Matter of Domingo

OATH Index No. 1125/98 (May 21, 1999), *rev'd,* Loft Bd. Order No. 2453 (Dec. 13, 1999), *aff'd sub nom Domingo v. NYC Loft Bd.*, Sup. Ct. N.Y. Co. Index No. 107058/00 (May 1, 2000)(Tolub,J.), ***appended,*** *aff'd,* 246 A.D.2d 337, 666 N.Y.S 2d 914 (1st Dep't 1998)**.**

Summary: 1. Petitioner is the sixth floor loft tenant in one of a complex of six buildings located at 463-469 Greenwich Street, in lower Manhattan. The subject premises are cooperatively owned by the tenants, including petitioner. Petitioner filed an unreasonable interference application challenging the Co-Op's legalization plans, in particular the plan to legalize the stairs in his building, which would require the construction of a floor to ceiling ladder enclosure in his loft to extend the stairs to the roof. Petitioner proposed an alternate plan involving legalization of the stairs in the adjacent building. **ALJ found that tenant established unreasonable interference claim; the Loft Board rejected the ALJs recommendation based upon its holding that an owner-occupant of residential unit in cooperative building lacks standing to bring unreasonable interference application. Board finds that petitioner was an owner rather than a tenant or occupant and therefore the Board's code compliance rules relating to narrative statements (2-01(d))did not apply. The Supreme Court upheld the Board's determination on appeal, finding that the Board properly gave collateral estoppel effect to a prior court ruling, Domingo v. C True Building Corp., 246 A.D.2d 337, 666 N.Y.S.2d 914 (1st Dep't 1998), which had held that C. True had obtained approval of a majority of the shareholders for its legalization plan and had properly exercised its business judgment which respect to the plan.**

The Court upheld the Board's interpretation that only the Board (and not the occupant) can initiate an unreasonable interference proceeding. 29 RCNY 2-01(d)(iv) and (vii)(B)(b)

2. Petitioner has burden of proving that Co-Op's plan for legalization not only would create interference in the use of his unit, but that such interference would be "unreasonable." Determination of application requires balancing a range of factors, but petitioner must prove that the balance favors his alternate plan over the owner's plan to the extent that adoption of owner's plan in the circumstances would be "unreasonable." The Loft Board did not pass upon this portion of the ALJ's report since it based its determination upon petitioner's lack of standing.

3. Business judgment rule, as applied to residential cooperatives in *Levandusky v. One Fifth Avenue Apartment Corp.,* 75 N.Y.2d 550, 554 N.Y.S.2d 807 (1990), does not remove tenant shareholders of residential cooperatives from the protection of the Loft Law, nor preempt Loft Board jurisdiction over legalization issues for cooperatively owned buildings. Only portion of Multiple Dwelling Law which does not apply to cooperatives is rent regulation as expressly provided for by statute. *See* MDL 286(8). Nothing in Loft Law nor Loft Board rules otherwise exempts tenants who are shareholders in a Co-Op from fully exercising the same rights under the Loft Law as any other residential tenant, in particular the right to participate in the narrative statement process. Shareholder tenant thus has standing to bring unreasonable interference application under Loft Board rules, even though Co-Op lawfully adopted such plans as per its by-laws and corporate procedures, and after shareholder meetings and a vote in which petitioner fully participated. **This portion of the ALJs report was rejected by the Loft Board for the reasons set forth in paragraph 1. As stated**

above, the Supreme Court upheld the Board's determination on appeal, finding that the Board properly gave collateral estoppel effect to a prior court ruling, Domingo v. C True Building Corp., 246 A.D.2d 337 (1st Dep't), which had held that C. True had obtained approval of a majority of the shareholders for its legalization plan and had properly exercised its business judgment which respect to the plan.

4. "Particular circumstances" of tenant and idiosyncratic uses of his loft unit, while not controlling with respect to legalization decisions, can be considered as one factor in assessing the pros and cons of competing legalization plans (citing *Matter of Langer,* OATH Index No. 1316/98 (Sept. 25, 1998), and distinguishing earlier Loft Board cases). Potential impact of Co-Op's legalization plan on ability of petitioner, a certified artist in the area of video filmmaking, to continue to make videos in his loft, could be considered, although ALJ ultimately found that petitioner failed to prove any significant impact on such artistic use. The Loft Board did not pass upon this portion of the ALJ's report since it based its determination upon petitioner's lack of standing.

5. While owner not required to legalize conditions in a loft which were created after the June 21, 1982 date on which the Loft Law was enacted, the mere fact that a condition was created after 1982 does not preclude its consideration (again citing *Langer* and distinguishing earlier Loft Board cases). The post-1982 creation if conditions is another factor to consider in the balancing of interests between competing plans. Here, fact that stairwell platform was erected by petitioner after 1982, and the fact that he did not start making videos in his loft until 1987, did not preclude any consideration of the impact of legalization proposal on those conditions. The Loft Board did not pass upon this portion of the ALJ's report since it based its determination upon petitioner's lack of standing.

6. Petitioner met his burden of proving that Co-Op's plan to legalize the stairs in his building, which would require construction of a stairwell enclosure in his loft taking a minimum of 50.9 square feet of space and which would negatively impact on the loft's appearance and configuration, was an unreasonable interference with the use of his loft. Although demonstrated adverse impact on petitioner was relatively minimal, petitioner established that his alternate plan would have virtually no impact on any other tenant and cost the same. The fact that Co-Op's choice of legalization plans was based on perceived economic benefit to Co-Op and desire to improve the existing conditions of adjacent tenant had nothing to do with legalization, and could not justify choice of plan which had demonstrated adverse impact to petitioner over a plan which would have no such impact on anyone and would simply preserve the status quo. Fact that Co-Op plan was developed after a corporate process in which petitioner fully participated is a factor to consider, but was ultimately not determinative. Application granted. **This portion of the ALJs report was rejected by the Loft Board for the reasons set forth in paragraph 1.**

Report and Recommendation, May 21, 1999

RAYMOND E. KRAMER, *Administrative Law Judge*

This application is for a finding of unreasonable interference pursuant to sections 282 and 284 of the Multiple Dwelling Law and title 29, sections 1-06 and 2-01(d)(2)(vii)(B) of the Rules of the City of New York (RCNY).

The petitioner, Javier Domingo, resides in the 6th floor loft at 467 Greenwich Street, in Manhattan, one of a complex of six six-story building sections, each approximately one hundred years old, constituting the subject premises. The building sections, designated as 463 (a.k.a. 22 Desbrosses Street), 465 and 467 Greenwich Street, 125 Watts Street, and 18 and 20 Desbrosses Street, encompass a full city block in Tribeca, in lower Manhattan, and together comprise what is reputedly the largest interim multiple dwelling (IMD) in the City. Respondent C. True Building Corporation (hereinafter "the Co-Op") is a tenant-sponsored *de facto* housing cooperative, consisting of some 26 shareholder tenants, including Mr. Domingo, which has owned the premises since purchasing it from the prior owner in 1993.

By his application, Mr. Domingo contends that Loft Board certification of the Respondent Co-Op's legalizations plans, specifically its plan to legalize the stairs in his building section, 467 Greenwich Street, by making them code compliant, which in his loft means extending them to the roof via an enclosed ladder and hatch, while removing the stairs in the adjacent building section at 465 Greenwich Street, would unreasonably interfere with the use of his unit. He further contends that his alternate plan, to legalize the stairs in the adjacent building at 465 Greenwich Street while removing the stairs in his building, would preserve his space intact while having no adverse impact on any other tenant, and should thus be adopted instead. Respondent Co-Op argued in opposition, among other things, that its legalization plan was reasonable and rational, would have a *de minimis* if any impact on petitioner's use of his loft, was a more equitable plan in terms of its impact on certain tenants, and should be accorded great deference because it was adopted in accordance with corporate by-laws and procedures and after shareholder meetings and a vote, in which petitioner fully participated. The parties stipulated at the outset of the proceedings that either of the two plans at issue, the plan to legalize the 467 stairs or the plan to legalize the 465 stairs, would be acceptable to the Department of Buildings, even though petitioner's alternate plan was never formally filed with that agency.

Trial in this matter was conducted before me on eight dates in September and October 1998. The record was held open for the submission of post-trial memoranda. The parties submitted extensive briefs on November 25, 1998, and reply briefs on December 9, 1998.

At the trial, petitioner called two witnesses in support of his claim of unreasonable interference, himself and a retained architect, Jose Martinez. Respondent Co-Op presented testimony from its architect, Alexandr Neratoff, whom the Co-Op retained to preside over the conversion of the premises to a legal residential dwelling, the current Co-Op Board president, Barbara Dufty, and Mr. Domingo's sixth floor neighbor in the adjacent building section at 465 Greenwich Street, Catherina Cosin, whose unit would be most directly affected if Mr. Domingo's alternate legalization plan were adopted. I also conducted an on-site visit to the premises during the course of the trial, accompanied by counsel, Mr. Domingo and Ms. Cosin, as an aid to resolution of the issues. Both architects are licensed and registered and were qualified as experts in their fields. Mr. Neratoff, however, has had

extensive experience in loft conversion under the Multiple Dwelling Law (MDL), whereas Mr. Martinez, although maintaining a working familiarity with the applicable MDL provisions, has not.

BACKGROUND

Some background as to the development of the Co-Op's legalization plans is helpful to an understanding as to how the parties arrived at their current impasse.

Following its purchase of the subject premises in November 1993, Respondent Co-Op set about the rather monumental task of legalizing the premises as required by the Loft Law. Its first step was to hire Mr. Neratoff to oversee that task, in May 1994. The goal of legalization was to convert the upper floors to legal residential use under Articles 7B and 7C of the Multiple Dwelling Law and the lower floors to a mix of commercial and residential use.

Mr. Neratoff testified that after he was retained, his first task was to visit the subject premises, including the common areas and the approximately 32 residential units in the building (some of which are occupied by rental tenants rather than shareholders), to inspect and prepare measurements, and to obtain an accurate picture of each building section's condition and what would be required for legalization. One of the legalization issues he quickly discerned needed to be addressed was the condition of the stairs. Each of the six building sections has its own set of stairs, none of which are presently code compliant. Among other problems, including steepness, narrowness and headroom problems, none of the stairs extend all the way to the roof by a full stairway and bulkhead, as required by the old building code under which these premises are being legalized. In some of the building sections, the stairs extend to the roof by means of a ladder and hatch, while in other sections, such as 465 and 467 Greenwich Street, the stairs do not extend to the roof at all.

In September 1994, Mr. Neratoff prepared a report for Respondent Co-Op's Board of Directors, outlining the work that he felt needed to be done with respect to legalizing each of the stairs and elevators at the premises, and giving a general cost characterization for that work (Pet. Ex. 19). In the report, Mr. Neratoff noted the work that would be required to legalize the 467 stairs and labeled it a "medium expensive" project. In contrast, he identified only one problem, a second floor headroom problem, that needed to be corrected to legalize the 465 stairs and estimated that the work could be done without any significant expense. Mr. Neratoff had not consulted with a contractor nor actually costed any of the work at that point.

Knowing that cost was an important factor for the Co-Op, Mr. Neratoff took a creative approach in tackling the stair legalization problem. Reasoning that the six building sections were legally considered one building under the Multiple Dwelling Law, Mr. Neratoff determined that not all of the stairs were necessary for legalization. As a way of cutting construction work and costs, and of recapturing space for tenants and the Co-Op, Mr. Neratoff proposed that only a single central stairway be made code compliant and extended to the roof as a full stairway with a bulkhead, and that the rest of the building sections combine their use of the stairs, so that only certain stairs would have to be legalized while the remaining ones could be removed. As a further cost and space saving device, Mr. Neratoff proposed that the stairs selected to remain be extended to the roof simply via

enclosed ladders and hatches, rather than as full stairs with bulkheads as would normally be required. Mr. Neratoff met with senior officials at the Buildings Department and received an informal approval for this concept. Later, in October 1995, he submitted a formal reconsideration request to the Buildings Department with respect to his stairs proposal and received a favorable decision (*see* Resp. Ex. A).

Mr. Neratoff quickly determined that the most logical choice for the stairway to be fully legalized was the stairs at 463 Greenwich Street, which were centrally located. The hot button issue soon became which of the remaining sets of stairs to keep and which to remove. With the approval of the Co-Op Board, Mr. Neratoff developed three different options in that regard, which, along with the fourth and most costly option of fully legalizing all the stairs, were outlined for the shareholders in a March 15, 1995 report issued by the Co-Op's Board of Directors in advance of a scheduled March 21 shareholders meeting. As to each alternative, the report noted the work required to be done, the impact on individual shareholder lofts, the approximate cost and an estimate of the total space which would be recaptured by Co-Op and shareholder owned lofts (*see* Pet. Ex. 20).

Of the three alternatives to fully legalizing all the stairs, Mr. Neratoff recommended that the Co-Op adopt the proposal designated as 1B alternate in the March 15 report, which called for the removal of the stairs at 125 Watts Street, the building adjacent to and immediately north of 467 Greenwich Street, legalization of the stairs at 467, which would then be used by both the 125 Watts Street and 467 Greenwich Street tenants, and removal of the stairs at 465 Greenwich Street, whose tenants would share the central stairs to be fully legalized at 463 Greenwich Street. Mr. Neratoff favored that option because of the substantially reduced construction work, cost savings and space gained by combining those particular sets of stairs. For reasons never fully explained to Mr. Neratoff, however, the Co-Op's Board of Directors rejected the idea of removing the 125 Watts Street stairs, and recommended to the shareholders instead in the March 15 report, that they adopt option 1B, which called for legalization of the 125 Watts Street stairs, legalization of the 467 stairs and removal of the 465 stairs. The Co-Op Board asserted in the report that it was recommending that option because it would not adversely impact on anyone's private space, would release some footage into private lofts and most importantly would enlarge two vacant lofts owned by the corporation (Pet. Ex. 20, p. 2). Option 2B, also presented to the shareholders and the one now pending as Mr. Domingo's alternate plan, called for legalization of the 125 Watts Street stairs, legalization of the 465 stairs, and removal of the stairs in 467.

