

40-11-A

APPLICANT – Bryan Cave LLP, Margery Perlmutter, Esq., for CPW Retail, LLC c/o American Continental Properties, LLC, owner.

SUBJECT – Application April 8, 2011 – Appeal challenging the Department of Building’s determination that non-conforming commercial use was discontinued pursuant to ZR §52-61. R10A & C4-7 LSD Zoning district.

PREMISES AFFECTED – 25 Central Park West, West 62nd and West 63rd Streets, Block 1115, Lot 7501(2) Borough of Manhattan.

COMMUNITY BOARD #7M

APPEARANCES –

For Applicant: Margery Perlmutter.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5

Negative:.....0

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a Final Determination dated March 9, 2011 by the Department of Buildings’ (“DOB”) Counsel’s Office with denial affirmed on April 8, 2011 by the Manhattan Borough Commissioner (the “Final Determination”), and

WHEREAS, the Final Determination states, in pertinent part:

Your letters request confirmation that a non-conforming Use Group 6 grocery store in Unit C-1 that was vacant for two years was not discontinued and may change to a non-conforming Use Group 6 eating and drinking establishment in accordance with New York City Zoning Resolution (ZR) Section 52-61.1 In your letters, you also state that the current art gallery use of Unit C-1 that followed the grocery store’s vacancy is a non-conforming Use Group 6 commercial art gallery, and not a conforming Use Group 3 community facility non-commercial art gallery.

The current certificate of occupancy for the building, No. 110135, dated September 19, 1996, is for a 34-story multiple dwelling with twelve doctors’ offices, a beauty parlor, servants rooms, three stores, a building manager’s office, an apartment lobby and mail

room located on the first floor.² The building occupies the entire west side block of Central Park West between 62nd and 63rd Streets with 200 feet on the east side located in the C4-7 district, and 50 feet on the west side located in the R10A district. In your August 2nd letter you state that the three stores listed on the CO are located in the portion of the building in the R10A district. You state that Unit C-1 contains 5,511 square feet (53% of the total commercial area), Unit C-2 which is an actively operating non-conforming drug store that contains 2,886 square feet (28% of the total commercial area), and Unit C-3 which is an actively operating non-conforming dry cleaning establishment that contains 1,925 square feet (19% of the total commercial area). You state that the grocery store vacated Unit C-1 on July 28, 2007 and the space remained vacant until mid-August 2009 when the art gallery took occupancy. In your letters, you assert that ZR § 52-61 allows a non-conforming use of Unit C-1 to resume because its vacancy did not amount to a two-year discontinuance of active operation of substantially all the non-conforming uses in the building given that the non-conforming drug store in Unit C-2 and the non-conforming dry cleaning establishment in Unit C-3 remained in active operation.

Contrary to your claim, ZR § 52-11 and § 52-61 require the elimination of any non-conforming use whose active operation is discontinued by a vacancy for more than two years, notwithstanding the active operation of other non-conforming uses in the same building. This interpretation of ZR § 52-11 and § 52-61 fulfills the public policy expressed in ZR § 51-00 to achieve a gradual remedy for incompatible uses by providing for the termination of non-conforming uses after a statutory time period and restricting further investment in non-conforming uses that adversely affect the development of a district with a more uniform character.

ZR § 52-11 provides that “a nonconforming use may be continued, except as otherwise provided in [Chapter 2 of Article 5].” Once a non-conforming use has changed to a conforming use, the use is no longer a non-conforming use eligible for protection under ZR § 52-11. Likewise, when an establishment

1 Your letters also respond to the letters to the Department dated August 11, 2010, September 10, 2010, October 25, 2010 and January 21, 2011, written on behalf of the managers of the condominium at the premises, the Residential Board of Managers of the Century Condominium, in opposition to a determination that a non-conforming use may resume.

2 The certificate of occupancy contains an administrative error in that it classifies all the first floor uses within Use Group 2.

40-11-A

ceases all business functions and the space is vacant for over two years, it cannot be said that there is still “a non-conforming use” to be “continued” and protected under the section. The rest of Article 5 Chapter 2 provides exceptions to ZR § 52-11 and does not grant further protection of non-conforming uses, but rather limits or terminates non-conforming uses.

