OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
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Appeal No. 2600030 **DOB v. Simon, Daniel** **February 26, 2026**

Appeal Decision

The appeal of Respondent, premises owner, is **granted**.

Respondent appeals from a recommended decision by Judicial Hearing Officer (JHO) M. Finkel, dated November 19, 2025, sustaining a Class 1 violation of § 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. Having fully reviewed the record, the Board finds that the JHO's decision is not supported by the law and a preponderance of the evidence. Therefore, the Board finds as follows:

Summons	Law Charged	Hearing Decision	Appeal Decision	Penalty
39155103M	Code § 28-118.3.2	In Violation	Reversed – Dismissed	$0

Background

In the summons, the issuing officer affirmed on July 25, 2025, at 137-02 71st Avenue, Queens, as follows:

> Observed at time of inspection, added third floor finished with new sidings, 2 windows at exposure #2 and 5 windows at exposure #4 and new siding, shingled roof. Newly added third floor with dimensions approximately 20' x 38' x 15' high contrary to the certificate of occupancy 401282232 that states upper part of this dwelling should be an attic not third floor.
>
> The IO indicated on the face of the summons that he issued a full stop work order.

At a telephonic hearing held on November 18, 2025, the representative for Petitioner, DOB, relied on the IO's affirmed statements on the summons and submitted photographs taken by the IO, including one of the certificate of occupancy (C of O). Respondent's representative, relying on *DOB v. Olshwang, Naftali*, Appeal No. 2400613 (May 30, 2024), argued that Petitioner failed to issue a Request for Corrective Action (RCA) prior to issuing the summons, as required by § 106-02 of Title 1 of the Rules of the City of New York (RCNY). Respondent's representative also challenged the Class designation of the charge, asserting that Respondent merely renovated the attic level and did not add a new third floor. Petitioner's attorney

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countered that the violation was immediately hazardous because Respondent was creating a habitable space.

In the decision sustaining the charge, the JHO found that Respondent was not eligible for the Homeowner's Resolution Program, which did not apply to Class 1 violations issued for illegal conversion. The JHO found further that cited conditions were immediately hazardous.

On appeal, Respondent's representative reiterates the hearing arguments and asserts that *Olshwang, Naftali*, 2400613, supports his position that issuance of an RCA is not a courtesy but required prior to issuance of a summons. Respondent's representative argues that the JHO misapplied the exception under 1 RCNY § 102-06(b), which refers to Class 1 violations of Code § 28-210.1, not Code §28-118.3.2.

Petitioner did not answer the appeal.

Issues on Appeal

The issues on appeal are (1) whether Petitioner was required to issue an RCA prior to issuing the summons; and if not, (2) whether Petitioner established a violation of Code § 28-118.3.2.

Applicable Law

Code § 28-208.1 provides, in pertinent part, that "[a]s an alternative to the issuance of an order or notice of violation, the commissioner may issue a request for corrective action to any person responsible for any claimed unlawful use or condition in any premises."

Section 102-06 of 1 RCNY provides, in pertinent part:

> Owners of one- and two-family homes who have not received any prior violations at the property will have an opportunity to correct certain violating conditions prior to receiving a notice of violation and associated penalties.
>
> (a) *Applicability.* The homeowner resolution program applies to owners of existing one- and two-family homes, whether or not they occupy those homes, where prior Department notices of violations returnable to the Environmental Control Board/Office of Administrative Trials and Hearings (ECB/OATH) have not been issued at the property within the past five years, whether or not the current owner owned the property during those five years.
>
> (b) *Eligible violations.* This program covers violations classified as Class 1, Class 2 or Class 3 in subdivision (k) of section 102-01 of these rules. Multiple violating conditions observed on the same date are considered as one request for corrective action. Any

repeated instance of the same violating condition is ineligible for this program and will result in the issuance of a notice of violation.

Exceptions. This section does not apply to Class 1 violations for illegal conversions as described in section 28-210.1 of the Administrative Code, Class 1 violations that result in the issuance of a Stop Work Order or a Vacate Order and Class 1 violations that lead to death or serious injury.

