138-07-A
APPLICANT – New York City Department of Buildings.
OWNER: 614 NYC Partners, Incorporated.
SUBJECT – Application May 24, 2007 – Appeal seeking to revoke Certificate of Occupancy No. 104114487 that allowed the conversion of single room occupancy units (SRO) to Class A apartments without obtaining a Certificate of No Harassment from NYC Housing Preservation and Development (HPD). R8 Zoning District.
PREMISES AFFECTED – 614 West 138th Street, West 138th Street, east of Riverside Drive and west of Broadway, Block 2086, Lot 141, Borough of Manhattan.
COMMUNITY BOARD #7M
APPEARANCES –
For Applicant: John Egnatios-Beene, Department of Buildings.
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0
THE RESOLUTION:

WHEREAS, the instant appeal comes before the Board in response to an application by the Department of Buildings ("DOB") to revoke a certificate of occupancy ("CO") issued to the subject premises, on the basis that it improperly approved the conversion of single room occupancy ("SRO") units to class A apartment units; and

WHEREAS, a public hearing was held on this application on September 11, 2007 after due notice by publication in the City Record, with continued hearings on October 30, 2007, December 11, 2007, January 29, 2008 and March 11, 2008, and then to decision on April 1, 2008; and

WHEREAS, the subject premises is a four-story building in an R8 zoning district; and

WHEREAS, the subject building is located at 614 West 138th Street, Manhattan; and

WHEREAS, according to records of the New York Division of Housing and Community Renewal ("DHCR"), the building currently consists of seven Class A rent stabilized apartments; and

WHEREAS, the legal occupancy of the building, according to a certificate of occupancy issued in 1971 (the "1971 CO"), was "one furnished room" and one apartment on the first story, and three "furnished rooms" on the second, third and fourth stories, for a total of 10 SRO dwelling units; and

WHEREAS, DOB states that § 27-217 of the Administrative Code provides that a change in use and occupancy requires a new certificate of occupancy; and

WHEREAS, DOB further states that § 27-198 of the Administrative Code provides, in part, that prior to the authorization by DOB of a conversion of any SRO units to permanent class A apartments, the applicant for such conversion must obtain a Certificate of No Harassment ("CNH") from the New York City Department of Housing Preservation and Development ("HPD"), the issuance of which indicates that the owner did not engage in harassment of the SRO unit occupants over a certain period of time (adopted as "Local Law 19"); and

WHEREAS, under §§ 27-217 and 27-198 of the Administrative Code, a CNH would therefore be required before a new certificate of occupancy could be issued; and

WHEREAS, the DOB states that it issued a new certificate of occupancy to the subject building as a class A multiple dwelling on March 6, 2006 ("the Current CO"); and

WHEREAS, DOB later determined that the Current CO had been issued without the filing of a CNH; and

WHEREAS, DOB thus brings the instant appeal seeking to revoke the Current CO as being erroneously issued; and

WHEREAS, the appeal raises three separate but related issues: (1) whether the current CO is legally valid; (2) whether, notwithstanding the legal status of the building, there is sufficient evidence that its actual use changed to a class A multiple dwelling prior to the 1983 adoption of the Administrative Code § 27-198 regarding conversion of SRO buildings; and (3) whether the Board could find it inequitable to revoke the Current CO; and

Issuance of the Current CO

WHEREAS, DOB states that the owner of the subject building (the "Respondent") filed five permit applications between 1997 and 2004, including applications seeking to convert SRO units to class A apartments, and had secured a CNH in connection with at least one of these applications, but failed to perform the permitted work before the lapse of the permit(s) and the expiration of the CNH; and

WHEREAS, on February 22, 2005, the Respondent filed with HPD for another CNH; and

WHEREAS, on May 17, 2005, the Respondent filed professionally certified Alteration Type 1 Application No. 104114487 "to obtain [an] Amended Certificate of Occupancy for existing conditions. No work to be performed;" attached to the application were floor plans showing the layouts of seven class A apartments; no CNH accompanied the application; and

WHEREAS, on June 15, 2005, DOB issued a temporary certificate of occupancy for the subject building, pursuant to Application No. 104114487; and

