214-10-A
APPLICANT – Carol E. Rosenthal, Esq./Fried Frank, for Boulevard Leasing Limited Partnership, owner.
SUBJECT – Application November 10, 2010 – Appeal challenging the Department of Buildings determination regarding maximum number of dwelling units (§23-22) allowed in a residential conversion of an existing building. C4-2 zoning district.
PREMISES AFFECTED – 97-45 Queens Boulevard, bounded by Queens Boulevard, 64th Road and 64th Avenue, Block 2091, Lot 1, Borough of Queens.
COMMUNITY BOARD #6Q
APPEARANCES – None.
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 subject appeal comes before the Board in response to a Final Determination dated October 12, 2010 by the Queens Borough Commissioner of the Department of Buildings ("DOB") (the "Final Determination"), with respect to DOB Application Nos. 40222139 and 420038890; and

WHEREAS, the Final Determination states, in pertinent part:

> Request to accept the proposed number of dwelling units of an existing non-residential building converted to residential use is denied.
> Existing building was built upon BSA approval #871-46-BZ to erect a twelve story building that exceeded the permitted area coverage, encroached on the required side yards and exceeds the permitted height.
> The proposed number of dwelling units is based on total floor area being converted to residential use but, it shall be limited to the maximum residential floor area permitted on the zoning lot divided by the applicable factor per ZR § 23-22 and 23-141; and

WHEREAS, a public hearing was held on this appeal on February 8, 2011, after due notice by publication in *The City Record*, and then to decision on March 15, 2011; and

WHERAS, the appeal is filed on behalf of the property owner who contends that DOB's denial was erroneous (the "Appellant"); and

WHEREAS, DOB and Appellant have been represented by counsel throughout this appeal; and

WHEREAS, the site has an irregular shape, with 19,421 sq. ft. of lot area, frontage on Queens Boulevard, 64th Road, and 64th Avenue, and is within a C4-2 zoning district; and

WHEREAS, the site is occupied by a 13-story commercial building with a connected garage and loading dock, with a total floor area of 131,930 sq. ft. (the "Building"); and

PROCEDURAL HISTORY

WHEREAS, the subject appeal concerns the proposal to convert the upper 12 floors of the Building from commercial use to 108 dwelling units and maintain the first floor commercial use; and

WHEREAS, the building was constructed in 1960, under the provisions of the 1916 ZR and pursuant to a 1959 Board approval (BSA Cal. No. 871-46-BZ Vol. II[1]) which allowed for waivers to height, side yards, lot coverage, and use, as a portion of the site was then within a residential zoning district; and

WHEREAS, the current zoning regulations do not restrict the total height (there are setback regulations), side yards, lot coverage, and use as the site is now completely within a C4-2 zoning district; and

WHEREAS, in 1992, the Board granted an amendment to the variance to permit the construction of a 900 sq. ft. extension of the ground-floor restaurant; and

WHEREAS, in June 2007, the Appellant informed the Board of its proposal to convert the Building to residential use and requested confirmation that the proposed conversion was in compliance with the 1959 variance; and

WHEREAS, by letter dated August 15, 2007, the Board stated that it did not have any objection to the proposed conversion, based on the Appellant's representations that the conversion would not increase any existing non-compliance of the building; and

WHEREAS, in 2010, the Appellant applied for an alteration permit under Application No. 40222139, for renovations in connection with the proposed project, described as the conversion of 122,745 sq. ft. of previously utilized commercial floor area to residential use and the creation of 108 dwelling units; and

WHEREAS, DOB approved the conversion of the upper 12 floors of floor area (122,745 sq. ft.) to residential use, pursuant to ZR § 34-222 (Change in Use) and ZR § 35-31 (Maximum Floor Area Ratio for Mixed Buildings) but denied the Appellant's proposed number of dwelling units pursuant to ZR § 23-22 (Maximum Number of Dwelling Units or Rooming Units); and

WHEREAS, in response, the Appellant applied to DOB for a determination from the Queens Borough Commissioner that its proposed number of dwelling units is permitted; and

WHEREAS, on October 12, 2010, DOB issued the Final Determination, denying the Appellant's request; and

