Matter of Chelsea Bus. & Prop. Owners' Assoc., LLC v City of New York

2011 NY Slip Op 32669(U)

October 14, 2011

Supreme Court, New York County

Docket Number: 113194/10

Judge: Joan A. Madden

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 10/14/2011

[* 1]

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

PRESENT: JOAN A. MADDEN, Justice — PART 11

Chelsea

- v -

New York City

INDEX NO. 113194/10

MOTION DATE

MOTION SEQ. NO. 004

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

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 proceeding is determined in accordance with the annexed decision, order 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).

Dated: October 17, 2011

JOAN A. MADDEN, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

---X

In the Matter of the Application of
CHELSEA BUSINESS & PROPERTY OWNERS' ASSOCIATION, LLC, d/b/a CHELSEA FLATIRON COALITION,

Petitioner,

INDEX NO. 113194/10

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

THE CITY OF NEW YORK; SETH DIAMOND, Commissioner for the Department of Homeless Services for the City of New York ("DHS"); GEORGE NASHAK, Deputy Commissioner for Adult Services for DHS; ROBERT D. LIMANDRI, Commissioner for the Department of Buildings of the City of New York ("DOB"); FATMA AMER, P.E., First Deputy Commissioner for DOB; JAMES P. COLGATE, R.A., Assistant Commissioner to Technical Affairs and Code Development for DOB; VITO MUSTACIUOLO, Deputy Commissioner for the Department of Housing, Preservation & Development of the City of New York; BOWERY RESIDENTS' COMMITTEE, INC.; 127 WEST 25TH LLC; and DANIEL SHAVOLIAN,

Respondents.

---X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner Chelsea Business & Property Owners' Association, LLC, d/b/a Chelsea Flatiron Coalition ("CFC") challenges Board of Standards and Appeals ("BSA") Resolution 189-10-A, adopted April 5, 2011 and published in Matter of Chelsea Bus. & Prop. Owners, for 127 W. 25th LLC, Bulletin of the New York City Bd. of Stds. & Appeals, vol. 96, No. 15, at 238-47 (April 13, 2011) ("Resolution"). The appeal to BSA challenged a final determination letter from the Manhattan Borough Commissioner of the

Department of Buildings ("DOB"), dated September 9, 2010, which refused CFC's request to revoke DOB Permit No. 120288054, issued to respondent Bowery Residents' Committee ("BRC"), a lessee/not-for-profit transitional housing and service provider, for the conversion of a 12-story building at 127-131 West 25th Street in Manhattan into a homeless shelter and offices (the "Building" or "proposed facility").

Specifically, the appeal to BSA challenged DOB's "use" classifications for the proposed facilities in the Building, as Use Group 5 transient hotel and Use Group 6 professional office. Pursuant to the Zoning Resolution of the City of New York ("ZR") both uses are permitted as of right in the M1-6 light manufacturing zoning district in which the Building is located.[1] CFC asserted that the proper use classification is Use Group 3 non-profit institution with sleeping accommodations or Use Group 3 health related facility. CFC also claimed that the portion of the Building designated as Use Group 6 could qualify, alternatively, as Use Group 4 ambulatory diagnostic or treatment health care facility. CFC argues that Use Groups 3 and 4 are prohibited in an M1-6 zoning district.

CFC now seeks revocation of the approvals and permits for the Building, claiming that, with respect to the Use Group 5 designation, the Resolution was arbitrary and capricious, and

---

[1] See ZR § 41-11; see also New York City Dept. of City Planning Zoning Map, Section 8d (http://www.nyc.gov/html/dcp/pdf/zone/map8d.pdf). According to the petition, CFC is comprised of "dozens of members" who own property or reside in close proximity to the proposed facility. ZR § 41-11 defines M1 zoning districts as "designed for ... manufacturing and related uses," providing "a buffer between Residence (or Commercial) Districts and other industrial uses which involve more objectionable influences," and with certain exceptions, "[n]ew residential development is excluded from these districts ... both to protect residences from an undesirable environment and to ensure the reservation of adequate areas for industrial development."

that it violates the ZR, the Administrative Code of the City of New York ("Administrative Code"), relevant case law and BSA precedent, constituting an error of law and abuse of discretion. CFC's Amended Petition does not challenge BSA's designation of a portion of the Building as Use Group 6 under the ZR. CFC also seeks to: 1) enjoin the occupancy and operation of BRC's 100,000 square foot facility, housing a 32-bed detoxification unit, and a 96-bed Reception Center and a 200-bed shelter for the homeless, pending compliance with all laws, rules and regulations; 2) compel the City to submit the proposed facility to ULURP review in accordance with New York City Charter § 197-c; and 3) enjoin occupancy and operation of the proposed facility unless and until it complies with the Administrative Code § 21-312 restriction on shelters exceeding 200 beds.

By notice of motion dated July 28, 2011, the City Council of the City of New York ("City Council") moved to intervene, and, on consent of the parties, as to the issue of State preemption with respect to size limitations of shelters, intervention was granted. Respondents reserved the right to object to intervention as to other issues raised by the City Council.[2]

I. BACKGROUND

This proceeding involves the renovation and use of the Building by BRC. BRC's Executive Director, Lawrence Rosenblatt submits an affidavit explaining that BRC is an "organization that partners with the City and the State of New York in an effort to help homeless individuals successfully transition from the streets through various forms of shelter, incorporating supportive services that enable homeless individuals to transition to permanent housing. Founded in 1971 by lodgers of Bowery flop houses, BRC has grown into a leading

[2]A briefing schedule was set with final submissions due on August 19, 2011.

[* 5]

provider of housing and services to New York's neediest individuals. Through a continuum of twenty-seven individually comprehensive and collaborative programs located throughout the City, BRC assists homeless individuals by providing accommodations, services and programs in an effect to end New York's homeless crisis."

The proposed facility will be located in a 12-story building at 127 West 25th Street in Chelsea. According to Rosenblatt, the renovations are designed to implement residential and non-residential programs which are to be operated by BRC and located within the Building with the primary goal that the renovated Building is to function as a "vertical campus." In addition, the Building will serve as BRC's new headquarters and will house all its administrative offices. Certain portions of the Building are dedicated to residential programs, and other portions to non-residential programs, professional offices related to the non-residential programs and BRC's staff and administrative offices. At DOB's request, a fire wall separates the residential and non-residential portions of the Building.

