

APPLICANT – Anderson Kill & Olick, P.C., for 9th & 10th Street, LLC, owner.

Subject – Application April 20, 2005 – An appeal challenging the Department of Buildings' decision dated March 21, 2005, as to whether they have sufficient documentation to determine the proposed use of said premises as a college student dormitory.

PREMISES AFFECTED – 605 East Ninth Street, between East Ninth and East Tenth Streets, 93' east of Avenue "B", Block 392, Lot 10, Borough of Manhattan.

COMMUNITY BOARD #3M

APPEARANCES – None.

ACTION OF THE BOARD – Appeal denied.

THE VOTE TO GRANT -

Affirmative:0

Negative: Chair Srinivasan, Vice-Chair Babbar and Commissioner Chin.....3

THE RESOLUTION -

WHEREAS, the instant appeal comes before the Board in response to a final determination of the Manhattan Borough Commissioner, dated March 21, 2005 (the "Final Determination"), stating that the Department of Buildings ("DOB") would not reconsider removing an objection to plans submitted with a building permit application to develop the referenced premises with a Use Group 3 "College or School Student Dormitory" ("UG 3 Dormitory") absent the submission of additional information; and

WHEREAS, the subject premises is located between East 9th and 10th Streets, 93 feet east of Avenue B, within an R7-2 zoning district, and is currently improved upon with a former school building; and

WHEREAS, 9th and 10th Street, LLC, the owner of the premises and the appellant in this appeal (hereinafter, the "appellant"), took title of the premises from the City in 1999 after purchasing it at auction; and

WHEREAS, title was transferred subject to a deed with the following restriction: "Use and development of this subject property is restricted and limited to a 'Community Facility Use' as defined in the New York City Zoning Resolution as existing on the date of the auction" (the "Deed Restriction"); and

WHEREAS, the Owner filed an application with DOB under Application No. 103948338 (the "Application") for construction of a 19-story UG 3 "College or School Student Dormitory" building (the "Proposed Dormitory"), which is a Community Facility ("CF") use as defined in the Zoning Resolution ("ZR"); and

WHEREAS, in an R7-2 zoning district, a UG 3 Dormitory, because it is a defined CF use listed in UG 3A (set forth at ZR § 22-13), may be developed with a Floor Area Ratio ("FAR") of 6.5, as opposed to a maximum FAR of 3.44 for a non-CF UG 2 residential building; and

WHEREAS, the DOB objection, noted as objection #4 on the DOB objection sheet for the Application (the "Objection"), was issued on November 29, 2004, and reads: "Substantiate Dormitory Use (UG3). This use is permitted for 'College or School Student' housing only as per Z.R. (Floors 3-19 indicates Res. Apartments layout)"; and

WHEREAS, following the issuance of this objection, Anderson Kill & Olick, P.C., representing the appellant, sent a letter to the Manhattan Borough Commissioner dated March 1, 2005, contending, in sum and substance, that: (1) development on the site was subject to the Deed Restriction, and therefore the appellant could not develop the site with anything but a CF use; (2) DOB did not have the authority to condition issuance of a permit based upon speculation that the building will be operated contrary to permitted uses after it is constructed, and consequently could not ask for substantiation of the represented dormitory use; and (3) that DOB's lack of authority to so condition issuance of the permit was settled in DiMilia v. Bennett, 149 AD2d 592 (2d Dep't 1989), in which the court held that DOB may not deny a permit based upon speculation that the future use may violate zoning; and

WHEREAS, in response, DOB issued the Final Determination; and

WHEREAS, the Final Determination reads, in pertinent part: "I write in response to your letter dated March 1, 2005 in which you respond to Objection #4, dated November 29, 2004, and request that the proposed use be accepted as a 'student dormitory,' as that term is used in Section 22-13 of the Zoning Resolution of the City of New York (Use Group 3 uses), notwithstanding that your client has failed to submit the documentation requested by the Department to substantiate a dormitory use.

