

2017-52-A

MEETING OF: December 5, 2017
CALENDAR NO.: 2017-52-A
PREMISES: 1109 Metropolitan Avenue, Brooklyn
Block 2927, Lot 25
BIN No. 3070491

ACTION OF BOARD — Appeal granted.

THE VOTE —

**Affirmative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown and
Commissioner Sheta.....4**
Negative:0

THE RESOLUTION —

WHEREAS, the determination of the Department of Buildings (“DOB”), dated January 26, 2017, acting on Alteration Application No. 321052114, reads in pertinent part:

The request, that the proposed caretaker’s apartment for the proposed sign painting contractor’s establishment satisfies ZR 12-10’s definition for “accessory use,” is hereby denied.

[. . .]

The proposed accessory caretaker’s apartment shall satisfy ZR 12-10’s definition for “accessory use,” including paragraph (b), which states that “[a]n ‘accessory use’ . . . is a use which is clearly incidental to, and customarily found in connection with, such principal use”

[. . .]

However, none of the buildings listed above are examples of caretaker’s apartments that are “clearly incidental to, and customarily found in connection with” a sign painting contractor’s establishment in Use Group 16A.

Therefore, for the above stated reasons, the applicant’s request is hereby denied and a caretaker’s apartment shall not be considered an “accessory use” to a sign painting contractor’s establishment.

The proposed caretaker’s apartment in the subject building shall, instead, be considered a residential use in Use Group 2, pursuant to ZR 22-12 (Use Group 2), which is not a permitted use in the M3-1 District, pursuant to ZR 42-00 (General Provisions); and

WHEREAS, this is an appeal for interpretation under ZR § 72-11 and Charter § 666(6)(a), brought on behalf of 1109 Metropolitan Avenue LLC, doing business as Colossal Media (“Appellant”), owner of the subject site, alleging errors pertaining to accessory uses permitted for a sign painting shop in Use Group 16 (the “Sign Painting Shop”) under ZR § 12-10 with respect to a proposed caretaker’s apartment (the “Caretaker’s Apartment”); and

WHEREAS, for the reasons that follow, the Board grants this appeal; and

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WHEREAS, a public hearing was held on this application on September 12, 2017, after due notice by publication in *The City Record*, with a continued hearing on December 5, 2017, and then to decision on that date; and

WHEREAS, Vice-Chair Chanda and Commissioner Ottley-Brown performed inspections of the site and surrounding neighborhood; and

WHEREAS, Council Member Antonio Reynoso submitted testimony in support of Appellant by letter dated January 20, 2016, stating that Appellant has represented that the Caretaker's Apartment meets all requirements of existing zoning and is necessary to ensure that the new facility is secure and operational at all times, as required by Appellant's business operations; and

WHEREAS, DOB and Appellant have been represented by counsel throughout this appeal; and

BACKGROUND

WHEREAS, the subject site is located on the north side of Metropolitan Avenue, between Vandervoort Avenue and English Kills, a tributary of Newtown Creek, north of Grand Street, in an M3-1 zoning district, in Brooklyn; and

WHEREAS, the site has approximately 139 feet of frontage along Metropolitan Avenue, between 61 feet and 113 feet of depth, 11,222 square feet of lot area and is occupied by a two-story industrial building currently being enlarged and converted for use as a Use Group 16 sign painting shop; and

WHEREAS, Appellant states that, after conversion to the Sign Painting Shop, the subject building will contain approximately 7,489 square feet of floor area as follows: 4,997 square feet of floor area on the first floor for use as workshop space and 2,492 square feet of floor area on the second floor proposed to be used as an accessory office (1,814 square feet of floor area) and the Caretaker's Apartment (678 square feet of floor area); and

WHEREAS, Appellant originally proposed to dedicate 1,196 square feet of floor area to the Caretaker's Apartment but subsequently reduced the size in response to DOB's concerns that the Caretaker's Apartment would not be "clearly incidental" to the Sign Painting Shop; and

WHEREAS, Appellant states that the Sign Painting Shop will be used by an existing business, which will employ approximately 40 full-time employees in departments devoted to operations, painting, rigging, shop and maintenance, and that employees will be responsible for the creation of custom patterning, sign designs and mixing of custom paint colors, that the Sign Painting Shop will operate 24 hours per day, seven days per week, and that office equipment, job materials, safety equipment, scissor lifts and other work vehicles will be stored at the subject site; and

WHEREAS, the Board notes that, generally, the term "sign painting shop" includes an establishment employing commercial artists and artisans to paint signage by hand and that sign painting shops are a small industry within the City; and

