MEETING OF: **June 4, 2019**
CALENDAR NO.: **2018-166-A**
PREMISES: **40-31 82nd Street**
Block 1493, Lot 15
BIN No. 4619702

ACTION OF BOARD — Appeal denied.

THE VOTE —
Affirmative: Commissioner Sheta 1
Negative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown, and Commissioner Scibetta.....4

THE RESOLUTION —

WHEREAS, this is an appeal challenging Permit Number 421485805-01-NB (the "NB Permit"), issued by the Department of Buildings ("DOB") on September 20, 2018, for a two-story plus cellar and sub-cellar building at the subject premises, anticipated to be leased, in part, by a Use Group 6 retail store operated as Target; and

WHEREAS, a public hearing was held on this application on March 7, 2019, after due notice in *The City Record*, with a continued hearing on May 21, 2019, and then to decision on June 4, 2019; and

WHEREAS, Vice-Chair Chanda and Commissioner Ottley-Brown conducted inspections of the subject site and the surrounding area; and

WHEREAS, the subject site is bounded by 82nd Street to the west, Ithaca Street to the south and Baxter Avenue to the east, in an R6 (C1-3) zoning district, in Queens; and

WHEREAS, the site has approximately 167 feet of frontage along 82nd Street, 53 feet of frontage along Ithaca Street, 267 feet of frontage along Baxter Avenue and 23,439 square feet of lot area; and

WHEREAS, this appeal was filed on behalf of Queens Neighborhoods United, an unincorporated association of Queens residents and business owners ("Appellant"); and

PROCEDURAL HISTORY

WHEREAS, New Building Application Number 421485805 (the "NB Application") was filed at DOB on May 24, 2017, on behalf of the property owner of the subject premises to construct a two-story plus cellar and sub-cellar building at the premises (the "Proposed Building"); and

WHEREAS, the Zoning Diagram (ZD1) filed in conjunction with the NB Application, dated September 13, 2017, summarizes that the Proposed Building would be occupied by Use Group 6 uses on all of the levels of the Proposed Building, including 23,138 square feet of "Building Code Gross Floor Area" and 20,132 square feet of "Zoning Floor Area" on the ground floor and 23,392 square feet of "Building Code Gross Floor Area" and 0 square feet of "Zoning Floor Area" in the cellar; and

WHEREAS, DOB issued the NB Permit on June 15, 2018; and

WHEREAS, on or around August 8, 2018, Appellant submitted a Zoning Challenge and Appeal ("ZRD2"), alleging, *inter alia*, that the NB Permit should be revoked because a 15-year lease recorded at the Office of the City Register indicating that "approximately 23,580 square feet of space in the aggregate" would be leased to the Target Corporation suggested that the Proposed Building would be occupied by a Use Group 10 department store that is not permitted at the subject premises as-of-right, not a Use Group 6 use; and

WHEREAS, DOB accepted the ZRD2 on August 29, 2018, and by letter dated August 30, 2018, notified the property owner and the filing representative of DOB's intent to revoke the NB Permit for reasons set forth in an accompanying Notice of Objections unless sufficient information was provided to DOB within 15 days and ordered that all work at the premises stop immediately (the "Intent to Revoke Letter"); and

WHEREAS, objection number 1 of the Notice of Objections reads as follows:

> 1. The subject new development located within R6 overlay C1-3 Local Retail District area, the building contained as declared by applicant as retail use group 6 located at cellar and first floor (Schedule A submitted), as per submitted Zoning Analysis, and Approved Plans (under Objections Self Certified), or the first floor commercial retail calculated without counting cellar commercial retail area, of the pure Zoning Floor Area of the first floor even after taken all area deduction, it is already up to 18,706 sf. which is way over the maximum permitted in the C1-3 District of allowed 10,000 square feet, and by which of such first floor commercial retail under the use group 6 is contrary to Section 32-15 ZR, file amendment and revised plans to correct the space area; and

WHEREAS, on September 6, 2018, the property owner submitted revised plans and a revised Zoning Diagram indicating that all of the retail establishments in the Proposed Building would contain less than 10,000 square feet of commercial gross floor space and averring that "Retail Establishment A," understood from publicly available information to be leased by the Target Corporate for operation as a Target store, would occupy 23,392 commercial gross square feet and 0 square feet of "Zoning Floor Area" in the cellar of the Proposed Building and 745 square feet of floor area on the first floor (together, the "Commercial Space"); and

WHEREAS, having accepted the property owner's response to the Intent to Revoke Letter, DOB issued a Stop Work Rescind Order on September 10, 2018 and the NB Permit was re-issued on September 20, 2018; and

WHEREAS, the subject appeal was filed on or around October 18, 2018; and

WHEREAS, Appellant, DOB and the Target Corporation were all represented by counsel in this appeal; and

APPELLANT'S POSITION

WHEREAS, Appellant asserts that the NB Permit was unlawfully issued because it permits construction of the Proposed Building contrary to ZR §§ 31-00, 31-11 and 32-15; and

WHEREAS, those provisions read, in pertinent part, as follows:

> **§ 31-00 GENERAL PURPOSES OF COMMERCIAL DISTRICTS**
>
> The Commercial Districts established in this Resolution are designed to promote and protect public health, safety and general welfare. These general goals include, among others, the following specific purposes:
>
> (a) to provide sufficient space, in appropriate locations in proximity to residential areas, for local retail development catering to the regular shopping needs of the occupants of nearby residences, with due allowance for the need for a choice of sites;
>
> (b) [. . .]
>
> (c) [. . .]
>
> (d) to protect both local retail development and nearby residences against congestion, particularly in areas where the established pattern is predominantly residential but includes local retail uses on the lower floors, by regulating the intensity of local retail development, by restricting those types of establishments which generate heavy traffic, and by providing for off-street parking and loading facilities;
>
> [. . .]