Whereas the commencement of a conforming use immediately terminates the ability to continue a non-conforming use, ZR § 52-61 provides guidance as to how long a non-conforming use may remain vacant before it too is no longer “a non-conforming use” eligible to be “continued.” ZR § 52-61 states: “If, for a continuous period of two years, . . . the active operation of substantially all the *non-conforming uses* in any *building or other structure* is discontinued, such. . . *building or other structure* shall thereafter be used only for a conforming use.” The text contains only one exception to the requirement that a non-conforming use become conforming after a two-year discontinuance: certain Use Group 6 uses may resume after a two-year vacancy of ground floor or basement stores in a building designed for residential use located in R5, R6 or R7 districts that are not in historic districts. The active operation of the non-conforming use in Unit C-1 stopped for two years and the space does not fall under ZR § 52-61’s exception, therefore, it was discontinued and cannot change to another non-conforming use or be reactivated.

The analysis of whether the active operation of “substantially all” of the non-conforming uses in the building has discontinued does not determine whether the non-conforming uses in the rest of the building (Units C-2 and C-3) may continue. Where one or more non-conforming uses are discontinued in a building with multiple non-conforming uses, ZR § 52-61 sets a threshold at which the remaining actively operating non-conforming uses in the same building must terminate as well so that the entire building is used only for conforming uses.³ As stated above, it is not proper to apply ZR § 52-61 as a protective statute, therefore it is also not relevant that Unit C-1 comprises less than substantially all of the Use

3 There appears to be no dispute that Unit C-1 does not comprise “substantially all” of the non-conforming uses in the building, and therefore the actively operating non-conforming drug store and dry cleaner uses may continue.

Group 6 non-conforming uses in the building. The New York case law raised in your letters does not support a finding that the non-conforming use in Unit C-1 may resume. Both Toys R Us v. Silva, 89 N.Y.2d 411 (1996), and Daggett v. Putnam, 40 A.D.2d 576 (4th Dept. 1972), concern the right to continue a single non-conforming use and do not address the question of whether ZR § 52-61 allows a two-year vacancy of a non-conforming use in a building with more than one non-conforming use to resume. Agoglia v. Glass, 25 A.D.2d 954 (2nd Dept. 1970), is also not applicable because it concerns the authority of the Board of Standards and Appeals and the City Planning Commission to authorize non-conforming uses under ZR § 11-412 and ZR § 11-413.

Given that the non-conforming use of Unit C-1 was discontinued by the grocery store’s two-year vacancy, the Department need not determine whether the non-conforming use would have been discontinued by the current art gallery use.

In the event the owner of the premises does not file an Alteration Type I permit application for a conforming use in Unit C-1, the Department may seek modification of the certificate of occupancy at the Board of Standards and Appeals; and

WHEREAS, a public hearing was held on this appeal on August 23, 2011, after due notice by publication in *The City Record*, with a continued hearing on October 18, 2011 and November 22, 2011, and then to decision on December 6, 2011; and

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

WHEREAS, the appeal is filed on behalf of the owner of the building’s three commercial condominium units (the “Appellant”) who contends that DOB’s denial was erroneous; and

WHEREAS, the condominium’s Residential Board of Managers initially made submissions and provided testimony in support of DOB’s position; by letter dated November 15, 2011, the Residential Board of Managers stated that it withdraws its opposition to the appeal and requested that its submissions to the Board be withdrawn; and

WHEREAS, DOB, Appellant, and the Residential Board of Managers have been represented by counsel throughout this appeal; and

WHEREAS, the site is located partially within an R10A zoning district and partially within a C4-7 zoning

40-11-A

district within the Special Lincoln Square District and is occupied by a 32-story mixed use commercial/residential/community facility condominium building; and

WHEREAS, the subject appeal concerns the question of whether the absence of a non-conforming Use Group 6 retail use (formerly a grocery store) one of three commercial units (Unit C-1) for a period of greater than two years, while the other two commercial units (Units C-2 and C-3) remained occupied by non-conforming uses, causes Unit C-1 to lose the right to be re-occupied by another non-conforming Use Group 6 use; and

BACKGROUND

WHEREAS, the building (the "Building") was constructed in 1931 and occupies the entire west side block front of Central Park West between West 62nd Street and West 63rd Street with 250 feet of frontage on the side streets; and

