

**113-14-A**

APPLICANT – Howard Goldman, Esq., for Speakeasy 86 LLC c/o Newcastle Realty Service, owner.

SUBJECT – Application May 29, 2014 – Appeal seeking revocation of a permit issued that allows a nonconforming use eating/drinking establishment to resume after being discontinued for several years. R6 zoning district.

PREMISES AFFECTED – 86 Bedford Street, northeastern side of Bedford Street between Barrow and Grove Streets, Block 588, Lot 3, Borough of Manhattan.

**COMMUNITY BOARD #3M**

**ACTION OF THE BOARD** – Application Denied.

**THE VOTE TO GRANT** –

Affirmative: .....0

Negative: Vice-Chair Hinkson, Commissioner Ottley-Brown and Commissioner Montanez .....3

Absent: Chair Perlmutter.....1

**THE RESOLUTION** –

WHEREAS, this is an appeal of the Department of Buildings' reinstatement of DOB Permit Number 120174658-01-A, re-issued April 29, 2014 (the "Permit"), which constitutes the final determination at issue herein and which reads, in pertinent part:

Alteration Type 1 – Convert Existing 3 Family House to 1 Family. Existing Restaurant to Remain on Ground Floor...; and

WHEREAS, a public hearing was held on this appeal on December 16, 2014, after due notice by publication in *The City Record*, and then to decision on February 24, 2015; and

WHEREAS, Vice-Chair Hinkson and Commissioner Ottley-Brown performed inspections of the subject premises, site and neighborhood; and

WHEREAS, the subject site is located at the northeast corner of Bedford Street and Barrow Street, within an R6 zoning district, within the Greenwich Village Historic District, in Manhattan; and

WHEREAS, the site is a single zoning lot occupied by five buildings: the subject three-story building at 86 Bedford Street (the "Subject Building") and four other buildings (82/84 Bedford Street, 58 Barrow Street and 56 Barrow Street) (collectively, the "Buildings"); and

WHEREAS, the Buildings were constructed in the early 1800s; and

WHEREAS, the ground floor and cellar at the Subject Building (the "Premises") have historically been occupied by an eating and drinking establishment (Use Group 6) known as Chumley's, with residential use above; and

WHEREAS, this appeal of DOB's issuance of the Permit is brought by the owner of an adjacent building (88 Bedford Street) (the "Appellant"); and

WHEREAS, as set forth below, the Appellant asserts that DOB erred in reinstating the Permit, because

the Permit authorizes the resumption of the non-conforming eating and drinking establishment use contrary to the Zoning Resolution; and

WHEREAS, DOB, the Appellant and the owner of the Subject Building (the "Owner"), all represented by counsel, appeared and made submissions in support of or in opposition to the instant appeal; and

**BACKGROUND**

WHEREAS, on May 12, 2006, the chimney and interior portions of 82/84 Bedford Street collapsed; and

WHEREAS, on or about April 4, 2007, the chimney and the south bearing wall of the Subject Building partially collapsed; on that same day, DOB was notified of the collapse and responded by issuing a Vacate Order; and

WHEREAS, the Vacate Order remains in effect and Chumley's has not operated since it was issued; and

WHEREAS, subsequent to the partial collapse of the chimney and south bearing wall of the Subject Building, the Owner was required to remove the existing south masonry wall and two chimneys from the Subject Building; and

WHEREAS, according to DOB and the Owner, the repair work related to the reconstruction of 82-84 Bedford Street and the Subject Building (the "Work") was complicated by the relationship of those two buildings to each other and to the remainder of the buildings on the zoning lot; and

WHEREAS, in order to facilitate the Work, the Owner regularly consulted with DOB and LPC personnel and was directed by representatives of the aforesaid agencies with respect to the Work; and

WHEREAS, after working with DOB to perform the Work for nearly two years, in March 2009, the Owner, at the direction of DOB, hired a DOB-licensed site safety manager to monitor the conditions at the Buildings; and

