
BULLETIN

OF THE NEW YORK CITY BOARD OF STANDARDS AND APPEALS

Published weekly by The Board of Standards and Appeals at its office at:
40 Rector Street, 9th Floor, New York, N.Y. 10006.

Volume 96, Nos. 49-50

December 15, 2011

DIRECTORY

MEENAKSHI SRINIVASAN, *Chair*

CHRISTOPHER COLLINS, *Vice-Chair*

DARA OTTLEY-BROWN

SUSAN M. HINKSON

EILEEN MONTANEZ

Commissioners

Jeffrey Mulligan, *Executive Director*

Becca Kelly, *Counsel*

OFFICE -	40 Rector Street, 9th Floor, New York, N.Y. 10006
HEARINGS HELD -	40 Rector Street, 6th Floor, New York, N.Y. 10006
BSA WEBPAGE @	http://www.nyc.gov/html/bsa/home.html

TELEPHONE - (212) 788-8500
FAX - (212) 788-8769

CONTENTS

DOCKET	771
CALENDAR of January 10, 2012	
Morning	772
Afternoon	773

CONTENTS

**MINUTES of Regular Meetings,
Tuesday, December 6, 2011**

Morning Calendar774

Affecting Calendar Numbers:

285-52-BZ 30-14 34th Avenue, Queens
926-86-BZ 217-07 Northern Boulevard, Queens
170-08-BZ 411-431 East 69th Street, Manhattan
187-08-BZ 1247 38th Street, Brooklyn
155-10-BZ 149-61 Willets Point Boulevard, Queens
321-63-BZ 1775 Grand Concourse, Bronx
624-68-BZ 188-07 Northern Boulevard, Queens
593-69-BZ 108-01 Atlantic Avenue, Queens
271-71-BZ 400 East 56th Street, Manhattan
255-00-BZ 130-30 31st Avenue, Queens
302-01-BZ 2519-2525 Creston Avenue, Bronx
8-10-BZ 58-14 Beach Channel Drive, Queens
40-11-A 25 Central Park West, Manhattan
125-11-A 514-516 East 6th Street, Manhattan
232-10-A 59 Fourth Avenue, Manhattan
15-11-A 860 Sixth Avenue, Manhattan

Afternoon Calendar788

Affecting Calendar Numbers:

39-11-BZ 2230-2234 Kimball Street, Brooklyn
90-11-BZ 23 Windom Avenue, Staten Island
91-11-BZ 25 Windom Avenue, Staten Island
94-11-BZ 149-06 Northern Boulevard, Queens
101-11-BZ 1152 East 24th Street, Brooklyn
42-11-BZ 135-11 40th Road, Queens
47-11-BZ 1213 Bay 25th Street, Queens
73-11-BZ 70 Tennyson Drive, Staten Island
74-11-BZ 1058 Forest Avenue, Staten Island
89-11-BZ 2224 Avenue S, Brooklyn
96-11-BZ 514-516 East 6th Street, Manhattan
105-11-BZ 147 Remsen Street, Brooklyn
115-11-BZ 1110 East 22nd Street, Brooklyn

Correction809

Affecting Calendar Numbers:

235-10-BZ 2363 Ralph Avenue, Brooklyn

DOCKET

New Case Filed Up to December 6, 2011

178-11-BZ

1944 East 12th Street, East 12th Street between Avenues S and T., Block 7290, Lot(s) 24, Borough of **Brooklyn, Community Board: 15**. Special Permit (73-622) for the enlargement of an existing two story, semi-detached single family home contrary to floor area and open space (ZR 23-141(b)); side yard requirement (ZR 23-461) and less than the required rear yard (ZR 23-47). R5 zoning district. R5 district.

179-11-BZ

65-45 Otto Road, between 66th Street and 66th Place., Block 3667, Lot(s) 625, Borough of **Queens, Community Board: 5**. Special Permit (§73-36) to permit the operation of a physical culture establishment (New Retro Fitness) to be located within 1-story existing building. M1-1 zoning district. M1-1 district.

180-11-A

34-57 107th Street, between 34th and 37th Avenues, Block 1749, Lot(s) 60(Tent 61), Borough of **Queens, Community Board: 3**. An appeal seeking a common law vested right to continue development commenced under the prior R6B zoning district . R5 Zoining dsitric . R5 district.

181-11-A

34-59 107th Street, between 34th and 37th Avenues, Block 1749, Lot(s) 60(Tent 60), Borough of **Queens, Community Board: 2**. An appeal seeking a common law vested right to continue development commenced under the prior R6B Zoning Distirct . R5 Zoning district . R5 district.

183-11-BZ

1133 York Avenue, property is situated on the north side of East 61st Street, westerly from the corner formed by the intersection of the northerly side of East 61st Street and the westerly side of York Avenue., Block 1456, Lot(s) 21, Borough of **Manhattan, Community Board: 8**. Variance (§72-21) to allow for the construction of a new outpatient surgical center (Memorial Hospital for Cancer and Allied Diseases) contrary to maximum floor area ratio (ZR§33-123); rear yard (ZR §33-261) height and setback regulations (ZR§33-432); curb cut (ZR§13-142) and signage (ZR §§32-643 & 32-655) C1-9/C8-4 zoning districts. C1-9; C8-4 district.

182-11-BZ

777 Broadway, located on the east corner of the intersection formed by Broadway and Summer Place, Block 3131, Lot(s) 6, Borough of **Brooklyn, Community Board: 4**. Special Permit (§73-36) to permit the operation of a physical culture establishment on a portion of the first, second and third floors of the existing three-story building. C4-3 zoning district. C4-3 district.

184-11-BZ

945 East 23rd Street, east side of East 23rd Street between Avenue I and Avenue J., Block 7587, Lot(s) 26, Borough of **Brooklyn, Community Board: 14**. Special Permit (§73-622) for the enlargement of an existing single family home contrary to floor area and open space (ZR 23-141) and less than the required rear yard (ZR 23-47). R2 zoning district. R2 district.

DESIGNATIONS: D-Department of Buildings; B.BK.-Department of Buildings, Brooklyn; B.M.-Department of Buildings, Manhattan; B.Q.-Department of Buildings, Queens; B.S.I.-Department of Buildings, Staten Island; B.BX.-Department of Building, The Bronx; H.D.-Health Department; F.D.-Fire Department.

CALENDAR

JANUARY 10, 2012, 10:00 A.M.