PROCEDURAL HISTORY

WHEREAS, on May 4, 2015, DOB issued a zoning determination stating, in part, that a "proposed accessory caretaker apartment with living and sleeping accommodations is contrary to

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ZR12-10” because “no such living or sleeping accommodations are [permitted to be] located in a C7, C8 or Manufacturing District”; and

WHEREAS, on October 23, 2015, through its internal appeals process, DOB upheld its denial of a proposed caretaker apartment on the grounds that no sufficient demonstration had been made that such caretaker’s apartment would be necessary for the maintenance of the subject building; and

WHEREAS, on June 28, 2016, DOB considered additional information provided in response to the determination dated October 23, 2015, and upheld its denial on the grounds that no sufficient demonstration had been made that a caretaker’s apartment would be incidental to or customarily found in connection with a sign painting shop and that caretakers’ apartments are not incidental to or customarily found in connection with uses located within heavy manufacturing districts; and

WHEREAS, on January 26, 2017, DOB issued the determination cited above, and Appellant commenced this appeal on February 22, 2017, seeking reversal of DOB’s determination; and

RELEVANT PROVISIONS OF THE ZONING RESOLUTION

WHEREAS, ZR § 42-00 states in relevant part: “Use Group[] . . . 16 . . . , including each *use* listed separately therein, . . . are permitted in *Manufacturing Districts* as indicated in Sections 42-11 to 42-15, inclusive”; and

WHEREAS, ZR § 42-12 allows as of right, in M1, M2 and M3 zoning districts, Use Group 16 uses set forth in ZR § 32-25; and

WHEREAS, ZR § 32-25 describes Use Group 16 uses, in relevant part, as follows:

Use Group 16 consists of . . . necessary semi-industrial *uses* which:

- (1) are required widely throughout the city; and
- (2) involve offensive noise, vibration, smoke, dust, or other particulate matter, odorous matter, heat, humidity, glare or other objectionable influences, making such *uses* incompatible with *residential uses* and other *commercial uses*.

A. Retail or Service Establishments

[. . .]

Sign painting shops, with no limitation on *floor area* per establishment [PRC-B1]

[. . .]

E. *Accessory Uses*

WHEREAS, ZR § 12-10 defines “accessory uses,” in part, as follows:

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 . . . in the same ownership as such principal *use*

[. . .]

An *accessory use* includes: . . . (2) Living or sleeping accommodations for caretakers in connection with any *use* listed in Use Groups 3 through 18 inclusive . . . ; and

ISSUE PRESENTED

WHEREAS, this appeal concerns whether the Caretaker’s Apartment is an accessory use to the Sign Painting Shop permitted in an M3-1 zoning district under ZR §§ 42-12 and 12-10; and

WHEREAS, however, the sole issue disputed by Appellant¹ and DOB—and, in turn, considered by the Board—is whether the Caretaker’s Apartment is “customarily found in connection with” the Sign Painting Shop under the definition of “accessory use” in ZR § 12-10; and

DISCUSSION

WHEREAS, ZR § 12-10 provides: “An ‘accessory use’ . . . is a *use* which is . . . customarily found in connection with” “the principal *use* to which it is related”; and

WHEREAS, in *New York Botanical Garden v. Bd. of Standards & Appeals of City of New York*, 91 N.Y.2d 413, 421 (1998), the Court of Appeals of New York explains the “accessory use” inquiry as follows:

In this case, there is no dispute that radio stations and their attendant towers are clearly incidental to and customarily found on college campuses in New York and all over the United States. The issue before the BSA was: is a station of this particular size and power, with a 480-foot tower, customarily found on a college campus or is there something inherently different in this radio station and tower that would justify treating it differently; and

WHEREAS, here, Appellant and DOB similarly “dispute that [living or sleeping accommodations for caretakers] are . . . customarily found [with sign painting shops] in New York,” *id.*; *see also Exxon Corp. v. Bd. of Standards & Appeals of City of New York*, 151 A.D.2d 438, 439 (N.Y. App. Div. 1989) (discussing application of “accessory use” definition); and

WHEREAS, accordingly, the Board first examines whether living or sleeping accommodations for caretakers generally are “customarily found in connection with” sign painting shops

¹ Appellant also argues that no showing of a customary connection need be made for “[l]iving or sleeping accommodations for caretakers in connection with any *use* listed in Use Groups 3 through 18 inclusive” under ZR § 12-10; however, the Board need not resolve that issue in this appeal because, as discussed herein, the record demonstrates a customary connection between accommodations for caretakers and a Use Group 16 sign painting shop.

