140-04-A
APPLICANT - Stuart A. Klein, Esq.
SUBJECT - Application March 25, 2004 - Appeal of Department of Buildings refusal to revoke approval and underlying permit for the subject premises which is occupied contrary to the existing Certificate of Occupancy and the Zoning Resolution.
BUSINESS ADDRESS of PREMISES OWNER - S.H.A.W.C HOUSING DEVELOPMENT FUND CORP. - 39 BOWERY STREET, Borough of Manhattan
APPEARANCES - None.
ACTION OF THE BOARD - Appeal denied.
THE VOTE TO GRANT -
Affirmative:.....0
Negative: Chair Srinivasan, Vice-Chair Babbar, Commissioner Miele, Commissioner Caliendo and Commissioner Chin:.....5
THE RESOLUTION -

WHEREAS, the instant appeal comes before the Board in response to a final determination, dated March 18, 2004, issued by the Brooklyn Borough Commissioner of the New York City Department of Buildings ("DOB") to counsel for certain individuals and a community organization (hereinafter, the "appellant"), who had requested revocation of a DOB alteration permit (the "Permit") allowing minor work at an existing building in Brooklyn in order to accommodate a domestic abuse survivors shelter (the "Shelter"); and

WHEREAS, said DOB determination states, in part:

> "This letter is written in response to your November 25, 2003 correspondence in which you request that the Department revoke the referenced permit. In your correspondence, you refer to statements made by the permit applicant's attorney . . . during recent litigation brought against the applicant and the Department. Your correspondence argues that [the permit applicant's attorney's] statements to the court are at odds with the application and current certificate of occupancy ("CO") and that the discrepancy is a basis for revocation of the permit.
>
> Your claim does not present the Department with cause to revoke the permit pursuant to authority set forth at New York City Administrative Code ("AC") § 27-197. First, you do not allege that approved and permitted application documents fail to comply with the AC, New York City Zoning Resolution ("ZR") or other applicable law. According to the Department's review, the application's proposed use and occupancy of the premises conform with the CO that allows four families to occupy the building. Contrary to the claim in your January 12, 2004 letter to the Department, the application PW-1 form does not propose a change in the classification of the premises from occupancy group J-2 to J-1.
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> Second, a comparison between the application and Ms. Hadberg's statements to the court does not establish a false statement or misrepresentation as to a material fact in the application. According to the portion of the court transcript enclosed with your January 12th letter, [the permit applicant's attorney] stated that six to eight families and a maximum of 18 people, with just over four people per floor, will occupy the premises. While these statements present an ambiguity as to whether future occupancy of the premises will conform to the limitations of the CO and applicable law, the application documents and plans do not contain any indication that the occupancy resulting from the permitted work will be unlawful. The application proposes a lawful occupancy of the premises consistent with the four-family occupancy allowed by the CO. The ambiguity presented by [the permit applicant's attorney's] statements leaves the Department without an adequate basis to find that the applicant made a knowingly false statement in the application in violation of AC §26-124.
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> The two examples you offer in support of your argument are not persuasive. The Department may properly issue letters of intent to revoke a permit upon receipt of a challenge to an application that proposes a use that contravenes a provision of the ZR, as in your example of a non-conforming use that was discontinued for a continuous period of more than two years, or to an application lacking support for classification within a certain use group, as in your example of an alleged school dormitory Use Group 3 community facility. Those examples regard defects in the application itself, and are not based on a claim that a future use will be contrary to law, permit or CO. Therefore, your request does not set forth a sufficient basis for revocation of the permit."; and

WHEREAS, appellant, DOB, and Shelter counsel agreed that in order to keep the actual address of the Shelter facility confidential, the hearings on the instant matter would be closed and the record would not be made available to anyone aside from the parties to the proceeding; and

WHEREAS, the subject premises is located within an R4 zoning district, and is occupied by a Class A four family, three-story with basement and cellar multiple dwelling (the "Existing Building");

and

WHEREAS, pursuant to Multiple Dwelling Law ("MDL") §4(8), a Class A multiple dwelling is considered to be a dwelling occupied for permanent residential purposes; and

