315-08-A
APPLICANT – Stuart A. Klein, Esq., for Bayrock/Sapir Organization, LLC, owner.
SUBJECT – Application December 23, 2008 – An appeal seeking the revocation of permits for a condominium hotel on the basis that the approved plans allow for exceeding of maximum permitted floor area. M1-6 zoning.
PREMISES AFFECTED – 246 Spring Street, between Varick Street and Hudson Street, block 491, Lot 36, Borough of Manhattan.
COMMUNITY BOARD #2M
APPEARANCES –
For Applicant: Jay Goldstein.
For Opposition: John E-Bene.
ACTION OF THE BOARD – Appeal denied.
THE VOTE TO GRANT –
Affirmative: 0
Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
THE RESOLUTION –

WHEREAS, this appeal comes before the Board in response to a Final Determination letter dated November 24, 2008 by the New York City Department of Buildings ("DOB") (the "Final Determination"), with respect to New Building Application No. 104403324; and

WHEREAS, the Final Determination states, in pertinent part:

> "The New York City Department of Buildings ("DOB") re-confirms its issuance of the above-referenced permit and approval of the post-approval amendment ("PAA") to this permit on August 22, 2008. Should you wish to challenge DOB's actions with regard to this permit, you may consider this letter a final determination on the validity of the permit and PAA for purposes of bringing an appeal to the Board of Standards and Appeals"; and

WHEREAS, a public hearing was held on this appeal on November 17, 2009, after due notice by publication in *The City Record*, with continued hearings on November 24, 2009, January 26, 2010 and July 27, 2010, and then to decision on October 5, 2010; and

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

WHEREAS, this appeal concerns the construction of a 44-story condominium hotel with 420 individual units in an M1-6 zoning district (the "Building"); and

WHEREAS, the appeal is brought on behalf of the SoHo Alliance, a membership organization of persons who live and work in the SoHo community (the "Appellant"); the Appellant was represented by counsel in this proceeding; and

WHEREAS, DOB and the owner of 246 Spring Street (the "Owner") have been represented by counsel throughout this Appeal; and

PROCEDURAL HISTORY

WHEREAS, on May 17, 2007, DOB issued New Building Permit No. 104403324 (the "Building Permit") for a proposed transient hotel at the subject site; and

WHEREAS, on October 30, 2007, the Appellant filed an appeal with the Board under BSA Cal. No. 247-07-A, arguing that DOB should revoke the Building Permit for the following reasons: (i) the length of stay permitted to unit owners violates the Zoning Resolution (the "ZR") and the New York City Administrative Code; (ii) individual ownership of units violates the ZR; (iii) DOB and the City cannot enforce against illegal residential use of the condominium hotel units; and (iv) that DOB acted inconsistently in approving the Building Permit; and

WHEREAS, on May 6, 2008, the Board denied the appeal under BSA Cal. No. 247-07-A, based on its determination that the Building, as proposed, complied with the criteria for a transient hotel in an M1-6 zoning district and that there was no basis for the revocation of the permit; and

WHEREAS, the Appellant subsequently filed an Article 78 action (SoHo Alliance, Inc. v. City of New York) to challenge the Board's denial of the appeal, in which the Appellate Division upheld the Board's determination; and

WHEREAS, on August 22, 2008, DOB approved a post-approval amendment which involved the addition of the 43rd and 44th floors to the Building; and

WHEREAS, on September 18, 2008 the Appellant submitted a letter to DOB requesting that it revoke the Building Permit on the basis that the plans filed indicated a floor area exceeding that permitted under the applicable zoning regulations; and

WHEREAS, in response, DOB issued the Final Determination on November 24, 2008, denying Appellant's request to revoke the Building Permit; and

WHEREAS, on December 23, 2008, the Appellant filed the subject appeal; and

ISSUES PRESENTED

WHEREAS, the Appellant asserts that the Building exceeds the maximum allowable floor area and, therefore, DOB should revoke the Building Permit; and

WHEREAS, the Appellant makes the following primary arguments in support of its position that DOB should revoke the Building Permit: (i) the elevator shafts and stairwells at the fourth floor were improperly deducted from the floor area calculations; (ii) excessive deductions were taken for the loading berths; and (iii) the swimming pool service process equipment and electric meter rooms were improperly deducted as mechanical equipment; and

WHEREAS, the Appellant makes several additional arguments in support of its position that the Building Permit should be revoked, including: (i) that the curb level elevations for the new building are calculated only for a portion of the zoning lot, contrary to the ZR § 12-10 definition of "curb level;" (ii) that no survey was provided to establish the zoning lot areas for different portions of the site, including the portion occupied by 145 Sixth Avenue, an existing building on the zoning lot; and (iii) that without the plans for the proposed work at 145 Sixth Avenue, it is not possible to confirm the accuracy of the attributable floor areas in determining floor area ratio ("FAR") compliance; and