NOTICE IS HEREBY GIVEN of a public hearing, Tuesday morning, January 10, 2012, 10:00 A.M., at 40 Rector Street, 6th Floor, New York, N.Y. 10006, on the following matters:

SPECIAL ORDER CALENDAR

118-53-BZ

APPLICANT – Issa Khorasanchi, for Henry R. Jenet, owner.

SUBJECT – Application October 24, 2011 – Pursuant to ZR 11-411 of the Zoning Resolution, this application is for an Extension of Term for the continued operation of UG6 retail stores which expired on December 7, 2011. R4 zoning district.

PREMISES AFFECTED – 106-57/61 160th Street, east side of 160th Street, 25' north of intersection of 107th Avenue and 160th Street, Block 10128, Lot 50, Borough of Queens.

COMMUNITY BOARD #12Q

295-57-BZ

APPLICANT – Vassalotti Associates Architects, LLP, for Aranoff Family Limited Partnership, owners.

SUBJECT – Application September 7, 2011 – Pursuant to (ZR 11-411) an Extension of Term for the continued operation of a Gasoline Service Station (*BP British Petroleum*) which expired on August 7, 2011; Extension of Time to obtain a Certificate of Occupancy which expired on February 7, 2002. C1-2/R4 zoning district.

PREMISES AFFECTED – 146-15 Union Turnpike, northwest corner of Union Turnpike and 147th Street, Block 6672, Lot 80, Borough of Queens.

COMMUNITY BOARD #8Q

737-65-BZ

APPLICANT – Sheldon Lobel, P.C., for Yorkshire Towers Company Successor II, L.P., owner.

SUBJECT – Application November 3, 2011 – Extension of Term permitting the use of no more than 50 unused and surplus tenant parking spaces, within an accessory garage, for transient parking granted by the Board pursuant to §60 (3) of the Multiple Dwelling Law (MDL) which expired on November 3, 2010; Waiver of the Rules of Practice and Procedure. C2-8 (TA), C2-8 and R8B zoning district.

PREMISES AFFECTED – 301-329 East 86th Street, corner through lot fronting on East 86th Street, East 87th Street and Second Avenue. Block 1549, Lot 1. Borough of Manhattan.

COMMUNITY BOARD #8M

352-69-BZ

APPLICANT – Sheldon Lobel, P.C., for Dr. Alan Burns, owner.

SUBJECT – Application September 29, 2011 – Extension of Term of a previously granted Variance (72-21) for the continued operation of a UG16 animal hospital (*Brooklyn Veterinary Hospital*) which expired on September 30, 1999; Waiver of the Rules. R6B zoning district.

PREMISES AFFECTED – 411 Vanderbilt Avenue, east side of Vanderbilt Avenue between Greene and Gates Avenue, Block 1960, Lot 28, Borough of Brooklyn.

COMMUNITY BOARD #2BK

156-03-BZ

APPLICANT – Goldman Harris LLC, for Northern RKO LLC, owner.

SUBJECT – Application November 30, 2011 – Extension of Time to Complete Construction of a previously granted Variance (72-21) for the construction of a seventeen story mixed-use commercial/community facility/residential condominium building which expires on January 12, 2012. R6/C2-2 zoning district.

PREMISES AFFECTED – 135-35 Northern Boulevard, north side of intersection of Main Street and Northern Boulevard. Block 4958, Lots 48, 38. Borough of Queens.

COMMUNITY BOARD #7Q

APPEALS CALENDAR

8-11-A

APPLICANT – Beach Haven Group, LLC, for MTA/SBRW, lessee.

SUBJECT – Application January 26, 2011 – Proposed reconstruction of a tennis club located within the bed of Atwater Court and Colby Court contrary to General City Law Section 35. R5 Zoning District.

PREMISES AFFECTED – 2781 Shell Road, Atwater Court bounded by Shell Road and West 3rd Street, Colby Court bounded by Bokee Court and Atwater Court, Block 7232, Lot 1, 70, Borough of Brooklyn.

COMMUNITY BOARD #13BK

45-07-A

APPLICANT – Eric Palatnik, P.C., for Debra Wexelman, owner.

SUBJECT – Application July 20, 2011 – Extension of time to complete construction in accordance with a previously approved resolution for a two-story and attic mixed-use residential and community facility building. R4-1 zoning district.

PREMISES AFFECTED – 1472 East 19th Street, between Avenue O and Avenue N, Block 6756, Lot 36, Borough of Brooklyn.

COMMUNITY BOARD #14BK

CALENDAR

JANUARY 10, 2012, 1:30 P.M.

NOTICE IS HEREBY GIVEN of a public hearing, Tuesday afternoon, January 10, 2012, at 1:30 P.M., at 40 Rector Street, 6th Floor, New York, N.Y. 10006, on the following matters:

ZONING CALENDAR

87-11-BZ

APPLICANT – Eric Palatnik, P.C., for Leonid Vayner, owner.

SUBJECT – Application June 21, 2011 – Special Permit (§73-622) for the enlargement of an existing single family home contrary to floor area, lot coverage and open space (§23-141(b)). R3-1 zoning district.

PREMISES AFFECTED – 159 Exeter Street, between Hampton Street and Oriental Boulevard, Block 8737, Lot 26, Borough of Brooklyn.

COMMUNITY BOARD #15BK

120-11-BZ

APPLICANT – Goldman Harris LLC. for Borden LIC Properties, LLC, owner.

SUBJECT – Application August 17, 2011 – Special Permit (§73-44) to reduce the parking requirement for office use and catering use (parking requirement category B1). M1-3 zoning district.

PREMISES AFFECTED – 52-11 29th Street, corner of 29th Street and Review Avenue. Block 295, Lot 1. Borough of Queens.

COMMUNITY BOARD #2Q

130-11-BZ

APPLICANT – Law Office of Fredrick A. Becker, for Leah Gutman and Arthur Gutman, owners.

SUBJECT – Application September 2, 2011 – Special Permit (§73-622) for the enlargement of an existing single family home contrary to floor area and open space (23-141); side yard (23-461) and less than the required rear yard (23-47). R-2 zoning district.

PREMISES AFFECTED – 3600 Bedford Avenue, between Avenue N and Avenue O, Block 7678, Lot 90, Borough of Brooklyn.

COMMUNITY BOARD #14BK

166-11-BZ

APPLICANT – Ellen Hay/Wachtel & Masyr LLP, for Roc Le Triomphe Associates LLC, owners; Crunch LLC, lessee.

