

304-13-A, 312-13-A and 313-13-A

APPLICANT – Simons & Wright, for 517 West 19th Street LLC, owner; David Zwirner, lessee; Lan Chen Corp. 36-36 Prince Street, owner; David Zwirner, lessee; 531 West 19th Street LLC, owner; David Zwirner, lessee.

SUBJECT – Application November 19, 2013 – Appeals challenging Department of Building's determination that subject premises is considered an art gallery and therefore a Certificate of Operation for place of assembly shall be required. C6-2/WCH special district.

PREMISES AFFECTED – 517-519, 521-525, 531 West 19th Street, north side of West 19th Street between 10th and 11th Avenues, Block 691, Lots 15, 19 and 22, Borough of Manhattan.

COMMUNITY BOARD #4M

ACTION OF THE BOARD – Appeals Denied.

THE VOTE TO GRANT –

Affirmative:0

Negative: Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez4

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to three final determinations issued by the Department of Buildings (“DOB”); and

WHEREAS, the final determination with respect to the building located at 517 West 19th Street and Certificate of Occupancy No. 110362054 was issued on October 21, 2013, and states in pertinent part:

[t]he request to consider an art gallery as retail space in Group M occupancy (2008 Building Code classification) and not as an assembly Group A-3 occupancy is hereby denied; and

WHEREAS, the final determination with respect to the building located at 521 West 19th Street and DOB Application No. 103825372 was issued on October 30, 2013, and states in pertinent part:

[t]he request to consider an art gallery as retail space in Group M occupancy (2008 Building Code classification) and not as an assembly Group A-3 occupancy is hereby denied; and

WHEREAS, the final determination with respect to the building located at 531 West 19th Street and Certificate of Occupancy No. 104404431 was issued on October 30, 2013, and states in pertinent part:

[t]he request to consider an art gallery as retail space in Group M occupancy (2008 Building Code classification) and not as an assembly Group A-3 occupancy is hereby denied; and

WHEREAS, hereafter these determinations are referred to as the Final Determinations; and

WHEREAS, a public hearing was held on this appeal on May 6, 2014, after due notice by publication in *The City Record*, with a continued hearing on June 24, 2014, and then to decision on July 29, 2014; and

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

WHEREAS, the appeal is filed on behalf of the tenant of the three buildings, David Zwirner Gallery (the “Appellant” or the “Gallery”), which contends that DOB’s determinations were erroneous; and

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

WHEREAS, the subject site comprises Tax Lots 22 (517 West 19th Street), 19 (521 West 19th Street, and 15 (531 West 19th Street); and

WHEREAS, the is site located within a C6-2 zoning district, within the Special West Chelsea District; it has 225 feet of frontage along West 19th Street, and approximately 20,700 sq. ft. of lot area; and

WHEREAS, the site is occupied by three abutting buildings; Lot 22 is occupied by a one-story building, and Lots 19 and 15 are each occupied by a two-story building; and

WHEREAS, the Certificate of Occupancy (“CO”) for the building on Lot 22 (CO No. 110362054, issued October 30, 2009) authorizes the first story to be occupied as “Art Sales,” which the CO classifies as Use Group 6 and Occupancy Group M, and it establishes a maximum occupancy of 35 persons; and

WHEREAS, the CO for the building on Lot 19 (CO No. 103825372) is a temporary CO, which will expire on October 22, 2014; it authorizes the first story to be occupied as “Commercial Art Gallery,” which it classifies as Use Group 6C and Occupancy Group F-3, and it establishes a maximum occupancy of 128 persons; in addition, it authorizes accessory storage and offices for nine persons on the mezzanine and an accessory library and offices for three persons on the penthouse level; and

WHEREAS, the CO for the building on Lot 15 (CO No. 10440443) was issued on July 2, 2007; it authorizes the first and second stories to be occupied as “Art Sales,” “Offices,” and “Storage,” all of which it classifies as Use Group 6 and Occupancy Group “COM”; this CO establishes a maximum occupancy of 129 persons on the first story and 37 persons on the second story; and