* * *

§ 31-11 C1 Local Retail Districts

These districts are designed to provide for local shopping and include a wide range of retail stores and personal service establishments which cater to frequently recurring needs. Since these establishments are required in convenient locations near all residential areas, and since they are relatively unobjectionable to nearby residences, these districts are widely mapped. The district regulations are designed to promote convenient shopping and the stability of retail development by encouraging continuous retail frontage and by prohibiting local service and manufacturing establishments which tend to break such continuity;

* * *

§ 32-15 Use Group 6

C1 C2 C4 C5 C6 C8

Use Group 6 consists primarily of retail stores and personal service establishments which:

(1) provide for a wide variety of local consumer needs; and

(2) have a small service area and are, therefore, distributed widely throughout the City.

Public service establishments serving small areas are also included. Retail and service establishments are listed in two subgroups, both of which are permitted in all C1 Districts.

The *uses*[1] listed in subgroup A are also permitted within a *large-scale residential development* to provide daily convenience shopping for its residents.

A. Convenience Retail or Service Establishments

Bakeries, provided that *floor area* used for production shall be limited to 750 square feet per establishment [PRC-B]

[. . .]

Dry cleaning or clothes pressing establishments or receiving stations dealing directly with ultimate consumers, limited to 2,000 square feet of *floor area* per establishment, and provided that only solvents with a flash point of not less than 138.2 degrees Fahrenheit shall be used, and total aggregate dry load capacity of machines shall not exceed 60 pounds [PRC-B]

[. . .]

Variety stores, limited to 10,000 square feet of *floor area* per establishment [PRC-B]

B. Offices

[. . .]

C. Retail or Service Establishments

[. . .]

Carpet, rug, linoleum or other floor covering stores, limited to 10,000 square feet of *floor area* per establishment [PRC-B1]

[1] Words in italics are as defined in ZR § 12-10.

Cigar or tobacco stores [PRC-B]

Clothing or clothing accessory stores, limited to 10,000 square feet of *floor area* per establishment [PRC-B]

Clothing rental establishments, limited to 10,000 square feet of *floor area* per establishment [PRC-B]

[. . .]

Dry goods or fabric stores, limited to 10,000 square feet of *floor area* per establishment [PRC-B]

[. . .]

Furniture stores, limited to 10,000 square feet of *floor area* per establishment [PRC-B1]

[. . .]

Interior decorating establishments, provided that *floor area* used for processing, servicing or repairs shall be limited to 750 square feet per establishment [PRC-B]

[. . .]

Television, radio, phonograph or household appliance stores, limited to 10,000 square feet of *floor area* per establishment [PRC-B]

[. . .]

D. Public Service Establishments

[. . .]; and

WHEREAS, specifically, Appellant argues that the NB Permit is contrary to ZR § 31-00(d) because, Appellant alleges, Target stores generate heavy traffic and the locating of such store at the premises will frustrate existing traffic congestion in the surrounding area; contrary to ZR § 31-11 in that Target stores are regional, rather than local, shopping destinations and not suitable in C1 zoning districts; and contrary to ZR § 32-15 because, if Target is appropriately characterized as a Use Group 6 variety store, the Commercial Space contains more than 10,000 square feet of "*floor area*"; and

WHEREAS, Appellant asserts that Target is more suitably characterized as a Use Group 10 retailer, specifically, a department store, which is not a permitted use in a C1 zoning district, and that such interpretation is supported by ZR § 32-19, which states:

32-19 Use Group 10
C4 C5 C6 C8

Use Group 10 consists primarily of large retail establishments (such as department stores) that:

(1) serve a wide area, ranging from a community to the whole metropolitan area, and are, therefore, appropriate in secondary, major or central shopping areas; and

(2) are not appropriate in local shopping or local service areas because of the generation of considerable pedestrian, automobile or truck traffic.

A. Retail or Service Establishments

Carpet, rug, linoleum or other floor covering stores, with no limitation on *floor area* per establishment

Clothing or clothing accessory stores, with no limitation on *floor area* per establishment

Department stores

[. . .]

Television, radio, phonograph or household appliance stores, with no limitation on *floor area* per establishment

Variety stores, with no limitation on *floor area* per establishment

B. Wholesale Establishments

[. . .]; and

WHEREAS, Appellant particularly notes that ZR § 32-19 describes uses within Use Group 10 as large retail establishments that "are not appropriate in local shopping or local service areas because of the generation of considerable pedestrian, automobile or truck traffic" and that such description accurately describes Target, a retailer that, Appellant alleges, derives its clientele from a large geographical area; thus, the characterization of a Target store as a Use Group 6 variety store as-of-right at the subject site is inappropriate because the store will invite considerable pedestrian, automobile and truck traffic to an area that is already heavily congested; and

WHEREAS, Appellant concedes that some uses may be characterized as either Use Group 6 or Use Group 10, but notes that when listed in Use Group 10, uses such as variety stores, carpet, rug, linoleum or other floor covering stores and clothing or clothing accessory stores are permitted without a floor area limitation because larger stores serve the purpose of C4 zoning districts, "General Commercial Districts" that "provide for occasional family shopping needs . . . over a wide area" pursuant to ZR § 31-14, and C5 zoning districts, "Restricted Central Commercial Districts" that "serve the entire metropolitan region" pursuant to ZR § 31-15; and

