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BOARD OF STANDARDS AND APPEALS

MEETING OF: **May 6, 2024**
CALENDAR NO.: **2022-44-A**
PREMISES: **638 East 11th Street, Manhattan**
Block 393, Lot 25

ACTION OF BOARD — Application denied.

THE VOTE TO APPROVE —
Affirmative: 0
Negative: Chair Chanda, Vice-Chair Scibetta, Commissioner Ottley-Brown, Commissioner Sheta, and Commissioner Yoon 5

THE RESOLUTION —

I. The Appeal

This is application for an interpretation concerning a final determination of the New York City Department of Buildings ("DOB"), under DOB Job No. 123783888, dated June 13, 2022, which denied the Appellant's request to convert a portion of the subject mixed-use building from community facility to residential use and, in conjunction with such conversion, provide dry floodproofing at the first floor, stating, in pertinent part:

> Dry floodproofing of residential portions of mixed-use buildings is not allowed (2014 BC Appendix G, Table 6-1, note 'c'). Variance to Building Code cannot be granted at Plan Examiner level. Obtain BSA approval for variance as per BC G107.1 and BC G107.2.

A public hearing was held on this application on November 27, 2023, after due notice by publication in *The City Record*, with a continued hearing on March 11, 2024, and then to decision on May 6, 2024.

II. The Location

The Premises are located on the south side of East 11th Street, between Avenue B and Avenue C, in an R8B zoning district, in Manhattan. With approximately 75 feet of frontage along East 11th Street, 95 feet of depth, and 7,109 square feet of lot area, the Premises

are occupied by an existing seven-story mixed-use community facility and residential building located at the subject zoning lot's front lot line (the "Front Building"). The Board also notes that there was a one-story, plus cellar, community facility structure located at the subject zoning lot's rear lot line, which extended 20'-9" into the required 30-foot rear yard and was connected to the Front Building by a bridge (the "Rear Structure") (collectively, the "Buildings"). The Appellant represents the Rear Structure was demolished and provided DOB-approved demolition plans dated March 24, 2022 and photographs.

III. Premises History

A. The 2004 Alteration

Historically, the Premises consisted of three separate tax lots that were developed with multi-family residential buildings. In March 2004, DOB issued two Alteration Type 2 Permits, under No. 103701709-EW-OT and No. 103745388-01-EW-OT, which permitted demolition and removal of certain portions of the structures at the Premises. DOB later approved new construction at the Premises when, between April and May 2004, it issued Alteration Type 2 Permit No. 103744067 to permit new foundations and footings for a new enlargement and Alteration Type 1 Permit No. 103703226-01-AL ("Permit No. 103703226") for a use identified as "J-2 Residential Apartment House," to which DOB attached a Schedule A indicating Use Group ("UG") 4 medical offices at the cellar level, first-floor, and first-floor mezzanine levels at the Premises (collectively, the "2004 Alteration Job").

On September 9, 2004, the New York City Council amended Z.R. § 24-33(b) to prohibit, within the subject R8B district, certain types of community facility uses, including medical offices, from being located within a required rear yard if such building or portion thereof would be located beyond 100 feet of a *wide street*[1] (the "Text Amendment"). After the enactment of the Text Amendment, the Appellant commenced the work under the 2004 Alteration Job and, on July 15, 2008, after DOB had signed off on the foundation application, DOB issued final Certificate of Occupancy No. 103703226F to the Premises, indicating a total of 36 dwelling units and UG 4 medical offices in the cellar level, first-floor, and first-floor mezzanine levels of the Front Building and the Rear Structure.

However, DOB subsequently discovered that the cellar level and first floor of the Front Building had been converted from medical offices to dwelling units. As such, DOB issued, in 2008 and again in 2010, Notices of Violation and summonses to the Premises to require compliance. In response, on May 16, 2011, the Appellant filed a

[1] *See* Z.R. § 12-10, "street, wide."

proposed amendment to Permit No. 103703226 seeking to legalize the conversion of the Front Building's cellar level and first floor medical offices to dormitories—later changing the proposal from dormitories to Class A residential apartments—and to add recreation rooms associated with such apartments in the cellar.