At the shareholders meeting on March 21, 1995, which Mr. Domingo did not attend, the shareholders voted to authorize the Co-Op Board to have Mr. Neratoff fully develop the Board recommended option 1B and to draft plans reflecting that option. Following the meeting, Mr. Domingo wrote a letter to the Co-Op's Board of Directors, dated March 28, 1995, complaining about the accuracy of its representation to the shareholders that its recommended plan would not adversely impact on anyone's private space. Mr. Domingo pointed out to the contrary that the Co-Op Board recommended proposal would cause "extreme distortion" to the appearance of his loft and would also result in a "large" loss of square footage, by removing from his space his fifth floor entrance and the fifth floor stairs, which have always been enclosed within his unit, and requiring the construction within his loft of a floor to ceiling enclosure to house a sixth floor landing and ladder and hatch

extension of the stairs to the roof (Pet. Ex. 23). In a letter in response to Mr. Domingo's, the Co-Op Board reassured Mr. Domingo that it sought the option which would have the least negative impact on individual shareholders, and that it was still in the process of developing a more detailed impact statement of the options for further review (Pet. Ex. 24).

Over the next several months, there were many informal meetings involving the Co-Op Board, shareholders, the architect and various other people. Mr. Neratoff worked to further develop the plans for the Co-Op Board recommended option. In reinspecting the premises, Mr. Neratoff made certain revisions in his assessments of the legalization work that needed to be done, including a determination that renovation of the stairs at 465 Greenwich Street would require the replacement of two runs of stairs between the first and third floors, and therefore entail more work and be more costly than he originally thought. By June 1995, Mr. Neratoff had drafted plans for the Co-Op Board's recommended option, option 1B, which were filed with the Loft Board for the limited purpose of keeping the building in compliance (*see* Pet. Ex. 26).

On September 21, 1995, a shareholders meeting and vote was held to determine which of the various legalization options should be finally adopted and filed in a narrative statement with the Loft Board. The Co-Op's recommended plans for legalization as drafted by Mr. Neratoff were on display at the meeting. Mr. Domingo was present and had an opportunity to speak against the Co-Op Board proposal, and in favor of his preferred option, option 2B. After much discussion, a vote was taken and by approximately a two-thirds majority, the Co-Op Board's recommended legalization plans, which included the plan to legalize the stairs in 467 Greenwich Street while removing the stairs at 465 Greenwich Street, were adopted. Mr. Neratoff was directed by the Co-Op's Board of Directors to prepare a narrative statement for filing with the Loft Board.

In the meantime, upset at his defeat and at what he perceived to be inaccuracies in the presentation of the options to the shareholders and what he claimed to be irregularities in the procedures followed, Mr. Domingo took the Co-Op Board to court. He filed suit in New York State Supreme Court, New York County, to enjoin the implementation of the legalization plans adopted by the shareholders by means of an action for a permanent injunction and damages. He also sought a preliminary injunction to prevent the Co-Op from removing or reconstructing the staircase adjacent to his unit pending the outcome of his action. In his suit, Mr. Domingo challenged the propriety of the Co-Op Board's actions under its by-laws and corporate procedures, in particular arguing that it had failed to comply with a shareholders agreement requiring a 75% majority vote before adopting any legalization plans.

In a decision filed on April 4, 1996, the Supreme Court denied Mr. Domingo's request for a preliminary injunction and granted the Respondent Co-Op's cross-motion to dismiss the complaint. In so doing, the Court determined that the shareholders agreement requiring a 75% majority vote had never been ratified by the shareholders and thus had no effect, and that any action taken by the corporation required only a simple majority. The Court further held that there was no evidence to indicate that the Co-Op's Board of Directors engaged in bad faith dealings or other improper conduct, that it had properly conducted its shareholder vote in accordance with its by-laws and procedures, and that its actions were fully justified under the "business judgment rule." *Domingo*

v. C. True Building Corp., Index No. 128739/96 (Sup. Ct. N.Y. Co., Apr. 4, 1996); (*see* ALJ Ex. 4, annexed Exhibit B). Mr. Domingo appealed the ruling to the Appellate Division.

In the meantime, the Co-Op proceeded with its legalization plans. By December 4, 1996, Mr. Neratoff prepared and filed with the Loft Board a narrative statement containing the shareholder adopted plans to legalize the premises, including the plan to legalize the 467 stairs and remove the 465 stairs. Thereafter, as per Loft Board procedures, a narrative statement conference was held at the Loft Board on February 24, 1997. Following the conference, Mr. Neratoff received various tenant comments with respect to the legalization plans, in response to which Mr. Neratoff made certain revisions to the narrative statement which he filed an addendum with the Loft Board on April 1, 1997 (Resp. Ex. E). Mr. Neratoff also responded in writing individually to all of the tenants, including Mr. Domingo (Resp. Ex. F). In an attempt to reduce the impact of the proposed legalization plans on Mr. Domingo's loft, the plans were further revised so that, as they currently stand, the enclosure to be built within Mr. Domingo's loft to house the ladder and hatch extension to the roof, would slope upward, parallel to the stairs, and then ascend at a height of ten feet vertically to the roof in a cube-shaped shaft, rather than simply ascend vertically from the floor to the ceiling for the length of the stairwell opening. The latest revision, for which Mr. Neratoff has informal approval from the Buildings Department, would substantially reduce the volume of space lost by Mr. Domingo's unit.

Despite the latest revisions, however, Mr. Domingo remained dissatisfied with the plans to legalize the 467 stairs. As a result, on May 15, 1997, he filed the pending application for a finding of unreasonable interference which was docketed by the Loft Board as BP-0022. Answers in opposition were filed by Respondent Co-Op and by Ms. Cosin, Mr. Domingo's neighbor in the adjacent sixth floor loft at 465 Greenwich Street, who, as noted, would be most directly impacted under the alternate plan proposed by Mr. Domingo.

In January 1998, the Appellate Division First Department upheld the lower court's ruling with respect to Mr. Domingo's suit to enjoin implementation of the Co-Op's legalization plans. The Appellate Division likewise found no evidence of self-dealing or other improper conduct by the Co-Op's Board of Directors, ruled that the legalization plans were properly adopted by the shareholders in accordance with the corporation's governing rules, and, citing to *Levandusky v. One Fifth Avenue Apartment Corp.,* 75 N.Y.2d 530, 537-38, 554 N.Y.S.2d 807, 811(1990), held that Mr. Domingo was otherwise bound by the Co-Op Board's actions by application of the business judgment rule. *Domingo v. C. True Building Corp.,* 246 A.D.2d 337, 666 N.Y.S.2d 914 (1st Dep't 1998).

The unreasonable interference application was ultimately referred to this tribunal for adjudication.

PRELIMINARY LEGAL ISSUE

Respondent Co-Op filed a pre-trial motion in this matter, which, among other relief, sought to dismiss the unreasonable interference application on the grounds that as a shareholder tenant in a housing cooperative, Mr. Domingo was bound by the Co-Op Board's lawfully effected actions under

the "business judgment rule," and thus had no standing to file the application. Furthermore, respondent Co-Op argued that the Supreme Court and Appellate Division First Department had already determined, in denying petitioner's request for a preliminary injunction and dismissing his complaint, that the Co-Op Board had properly exercised its business judgment in developing its legalization plans, and that therefore petitioner was estopped by the doctrine of *res judicata* from relitigating the issue (ALJ Ex. 4).

Petitioner filed papers in opposition to the motion, arguing that the premises are not a lawfully formed cooperative at this point, in that no offering plan has been filed as per the requirements of the General Business Law; that the only portion of the Loft Law inapplicable to cooperatives is the rent regulatory provisions, as specifically provided in the Multiple Dwelling Law; and that at no time did petitioner effect a knowing and voluntary waiver of his rights under the Loft Law. Petitioner also argued that there was no identity of issues between the action that he brought and was decided in the Supreme Court and Appellate Division and the application now pending here, such that the doctrines of *res judicata* and collateral estoppel would apply (ALJ Ex. 5).

Respondent Co-Op filed reply papers, noting that it was a *de facto* housing cooperative which has only been prevented from filing its offering plan to finalize the cooperative conversion essentially because of the various litigation embarked upon by petitioner. Respondent further argued that the fact that it is a *de facto* cooperative was of no legal significance for purposes of the application of the business judgment rule. Respondent further reiterated its arguments regarding the business judgment rule and the very limited judicial review of corporate decisions that such rule permits, and presented policy arguments as to why the rule should be recognized in this context (ALJ Ex. 6).

By letter decision, this tribunal resolved the motion prior to trial of this matter, denying respondent's request to dismiss the application on the specified grounds (ALJ Ex. 7). A brief further mention of the standing issue is appropriate here.

The business judgment rule cited to by respondent was developed in the context of commercial enterprises, and prohibits judicial inquiry into actions of corporate directors "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 419 N.Y.S.2d 920, 926 (1979). As long as the corporate directors were not shown to have breached their fiduciary obligation to the corporation, the exercise of their powers for the common good of the corporation was beyond review, even though their actions might otherwise be considered unwise or inadvisable in the context.

In *Levandusky*, 75 N.Y.2d 530, 554 N.Y.S.2d 807 (1990), the Court of Appeals determined, by analogy, that the business judgment rule was the appropriate standard of judicial review to apply to a challenge to a decision of the board of directors of a residential cooperative corporation as well. Noting the cooperative board's duty to act for the benefit of the residents collectively, the Court held that "[s]o long as the boards acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's." *Levandusky v. One Fifth Avenue Apartment Corp.*, 75 N.Y. 2d at 538, 554 N.Y.S.2d at 812. Specifically rejecting a

reasonableness standard of inquiry for reviewing board decisions, the Court held that unless a resident challenging the cooperative board's action is able to demonstrate a breach of its duty to the cooperative, judicial review is not available. *Levandusky* involved a challenge by a tenant to a cooperative board's resolution disallowing his request to move a steam riser in the course of performing alterations to his kitchen and requiring him to remove air conditioners he had installed, allegedly in violation of Landmarks Preservation requirements.

Levandusky's general application of the business judgment rule to cooperatives, however, does not require the relief sought by respondent in this proceeding under the Loft Law. First, petitioner's standing to file the pending unreasonable interference application is derived from the fact that he resides in a registered interim multiple dwelling (IMD) the legalization and regulation of which is governed exclusively by Article 7-C of the Multiple Dwelling Law (Loft Law) (McKinney Supp. 1999), and more specifically from the authorized rules enacted by the Loft Board in its statutorily mandated duty to administer that law and oversee IMD legalization. 29 RCNY §2-01 (Jan. 31, 1999). Respondent's argument that Loft Board rules regarding the narrative statement process do not apply to petitioner because he is not a "tenant" in the traditional sense, but a corporate shareholder/owner of the premises, is without authority and misplaced. Both the Multiple Dwelling Law (MDL § 286 (11)) and the Loft Board Rules (29 RCNY § 2-05) speak in terms of providing protection to properly qualified "residential occupants." As one court recognized, the legislature, in drafting the Loft Law, was deliberately vague in its use of the term "residential occupant" rather than "tenant," in part because of the enormous variety of transactions and relationships which characterize the New York City loft situation. *Dworkin v. Duncan*, 116 Misc.2d 853, 854, 456 N.Y.S.2d 939, 944 (Civ. Ct. N.Y. Co. 1982).

Second, nothing in the Loft Law or in the Loft Board rules indicates that shareholders in a residential cooperative corporation are denied the full protections of that law and those rules, or which specifically excludes them from participation in the narrative statement process. As petitioner notes, the only portion of the Loft Law from which cooperatives are specifically exempted is rent regulation. *See* MDL § 286(8).

Third, the Loft Board has previously held that cooperative buildings must go through the narrative statement process unless the residential occupants execute a waiver to the narrative statement process. *Matter of 96-100 Prince Street*, Loft Bd. Order No. 1169, 15 Loft Bd. Rptr. 129A, 130 (Nov. 17, 1994). There was no showing that Mr. Domingo knowingly, intentionally and voluntarily exercised such a waiver in this case. Moreover, as petitioner noted, respondent's course of conduct in this case has contrasted with its claims, in that it notified all tenants including shareholders of the narrative statement process and of their right to participate therein, and several of the shareholders including petitioner, have so participated.

Fourth, nothing in the holding in the *Levandusky* case suggested that application of the business judgment rule standard of judicial review to the decisions of cooperative boards was meant to preempt Loft Board jurisdiction over IMD legalization issues or remove shareholder tenants from the protection of a statutorily enacted tenant protection scheme. *Levandusky* limits court review of

cooperative board decisions, not Loft Board review of the legalization process. Indeed, the Court in *Levandusky* declined to consider the issue of the cooperative board's attempt to compel the cooperative tenant to remove certain air conditioning units for violating Landmark Preservation requirements as an issue more appropriately heard in an administrative review proceeding. *Levandusky*, 75 N.Y.2d at 535, 554 N.Y.S.2d at 810.

Nor can it be persuasively argued that the Supreme Court and Appellate Division First Department decisions denying Mr. Domingo's application for a preliminary injunction finally determined the issues pending in this proceeding such that petitioner is estopped under the doctrines of *res judicata* and collateral estoppel from proceeding with his application here. Review of Mr. Domingo's complaint in that action and the decisions made clear that the courts primarily resolved the issue of the legality of the Co-Op's actions under its corporate by-laws and procedures. Upon finding no evidence of the Co-Op Board's breach of its duty to the cooperative or a violation of its procedures, both courts simply declined further review of the process by which the Co-Op Board adopted its legalization plans. Neither court addressed the issue presented here, which is whether the legalization plans adopted by the Co-Op unreasonably interfere with Mr. Domingo's use of his space as that term is defined in the Loft Board rules and interpretive case law. In the absence of an identity of issues which were necessarily decided in the prior court proceedings, neither the doctrine of collateral estoppel nor *res judicata* applies here. *See Ryan v. New York Telephone Co.,* 62 N.Y.2d 494, 478 N.Y.S.2d 823, 826 (1984).