WHEREAS, Appellant avers that the characterization of the a Target store as Use Group 10 is also supported by the legislative history of the 1961 Zoning Resolution, to wit, two studies commissioned by the City of New York prior to that resolution's adoption: (1) "The Plan for Rezoning the City of New York" by Harrison Ballard & Allen (1950) (the "1950 Study"), which distinguished "Residence Retail Districts," intended "to protect both residential and retail development against congestion . . . by regulating the intensity of retail development," from "Commercial Districts," meant to "provide sufficient space in appropriate locations for transactions of all types of commercial and miscellaneous service activities in beneficial relation to one another"; classified as Use Group 6 uses "needed for more or less daily shopping by persons residing nearby," which would be permitted in both "Residence Retail Districts" and "Commercial Districts"; and classified as Use Group 9 retail uses "used for occasional shopping by persons residing at a considerable distances, and therefore serve an area ranging from several square miles to the whole metropolitan area," which would be permitted in "Commercial Districts" and prohibited in "Residence Retail Districts"; and (2) "Zoning New York" by Voorhees Walker Smith & Smith (1958) (the "1958 Study"), which distinguished between C1 and C2 zoning districts designed to serve local needs, C4 zoning districts designed for the primary and secondary outlying shopping centers serving extensive service areas and C5 and C6 zoning districts that cater to the retail and commercial needs of the entire City and metropolitan region; and limited the size of establishments in C1 zoning districts because they are closely related to residential areas and larger establishments generate excessive pedestrian and vehicle traffic originating from outside of the immediate residential neighborhood; and

WHEREAS, Appellant additionally contends that the NB Permit is based on an erroneous application of the definition of "*floor area*," set forth in ZR § 12-10, to ZR § 32-15, which limits variety stores in Use Group 6 to "10,000 square feet of *floor area* per establishment"; and

WHEREAS, the definition of "*floor area*" provided in ZR § 12-10 states in relevant part:

> "Floor area" is the sum of the gross areas of the several floors of a *building* or *buildings*, measured from the exterior faces of exterior walls or from the center lines of walls separating two *buildings*. In particular, *floor area* includes:
>
> [. . .]

(o) any other floor space not specifically excluded.

However, the *floor area* of a *building* shall not include:

(1) *cellar* space, except where such space is used for dwelling purposes. *Cellar* space used for retailing shall be included for the purpose of calculating requirements for *accessory* off-street parking spaces, *accessory* bicycle parking spaces and *accessory* off-street loading berths [(the "Cellar Space Exclusion")];

[. . .]; and

WHEREAS, Appellant asserts, therefore, that the portion of the Commercial Space located in the cellar was incorrectly deducted from the "*floor area*" calculation of the Commercial Space pursuant to the Cellar Space Exclusion because the exclusion is based on, and therefore, only applicable to, calculations of the "*floor area* of a *building*"; [2] and

WHEREAS, instead, Appellant argues that the phrase "per establishment," utilized in ZR § 32-15, is distinct from the phrase "of a *building*," utilized in the ZR § 12-10 definition of "*floor area*" and must be given meaning, in particular, reference should not be made to Cellar Space Exclusion, which specifically relates to the "*floor area* of a *building*"; and

WHEREAS, accordingly, Appellant asserts that the Commercial Space consists of 23,580 square feet of floor area located on both the ground floor and cellar level, far more than the 10,000 square foot floor area limitation set forth in ZR § 32-15 for variety stores permitted as-of-right in a C1 zoning district; and

WHEREAS, Appellant argue that their suggested interpretation of ZR §§ 12-10 and 32-15 is consistent with those provisions' respective purposes: the ZR § 12-10 definition of "*floor area*" is meant to aid in calculating the allowable bulk and/or density of a particular building whereas ZR § 32-15, a use, rather than a bulk, restriction, is to be utilized in calculating the allowable size of an establishment, without reference to its location in a particular building; and

WHEREAS, Appellant suggests that, per the explicit language of the ZR § 12-10 definition of "*floor area*"—specifically, the introduction to the Cellar Space Exclusion which begins, "However, the *floor area* of a *building* shall not include . . . ."—the Cellar Space Exclusion, as well as the other exclusions that follow, is applicable only when calculating the "*floor area* of a *building*" and because "*floor area*," in this case, is being calculated "per establishment," the Cellar Space Exclusion is not applicable; and

WHEREAS, Appellant alleges that the permitting of the Commercial Space as a Use Group 6 use, despite the locating of over 23,000 square feet of the establishment in the cellar, is an absurd result that frustrates the statutory purpose of ZR § 32-11, which reserves C1 zoning districts for local retail, because it permits retail stores of unlimited size in cellars; and

WHEREAS, such an interpretation, the Appellant urges, allows for the locating of a destination retailer in a Local Retail district meant for local shopping, invites additional traffic to an already congested area and, ultimately, displaces existing local retailers; and

DOB'S POSITION

WHEREAS, DOB argues that, pursuant to ZR § 32-15, variety stores with less than 10,000 square feet of "*floor area* per establishment" are permitted as-of-right at the premises; that, pursuant to the ZR § 12-10 definition of "*floor area*," space in the cellar may be excluded from the calculation of "*floor area*"; thus, the 23,392 square feet located in the cellar of the Proposed Building was properly excluded from the Commercial Space's "*floor area*" and the NB Permit was lawfully issued; and

[2] "Building" is defined in ZR § 12-10, in relevant part, as any structure located within the lot lines of a zoning lot, permanently affixed to the land with one or more floors and a roof, bounded by open area or fire walls with at least one primary entrance, provides all the vertical circulation and exit systems required by the New York City Building Code without reliance on other buildings, including required stairs and elevators and contains all the fire protection systems required by the Building Code without reliance on other buildings, including fire suppression or fire alarm systems. Pursuant to ZR § 12-01(e) ('Rules Applying to Text of Resolution"), "[a] 'building' or 'structure' includes any part thereof."