and then looks to whether Appellant has demonstrated that the specific activities proposed render the Caretaker's Apartment a "living or sleeping accommodations for caretakers" within the meaning of ZR § 12-10; and

WHEREAS, for the reasons that follow, the Board finds both the general and specific inquiries answered in the affirmative; and

(1) GENERAL INQUIRY

WHEREAS, Appellant and DOB disagree as to whether living or sleeping accommodations for caretakers are typically found in conjunction with sign painting shops; and

WHEREAS, Appellant argues that the plain meaning of the ZR § 12-10 definition of "accessory use" evinces a clear intent to determine, by legislative fiat, that living or sleeping accommodations for caretakers are always customarily found in connection with any and all uses listed in Use Groups 3 through 18 by explicitly identifying such use on a list of uses "included" as "accessory"; and

WHEREAS, Appellant also furnished, in support of a general customary connection, multiple certificates of occupancy listing as lawful uses art studios and photography studios with caretakers' apartments within the same building; and

WHEREAS, Appellant notes that there is a dearth of sign painting shops located within the City and that accordingly it is appropriate for the Board to examine analogous uses; and

WHEREAS, DOB does not credit this evidence, noting that art studios and photographic developing or photographic printing establishments are listed in Use Group 9, not Use Group 16; and

WHEREAS, DOB states that, in *New York Botanical Garden*, the court examined the exact same principal use and concludes that Appellant needs to demonstrate the custom in the Use Group 16 sign painting industry specifically, rather than analogizing to a Use Group 9 use; and

WHEREAS, DOB states that none of the examples provided are in the same use group as—or even analogous to—sign painting shops; and

WHEREAS, DOB also points out that, in *New York Botanical Garden*, the Court of Appeals specifically interpreted the list in the "accessory use" definition "as examples of permissible accessory uses (provided, of course, that they comply with the requirements of Zoning Resolution § 12-10 [accessory use] [a], [b] and [c])," 91 N.Y.2d at 422; and

WHEREAS, DOB posits that, if there are too few sign painting shops within the City to demonstrate a customary connection, Appellant should demonstrate that sign painting shops around the country typically have caretakers' apartments; and

WHEREAS, Appellant responds that a country-wide query would prove too onerous and that, in any case, other localities may have regulations regarding caretakers' apartments that materially differ from the Zoning Resolution; and

WHEREAS, nothing in the record demonstrates that there are sign painting shops in the City without caretakers' apartments or that there are more than a few, if any, other sign painting shops whatsoever within the City; and

WHEREAS, as noted above, the Board finds that sign painting shops employ commercial artists and artisans to paint signs and that sign painting is a small industry within the City; and

WHEREAS, the Board also notes that many artists work with paint as their medium and often toil long hours with expensive equipment and inventory, which they have a strong interest in protecting, so there is sufficient overlap and overall similarity of activities carried on within sign painting shops and art studios to make an analogy between Use Group 16 sign painting shops and Use Group 9 artists' studios, as Appellant suggests; and

WHEREAS, the Board credits said analogy between art studios and sign painting shops as being close enough to find the supplied certificates of occupancy of art studios with caretakers' apartments of probative value; and

WHEREAS, the Board notes that caretaker's apartment is shorthand for "living or sleeping accommodations for caretakers," which appears in ZR § 12-10; and

WHEREAS, the Board determines that said certificates of occupancy indicate that living or sleeping accommodations for caretakers are concomitant with sign painting shops; and

WHEREAS, because there is sufficient evidence in the record to support a general connection between living or sleeping accommodations for caretakers and sign painting shops, the Board need not reach Appellant's argument as to an interpretation regarding every use in Use Groups 3 through 18, which is beyond the scope of this appeal; and

WHEREAS, accordingly, the Board finds that, generally, living or sleeping accommodations for caretakers are "customarily found in connection with" Use Group 16 sign painting shops under ZR § 12-10; and

(2) SPECIFIC INQUIRY

WHEREAS, the Board next considers the specific activities proposed with regard to the Caretaker's Apartment; and

WHEREAS, at the outset, the Board notes that this consideration does not look to the size and scope of the proposed activities, which would implicate the not-at-issue "clearly incidental" aspect of the "accessory use" definition; rather, the Board examines whether the activities proposed for the Caretaker's Apartment are of a type and character within the ambit of the general term "living or sleeping accommodations for caretakers" or whether there is something inherently different about Appellant's proposed activities that would justify treating the Caretaker's Apartment differently; and

