Matter of 135-139 Plymouth St., Brooklyn

OATH Index Nos. 1871/12-1896/12, 1898/12-1901/12, 1053/13-1054/13, 1409/13 (Feb. 5, 2013)
[Loft Bd. Dkt. Nos. TR-0911-0932, TR-0934-0937, TR-0939, Tr-0953, Tr-0987, TR-0990, Tr-1017, TR-1026-27, TR-1047, TR-1050, Tr-1052 [135-139 Plymouth Street, Brooklyn, N.Y.]

Petitioners who filed coverage applications moved to withdraw those applications without prejudice due to recent amendments to the Multiple Dwelling Law. ALJ recommends that motion be granted.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
135-139 PLYMOUTH STREET, BROOKLYN

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

On February 17, 2012, the Loft Board referred thirty related applications to this tribunal. The applicants are tenants who claim that the premises is an interim multiple dwelling under section 281(5) of the Multiple Dwelling Law and that they are protected residential occupants. Six other tenants later applied for coverage and those applications were consolidated with the pending applications. The owner filed answers opposing in opposition, claiming that the building is not covered by the Loft Law because, on the effective date of the statute, June 21, 2010, the building contained a paper transfer station, engaging in activities set forth in Use Groups 15 through 18 of the Zoning Resolution and that such use is inherently incompatible with residential used in the same building. *See* MDL § 281(5).

Following conferences, motion practice, and discovery, the matter was scheduled for a hearing on December 13, 2012. Due to the illness of one of the attorneys for the applicants, the matter was adjourned on consent of the parties to February 5, 2013.

On January 24, 2013, applicants' counsel notified this tribunal of pending legislation, passed by the New York State Senate, which would amend the "incompatible use" provisions of the Multiple Dwelling Law. Most notably, the legislation would give the Loft Board discretion to exempt, by rule, certain categories of units and buildings from incompatible use

determinations. Within a week, the State Assembly passed the amendment and it was signed into law by the Governor (available at http://open.nysenate.gov/legislation/bill/S2320-2013).

On January 29, 2013, after conferring with the parties, I denied the applicants' request for an indefinite adjournment. Because the matter had been pending for a long time and had already been adjourned, I agreed with the owner that an open-ended adjournment would be inappropriate.

After denial of the motion for an indefinite adjournment, petitioners moved to withdraw the coverage applications without prejudice because the amendment to the Multiple Dwelling Law would materially impact its presentation of the case. Among other things, the applicants noted that, if the Loft Board exempted the building from the incompatible use requirement, that would avoid a month-long hearing with extensive expert testimony, and spare the thirty-six applicants an additional $100,000 of litigation costs (Letter of M. Kozek, January 30, 2013). The self-represented applicants joined in counsel's application. The owner opposed the motion to withdraw and, in the alternative, requested: (1) that the withdrawal be deemed with prejudice; (2) that the withdrawal be on the condition that any new coverage application be deemed filed on the date of the original application; and (3) an award of costs for attorneys' fees and expert witnesses (Letter of J. Burden, January 31, 2013).

I advised the parties that I would grant the application to withdraw without prejudice and issue a report and recommendation to that effect. For the reasons below, petitioners' motion to withdraw their applications should be granted without prejudice.

ANALYSIS

"As a general matter, parties may withdraw applications without prejudice." *Matter of Mark-Holli Realty Corp.*, Loft Board Order No. 2160 (Oct. 10, 1997) (upholding dismissal without prejudice unless there are circumstances that warrant a "more stringent result"); *see also* 48 RCNY §1-32(f) (Lexis 2012) (withdrawal of a case from the calendar by petitioner "shall not be subject to the 'good cause' requirement" applicable to adjournments but shall only be permitted upon application); *Matter of Friedman*, Loft Bd. Order No. 3035 (Apr. 20, 2006) (timing of motion to withdraw and merit of application are factors to consider in determining whether to grant the motion without prejudice); *Matter of Ancona*, Loft Bd. Order No. 1906 (Jan. 24, 1996), *adopting* OATH Index No. 116/96 (Dec. 8, 1995) (same); *Matter of Puryear*, OATH

Index No. 1645/98 (June 26, 1998), *adopted*, Loft Bd. Order No. 2285 (Sept. 24, 1998) (application dismissed without prejudice where applicant fails to appear for hearing); *Matter of Reibman*, OATH Index No. 742/97 (Aug. 13, 1997), *adopted*, Loft Bd. Order No. 2208 (Jan. 22, 1998) (dismissal without prejudice to renew when and if parties are able to proceed).

Here, there are several reasons to grant the motion to withdraw without prejudice. To begin with, there is no dispute that a lengthy hearing contesting the issue of incompatible use would involve considerable expense for both sides. The coverage applications are not frivolous. Three dozen applicants claiming that they were residential occupants during the relevant window period and the parties are sharply divided on whether the incompatible use exception applies. Second, the newly-enacted amendment to the Multiple Dwelling Law significantly changes to the law. Under the amendment, the incompatible use exemption from coverage only applies if the use was actively and continuously pursued from June 21, 2010, through the date of the coverage application – in contrast to the previous requirement that the incompatible use only had to exist on June 21, 2010. Moreover, under the new amendment, the Loft Board has the discretion to exempt, by rule, certain categories of units and buildings from the incompatible use exception to coverage. Thus, the newly-enacted amendment materially alters the legal landscape. Because the impact of the amendment is unclear, the applicants should be given an opportunity to re-evaluate how to proceed.

Also, the applicants' motion to withdraw was timely. When the coverage applications were filed, there was no reason to expect any change to the incompatible use exception. Immediately after the State Senate approved the proposed amendment, the applicants brought that information to the attention of the owner and this tribunal. *See Matter of Helfer*, Loft Bd. Order No. 2189 at 3 (Dec. 18, 1997), *adopting*, OATH Index No. 302/98 (Oct. 21, 1997) (upon discovery of procedural defect, after amended pleadings and conference, it was proper for owner to seek to withdraw application without prejudice).

Contrary to the owner's claim, withdrawal of the coverage applications should be without prejudice. To bar the applicants from re-filing, or to impose further restrictions, would unfairly penalize them and deprive them of the benefit of the new, less-restrictive, amendment. Although both sides incurred costs in preparing for a hearing, withdrawal without prejudice benefits both sides because it avoids the substantial time and expense of a protracted hearing focused on an issue that may become irrelevant.

The owner also argued that it would be harmed by withdrawal of the applications without prejudice because it would leave the building "in limbo" (Letter of J. Burden, Jan. 31, 2013). That argument is unpersuasive. The owner's counsel conceded that the owner "always intended to legalize the building for residential use and believe it cannot be made legal without relocating the paper transfer station it is operating." *Id*. But if the owner seeks to resolve any uncertainty, it has the power to do so. To obtain coverage under the Loft Law, it can remove any incompatible use and register the building or keep the incompatible use and seek an exemption under the new amendment. Alternatively, the owner can continue to oppose coverage and assert that there is an incompatible use. Allowing the applicants to withdraw their coverage applications does not substantially harm the owner.

Finally, under these circumstances, there is no authority for this tribunal to award attorney's fees or witness costs. *See Matter of Korean American Assoc. of Greater New York,* OATH Index No. 2910/10 at 3 (Dec. 30, 2010).

RECOMMENDATION

I recommend that applicants' motion to withdraw their coverage applications be granted, without prejudice.

Kevin F. Casey
Administrative Law Judge

February 5, 2013

SUBMITTED TO:

ROBERT D. LIMANDRI
Chair

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