

**166-12-AII**

APPLICANT – NYC Department of Buildings.  
SUBJECT – Application April 9, 2018 – Request for a Re-hearing for an appeal seeking a reconsideration of a ruling to partially revoke a certificate of occupancy.

**166-12-AIII and 107-13-A**

APPLICANT – Steven Barshov, Esq., Sive, Paget & Riesel, P.C., for Sky East LLC, owner.  
SUBJECT – Application April 9, 2018 – Request for a Re-hearing for an appeal seeking a reconsideration of a ruling to partially revoke a certificate of occupancy and that the subject property common law rights had vested and then by ruling that such its vested rights had been abandoned.

PREMISES AFFECTED – 638 East 11<sup>th</sup> Street, Block 393, Lot(s) 25, 26, 27, Borough of Manhattan.

**COMMUNITY BOARD #1M**

**ACTION OF THE BOARD** – Request for re-argument denied; Board’s Motion to Review Decision Granted.

**THE VOTE TO DENY –**

Affirmative: .....0  
Negative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown, Commissioner Sheta and Commissioner Scibetta..... 5

**THE VOTE TO GRANT –**

Affirmative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown, Commissioner Sheta and Commissioner Scibetta.....5  
Negative: .....0

**THE RESOLUTION –**

WHEREAS, these are two requests for re-argument of two applications previously heard and decided by the Board; and

WHEREAS, by submission dated April 6, 2018, the New York City Department of Buildings (“DOB”) filed an application, pursuant to § 1-12.4 of the Board’s Rules of Practice and Procedure, to reargue BSA Cal. No. 166-12-A, an application DOB filed with the Board to revoke Certificate of Occupancy No. 103703226, issued to the subject premises (the “CO Revocation Appeal”), which the Board granted with regards to the Use Group 4 medical offices in a one-story plus cellar structure located at the premises’ rear lot line (the “Rear Structure”) only; and

WHEREAS, by submission dated April 9, a representative of the owner of the premises (“Appellant”) filed an application, pursuant to § 1-12.4 of the Board’s Rules of Practice and Procedure, to reargue both the CO Revocation Appeal and BSA Cal. No. 107-13-A, an application filed with the Board to recognize a common law vested right to continue construction at the site subsequent to an amendment to the Zoning Resolution that excluded Use Group 4 medical offices from the list of permitted obstructions in the subject premises’ required rear yard (the “Common Law Vested Right Appeal”; together, the “Appeals”), which the Board recognized, but found had been abandoned, pursuant to Putnam Armonk, Inc. v.

Town of Southeast, 52 AD2d 10 (2d Dept 1976), when the space was continuously occupied, contrary to law, by residential tenants; and

WHEREAS, DOB argued that the Board’s partial revocation of the certificate of occupancy, as stated in the resolution issued for both applications (the “Resolution,” BSA Cal. Nos. 166-12-A & 107-13-A) (October 17, 2017)1), was not supported by the text of the Zoning Resolution and failed to address issues affecting not only the rear portion of the premises, but the premises in its entirety; and

WHEREAS, DOB argued that the denial of the Common Law Vested Right Appeal was legally inconsistent with the Board’s decision in the CO Revocation Appeal; that the abandonment of a non-conforming use was irrelevant to the subject premises, where the issue was, instead, non-compliance; and that, because outstanding objections remain at the premises, including the absence of a second means of egress from the front portion, the certificate of occupancy at issue could not be considered lawfully issued and must be revoked in its entirety; and

WHEREAS, the Appellant also argued that the Board was in error in determining that the vested right had been abandoned where the issue at the site was the non-complying, rather than non-conforming, Rear Structure and suggested that the Board reverse its decision in the Common Law Vested Right Appeal and stay further disposition of the CO Revocation Appeal to permit DOB to issue permits so that the Appellant may cure the outstanding objections and DOB may ultimately issue a new certificate of occupancy; and

WHEREAS, a public hearing was held on this application on June 5, 2018, after due notice by publication in *The City Record*, and then to decision on June 15, 2018; and

WHEREAS, § 1-12.4 of the Board’s Rules of Practice and Procedure states, in relevant part:

The Board will not grant a request to reargue a case which was denied, dismissed, or approved unless the applicant shows that the Board misapprehended the relevant facts or misapplied any controlling principals of law, including the Zoning Resolution; and

WHEREAS, the Board disagrees with both DOB and the Appellant that it misapplied the relevant facts in its decision on the Appeals—the CO Revocation Appeal was pending at the Board for four years and the Common Law Vested Right Appeal was pending at the Board for three years, with several hearings, written submissions and oral testimony from both DOB and the Appellant in which either party could have identified and/or cleared up any factual errors or explained

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1 The resolution was released on March 8, 2018.

