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Appeal No. 2000284 DOB v. Terrilee 97th Street, LLC September 10, 2020

APPEAL DECISION

The appeal of Petitioner, Department of Buildings (DOB), is **granted**.

Petitioner appeals from that part of a recommended master decision by Hearing Officer M. Regenbogen (Manh.), dated December 20, 2019, dismissing a Class 1 Aggravated (Agg) I charge of § 28-210.3 of the Administrative Code of the City of New York (Code), for the illegal conversion of a permanent dwelling for transient use and imposing no per-day penalties under Code § 28-202.1; a Class 1 Agg I charge of Code § 28-301.1 for failing to provide the required number of means of egress; a Class 2 Agg I charge of New York City Zoning Resolution (ZR) § 22-00 for illegal use in a residential district; and a Class 2 charge of New York City Building Code (BC) § 1004.1.2 for exceeding the maximum permitted occupant load.[1] Having fully reviewed the record, the Board finds that the appealed part of the hearing officer's decision is supported by the law and a preponderance of the evidence. Therefore, the Board finds as follows:

Summons	Law Charged	Hearing Determination	Appeal Determination	Penalty
35096126M (26M)	Code § 28-210.3	Dismissed	Reversed – In Violation	$8,000
	Code § 28-202.1	Dismissed	Reversed – In Violation	$45,000
35096127Y	BC § 905.3.1	Dismissed	Not Appealed	$0
35096128X (28X)	Code § 28-301.1	Dismissed	Reversed – In Violation	$3,000
35096129H (29H)	ZR § 22-00	Dismissed	Reversed – In Violation	$2,000
35096130P	BC § 1008.1.2.2	Dismissed	Not Appealed	$0
35096132Z (32Z)	BC § 1004.1.2	Dismissed	Reversed – In Violation	$800
35096133K	Code § 28-301.1	In Violation	Not Appealed	$1,000
35096134M	Code § 28-301.1	In Violation	Not Appealed	$1,000
35096135Y	BC § 1509.8	Dismissed	Not Appealed	$0
35096136X	Code § 28-204.4	Withdrawn	Not Appealed	$0

BACKGROUND

In the summonses, the issuing officer (IO) affirmed observing on May 29, 2014, at 258 West 97th Street, Manhattan:

- *26M* – "Permanent dwelling converted for other than permanent residential purposes. Noted: [certificate of occupancy, CO] #59417 indicates building to be legally approved as [] class 'A' apartments and class 'A' SRO [single room occupancy]. Now building converted and occupied as a transient hotel throughout rooms/floors. Additional daily penalties cited because more than one unit were [sic] converted in the building. Previous viol #35007063R."
- *28X* – "Failure to maintain building in code-compliant manner. Failure to provide number of required means of egress for every floor per BC [§] 1018.1 & [Code §] 27-366. Noted: Bldg converted into transient hotel without required means of egress. Previous viol #35007061N."

[1] The BC is found in Title 28 of the Code.

- *29H* – "Illegal use in residential district. Illegal use noted: Premises occupied as transient hotel (over 30 hotel rooms) in R8B general zoning district. Previous viol #34754236Z, #34980307M, #35007058M."
- *32Z* – "Failure to comply with maximum floor area requirements per occupant load. Noted: Rooms occupied as transient hotel and being occupied by up to 4 occupants in various rooms."

At the consolidated hearing held on December 19, 2019, Petitioner's attorney provided the 1964 CO for the premises, which identified its occupancy classification as, "Old Law Tenement Class 'A' Mult. Dwelling & S.R.O." and the dispositions of prior summonses in support of the respective Agg I designations.[2] He also provided a number of documents and photographs taken by the IO in support of the allegations. Addressing summons 28X specifically, Petitioner's attorney argued that Respondent provided an inadequate second means of egress (a fire escape), because Multiple Dwelling Law (MDL) § 67 prohibited such means for a transiently occupied tenement.