(c) *Request for corrective action.* Where a violating condition is observed at a property that is part of this program, the commissioner will issue a request for corrective action, giving the owner 60 days to correct the condition. In order to resolve a request for corrective action, the owner must correct the condition and submit acceptable proof of correction to the Department within such 60 days. The Department may perform an inspection upon receiving such proof of correction in order to verify that such conditions have been corrected.

(d) *Failure to correct condition.* At the expiration of the 60-day correction grace period, a notice of violation returnable to ECB/OATH based on the conditions observed and documented on the request for corrective action will be issued to the owner for each condition for which correction has not been verified as described in subdivision (c).

Code § 28-118.3.2 provides:

> No change shall be made to a building , open lot or portion thereof inconsistent with the last issued certificate of occupancy or, where applicable, inconsistent with the last issued certificate of completion for such building or open lot or which would bring it under some special provision of this code or other applicable laws or rules, unless and until the commissioner has issued a new or amended certificate of occupancy.

Analysis

For the following reasons, the Board reverses the JHO's decision.

On this record, the Board finds that Petitioner was not required to issue an RCA prior to issuing the summons. Section 102-06 of 1 RCNY implements the Homeowner's Resolution Program authorized by Code § 28-801.1. Per 1 RCNY § 102-06, "[o]wners of one- and two-family homes who have not received any prior violations at the property will have an opportunity to correct certain violating conditions prior to receiving a notice of violation[.]" Per paragraph (b), the Homeowner's Resolution Program applies to all violations listed in DOB's penalty schedule, except for Class 1 violations of Code § 28-210.1, Class 1 violations that result in the issuance of a stop work order or vacate order, and Class 1 violations that lead to death or serious injury. Here, the C of O shows that the premises is a one-family dwelling, and at the hearing, Petitioner's representative did not submit evidence of any prior violations. Contrary to the

JHO's decision, the exception to the applicability of the Homeowner's Resolution Program are Class 1 violations of Code § 28-210.1, not Class 1 violations of Code § 28-118.3.2, the provision of law charged here. Nevertheless, because the IO issued a full stop work as a result of the violation, it was not a violation eligible under the Home Resolution Program. Petitioner was therefore not required to issue an RCA prior to issuing the summons.[1]

However, on this record, the Board finds that Petitioner failed to establish a violation of Code § 28-118.3.2. Petitioner's case rests on the IO allegation on the summons that the upper part of the building was an "added third floor" instead of the attic authorized by the C of O and photographs showing a three-story building. Respondent's representative asserted that the attic at the third-story level had merely been renovated, and Petitioner's representative countered that the attic had been converted to a habitable floor. However, the C of O states that a third of the single-family dwelling authorized at the premises is on each of the first, second, and attic stories, indicating that the attic was legally approved as habitable space. As used on the C of O, "attic" meets the definition of "story" contained in § 202 of the Building Code, found in Title 28 of the Code, which provides, in pertinent part, that a story "is measured as the vertical distance from top to top of two successive tiers of beams or finished floor surfaces and, for the topmost story, from the top of the floor finish to the top of the ceiling joists or, where there is not a ceiling, to the top of the roof rafters." Therefore, contrary to the IO's allegation, a third floor was not "added," and Petitioner failed to show that the top floor of the house was contrary to occupancy authorized by the C of O. As the Board is dismissing the violation on this ground, it need not address Respondent's representative's class challenge.

Accordingly, the Board reverses the JHO's decision sustaining a Class 1 violation of Code § 28-118.3.2 and dismisses this charge.

By: OATH Appeals Division

[1] The Board notes that if the requirements for the Home Resolution Program are met, the issuance of an RCA is required by 1 RCNY § 102-06 and is not merely a courtesy. *See DOB v. Edward N. Gewirtz*, Appeal No. 2501189 (December 18, 2025). To the extent that *DOB v. Torah Veavoda LLC*, Appeal No. 2401848 (February 27, 2025), holds otherwise, it is overruled, although a finding of violation in that case was nevertheless proper because an RCA was issued to a prior owner who did not transfer the property to the named corporate-respondent in an arm's-length transaction.