The residential programs include a 96-bed Reception Center, a 32-bed detoxification facility called the Chemical Dependency Crisis Center ("CDCC"), and a 200-bed homeless shelter. Specifically, the Reception Center is "short-term housing," described by BRC as "a transitional residence offered in the city for homeless individuals who have been diagnosed with one or more severe and persistent mental illness," many of whom "have a history of substance abuse" and are "medically fragile." According to BRC's Program Descriptions, the "goals of the Reception Center are to provide psychiatric and medical stabilization along with therapeutic and case management services with the aim of placing its clients in appropriate, supportive housing

[* 6]

within nine months." [3] The Reception Center is licensed by the New York State Office of Temporary and Disability Assistance ("OTDA") and is to be located on the fourth and fifth floors of the Building. The Reception Center currently operates as a 77-bed Reception Center at 324 Lafayette Street, and is funded by the Department of Homeless Services of the City of New York ("DHS"), pursuant to an agreement with BRC. DHS and BRC plan to amend their current contract to account for the expansion to 96 beds and the relocation to the Building. BRC explains that the Reception Center welcomes "walk-in," and clients need not be referred by DHS, and while clients are encouraged to participate in day treatment programs in and outside the Building, they are not required to attend such programs.

Rosenblatt describes the CDCC as offering "short term transitional accommodations to men and women in need of detoxification from substance abuse, as well as those in imminent risk of relapse . . . [and] serves both the homeless and non-homeless individuals." The CDCC, which is to be located on the third floor, is also moving to the Building from 324 Lafayette Street and seeks to expand from a 24-bed program to a 32-bed program. According to City respondents,[4] CDCC is licensed by the New York State Office of Alcoholism and Substance Abuse Services ("OASAS") and funding for the program is provided primarily by the New York City Department of Health and Mental Hygiene ("DOH"). Rosenblatt explains that like clients

---

[3] CFC raises issues related to transiency and the length of stay of clients at the programs which are discussed below.

[4] The following respondents answered the Amended Petition together, and are referred to collectively as "City respondents": the City of New York; BSA; Seth Diamond, as Commissioner for DHS; George Nashak, Deputy Commissioner for Adult Services for DHS; Robert LiMandri, Commissioner for the DOB; Fatma Amer, First Deputy Commissioner for DOB; and James Colgate, Assistant Commissioner of Technical Affairs and Code Development for DOB.

of the Reception Center, clients in the CDCC are encouraged, although not required, to participate in programs including therapy, substance abuse education and self-help programs.

According to BRC, the 200-bed shelter "will serve homeless men and women of all ages who have a history of mental illness and who are seeking to attain or maintain stability in their mental health." Located on floors six through nine of the Building, the shelter will be operated pursuant to BRC's contract with DHS and is licensed by OTDA. Rosenblatt states that clients will also be encouraged, although not required, to participate in day treatment programs inside and outside the Building.

In the non-residential portion of the Building, BRC will house the Fred Cooper Substance Abuse Service Center ("SASC"), and a Continuing Day Treatment program ("CDT"). Both programs will operate on the tenth floor of the Building. According to BRC, the SASC is an out-patient program that will "serve people with alcohol and substance abuse problems who are homeless or marginally housed," and also clients "dually diagnosed with mental illness and substance abuse." Rosenblatt states that the SASC is licensed under the State Mental Hygiene Law and is funded by DOH and Medicaid; the CDT program is licensed under the New York State Office of Mental Health ("OMH") and is funded by Medicaid. BRC's Program Descriptions states that the CDT program will work with clients who have a "long history of mental illness," many of whom are "dually diagnosed with chemical addictions," providing "on-site psychiatric treatment and medication management, case management, assistance with entitlements and housing, and rehabilitation activities." Rosenblatt states that both programs are open to anyone seeking their services, whether or not they are clients of BRC's Shelter, Reception Center or CDCC.

The Amended Petition alleges that two additional programs, Home-Based Case Management and the Metropolitan Apartment programs, will be located on the eleventh floor of the Building. According to BRC's Program Descriptions, the Home-Based Case Management program receives funding from Medicaid, DOH and HRA' s Adult Protective Services division, and will offer "comprehensive case management services to individuals diagnosed with a serious and persistent mental illness, many with a history of homelessness and/or substance abuse." BRC's Program Descriptions state that the Metropolitan Apartment program is funded by OMH and Medicaid, and "is a transitional housing program targeting formerly homeless clients who are either mentally ill or dually diagnosed as mentally ill and chemically addicted," with a mission to "provide a safe and supportive environment where residents partake of rehabilitation interventions that will assist them in the attainment of their work, social and community living goals."[5]

In addition, food services will be provided at the Building, and, as previously stated, BRC's headquarters and administrative offices will be located in the Building on the twelfth floor.

According to Rosenblatt, the portion of the Building used for residential purposes and designated Use Group 5 by DOB "will provide living and sleeping accommodations on a temporary basis," and will be used for "transient occupancy," containing "beds, lounge areas, eating areas and some meeting rooms." Rosenblatt also states that the non-residential portion of the Building designated Use Group 6 "will be used primarily for staff meetings, counseling and

[5]Rosenblatt's affidavit states there will be two non-residential programs, the SASC and the CDT program at the proposed facility.

related professional services to clients in the CDT and SASC programs, administrative services, and executive offices." He explains that the Use Group 5 and Use Group 6 portions of the Building are designed to be "splitting the space" on portions of floors 3 through 9; floors 10 through 12 will be used "entirely" as Use Group 6 professional offices; the first floor will consist of a Use Group 5 accessory use kitchen and Use Group 6 retail/office space; and the second floor will consist of a Use Group 5 accessory use cafeteria. Rosenblatt further explains that the Use Group 5 portion of the Building will have one "common entrance" on West 25th Street, and the Use Group 6 portion will have a separate entrance. In addition, the Use Group 5 portion of the Building will operate year-round, 24-hours daily, including 24-hour staff services, such as daily housekeeping, telephone and laundry services provided by BRC personnel. As indicated above, while residential clients will be encouraged to participate in the programs, to access the programs they need to exit the residential portion of the building and enter the non-residential portion through its separate entrance. Moreover, BRC's shelter clients can participate in programs outside the Building.

Certain facts and the procedural history of this proceeding were stated in detail in this court's previous decisions in this proceeding: Matter of Chelsea Business & Property Owners' Association, LLC v. City of New York, 30 Misc 3d 1213(A) (Sup Ct, NY Co, January 10, 2011), (BRC's motion for a stay of CFC's motion for injunctive relief); and Matter of Chelsea Business & Property Owners' Association, LLC v. City of New York, 2011 NY Slip Op 31946 (Sup Ct, NY Co, July 8, 2011) (CFC's motion for a preliminary injunction). Therefore, the court presumes familiarity with such facts and procedural history.