WHEREAS, in support of its determination to issue the NB Permit, DOB cites Raritan Development Corp. v. Silva, 91 N.Y.2d 98 (1997), in which the New York Court of Appeals found that the prior text of the ZR § 12-10 "*floor area*" definition—which read in pertinent part, "However, the *floor area* of a *building* shall not include (a) *cellar* space" without qualifications—unambiguously excluded all cellar space, regardless of its use, from "*floor area*" and that DOB erred in interpreting the definition to only allow the exclusion of floor space in the cellar used for non-habitable purposes and insisting that a habitable room in the cellar of a two-family dwelling constituted "*floor area*"; and

WHEREAS, DOB notes that the ZR § 12-10 definition of "*floor area*" was subsequently revised to read as it does today—allowing the exclusion of cellar space, "except where such space is used for dwelling purposes"—but that DOB is unaware of any case law or other authority contradicting the holding in Raritan, that is, that cellar space is to be excluded from calculations of "*floor area*" as defined in ZR § 12-10, unless it is otherwise expressly included; and

WHEREAS, DOB states that Appellant does not dispute that the limitation on Use Group 6 variety stores set forth in ZR § 32-15 uses the defined term, "*floor area*," meaning, as all uses of defined terms in the Zoning Resolution do, that the term is to be interpreted as it is defined in ZR § 12-10, including the portion that permits cellar space to be excluded from "*floor area*" calculations; and

WHEREAS, DOB acknowledges that the floor area limitation is "per establishment," but argues that the straightforward and unambiguous meaning of the limitation is that it is to be applied individually to each Use Group 6 business enterprise (establishment) located in a building, rather than on all Use Group 6 uses in a building; and

WHEREAS, DOB states that the term "*floor area*," defined in ZR § 12-10 as "the sum of the gross areas of the several floors of a *building* or *buildings*," includes all of the building's various components, its floors as well as its establishments, therefore, "*floor area* of a *building*" cannot be calculated differently from the "*floor area* per establishment"; and

WHEREAS, DOB additionally asserts that its determination to issue the NB Permit is consistent with structure of the ZR § 12-10 definition of "*floor area*," and in particular the Cellar Space Exclusion which, while excluding the cellar space for purposes of calculating "*floor area*," expressly requires the inclusion cellar space "used for retailing" for purposes of calculating requirements for accessory off-street parking spaces, bicycle parking and off-street loading berths, demonstrating that the legislature is aware, first, that cellar space may be "used for retailing" and, second, that such space, while excluded from "*floor area*" calculations, should nevertheless be included for purposes of calculating the number of parking spaces, et al. an establishment must provide to mitigate its impact on the surrounding community; and

TARGET'S POSITION

WHEREAS, Target confirms that the corporation entered a lease to occupy the Commercial Space in the Proposed Building as a Use Group 6 variety store in compliance with ZR § 32-15 and states that the ZR § 12-10 definition of "*floor area*," DOB's consistent application of that definition and binding case law are all clear that cellar space used for retail purposes is not included in the calculation of "*floor area*"; and

WHEREAS, Target avers that the language of the Zoning Resolution is clear and unambiguous and that, because the Target store proposed in the Commercial Space will occupy less than 10,000 square feet of "*floor area*," the NB Permit was properly issued for a Use Group 6 variety store at the subject premises; and

WHEREAS, Target notes that ZR § 12-10 (DEFINITIONS) starts, "Words in the text or tables or this Resolution which are *italicized* shall be interpreted in accordance with the provisions set forth in this Section," thus, the use, in italics, of the term "*floor area*" with regards to the 10,000 square foot limitation on Use Group 6 variety stores set forth in ZR § 32-15 evidenced an intention for the term to be interpreted as defined in ZR § 12-10, the Cellar Space Exclusion included; and that DOB has consistently interpreted ZR §§ 32-15 and 12-10 to allow the exclusion of cellar space used for retailing from the "*floor area*" of other Use Group 6 variety stores, most notably, DOB recently approved the Zoning Resolution Determinations filed for two Target stores located within C1 zoning districts (500 East 14th Street, Manhattan, located in a C1-6A zoning district and containing 17,000 square feet of cellar space (DOB Control No. 45352, Approved with Conditions August 9, 2016); and 1201 Third Avenue, Manhattan, located in a C1-9 zoning district and

containing 12,477 square feet of cellar space (DOB Control No. 55551, Approved with Conditions October 9, 2018)) and confirmed that cellar space for those stores may be excluded from the calculation of "*floor area*" pursuant to ZR § 12-10; and

WHEREAS, Target acknowledges that the Zoning Resolution calculates space as "*floor area*" in a "building" and describes "establishments" as existing within buildings, but argues that nothing in the zoning text supports Appellant's assertion that "*floor area* per establishment" should be calculated differently from "*floor area* of a *building*"; and

WHEREAS, Target states that while "establishment" is not a defined term in the Zoning Resolution, the word is used throughout the text to refer to individual stores, facilities or places of business located within a "building" and, since multiple "establishments" may be located within a single "building," there is no rationale for calculating "*floor area* per establishment" differently than one would calculate the "*floor area* of a *building*," specifically, ignoring the Cellar Space Exclusion and including such space in the calculation of "*floor area* per establishment," but applying the Cellar Space Exclusion and excluding such space in the calculation of the "*floor area* of a *building*"; and