WHEREAS, a Class A Multiple Dwelling is analogous to a dwelling classified in Occupancy Group J-2, as defined by Section 27-265 of the City's Building Code (Titles 26 and 27 of the Administrative Code of the City of New York); and

WHEREAS, Building Code §27-265 provides that Occupancy Group J-2 "[s]hall include buildings and spaces that are primarily occupied for the shelter and sleeping accommodation of individuals on a month-to-month or longer term basis"; and

WHEREAS, the certificate of occupancy for the Existing Building (the "CO") permits "ordinary use" in the cellar, and one family each on the first, second and third floors and in the basement; and

WHEREAS, the application for the Permit, as filed with DOB, proposed no change in occupancy, use or egress in the Existing Building; and

WHEREAS, the Permit application sought DOB authorization to make minor revisions to the internal layout of the Existing Building, install new fireproof self-closing doors, replace an existing fire escape, and replace 20 percent of damaged joists in the basement; and

WHEREAS, subsequent to issuance of the Permit, certain parties, some of whom are the appellants in the instant matter, petitioned for injunctive relief in the Supreme Court of the State of New York, Kings County, seeking to enjoin use and occupancy of the Existing Building by the Shelter and performance of the construction work pursuant to the Permit; and

WHEREAS, the court dismissed the petition because administrative remedies had not been exhausted; and

WHEREAS, appellant then filed the instant appeal; and

WHEREAS, appellant makes three primary arguments: (1) that statements made by counsel to the Shelter in the court proceeding (hereinafter "Shelter Litigation counsel") and by other Shelter representatives allegedly indicated an intent on the part of the Shelter to occupy the Existing Building in a manner contrary to the CO; (2) the proposal to use the Existing Building as a shelter violates use provisions of the Zoning Resolution; and (3) the proposal violates Local Law 10 of 1999, which concerns the provision of automatic sprinkler systems; and

WHEREAS, appellant contends that based upon the above arguments, DOB should have revoked the Permit; and

WHEREAS, as presented by appellant, the first argument has two components; specifically, that the statements by Shelter representatives indicated: (1) that the number of families proposed to occupy the Shelter will exceed that permitted by the CO; and (2) that the Shelter will be occupied on a temporary, not permanent, basis, which is not allowed by the CO; and

WHEREAS, as to the first component, appellant cites to the following statements, which were made on the record in the court proceeding by Shelter Litigation counsel: "and the idea is that there will be six to eight families in total among the four units" and "[the] definition of family under zoning rules is not more than four unrelated persons is (sic) occupying a dwelling living together and maintaining a common household"; and

WHEREAS, pursuant to MDL §4(5), the term "family" is defined as: "[E]ither a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintained a common household, with not more than four boarders, roomers, or lodgers"; and

WHEREAS, pursuant to Building Code §27-232, the term "family" is defined as: "A single individual; or two or more individuals related by blood or marriage or who are parties to a domestic partnership, and living together and maintaining a common household, with not more than four boarders, roomers or lodgers; or a group of not more than four individuals, not necessarily related by blood, marriage or because they are parties to a domestic partnership, and maintaining a common household"; and

WHEREAS, the architect who filed the Permit application with DOB on behalf of the Shelter operators (hereinafter, the "Shelter architect") testified that she discussed the legal definitions of the term "family" with the Shelter operators and that the operational program as proposed for the Shelter will comply with such definitions; and

WHEREAS, the Shelter architect submitted to the Board a memorandum that confirms her prior statements that the permit application proposed a use and occupancy of the Existing Building that is fully consistent with the CO and applicable laws; and

WHEREAS, Shelter counsel states that there was never an intent to occupy the Existing Building in violation of the CO or any applicable law; and

WHEREAS, Shelter Litigation counsel testified that when she made the statement about "six to eight families" during the court proceeding, she meant a situation where there was a mother and child living with a mother and either a single child or two children on one floor (i.e. two genetic families per floor living as one legal family), and that the Shelter operator was aware of the legal definition of family; and

WHEREAS, the Board finds this explanation credible and sufficient, in light of the applicable laws;

and

WHEREAS, the Board notes that the license for the Shelter issued by the New York State Office of Children and Family Services ("NYSOCF"), dated April 7, 2004, indicates that the facility is to have 20 beds total, over 4 habitable floors, which would allow the type of situation discussed by Shelter Litigation counsel; and

WHEREAS, the Board finds that six to eight genetic families could reside in a four-family multiple dwelling such as the Existing Building and nevertheless meet the legal definition of the term "family" under the applicable laws, given that the laws allow for families to be comprised of unrelated individuals in certain configurations, or one set of related individuals residing with another set of related individuals; and

WHEREAS, the Board also finds that the DOB-approved plans show a configuration on each self-contained habitable floor whereby occupants would share a kitchenette and bathroom, which is indicative of a layout designed for maintenance of a common household; and

WHEREAS, the Board further finds that appellant's assertion that the statements of the Shelter Litigation counsel indicate an intent on the part of the Shelter operator to occupy the Existing Building contrary to the CO to be mere speculation; and

WHEREAS, DOB states that, upon review, the statements of the Shelter Litigation counsel in the court proceeding do nothing more than raise an ambiguity as to how the Existing Building may be operated in the future when occupied by the Shelter; and

WHEREAS, DOB also states that its review of the Permit application revealed no indication that the occupancy resulting from the proposed work would be inconsistent with the CO or any applicable law, in that the application did not, on its face, propose any change in the number of families that will occupy the existing building; and

WHEREAS, DOB considered the statements of the Shelter Litigation counsel and compared them to the representations made by the Shelter architect in the Permit application and, because the Shelter Litigations counsel statements were deemed ambiguous at best, concluded that the application did not contain knowingly or unintentionally false statements, which, pursuant to Building Code §26-124, would subject the Shelter architect to misdemeanor charges and civil penalty; and

WHEREAS, DOB further determined that the statements of the Shelter Litigation counsel did not warrant revocation under the permit pursuant to Building Code §27-197; and

WHEREAS, DOB states that Building Code §27-197 allows DOB to revoke permits and application approvals under three general circumstances: 1) forgery of an owner's or applicant's signature; 2) a substantive violation contained in an application that is certified by an architect or engineer as complying with all applicable law; and 3) where substantively different applications are concurrently filed with the Department and another City agency that are purportedly for the same work; and

WHEREAS, DOB argues that the facts as presented by appellant do not fall under any of these three categories, and that as a result, it is without authority to revoke the permit; and

WHEREAS, the Board agrees that DOB did not have the statutory authority to revoke the Permit on the basis of the Shelter Litigation counsel's statements in the court proceeding; and

WHEREAS, the second component of appellant's first argument is that the Existing Building will be used for temporary occupancy by the Shelter, which would be contrary to the CO; and

WHEREAS, in support of this contention, appellant claims that Shelter officials made representations to members of the immediate community that it intended to provide only temporary, emergency shelter to the proposed occupants, with length of stays averaging one to two weeks; and

WHEREAS, appellant also cites screen print-outs from a web-site run by the Shelter operator, submitted into the record, which state that the Shelter offers a "temporary" place to stay; and

WHEREAS, appellant maintains that these representations indicate that the Shelter sought to occupy the existing building as Occupancy Group J-1; and

WHEREAS, Building Code §27-264 provides that Occupancy Group J-1 "[s]hall include buildings and spaces that are primarily occupied for the shelter and sleeping accommodation of individuals on a day-to-day or week-to-week basis"; and

WHEREAS, appellant argues that such a change in occupancy is contrary to the CO, and therefore violates Building Code §27-217, which provides that no change shall be made in the use or occupancy of an existing building that is inconsistent with the last issued certificate of occupancy for such building unless a new certificate of occupancy is issued by DOB; and

WHEREAS, DOB states that the Permit application contained no indication that the duration of occupancy at the premises would be day-to-day or week-to-week; and

WHEREAS, DOB also states that the web-site representation fails to establish a J-1 occupancy of the premises, as the word "temporary" could encompass month-to-month accommodation, which is Occupancy Group J-2; and