WHEREAS, the 1954 Certificate of Occupancy (CO) states that the Building is a 32-story Class A Multiple Dwelling located in a "Business Use District" with apartments on all floors above the first floor and the following uses on the first floor: "eight (8) apartments, twenty-two (22) maids' rooms, three (3) doctors' offices, one (1) superintendent's office, five (5) stores[,] renting office"; and

WHEREAS, retail use was permitted as-of-right in "Business" districts pursuant to the 1916 Zoning Resolution; and

WHEREAS, in 1961, the site was mapped R10, a residential district which does not permit Use Group 6 use as-of-right, thus the existing Use Group 6 use was rendered non-conforming; and

WHEREAS, the 1983 CO, issued when the site was still within an R10 zoning district stated that the first floor contained "eleven (11) doctors' offices, beauty parlor, law office, storage, three (3) stores, building manager's offices, apartment, lobby and mail room"; the most recent CO, issued in 1996 reflects "three (3) stores" at the first floor, without any notation as to specific use within each store; and

WHEREAS, the site has since been rezoned and 200 feet are now located within an R10A zoning district and the westernmost 50 feet are within a C4-7 zoning district within the Special Lincoln Square District; all three of the retail spaces on the first floor are located within the R10A zoning district, where they are not permitted unless they are established as non-conforming uses; and

WHEREAS, the Appellant represents that the earliest available first floor plan is the 1989 Tax Lot Certification for the condominium which shows "commercial" Unit C-1 (Tax Lot 1001) (located at the corner of West 62nd Street and Central Park West) occupied by Gristedes a "Grocery Store," Unit C-2 (Tax Lot 1002) (located at the corner of West 63rd Street and Central Park West) occupied by a "Drug Store" or "Pharmacy," and Unit C-3 (Tax Lot 1003) (located

immediately west of Unit C-2, on West 63rd Street) occupied by "Cleaners;" the building lobby and three doctors' offices separate Unit C-1 from Units C-2 and C-3, which are adjacent to each other; and

WHEREAS, the condominium formation documents reflect that Unit C-1 contains 5,511 sq. ft. of which 2,937 sq. ft. are on the first floor and the balance in the cellar (field measurements show the first floor portion at 3,298 sq. ft.), Unit C-2 contains 2,886 sq. ft. of which 1,062 sq. ft. is on the first floor (field measurements show the first floor portion at 1,580 sq. ft.), and Unit C-3 contains 1,925 sq. ft. of floor area, 888 sq. ft. of which is on the first floor (field measurements show the first floor portion at 1,119 sq. ft.), for a total of 5,997 sq. ft. in zoning floor area at the first floor based on field measurements, with Unit C-1 comprising 55 percent of the total; and

WHEREAS, the Appellant asserts that Unit C-1 is now occupied by a commercial art gallery, Unit C-2 is occupied by a drug store, and Unit C-3 is occupied by a dry cleaning establishment and that the drug store and dry cleaning establishment have occupied the building for decades; and

WHEREAS, the Appellant asserts that Gristedes grocery store occupied Unit C-1 from the 1950s until July 28, 2007 and the art gallery rented the space in August 2009; and

WHEREAS, the Board notes that none of the background information is being contested except whether or not the art gallery is a commercial use; the question of the art gallery's status is not relevant to this appeal and will not be discussed; and

RELEVANT PROVISIONS OF THE ZONING RESOLUTION

WHEREAS, the primary ZR provisions the Appellant and DOB cite are as follows, in pertinent part: ZR § 12-10

Non-conforming, or non-conformity
A "non-conforming" #use# is any lawful #use#, whether of a #building or other structure# or of a #zoning lot#, which does not conform to any one or more of the applicable #use# regulations of the district in which it is located, either on December 15, 1961 or as a result of any subsequent amendment thereto. . .

* * *

- A "use" is:
- (a) any purpose for which a #building or other structure# or an open tract of land may be designed, arranged, intended, maintained or occupied; or
 - (b) any activity, occupation, business or operation carried on, or intended to be carried on, in a #building or other structure# or on an open tract of land.

* * *

ZR § 52-11 – Continuation of Non-Conforming Uses/General Provisions

A #non-conforming use# may be continued, except as otherwise provided in this Chapter.

* * *

ZR § 52-61 – Discontinuance/General Provisions

If, for a continuous period of two years, either the #nonconforming use# of #land with minor improvements# is discontinued, or the active operation of substantially all the #non-conforming uses# in any #building or other structure# is discontinued, such land or #building or other structure# shall thereafter be used only for a conforming #use#. Intent to resume active operations shall not affect the foregoing . . .