WHEREAS, the Appellant initially submitted several arguments related to the permit issued for the enlargement of the adjacent building on the subject zoning lot, 145 Sixth Avenue (Alteration Permit No. 104351979), including concerns related to the zoning computations, and the inclusion and dimensions of a greenhouse; and

WHEREAS, the Appellant made additional arguments, regarding deductions taken on the first through sixth floors and the classification of certain uses in the Building as non-accessory, based on amended plans that were submitted by the Owner during the course of the hearing process (the "Revised Plans"); and

WHEREAS, the Board notes that the Appellant failed to submit a final determination from DOB either for the issues related to the permit for 145 Sixth Avenue or the issues related to the Revised Plans and, thus, the Appellant's concerns regarding those issues are not properly before the Board within the context of the subject appeal; and

WHEREAS, accordingly, the Board acknowledges the Appellant's arguments associated with both 145 Sixth Avenue and the Revised Plans, but does not analyze or reach a determination on any of them in the absence of a final determination from DOB; and

THE ZONING RESOLUTION'S DEFINITION OF FLOOR AREA

WHEREAS, ZR § 12-10 (titled "Definitions") provides the definition for "Floor Area," and reads, in pertinent part:

> 'Floor area' is the sum of the gross areas of the several floors of a *building* or *buildings*, measured from the exterior faces of exterior walls or from the center lines of walls separating two *buildings*. In particular, *floor area* includes:
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> ***
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> (b) elevator shafts or stairwells at each floor;
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> ***
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> (o) any other floor space not specifically excluded. However, the *floor area* of a *building* shall not include:
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> ***
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> (7) floor space used for *accessory* off-street loading berths, up to 200 percent of the amount required by the applicable district regulation;
>
> (8) floor space used for mechanical equipment

DISCUSSION

A. Elevator Shafts and Stairwells on a Mechanical Floor

WHEREAS, in support of its assertion that the elevator shafts and stairwells on the fourth floor should be included in the floor area calculations, the Appellant makes the following arguments: (i) the ZR text is unambiguous and states that those spaces count towards floor area; (ii) DOB does not have the authority to narrow a definition contained in the ZR; and (iii) even if there is a longstanding DOB practice of excluding elevator shafts and stairwells on a mechanical floor, it does not legitimize such an incorrect interpretation; and

WHEREAS, in response, DOB makes the following arguments with which the Owner concurs: (i) the inclusion of elevator shafts and stairwells in the floor area calculations on a mechanical floor would lead to an absurd result; (ii) DOB, as the agency that administers and enforces the ZR, has the authority to narrow the definition of otherwise clear language to further the purpose of the ZR; and (iii) DOB's longstanding and consistent practice has been to exclude elevator shafts and stairwells on mechanical floors from the floor area calculations; and

WHEREAS, in addition to the arguments set forth by DOB, the Owner also asserts that DOB's interpretation is necessary to account for relevant advances in technology and approaches to building design that allow for a wholly mechanical floor; and

1. Interpretation of the ZR Text

WHEREAS, in its analysis of the appropriateness of floor area deductions for elevator shafts and stairwells on the Building's fourth floor – a mechanical floor – the Appellant relies on the plain meaning doctrine; and

WHEREAS, the Appellant, citing Raritan Development Corp. v. Silva, 91 N.Y.2d 98, 107 (1997), asserts that the plain language of the ZR § 12-10 definition of floor area is unambiguous, and that under applicable New York law on statutory interpretation, DOB may not go outside the text to interpret the ZR's unambiguous language; and

WHEREAS, the Appellant notes that the definition of floor area under ZR § 12-10 is subdivided into two lists, one which includes those areas that count towards floor area, and one which includes those areas which are not deemed floor area; and

WHEREAS, the Appellant asserts that the plain language of the ZR requires the inclusion of the elevator shafts and stairwells at the fourth floor of the Building in

the floor area calculation because the text specifically lists as floor area "elevator shafts or stairwells at each floor" and "any other floor space not specifically excluded," and the list of exemptions does not include any reference to elevator shafts or stairwells; and WHEREAS, the Appellant cites to McKinney's Consolidated Laws of New York, Book 1, Statutes § 76, "[w]here words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation;" and

WHEREAS, accordingly, the Appellant contends that it was improper to exclude the fourth floor elevator shafts and stairwells from the zoning floor area, and the Building Permit must be revoked because there is not sufficient available bulk to accommodate the inclusion of the elevator shafts and stairwells in the floor area, which will increase the actual net zoning floor area by between 1,200 sq. ft. and 1,500 sq. ft.; and

WHEREAS, in response, DOB acknowledges that the ZR § 12-10 definition of floor area specifically includes "elevator shafts or stairwells at each floor," however, it notes that the entire fourth floor of the Building is a mechanical floor devoted to mechanical equipment; and

