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E 12-31-08

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: KIBBIE F. PAYNE PART 4
Justice

SOHO ALLIANCE, INC.,

INDEX NO. 108064/08

MOTION DATE 09-9-08

- v -

MOTION SEQ. NO. 001

THE CITY OF NEW YORK, et al.,

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

The above entitled matter is decided in accordance with the accompanying memorandum and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

SUPREME COURT
RECEIVED
DEC 31 2008
IAS MOTION
SUPPORT OFFICE

Dated: December 19, 2008

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 4

----------X

SOHO ALLIANCE INC.

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

Index No. 108064/08

-against-

Judgment/Decision

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF BUILDINGS, THE NEW YORK CITY BOARD OF STANDARDS AND APPEALS, BAYROCK/SAPIR ORGANIZATION LLC,

Respondent.

KIBBIE F. PAYNE, J.:

In this Article 78 proceeding, petitioner Soho Alliance Inc. ("SAI") seeks nullification of the May 8, 2008 resolution issued by respondent the New York City Board of Standards and Appeals ("BSA"), which upheld the September 28, 2007 determination of the New York City Department of Buildings ("DOB"). That determination approved permits for the construction of a "Use Group 5 transient hotel" at 246 Spring Street, New York, New York (the "Building"). Respondents the City of New York, the New York City Department of Buildings ("DOB"), the New York City Board of Standards and Appeals ("BSA") (collectively, the "City") and Bayrock/Sapir Organization LLC ("BSO") have answered, opposing the instant petition.

The subject of this proceeding is a transient hotel, located

at 246 Spring Street in Manhattan (the "Site"). On May 17, 2007, the DOB issued New Building Permit No. 104403334 to BSO for the proposed transient hotel at the Site. The Site is located in an M1-6 zoning district and, according to the DOB permit, the proposed Building would be a "J-1 occupancy" transient hotel. Prior to the issuance of the permit, on April 26, 2007, BSO-the Building owner-executed a Restrictive Declaration, which included the following provisions:

> the New Building shall contain upon completion and thereafter, (A) no less than 40,000 square feet of space that is used for one or more uses (other than guest rooms or suites) that are accessory to a transient hotel use, including food and beverage, conference, spa, gym, retail, back of house or other function facilities and (B) a Class J Fire Safety System and . . . shall not include . . . a central chute for rubbish or individual mailboxes for each Unit, and no standard guestroom shall have a stove, oven or fixed rangetop, a dishwasher or a washer/dryer
> * * *
> No Unit may be occupied by its Unit Owner or by any other individual: (i) for a continuous period of more than 29 days in any 36 day period; or (ii) for a total of more than 120 days in any calendar year
>
> (Petition, Ex. F at 2).

Petitioner appealed the issuance of the permit, arguing that the DOB improperly determined that the Building constitutes a "transient hotel" as defined by New York City Zoning Regulation § 12-10. The petitioner claims that since the Site is in an M1-6 manufacturing zone, a Use Group 5 transient hotel would be

permitted, whereas a Use Group 2 residential building would be prohibited. According to petitioner, despite the DOB's determination, the Building falls in the prohibited Use Group 2 category. In a resolution dated May 8, 2008, the BSA denied petitioner's appeal.

Article 78 provides that:

> The only questions that may be raised in a proceeding under [it] are . . . whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or . . . whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed
>
> (CPLR 7803 [2], [4]).

The court's review of an administrative decision is limited to an assessment of whether it is arbitrary and capricious—"whether there is a rational basis for the administrative determination without disturbing underlying factual determinations" (*Heintz v. Brown*, 80 NY2d 998, 1001 [1992]). Only the evidence and arguments raised before the agency at the time of the administrative determination will be considered (*HLV Assocs. v. Aponte*, 223 AD2d 362, 363 [1st Dept 1996]). A zoning "board determination may not be set aside in the absence of illegality, arbitrariness or abuse of discretion", and "will be sustained if it had a rational basis and is supported by substantial evidence" (*SoHo Alliance v. New York City Bd. of Stds. & Appeals*, 95 NY2d

437, 440 [2000] citing *Matter of Consolidated Edison Co. v Hoffman*, 43 NY2d 598, 608 [1978]) Additionally, the Board's determination merits "substantial judicial deference and, even when a contrary determination would be reasonable and sustainable, a reviewing court may not substitute its judgment for that of the agency if the determination is supported by substantial evidence" (*Soho Alliance v. New York City Bd. of Stds. & Appeals*, 264 AD2d 59, 63 [1st Dept 2000], *affd* 95 NY2d 437).