WHEREAS, Target argues that Appellant's claims that the introductory text of ZR §§ 32-15 and 32-19 prohibit the issuance of the NB Permit are not supported by the case law, most notably Coalition for Community Preservation & Stabilization, Inc. v. Board of Standards & Appeals (Sup Ct, Queens County 1985), in which the Supreme Court upheld the Board's determination that a Home Depot store was properly designated as an as-of-right Use Group 6 hardware store, and Applebaum v. Deutsch, 66 N.Y.2d 975 (1985), in which the Court of Appeals upheld a Board determination that a non-profit institution qualified as a community facility, rejected the Appellate Division dissenters' position that "introductory statements at the head of the zoning resolution sections listing which uses constitute 'community facilities' are to be read as conditions precedent to granting a permit"; observed that "[t]he resolution itself provides that brief statements are inserted at the start of each 'Use Group' to describe and clarify the basic characteristics of the various uses listed" and, accordingly, held that such introductory statements are not conditions precedent to the granting of a building permit; and

WHEREAS, Target additionally notes that in certain locations within New York City, the Zoning Resolution explicitly includes cellar space when limiting the overall size of uses and establishments with reference to the defined term "*floor area*"; for example, pursuant to ZR § 111-13(a)(3) (Additional Use Regulations), Use Group 6A and 6C uses in "buildings" located in Subareas A1 and A3 of the Special Tribeca Mixed Use District and fronting on Chambers Street, Church Street, Greenwich Street, Hudson Street or West Broadway "shall be limited to 20,000 square feet of *floor area* on a *zoning lot*, including retail *cellar* space allotted to such *uses*…" and pursuant to ZR § 137-22 (Community Facility Use), certain ambulatory diagnostic or treatment health care facilities located within Special Coastal Risk Districts are limited "on any *zoning lot* to 1,500 square feet of *floor area*, including *cellar* space"; and

WHEREAS, accordingly, Target states that the 23,392 square feet located in the cellar of the Proposed Building and intended to be occupied by a Use Group 6 variety store was properly excluded from the "*floor area*" calculation of Retail Establishment A, consistent with ZR § 32-15, which limits the size of Use Group 6 variety stores to "10,000 square feet of *floor area* per establishment," and ZR § 12-10, which excludes from the calculation of "*floor area*" "*cellar* space, except where such space is used for dwelling purposes"; thus, the NB Permit was properly issued and the subject appeal should be denied by the Board; and

ADDITIONAL TESTIMONY

WHEREAS, the New York City Department of City Planning ("DCP") submitted a letter, dated March 4, 2019, in support of DOB's issuance of the NB Permit, stating that the size limitations stated in ZR § 32-15 are as to "*floor area*," a term defined in ZR § 12-10 to explicitly exclude the area of a cellar, thus the cellar space in a retail establishment utilized for retailing is excluded from the calculation of the establishment's "*floor area*"; and

WHEREAS, DCP states that the exclusion of cellar space from "*floor area*" and inclusion of cellar spaces for purposes of calculating accessory parking and loading requirements has been a feature of the Zoning Resolution since 1961, is intended to allow retail uses in cellar spaces while also limiting potential adverse parking and loading impacts of larger establishments and allows retail establishments that were typically larger in 1961, and that are limited to "*floor area* per establishment," to locate on local commercial streets, minimizing dead commercial street frontage while also avoiding the negative visual impact of very large stores; and

WHEREAS, with regards to the characterization of the use as Use Group 6 variety store, DCP states that the Zoning Resolution regularly lists uses in more than one use group, allowing those uses in different zoning districts and implying that the use may be categorized under the Use Group permitted as-of-right in the zoning district in which the use is located—for example, doctor's offices are included in Use Group 6 as professional offices permitted in commercial and manufacturing districts as well as in Use Group 4 as ambulatory diagnostic or treatment health care facilities, which may be located in residence districts; that the categorization of a use, while subject to DOB review and approval, is at the discretion of the permit applicant; and that retail models have evolved over time to serve the evolving needs of the public and the neighborhoods in which the retailers are located, to wit, DCP reports that there are currently 28 Target stores either planned or open in New York City ranging in size from 150,000 square feet in a shopping center in Staten Island to 18,000 square feet and these stores carry a large variety of merchandise characteristic of variety stores; and that DCP typically defers to DOB as to the categorization of uses, but there is, admittedly, little to distinguish a department store from a variety store in this instance; and

WHEREAS, DCP offers, as a comparison, "drug stores," permitted without size limitation as Use Group 6 and which now include larger format stores that carry apparel, housewares, beach and outdoor furniture, hardware, groceries and home furnishings in addition to prescription drugs and suggests that retail models evolve to meet the changing needs of the communities in which they are located; and

WHEREAS, in reply to Target and DOB's initial submissions, and prior to the initial hearing, Appellant claims that Raritan, cited by DOB, is inapposite to the subject appeal because the question in that case was whether cellar space utilized for dwelling purposes was to be included in the calculation for "*floor area* of a *building*" (in that case, a two-family residence), but that the question presented in this appeal is with regards to the calculation of "*floor area* per establishment"; that Appelbaum, cited by Target, "simply agreed" that a particular Board interpretation of prefatory language in a Use Group descriptions was "something less than 'conditions precedent,'" but that, consistent with that decision, the Board "must rely on the introductory statements that describe U[se] G[roup] 6 for 'guidance in interpreting the resolution," 66 N.Y.2d at 977, and that both the express language and the intent of the Zoning Resolution are relevant in this appeal; and

WHEREAS, with regards to the Special Tribeca Mixed Use District regulations identified by Target in their submission in opposition to this appeal, Appellant claims that these regulations support Appellant's argument that "*floor area* of a *building*" is distinct from "*floor area* per establishment" because the restriction set forth in ZR § 111-13(a)(3), which Appellant calls "a different kind of restriction on use," is based on the total floor area dedicated to a particular use across a "zoning lot," which could include several establishments and several buildings and that the provision "correctly clarifies that floor space in the cellar should be included when calculating the floor area of a 'building' that is dedicated to a particular use as it would otherwise be excepted from that calculation"; and