As you know, the Department requires an institutional nexus in order for construction to be classified as a dormitory. This is necessary to distinguish a "student dormitory" which is a community facility use and entitled to extra floor area, from other types of housing that are classified as Use Group 2, including buildings that house students, and that are not eligible for additional bulk. To reflect the nexus, the Department asks for either a deed or a lease from a school. You respond 1) that the premises is subject to a deed restriction from the City that prohibits residential use, and 2) that the Department must accept the applicant's representation that the premises will be a dormitory, without requiring further substantiation. In support of this latter argument, you cite DiMilia v. Bennett, 149 AD2d 592 (2d Dep't 1989). In DiMilia, the court held that it was improper to deny an application to amend plans for construction of single-family houses on the theory that the design and arrangement of the proposed amendment would enable

the proposed buildings to be readily convertible into illegal, non-conforming, two-family homes.

We disagree with your arguments. Although the premises is subject to a deed restriction that would prohibit residential use, this is not sufficient to establish its use as a dormitory. Where two uses appear very similar on plan, yet result in very different zoning benefits (such as the Use Group 2 residences and Use Group 3 dormitory), it is incumbent upon the Department to ask for documentation to substantiate the particular community facility use. While the deed restriction may be an incentive to the owner to classify the building's use as a student dormitory and not a Use Group 2 residence, it is not sufficient to justify deviating from the Department's general requirement that a dormitory use be substantiated prior to permit. Moreover, DiMilia is not controlling here, as the Department's issue is not whether the proposed dormitory use will easily convert to an unlawful use, but rather whether we have sufficient documentation to determine that the proposed use is a dormitory. Without a deed or lease with an educational institution, the Department is not satisfied that a dormitory use is being established.

As such, your request for reconsideration of the Objection dated November 29, 2004 is denied.”; and

WHEREAS, during the Spring of 2005, while this exchange between DOB and the appellant was occurring, DOB announced its intent to adopt a rule setting forth certain pre-permit requirements for construction of UG 3 College or School Student Dormitories (the “Proposed Rule”); and

WHEREAS, the Proposed Rule provided that in order to obtain a permit for construction of a UG 3 Dormitory, a permit applicant must establish institutional control by submitting either: (1) documentary evidence of ownership by an educational institution; (2) documentary evidence of a lease by an educational institution; or (3) documentary evidence of the formation of a non-profit entity to provide dormitory housing for students, the board of directors of which shall be exclusively the representatives of participating educational institutions, plus a copy of a lease for a 10- year period for such non-profit entity; and

WHEREAS, the Proposed Rule also requires the execution and recording of a restrictive declaration, providing, among other things, that the building shall only be used as a UG 3 Dormitory; and

WHEREAS, in a letter to DOB dated March 24, 2005, the appellant commented upon the Proposed Rule, stating, in sum and substance, that the Proposed Rule did not comply with the law applicable to issuance of building permits, as it imposed a pre-permit requirement of establishment of a nexus of control between an education institution and the Proposed

Dormitory; and

WHEREAS, however, the appellant also indicated that the Application would nonetheless be amended to comply with the Proposed Rule provisions; and

WHEREAS, the Proposed Rule was ultimately adopted by DOB on May 16, 2005 as Rule 51-01 of the Rules of the City of New York, but only became effective 30 days later on June 15, 2005; and

WHEREAS, accordingly, as discussed more fully before, DOB never applied Rule 51-01 applied to the Application; rather, DOB applied pre-permit conditions consistent with its current practice that would later be incorporated into this Rule; and

WHEREAS, the appellant filed the instant appeal on April 20, 2005, noting in its Statement that it reserved the right to supplement the record of the appeal pending the receipt of additional correspondence from DOB in response to a March 28, 2005 letter it sent to DOB regarding the Final Determination; and

WHEREAS, in the March 28 Letter, the appellant states, in sum and substance, that: (1) the provisions as set forth in the Proposed Rule allow a permit to be issued for a dormitory upon submission of copies of documents evidencing the establishment of a not-profit entity chartered for the benefit of participating educational institutions, and that this provision was complied with through the formation of such a non-profit, University House Corp. (“UHC”); and (2) based upon DiMilia, DOB has no authority to require evidence of a institutional nexus between a proposed dormitory and an educational institution; and

WHEREAS, the Manhattan Borough Commissioner subsequently issued a letter dated March 29, 2005, in which DOB again refused to remove the Objection; and

WHEREAS, DOB's March 29 Letter reads, in pertinent part: “I am responding to your letters dated March 24, 2005 and March 28, 2005, wherein you submit that the proposed dormitory at the referenced premises meets the requirements of the Department's proposed rule on dormitories and that we should therefore issue a building permit for a student dormitory use.