WHEREAS, thereafter, in addition to the Work which was supervised by DOB and LPC, the Owner was required to perform the following DOB-mandated repairs to the Buildings: (1) pursuant to a DOB Emergency Declaration dated July 2, 2009, the Owner was required to demolish the structurally compromised rear extension of the Subject Building and perform shoring and bracing of the exterior walls and interior floors of that building; (2) pursuant to a second DOB Emergency Declaration dated July 2, 2009, the Owner was directed to address structural conditions at 82-84 Bedford Street; and (3) pursuant to DOB Emergency Declaration dated December 9, 2009, the Owner was required to demolish and replace a bearing wall at 58 Barrow Street that was adjacent to the Subject Building; and

WHEREAS, in order to complete the Work, the Owner was required to file four applications with DOB and six post approval amendments related to the Subject Building; and

WHEREAS, on October 8, 2009, the Owner

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applied to DOB for the Permit, seeking approval to convert the Subject Building from a three-family to a one-family and to maintain the non-conforming eating and drinking establishment (Use Group 6) at the ground floor; and

WHEREAS, on December 20, 2010, DOB approved the Permit; and

WHEREAS, on December 2, 2011, following an audit of the Permit, DOB issued a Notice of Objections including 12 objections pertaining to the Zoning Resolution and the Building Code; among the objections was a ZR § 52-61 objection that the non-conforming Use Group 6 was discontinued for two consecutive years and, therefore, that the eating and drinking establishment (Use Group 6) was not permitted; and

WHEREAS, based on the objections remaining unresolved, including the issue of discontinuance of the eating and drinking establishment, DOB revoked the approval and Permit on March 8, 2013; and

WHEREAS, on April 29, 2013, the Owner filed an appeal of DOB's revocation to the Board under BSA Cal. No. 123-13-A; and

WHEREAS, initially, DOB defended its revocation of the Permit; however, through the hearing process, DOB was persuaded that the Owner was entitled to resume its non-conforming use, and on January 21, 2014, DOB issued a letter to the Board stating that the discontinuance of the eating and drinking establishment use for a period of greater than two years was within the tolling standards set forth in *149 Fifth Avenue Corp. v Chin*, 305 AD2d 194 (1<sup>st</sup> Dept 2003); and

WHEREAS, in its letter to the Board, DOB stated that it:

has been provided with sufficient evidence that the repair work was diligently completed in light of the complexity of the task of repairing damage on landmark-designated buildings constructed in the early [1800s] on five interrelated buildings accessed through a narrow alley. The Department recognizes that the repair work, imposed by multiple emergency declarations and under supervision of a Department engineer who directed the sequence of repair work, is tantamount to being a legal mandate; and

WHEREAS, on April 8, 2014, DOB accepted the earlier audit and on April 29, 2014, it reinstated the Permit; and

WHEREAS, on May 6, 2014, the Owner withdrew the appeal before the Board, which the Board recognized had been rendered moot by DOB's determination that the two-year period of discontinuance had been tolled; and

WHEREAS, on May 29, 2014, the Appellant filed the subject appeal based on DOB's reinstatement of the Permit; and

### RELEVANT ZONING RESOLUTION PROVISIONS

### ZR § 12-10 (*Definitions*)

Non-conforming, or non-conformity

A "non-conforming" *use* is any lawful *use*, whether of a *building or other structure* or of a *zoning lot*, which does not conform to any one or more of the applicable *use* regulations of the district in which it is located, either on December 15, 1961 or as a result of any subsequent amendment thereto. . .

\* \* \*

### ZR § 52-11 (*Continuation of Non-Conforming Uses*)

General Provisions

A *non-conforming use* may be continued, except as otherwise provided in this Chapter; and

\* \* \*

### ZR § 52-22 (*Structural Alterations*)

General Provisions

\* \* \*

No structural alterations shall be made in a *building or other structure* substantially occupied by *non-conforming use*, except when made ... (a) in order to comply with requirements of law...;

\* \* \*

### ZR § 52-61 (*Discontinuance*)

General Provisions

If, for a continuous period of two years, either the *nonconforming use of land with minor improvements* is discontinued, or the active operation of substantially all the *non-conforming uses* in any *building or other structure* is discontinued, such land or *building or other structure* shall thereafter be used only for a conforming *use*. Intent to resume active operations shall not affect the foregoing . . .

