

**170-09-A**

APPLICANT – NYC Department of Buildings

OWNER – Kenbridge Realty Corporation

SUBJECT – Application May 12, 2009 – An appeal filed by the Department of Buildings seeking to amend Certificate of Occupancy to remove the reference to "Adult" Establishment "use on the second floor. M1-5/R-9 Special Mixed Use District.

PREMISES AFFECTED – 24-03 Queens Plaza North, northeast corner of Queens Plaza North and 24<sup>th</sup> Street, Block 414, Lot 5, Borough of Queens.

**COMMUNITY BOARD #1Q**

APPEARANCES –

For Applicant: John R. Egnatos-Beene.

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

**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 Department of Buildings (“DOB”) seeks to modify Certificate of Occupancy Number 400942655 (the “Current CO”), issued to the subject premises on May 2, 2002, on the basis that it improperly reflects a non-conforming adult establishment on the first floor of the existing building located at the premises; and

WHEREAS, a public hearing was held on this application on September 15, 2009, after due notice by publication in the *City Record*, with a continued hearing on November 24, 2009, and then to decision on December 15, 2009; and

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

WHEREAS, the subject premises is located on the northeast corner of Queens Plaza North and 24<sup>th</sup> Street, in an M1-5/R9 zoning district within the Special Long Island City Mixed-Use District; and

WHEREAS, the Current CO reflects the following uses: (i) an employees lounge, office storage, kitchen and utility rooms in the cellar; and (ii) Use Group 6 stores and Use Group 12 adult eating and drinking establishment on the first floor; and

WHEREAS, DOB asserts that the adult establishment use on the first floor has been prohibited since July 26, 2001, when the premises was rezoned to an M1-5/R9 zoning district within the Special Long Island City Mixed-Use District; and

WHEREAS, DOB states that, pursuant to ZR § 42-01(a), adult establishments are prohibited in manufacturing districts in which residential use is permitted as-of-right; and

WHEREAS, DOB further states that, pursuant to ZR § 123-20, Special Mixed-Use Districts, such as the subject district, permit residential use as-of-right; and

WHEREAS, DOB states that, pursuant to ZR § 52-77, a non-conforming adult establishment must terminate

within one year from the date it becomes non-conforming; thus, because the rezoning became effective on July 26, 2001, the adult establishment use at the subject building should have terminated on or before July 26, 2002; and

WHEREAS, DOB notes that its issuance of the Current CO was erroneous, because it was issued on May 2, 2002, which is after the date of the rezoning; and

WHEREAS, representatives of TC Entertainment Inc., the lessee of the first floor of the subject building (hereinafter, the “Opposition”), testified at hearing and made submissions to the record in opposition to the application; and

WHEREAS, the Opposition raised the following primary arguments: (1) the Board should not act on the subject application due to pending litigation; (2) the adult use regulations were not intended to apply to Special Mixed Use Districts and prohibiting adult establishments in a district specifically intended for mixed uses is invalid as a matter of constitutional law; and (3) the Board should re-start the one-year amortization period of ZR § 52-77; and

WHEREAS, as to the pending litigation, the Opposition asserts that the Board should not act on the subject application in the absence of a decision in Ten’s Cabaret, Inc. v. City of New York (Index No. 121197/02), which concerns the regulation of adult uses in New York City; and

WHEREAS, the Board disagrees with the Opposition, noting that the instant case can be distinguished from the issues under review in Ten’s Cabaret in that DOB’s request to modify the Current CO is based on the fact that an adult establishment is not permitted within the subject zoning district, and thus such use cannot be reflected on any certificate of occupancy within the subject district; and

WHEREAS, additionally, the Board notes that the outcome of Ten’s Cabaret and the definition of what an adult establishment is does not have any bearing on whether an adult establishment is a conforming use in an M1-5/R9 zoning district; and

WHEREAS, as to the Special Mixed Use Districts, the Opposition asserts that the effect of adult uses in such districts was never analyzed because Special Mixed Use Districts had not yet been created when the adult use regulations prohibiting the operation of adult establishments near residential and specified community facility uses were enacted; and

WHEREAS, the Opposition further asserts that Special Mixed Use District regulations substantially alter the relationship between mixed uses, and the application of the adult use regulations to such districts is not supported; and

WHEREAS, the Board notes that ZR § 42-01(a) specifically prohibits adult establishments in a

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manufacturing zoning district where residential use is permitted as-of-right, such as in the subject M1-5/R9 zoning district; and

WHEREAS, as to an amortization period, the Opposition requests that the Board re-start the one-year period set forth in ZR § 52-77 based on the equitable defense of laches, the requirement for procedural due process, and the Board's power pursuant to City Charter § 666(7); and

WHEREAS, specifically, the Opposition alleges that DOB failed to pursue the modification to the Current CO in a timely fashion, and because DOB issued the Current CO in 2002, the owner lacked notice of the alleged non-conformity under ZR § 42-01; and

WHEREAS, the Opposition argues that restarting the amortization period is similarly demanded by the requirements of procedural due process, because the owner was not afforded notice that the use was non-conforming after the zoning change; and

WHEREAS, the Board notes that it is an administrative body rather than a court, so it is not appropriate for it to entertain equitable defenses; and

WHEREAS, the Board further notes that the owner had constructive notice of the subject non-conformity by virtue of the rezoning of the site to a zoning district in which adult establishments are prohibited; and

WHEREAS, additionally, the Board notes that the one-year amortization period began on July 26, 2001, more than eight years ago, so any argument for equitable relief, even if the Board were able to consider it, is unavailing; and

WHEREAS, DOB notified the Opposition to the non-conformity with zoning by letter dated October 14, 2008, more than one year ago; and

WHEREAS, based on the above, the Board finds the Opposition's invocation of the Board's powers pursuant to City Charter § 666(7) misplaced; and

WHEREAS, accordingly, the Board finds that the adult establishment use should have been terminated on or before July 26, 2002, pursuant to ZR § 52-77; and

WHEREAS, therefore, the Board finds that the reference on the Current CO to adult establishment use on the first floor is contrary to the provisions of the Zoning Resolution.

*Therefore it is Resolved* that the application brought by the Deputy Commissioner of the Department of Buildings on May 12, 2009, seeking to modify Certificate of Occupancy No. 400942655 by removing any reference to "adult establishment" on the first floor, is hereby granted.

Adopted by the Board of Standards and Appeals,

**A true copy of resolution adopted by the Board of Standards and Appeals, December 15, 2009.**

**Printed in Bulletin Nos. 50-51, Vol. 94.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

**Updated: March 4, 2010**