WHEREAS, DOB notes that the ZR § 12-10 definition of floor area also specifically excludes "floor space used for mechanical equipment," and that because the entire fourth floor is allocated to mechanical use and is thus wholly excluded, the elevator shafts and stairwells which pass through the mechanical floor are excluded from floor area calculations; and

WHEREAS, DOB asserts that the ZR is silent as to whether elevator shafts and stairwells should be included in floor area calculations when the remainder of the floor is occupied by mechanical equipment and thus exempt from floor area calculations; and

WHEREAS, DOB concludes that an interpretation whereby such spaces are the only floor area on a floor would be unreasonable; and

WHEREAS, further, in support of its authority to interpret the ZR, DOB cites to Appelbaum v. Deutsch, 66 N.Y.2d 975, 977 (1985), wherein the Court of Appeals noted that "BSA and DOB are responsible for administering and enforcing the zoning resolution, and their interpretation must therefore be given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute" (internal citations and quotation marks omitted); and

WHEREAS, DOB states that its duty as the agency that administers and enforces the ZR (see New York City Charter § 643; ZR § 71-00) requires that it interpret the Zoning Resolution in a logically consistent manner; and

WHEREAS, DOB argues that the result of applying the Appellant's interpretation to the Building leads to a result contrary to the spirit of the ZR; and

WHEREAS, DOB cites to McKinney's Consolidated Laws of New York, Book 1, Statutes § 113, "[g]eneral words in a statute may receive limited construction in order to avoid absurd, unjust, or other objectionable results;" and

WHEREAS, DOB states that its interpretation that elevator shafts and stairwells are excluded from floor area on an entirely mechanical floor is necessary in order to avoid the absurd result of counting these voids as floor area when they have no floor space and where the adjoining floor is not counted as floor area; and

WHEREAS, the Owner claims that DOB's interpretation of the relevant provisions of the ZR to permit elevator shafts and stairwells to be excluded from zoning floor area on floors occupied solely by mechanical equipment is the only rational way to reconcile the several different characteristics of zoning floor area; and

WHEREAS, specifically, the Owner contends that the determination of whether or not elevator shafts and stairwells on an otherwise mechanical floor should be treated as floor area involves the interaction of three different elements of the definition of zoning floor area, pursuant to ZR § 12-10: (i) that "'floor area' is the sum of the gross areas of the several *floors* of a building [emphasis added];" (ii) that "elevator shafts and stairwells at each floor" are to be included as floor area; and (iii) that "floor space used for mechanical equipment" is to be excluded from zoning floor area; and

WHEREAS, the Owner argues that the ZR requires elevator shafts and stairwells to be included in zoning floor area because these areas are not "floors;" rather, they are voids that do not fall strictly into the definition of floor area, and therefore the ZR must specify that these spaces are treated as floor area so that they can take on the character of the remainder of the floor on which they are located; and

WHEREAS, the Owner further argues that these areas are better characterized as voids rather than floor space because they are circulation elements appurtenant to the floor through which they pass or which they serve, and therefore should be treated for floor area purposes in the same manner as the floor to which they relate is treated; and

WHEREAS, the Owner concurs with DOB's interpretation for the following reasons: (i) vertical circulation spaces do not have a character of their own but are accessory to and take their character from, the individual floors through which they pass; (ii) excluding elevator shafts and stairwells on mechanical floors is entirely consistent with the purposes of the ZR's floor area controls because these spaces make no greater contribution to a building's density and have no greater impact on its neighbors than does the actual floor space on the mechanical equipment floor; and (iii) it is absurd

to exclude from zoning floor area all of the floor space on an exclusively mechanical floor while including all of the voids; and

WHEREAS, the Owner states that the elevator shafts and stairwells merely pass through the subject mechanical floor, which is only accessible via the service elevator and as a fire exit stair, and that if the elevators and stairwells did not have to pass through the subject mechanical floor to connect the floors above and below, the entire floor could be occupied by mechanical space – and therefore be exempted from floor area – even though the bulk of the building, which is what the ZR's floor area regulations seek to control, would be the same; and

WHEREAS, the Board agrees that DOB has the authority to administer and enforce the ZR and that it is within its authority to interpret how the language including elevator shafts and stairwells as floor area applies to floors that are otherwise completely exempt from floor area; and

WHEREAS, further, the Board agrees with DOB and the Owner that it is unreasonable to exclude from zoning floor area all of the floor space on an exclusively mechanical floor while including all of the voids; and

2. The Extent of DOB's Interpretive Authority

WHEREAS, the Appellant asserts that DOB's interpretation has the effect of rewriting the law in violation of the doctrine of legislative equivalency, which provides that "existing legislation may only be amended or repealed by the same means as was used to enact it." Noghrey v. Town of Brookhaven, 214 A.D. 2d 659 (N.Y.A.D. 2d Dept., 1995), citing Matter of Gallagher v. Regan, 42 N.Y.2d 230, 234 (N.Y. 1977); and

WHEREAS, the Appellant argues that DOB has no authority to narrow a definition in the ZR in the face of clear and unambiguous language; and

