14-11-A
APPLICANT – Law Office of Fredrick A. Becker, for Chaya Schron and Eli Shron, owners.
SUBJECT – Application February 2, 2011 – Appeal challenging a determination by the Department of Buildings that a proposed cellar to a single family home is contrary to accessory use as defined in §12-10 in the zoning resolution.
R2 zoning district.
PREMISES AFFECTED – 1221 East 22th Street, between Avenues K and L, Block 7622, Lot 21, Borough of Brooklyn.
COMMUNITY BOARD #14BK
APPEARANCES –
For Applicant: Hai Blorfmen.
ACTION OF THE BOARD – Application Denied.
THE VOTE TO GRANT –
Affirmative:.....0
Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
THE RESOLUTION –

WHEREAS, this is an appeal of a Department of Buildings ("DOB") final determination dated January 7, 2011, issued by the Acting First Deputy Commissioner (the "Final Determination"); and

WHEREAS, the Final Determination reads in pertinent part:

> [A] cellar that exceeds 49% of the total floor space of the residence to which it is appurtenant (the principal use) is not considered an "accessory use" as that term is defined by Section 12-10 of the ZR. An accessory use is a use which is "clearly incidental to, and customarily found in connection with" the principal use conducted on the same zoning lot. Here, the proposed principal use is a two-story, single-family dwelling. The proposed accessory use is a storage cellar that extends well beyond the footprint of the dwelling and well below ground. More importantly, the cellar has nearly as much floor space as the dwelling has floor area. In such an arrangement there is nothing "incidental" about the cellar; it is essentially a principal use. As indicated in the August determination, the cellar cannot exceed 49% of the floor space of the residential dwelling.1 Beyond 49% the cellar use ceases to be "incidental" to the principal use and therefore does not comply with the Section 12-10 definition of accessory use. Accordingly, the cellar as proposed is not permitted; and

WHEREAS, the appeal was brought on behalf of the owners of 1221 East 22nd Street (hereinafter the "Appellant"); and

WHEREAS, a public hearing was held on this application on May 17, 2011 after due notice by publication in *The City Record*, with continued hearings on June 21, 2011 and August 18, 2011, and then to decision on October 18, 2011; and

WHEREAS, DOB appeared and made submissions in opposition to this appeal; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and

THE PROPOSED PLANS

WHEREAS, the subject site is located on East 22nd Street between Avenue K and Avenue L, within an R2 zoning district and is currently occupied by a two-story single-family home (the "Home"); and

WHEREAS, on August 13, 2009, the Appellant submitted Alteration Application No. 320062793 to DOB for the proposed enlargement of the Home pursuant to ZR § 73-622; and

WHEREAS, the proposal includes a total of 6,214.19 sq. ft. of floor area (1.04 FAR) and a cellar with a floor space of 5,100 sq. ft. (the equivalent of approximately 0.85 FAR, if cellar space were included in zoning floor area, and 82 percent of the Home's above-grade floor space); and

WHEREAS, the proposed cellar extends beyond the footprint of the first floor; includes two levels; and is proposed to contain storage area, a home theater, and a multi-level gymnasium/viewing area, among other uses; and

WHEREAS, on September 3, 2009, DOB issued 23 objections to the plans, the majority of which were later resolved; however, on January 7, 2011, DOB determined that the proposed cellar failed to satisfy the ZR § 12-10 definition of "accessory use" in that it was not "clearly incidental to" and "customarily found in connection with" the principal use of the lot and, thus, the cellar objection remains; and

WHEREAS, DOB states that because the cellar extends beyond the Home's footprint, its maximum permitted size is 49 percent of the proposed Home's floor area square footage, which equals 3,043.25 sq. ft.; and

WHEREAS, the Appellant concurrently filed the subject appeal and an application for a special permit (BSA Cal. No. 3-11-BZ) pursuant to ZR § 73-622; at the Appellant's request, the Board has adjourned the special permit application pending the outcome of the subject appeal; and

RELEVANT ZONING RESOLUTION PROVISIONS

WHEREAS, the following provisions are relevant

1 As used in this determination, "floor space" includes any space in the dwelling, whether or not the space is included in the "floor area" per ZR section 12-10. (original footnote)

definitions set forth at ZR § 12-10, which read in pertinent part:

> Accessory Use, or accessory
> An "accessory use":
> (a) is a #use# conducted on the same #zoning lot# as the principal #use# to which it is related (whether located within the same or an #accessory building or other structure#, or as an #accessory use# of land) . . .; and
> (b) is a #use# which is clearly incidental to, and customarily found in connection with, such principal #use#; and
> (c) is either in the same ownership as such principal #use#, or is operated and maintained on the same #zoning lot# substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal #use# . . .
>
> * * *
>
> Dwelling unit
> A "dwelling unit" contains at least one #room# in a #residential building#, #residential# portion of a #building#, or #non-profit hospital staff dwelling#, and is arranged, designed, used or intended for use by one or more persons living together and maintaining a common household, and which #dwelling unit# includes lawful cooking space and lawful sanitary facilities reserved for the occupants thereof.
>
> * * *
>
> Residence, or residential
> A "residence" is one or more #dwelling units# or #rooming units#, including common spaces such as hallways, lobbies, stairways, laundry facilities, recreation areas or storage areas. A #residence# may, for example, consist of one-family or two-family houses, multiple dwellings, boarding or rooming houses, or #apartment hotels#. . .
> "Residential" means pertaining to a #residence#.
>
> * * *
>
> Residential use
> A "residential use" is any #use# listed in Use Group 1 or 2; and
>
> * * *
>
> Rooms
> "Rooms" shall consist of "living rooms," as defined in the Multiple Dwelling Law; and

THE APPELLANT'S POSITION

WHEREAS, the Appellant makes the following primary arguments: (1) the proposed cellar meets the ZR § 12-10 definition of accessory use; (2) DOB has approved cellars which extend beyond the building footprint, like the proposed, and must approve the proposal to be consistent with its practice; (3) prior Board cases and case law support the contention that the cellar use is accessory; and (4) DOB cannot impose bulk limitations on a use definition; and

WHEREAS, as to the definition of accessory use, the Appellant asserts that the proposed cellar meets the criteria as it is: (a) located on the same zoning lot as the principal use (the single-family home), (b) the cellar uses are incidental to and customarily found in connection with a single-family home, and (c) the cellar is in the same ownership as the principal use and is proposed for the benefit of the owners of the Home who occupy the upper floors as a single-family home; and

WHEREAS, the Appellant asserts that DOB's interpretation of "accessory use" is erroneous because it is not consistent with the ZR § 12-10 definition and because DOB may not limit a residence's principal use to "habitable rooms" or sleeping rooms as set forth in the Building Code or Housing Maintenance Code ("HMC"); and

WHEREAS, specifically, the Appellant cites to DOB's argument that "all portions of a residence that are not used for sleeping, cooking, or sanitary functions are accessory to the residence and are permitted only to the extent they are customarily found in connection with and clearly incidental to the residence;" and

WHEREAS, the Appellant asserts that the proposed cellar is "incidental" to the primary use as it is "less important than the thing something is connected with or part of;" and

WHEREAS, further, the Appellant asserts that the ZR § 12-10 definition of residence is broad and includes rooms other than those for sleeping and that as per the Multiple Dwelling Law ("MDL"), every room used for sleeping purposes shall be deemed a living room, but rooms other than those used for sleeping shall also be considered living rooms; and

WHEREAS, as to DOB's approvals, the Appellant initially submitted cellar plans for seven homes approved by DOB with cellars that extend beyond the footprint of the building to support the claim that such cellars are customary and that DOB has a history of approving them; and

WHEREAS, the Appellant contends that the examples reflect cellars that extend beyond the footprint of the home and exceed 49 percent of the home's floor area, thus, DOB is arbitrary to now deny this request; and

WHEREAS, as to Board precedent, the Appellant sites to BSA Cal. No. 60-06-A (1824 53rd Street, Brooklyn/Viznitz), a case that involved the analysis of whether a catering facility associated with a synagogue and yeshiva was accessory to the primary synagogue and yeshiva use or whether it was a primary use not permitted by zoning district regulations; and

WHEREAS, the Appellant cites the Board's decision for the point that certain accessory uses noted in ZR § 12-10's definition of accessory use could also be

primary uses, but the majority of them are ancillary uses that support the site's primary use; accordingly, the Appellant likens the proposed cellar uses – exercise areas and a home theater - to those on the list of accessory uses in that they are not primary uses; and