Except in Historic Districts as designated by the Landmarks Preservation Commission, the provisions of this Section shall not apply to vacant ground floor or *basement* stores in *buildings designed for residential use* located in R5, R6 or R7 Districts where the changed or reactivated *use* is listed in Use Group 6A, 6B, 6C or 6F...; and

### THE ISSUE PRESENTED

WHEREAS, the issues to be decided on appeal are (1) whether DOB properly issued the Permit notwithstanding that the non-conforming use of the Premises was discontinued as of April 4, 2007, and (2) whether the Owner was permitted to perform structural alterations to the Building; and

### LEGAL STANDARDS

### THE RESUMPTION OF A NON-CONFORMING USE

WHEREAS, DOB and the Appellant agree that the site is currently within an R6 zoning district and that an

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eating and drinking establishment is not permitted as-of-right within the zoning district; and

WHEREAS, accordingly, in order to establish the Permit was issued in error, the Appellant must demonstrate that the Owner is precluded from reestablishing its non-conforming eating and drinking establishment (Use Group 6) at the Premises notwithstanding DOB's determination that (1) the Owner's use of the Premises meets the Zoning Resolution's criteria for a "non-conforming use" as defined at ZR § 12-10, and (2) that the Owner's discontinuance of the non-conforming use of the Premises does not preclude the reestablishment of such use pursuant to ZR § 52-61 because of the tolling doctrine announced in *149 Fifth Avenue Corp. v Chin*; and

WHEREAS, ZR § 12-10 defines "non-conforming" use as "any lawful use, whether of a building or other structure or of a tract of land, which does not conform to any one or more of the applicable use regulations of the district in which it is located, either on December 15, 1961 or as a result of any subsequent amendment thereto"; and

WHEREAS, ZR § 52-61 (*Discontinuance, General Provisions*) states that: "[i]f, for a continuous period of two years, either the non-conforming use of land with minor improvements is discontinued, or the active operation of substantially all the non-conforming uses in any building or other structure is discontinued, such land . . . shall thereafter be used only for a conforming use"; and

WHEREAS, the Board acknowledges that in certain instances, the two-year period beyond which a non-conforming use may not be reestablished can be tolled pursuant to the doctrine set forth in *149 Fifth Avenue Corp. v Chin*, in which the owner of a non-conforming advertising sign removed the sign for a period of 27 months in order "to permit legally mandated building façade inspections and repairs." 305 AD2d at 194; and

WHEREAS, in *149 Fifth Avenue Corp.* the Appellate Division, First Department ruled that because the non-conforming use at issue was disrupted in order to perform "legally mandated, duly permitted and diligently completed repairs, the nonconforming use may not be deemed to have been 'discontinued' within the meaning of [ZR § 52-61]." *149 Fifth Avenue Corp. v Chin*, 305 AD2d at 195; and

WHEREAS, the Appellate Division, First Department reiterated that the two-year period set forth in ZR § 52-61 was appropriately tolled where the discontinuance of the underlying non-conforming use was occasioned by the owner's need "to satisfy a legal mandate." *Id.*; and

WHEREAS, thus, the Board will examine whether the discontinuance of the subject non-conforming use should be tolled pursuant to *149 Fifth Avenue Corp. v*