As set forth in my letter to you dated March 21, 2005, the Department requires a deed or a lease from an acceptable school prior to issuance of a permit to establish a dormitory use. You respond that under Section (c)(1) of the proposed rule the Department will accept “a non-profit entity chartered for the benefit of participating educational institutions...” as proof of the control needed for a Use Group 3 dormitory. However, the proposed rule also requires a copy of the deed or lease of the premises for a minimum ten-year term as evidence of such entity's control of the premises, prior to issuance of the permit. While you state that the premises will be leased for a ten-year term to an entity that qualifies as a non-profit entity under the terms of

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the proposed rule, you have failed to provide a lease of the premises by such an entity. It is not sufficient that you intend to enter into a lease with a qualifying entity, or that you intend to enter into a restrictive declaration that would meet the Department's requirements. Until a satisfactory lease is submitted together with the restrictive declaration, the Department can not issue a permit for a Use Group 3 dormitory use.

In addition, the documentation that you attached regarding the establishment of University Housing Corporation does not require the board members of the non-profit entity to consist of each of the participating educational institutions, as is our intent. We appreciate your comments on the draft rule and will consider clarifying the language.

Moreover, as stated in my letter to you dated March 21, 2005, this matter is distinguished from DiMilia in that the Department is not objecting on the grounds that the use might convert to a Use Group 2 residence. Rather, the Department is seeking documentation necessary to establish that the proposed use is a Use Group 3 dormitory. To the extent the proposed non-profit entity currently lacks control of the premises, you have not established that the premises is a dormitory. Unlike most other uses that can be established by any party, a dormitory use can only be established by controlling educational institutions. Please submit to this office any appropriate documentation you may have to demonstrate that a qualified educational institution(s) has control over the subject premises, so that we may consider issuing the requested building permit."; and

WHEREAS, in response, the appellant, in a letter dated May 3, 2005, states, in sum and substance, that it would: (1) prepare a lease for a period of not less than 10 years between the appellant and UHC, which would have a board of directors consisting solely of persons appointed by educational institutions which refer students as prospective tenants of UHC within the Proposed Dormitory, and submit a draft of said lease for DOB approval; (2) prepare a restrictive declaration in accordance with the Proposed Rule provision, and submit a draft of said restrictive declaration for DOB approval; and (3) prepare an amendment to the bylaws or certificate of incorporation of UHC providing that, prior to occupancy of the Proposed Dormitory, the UHC board shall consist solely of members appointed by participating educational institutions; and

WHEREAS, in a letter dated May 19, 2005, the Manhattan Borough Commissioner responded to the appellant's May 3 letter; and

WHEREAS, DOB's May 19 letter states, in sum and substance, that: (1) the appellant's proposal provides no assurance that the educational institutions will operate the Proposed Dormitory since no contractual arrangements currently exist; and (2) the

proposal is speculative and improper since the board of directors of UHC will only be composed of persons appointed by participating educational institutions prior to occupancy, not prior to issuance of a permit; and

WHEREAS, since DOB did not retreat from its position as set forth in the Final Determination and waive the Objection, the appellant maintained the instant appeal, although it updated its Statement of Facts and Discussion to include a discussion of the additional correspondence and the adoption of the Proposed Rule by DOB, as well as a discussion of additional legal authority in purported support of its position; and

WHEREAS, a public hearing was held on this appeal on August 16, 2005 after due notice by publication in the City Record, on which date the matter was closed and a decision date of October 18, 2005 was set; the record was left open for additional written submissions from both the appellant and DOB; and