WHEREAS, the Appellant represents that the buildings are connected by access openings and used both individually and conjunctively by the Gallery for the display and sale of art, art openings, and other events; and

PROCEDURAL HISTORY

WHEREAS, the Appellant states that in April 2012, it sought determinations from DOB confirming that none of the buildings at the site required the installation of a sprinkler system; in reviewing the requests, DOB determined that the COs for the buildings on Lots 22 and 15 should have been identified as assembly occupancies (F-3 under the 1968 Building Code) rather than as “Art Sales” occupancies (C under the 1968 Building Code); as such, DOB determined that the buildings failed to

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provide adequate egress, that the COs were issued in error, and that amended COs and Place of Assembly Certificates of Operation were required; and

WHEREAS, in addition, the Appellant states that DOB determined that although the Temporary CO for the building on Lot 19 correctly identifies the occupancy as assembly, the maximum number of persons permitted—the occupant load—was incorrectly calculated; as such, the building failed to provide adequate egress, the required Place of Assembly Certificate of Operation was never obtained, and the permit underlying the Temporary CO was subject to revocation; and

WHEREAS, in response, the Appellant filed a series of determination requests seeking reconsideration of the interpretation that the buildings were properly classified as assembly occupancies; these requests were denied by the Manhattan Borough Commissioner on February 5, 2013, and by the First Deputy Commissioner in October 2013, resulting in the issuance of the Final Determinations; and

WHEREAS, the Appellant then timely filed this appeal; and

WHEREAS, accordingly, the question on appeal is whether the Gallery at the site is, as DOB asserts, an assembly occupancy, or, as the Appellant asserts, a mercantile occupancy; and

DISCUSSION

A. THE APPELLANT’S POSITION

WHEREAS, the Appellant asserts that the Final Determinations are erroneous in that they: (1) classify the buildings on Lots 15 and 22 as assembly occupancies even though the buildings are primarily used for art sales; (2) fail to comply with the code requirement to calculate the occupant load for all three buildings based on actual usage; and (3) include reference to the 1938 Building Code despite the fact that none of the buildings was altered under the 1938 Building Code; and

WHEREAS, in the alternative, the Appellant contends that providing a second means of egress for the building located on Lot 19 is a sufficiently safe alternative to changing the classifications of the buildings on Lots 15 and 22 and obtaining Place of Assembly Certificates of Operation for all three buildings at the site; and

WHEREAS, the Appellant states that, per 1968 Building Code § 27-239, “every building hereafter erected or altered . . . shall be classified in one of the occupancy groups listed in Table 3-1 according to the main use or dominant occupancy of the building”; and

WHEREAS, the Appellant contends that the final determinations do not reflect that DOB complied with this provision; rather, the Appellant states that DOB classifies the buildings as “galleries” because they are tenanted by the David Zwirner Gallery and galleries appear in 1968 Building Code Table 3-2 as an illustrative example of an assembly occupancy; and

WHEREAS, the Appellant notes that the other F-3 occupancies provided in 1968 Building Code Table 3-2 (exhibition halls, gymnasias, museums, passenger terminals, bowling alleys, and skating rinks) are categorically distinct from the day-to-day operations of the buildings that comprise the David Zwirner Gallery; and

WHEREAS, the Appellant states that the Gallery is a place to purchase art; thus, it is primarily a mercantile occupancy rather than assembly occupancy and the usage of the term “gallery” is to connote the high-end nature of the business, akin to certain retail establishments that sell expensive jewelry under trade names including the word “gallery”; and

WHEREAS, the Appellant notes that 1968 Building Code § 27-232 defines an “assembly space” as “any part of a place of assembly, exclusive of a stage, that is occupied by numbers of persons during the major period of occupancy” and a “place of assembly” as “an enclosed room or space in which seventy-five or more persons gather for religious, recreational, educational, political or social purposes, for the consumption of food or drink, or for similar group activities or which is designed for use by seventy-five or more persons gathered for any of the above reasons”; and