DOB thereafter audited the work done to the Rear Structure under the 2004 Alteration Job, and, by letter dated February 3, 2012, stated to the Appellant, in relevant part, that the agency believed that the Text Amendment rendered the Rear Structure containing medical offices non-conforming and non-compliant. Furthermore, DOB explained that because the Appellant had not completed the foundation prior to the date of the Text Amendment, it had failed to obtain a vested right under Z.R. § 11-331 to complete construction of the Rear Structure. Simultaneously, DOB also commenced a broader audit of compliance with the Certificate of Occupancy No. 103703226F and noted a series of objections related to the residential conversion. In response to DOB's letter regarding the Rear Structure, the Appellant submitted various materials to DOB to argue that the foundations were complete prior to the amendment's effective date and it thereby obtained a vested right to have constructed medical offices within the required rear yard.

The parties each subsequently filed appeals before the Board: DOB sought to revoke Certificate of Occupancy No. 103703226F, claiming that Permit No. 103703226 had lapsed because the Appellant had not completed the foundation prior to the date of the Text Amendment, and the Appellant sought recognition of a common law vested right to complete the remaining construction under Permit No. 103703226 as to the Rear Structure, contending that it had, in fact, timely completed the foundation as required by Z.R. § 11-331 (collectively, the "Prior Appeals").

B. Board History

The Board has exercised jurisdiction over the Premises since October 17, 2017, when, under BSA Cal. No. 107-13-A, the Board denied the Appellant's application to recognize a common law vested right to complete construction under Permit No. 103703226 as to the Rear Structure. Under BSA Cal. No. 166-12-A, on that same date, the Board also denied DOB's request to revoke Certificate of Occupancy No. 103703226F, in part, as to the Front Building, and granted, in part, as to the Rear Structure, DOB's request to revoke Certificate of Occupancy No. 103703226F, insofar as the UG 4 medical offices indicated in the cellar level, first floor, and mezzanine levels of the Rear Structure were non-complying and non-conforming, on condition that the appellant submit to DOB plans sufficient to bring the Front Building and Rear Structure located at the Premises into full compliance with, inter alia, the Zoning Resolution and Building Code

and DOB, upon finding that the plans cure existing objections including, but not limited to, the lack of a secondary means of egress from the Front Building, issue permits for all necessary work; upon the satisfactory completion of all necessary work, DOB issue a new certificate of occupancy or otherwise modify Certificate of Occupancy No. 103703226F to reflect that the subject site is occupied by a Front Building and a one-story plus cellar Rear Structure that relies on the Front Building for egress, access and fire and mechanical systems, but not for vertical circulation, separated from the Front Building by 24 feet and the rear wall of which is located at the rear lot line; the new or modified certificate of occupancy maintain a listing of the uses permitted in the Front Building on a floor by floor basis and add, with regards to the Rear Structure, this portion of the building does not contain a mezzanine and that occupancy by UG 4 medical offices, rooms used for living or sleeping purposes, residential use or any other uses not specifically permitted under the permitted obstruction regulations set forth in Z.R. §§ 23-44 or 24-33, effective August 17, 2018, is prohibited; the appellant may elect, in the alternative, to demolish the Rear Structure, in which case the new or modified certificate of occupancy explicitly state that "one (1) building," the Front Building, is present on the Premises; Certificate of Occupancy No. 103703226F remains valid with regards to the Front Building until such time as another, either new or modified, certificate of occupancy is issued in compliance with the aforementioned conditions; the Board is not an enforcement agency and DOB, equipped as it is with the power to issue violations, criminal summonses and other aggressive, but legal, means, should use these means to require the Appellant to make these essential corrections; and accordingly, nothing in the resolution be deemed to estop DOB from enforcing against the subject site as DOB may deem necessary, including, but not limited to, filing a new appeal with the Board (but the Board, however, not accept any further applications under BSA Cal. Nos. 166-12-A & 107-13-A).

