75 percent of a non-complying building constructed before 1961 may be reconstructed, so long as the reconstruction does not create a new non-compliance nor increase the pre-existing degree of non-compliance with the applicable bulk regulations.

Accordingly, the Board reverses the ALJ’s recommended decision and order.