WHEREAS, the Appellant asserts that neither definition supports classification of a gallery where art sales occur as an inherently assembly occupancy; the Appellant states that the buildings are not designed or used as a space to gather but rather as a space to sell art; and

WHEREAS, the Appellant observes that, per 1968 Building Code § 27-257, F-3 occupancies are characterized by occupancies in which persons are “physically active and do not have a common center of attention” and contrasts this description with the actual use of the Gallery, which the Appellant represents does not include physical activity and does include a narrow center of attention (pieces of art); and

WHEREAS, the Appellant notes that 1968 Building Code § 27-232 omits the words “retail” and “sales” from its list of activities for which people gather, which it states implies that retail and assembly uses are mutually exclusive; thus, because the buildings are primarily intended to facilitate sales of art, they are properly classified as mercantile occupancies; and

WHEREAS, further, the Appellant notes that 1968 Building Code § 27-248 indicates that “buildings and spaces shall be classified in the mercantile occupancy group when they are used for display and sales of goods accessible to public inspection” and that 2008 Building Code § 309.1 provides that mercantile group M includes “retail” and “sales rooms”; thus, because the Gallery is engaged in a retail business, the occupancy of the buildings is by definition mercantile; and

WHEREAS, in support of this assertion, the Appellant represents that the Gallery sold approximately

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2,025 works of art during the years 2010-2012 and that it sells approximately 750 art books per year; therefore, the Appellant contends that the buildings are primarily used for selling goods and thus properly categorized as mercantile occupancies; and

WHEREAS, to further support its assertion that the proper classification of the buildings is mercantile, the Appellant submitted a table reflecting that eight nearby art galleries have COs that do not classify the occupancy as F-3 or A-3; the COs range in issuance date from 2001 to 2014 and reflect a variety of use and occupancy descriptions; accordingly, the Appellant asserts that DOB has previously classified art galleries as mercantile and it is arbitrarily declining to classify the buildings on Lots 22 and 15 as mercantile in this case; and

WHEREAS, in addition, the Appellant states that the Final Determinations contain erroneous occupant load calculations, which result in occupant loads in excess of 74 persons per building and trigger the requirement to provide a second means of egress from each building and Place of Assembly Certificates of Operation for each building; and

WHEREAS, the Appellant states that, pursuant to 1968 Building Code § 27-358(b), “when the actual occupant load of any space will be significantly lower than that listed in Table 6-2, the commissioner may establish a lower basis for determination of occupant load”; thus, the typical occupancy of the buildings, which, the Appellant estimates is five to ten persons for the entire site per day, must be considered rather than the buildings’ capacity based on their floor area; and

WHEREAS, the Appellant asserts that the Final Determinations for the buildings located on Lots 22 and 15 erroneously employ the 1938 Building Code for the calculation of the required occupant load despite the fact that the permit applications were filed to comply with the applicable provisions of the 1968 Building Code; therefore, these final determinations are defective as a matter of law; and

WHEREAS, the Appellant also states that DOB cannot clarify the rationale for its Final Determinations on appeal; and

WHEREAS, accordingly, the Appellant requests that the Board grant the appeal, reverse the Final Determinations, and declare that Place of Assembly Certificates of Operation are not required for any of the buildings, including the building located on Lot 19; and

WHEREAS, finally, at hearing and in its final submission, the Appellant advanced alternative proposal in which the buildings on Lots 22 and 15 remain mercantile and the building on Lot 19 retains its classification as assembly but is altered to include a second means of egress; and

WHEREAS, the Appellant represents that because the buildings essentially operate as a single facility, four means of egress (one each from the buildings on Lots 22

and 15 and two from the building on Lot 19) is a sufficiently safe condition regardless of whether the facility is classified as mercantile or assembly; and

WHEREAS, thus, the Appellant alternatively requests that the Board grant the appeal subject to the inclusion of a second means of egress from the building on Lot 19; and