WHEREAS, the Board notes that there is no evidence in the record that the Shelter operator was

using the word "temporary" in its web-site description of the Shelter as a term of art, or in any way intended to bind itself through this representation to providing stays of only one to two weeks duration; and

WHEREAS, Shelter counsel states that the length of occupancy by the typical Shelter resident will likely be comparable to that of other shelters run by the Shelter operator, in the range of approximately 130 days (or about four months); and

WHEREAS, in support of this statement, in a submission dated July 14, 2004, Shelter counsel submitted materials published by the Shelter operator concerning two other comparable shelters, and the average length of stay for each; and

WHEREAS, the Shelter architect testified that in conversations she had with the Shelter operator and she was informed that the typical length of stay would be for a month or possibly longer; and

WHEREAS, Shelter counsel represents that the Shelter operator chose the particular residential neighborhood in question because it is safe and appropriate for longer-term stays, given that it is located in a good school district and provides residents with access to mass transportation; and

WHEREAS, based upon the above, the Board finds that there is no indication in the record that the Existing Building will be primarily occupied for the shelter and sleeping accommodation of individuals on a day-to-day or week-to-week basis; and

WHEREAS, instead, the Board finds that the evidence supports the Shelter's assertion that the typical intended length of stay for an occupant is one month or more; and

WHEREAS, therefore, the Board disagrees with appellant's contention that the Existing Building will be used primarily for temporary occupancy; and

WHEREAS, accordingly, the Board finds that appellant's first argument - that the Existing Building will be occupied by more families and for a period of time than what it is allowed by the CO - is without merit, and does not support the claim that the Permit must be revoked by DOB; and

WHEREAS, appellant's second argument is that the Shelter proposal, because it actually contemplates temporary, and not permanent, occupancy, should have been classified in Use Group 5, "Transient Hotel", pursuant to Z.R. §32-14; and

WHEREAS, because, as noted above, the Board finds that the occupancy of the existing building by Shelter clients will not be on a primarily temporary basis, this argument fails; and

WHEREAS, moreover, the Board notes that other similar shelters are located as-of-right in residential districts without commercial overlays, as evidenced by data presented by Shelter counsel (Shelter counsel submission, June 9, 2004, Exhibit G "Shelter-Type Establishments Located Within Residential Zoning Districts"); and

WHEREAS, Shelter counsel states, and the Board agrees, that the Shelter does not have twenty-four hour desk service, and therefore does not meet the definition of "Transient Hotel" as set forth in Z.R. §12-10, which requires that such desk service be provided; and

WHEREAS, the Board notes that the appellant did not obtain a final determination from the DOB as to the third argument, that occupancy of the Existing Building by the Shelter violates Building Code §27-954(t) (which codifies Local Law 10 of 1999); and

WHEREAS, accordingly, the issue is not properly before the Board; and

WHEREAS, in sum, the Board finds appellant's arguments in response to the final DOB determination dated March 18, 2004 unpersuasive, and, on this basis, concludes that denial of the instant appeal is warranted; and

WHEREAS, appellant's initial submission to the Board presented other arguments - namely, that the Existing Building is not suitable to meet the programmatic needs of the Shelter and that the Board must revoke the CO because failure to do so will expose the City to tort liability - which the Board finds irrelevant to the instant appeal, and for which appellant did not obtain a final determination from DOB; and

WHEREAS, at hearing, appellant raised an argument concerning Building Code §27-215; and

WHEREAS, Building Code §27-215 provides, in part: "[N]o building hereafter altered so as to change from one occupancy group to another, either in whole or in part, or so as to affect any existing means of egress, or so as to increase the number of habitable rooms in the building, and no building hereafter altered for which a certificate of occupancy has not theretofore been issued, shall be occupied or used unless and until a certificate of occupancy shall have been issued certifying that the alteration work for which the permit was issued has been completed substantially in accordance with the approved plans and the provisions of this code and other applicable laws and regulations."; and

WHEREAS, applicant argues that plans submitted with the Permit application show that the number of habitable rooms increased in the Existing Building; and