On June 19, 2018, under BSA Cal. Nos. 166-12-A and 107-13-A, the Board denied the parties' requests to reargue the Prior Appeals and amended the October 17, 2017 resolution to more specifically describe the Board's determinations and conditions. The Board notes that the text of the October 17, 2017 resolution reflects the language of that resolution as amended on June 19, 2018 (and revised on July 17, 2018 and filed (i.e., reissued) on August 17, 2018) which added the full list of directives (i.e., Board conditions) to DOB and the appellant noted above, regarding, generally, how DOB and the appellant may pursue bringing the Premises "into full compliance with, inter alia, the Zoning Resolution and Building Code."

C. The Subject DOB Job Application

During the pendency of the Prior Appeals, the Appellant submitted revised plans to DOB attempting to cure the objections raised by DOB during its audit of compliance with Certificate of Occupancy No. 103703226F. These plans, initially proposed as an amendment to Permit No. 103703226, continued to seek the legalization of the residential conversion of the cellar level and first floor of the Front Building. In response, DOB issued a letter, dated July 12, 2016, and a revised Audit of Objections, which indicated that the owner's newly submitted drawings would satisfy all but one of the objections raised by DOB in the audit of the Premises' Building Code compliance status. The outstanding objection (listed as number "28") in the revised Audit of Objections, dated July 12, 2016, states "provide detail of steel dunnage for new mechanical equipment on 7th floor mezzanine." The Board also notes that on that sheet, above objection number 28 and directly below objection number 27, is an unnumbered handwritten note, stating "flood zone regulations -new filing."

Furthermore, by letter dated May 31, 2017, DOB stated, in relevant part, that:

> The plans provided [by the Appellant] on January 13, 2017 address both the zoning objections and remaining Building Code matters. However, the revised plans may only be accepted for filing after the Board reinstates the lapsed permit [i.e., Permit No. 103703226].

After DOB's issuance of these two letters and revised Audit of Objections sheet (collectively, the "DOB Letters"), the Board issued its decisions on the Prior Appeals, as described above, and the Appellant subsequently filed plans to demolish the Rear Structure and continued to pursue its proposed legalization of the Front Building. However, DOB did not accept the Appellant's proposed plans for legalization of the conversion in the Front Building as an amendment to Job No. 103703226, despite its representations in the DOB Letters that the proposed work would cure the audit objections.

On August 2, 2019, under the subject Job No. 123783888, the Appellant submitted a new application to DOB for a permit to authorize the subject residential conversion. In its plans, the Appellant proposed the conversion of the first-floor medical offices in the Front Building into five Class A residential dwelling units, three of which would be duplexes with residential spaces that would extend into the cellar level and replace the cellar-level medical offices.

On September 20, 2019, in response to the applicant's initial filing of Job No. 123783888, DOB issued a Notice of Objections stating that the cellar level is unfit for residential occupancy because, as shown on

the applicable panel of the Federal Emergency Management Agency's ("FEMA") 2013 Preliminary Flood Rate Insurance Map, Panel No. 201 of 457, New York, New York (Map No. 3604970201F), effective December 5, 2013 (the "2013 PFIRM"), the Premises are located within Flood Hazard Zone "AE" and, according to the plans, the cellar level is below the required Design Flood Elevation ("DFE") for Zone AE. The applicant subsequently added proposed dry-floodproofing to its plans to attempt to cure DOB's objection. However, on March 16, 2020, DOB disapproved the application, and on June 13, 2022, it reissued the disapproval with a formal denial stamp. In response, the Appellant filed the instant interpretative appeal.[2]