II. ZONING RESOLUTION

"BSA and DOB are responsible for administering and enforcing the zoning resolution (New York City Charter §§ 643, 666 [7]), 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.'" Appelbaum v Deutsch, 66 NY2d 975, 977-78 (1985) (citation omitted); see also 129 East 82nd St. Owners Corp. v Board of Standards and Appeals of City of New York, 244 AD2d 213 (1st Dept 1997); CPLR § 7803. As stated by the Court of Appeals, "[j]udicial review of local zoning decisions is limited," and such decisions should be sustained when supported by "a rational basis," regardless of "whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them." Matter of Cowan v Kern, 41 NY2d 591, 599 (1977); see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, 34 NY2d 222, 231 (1974).

A determination that is "consistent with [the agency's] own rules and precedents" establishes "a rational basis for the determination." Matter of Peckham v Calogero, 12 NY3d 424, 431 (2009). However, "[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious and mandates reversal, even if there may otherwise be evidence in the record sufficient to support the determination." Lyublinskiy v Srinivasan, 65 AD3d 1237, 1239 (2nd Dept 2009) (interior quotation marks and citations omitted). While an agency's rational construction is entitled to deference when it applies "its special expertise in a

particular field to interpret statutory language," deference to an agency's interpretation is not required where "the question is one of pure legal interpretation of statutory terms." Matter of Raritan Dev. Corp. v. Silva, 91 NY2d 98, 102-103 (1997) (internal quotation marks and citations omitted). "[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used." Id at 107 (emphasis in original) (citations omitted). However, even in situations where an agency applies special expertise, a determination that "'runs counter to the clear wording of a statutory provision' is given little weight." Id. (citations omitted).

"[T]he fundamental rule in construing any statute, or in this case ... the City's Zoning Resolution, is to ascertain and give effect to the intention of the legislative body, here the New York City Council." City of New York v Stringfellow's of N.Y., 253 AD2d 110, 115-116 (1st Dept 1999). The City Council's intent "is controlling" and "is ascertained from the words and language used in the statute and if the language thereof is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation." Id at 116. The City Council's intent "must be given force and effect," and "[o]nly when words of the statute are ambiguous or obscure may courts go outside the statute in an endeavor to ascertain their true meaning." Id.

A. BSA'S RESOLUTION AND USE GROUP DETERMINATION

Here, BSA concluded that the proposed uses of the residential and non-residential portions of the Building were "consistent with a Use Group 5 transient hotel and Use Group 6 professional office under the ZR." ZR § 12-10 defines "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.[6]

BSA found that ZR §12-10 "is clear and unambiguous and that the proposed use of the building meets the three criteria of the definition . . . in that, as presented by BRC, it (1) provides sleeping accommodations used primarily for transient occupancy, (2) has a common entrance to serve the sleeping accommodations, and (3) provides 24-hour desk service, housekeeping, telephone, and linen laundering." BSA determined that, "because the statute is unambiguous, the Board does not find that it is necessary or appropriate to consult sources outside of the ZR for clarity."

CFC challenges on various grounds, BSA's conclusion that the residential portion of the proposed facility is properly classified within Use Group 5 as a transient hotel, and asserts that the proposed facility's proper classification is as a community facility under Use Group 3. In the subject zoning district, a Use Group 5 transient hotel is permitted as of right, while a Use Group 3 community facility requires a special permit. CFC's arguments are addressed below.

Initially, CFC asserts that BSA's Resolution "ignores the clear and common meaning of the term 'hotel.'" Specifically, CFC argues that as commonly understood, a hotel does not

---

[6]According to the ZR, words in the text surrounded by the number sign or italicized are to be interpreted in accordance with the provisions set forth in the ZR.

provide the types of medical and social services to be provided at the non-residential portion of the proposed facility, and that New York State statutes and regulations governing the proposed facility also indicate it is not a hotel. CFC refers to statutes and regulations cross-referenced in the ZR, such as the Administrative Code, the Multiple Dwelling Law ("MDL"), the New York State Hospital Code, and the Housing Maintenance Code ("HMC").

CFC's arguments are without merit, as they ignore the plain language of ZR § 12-10, which clearly and expressly designates the criteria for a transient hotel. See Toys "R" Us v. Silva, 89 NY2d 411, 420 (1996). For the reasons discussed below, the court finds that BSA had a rational basis for its conclusion that the definitional criteria in ZR § 12-10 controls the determination as to whether the residential portion of the Building is a transient hotel under the ZR.

The words and language used in the criteria for determining whether a building is a transient hotel under the ZR are clear and unambiguous. BSA's Resolution was based upon the job application, approved plans, and information provided by BRC to DOB, indicating that the sleeping accommodations on floors 3 through 9 of the Building would be made available on a daily basis, and that the homeless clients would not remain in the same dwelling space for more than 30 days at a time. BSA also relied on the amended plans indicating that 24-hour desk service would be provided on the ground floor for the entrance to the Use Group 5 portion of the Building, and also at the third floor interior entrance to the Use Group 5 sleeping accommodations, and that laundry services would be provided at the cellar level. The amended plans further indicate that the Building would be served by two separate entrances, including a common entrance to the eastern portion of the Building with an elevator that would exclusively

serve the living or sleeping units of the Use Group 5 Transient Hotel, and an entrance at the western portion of the Building with an elevator that would exclusively serve the Use Group 6 professional offices. Thus, since the record satisfies the statutory criteria, BSA had a rational basis for concluding that the residential portion of the proposed facility is a transient hotel within the meaning of ZR § 12-10.

The court also concludes that BSA was not required to look outside the ZR and apply what CFC argues is the commonly understood meaning of the term "hotel." As explained by BSA, although it recognized there may be some ambiguity to the concept of hotel, "since the ZR has defined hotel, for zoning purposes, and the case at issue concerns a zoning matter, the ZR is the best and only resource for the meaning of the term for zoning purposes." BSA's conclusion is consistent with its conclusion in Matter of Soho Alliance Community Group, BSA Resolution 247-07-A, where it found that a condominium hotel was a transient hotel under ZR § 12-10 even though it differed from traditional concepts of a hotel, since the hotel permitted its clients to own units and to occupy units for up to 29 consecutive days.

Moreover, BSA properly found that CFC's attempt to apply definitions from common experience or other statutes, "would defeat the distinct purposes of individual statutes." See Appelbaum, 66 NY2d at 977 (BSA not required blindly to import definitions from statutes with varying purposes). As explained by DOB and as argued by respondents, the other laws cited by CFC serve different purposes than the ZR. Specifically, the ZR governs land use in New York City. On the other hand, the MDL was enacted to "ensure the establishment and maintenance of proper housing standards requiring sufficient light, air, sanitation and protection from fire hazards" (MDL §2), and the HMC was enacted to establish "minimum standards of health and

safety, fire, protection, light, ventilation, cleanliness, repair and maintenance, and occupancy in dwellings" (Admin Code § 27-2002). As argued by City respondents, for these reasons there is not a perfect correlation between the Use Group designations in the ZR, and the definitions in the MDL and HMC. The court, therefore, concludes that BSA's refusal to consult statutes and regulations outside the ZR, or to apply a differing common meaning of the word hotel was not irrational, unreasonable, or inconsistent with the governing statute. See Matter of Cowan, 41 NY2d at 599; Matter of Pell, 34 NY2d at 231.

