

From: <Bliss>, Charles Bliss <Charles.Bliss@dos.ny.gov>
Date: Friday, November 1, 2013 11:51 AM
To: Jonathan Ochshorn <jo24@cornell.edu>, Brian Tollisen <Brian.Tollisen@dos.ny.gov>
Subject: RE: Reminders - material or interpretations requested

... I have told you many times, that the intent of Appendix K was to allow additions larger than the size allowed for the original building. You actually called it a "loophole" in your response to Cornell's variance application. A loophole is something that is legal...

Charles P. Bliss, PE

From: Jonathan Ochshorn [<mailto:jo24@cornell.edu>]
Sent: Friday, November 01, 2013 12:41 PM
To: Bliss, Charles (DOS)
Cc: Tollisen, Brian (DOS); Girzone, Ed (DOS)
Subject: Re: Reminders - material or interpretations requested

Hi Charles,

To respond to your comments and questions...

2. Code Interpretation request. Appendix K states that an addition cannot "increase the area of an existing building beyond that permitted under the applicable provisions of Chapter 5 of the Building Code for new buildings, unless a fire barrier in accordance with Section 706 of the Building Code is provided." I'm not challenging the idea that an addition can increase the area of an existing building under this provision. My question is whether this increased area **is permitted to be unlimited.**

If unlimited area is found to be permitted, then an addition separated by a fire barrier per Section K902.2 could consist of *any* construction type (including Type VB combustible wood-frame construction), could be built *without* sprinklers, could include *any and all occupancy groups* (even those explicitly prohibited under Table 503), and could have *unlimited floor area*. For example, such an interpretation would allow an addition consisting of a high-hazard H-1 occupancy

in Type VB combustible construction without sprinklers and with 1,000,000 or even more square feet of floor area, something not only incredibly dangerous, but something that is absolutely prohibited under all rational Building Codes. In fact, such an interpretation is so clearly absurd that I believe it would be governed by the same legal standards referenced by Ronald E. Piester, the Director of DCEA in his endnote 4 of *NYS Code Interpretation 2008-01*. In that document, Piester provides these quotations to argue *against* taking absurd provisions literally: "The courts may in a proper case indulge in a departure from literal construction and will sustain the legislative intention although it is contrary to the literal letter of the statute." (McKinney's Statutes § 111.) "Generally, statutes will be given a reasonable construction, it being presumed that a reasonable result was intended by the Legislature." (Id. § 143.) "**A construction which would make a statute absurd will be rejected.** (Id. § 145.)"...

Jonathan Ochshorn

From: <Bliss>, Charles Bliss <Charles.Bliss@dos.ny.gov>
Date: Friday, November 1, 2013 1:01 PM
To: Jonathan Ochshorn <jo24@cornell.edu>
Cc: Brian Tollisen <Brian.Tollisen@dos.ny.gov>, "Girzone, Ed (DOS)" <Ed.Girzone@dos.ny.gov>
Subject: RE: Reminders - material or interpretations requested

- 2) The increased area of the addition is limited to the values in chapter 5. I believe Milstein Hall meets that criteria.
- 3) The board will address the submittal by the City at the hearing.

Charles P. Bliss, PE

From: Jonathan Ochshorn [<mailto:jo24@cornell.edu>]
Sent: Friday, November 01, 2013 2:04 PM
To: Bliss, Charles (DOS)
Cc: Tollisen, Brian (DOS); Girzone, Ed (DOS)
Subject: Re: Reminders - material or interpretations requested

Hi Charles,

You state that: "The increased area of the addition is limited to the values in chapter 5. I believe Milstein Hall meets that criteria."

This is incorrect. In fact, the addition area, all by itself, **exceeds** the values in chapter 5. This is based on an A-3 Occupancy Class and a VB construction type.

Because the occupancy is nonseparated mixed use, it is governed by **Occupancy Group A-3. The construction type is VB** because fire barriers do not create separate buildings, so the construction type is determined by the "weakest link" of the combined building, as you stated yourself at the hearing (see transcript excerpt below). Therefore, the allowable "tabular" per-floor area is 6,000 square feet, and the allowable per-floor area (including appropriate factors for sprinklers and for maximum frontage) is 22,500 square feet.