WHEREAS, in response, DOB asserts that, although the ZR states that elevator shafts and stairwells are treated as floor area, a rational interpretation of the statute requires DOB to apply a more narrow interpretation which recognizes that those spaces do not count as floor area when the entire floor through which they pass is excluded as mechanical space; and

WHEREAS, DOB argues that New York State courts' and the Board's precedent support its authority to narrow the definition of otherwise clear language to further the purpose of the ZR and prevent an inconsistent result; and

WHEREAS, DOB cites to People v. Ryan, 274 N.Y. 149 (N.Y. 1937) for the principle that narrowing the application of a statutory term is permitted to avoid a result contrary to legislative intent; and

WHEREAS, DOB also cites to BSA Cal. No. 307-06-A (86-18 58th Avenue, Queens), wherein the Board denied a property owner's appeal seeking to have its use classified as a Use Group 3 philanthropic or non-profit institution with sleeping accommodations pursuant to ZR § 22-13; although the applicant was a registered non-profit corporation whose proposed premises contained sleeping accommodations, the Board upheld DOB's interpretation narrowing the application of ZR § 22-13 to apply only to institutions for which the provision of sleeping accommodations was necessary to a philanthropic purpose that was not itself the provision of sleeping accommodations; and

WHEREAS, the Board agrees that BSA Cal. No. 307-06-A is analogous to the subject case in that both involve a DOB interpretation which narrows the application of the ZR's general language in order to achieve results consistent with the purposes of the ZR; and

WHEREAS, the Appellant argues that the subject case is analogous to BSA Cal. No. 67-07-A (515 East 5th Street, Manhattan), wherein the Board rejected DOB's attempts to "create ambiguity in the Zoning Resolution where none exists;" and

WHEREAS, the Board notes that BSA Cal. No. 67-07-A involved a challenge to DOB's issuance of a permit for an enlargement of a building that would exceed 60'-0" in height, despite the language in ZR § 23-692 prohibiting the building from exceeding a height equal to the width of the abutting street, which was 60'-0"; DOB argued that that the term "height" was ambiguous because it was not defined in the ZR, and that DOB was therefore authorized to define height by turning to the "Penthouse Rule," codified in Building Code § 27-306(c), under which the proposed penthouse was not included in the calculation of height; and

WHEREAS, in granting the appeal, the Board found that merely because "height" is not defined in the ZR does not mean that the word is ambiguous, that the Building Code cannot override the ZR and the limitations it establishes on the heights of buildings, and that DOB's application of the Penthouse Rule in the absence of action by the Board or City Planning was equivalent to a legislative act, which exceeded its authority; and

WHEREAS, the Board finds the facts underlying BSA Cal. No. 67-07-A to be distinguishable from the case at hand for a number of reasons; and

WHEREAS, the Board finds that, unlike in BSA Cal. No. 67-07-A, DOB's interpretation in the subject case does not rely on the application of the Building Code or any other extrinsic statutory source, but rather is based on a more inclusive reading of the ZR § 12-10 definition of floor area; and

WHEREAS, the Board notes that in Lee v. Chin, 781 N.Y.S.2d 625 (N.Y. Sup. Ct. 2003) the court stated that it is a "well-established rule in statutory construction that a statute be viewed as a whole, and all of its parts, if possible, be harmonized to achieve the legislative purpose;" and

WHEREAS, the Board finds that, as opposed to being equivalent to a legislative act, DOB's current interpretation merely limits the construction of the general words that floor area includes "elevator shafts or stairwells at each floor," in order to harmonize the components of the ZR to achieve the legislative purpose and avoid an absurd result; and

WHEREAS, as to the Appellant's contention that the relevant text is entirely free from ambiguity, the Board finds that the fact that the ZR § 12-10 definition of "floor area" includes elevators and stairwells in the floor area calculations, yet specifically excludes floor space devoted to mechanical equipment from the floor area calculations, creates a degree of ambiguity as to whether or not elevator shafts and stairwells are to be treated as floor area when they are located on a floor that consists entirely of mechanical space; and

WHEREAS, the Board notes that while the two provisions may not be ambiguous when read independently, an ambiguity arises in applying the provisions to a situation in which they are both applicable, as is the case with elevator shafts and stairwells on an entirely mechanical floor; and

WHEREAS, the Appellant also asserts that DOB's authority to narrow a definition contained in the ZR was rejected by the Court of Appeals in Raritan; and

WHEREAS, in Raritan, the Court rejected DOB's practice of counting cellar space as floor area when it was being used for residential purposes despite the fact that the ZR exempted cellar space from floor area; and

WHEREAS, the Appellant asserts that Raritan is analogous to the subject case because the language in the ZR regarding the inclusion of elevator shafts and stairwells in floor area calculations is clear and unambiguous, similar to the cellar language in Raritan; and