Contrary to CFC's argument, Fischer v Taub, 127 Misc2d 518 (App Term, 1st Dept 1984), does not require a different result, as that case is distinguishable on its facts. Fischer did not involve an analysis of the definition of "transient hotel" under the ZR, but rather an analysis of whether an adult care facility was a "hotel" so as to qualify as a multiple dwelling subject to Rent Stabilization Laws. The Appellate Term, First Department concluded the premises was not a hotel, because it was not a multiple dwelling under the MDL. Notably, Fischer highlights the fact that certain premises may meet the definition of a "transient hotel" for zoning purposes under the ZR, but not the definition of "hotel" under other statutory schemes, such as the MDL or the Administrative Code.

CFC also argues that the Department of Housing Preservation and Development's approval of rooming units in the residential portion of the Building is inconsistent with its Use Group 5 designation as a transient hotel. CFC relies on the definition of rooming units in ZR § 12-10, and on HMC § 27-2004(a)(15) which excludes rooming units in a Class B Hotel. Specifically, CFC argues that as section 27-2004(a)(15) excludes rooming units in a Class B hotel, and since rooming units have been approved in the Building, the Building cannot be

properly designated under the ZR within Use Group 5 as a transient hotel. This argument is without merit. As stated above, the ZR and HMC have different and distinct purposes, and different definitions and classifications. Under the circumstances here, BSA had a rational basis for its conclusion that the creation of rooming units for purposes of the HMC, does not disturb its designation as a Use Group 5 transient hotel. For similar reasons, the courts rejects CFC's argument that the Building cannot be a Use Group 5 transient hotel as it has been classified under the MDL as a lodging house for purposes of the certificate of occupancy. As explained by DOB, the Building's classification as a lodging house under MDL requires that it comply with fire and safety requirements under MDL § 66, as opposed to the less stringent requirements applicable to hotels under MDL § 67.

CFC further argues that the "permitted accessory uses" in ZR § 12-10, which "include restaurants, cocktail lounges, public banquet halls, ballrooms, or meeting rooms," demonstrates a legislative intent to create a use group designation for "hotel" as the term is commonly understood. However, as BSA determined, the definition in section 12-10, does not exclude other accessory uses, such as facilities like BRC's proposed facility here. Moreover, CFC fails to identify any provision in the ZR evincing an express legislative intent that homeless shelters fall within another use group, or any prohibition against their inclusion under Use Group 5. Therefore, BSA provided a rational basis for its Use Group 5 designation, having considered the "permitted accessory uses" identified in ZR § 12-10.

CFC also challenges BSA's analysis of "transiency," an issue that BSA "defer[red] to DOB to enforce." BSA found that it was reasonable for DOB to accept BRC's representations that its clients in the CDCC, the Reception Center and the Shelter would not stay in the same

space for greater than 30 days. CFC relies on statements in BRC's Program Descriptions that stays at the Reception Center would be up to nine months. However, since BRC's representations to DOB post-date the Program Descriptions, BSA had a rational basis for accepting BRC's representations. BSA also concluded that BRC will be able to comply with this representation and its contract with DHS, as the contract does not require BRC to allow stays of nine months or longer. Thus, BSA's conclusion that BRC will be able to comply with the zoning requirements as well as its contract with DHS, has a rational basis. Moreover, the ZR does not define the word "transient." See e.g. Matter of Soho Alliance Community Group, BSA Resolution 247-07-A, adopted May 6, 2008 (ZR is silent concerning the specific parameters of a transient occupancy). BSA's conclusion concerning transiency and its determination to defer to DOB to treat certificate of occupancy violations as an enforcement issue, are rational and supported by New York law, as a prohibition "based on a possible future illegal use" would be "arbitrary and capricious." Matter of DiMilia v Bennett, 149 AD2d 592, 593 (2nd Dept 1989).

B. CLASSIFICATION AS A COMMUNITY FACILITY UNDER USE GROUP 3

CFC argues that the Building should be designated a community facility, specifically, a Use Group 3 non-profit institution with sleeping accommodations, under ZR § 22-13(A), "due to the fundamentally integrated nature of the sleeping accommodations and the other services provided at the facility by BRC." CFC further argues that the firewall, separate entrances and elevators between the residential and non-residential portions of the Building do not convert it from a Use Group 3 community facility to a Use Group 5 transient hotel and Use Group 6 professional offices; that BSA ignored its own precedent in classifying the Building as Use Group 5; and that BSA failed to address the integrated nature of the services and sleeping

accommodations. In response, BRC asserts, that its residential programs are aimed in the first instance at providing transient shelter to its homeless clients, and also to assist them in finding permanent housing. According to BRC, the programs are complementary to the provision of shelter, and sharing a building will provide access by BRC's clients to the programs, and will allow BRC to take advantage of the benefits and efficiencies associated with housing both in the same location. BRC further asserts that the programs are independent of one another and not fundamentally integrated as CFC argues.

As previously stated, a Use Group 3 non-profit institution with sleeping accommodations is not permitted as of right in the subject M1-6 zoning district. Use Group 3 consists of various types of community facilities, one of which includes philanthropic or non-profit institutions with sleeping accommodations. In support of its argument that the Building qualifies as a community facility under this definition, CFC relies on BRC's status as a not-for-profit corporation whose mission is to provide housing and nonresidential programs to homeless men and women, especially those suffering from mental illness or drug and alcohol addiction. According to CFC, BRC's provision of beds, shelter, safety and oversight are the fundamental non-profit services of a homeless shelter. As to BRC's programs in the Building, CFC relies on BRC's 2009 annual report and claims that the high level of integrated, comprehensive care provided to clients in the residential portion of the Building by the medical and social service programs in its non-residential portion, establishes the relationship between the sleeping accommodations and BRC's philanthropic purpose "of helping mentally ill and alcohol and substance addicted homeless 'break the cycle of homelessness' and achieve stability through on-site, coordinated alcohol and drug rehabilitation, medical and mental health treatment, and financial, life and career skill

training." CFC argues that its interpretation of the language of the ZR is supported by countless BSA resolutions and several court decisions that label similar social service facilities as Use Group 3 non-profit institutions with sleeping accommodations.