WHEREAS, Appellant additionally argues that the North American Industry Classification System ("NAICS") defines "Variety Store" as:

> Establishments primarily engaged in selling a variety of merchandise, such as inexpensive apparel and accessories, costume jewelry, notions and smallwares, candy, toys, and other items in the low and popular price ranges. These establishments generally do not carry a complete line of merchandise, are not departmentalized, do not offer their own charge service, and do not deliver merchandise; and

WHEREAS, Appellant alleges that Target carries a complete line of merchandise that is organized in departments and the corporation has its own charge service, therefore, it does not qualify as a "variety store" under the NAICS and, as the Zoning Resolution does not provide an alternative definition for "variety store," Target cannot be classified as a Use Group 6 variety store at all, regardless of how much "*floor area*" it is intended to occupy at the premises; and

WHEREAS, Appellant avers that the question of whether Target is properly classified as a Use Group 6 variety store is similar to the question in the appeal filed and decided under BSA Cal. No. 74-93-A (112-20 Rockaway Boulevard, Queens) in which the Board considered whether DOB's properly classified a proposed Home Depot as a Use Group 6A hardware store rather than a Use Group 16A or 17A "building materials dealer" and argues that the Board must rely, as it did

in that case, on the introductory statements describing Use Group 6 uses to determine whether the development is properly characterized as Use Group 6; and

WHEREAS, in a submission following the initial public hearing, Appellant refers to certificates of occupancy issued to 12 developments throughout the City occupied in part by a Target store that include reference to a Use Group 10 occupancy[3] and argues that the characterization of the store intended for the Commercial Space as a Use Group 6 variety store is, thus, incorrect and intended to mislead DOB; notes that the term "*floor area*" appears in the Zoning Resolution without "of a *building*" as a modifier, suggesting that not all "*floor area*" is "*floor area* of a *building*" and refers to ZR §§ 36-21 (General Provisions of Required Accessory Off-Street Parking Spaces for Commercial or Community Facility Uses), 36-62 (Required Accessory Off-street Loading Berths) and 36-711 (Enclosed bicycle parking spaces) as provisions that use "*floor area*," not "*floor area* of a *building*," as the basis for calculating those requirements; and asserts that the instruction in the ZR § 12-10 definition of "*floor area*" to include cellar space used for retailing for purposes of calculating accessory off-street parking spaces, et al. is "a restatement of how to treat retail floor area in the cellar . . . a summary provided for the convenience of the reader, not a new rule"; and

WHEREAS, in their response to Appellant's post-hearing memorandum, counsel for Target further states that Target may qualify as either a Use Group 6 variety store or a Use Group 10 department store and such designations are not mutually exclusive as the Zoning Resolution lists several uses in more than one use group, thereby allowing the uses in different zoning districts, and that in zoning districts in which only one use is allowed, a permit applicant has no choice but to choose the use permitted as-of-right—in this instance, such use was Use Group 6 variety store; and

WHEREAS, in response to Appellant's post-hearing memorandum, DOB states that the characterization of certain Target stores in New York City as a Use Group 10 department store is irrelevant to the use group characterization of the store proposed to occupy the Commercial Space because it is both factually possible and lawful for a use to be classified as more than one use and/or to be listed in different use groups; that the relevant question in this appeal is whether the Commercial Space has more than 10,000 square feet of floor area; that because "variety store" is not defined in the Zoning Resolution DOB looked to the term's plain meaning, notably, Merriam-Webster's definition as "a retail store that carries a wide variety of merchandise of low unit value," and determined, based on DOB's experience and publicly available information, that Target stores satisfy that definition because they offer food items, cosmetics, hygiene products, toys, office supplies and housewares for sale; that NAICS classifies "general merchandise stores," under which "variety stores" are listed as an illustrative example, separately from "department stores"; that the wide variety of merchandise offered for sale at Target serves a "wide variety of local consumer needs" and Targets are widely distributed throughout the City, satisfying both general characteristics ascribed to Use Group 6 uses in ZR § 32-15; that even in cases where Target is listed as a Use Group 10 use on certain certificates of occupancy, as in the CO for the Target located on Greenwich Street in Manhattan, and on Austin Street in Queens, it is categorized as a "variety store," further justifying its characterization as a "variety store" at the subject premises; that the NAICS "variety store" definition cited by Appellants dates from 2008 and does not appear in the most recent NAICS manual, published in 2017, but that, nevertheless, Target stores match that "variety store" definition proffered by Appellant because it is primarily engaged in selling items "in the low and popular price ranges" and, to the extent the stores have departments, offer their own charge service and/or deliver merchandise, these features are not inconsistent with the definition, which states that variety stores "generally" lack such characteristics, thus implying that some variety stores may; that Target is distinguishable from famous department stores like Macy's, Lord & Taylor, JC Penney and Bloomingdales, which are all generally much larger than the Target proposed for the Commercial Space and dedicate larger proportions of their floor space to clothing sales; that retail drug stores also have "departments" in the manner of labeled aisles, but are generally classified as Use Group 6B drug stores," hence the presence of "departments" does not automatically render a retail use a Use Group 10 "department store"; that Appellant's argument that "*floor area* per establishment" should include the cellar space as floor area and "*floor area* of a *building*" should not is non-sensical because all "*floor area*," defined in ZR § 12-10 as "the sum of the gross areas of the several floors of a *building* or *buildings*," is "of a *building*"; that the exception to the general exclusion of cellar space from "*floor area*" for cellar space used for dwelling purposes as well as the explicit inclusion of cellar space used for retailing for purposes of

