

Respondent, premises owner, appeals from a recommended decision sustaining a Class 2 violation of Section 28-118.3.2 of the Administrative Code of the City of New York (Code) for occupancy in a manner contrary to that allowed by Department of Buildings (DOB) records. In the summons, the issuing officer (IO) affirmed that on December 9, 2014: “3 story building at time of inspection was occupied by a daycare center called “Diversity Learning Center.” Tel: 718-574-2550. At 1st fl[oor] 4 children and 2 day care attendants observed. At front room (exp #1) play area with kitchen, fridge, residential sink, microwares, cubicles, clothing, toys. 1 bathroom with 2 toddler toilets and 2 sinks. At rear 3 pc. bathroom (bathtub, sink, toilet), rear playroom, egress at rear to enclosed yard which does not lead to street. At 2nd fl[oor], same configuration, door at exp #3 (rear) leads to enclosed steel staircase down to rear yard. Steel staircase has plexi-glass enclosure. Rear yard does not lead to street at exposure #1.”

The hearing

At the hearing, Petitioner, the Department of Buildings (DOB) submitted a certificate of occupancy (C of O) for the cited premises, issued on April 28, 2006, authorizing a dwelling unit on each of the first through third floors. Respondent asserted that he was licensed to operate a group family day care facility at the premises on the date of the summons. He submitted a group family day care license that had expired in 2010, and a letter of no objection from DOB, issued on August 29, 2016, stating that DOB had no objection to using the first-floor apartment as a day care for not more than 12 children. He offered to return with the license in effect on the date of offense, but the hearing officer indicated that he would not give an adjournment.

In sustaining the violation, the hearing officer found that Respondent’s use of the premises as a group family day care center was contrary to the use authorized by the C of O.

Issues presented on appeal

The issue on appeal is whether DOB’s enforcement of the residential C of O against a licensed group family day care was preempted by Section 390(12) of New York State Social Services Law (SSL).

Applicable law

Code Section 28-118.3.2 prohibits any change in occupancy or use inconsistent with that allowed by the last-issued C of O.

SSL Section 390(12)(a) provides, in pertinent part, that “[n]o . . . city or county shall prohibit or restrict use of a . . . multiple dwelling for family or group family day care where a license or registration for such use has been issued in accordance with regulations issued pursuant to this section.”

The appeal

On appeal, Respondent states as follows. He was operating a center for group family day care in a residential home, which has a valid C of O. He was not operating a day care center, as alleged by the IO, but a group family day care center, for which he has had a license from 2008 through 2016. For the first time on appeal, Respondent submits copies of group family care licenses for the cited premises from 2010 through 2016. Per Section 6-19(b) of Title 48 of the Rules of the City of New York, the Board will not consider evidence not presented to the hearing officer.

Petitioner did not answer the appeal.

The Board's determination

Having fully reviewed the record, the Board finds that the hearing officer's decision is not supported by the law and a preponderance of the evidence and grants the appeal. Respondent testified that a group family day care center was licensed to operate at the cited premises on the date of the violation and offered to produce the license in effect on that date. The Board credits that testimony which, it notes, is consistent with the earlier license and 2016 DOB letter of no objection submitted at the hearing. SSL Section 390(12)(a) precludes DOB from prohibiting or restricting the use of a multiple dwelling for group family day care where a license for such use has been issued. Consequently, DOB's enforcement of the residential C of O against a licensed group family day care was preempted by State law.

Accordingly, the Board reverses the hearing officer's decision and dismisses the violation.

Additional information from OATH records (not in original decision)

Master NOV #	Name of Respondent's counsel or other authorized representative (if any)
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