WHEREAS, accordingly, the question on appeal is limited to the determination of the maximum number of

1 The site was subject to an earlier variance, in 1946 – BSA Cal. No. 871-46-BZ Vol. I – for a proposed movie theater and stores, which was never constructed.

permitted dwelling units for the proposed conversion; and

WHEREAS, the Appellant asserts that the Final Determination is contrary to the plain language of the ZR as ZR §§ 34-222 and 35-31 permit all non-residential floor area in existence prior to December 15, 1961 in buildings within certain commercial districts to be converted to residential use and that ZR § 35-40 provides that the "maximum *residential floor area* permitted on the *zoning lot*," in accordance with ZR § 35-31, is used as the basis for calculating the maximum number of permitted dwelling units on such a zoning lot; and

PROVISIONS OF THE ZONING RESOLUTION

WHEREAS, the primary ZR provisions the Appellant and DOB cite are as follows, in pertinent part:

ZR § 34-222 (Exceptions to Applicability of Residential District Controls/Change of Use)

A non-#residential use# occupying a #building#, or portion thereof, that was in existence on December 15, 1961, may be changed to a #residential use# and the regulations on minimum required #open space ratio# and maximum #floor area ratio# shall not apply to such change of #use#.

* * *

ZR § 35-31 (Applicability of Floor Area and Open Space Regulations to Mixed Buildings/Maximum Floor Area Ratio)

. . . A non-#residential use# occupying a portion of a #building# that was in existence on December 15, 1961, may be changed to a #residential use# and the regulations on maximum #floor area ratio# shall not apply to such change of #use#.

* * *

ZR § 35-40 (Applicability of Density Regulations to Mixed Buildings)

In the districts indicated, the maximum number of #dwelling units# or #rooming units# on a #zoning lot# shall equal the maximum #residential floor area# permitted for the #zoning lot# determined in accordance with the provisions set forth in Section 35-30 (APPLICABILITY OF FLOOR AREA AND OPEN SPACE REGULATIONS) divided by the applicable factor in Section 23-20 (DENSITY REGULATIONS).

* * *

ZR § 23-22 (Density Regulations/Maximum Number of Dwelling Units or Rooming Units)

In all districts, as indicated, the maximum number of #dwelling units# or #rooming units# shall equal the maximum #residential floor area# permitted on the #zoning lot# divided by the applicable factor in the following table . . .

FACTOR FOR DETERMINING MAXIMUM NUMBER OF DWELLING UNITS OR ROOMING UNITS

District	Factor for #Dwelling Units#	Factor for #Rooming Units#
…	…	…
R6 R7 R8B	680	500
…	…	…

ZR § 23-24 (Density Regulations/Special Provisions for Building Used Partly for Non-Residential Uses)

In all districts, as indicated, if a #building# is used partly for #residences# and partly for non-#residential uses# (other than #community facility uses#, the provisions for which are set forth in Article II, Chapter 4), the maximum number of #dwelling units# or #rooming units# permitted on the #zoning lot# shall equal the total #residential floor area# permitted on the #zoning lot# after deducting any non-#residential floor area#, divided by the applicable factor in Section 23-22 (Maximum Number of Dwelling Units or Rooming Units); and

DISCUSSION

A. The Basis of the Appeal – The Plain Meaning of the Zoning Resolution

WHEREAS, the Appellant asserts that the provisions of the ZR at issue are clear and unambiguous and that, accordingly, one must "look to the plain meaning of the applicable sections" (Gruson v. Dep't of City Planning, 2008 N.Y. Slip Op 32791U at 6, and Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98 106-107 (1997)); and

WHEREAS, the Appellant bases its determination of the maximum number of dwelling units permitted for the conversion of a pre-1961 building in a C4-2 zoning district to residential use on the following provisions: (1) ZR § 35-30 (Applicability of Floor Area and Open Space Regulations to Mixed Buildings), which allows for the conversion of pre-1961 non-residential uses and leads to ZR § 35-31 (Maximum Floor Area Ratio) to establish the "maximum *residential floor area* permitted for the *zoning lot*;" (2) ZR § 35-40 (Applicability of Density Regulations to Mixed Buildings), which sets forth the formula for determining the number of dwelling units permitted in a mixed-use building in a commercial zoning district, references ZR § 35-30 for the floor area calculation and ZR § 23-20 (Density Regulations) for the dwelling unit factor; and (3) ZR § 23-22 (Maximum Number of Dwelling Units or Rooming Units) identifies the dwelling unit factor for a C4-2 (R6 equivalent) zoning district; and