For all these reasons, I reaffirm my previous decision to deny respondent's pretrial motion to dismiss petitioner's application on standing and *res judicata* grounds.

ANALYSIS

The issue to be decided in this case is relatively straightforward: whether the stairs in Mr. Domingo's building at 467 Greenwich Street should be legalized, as voted by the shareholders, and the stairs at 465 Greenwich Street removed, or vice versa, as proposed by Mr. Domingo. There is no question that one of these stairs must be legalized, meaning, made code compliant in all respects including extending them to the roof at the sixth floor via an enclosed ladder and hatch. Unlike the typical Loft Board application, pitting owner against tenant, this case effectively pits one tenant against another, since the two tenants most directly impacted by this determination are the two adjacent sixth floor loft tenants, Mr. Domingo in 467 and Ms. Cosin in 465. This case also in a sense pits one tenant against a majority of the others, since this building is cooperatively owned by the tenants and approximately two-thirds of them voted to adopt the Co-Op Board proposal to legalize the 467 stairs.

Resolution of this issue is not simply a matter of determining which of the two plans appears to be the better or most appealing. Rather, having filed the present application in opposition to the owner adopted plan and in favor of an alternative plan, Mr. Domingo must show that the Co-Op Board's proposal, if implemented, would constitute an unreasonable interference with the use of his space. Since it is his application, and his contention as much, Mr. Domingo bears the burden of proof in

this proceeding. *See Matter of Sultan & Shore,* OATH Index Nos. 1314-15/98, report and recommendation at 4 (Aug. 18, 1998), *adopted,* Loft Bd. Order No. 2323 (Oct. 27, 1998).

Moreover, the critical word in the regulatory standard is "unreasonable." It is not enough for Mr. Domingo to show that the Co-op Board's recommended plan would interfere with or have some impact on his use of his space. As discussed below, it will clearly have some effect. The issue is whether that interference or impact will be unreasonable. Deciding what is unreasonable depends on a variety of factors in the context, and, as the Loft Board has noted, requires an "inevitable balancing of interests." *Matter of Insley*, Loft Bd. Order No. 1473, 14 Loft Bd. Rptr. 192b, 198 (July 28, 1993). In determining whether the Co-Op's proposal will unreasonably interfere with Mr. Domingo's use of his space in this case, this tribunal must consider a wide range of factors as discussed and developed at the trial, including the pros and cons of Mr. Domingo's alternate plan. Mr. Domingo, as the petitioner, however, must prove that the balance of factors presented weigh in favor of his alternate plan, such that adoption of the Co-Op's plan would be unreasonable.

The starting point for this analysis should be to first determine the demonstrated impact of the Co-Op's proposal to legalize the 467 stairs on Mr. Domingo's unit.

I. Description of Mr. Domingo's Loft

To fully understand the nature of Mr. Domingo's objections to the Co-Op's legalization plans, a description of Mr. Domingo's unit is helpful. Mr. Domingo occupies the sixth floor loft at 467 Greenwich Street. As presently configured, the entrance to Mr. Domingo's loft is located on the fifth floor and the fifth floor stairs are enclosed within the confines of his unit. The public stairs in the building, which are relatively narrow and steep, ascend from the lobby of the 467 building to the fifth floor landing, where they end at the entrance door to Mr. Domingo's sixth floor unit. Mr. Domingo has the only key for that door. Inside the door, there is a small foyer and the stairs which ascend to the sixth floor. The stairs have no bulkhead and are open to the sixth floor ceiling, except for a small platform that Mr. Domingo has constructed over the stairwell. There is a railing around the stairwell opening at the sixth floor, but no door or other enclosure. One ascending the stairs, simply ascends into the main loft space.

That space is mostly open and rectangular in shape, measuring 1597 square feet, with 15 feet high ceilings. There is an elevator, the shaft for which runs through the northwest corner of 465 Greenwich Street, which services the tenants in both 465 and 467 Greenwich Street. The elevator opens directly into the northwest corners of the 465 lofts and the southwest corners of the 467 lofts, including Mr. Domingo's. Light for Mr. Domingo's unit comes from four windows on the front or west wall, four windows on the east wall and a skylight just to the east of the stairwell area. There are four columns spaced at intervals in the center of the loft on a west to east line, but no other partitions or divisions. In the southeast corner of the loft, the predecessor tenant built an enclosure on a small platform about 3 feet high, which contains the bathroom facilities. In an effort to keep the loft space open and relatively clear of obstructions, Mr. Domingo built a second platform, rather than enclosures, against the east wall of the loft, about 8 feet high and running from the north to the

south walls, which contains his sleeping and various storage areas above and his kitchen and living areas below. Mr. Domingo keeps the central and western portions of the loft as open space for purposes of his artistic pursuits, as discussed in more detail below.

Mr. Domingo first took occupancy of the loft pursuant to a lease from the prior building owner in November 1980, after buying the fixtures from the preceding tenant. Mr. Domingo, who is a pathologist, had recently moved from Spain to New York to further his pathology training. He was also interested in photography and acting and sought a loft situation in which he could both live and use as a studio to pursue his artistic interests. He testified that the reason that he was attracted to this loft in the first place was its configuration, which allows one to enter it from underneath and ascend into a main space which is largely open and free of obstructions. According to Mr. Domingo, the loft so suited his purposes, that he decided to take it on the spot.

II. Impact of Board Recommended Legalization Proposal on Mr. Domingo's Sixth Floor Loft

Mr. Domingo identified four basic ways in which the Co-Op's plan to legalize the 467 stairs, which would entail among other things constructing in his loft an approximately 4 by 15 feet enclosure against the north wall to house a ladder and hatch extension of the stairs to the roof, would adversely impact on the use of his space: the loss of space from his unit; a detrimental impact on his use of the unit for artistic purposes; a negative impact on the aesthetics of the loft; and a negative impact on the natural lighting in the unit.

a. Impact on Natural Lighting

There was really no dispute that the construction of an enclosure to house a ladder and hatch to the roof in Mr. Domingo's unit, even one made as small as legally possible as currently proposed by the Co-Op, would have some impact on the natural lighting in the loft. Both architects, Mr. Martinez and Mr. Neratoff, agreed that the construction of the proposed ladder enclosure would at certain times of the day and year create the potential for new shadows to be cast to the east of the enclosure from light entering through the loft's west window, and also to the west of the enclosure, from a skylight that currently exists just to the east of the stairwell. Both architects appeared to agree that the impact on the unit's natural lighting, however, would be minimal.

b. Impact on the Aesthetics of the Unit

There also seemed to be no real dispute that the aesthetics, the "look" of the loft, would be negatively impacted by the Co-Op's legalization proposal, although again the parties differed as to how meaningful the changes in aesthetics would really be. As the loft is currently configured, Mr. Domingo's north wall, against which the stairs ascend into the unit and against which the proposed ladder enclosure would be built, is essentially uninterrupted for 65 feet. Mr. Domingo complains, as both architects corroborate, that construction of the enclosure would create a visual obstruction along that wall and break it up into three distinct segments: a 15 feet stretch of wall from the northwest corner to the beginning of the proposed enclosure; the 15 feet length of the enclosure

itself, which will protrude almost four feet into the loft space from the north wall and extend from floor to ceiling; followed by another 35 feet stretch of wall to the east wall. As Mr. Martinez testified, someone standing in the northwest corner of the loft would have his view of the east wall obstructed. Moreover, the stair enclosure is likely to be constructed of some type of sheetrock, the texture and the look of which will likely further contrast with the current texture and look of the north wall.

It is true, as respondent pointed out, that the wall as it presently exists is not completely obstacle free, since Mr. Domingo, as noted, has erected a relatively small platform against the north wall and over the open stairwell. There is also a sprinkler riser at one point along the north wall which measures about two and one half inches in diameter. Mr. Domingo pointed out, however, that the platform is without railings and is relatively thin and horizontal, and that the sprinkler riser is very small as compared to the size of the wall, such that both items have little impact on the visual appearance of the wall and present no visual obstruction to one looking along that wall.

In addition, the loft, as noted has a general look of open, clear clean space, which was part of Mr. Domingo's enticement to rent it and the way he has tried to maintain it, both for aesthetic reasons and for purposes of his artistic endeavors. Construction of the proposed ladder enclosure would change that look, as both architects largely agreed. Mr. Martinez testified that it would break the continuity of the space and create more corners, and means less free and clear space, claims that Mr. Neratoff did not really dispute.
Thus, I find, as confirmed by both architects, that adoption of the Co-Op's plan to legalize the 467 stairs would have some negative impact on the look or aesthetics of Mr. Domingo's loft.

c. Impact on Artistic Use of the Loft

Mr. Domingo is a pathologist with a long standing interest in the arts, in particular acting, video and photography. Since moving into his loft in 1980, he has pursued his artistic interests, quitting his work as a pathologist in 1993 to pursue such interests full time. At present, he is a certified artist in the filed of video film making, and purses careers in acting and modeling (*see* Pet. Exs. 8, 10, 11A-11B, 12A-12C, 13A-13B). There was no serious challenge to Mr. Domingo's credentials as an artist nor to the fact that he currently pursues his artistic career, consisting of video filmmaking, acting and modeling, as a serious full time pursuit.

Most of Mr. Domingo's testimony in this proceeding was devoted to explaining the techniques and process by which he creates his various video works, the extent to which he uses his loft as his studio for that purpose, and the "serious detrimental impact" the Co-Op Board's legalization plans would have on his ability to continue in his artistic endeavors.

In describing his artistic pursuits, Mr. Domingo described himself as an "image maker." He testified that his primary artistic interest, regardless of the medium, has been the creation of multiple images using different techniques by combining or superimposing images one upon another, resulting in the

formation of altogether new and distinct images. He likened the process to someone putting two mirrors one in front of the other to create an infinite series of reflected images.

Mr. Domingo described how his artistic interests evolved over the years from his creation of multiple images in the context of photographic performance art projects, where he might superimpose images in the form of projected slides upon images of live models in performances where the audience is invited to attend, to superimposing images using still photography, to his current passion, which is creating multiple images on video, as the technology has evolved. Video allowed him to present images as a continuos image narrative rather than a sequence of still photos, and expanded his range of options. It also linked with his interest in acting, since he could and does act in many of his videos.

Mr. Domingo testified to the importance of his loft in its present configuration to his video filmmaking. Essentially since the beginning of his occupancy in 1980, Mr. Domingo has used his loft in connection with his creation of art works involving images. In the early 1980's, he presented several photographic performance art exhibits in his loft which the public was invited to attend. He made his first video, *New York Pier 34*, in his loft in 1987, and has continued over the ensuing years to use his loft as a place to film portions of or entire videos, which are generally very brief (three to twenty minutes) in length. While he uses the platform that he built over the stairwell for various purposes, since 1987 he has primarily used it as a camera location in filming his videos.

According to Mr. Domingo, respondent's proposed plan to legalize the 467 stairs with the required construction of the 4 x 15 feet ladder enclosure along the north wall, would negatively impact on his use of the loft for artistic purposes in a variety of ways. As noted, it will change the aesthetics of the loft for filmmaking as well as living purposes, by producing a visual obstruction and indentation where there is currently clean, open space and unbroken wall. The affect on the natural lighting and the resulting new shadows will also negatively impact on the quality of his films. To the extent that he uses the unbroken north wall as a backdrop for filming or as a screen upon which to project images, he will lose that ability. He will also lose the use of the stairwell platform, which at the least cannot remain in its current position under the Co-Op's proposal, thereby eliminating certain camera angles and shots now available to him.

The greatest impact of the Co-Op's proposal, however, according to Mr. Domingo, will simply be as a result of the loss of physical space from his unit due to the construction of the ladder enclosure and the change such construction will have on the constancy of his environment. Mr. Domingo described the experimental nature of the process he uses to create his video works, likening it in certain respects to the kind of work he did as a scientist and pathologist. Like a scientist, he moves his camera around his loft in a process of trial and error, until he obtains just the right camera angles and images that he decides he wants for his project. In order to create through such a process, Mr. Domingo explained that he needs the maximum amount of mobility and open space in his loft. Although the final product by necessity entails artistic choices, and may not include a shot from the space at issue, the more space he has available the more artistic choices which will be presented. For that reason, he has tried to keep the space open and obstruction free over the years. The

proposed ladder enclosure would impair that process simply by eliminating certain space within which he can currently move, thereby limiting certain camera options available to him.

Mr. Domingo likened his loft to a controlled laboratory environment in a science experiment, where the space is always a constant and within which he can experiment with a maximum range of camera options and angles to create the final finished video product. In the eighteen years that he has occupied his space, he has consciously maintained its constancy and come to learn it very well. In this "image laboratory" as he described it, he has made observations, conducted experiments as in a research project, and has slowly learned to make the space predictable.

The Co-Op's legalization proposal, according to Mr. Domingo, would "dramatically" disrupt this controlled environment, forcing him to relearn the space and the lighting, but with a substantially reduced number of camera options available to him. In Mr. Domingo's words, the space will become "handicapped," "dysfunctional,' "amputated" for his filmmaking purposes. In an attempt to quantify the impact, Mr. Domingo estimated that the construction of the proposed ladder enclosure along the north wall would eliminate 20 to 25% of the functional value of his space as a video filmmaking studio.