WHEREAS, the Board finds that the Appellant's reliance on Raritan is not supported by the underlying facts of the case; and

WHEREAS, the Board notes that Raritan involved a development consisting of two-family homes with residential use within the cellar space, where the developer excluded the cellar space from floor area calculations based on the "cellar space" exemption of the ZR § 12-10 definition of floor area, however, DOB revoked the building permit based on its determination that the cellar space should be included in the floor area calculations since it was being used for residential purposes and space dedicated to residential use was included in floor area calculations wherever it was located within a building; the developer appealed DOB's decision to the Board, and the Board upheld DOB's decision; and

WHEREAS, the Court of Appeals overturned the Board's denial of the developer's appeal in Raritan, holding that the statutory language was clear in that "cellar space," without qualification, is expressly excluded from floor area calculations, and therefore floor area calculations "should not include cellars regardless of the intended use of the space" Raritan, 91 N.Y.2d 98, at 103; and

WHEREAS, contrary to the Appellant's argument, the Board finds the analysis in Raritan – that if an entire floor is excluded from floor area calculations even space dedicated to other uses otherwise not exempted should also be excluded – more analogous to the subject case in terms of the ZR's express exclusion of "floor space used for mechanical equipment," in that if the floor space of a floor is devoted entirely to mechanical equipment the entire floor should be exempt, regardless of whether the floor includes elevator shafts and stairs which count towards floor area on other floors; and

WHEREAS, the Board notes that since the Court's decision in Raritan, the ZR has been amended to specify that, "cellar space" is exempt from floor area calculations, "except where such space is used for dwelling purposes;" and

WHEREAS, the Board finds an additional parallel between the exemption for "cellar space" and the current situation, in that DOB does not count elevator shafts or stairwells in the floor area calculations for "cellar space" since the entire floor is exempt under ZR § 12-10 (unless it is used for dwelling purposes); therefore, the Board finds DOB's practice of exempting elevator shafts and stairwells for floors occupied entirely of mechanical space consistent with its approach to "cellar space," in that the entire mechanical floor is exempt; and

WHEREAS, the Board agrees with DOB and the Owner that, when read in the context of the ZR § 12-10 definition of floor area as a whole, a rational interpretation of the statute requires DOB to apply a more narrow definition of floor area which recognizes that elevator shafts and stairwells do not count as floor area when the entire floor is excluded as mechanical space; and

3. DOB's Past Practice

WHEREAS, the Appellant asserts that DOB practice, however longstanding, does not inherently legitimize an interpretation that is inconsistent with the plain meaning of a statute; and

WHEREAS, the Appellant again points to BSA Cal. No. 67-07-A, wherein the Board rejected the argument that a longstanding DOB practice in and of itself signifies that an interpretation is correct; and

WHEREAS, the Appellant further argues that even if a longstanding and consistent DOB practice does exist on this matter, no written memoranda or technical policy and procedure notices have been published by DOB to provide guidance as to this aspect of its interpretation of the definition of floor area; and

WHEREAS, DOB and the Owner argue that DOB's interpretation should be upheld because it is consistent with the agency's longstanding practice and policy to exclude elevator shafts and stairwells from the zoning floor area when the remainder of the entire floor is excluded from the definition of floor area as mechanical equipment; and

WHEREAS, as evidence of its policy to exclude elevator shafts and stairwells located on wholly mechanical floors from the floor area calculation, DOB provided a list of other cases in which it has applied this interpretation, and submitted examples of reconsiderations which were granted specifically on this issue; and

WHEREAS, in further support of DOB's consistent practice in this regard, the Owner submitted a list prepared by its zoning consultant which showed 16 additional buildings, dating back approximately 40 years, that have mechanical floors in the middle of the building and for which DOB determined that elevator shafts and stairwells were excluded from the zoning floor area where they passed through the mechanical floor; and

WHEREAS, the Owner also argues that the concept of an entire floor being devoted to mechanical space was not contemplated when the ZR was drafted in 1961 and therefore DOB's interpretation is necessary to account for relevant advances in technology and approaches to building design that allow for a wholly mechanical floor; and

WHEREAS, the Owner notes that DOB is often required to interpret provisions of the ZR that appear to be clear and unambiguous in order to achieve fairness, accommodate new approaches to building design or engineering, or recognize new technologies; and

WHEREAS, the Owner provided a number of examples of situations in which DOB made such interpretations of seemingly unambiguous text in order to accommodate modern building designs or advances in technology; and

WHEREAS, the Board finds the evidence of DOB's longstanding and consistent practice to be a relevant consideration regarding the propriety of DOB's interpretation of the ZR, but agrees with the Appellant that evidence of such practice, particularly in the absence of any written memoranda or technical policy and procedure notices, does not, in and of itself, signify that an interpretation is correct; and

WHEREAS, conversely, the Board notes that the fact that DOB has not memorialized this longstanding policy is not a compelling reason to nullify DOB's rational interpretation to exclude elevator shafts and stairwells from floor area calculations on a wholly mechanical floor; and