WHEREAS, Community Board 3, Manhattan, supports DOB's denial of a permit for construction of the Proposed Dormitory; and

WHEREAS, the following elected officials and other parties also appeared or made submissions in opposition to the instant appeal: Congresswoman Velazquez, Assembly Member Glick, State Senator Connor, Council Member Lopez, Democratic District Leader Mendez, the Greenwich Village Society for Historic Preservation, representatives of the East Village Community Coalition, the Municipal Art Society, various neighbors to the referenced premises, and other City residents; and

WHEREAS, in its September 16, 2005 submission, the appellant argues that much of the testimony given at the August 16 hearing was either irrelevant to the issue presented in the instant appeal, untimely or inaccurate; and

WHEREAS, the Board agrees that a significant amount of the testimony presented at the hearing was not relevant to the instant appeal since it related to tangential matters such as the history of the premises, the intentions of the Owner as to the use of the premises, or the impact of the bulk of the proposed building on the character of the community; and

WHEREAS, the Board further notes that certain of the individuals testifying did not have standing to address the appeal because they were not residents or occupants of property within close proximity to the subject premises; and

WHEREAS, accordingly, the Board bases its decision herein solely on its analysis of the legal arguments made by the appellant and DOB at hearing and in written submissions; and

WHEREAS, as noted above, DOB issued and maintained the Objection in response to the Application after it determined that sufficient evidence of institutional control over the Proposed Dormitory had

not been submitted by the appellant; and

WHEREAS, DOB states that if it issued a permit based upon plans showing what could be UG 2 residences — even if identified as a UG 3 Dormitory on the plans and application materials — without some additional evidence of institutional control, it would not have certainty that it was properly permitting a UG 3 Dormitory as opposed to improperly permitting UG 2 residences; and

WHEREAS, DOB asserts that since the plans submitted with the Application reflect an FAR in excess of what is permitted by regulations applicable to UG 2 residences, approval of such plans would be in error; and

WHEREAS, the appellant disagrees, and in its original Statement (submitted in response to the Final Determination, but not the subsequent correspondence between the appellant and DOB), makes the following arguments: (1) DOB does not have the power to require an institutional nexus between a dormitory and an educational institution; (2) DOB does not have the power to require the appellant to substantiate dormitory use as a condition of issuing a construction permit under DOB Job No. 103948338; and (3) in the Final Determination, DOB imposes a documentation requirement on the appellant greater than that generally applied by DOB to applicants for permits to construct dormitories; and

WHEREAS, in its updated Statement of Facts and Discussion, submitted subsequent to the issuance of the above-noted correspondence, the appellant makes the additional argument that DOB's adoption of Rule 51-01, as applied to the Application, is an illegal usurpation of legislative authority; and

WHEREAS, finally, during the course of the hearing process, the appellant made supplemental arguments, which are addressed below; and

WHEREAS, as to the first argument (DOB does not have the power to require an institutional nexus between a UG 3 Dormitory and an educational institution), the appellant argues that there has never been any requirement of an "institutional nexus" anywhere in the Zoning Resolution, and that the imposition of such a requirement as to the Application is tantamount to DOB changing statutory criteria through "administrative fiat"; and

WHEREAS, the appellant states that once a certificate of occupancy ("CO") is issued, then reasonable conditions upon the management and rental structure of a UG 3 Dormitory may be fashioned, and that any such conditions, if lawful for DOB to impose, may be set forth in the CO; and

WHEREAS, in response, DOB first notes that the phrase "college or school student dormitory" as set forth at ZR §22-13 is not a defined phrase in the Z.R., and thus it is appropriate for it to interpret the phrase;

and

WHEREAS, the Board agrees, and observes that DOB's authority to engage in such interpretation where necessary to carry out its administrative and enforcement mandates --is-- well-established and evidenced by the Board's own ability to review DOB interpretations as part of its appellate jurisdiction; and

WHEREAS, specifically, the Board notes that ZR §71-00 provides that the Commissioner of DOB shall administer and enforce the ZR, and that this will necessarily require occasional interpretation of its provisions; and