The Board notes that, as of the date of DOB's approval of the 2004 Alteration Job, the applicable FEMA FIRM panel for the Premises was Panel 47 of 131 for the City of New York, New York (Community Panel No. 360497 0047 B), effective on November 16, 1983 (the "1983 FIRM"). The 1983 FIRM indicated that the Premises were located within "Zone B," which did not have an indicated BFE or DFE. At the time of DOB's issuance of Certificate of Occupancy No. 103703226F, FIRM Panel 201 of 457, New York, New York (Map No. 3604970201F), revised as of September 5, 2007, indicated that the Premises were located in the shaded "Zone X," labeled as "Other Flood Areas," with an Advisory Base Flood Elevation BFE ("ABFE")[3] of 11 feet. Thereafter, by August 2, 2019, the date on which the applicant filed its new application to DOB under Job No. 123783888, FEMA had already issued the 2013 PFIRM locating the Premises within Zone AE—a "Special Flood Hazard Area" which FEMA describes as "subject to inundation by the 1% annual chance flood." The 2013 PFIRM indicates that this Zone AE has a Base Flood Elevation ("BFE") of 11 feet from the waters of the East River.

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[2] The Board notes that the Appellant also filed another application, under BSA Cal. No. 2022-43-A, seeking a variance, pursuant to Building Code §§ G107.1 and G107.2, of applicable flood-resistant construction requirements. As of the issuance of this resolution, the appeal under Cal. No. 2022-43-A is still pending.

[3] *See* U.S. ARMY CORPS OF ENGINEERS, ADVISORY BASE FLOOD ELEVATIONS (ABFE) FREQUENTLY ASKED QUESTIONS, https://www.nad.usace.army.mil/Portals/40/docs/ComprehensiveStudy/ABFE%20FAQ_12_6_12.pdf#:~:text=ABFEs%20are%20advisory%20in%20nature%20and%20more%20accurately,effective%20FIRMs%20adequately%20reflects%20the%20current%20flood%20hazard (last visited September 17, 2024) ("ABFEs are advisory in nature and more accurately reflect the true 1% annual chance flood hazard elevations in a given area. Following large storm events, such as Hurricane Sandy, FEMA performs an assessment to determine whether the 1% annual chance flood event, shown on the effective FIRMs adequately reflects the current flood hazard. In some cases, due to the age of the analysis and the science used to develop the effective FIRMs, FEMA determines there is a need to produce ABFEs. ABFEs are provided to communities as a tool to support them in recovering in ways that will make them more resilient to future storms").

IV. The New York City Building Code and Charter

A. Appendix G of the Building Code

Appendix G of the New York City Building Code (the "Building Code" or "B.C.")[4] regulates construction within the floodplains of the City and applies to not only new construction within a floodplain, but also "alterations or repairs to pre-FIRM buildings and structures [. . .] that increase the degree of noncompliance with this appendix," including the "conversion of any space below the DFE from nonhabitable space into habitable space." B.C. § G102.1 (§ 10.3). "Habitable space" is defined as including "[a]ll rooms and space within a dwelling unit," such as the proposed dwelling spaces in the first floor and cellar of the Front Building. B.C. § G201. Moreover, Appendix G prohibits the "conversion of existing nonoccupiable space to occupiable space without such space being in full compliance with [Appendix G]" (B.C. § G304.4.1.3), and mandates that "the lowest floor…shall be elevated to or above the design flood elevation." B.C. § G304.1.1(1).

To determine the applicable DFE, Appendix G states, in pertinent part, that a building in Flood Design Class 2—i.e., most residential buildings, including the Front Building (*see* B.C. § 1.4.3)—must have a minimum elevation of flood proofing relative to DFE as follows: "DFE = Base Flood Elevation ("BFE") + 2 feet." *See* B.C., App'x G, § 6.2, Table 6-1. Moreover, subsections (c) and (d)(i) of § 6.2 provide that "c. Wet or dry floodproofing shall extend to the same level," and "d. Dry floodproofing shall not be permitted (i) in buildings that are 'residential for flood zone purposes[.]'"