Except in Historic Districts as designated by the Landmarks Preservation Commission, the provisions of this Section shall not apply to vacant ground floor or #basement# stores in #buildings designed for residential use# located in R5, R6 or R7 Districts where the changed or reactivated #use# is listed in Use Group 6A, 6B, 6C or 6F excluding post offices, veterinary medicine for small animals, automobile supply stores, electrolysis studios and drive-in banks. In addition, the changed or reactivated #use# shall be subject to the provisions of Section 52-34 (Commercial Uses in Residence Districts); and

DISCUSSION

WHEREAS, the Appellant requests that the Board grant its appeal based on the following primary arguments: (1) ZR § 52-61 is clear and unambiguous; (2) substantially all of the non-conforming uses in the building have been continuous; and (3) case law and public policy compel the conclusion that the non-conforming use be entitled to continue as statutes in derogation of the common law are to be construed in favor of the owner; and

A. The Basis of the Appeal

The Plain Meaning of the Zoning Resolution

WHEREAS, the Appellant asserts that the Final Determination is contrary to the plain language of the ZR as ZR §§ 52-11 and 52-61 permit non-conforming uses to remain so long as they do not discontinue for a period of two years or longer because the text of ZR § 52-61 clearly states that “if for a continuous period of two years, . . . the active operation of substantially all the *non-conforming* uses in any *building or other structure* is discontinued, such . . . *building or other structure* shall thereafter be used only for a conforming use;” and

WHEREAS, the Appellant asserts that a plain reading results in the conclusion that all or substantially all of the non-conforming uses in the building must be

discontinued for more than two years before the entirety of such building must be used only for conforming uses; and

WHEREAS, the Appellant cites to Toys “R” Us v. Silva, 89 N.Y.2d 411 (1996) in which the Court of Appeals stated that ZR § 52-61 “is not ambiguous – its clear language prohibits additional non-conforming activity when ‘substantially all’ of the ‘active’ nonconforming operations are discontinued;” and

WHEREAS, the Appellant notes that ZR § 52-11 states that “*non-conforming use* may be continued, except as otherwise provided in this Chapter” and that “as otherwise provided” is a reference to the ZR § 52-61 condition that “the active operation of substantially all the *non-conforming uses* in any *building or other structure*” must never discontinue for a period of two years or more; and

WHEREAS, the Appellant disagrees with DOB’s assertion that the “‘substantially all’ of the non-conforming uses in any building” is meant to determine whether other non-conforming uses, by unit, in the building (in Unit C-2 and Unit C-3) may continue; and

WHEREAS, the Appellant asserts that such an interpretation which could potentially require active non-conforming uses to terminate is not supported by the text or public policy; and

WHEREAS, the Appellant disagrees with DOB’s conclusion that ZR §§ 52-11 and 52-61 “require the elimination of any non-conforming use whose active operation is discontinued by a vacancy for more than two years, notwithstanding the active operation of other non-conforming uses in the same building;” the Appellant states that DOB misreads the plain text in the interest of its stated public policy goals; and

WHEREAS, the Appellant finds that the text is clear that the unit of measure for the “substantially all” analysis is “uses” plural in the “building” as a whole and that there is no support for DOB’s conclusion that each use in each unit be measured separately; and

The Substantially All of the Uses in the Building Test

WHEREAS, the Appellant cites to ZR § 52-61 for the rule that if “the active operation of substantially all the *non-conforming uses* in the *building or other structure* is discontinued, such . . . *building or other structure* shall thereafter be used only for a conforming use;” and

WHEREAS, the Appellant asserts that since all three stores were rendered non-conforming in 1961, the three stores are all of the non-conforming commercial uses in the building – because Unit C-1 includes 55 percent of the stores’ total floor area and the other two stores, which no one argues have been discontinued, contain 45 percent, there was never a point when less than 45 percent of the stores’ total floor area was in continuous use, so the facts do not trigger the limitation set forth in ZR § 52-61 when substantially all the uses are discontinued; and

40-11-A

WHEREAS, the Appellant notes that “substantially all” is not defined in the ZR, but asserts that New York State courts have established a standard which supports a conclusion that even a small percentage of remaining non-conforming use could defeat a claim that “substantially all” had been discontinued, including Marzella v. Munroe, 69 N.Y.2d 967 (1987) which concludes that “abandonment does not occur unless there has been a complete cessation of the non-conforming use;” and