WHEREAS, Appellant states that the Caretaker's Apartment will allow an individual (the "Caretaker") to reside at the subject site and perform the following duties: collect all refuse and manage the collection of refuse by private refuse collectors; maintain the sidewalk at the subject site in good condition; maintain the bulkhead and shoreline at the subject site in good condition; maintain the subject site and subject building in good condition; maintain the façade of the subject building in a clean and graffiti-free condition; maintain and operate the mechanical and heating equipment at the subject site; maintain the subject site in a state of overall good repair; ensure continuance of maintenance, security and good repair of the subject site; maintain the Sign Painting Shop's inventory; and

WHEREAS, Appellant also notes that the subject site is remote, with infrequent vehicular and pedestrian traffic, and bordered on two sides by waterfront, leaving the subject site susceptible to burglaries and vandalism, and that the Caretaker would provide constant safeguarding and perform frequent patrolling to assure that the subject building remain secure and safe; and

WHEREAS, Appellant states that the Caretaker's responsibilities pertaining to site security and theft deterrence would be the most practical and cost-effective measure because the subject site is already outfitted with gates, lighting, fencing and 14 security cameras, with two additional cameras to be installed, which have not been effective in deterring break-ins; and

WHEREAS, Appellant submitted police reports documenting three burglaries that have occurred at the subject site since 2016 and states that the subject site has been burgled four times with one instance unreported; and

WHEREAS, Appellant submitted a fourth police report documenting a burglary that occurred while this appeal was pending; and

WHEREAS, Appellant states that the Caretaker will perform duties akin to the responsibilities of a superintendent who lives in a residential building; and

WHEREAS, DOB states that it is improper to compare caretakers with superintendents since they are different uses and that the Caretaker's Apartment should instead be categorized as a primary, residential use that is not permitted in M3-1 zoning districts as of right; and

WHEREAS, the Board notes that a restrictive declaration for caretakers' apartments, in the form approved by DOB and required to be recorded against all premises with caretakers' apartments prior to the issuance of a certificate of occupancy pursuant to the ZR § 12-10 definition of "accessory use," states that a caretaker will provide the following maintenance and repair services for the premises: collect all refuse and maintain such refuse in refuse bins; maintain the sidewalk outside the premises in good repair and in clear condition; maintain the façade of the premises in a clean and graffiti-free condition; maintain and operate mechanical equipment that heats the premises; maintain the premises in overall good repair; and perform any other caretaker functions necessary to insure the continuance of maintenance, security and good repair of the premises; and

WHEREAS, the Board notes that the premises issued the supplied certificates of occupancy for art studios with caretakers' apartments have recorded restrictive declarations listing the same duties as those proposed for the Caretaker; and

WHEREAS, the Board finds that the specific activities proposed for the Caretaker, including maintaining and safeguarding the subject site, fall within the scope of duties typical of caretakers; and

WHEREAS, the Board finds that, as an apartment where the Caretaker will reside, the Caretaker's Apartment is properly classified under "living or sleeping accommodations for caretakers" within the meaning of the "accessory use" definition of ZR § 12-10; and

CONCLUSION

WHEREAS, the Board has considered all of DOB's arguments on appeal and finds them ultimately unpersuasive as applied to the Caretaker's Apartment at the subject site; and

WHEREAS, because the Board’s determination is limited to the evidence in the record regarding the Caretaker’s Apartment at the subject site, nothing herein shall be understood as a determination by the Board that living or sleeping accommodations for caretakers generally are always customarily found in connection with any and all uses listed in Use Groups 3 through 18 since it is unnecessary to reach such issue in this appeal; and

WHEREAS, for the foregoing reasons, the Board finds that the Caretaker’s Apartment is a permitted accessory use for the Sign Painting Shop at the subject site.

Therefore it is Resolved, that the determination of the Department of Buildings, dated January 26, 2017, acting on Alteration Application No. 321052114, shall be and hereby is *reversed*, only as to the Caretaker’s Apartment accessory to the Sign Painting Shop in Use Group 16 as proposed at the subject site, and that this appeal shall be and hereby is *granted*.

Adopted by the Board of Standards and Appeals, December 5, 2017.

CERTIFICATION

*This copy of the Resolution
dated December 5, 2017
is hereby filed by
the Board of Standards and Appeals
dated January 26, 2018*



**Carlo Costanza
Executive Director**