Here, the thrust of petitioner's argument is that the BSA acted outside its authority in denying petitioner's appeal of the permit. Specifically, petitioner argues that the BSA varied the terms of the Zoning Resolution in finding that the Building fell into Use Group 5, rather than Use Group 2. The court is unpersuaded with this argument.

NY City Zoning Resolution § 12-10 defines a transient hotel as follows:

> A "transient hotel" is a building or part of a building in which:
> (a) living or sleeping accommodations are used primarily for transient occupancy, and may be rented on a daily basis;
> (b) one or more common entrances serve all such living or sleeping units; and
> (c) twenty-four hour desk service is provided, in addition to one or more of the following services: housekeeping, telephone, or bellhop service, or the furnishing or laundering of linens.
>
> Permitted accessory uses include restaurants,

> cocktail lounges, public banquet halls, ballrooms, or meeting rooms.

While petitioner does not dispute that the Building will meet the requirements of § 12-10 (b) and (c), it claims that somehow the provision in § 12-10 (a), *viz.*, that the hotel "*may* be rented on a daily basis[,]" mandates that the hotel *must only* be rented on a daily basis. However, the plain wording of the Zoning Resolution statute evidences no such requirement (*see Mayor of the City of New York v. Council of the City of New York*, 38 AD3d 89, 100 [1st Dept 2006], *affd* NY3d 23 [2007]; *cf. Aetna Cas. & Sur. Co. v. County of Nassau*, 221 AD2d 107, 115 [2d Dept 1996]). Thus, the BSA did not vary the terms of the Zoning Resolution as the petitioner alleged.

Although petitioner relies heavily on the case of *Raritan Dev. Corp. v. Silva*, (91 NY2d 98 [1997]), that matter is distinguishable from the dispute before this court. In *Raritan*, the "BSA's interpretation [of the Zoning Resolution] conflict[ed] with the plain statutory language" and, thus, the Court of Appeals found that the BSA's interpretation could not be sustained (*Raritan*, 91 N.Y.2d at 103). Here, the BSA's interpretation of § 12-10 (a) does not conflict with its plain language.

Furthermore, while the Zoning Resolution defines a transient hotel as one with primarily "transient occupancy," it fails to

provide further definition for "transient," leaving this term subject to the BSA's interpretation. Petitioner argues that because of this lack of a definition, Zoning Regulation § 11-22 applies. Pursuant to § 11-22:

> Whenever any provision of this Resolution and any other provisions of law, whether set forth in this Resolution or in any other law, ordinance or resolution of any kind, impose overlapping or contradictory regulations over the use of land, or over the use or bulk of buildings or other structures, or contain any restrictions covering any of the same subject matter, that provision which is more restrictive or imposes higher standards or requirements shall govern.

However, petitioner has failed to cite any provision of law that is more restrictive than Zoning Resolution § 12-10. Indeed, it is petitioner's contention that it is § 12-10-compared with other statutes, including the New York Rent Stabilization Code-that is *more restrictive*, requiring day-to-day occupancy in transient hotels. As discussed above, though, the plain language of § 12-10, and its use of the permissive word "may" rather than the imperative word "shall," renders any such argument devoid of merit.

Additionally, petitioner argues that issuing the permit for the Building, "undermines" the purpose of Zoning Regulation § 41-00 (b), which identifies one purpose of manufacturing districts as follows:

> To provide, as far as possible, that such space will be available for use for

> manufacturing and related activities, and to protect residences by separating them from manufacturing activities and by generally prohibiting the use of such space for new residential development.

In light of the fact that the BSA had a rational basis for determining that the Building is *not* residential in nature but is, as discussed above, a transient hotel, the petitioner's argument is not compelling. Ample evidence exists, for the BSA's determination. The Restrictive Declaration provides that no owner or individual may occupy a unit in the Building for more than 120 in any calendar year, nor for any period of more than 29 days in a 36-day period. Additionally, the Building has been designed without kitchens in the guestrooms and without other residential amenities such as mailboxes or common garbage chutes. Thus, the BSA's determination that the Building would not qualify as residential is neither arbitrary nor capricious.