WHEREAS, moreover, the Board notes that ZR §72-01(a) gives it the power to "hear and decide appeals from and to review interpretations" of the ZR made by DOB; and

WHEREAS, in interpreting the phrase "college or school student dormitory", DOB states that some institutional control by an educational institution over the building or space therein is necessary; otherwise, a UG 3 Dormitory would be indistinguishable from UG2 residences for students; and

WHEREAS, in support of its interpretation, DOB submits a letter from the counsel to the Department of City Planning ("DCP"), dated August 9, 2005; and

WHEREAS, in this letter, DCP's counsel states that for UG 3 uses that include sleeping facilities, "it is not merely the identity of the individuals residing within the facility that makes it a 'community facility.' It is also the fact of institutional management and control of the facility."; and

WHEREAS, DCP's counsel also states that for a building to qualify as a UG 3 Dormitory under the ZR, "the dwelling units must be provided by an educational institution in the performance of its educational mission."; and

WHEREAS, DCP's counsel cites both to the plain language of the UG 3 listing for dormitories and to a City Planning Commission report regarding a text amendment to the CF provisions of the ZR (including the subject UG 3 listing), which reads, in pertinent part: "The proposal adds language clarifying that college and school dormitories or fraternity and sorority house are accommodations provided by the educational institution for its students."; and

WHEREAS, thus, DCP supports the interpretation made by DOB and its position in this appeal; and

WHEREAS, the Board agrees with DOB and DCP, for the reasons set forth below; and

WHEREAS, first, other UG 3 CF uses that allow sleeping accommodations are clearly related to, and controlled by, the primary community facility use; and

WHEREAS, for instance, a non-profit hospital controls its facilities for doctor and nurse housing; and

WHEREAS, likewise, a religious institution controls its sleeping facilities for its religious officials, such as monks or nuns; and --

WHEREAS, without some form of established college or school control of a building occupied by students, a proposed building ceases to be a UG 3 Dormitory and instead is better characterized as UG 2 residences designed for general student occupancy; and

WHEREAS, while plans for such a building might still illustrate features common to a UG 3 Dormitory (e.g. joint kitchens and bathrooms, communal laundry rooms), they would not reflect an actual UG 3 Dormitory because no institutional control would have been established; and

WHEREAS, second, CF uses are presumed to have a benefit for the neighborhood in which they are situated; and

WHEREAS, ZR § 22-13 provides that CF uses are allowed in residential areas "to serve educational needs or to provide other essential services for residents"; and

WHEREAS, accordingly, the ZR allows the development of buildings for such uses with generous bulk increases not afforded to non-community facility development, as set forth in detail in Article 2, Chapter 4 of the ZR "Bulk Regulations for Community Facility Buildings in Residence Districts"; and

WHEREAS, the Board notes that ZR § 24-01 specifically provides that while CF buildings enjoy bulk increases and bonuses, regular residential buildings do not enjoy such increases since the residential bulk regulations apply; and

WHEREAS, if there was no requirement of institutional control, any private party could build UG 2 residences and market them to students from any school, negating the presumed beneficial effect for a specific community-based educational institution and thus for the community as a whole, and resulting in an unjustified financial windfall (in terms of developable floor area) for the private developer; and

WHEREAS, while the appellant may see the current development proposal as the most personally profitable use of a parcel of land restricted to CF use, the Board concludes that not establishing institutional control prior to permitting subverts the public policy of favor towards CF uses as reflected in the ZR's additional bulk allowances for such uses; and

WHEREAS, the appellant notes that the CPC report cited in the letter from DCP concerns a text amendment to the UG 3 listing for "College or School Student Dormitory", which clarified that a UG 3 Dormitory must be occupied by students, as opposed to faculty; and

WHEREAS, the appellant argues that this change leads to the conclusion that there is no requirement in the ZR that an educational institution own or control the dorm, only that students occupy it; and

WHEREAS, while the Board agrees that this is an accurate portrayal of the goal of the text amendment,

this does not mean that institutional control is not an essential requirement for a UG 3 Dormitory building permit application; and