WHEREAS, the Appellant states that the last paragraph of ZR § 35-31 allows for the conversion of non-residential use, which existed on December 15, 1961, to residential use in excess of what would be

permitted by the applicable underlying zoning district floor area regulations; and

WHEREAS, thus, the Appellant asserts, in accordance with ZR § 35-31, the "maximum *residential floor area* permitted on the *zoning lot*" is based on the amount of existing non-residential floor area rather than the maximum residential floor area ratio of the C4-2 (R6 equivalent) zoning district; and

WHEREAS, the Appellant asserts that, by applying the plain meaning of ZR § 35-31, the entire existing non-residential floor area of 131,930 sq. ft. at the site may be converted to residential use; and

WHEREAS, the Appellant then consults ZR § 35-40 (which cross references ZR § 35-31) for instruction on determining the density regulations to apply to its total floor area; ZR § 35-40 cross references ZR § 23-20 for the density factor to apply to the floor area identified at ZR § 35-31; ZR § 23-22 (Density Regulations/Maximum Number of Dwelling Units or Rooming Units) sets forth the dwelling unit factor required for calculating the maximum number of dwelling units; and

WHEREAS, the Appellant also cites to ZR § 23-24 (Special Provisions for Building Used Partly for Non-Residential Uses) for the provision that if a building is used partially for non-residential uses, then the maximum residential floor area permitted on the zoning lot shall be reduced by any non-residential floor area used within the building; and

WHEREAS, the Appellant asserts that the cited provisions should be applied to the proposal as follows: (1) since the total building floor area of 131,930 sq. ft. existed on December 15, 1961, it can be converted to residential floor area, pursuant to ZR §§ 35-40 and 35-31, and 9,185 sq. ft. of floor area are being maintained as commercial uses, so the maximum residential floor area for the purposes of density calculations is 122,745 sq. ft. (after following ZR § 23-24's instruction to subtract any commercial floor area being maintained); (2) pursuant to ZR § 23-22, the applicable dwelling unit factor in a C4-2 (R6 equivalent) zoning district to divide into the floor area is 680; (3) the maximum residential floor area divided by the applicable factor (122,745/680) equals 180.51; and (4) therefore, the proposed 108 dwelling units, 73 fewer units than the maximum, is allowed; and

WHEREAS, the Appellant asserts that, in plain language, ZR § 35-40 specifies that the calculation for density should be based on the actual maximum residential floor area permitted pursuant to ZR § 35-31; and

WHEREAS, the Appellant distinguishes other provisions of the ZR where it specifies that the underlying district regulations are to apply and the text specifically notes that the regulation shall be applied "in accordance with the applicable district regulations;" and

WHEREAS, the Appellant asserts that the sections applicable to the conversion of a pre-1961 building (ZR §§ 35-40 and 35-31) direct the opposite and state that the district regulations with respect to floor area ratio are not applicable to such residential conversion; and

WHEREAS, the Appellant cites to ZR § 15-111, which states "the maximum number of dwelling units permitted shall be determined in accordance with the applicable district regulations" as an example of where the ZR directs readers to apply the applicable district restrictions as opposed to ZR § 35-31 which state that the district regulations with respect to floor area are not applicable to the residential conversion of a pre-1961 non-residential building; and

WHEREAS, the Appellant maintains that the ZR is not ambiguous and that DOB has misapplied the regulations by applying floor area regulations of the underlying district to the dwelling count calculations; and

WHEREAS, the Appellant states further that even if the meaning of "maximum *residential floor area* on the *zoning lot*" is ambiguous, the Court of Appeals instructs that the ambiguity should be resolved in favor of the property owner, citing Toys "R" Us v. Silva, 89 N.Y.2d 411 (1996); and

