

Respondent, premises owner, appeals from a recommended decision and order sustaining a Class 2 violation of Section 28-302.4 of the New York City Construction Codes (Code) for failure to file an acceptable sixth round technical report for the periodic inspection of the building's exterior walls and appurtenances. The notice of violation (NOV) was issued on May 10, 2010. At the hearing, Respondent asserted that the building was not greater than six stories, and therefore it was not required to submit periodic inspection reports of the exterior walls and appurtenances. In support, Respondent offered a letter from its architect stating that the certificate of occupancy (C of O) indicated that the building had six floors and a cellar level, which should not be counted as a story. Respondent argued that Petitioner, the Department of Buildings (DOB), had determined that the building was not subject to the periodic reporting requirements, as evidenced by a handwritten note to that effect from the Façade Unit's Chief Inspector. Petitioner contacted the Façade Unit and confirmed that the building was re-inspected and found to have six stories and a basement. Petitioner contended that because a basement is above grade, it is considered a story. In support, Petitioner submitted two field reports by the same façade inspector, dated April 2, 2010 and September 21, 2010, indicating that the building had six stories and a basement. The administrative law judge (ALJ) credited the field inspector's observations that the building was greater than six stories and sustained the NOV. The issue on appeal is whether Respondent's evidence was sufficient to refute Petitioner's case that the building is greater than six stories.

Code Section 28-302.4 requires building owners to submit written reports to Petitioner certifying the results of their periodic inspections of exterior walls and appurtenances.

Code Section 28-302.1 states, in pertinent part, that all buildings greater than six stories shall comply with the requirements of this article.

Section 502.1 of the New York City Building Code (BC) provides the following definitions:

**BASEMENT.** A story partly below the grade plane and having less than one-half its clear height (measured from finished floor to finished ceiling) below the grade plane (See "story" and "Story above grade plane" in Section 502.1).

**CELLAR.** That portion of a building that is partly or wholly underground and having one-half or more of its clear height (measured from finished floor to finished ceiling) below the grade plane. Cellars shall not be counted as stories in measuring the height of the buildings.

**STORY ABOVE GRADE PLANE.** Any story having its finished floor surface entirely above grade plane, except that a basement shall also be considered a story above grade plane (also see “Basement” and “Story”).

**STORY.** That portion of a building included between the upper surface of a floor and the upper surface of the floor or roof next above (also see “Basement” and “Mezzanine”).

On appeal, Respondent again argues that the building is not greater than six stories, as confirmed by DOB at a hearing on another violation and by the Chief Inspector of the Façade Unit. Respondent reiterates that according to its architect, the building has six stories and a cellar, which is less than 50% above grade and therefore not counted as a story. Respondent submits for the first time on appeal architectural drawings and photographs referenced in the architect’s letter submitted at the hearing. As this evidence clarifies the architect’s statements, the Board accepts it into the record.

In its answer to the appeal, Petitioner argues that Respondent’s evidence is insufficient to refute the field inspection reports indicating that the building has six stories and a basement.

On this record, the Board finds that Respondent’s evidence was sufficient to refute Petitioner’s case that the building is greater than six stories. Petitioner’s case rests on the representative’s statement that he confirmed with the Façade Unit that upon re-inspection, the building was found to have six stories and a basement, as well as two field inspection reports by the same façade inspector indicating the same. Respondent offered a letter from its architect stating that the C of O indicated the building had six stories and a cellar. The architect stated further that at the north end of the building only, less than one-half of the cellar’s clear height was above curb level. The architect’s statements are supported by architectural drawings and photographs attached to his letter. Additionally, Respondent offered evidence that DOB had previously determined that the building was not subject to periodic inspection. Petitioner offered no additional evidence to prove that the building’s lowest level was a basement, not a cellar. The Board concludes that Respondent’s credible evidence established that the building has six stories and a cellar, which pursuant to BC Section 501.2 does not count as a story. Consequently, Respondent’s building is not subject to the periodic inspection requirements under Code Section 28-302.4.

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