WHEREAS, in connection with Respondent's February 22, 2005 filing, HPD made a finding on January 23, 2006 that there was a reasonable cause of harassment and denied the CNH; and

WHEREAS, the Respondent appealed to the Office

of Administrative Trials and Hearings ("OATH") for a decision which would allow issuance of a new certificate of occupancy legalizing the current use; the matter was calendared for a hearing for March 30, 2006; and

WHEREAS, however, notwithstanding the denial of a CNH, DOB issued the Current CO to the subject building on March 6, 2006, as a class A multiple dwelling; and

WHEREAS, at a pre-hearing meeting, it was disclosed that the Current CO had been issued and HPD stated that it therefore lacked jurisdiction to issue a CNH; the Respondent declined to pursue its appeal at OATH and the March 30, 2006 CNH hearing did not occur; and

WHEREAS, in response to an inquiry by HPD concerning the validity of the Current CO, DOB found that the "job folder" assembled in connection with Job # 104114487 did not contain a CNH; and

WHEREAS, Manhattan Borough Commissioner Christopher M. Santulli, P.E. requested production of a valid CNH from the owner on August 12, 2006; and

WHEREAS, upon receiving no response, DOB determined that the issuance of the Current CO without a CNH had been in error and that the building was legally an SRO; thus, the instant appeal was brought to revoke the Current CO; and

WHEREAS, DOB contends that the Current CO was erroneously issued because the application on which it was based included no CNH and, therefore, failed to comply with the requirements of § 27-198 of the Administrative Code regarding alterations to SRO multiple dwellings; and

WHEREAS, DOB further contends that since the permit ought not to have been issued, the remedy for the erroneous approval is revocation of the Current CO; and

Validity of the Current CO

WHEREAS, as to the validity of the Current CO, DOB argues that the cited provisions of the Administrative Code clearly prohibit it from approving building plans and issuing a permit for the conversion of an SRO multiple dwelling to a class A multiple dwelling, absent a certification by HPD that there has been no harassment of lawful occupants within the 36-month period prior to the date of a submission of an application for a certificate of no harassment; and

WHEREAS, the Respondent states, in an affidavit submitted to the Board, that Job # 104114487 was a "no work" application that disclosed in an attachment ("Schedule A") that the existing legal use of the subject building consisted of one apartment and ten furnished rooms and that the proposed use consisted of seven class A apartments; and

WHEREAS, Respondent argues that the Code provisions apply only to a change in use, not to the legalization of an existing use proposed by Job # 104114487, and

WHEREAS, however, the Board finds that the relevant Code provisions do not distinguish between "no work" applications and applications to perform work, and that because Job # 104114487 would result in a new certificate of occupancy, the requirement of a CNH would apply to the filing of the permit application; and

WHEREAS, it is uncontroverted that the Respondent did not file a CNH in connection with Job # 104114487; and

WHEREAS, the Respondent states that it was constrained from filing a CNH in connection with Job # 104114487 through circumstances over which it had no control; and

WHEREAS, the Respondent further states that after an application for a CNH was filed with HPD prior to its filing with DOB of Job # 104114487, the tenants of the subject building commenced a rent strike and attempted to extort a substantial sum of money in exchange for withdrawing allegedly baseless claims of harassment; and

WHEREAS, according to the Respondent, an HPD investigator visited the subject building while litigation was underway and documented harassment which then formed the basis for HPD's denial of a CNH; and

WHEREAS, the Board finds that the Code provisions requiring submission of a CNH in connection with the legal conversion of SRO units to be unambiguous and not susceptible to interpretation or discretion in meeting their requirements; and

WHEREAS, therefore, even accepting Respondent's facts as true, a CNH would still be required before a valid certificate of occupancy could be issued; and

WHEREAS, further, the Respondent might have obtained a CNH by pursuing its appeal to OATH, rather than ceasing its application for one subsequent to the issuance of the Current CO; and

WHEREAS, the Respondent further contends that the instant appeal should be denied because it is untimely under the Board's Rules of Practice and Procedure; and

WHEREAS, §1-07(b) of the Board's Rules preclude consideration of an appeal that is filed more than thirty days from the date of a final determination by a relevant commissioner; and

