

189-05-A

APPLICANT – James Periconi for Olive Freud, Hudson Waterfront Associates, owners et al.

SUBJECT – Application filed on September 7, 2005 – An appeal challenging the Department of Building’s issuance of Temporary Certificate of Occupancies for 240 Riverside Boulevard (Building A) before the completion of the roadway connection between 72nd Street and Riverside Boulevard.

PREMISES AFFECTED – 240 Riverside Boulevard, (Building A), Block 1171, Lot 120, Borough of Manhattan.

COMMUNITY BOARD #6M

APPEARANCES –

For Administration: Janine Gaylard, Department of Buildings.

ACTION OF THE BOARD – Appeal denied.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice-Chair Babbar, Commissioner Chin and Collins.....4

Negative:.....0

THE RESOLUTION –

WHEREAS, the instant appeal comes before the Board in response to a final determination of the Manhattan Borough Commissioner, dated August 12, 2005 (the “Final Determination”); and

WHEREAS, a public hearing was held on this application on February 7, 2005 after due notice by publication in *The City Record*, and then to decision on March 14, 2006; and

WHEREAS, the Final Determination was issued in response to a request from the appellant that the Department of Buildings (“DOB”) rescind two temporary certificates of occupancy (Nos. 101236002T001 and 101236002T002, collectively, the “TCOs”) issued to a 31-story residential building (“Building A”) at the subject premises; and

WHEREAS, as reflected in the Final Determination, the Manhattan Borough Commissioner denied this request because there was no basis to rescind the TCOs; and

WHEREAS, Building A is located within a planned general large-scale development of residential and commercial uses, comprised of 15 development parcels, facing Riverside Drive South (the “development”); and

WHEREAS, on October 26, 1992, the City Planning Commission (“CPC”) approved certain special permits related to the development (the “special permits”); and

WHEREAS, the CPC resolution approving the special permits states that the development must be constructed in accordance with plans set forth in the CPC resolution; that the development must include mitigation measures as set forth in the Final Environmental Impact Statement prepared for the development (the “FEIS”); and that the development would be allowed only after a restrictive declaration is recorded and filed; and

WHEREAS, CPC approved changes to the City Map in order to extend the existing street system into the

development site, and to eliminate several streets in order to consolidate the development parcels, and also amended ZR Zoning Map 8c to allow for higher density at the development; and

WHEREAS, on December 17, 1992, the owner of the premises, as required by the special permits, entered into a restrictive declaration concerning the development, restricting its construction in a manner consistent with the special permits, the City Map change, and the rezoning; and

WHEREAS, on May 27, 1998, the City and the owner entered into a mapping agreement, in which the owner agreed to perform work “substantially in accordance with” the requirements set forth in a NYC Department of Transportation (“DOT”) letter dated January 23, 1998; said mapping agreement was accepted by CPC on July 16, 1998; and

WHEREAS, DOB issued excavation, foundation and structural framing permits for Building A under Application No. 101236002 on July 1, 2002, and under Application Nos. 103177893 and 103173888 on August 1, 2002, and a builder’s pavement plan permit on July 24, 2002 (collectively, the “DOB permits”); and

WHEREAS, in a prior appeal before the Board, brought under BSA Cal. No. 134-03-A, the appellant (the same appellant as in the instant appeal) claimed that the special permits and the mapping agreement contained a condition providing that the developer of the premises must undertake the work necessary to connect Riverside Boulevard to 72nd Street in conjunction with the construction of Building A, as well as close the off ramp from Riverside Drive to 72nd Street, and further claimed that DOB must ensure that construction of the road connection, and the ramp closure, occur simultaneously with the building construction; and

WHEREAS, on this basis, the appellant asked the Board to overturn DOB’s refusal to revoke the DOB permits; and

WHEREAS, the Board denied the appeal on October 21, 2003, finding that DOB properly issued the DOB permits, and that there was no requirement in any of the above-mentioned agreements, special permits or related actions that the ramp be closed or the roadway be constructed prior to their issuance; and

WHEREAS, the Board’s decision was challenged in an Article 78 proceeding; and

WHEREAS, while the litigation was being resolved, a major portion of the construction of Building A was completed, and DOB issued the subject TCOs; and

WHEREAS, the appellant now challenges DOB’s issuance of the TCOs, based upon the following arguments: (1) DOB failed to review the alleged traffic burden arising from the occupancy of Building A before closure of the ramp and connection of the roadway, as

189-05-A

is allegedly required by Building Code Section 27-218 (which authorizes DOB to issue TCOs so long as the part of the premises covered by the TCO is deemed safe for occupancy); (2) DOB failed to determine that all permitted work is complete and that such work substantially complies with approved plans and all applicable law, as is allegedly required by Section 27-218; and (3) the BSA, in the prior appeal, stated that DOB should not issue a TCO for Building A prior to completion of the roadway connection; and

WHEREAS, as to the first argument, the appellant states that DOB's issuance of the TCOs was an abuse of its discretion in that DOB did not require any information as to when the roadway connection would be completed even though the TCOs allow residents to occupy Building A and also to allegedly park up to 144 cars; and