Because the actual per-floor area of the addition (Milstein Hall, taken by itself) is 25,000 square feet, **it exceeds the allowable area, according to Table 503.**

Here's what you stated at the July 18, 2013 hearing, per the official transcript:

"Appendix K does state that additions are allowed to exceed the values in Chapter 5 if a fire barrier is constructed. And there is no limitation found in Appendix K regarding the size of that addition. And in talking years ago with the author of Appendix K that was what they intended. The Petitioner is correct in saying that, even though a fire barrier is there, a fire barrier does not separate the building into two different construction types -- or two different buildings, which would allow two different construction types. **So, under the code, the entire building would be classified whatever the lowest rating would be, which would be Type V-B.**"

Jonathan Ochshorn

From: <Tollisen>, Brian Tollisen <Brian.Tollisen@dos.ny.gov>
Date: Friday, November 1, 2013 2:19 PM
To: Jonathan Ochshorn <jo24@cornell.edu>, Charles Bliss <Charles.Bliss@dos.ny.gov>
Cc: "Girzone, Ed (DOS)" <Ed.Girzone@dos.ny.gov>
Subject: RE: Reminders - material or interpretations requested

This issue is not going to be resolved ourselves. The Decisions rendered by the Board of Review are final. We will continue to work with the BOR on the reopening portions of the previous appeal at the boards discretion. We will continue to process any new variance requests or new appeals as they come.

From: Jonathan Ochshorn [<mailto:jo24@cornell.edu>]
Sent: Friday, November 08, 2013 3:08 PM
To: Tollisen, Brian (DOS)
Cc: Girzone, Ed (DOS); Bliss, Charles (DOS)
Subject: Addition question about the interpretation of Section K902.2 of the 2002 BCNYS
Importance: High

Hi Brian,

Per our phone conversation today, I have a follow-up question about the interpretation of Section K902.2 of the 2002 NYS Building Code.

I understand, per the letter from Ronald Piester dated Oct. 4, 2013, that Section K902.2 "permits an addition's area to be regulated separately, limited only by the applicable provisions of Chapter 5, from an existing building area."

My question is this: Is the construction type of an addition built per Section K902.2 of the 2002 BCNYS (separated from the existing building by a fire barrier and not by a fire wall) determined by applying the requirements of Table 601, Fire-Resistance Rating Requirements for Building Elements, to the *entire building*, or by applying those requirements only to the addition as if it were a separate building with its own construction type?

I would note that nothing in Appendix K indicates that such an addition can be considered as a separate building, and that the Capital Region-Syracuse Board of Review, in their findings for Petition No. 2013-0250, ruled that the combined building had a single construction type (V-B), and that the addition could *not* be designed as if it had a separate construction type. Relevant excerpts from the Review Board hearing transcripts are as follows:

On p.5 of the hearing transcript, George Maney stated: "This hearing is in the matter of Petition Number 2013-0250, Cornell University, pertains to a B occupancy and A-3 occupancy, mixed occupancy, three stories in height, approximately 99,800 square feet in gross area of **Type V-B construction...**"

On p.64 of the hearing transcript, Charles Bliss stated: "The Petitioner is correct in saying that, even though a fire barrier is there, **a fire barrier does not separate the building into two different construction types** -- or two different buildings, which would allow two different construction types. So, under the code, the entire building would be classified whatever the lowest rating would be, **which would be Type V-B.**"

On. p.100 of the hearing transcript, Mark Dedrick stated: "The petition pertains to a B occupancy and an A-3 occupancy, mixed occupancy, three stories in height of square footage numbers as noted in the submittal of **Type V-B construction...**"

In addition to this testimony by members of the Review Board, the conclusion that the addition's area must be based on the construction type of the combined building was even supported by the Acting Building Commissioner from Ithaca: On p.88-89 of the hearing transcript, Mike Niechwadowicz stated: "Admittedly, this building is a **type V-B building** based on Sibley Hall...because it is all one building and the construction classification is Type V."

Accepting the conclusion reached by the Review Board -- that there can be only a single construction type for a building, unless separated by a fire wall -- still permits the addition's area to be regulated separately per Chapter 5, as the letter from Ronald Piester advises, and still allows the area increase for an addition that is described in Section K902.2 of the 2002 BCNYS.

However, if you rule that the addition counts as a separate building with its own

construction type -- something not supported by any section of the Building Code, you would be contradicting not only the judgment of the Review Board that considered Petition No. 2013-0520, but also specific language in the 2002 BCNYS, as follows:

Section 503.1 states: "The height and area for buildings of different construction types shall be governed by the intended use of the building and shall not exceed the limits of Table 503 except as modified hereafter. *Each part of a building included within the exterior walls or the exterior walls and fire walls where provided shall be permitted to be a separate building*" (emphasis added).

Section 706.3.5 (Separation of occupancies and fire areas) states: "Where the provisions of Section 302.3.3 are applicable, the fire barrier separating mixed occupancies of a single occupancy into different fire areas shall have a fire-resistance rating of not less than that indicated in Section 302.3.3 *based on the occupancies being separated*" (emphasis added). The only variable mentioned is "occupancy," not construction type. This is because one construction type is assigned to the building as a whole, and not to individual fire areas.

Section 602.1 states: "Buildings and structures erected or to be erected, altered or extended in height or area shall be classified in *one* of the five construction types defined in Sections 602.2 through 602.5..." (emphasis added).