SUBJECT – Application October 24, 2011 – Special Permit (§73-36) to continue the operation of the Physical Culture Establishment (*Crunch Fitness*). C2-8 (TA) zoning district.

PREMISES AFFECTED – 1109 Second Avenue aka 245 East 58th Street, west side of Second Avenue between East 58th and East 59th Streets, Block 1332, Lot 29, Borough of Manhattan.

COMMUNITY BOARD #6M

Jeff Mulligan, Executive Director

MINUTES

**REGULAR MEETING
TUESDAY MORNING, DECEMBER 6, 2011
10:00 A.M.**

Present: Chair Srinivasan, Vice-Chair Collins,
Commissioner Ottley-Brown, Commissioner Hinkson and
Commissioner Montanez.

SPECIAL ORDER CALENDAR

285-52-BZ

APPLICANT – Vassalotti Associates Architects, LLP, for
Astoria 42, LLC, owner; Neil Tannor, lessee.

SUBJECT – Application July 8, 2011 – Extension of Term
of a previously granted Variance (§72-21) for the continued
operation of a gasoline service station (*Getty*) which expired
on October 21, 2007; Extension of Time to obtain a
Certificate of Occupancy which expired on March 9, 2000;
Waiver of the rules. R-5 zoning district.

PREMISES AFFECTED – 30-14 34th Avenue, southwest
corner of the intersection of 34th Avenue and 31st Street,
Block 607, Lot 29, Borough of Queens.

COMMUNITY BOARD #1Q

APPEARANCES –

For Applicant: Todd Dale.

ACTION OF THE BOARD – Application granted on
condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins,
Commissioner Ottley-Brown, Commissioner Hinkson and
Commissioner Montanez5

Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application for a waiver of the
Rules of Practice and Procedure, a reopening, an extension
of the term of a previously granted variance for a gasoline
service station, and an extension of time to obtain a
certificate of occupancy; and

WHEREAS, a public hearing was held on this
application on November 15, 2011 after due notice by
publication in *The City Record*, and then to decision on
December 6, 2011 and

WHEREAS, Community Board 1, Queens,
recommends approval of this application; and

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

WHEREAS, the site is located on the southwest corner of
the intersection of 34th Avenue and 31st Street, within an R5
zoning district; and

WHEREAS, the Board has exercised jurisdiction over
the subject site since November 3, 1952 when, under the
subject calendar number, the Board granted a variance to
permit the construction of a gasoline service station with
accessory uses, for a term of 15 years; and

WHEREAS, subsequently, the grant has been
amended and the term extended by the Board at various
times; and

WHEREAS, most recently, on March 9, 1999, the
Board granted an extension of term for a period of ten years,
which expired on October 21, 2007; a condition of the grant
was that a new certificate of occupancy be obtained by
March 9, 2000; and

WHEREAS, the applicant states that a new certificate
of occupancy was never obtained, due to administrative
oversight; and

WHEREAS, the applicant now seeks an additional ten-
year extension of term and an extension of time to obtain a
certificate of occupancy; and

WHEREAS, pursuant to ZR § 11-411, the Board may
permit an extension of term; and

WHEREAS, based upon the above, the Board finds
that the requested extension of term and extension of time
are appropriate with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and
Appeals *waives* the Rules of Practice and Procedure, *reopens*
and *amends* the resolution, dated November 3, 1952, so that as
amended this portion of the resolution shall read: “to extend
the term for a period of ten years from October 21, 2007, to
expire on October 21, 2017, and to grant a one-year extension
of time to obtain a certificate of occupancy, to expire on
December 6, 2012; *on condition:*

THAT the term of the grant shall expire on October 21,
2017;

THAT the above condition shall be listed on the
certificate of occupancy;

THAT a certificate of occupancy shall be obtained by
December 6, 2012;

THAT all conditions from the prior resolution not
specifically waived by the Board remain in effect; and

THAT the Department of Buildings must ensure
compliance with all other applicable provisions of the
Zoning Resolution, the Administrative Code and any other
relevant laws under its jurisdiction irrespective of plan(s)
and/or configuration(s) not related to the relief granted.”
(DOB Application No. 400896090)

Adopted by the Board of Standards and Appeals
December 6, 2011.

926-86-BZ

APPLICANT – Sheldon Lobel, P.C., for Manes Bayside
Realty LLC, owner.

SUBJECT – Application November 1, 2010 – Extension of
Term of a variance for the operation of an automotive
dealership with accessory repairs (UG 16B) which expired
on November 4, 2010; Extension of time to obtain a
Certificate of Occupancy which expired on January 6, 2006;
Waiver of the Rules. C2-2/R6-B/R3X zoning district.

PREMISES AFFECTED – 217-07 Northern Boulevard,
block front on the northerly side of Northern Boulevard
between 217th Street and 218th Street, Block 6320, Lot 18,
Borough of Queens.

MINUTES

COMMUNITY BOARD #11Q

APPEARANCES –

For Applicant: Jordan Most.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5

Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application for a waiver of the Rules of Practice and Procedure, a reopening, an extension of the term of a previously granted variance for an automotive dealership with accessory repairs (Use Group 16B), and an extension of time to obtain a certificate of occupancy; and

WHEREAS, a public hearing was held on this application on July 12, 2011 after due notice by publication in *The City Record*, with continued hearings on August 23, 2011, September 27, 2011 and October 25, 2011, and then to decision on December 6, 2011; and

WHEREAS, Community Board 11, Queens, recommends approval of this application, with the following conditions: (1) the term of the grant be limited to five years; (2) the lessee submit a report to the Community Board every six months detailing their compliance with the conditions of the grant; (3) lighting be installed; (4) all cars awaiting service be parked on-site and all work be performed on-site; (5) the fencing be repaired and graffiti removed; (6) the landscaping be maintained; (7) “grass” slats be installed in the chain link fence; (8) after-hour tow trucks turn off engines and flashing lights when on the property; (9) the hours of operation remain as previously approved; and (10) workers on the site not be allowed to barbecue or play excessively loud music; and

WHEREAS, Queens Borough President Helen Marshall recommends approval of this application, with similar conditions as stipulated by the Community Board; and

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

WHEREAS, the site is located on the north side of the Northern Boulevard between 217th Street and 218th Street, partially within a C2-2 (R6B) zoning district, and partially within an R3X zoning district; and