WHEREAS, if the appellant's position was accepted, this would mean that any building where students lived would qualify as a UG 3 Dormitory, which would render this UG designation meaningless; and

WHEREAS, moreover, while the appellant is correct in noting that it is bound by the Deed Restriction to comply with the zoning for CF uses as it existed when the title was transferred, this does not mean that an institutional nexus is not required; it merely raises the possibility that a UG 3 Dormitory that houses faculty could be developed by the appellant if desired, subject to DOB permitting requirements; and

WHEREAS, the appellant also argues that a strict application of DCP's interpretation of the subject ZR language would not allow for control of the building to be vested in a not-for-profit such as UHC; and

WHEREAS, again, the Board does not agree: the requirement imposed by DOB is that any such non-profit have as its sole purpose the provision of an educational institution-controlled UG 3 Dormitory, and that the participating educational institutions are the sole directors of the non-profit's board; and

WHEREAS, thus, an institutional nexus, and resulting control over a proposed UG 3 Dormitory, is preserved; and

WHEREAS, for the above reasons, the Board concludes that DOB possesses the authority to interpret the UG 3 language at issue here, and that said interpretation was correct; and

WHEREAS, furthermore, the Board finds appellant's arguments to the contrary unpersuasive; and

WHEREAS, as to the second argument (DOB has no power to ask for substantiation of dormitory use as a pre-permit condition), the appellant states that DOB is inappropriately imposing the requirement because it fears that the future use of the Proposed Dormitory will be for a use other than a UG 3 Dormitory; and

WHEREAS, the appellant cites to DiMilia for the proposition that DOB cannot deny a permit because it suspects a "possible future illegal use."; and

WHEREAS, however, the Board agrees with DOB that DiMilia is inapplicable; and

WHEREAS, in DiMilia, DOB refused to issue a permit where the amended plans for a single-family dwelling submitted in the permit application showed the addition of a full bathroom, a private entrance, and a division of a large room into two on the dwelling's first floor; and

WHEREAS, DOB refused to approve the amended plans because it believed the proposed single-family dwelling would then be readily convertible to two-family dwellings, which were not permitted; and

WHEREAS, the Board upheld DOB in an appeal

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of DOB's refusal to approve the amended plans; and

WHEREAS, the Supreme Court annulled the Board determination and the Second Department affirmed, holding that "the standard to be applied herein is the actual use of the building in question, not its possible future use"; and

WHEREAS, the Board disagrees that the basis of DOB's refusal to permit the construction of the Proposed Dormitory is analogous to its refusal to approve the amended plans in DiMilia; and

WHEREAS, here, DOB has not stated that the basis of the pre-permit requirements is fear that the proposed building will be occupied as something besides a UG 3 Dormitory, nor is there any evidence in the record that its stated position is a subterfuge for such fear; and

WHEREAS, instead, DOB claims that it may only approve an application and plans where it can be shown that such application and plans conform to all applicable laws, including the ZR; and

WHEREAS, this requirement is set forth at Building Code §27-191, which provides, in part: "All applications for permits and any accompanying plans and papers, including any amendments thereto, shall be examined promptly after their submission for compliance with the provisions of this code and other applicable laws and regulations."; and

WHEREAS, the Board agrees with DOB that the submitted application materials related to construction of the Proposed Dormitory do not show compliance with the ZR; and

WHEREAS, the permitted FAR for community facilities reflects the interplay that infrequently occurs between the ZR's bulk and use regulations; and

WHEREAS, if a developer proposes a CF use in a permit application, it often entitles the developer to a FAR that is greater than the FAR to which a non-CF use is entitled; and

WHEREAS, thus, an appropriate showing of conformance, through plans and related application materials, with the use regulations that trigger the applicable FAR regulations is an indisputable part of DOB's Building Code-mandated review of permit applications where a CF use is proposed; and

WHEREAS, however, the Board observes that the application review in DiMilia did not require DOB to ascertain whether the proposed use had any bearing on the bulk of the building; the review led to the denial of the permit merely because of DOB's fear of improper future use; and