WHEREAS, the Board agrees with the Owner that DOB's past practice of interpreting provisions of the ZR that appear to be unambiguous in order to accommodate new approaches to building design or advances in technology supports DOB's interpretation in the subject case, as wholly mechanical floors may not have been contemplated when the ZR was drafted in 1961; and

WHEREAS, accordingly, for the reasons stated above, the Board concludes that the elevator shafts and stairwells on the fourth floor of the Building – which is otherwise an entirely mechanical floor – were properly excluded from the floor area calculations; and

B. Floor Area Deductions Related to the Loading Berths

WHEREAS, initially, the Appellant made the argument that the Owner took excessive floor area deductions on the ground floor for the loading berths; and

WHEREAS, specifically, the Appellant asserted that ancillary space, including an office, was improperly included in the areas for which the Owner took deductions for the loading berths; and

WHEREAS, the Board notes that at the time of filing of this appeal, two loading berths were required as per the underlying zoning regulations; and

WHEREAS, pursuant to the ZR § 12-10 definition of floor area, floor area does not include "floor space used for *accessory* off-street loading berths, up to 200 percent of the amount required by the applicable district regulation;" and

WHEREAS, however, the Appellant contends that the Owner took deductions for the loading berths that were approximately 671 sq. ft. in excess of the allowable 200 percent of the area of the loading berths; and

WHEREAS, on November 13, 2009, DOB sent the Owner a letter requesting that it clarify how specified areas in the Building function as part of the loading berth, so as to confirm whether the areas are properly deducted from floor area computations; and

WHEREAS, during the course of the hearing process, the Owner filed an application with the Board under BSA Cal. No. 281-09-BZ, for a special permit to allow a physical culture establishment ("PCE") on the fifth and sixth floors of the subject Building; and

WHEREAS, in response to requests to clarify the loading berth computations, the Owner stated that the proposed plans would be amended based on the disposition of BSA Cal. No. 281-09-BZ, as the loading berth configuration would be revised upon approval of the PCE application; and

WHEREAS, on February 23, 2010, the Board approved the PCE application; and

WHEREAS, subsequently, the Owner submitted the Revised Plans, which reduce the number of required loading berths from two loading berths to a single loading berth, and as a result the floor area deductions were correspondingly reduced; and

WHEREAS, DOB submitted a letter dated July 6, 2010, stating that the Revised Plans address the disputed

loading berth deductions and were approved by DOB on June 24, 2010; and

WHEREAS, the Board notes that loading berth is not a defined term in the ZR and that the ZR § 12-10 definition of floor area, by permitting 200 percent of the amount of floor space required for an accessory loading berth to be deducted from floor area calculations, recognizes that what constitutes a loading berth for the purposes of calculating floor area inherently goes beyond the floor space devoted to the loading berth itself, and may include some ancillary spaces as well; and

WHEREAS, following the submission of the Revised Plans, the Appellant did not pursue its argument that ancillary space was improperly included in floor area deductions for the single loading berth; and

WHEREAS, the Board notes that loading berth deductions in the Revised Plans have been reduced to 200 percent of the floor space required for the single loading berth; and

WHEREAS, accordingly, the Board finds that the deductions related to the loading berth on the Revised Plans are proper; and

C. Classification of Swimming Pool Service Process Equipment Spaces and Electric Meter Rooms as Mechanical Equipment

WHEREAS, the Appellant asserts that the floor area deductions taken for swimming pool service process equipment spaces and electric meter rooms are improper because neither of these facilities constitutes "mechanical equipment" as set forth in the allowable deductions for floor area under ZR § 12-10; and

WHEREAS, the Appellant further asserts that since such deductions are not specifically excluded in the ZR, they should be included in the attributable zoning floor area, and there is not sufficient available zoning bulk to accommodate this increase; and

WHEREAS, in response, DOB states that the swimming pool service process equipment spaces and electric meter rooms are properly excluded from floor area calculations as mechanical equipment deductions because these spaces service the swimming pool, which in turn serves the entire building; and

WHEREAS, the Owner similarly states that these spaces are necessary to operate the swimming pool, which will be available to all guests in the hotel, and therefore falls within the ZR § 12-10 exclusion from zoning floor area for "space used for mechanical equipment;" and

WHEREAS, the Board notes that following its initial submission, the Appellant did not pursue the arguments related to the swimming pool service process equipment spaces and electric meter rooms, and failed to provide additional evidence to support them; and

WHEREAS, the Board notes that the ZR does not differentiate swimming pool service process equipment and electric meter rooms from other mechanical equipment; and

WHEREAS, the Board further notes that the Appellant has offered no specific reason for why the swimming pool service process equipment spaces and electric meter rooms do not qualify as mechanical equipment; and

WHEREAS, accordingly, the Board agrees with DOB and the Owner that these spaces are properly excluded from the floor area calculations as "space used for mechanical equipment," pursuant to ZR § 12-10; and