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**166-12-AIII and 107-13-A**

shifting approaches; and

WHEREAS, however, at hearing, the Board suggested that DOB's application to reargue the CO Revocation Appeal, which the Board understood to heavily rely on DOB's procedural difficulties in enforcing the Board's decision on the Appeals (i.e. ensuring that the objections at the site are actually cured where the premises has a valid certificate of occupancy), may be better suited as a request for rehearing, pursuant to § 1-12.5 of the Board's Rules of Practice and Procedure; and

WHEREAS, § 1-12.5 of the Board's Rules of Practice and Procedure states, in relevant part:

The Board will not grant a request to rehear a case which was denied, dismissed, or withdrawn with prejudice unless: (1) substantial new evidence is submitted that was not available at the time of the initial hearing, (2) there is a material change in plans or circumstances, or (3) an application is filed under a different jurisdictional provision of the law; and

WHEREAS, the Board proposed that DOB's procedures constituted substantial new evidence not available at the time of the initial hearings in accordance with that section; and

WHEREAS, the Appellant objected to the recasting of DOB's application for a re-argument as one for rehearing, arguing that DOB's information regarding the difficulties in enforcement at the site was not, in fact, new—all of that information had been provided in the underlying record for the Appeals—and reiterated Appellant's proposal that the Board reverse its decision with regards to the Common Law Vested Right Appeal and allow the Appellant and DOB to cure the violations at the site that DOB states render Certificate of Occupancy No. 103703226 invalidly issued; and

WHEREAS, in light of the Appellant's objection, the Board agrees that DOB's application for re-argument should remain as filed; and

WHEREAS, the Board additionally disagrees that it misapplied any controlling principals of law in its decision on the Appeals—neither DOB nor the Appellant identified a provision of law that the Board's Resolution misapplied; the Board relied on Putnam in its determination that the vested right to occupy the Rear Structure with Use Group 4 medical office use had been abandoned, and such case was submitted into the Record and cited by the Appellant in the Common

Law Vested Right Appeal; the Appellant had acknowledged in the course of the hearings on the Appeals that the Common Law Vested Right Appeal was with regards to the Rear Structure only because the building located at the front of the premises was not rendered non-complying by amendment to the Zoning Resolution; DOB's history of issuing temporary certificates of occupancy to the site that did not mention the Rear Structure or Use Group 4 medical offices and the Board's knowledge of lots throughout the city with certificates of occupancy that explicitly note the presence of multiple structures thereon (i.e. one (1) dwelling and a one (1) accessory garage) supported the Board's determination that Certificate of Occupancy No. 103703226 could be modified without having to be revoked in its entirety; additionally, the Board has the authority to modify, in addition to set aside or vacate, certificates of occupancy pursuant to § 645(b)(3)(e) of the New York City Charter; and

WHEREAS, however, the Board notes that, in reviewing the Resolution, there are clauses that could be modified to clarify the Board's rationale and provide greater guidance to the Appellant and DOB as to how to move forward; and

WHEREAS, accordingly, and having found good cause, the Board made and granted a motion to review the Resolution, pursuant to § 1-12.6 of the Board's Rules of Practice and Procedure; and

WHEREAS, that section provides that,

In accordance with § 666(8) of the Charter, the Board may, for good cause, on its own motion at a public hearing, review any decision that it has made and may reverse or modify such decision but no such review will prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified; and

WHEREAS, the date for review of decision was set for July 17, 2018; and

*Therefore, it is Resolved,* that the Board of Standards and Appeals does hereby *deny* the Department of Buildings' application to reargue BSA Cal. No. 166-12-A, *deny* the Appellant's application to reargue both BSA Cal. Nos. 166-12-A and 107-13-A; and *grant* the Board's motion to review its decision in BSA Cal. Nos. 166-12-A and 107-13-A, dated October 17, 2017, at public hearing on July 17, 2018.

Adopted by the Board of Standards and Appeals, June 19, 2018.

**A true copy of resolution adopted by the Board of Standards and Appeals, June 19, 2018.**

**Printed in Bulletin Nos. 25-26, Vol. 103.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

