

**189-10-A**

APPLICANT – Bracewell & Giuliani, LLP on behalf of Chelsea Business & Property Owners, for 127 West 25<sup>th</sup> LLC, owner; Bowery Residents’ Committee, Incorporated, lessee.

SUBJECT – Application October 8, 2010 – Appeal challenging the Department of Buildings’ interpretation that the proposed use is a transient hotel. M1-6 zoning district.

PREMISES AFFECTED – 127-131 West 25<sup>th</sup> Street, between 6<sup>th</sup> and 7<sup>th</sup> Avenue, Block 801, Lot 21, Borough of Manhattan.

**COMMUNITY BOARD #4M**

**APPEARANCES –**

For Applicant: Daniel S. Connolly.

**ACTION OF THE BOARD –** Application Denied.

**THE VOTE TO GRANT –**

Affirmative:.....0

Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez .....5

**THE RESOLUTION: 1**

WHEREAS, this appeal comes before the Board in response to a final determination letter from the Manhattan Borough Commissioner of the Department of Buildings (“DOB”), dated September 9, 2010 (the “Final Determination”); and

WHEREAS, the Final Determination was issued in response to a request by a representative of the Chelsea Flatiron Committee, a group of area residents and businesspeople (the “Appellant” or “CFC”), to revoke DOB Permit No. 120288054 (the “Permit”) issued to the Bowery Residents’ Committee, a lessee/not-for-profit transitional housing and service provider (“BRC”) for the conversion of a 12-story building at 127-131 West 25<sup>th</sup> Street (the “Building”) into a homeless shelter and offices; and

WHEREAS, this appeal challenges DOB’s use classifications of the two proposed components of the Building and the resultant determination that the proposal complies with zoning and other relevant regulations; and

WHEREAS, the Final Determination reflects DOB’s position that the proposed uses are Use Group 5 Transient Hotel and Use Group 6 Professional Office, both of which are permitted as of right in the subject M1-6 zoning district; the Appellant asserts that the appropriate use classification is Use Group 3 Non-Profit Institution with Sleeping Accommodations and either Use Group 3 Health Related Facility or Use Group 4 Ambulatory Diagnostic or Treatment Health Care Facility, none of which are conforming uses in an M1-6 zoning district; and

WHEREAS, the Final Determination provides in pertinent part:

The Department of Buildings (the “Department”) is in receipt of your letter dated

September 2, 2010 in which you request the revocation of Permit No. 120288054 (the “Permit”) issued by the Department based on Alteration Type-1 Application No. 120288054 (the “Application”) for 127 West 25<sup>th</sup> Street, New York, NY. The Department has conducted a review of the construction documents submitted with the Application and has determined that the Permit was lawfully issued; and

WHEREAS, a public hearing was held on this appeal on March 1, 2011, after due notice by publication in *The City Record*, and then to decision on April 5, 2011; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and

WHEREAS, the Appellant, BRC, and DOB were represented by counsel in this proceeding; and

**THE PROPOSAL**

WHEREAS, the subject site is within an M1-6 zoning district and is occupied by a 12-story factory building that BRC proposes to convert to a homeless shelter and professional offices; and

WHEREAS, the DOB-approved plans reflect the following program: Cellar: Offices, Storage, Mechanical/Electrical Room, Laundry Room – Use Group 5; 1<sup>st</sup> Floor: Kitchen – Use Group 5 and Retail Space, Office – Use Group 6; 2<sup>nd</sup> Floor: Dining, Servery Station – Use Group 5; 3<sup>rd</sup> to 9<sup>th</sup> Floors: Lodging House – Use Group 5 and Offices – Use Group 6; 10<sup>th</sup> to 12<sup>th</sup> Floors: Offices – Use Group 6; and

WHEREAS, BRC provided the following supplementary information about the Building’s use and occupancy to support its application to DOB; the information reflects that the Building will include: (1) a 32-bed Chemical Dependency Crisis Center serving men and women of all ages who have a history of addiction and who are seeking to attain or maintain sobriety, on the third floor; (2) a 96-bed Reception Center serving homeless men and women of all ages who have a history of mental illness and who are seeking to attain or maintain stability in their mental health on the fourth and fifth floors; (3) a 200-bed Shelter serving homeless men of all ages who have a history of mental illness and who are seeking to attain or maintain stability in their mental health on the sixth through ninth floors; (4) an outpatient Substance Abuse Center serving approximately 65 men and women daily; and (5) an outpatient Continuing Day Treatment program serving approximately 35 men and women daily, who have a history of mental illness; and

1 Headings are utilized only in the interest of clarity and organization.

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**PROCEDURAL HISTORY**

WHEREAS, on December 23, 2009, BRC submitted a request for a zoning resolution determination (a “ZR1”) that the proposed homeless shelter was permitted as an as-of-right Use Group 5 Transient Hotel in the M1-6 zoning district; and

WHEREAS, on January 4, 2010, DOB issued a determination that “a transient facility with multiple beds rented to different individuals or families located within the same dwelling unit (per the Housing Maintenance Code [HMC] § 27-2004(a)(27)) can be appropriately classified as Use Group 5 ‘transient hotel’ pursuant to the ZR and, as such, may be located in the subject M1-6 district;” and

WHEREAS, on March 9, 2010, BRC filed an application, based on DOB’s approval of the proposed uses, pursuant to the PW1A: Schedule A – Occupancy Use form (“Schedule A”), which reflected the following: Cellar: Offices, Storage, Mechanical/Electrical Room, Laundry Room – Use Group 5; 1<sup>st</sup> Floor: Retail Space, Kitchen, Offices – Use Group 5; 2<sup>nd</sup> Floor: Dining – Use Group 5; 3<sup>rd</sup> Floor to 9<sup>th</sup> Floor: Offices, Lodging House – Use Group 5; 10<sup>th</sup> Floor to 12<sup>th</sup> Floor: Offices – Use Group 5; and