In support of its proposed Use Group 3 designation, CFC relies in part upon Manton v New York City Board of Standards & Appeals, 117 Misc2d 255 (Sup Ct, Queens Co 1982) and two BSA resolutions: Matter of 9th & 10th St., LLC, Bulletin of the New York City Bd. of Stds. & Appeals, vol. 90, Nos. 42-43, at 694-700 (adopted Oct. 18, 2005, published Oct. 27, 2005) ("9th & 10th St. Case"); and Matter of Forest Hills Student Residences, Bulletin of the New York City Bd. of Stds. & Appeals, vol. 92, No. 24, at 482-86 (adopted June 19, 2007, published June 28, 2007) ("Youth Hostel Case").[7] In Manton, the issue before the court was whether the subject ZR was unconstitutionally void for vagueness and over breadth; not, as argued by CFC, whether there was a nexus between the philanthropic purpose of drug rehabilitation and the provision of sleeping accommodations. CFC cites the 9th & 10th St. Case for the proposition that institutional management and control of the facility is relevant to a designation of community facility under

---

[7]The additional cases and BSA resolutions relied upon by CFC do not involve applications for designation as Use Group 5 transient hotels, but rather, applications for zoning variances for properties designated as Use Group 3, including uses that combined homeless shelters and social service programs not permitted as of right. See Homes for Homeless, Inc. v Board of Standards & Appeals of City of New York, 24 AD3d 340 (1st Dept 2005), revd 7 NY3d 822 (2006); Manton v New York City Board of Standard & Appeals, 117 Misc 2d 255 (Sup Ct, Queens Co 1982); BSA Resolution No. 299-08-BZ, Dec. 15, 2009; BSA Resolution No. 210-08-BZ, Oct. 20, 2009; BSA Resolution No. 26-09-BZ, June 16, 2009; BSA Resolution No. 48-09-A, May 12, 2009; BSA Resolution No. 7-00-BZ, Sept. 11, 2007; BSA Resolution No. 257-02-BZ, Feb. 11, 2003; BSA Resolution No. 193-02-BZ, Dec. 17, 2002; BSA Resolution No. 196-02-BZ, Nov. 19, 2002; and BSA Resolution No. 69-02-A, Oct. 1, 2002.

Here, BRC did not seek a variance for a Use Group 3 designation and, therefore, the resolutions cited by CFC are distinguishable on their facts.

Use Group 3. While such control may be a factor to be considered, it is not dispositive of the issue as to whether the residential portion of the Building is properly classified as a transient hotel. The Youth Hostel Case, however, is relevant to this issue, and is cited by both CFC and BRC.

In the Youth Hostel Case, Forest Hills Student Residences (FHSR) was the not-for-profit lessee of certain premises, converted for use as a youth hostel in Queens, New York. FHSR provided, among other services, sleeping accommodations, immigration counseling, English as a second language instruction, and educational film screenings. On appeal, BSA affirmed DOB's final determination that the premises were properly classified a Use Group 5 transient hotel, rather than a Use Group 3 non-profit institution with sleeping accommodations. BSA concluded that the ZR § 22-13 "does not unambiguously require that any 'philanthropic or non-profit institution' that provides 'sleeping accommodations' is necessarily a Community Facility falling within Use Group 3," and that "the primary purpose of a 'philanthropic or non-profit institution with sleeping accommodations' properly classified within Use Group 3 cannot be the provision of sleeping accommodations." BSA further concluded that "the sleeping accommodations provided by [FHSR] are either its primary purpose or, if its primary purpose is educational or cultural, that they have no necessary relationship to such purpose(s)," and that FHSR "has failed to demonstrate the required nexus between its philanthropic purpose and the provision of sleeping accommodations."

CFC argues that the Youth Hostel Case stands for the proposition that a facility is Use Group 3 non-profit institution with sleeping accommodations where there is a clear nexus between the non-profit purpose and the provision of sleeping accommodations. CFC asserts that

since there is a clear nexus between BRC's non-profit purpose and its sleeping accommodations, the proposed facility is a Use Group 3 community facility. BRC, on the other hand, cites the Youth Hostel Case for the proposition that the primary purpose of a Use Group 3 non-profit institution with sleeping accommodations cannot be the provision of such sleeping accommodations. BRC argues that since the primarily purpose of the residential portion of the proposed facility is to provide sleeping accommodations, the proposed facility cannot be classified as a Use Group 3 community facility. Although BSA found that for a facility to be classified under Use Group 3, it must be shown that there is a clear nexus between the facility's philanthropic purpose and sleeping accommodations, it did not find that the ZR unambiguously requires a Use Group 3 classification where a non-profit institution provides sleeping accommodations. As BSA concluded here, the Youth Hostel Case "does not establish that a facility with social services programs that have a clear nexus to the sleeping accommodations could not be a use Group 5 Transient Hotel."

In the instant Resolution, BSA's carefully worded determination, states that it is "reasonable to conclude that Use Group 6 Professional Offices or Ambulatory Diagnostic and Treatment Care Facility. . . may be able to exist in the Building with sleeping accommodations and not necessitate a change in use classification from Use Group 5 to Use Group 3." BSA explicitly limited its conclusion to the facts of BRC's Building and its programs for occupancy that it submitted to DOB. The Resolution shows that DOB considered BRC's amended plans indicating that separate entrances and separate elevators serve the sleeping accommodations and professional offices where the medical and social service programs will be located, and that the residential and non-residential portions of the Building will be separated by fire-rated walls

equipped with alarmed, fireproofed and self-closing doors. DOB's submissions to BSA further show that DOB considered BRC's representations that the residential and non-residential programs will not only be physically separated, but that they will be operated independently of one another and that while the social service programs are available to BRC's residential clients, such clients are not required to participate in the programs as a condition of shelter, and that these programs are open to the general public.

Although the primary purpose of the residential portion of the Building designated as Use Group 5 is the provision of sleeping accommodations, as one of BRC's stated purposes is to transition homeless clients, many with mental health and substance abuse problems, into permanent housing, it cannot be said that there is no relationship between the sleeping accommodations and the social service programs designed to implement such transition.[8] However, an analysis of the nature and character of the programs in relation to the sleeping accommodations shows that this relationship is defined and circumscribed by the configuration of the Building, and the operation of the programs independent of, and distinct from, the provision of sleeping accommodations. Specifically, the programs are separately operated with separate operating budgets, and operate under separate contracts with various agencies, and are separately licensed. Furthermore, the nature of the relationship is circumscribed by the separation of the residential and non-residential portions of the Building, the separate entrances and elevators, the firewall, the lack of a requirement that residential clients participate in the programs, and the fact that the social service programs are open to the general public. Based on the nature of the

[8]This is also apparent with respect to the operation of the CDCC which provides medical supervision and monitoring of its clients.

relationship, and as the Youth Hostel Case did not establish that a facility with a nexus between social service programs and accommodations must be a Use Group 3 community facility, the court finds that the uses in the residential and non-residential portions of the Building are not fundamentally integrated so as to warrant a determination that BSA's conclusions lacked a rational basis. For these reasons, BSA's Resolution is not inconsistent with the Youth Hostel Case, and this is not an instance of BSA failing to "adhere[] to its own prior precedent." Lyublinskiy, 65 AD3d at 1239.