B. DOB’S POSITION

WHEREAS, DOB contends that that the Final Determinations were properly issued, in that: (1) each of the three buildings at the site is an assembly occupancy; and (2) the occupant load calculations indicate each building has an occupant load in excess of 74 persons, triggering the requirement to obtain a Place of Assembly Certificate of Operation; and

WHEREAS, DOB contends that the proper classification of all three buildings at the site is assembly; thus, to the extent that DOB has issued COs classifying the occupancy at the buildings on Lots 22 and 15 as other than assembly, it did so erroneously; and

WHEREAS, DOB asserts that the only applicable occupancy group for the Gallery under the 1968 Building Code and 2008 Building Code is the assembly occupancy, which includes art gallery occupancies; and

WHEREAS, DOB notes that 1968 Building Code § 27-241 directs an applicant to Table 3-2 and Reference Standard RS 3-3 for the list of representative occupancies that must be used as a basis for classifying buildings and spaces by occupancy; and

WHEREAS, DOB states that 1968 Building Code Table 3-2 identifies “galleries” as representative of the assembly occupancy group with the F-3 designation and Reference Standard RS 3-3 lists “art galleries” as belonging to the assembly Occupancy Group F-3; thus, DOB asserts that an “art gallery” occupancy is expressly categorized in the assembly occupancy group; and

WHEREAS, in addition, DOB states that an art gallery is consistent with the descriptions of assembly occupancy under 1968 Building Code §§ 27-254 and 27-257; and

WHEREAS, DOB observes that 1968 Building Code § 27-254 provides that buildings and spaces shall be classified in the assembly occupancy group when they are designed for use by any number of persons for recreational or social purposes or for similar group activities; DOB contends that art galleries are designed to accommodate people convened to view and buy artwork and therefore belong in the assembly category per § 27-254; likewise, 1968 Building Code § 27-257 provides that occupancy group F-3 shall include buildings and spaces in which the persons assembled are physically active and do not have a common center of attention; DOB contends that this description is suitable for art galleries, where viewers walk through the gallery spaces and direct their attention to various exhibits; and

WHEREAS, as to the 2008 Building Code, DOB notes that § BC 303 specifically lists “art galleries”

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among the A-3 assembly uses and § BC 303.1 provides that Assembly Group A includes the use of a building or portion thereof for the gathering together of any number of persons for purposes such as social functions, recreation or similar group activities; and

WHEREAS, thus, DOB asserts that art galleries are categorized in the assembly occupancy group by the specific and general descriptions of the 1968 and 2008 Building Codes; thus, DOB properly concluded that all three buildings at the site are F-3 assembly occupancies; and

WHEREAS, DOB notes that the appellant disavows the label used on the davidzwiner.com website (which describes the site as “a contemporary art gallery”) and disregards the plain meaning of the term “art gallery” as an establishment that displays and sells works of art; and

WHEREAS, DOB also observes that neither the 1968 Building Code nor the 2008 Building Code uses the term “art sales establishment”; thus, DOB states that there is no support for the Appellant’s classification of the buildings using that term; and

WHEREAS, DOB notes that the Appellant does not dispute that the buildings are used to display and sell art, and does not distinguish the activities at the site from those typical of art galleries; and

WHEREAS, DOB states that the concept that art gallery assembly occupancies should be classified as “art sales” mercantile occupancies must be rejected because art galleries do not have the degree of openness and organization of displays found in most mercantile occupancies that alleviate risks to life safety; and

WHEREAS, rather, DOB states that the arrangement, darkened spaces, opportunity for congestion and density of occupant loads associated with art galleries and other occupancies classified in the assembly group category creates a potential for fatality and injury from fire that is comparatively high; thus, building code limitations are generally more restrictive for assembly occupancies than for other group classifications; and