WHEREAS, the Appellant also cites to the Board's decision at BSA Cal. No. 202-05-BZ (11-11 131st Street, Queens/InSpa) in which the Board, when evaluating whether a small percentage of a physical culture establishment's floor area dedicated to massage in comparison to the large size of the facility made it appropriate for the massage area to establish the primary use; the Appellant notes that the Board stated in its decision that there was not any mention of size limitations in the ZR § 12-10 accessory use definition; and

WHEREAS, the Appellant cites to Mamaroneck Beach & Yacht Club v. Zoning Board of Appeals, 53 A.D.3d 494 (2008), for the determination that proposed seasonal residential use at a yacht club was deemed to be accessory to the primary yacht club use even though it would occupy more than 50 percent of the total building floor area on the site; and

WHEREAS, the Appellant also cites to New York Botanical Garden v. Board of Standards and Appeals, 91 N.Y.2d 413 (1998), in which the court rejected the Botanical Garden's assertion that a radio tower was too large to be considered clearly incidental to or customarily found in connection with the principal use and upheld the Board's determination that the radio tower was accessory to the university use; and

WHEREAS, finally, the Appellant asserts that DOB does not have the authority to impose bulk limitations on a use and to impose a quantitative measurement where the ZR is silent; and

WHEREAS, the Appellant asserts that the ZR does not limit the size of the subject accessory use as it does certain other accessory uses such as home occupation and that the absence of a size limit in the ZR is evidence that there is no such limit; and

WHEREAS, the Appellant asserts that since zoning regulations are in derogation of the common law, they should be construed against the property owner and, thus, DOB should not be permitted to add a limitation not written in the text that imposes a burden on property owners; and

WHEREAS, further, the Appellant asserts that DOB's restriction that residential cellars not exceed 49 percent of the floor area of the home is not fair, consistent, or proportional and cites as an example of inequity the fact that a 1,000 sq. ft. home with one-story could have a cellar with 1,000 sq. ft. if built within the building's footprint, but if that 1,000 sq. ft. home were two stories and had a footprint of 500 sq. ft., the cellar could only be 500 sq. ft.; and

DOB'S POSITION

WHEREAS, DOB states that its cellar size limitation is: (1) based on a rational construction of the definition of accessory use, particularly the phrase "clearly incidental," which furthers the intent of the ZR; (2) a reasonable restriction developed pursuant to the principles of fairness, consistency, and proportionality; (3) applicable only to residences, and based on an assessment of the needs presented by residences; (4) not new but rather, a consistent approach that is challenged for the first time; (5) in accordance with the Board's cases concerning accessory uses; and (6) consistent with the Board's cases regarding DOB's authority to establish measurements that are not clearly stated within the text in order to clarify terms; and

WHEREAS, as to whether or not the proposed use is accessory, DOB asserts that the size of the proposed cellar is neither customary, nor clearly incidental to the home and that its multi-level configuration is not customary; and

WHEREAS, DOB states that the proposed storage, theater, and gymnasium rooms in the cellar are not part of the principal use of the residence and must meet the definition of "accessory use;" and

WHEREAS, DOB's analysis includes that several ZR § 12-10 definitions together define (1) a "residence" as those rooms used for sleeping, cooking and sanitary purposes, (2) a "residence" is a building or part of a building containing dwelling units, (3) a "dwelling unit" consists of one or more "rooms" plus lawful cooking space and lawful sanitary facilities, and (4) a "room" is a room used for sleeping purposes in accordance with the definition of a "living room" as defined by MDL § 4.18; and

WHEREAS, DOB states that sleeping rooms are the essential component of a dwelling unit and the principal use and the rooms in the Home's cellar, none of which are sleeping rooms, must be accessory to the residence; and

WHEREAS, DOB asserts that all portions of a residence that are not for used for sleeping, cooking, or sanitary functions are accessory to the residence and are permitted only to the extent that they are customarily found in connection with and clearly incidental to the residence and, further, cellar floor space that exceeds 49 percent of a residence's floor area is not accessory where the cellar walls extend below or beyond the footprint of the superstructure; and

WHEREAS, DOB states that its restriction on residential cellar size is appropriate since limiting the size beyond the perimeter of the cellar walls, results in cellars of a size that are customarily found, because historically, the cellar walls were directly below the above-grade walls—and may be considered clearly incidental because its size is no greater than is required for the utilitarian purpose of carrying the loads imposed by the superstructure; and

