Jane 8 LLC v City of N.Y. Bd. of Stds. & Appeals
2026 NY Slip Op 30443(U)
February 4, 2026
Supreme Court, New York County
Docket Number: Index No. 151818/2025
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART** **58**

Justice

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JANE 8 LLC D/B/A INCENTRA VILLAGE HOUSE,

Petitioner,

- v -

CITY OF NEW YORK BOARD OF STANDARDS AND APPEALS, CITY OF NEW YORK

Respondents.

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INDEX NO. 151818/2025

MOTION DATE 02/10/2025

MOTION SEQ. NO. 001

DECISION + JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this Article 78 proceeding, petitioner challenges respondents' determination regarding its use of its historic inn, called the Incentra Village House (Incentra). Respondents answer and oppose.

I. PETITION (NYSCEF 1)

Petitioner owns two parcels of real property located at 30 and 32 Eighth Avenue in Manhattan. The property consists of two adjoining lots with two attached multi-dwelling buildings, used in conjunction with each other and with shared building features.

The property was originally constructed in 1841, and for many years, Incentra has operated there, and is acknowledged to be the first gay inn in Manhattan. The buildings are devoted to the operation of the inn for short-term stays, and Incentra has a staff of five employees, private rooms with bathrooms, linen and room-cleaning services, a front desk, and other amenities typical for hotels or inns.

A Department of Buildings (DOB) index card or "I-Card", a historical, handwritten record for older buildings, for the building located at 32 8th Avenue (32 building) reflects that as of December 12, 1938, the building was " Occupied as Class B Furnished Rooms," and that as of October 14, 1938, the "building is hereby accepted as Heretofore Converted 'B'," with 17 "furnished rooms."

According to Multiple Dwelling Law 4(9), a Class B multiple dwelling is a "multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels, lodging houses, rooming houses, boarding houses, boarding schools, furnished room houses . . ."

Then, in August 1961, the entry in the I-Card reflects "Class 'A' H.C.D. Formerly H.C.D. B," with the number of rooms reduced to six. Thus, in 1961, the building was changed from Class B to Class A, ostensibly related to alterations/improvements made to the property pursuant to plans filed in 1960. Pursuant to MDL 4(8), a Class A multiple dwelling is one occupied for permanent residence purposes, and includes all multiple dwellings except Class B multiple dwellings; "permanent residence purposes" are defined as occupancy by the same person or family for 30 consecutive days or more.

As to 30 8th Avenue (30 building), the I-Card reflects that as of November 26, 1941, the building was "occupied and arranged as fur[nished] rooms," with six rooms in total, under the "B" cycle. In March 1960, a DOB log reflects that certain improvements resulted in the conversion from Class B to Class A apartments.

Thus, by September 1961, certificates of occupancy (CO) for the two buildings showed that they had been classified for occupancy as converted Class A multiple dwellings, with the permissible use and occupancy for 32 building listed as one apartment in the basement, one on

the first floor, and two apartments each on the second and third floors. For 30 building, the permissible use and occupancy was listed as one apartment in the basement, and one each on the first through third floors (NYSCEF 10).

II. PROCEEDINGS BEFORE DOB

In October 2023, petitioner filed applications with DOB for a Letter of No Objection/Letter of Verification (LOV) for each building, requesting that DOB establish the propriety of petitioner's short-stay use of each building as a pre-existing non-conforming use. The topic of the applications, as set forth by petitioner, was "Did residential use include the right to short-term use (or inn use) prior to December 15, 1961: and/or Was it relevant whether dwelling units were Class A or Class B to determine whether they could be used for short-term use prior to December 25, 1961?"

By letters dated January 2, 2024, a DOB Deputy Borough Commissioner of Manhattan wrote that DOB could not issue the LOV as requested, and that "in order to allow [use as a short term stay inn], an ALT CO application must be filed with this Department to change such use and a Certificate of Occupancy must be obtained if permitted by zoning."

Petitioner responded by email, asking whether DOB had considered the evidence submitted along with the requested LOVs, and in January 2024, the deputy commissioner replied that whether the Inn was used for short stays before 1961 was irrelevant, and that the only relevant information was the designation of the buildings in their COs as Class A Multiple Dwellings.

Apparently deeming DOB's January 2024 email as a final determination, petitioner filed an appeal of it to the Board of Standards and Appeals (BSA) in February 2024. BSA, however,

declined to hear the appeal, asserting it was procedurally improper as DOB had not issued an appealable determination.

Petitioner then commenced an Article 78 proceeding, seeking a writ of mandamus to compel BSA to hear its appeal. The petition was granted in June 2024, and BSA was directed to hear the appeal and issue a final written determination.