WHEREAS, on June 24, 2010, DOB approved the application and on July 9, 2010 issued the Permit; and

WHEREAS, on June 28, 2010, DOB received a complaint from the Appellant alleging that the classification of the use as a Use Group 5 Transient Hotel was improper and, further, that the approved application and plans were not consistent with information being disseminated to the public from BRC or with documents submitted by BRC to other city, state, and federal agencies; and

WHEREAS, based on the Appellant’s complaint, DOB conducted a review of the application and BRC provided additional information about the proposed use of the site, including the information about the programs, noted above; and

WHEREAS, on August 4, 2010, BRC filed amended plans, which reflect that a firewall will separate the sleeping accommodations from the offices and that separate entrances and elevator access is provided for each use, and an amended Schedule A, which identifies the uses as Use Group 5 Transient Hotel and Use Group 6 Professional Offices; and

WHEREAS, the amended Schedule A contains the following note: “Floors occupied by lodging house (Use Group 5) and Professional Offices (Use Group 6) are separated by fire-rated walls equipped with alarmed, fireproofed self-closing doors;” and

WHEREAS, on August 5, 2010, DOB approved the amended plans; and

WHEREAS, the Appellant initiated an action against the Department of Homeless Services (DHS), DOB, the Department of Housing Preservation and

Development (HPD), BRC, and others in New York State Supreme Court (Chelsea Business & Property Owners’ Association LLC v. City of New York et al, Index No. 113194/10); the case is ongoing, but the court determined that the Appellant must exhaust its administrative remedies for its claims related to DOB permits and zoning issues and, thus, the Appellant filed its case at the Board; and

**RELEVANT STATUTORY PROVISIONS**

**ZR § 12-10 (Definitions)**

A transient hotel is a building or part of a building in which:

- (a) living or sleeping accommodations are used primarily for transient occupancy, and may be rented on a daily basis;
- (b) one or more common entrances serve all such living or sleeping units; and
- (c) twenty-four hour desk service is provided, in addition to one or more of the following services: housekeeping, telephone, or bellhop service, or the furnishing or laundering of linens.

Permitted accessory uses include restaurants, cocktail lounges, public banquet halls, ballrooms, or meeting rooms.

\* \* \*

**ZR § 11-22 (Applications of Overlapping Regulations)**

Whenever any provision of this Resolution and any other provisions of law, whether set forth in this Resolution or in any other law, ordinance or resolution of any kind, impose overlapping or contradictory regulations over the #use# of land, or over the #use# or #bulk# of #buildings or other structures#, or contain any restrictions covering any of the same subject matter, that provision which is more restrictive or imposes higher standards or requirements shall govern . . .

\* \* \*

**ZR § 22-00 (Use Regulations – General Provisions) also ZR §§ 33-00, 42-00)**

. . . Whenever a use is specifically listed in a Use Group and also could be construed to be incorporated within a more inclusive listing, either in the same or another Use Group, the more specific listing shall control . . .; and

**THE APPELLANT’S POSITION**

WHEREAS, the Appellant asserts that DOB’s acceptance of the proposed homeless shelter and offices as part Use Group 5 Transient Hotel and part Use Group 6 Professional Offices is erroneous in that the facility should appropriately be characterized as Use Group 3 Non-Profit Institution with Sleeping Accommodations and either Use Group 3 Health Related

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Facility or Use Group 4 Ambulatory Diagnostic or Treatment Health Care Facility; and

WHEREAS, the Appellant's primary assertions are that (1) the plain meaning of the word "hotel" dictates that the facility is not a transient hotel, (2) the proposed sleeping accommodations are a non-profit institution with sleeping accommodations, (3) the proposed facility cannot be classified alternately as Use Group 5 or Use Group 3 depending on which zoning district it is in, (4) if the offices are not Use Group 3, then they should be classified as Use Group 4 Ambulatory Diagnostic or Treatment Health Care Facility, (5) the Building cannot be a Lodging House under the Multiple Dwelling Law (MDL) and Housing Maintenance Code (HMC) and a transient hotel per zoning, and (6) the occupancy exceeds that permitted by Administrative Code § 21-312; and

1. The Definition of Hotel

WHEREAS, the Appellant asserts that the proposed facility is not a hotel according to (1) the plain meaning of "hotel," (2) the ZR or other statutory framework, and (3) prior Board determinations; and

WHEREAS, the Appellant asserts that in evaluating the meaning of "hotel," one must analyze the term hotel, which means more than just "transient accommodations;" and

WHEREAS, the Appellant cites to case law and the principles of statutory construction for the principle that "statutory language [be] interpreted according to its natural and obvious sense without resorting to an artificial or forced construction" City of New York v. Stringfellow's of N.Y., 253 A.D.2d 110, 115-16 (1<sup>st</sup> Dep't 1999); and

WHEREAS, accordingly, the Appellant asserts that a homeless shelter is not commonly understood to be a hotel and that fact cannot be ignored when classifying a homeless shelter for zoning purposes; and

WHEREAS, the Appellant asserts that DOB and BRC strain the definition of hotel and negated any import of having the word "hotel" in the ZR definition; and

WHEREAS, the Appellant asserts that the ZR definition is for "hotel, transient," so the "hotel" aspect is first and foremost and cannot be ignored; the Appellant asserts that the ZR presents the definition this way so as to distinguish transient hotels from other kinds of hotels, such as "apartment hotels," which are also defined; and

WHEREAS, the Appellant states that the common understanding of what a hotel is cannot be ignored and that the inclusion of any use that may meet the criteria of the ZR § 12-10 definition of hotel would lead to absurd results; and

WHEREAS, the Appellant states that the ZR does not require any temporary provision of sleeping accommodations that also has front-desk and laundry

service to be classified as a Use Group 5 Transient Hotel; and

WHEREAS, the Appellant asserts that a use is not a transient hotel, even when it meets the criteria of the ZR § 12-10 definition, if it is not commonly understood to also be a "hotel;" and