*Chin*; and

### *THE OWNER'S ABILITY TO PERFORM STRUCTURAL ALTERATIONS TO A BUILDING SUBSTANTIALLY OCCUPIED BY A NON-CONFORMING USE*

WHEREAS, in order to establish that the Permit was issued in error, the Appellant must demonstrate that (1) structural alterations were made to the Subject Building; (2) that the Subject Building was substantially occupied by the non-conforming eating and drinking establishment (Use Group 6); and (3) that such structural alterations were not made (a) in order to comply with requirements of law, (b) in order to accommodate a conforming use, (c) in order to conform to the applicable district regulations or performance standards, or (d) in the course of enlargement permitted under ZR §§ 52-41 through 52-46; and

### THE APPELLANT'S POSITION

WHEREAS, the Appellant raises two issues on appeal: (1) that the non-conforming use of the Premises was discontinued for a period of more than two years in violation of ZR § 52-61 and, therefore, that the Premises can only be used for a conforming use; and (2) that the Owner performed substantial structural alterations to the Subject Building thereby forfeiting the Owner's right to maintain the non-conforming use at the Premises; and

WHEREAS, the Appellant's position is that the non-conforming eating and drinking establishment at the site was discontinued for a period longer than two years; therefore, per ZR § 52-61, the Owner is not permitted to resume such use; and

WHEREAS, specifically, the Appellant states that it is undisputed that the eating and drinking establishment has not operated since the April 2007 vacate order; and

WHEREAS, the Appellant argues that the period of discontinuance permitted pursuant to ZR § 52-61 cannot be tolled pursuant to *149 Fifth Avenue Corp.* and attempts to distinguish that case from the instant matter on the grounds that (1) the non-conforming use at issue in *149 Fifth Avenue Corp.* was an insignificant nuisance whereas the subject non-conforming use is of significant nuisance potential for nuisance; (2) the discontinuation in *149 Fifth Avenue Corp.* was for a period of 27 months whereas the underlying discontinuance was for a period of over seven years; (3) that the granting of the subject appeal does not effect a regulatory taking while the lawful status of the non-conforming use at issue in *149 Fifth Avenue Corp.*, if vitiated, would have effected a taking; and

WHEREAS, the Appellant further argues that the final paragraph of ZR § 52-61, which exempts certain uses in certain buildings from the two-year discontinuance provision but excludes from that exemption buildings in historic districts designated by the LPC, suggests that the tolling doctrine announced in *149 Fifth Avenue Corp.* should not apply to ground floor commercial uses in R5, R6 and R7 districts which are also within historic districts; and

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WHEREAS, the Appellant also asserts that the court in *149 Fifth Avenue Corp.* intended its decision to be narrow and to apply only in like circumstances; and

WHEREAS, accordingly, the appellant concludes that DOB's reinstatement of the permit was contrary to the plain text of ZR § 52-61 and inconsistent with *149 Fifth Avenue Corp.*; and

WHEREAS, in addition, the Appellant contends that the Permit authorizes substantial structural alterations to the Subject Building in violation of ZR § 52-22, which, in relevant part, provides that:

[n]o structural alterations shall be made in a *building or other structure* substantially occupied by *non-conforming use*, except when made ... (a) in order to comply with requirements of law...; and

WHEREAS, the Appellant submits that ZR § 52-22 is intended to "phase-out" non-conforming uses and therefore prohibits the performance of structural alterations to buildings except when made to comply with the requirements of law; and

WHEREAS, the Appellant asserts that while the vacating and securing of the Subject Building were mandated by law, the structural alterations to the Subject Building were not; and

WHEREAS, therefore, the Appellant contends that DOB's issuance of the Permit violates ZR §§ 52-22 and 52-61; and

#### THE DEPARTMENT OF BUILDINGS' POSITION

WHEREAS, DOB states that the reinstatement was proper and conforms to the requirements of ZR § 52-61 as informed by *149 Fifth Avenue Corp.*; and

WHEREAS, DOB cites to *149 Fifth Avenue Corp.*, in which the Court stated:

Where, as here, interruption of a protected nonconforming use is compelled by legally mandated duly permitted and diligently completed repairs, the nonconforming use may not be deemed to have been "discontinued" in the meaning of Zoning Resolution § 52-61; and