[3] Those developments are located at (1) 69-40 Austin Street, Queens; (2) 1715 East 13th Street, Brooklyn; (3) 88-01 Queens Boulevard, Queens; (4) 255 Greenwich Street, Manhattan; (5) 445 Gold Street, Brooklyn; (6) 139 Flatbush Avenue, Brooklyn; (7) 517 East 117th Street, Manhattan; (8) 700 Exterior Street, Bronx; (9) 131-07 40th Road, Queens; (10) 135-05 20th Avenue, Queens; (11) 1865 Broadway, Manhattan; and (12) 1520 Forest Avenue, Staten Island.

calculating accessory off-street parking requirements, among others, evinces the drafters' ability and authority to make exceptions to what space should be exempt from calculations of "*floor area*"; that the 10,000 square foot floor area limitation on Use Group 6 variety stores" is with regards to "establishments" because the intent of the limitation was neither to limit the overall commercial space of the building in which the establishment was located, which could be done by a commercial floor area restriction, nor to necessarily limit vehicular traffic, since there are other Use Group 6 uses, such as supermarkets, with unlimited floor area per establishment that generate a higher accessory off-street parking requirement than a variety store[4] and, therefore, are expected to attract more traffic; and

WHEREAS, counsel for the owner of the premises submitted a letter in opposition to this appeal, dated April 24, 2019, stating that the ZR § 12-10 definition of "*floor area*" is unambiguous in its exclusion of cellar floor space from the "*floor area*" of an establishment for purposes of complying with the 10,000 square foot of floor area limit for Use Group 6 variety stores and providing a list of six Target locations in New York City with certificates of occupancy classifying Target as a Use Group 6 "retail" use[5]; and

WHEREAS, several elected officials submitted letters in support of this appeal citing concerns that the locating of a Target at the premises will adversely impact small businesses in the area that exemplify "local retail" because they are operated by local residents that serve neighborhood needs, encourage gentrification and displacement by raising rents, further crowd the already crowded 7 train and exacerbate vehicular traffic in the area, in particular, further frustrate the ability of emergency vehicles to reach the Elmhurst Hospital Center located a few blocks away from the subject site; and

WHEREAS, the Board also heard hours of public testimony and received two letters in support and more than 150 additional letters in opposition to this appeal, citing concerns that the locating of a Target store at the subject premises will displace local small businesses, increase crowding on the subway, street traffic and travel times to Elmhurst Hospital and adversely impact the affordability of the area; and

DISCUSSION

WHEREAS, a majority of the Board finds that the ZR § 12-10 definition of "*floor area*" is clear and unambiguous and that the use, in ZR § 32-15, of the defined term "*floor area*" in the "10,000 square feet of *floor area* per establishment" limitation on Use Group 6 variety stores requires the interpretation of that limitation in accordance with the ZR § 12-10 definition of "*floor area*"; that, consistent with the ZR § 12-10 definition of "*floor area*" and the Cellar Space Exclusion, 23,392 square feet of floor space in the cellar of the Proposed Building was properly excluded from the "*floor area*" of the Commercial Space as well as the Proposed Building; that the Commercial Space, a proposed Target store, contains less than 10,000 square feet of "*floor area*"; that the categorization of the Commercial Space as a Use Group 6 variety store is consistent with ZR § 32-15; and that, therefore, the NB Permit was lawfully issued; and

WHEREAS, the Board notes that while the present wording of Cellar Space Exclusion is the result of an amendment to the text in 1999 subsequent to the Court of Appeals' decision in Raritan, the precise portions of the text in question in this appeal have existed since the adoption of the Zoning Resolution in 1961—that is, the only phrases that distinguish the current Cellar Space Exclusion from the 1961 text are the additions of "except where such space is used for dwelling purposes" and "accessory bicycle parking spaces"[6]; and

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[4] In a C1-3 zoning district, Use Group 6 uses in Parking Requirement Category ("PRC") B, such as variety store, are required to provide "1 [parking space] per 400 sq. ft. of *floor area*" and food stores in PRC-A are required to provide "1 [parking space] per 300 sq. ft. of *floor area*." ZR § 36-21.

[5] Those stores are located at (1) 50 West 225th Street, Manhattan (CO No. 103171933); (2) 500 East 14th Street, Manhattan (Temporary CO No. 121185519); (3) 815 Hutchinson River Parkway, Bronx (Temporary CO No. 220139516); (4) 145 Clinton Street, Manhattan (Temporary CO No. 121186938); (5) 6401 18th Avenue, Brooklyn (CO No. 3P0008032); and (6) 69-32 Austin Street, Queens (Temporary CO No. 400527505). Both the owner and Appellant identified the Austin Street, Queens, Target location to advance their arguments that Target stores are consistently characterized as Use Group 6 and Use Group 10, respectively. The referenced certificate of occupancy indicates both Use Group 6 "retail stores" and Use Group 10A "variety store" at the basement level and Use Group 10A "variety store" at the first floor.

[6] In 1961, this portion of the text read:

> However, the *floor area* of a *building* shall not include:
>
> (a) *Cellar* space, except that *cellar* space used for retailing shall be included for the purpose of calculating requirements for *accessory* off-street parking spaces and *accessory* off street loading berths;
> [. . .]