WHEREAS, the Appellant asserts that any analysis of the "transient hotel" definition that fails to first resolve whether the facility is a hotel, as commonly understood, will lead to an unreasonable or absurd application of the law; and

WHEREAS, the Appellant cites to a case in which residents of an adult care facility sought to establish that the facility was subject to the Rent Stabilization Law for instruction on how to interpret "hotel" (Fischer v. Taub, 127 Misc.2d 518, 525 (1<sup>st</sup> Dep't 1984)); in Fischer, the facility was determined not to be a hotel, and the court stated that "a facility is the sum of its parts and not a manifestation of any one of them;" and

WHEREAS, the Appellant asserts that, based on Fischer, merely satisfying the ZR § 12-10 criteria (including the provision of a reception desk and housekeeping) does not, in and of itself, establish that the Building is proposed to be used as a conforming Use Group 5 Transient Hotel; rather, when the facility is looked at as a whole, which includes counseling services, medical care, and rooming units, the proposed use is not consistent with a hotel; and

WHEREAS, however, the Appellant asserts that even if the ZR § 12-10 definition of transient hotel were to apply, the use is not transient, if the definition of transient as applied by DOB is that stays are for 30 days or less; and

WHEREAS, the Appellant cites to documentation that BRC has released which states that occupants of the homeless shelter may stay for as long as nine months and beyond, upon approval from the DHS; and

WHEREAS, as to the Board's prior decisions, the Appellant cites to a number of variance cases in which homeless shelters or similar facilities were identified as Use Group 3, for precedent that the Board has considered and accepted Use Group 3 as the appropriate classification for such use; and

WHEREAS, accordingly, the Appellant asserts that the proposed use is neither a hotel, if one applies the common understanding of what a hotel is, nor transient, because BRC materials reflect that stays could last for nine months or longer; and

2. The Appropriate Use Group Classification for the Sleeping Accommodations

WHEREAS, the Appellant asserts that the Building should be classified as a Use Group 3 Non-Profit Institution with Sleeping Accommodations, pursuant to ZR § 22-13 because there is a connection between BRC's purpose and the facility's sleeping accommodations; and

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WHEREAS, the Appellant states that because the sleeping accommodations are part of the facility's overall not-for-profit purpose, the facility must be characterized as a Use Group 3 Non-Profit Institution with Sleeping Accommodations; and

WHEREAS, the Appellant notes that DOB identified the facility as Use Group 3, and not Use Group 5, before BRC added the wall to provide a physical separation between the two components of the Building; and

WHEREAS, the Appellant notes that DOB stated that the facility could not be both Use Group 3 and Use Group 5; and

WHEREAS, the Appellant finds that there is a nexus between the social service programs offered in the offices and the sleeping accommodations, despite the physical separation, and, thus, the use must be classified as Use Group 3; and

WHEREAS, the Appellant cites to the Board's decision in BSA Cal. No. 307-06-A (the "Youth Hostel Case") (a case in which the Board upheld DOB's determination that a youth hostel was a Use Group 5 use in part because there was no nexus between the program and the provision of sleeping accommodations) in support of its assertion that when there is a "clear" or "reasonable nexus between the not-for-profit purpose and [the] provision of sleeping accommodations," the use is Use Group 3, rather than Use Group 5; and

WHEREAS, the Appellant cites to information released by and about the facility, which describes the interrelation between the social services and the sleeping accommodations; and

WHEREAS, the Appellant notes, specifically, that there will be a 24-hour inpatient detoxification program onsite, which necessarily draws a connection between the two uses in the Building; and

WHEREAS, the Appellant cites to contracts between BRC and DHS about the provision of services to the occupants of the homeless shelter; and

WHEREAS, the Appellant is also concerned that DOB initially identified the facility as a Use Group 3 use but that BRC later, at DOB's direction, added measures to create a physical separation between the two portions of the Building while maintaining the initially proposed program; and

**3. The Limitations on Use Group Classification**

WHEREAS, the Appellant relies on statutory interpretation principles to conclude that the facility cannot be Use Group 5 and, in the alternate, Use Group 3, as set forth in (1) New York State case law and (2) ZR provisions; and

WHEREAS, as to New York State case law, the Appellant asserts that to permit a building or proposed development to be within two use groups at the same time would render the existence of use groups superfluous and meaningless; and

WHEREAS, the Appellant asserts that statutory construction principles assume that every provision of a statute is intended to serve some useful purpose, *See Crimmins v. Dennison*, 12 Misc. 3d 725, 729-30 (Sup. Ct. N.Y. Cty. 2006) (quoting *Allen v. Stevens*, 15 E.H. Smith 122, 145 (1899)) and that every statute should be construed to avoid rendering language superfluous; and

WHEREAS, the Appellant cites to *Manton v. Board of Standards and Appeals*, 117 Misc.2d 255, 265 (Sup Ct. Queens Cty) which states that "[t]he plan of the Zoning Resolution is to classify and list all permissible uses of land in 'Use Groups,' and to then specify which districts the various use groups may be located;" and

WHEREAS, the Appellant states that Use Group 3 Non-Profit Institutions with Sleeping Accommodations are prohibited in manufacturing districts and that Use Group 5 Transient Hotels are prohibited in residential districts, thus allowing an applicant to identify a facility as either Use Group 3 or Use Group 5, depending on which zoning district it is in would negate the ZR restrictions and run contrary to the legislature's intent; and

WHEREAS, the Appellant asserts that the possibility of identifying a specific use in more than one use group category renders the distinctions of use groups meaningless; and

WHEREAS, the Appellant cites to the Board's decision in the Youth Hostel Case for support of the position that the Board recognizes distinctions between uses and use groups so that applicants cannot "impermissibly locate . . . facilities in districts where such uses would otherwise be prohibited;" and