WHEREAS, DOB states that by including the language "as here," the Court clearly contemplated applying its limited tolling principle in cases with facts different than those concerning a sign at *149 Fifth Avenue*; and

WHEREAS, DOB disagrees with the Appellant's position that the analysis in *149 Fifth Avenue Corp.* be limited to the specific facts and circumstances of the sign at *149 Fifth Avenue*; and

WHEREAS, DOB states that the circumstances and work history at the site meet the criteria set forth by the Court in *149 Fifth Avenue Corp.*, thereby allowing the tolling of the two-year discontinuance provision of ZR § 52-61 and the issuance of the Permit; and

WHEREAS, specifically, DOB states that (1) it

"legally mandated" the scope of work performed at the site; and (2) the Owner "diligently completed repairs" as per DOB's directives; and

WHEREAS, as to the legal mandate, DOB states that the work that was required to repair the damage to the Subject Building following the April 2007 partial collapse progressed under its direction and in response to unforeseen conditions at the site including that the zoning lot includes five interrelated Buildings which were constructed in the early 1800s; and

WHEREAS, specifically, DOB states that after the initial filing of the application to remove the south masonry wall and two chimneys from the Subject Building, the Owner was required to file four additional applications and six Post Approval Amendments due to the unique site conditions and interconnected nature of the historic buildings on the lot; and

WHEREAS, DOB notes that among the latent and unforeseeable conditions the Owner encountered at the site was the absence of a foundation, which necessitated the amendment of the plans for the reconstruction; and

WHEREAS, DOB notes that the prior appeal included the submission of engineering reports that further detail the structural complexity and instability of the site, including a broken steam pipe that caused significant soil erosion and interdependent building walls; one engineer opined that buildings were actually leaning upon one another; and

WHEREAS, DOB states that subsequently, in late 2008, the wall adjacent to 88 Bedford Street as well as the entire roof were determined to require replacement, thus requiring further modification and re-sequencing of the Work; and

WHEREAS, DOB states that in 2009, the planned reconstruction had to be further amended to account for a lack of foundation at the rear of the Subject Building; and

WHEREAS, further, also in 2009, DOB issued Emergency Declarations for the Subject Building and the as well as for 82-84 Bedford Street, which required the Owner to amend the plans once again while allowing for temporary shoring; and

WHEREAS, DOB states that in August 2009, the work at the Subject Building's second floor had to be halted following a finding of potential instability in the adjoining bearing wall at 58 Barrow Street; and

WHEREAS, DOB states that even with the remedial shoring measures in place, it had to issue a third Emergency Declaration in December 2009 to demolish the bearing wall at 58 Barrow Street, thereby delaying further performance of the Work at the Subject Building; and

WHEREAS, DOB adds that in addition to compliance with the legal mandate imposed by the filings and amendments, the Subject Building was subject to a full or partial Stop Work Order ("SWO") for significant periods of time between the April 2007 collapse and April 2014; and

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WHEREAS, according to DOB records, a full SWO was placed on the Subject Building on April 5, 2007 and was not fully lifted until June 30, 2009; and

WHEREAS, subsequent partial SWOs were in effect from July 23 to July 30, 2009, November 16 to December 22, 2009, April 14 to May 10, 2011, and May 10, 2012 to April 24, 2014; and

WHEREAS, DOB concludes that its direction to the Owner to file and obtain approval for amendments to plans to make the Subject Building safe and compliant and the imposition of SWOs for significant periods of time as tantamount to “legal mandates” that justify tolling of the discontinuance provisions akin to the legally mandated façade inspections that were sufficient to toll the discontinuance in *149 Fifth Avenue Corp.*; and

WHEREAS, as to the second finding in *149 Fifth Avenue Corp.*, DOB states that it accepts that the Owner diligently completed repairs as per its directives; and

WHEREAS, DOB notes that the Owner’s submissions in the prior BSA appeal as well as its staff engineer’s affidavit, describe the extensive, complex and interconnected repairs required at the Subject Building and the adjacent and contiguous Buildings following the 2007 collapse; and

WHEREAS, DOB asserts that it is important to make a distinction between *149 Fifth Avenue Corp.* “diligently” completed and the general concept of “quickly” completed work; and

WHEREAS, DOB finds that the owner satisfies the common definition of diligent which is “characterized by steady, earnest, and energetic effort” in that the Owner repeatedly advised DOB of changing circumstances and conditions in a complex and multi-faceted project and always sought DOB’s approval before proceeding with actions required to address the changing circumstances and conditions; and

WHEREAS, DOB also notes that in the prior appeal, the Owner provided substantial evidence that work at the site was nearly constant; such evidence included copies of contracts between the Owner and various sub-contractors and monthly payment requisitions; and

WHEREAS, DOB states that further evidence of the Owner’s diligence in its attempt to legalize the eating and drinking establishment use is that from April 5, 2007 to date DOB issued 19 Environmental Control Board Notices of Violation (ECB), which have all been resolved; and

WHEREAS, additionally, DOB states that it issued 32 ECBs for the other Buildings on the lot, all of which are now resolved; and

WHEREAS, DOB concludes that taking into account the complexity of working on five interconnected historic Buildings, the Owner’s ongoing communication with DOB and its success in resolving all outstanding ECBs, the owner has diligently completed repairs as

accepted by the Court in *149 Fifth Avenue Corp.*; and

WHEREAS, finally, DOB states that based on the Owner’s diligence, the failure to reestablish the eating and drinking establishment within two years should not lead to a termination of the use or the Owner’s inability to complete the application as approved; and

### THE OWNER’S POSITION

WHEREAS, the Owner, through counsel, submitted testimony reiterating its position that Chumley’s discontinuance was tolled under *149 Fifth Avenue Corp.*, because the eating and drinking establishment’s active operation was interrupted by legally-mandated repairs that were diligently completed under a valid permit; and

### CONCLUSION

WHEREAS, the Board notes that it is uncontested that Owner’s use of the Premises was lawful as of December 15, 1961, was not discontinued for a period of two years until April 2007 and remains discontinued at this time; and

WHEREAS, the Board finds that the two-year period of discontinuance set forth in ZR § 52-61 is properly tolled pursuant to *149 Fifth Avenue Corp.*, because the non-conforming use at issue was interrupted by legally-mandated repairs that were diligently completed under a valid permit; and, in addition, the Board finds that nothing in the record demonstrates that the Owner was precluded from performing structural alterations at the site; and

WHEREAS, as to the evidence of the legal mandate, the Board credits the affidavit of Timothy Lynch, sworn to on December 1, 2014, in which Mr. Lynch, the Assistant Commissioner for Investigative Engineering Services with the New York City Department of Buildings, avers that he: (1) directed Owner’s representatives to install emergency and secondary shoring at the Subject Building; (2) directed Owner’s representatives to complete hand demolition of the masonry wall and chimneys at both the Subject Building and the adjacent 82-84 Bedford; and (3) worked with Owner’s representatives to fashion a sequence of construction [of the Buildings]; and

WHEREAS, as to evidence of the diligent completion of the Work, the Board notes that, in response to latent conditions related to the age of the Buildings, DOB issued three separate Emergency Declarations which dictated the sequencing of the Work; and

WHEREAS, the Board also notes that the Subject Building was subject to a series of full and partial Stop Work Orders issued by DOB during the period commencing on April 5, 2007 and ending in April of 2014 when the Permit was reissued; and

WHEREAS, the Board finds that “diligent” completion of the work need not be expedient where, as here, the Owner has undertaken steady, earnest and energetic efforts to perform the Work; and

WHEREAS, the Board agrees with DOB that the

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Owner's evidence of diligence, including the contracts and monthly payment requisitions, demonstrates that work at the site was nearly constant; and

WHEREAS, the Board credits DOB's determination that, taking into account the complexity of the Buildings and Work, Owner's ongoing communication with DOB and adherence to DOB and LPC directives and instructions and Owner's resolution of all related outstanding ECB violations, that the Owner of the Subject Building has diligently completed repairs in an effort to re-establish its non-conforming use of the Premises as contemplated by the Appellate Division, First Department, in *149 Fifth Avenue Corp.*; and

WHEREAS, as to the final element of the *149 Fifth Avenue Corp.* tolling doctrine—that the work have been performed pursuant to a validly-issued permit—there is no dispute regarding the validity of the building permits issued by DOB throughout the course of the Work undertaken in order to resume the non-conforming use, except insofar as the Appellant asserts that the Permit violates ZR §§ 52-22 and 52-61; thus, the Board finds that legally-mandated, diligently performed repairs were performed pursuant to a valid permit; and

WHEREAS, the Board finds Appellant's argument that the tolling doctrine of *149 Fifth Avenue Corp.* should not apply to ground floor commercial uses in R5, R6 and R7 districts which are also within historic districts unavailing, and notes that neither the language relief upon by Appellant nor the undisputed fact that the Subject Building is located within an historic district impact the analysis proscribed in *149 Fifth Avenue Corp.*; and

WHEREAS, as to the Appellant's arguments that *149 Fifth Avenue Corp.* is distinguishable from the matter on appeal, the Board finds no merit in Appellant's argument that *149 Fifth Avenue Corp.* is applicable only in instances where the non-conforming use at issue is not of "significant nuisance potential," nor does the Board find merit in Appellant's contention, which is made in contravention of the Zoning Resolution, that advertising signs do not constitute a significant nuisance; and

WHEREAS, as to the Appellant's arguments that *149 Fifth Avenue Corp.* is distinguishable from the matter on appeal because the non-conforming use at issue in that case was discontinued for 27 months while the non-conforming use at issue herein was discontinued for many years, the Board finds that, while an important factor in determining whether repair work was diligently completed, the period of discontinuance beyond that

which is permitted in ZR § 52-61 is not dispositive; and

WHEREAS, the Board notes that the extensive and complicated repairs required to renovate the Subject Building, which are unique to two-hundred year old interrelated structures with extensive latent defective conditions, mitigate against strict adherence to the two-year period of permitted discontinuance where, as here, the Work was diligently completed; and

WHEREAS, as to the Appellant's arguments that *149 Fifth Avenue Corp.* is distinguishable from the matter on appeal because the Appellate Division, First Department, noted that a result contrary to its holding may raise a question about whether the Zoning Resolution authorized an unconstitutional taking, the Board finds that the Court's musing was mere *dicta* and was not relevant to the tolling doctrine announced therein; and

WHEREAS, in conclusion, the Board finds that DOB has sufficiently demonstrated that the Owner of the Subject Building would have re-established the non-conforming use of the Premises within the allowable time but for its performance of legally-mandated and diligently completed repairs which were performed in response to latent and undiscoverable conditions of the interrelated, 200-year old Buildings and which necessitated a re-sequencing of the Work so that the completion of the repairs necessary to reestablish the non-conforming use of the Premises were necessarily subordinate to the completion of repairs at the adjacent Buildings; and

WHEREAS, as to the Appellant's argument that ZR § 52-22 precludes the performance of the Work at the Building, the Board finds (1) that Appellant appears to have abandoned this argument and (2) that, in any event, failed to establish that the Building was "substantially occupied" by the non-conforming use at issue; therefore, the Board declines to examine whether, for the purposes of ZR § 52-22, the Work was performed "to comply with the requirements of law"; and

*Therefore it is Resolved*, that this appeal challenging the April 29, 2014 Final Determination is hereby *denied*.

Adopted by the Board of Standards and Appeals, February 24, 2015.

**A true copy of resolution adopted by the Board of Standards and Appeals, February 24, 2015.**

**Printed in Bulletin Nos. 9-10, Vol. 100.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