WHEREAS, DOB notes that the proposed cellar extends beyond the Home's footprint and extends so far

below grade that another staircase must be installed to access the lower portion of it, thus the proposed cellar is undeniably different than cellars traditionally found in connection with detached, single-family homes and, further that the proposed cellar is not clearly incidental to the home above it; and

WHEREAS, DOB finds that the proposed cellar is simply too large and too significant in comparison to the home to be clearly incidental to it; and

WHEREAS, as to the 49 percent measure, DOB states that it is appropriate because it is its reasoned determination that something cannot be clearly incidental to something else and be fully half as large as it and that (1) the size limitation furthers the intent of the ZR to allow such spaces that normally accompany residential rooms to remain secondary in nature, (2) the percentage is an appropriate measure since it allows for proportionality based on different home sizes, (3) the limitation is only for these residential uses and not for other types of uses, and (4) its restriction on cellar size is not new and that it has required it in the past; and

WHEREAS, DOB articulates the following two-step process for measuring the permissible cellar size: (1) if the cellar matches the footprint of the superstructure, it is permitted regardless of how much floor space it has in comparison to the floor area of the building, and (2) if the cellar extends beyond the footprint of the superstructure, the cellar may not exceed 49 percent of the floor area of the building; and

WHEREAS, DOB states that the 49 percent parameter ensures that, for a typical two-story, single-family home, the cellar floor space does not eclipse an entire story of floor area and that in a three-story home, somewhat more than one story's worth of floor area would be permitted for the cellar; and

WHEREAS, DOB asserts that the size of the permitted accessory use directly corresponds to the size of the principal use at a constant rate and follows the plain text of the ZR, gives meaning to the undefined terms, and is consistent with the policy of allowing certain accessory uses to exist, to an appropriate degree, in connection with certain principal uses; and

WHEREAS, as to the Appellant's assertion that DOB's prior approvals require it to approve the proposal, DOB disagrees and states that the plans submitted as precedent are incomplete and cannot be verified and that most of the buildings depicted (Drawings 1, 3, 4, 5 and 7) appear to be three stories in height, which might allow for an extension beyond the footprint; and

WHEREAS, however, DOB states that to the extent that any of the plans show applications that were approved with accessory cellars extending beyond the footprint of the building and having more than 49 percent of the total floor area of the homes, such approvals were issued in error; and

WHEREAS, DOB asserts that the Board has recognized that size limitation is appropriate in two prior cases BSA Cal. No. 45-96-A (27-01 Jackson Avenue, Queens) and BSA Cal. No. 748-85-A (35-04 Bell Boulevard, Queens); and that the Board has recognized DOB's authority to impose size limits which are not stated in the ZR see BSA Cal. No. 320-06-A (4368 Furman Avenue, Bronx), 189-10-A (127-131 West 25th Street, Manhattan), and 247-07-A (246 Spring Street, Manhattan); and

WHEREAS, as to the case law, DOB asserts that neither Mamaroneck nor Botanical Garden can be read to include a limit on the cellar size in a single-family home; DOB asserts that Mamaroneck is distinguishable and Botanical Garden supports its position, rather than Appellant's; and

WHEREAS, specifically, DOB notes that the seasonality of the residences, which were specifically permitted by Mamaroneck's zoning, was the limitation imposed by the plain text of the Mamaroneck Zoning Code, and the zoning board went beyond the plain text to impose a size limitation; and

WHEREAS, by contrast, DOB asserts that cellars are only permitted if they are accessory and size is relevant to the analysis of whether or not they are accessory; and

WHEREAS, DOB finds support for its position in Botanical Garden in that it finds that the court's holding is limited to stating that a size analysis is not appropriate for a radio tower, but does not extend to whether a size analysis may be appropriate in other situations with accessory uses; specifically it cites to the court decision: "the fact that the definition of accessory radio towers (in Section 12-10) contains no [size restrictions such as a "home occupation" or "living or sleeping accommodations for caretakers"] supports the conclusion that the size and scope of these structures must be based upon an individualized assessment of the need;" and

WHEREAS, DOB asserts that Botanical Garden supports the position that where the ZR does not provide a size limitation, the appropriate limitation is based on an "individualized assessment of the need" for the accessory use and its two-part test follows the Botanical Garden "assessment of the need" analysis, in that it was developed by balancing the historical and practical purpose of accessory cellars (the "need") with the policy considerations within the definition of accessory use; and THE DRAFT BULLETIN