WHEREAS, the Appellant also expressed concern about multiple use group classifications leading to inconsistent application of the ZR and that parties should be discouraged from choosing one use group classification over another depending on the applicable zoning district; and

WHEREAS, as to instruction from the ZR, the Appellant cites to the preambles of ZR chapters (for example, ZR § 22-00) which state that "[w]henver a use is specifically listed in a Use Group and could also be construed to be incorporated within a more inclusive listing, either in the same or another Use Group, the more specific listing shall control;" and

WHEREAS, the Appellant asserts that Use Group 3 Non-Profit Institution with Sleeping Accommodations is more specific than Use Group 5 Transient Hotel, so the former is the controlling use group classification; and

WHEREAS, the Appellant cites to ZR § 11-22 (Applications of Overlapping Regulations) for a similar principle that, even if the facility could also be classified as a Use Group 5 Transient Hotel, Use Group

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3 Non-Profit Institution with Sleeping Accommodations is more restrictive and should control; and

4. The Appropriate Classification for the Use Group 6 Professional Offices

WHEREAS, initially, the Appellant asserted that the proposed Use Group 6 Professional Office use must be classified as a mix of Use Group 3 Health Related Facility and a Use Group 3 Domiciliary Care Facility for Adults pursuant to ZR § 22-13 because there will be nurses, doctors, and medical professionals present in the building to assist in counseling of BRC's clients, including occupants of the shelter; and

WHEREAS, the Appellant asserted that because the sleeping accommodations portion of the Building should be classified as Use Group 3, the social service program, given its nexus to the sleeping accommodations, should be classified as Use Group 3 as well; and

WHEREAS, in the alternate, the appellant asserted that the offices were not consistent with Use Group 6 Professional Offices and should rather be classified as Use Group 4 Ambulatory Diagnostic or Treatment Health Care Facility use, given the presence of medical personnel, among other factors; and

WHEREAS, in a later submission, after DOB noted a ZR text amendment which now includes Ambulatory Diagnostic or Treatment Health Care Facilities within Use Group 6 offices, the Appellant stated that its analysis does not change since it maintains that both portions of the Building should be classified as Use Group 3; and

5. Additional Regulatory Restrictions

WHEREAS, the Appellant asserts that certain provisions of the Multiple Dwelling Law (MDL) and Housing Maintenance Code (HMC) prohibit the designation of the Building as a Transient Hotel under the ZR; and

WHEREAS, specifically, the Appellant claims that the designation of the Building as a lodging house, pursuant to the MDL and HMC is erroneous and is inconsistent with the designation of the Building as a Use Group 5 Transient Hotel; and

WHEREAS, the Appellant also asserts that the Building does not comply with Administrative Code § 21-312, which limits the occupancy of a homeless shelter to 200 beds and the total number within the Building exceeds that; and

THE DEPARTMENT OF BUILDINGS' POSITION

WHEREAS, DOB has determined that that the proposed use of the Building complies with the ZR as a Use Group 5 Transient Hotel and Use Group 6 Professional Office and that pursuant to ZR § 42-00, both use groups are permitted as-of-right in the subject M1-6 zoning district; and

1. The Proposed Use is Consistent with a Use Group 5 Transient Hotel

WHEREAS, DOB states that the proposed use of

the Building, as reflected in the approved plans and other information BRC submitted, complies with the definition of transient hotel set forth at ZR § 12-10; and

WHEREAS, specifically, DOB's conclusion is based on BRC's representations that the sleeping accommodations on floors three through nine will be made available on a daily basis and that the occupants will not remain in the same dwelling space for more than 30 days at a time; and

WHEREAS, secondly, the amended plans reflect and BRC has informed DOB that 24-hour desk service will be provided on the ground floor for the entrance to the Use Group 5 portion of the building and 24-hour desk service will be provided at the 3<sup>rd</sup> Floor interior entrance to the Use Group 5 sleeping accommodations; and

WHEREAS, as to the third element of the definition for transient hotel, DOB states that BRC has noted that housekeeping and laundry services will be provided and the amended plans indicate that laundry will be processed at the cellar level; and

WHEREAS, finally, DOB notes that the amended plans also indicate that the Building will be served by two separate entrances: a common entrance on the eastern portion of the building with an elevator that will exclusively serve all the living or sleeping units of the Use Group 5 Transient Hotel and an entrance on the western portion of the building with an elevator that will exclusively serve the Use Group 6 Professional Offices; and

WHEREAS, DOB states that based on the foregoing, the portion of the Building which is proposed as a Use Group 5 Transient Hotel meets the ZR § 12-10 definition of transient hotel and does not find that the fact that the occupants of the Building may be homeless or may have mental health issues precludes the proposal from meeting the definition of transient hotel in the ZR; and

WHEREAS, accordingly, DOB determined that the proposed Use Group 5 Transient Hotel complies with the ZR and is permitted as-of-right; and

WHEREAS, in response to the Appellant's assertion that the occupants in the proposed Use Group 5 Transient Hotel will not be "transient" because they claim that the occupants will be staying in excess of 30 days, DOB states that BRC has informed it that the occupants in the Chemical Dependency Crisis Center, the Reception Center, and the Shelter will only stay in the same dwelling space for a maximum of 30 days; and

WHEREAS, DOB states that it accepts BRC's representations and concludes that the occupants will occupy the Building transiently; DOB states that it cannot withhold an approval based on a speculative non-compliance and that if DOB later determines that the occupancy is not conforming to the transient use

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requirement, then it would handle such a case as an enforcement issue; and

WHEREAS, in response to the Appellant's assertion that the use must be classified as Use Group 3 Non-Profit Institution with Sleeping Accommodations, pursuant to ZR § 22-13, because there is a "clear or reasonable nexus" between BRC's purpose and the facility's sleeping accommodations, DOB states that based on its review of BRC's amended plans and the information provided to it, there is no basis to assume that BRC's counseling programs, including the outpatient Substance Abuse Center and the outpatient Continuing Day Treatment program, are integral to the sleeping accommodations for the Shelter program; and