WHEREAS, lastly, the Appellant asserts that DOB's interpretation of ZR § 23-22 as applied to the subject site would create an absurd result; and

WHEREAS, specifically, the Appellant states that if the maximum floor area permitted in the zoning district (rather than the maximum permitted on the site as built prior to December 15, 1961) were the basis for the dwelling unit calculations, 122,745 sq. ft. of residential floor area would yield only 56 dwelling units at an average of 2,192 sq. ft. each while ZR § 23-22 contemplates a dwelling unit factor of only 680 (sq. ft.); and

WHEREAS, the Appellant asserts that DOB ignores ZR § 35-31 which established the amount of residential floor area permitted on the zoning lot and instead calculates the maximum permitted residential floor area on a hypothetical zoning lot without a pre-existing legal non-complying building; and

WHEREAS, the Appellant set forth several scenarios using DOB's methodology that it found to lead to unintended results, including (1) if only 47,193 sq. ft. of floor area is used as the basis for calculating the dwelling unit count (based on 2.43 residential FAR in an R6 zoning district), the result would be 69 units at an average of 1,879 sq. ft. per unit; and (2) if the Appellant retained six floors of commercial use and converted only seven floors to residential use, 59,000 sq. ft. would need to be subtracted from 47,193 sq. ft., resulting in a negative amount of floor area and dwelling units, even though DOB would allow seven floors of the building to be converted to residential use, pursuant to ZR § 35-31; and

WHEREAS, the Appellant concludes that the meaning of "maximum *residential floor area* permitted on the *zoning lot*" in ZR § 35-40, in the context of

residential conversions pursuant to ZR §§ 34-222 and 35-31, is the maximum residential floor area allowed on the zoning lot rather than the maximum residential floor area allowed pursuant to underlying zoning district regulations, based on the plain language of the ZR; and

B. The Department of Buildings Interpretation

WHEREAS, DOB asserts that it is erroneous to use all of the proposed residential floor area as the basis for calculating the permitted density of the converted building for the following primary reasons: (1) the ZR requirements are clear and unambiguous; (2) there is an exception to the standard density calculation, but it does not apply to the subject proposal; (3) its interpretation is consistent with ZR § 11-22 (Applications of Overlapping Regulations) and does not create an absurd result; and (4) requiring compliance with density for residential conversions under Article III is sound public policy; and

WHEREAS, DOB cites to ZR §§ 34-222 and 35-31 in its analysis as the appropriate sections to apply to mixed buildings with regard to exemption from floor area and lot coverage limitations, but not for dwelling unit calculations; and

WHEREAS, DOB cites to ZR § 35-40 for the regulation of dwelling unit count and notes ZR § 35-40's reference to ZR § 23-20 for the applicable density factor; and

WHEREAS, DOB agrees with the Appellant that the language of ZR § 35-40 is unambiguous, but to a different result; DOB finds that the maximum residential floor area "permitted" on the subject zoning lot for the dwelling unit count calculation is determined by identifying the maximum residential floor area ratio in the district, which is 2.43, per ZR § 23-142, multiplied by the lot area; and

WHEREAS, DOB finds that the maximum amount of floor area permitted to be converted to residential use is the appropriate basis for the floor area calculation at ZR § 35-31, but not for the dwelling unit count computation; and

WHEREAS, DOB concludes that since the maximum permitted floor area for a lot with 19,421 sq. ft. of lot area in an R6 equivalent zoning district is 47,193 sq. ft., that is the appropriate basis for the dwelling unit computation; and

WHEREAS, thus, DOB's methodology of dividing 47,193 sq. ft. of floor area by a factor of 680 results in a possible conversion to 69 dwelling units or 56 dwelling units if 9,185 sq. ft. of commercial floor area remains; and

WHEREAS, as to whether an exception to the standard density calculation applies, DOB cites to ZR § 15-111 which states that "where the total *floor area* on the *zoning lot* exceeds the maximum *floor area* permitted by the applicable district regulations, such excess *floor area* may be converted in its entirety to *residences*. Such excess *floor area* shall be included in the amount of *floor area* divided by the applicable factor of 23-20;" and