Nor is BSA's Use Group 5 classification arbitrary and capricious, based on BSA's prior classification as Use Group 3 of similar facilities and shelters, which CFC asserts offered accommodations and programs of the same type as those to be offered at the proposed facility. As respondents point to resolutions where BSA classified shelters, including BRC's Reception Center at 324 Lafayette Street, as Use Group 5, precedent supports both classifications.[9]

Citing the preamble of various Use Group sections in the ZR, CFC argues that the Use Group 3 designation controls because it is more restrictive than the Use Group 5 designation. CFC points to the preamble of ZR § 42-00 which provides that, "[w]henever a #use# is specifically listed in a Use Group and also could be construed to be incorporated within a more inclusive #use# listing, either in the same or another Use Group, the more specific listing shall control." CFC also cites the preamble to ZR § 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

[9]Respondents also submit the transcript from the hearing before BSA on March 1, 2011, where DOB cited 1921 Jerome Avenue in the Bronx and 317 Bowery as instances of homeless shelters designated as Use Group 5 transient hotels.

> 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.

BSA rationally concluded that the preambles do not apply to the question of how to classify a use such as a shelter which is not listed in the ZR. "Transient hotel" is explicitly defined in ZR § 12-10, while a homeless shelter is not, and thus, this not a case of overlapping or contradictory provisions. In any event, BSA's statement that it was not persuaded that Use Group 3 could not be objectively determined as more or less restrictive than Use Group 5, is supported by its reference to the Youth Hostel Case, where a Use Group 5 transient hotel was deemed more restrictive than a Use Group 3 community facility, as the hotel was not permitted in the zoning district at issue. Moreover, the record indicates BRC argued that a Use Group 5 designation may be more restrictive since it is permitted in commercial and manufacturing zoning districts, while a Use Group 3 facility is permitted in residential districts.

CFC also argues that under the ZR, the Building cannot not be classified under both Use Group 3 and Use Group 5. Specifically, CFC argues that dual classification undermines the purposes of the ZR, and renders the use groups superfluous and meaningless. Significantly, BSA did not find that the Building could be classified as either Use Group 3 or 5, but rather, expressly limited its determination to whether DOB appropriately approved the proposed facility as a Use Group 5 transient hotel, thereby undermining CFC's assertion. Additionally, BSA expressly stated that it "does not address the question of whether all homeless shelters and social service programs function identically and should be classified as such . . . and that other similar facilities

may operate differently in terms of length of stay or the relationship between programming and sleeping accommodations and may be appropriately classified in a different group."

That BSA appropriately considered only the issue as to the Building's Use Group 5 classification is reflected in DOB's procedures. As DOB stated at the March 1, 2011 hearing, "[t]he applicant comes to [DOB] with a proposed use," and DOB reviews the applicant's plans and information to determine whether the applicant's proposed use conforms with its proposed use group. Thus, the issue is not whether the Building "is most specifically and accurately captured in the ZR's [Use Group] 3 ... designation," as is argued by CFC, but rather, whether BSA rationally concluded that DOB's Use Group 5 designation, as proposed by BRC, was proper. Moreover, BSA properly relied on Manton v. Board of Standard and Appeals, 117 Misc.2d at 256, to support its conclusion that it need only consider Use Group 5. BSA cited Manton for the proposition that "any use which properly falls within a use group listing is permitted in a zoning district where such use is permitted as a matter of right and neither DOB nor the Board has discretionary authority to refuse permission." Therefore, it was not irrational for BSA to conclude that it need not consider whether the Building could also be classified as a Use Group 3 community facility. Nor was it irrational for BSA to conclude that CFC's reliance upon cases interpreting the appropriateness of Use Group 3 classification of similar uses was misplaced.

CFC argues in the alternative that the Building should be classified as a Use Group 3 health-related facility under ZR § 22-13(A). Based on this court's conclusion that BSA was not required to consider whether the Building could be classified under a Use Group other than Use Group 5, the court need not consider this argument. However, even if that argument were considered, it is without merit. ZR § 22-13(A) includes, among "community facilities,"

"health-related facilities as defined in Section 10 NYCRR 700.2(a) of the New York State Hospital Code." Section 700.2(a)(4), in turn, defines "health-related facility" as:

> a facility, institution, intermediate care facility, or a separate or distinct part thereof, providing therein lodging, board and social and physical care, including but not limited to the recording of health information, dietary supervision and supervised hygienic services incident to such care to six or more residents not related to the operator by marriage or by blood within the third degree of consanguinity.

Under section 700.2(c)(9), a "health-related facility resident" is "a person who, because of social, physical, developmental or mental condition, requires institutional care and services above the level of room and board in order to secure basic services necessary to function, but who does not require the inpatient care and services provided by a hospital or skilled nursing facility."

CFC's argument, and evidence related thereto, was before BSA in the underlying proceeding. The record does not establish that BRC's clients require institutional care to secure basic services necessary to function. Indeed, CFC concedes that "residents" of "health-related facilities" typically stay in the facilities "for extended periods of time," which is at odds with the "transient" nature of the instant accommodations. Thus, the provisions of ZR § 22-13(A) relating to a health-related facility are not applicable.

Based upon the foregoing, the Court finds that CFC has failed to establish a meritorious basis for vacating BSA's resolution.

III. ULURP REVIEW

Under City Charter §197-a, ULURP review is required where the City action falls within one of the categories specified in the section. See Ferrer v. Dinkins, 18 AD2d 89 (1st Dept 1996). CFC argues that ULURP review is required under three separate categories: 1) section 197-c

[* 27]

(a)(4) as a "special permit" within the City Planning Commission's jurisdiction under the ZR; 2) section 197-c (a)(11) as an acquisition by the City of real property pursuant to lease; and 3) section § 197-c (a)(8) as a housing and urban renewal plan pursuant to city, state and federal housing law.

As to the first category, CFC argues that the Building should have been designated Use Group 3 and, if were, a special permit would have been required, since Use Group 3 is not a permitted use as of right in the subject M1-6 zoning district, thereby subjecting it to ULURP review. For the reasons discussed above, the Building was properly designated Use Group 5 and Use Group 6 which are permitted as of right in the M1-6 zoning district, so there was no need for BRC to seek a special permit. Therefore, Charter § 197-c(a)(4) does not apply.