WHEREAS, during the course of the hearing and at the Board's request, DOB drafted a proposed bulletin (the "Bulletin"), which sets forth the restrictions on cellar space and a version of which DOB proposes to issue after the Board's decision in the subject appeal; and

WHEREAS, the Bulletin has the defined purpose of "clarifying size of non-habitable accessory cellar space in residences," and includes the following:

. . .Within a residence, all rooms are either

> habitable or non-habitable. Habitable rooms, in contrast to non-habitable rooms, are rooms in which sleeping is permitted. The ZR classifies uses on a zoning lot as either principal or accessory. Where habitable rooms are the principal use on a zoning lot, non-habitable rooms are not part of the principal use; they are accessory to the principal use, and are permitted pursuant to subsection (b) of the ZR definition of "accessory use" only to the extent that they are clearly incidental to and customarily found in connection with such habitable rooms. Thus, the definition of "accessory use" contains a limitation on the size of residential cellars containing non-habitable rooms . . .; and

WHEREAS, the Appellant made the following supplemental arguments in response to the Bulletin; and

WHEREAS, the Appellant asserts that the Bulletin is not a logical interpretation of the relevant regulations; and

WHEREAS, specifically, the Appellant asserts DOB's comparison of habitable space to the HMC definition is flawed because the HMC definition of "dwelling" does not address "living rooms," but defines a dwelling as "any building or other structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings;" and

WHEREAS, the Appellant asserts that the HMC definition does not limit a dwelling to the specific rooms used for sleeping and thus is not comparable to DOB's definition of habitable space; and

WHEREAS, the Appellant adds that the HMC definition of "living room" is broader than DOB suggests and that DOB fails to provide support for equating a space's habitability to its status as a principal or accessory use; and

WHEREAS, the Appellant asserts that the cellar size limit of 49 percent of a home's floor area when it extends beyond the building footprint is arbitrary and that DOB cannot enact additional limitations not written in the text and cannot make a rule limiting cellar size that applies to certain (residential) and not all uses; and

CONCLUSION

WHEREAS, the Board has determined that DOB is reasonable to restrict the size of residential cellars and that (1) its position is supported by the Zoning Resolution, (2) it has the authority to set forth and apply parameters for limiting the size of residential cellars and its parameters are reasonable, and (3) all of the authorities the Appellant cites can be distinguished from the subject application and do not support its position; and

WHEREAS, as to the Zoning Resolution, the Board refers to the ZR § 12-10 definitions of dwelling unit, residence or residential, residential use, and rooms cited above; and

WHEREAS, the Board first notes that a residence is one or more "dwelling units" including common spaces (which also addresses multiple dwellings) such as (but not limited to) hallways, lobbies, stairways, laundry facilities, recreation areas, or storage areas; and

WHEREAS, the Board notes that residences include single-family or two-family homes, thus the proposed single-family home is a "dwelling unit;" and

WHEREAS, the Board notes that the proposed enlargement is for a single-family home which is (1) a "residence" and therefore a "dwelling unit," and (2) as a dwelling unit, it must contain at least one "room," and includes lawful cooking space and lawful sanitary facilities; and

WHEREAS, further, the Board notes that a dwelling unit comprises "rooms" (defined in the ZR as the same as "living rooms" in the MDL) and cooking and sanitary facilities; therefore, a residential use (such as the proposed single-family home) is a "dwelling unit" which contains "rooms" (ZR or MDL "living rooms") and cooking and sanitary facilities; and

WHEREAS, the Board finds that the primary use of a residence is limited to living rooms (which DOB refers to as "habitable" in this context), and cooking and sanitary facilities; all other uses become accessory; and

WHEREAS, the Board notes that its proffered zoning interpretation establishes that (1) spaces above grade that are habitable including recreation spaces, libraries, studies, attic space, are all considered "rooms" and part of the primary use and also counted as floor area and (2) below grade space that is habitable and may be used as a sleeping room is also part of the primary use and would be considered as floor area and should be not included in the accessory calculation; the Board notes that below grade space that is not habitable is not included in zoning floor area calculations; and