Respondent's attorney primarily argued that the "Occupancy Classification" field on the current CO did not in fact determine the authorized occupancy of the building, but only reflected the premises' *conversion* from its prior authorized occupancy, an Old Law Tenement class "A" multiple dwelling, to its current classification, a class "B" SRO. In support, he provided the premises' two prior COs, issued in 1931 and 1947, to show the changes to the building's occupancy over time. The 1931 CO did not contain a field for "Occupancy Classification"; rather, that information, identifying the premises as a "Class A Multiple Dwelling" appeared at the top of the "Use" column, just above the usage-by-floor information (which authorized two apartments on each floor). In contrast, the 1947 CO did include a field for "Occupancy Classification" and identified the premises as an "Old Law Tenement Single Room Occupancy" and authorized 12 to 15 SROs per floor. Respondent's attorney argued that the section of the COs that contained the usage-by-floor information (i.e., "Permissible Use and Occupancy") actually determined the authorized occupancy of the premises.[3] However, because that section of the CO provided neither class "A" nor class "B" identifiers for Respondent's SROs, it must be read in conjunction with the premises' I-card, which referenced class "B" units in 1946, prior to Petitioner's issuance of the 1947 CO. The attorney argued that the only change between the 1947 and 1964 COs involved the merging of some one-room SROs into two-room SROs; therefore, all units remained class "B" when DOB issued the current CO. Respondent's attorney provided tax documents, deeds, a DOB letter, a document from the Fire Department, and utility bills, all either classifying Respondent's premises as a hotel, or acknowledging transient occupancy of the building. Respondent's attorney also elicited testimony from a former DOB borough commissioner, Ronnie Livian, who stated that the current CO, when read in context with other documents, supported the conclusion that the premises was authorized for occupancy as a class

[2] The hearing officer did not preserve exhibits in the digital case file but referred to them in the decision.
[3] In support, Respondent's attorney quoted from § C26-186.0 of the 1938 BC (in effect at the time of issuance of the two prior COs):

> Contents of Certificates of Occupancy. In addition to the certification, required by this article, of compliance with the approved plans and application and with the provisions of laws governing building construction, each certificate of occupancy shall state the purposes for which the structure may be used in its several parts, the maximum permissible live loads on the several floors, the number of persons which may be accommodated in the several stories and any special stipulations of the permit.

"B" multiple dwelling. Accordingly, because Respondent believed that its transient occupancy of the SROs was lawful, it did not correct the condition.

With respect to the remaining charges, Respondent's attorney argued that: (1) its fire escape sufficed as a second means of egress because the subject premises was no longer a tenement, and that res judicata applied (28X); (2) the zoning violation hinged on a finding of unlawful transient occupancy (29H); and (3) Petitioner failed to establish a prima facie violation of BC § 1004.1.2 without the IO's live testimony, notwithstanding its proffered photographs depicting the excessive load (32Z).

In the decision dismissing the charges, the hearing officer found that although Petitioner established a prima facie case for each summons, Respondent proved that its CO authorized class "B" occupancy and that the "Old Law Tenement Class 'A'" language therein was only a historical reference to the prior status of the building. He reasoned that COs sometimes provided ambiguous information which required consulting other records to determine their actual meaning. He also noted that various City agencies knew of and acquiesced to Respondent's transient occupancy of the property.

On appeal, Petitioner contends that the Board already held in *DOB v. Terrilee 97th Street LLC,* Appeal No. 1801127 (February 21, 2019), and *NYC v. Terrilee 97th Street, LLC,* Appeal No. 1300391 (July 25, 2013) (*aff'd, Matter of Terrilee 97th St. LLC v. New York City Envtl. Control Bd.*, 146 A.D.3d 716 (1st Dep't 2017)), that the occupancy classification language on Respondent's current (1964) CO, "Old Law Tenement Class 'A' Mult. Dwelling & S.R.O.," for its building located at 258 West 97th Street, Manhattan, authorized only permanent residential occupancy of 30 days or more for all SROs. Petitioner argues that the conversion of Respondent's units, from class "A" apartments, to one-room SROs, to two-room SROs (as reflected by its 1931, 1947, and 1964 COs, respectively) does not affect the classification of the building itself as a class "A" multiple dwelling, which still requires occupancy for permanent residence purposes in all SRO units.

In its answer, Respondent urges affirmance of the hearing officer's decision on the bases stated therein. Respondent argues that: (1) the "Permissible Use and Occupancy" section of a CO dictates the use of each floor; (2) its 1964 CO must be construed per the 1955 Multiple Dwelling Code, in effect when DOB issued it, which permitted transient occupancy of SROs in both class "A" and class "B" buildings; (3) the subject premises is not class "A" multiple dwelling because it is not occupied for permanent residence purposes, as the definition requires; (4) the 2010 MDL amendments do not apply to Respondent's premises because Petitioner categorized it as Occupancy Class J-1 (i.e., a classification for transient occupancy) in a 1989 Technical Policy and Procedure Notice (TPPN) #4/89[4]; (5) the holding in *Matter of Terrilee 97th St. LLC,* 146 A.D.3d 716, addressed only whether the fines imposed were supported by substantial evidence based on that particular case record – the remainder of the decision is mere dicta and neither binding nor persuasive[5]; and the Board's prior decisions (*Terrilee 97th Street LLC,* 1801127 and

[4] TPPN #4/89 (superseded) stated that the J-1 classification applied only "for the purposes of Local Laws 16/84 and 16/87" (i.e., Building Code amendments that required automatic sprinkler systems in specified buildings).