Following that decision, the parties submitted written arguments and evidence to BSA. Petitioner's argument was, in essence, that whether there was pre-existing, non-conforming use of the Inn had to be based on the actual use of the property at the relevant time period, not on any designations in a CO, and that if there was such non-conforming use, petitioner was not required to apply for a change-of-use CO or even a LOV. DOB argued the opposite – that it was the CO's language and not actual use that governed in determining whether there was non-conforming use.

In January 2025, BSA rendered its determination, framing the question before it as follows: "[BSA] accepts these instant appeals to examine the specific inquiry: was DOB rational in denying LOV(s) to permit a change in use on valid certificate(s) of occupancy from 'Class A' occupancy to transient, or 'Class B' occupancy and, instead, determining that the change(s) of use requires the filing of 'ALT CO' application(s)" (NYSCEF 3).

BSA determined that the "Class A" designation of the buildings meant that they could be used only for permanent residential purposes, and not transient occupancy, as only "Class B" buildings permitted transient occupancy. BSA also decided that the existing CO's for the buildings were valid and clear, noting that:

a CCD1 or ZRD1[1] would be an appropriate avenue for the Appellant to raise questions regarding the applicability of Z.R. § 52-11 [which provides that "non-conforming use may be continued"], or other provisions of the Zoning Resolution, which would afford DOB the opportunity to review submissions, documents, and DOB records, apply relevant codes, rules, and laws, and make a determination as to whether a specific provision of construction code or the Zoning Resolution should apply. Such route has not been explored by the Appellant.

To the contrary, DOB notes that Appellant received confirmation in 2012 via DOB Letter of No Objection that the Premises legal use, as to 30 Eighth Avenue, is four "Class A" apartments and that transient use is not compatible.

BSA also found that transient or short-term stays were not permitted at the buildings, and that:

Furthermore, the Appellant did not submit evidence to indicate a job application to permit transient, "Class B" use at the Premises has been made to DOB. Instead, Appellant, while on notice, has argued that the certificates of occupancy contain errors correctable by LOVs. The Board disagrees.

The Board declares that DOB rationally denied the LOV requests and rationally instructed Appellant to file "ALT CO Application[s] [. . . .] to change such use and a Certificate of Occupancy must be obtained if permitted by zoning." The Board finds Appellant's arguments that an open job filing is a prerequisite to a ZRD1 filing seeking a determination as to whether Z.R. § 52-11 applies and, thus, whether the Premises may be recognized as a non-conforming use of transient occupancy unpersuasive and incorrect. Also, Board and DOB precedent does not support Appellant's assertion that the ZRD1 process is inappropriate because it would require a full set of plans and such requirement would be a hardship. The Board also rejects Appellant's assertion that the act of filing a ZRD1 is futile and would be rejected immediately: no such filing has ever been made. Further, and in light of Appellant's willingness to, now, explore a ZRD1 path, **the Board is also unpersuaded that Appellant has been deprived of the opportunity to seek a determination on the applicability of Z.R. § 52-11 – no ZRD1 has been filed and the question is not properly placed as a request for LOVs.**

Appellant's mere act of filing the LOV requests avers availability of certificates of occupancy for the Premises. **A determination as to whether Z.R. § 52-11 may apply is not properly placed in a LOV.** No evidence has been presented to suggest that the certificates of occupancy are unverifiable, need clarification, or are erroneous. To the contrary, the certificates of occupancy are clear and transient use is not permitted at the Premises based upon the certificates of occupancy.

[1] A CCD1 is Construction Code Determination, which is an application to get a ruling from the DOB on the interpretation of a specific Construction or MDL Code, whereas a ZRD1 is a Zoning Resolution Determination, which is an application to get a ruling from the DOB on the interpretation of a specific Zoning Code.

> In conclusion, the Board determines: (1)(a) the certificates of occupancy for the Premises are valid; (b) the certificate(s) of occupancy permit "Class A," permanent residential use; **(2)(a) LOVs are required when a valid certificate of occupancy requires clarification or verification; (b) DOB was rational in denying LOVs to permit transient use, as the certificates of occupancy do not require clarification**, reflect "Class A" occupancy, and transient use would be a change in use contrary to the last validly issued certificate(s) of occupancy; and, (3) "Class B"/transient use is not permitted at the Premises based on the certificate(s) of occupancy – only permanent, "Class A," occupancy is permitted; a valid certificate of occupancy is changed pursuant to the filing of an Alteration CO application with DOB.
>
> The Department of Buildings rationally denied the requests for LOV for the Premises. Further, DOB rationally directed Appellant to file "ALT CO" job applications to appropriately seek the proposed changes of use.
>
> (emphasis added).