Mr. Martinez, aware that Mr. Domingo uses his loft for the purpose of making videos, supported Mr. Domingo's claims regarding the impact of the construction of the ladder enclosure on Mr. Domingo's artistic use of the space. Mr. Martinez too, testified, primarily based on Mr. Domingo's statements to him, that the ladder enclosure would reduce Mr. Domingo's options for camera views within the loft, reduce the length for some shots, eliminate certain view points, such as the platform Mr. Domingo uses as a camera location, reduce or eliminate the north walls area as a background for camera shots, and generally reduce his mobility in the loft.

In opposition to these claims, respondent, relying on certain Loft Board cases, argued that the "particular circumstances" of a tenant and his idiosyncratic uses of a loft are never factors to be considered in the legalization process nor can they be controlling in legalization decisions. *Matter of Insley,* Loft Bd. Order No. 1473, 14 Loft Bd. Rptr. 192b, 198 (July 28, 1993) (finding that owner's plan to install sprinkler system throughout interior of building did not constitute unreasonable interference with tenants' use of their spaces, given the relatively small reduction in their ceiling space resulting from the installation and notwithstanding tenants' claims that the sprinkler system would cast shadows on their painting walls); *Matter of 458 Greenwich Street,* Loft Bd. Order No. 1413, 14 Loft Bd. Rptr. 93, 97 (Mar. 3, 1993) (tenant's "particular circumstance" of suffering from a chronic back disability, which necessitated bath therapy, did not require the owner to construct bathtub as part of its legalization plans); *see also 42 North Moore Street*, Loft Bd. Order No. 1411, 14 Loft Bd. Rptr. 79, 88 (Mar. 3, 1993) (owner not required to provide for elevator service in legalization plans simply as a convenience to tenants where it was not legally mandated); *Matter of Wertheim*, OATH Index No. 1758/98 (Feb. 1, 1999), *adopted*, Loft Bd. Order No. 2373 (Feb. 23, 1999) (owner not required to legalize a staircase used solely as a convenience by a subtenant to access an office he shares with tenant in the loft above). Indeed, relying on those cases, respondent's counsel made an unsuccessful pretrial motion to exclude from the trial any testimony regarding Mr. Domingo's use of his loft as an artist or the impact that respondent's legalization proposal might

have on that artistic use (*See* ALJ Exs. 4-7). Respondent Co-Op argued that its legalization proposal would have no impact on any living activity in Mr. Domingo's loft but merely on his idiosyncratic use of the loft as an experimental filmmaker.

The cases cited by respondent in support of its position, however, are distinguishable. In those cases, the tenants were seeking to have the owner accommodate their personal circumstances by providing or legalizing structures or amenities at the owner's cost that were not required for code compliance. The *Insely* case did not preclude any consideration of the impact of the owner's proposed legalization plans on the artist tenants' particular uses of their lofts but decided that on balance, the claimed impact did not establish unreasonable interference. Moreover, this tribunal recognized in *Matter of Langer,* OATH Index No. 1316/98 (Sept. 25, 1998), *adopted,* Loft Bd. Order No. 2334 (Nov. 24, 1998), that while the particular circumstances of a tenant may not be controlling in legalization decisions, they may be considered as one of the many factors to be balanced in assessing the impact of a legalization decision on a particular tenant. *Matter of Langer*, OATH Index No. 1316/98, rep. and rec. at 7.

That same case also dispenses with respondent's argument that since owners are generally not required to legalize conditions that existed only after the Loft Law was enacted on June 21, 1982 (*see Matter of 4-6 White Street*, Loft Bd. Order No. 1553, 14 Loft Bd. Rptr. 328b, 331 (May 4, 1994) and since petitioner, by his own admission did not start making videos until 1987, any claimed impact on his ability to use his loft to shoot videos is not a factor that can be considered here. In *Langer*, the tenant, an award winning filmmaker and documentarian, argued that her landlord's legalization proposal to construct an internal staircase which would run through her loft and which would take some 80-90 square feet from her 1900 square foot loft, constituted an unreasonable interference with her use of her space because it would leave only a four foot wide corridor between the loft wall and the walls of an editing room she had constructed, which was too narrow to permit her to move equipment back and forth. Judge Lewis ruled that the fact that the tenant had constructed the editing room in 1993, well after the effective date of the Loft Law, did not in and of itself negate her claim of unreasonable interference, but was simply one of the factors to be considered in determining the reasonableness of the owner's proposal.

Langer also distinguished *White* and earlier cases by stating that in the cases where the Loft Board used 1982 as the "base date," tenants "sought to have the owner legalize, at his cost...an amenity not required for code compliance." In *Langer,* the tenant did not seek to have respondent do anything or spend any money to physically modify the unit, but simply sought to preclude the owner from legalizing in such a way as would impair the tenant's ability to conduct her business in the loft. *Langer*, OATH Index No. 1316/98, rep. and rec. at 6-7.

The same is true in this instance. As per *Langer*, therefore, I find that the fact that Mr. Domingo did not start making videos until 1987, after the enactment of the Loft Law, does not preclude consideration of the impact of the Co-Op's legalization proposal on his current use of the loft for that purpose, but is only one factor to consider. Moreover, while Mr. Domingo admittedly did not start making videos until 1987, his use of the his loft for artistic purposes has been ongoing since he first

took occupancy. Even before he made videos, he used the loft to create photographic performance art projects and still photography, in a process similar to the one he employs for videos. To argue as respondent did, that consideration of the impact of the Co-Op's legalization proposal on Mr. Domingo's ability to make videos in the loft was precluded because he admittedly did not start making them until 1987, was too narrow an interpretation of his artistic use of the loft. Rather, as in *Langer*, I found Mr. Domingo's testimony regarding his artistic use of the loft and his assessment of the potential impact of the legalization proposal on such use to be one of several factors that can be considered in the balancing of interests here.

Having said that, however, and having considered it as a factor, I was ultimately not persuaded that it should be given much weight in this case. Mr. Domingo's explanations and arguments as to the potential impact on his ability to make videos from the construction of a ladder enclosure on part of the north wall were far too hypothetical and speculative to establish his claim of unreasonable interference. The bottom line impact according to Mr. Domingo was that the proposed ladder enclosure would eliminate certain space from the loft and thereby eliminate certain potential camera angles and locations that he would normally have available to him with which to experiment. The relatively small amount of space to be lost, 57.5 square feet of floor area according to his architect, in a loft that is approximately 1597 square feet (or less than 4% of the total loft area), eliminates only the smallest number of options for the camera. Moreover, to the extent that that space is even used in the experimentation process it is with no guarantee that a shot taken from that particular area would end up as part of the final video product. In addition, as Mr. Domingo conceded, the construction of a ladder enclosure, while eliminating certain choices, might also create new options that did not previously exist. Ultimately, the creation of art always involves artistic choices, which are limited in some fashion by the confines of a particular space, the limits of the medium, the limitations of the materials used or the limits of the creative technology available. Using Mr. Domingo's reasoning, his creative options and ability to experiment are already limited by the fact that the loft space has four walls and is a finite size, or by the fact that he constructed a platform containing his work and living area in the east end of the loft. Yet those limitations have not prevented him from being able to create videos to date. Nor will the construction of the proposed stair enclosure here.

Mr. Domingo's estimate of a 20-25% loss of functional use of the space was purely speculative and subjective. Indeed, as respondent's counsel pointed out, in the last three years Mr. Domingo has only used his loft in the filming of four brief videos, only one of which he even claimed would have been affected by the presence of the proposed ladder enclosure. Mr. Domingo provided a video sampling of three of his prior videos, and gave detailed testimony as to how those videos, or portions of them, were filmed in his loft, why he chose the camera angles that he chose and how the stair enclosure would have foreclosed certain shots in those videos. Yet, those videos - - *New York Pier 34* filmed in 1987, *Amazons*, filmed in 1992, and *New York Vignettes*, filmed in 1997 - - are completed works which will not be remade. Thus, the fact that the stair enclosure, if it had existed at the times those videos were filmed, may have had some affect on the final products, while illustrative of how Mr. Domingo's work is created, really established nothing as to the effect that such enclosure might have on future not yet conceived videos. For future videos, Mr. Domingo may have 57.5 square feet less

within which to move around, but he concededly cannot maintain that he would no longer be able to create videos. He would simply lose some possible camera options, while perhaps gaining others, the impact of which on the finished product he can never really assess since he will never have had the options to exercise in the first place. Similarly, Mr. Domingo's detailed description of how he made and publicly presented a photographic performance art project in his loft, entitled *Realities*, in 1983, had little bearing on the impact that the Co-Op's legalization proposal may have on his future use of his loft space. The *Realities* project will not be remade, and, as Mr. Domingo explained, his artistic pursuits long ago evolved from such performance art projects into his current pursuits as a video filmmaker, actor and model. Thus, the relevance of the testimony regarding the creation of that project was minimal.

Moreover, Mr. Domingo is not strictly a video filmmaker. He also is pursuing a career as a model and actor, which pursuits occur mostly away from his loft. In addition, he shoots many of his videos on location outside the loft and has even traveled to foreign countries to make videos. Six of the ten videos he has filmed in the past three years were filmed away from his loft. Thus, his actual use of the loft to make videos overall was not demonstrated to be frequent or substantial.

As to Mr. Domingo's claims that the proposed stair enclosure would negatively impact on his artistic use of the loft in other ways, such as changing the natural lighting, creating shadows where none had previously existed, eliminating the stairwell platform as a camera location or eliminating the use of the currently uninterrupted north wall as a backdrop for shots or as a screen for the projection of slides and images, I was not persuaded that any of these claims were substantial. The impact on the lighting and the creation of certain shadows, both architects agreed, would be minimal, limited to certain times of day and year, and to discrete areas of the loft in the vicinity of the proposed enclosure. As to the obstruction to be created on the north wall, Mr. Domingo did not establish his regular and frequent use of that wall in recent years as a backdrop or projection area, or that the uninterrupted wall continued to be an integral element of his artistic work. Nor did he establish that the north wall would be rendered totally useless for its former purposes. He would still have a 35 foot stretch of unobstructed wall. Similar types of claims from artist tenants, as noted, were ultimately rejected in *Matter of Insley,* Loft Bd. Order No. 1473, 14 Loft Bd. Rptr. 192b, 198 (July 28, 1993). Moreover, it would seem here that Mr. Domingo might be able to construct or purchase a large backdrop or projection screen as a substitute for the north wall's use for those purposes.

As to the claimed elimination of the stairwell platform as a camera location, the architects agreed, as discussed further below, that the platform could be moved a short distance and thus retained. While ceratin camera angles might be reduced, I was not persuaded that the impact would be substantial.

In sum, I found Mr. Domingo's testimony regarding the impact of the Board's legalization plans on his artistic use of the loft to have been greatly exaggerated and far too subjective and speculative to constitute a basis, without more, for a finding of unreasonable interference with the use of his loft.

d. Loss of Space

Finally, Mr. Domingo claimed that his loft unit would be adversely impacted by the actual loss of physical space in the unit. Determination of that claim depends on the extent of the premises demised to Mr. Domingo, an issue that was hotly contested by the parties.

Mr. Domingo's architect, Mr. Martinez, testified that construction of the proposed ladder enclosure in Mr. Domingo's loft as part of the plan to legalize the 467 stairs, would result in the total loss to Mr. Domingo's unit of 103 square feet of floor area. In arriving at that figure, Mr. Martinez included in his calculations the loss of the fifth floor foyer (13.3 square feet), the loss of the area represented by the opening of the stairwell into the loft and a portion of the sixth floor at the top of the stairs which would need to be recaptured to serve as a landing and including the thickness of the walls that would be needed to enclose that landing (57.5 square feet), and the area of the stairwell platform which Mr. Domingo claimed would be lost to him (32.2 square feet).

Respondent Co-Op advanced the argument that Mr. Domingo would incur no actual loss of space to his loft because he did not legally own or occupy the area of the fifth floor foyer and stairs and therefore that space, including the space needed for a sixth floor landing, could properly be recaptured by the Co-Op in the process of legalization. The Co-Op also argued that the stairwell platform should not be considered as lost floor area because it need not necessarily be removed. In the alternative, the Co-Op argued that the most space that Mr. Domingo could fairly be calculated to lose was the area represented by the opening of the stairwell into the sixth floor loft and that portion of the sixth floor which would be needed for the construction of the landing and enclosure, which Mr. Neratoff calculated to be 50.9 square feet.

1. platform over the stairwell

The stairwell platform at issue is a wooden platform measuring 4 feet 3 inches in width by 7 feet 7 inches in length (32.2 square feet), which abuts the north wall above the stairwell opening and is secured to the wall and also rests on two wooden legs. At present it sits 5 feet 3 inches above floor level, providing about 6 feet 2 inches of headroom to the stairs below it (which is less than required by the building code). It is slightly wider than the stairwell, extending almost a foot beyond the stairwell width into the loft space. There is a counter that is positioned in front of it and that can be used as a step up onto it. Mr. Domingo testified that he erected the platform two years or more after he moved into the loft in 1980. He has used it for various purposes, including as a guest sleeping area, but in recent years, primarily as a location on which to position his video camera on a tripod while shooting videos in his loft.

There was much debate between the parties and the architects as to the legality of the platform in its current condition. Mr. Martinez was of the view that it was a sound structure which could legally be used as it has been for various human activity including as a camera location. Mr. Neratoff just as strenuously argued that it could not be used for anything other than a storage shelf in its current condition and could only be used for human activity, such as sleeping or as a camera location, with modifications, specifically that a 30 inch high railing would have to be erected around it and a 30

inch wide set of stairs with a railing constructed to ascend to it. Mr. Neratoff also credibly testified that in its current position, it creates headroom problems for the stairs below it.

There is no question that the platform could not remain in its current location under the Co-Op's proposal. However, the Co-Op's architect, Mr. Neratoff, testified that the platform would not necessarily have to be removed, but could be retained if it was moved a few feet to the east of the proposed ladder enclosure and raised a few inches, with of course the necessary modifications if it were continued to be used as a camera location.[1] Mr. Domingo complained that movement of the platform east even a few feet would essentially render it dysfunctional for its intended purpose as a camera location, since it would no longer be centrally located and certain columns in the center of the loft would block most of the camera angles and camera shots that might be taken from the platform. Accepting Mr. Domingo's complaints, Mr. Martinez included the loss of the platform area as part of the floor space that would be lost to Mr. Domingo under the Co-Op's plan.

Respondent argued that the platform should get no consideration in assessing the impact on Mr. Domingo's loft because the Loft Law does not require owners to legalize conditions that were constructed or existed after the enactment of the Loft Law on June 21, 1982. Mr. Domingo testified that he took occupancy of his unit in November 1980 and constructed the platform more than two years later, which would mean after the critical date of June 21, 1982. Thus, respondent, again citing to cases like *Matter of 4-6 White Street*, Loft Bd. Order No. 1553, 14 Loft Bd. Rptr. 328b, 331 (May 4, 1994) and *Matter of 458 Greenwich Street*, Loft Bd. Order No. 1413, 14 Loft Bd. Rptr. 93, 97 (Mar. 3, 1993), argued that the potential loss of the platform was a factor that need not be considered here.

Again, I adopt the reasoning in *Matter of Langer,* OATH Index No. 1316/98 (Sept. 25, 1998), *adopted*, Loft Bd. Order No. 2334 (Nov. 24, 1998) that the fact that the improvement that a tenant wants to retain in the face of an owner's legalization proposal was constructed after the enactment of the Loft Law does not in and of itself defeat a claim of unreasonable interference, but is one factor that can be considered in deciding that claim. Thus, I decline to preclude consideration of the platform as space that will potentially be lost by Mr. Domingo if the Co-Op's legalization plan is adopted on the basis that the platform was built sometime after June 21, 1982.

However, I was not persuaded by Mr. Domingo's subjective assertions that movement of the platform even a few feet, would essentially render it useless to him. Indeed, Mr. Domingo testified at one point that the platform was a "versatile structure" that he used for a variety of purposes other than as a camera location. Since, as Mr. Neratoff credibly testified and Mr. Martinez conceded, the platform can be retained despite the construction of the new ladder enclosure by moving it slightly to the east and raising it, and could continue to be used either for storage or for various human

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[1] I credited Mr. Neratoff's claim that any platform of this nature that is more than 7 feet away from the ceiling, as this one currently is, is presumed to be used for human activity and would require a railing and stairs. Thus, even if Mr. Domingo were to use the platform as storage space only, it would have to be raised so that it was no more than 7 feet from the ceiling.

activity, including as a camera location, with the appropriate modifications, the surface area of the platform should not be counted as lost floor area to Mr. Domingo.

2. fifth floor foyer and stairwell

There was an even stronger debate between the parties as to Mr. Domingo's claim on the fifth floor foyer and stairs leading up to his apartment, and thus whether any of the space that the Co-Op would recapture from Mr. Domingo to legalize the 467 stairs should be calculated as space that his loft stood to lose under the Co-Op's legalization proposal.

As noted, unlike most of the other sixth floor lofts in this complex of buildings, the fifth floor stairs, along with a foyer, are enclosed within the physical confines of Mr. Domingo's unit and have been since before he took occupancy in 1980. There was no dispute that Mr. Domingo has had sole access to and control over that area throughout his tenancy. He neither reconfigured the loft nor in any other manner assumed control of space that had previously been public; that was the manner in which the loft was configured when he first took possession. Mr. Martinez testified without contradiction that the fifth floor door and entranceway appeared to be in its original condition, meaning unaltered by Mr. Domingo and predating his occupancy. Indeed, Mr. Martinez reasonably conjectured that the loft had probably been so configured with its entrance on the fifth floor since the building began to be used residentially.

Mr. Domingo credibly testified that he assumed occupancy of the loft in November 1980 pursuant to a Standard Form of Loft Lease, which specified that he assumed possession of the premises "as is." The prior building owner, Mr. Katz, was notified that Mr. Domingo had purchased the fixtures in the unit from the prior tenant. Mr. Katz provided him with the lease and was certainly aware of the configuration of the space. The prior tenant turned over the key to the fifth floor door to Mr. Domingo and at no time did Mr. Katz ever seek a copy or notify Mr. Domingo that he was not entitled to occupy or exercise sole control over the fifth floor stair area. It was only logical in the circumstances for Mr. Domingo to assume as he did, that his loft came with an entrance, and that his lease of the premises "as is" included the area of the fifth floor entrance and foyer and the stairs leading up to his loft.

When Mr. Domingo participated in the tenants' purchase of the building in 1993, he was issued, as were all the shareholder tenants, a new Standard Form of Loft Lease, in which he again accepted the premises "as is" (Resp. Ex. B, para. 15). Since he had always occupied and maintained sole control over the fifth floor entrance and stairs, Mr. Domingo never questioned but that the shares allocated him at the time the tenants purchased the building represented the sum total of his space including the fifth floor entranceway and stairwell. Mr. Domingo conceded that he had never obtained a written description of his premises when he received his share allocation. By the same token, no one ever asked him to vacate that area or notified him orally or in writing, that it was not part of his space and that he had no right to occupy it.

Current Co-Op Board President Barbara Dufty confirmed that Mr. Domingo's unit has remained configured in the same manner throughout his tenancy, and that he has had sole control and access to the fifth floor foyer and stairs to his unit during that time. Ms. Dufty further confirmed that when the corporation of tenant shareholders purchased the building in 1993, everyone's unit retained the same configurations. At no time thereafter, did the Co-Op's Board of Directors ask Mr. Domingo to vacate that part of his unit, notify him that it was not legally part of his space nor require that he turn over the key to the fifth floor door.

Ms. Dufty testified that when the tenants purchased the building, the Board engaged in a very contentious process of case by case debate and decision over how to allocate shares to each unit. For guidance in that process, the Co-Op Board consulted with a real estate broker who suggested that shares be allocated, in addition to the net square footage in each unit (the usable as opposed to the gross space), based on certain additional positive or negative values assigned for certain features in each loft (*see* Resp. Ex. J). The Board adopted most of the broker's suggestions and thus allocated shares based on, in addition to the net square footage of the lofts, the number of windows, the ceiling height, the floor level and a miscellaneous category of "other" (*See* Pet. Ex. K: share allocation sheet). Mr. Domingo's unit was assigned a numerical value of a "3" for the "other" category, the highest value available in such category. Ms. Dufty was unable to recall what idiosyncratic features in the loft that value represented, and petitioner tried to insinuate that it represented the existence of the unit's fifth floor entrance and stairs. Ms. Dufty, however, testified based on her recollection that the shares that the Co-Op Board decided to allocate for Mr. Domingo's unit were not meant to include the area of his fifth floor entrance and stairwell, because, as reflected in a narrative statement prepared by the prior building owner, that area was considered part of the public stairs which would ultimately have to be recaptured in order to legalize the stairs by extending them to the roof. Indeed, Ms. Dufty testified that the Co-Op Board's belief that Mr. Domingo could not properly assert claim to the fifth floor foyer and stairs, was what led it to assert in its March 15, 1995 report to the shareholders that adoption of the plan to legalize the 467 stairs would have no adverse impact on any individual's private space. It continues to be Ms. Dufty's view, as a representative of the Co-Op Board, as it is Mr. Neratoff's, that the fifth floor entrance and stairway are not properly occupied by Mr. Domingo, but should instead be considered part of the public stairs to be recaptured for legalization, and thus should not be included in calculations of potential lost space to Mr. Domingo's unit under the Co-Op's legalization plan. No documentation exists, however, as to the exact scope of Mr. Domingo's loft that was meant to be included in the share allocation. The shares certificate issued to Mr. Domingo does not specify the dimensions or configuration of the premises.

Despite his more than eighteen-year occupancy of the fifth floor entrance and stairs to his unit, Respondent Co-Op argued that several factors militate against any claim of ownership by petitioner over that area. First, in the lease issued by the Co-Op in 1993, the lease refers to the premises as "the sixth floor loft." *See* Resp. Ex. B. There is no other physical description of the premises. Respondent argues that that description must be literally interpreted as written to mean that Mr. Domingo properly occupies only the physical area of the sixth floor, and no space below that. Without a more specific description of the loft, indicating that the leased space included the fifth floor foyer and stairs, ownership of those areas could not simply be inferred.

Second, respondent cites two preprinted clauses in the lease which it argues defeats any claim for ownership to the fifth floor entrance and stairs. Paragraph 20 of that lease provides:

"20. The Owner shall have the right at any time without the same constituting an eviction and without accruing liability to Tenant therefor to change the arrangement and or location of public entrances, passageways, doors, doorways, corridors, elevators, stairs, toilets or other public parts of the building..."

Resp. Ex. B, para. 20.

Respondent argues that the fifth floor stairs and entrance should be considered as part of the public stairs, despite the fact that they are presently enclosed within Mr. Domingo's unit, and thus an area, under paragraph 20 of the effective lease, that respondent reserved the right to alter. Paragraph 15 of the lease further provides that:

"15. Tenant will not at any time use or occupy the demised premises in violation of existing governmental codes or regulations."

According to Mr. Neratoff, the current condition of the stairs in 467, where the stairs are public from the lobby to the fifth floor, but are then blocked off at the fifth floor by the door to Mr. Domingo's unit, thereby preventing any access to the roof, is illegal under building and fire codes and must be corrected. Respondent thus argued that as currently configured, Mr. Domingo's occupancy of the fifth floor entry and stairway is in violation of paragraph 15 of the lease and can be recaptured by the Co-Op to the extent needed to legalize the condition, *i.e.*, properly extend the stairs to the roof.

In further support of its claims, Respondent Co-Op argued that a similar situation existed with another tenant, Curt Royston, who lives in another section of the building. Mr. Royston also had the entrance to his loft on the fifth floor but he voluntarily surrendered the stairs when the plan to legalize was proposed. Respondent argued that the treatment accorded Mr. Royston was precedent for its claim that no shares were allocated to Mr. Domingo's unit to encompass the fifth floor foyer and stairs, and that he could claim no greater rights than Mr. Royston over what should be considered public stairs despite their enclosure within Mr. Domingo's unit.

I was not fully persuaded by respondent's arguments on these issues. The debate over whether the fifth floor stairs to Mr. Domingo's unit should be considered public or private stairs, since the stairs from the lobby up to that point are public, was largely a matter of semantics. There is no question that if the stairs are legalized they would have to become public stairs and extend all the way to the roof. By the same token, as Mr. Neratoff considered, as they are presently configured, they are by definition private stairs since they are wholly encompassed within Mr. Domingo's unit and do not currently allow for public access or egress. Arguing over their definition, however, largely begs the issue.

Respondent Co-Op's assertion that the lease description of the premises, in this case as "the sixth floor loft," must be strictly interpreted in determining the scope of the demised premises, while generally a correct proposition, is not controlling in this case. The several cases cited by respondent in support of its position, *Jossel v. Filicori*, 235 A.D.2d 205, 652 N.Y.S.2d 12 (1st Dep't 1997), *Matter of Mittelsdorf,* Loft Bd. Order No. 1197, 12 Loft Bd. Rptr. 357 (May 30, 1991), *aff'd sub nom., Ashley v. New York City Loft Board*, 200 A.D.2d 537, 606 N.Y.S.2d 704 (1st Dep't 1994), *Matter of Nelson*, Loft Bd. Order No. 1161, 12 Loft Bd. Rptr. 246 (Mar. 14, 1991), *Matter of Minjak Co.,* Loft Bd. Order No. 181, 2 Loft Bd. Rptr. 47 (Mar. 6, 1985), and *Matter of 42 North Moore Street*, Loft Bd. Order No. 1411, 14 Loft Bd. Rptr. 79 (Mar. 3, 1993), are distinguishable. All but *42 North Moore Street* involved claims by tenants that the extent of their demised premises included portions of the roof area. In *42 North Moore Street*, the tenants claimed a right to continued storage space in the buildings common lobby. In all of the cases, no mention was made in the leases as to the disputed areas. The mere fact that the tenants occupied those areas openly, in some cases with the knowledge and acquiescence of the landlord, was not enough to establish their claims. In some of the cases, the tenants themselves acknowledged that the disputed areas were not included in the lease agreement. In other cases, the tenants failed to prove the approval or consent of the owner, or the parties intentions to include the disputed areas as part of the lease arrangements.

Mr. Domingo's circumstances seem clearly different from the tenants in the cited cases. Where the lease description is fairly straightforward, for example "7 West" in *Minjak,* it is somewhat of a stretch to infer that it includes an adjacent roof area or storage space in a common lobby. The mere fact that the tenants have converted those spaces for their own use, in and of itself, should not entitle them to extend the scope of the demised premises as specified in the lease. It goes without saying, however, that every unit should have an entrance. If the fifth floor door, foyer and stairs were determined to be public stairs and not part of the demised premises, Mr. Domingo's loft would effectively have no private entrance. Mr. Domingo first took occupancy of his loft with it configured in this fashion. He did not reconfigure his space to improperly capture public stairs area. He did not assume control over areas, like the tenants in the cases cited by respondent, beyond the physical confines of his space. He simply took the unit as it was configured and maintained it that way. Moreover, both the prior owner and respondent were well aware of that configuration at all times, and if they did not expressly consent to it, never challenged it. In the cases cited by respondent, the Loft Board and the courts suggested that despite the plain description of the lease, if it were demonstrated that the parties intended to include the disputed area within the demised premises and that the owner consented to such occupancy, that would be sufficient. "This failure to specifically mention the roof [in the lease agreement] would not be fatal to the tenant's claim if it could be shown that both parties intended '7 West' to include the roof, *i.e.*, that in the minds of the parties, as demonstrated by conduct or statements, the roof is an *integral* part of the demised premises such that the specific mention of the roof would have been superfluous or redundant." *Matter of Minjak Co.*, Loft Bd. Order No. 181, 2 Loft Bd. Rptr. 47, 48 (Mar. 6, 1985) (emphasis added). What could be more integral to a rental unit than an entrance? When the unit was first rented by Mr. Domingo and the key to the door turned over, he was entitled to expect and the prior owner surely intended that the premises Mr. Domingo rented included the entrance and all that was physically enclosed behind it.

Nothing in the statements or conduct of the Co-Op Board suggested differently after the tenants purchased the building in 1993. Nor did the share allocation sheet or shares certificate exclude those areas. Ms. Dufty's recollection alone of what the shares issued to Mr. Domingo's unit were intended to include based on one of many contentious meetings held some five years ago to deal with share allocation, without any supporting documentation, cannot be found to establish otherwise. Nor does the fact that another tenant, Mr. Royston, agreed to give up any claim to stairs enclosed within his loft without debate, bind Mr. Domingo.

Nor do the preprinted lease clauses cited by respondent persuade me that the fifth floor entrance and stairs are not part of Mr. Domingo's premises. Paragraph 20 clearly refers to the owner's right to alter what are undisputedly public areas. The fifth floor stairs in this building, given the history of the loft's use and configuration, do not fall into this category. That paragraph is not intended to justify, as petitioner's counsel argued, the taking by the owner of private tenanted space. Nor is paragraph 15, prohibiting occupation of premises in violation of existing governmental codes, meant to encompass Mr. Domingo's occupation of his own unit's entranceway. Even if it were, the remedy would not be an uncompensated taking of his space where his occupancy was otherwise innocent. That same paragraph indeed, required Mr. Domingo to accept the premises "as is."

I do not accept petitioner's counsel's interpretation of *Matter of Sultan & Shore*, OATH Index Nos. 1314-15/98 (Aug. 18, 1998), *adopted*, Loft Bd. Order No. 2323 (Oct. 27, 1998), that where a tenant occupied what had previously been public space (hoistway shafts) with the consent of the owner and at the time of the enactment of the Loft Law, that the owner could not "recapture" such space without creating an unreasonable interference. As Judge Fraser suggested in that case, and as the Loft Board clearly spelled out in adopting Judge Fraser's decision, such space can be recaptured where it is necessary for legalization purposes.

Here, however, the taking of the fifth floor entrance and stairs to Mr. Domingo's loft is not necessary for legalization purpose for the very reason at issue here, that there is another alternative, legalization of the 465 stairs, which would not require such action. Thus, the holding in *Sultan* does not resolve this case. Moreover, one might argue that there was no proof, as in *Sultan*, that the disputed area sought to be recaptured was ever a public area. The limited proof rather suggests that Mr. Domingo's unit, with the fifth floor stairs enclosed within, had been configured in this manner since residential use of the building began.

Ultimately, however, I do not have to decide the issue of the ownership of the fifth floor foyer and stairwell or whether shares were allocated for it. As with the stairwell platform, the real relevance of Mr. Domingo's claims to the foyer and stairs in this proceeding goes to the calculations of how much actual space he would lose under the Co-Op's proposal to legalize the 467 stairs, which in turn is a measure of the adverse impact upon him of that proposal.

After almost twenty years, respondent cannot simply declare that Mr. Domingo's entrance foyer and stairs were never his and that the seizure of that space would thus have no real impact on his loft unit. As its own architect recognized, at a minimum, the space representing the opening of the

stairwell into the loft and the space that would have to be taken from the sixth floor to create a landing and enclosure, is clearly space that was his under any interpretation of the lease, which describes the premises as the "the sixth floor loft," and under the Co-Op Board's own view of the physical extent of the loft for which it allocated shares. Mr. Neratoff calculated that the taking of those areas in legalizing the 467 stairs would amount to a loss to Mr. Domingo's loft of 50.9 square feet. Thus, at the very least, both architects ultimately agreed that Mr. Domingo would at a minimum lose that much space, although Mr. Martinez measured it at 57.5 square feet. For purposes of this proceeding, I accept Mr. Neratoff's calculations and find that at a minimum the legalization of the 467 stairs would result in a loss of 50.9 square feet to Mr. Domingo's unit.

For reasons other than the ownership issue, however, I decline to include, as Mr. Martinez did, the dimensions of the fifth floor foyer or the stairs as part of the lost space to Mr. Domingo, because that space would appear to be lost to Mr. Domingo even if his alternate plan were adopted.
Under the alternate plan, which is to legalize the 465 stairs, all of the stairs at 467 below the fifth floor (the cellar stairs excluded) will be removed, and the space recaptured by the tenants in the respective lofts below Mr. Domingo. Once the 467 stairs are removed, Mr. Domingo's stairs would descend from the sixth floor loft to a fifth floor entrance foyer and door which would lead to nowhere. Mr. Neratoff believed that such a condition would not be allowed to remain by the Department of Buildings. Thus, as a practical matter, the fifth floor foyer and stairs is space Mr. Domingo stands to lose in any event. For that reason, I decline to include it in the calculations of lost space to Mr. Domingo's unit.

Thus, I conclude that the impact on Mr. Domingo's unit from the Co-Op's proposed legalization plan would be a minimum loss of 50.9 square feet of floor area.

In addition, there would also be a loss of volume of space as a result of the construction of the enclosure for the ladder extending the stairs to the roof. Under the initial legalization plans developed in 1995, a full square enclosure from floor to roof the length of the stairwell opening was envisioned. Mr. Martinez had calculated that the volume of space lost under that original proposal would be 1002 cubic feet. Under the most recent revision, with the ladder enclosure sloping parallel to the stairs and then ascending vertically in a cube-like shaft to the roof, which was proposed to reduce the impact on Mr. Domingo, Mr. Martinez estimated the loss of volume of space to Mr. Domingo's unit as approximately 700 cubic feet. Mr. Neratoff agreed that Mr. Domingo would lose a certain volume of space, but did not offer specific calculations as to the amount.

Thus, I find that under the Co-Op Board's proposed plan to legalize the 467 stairs, Mr. Domingo's unit would be adversely impacted by the loss of a minimum of 50.9 square feet of floor area and also some 700 cubic feet of volume.

In sum, petitioner established on his direct case, that there would be some an adverse impact on his loft space if the Board's plan to legalize the 467 stairs were adopted. Of the various negative results that he cited, I found the loss of physical space and the impact on the aesthetics or look of the loft

to be the most significant, and the impact on the natural lighting and his artistic use of his loft to be minimal and worthy of little weight.

e. Prima Facie Motion to Dismiss

Respondent, at the close of petitioner's direct case, moved to dismiss the unreasonable interference application for the failure by Mr. Domingo to establish a *prima facie* case. I previously reserved decision, and respondent has renewed its motion in its post-trial brief. Respondent's argument is based on three grounds: 1) that interference with idiosyncratic uses of a tenant's loft are not a factor to be considered in assessing reasonable interference; 2) that even if considered, the proof offered by petitioner of the impact on his artistic use was at best insubstantial; and 3) that the demonstrated loss of actual usable space to his loft was *de minimus*. I have already addressed the first two issues, disagreeing with the first and agreeing with the second, although that agreement does not resolve the case.

As to the argument that the demonstrated loss of space to Mr. Domingo's unit is *de minimus* and cannot as a matter of law constitute unreasonable interference, I was not so persuaded. In the case relied upon respondent as support for that position, *Matter of County Dollar Corp.* Loft Bd. Order No 955, 10 Loft Bd. Rptr. 18 (Sept. 28, 1989), the Loft Board rejected an argument by a tenant that it was *per se* unreasonable to take space from a tenant, even though it amounted to less than 100 square feet, to provide elevator access to a non-IMD unit. While the Loft Board did characterize the loss of space to be suffered by the tenant as "minimal," its decision was made in the absence of a proposed alternative plan. If no alternative were proposed here, and the argument from Mr. Domingo was simply that the taking of 50.9 square feet of space from his unit and the claimed disruption to his ability to make videos made the Co-Op's legalization plans *per se* unreasonable, I would be inclined to grant respondent's motion to dismiss as per *County Dollar Corp.*

Mr. Domingo, however, proposed an alternative plan which must be considered in determining whether the interference to the use of his loft from the Co-Op's proposal would be unreasonable. Thus, even if the interference in the use of Mr. Domingo's loft was deemed relatively minimal, it would still be unreasonable if he could demonstrate, as he claimed, that an alternative exists which would have no negative impact on any other tenant. Mr. Domingo presented evidence to that extent on his direct case. Giving every favorable inference to petitioner, as I am obligated to do for purposes of resolving a *prima facie* motion, the motion must be denied.

I turn now to an assessment of the relative merits of Mr. Domingo's alternative legalization plan as compared to the Co-Op's plan on the basis of the entire record submitted.

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III. Consequences of Legalizing Stairs at 465 Greenwich Street versus Stairs at 467 Greenwich Street

Mr. Neratoff and Ms. Dufty, as the representative of the Co-Op Board, identified a number of factors which led them to favor the plan they ultimately adopted, to legalize the 467 stairs, over the

alternative plan to legalize the 465 stairs. I address each of them below, as well as certain other additional factors raised by the parties.

a. Removal of the Stairs at 125 Watts Street

The most potentially compelling reason in support of the Co-Op Board's stair proposal in my view, and the primary reason Mr. Neratoff recommended it, was the fact that legalization of the 467 stairs would allow the Co-Op Board to remove the stairs in 125 Watts, the building section adjacent to the north side of 467 Greenwich. The tenants at 125 Watts would then use the same staircase as the tenants in 467, while the 465 tenants, whose stairs would be removed, would use the proposed fully legalized stairs in 463 Greenwich Street. This plan was part of Mr. Neratoff's concept of combining stairs to provide substantial savings to the Co-Op in costs, work to be done and the amount of space lost to tenants. Removal of the 467 stairs as proposed under the alternate plan would foreclose the ability to remove the 125 Watts Street stairs.

The Co-Op's Board of Directors, however, rejected that part of Mr. Neratoff's recommendation that the stairs at 125 Watts Street be removed, and instead presented to the shareholders its current plan of legalizing both the 125 Watts and 467 Greenwich Street stairs, while removing only the 465 stairs. Thus, the primary and substantial benefit of legalizing the 467 stairs as per the Co-Op's architect was eliminated by the Co-Op Board at the outset.

Respondent still argues that retaining the option of one day removing the 125 Watts stairs is a factor which it considered in recommending its legalization plan to the shareholders and should be a factor in assessing the reasonableness of its proposed interference with Mr. Domingo's unit. However, that reason is a hypothetical one and too speculative to give it any real weight in this analysis. The concrete benefits of such stair removal exist now as the building is about to undergo legalization. The possibility that one day the tenants will get together and agree to remove the 125 Watts stairs after substantial money was spent to legalize them seems remote at this point.

Thus, I was not persuaded that having the ability to retain the option of one day being able to remove the stairs at 125 Watts Street to combine with the 467 stairs was a viable reason to justify the proposed intrusion into Mr. Domingo's space.

b. Cost

Despite some earlier estimates that legalization of the 467 stairs might cost as much as $20,000 more than the legalization of the 465 stairs (*see* Pet. Ex. 20), the parties stipulated that the costs of legalizing either of the two sets of stairs were roughly the same. Somewhat more work is involved in legalizing the 465 stairs, as both architects agreed it will require the replacement of two runs of stairs, between the first and third floors, and the widening of the first and second floor landings by about a foot, whereas legalization of the 467 stairs would only require the replacement of one run of stairs, from the second to the third floor with a concomitant widening of the third floor landing

by about a foot.[2] Mr. Martinez pointed out that the stairs from the cellar to the first floor lobby area in 467 would also have to be replaced if the 467 stairs were legalized and thus that the work involved under either legalization proposal would be roughly the same, *i.e.,* the replacement of two runs of stairs. Mr. Neratoff, however, persuasively made clear that the cellar stairs would have to remain and be replaced no matter which legalization plan were adopted, since those stairs are needed for a second means of egress from the basement. Thus, there does appear to be somewhat more work required with the plan to legalize the 465 stairs.

There was also some testimony to the extent that more fireproofing work would be required in legalizing the 465 stairs since those stairs are made of wood, whereas the stairs between the first and third floors at 467 are part steel and concrete, and would require less fire retarding work.

Nevertheless, as stipulated, the costs of the work under either plan are essentially the same, thereby eliminating any advantage for one plan over the other on that basis.

c. Recapture of Space and Reduction of Loss of Space

Respondent argued that another reason that the Co-Op Board recommended the plan to legalize the 467 stairs, and another factor in that plan's favor, was the fact that the concomitant removal of the 465 stairs would free up more space in Co-Op owned lofts (214 square feet as opposed to 107 square feet - Pet. Ex. 20) that could later be sold at market value. Thus, the Co-Op perceived a potential economic benefit in legalizing the 467 stairs and removing the 465 stairs.

However, Mr. Domingo pointed out, as Mr. Neratoff confirmed, that 168 more square footage of space overall would be freed up by removing the 467 stairs and legalizing the 465 stairs (568 square feet as opposed to 400 square feet - Pet. Ex. 20), space which would primarily be recaptured by individual shareholders who would presumably purchase it from the Co-Op at insider prices.

The potential for more revenue for the corporation is not a factor driven by considerations of legalization and thus not one that justifies the intrusion into Mr. Domingo's space. An argument that taking space from a tenant was justified by the potential economic benefit to the owner in a more typical situation where the owner was not a Co-Op would certainly be flatly rejected. The argument has more appeal but no more merit in the context of cooperative ownership.