[5] The decision reads:

> Under the [MDL], as amended effective May 1, 2011, none of the units in petitioner's Class A multiple dwelling may be used for occupancy periods shorter than 30 days. Petitioner's suggestion that the 1947 I-

1300391) are not dispositive because Respondent offered new evidence and argument in the instant case.[6] With respect to summons 28X, Respondent's attorney points out that in *Terrilee*, 1300391, the Board found its fire escape sufficient for egress; therefore, res judicata applies.[7]

ISSUE ON APPEAL

The main issue on appeal is whether Respondent established that the current CO for its premises authorized it for transient occupancy as a class "B" multiple dwelling.

APPLICABLE LAW

Code § 28-210.3 provides:

> It shall be unlawful for any person or entity who owns or occupies a multiple dwelling or dwelling unit classified for permanent residence purposes to use or occupy, offer or permit the use or occupancy or to convert for use or occupancy such multiple dwelling or dwelling unit for other than permanent residence purposes.

Code § 28-202.1 provides that, in addition to a civil penalty, a separate penalty of one thousand dollars may be imposed for each day that a Class 1 violation of Code § 28-210.3 remains uncorrected.

Section 102-01(g)(1) of Title 1 of the Rules of the City of New York (RCNY) directs that daily penalties pursuant to Code § 28-202.1 shall continue to accrue for a total of 45 days, running from the date of the Commissioner's order to correct set forth in the summons, unless Respondent proves at the hearing that correction occurred earlier.

MDL § 4(7) defines a "multiple dwelling" as "a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other . . . . For the purposes of this chapter 'multiple dwellings' are divided into two classes: 'class A' and 'class B.'"

MDL § 4(8)(a) defines a class "A" multiple dwelling as a multiple dwelling occupied for permanent residence purposes. "This class shall include *tenements*, flat houses, maisonette

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> card (which recorded use of the subject building for 'Class B sleeping rooms'), and not the most recent 1964 certificate of occupancy (CO) controls the building's lawful occupancy is meritless. Petitioner's contention that it has, in effect, grandfathered rights to continue its preexisting legal use of the premises also lacks merit. The 2010 amendments extinguished the accrued rights which petitioner otherwise would have enjoyed under MDL § 366(1). Hence, ECB properly reinstated NOV 349-803-05Z, stating that the building's use 'in part as a transient hotel' violated the CO. The 2010 amendments likewise supplanted the New York City Zoning Resolution's nonconforming use regime. Since petitioner makes no claim that it attempted to comply with MDL § 120's conversion regime (and indeed asserts that it is impossible for it to meet Section 120's requirements), and there is no dispute that the building's transient use violates applicable residential zoning, ECB properly reinstated NOV 349-803-07M [issued for a violation of ZR § 22-00]. [All citations omitted.]

The remainder of the decision addressed Respondent's failure to preserve constitutional challenges and a violation of BC § 1008.1.2.2, not charged here, for doors swinging against the flow of egress.

[6] Respondent resubmitted select exhibits in its answer to the appeal.

[7] Petitioner issued the prior summons, 34980308Y, to Respondent on July 5, 2012, at the same place of occurrence, for a violation of Code § 28-301.1, for failing to provide sufficient egress, per BC § 1018.1. At the hearing, the IO testified that he observed one internal staircase and fire escapes, but that compliance required two internal exits.

apartments, apartment houses, apartment hotels, bachelor apartments, studio apartments, duplex apartments, kitchenette apartments, garden-type maisonette dwelling projects, and all other multiple dwellings except class B multiple dwellings." (Emphasis added.)

The 2010 amendments added the following relevant language to MDL § 4(8)(a):

> A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, "permanent residence purposes" shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit.