WHEREAS, similarly, DOB contends that the diversity of displays in the David Zwirner Gallery during recent exhibitions reveals their dissimilarity to the orderly displays of department store, drug store and convenience store mercantile occupancies; these displays include the following: (1) a recording studio film was shown from January 9 to February 22, 2014; (2) abstract sculptures made of cellophane, chalked paper and powder were arranged on the floor and suspended from the ceiling from February 28 to April 12, 2014; (3) a life-sized sculpture was encountered by viewers on a one-on-one basis in a mirrored room from March 6 to April 19, 2014; (4) a candy-making factory was installed from April 24 to June 14, 2014; and (5) contemporary art and sculpture was displayed on the wall, floor and ceiling from May 2 to June 14, 2014; and

WHEREAS, DOB contends that art galleries do not belong in the mercantile occupancy group merely because sales comprise a portion of gallery activities; occupancy groups are intended to capture the full scope of activities associated with a particular occupancy, not just one aspect, and occupancies that include the sale of merchandise, such as coffee houses (assembly occupancy) or barber and beauty shops (business occupancy), are not classified under the mercantile occupancy group because additional characteristics call for a more comprehensive classification to address the particular life safety concerns associated with such occupancies; and

WHEREAS, DOB states that with respect to the Gallery buildings, the design and arrangement of spaces and displays of artwork are indistinguishable from those found in museums, which are also F-3 assembly occupancies; given this similarity of design, DOB contends that the distinction that artwork can be purchased from a gallery but not from a museum is not relevant to the codes’ safety considerations; and

WHEREAS, DOB also disagrees with the Appellant that the classification of the buildings as assembly instead of mercantile violates 1968 Building Code § 27-239, which, as noted above, states that “[e]very building hereafter erected or altered . . . shall, for the purposes of this code, be classified in one of the occupancy groups listed in Table 3-1 according to the main use or dominant occupancy of the building”; as noted above, the Appellant asserts that the dominant occupancy of the building is mercantile because the majority of activities at the site are sales of art; and

WHEREAS, DOB asserts that the Appellant failed to submit evidence to demonstrate that the buildings’ main use or dominant occupancy is mercantile; further, DOB states that even if the buildings’ classification were mercantile, the 1968 Building Code § 27-238 requires that every “space or room . . . be classified in one of the occupancy groups listed in Table 3-1 according to the occupancy or use of the space or room,” and DOB classifies the spaces within the buildings as assembly; thus, DOB contends that the code requires the classification of both buildings and spaces and does not mandate that the classification of the building controls the classification of its spaces; and

WHEREAS, DOB also notes that this concept is reflected in COs, which specify the occupancy classification of a building as well as the occupancy groups that apply to specific parts of a building; and

WHEREAS, DOB also disagrees with the Appellant’s occupant load calculations and asserts that, based on its calculations, each building has a capacity of more than 74 persons and therefore must obtain a Place of Assembly Certificate of Operation; and

WHEREAS, DOB notes that 1968 Building Code § 27-358 and Table 6-2 establish the occupant load for an art gallery; according to Table 6-2, the occupancy

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“exhibition space” which is used for museums, is also used for art galleries because museums have spaces, activity and occupant volumes comparable to art galleries; per Table 6-2, the occupant load requirement for an “exhibition space” is ten sq. ft. of net floor area per occupant; and

WHEREAS, DOB states that, with respect to an art gallery assembly occupancy, areas used for the display of art work must be included in the net floor area calculation because art installations are changed over time as new pieces having various dimensions are displayed and sold; further, DOB notes that such display areas do not fall under any exclusion listed in 1968 Building Code § 27-232’s definition of “net floor area”; and

WHEREAS, DOB agrees with the Appellant that per 1968 Building Code § 27-358(b), it has the authority to establish a lower basis for determination of occupant load where appropriate; however, DOB contends that such a reduction is not appropriate for the Gallery given the size of the exhibition space; and

WHEREAS, DOB states that even though normal occupancy may be less than that determined by Table 6-2, the normal occupant load is not an appropriate design standard because the greatest hazard to occupants occurs when an unusually large crowd is present; and