WHEREAS, the Board has exercised jurisdiction over the subject site since July 24, 1962 when, under BSA Cal. No. 1875-61-BZ, the Board granted a variance to permit, in conjunction with the construction of a one-story and basement building for use as an authorized car agency, accessory auto repairs and the use of the open area for sales and service of new and used cars and the parking of more than five vehicles; and

WHEREAS, on November 4, 1987, under the subject calendar number, the Board granted a special permit

pursuant to ZR § 11-412, to allow the expansion of the outdoor parking area of the automobile showroom and service facility, for a term of three years; and

WHEREAS, subsequently, the grant was amended and the term extended by the Board at various times; and

WHEREAS, most recently, on December 13, 2005, the Board granted a five-year extension of the term and an amendment to permit an increase from a maximum of 72 parking spaces to a maximum of 82 parking spaces on the site, which expired on November 4, 2010; and

WHEREAS, the applicant now seeks a ten-year extension of term, and an extension of time to obtain a certificate of occupancy; and

WHEREAS, pursuant to ZR § 11-411, the Board may permit an extension of term; and

WHEREAS, as to the conditions stipulated by the Community Board and the Queens Borough President, the applicant requests that the Board extend the term for a full ten years, and permit an extension of the hours of operation for the showroom portion of the site; and

WHEREAS, specifically, the applicant proposes to increase the hours of operation for the showroom to Monday through Friday, from 9:00 a.m. to 9:00 p.m., Saturday, from 9:00 a.m. to 6:00 p.m., and Sunday, from 9:00 a.m. to 5:00 p.m.; the hours of operation for the automotive service use would remain Monday through Thursday, from 8:00 a.m. to 7:00 p.m., Friday, from 8:00 a.m. to 6:00 p.m., Saturday, from 8:00 a.m. to 3:00 p.m., and closed on Sundays; and

WHEREAS, the applicant submitted a table reflecting the hours of operation for other automobile dealerships along Northern Boulevard, which reflects that the proposed extension of the hours of operation for the showroom is consistent with the hours for similar uses in the surrounding area; and

WHEREAS, the applicant agreed to comply with the remaining conditions proposed by the Community Board and the Borough President; and

WHEREAS, at the Board’s direction, the applicant submitted a contract with a fencing company for the removal and replacement of damaged fencing and cinder block walls on the site, and submitted photographs reflecting that said work has commenced on the site; and

WHEREAS, based upon the above, the Board finds that the requested extension of term and extension of time are appropriate with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and Appeals *waives* the Rules of Practice and Procedure, *reopens* and *amends* the resolution, dated November 4, 1987, so that as amended this portion of the resolution shall read: “to extend the term for a period of ten years from November 4, 2010, to expire on November 4, 2020, and to grant a one-year extension of time to obtain a certificate of occupancy, to expire on December 6, 2012; *on condition*:

THAT the term of the grant shall expire on November 4, 2020;

THAT the site shall be maintained free of debris and graffiti;

THAT lighting shall be installed in accordance with

MINUTES

the BSA-approved plans;

THAT all cars awaiting service shall be parked on-site and all work shall be performed on-site;

THAT fencing and landscaping shall be maintained as indicated on the BSA-approved plans;

THAT tow trucks arriving after business hours shall turn off engines and flashing lights while on the site;

THAT the hours of operation for the showroom shall be Monday through Friday, from 9:00 a.m. to 9:00 p.m., Saturday, from 9:00 a.m. to 6:00 p.m., and Sunday, from 9:00 a.m. to 5:00 p.m.; and the hours of operation for the automotive service use shall be Monday through Thursday, from 8:00 a.m. to 7:00 p.m., Friday, from 8:00 a.m. to 6:00 p.m., Saturday, from 8:00 a.m. to 3:00 p.m., and closed on Sundays;

THAT the above conditions shall be listed on the certificate of occupancy;

THAT a certificate of occupancy shall be obtained by December 6, 2012;

THAT all conditions from the prior resolution not specifically waived by the Board remain in effect; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plan(s) and/or configuration(s) not related to the relief granted.” (DOB Application No. 402140875)

Adopted by the Board of Standards and Appeals December 6, 2011.

170-08-BZ

APPLICANT – Kramer Levin Naftalis & Frankel, LLP, for Cornell University, owner.

SUBJECT – Application September 28, 2011 – Amendment to a variance (§72-21) for a 16-story biomedical research building (*Weill Cornell Medical College*) to permit Hunter College to occupy one floor for medical research purposes. R8 zoning district.

PREMISES AFFECTED – 411-431 East 69th Street, midblock bounded by East 69th and 70th Streets, York and First Avenues, Block 1464, Lot 8, 14, 15, 16 p/21, Borough of Manhattan.

COMMUNITY BOARD #8M

APPEARANCES –

For Applicant: Gary Tarnoff.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5
Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application for an amendment to a previously approved variance for the construction of an 18-story biomedical research building within an R8 zoning district; and

WHEREAS, a public hearing was held on this application on November 22, 2011, after due notice by publication in *The City Record*, and then to decision on December 6, 2011; and

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

WHEREAS, Community Board 8, Manhattan, recommends approval of this application; and

WHEREAS, this application is being brought on behalf of Weill Cornell Medical College (“WCMC”), a non-profit educational institution; and

WHEREAS, the subject site is located on the north side of East 69th Street between First Avenue and York Avenue, within an R8 zoning district; and

WHEREAS, on January 13, 2009, under the subject calendar number, the Board granted a variance to permit the construction of an 18-story biomedical research facility building to be occupied for community facility use by WCMC, that does not comply with zoning parameters for floor area, lot coverage, height and setback, and rear and side yards, contrary to ZR §§ 24-11, 24-36, 24-522, 24-552, and 24-35; and

WHEREAS, on March 30, 2010, the Board issued a letter of substantial compliance permitting certain modifications to the originally approved plans, including the elimination of one below-grade research support floor, the relocation of support and mechanical spaces, and the reconfiguration of the roof of the proposed building; and

WHEREAS, the applicant now requests an amendment to modify the prior resolution which stated that the subject building was “to be occupied for community facility use by the Weill Cornell Medical College;” and

WHEREAS, specifically, the applicant requests that the Board permit Hunter College of the City University of New York (“CUNY”) to occupy one laboratory floor (the fourth floor), with a total of 21,752 gross sq. ft., for research by its biomedical faculty and students; and

WHEREAS, the applicant states that the proposed amendment only relates to the ownership of the fourth floor of the proposed building, and would not affect the bulk variances that were granted or the proposed use of the space; and