MDL § 4(16) defines "Single room occupancy" as:

> [T]he occupancy by one or two persons of a single room, or of two or more rooms which are joined together, separated from all other rooms within an apartment in a multiple dwelling, so that the occupant or occupants thereof reside separately and independently of the other occupant or occupants of the same apartment. When a class A multiple dwelling is used wholly or in part for single room occupancy, it remains a class A multiple dwelling.

MDL § 4(9) defines a class "B" multiple dwelling as:

> [A] multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels, lodging houses, rooming houses, boarding houses, boarding schools, furnished room houses, lodgings, club houses, college and school dormitories and dwellings designed as private dwellings but occupied by one or two families with five or more transient boarders, roomers or lodgers in one household.

Code § 28-301.1 provides, in relevant part:

> All buildings and all parts thereof and all other structures shall be maintained in a safe condition . . . . The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant manner and shall comply with the inspection and maintenance requirements of this chapter.

Section 1018.1 of the 2008 BC provides: "Minimum number of exits. All rooms and spaces within each story shall be provided with and have access to the minimum number of approved independent exits as required by Table 1018.1 based on the occupant load of such story . . . . Occupant Load 1-500 – Minimum Number of Exits: 2."

MDL § 67 reads in relevant part:

> (1) It shall be unlawful to occupy any class A or class B multiple dwelling, including a hotel, unless it conforms to the provisions of . . . . the applicable provisions of this section . . . except that the provisions of this section shall not apply to . . . [t]enements.
>
> (6) Hotels and certain other class A and class B dwellings . . . . [I]n every such dwelling three or more stories in height there shall be from each story at least two independent

> means of unobstructed egress . . . The first means of egress shall be an enclosed stair extending directly to the street . . . . The second means of egress shall be by an additional closed stair . . . or an outside fire-escape.

ZR § 22-00 sets forth the use groups permitted in residential districts.

> ZR §§ 22-10 through 22-14 provide that Use Groups 1 through 4 are permitted in an R8B residential district.
>
> ZR § 32-14 provides that hotels used primarily for transient occupancy are categorized in Use Group 5 and are only allowed in designated commercial districts.

Section 1004.1 of the 2008 BC provides:

> Design occupant load. In determining means of egress requirements, the number of occupants for whom means of egress facilities shall be provided shall be established by the largest number computed in accordance with Sections 1004.1.1 through 1004.1.3.
>
> 1004.1.2 Number by Table 1004.1.2. The number of occupants computed at the rate of one occupant per unit of area as prescribed in Table 1004.1.2 . . . . Residential: 200 gross within dwelling units [floor area in square feet per occupant].

Section 102-01(f)(1) of 1 RCNY permits the imposition of an aggravated penalty of the first order (Agg I) when evidence establishes the same condition or the same charge under the Construction Codes in a prior enforcement action against the same owner during the past three years.

ANALYSIS

For the following reasons, the Board reverses the appealed part of the hearing officer's decision.

The Board finds that Respondent did not establish that the current CO for its premises authorized it for transient occupancy as a class "B" multiple dwelling (26M). Code § 28-210.3 prohibits any person or entity who owns a multiple dwelling classified for permanent residence purposes to occupy it for other than permanent residence purposes. Here, Respondent's CO classified the premises' occupancy as "Old Law Tenement Class 'A' Mult. Dwelling & S.R.O." As the Board previously found in *Terrilee 97th Street LLC,* 1801127, and *Terrilee 97th Street, LLC,* 1300391, Respondent's premises at 258 West 97th Street, Manhattan, is a class "A" multiple dwelling and its 1964 CO authorizes occupancy of its SROs for permanent residence purposes of 30 days or more by the same natural person or family.

The Board finds no ambiguity in interpreting Respondent's CO, which might otherwise necessitate the consultation of other records for clarity. Respondent incorrectly asserts that the 1955 MDL controls the review of its 1964 CO; on the contrary, the 2010 MDL "shall apply to all buildings in existence on such effective date." *Matter of Grand Imperial, LLC v. New York City Bd. Of Stds. & Appeals,* 137 A.D.3d 579 (1st Dep't 2016). A class "A" multiple dwelling is a dwelling for three or more families living independently from one another for "permanent residence purposes," for at least 30 days. *See* MDL § 4(7), (8). Additionally, a tenement is automatically classified as a multiple dwelling to be occupied only for permanent residence purposes. *See* MDL § 4(11). Respondent's conversion of its building from apartments to SROs

does not affect its occupancy classification as a class "A" multiple dwelling. *See* MDL § 4(16). Respondent cites to no legal authority or purpose in support of its argument that the "Occupancy Classification" – prominently displayed near the top of the document, directly above the 1964 issuance date, and containing the first substantive information about the premises – provides only a historical reference of a prior classification to the present one, particularly when the prior, superseded CO already memorializes the prior occupancy classification. Nor does Respondent explain the purpose of providing any "Occupancy Classification" information on a CO, whether prior or current, if the "Permissible Use and Occupancy" section dictates the authorized occupancy for each floor.