WHEREAS, DOB asserts that using the exhibition space occupant load calculation of ten sq. ft. of net floor area per person, the following are the occupant loads for the buildings: (1) 460 persons for the building on Lot 22, which has approximately 4,600 sq. ft. of net floor area; (2) 253 persons for the building on Lot 19, which has approximately 2,535 sq. ft. of net floor area; and (3) 284 persons for the building on Lot 15, which has approximately 2,835 sq. ft. of net floor area; and

WHEREAS, consequently, DOB concludes that each building has an occupant load well in excess of 75 persons; as such, each building is a “place of assembly,” which according to 1968 Building Code § 27-232 is “an enclosed room or space in which seventy-five or more persons gather for religious, recreational, educational, political or social purposes, or for the consumption of food or drink, or for similar group activities or which is designed for use by seventy-five or more persons gathered for any of the above reasons;” and

WHEREAS, DOB notes that per 1968 Building

1 “Floor area (net)” is defined in the 1968 Building Code to include actual occupied area and to exclude permanent building components, as follows: “when used to determine the occupant load of a space, shall mean the horizontal occupiable area within the space, excluding the thickness of walls, and partitions, columns, furred-in spaces, fixed cabinets, equipment, and accessory spaces such as closets, machine and equipment rooms, toilets, stairs, halls, corridors, elevators and similar unoccupied spaces.”

Code § 27-525.1(a), it is “unlawful to use or occupy any building or premises or part thereof as a Place of Assembly unless and until a permit therefor has been issued”; accordingly, DOB states that each of the buildings requires a Place of Assembly Certificate of Operation; and

WHEREAS, as to the Appellant’s assertion that because the Final Determinations for the buildings located on Lots 22 and 15 erroneously employ the 1938 Building Code for the calculation of the required occupant load despite the fact that the permit applications were filed to comply with the applicable provisions of the 1968 Building Code, the determinations are defective as a matter of law, DOB disagrees; and

WHEREAS, DOB states that the Appellant specifically requested (by checking the applicable checkboxes on the determination request form) an analysis of the buildings’ occupancy classifications and compliance under 2008, 1968, and 1938 Building Codes; and

WHEREAS, thus, DOB asserts that it was merely being responsive to the Appellant’s request; and

WHEREAS, accordingly, DOB requests that the Board deny the appeal and affirm the Final Determinations; and

CONCLUSION

WHEREAS, the Board agrees with DOB that: (1) the occupancy of each building on the site is assembly; (2) based on the occupant loads for the buildings, Place of Assembly Certificates of Operation are required for each building; and (3) references to the 1938, 1968, and 2008 Building Codes in the Final Determinations were provided at the request of the Appellant, and, in any event, would not be an impediment to the Board’s resolution of this appeal; in addition, the Board declines to consider the Appellant’s alternative compliance proposal, as it has not been submitted to DOB for that agency’s consideration; and

WHEREAS, the Board finds that, based on the evidence submitted and the applicable provisions of the 1968 Building Code, the buildings have been appropriately classified by DOB as assembly occupancies; and

WHEREAS, the Board agrees with DOB that the only applicable occupancy group for the Gallery under the 1968 Building Code and 2008 Building Code is the assembly occupancy; and

WHEREAS, the Board finds that the applicable provisions of the 1968 Building Code expressly categorize a gallery as an assembly occupancy, in that § 27-241 directs an applicant to Table 3-2 and Reference Standard RS 3-3 for the list of representative occupancies that must be used as a basis for classifying buildings and spaces by occupancy and both Table 3-2 and Reference Standard RS 3-3 clearly identify “galleries” as representative of the assembly occupancy group; and

WHEREAS, likewise, the Board agrees with DOB

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that an art gallery is consistent with the descriptions of assembly occupancy under 1968 Building Code §§ 27-254 and 27-257; and