WHEREAS, DOB adds that BRC has informed it that the counseling programs provided in the Use Group 6 space will be available to the general public, not just to occupants using the Shelter, Chemical Dependency Crisis Center, and the Reception Center and the amended plans confirm that the counseling uses to be provided in the Use Group 6 Professional Office space will not only operate independently from the Use Group 5 transient use on the 3<sup>rd</sup> to 9<sup>th</sup> Floors, but that the counseling and office use will be physically separated from the transient use on those floors by fire-rated walls equipped with alarmed, fireproofed self-closing doors and independent elevators will serve the Use Group 5 use and the Use Group 6 use; and

WHEREAS, DOB concludes that based on the information BRC provided, it had a reasonable and sufficient basis for accepting the sleeping accommodations as a separate, transient use from BRC's other programs operated out of the Use Group 6 Professional Office space; and

WHEREAS, DOB disagrees with the Appellant about its application of the Youth Hostel Case, and cites to the Board's resolution for a different provision: "the language of Section 22-13 of the ZR does not unambiguously require any philanthropic or non-profit institution that also offers sleeping accommodations to be classified as a Community Facility within Use Group 3" and that the "primary purpose of a 'philanthropic or Non-Profit Institution with Sleeping Accommodations' properly classified within Use Group 3 cannot be the provision of sleeping accommodations;" and

WHEREAS, DOB states that in the Youth Hostel Case, the Board upheld DOB's determination that the youth hostel "did not demonstrate a necessary connection between its provision of sleeping accommodations and its educational and cultural mission as properly required by DOB;" and

WHEREAS, DOB does not find that the facts in the subject appeal are at odds with the Board's decision in the Youth Hostel Case since the amended plans and the information provided to DOB indicate that BRC's sleeping accommodations provided in the Use Group 5 Transient Hotel portion of the Building are separate and

distinct from the counseling and other services provided in the Use Group 6 Professional Offices; and

WHEREAS, DOB does not find it to be conclusive that the counseling programs are run by the same entity or might share some of the same clients and, furthermore, BRC has indicated to DOB that the primary purpose of the Shelter is to provide sleeping accommodations to homeless; DOB adds that BRC has stated that the counseling and services offered in the Use Group 6 Professional Offices will be open to the general public and is not a component, much less a necessary component, of the transient sleeping accommodations provided for the Shelter occupants; and

WHEREAS, DOB distinguished the subject case from the cited Board variance cases for Use Group 3 facilities in manufacturing districts in that a variance is not required for a Use Group 5 Transient Hotel in an M1-6 zoning district; DOB finds its approval of a homeless shelter as a Use Group 5 Transient Hotel in this case to be consistent with prior approvals including the Temporary Certificate of Occupancy No. 103051206-T issued on February 20, 2002 at 324 Lafayette Street, Manhattan for a Use Group 5 Transient Hotel operated as a homeless shelter by BRC; and

2. The Proposed Use is Consistent with Use Group 6 Professional Offices

WHEREAS, DOB states that it accepts that a portion of the third through ninth floors, as reflected on the amended plans, will be occupied by Use Group 6 Professional Offices that will be separated from the Use Group 5 Transient Hotel by fire-rated walls equipped with alarmed, fireproofed self-closing doors; and

WHEREAS, DOB states that BRC represents that these offices, as well as the offices on the 10<sup>th</sup> and 11<sup>th</sup> Floors, will provide professional and counseling services for substance abusers and for mentally ill men and women, regardless of whether they are occupants of the Use Group 5 Transient Hotel; and

WHEREAS, DOB states that although medically licensed individuals, such as nurses and psychiatrists will serve the counseling program, a significant part of services will be performed by social workers and case managers, many of whom are recovering addicts and former clients of BRC and the 12<sup>th</sup> Floor will be occupied by office space as the headquarters for BRC; and

WHEREAS, DOB states that all of the Use Group 6 Professional Office space will be accessed by a different elevator from the elevator that serves the occupants of the Use Group 5 Transient Hotel and that DOB accepts such use as being consistent with a Use Group 6 Professional Office; and

WHEREAS, DOB provided a supplemental argument that, in light of a ZR text amendment,

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effective February 2, 2011, Use Group 6 office uses at ZR § 32-15 (Uses Permitted As of Right – Use Group 6) now includes “offices, business, professional including ambulatory diagnostic or treatment health care, or governmental;” and

WHEREAS, accordingly, if the office use is identified as an ambulatory diagnostic or treatment facility as the Appellant suggests, in the alternate, DOB states that the ZR now clearly classifies such use as Use Group 6, so it would be conforming either as professional offices or ambulatory diagnostic or treatment facility; and

3. The Proposed Uses are not Consistent with a Use Group 3 Health Related Facility or a Use Group 3 Domiciliary Care Facility for Adults

WHEREAS, DOB asserts that the proposed uses are not consistent with a Use Group 3 Health Related Facility or a Use Group 3 Domiciliary Care Facility for Adults because of (1) the separation between the sleeping accommodations under the Use Group 5 Transient Hotel use and the Use Group 6 Professional Office use and independent elevators serving each use, and (2) the information from BRC that the primary purpose of the facility is to provide transient living and sleeping accommodations for the homeless in the Use Group 5 portion of the Building and office space for BRC executive offices and counseling programs in the Use Group 6 portion of the building; and

WHEREAS, DOB rejects the Appellant’s claim that the entire Building is rendered a Health Care or a Domiciliary Care Facility simply because there may be doctors, nurses or other medically trained professionals present and finds it to be contrary to the ZR’s description of Use Group 3 Health Related Facilities and Domiciliary Care Facilities; and

WHEREAS, DOB states that the ZR makes it clear that the noted Use Group 3 uses do not include temporary or transient housing, but are intended to provide residents of such facilities with long-term housing and care for persons who cannot care for themselves; and