Here, because the 2013 PFIRM indicates that the Premises have a BFE of 11 feet, the applicable DFE would be 13 feet. Furthermore, because the Front Building is "residential for flood zone purposes" as defined in B.C. § 202,[5] subsection (d)(i) would prohibit the Front Building from having dry floodproofing, and as per subsection (c), it would need wet floodproofing to the level of 13 feet.

B. The Board's Appellate Jurisdiction under the Charter

Section 666(6)(a) of the New York City Charter states that the Board shall have the power:

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[4] The Building Code is part of the New York City Construction Code, codified at Title 28 of the N.Y.C. Administrative Code and effective July 1, 2008. The Construction Code replaced many provisions of the 1968 Building Code, which governed construction in the City prior to the enactment of the Construction Codes, which were amended in 2014 and 2022.

[5] As shown on the plans submitted by the appellant under Job No. 123783888, the Front Building is within Occupancy Class R-2, which is included within the definition of "residential (for flood purposes)" stated in Building Code § 202.

> [t]o hear and decide appeals from and review [. . .] except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or of a deputy commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of section six hundred forty-two or section six hundred forty-five of this charter.

V. Arguments on Appeal

A. The Appellant's Arguments

The Appellant filed this subject appeal contending that the post-2013 PFIRM revision to Appendix G, requiring a DFE of 13 feet in the area of the Premises, does not apply to the subject Premises, and DOB is obligated to approve the proposed conversion. The Appellant argues that the Board's October 17, 2017, resolution ordered DOB to approve the proposed work, as an amendment to Job No. 103703226, as the DOB Letters indicated that the plans would cure such objections, including those related to residential use in the cellar level and first floor. The Appellant maintains that these DOB materials constitute binding representations from DOB that the proposed work would be compliant with the applicable Building Code provisions. The Appellant further states that because these DOB materials did not explicitly list any objections related to Appendix G—other than the handwritten note stating "flood zone regulations -new filing" which the Appellant contends was not an actual objection as it was unenumerated and not otherwise raised to the Appellant during the Prior Appeals—Appendix G compliance is, thereby, not required.

In further support of this contention, the Appellant highlights the condition stated in the June 19, 2018, amendment of the Board's October 17, 2017, resolution which required, in pertinent part:

> [That] the Appellant submit to DOB plans sufficient to bring the Front Building and Rear Structure located at the subject site into full compliance with, inter alia, the Zoning Resolution and Building Code and DOB, upon finding that the plans cure *existing objections* including, but not limited to, the lack of a secondary means of egress from the Front Building, issue permits for all necessary work [emphasis added].

The Appellant represents that DOB's failure to explicitly object to the proposed residential conversion's lack of adherence to the revised Appendix G during the Prior Appeals, in addition to its representations in the DOB Letters, established that the "existing objections" had been

cured and that the proposed plans were in "full compliance" with the Building Code, thereby activating the remaining portion of the directive to DOB to "issue permits for all necessary work." However, the Appellant claims that DOB attempted to subvert the Board's directive by refusing to accept the Appellant's amended filings under Job No. 103703226 to legalize the conversion and by ordering the Appellant to submit the proposed conversion as a new application under a new job number (the subject Job No. 123783888). Moreover, the Appellant contends that, by proceeding in this manner, DOB unlawfully prevented the Appellant from executing the proposed conversion, forcing the Appellant to comply with Appendix G and forfeit its right to have residential use in the cellar level and first floor. As such, the Appellant seeks, in this appeal, that the Board determine that DOB accept the instant Job No. 123783888 as an amendment to Job No. 103703226.