WHEREAS, the Board finds that this argument was also not the subject of a final DOB determination and, therefore, it is not properly before the Board; and

WHEREAS, during the course of the public hearing on the instant appeal, appellant asked the Board to subpoena New York City Fire Department Lieutenant Thomas Coleman, who had inspected the premises and issued a report on December 22, 2003, pursuant to normal procedures, in order for him to provide testimony about his observations and

conclusions; and

WHEREAS, FDNY Deputy Chief Inspector Anthony Scaduto testified before the Board that that senior officials of the FDNY's Bureau of Fire Prevention ("BFP") did not concur with the Lieutenant's recommendation, though the inspection observations were taken into account; and

WHEREAS, Inspector Scaduto testified that the official FDNY position was reflected in a letter from the BFP, dated February 23, 2004, which states that "the requirements of all laws, regulations, etc. under the jurisdiction of the Fire Department have been complied with."; and

WHEREAS, Inspector Scaduto also testified that the initial inspection by the Lieutenant is the first step in a long-term process, and does not constitute a final FDNY determination; and

WHEREAS, Inspector Scaduto further testified that the experts in the BFP review the initial inspection report, but make a final determination on other considerations beyond what is contained in the report; and

WHEREAS, the Board notes that it is not uncommon for inspector level recommendations to be later overruled or modified by senior officials within an agency, and observes that the evaluation of the Lieutenant's observations and recommendations by the BFP was per procedure; and

WHEREAS, in a letter dated June 30, 2004, Chair Srinivasan wrote to appellant and stated that the Board would not issue a subpoena to Lieutenant Coleman because his observations as set forth in the December 22, 2003 inspection report were already in the record, and any testimony he provided as to his conclusions would not reflect the official FDNY position¸ which was set forth in the February 23, 2004 letter from the BFP; and

WHEREAS, appellant also requested that the Board issue a subpoena duces tecum to the Shelter operator in order to obtain license application materials filed with NYSOFS on the basis that they would indicate an intent to occupy the existing building in a manner contrary to the CO; and

WHEREAS, the Board had before it no evidence whatsoever that the materials contained such information, and, more importantly, the Board has no Charter authority to subpoena documents; and

WHEREAS, accordingly, the Board, in it June 30 letter, informed appellant that it could not issue a subpoena duces tecum to NYSOFS; and

WHEREAS, the Board then granted leave to the appellant to issue its own subpoena duces tecum to the Shelter operator, and the Board set a delayed decision date so that the subpoena issue could be resolved prior to a decision; and

WHEREAS, appellant subsequently submitted a letter to the Board, dated September 8, 2004, stating that the Shelter operator did not respond to the subpoena duces tecum, on the basis that the application materials were shielded under law; and

WHEREAS, appellant also stated in this letter that the Board was not empowered to decide the efficacy of the subpoena or the Shelter operator's objection thereto, and that appellant therefore had no objection to the Board rendering its determination; and

WHEREAS, also during the course of the public hearing, appellant asked the Board to conduct a site visit of the Existing Building; and

WHEREAS, the Board was aware that DOB and FDNY had inspected the site numerous times, and that neither agency observed conditions that were contrary to the CO; and

WHEREAS, the Board notes that the basis of the instant appeal was that the Permit application contained incorrect information as evidenced by statements made by Shelter Litigation counsel at the court proceeding, and that a site inspection would not assist the Board in determining the validity of this claim; and

WHEREAS, therefore, the Board declined to conduct a site inspection; and

WHEREAS, the Board observes that if appellant is concerned that there may be a violation of an applicable law at the Existing Building, including occupancy contrary to the CO, then a complaint and inspection request may be made to DOB; and

WHEREAS, based upon the foregoing, the Board finds that there is no basis for revocation of the Permit by DOB.

Therefore, it is resolved that the final determination of the New York City Department of Buildings, dated March 24, 2003, is upheld and this appeal is denied.

Adopted by the Board of Standards and Appeals, September 14, 2004.

A true copy of resolution adopted by the Board of Standards and Appeals, September 14, 2004.
Printed in Bulletin Nos. 36-38, Vol. 89.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.