WHEREAS, the Respondent contends that the date of the final determination which would serve as the basis of the appeal to be either the issuance of the Current CO on March 8, 2006, or DOB's letter of August 17, 2006 seeking a copy of the CNH, and that either date precedes the filing of the appeal by at least nine months; and

WHEREAS, DOB, in written and oral submissions to the Board, argues that it can never be

time-barred from reviewing a certificate of occupancy (see e.g., Matter of Parkview Assocs. v. City of New York, 71 N.Y.2d 274, 282 (1988) (mistake does not estop a government agency from correcting its errors) and that therefore § 1-07(b) of the Rules applies only to preclude untimely appeals to DOB determinations filed by affected parties, and

WHEREAS, at hearing, the Respondent stated that the Board's resolution in BSA Cal. No. 353-05-BZY supports its position that DOB's appeal is time-barred; and

WHEREAS, the Board finds that its resolution in BSA Cal. No. 353-05-BZY, a case which addressed the question of whether an owner was time-barred from seeking to renew a building permit and extend the time to complete construction, is entirely irrelevant to question of whether DOB would be time-barred from bringing an appeal; and

WHEREAS, accordingly, the Board finds that the instant appeal is not time-barred; and

Conversion Prior to 1983

WHEREAS, the Respondent states that while the building may have contained SRO units at one time, the units were reconfigured to class A apartments prior to the adoption of the Administrative Code § 27-198 governing conversions of SRO buildings; and

WHEREAS, the Respondent asserts that when it was purchased in a 1996 mortgage foreclosure sale, the subject building consisted of seven vacant class A apartments, each with a private kitchen and bathroom; and

WHEREAS, the Respondent further states that it was told by the mortgagee that the building had been converted to class A apartments at least ten years before DOB issued the Current CO, and possibly as much as 25 years earlier; and

WHEREAS, the Respondent asserts that it was therefore not responsible for an illegal conversion of the former SRO units to class A apartments; and

WHEREAS, at hearing, DOB testified that, if it could be proven that the property was altered prior to the 1983 adoption of the Code provisions, despite the absence of any issued permits or a valid certificate of occupancy, legalization of this work could be allowed without subjecting the application to the Code requirements, and a CNH would not be needed as part of the job permitting process; and

WHEREAS, at hearing, the Board asked the Respondent whether it could prove that the building was converted to rent stabilized Class A dwelling units prior to 1983 and suggested potential sources of documentation such as: pre-1983 DOB drawings/permits; registration documents from DHCR; documents from the foreclosure sale indicating the status of building use; affidavits from tenants, neighbors, employees, or former managers who could fix the date of conversion from SRO units to class A apartments; and/or HPD "I-Cards" documenting inspections performed at the subject building; and

WHEREAS, in response, the Respondent submitted affidavits from two individuals who lived in the neighborhood from at least 1980, who both attested that renovations resulting in the conversion of the building were completed in 1982; and

WHEREAS, DOB argues that affidavits cannot supersede certificates of occupancy to establish the legal use of a building; and

WHEREAS, the Board agrees that the affidavits are not particularly compelling because of their lack of specificity in the circumstances surrounding the alleged conversion; and

WHEREAS, to bolster an affidavit, the Respondent produced an affiant to testify at hearing who stated that she lived across from the subject building and knew the former building owner during the early 1980's; and

WHEREAS, the neighbor testified that she recalled seeing only the apartment on the first floor; she was therefore unable to corroborate the conversion of the ten SRO units to class A apartments prior to adoption of the relevant Code provisions; and

WHEREAS, through its staff, the Board suggested four additional sources of documentation that could demonstrate that the conversion of the building to Class A apartments took place before the 1983 adoption of the Code provisions; (i) a copy of DOB alteration application ALT 907-81 which is listed by DOB as having been filed with respect to the Subject Building; (ii) Coles Cross-Reference Directory telephone listings at the building; (iii) Con Edison documentation showing separate metering or accounts at the building; and (iv) rent rolls filed with DHCR; and

WHEREAS, the Respondent was unable to submit any additional evidence that the actual use of the building changed to a class A apartment building prior to the 1983 adoption of the Code provisions; and

WHEREAS, the Board has reviewed all the evidence submitted by the Respondent prior to and during the hearing process, and is not persuaded that the actual use changed prior to adoption of § 27-198 of the Administrative Code; and