WHEREAS, accordingly, a majority of the Board finds Raritan to be instructive in the subject appeal in its insistence that meaning not be imported into clearly written text and that where the statutory language is clear and unambiguous as it is in this case, reference to legislative history need not be made; and

WHEREAS, a majority of the Board agrees that, as argued by DOB and DCP, the reference to "*cellar* space used for retailing" in the Cellar Space Exclusion indicates that the drafters of the text were aware that cellar space could be utilized for retail purposes and the express requirement that such space be included for purposes of calculating parking requirements indicates both the drafters' understanding that such space did not already constitute "*floor area*," the unit of measure to which parking requirements are applied, see, e.g. ZR § 36-21, and the intention that such space, nevertheless, be included for purposes of providing, among other things, sufficient off-street parking spaces; and

WHEREAS, a majority of the Board is, therefore, unconvinced that "*floor area* of a *building*" and "*floor area* per an establishment" are subject to different methods of calculation in light of the explicit text of the Zoning Resolution as well as the Board's experience in interpreting that text; and

WHEREAS, the term "*floor area*"—and its definition of excluding cellar space not utilized for dwelling purposes—is consistently used throughout the Zoning Resolution and where the Zoning Resolution seeks to create or recognize an exception to the definition and include cellar space, the text is abundantly clear; and

WHEREAS, for example, ZR § 22-14 limits Use Group 4 ambulatory diagnostic or treatment health care facilities in R3-1, R3A, R3X, R4-1, R4A or R4B zoning districts to "1,500 square feet of *floor area*" and such uses in R3-1, R3A, R3X, R4-1 or R4A zoning district in lower density growth management areas to be limited "to 1,500 square feet of *floor area*, including *cellar* space"; ZR § 42-121 requires certain self-service storage facilities to provide industrial floor space "equal in *floor area* or *cellar* space to 25 percent of the *lot area*"; ZR § 63-01 defines a "FRESH food store" as a Use Group 6 food store containing "at least 6,000 square feet of *floor area*, or *cellar* space utilized for retailing"; and ZR § 111-13 limits certain uses in certain subareas of the Special Tribeca Mixed Use District "to 20,000 square feet of *floor area* . . . including retail *cellar* space allotted"; and

WHEREAS, adopting Appellant's interpretation that the Use Group 6 variety store limitation of "10,000 square feet of *floor area* per establishment" includes cellar space used for retailing would not only be contrary to the ZR § 12-10 definition of "*floor area*," particularly the Cellar Space Exclusion—which explicitly differentiates between cellar space "used for dwelling purposes," which is to be included in "*floor area*," and cellar space "used for retailing," which is not mentioned as an exception to the Cellar Space Exclusion and "shall be included" for purposes of calculating required parking spaces and loading berths—but would also render superfluous the use of the phrase "cellar space" in addition to the defined term "*floor area*" in the above-referenced sections of the text; and

WHEREAS, a majority of the Board notes that because the drafters of the Zoning Resolution acknowledge situations, as described above, in which "cellar space" should be included in total area calculations where the drafters seek to limit the impacts of certain uses on the community, they could easily introduce similar modifications to the text of the Zoning Resolution to respond to changes in retailing, but have so far chosen not to do so except in the case of the Special Tribeca Mixed-Use District; and

WHEREAS, with regards to the proper use group categorization of the Commercial Space, anticipated to be occupied by a Target store, a majority of the Board finds that Target, which sells a variety of goods and merchandise, is properly categorized as a variety store and not a department store, which by virtue of its "*floor area*" being under 10,000 square feet is a Use Group 6 variety store, and not a Use Group 10 variety store, nor a Use Group 10 department store, which typically have larger branded boutiques, sell large home furnishings and appliances, and checkouts in each department; that Target's categorization as a Use Group 6 at the subject premises is proper because, consistent with the characteristics of Use Group 6 uses set forth in ZR § 32-15, Target stores provide "a wide variety of local consumer needs" and with 28 locations located throughout all five boroughs, they are "distributed widely throughout the City"; additionally, as previously mentioned,

the Commercial Space consists of less than 10,000 square feet of "*floor area*" and such use is permitted at the subject site as-of-right; and

WHEREAS, in any event, it became apparent over the course of public hearings that Appellant conceded that the subject Target store could be characterized as either a Use Group 6 variety store or a Use Group 10 department store; and

WHEREAS, the Board acknowledges that excluding cellar space used for retailing from the calculation of "*floor area* per establishment" could, hypothetically, permit stores of virtually unlimited size in a cellar that, because of their size, may be said to lack a "small service area," and, thus, not meet the general characteristics of Use Group 6 uses as stated in ZR § 32-15, but a majority of the Board finds that the present language of the Zoning Resolution is clear as applied to the Commercial Space and that the proper body to address such potential occupancies, and decide whether or not such use is properly characterized as within Use Group 6, is the legislature through amendments to the relevant portions of the zoning text; and

WHEREAS, with regards to arguments made in support of this application to revoke the NB Permit because the locating of a Target store at the subject premises will increase traffic in the surrounding area, the Board notes that the subject application is for an interpretation of the Zoning Resolution regarding an as-of-right development, not a variance, wherein the Board must find, pursuant to ZR § 72-21(c), that a proposed development requiring variation of applicable zoning regulations "will not alter the essential character of the neighborhood or district . . .; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare"; and, second, that Use Group 6 variety stores, Use Group 10 variety stores and Use Group 10 department stores are in Parking Requirement Category ("PRC") B, and, pursuant to ZR § 36-21, each use is required to provide 1 parking space per 400 square feet of "*floor area*," suggesting that the traffic impacts of such uses were not considered by the drafters of the resolution to have been substantially different, despite Use Group 10 uses only being permitting as-of-right in C4, C5, C6 and C8 zoning districts; and

Therefore, it is Resolved, that the instant appeal, seeking revocation of Permit Number 421485805-01-NB, issued by the Department of Buildings on September 20, 2018, is hereby *denied*.

Adopted by the Board of Standards and Appeals, June 4, 2019.

CERTIFICATION

This copy of the Resolution
dated June 4, 2019
is hereby filed by
the Board of Standards and Appeals
dated September 3, 2019

Carlo Costanza
Executive Director