D. Calculations Related to the Zoning Lot

WHEREAS, the Appellant initially made several additional arguments in support of its position that the Building Permit should be revoked, based on issues related to the zoning lot as a whole and the effect of the adjacent building at 145 Sixth Avenue on the Building; and

WHEREAS, the Board notes that the zoning lot on which the Building is being developed includes Lots 1101 through 1131, the lots located within an eight-story (including penthouse) condominium building at 145 Sixth Avenue; and

WHEREAS, the Owner states that the zoning lot was created pursuant to a Declaration of Zoning Lot Restrictions, dated February 3, 2006, which merged the 246 Spring Street lot with the adjacent property at 145 Sixth Avenue; and

WHEREAS, the Appellant asserts that the mean curb level elevations have been calculated only for the portion of the zoning lot on which the Building is to be developed, and that the definition of curb level in ZR § 12-10 requires that the curb level elevations be calculated for the entire zoning lot; and

WHEREAS, in response, DOB states that since the ZR requires the curb level to be independently calculated for each portion of the zoning lot, adequate calculations have been provided for the subject site, which is a large corner lot with a portion of the lot subject to through lot regulations; and

WHEREAS, DOB further states that corner and through lot requirements have been satisfied and there is no requirement in the ZR to factor in curb level elevations from the other corner lot portion on which 145 Sixth Avenue is located; and

WHEREAS, the Board agrees with DOB that adequate curb level calculations have been provided for the subject site; and

WHEREAS, the Appellant also argues that there are inconsistencies between the zoning lot areas indicated in the plans for the Building and the plans for 145 Sixth Avenue, and that no survey was provided to establish which zoning lot area is correct; and

WHEREAS, in response, DOB notes that a survey was provided in the approved plans for the Building, which were submitted to the Board, reflecting that the

zoning lot area is 34,102 sq. ft.; and

WHEREAS, DOB states that the Appellant has cited no authority to dispute the survey submitted with the approved plans for the Building; and

WHEREAS, the Board agrees with DOB that it was proper to rely on the zoning lot area indicated on the survey submitted with the approved plans for the Building; and

WHEREAS, finally, the Appellant asserts that without the plans showing the floor area for each floor at 145 Sixth Avenue, it is not possible to confirm the accuracy of the attributable floor areas in determining FAR compliance; and

WHEREAS, in response, DOB states that while there is not a diagram showing the floor area for each floor of 145 Sixth Avenue, the plans include a drawing with a table of the relevant floor areas, which shows compliance, and DOB customarily accepts such tables as evidence of the FAR compliance; and

WHEREAS, DOB further states that 145 Sixth Avenue has full lot coverage without any floor area deductions for the first four floors, so it is not possible for these floors to take up any more floor area; and

WHEREAS, the Board finds that DOB's acceptance of the floor area table provided in the drawings for 145 Sixth Avenue was appropriate, particularly in light of the physical constraints of the lot; and

WHEREAS, the Board notes that following its initial submission, the Appellant provided no additional arguments or support for its assertions related to the curb levels, the lack of a survey, or the lack of plans demonstrating the floor area for each floor of 145 Sixth Avenue; and

WHEREAS, accordingly, the Board finds that the Appellant has provided no compelling argument as to why the Building Permit should be revoked on these bases; and

E. Issues Related to the Permit for 145 Sixth Avenue

WHEREAS, the Appellant initially included arguments related to the compliance of 145 Sixth Avenue with the relevant zoning regulations; and

WHEREAS, the Board notes that following its initial submission, the Appellant did not pursue the arguments related to 145 Sixth Avenue, and failed to provide additional evidence to support them; and

WHEREAS, DOB argues that the Appellant's allegations about the 145 Sixth Avenue site are not properly joined in these proceedings, and are not appropriate claims for an appeal in connection with the subject application; and

WHEREAS, specifically, DOB states that despite the fact that the Appellant's claim that the 145 Sixth Avenue site does not comply with the approved plans is irrelevant to the propriety of the Building Permit, and therefore is irrelevant to the subject appeal, DOB nonetheless inspected the construction at 145 Sixth Avenue and found that it was in compliance with the approved plans; and

WHEREAS, pursuant to New York City Charter § 666(6) and the Board's Rules of Practice and Procedure § 1-01(6), a final determination in the form of an "order, requirement, decision or determination" from DOB is required in order for the Board to hear and decide an appeal of a DOB action related to a site; and

WHEREAS, the Board notes that a final determination has not been issued by DOB related to the arguments raised by the Appellant concerning 145 Sixth Avenue; and

WHEREAS, specifically, the Board notes that the Appellant's letter dated September 15, 2008, upon which the Final Determination is based, only raised issues concerning the allegedly excessive floor area deductions taken by the Owner, which are addressed *supra*, and did not refer to any of the issues concerning 145 Sixth Avenue; and

