

Respondent, the premises owner, appeals from a recommended decision and order finding it in violation of New York City Administrative Code (Code) Section 28-118.3.2 for occupancy of the premises contrary to that allowed by the Certificate of Occupancy (C of O). In the notice of violation (NOV), dated June 9, 2010, the issuing officer affirmed he observed that the second floor was used as a bar instead of the “meeting room” authorized by C of O # 4846 (issued June 12, 1922). Respondent argued that it was not required to obtain a new C of O because Section 27-217(b), as heretofore in effect, of the 1968 Building Code applies to this existing building. Respondent contended that section of law exempted changes within the same Zoning Use Group from requiring a new C of O as in the present case where “meeting room” and “eating and drinking establishment” are both within Zoning Use Group 6. The issue on appeal is whether Respondent established a defense to occupancy contrary to the C of O by showing that the bar would be a continuing lawful existing use pursuant to Code Section 28-102.4.

At the hearing, Respondent argued that Section 27-217(b), as heretofore in effect, of the 1968 Building Code applies since the building predates the 2008 Building Code. That section allowed changes within the same Zoning Use Group without requiring a new C of O. It claimed that the second floor had been used as a tavern since the 1940’s and showed that the current bar owner had a liquor license for the bar since 1993. Respondent submitted a copy of Reference Standard 3-3 to show that a meeting room and an eating and drinking establishment were both in Zoning Use Group 6. Respondent submitted an affidavit from its principal affirming the bar had seating for 37 patrons and the 1922 C of O allowed occupancy by 40 persons. Respondent asserted it had not violated Code Section 28-113.3.2 because there had been no change to the premises that required a new C of O. Respondent also presented a letter from June of 2000 from then acting Deputy Commissioner of the Department of Buildings (DOB) Satish K. Babbar to show that a new C of O would only be necessary if one Use Group 6 use were changed into an eating and drinking establishment that provided space for 75 or more people, otherwise an Alteration 2 (Alt 2) filing would suffice.

Petitioner countered that a new C of O was needed since some time between the issuance of the 1922 C of O and the date of inspection the use of the second floor had changed from a meeting room to a bar. Petitioner further argued that illegal occupancy use was not grandfathered into the 2008 Code and this was not a zoning use issue, but a use inconsistent with that allowed by the C of O. Petitioner contended that the Board has previously found a new C of O is required when there is a change in the Building Code occupancy group. Petitioner pointed out there was no record of Respondent filing an Alt 2. Respondent replied that there was no change to the premises and no work was done. Respondent also argued that DOB records were not necessarily complete.

The administrative law judge (ALJ) credited that the premises had been used as a bar since the 1940’s. The ALJ recognized that pursuant to DOB procedures under the 1968 Building Code, Respondent would not have been required to obtain a new C of O where there had been an approved Alt 2 filing. However, the ALJ found that Respondent made no showing that an Alt 2 had been filed. The ALJ found occupancy was contrary to that allowed by the C of O because

Respondent failed to have a permit signed-off prior to the date of occurrence. The ALJ notes that even if there was no change in the Zoning Use Group, the Building Code occupancy group had changed from an F-4 to an F-1b.

Code Section 28-118.3.2 provides:

No change shall be made to a building or open lot or portion thereof inconsistent with the last issued certificate of occupancy or, where applicable, inconsistent with the last issued certificate of completion for such building or open lot or which would bring it under some special provision of this code or other applicable laws or rules, unless and until the commissioner has issued a new certificate of occupancy.

2008 Code Section 28-102.4 Existing Buildings reads in pertinent part:

*The lawful use or occupancy of any existing building or structure . . . may be continued unless a retroactive change is specifically required by the provisions of this code or other applicable laws or rules. The continuation of the unlawful use or occupancy of a building or structure after the effective date of this code contrary to the provisions of this code or other applicable law or rule shall be a violation of this code. [Emphasis added]*

1968 Building Code Section 27-217 Change of occupancy or use reads in relevant part:

(b) Except as provided by law, a new certificate of occupancy shall not be required where the change of use is within the same use group as listed in the amended zoning resolution.

Section 32-15 of the Zoning Resolution (ZR) describes those uses comprising Use Group 6, "Retail or Service Establishments." Eating and drinking establishments and meeting rooms are both included in Use Group 6.

On appeal, Respondent repeats that the second floor bar is not a use contrary to that allowed by the C of O. The C of O, which predates the current and the 1968 Building Codes, permits a meeting room on the second floor. Since meeting rooms and drinking establishments are within Zoning Use Group 6, no new C of O was required. Respondent believes the ALJ's decision applied an erroneous standard when it stated Respondent was in violation because it failed to have a permit signed off prior to the date of occurrence and failed to show an Alt 2 had been filed. Respondent points out that no change to the premises had been made.

Petitioner did not answer the appeal.

Respondent's appeal is granted. Respondent's evidence, unchallenged by Petitioner and credited by the ALJ, established that the second floor of this existing building was used as a bar since 1948, long before the effective date of Code Section 28-118.3.2. The predecessor statute, 1968 Building Code Section 27-217(b) provided that a new C of O is not required where the

change in use is within the same use group as listed in the amended ZR. Further, ZR Section 32-15 identifies meeting rooms and drinking establishments such as the bar now occupying the space as uses within Use Group 6. Therefore, the change in the use of the second floor fell within the predecessor statute's exemption and was a lawful use. Although 1968 Building Code Section 27-217(b) was repealed, Code Section 28-102.4 provides that any lawful use or occupancy of "any existing building . . . may be continued unless a retroactive change is specifically required by the provisions of this code or other applicable laws or rules." Petitioner failed to show that the Code requires a retroactive change for this use or a special permit. Nor did it show that the change required compliance with other laws or rules or compromised fire safety at the premises. Consequently, the Board finds the bar on the second floor constituted a continuation of a lawful existing use under Code 28-102.4 and a defense to the charge of occupancy contrary to the C of O.

Accordingly, the Board reversed the ALJ's recommended decision and order and dismisses the NOV.