The Appellant also claims that the subject Premises are not subject to Appendix G because the Premises are a "pre-FIRM development" and not a "substantial improvement." Under B.C. § G201, which provides definitions for Appendix G related terms, a pre-FIRM development is, in pertinent part, one for which the construction was completed after November 16, 1983, and the property was located in FEMA Flood Risk Zone B at the start of construction. Specifically, B.C. § G201 defines "substantial improvement," in relevant part, as "[a]ny repair, reconstruction, rehabilitation, addition or improvement of a building or structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the improvement or repair is started." The Appellant represents that because the work to construct the Front Building started in 2004, and the Premises were located in Zone B at that time, the subject Premises are a pre-FIRM development. Furthermore, while work classified as a substantial improvement must comply with the flood-resistant construction requirements in effect at the time of the improvement, the Appellant maintains that the improvements at the Premises do not qualify as substantial improvements.

B. DOB's Arguments in Opposition

DOB argues that Appendix G, as amended subsequent to the 2013 PFIRM, applies to the Premises, regardless of whether the Appellant was aware of such requirements during the pendency of the Prior Appeals. DOB notes that the Prior Appeals concerned the application of vested rights under Certificate of Occupancy No. 103703226F as to the UG 4 medical offices indicated in the cellar level, first floor, and mezzanine levels of the Two Buildings, and not the Appellant's right to change the use to residential. DOB thus maintains that such limited scope of the Prior Appeals is the reason that DOB's instant Appendix G objections were not explicitly raised during those prior proceedings.

Next, DOB contends that the handwritten comment on the revised Audit of Objections sheet attached to the DOB Letters, stating "flood zone regulations -new filing," was an indication by DOB that, after the disposition of the Prior Appeals, Appendix G compliance would be a necessary step toward issuance of a permit to complete work at the Premises—notwithstanding its unenumerated format—and serves as evidence that the Appellant was on further notice of the requirements posed by Appendix G.

DOB further states that it is not permitted to designate the instant job application under No. 123783888 as a post-approval amendment ("PAA") of the original application under Job No. 103703226, contrary to the Appellant's assertion. DOB explains that, although owners of buildings constructed under the 1968 Building Code, such as the Front Building, may comply with those regulations for many aspects of construction, Administrative Code ("A.C.") § 28-101.4.3, exception (7), dictates:

> [The] administration and enforcement of the 1968 Building Code shall be in accordance with [the Construction Codes], including, but not limited to, approval of construction documents, issuance of permits, and certificates of occupancy.

Moreover, DOB notes that A.C. § 28-104.3 also states that "amendments to approved construction documents shall be submitted…*before* the work…is completed," and only minor revisions are allowed prior to sign-off of the work. *Id* (emphasis added). Thus, DOB argues, because the Department "signed off" on the original work proposed under Job No. 103703226 on July 15, 2008, the Construction Codes, which the Premises must comply with under § 28-101.4.3, exception (7), do not allow for a PAA to be filed 15 years later. DOB further describes that refusing to allow the filing of a PAA is in line with a longstanding practice, dating back 85 years: even under the code provisions applicable to the 1968 Building Code, "amendments to permit applications[,] accompanying plans and papers may be submitted at any time *before* final inspection of the work or equipment is completed." A.C. § 27-154 (emphasis added). DOB also contends that this time limit on filing PAAs dates back to at least the 1938 Building Code, under which then-§ C26-170.0 states that "[a]mendments to any application or permit may be filed at any time *before* the completion of the work for which the permit was sought." (emphasis added). Accordingly, DOB asserts that, as the Appellant cannot amend Job No. 103703226 by PAA, it remains subject to the amended Appendix G requirements.