WHEREAS, the applicant notes that the proposed building will be organized as a condominium, with the fourth floor unit owned by CUNY and the other condominium unit, consisting of the other 12 laboratory floors and the common areas, owned by WCMC; and

WHEREAS, the applicant states that WCMC would oversee all operations in the building, including safety training, materials deliveries and waste disposal; and

WHEREAS, the applicant represents that the need for the proposed amendment arises from an institutional collaboration between WCMC and Hunter College that has become critical to each institution since the time of the original variance; and

WHEREAS, the applicant further represents that the collaboration with Hunter College has helped WCMC accomplish its mission of responding to National Institution of Health (“NIH”) priorities and has led to several successful

MINUTES

research partnerships between WCMC and Hunter College scientists; and

WHEREAS, specifically, the applicant states that Hunter College's participation was instrumental to WCMC's successfully obtaining the initial NIH funding to establish a "Clinical Translation Sciences Center," which represented the largest single grant in WCMC's history, and includes faculty from Hunter College among its members; and

WHEREAS, the applicant further states that allowing Hunter College to occupy the fourth floor of the building will help make both WCMC and Hunter College more attractive for NIH funding because it will enable some of Hunter College's research faculty to be located in a physical environment where they can have regular interactions with clinicians that will permit translation of their discoveries to new diagnostic and treatment modalities; and

WHEREAS, the applicant represents that the two institutions will also seek to develop a process whereby their respective faculty members can obtain joint appointments at Hunter College and WCMC, and the collaboration between the institutions' faculty and graduate students will make these programs more attractive to PhD degree applicants; and

WHEREAS, the applicant notes that the proposed change in occupancy of the fourth floor would not change the use of the space, and the type of scientific research that will be undertaken by Hunter College will be comparable and complimentary to that performed on WCMC's floors; and

WHEREAS, the applicant submitted a letter in support of the project from the President of Hunter College, which reiterates the collaboration between Hunter College and WCMC and that the scientific research performed on the fourth floor space will be comparable to that performed on the WCMC floors; and

WHEREAS, based upon the above, the Board finds that the requested amendment to the variance is appropriate with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and Appeals reopens and amends the resolution, as adopted on January 13, 2009, so that as amended this portion of the resolution shall read: "to permit the fourth floor of the proposed building to be occupied by Hunter College of the City University of New York for research by its biomedical faculty and students; *on condition* that the use and operation of the site shall substantially conform to the previously approved plans; and *on further condition*:

THAT all conditions from prior resolutions not specifically waived by the Board remain in effect;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted." (DOB Application No. 110098787)

Adopted by the Board of Standards and Appeals, December 6, 2011.

187-08-BZ

APPLICANT – Sheldon Lobel, P.C., for Congregation & Yeshiva Machzikei Hadas Inc., owner.

SUBJECT – Application July 18, 2011 – Amendment to a variance (§72-21) to allow a five-story school (*Congregation & Yeshiva Maschzikei Hadas*) to add a sub-cellar level, add additional floor area, increase in lot coverage and building heights, and additional interior changes. M1-2/R6B zoning district.

PREMISES AFFECTED – 1247 38th Street, north side of 38th Street, 240' west of 13th Avenue, lock 5295, Lots 52 & 56, Borough of Brooklyn.

COMMUNITY BOARD #12BK

APPEARANCES –

For Applicant: Richard Lobel.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5
Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application for an amendment to a previously approved variance for the construction of a five-story yeshiva; and

WHEREAS, a public hearing was held on this application on November 1, 2011, after due notice by publication in *The City Record*, with a continued hearing on November 22, 2011, and then to decision on December 6, 2011; and

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

WHEREAS, Community Board 12, Brooklyn, did not vote on the proposed amendment, but submitted a letter stating that it previously recommended approval of the original variance application, which would have permitted a yeshiva with a floor area of 135,390 sq. ft. (5.6 FAR) and a height of 80'-6" at the site; and

WHEREAS, New York City Council Member Brad Lander recommends approval of this application; and

WHEREAS, this application is being brought on behalf of Congregation and Yeshiva Machzikei Hadas (the "Yeshiva"), a not-for-profit religious and educational entity; and

WHEREAS, the subject site is located on the east side of 38th Street, between 12th Avenue and 13th Avenue, within an M1-2/R6B zoning district; and

WHEREAS, the applicant notes that at the time of the original grant the subject site was located within an M2-1 zoning district; however, on October 27, 2010, the subject site was rezoned to an M1-2/R6B zoning district; and

WHEREAS, on March 16, 2010, under the subject calendar number, the Board granted a variance to permit the

MINUTES

construction of a five-story yeshiva, which did not conform with the use regulations of the former M2-1 zoning district, contrary to ZR § 42-00; and

WHEREAS, the applicant states that the proposed yeshiva now conforms with the use regulations of the subject M1-2/R6B zoning district; however, the applicant proposes amendments to the previously-approved plans which do not comply with the zoning regulations related to FAR, lot coverage, rear yard, height, and front setback in the M1-2/R6B zoning district, contrary to ZR §§ 24-11 and 23-633; and

WHEREAS, specifically, the applicant requests an amendment which would allow: (1) the addition of a sub-cellar; (2) changes to the interior layout of the cellar, first floor and fifth floor; (3) a floor area of 102,360 sq. ft. (the original proposal reflected 99,200 sq. ft. and 48,112 sq. ft. is the maximum permitted) and FAR of 4.25 (the original proposal reflected 4.1 and 2.0 is the maximum permitted); (4) a base height of 55'-0" with a setback of 10'-0" above the base height (the original proposal reflected a base height of 48'-8" with a setback of 10'-0" above the base height and the maximum permitted base height is 40'-0" with a setback of 10'-0" above the base height); (5) a total height of 70'-0" (the original proposal reflected a total height of 60'-0" and the maximum permitted total height is 50'-0"); (6) a lot coverage of 83 percent (the original proposal reflected 80 percent and 60 percent is the maximum permitted); and (7) the maintenance of the previously-approved rear yard with a minimum depth of 15'-0" (a rear yard with a minimum depth of 30'-0" is required); and

WHEREAS, the applicant states that the proposed sub-cellar is requested due to the soil conditions at the site as well as the depth of the cellar adjacent to the site which resulted in the placement of footings at a depth of 27'-0" below grade; and