WHEREAS, the Appellant also cites to Toys “R” Us in which the Court of Appeals clarified the distinction between the common law standard and that of ZR § 52-61, holding that “52-61 terminates a non-conforming use when only minimal non-conforming activity continues; in Toys “R” Us, the business maintained 19 crates in a 16-story warehouse which amounted to one-tenth of one percent of the building’s volume; and

WHEREAS, the Appellant states that there is no support in ZR § 52-61 or in the case law for treating each commercial unit as a separate non-conforming use that might be susceptible to ZR § 52-61’s “substantially all” discontinuance standard on a unit-by-unit basis; and

WHEREAS, the Appellant notes that the warehouse in Toys “R” Us was only occupied by a single use and, thus the court did not analyze the subject issue of how the rights for multiple non-conforming uses to continue in a single building must be preserved; and

WHEREAS, the Appellant finds that Daggett v. Putnam, 40 A.D.2d 576 (4th Dep’t. 1972) in which the court determined that two residential trailers constitute a single non-conforming use so removal of one trailer for six years did not result in the abandonment of the right to maintain two trailers more closely considers the subject issue; and

WHEREAS, the Appellant asserts that Daggett establishes a rule, not refuted by Toys “R” Us that an abandonment analysis should consider the non-conforming portion of the floor in its entirety and not the individual parts or rooms on a floor and that in New York City “substantially all the *non-conforming uses* in any *building*” is required for an abandonment to have occurred; and

WHEREAS, the Appellant concludes that whether the three Use Group 6 retail spaces on the first floor are a single “use” or multiple “uses,” substantially all of the use or all of the uses in the building must have been discontinued in order for ZR § 52-61’s discontinuance provision to apply in this case: and

WHEREAS, the Appellant analyzed the ZR and argues that there is no basis for considering “building” in ZR § 52-61 to alternately mean “part of a building” or to convert “uses” plural into “use” singular; and

WHEREAS, the Appellant notes that DOB’s interpretation would require different language, such as the insertion of the word “establishment” if the intent of

ZR § 52-61 were to isolate uses or portions of a building; and

WHEREAS, the Appellant cites to several New York State cases to support its contention that statutes concerning the cessation of non-conforming uses be construed in favor of the property owner; and

WHEREAS, the Appellant notes examples from elsewhere in the state where the complete cessation of non-conforming uses is required before a property owner must convert to a conforming use see Marzella v. Munroe, Agoglia v. Glass, Daggett v. Putnam, and Town of Islip v. P.B.S. Marina; and

WHEREAS, the Appellant cites the principle that zoning regulations, since they are in derogation of the common law, must be strictly construed against the municipality which has enacted and seeks to enforce them see Allen v. Adami, 39 N.Y.2d 275 (1976); and

WHEREAS, accordingly, the Appellant finds that even if there is ambiguity in the statute as DOB suggests, it would be improper to resolve the ambiguity so as to expand the regulatory reach of the ZR to further restrict the use of Unit C-1; and

WHEREAS, the Appellant asserts that there are two public policy goals, rather than one, with regard to the cessation of non-conforming uses which must be balanced; those are (1) to discontinue non-conforming uses in buildings where they have been abandoned and (2) to protect building owners from the harm they would suffer if an amendment to the zoning were to be applied retroactively to pre-existing buildings; and

B. The Department of Buildings’ Interpretation

WHEREAS, DOB makes the following primary arguments in support of its position that ZR § 52-61 does not allow the discontinued non-conforming use on Unit C-1 to be reactivated: (1) the non-conforming use in Unit C-1 ended and may no longer be continued per ZR § 52-11; (2) the “use” that may be continued pursuant to ZR § 52-11 refers to each individual non-conforming store; (3) the use was not “continued” per ZR § 52-11; and (4) ZR § 52-61 is not controlling where only one of several non-conforming uses in a building completely ceases; and

WHEREAS, DOB asserts that the plain meaning of ZR § 52-11 only authorizes present and ongoing non-conforming uses to keep operating and that ZR § 52-61 provides for the termination of such non-conforming use after a period of time when only a small portion of the establishment continues to operate; and