Regarding the definition of "substantial improvement," DOB concedes that the proposed work does not meet the definition of a substantial improvement, but nevertheless falls within the scope of

B.C. § G102.1(10.3): "[t]his appendix shall apply to alterations or repairs to pre-FIRM buildings and structures…that increase the degree of noncompliance with this appendix," and "[t]he conversion of any space below the design flood elevation from nonhabitable space into habitable space shall be deemed an increase in the degree of noncompliance." DOB clarifies that, since the 2013 PFIRM led to a recalculation of the BFE rendering the cellar and first floor below the DFE, Appendix G applies to the residential conversion that the Appellant proposes under the instant job application. DOB further describes that Building Code § G304.1.1(1) requires, for any residential space, that "the lowest floor…shall be elevated to or above the design flood elevation." Accordingly, DOB argues that, because the proposed residential units would be located below the current DFE, the proposed work does not comply with Appendix G.

Finally, DOB states that, regardless of whether the Appellant filed a new application to convert to residential use, as it did under Job No. 123783888, or had filed an application for a PAA to Job No. 103703226 after the conclusion of the Prior Appeals, the Appellant would have been required to comply with all new laws effective at that time of filing, including Appendix G, as amended. Therefore, DOB concludes that, because it has no legal authority to vary the application of Appendix G, and the Board's October 17, 2017 resolution, as amended, did not grant an Appendix G variance,[6] DOB cannot approve the Appellant's instantly proposed plans under Job No. 123783888.

VI. Board Review

Over the course of hearings, in considering the primary issue of whether Appendix G applies to the subject Premises, the Board questioned (1) the scope of the Prior Appeals; (2) whether the subject job application could be deemed and accepted by DOB as an amendment to the 2004 Alteration Job; and (3) if the Appellant was on notice of the applicability of Appendix G prior to filing Job No. 123783888.

A.

First, the Board finds that the scope of the Prior Appeals was limited solely to the question of whether the Appellant had obtained a vested right to have medical offices within the required rear yard. Because of this limitation on the Board's review, the Board did not opine on the status of the subject Premises' compliance with Appendix G. Moreover, the Board's conditions of its amended October 17, 2017 resolution did not order DOB to issue permits for work that would violate the Building Code. While the Board's conditions noted that such

[6] *See supra* note 2, pg. 6.

plans must "cure existing objections," the Board's resolution clearly directed that the plans must be "in *full* compliance with, inter alia, the Zoning Resolution and Building Code" (emphasis added). Here, the Board notes that failure to comply with Appendix G does not constitute full compliance with the Building Code. Furthermore, the conditions of the Board's resolution also ordered DOB to use its full range of powers to enforce the law, stating:

> [as] the Board is not an enforcement agency and DOB, equipped as it is with the power to issue violations, criminal summonses and other aggressive, but legal, means, [DOB] should use these means to require the Appellant to make these essential corrections; and accordingly, *nothing in the resolution shall be deemed to estop DOB from enforcing against the subject site as DOB may deem necessary*, including, but not limited to, filing a new appeal with the Board [emphasis added].

Under these conditions of the Board's resolution and DOB's general jurisdiction, DOB is empowered not only to require the Appellant to cure the existing objections raised during the prior audits which were unrelated to Appendix G, but also any subsequent objections related to any non-compliance or any non-conformance with any law that DOB may find, within its jurisdiction, such as Appendix G. The Board thus concludes on this point that Appendix G was not the substantive issue of the Prior Appeals and thereby the Board did not waive the law's applicability to the subject Premises, and the Board reiterates that "nothing in [the prior] resolution[s] shall be deemed to estop DOB from enforcing against the subject site as DOB may deem necessary."

B.

Second, the Board finds that the Building Code prohibits the subject Job No. 123783888 from being filed as an amendment to the original 2004 Alteration Job. As noted by DOB, the applicable rules of the Construction Codes, the 1968 Building Code, and even the 1938 Building Code all prohibited the filing of a PAA after work has been completed at a site. *See, e.g.*, A.C. § 28-101.4.3, exception (7); A.C. § 27-154; and § C26-170.0. While the Appellant argues that DOB is legally bound by its representations in the DOB Letters and associated revised Audit Objection sheets that the Appellant's then-proposed plans would cure the existing objections noted by DOB at that time, the Board notes that the representations in such letters are not legally binding statements. Because DOB never actually approved any proposed plans to legalize the conversion to residential use in the cellar level and first floor of the Front Building, and the Appellant completed illegally

converting these spaces *prior* to attempting to amend its plans under Job No. 103703226 to legalize such conversion, the Appellant is prohibited from amending the original 2004 Alteration Job to propose such legalization, and DOB may not deem the instant job an amendment.