Here, the "Occupancy Classification," when read together with the "Permissible Use and Occupancy" section on the current CO, states that Respondent's building is authorized for permanent residence purposes, and that each floor is authorized for a specific number of SROs, some of which may be occupied by not more than one person. The Board notes that the 1931 CO does not contain a separate "Occupancy Classification" section like Respondent's more recent COs; rather, that information appears on the first line of the "Permissible Use and Occupancy" section, directly above the authorized uses proscribed for each floor, which underscores an intent to read the per-floor use within the context of the building's authorized occupancy as a class "A" multiple dwelling. This reading is also consistent with § C26-186.0 of the 1938 BC (which required a CO to state "the purpose the structure may be used in its several parts") because as Respondent's own 1931 CO illustrates, the occupancy classification and per-floor usage appeared together in that same section. *See* fn. 3.

Turning to the remaining summonses, the Board finds that Respondent violated ZR § 22-00 by transiently occupying its premises (a commercial use permitted in Use Group 5), in a residential district that permits Use Groups 1 through 4 (29H). *See Terrilee 97th Street LLC*, 1801127 and *Terrilee 97th Street, LLC* 1300391 (*aff'd, Matter of Terrilee 97th St.* LLC, 146 A.D.3d 716). The Board also finds that Petitioner established a prima facie violation of BC § 1004.1.2 for exceeding the maximum permitted occupant load by offering the IO's affirmed statement in the summons and photographs depicting the violating conditions (32Z). *See* 48 RCNY § 6-12(b) (a summons affirmed under penalty of perjury shall be admitted as prima facie evidence of the facts contained therein) and *DOB v. Stephen Hutchinson*, Appeal No. 1800464 (August 23, 2018) (dismissal of summons based on conclusory language in the narrative not appropriate unless Petitioner failed to submit "any evidence supporting" it at the hearing). For summons 28X, the Board finds that Respondent's failure to maintain its premises in a code-compliant manner at all times, via its ongoing obligation to provide a sufficient number of means of egress, is a continuing violation for which res judicata does not apply. *See generally NYC v. Yitzchok Stern*, Appeal No. 1601253 (January 19, 2017). Consequently, Respondent's premises, a tenement, cannot avail itself of the provision of MDL § 67 that authorizes a fire escape as a second means of egress because that MDL section excludes tenements from its application.

Under Code § 28- 202.1, daily penalties may be imposed for an immediately hazardous violation "for each day that the violation is not corrected." Section 102-01(g) of 1 RCNY, promulgated by Petitioner pursuant to its rulemaking authority found in Charter § 1043(a) and Chapter 26, further provides that where Petitioner seeks daily penalties, such penalties "*will* accrue at the rate of $1,000 per day for a total of forty-five days running from the date of the Commissioner's order to correct set forth in the [summons], unless the violating condition is proved by the respondent at the hearing to have been corrected prior to the end of that forty-five day period, in which case

the daily penalties *will* accrue for every day up to the date of that proved correction." (Emphasis added.) Consequently, here, Respondent bore the burden to show when it corrected the cited conditions in summons 26M to toll the imposition of daily penalties. Because Respondent failed to provide credible evidence that it corrected the violating conditions before the hearing date, the Board imposes per-day penalties of $1,000 for each day the violation remained uncorrected for 45 days or $45,000. *See DOB v. 1058 Bronx LLC,* Appeal No. 1901202 (October 10, 2019).

Accordingly, the Board reverses the hearing officer's dismissal of the summonses, finds a Class 1 Agg I violation of Code § 28-210.3 ($8,000), a Class 1 Agg I violation of Code § 28-301.1 ($3,000), a Class 2 Agg I violation of ZR § 22-00 ($2,000), and a Class 2 violation of BC § 1004.1.2 ($800), plus $45,000 in per-day penalties under Code § 28-202.1, for a total civil penalty of $58,800.

By: OATH Hearings Division Appeals Unit