WHEREAS, DOB also cites to the ZR’s use of the term Domiciliary Care Facility, which, by its plain meaning, refers to long-term or permanent living arrangements for those who cannot live on their own, in contrast to BRC’s representations that the Building’s occupants will be transient and will not be occupying the Building for long term, institutional care; and

4. The Proposed Use is Not Prohibited by the Multiple Dwelling Law or the Housing Maintenance Code

WHEREAS, DOB states that neither the MDL nor the HMC govern land use but that Section 2 of the MDL was enacted to ensure, “the establishment and maintenance of proper housing standards requiring sufficient light, air, sanitation and protection from fire hazards” and, pursuant to Administrative Code § 27-

202, the HMC was enacted to establish “minimum standards of health and safety, fire protection, light and ventilation, cleanliness, repair and maintenance, and occupancy in dwellings” in New York City; and

WHEREAS, DOB distinguishes the purposes of the MDL and the HMC from the ZR because the ZR governs land use in New York City and the 18 use groups defined in the ZR do not perfectly correlate with the definitions set forth in the MDL or the HMC; and

WHEREAS, DOB adds that there are many instances where a building’s designation under the ZR seemingly contradicts its designation under the MDL or HMC, which reflects nothing more than a function of three separate regulatory schemes governing similar activity; and

WHEREAS, DOB states that the designation of the portion of the Building containing Use Group 5 Transient Hotel sleeping accommodations is appropriately characterized as a Lodging House under the MDL and HMC and designation as an MDL Lodging House on the Schedule A, and eventually on the certificate of occupancy (CO), indicates that the Building complies with the fire and safety requirements under Section 66 of the MDL, rather than Section 67 of the MDL which governs MDL Hotels; and

WHEREAS, DOB does not find that the designation as an MDL and HMC Lodging House negates the transient use of the Building; and

WHEREAS, DOB notes that the ZR only has one use group, Use Group 5, for transient occupancy, which, in contrast, may take many forms individually recognized in the MDL or HMC; and

WHEREAS, DOB states that under the ZR, the only use group that appropriately encompasses an MDL Lodging House is a Use Group 5 Transient Hotel; therefore, as is the case with the proposed use of the Subject Premises, it is possible for a building to be a Transient Hotel for purposes of the ZR, but a Lodging House under the MDL and HMC and the fact that the Schedule A and CO label a building a Lodging House for MDL and HMC fire and safety purposes does not negate the proper designation of the Subject Premises as a Transient Hotel under the ZR; and

WHEREAS, additionally, DOB notes that the Appellant claims that the approval of the Building with HMC Rooming Units is inconsistent with the approval of a Use Group 5 Transient Hotel in the ZR; however, nothing in the ZR precludes a Transient Hotel from having HMC Rooming Units; and

The Appellant’s Supplemental Claims

WHEREAS, DOB has been informed by BRC and has confirmed with DHS that the proposed operation of the 200-bed Shelter at the Subject Premises will be in compliance with the applicable provisions of the Administrative Code governing the capacity of shelters and BRC’s proposal to operate the

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Shelter is the subject of pending litigation in which the issue of permitted capacity will be addressed; and

WHEREAS, finally, DOB addresses the Appellant's claims that the plans submitted to it differ from plans and information provided to other entities, including the New York State Office of Alcoholism and Substance Abuse Services (OASAS); and

WHEREAS, DOB states that the plans and information an applicant submits to it must reflect compliance with the ZR, the 2008 Construction Codes, and other applicable rules and regulations but DOB is not required to review nor is it authorized to evaluate information provided to other entities regarding requests for funding; and

WHEREAS, DOB states that it has reviewed the application and plans and has determined that they comply with the ZR, the 2008 Construction Codes, and other applicable rules and regulations; and

**BOWERY RESIDENTS' COMMITTEE'S POSITION**

WHEREAS, BRC makes the following primary assertions in support of its approval, (1) the definition of "transient hotel" under the ZR is clear and unambiguous; (2) the Building is properly designated as, in part, a Use Group 5 Transient Hotel and clearly satisfies all the elements of the ZR's definition of "transient hotel;" (3) the remainder of the Building is used for a separate purpose, has separate access and separate elevators and is properly designated as, Use Group 6 Professional Offices; (4) the Building is not required to be designated a non-profit institution with sleeping accommodations, a health-related or domiciliary care facility, or a diagnostic and treatment healthcare facility under Use Groups 3 or 4; (5) the proposed Use Group 5 use of the Building is consistent with the MDL and HMC; and (6) the Appellant's claims based on the AC are not properly before the Board and, in any event, the proposed use of the Building is consistent with the AC's requirements; and

WHEREAS, as to the classification as Use Group 5, BRC states that the proposed use satisfies each element of a "transient hotel" as defined in the ZR; and

WHEREAS, BRC rejects the Appellant's invocation of the common meaning of the word hotel because the ZR definition is clear and unambiguous and it is not necessary or proper to consult outside sources; and

WHEREAS, BRC likens the proposed use to that of a hotel in that both host clients for short stays and cites to the New York Court of Appeals for the principle that "where statutory language is clear and unambiguous, *the court should construe it so as to give effect to the plain meaning of the words used.*" Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98, 107 (1997) (emphasis in the original) (citation omitted); and

WHEREAS, as to the assertion that the Building is a Use Group 3 Non-Profit Institution with Sleeping Accommodations, BRC asserts that its revised plans

reflect a separation between the sleeping accommodations and BRC's social service program offices and, thus, the portion that is only sleeping accommodations can only be Use Group 5 because it is occupied by transient accommodations in a facility for which the provision of sleeping accommodations is the primary purpose; and

WHEREAS, BRC cites to the Board's decision in the Youth Hostel Case for the proposition that a facility with a primary purpose of providing sleeping accommodations could not be Use Group 3 Non-Profit with Sleeping Accommodations, but must be a Use Group 5 Transient Hotel; and