WHEREAS, the Board notes that DOB does not need to rely on the Building Code definition of habitable space, as the Appellant suggests, but rather chooses "habitable" as a shorthand way to encompass the living rooms which constitute a dwelling unit; and

WHEREAS, the Board notes that the ZR directly references the MDL and therefore reflects an expected link between ZR "rooms" and MDL "living rooms" acknowledged by the ZR; the Board also finds that the Appellant's concern about there potentially being above-grade space that would be deemed accessory rather than primary is unavailing because the above grade space (1) counts towards floor area, is within the anticipated volume of the building, and is covered by the relevant restrictions on floor area and (2) could potentially be converted to primary use as it can become habitable space; and

WHEREAS, the second part of the Board's analysis considers whether DOB may appropriately put a quantitative measure on cellar size; and

WHEREAS, the Board finds that DOB may place a

quantitative measure to ensure that the accessory use remains incidental to the primary use; and

WHEREAS, the Board acknowledges that size may not always be a relevant factor when establishing accessory use but when cellars go beyond the customary boundary of the building's footprint, it is appropriate to restrict the size in order to maintain its incidental relationship to the primary use; and

WHEREAS, the Board does not find DOB's application of the restriction only to residential uses to be arbitrary since it stems from the ZR definition of residential uses and the distinction between habitable and non-habitable space which does not arise for nonresidential uses; and

WHEREAS, the Board distinguishes its two prior cases that the Appellant cites; and

WHEREAS, first the Board notes that in Viznitz, the Board clearly stated that "a determination of whether a particular use is accessory to another use requires a review of the specific facts of each situation" and quoted the Court of Appeals in Botanical Garden for the theory that "[w]hether a proposed accessory use is clearly incidental to and customarily found in connection with the principal use depends on an analysis of the nature and character of the principal use . . . taking into consideration the over-all character of the particular area in question" when determining whether a catering use was primary or accessory to the synagogue or yeshiva; and

WHEREAS, the Board also distinguishes InSpa in that it involved a PCE special permit application, not an interpretive appeal and, thus the decision in that case is limited to the unique circumstances of a PCE special permit; if the Board had agreed that the small amount of massage space in comparison to the large size of the overall facility would make such use accessory, it would follow that the remaining uses could have existed as-of-right (for example as a Use Group 13 commercial pool with accessory massage); and

WHEREAS, the Board notes that the InSpa case was before the Board because DOB has taken a conservative approach that any amount of space dedicated to a defined PCE, no matter how small in proportion to the whole use, triggers the requirement for a PCE special permit rather than allowing small PCE uses to be subsumed by a larger as of right use and sidestep the special permit; this furthers the intent of the ZR to have City oversight, including conditional approval and term limits, of certain specific physical improvement uses; and

WHEREAS, the Board finds that the intent and the purpose of the analysis in the InSpa case cannot be applied to the subject case; and

WHEREAS, as to the case law, the Board does not find that either Mamaroneck or Botanical Garden supports the Appellant's position; and

WHEREAS, as to Mamaroneck, the Board distinguishes the facts since Mamaroneck is within a different jurisdiction subject to a different zoning code and seasonal residences were explicitly permitted under zoning without a restriction on size; and

WHEREAS, as to Botanical Garden, the Board finds that the court did not prohibit size as a consideration across the board but rather said to employ an individualized assessment of need and a consideration of the facts, as cited above; and

WHEREAS, the Board finds it inappropriate to compare the assessment of need for a radio tower, which has technical requirements, and a home's cellar, which is based on a homeowner's preferences; and

WHEREAS, the Board upheld DOB's authority to interpret and impose quantitative guidelines not found in the ZR in BSA Cal. No. 320-06-A (4368 Furman Avenue, Bronx) and also upheld DOB's authority to fill in gaps not set forth in relevant statutes in BSA Cal. No. 121-10-A (25-50 Francis Lewis Boulevard, Queens); the Board notes that the court recently upheld its decision in Francis Lewis Boulevard at 25-50 FLB v. Board of Standards and Appeals, 2011 NY Slip Op 51615(U) (S. Ct. 2011); and

WHEREAS, in 25-50 FLB, the Supreme Court recognized DOB's authority to fill in gaps in instances where specific procedures are not codified and upheld the Board's decision based on its recognition of that authority; and