WHEREAS, DOB notes that ZR § 15-111 does not apply in C4-2 zoning districts, so the exception to the dwelling unit restriction is not available to the Appellant; and

WHEREAS, instead, DOB finds that Article III applies to C4-2 zoning districts and it does not include a section on how to calculate density for a building being converted under ZR § 34-222 or § 35-31; and

WHEREAS, as to the reasonableness of the result, DOB states that its interpretation is consistent with ZR § 11-22 and does not lead to absurdity; and

WHEREAS, DOB states that the Appellant's examples which do not allow for any dwelling units arise from a scenario with too much residential and non-residential floor area to be in compliance with ZR § 23-24 (Special Provisions for Buildings Used Partly for Non-Residential Uses); and

WHEREAS, DOB finds that the Appellant's examples include contradictory regulations and, per ZR § 11-22, when there are contradictory regulations over the bulk of buildings, the more restrictive shall govern such that even if ZR § 34-222 or § 35-31 would permit a conversion, if the conversion cannot be accomplished without violating ZR § 23-24, then it is prohibited by ZR § 11-22; and

WHEREAS, DOB also cites to public policy interests as a reason for limiting the dwelling unit count as it suggests; and

WHEREAS, specifically, DOB states that the building, which is built to a floor area ratio of approximately 6.32 far exceeds the 2.43 FAR residential maximum permitted by the underlying C4-2 (R6 equivalent) zoning district regulations; and

WHEREAS, DOB asserts that a building of the Building's size is not permitted even if ZR §§ 34-222 and 35-31 would otherwise allow it and the requirements of the number of dwelling units associated with the total pre-existing FAR (rather than the underlying zoning district regulation's maximum FAR) is not anticipated by the area's provision of government services; and

WHEREAS, DOB identifies its density calculations as a check on ZR §§ 34-222 and 35-31 potentially creating strains on city services; and

WHEREAS, finally, DOB made a supplemental argument that ZR § 35-31 does not apply to the Building since it only applies to buildings that were mixed-use as of December 15, 1961; and

WHEREAS, DOB contrasts the language of ZR § 35-31 to ZR § 34-222 in that ZR § 35-31 identifies its applicability to "a non-*residential use* occupying a portion of a *building* that was in existence on December 15, 1961" (emphasis added) while ZR § 34-222 identifies "[a] non-*residential use* occupying a *building*,

or portion thereof" (emphasis added) to mean that ZR § 35-31 does not apply to buildings, like the Building, that were non-residential in their entirety because only ZR § 34-222 identifies a "building," rather than just a "portion of a building;" and

WHEREAS, DOB cites to the second paragraph of ZR § 35-31, rather than the final paragraph regarding non-residential use in existence on December 15, 1961 which the Appellant cites and DOB finds to be inapplicable; the second paragraph states that "[t]he maximum *floor area ratio* permitted for a *residential use* shall be set forth in Article II, Chapter 3;" and

WHEREAS, DOB notes that Article II, Chapter 3 sets forth the maximum floor area of 47,193 sq. ft. for the site based on the underlying district regulations: and

C. The Appellant's Response to the Department of Buildings

WHEREAS, the Appellant disagrees with DOB's reading of ZR § 35-31 and finds that it is erroneous to conclude that the text distinguishes between buildings which were non-residential in part or non-residential in their entirety; it finds "a portion" to mean "any portion" and there is no basis to find that a building that was entirely non-residential on December 15, 1961 could not be covered by the section; and

WHEREAS, the Appellant finds that DOB's interpretation could lead to discordant results if (1) the building had been occupied by 12 floors of commercial use and one floor of residential use as of December 15, 1961 as opposed to (2) the building being occupied by 13 floors of commercial use; in the former, the Appellant would now be able to convert to 108 residential units, but in the latter, it would only be able to convert to 56 residential units; and

WHEREAS, the Appellant finds DOB's supplemental argument about the inapplicability of ZR § 35-31 to be contrary to earlier assertions and the Appellant is unconvinced that the disparate results of the two scenarios cited above were intended by the ZR; and

CONCLUSION

WHEREAS, the Board agrees with the Appellant's analysis for determining the maximum permitted dwelling units for the Building; and