Nor does the contract between BRC and DHS illustrate that BRC is a "pass-through lessee," thereby triggering ULURP review under Charter § 197-c(a)(11). "Crucial to any determination that there is a lease is a finding that the City's occupancy of the land is the functional equivalent of a landowner's, lacking only the actual transfer of title." Ferrer, 218 AD2d at 93-94. "[T]he pertinent focus of a review question is on the nature of the land use," and "whether or not the City's interests will so predominate the use of the land, to the exclusion of the owner's, that the effect on the community will be the same as if the City had taken title to the land." Id. at 94. "The central distinguishing characteristic of a lease is the surrender of absolute possession and control of property to another party for an agreed upon-rent." Matter of Davis v Dinkins, 206 AD2d 365, 366 (2nd Dept 1994) (citing Feder v Caliguira, 8 NY2d 400 [1960]). "In order for an agreement, oral or written, to be enforceable as a lease, all the essential terms must be agreed upon," including "the area to be leased, the duration of the lease, and the price to be paid."

[* 28]

Id at 366-67. "If any of these essential terms are missing and are not otherwise discernible by objective means, a lease has not been created." Id at 367.

The City respondents rely on Matter of Plaza v City of New York, 305 AD2d 604 (2nd Dept 2003), in which DHS entered into an agreement with the Doe Fund, a not-for-profit entity, to renovate a vacate building, and operate a homeless shelter and transitional residence. The contract gave DHS approval authority over various aspects of the renovation work, established minimum requirements for the shelter's operation, and made DHS the only referral source for homeless clients. The Appellate Division held that the contract was not a lease subject to ULURP review, reasoning that it was "merely an agreement by which the Doe Fund will acquire, renovate, and operate a transitional residence for homeless men," and that the contract did "not constitute the surrender of absolute possession and control of property to another for an agreed-upon rent." Id at 605-606.

To support its argument that the contract between DHS and BRC is an "acquisition of property by lease," CFC points to various provisions in the contract, including the requirements that BRC operate the shelter "as part of the City's homeless service system" in accordance with DHS "policies and procedures," accept all homeless adults referred to it by DHS, operate at an average of 95% of shelter capacity, and permit access by a court-appointed monitoring agency. CFC also points to contract provisions compensating BRC for its services, including the payment of $7.2 million annually and up to $76.1 million over the entire contract, and DHS's acknowledgment that as the lease provides for annual increases in rent over the lease term, the operating budget include sufficient funds to cover such increases.

CFC further asserts that the contract term is from September 1, 2010 through June 30, 2021, with two five-year renewal terms at DHS's option; the contract may be terminated only by DHS; the parties may amend the contract in the event of a "change" in the "needs of the City and the purposes for which the Shelter shall be used"; the contract requires BRC to "consult with, and receive written approval" from DHS before making any structural changes; and DHS must also approve changes to "any major program component," changes to the "level of paid or unpaid staff which may affect the continuing ability of the program to operate efficiently," and the selection of the Director of the Shelter, the Director of Social Services and the maintenance superintendent. CFC also relies on the lease between BRC and 127 West 25th LLC, and conditions related to funding by various New York City agencies. From this, CFC argues that DHS has complete control over the proposed facility at the Building.

The court does not agree. Rather, the court finds that the contract does not establish DHS's control over the premises so as to constitute occupancy or control that is "the functional equivalent of a landowner's." Ferrer, 218 AD2d at 94. Significantly, the lease is between BRC and 127 West 25th LLC, and DHS is not a signatory on the lease, nor does it have any obligations under the lease. The lease term exceeds the length of the contract and its renewals. BRC bears the risk under the lease for the rent, and the risks related to the renovations and interior construction. While DHS must approve structural changes, approval cannot be equated with the right of a landowner to make such changes.

Moreover, under the contract, BRC, not DHS, operates and manages the shelter, and provides "ancillary services related thereto." Indeed, the first sentence under article 2 states that the "purpose" of the contract is for BRC "to operate an emergency shelter for homeless adults."

BRC is responsible for the facility and its day-to-day operations, including supervising the shelter programs and residents, developing shelter rules and regulations for the residents, providing case management services and health and drug counseling, admitting and discharging residents, handling emergencies, feeding residents, keeping records, and ensuring that the facility complies with all applicable laws. BRC is also responsible for "the preventative, daily, corrective, interior, exterior, structural and emergency maintenance of the Shelter."

Notably, the contract provisions cited by CFC as evidence of DHS's "complete control" are identical to the provisions in the contract at issue in Matter of Plaza, which the Court found was neither a lease nor the "functional equivalent of a lease." Matter of Plaza, 305 AD2d at 605. Here, as in Matter of Plaza, DHS is not responsible for management and maintenance of the shelter, but rather, that responsibility at all times resides with the BRC as the lessee. In short, the provisions cited by CFC define the nature and quality of the services BRC is required to provide, and do not implicate issues of DHS's occupancy of, or control over, the premises. Accordingly, DHS cannot be construed as a lessee under section 197-c(a)(11) of the Charter and, therefore, the proposed facility is not subject to ULURP review as an acquisition of real property by lease.

Nor is the proposed facility subject to ULURP review on the grounds that the contract is a "housing plan" within the meaning of Charter § 197-c(a)(8). Citing the "five-year plan to relieve homelessness" codified in Administrative Code § 21-308, CFC argues that all actions taken and money spent by DHS in combating homelessness are pursuant to statutorily-required plans. CFC also relies on DHS Deputy Commissioner Nashak's statements that the contract with Bowery Residents is part of DHS's "plan to meet projected needs," and that the proposed facility is "necessary to meet the City's legal obligation to provide shelter to the homeless." According to

CFC, the facility "was fashioned in response to an open-ended" request for proposals with costs reimbursed by DHS.

CFC's argument that the contract for the shelter is part of a "housing plan" as intended by Charter § 197-c(a)(8) is not supported by proof. Deputy Commissioner Nashak's statements reflect policy rather than a specific plan. While the purpose of the contract is to provide shelter to the homeless and this purpose is consistent with the City's obligation to provide such shelter, absent proof that the contract is part of an actual "housing and urban renewal plan," there is no reasonable basis to find that ULURP review is required under section 197-c(a)(8). See West 97th-West 98th Sts. Block Assn. v Volunteers of Am. of Greater N.Y., 190 AD2d 303 (1st Dept 1993).

IV. SHELTER SIZE LIMITS

CFC argues that the proposed facility violates Administrative Code § 21-312(2)(b), which states that "[n]o shelter for adults shall be operated with a census of more than two hundred persons." Administrative Code § 21-312(1) defines "census" as the "actual number of persons receiving shelter at a shelter for adults."