WHEREAS, DOB asserts that ZR § 52-11 authorizes each non-conforming “use” to be continued and provides that the right to a non-conforming use in Unit C-1 is examined independently from the other non-conforming uses in the building and not together with all the non-conforming uses in the building as part of a single non-conforming use; and

40-11-A

WHEREAS, DOB looks to the definition of “use” in ZR § 12-10(b) to include any activity, occupation, business or operation carried on in a building to support the position that ZR § 52-11 governs the right to continue each independently operating business in the building; DOB asserts that the text does not support a right to continue all the non-conforming uses as an indivisible category; and

WHEREAS, DOB states that to consider all three non-conforming uses as a single non-conforming use is broader than the definition of a “use” in ZR § 12-10 and is contrary to the public policy to reasonably restrict and ultimately eliminate such uses; and

WHEREAS, to the requirement for continuity, DOB asserts that the facts of allowing a single non-conforming use which was discontinued for a period of greater than two years to reactivate because the other non-conforming uses in the building have continued is not supported by the concept of continuation within ZR § 52-11; and

WHEREAS, DOB asserts that it must consider the general requirement for continuation in ZR § 52-11 together with the two-year discontinuation limit set forth at ZR § 52-61 such that a business which has discontinued does not satisfy the general provision of ZR § 52-11 which requires continuation or the limit that the discontinuation be for a period of less than two years; and

WHEREAS, DOB states that although ZR § 52-11 does not specify that non-conforming status is lost at the end of the second year of vacancy, it is reasonable to infer that an owner has abandoned a non-conforming use when the owner does not employ the space for the non-conforming use for two or more years; and

WHEREAS, to the applicability of ZR § 52-11, DOB states that it allows non-conforming uses to be continued unless limited or terminated by other sections of the ZR and that in the subject case it is not necessary to go any further since none of the section’s exceptions apply; and

WHEREAS, DOB asserts that the Appellant mistakenly treats ZR § 52-61 as a provision that protects the non-conforming use when ZR § 52-61 actually establishes the point at which the non-conforming use or uses must change to a conforming use or uses, with exceptions as provided in ZR §§ 52-61 and 52-62; and

WHEREAS, DOB interprets ZR § 52-61 “If, for a continuous period of two years, . . . the active operation of substantially all the *non-conforming uses* in any *building or other structure* is discontinued, such . . . *building or other structure* shall thereafter be used only for a conforming use,” to mean that *each* non-conforming use must not discontinue for a period of two years or longer or else it loses the right to change or resume activity regardless of whether other non-conforming uses within the same building have been

continuous; and

WHEREAS, to the applicability of ZR § 52-61, DOB asserts that ZR § 52-61 contemplates a limitation on the right to continue a non-conforming use in a building where substantially all of the sole non-conforming use, or substantially all of each of the multiple non-conforming uses, is discontinued; DOB asserts that the purpose of ZR § 52-61 is to set a threshold for when non-conforming uses are no longer allowed in the building; and

WHEREAS, DOB refers to Toys “R” Us v. Silva, 89 N.Y.2d 411 (1996) to support its claim that the courts have applied ZR § 52-61 as the standard for determining whether the sole non-conforming use in a building has substantially ceased operating and only minimal activity is taking place; in Toys “R” Us, the court determined that the occupancy of a small portion of the building by a non-conforming use could not establish the required continuance of the use and thus determined that the reactivation of the non-conforming use in the building was not permitted; and

WHEREAS, therefore, DOB asserts, the text must be read to require that active operation of substantially all of each non-conforming use be discontinued before the entire building must be used for a conforming use; and

WHEREAS, DOB states that ZR § 52-61 is not applicable to a building with multiple non-conforming uses unless each non-conforming uses is substantially discontinued; the discontinuance of the nonconforming use in Unit C-1 alone does not cause the entire building to conform; and

WHEREAS, DOB finds that where one non-conforming use completely ceases for more than two years in a building with several actively operating non-conforming uses, only that particular use is discontinued and the right to continue the use as a non-conforming use under ZR § 52-11 is lost; and

WHEREAS, DOB asserts that the ZR does not expressly provide for every instance in which a non-conforming use status is lost, but rather allows DOB to interpret the relevant provisions of Chapter 5 to achieve the purpose set for in ZR § 51-00 of gradually eliminating non-conforming uses; and