WHEREAS, here, DOB's concern that the appellant show compliance with the pre-permit requirements is not based upon a fear regarding the future use of the Proposed Dormitory – specifically, that it will be used for UG residences for students but not an actual UG 3 Dormitory – but whether it, as the

City agency charged with review and approval of permit applications, may lawfully approve an application that does not contain all the requisite information needed to establish conformance with applicable laws; and

WHEREAS, this concern, that DOB would be exceeding its lawful authority in permitting the Proposed Dormitory, is distinguishable from the concern of DOB as reflected in DiMilia; and

WHEREAS, a further distinction between the instant case and DiMilia is evident when comparing the plans for the proposed developments in each matter: in DiMilia, DOB reviewed plans that showed a conforming, complying home; thus, zoning compliance was not an issue; and

WHEREAS, here, DOB reviewed plans that show a residential layout that could be for either UG 2 residences or a UG 3 Dormitory; thus, zoning compliance is an issue; and

WHEREAS, without appropriate materials establishing an institutional nexus between a qualifying educational institution or not-for-profit in the permit application, DOB is unable to determine if it is approving plans that comply with the ZR, given the disparity between UG 2 uses and UG 3 uses in terms of as of right FAR; and

WHEREAS, the Board observes that DOB is bound by 27-191 and may not issue a permit where the plans and papers submitted in support of the permit application do not show conformance with applicable laws; and

WHEREAS, the appellant also argues that certain other uses that enjoy bulk bonuses are not subject to pre-permit documentary evidence requirements comparable to those imposed upon the Application; and

WHEREAS, specifically, the appellant cites to the following examples: (1) FAR bonuses for a mixed-use residential/community facility building where the proposed community facility is a medical office (now referred to in the ZR as ambulatory diagnostic and treatment health care facility); and (2) FAR bonuses for hotel use; and

WHEREAS, the Board agrees that DOB currently may not be imposing the same documentary requirements for plan and permit approvals related to the above-mentioned types of applications; and

WHEREAS, however, this does not mean that DOB lacks the authority to address now applications for UG 3 Dormitories in the manner that it has; and

WHEREAS, in fact, at hearing, DOB identified a viable reason for why it was important to address the UG 3 Dormitory issue as soon as possible: unlike the development scenarios cited by the appellant, if DOB is compelled to revoke a CO based upon issuance of an invalid permit for development presented as UG 3 Dormitory but actually used for UG 2 residences, individuals' homes could be affected; and

WHEREAS, DOB notes that such a concern is not present with health care facilities: if occupancy of such a space is contrary to the ZR, a new occupant who meets the requirements in terms of licensing can be procured and no individual or family loses a home; and

WHEREAS, the Board further observes that unlike plans for a UG 3 Dormitory and UG 2 residences, plans for a hotel are distinguishable from those for UG 2 residences, given the typical floor plates, room sizes, and amenities present in a hotel; and

WHEREAS, thus, a review of plans, without secondary information supplied by the applicant showing that a hotelier will actually control the hotel, is typically sufficient for DOB to ensure that it is lawfully approving plans for a hotel; and

WHEREAS, in sum, the Board agrees that the need to address the pressing issue of applications for UG 3 Dormitories is an appropriate reason for DOB to impose pre-permit requirements upon the Application, like other applications for UG 3 CF uses that have a residential component, and that there are legitimate reasons why DOB has not addressed the other uses cited by the appellant in a comparable fashion; and

WHEREAS, finally, the appellant suggests two more alternative arguments as to why DOB lacks authority to ensure, through the submission of documentary evidence, that the plans for the proposed building reflect a UG 3 Dormitory before issuance of a building permit: (1) DOB enforcement capacity in this regard is limited to its ability to enforce against an issued CO; and (2) the Deed Restriction eliminates the need to impose the pre-permit requirements, since the appellant would risk the investment in the property should this restriction be violated; and

WHEREAS, the Board acknowledges that DOB has the authority to enforce against any CO listing the legal use of the proposed building as a UG 3 Dormitory should there be an occupancy contrary to such a CO; and