WHEREAS, the Board agrees with the Appellant that the appropriate methodology is to follow the interrelated texts and cross references as follows: (1) begin at ZR § 35-31 (Maximum Floor Area Ratio) which states that the maximum floor area regulations do not apply for conversions of pre-1961 buildings; (2) ZR § 35-31 leads to ZR § 35-40 (Applicability of Density Regulations), which states that "the maximum number of *dwelling units* or *rooming units* on a *zoning lot* shall equal the maximum *residential floor area* permitted for the *zoning lot* determined in accordance with the provisions set forth in Section 35-30" and references the dwelling unit factor in ZR § 23-22 (Maximum Number of Dwelling Units or Rooming Units); (3) ZR § 23-22 provides a dwelling unit factor of 680 for C4-2 (R6 equivalent) zoning districts; and

WHEREAS, the Board agrees with the Appellant that ZR § 35-40 and the relevant phrase "the maximum *residential floor area* permitted for the *zoning lot*," as informed by ZR § 35-31, which states that "the regulations on maximum *floor area ratio* shall not apply to such change of use" is unambiguous in the context of determining the maximum permitted floor area and, ultimately, the dwelling unit count for the Building; and

WHEREAS, the Board acknowledges that there are other places in the ZR where the text distinguishes between the maximum floor area permitted and the maximum floor area permitted *pursuant to the underlying district regulations* and that there may be other situations where those provisions have different meanings, but it finds that in the context of determining the ability to convert the floor area of the subject pre-1961 building to residential use and individual dwelling units, ZR §§ 35-40 and 35-31, read together or read separately, convey that the underlying district regulations do not apply to the density regulations for the subject pre-1961 building; and

WHEREAS, in addition to the language being unambiguous, the Board finds that it would be incongruous to allow for the full conversion of the floor area of a pre-existing building, pursuant to ZR §§ 35-40 and 35-31, and accept an FAR in excess of the underlying district regulations, but then apply a different standard – the underlying district regulations – when it comes to computing the dwelling unit count, pursuant to the factor set forth at ZR § 23-22; and

WHEREAS, further, the Board notes that ZR § 35-40 refers to ZR § 35-30 (and, thus, § 35-31) for determining the floor area permitted and only refers to ZR § 23-20 (and, thus, § 23-22) for obtaining the dwelling unit factor with which to divide the floor area; and

WHEREAS, the Board does not find that ZR § 11-22 applies since one does not encounter contradictory provisions when following the Appellant's methodology; and

WHEREAS, the Board agrees with the Appellant that the appropriate context for the analysis of the dwelling count is the conversion of a legal pre-1961 building and not a hypothetical zoning lot in the C4-2 zoning district; and

WHEREAS, accordingly, the Board determines that in the context of converting a pre-1961 mixed-use building, like the Building, maximum residential floor area permitted on the zoning lot derives from the actual floor area and not hypothetical floor area if the pre-1961 building did not exist; and

WHEREAS, the Board finds that the absence of an exception for C4-2 zoning districts in ZR § 15-111

(Number of Permitted Dwelling Units) is not instructive to the facts of the subject case since the context and the purpose for the conversions at issue in ZR § 15-111 are not analogous to the subject case; and

WHEREAS, the Board concludes that, under the subject facts, the allowable floor area and the allowable density should be analyzed by following the interrelated provisions of ZR §§ 35-31, 35-40, and 23-22, which apply to the legal pre-1961 building on the site, rather than by basing one part of the equation on the existing permitted floor area, without conditions, and basing another part of the equation on the hypothetical maximum floor area permitted pursuant to the underlying zoning district regulations, without consideration of the existence of a legal pre-1961 building on the site; and

Therefore it is Resolved that the subject appeal, seeking a reversal of the Final Determination of the Queens Borough Commissioner, dated October 12, 2010, denying the proposed dwelling unit count, is hereby granted.

Adopted by the Board of Standards and Appeals, March 15, 2011.

A true copy of resolution adopted by the Board of Standards and Appeals, March 15, 2011.
Printed in Bulletin No. 12, Vol. 96.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.