WHEREAS, DOB concludes that ZR § 52-61 does not allow the reactivation of the discontinued use in Unit C-1 as its purpose is to divest the right to a non-conforming use or uses in a building and not grant the right to resume a discontinued non-conforming use; and

WHEREAS, DOB adds that it would seek to amend the certificate of occupancy to reflect a conforming use in Unit C-1; and

CONCLUSION

WHEREAS, the Board agrees with the Appellant’s analysis that the ZR does not dictate that when there is a two-year discontinued use of one non-

40-11-A

conforming Use Group 6 store while two other non-conforming Use Group 6 stores in the same building remain in continuous use, the vacated store may not reactivate; and

WHEREAS, the Board agrees with the Appellant that the appropriate methodology is to consider the text as follows: (1) begin at ZR § 52-11 which states that non-conforming uses may continue unless limited by the remainder of the chapter; (2) ZR § 52-61 sets forth limits which include that substantially all the non-conforming uses in a building may not discontinue for a period greater than two years; (3) the text reflects that the “substantially all” analysis applies to “uses” plural in the “building” as a whole; and (4) although “substantially all” is not defined, prior DOB determinations and case law do not support the conclusion that 45 percent of continuously operating non-conforming uses would be below the minimum threshold; and

WHEREAS, the Board finds that, although the text does not specifically address situations like the subject building where there are multiple independent stores, the Board does not find a basis for reading the word “establishment” or “portion of a building” into ZR § 52-61 and that the plain meaning of the text reflects a broader reading, as the Appellant suggests; and

WHEREAS, the Board recognizes a distinction between “establishment” and “use” and finds that there is no basis to impose the term “establishment” onto the reading of ZR § 52-61’s “uses” so as to allow for a unit by unit analysis as DOB suggests; and

WHEREAS, the Board notes that if the drafters of the ZR intended ZR § 52-61 to apply to each unit, rather than the building as a whole, it could have included more specificity as it has done in regulations related to signage and adult use regulations; and

WHEREAS, the Board was not persuaded by DOB’s premise that ZR § 52-11 and not ZR § 52-61 applies to the subject matter; the Board recognizes ZR § 52-11 as the general provision that refers property owners to the limits set forth within the chapter, such as at ZR § 52-61, and does not see any basis to limit the applicability of ZR § 52-61 to only the analysis of whether “substantially all” of the use has ceased; and

WHEREAS, the Board finds that ZR § 52-61 is necessary to inform property owners about the two-year discontinuance condition and does in fact apply to instances where non-conforming uses have been discontinued; and

WHEREAS, the Board acknowledges that there are public policy interests to eliminate non-conforming uses and that the text does not specifically address the

subject facts with multiple units and uses in a single building, but it does not find a basis for the public policy as stated by DOB to substitute for the text; and

WHEREAS, although the Residential Board of Managers withdrew its opposition, the Board notes that it made the following primary arguments in opposition to the appeal (1) the plain language of the ZR bars extension of a non-conforming use into the space at issue because “building” in ZR § 52-61 should be read to mean “any part of any building and “part of such building”; (2) there is a strong public policy goal of gradually eliminating non-conforming uses; (3) ZR § 52-61’s “uses” should also be read to mean “use,” singular; (4) the spirit of the ZR bars conversion of the vacated space to a non-conforming use; and (5) reviewing each non-conforming use in a building independently is a fair and effective means of administering zoning; and

WHEREAS, the Board acknowledges the Residential Board of Managers’ withdrawal of its opposition, but because its arguments were entered into the record and the Board considered them when evaluating the merits of the case, the Board notes that it was not persuaded by any of the arguments; and

WHEREAS, the Board concludes that the evaluation of whether there is discontinuance of substantially all of the non-conforming uses applies to the uses within the building and not to each individual use and since it is not disputed that 45 percent of the building’s non-conforming uses have been continuous, as defined by ZR § 52-61, since prior to 1961, a non-conforming Use Group 6 use may re-occupy Unit C-1; and

Therefore it is Resolved that the subject appeal, seeking a reversal of the Final Determination of the Manhattan Borough Commissioner, dated April 8, 2011, denying the non-conforming status of Unit C-1, is hereby granted.

Adopted by the Board of Standards and Appeals, December 6, 2011.

**A true copy of resolution adopted by the Board of Standards and Appeals, December 6, 2011.
Printed in Bulletin Nos. 49-50, Vol. 96.**

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