WHEREAS, the Board notes that 1968 Building Code § 27-254 classifies buildings in the assembly occupancy group when they are designed for use by any number of persons for recreational or social purposes or for similar group activities and the Board finds that an art gallery falls squarely within this classification; and

WHEREAS, the Board agrees with DOB that art galleries are designed to accommodate people convened to view and buy artwork and therefore belong in the assembly category per § 27-254; and

WHEREAS, likewise, the Board finds that art gallery patrons are physically active and do not have a common center of attention but rather may not follow a direct path as they examine various exhibits and installations; thus, per 1968 Building Code § 27-257, an art gallery is properly classified as an assembly occupancy; and

WHEREAS, as to the 2008 Building Code, the Board notes that § BC 303 specifically lists “art galleries” among the A-3 assembly uses and § BC 303.1 provides that Assembly Group A includes the use of a building or portion thereof for the gathering together of any number of persons for purposes such as social functions, recreation or similar group activities; and

WHEREAS, the Board disagrees with the Appellant that DOB determined that the David Zwirner Gallery was a gallery because its trade name include the word “gallery”; rather, DOB methodically examined the nature of the occupancy in light of the applicable provisions of the code, and concluded that the buildings at the site are properly classified as assembly occupancies; and

WHEREAS, the Board observes, as DOB notes, that neither the 1968 Building Code nor the 2008 Building Code uses the term “art sales establishment”; thus, the Board finds that there is no support in either code for the Appellant’s classification of the buildings using that term; and

WHEREAS, the Board also finds that an “art sales” mercantile occupancy is not appropriate for the buildings in question because they do not have the degree of openness and organization of displays found in most mercantile occupancies; likewise, as DOB’s catalog of recent exhibitions demonstrates (which include a film, a sculpture installation, and a candy-making factory), displays found within the Gallery have little in common with displays typically found in representative mercantile occupancies; and

WHEREAS, further, the Board agrees with DOB that the design and arrangement of spaces and displays of artwork are indistinguishable from those found in museums, which are also F-3 assembly occupancies; that a visitor can purchase the items on display at a gallery but

cannot, generally speaking, purchase the items on display at a museum is, in the Board’s view, an inconsequential distinction in the realm of occupancy classification; and

WHEREAS, similarly, the Board disagrees with the Appellant that having a substantial and lucrative sales component compels classification of the buildings as mercantile; whether an art gallery is highly successful is not a reasonable consideration in determining how to classify the art gallery occupancy; rather, as DOB asserts, the nature of the display and the anticipated behavior of the occupants control; and

WHEREAS, the Board also disagrees with the Appellant that the classification of the buildings as assembly instead of mercantile violates 1968 Building Code § 27-239; the Board finds that the Appellant failed to submit anything other than conclusory statements to demonstrate that the buildings’ “main use or dominant occupancy” is mercantile; further, even if the buildings’ classification were mercantile, the Board agrees with DOB that 1968 Building Code § 27-238 requires every space or room to be classified in one of the occupancy groups and the Board finds that DOB correctly classified the spaces within the buildings as assembly; thus, the Board concludes that both the majority of spaces within the buildings and the buildings themselves are properly classified within the assembly occupancy group; and

WHEREAS, similarly, the Board is not persuaded by the Appellant’s argument that because the typical number of visitors to the Gallery on a daily basis is ten persons or less, the buildings are not appropriately classified as assembly occupancies; first, the Appellant conceded at hearing that the number of visitors for special events and openings was significantly greater than ten persons; second, both Vice-Chair Collins and Commissioner Hinkson indicated at hearing that they had personally attended events at the Gallery and recall seeing numbers of persons well in excess of the typical occupant loads of the Gallery according to the Appellant; thus, the Board agrees with DOB that public safety dictates that a building or space be required to have sufficient egress for the maximum number of persons capable of occupying such building or space, rather than the “typical” number of persons; and