WHEREAS, the applicant further states that the need to excavate to a depth of 27'-0" facilitates the construction of a sub-cellar, which can accommodate certain program space that would otherwise be located above grade, and which allows for a better layout for the yeshiva; and

WHEREAS, the applicant states that the proposed amendment would modify the interior layout of the cellar by providing a second multipurpose room, thereby increasing the total amount of multipurpose space in the cellar from 9,325 sq. ft. to 13,027 sq. ft.; and

WHEREAS, the applicant represents that the proposed increase in multipurpose space at the cellar will allow the yeshiva to improve the scheduling of student lunches and provide an expanded gymnasium space; and

WHEREAS, as to the layout of the first floor, the applicant states that the proposed amendment will increase the number of classrooms on the first floor from four to nine; and

WHEREAS, the applicant represents that the proposed increase in the number of classrooms at the first floor will enable the yeshiva to keep all kindergarten and pre-school children on the first floor, which provides better grouping of the students by floor and helps the yeshiva meet the requirements of the New York City Health Code and the Federal Head Start performance standards; and

WHEREAS, as to the layout of the fifth floor, the

applicant states that the proposed amendment will increase the floor area of the study hall at the fifth floor from 2,048 sq. ft. to 4,820 sq. ft.; and

WHEREAS, the applicant represents that a larger study hall would benefit the yeshiva's primary function as a place of religious learning, as typical yeshivas provide a study hall that allows large numbers of students to congregate for active and vocal learning; and

WHEREAS, as to the proposed increase in floor area, the applicant represents that the addition of 3,160 sq. ft. in floor area is minimal, and it primarily results from minor modifications to the building footprint which reduce the size of the proposed inner courts, enabling the applicant to increase the number of classrooms in the proposed yeshiva; and

WHEREAS, as to the proposed increase in the building height, the applicant represents that, due to the required duct work and mechanicals, the previously-approved plans resulted in sub-optimal clear ceiling heights of only 8'-0", while the proposed 13'-0" floor-to-floor height enables the yeshiva to provide clear ceiling heights of 9'-6" which is typical for classrooms; and

WHEREAS, at hearing, the Board raised concerns about the applicant's need for the proposed increase in height, and the effect it would have on the surrounding neighborhood; and

WHEREAS, in response, the applicant submitted a letter from the architect stating that the increased height is necessary to provide clear ceiling heights of 9'-6" per floor, submitted a building height comparison chart which identified 11 buildings with a height of at least 70'-0" within a ¼-mile radius of the site, and submitted a classroom ceiling height survey which reflects that for the thirty schools surveyed in the vicinity of the site, most classrooms provide a ceiling height of at least 9'-6"; and

WHEREAS, the Board notes that the building height comparison chart submitted by the applicant was accompanied by a map identifying the location of the taller buildings in the surrounding area, several of which are located within two blocks of the subject site; and

WHEREAS, based upon the above, the Board concludes that the proposed changes will not affect the findings under ZR §§ 72-21 (c) or (e); and

WHEREAS, accordingly, the Board finds that the proposed modifications are necessary to meet the programmatic needs of the yeshiva; and

WHEREAS, accordingly, the Board finds that the requested amendment to the variance are appropriate with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and Appeals reopens and amends the resolution, as adopted on March 16, 2010, so that as amended this portion of the resolution shall read: "to permit the noted modifications to the approved plans; *on condition* that the use shall substantially conform to drawings as filed with this application, marked "Received October 20, 2011"—Ten (10) sheets; and *on further condition*:

THAT the following are the bulk parameters of the proposed building: five stories, a maximum floor area of 102,360 sq. ft. (4.25 FAR), a maximum lot coverage of 83

MINUTES

percent, a maximum base height of 55'-0" with a setback of 10'-0" above the base height, a maximum total height of 70'-0", and a rear yard with a minimum depth of 15'-0", as illustrated on the BSA-approved plans;

THAT all conditions from prior resolutions not specifically waived by the Board remain in effect;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted." (DOB Application No. 302269925)

Adopted by the Board of Standards and Appeals, December 6, 2011.

155-10-BZ

APPLICANT – Sive, Paget & Riesel, P.C., for Wayne Hatami, owner.

SUBJECT – Application August 25, 2010 – Dismissal for Lack of Prosecution – Variance (§72-21) to allow for a conversion and enlargement of an existing residential building for community facility use, contrary to side yard (§24-35), front yard (§24-34) and lot coverage (§23-141) regulations. R3-1 zoning district.

PREMISES AFFECTED – 149-61 Willets Point Boulevard, corner parcel bound by Willets Point Boulevard, 150th Street and 24th Avenue, Block 4675, Lot 34, Borough of Queens.

COMMUNITY BOARD #7Q

APPEARANCES – None.

ACTION OF THE BOARD – Application withdrawn.

THE VOTE TO WITHDRAW –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

Adopted by the Board of Standards and Appeals, December 6, 2011.

321-63-BZ

APPLICANT – Greenberg Traurig, LLP by Jay A. Segal, Esq., for Verizon New York, Inc., owner; 1775 Grand Concourse LLC, lessee.

SUBJECT – Application October 13, 2011 – Amendment of a special permit (§73-65) which permitted the construction of an 8-story enlargement of a telephone exchange building.

The Amendment seeks to permit Use Groups 6A, 6B and 6C, pursuant to §122-10. R8/Special Grand Concourse Preservation District.

PREMISES AFFECTED – 1775 Grand Concourse, west side of the Grand Concourse at the southeast intersection of Walton Avenue and East 175th Street, Block 282, Lot 1001-1004, Borough of Bronx.

COMMUNITY BOARD #5BX

APPEARANCES –

For Applicant: Jay Segal.

ACTION OF THE BOARD – Laid over to January 10, 2012, at 10 A.M., for continued hearing.

624-68-BZ

APPLICANT – Rothkrug Rothkrug & Spector, LLP, for MMT Realty Associates LLC, owner.

SUBJECT – Application June 7, 2011 – Extension of Term of a Variance (§72-21) to permit wholesale plumbing supply (UG16), stores and office (UG6) which expired on January 13, 2011; Extension of Time to obtain a Certificate of Occupancy and waiver of the rules. R3-2 zoning district.

PREMISES AFFECTED – 188-07 Northern Boulevard, north side of Northern Boulevard between Utopia Parkway and 189th Street, Block 5364, Lots 1, 5, 7, Borough of Queens.