III. ANALYSIS

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and ... without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). The determination of an administrative agency, acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

In *Matter of Peyton v New York City Bd. of Standards and Appeals*, the Court of Appeals held that:

> Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute" . . . If the agency's "interpretation is not irrational or unreasonable, it will be upheld."
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> (36 NY3d 271, 280-281 [2020] [citations omitted]); *see also Van Dam Specialty & Promotion, Inc. v Bd. of Standards and Appeals of City of New York*, 242 AD3d 892 [2d Dept 2025] [determination of BSA may not be set aside in absence of "illegality, arbitrariness, or abuse of discretion" and determination is not arbitrary and capricious if it has rational basis]).

Pursuant to the DOB application and checklist for the issuance of Letters of No Objection and Verification:

> Prior to January 1, 1938, the Department of Buildings (DOB) did not typically require a Certificate of Occupancy (CO). A Letter of No Objection (LNO) may be issued if no CO is available, or if the building (or part of the building) has a different *use* than that listed on the CO or noted on the available records. A LNO may be issued if the proposed/actual *use* belongs to the same Use Group (UG) as defined by the Zoning Resolution and the same Occupancy Group (OG) as defined by the 2008 Building Code (BC 2008) and the occupancy load and egress is substantially unchanged. A LNO cannot be issued for a change of UG and/or OG per (AC 28-118.3.4) which requires the filing of an Alteration Type 1 (Alt-1) application and a new CO. (Note: A limited exception exists per Building Buletin 2009-025). If a CO is available and requires verification, a Letter of Verification may be issued.
>
> (https://www.nyc.gov/assets/buildings/pdf/lno_lov_form.pdf).

New York City Administrative Code, Article 118, governs certificates of occupancy. Pursuant to section 28-118.3.1, "no building, open lot or portion thereof hereafter altered so as to change from one occupancy group to another, or from one zoning use group to another, either in whole or in part, shall be occupied or used unless and until the commissioner has issued a certificate of occupancy certifying that the alteration work for which the permit was issued has been completed substantially in accordance with the approved construction documents and the provisions of this code and other applicable laws and rules for the new occupancy or use."

Petitioner's main argument is, essentially, that BSA's determination was irrational and arbitrary and capricious as it did not answer the question(s) raised by petitioner in its requests for LOVs and subsequent appeals, and instead propounded its own questions which it then answered against petitioner.

However, a review of BSA's determination reflects that it considered petitioner's arguments and addressed them, but ultimately found that the questions raised by petitioner, and the ultimate relief sought, were brought improperly via a request for a LOV. In other words, petitioner's request for confirmation or verification that it could continue to use the Incentra as a short-stay inn as a pre-existing non-conforming use was not the sort of verification that it could receive from a LOV, as it held valid COs for the buildings and those COs were clear and clearly prohibited transient use.

BSA's reasoning is supported by the language of the LOV application process, which reflects that it may be used to "verify" an existing CO, or a Letter of No Objection may be issued if the proposed or actual use belongs to the same use or occupancy group; if it involves a different use or occupancy group, then an Alteration application and new CO would be required.

Moreover, BSA set forth in its determination the alternative process which it believed petitioner could undertake to resolve the issue it had raised, and petitioner does not establish that it cannot either participate in this process or that it is the incorrect one. Indeed, a review of pertinent caselaw reflects that the issue of non-conforming use is generally raised in an application made to the DOB to recognize such use, not through a request for a LOV (*see e.g.*, *OTR Media Group v Bd. of Standards and Appeals of City of New York*, 141 AD3d 417 [1st Dept 2016] [challenging denial of application to register sign as nonconforming use of sign]; *Van Wagner Communications, LLC v Bd. of Standards*, 137 AD3d 650 [1st Dept 2016] [same]; *Bath*

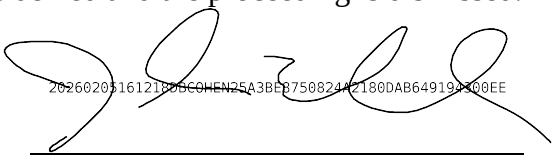
Beach Health Spa of Park Slope, Inc. v Bennett, 176 AD2d 874 [2d Dept 1991] [application for variance to permit cellar to be used as nonconforming use]).

Petitioner thus fails to meet its burden of demonstrating that BSA's January 2025 determination was irrational or arbitrary and capricious.

IV. CONCLUSION

Accordingly, it is hereby

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



2/4/2026
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
		GRANTED	X	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE