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Chairman

GREELEY FORD
Commissioner

DECLARATORY RULING

Premises located at 239 West 49th Street, NY, NY (St. Malachy's Church)

Agenda # 2022-01028

The Alcoholic Beverage Control Law [ABCL] prohibits the Authority from issuing a retail license for the sale or consumption of liquor for any premises which is on the same street and within 200 feet of a "building occupied exclusively as" a school or place of worship. This licensing restriction is commonly referred to as the "200 Foot Law."

The Members of the Authority are in receipt of a request on behalf of a prospective applicant ("Applicant") to be located at 233 West 49th Street for a declaratory ruling as to whether, under the facts presented, the location is subject to the 200 Foot Law. Applicant does not dispute that the location is on the same street as and within two hundred feet of St. Malachy's Church ("Church"), located at 239 West 49th Street. Applicant seeks a ruling that the Church building is not occupied exclusively as a place of worship which, if true, would render the 200 Foot law inapplicable. ABCL § 64(7)(a).

Applicant is aware that the SLA denied a class change to the current licensee at this location, Jonah's Pastrami LLC (New York RW 1312825), due to its proximity to the Church, rejecting a similar argument of non-exclusive use made on essentially the same factual record. Applicant nonetheless now asks the Board to find the contrary: that St. Malachy's Church is not occupied exclusively as a place of worship. St. Malachy's Church was established in 1902.

Applicant argues that because the Church "leases" the basement of its building to Encore Community Services ("Encore"), the building ceases to be exclusively used as a place of worship. Encore is a not-for-profit organization that provides care and services to the elderly of the Clinton/Times Square/Midtown communities. Encore is not affiliated with, or under the auspices of the Archdiocese of New York. Encore's activities for seniors include Tai Chi, sustainable fashion workshop, yoga, exercise programs, concerts, cooking classes and movie screenings. No information about what rent Encore pays is provided.

Applicant further alleges that the Church rents out two storage rooms for the storage of linens, housekeeping supplies and hotel room furnishings. Applicant intends to open a restaurant in the hotel located at 233 West 49th Street; it did not initially disclose that it is the hotel that rents the space for storage. The lease agreement for this rental is dated around the time the request for this DR was made.

The question presented is whether these activities are merely incidental uses or are uses that detract from the "predominant character of the building" as a place of worship, a

standard first espoused by the Court of Appeals and later adopted in a legislative amendment to the 200 Foot Law.

In the 1985 Court of Appeals decision in *Fayez Restaurant, Inc. v. State Liquor Authority*, 66 N.Y.2d 978 (1985), the court considered whether church use would remain “exclusive” where:

(a) the pastor and his wife used upstairs floors as their residence, (b) the pastor broadcasted evangelical radio shows from the building, (c) the pastor and his wife cared for persons in need, and (d) the church stated that it was “the home of New York Christian Outreach,” a “department of the church which handles the evangelistic outreach and visitation endeavors of our congregation.”

The Court did not find these activities to render the building non-exclusive because “its primary or paramount use is as a church, even though there is an incidental use not inconsistent or detracting the predominant character of the building as a church.”

The Legislature in 2007 (L. 2007, Ch. 406) essentially codified the holding in *Fayez Restaurant* through an amendment to ABCL §§ 64 et seq., providing a longer list of activities that would not constitute non-exclusive uses than the ones considered in *Fayez*. Pursuant to ABCL §64(7)(d-1):

[A] building occupied as a place of worship does not cease to be exclusively” occupied as a place of worship by *incidental uses that are not of a nature to detract from the predominant character of the building as a place of worship*, such uses **which include, but which are not limited to:**

- the conduct of legally authorized games of bingo or other games of chance held as a means of raising funds for the not-for-profit religious organization which conducts services at the place of worship or for other not-for-profit organizations or groups;
- use of the building for fund-raising performances by or benefitting the not-for-profit religious organization which conducts services at the place of worship or other not-for-profit organizations or groups;
- the use of the building by other religious organizations or groups for religious services or other purposes;
- the conduct of social activities by or for the benefit of the congregants; the use of the building for meetings held by organizations or groups providing bereavement counseling to persons having suffered the loss of a loved one, or providing advice or support for conditions or diseases including, but not limited to, alcoholism, drug addiction, cancer, cerebral palsy, Parkinson's disease, or Alzheimer's disease;
- the use of the building for blood drives, health screenings, health information meetings, yoga classes, exercise classes or other activities intended to promote the health of the congregants or other persons; and use of the building by non-congregant members of the community for private social functions.

- The building occupied as a place of worship does not cease to be "exclusively" occupied as a place of worship where the not-for-profit religious organization occupying the place of worship accepts the payment of funds to defray costs related to another party's use of the building.

This statutory list of incidental activities is broad; it includes the use of the building by non-congregant members for private functions, even if the church gets paid for such activities. Thus, even if Encore is paying rent, it would appear to fall within this language defining what does *not* change the predominant nature of the building.

The uses which are alleged by applicant to render use of the building as non-exclusive appear to be either expressly or impliedly permitted by the language of the statute. As set forth in its public mission statement, St. Malachy's made a decision in 1977 to minister to people of the neighborhood to provide space to Encore to serve the needs of senior citizens in the community. Encore's use of the building is thus consistent with the overall spiritual mission of the church.

Further, even though Encore had been operating out of the basement of St. Malachy's Church since 1977, special legislation was sought in 2003 to create an exception to the 200-Foot law for real property located at 240-242 West 49th Street due to the property's proximity to St. Malachy's. This was four years before the 2007 legislative amendment expanded the scope of incidental activities that could take place within a church building without changing its predominate character as a place of worship. [ABCL § 64(7)(e-1)].

As for the hotel's decision to rent space in the Church building, putting aside the issue of whether this was an intentional effort to evade the 200 foot rule or not *by Applicant*, we could not conclude that a landlord's decision to rent a small space in a church building, apparently to claim a non-exclusive use, serves to change the predominant character of the building from a place of worship. Such a ruling would not appear to be consistent with the intent of the 200 Foot law and, too easily, allow for attempts to evade it.

The Board hereby finds that the identified activities in the Church are incidental to the predominate character of the building as a church. Since the Church building is occupied exclusively as a place of worship, the Applicant is barred by the 200' law from applying for a full liquor license at 233 West 49th Street in Manhattan.

This matter was heard and determined by the Members of the Authority at a Full Board meeting held on June 22, 2022 before Chairman Vincent Bradley, Commissioner Lily Fan and Commissioner Greeley Ford. The above written ruling was approved by Chairman Bradley on behalf of the Members on June 29, 2022.

Dated: 07/01/22



Donald Roper
Secretary to the Authority