C.

Third, the Board finds not only that the Appellant was on notice of Appendix G—both as a matter of fact and as a matter of law—but also that the Premises are subject to Appendix G requirements according to the explicit language of the code. Regarding notice as a matter of fact, the Board agrees with DOB that the handwritten comment on the revised Audit of Objections sheet attached to the DOB Letters, stating "flood zone regulations -new filing," was a written instruction provided by DOB to the Appellant years prior to the filing of the subject Job No. 123783888 that clearly references that a new filing would be made to address Appendix G requirements. The Board also notes that a failure by the Appellant to heed or inquire further to DOB about this note is not grounds to flout the requirements of Appendix G. Furthermore, the Board points to the history of the 2013 PFIRM and the subsequent revision of Appendix G and related zoning regulations as a response to the unprecedented flooding caused by Superstorm Sandy.[7] The Board also notes the general purpose of Appendix G "to promote the public health, safety and general welfare and to minimize public and private losses due to flood conditions in specific flood hazard areas through the establishment of comprehensive regulations."[8]

Finally, the Board declares that the subject Premises otherwise fall within the scope of Appendix G, as explicitly mandated by the code. As DOB explained, Appendix G "shall apply to alterations or repairs to pre-FIRM buildings and structures [. . . .] that increase the degree of noncompliance with this appendix," and "[t]he conversion of any space below the design flood elevation from nonhabitable space into habitable space shall be deemed an increase in the degree of noncompliance." B.C. § G102.1(10.3). As the 2013 PFIRM caused the City to recalculate the BFE, rendering the cellar and first floor below the DFE, Appendix G applies to the residential conversion—regardless

[7] *See, e.g.,* N.Y.C. DEPARTMENT OF CITY PLANNING, RULES FOR SPECIAL AREAS: FLOOD RESILIENCE ZONING TEXT, https://www.nyc.gov/site/planning/zoning/districts-tools/flood-text.page (last visited September 17, 2024) ("The impact of Hurricane Sandy in October 2012 was a brutal reminder that a significant portion of the city is subject to flood risk, even beyond the floodplain delineated by the FIRMs. In 2012, FEMA was already working on an update to the FIRMs and after the storm, new, non-binding flood maps were issued for New York City [i.e., the 2013 PFIRM]").

[8] B.C. § G101.1; *see also* B.C. § G101.2 ("The objectives of this appendix are to [inter alia. . . .] protect human life [. . . . and] minimize the need for rescue").

of whether the conversion constitutes a substantial improvement. Furthermore, under B.C. § G304.1.1(1), "the lowest floor" of any residential space "shall be elevated to or above the design flood elevation," and the conversion at the subject Premises fails to comply with this requirement. Moreover, as subsection (d)(i) of § 6.2 of Appendix G provides that "dry floodproofing shall not be permitted…in buildings that are 'residential for flood zone purposes,'" such as the Front Building, the Appellant's proposal to provide dry floodproofing for the residential spaces is also prohibited and would not cure the Premises' non-compliance.

VII. The Decision

Based upon the foregoing, the Board finds that the DOB determination shall be upheld.

Therefore, it is Resolved, that the Board of Standards and Appeals does hereby *deny* this appeal.

Adopted by the Board of Standards and Appeals, May 6, 2024.

CERTIFICATION

This copy of the resolution dated May 6, 2024 is hereby filed by the Board of Standards and Appeals on September 18, 2024.

Carlo Costanza
Executive Director