WHEREAS, Section 27-218 provides that DOB may issue a TCO for "a part or parts of a building before the entire work covered by the permit shall have been completed, provided that such part or parts may be occupied safely prior to completion of the building and will not endanger public safety, health or welfare"; and

WHEREAS, DOB disputes that 27-218 imposes any requirement upon it to assess environmental impacts such as potential traffic concerns; and

WHEREAS, DOB notes that upon issuing a TCO, it is only required to evaluate whether tenants may safely occupy a part of a building prior to full completion of all work; and

WHEREAS, the Board agrees with DOB: there is no requirement in Section 27-218 that would require DOB to research, or solicit data from the permit applicant about, potential parking and/or traffic impacts; and

WHEREAS, the Board notes that Section 27-218 solely addresses the safety, health and welfare of the occupants of the building parts that would be occupied under a TCO; and

WHEREAS, unlike a discretionary review agency such as the Board, DOB, when issuing permits or TCOs, is not required to evaluate the potential environmental impacts like traffic and parking that a proposal might generate; and

WHEREAS, finally, the Board observes that appellant makes no argument that Building A is not safe for occupancy; and

WHEREAS, accordingly, the Board finds that appellant's first argument is without merit; and

WHEREAS, as to the second argument, the appellant states that the owner of Building A will, in bad faith, pursue further TCOs without any intention of obtaining a final CO, and that DOB is complicit in this process, which is a further abrogation of DOB's responsibility under Section 27-218; and

WHEREAS, the appellant seems to imply that DOB must, upon issuing a TCO, make a determination

that all work conforms to applicable laws, because the developer can not be trusted; and

WHEREAS, DOB responds that both the Building Code and the City Charter provide that a certification as to conformance with all applicable laws is not the standard for issuance of a TCO; instead, DOB has the discretion to issue a TCO upon finding that a building or part of a building is safe for occupancy though all work has not been completed; and

WHEREAS, again, the Board agrees with DOB, for the reason given; and

WHEREAS, accordingly, the Board finds that appellant's second argument is without merit; and

WHEREAS, as to the third argument, the appellant cites to various comments made by former commissioners on the record while Cal. No. 134-03-A was being heard; and

WHEREAS, the appellant argues that the comments should be taken as an expression of the Board's concern that no TCO be issued for Building A until the roadway connection was constructed; and

WHEREAS, however, the resolution issued for the Board's decision as to the prior appeal makes no mention of this alleged concern, nor does it prohibit the issuance of a TCO for Building A; and

WHEREAS, the Board observes that the resolution is the official return of the Board as to the substance of any matter before it; and

WHEREAS, the Board finds that that the individual comments of commissioners at hearing, especially when taken out of context or when tangentially related to the issue before it, should not be construed as binding orders upon DOB; and

WHEREAS, moreover, as correctly noted by counsel to the developer, the decision to issue a TCO is a power of the DOB Commissioner or Borough Commissioner; none of the comments cited by the appellant suggest that DOB could not exercise its authority to issue one; and

WHEREAS, further, with one exception, none of the comments concerned issuance of a TCO, but were rather addressed towards issuance of a final CO; and

WHEREAS, accordingly, the Board finds that appellant's third argument is without merit; and

WHEREAS, subsequent to the first hearing on the matter, the appellant submitted copies of the Mapping Agreement, the CPC Resolution granting the 1992 Special Permit, and portions of the FEIS; and

WHEREAS, the appellant states that the provided documents support the contention that DOB had the responsibility to ensure that the roadway connection would be completed in time to accommodate the traffic impacts that would result from the development at the subject premises; and

WHEREAS, DOB responded that none of the submitted documents require construction of the

189-05-A

roadway connection prior to issuance of a TCO for Building A; and

WHEREAS, the Board has reviewed the documents and agrees that no such requirement is present in any of them; and

WHEREAS, nor does the Board find persuasive appellant's argument that such a requirement might not be explicitly imposed in such documents, but that it should be inferred nonetheless; and

WHEREAS, additionally, the Board notes DOB's submission into the record of a June 17, 2005 letter from CPC Commissioner Burden to DOB Commissioner Lancaster, which states that the developer of Building A was free to file for a TCO, as it had satisfied obligations in the restrictive declaration; and

WHEREAS, the Board observes that no such letter would have been issued by CPC had that agency been concerned that any of the documents submitted by appellant prevented issuance of a TCO until the roadway connection was constructed; and

WHEREAS, accordingly, the Board finds that appellant's final argument is without merit; and

WHEREAS, the Board notes that the appellant, by letter dated February 28, 2006, asked the Board to delay decision until DOT approval of the roadway connection, which the appellant believes could occur sometime in the middle of 2006; and

WHEREAS, however, because the instant appeal is meritless, the Board sees no reason to delay its denial.

Therefore it is Resolved that the instant appeal, seeking a reversal of the determination of the Manhattan Borough Commissioner, dated August 12, 2005, refusing to rescind the subject TCOs, is hereby denied.

Adopted by the Board of Standards and Appeals, March 14, 2006.

**A true copy of resolution adopted by the Board of Standards and Appeals, March 14, 2006.
Printed in Bulletin No. 12, Vol. 91.**

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.