In its resolution, the BSA determined that despite petitioner's claim that a secure closet is a "hallmark of residential use," the locked closet:

> is instead evidence of the transient nature of the unit, . . . [as] no need for a secure storage closet would exist if the unit were indeed used as a permanent residence, because a unit owner who had unrestricted access and control of the unit's occupancy would not require a secure place to store personal effects
>
> (Resolution, ¶¶ 80-81).

Petitioner argues that the Resolution is in error, since the

"owner's secure closet," as shown in the Building plans, is not among the permitted accessory uses of transient hotels, enumerated in § 12-10.

The court notes that § 12-10 provides that in transient hotels "[p]ermitted accessory uses *include* restaurants, cocktail lounges, public banquet halls, ballrooms, or meeting rooms" (emphasis supplied). Despite petitioner's seeming contention, the plain language of § 12-10 does not limit accessory uses to those enumerated therein. Indeed, the Zoning Resolution specifically provides that "[t]he word 'includes' shall not limit a term to the specified examples, but is intended to extend its meaning to all other instances or circumstances of like kind or character" (NY City Zoning Resolution § 12-01 [i]).

In relevant part, Zoning Resolution § 12-10 specifies that an "accessory use":

> (a) is a use conducted on the same zoning lot as the principal use to which it is related (whether located within the same or an accessory building or other structure, or as an accessory use of land) . . . ; and
> (b) is a use which is clearly incidental to, and customarily found in connection with, such principal use; and
> (c) is either in the same ownership as such principal use, or is operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal use.

Of this three-prong test used to determine whether a use qualifies as an accessory use, paragraph (b) is the only test at

issue here. In defining the term "accessory use," relevant case law "has accorded significant flexibility to the term, albeit turning on particular factual circumstances, so that the application of the term, it seems, remains ad hoc" (*Mason v. Dep't of Bldgs.*, 307 AD2d 94, 101 [1st Dept 2003]). Determining whether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use will depend upon "an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question" (*New York Botanical Garden v. Board of Stds. & Appeals*, 91 NY2d 413, 420 [1998]). The Court "may not lightly disregard [the BSA's] determination" on this issue (*Id.* at 420).

Here, the BSA determined that the presence of the locked storage closet "is instead evidence of the transient nature of the unit." No such storage closet would be needed if the unit owners had permanent access to the units. The fact that the closet exists has no effect upon the timing restrictions for the length of time owners, or any other guests, may stay in the Building. Viewing the BSA's determination favorably, as this court is compelled to do, the determination was neither arbitrary nor capricious.

Finally, respondents are correct. The BSA cannot deny a

permit to the Owner upon mere conjecture and speculation that, in the future, the Building might be improperly used for residential purposes. When rendering a determination upon whether a permit may be issued, "[t]he standard to be applied [thereto] is the actual use of the building in question, not its possible future use" (*Di Milia v. Bennett*, 149 AD2d 592, 593 [2d Dept 1989]). A building permit may not be withheld due to the "mere possibility of a future illegal use" (*Matter of 9th & 10th St. L.L.C. v. Board of Stds. & Appeals of the City of New York*, 10 NY3d 264, 270 [2008]).

The record clearly indicates the Owner has demonstrated that the Building will be a Use Group 5, transient hotel. Petitioner maintains theoretically that the use of the Building in the future could be residential, thus argues that the Owner failed to establish an intent to comply with zoning regulations. In support of this argument petitioner *Matter of 9th & 10th St.* as a compelling authority for denial of the permit, that case is inapposite on the facts. In the *Matter of 9th & 10th St.*, the proposed building, a dormitory, could not at the outset meet the applicable Zoning Criteria as it had no affiliation with an educational institution. Whereas, in this case, the proposed Building has met the BSA's requirements for a Use Group 5 building. The fact that it could, at some future time, be misused for another purpose is insufficient reason to deny the

permit now. Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

The foregoing constitutes the judgment and order of this court.

Dated: December 19, 2008

ENTER:

KIBBIE F. PAYNE
J.S.C.