WHEREAS, as to the Appellant’s assertion that because eight nearby retail art galleries have COs that do not classify the occupancy as F-3 or A-3, DOB is arbitrarily refusing to classify the buildings on Lots 22 and 15 as mercantile, the Board does not agree; indeed, the Board finds nothing persuasive about the Appellant’s table; the actual COs themselves were not included, there are no plans associated with the information provided about the COs, and there is no indication whether the buildings have Place of Assembly Certificates of Operation; therefore, based on the Appellant’s table, it is impossible to determine the extent to which DOB’s issuance of these eight COs deviated in any meaningful respect from DOB’s position in the instant appeal; and

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WHEREAS, in addition, former Chair Srinivasan noted at hearing that her own research of property records in the neighborhood surrounding the site revealed art galleries that have COs for assembly occupancy, including the Jack Shainman Gallery at 513 West 20th Street (CO No. 101301002, issued December 27, 2011) and the Bortolami Gallery-Zieher Smith Gallery at 526-520 West 20th Street (CO No. 102824552, issued December 8, 2011); and

WHEREAS, therefore, the Board concludes that DOB correctly classified the buildings' occupancy as assembly; and

WHEREAS, the Board agrees with DOB's occupant load calculations and agrees that each building has a capacity of more than 74 persons and therefore each must obtain a Place of Assembly Certificate of Operation; and

WHEREAS, the Board finds that, pursuant to 1968 Building Code § 27-358 and Table 6-2, the occupant load for the exhibition space within the subject buildings is ten sq. ft. of net floor area per occupant; accordingly, the Board agrees with DOB that each building has an occupant load well in excess of 74 persons; and

WHEREAS, the Board also agrees with DOB that the areas used for the display of art work must be included in the net floor area calculation both because art installations are changed over time as new pieces having various dimensions are displayed and sold, and because areas used for art displays are not excluded from net floor area under 1968 Building Code § 27-232's definition of "net floor area"; and

WHEREAS, the Board finds that under 1968 Building Code § 27-358(b), DOB may establish a lower basis for determination of occupant load where appropriate, but is by no means required to where it determines doing so would not further public safety; thus, the Board finds, as DOB found, that a lower basis for determination of occupant load is not appropriate for the Gallery given the size of the exhibition space and the evidence that it holds events and openings in which hundreds of persons are permitted to occupy the gallery at once; and

WHEREAS, accordingly, the Board finds that each building is a "place of assembly" pursuant to 1968 Building Code § 27-232; and

WHEREAS, the Board also notes that the failure to obtain a Place of Assembly Certificate of Operation where required is contrary to 1968 Building Code § 27-

525.1(a); and

WHEREAS, turning to the Appellant's assertion that because the Final Determinations for the buildings located on Lots 22 and 15 erroneously employ the 1938 Building Code for the calculation of the required occupant load despite the fact that the permit applications were filed to comply with the applicable provisions of the 1968 Building Code, the determinations are defective as a matter of law, the Board is not persuaded; and

WHEREAS, first, as DOB notes, the Appellant specifically requested an examination of the buildings' occupancy classifications under the 2008, 1968, and 1938 Building Codes; second, and more importantly, the Board observes that DOB often clarifies the rationale for its determinations during the appeal process; thus, an appellant is given ample opportunity to respond to any arguments that DOB may not have presented at the agency level; and

WHEREAS, finally, at hearing, the Appellant advanced an alternative egress configuration for the buildings, which it represents provide a sufficient safe alternative to obtaining Public Assembly Certificates of Operation and new COs for the buildings on Lot 22 and 15; the Board declines to consider the Appellant's proposal, because it has not been submitted to DOB for consideration; and

WHEREAS, in conclusion, the Board affirms the Final Determinations classifying the buildings' occupancy as assembly and requiring a Place of Assembly Certificate of Operation for each building; and

Therefore it is Resolved, that the subject appeal, seeking a reversal of the Final Determinations, dated January 14, 2014, is hereby *denied*.

Adopted by the Board of Standards and Appeals, July 29, 2014.

A true copy of resolution adopted by the Board of Standards and Appeals, July 29, 2014.

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Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