COMMUNITY BOARD #11Q

APPEARANCES –

For Applicant: Todd Dale.

For Opposition: Terr Pouymcri.

ACTION OF THE BOARD – Laid over to January 10, 2012, at 10 A.M., for continued hearing.

593-69-BZ

APPLICANT – Eric Palatnik, P.C., for Metro New York Dealer Stations, LLC, owner.

SUBJECT – Application May 27, 2011 – Amendment (§11-413) to convert automotive repair bays to an accessory convenience store at an existing gasoline service station (*Shell*). C2-2/R5 zoning district.

PREMISES AFFECTED – 108-01 Atlantic Avenue, Between 108th and 109th Street. Block 9315, Lot 23, Borough of Queens.

COMMUNITY BOARD #9Q

APPEARANCES –

For Applicant: Trevis Savage.

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to January 10, 2012, at 10 A.M., for decision, hearing closed.

271-71-BZ

APPLICANT – Sheldon Lobel, P.C., for Plaza 400 Owners Corp., owner

SUBJECT – Application October 11, 2011 – Extension of Term for the continued use of transient parking in a residential apartment building which expired on July 6, 2011; waiver of the rules. R10/C1-5 zoning district.

PREMISES AFFECTED – 400 East 56th Street, corner of First Avenue, Block 1367, Lot 1, Borough of Manhattan.

COMMUNITY BOARD #1M

MINUTES

APPEARANCES –

For Applicant: Josh Rinesmith.

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5

Negative:.....0

ACTION OF THE BOARD – Laid over to January 10, 2012, at 10 A.M., for decision, hearing closed.

255-00-BZ

APPLICANT – Sheldon Lobel, P.C., for Full Gospel New York Church, owner.

SUBJECT – Application August 12, 2011 – Amendment to a variance (§72-21) to permit a change of use on the 2nd and 3rd floors of the existing building at the premises from UG4 house of worship to UG3 school. M1-1/M2-1 zoning district.

PREMISES AFFECTED – 130-30 31st Avenue, north side of 31st Avenue, between College Point Boulevard and Whitestone Expressway, block 4360, Lot 1, Borough of Queens.

COMMUNITY BOARD #7Q

APPEARANCES –

For Applicant: Josh Rinesmith.

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5

Negative:.....0

ACTION OF THE BOARD – Laid over to January 10, 2012, at 10 A.M., for decision, hearing closed.

302-01-BZ

APPLICANT – Deirdre A. Carson, Esq., for Creston Avenue Realty, LLC, owner.

SUBJECT – Application October 12, 2011 – Extension of Time to obtain a Certificate of Occupancy for a variance for the continued use of a parking facility accessory to commercial use which expired on April 23, 2033; waiver of the rules. R8 zoning district.

PREMISES AFFECTED – 2519-2525 Creston Avenue, between East 190th and 191st Streets, Block 3175, Lot 26, Borough of Bronx.

COMMUNITY BOARD #7BX

APPEARANCES –

For Applicant: Randell Miner.

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5

Negative:.....0

ACTION OF THE BOARD – Laid over to January 10, 2012, at 10 A.M., for decision, hearing closed.

8-10-BZ

APPLICANT – Sheldon Lobel, P.C., for Adel Kassim, owner.

SUBJECT – Application January 21, 2010 – Dismissal for Lack of Prosecution – Variance (§72-21) to allow the legalization and enlargement of an existing supermarket, contrary to use regulations (§22-00). R4 zoning district.

PREMISES AFFECTED – 58-14 Beach Channel Drive, northeast corner of the intersection of Beach 59th Street and Beach Channel Drive, Block 16004, Lot 96, Borough of Queens.

COMMUNITY BOARD #14Q

APPEARANCES –

For Applicant: Richard Lobel.

ACTION OF THE BOARD – Laid over to February 14, 2012, at 10 A.M., for adjourned, dismissal calendar.

APPEALS CALENDAR

40-11-A

APPLICANT – Bryan Cave LLP, Margery Perlmutter, Esq., for CPW Retail, LLC c/o American Continental Properties, LLC, owner.

SUBJECT – Application April 8, 2011 – Appeal challenging the Department of Building’s determination that non-conforming commercial use was discontinued pursuant to ZR §52-61. R10A & C4-7 LSD Zoning district.

PREMISES AFFECTED – 25 Central Park West, West 62nd and West 63rd Streets, Block 1115, Lot 7501(2) Borough of Manhattan.

COMMUNITY BOARD #7M

APPEARANCES –

For Applicant: Margery Perlmutter.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5

Negative:.....0

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a Final Determination dated March 9, 2011 by the Department of Buildings’ (“DOB”) Counsel’s Office with denial affirmed on April 8, 2011 by the Manhattan Borough Commissioner (the “Final Determination”), and

WHEREAS, the Final Determination states, in pertinent part:

Your letters request confirmation that a non-conforming Use Group 6 grocery store in Unit C-1 that was vacant for two years was not discontinued and may change to a non-conforming Use Group 6 eating and drinking establishment in accordance with New York City Zoning Resolution (ZR)

MINUTES

Section 52-61.1 In your letters, you also state that the current art gallery use of Unit C-1 that followed the grocery store's vacancy is a non-conforming Use Group 6 commercial art gallery, and not a conforming Use Group 3 community facility non-commercial art gallery.

The current certificate of occupancy for the building, No. 110135, dated September 19, 1996, is for a 34-story multiple dwelling with twelve doctors' offices, a beauty parlor, servants rooms, three stores, a building manager's office, an apartment lobby and mail room located on the first floor.² The building occupies the entire west side block of Central Park West between 62nd and 63rd Streets with 200 feet on the east side located in the C4-7 district, and 50 feet on the west side located in the R10A district. In your August 2nd letter you state that the three stores listed on the CO are located in the portion of the building in the R10A district. You state that Unit C-1 contains 5,511 square feet (53% of the total commercial area), Unit C-2 which is an actively operating non-conforming drug store that contains 2,886 square feet (28% of the total commercial area), and Unit C-3 which is an actively operating non-conforming dry cleaning establishment that contains 1,925 square feet (19% of the total commercial area). You state that the grocery store vacated Unit C-1 on July 28, 2007 and the space remained vacant until mid-August 2009 when the art gallery took occupancy. In your letters, you assert that ZR § 52-61 allows a non-conforming use of Unit C-1 to resume because its vacancy did not amount to a two-year discontinuance of active operation of substantially all the non-conforming uses in the building given that the non-conforming drug store in Unit C-2 and the non-conforming dry cleaning establishment in Unit C-3 remained in active operation.