WHEREAS, however, BRC disagrees with DOB and finds that absent the separation between the Use Group 5 and Use Group 6 portions of the Building, other homeless shelters and similar programs could potentially be either a Use Group 5 Transient Hotel or a Use Group 3 Non-Profit with Sleeping Accommodations; and

WHEREAS, BRC notes that homeless shelters are not identified in the ZR as belonging to any use group and, thus, may be classified as either a Use Group 5 or Use Group 3 facility; and

WHEREAS, BRC also notes that the ZR § 12-10 definition of transient hotel provides the threshold requirements for such use, but does not reflect an exhaustive list of elements or uses which may be present at a hotel; and

WHEREAS, BRC finds that the Board's decision in the Youth Hostel Case stated that an institution cannot be a Use Group 3 community facility unless there is "a reasonable nexus between the non-profit purpose and its provision of sleeping accommodations" but it did not determine that if there is a sufficient nexus between the non-profit purpose and the provision of sleeping accommodation, then the use cannot be classified as Use Group 5; and

WHEREAS, BRC asserts that a facility with a nexus between the non-profit purpose and the provision of sleeping accommodations could be classified as Use Group 3 or Use Group 5; and

WHEREAS, BRC notes that the Board also stated that "the language of ZR § 22-13 does not unambiguously require any philanthropic or non-profit institution that also offers sleeping accommodations to be classified as a Community Facility within Use Group 3;" and

WHEREAS, BRC asserts that even if there were no separation between the Use Group 5 accommodations and the Use Group 6 professional offices in the Building, it could still be a Use Group 5 facility; and

WHEREAS, BRC concludes that since the Building provides a separation, it is an even clearer example of a Use Group 5 Transient Hotel since the

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vast majority of what is provided in that portion of the Building is transient sleeping accommodations; and

WHEREAS, BRC disagrees with the Appellant that the Building must be a Use Group 3 community facility because “non-profit institution with sleeping accommodations” is “more specific” than a “transient hotel;” and

WHEREAS, in response to the Appellant’s assertion that the facility cannot be classified as Use Group 5 and Use Group 3, BRC notes that “homeless shelter” does not have a specific listing in the ZR, thus, the cited preamble provisions do not apply; and

WHEREAS, BRC notes that if a term has a specific listing, as prison does, then it must apply the use group classification of that specific listing rather than another listing, which might also apply; and

WHEREAS, as to the application of ZR § 11-22, BRC states that there are no “overlapping or contradictory regulations” at issue in the subject case, but rather two definitions that could potentially apply to the same facility; and

WHEREAS, BRC states that even if ZR § 11-22 did apply, it finds the Use Group 5 designation to be more restrictive since it is permissible only in commercial and manufacturing zoning districts while if Use Group 3 and 4 uses, the facility would be permitted also in residential districts; and

CONCLUSION

WHEREAS, the Board has considered all of the arguments made by all parties in light of the entire record; and

WHEREAS, the Board concludes that the proposed use of the Building is consistent with a Use Group 5 Transient Hotel and Use Group 6 Professional Offices under the ZR and that its classification as a lodging house and the creation of rooming units for purposes associated with the MDL and HMC requirements, does not disturb that classification; and

WHEREAS, the Board agrees with DOB that the ZR § 12-10 definition of transient hotel is clear and unambiguous and that the proposed use of the building meets the three criteria of the definition in that, as presented by BRC, it (1) provides sleeping accommodations used primarily for transient occupancy, (2) has a common entrance to serve the sleeping accommodations, and (3) provides 24-hour desk service, housekeeping, telephone, and linen laundering; and

WHEREAS, because the statute is unambiguous, the Board does not find that it is necessary or appropriate to consult sources outside of the ZR for clarity; and

WHEREAS, the Board recognizes that perhaps there may be some ambiguity to the concept of what a hotel is, but since the ZR has defined hotel, for zoning purposes, and the case at issue concerns a zoning matter, the ZR is the best and only resource for the meaning of the term for zoning purposes; and

WHEREAS, even if the word “hotel,” ascribed to

the ZR definition may be embedded with different common meanings, the three criteria set forth at ZR § 12-10 are not ambiguous and it is rational to apply definitions or criteria, rather than titles of definitions to a specific use that is not otherwise defined in the ZR; and

WHEREAS, the Board does not find that it is appropriate to apply definitions from common experience or from other statutes, which have different purposes other than zoning; as examples in the MDL and HMC suggest, other statutes’ definitions may be more specific given their mandates and not take land use principles into consideration; and

WHEREAS, the Board finds that the Appellant’s reliance on Fischer is misplaced since Fischer was not a zoning case and involved the interpretation of hotel within the context of rent stabilization, rather than the ZR; and

WHEREAS, further, the Board cites to Fischer (quoting another case that did not review the ZR definition of hotel) in a discussion about different statutes having different definitions of hotel: “[t]he word ‘hotel’ is not one with a fixed and unalterable meaning; in fact, whether a place is or is not a hotel in a given instance may depend on the particular statute involved or the circumstance of the individual case;” and

WHEREAS, the Board finds that to apply a common meaning would defeat the distinct purposes of individual statutes; and

WHEREAS, as to the question of transiency, the Board defers to DOB to enforce the occupancy and finds that it was reasonable for DOB to accept that the use of the homeless shelter will be transient, based on BRC’s representations; and

WHEREAS, specifically, the Board notes that BRC’s contract with DHS does not require it to allow stays of nine months or longer, so BRC is able to comply with the zoning (and its CO) as well as its contract with DHS; and

WHEREAS, the Board notes that the ZR also sets forth certain permitted accessory uses for transient hotels, which serve as examples of common accessory uses, but, notably, do not exclude any accessory uses; and