CFC asserts that the proposed facility violates the statutory size limits on shelters, since it will shelter more than 200 residents through a combination of programs all run by the same provider in the same building, including 96 beds in the Reception Center, 32 detoxification beds in the CDCC, and 200 shelter beds for homeless residents, for a total of 328 beds. Respondents counter that the only "shelter for adults" that will be housed in the proposed facility is the 200-bed shelter, as the CDCC program is a chemical dependency detoxification facility and the Reception Center is an intake program that does not receive clients from DHS. In the alternative, respondents argue that that the proposed facility complies with restrictions on shelter size, as it

qualifies as a permissible exception under section 21-315(a)(6) of the Administrative Code.[10]

First, as to the 32-beds in the CDCC detoxification facility, although BRC refers to that facility as an "inpatient unit" with 32 beds, the primarily focus of that facility, as stated in BRC's Program Descriptions, is the provision of "supportive medically monitorized detoxification services." The court, therefore, concludes that the CDCC is not a "shelter" within the meaning of Administrative Code § 21-312(b), since the clients of that facility will receive support for addiction, and not specifically shelter, thereby serving a mission distinct from that of a shelter. Notably, the CDCC accepts both homeless and non-homeless persons.

As to the 96-beds in the Reception Center, the court concludes that the clients of that Center will be receiving shelter for purposes of Section 21-312(a)(1). The record establishes that the primary purpose of the Reception Center is to provide transient housing to homeless men and women, and that the Reception Center and the 200-bed shelter are situated in same residential portion of the proposed facility which is contained in one building. The court rejects the arguments by BRC that the shelter and the Reception Center are to be considered separate for size limitation purposes. BRC's argument would render the size limits of the Administrative Code meaningless, in violation of basic principles of statutory construction. See Rocovich v. Consolidated Edision Co., 78 NY2d 509 (1991); Canal Carting, Inc. v. City of New York Business Integrity Commission, 66 AD3d 609 (1st Dept 2009), lv app den 14 NY3d 710 (2010). Moreover, this conclusion is consistent with the legislative history of section 21-312(a)(1), which

---

[10]City respondents additionally argue that size limitation imposed by the Administrative Code is pre-empted by State law. As previously noted, the City Council's motion to intervene was granted on consent limited to the issue of preemption. However, because the proposed facility falls under the Camp LaGuardia Exception, the court need not consider the preemption issues raised by City respondents.

shows that the size limitation was enacted to ensure the health and safety of shelter residents and to minimize the impact on the community.[11] For these reasons, the 96 beds in the Reception Center shall be combined with the 200 shelter beds for a total of 296 beds, which exceeds the 200-bed statutory limit.

Notwithstanding this conclusion, the court finds that the proposed facility is permitted under Administrative Code § 21-315(a)(6), which creates an exception to the 200-bed limit for a "grandfathered shelter," defined as a "shelter for adults that operates with a permitted census in excess of two hundred persons pursuant to subdivision b of section 21-312 of this code." A "grandfathered shelter" that is closed "may be replaced" pursuant to several specified provisions, including section 21-315(a)(6), which states that the "Camp LaGuardia Shelter operating with a census of one thousand seventeen persons . . . may be replaced with two shelters each with a maximum census of four hundred persons" ("Camp LaGuardia Exception"). In reaching this conclusion, the court rejects the arguments of the City Council that the proposed facility does not qualify under the Camp LaGuardia exception, as the Camp LaGuardia shelter closed four years ago and there is no immediate need to shelter large number of homeless, and the exception violates the spirit of the law.

---

[11]The court relies on the legislative history submitted by CFC as exhibit 75 (testimony of Mary Brosnahan, Executive Director of the Coalition for the Homeless, before the City Council's Committee on General Welfare, March 22, 1999); exhibit 76 (testimony of Steven Banks of the Legal Aid Society's Homeless Rights Project, before the City Council's Committee on General Welfare, October 30, 1998); exhibit 77 (testimony of Manhattan Borough President C. Virginia Fields, before the City Council's Committee on General Welfare, October 30, 1998), and exhibit 78 (letter from New York State Assembly to City Council Speaker Peter Vallone, dated October 6, 1998).

While CFC argues that DHS may not unilaterally invoke the Camp LaGuardia Exception without the City Council's approval, CFC cites no legal authority to support its argument. The City Council, in turn, argues that the City respondents "fail to even assert" that Camp LaGuardia has not already been replaced, and that at a minimum they "must affirm that the City has not opened two other shelters exceeding 200 beds."

When the court heard arguments on July 22, 2011, the City respondents represented that "there is no procedure" and "no process . . . that the city needs to take to invoke the [Camp LaGuardia] exception, if that were to become necessary." The City respondents also represented that they "are certain that the exception of Camp LaGuardia has not been invoked," and that they "can provide more facts" if necessary. Indeed, they subsequently provided additional factual support, by submitting an affidavit from DHS Deputy Commissioner Nashak dated August 19, 2011. That affidavit, which was submitted in opposition to the City Council's motion to intervene, confirms that DHS has not "previously invoked an exception to the 200-bed limit on shelter capacity under Administrative Code § 21-315(a)(6)." Thus, since no basis exists for concluding that the City respondents are not acting in good faith in invoking the statutory authority of the Camp LaGuardia Exception, they are entitled to invoke that exception.

Contrary to CFC's argument, the invocation of the Camp LaGuardia Exception does not automatically subject the proposed facility to mandatory ULURP review pursuant to Administrative Code § 21-315(b). Section 21-315(b) states that "[e]ach new shelter which replaces a shelter listed in subdivision a of this section shall comply with *applicable* statutes, laws, rules and regulations, including, but not limited to section 197-c of the New York city charter," which, as discussed above, refers to ULURP (emphasis added). By its clear and express

terms, section 21-315(b) simply requires ULURP review if ULURP is "applicable," and, as this court has determined above, ULURP is not applicable to the proposed facility. [12]

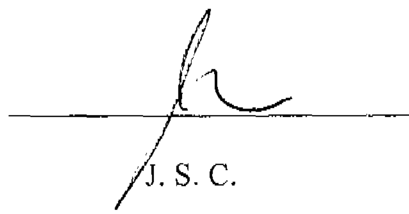
Based upon the foregoing, petitioner has failed to make a sufficient showing so as to be entitled to Article 78 relief, and the amended petition is denied and dismissed.

Accordingly, it is

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

Dated: October 14, 2011

ENTER:



J. S. C.

---

[12]CFC additionally objects that DHS did not registered its contracts with the Comptroller. In response to this objection, City respondents assert that the contract was registered with the Comptroller on May 6, 2011, and provide supporting documentary proof, which CFC does not controvert. Hence, the court finds that the registration requirement has been satisfied. As to the Reception Center contract, City respondents submit that DHS is in the process of amending that contract and only after the amended contract is registered with the Comptroller, will DHS permit BRC to open the Reception Center.