WHEREAS, however, contrary to the appellant's assertion, the Board finds that DOB's enforcement capability in this regard does not eliminate or modify the requirement that DOB perform a full plan review and act thereafter in compliance with Building Code § 27-191; and

WHEREAS, likewise, the Board also finds that the existence of the Deed Restriction does not eliminate or modify this requirement; and

WHEREAS, in sum, the Board concludes that the pre-permit requirements imposed by DOB as set forth in its Final Determination and subsequent letters constitute a reasonable exercise of DOB's authority, based upon a reasonable interpretation of a ZR provision; and

WHEREAS, as to the third argument (DOB is imposing a documentation requirement on the Owner

greater than that generally applied by DOB to applicants for permits to construct dormitories), the appellant contends that it complies with the language of the Proposed Rule as to submission of documentary evidence; and

WHEREAS, however, as noted by DOB, UHC does not meet the imposed pre-permit requirements; and

WHEREAS, specifically, the certificate of incorporation for UHC does not identify all of its members as representatives of participating educational institutions, nor does it specify that UHC was formed to provide housing for students of participating educational institutions; and

WHEREAS, these requirements have been in place since DOB issued the Final Determination, and, despite the appellant's representations that they would be met, no documentary evidence showing compliance with them has been presented to DOB; and

WHEREAS, in its September 16, 2005 submission, the appellant argues that DOB should be stopped from requiring evidence of institutional control based upon statements made by the City in a prior Article 78 proceeding regarding the premises; and

WHEREAS, the appellant asserts that accepting DOB's position as presented herein would be the equivalent of the City deceiving the appellant into the purchase of the property without any intention of letting the appellant actually develop it, and that if the City had the concerns it is currently expressing about development of a UG 3 Dormitory at the subject premises then these concerns should have been expressed at the time of purchase; and

WHEREAS, the Board observes that the Final Determination does not address this issue; therefore, the issue is not properly before the Board for its review in the instant appeal; and

WHEREAS, moreover, the Board does not possess the authority to apply principles of equitable estoppel against DOB in the context of the appeal; and

WHEREAS, accordingly, the Board declines to address this argument further; and

WHEREAS, additionally, the appellant argues that DOB's adoption of Rule 51-01 was an improper usurpation of legislative authority, and that the application of this Rule to the permit application for the Proposed Dormitory was a violation of the Owner's due process rights; and

WHEREAS, as noted above, the Board observes that the Objection, the Final Determination, and all the DOB-imposed requirements predate the effectiveness of Rule 51-01; and

WHEREAS, because Rule 51-01 was not effective when the Objection was issued or when this appeal was taken, the argument that the Rule was applied to the Application is erroneous; and

WHEREAS, accordingly, the Board need not pass

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on DOB's adoption of the Rule nor on the alleged applicability of it to the Application; and

WHEREAS, in its September 16, 2005 submission, the appellant also argues that the Building Code provides that DOB should only review permit applications to ensure "that the plans conform to sound construction engineering requirements, and that the proposal conforms to all existing rules and laws."; and

WHEREAS, the appellant implies that only architectural, structural and mechanical elements of the proposed building require review; and

WHEREAS, however, as noted above, DOB must ensure compliance with all applicable laws pursuant to Building Code §27-191; since ZR provisions as to use and bulk are applicable, they must be evaluated by DOB along with applicable Building Code provisions; and

WHEREAS, thus, the Board finds this argument unpersuasive; and

WHEREAS, in conclusion, the Board finds that: (1) DOB's interpretation of the subject ZR provision is correct; and (2) its refusal to lift the Objection for failure to submit documentary evidence of institutional control over the Proposed Dormitory, as set forth in the Final Determination, is an appropriate exercise of its authority.

Therefore it is Resolved that the instant appeal, seeking a reversal of the determination of the Manhattan Borough Commissioner, dated March 21, 2005, to refuse to remove an objection to DOB Permit Application 103948338, is hereby denied.

Adopted by the Board of Standards and Appeals, October 18, 2005.

**A true copy of resolution adopted by the Board of Standards and Appeals, October 18, 2005.
Printed in Bulletin Nos. 42-43, Vol. 90.**

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.