WHEREAS, accordingly, the Board finds that it is reasonable to conclude that the Use Group 6 Professional Offices or Ambulatory Diagnostic and Treatment Health Care Facility, however it is characterized, may be able to exist in the Building with the sleeping accommodations and not necessitate the change in the use classification from Use Group 5 to Use Group 3; and

WHEREAS, the Board notes that its decision is limited to whether DOB appropriately approved the proposed project as part Use Group 5 Transient Hotel and part Use Group 6 Professional Offices and it does not address the question of whether all homeless shelters and social service programs function identically and should be classified as such; and

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WHEREAS, the Board notes that the record before it is limited to the facts of BRC's Building and its program for occupancy that it has submitted to DOB; and

WHEREAS, the Board states that other similar facilities may operate differently, in terms of length of stay or the relationship between programming and sleeping accommodations, and may be appropriately classified in a different use group; and

WHEREAS, the Board does not find that the Manton decision conflicts with DOB's position and cites two principles from the court's decision: (1) any use which properly falls within a use group listing is permitted in a zoning district where such use is permitted as a matter of right and neither DOB nor the Board has discretionary authority to refuse permission and (2) on the matter of determining whether a statute is vague or ambiguous: "[t]he board is the administrative agency charged with interpreting the zoning resolution and its determination is to be given great weight" (Manton at 257 citing East Bayside Homeowners v. Board of Standards and Appeals, 77 A.D.2d 858); and

WHEREAS, as to the Appellant's assertion that the facility cannot be both a Use Group 5 Transient Hotel and a Use Group 3 Non-Profit Institution with Sleeping Accommodations because of statutory interpretation principles, the Board does not need to answer the question since it finds that the use is appropriately classified as Use Group 5, but it disagrees that statutory interpretation principles preclude a particular use from being within more than one use group, as set forth in the ZR; and

WHEREAS, the Board finds that the Appellant's concern - that allowing a use to be classified within more than one use group leads to inconsistency, uncertainty, or renders the ZR distinctions meaningless - is baseless; and

WHEREAS, the Board notes that there are 18 use groups in the ZR with a significant number of sub-groups and that allowing certain uses to be classified within more than one use group still allows for consistency and certainty when applying the ZR as there would then be at least 16 use groups that would not apply; and

WHEREAS, further, the Board notes that the ZR classifies a significant number of uses within more than one use group, including ambulatory diagnostic or treatment health care (Use Group 4 or 6), banquet halls (Use Group 9 or 13), bicycle rental or repair shops (Use Group 7 or 14), drug stores (Use Group 6 or 12) and that one use group may be restricted in certain zoning districts where the other is permitted; and

WHEREAS, accordingly, the Board disagrees with the Appellant that the legislators intended to restrict use group classifications to the extent that the Appellant suggests since there are so many examples of uses that may be classified within more than one use

group; and

WHEREAS, the Board states that if DOB determined the use could also be classified as Use Group 3, that would not preclude it from being Use Group 5, but, as noted, the Board does not need to evaluate whether or not it is also Use Group 3 because it accepts that it is Use Group 5, as an of right use in the subject zoning district; and

WHEREAS, further, the Board is not persuaded that Use Group 3 Non-Profit Institution with Sleeping Accommodations cannot objectively be determined to be more or less specific or restrictive than Use Group 5 Transient Hotel, and does not find that the chapter preambles or ZR § 11-22 (Applications of Overlapping Regulations) apply to the question of how to classify a use that is not listed in the ZR; and

WHEREAS, the Board accepts that the proposed offices meet the criteria for Use Group 6 Professional Offices and are not necessarily an ambulatory diagnostic or treatment health care facility because medical personnel will be on staff; and

WHEREAS, however, as far as ambulatory diagnostic or treatment health care facilities, the Board notes that Use Group 4 and Use Group 6 facilities are permitted in the majority of the same commercial zoning districts, but that Use Group 4 are permitted in certain residential zoning districts and Use Group 6 facilities are also permitted in certain manufacturing zoning districts; and

WHEREAS, the Board notes that the two use classifications of ambulatory diagnostic or treatment health care facilities allow them to be in a wide range of zoning districts, which demonstrates a degree of flexibility in the ZR and a reflection that certain uses are deemed to be compatible with many other uses and use groups throughout the city; and

WHEREAS, the Board finds that the Youth Hostel Case, in which it determined that a youth hostel should be classified as a Use Group 5 Transient Hotel rather than Use Group 3, does not establish that a facility with social service programs that have a clear nexus to the sleeping accommodations could not be a Use Group 5 Transient Hotel; and

WHEREAS, additionally, the Board cites the Youth Hostel Case for the proposition that, in certain circumstances, hotels may be deemed more restrictive (in that they are not permitted) than Use Group 3 uses; and

WHEREAS, the Board notes that it did not interpret the appropriateness of the Use Group 3 classification of similar uses in the variance cases cited by the Appellant, so the Appellant's reliance on those cases is misplaced; and

WHEREAS, lastly, as to the question of whether or not the Building complies with Administrative Code § 21-312(2)(b), the Board notes that its jurisdiction

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over the subject matter on appeal, pursuant to New York City Charter § 666(6)(a), arises from a DOB determination on matters properly before DOB; and

WHEREAS, the Board notes that DHS, rather than DOB enforces the noted provision and that DOB has deferred to DHS for confirmation of compliance with AC § 21-312(2)(b); accordingly, the Board also defers to DHS for interpretation and enforcement of the cited provision and abstains from determining whether DHS has appropriately interpreted its own provision, which is now also a matter before the court.

*Therefore it is Resolved* that the instant appeal, seeking a reversal of the Final Determination of the Manhattan Borough Commissioner, dated September 9, 2010, is hereby denied.

Adopted by the Board of Standards and Appeals,  
April 5, 2011.

**A true copy of resolution adopted by the Board of Standards and Appeals, April 5, 2011.  
Printed in Bulletin No. 15, Vol. 96.**

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