Mr. Neratoff also testified at one point that he favored legalization of the 467 stairs over the 465 stairs because it would reduce the amount of space that would be lost by individual units. In that regard, he calculated that the necessary widening of landings which would have to occur where runs of stair would have to be replaced, would take about 10 square feet from the units on those floors. Thus, he calculated that a total of 20 square feet would be lost in 465 as a result of widening the landings for the first and second floor stairs that would be replaced, and 10 square feet in 467 as a

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[2] Mr. Martinez testified that there might also be some need to widen the first floor landing at 467, but he was not clear how much space on the first floor would be affected without studying the plans further.

result of the widening of the landing for the third floor stairs which would be replaced, a net difference of 10 square feet. That difference is negligible. Moreover, Mr. Neratoff conceded that in calculating the net loss of space to each building under the two legalization proposals, he did so under the assumption that Mr. Domingo could make no legal claim to the area of the fifth floor stairs or the area of the sixth floor which would need to be recaptured for a landing if the 467 stairs were legalized, and that he thus would suffer no loss of space to his unit. For the reasons discussed above, I reject the validity of that assumption.

d. Process By which Owner Determined its Legalization Plans

As an additional factor in support of its position that its plan was reasonable and rational and should not be deemed an unreasonable interference, respondent cited to the process by which this *de facto* housing cooperative decided to legalize the 467 stairs. As a corporation, respondent has specified procedures and by-laws which govern the process by which the legalization decision was made and in which Mr. Domingo fully participated.

Respondent argued that it had no choice but to conduct business in this manner, and, as stipulated by the parties, followed its procedures properly, despite some implications by Mr. Domingo to the contrary. Respondent argued that the decision of the majority of tenants in this "democratic" process should not be undermined in determining this unreasonable interference application. Respondent also raised the specter of another tenant, for example Ms. Cosin, bringing his or her own unreasonable interference application, causing further delay in the legalization process, if this tribunal ruled that Mr. Domingo's alternate plan had to be adopted and the proposed legalization plans were thus modified.

Whether someone would be in a position to file a new unreasonable interference application at this late date, depending on the outcome of this one, is an entirely speculative consideration and not one properly considered here. Indeed, Ms. Cosin may be estopped from such action, having filed an answer in this proceeding, presented her position at trial, and having had the opportunity to appear as a party and litigate those issues if she chose.

The fact that the legalization plan was determined by a majority vote of the shareholders after a lengthy process of correspondence, information gathering, meetings and a vote in which Mr. Domingo had the opportunity to participate, is indeed a consideration that I weighed very seriously. Ultimately, however, as I ruled, Mr. Domingo had the right under Loft Board rules to pursue this application, and that right should not be defeated simply because a majority of his neighbors outvoted him.

e. Stairs and Elevator in Same Lobby

One potential advantage to Mr. Domingo's alternate plan over the Co-Op Board's plan, as identified by his architect, Mr. Martinez, was the fact that removal of the 467 stairs and legalization of the 465 stairs would place the entrance to the elevator and the stairs for those buildings in the same lobby at 465. The elevator entrance is already located in that lobby. At the moment, the entrance to the

stairs for 465 are also in that lobby, while the stairs for 467 are of course in the adjacent lobby, separated from the elevator entrance. Under the Board's plan to legalize the 467 stairs and remove the 465 stairs, the elevator entrance would remain in the 465 lobby, while the stair entrance would be separated from it, in the lobby at 467. Under Mr. Domingo's plan, the entrance to the elevator and to the stairs for 465 and 467 would both be located in the lobby of 465. That presents advantages for purposes of monitoring the lobby and security. While there is nothing illegal about having the elevator and stair entrances in separate lobbies, there is some benefit in keeping them together. While Mr. Neratoff did not deny the benefit, he minimized its significance.

I credited Mr. Martinez's testimony that containing the building stairs and elevator in one lobby was a beneficial factor which weighed in favor of adopting Mr. Domingo's alternate plan.

f. Impact on Cosin Unit

Finally, there is the issue of the impact the two legalization plans would have on Mr. Domingo's neighbor, the sixth floor tenant in the adjacent loft at 465 Greenwich. In Ms. Cosin's loft, unlike Mr. Domingo's, a sloping stairwell enclosure already exists enclosing a pubic landing. The stairs from the lobby to the sixth floor in 465 Greenwich Street are public stairs. One entering Ms. Cosin's loft from the stairs would ascend from the fifth floor to the sixth by the stairs. At the sixth floor there is an enclosed landing and a door leading into Ms. Cosin's loft. To legalize the 465 stairs as per the alternate plan, all that would be required would be to extend the existing stairwell enclosure, which is about ten feet high, by means of a cube shaped shaft straight up an additional six feet to the ceiling.

Ms. Cosin, who testified for respondent in this proceeding and who is also an artist, identified two potential losses to her from such plan: the loss of 120 cubic feet of volume to the loft and the loss of some storage space. Ms. Cosin explained that she built a series of step-like shelves along the existing sloping stairwell enclosure, which she uses for storage and on which she can climb up. At the top of the existing enclosure, over the door into her loft, she built a small platform or shelf, approximately 4 x 5 feet, where she stores various art supplies and items that she does not need to get to regularly. It is that top shelf which she would lose under the alternate plan, along with the volume of space taken up by construction of the shaft to the roof.

Ms. Cosin's unit is concededly smaller than Mr. Domingo's (approximately 61 square feet smaller), as indeed are all the units in 465 in comparison to 467. That is primarily because the elevator shaft for the elevator jointly used by the tenants at 465 and 467 Greenwich Street runs up through the northwest corners of the loft units at 465. Ms. Cosin described the layout in her loft, the use of her loft for her artistic endeavors, which include the production of large scale oil paintings, large scale color gouaches (painting done on paper with water-based paints), and slate objects in various shapes backed by plywood and featuring black and white drawings, and the difficulty she would have in finding other areas in her loft to store her various materials if she loses the storage area at the top of her stairwell enclosure. Ms. Cosin's loft is already crowded with, in addition to her normal furniture and items associated with her living there, her paintings, art supplies, slate objects, and piles of slate used in their production. If she loses the storage area at the top of the current stair enclosure, she

would have to store those objects in the only unobstructed area left in her loft, which is along her north wall, which would then interfere with her use of her north wall for the production and display of her large scale art work. Ms. Cosin would not lose the storage shelves she built along the side of the sloping stair enclosure under the alternate plan.

If the 467 stairs were legalized and the 465 stairs removed, as the Co-Op proposes, the existing stair enclosure in Ms. Cosin's loft would be removed, the opening for the stairs floored over, and Ms. Cosin would stand to gain, by purchase from the Co-Op, additional floor area, which she proposed to make into a study. Mr. Martinez estimated that area to be about the same as the area that Mr. Domingo would lose (not counting the fifth floor foyer and the platform), which was 57.5 square feet. Mr. Neratoff calculated the area gained to be about 50.8 square feet.

In addition, Ms. Dufty testified that a balancing of equities was also at work in the Co-Op Board's decision to recommend legalization of the 467 stairs and removal of the 465 stairs. The Board felt that it would be more fair to Ms. Cosin to make up for the fact that she has a smaller space than Mr. Domingo, has one less window on the western or front wall (three windows as compared to Mr. Domingo's four, due to the presence of the elevator shaft), and has to contend with the noisy elevator, to give her an opportunity to gain some space by removing the stair enclosure from her loft.

If the impact on Mr. Domingo's space of legalizing the 467 stairs is labeled by respondent as *de minimus*, the impact on Ms. Cosin's loft must be considered all but nil. By legalizing the 465 stairs, Ms. Cosin would lose no floor area, as the Co-Op's architect, Mr. Neratoff readily concedes. A stairwell enclosure already exists in her loft. A simple six-foot extension of that enclosure to the roof via a 4 x 5 feet shaft is all that is required, in contrast to the construction of an entire enclosure in Mr. Domingo's space with the concomitant loss of floor space and volume. According to Mr. Neratoff, construction of the shaft extension in Ms. Cosin's unit would be to the east and alongside the existing elevator shaft, and would involve no real loss of light, no obstruction of a window and no impact on the configuration or aesthetics of the unit. There would be the loss of some volume of space to Ms. Cosin, as she noted, but which would be substantially less (120 cubic feet as compared to 700 cubic feet) than the loss of volume to Mr. Domingo's unit.

Ms. Cosin's assertion of a loss of storage area as a result of the loss of the shelf now existing at the top of her stair enclosure, is negligible, particularly since the evidence indicated that there are other areas in the loft where shelving for storage could be built to compensate. It should be noted that the storage shelf Ms. Cosin stands to lose if the 465 stairs are legalized was constructed by her in 1984, after the enactment of the Loft Law, so that the same objections respondent raised about Mr. Domingo's post-1982 construction of his platform and use of his loft to make videos, would apply to Ms. Cosin's claims about her storage shelf.

Nor would Mr. Domingo gain any windfall from legalizing the 465 stairs and removing the 467 stairs. The area represented by the opening of the stairwell in Mr. Domingo's unit and the area that would be used for a sixth floor landing if 467 stairs were legalized are already occupied by Mr. Domingo and have been so occupied for eighteen years. The alternate plan gains no space for Mr.

Domingo, but would simply preserve the status quo (except that he would lose the fifth floor foyer and stairs no matter what). In the same vein, it would also preserve the status quo in Ms. Cosin's apartment, since she already has an existing stair enclosure in the loft and would lose no floor area.

Finally, the consideration by the Co-Op Board of certain perceived "inequities" between Mr. Domingo's and Ms. Cosin's spaces and the attempt to remedy them to some extent by taking space from Mr. Domingo to give to Ms. Cosin is not justified under the Loft Law and is not reasonable interference as contemplated by Loft Board regulations. Ms. Cosin, like Mr. Domingo, took occupancy of her unit "as is." She has always had the elevator shaft protruding into her loft space and has always had to contend with noise from the elevator since she first moved in. She has also always had only three windows in the front or west wall. With respect to her windows, Ms. Cosin has four on the east wall of the loft as well as some on the south wall, and as Mr. Martinez testified without contradiction, her unit has plenty of light. None of those existing "deficiencies" will cease to exist if the Co-Op's plan to legalize the 467 stairs is adopted. Ms. Cosin will still have only three front windows, the elevator shaft protruding into her loft space, and the elevator noise to contend with, although the noise should be greatly diminished under either legalization plan because the elevator will be converted to a quieter automatic one.

In any event, rectifying the perceived inequities between Mr. Domingo's and Ms. Cosin's do not implicate legalization considerations. It is not the intention or purpose of the Loft Law to allow an owner to take space from one tenant or interfere in one tenant's use of his loft, simply to rectify perceived inequities to another tenant. However humane or sympathetic the Co-Op Board's intentions, helping Ms. Cosin to improve her unit is not a factor which supports adoption of its plan over Mr. Domingo's plan. Stated another way, it would be unreasonable to interfere with or intrude into Mr. Domingo's space on the basis of these claimed equitable considerations.

IV. Conclusion

In analyzing the pros and cons of each plan, it is evident that there will be a demonstrable negative impact on petitioner if the Co-Op's legalization plans are adopted as proposed. In contrast, respondent demonstrated no such comparable harm to any other tenant resulting from the proposed alternate plan. The potential benefits touted by the Co-Op with respect to its plans ultimately relate to non-legalization considerations. Mr. Martinez provided his expert opinion that there were no benefits related to legalization that commended the Co-Op's plan over the alternate, but there was harm to an individual shareholder, Mr. Domingo, which could be avoided by adoption of the alternate plan. The owner's architect, Mr. Neratoff, conceded that once one eliminates the potential substantial benefits of removing the 125 Watts stair, as the Co-Op Board did, and assumes the costs of the two plans to be equal, as the parties stipulated, the differences between the two plans in terms of legalization benefits was negligible.

Indeed, as Ms. Dufty candidly acknowledged, once the Co-Op Board determined that the price of the work to legalize the two sets of stairs was basically the same, the Board's decision to recommend legalization of the 467 stairs pretty much came down to a consideration of how the two proposals

impacted on Mr. Domingo and Ms. Cosin. As noted, they decided that since Ms. Cosin already had a smaller unit and the elevator shaft in her loft, and the space Mr. Domingo stood to lose was relatively small, that they should legalize the 467 stairs as a way of trying to even things out. However fair that sentiment, Loft Board Rules do not recognize such considerations in this context.

I disagree with respondent's counsel's contention that the facts in this case are similar to the facts in *Langer,* OATH Index No. 1316/98 (Sept. 25, 1998), *adopted*, Loft Bd. Order No. 2334 (Nov. 24, 1998), such that a similar result should occur here. In *Langer*, Judge Lewis found the owner's legalization plan which called for an internal staircase to run through the tenants' loft, to be reasonable, despite the fact that it would take 80-90 square feet from her loft and would impact on her ability to use an editing room she had constructed which was critical to her work. In so finding, Judge Lewis considered among other factors that adoption of the tenant's proposed alternate plan would take space from an adjacent loft which was smaller than the tenant's, even though it was vacant at the time.

The critical difference between the *Langer* case and this one, is that the tenant's proposed alternate plan in *Langer* was shown to have a clear detrimental impact on two other units, requiring a change in configuration and a loss of space to the adjacent vacant loft and adversely impacting on a second tenant's artistic use of his loft a floor below. In the present case, petitioner's proposed alternate plan, which was an option originally worked up by respondent's architect, would not change the configuration of nor take any floor space from Ms. Cosin's loft, nor impact adversely on any other loft's use. Moreover, the size difference between the two affected adjacent lofts in *Langer* was over 400 square feet, while the size difference between Mr. Domingo's and Ms. Cosin's units is only 61 square feet.

In the end, the issue here comes down to a consideration of an owner's legalization plan which will have a demonstrated adverse impact on one of its tenants, petitioner, versus an alternate plan, which would have virtually no adverse impact on any tenant and would simply preserve the status quo. To interfere with Mr. Domingo's loft to the extent and in the manner proposed in such circumstances is unreasonable. Thus, petitioner's application should be granted and respondent should have to modify its legalization plans to the extent that they reflect that the 465 stairs will be legalized and the 467 stairs removed.