WHEREAS, the Board finds that size can be a rational and consistent form of establishing the accessory nature of certain uses such as home occupations, caretaker's apartments, and convenience stores on sites with automotive use, but may not be relevant for other uses like radio towers or massage rooms; and

WHEREAS, the Board does not find that any of the prior cases the Appellant relies on include any recognition of the distinction between above grade and below grade space and the associated questions of habitability; and

WHEREAS, as to the Appellant's assertion that DOB has been inconsistent and has a history of approving cellars like the proposed, the Board notes that the drawings the applicant submitted lack sufficient detail to make such a conclusion; the Appellant submitted only one case which has a certificate of occupancy and zoning calculations, which shows that DOB has allowed cellars greater than 49 percent of the building's floor area; and

WHEREAS, the Board notes that the other six examples which show larger cellars do not provide any analysis regarding the 49 percent standard; and

WHEREAS, the Board notes that (1) even if the examples do support the Appellant's claim that DOB approved cellars with area in excess or 49 percent of the homes' floor area, seven examples do not establish a compelling established practice, (2) it is possible that DOB did not have sufficient information to perform the analysis, and (3) DOB has the authority to correct erroneous approvals; and

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WHEREAS, the Board has determined that DOB has the authority to issue the Bulletin and that it is appropriate to do so immediately following the Board's decision since this zoning issue has emerged and its regulation requires memorialization; and

WHEREAS, the Board does not find DOB's discrete application of the rule to be arbitrary as the distinction between habitable and non-habitable use is not relevant or applicable to the non-targeted uses; and

WHEREAS, the Board also notes the following considerations, which support limiting the size of residential cellars: (1) there is a distinction between above grade habitable space, which provides access to light and air, and below grade space, which does not, and yet homes function as a whole so there is a public interest in distinguishing between the primary habitable space and the accessory non-habitable space and limiting the amount of non-habitable space; (2) the ZR intends to limit, and there is a public interest in limiting, the volume of homes; and (3) the ZR sets limits on above grade floor area, which counts towards zoning floor area and so it is reasonable to limit the below grade floor space, which is not addressed within bulk regulations as it does not count towards bulk, but does contribute to the home's overall occupation of space; and

WHEREAS, as to the Appellant's concern that the cellar limitation is inequitable and disproportionate, the Board considered the effect the Bulletin (with the variation that a cellar built beyond the footprint may not exceed 50 percent of the home's floor area) would have on homes within an R3-2 zoning district; for example a 6,000 sq. ft. lot built out could choose from the following parameters: (1) a home with a maximum floor area of 3,600 sq. ft. (0.6 FAR) and a maximum footprint of 2,585 sq. ft., which would permit a cellar of either 2,585 sq. ft. or 1,800 sq. ft., if built to a smaller footprint and multiple stories, or (2) if a property owner obtains a special permit pursuant to ZR § 73-622, it may potentially build to a floor area of 6,000 sq. ft. (1.0 FAR), a maximum footprint of 3,055 sq. ft., and provide a cellar of either 3,055 sq. ft. or 3,000 sq. ft., if the built to a smaller footprint; and

WHEREAS, the Board finds that the results are not inequitable or disproportionate in that a property owner, like the subject property owner seeking a special permit, would be permitted virtually the same size cellar 3,055 sq. ft. vs. 3,000 sq. ft. whether it builds to the maximum footprint size or not; and

WHEREAS, based on the applicant's actual special permit proposal for 1.04 FAR, a 50 percent limit on the size of the cellar would result in 3,107 sq. ft., which the Board deems to be a reasonable outcome; and

WHEREAS, as to the Bulletin, the Board finds 50 percent to be a more appropriate guideline and, thus, the Board respectfully requests that DOB modify the Bulletin to replace "should not be greater than 49%" with "should be less than 50% of the total FAR," with regard to the size of the cellar, and to include a provision that exceptions must be reviewed and approved by its technical affairs division or by another DOB authority with inter borough oversight to ensure a consistent application in all five boroughs; and

WHEREAS, based on the above, the Board has determined, the Final Determination must be upheld and this appeal must be denied; and

Therefore it is Resolved that this appeal, which challenges a Department of Buildings final determination dated January 7, 2011, is denied.

Adopted by the Board of Standards and Appeals, October 18, 2011.

A true copy of resolution adopted by the Board of Standards and Appeals, October 18, 2011.
Printed in Bulletin Nos. 41-43, Vol. 96.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.