WHEREAS, the Board further notes that the building at 145 Sixth Avenue is owned separately from the subject building, at 246 Spring Street, and that work on the buildings is being performed pursuant to separate building permits; therefore the resolution of the issues raised by the Appellant as to 145 Sixth Avenue involves different parties than, and is not directly related to, the subject appeal; and

WHEREAS, accordingly, the Board finds that the compliance of the building at 145 Sixth Avenue, and any issues related thereto, are not included in the subject appeal; and

F. Issues related to the Revised Plans

WHEREAS, during the course of the hearing, in response to the Revised Plans which reflected a reduced loading berth requirement, the Appellant made the following additional arguments: (i) the Revised Plans improperly took deductions on the first through sixth floors of the Building; and (ii) in order to reduce the loading berth requirement the Owner improperly listed accessory uses within the hotel as separate uses; and

WHEREAS, notwithstanding the absence of a final determination on the additional deductions and the accessory use question, DOB and the Owner provided responses refuting the Appellant's claims; and

WHEREAS, as to the additional floor area deductions, the Appellant now contends that deductions were improperly taken on the first through sixth floors in order to compensate for the approximately 700 sq. ft. increase in floor area on the ground floor attributed to the space formerly occupied by the second loading berth, which had been excluded from the floor area calculations; and

WHEREAS, in response, DOB states that it

accepted additional floor area deductions for mechanical space found to be necessary in the Revised Plans; and

WHEREAS, specifically, the Owner submitted a letter from the project architect which states that the additional floor area deductions in the Revised Plans reflect (i) the incorporation of the new spa facility (the Board-granted PCE), (ii) the incorporation of the final kitchen plans and restaurant drawings, and (iii) revisions to the mechanical and plumbing chases that pass through the lower floors of the Building to service the spa facility and kitchen spaces; and

WHEREAS, DOB states that it reviewed the additional floor area deductions reflected in the Revised Plans and determined that they are for mechanical space and, thus, are appropriate; and

WHEREAS, as to the accessory use issue, the Appellant argues that, in order to reduce the required number of loading berths for the Building from two to one, the Owner improperly listed the spa, restaurant and catering facility as separate rather than accessory uses from the hotel use; and

WHEREAS, the Appellant contends that the spa, restaurant, and catering facility are properly classified as accessory uses to the hotel, such that the floor area of these uses is counted toward the overall hotel floor area, which would put the hotel floor area over the 300,000 sq. ft. threshold and require a second loading berth; and

WHEREAS, the Owner states that the spa is designed to be open to the public, and submitted the public relations plan for the spa which illustrates that while it will serve hotel guests, the spa is marketed towards people who are not staying at and have no association to the hotel; and notes that it obtained a special permit from the Board pursuant to ZR § 73-36 for a PCE specifically so that it could operate the spa as a public facility; and

WHEREAS, the Owner states that the restaurant can be entered directly from the street, and that it is intended to operate independently from the hotel and attract a clientele outside of hotel guests; and

WHEREAS, the Owner states that the third floor function space is correctly identified as a catering space and not accessory to the hotel; and

WHEREAS, finally, the Owner states that these uses are operated in individual condominium spaces that, although the Owner is holding for now, could be sold and owned by different entities; and

WHEREAS, DOB states that the spa, restaurant, and catering facility uses, which were previously listed as being part of the hotel, will be open to the public and therefore will not be accessory to the hotel use; and

WHEREAS, DOB further states that if it finds in the future that the spaces are, in fact, closed to the public, it is an enforcement issue that DOB will address at that time; and

WHEREAS, as noted above, the Board declines to make a determination as to the propriety of the deductions taken on the first through sixth floors of the Building or whether or not the spa, restaurant, and catering facility are accessory uses, but notes that DOB has accepted the additional deductions as mechanical and has accepted the spa, restaurant and catering facility as non-accessory uses for the reasons stated above; and

CONCLUSION

WHEREAS, for the reasons stated above, the Board rejects the Appellant's arguments that: (i) the elevator shafts and stairwells at the fourth floor were improperly deducted from the floor area calculations; (ii) excessive deductions were taken for the loading berths; (iii) the swimming pool service process equipment and electric meter rooms were improperly deducted as mechanical equipment; (iv) the curb levels were improperly calculated; (v) the zoning lot area for the site was not established; and (vi) compliance with FAR cannot be established without plans for the proposed construction at 145 Sixth Avenue; and

WHEREAS, accordingly, the Board agrees with DOB and the Owner that there is no basis for the revocation of the Building Permit.

Therefore it is Resolved that the subject appeal, seeking a reversal of the Final Determination of the Department of Buildings, dated November 24, 2008, is hereby denied.

Adopted by the Board of Standards and Appeals, October 5, 2010.

A true copy of resolution adopted by the Board of Standards and Appeals, October 5, 2010.
Printed in Bulletin Nos. 40-41, Vol. 95.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.