FINDINGS AND CONCLUSIONS

1. Petitioner has demonstrated that the owner Co-Op's plan to legalize the stairs in his building, 467 Greenwich Street, while removing the stairs in the adjacent building at 465 Greenwich Street, would constitute an unreasonable interference with petitioner's use of his loft.

RECOMMENDATION

Petitioner has met his burden of proving that Respondent C. True Building Corporation's legalization plans, as currently constituted, would pose an unreasonable interference with petitioner's use of his loft space. I recommend that petitioner's application be granted and that respondent be

required to amend its plans to substitute petitioner's proposed alternate plan regarding the legalization of the stairs at 465 Greenwich Street and the removal of the stairs at 467 Greenwich Street.

P R E S E N T: **RAYMOND E. KRAMER**, *Administrative Law Judge*

T O: **HECTOR BATISTA**, *Chair*, Loft Board

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Domingo v. Loft Board and C. True Building Corporation
Supreme Court New York County, Index 107058/00, May 1st , 2000

WALTER B. TOLUB, *Supreme Court Judge,* New York County

This proceeding, commenced pursuant to CPLR Article 78, seeks review of a determination of the New York City Loft Board ("Loft Board "), dated December 13, 1999, which denied standing to petitioner Javier Domingo ("Domingo") in a proceeding before the Loft Board. In that proceeding, Domingo sought to obtain the Loft Board's review of respondent C. True Building Corp.'s ("C.True") legalization plan for the subject premises.

Domingo occupies a residential unit located at 467 Greenwich Street, New York, New York, which, in turn, is one part of a multi-building intermediate multiple dwelling ("IMD"), as that term is defined in Multiple Dwelling Law Article 7-C ("the Loft Law"). This particular IMD includes the premises known as 463 and 465 Greenwich Avenue, 18 and 20 Desbrosses Street, and 125 Watts Street, as well as the building located at 467 Greenwich Avenue. The buildings are owned and operated as one IMD by C. True, which characterizes itself as a de facto housing cooperative. C. True's legalization plan, challenged by Domingo, calls for the modification of a stairway, used exclusively by Domingo to gain access to his loft, so as to make that stairway a code-compliant access for all residents to the roof of the premises,

On March 15, 2000, the Court granted a temporary restraining order enjoining C. True from commencing construction, required to implement the legalization plan, at the subject premises. The stay is in effect pending the resolution of this proceeding.

In previous proceedings between Domingo and C. True, Domingo sought judicial review of the manner in which C. True obtained shareholder approval of the legalization plan. The court found that C. True had obtained the approval of the legalization plan by a majority of the shareholders, and that it had properly exercised its business judgment. That decision was affirmed by the Appellate Division, First Department. *See, Domingo v. C True Building Corporation,* 246 AD2d 337 (1th Dept. 1998).

Following the Appellate Division's affirmance, in May 1997, Domingo petitioned the Loft Board, claiming that the legalization plan for the IMD constituted an "unreasonable intrusion" on his rights as an occupant of the premises, in violation of 29 RCNY § 2-01(d)(2)(iv)(A), known as the "narrative statement process." The Loft Board dismissed the proceeding without addressing the merits of Domingo's petition, finding that "it would be patently unfair for this shareholder to jeopardize the legalization process undertaken at great expense by his fellow shareholders where the Supreme court had determined that the Board of Directors did not violate the business judgment rule." Domingo now seeks review of this determination, claiming that the Loft Board's finding that he lacked standing was arbitrary and capricious, in that the Loft Board violated statutes, rules and case law in reaching its decision.

The Court's role in an Article 78 proceeding is not to weigh the merits and facts de novo, or to substitute the court's judgment for that of the agency, but rather it is to determine whether there was a rational basis for the agency's decision. *Clancy-Cullen Stor. Co. v. Board of Elections in the City of New York* 98 AD2d 635 (1th Dept 1983). "It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld." *Howard v. Wyman*, 28 NY2d 434, 438 (1971). The administrative determination is to be accepted by the courts " 'if it has "warrant in the record" and a reasonable basis in law'." *Lower Manhattan Lot Tenants v. New York City Loft Bd*., 104 AD2d 223, 224 (1st Dept 1984), *aff'd* 66 NY2d 298 (1985). Courts will defer to the construction given to a statute or regulation by the agency responsible for its administration, so long as that construction is not irrational, or unreasonable. *Liberty Lines Express, Inc. v. New York City Envtl. Control Bd.,* 160 AD2d 295 (1st Dept 1990).

Res judicata, or claim preclusion, bars future actions between the same parties on the same cause of action once a valid final judgment has been entered. *Parker v. Baluvelt Volunteer Fire Co.*, 93 NY2d 343 (1999). All other claims arising out of the same transaction or series of transactions are barred, regardless of whether they are based on different theories, or seek different remedies. *O'Brien v. City of Syracuse*, 54 NY2d 353 (1981).

In the prior action between Domingo and C. True, Domingo alleged that the legalization plan threatened to adversely impact him through an appropriation of approximately 200 square feet of the floor area of his premises, and a diminishment in the cubic area of his loft of approximately 2,800 cubic feet.

The entry way to plaintiff's premises shall be transformed substantially, in that the entry door and stairway located at the fifth floor level of the building shall become a public area instead of under the exclusive possession and control of plaintiff. A new entry way shall have to be constructed at the sixth floor level, thereby reducing the floor area available for plaintiff's beneficial use.

Domingo v. C. True Building Corp., complaint, at ¶19.

Domingo's application to the Loft Board, submitted in conjunction with the narrative statement process, stated, in relevant part:

The owner's proposal unreasonably interferes wit the applicant's use of his space. It shall require the forfeiture of approximately 200 square feet of space. It shall require the removal of a sleeping area which can not be replicated elsewhere in the premises. . . . No legalization consideration argues in favor of the owner's plan. Accordingly, it has no rational advantage.

In *Domingo v. C, True Building Corp., supra,* 246 AD2d, at 337, the Appellate Division held that C. True had properly exercised its business judgment in developing the legalization plan here in issue:

Plaintiff fails to allege any facts showing that defendant's board of directors acted in bad faith such as to render the business judgment rule inapplicable to its decision to renovate (*see, Matter of Levandusky v. One Fifth Ave. Apt. Corps.*, 75 NY2d 530, 537-538).

The Loft Board's findings, although couched in the language of standing to bring a proceeding, rest on principles of res judicata. The Loft Board decision is thus found to have a basis on the record, and to be neither arbitrary nor capricious.

In reaching its decision, the Loft Board rejected the Report and Recommendations of an Administrative Law Judge ("ALJ") at the Office of Administrative Trials and Hearings ("OATH"), to whom Domingo's petition had been referred. The ALJ held that Domingo not only had standing to pursue his claim before the Loft Board; but that C. True's legalization plan unreasonably interfered with Domingo's use of his unit and should be modified along the lines proposed by Domingo. The Court finds, however, that the Loft Board had the authority to accept or reject the findings of the Administrative Law Judge. 29 RCNY § 1-06(n) provides, in relevant part as follows:

All final determinations regarding the disposition of any application brought to a hearing or inquest shall be made by the board. The board may adopt, reject, remand, defer or modify the disposition recommended by the staff or administrative law judge employed by OATH.

See also, 29 RCNY § 1.06(j)(2)(ii):

Where a hearing is conducted at OATH, the administrative law judge shall submit recommended findings of fact and a recommended decision to the Loft Board, which shall make the final findings of fact and decision.

Domingo points to General Business Law §352-e, which requires the filing of an offering plan with the New York State Attorney General before cooperative status can become effective. He claims that the Loft Board erred in concluding that he was a shareholder in a residential cooperative, since cooperative status had never been granted to C. True by the Attorney General. Even if he is found to be a shareholder, however, Domingo claims that he is an "occupant" of an IMD, within the meaning of 29 RCNY §2-01 (a), entitled to the full protection of Multiple Dwelling Law Article 7-C, and that the Loft Board ignored its own regulation in denying him standing. Regulation 29 RCNY § 2.01 (a) defines "occupant" as follows:

". . .occupant," *unless otherwise provided*, shall mean a residential occupant qualified for the protections of Article 7-C, any other residential tenant, and any nonresidential tenant. [Emphasis added].

In particular, Domingo claims that he was denied the right to initiate a proceeding to object to the legalization plan which is granted by 29 RCNY § 2-01(d)(2)(iv)(A). That section states:

any occupant may file (a) with the [Department of Buildings], an alternate plan for work affecting the occupant's use of its unit when the owner's proposed plan may unreasonably interfere with the occupant's use of the unit or (b) with the Loft Board an application in support of any claim that the owner's proposed plan will diminish services to which an occupant is legally entitled. In addition, if authorized by the Loft Board representative, an alternative plan may be proposed by an occupant which is not required to be filed with the D.O.B. when the occupant's claim does not require a D.O.B. review of the code issues in order for the Loft Board to resolve the dispute.

According to the Loft Board, although occupants may participate in the narrative statement process, it is only the Loft Board which may, at its option, initiate a proceeding to determine a claim of unreasonable interference, upon receipt of an application in support of such a claim from an occupant. *See*, 29 RCNY §§ 2-01(d)(iv) and (vii)(B)(b).

The Loft Board found that Domingo "is a residential occupant of a cooperative building who has opted to purchase shares in his unit, and continues to reside there as an owner-occupant." The record before this Court reflects that Domingo entered into a proprietary lease of the premises with C. True on November 23, 1993. The lease states that C. True is a corporation with 200 authorized shares, and that for purposes of ownership in the corporation, the shares allocable to each unit are the proportionate ownership of each stockholder. The lease further states that Domingo purchased 4.279 shares in C. True, reflecting an ownership interest in the corporation, and that he agreed to be bound by the C. True's by-laws, which were separately executed on November 20, 1993. Further, case law supports the Loft Board's finding that a shareholder in a de facto cooperative may be treated as a tenant-shareholder in particular circumstances, despite the fact that the corporation has not yet filed with the Attorney General. *See, e.g., O'Flaherty v. Schwimmer*, 158 Misc 2d 420 (Sup Ct NY

County 1993) ("While the Corporation never obtained approval by the Attorney General ... for cooperative conversion ... the shareholders occupied and maintained the subject premises throughout the years as a de facto cooperative"). The Loft Board's finding that Domingo is an owner-occupant in a residential cooperative has a rational basis on the record, and is neither irrational nor unreasonable.

Domingo asserts that prior Loft Board decisions support his claim that the narrative statement process is applicable to cooperatives, unless all residents file a waiver, citing *In the Matter of 96-100 Prince Street, Inc.*, 15 LBR 129 (1995). In *Prince Street*, the Loft Board had initiated a proceeding to determine why the owner had not complied with certain of its mandated obligations in a timely fashion, including the requirement that it provide all occupants with a narrative statement describing all the work to be performed, in a timely fashion, pursuant to 29 RCNY § 2-01(d)(2)(i). The owner filed an answer in which it claimed that the premises were owned cooperatively and were occupied exclusively by tenant-shareholders, and were therefore not subject to the narrative statement process. But the Loft Board held that the obligation to serve and file a narrative statement is not automatically negated by alleged cooperative ownership unless the residential occupants execute a waiver to the narrative process.

The Loft Board claims that *Prince Street* is distinguishable from the present case. In *Prince Street*, the owner tried to avoid compliance with the requirement of filing a narrative statement by asserting the cooperative status of the building as a shield against the need to comply. In the present case, Domingo, as an owner-occupant, seeks to use the narrative statement process as a sword, asserting a right to initiate a proceeding before the Loft Board, where no such proceeding is provided for in the Loft Board's regulations.

Next, the Loft Board examined the intent of the narrative statement process. It found that the process of bringing a rental building into compliance with the Loft Law may affect the way in which individual units are designed and constructed, according to a plan unilaterally developed by the owner and that rent-regulated tenants must be involved in the compliance process. However, the Loft Board went on to find that "[a]lthough market rent residential tenants, commercial tenants, and cooperative tenant shareholders are invited to attend narrative statement conferences and be kept informed of the owner's plans, they do not have a right to challenge the owner's plans in the context of the Loft Board's narrative statement process." The Loft Board argues that, at its option, it may initiate a proceeding to determine a claim of unreasonable interference, upon receipt of an application in support of such a claim from an occupant, citing 29 RCNY §2-01(d)(iv) and (vii)(B)(b).

Domingo was found to be an "owner," rather than a "tenant" or occupant" in the context of the narrative statement process, found at 29 RCNY § 2-01(d). Unlike the situation in a traditional rent-regulated tenancy, held the Loft Board, where the landlord has an incentive to harass a below-market rent tenant, "[t]his incentive does not exist for the cooperative association vis-a vis a fellow shareholder, whose monthly maintenance charges are equitably set based on the number of shares he owns, which number is typically based on the size of his unit." It further hold that, in a particular

case, if a tenant-shareholder believes that he is being harassed by the cooperative association, recourse lies under the business judgment rule. Here, the Loft Board held that because the Supreme Court decided that C. True's Board of Directors did not violate the business judgment rule, it would be "patently unfair" to allow Domingo to delay the legalization process. Domingo was held to be bound by C. True's corporate action. The review which be sought was found to be outside of the Loft Board's authority. Further, since the Supreme Court had found that C. True had properly exercised its business judgment in developing a legalization plan, a finding of unreasonable interference was rejected. This result, resting as it does on principles of res judicata, is found to be neither arbitrary, nor capricious.

The petition is, therefore, dismissed.

Accordingly, it is

ORDERED that the temporary restraining order is vacated; and it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the Court.

WALTER B. TOLUB, *Supreme Court Judge*, New York County

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

ENTER: May 1st, 2000