Revocation of the Current CO

WHEREAS, DOB contends that revocation is the appropriate remedy to correct the improper issuance of the Current CO; and

WHEREAS, the Respondent argues that revocation is an extreme remedy that would create an illegal occupancy; and

WHEREAS, the Respondent further argues that the illegal occupancy would enable the current rent-stabilized tenants to avoid rent payments; and

WHEREAS, at hearing, the Board asked the Respondent to submit a brief on this issue, but the

Respondent declined to do so; and

WHEREAS, the Respondent also asserts that the illegal occupancy created by a revocation of the Current CO would make the building vulnerable to a vacate order; and

WHEREAS, at hearing, DOB testified that the agency would not issue a vacate order based solely on an illegal occupancy; that a vacate order would ensue only in response to a life safety condition –unlikely in this case in that DOB had signed off on the building's safety and construction inspections had not indicated any dangerous condition; and

WHEREAS, the Respondent also contends that the illegal occupancy of the building would trigger a default on mortgages covering the subject building as well as another building; and

WHEREAS, the Respondent claims that this is the case because its mortgage on the subject building contains a provision stating that it will be in default and subject to foreclosure if the occupancy of the building is contrary to law; and

WHEREAS, the Board notes that similar violations are common among New York City buildings and foreclosure for such a reason is rare, if not nonexistent; and

WHEREAS, to avoid the potential enumerated consequences, the Respondent has requested that the Board withhold a decision on the instant appeal pending its submission of another CNH application to HPD; and

WHEREAS, however, DOB contends that permitting the Current CO to remain in place would actually make it impossible to file a CNH application and to legalize the occupancy of the building; and

WHEREAS, DOB states that by law, HPD has no jurisdiction to process an application for a CNH for a building with a certificate of occupancy as a class A multiple dwelling and the Respondent would be unable to apply to and secure a CNH from HPD unless the 1971 CO were reinstated; and

WHEREAS, DOB cites to § 645(e) of the New York City Charter stating that "every certificate of occupancy shall, unless and until set aside, vacated or modified by the board of standards and appeals or a court of competent jurisdiction, be and remain binding and conclusive upon all agencies and officers of the city"; and

WHEREAS, DOB further notes that the procedures for the legal conversion of SRO units, set forth in §§ 27-2093 and 27-198 of the Administrative Code would therefore be inapplicable to the Subject Building if the Current CO as a class A multiple dwelling remained in place; and

WHEREAS, the Respondent further argues that revocation would be unjustified and inequitable because it has committed no wrong, and that the Board should therefore deny the instant appeal; and

WHEREAS, as an administrative agency, the Board is not empowered to grant equitable relief to the Respondent (see People ex rel. New York Tel. Co. v. Public Serv. Comm., 157 A.D. 156, 163 (3d Dep't 1913); see also Faymor Development Co. v Board of Standards and Appeals, 45 N.Y.2d 560, 565 (1978)); and

WHEREAS, since the Board lacks the powers of a court acting in equity, it cannot fashion a remedy that ignores the clear, unambiguous requirement of a CNH established by § 27-198 of the Administrative Code, no matter how persuasive the merits; and

WHEREAS, DOB testified that the revocation of the Current CO would reinstate the preexisting certificate of occupancy; and

WHEREAS, the Board therefore rejects the contention that revocation of the Current CO would be an inequitable or excessive remedy, noting that a revocation merely restores the Respondent to the same position it had before the Current CO was issued; and

Therefore it is Resolved, that the subject appeal, insomuch as the Board has determined both that the legal use of the premises is an SRO under Administrative Code § 27-198(a) (6), and, has determined that the record contains insufficient evidence showing that actual use of the subject building changed to Class A apartment prior to its enactment, the Board hereby grants the request by DOB to revoke a certificate of occupancy issued to the subject premises, on the basis that it improperly approved the conversion of single room occupancy ("SRO") units to class A apartment units.

Adopted by the Board of Standards and Appeals, April 1, 2008.

A true copy of resolution adopted by the Board of Standards and Appeals, April 1, 2008.
Printed in Bulletin Nos. 13-14, Vol. 93.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.