Section 705.1 states: "Each portion of a building separated by one or more fire walls that comply with the provisions of this section shall be considered a separate building..."

This last point is reinforced in the unofficial *Commentary* to the 2009 International Building Code, which states: "**Areas separated with fire barriers are not considered separate buildings**; they are considered separate fire areas. Two areas must be separated by a fire wall or exterior walls to be considered separate buildings. *Two areas separated with fire barriers are still considered part of a single building*. This distinction is critical in determining compliance with allowable height and area, and other code provisions" (commentary on Section 707.3.9 of the 2009 IBC, emphasis added).

Jonathan Ochshorn

From: <Bliss>, Charles Bliss <Charles.Bliss@dos.ny.gov>
Date: Friday, November 8, 2013 3:45 PM
To: Jonathan Ochshorn <jo24@cornell.edu>, Brian Tollisen <Brian.Tollisen@dos.ny.gov>
Cc: "Girzone, Ed (DOS)" <Ed.Girzone@dos.ny.gov>
Subject: RE: Addition question about the interpretation of Section K902.2 of the 2002 BCNYS

It was the intent of Appendix K to allow the addition to be regulated separately. That includes the construction type. Section 503 and 706.3.5 are general requirements found in the code. Section BK 902.2 gives a specific requirement which actually is an exception that allows the use of a fire barrier in place of a fire wall. That allows the addition to be classified as a type 2B building for construction purposes. Technically, the entire building is classified as a type 5B building. Years down the road, if someone were to look at the building to determine code compliance, they would have to look at all aspects of the code along with any variances to determine code compliance.

The 2009 unofficial commentary is not applicable because the building was built under the 2002 code and Appendix K.

Charles P. Bliss, PE

From: <Tollisen>, Brian Tollisen <Brian.Tollisen@dos.ny.gov>
Date: Tuesday, November 12, 2013 12:02 PM
To: Jonathan Ochshorn <jo24@cornell.edu>
Subject: RE: Addition question about the interpretation of Section K902.2 of the 2002 BCNYS

[note: Tollisen's comments are inserted in blue below]

From: Jonathan Ochshorn [<mailto:jo24@cornell.edu>]
Sent: Friday, November 08, 2013 5:04 PM
To: Tollisen, Brian (DOS)
Cc: Bliss, Charles (DOS); Girzone, Ed (DOS)

Subject: Re: Addition question about the interpretation of Section K902.2 of the 2002 BCNYS

Hi Brian,

I can live with an interpretation of Appendix K (Section K902.2) that differs from my own, but I still prefer a coherent explanation.

Appendix K says nothing about allowing "a fire barrier to exist where a fire wall is typically required," and the Review Board ruled, in fact, that fire barriers installed per Appendix K do **not** create separate buildings or separate construction types. If decisions of the Review Board are final, as you state, why are you contradicting their ruling in this matter? [I am offering my opinion. That is why. My opinion does not have to coincide with decisions rendered by the board.](#)

Having a fire barrier that allows an addition's floor area to be separately computed under Chapter 5 of the Code does **not** require that the fire barrier act like a fire wall. Nothing in Section K902.2 mentions a fire wall. Section K902.2 still would work as intended if the construction type for the addition were determined by the construction type of the building. This would be consistent with the ruling of the Review Board (Petition 2013-0250), it would be consistent with the letter from Ronald Piester (dated Oct. 4, 2013), it would be consistent with Appendix K, and it would be consistent with the rest of the 2002 BCNYS. [I understand in part. The letter dated October 4 is not in conflict with my opinion on this matter. K902 allows an addition to be considered independent from the attached existing building with regards to height and area when a fire barrier separates the existing building from the addition.](#)

In contrast to the consistency of such an interpretation ([OPINION](#)), your latest interpretation ([OPINION](#)) contradicts the ruling of the Review Board (which stated that an addition's construction type is determined by that of the building as a whole) and contradicts numerous sections of the 2002 BCNYS that I excerpted below. Yes, it is possible for a section of the Code to make an exception, as Charles correctly notes, but in doing so, such exceptions are explicit about what exactly is permitted. In this case, there is nothing in Appendix K that "allows the use of a fire barrier in place of a fire wall." Both you and Charles make that claim as if it was written in the Code. But it is not written anywhere in the Code and, in fact, this assumption that you are both making contradicts numerous sections that **are**

actually written in the Code.

So I remain unsatisfied with your last email. Considered from either a logical fire safety standpoint, or just from reading and interpreting the actual Code language, the argument in your latest email lacks coherence. Please think about it and reconsider.

Also, since this question may prove critical if I file an Article 78 proceeding challenging various City of Ithaca Code rulings, I would appreciate it if your final answer could be addressed to me as a formal letter from the DCEA, sent to the address listed below. [I will ask now then that your letter be formally sent asking for our opinion on your revised question.](#)

Thanks.

Jonathan Ochshorn