Contrary to your claim, ZR § 52-11 and § 52-61 require the elimination of any non-conforming use whose active operation is discontinued by a vacancy for more than two years, notwithstanding the active operation of other non-conforming uses in the same building. This interpretation of ZR § 52-11 and § 52-61 fulfills the public policy expressed in ZR § 51-00 to achieve a gradual remedy for incompatible uses by providing for the termination of non-

conforming uses after a statutory time period and restricting further investment in non-conforming uses that adversely affect the development of a district with a more uniform character.

ZR § 52-11 provides that "a nonconforming use may be continued, except as otherwise provided in [Chapter 2 of Article 5]." Once a non-conforming use has changed to a conforming use, the use is no longer a non-conforming use eligible for protection under ZR § 52-11. Likewise, when an establishment ceases all business functions and the space is vacant for over two years, it cannot be said that there is still "a non-conforming use" to be "continued" and protected under the section. The rest of Article 5 Chapter 2 provides exceptions to ZR § 52-11 and does not grant further protection of non-conforming uses, but rather limits or terminates non-conforming uses.

Whereas the commencement of a conforming use immediately terminates the ability to continue a non-conforming use, ZR § 52-61 provides guidance as to how long a non-conforming use may remain vacant before it too is no longer "a non-conforming use" eligible to be "continued." ZR § 52-61 states: "If, for a continuous period of two years, . . . the active operation of substantially all the *non-conforming uses* in any *building or other structure* is discontinued, such. . . *building or other structure* shall thereafter be used only for a conforming use." The text contains only one exception to the requirement that a non-conforming use become conforming after a two-year discontinuance: certain Use Group 6 uses may resume after a two-year vacancy of ground floor or basement stores in a building designed for residential use located in R5, R6 or R7 districts that are not in historic districts. The active operation of the non-conforming use in Unit C-1 stopped for two years and the space does not fall under ZR § 52-61's exception, therefore, it was discontinued and cannot change to another non-conforming use or be reactivated.

The analysis of whether the active operation of "substantially all" of the non-conforming uses in the building has discontinued does not determine whether the non-conforming uses in the rest of the building (Units C-2 and C-3) may continue. Where one or more non-conforming uses are discontinued in a building with multiple non-conforming uses, ZR § 52-61 sets a threshold at which the remaining actively operating non-conforming uses in the same building must terminate as well so that the entire building is used only for conforming uses.³ As stated above, it is not proper to apply ZR § 52-61 as

1 Your letters also respond to the letters to the Department dated August 11, 2010, September 10, 2010, October 25, 2010 and January 21, 2011, written on behalf of the managers of the condominium at the premises, the Residential Board of Managers of the Century Condominium, in opposition to a determination that a non-conforming use may resume.

2 The certificate of occupancy contains an administrative error in that it classifies all the first floor uses within Use Group 2.

3 There appears to be no dispute that Unit C-1 does not comprise "substantially all" of the non-conforming uses in the building, and therefore the actively operating non-conforming drug store and dry cleaner uses may continue.

MINUTES

a protective statute, therefore it is also not relevant that Unit C-1 comprises less than substantially all of the Use Group 6 non-conforming uses in the building.

The New York case law raised in your letters does not support a finding that the non-conforming use in Unit C-1 may resume. Both Toys R Us v. Silva, 89 N.Y.2d 411 (1996), and Daggett v. Putnam, 40 A.D.2d 576 (4th Dept. 1972), concern the right to continue a single non-conforming use and do not address the question of whether ZR § 52-61 allows a two-year vacancy of a non-conforming use in a building with more than one non-conforming use to resume. Agoglia v. Glass, 25 A.D.2d 954 (2nd Dept. 1970), is also not applicable because it concerns the authority of the Board of Standards and Appeals and the City Planning Commission to authorize non-conforming uses under ZR § 11-412 and ZR § 11-413.

Given that the non-conforming use of Unit C-1 was discontinued by the grocery store's two-year vacancy, the Department need not determine whether the non-conforming use would have been discontinued by the current art gallery use.

In the event the owner of the premises does not file an Alteration Type I permit application for a conforming use in Unit C-1, the Department may seek modification of the certificate of occupancy at the Board of Standards and Appeals; and

WHEREAS, a public hearing was held on this appeal on August 23, 2011, after due notice by publication in *The City Record*, with a continued hearing on October 18, 2011 and November 22, 2011, and then to decision on December 6, 2011; and

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

WHEREAS, the appeal is filed on behalf of the owner of the building's three commercial condominium units (the "Appellant") who contends that DOB's denial was erroneous; and

WHEREAS, the condominium's Residential Board of Managers initially made submissions and provided testimony in support of DOB's position; by letter dated November 15, 2011, the Residential Board of Managers stated that it withdraws its opposition to the appeal and requested that its submissions to the Board be withdrawn; and

WHEREAS, DOB, Appellant, and the Residential Board of Managers have been represented by counsel throughout this appeal; and

WHEREAS, the site is located partially within an R10A zoning district and partially within a C4-7 zoning district within the Special Lincoln Square District and is occupied by a 32-story mixed use commercial/residential/community facility condominium building; and

WHEREAS, the subject appeal concerns the question of whether the absence of a non-conforming Use Group 6 retail

use (formerly a grocery store) one of three commercial units (Unit C-1) for a period of greater than two years, while the other two commercial units (Units C-2 and C-3) remained occupied by non-conforming uses, causes Unit C-1 to lose the right to be re-occupied by another non-conforming Use Group 6 use; and

BACKGROUND

WHEREAS, the building (the "Building") was constructed in 1931 and occupies the entire west side block front of Central Park West between West 62nd Street and West 63rd Street with 250 feet of frontage on the side streets; and

WHEREAS, the 1954 Certificate of Occupancy (CO) states that the Building is a 32-story Class A Multiple Dwelling located in a "Business Use District" with apartments on all floors above the first floor and the following uses on the first floor: "eight (8) apartments, twenty-two (22) maids' rooms, three (3) doctors' offices, one (1) superintendent's office, five (5) stores[,], renting office"; and

WHEREAS, retail use was permitted as-of-right in "Business" districts pursuant to the 1916 Zoning Resolution; and

WHEREAS, in 1961, the site was mapped R10, a residential district which does not permit Use Group 6 use as-of-right, thus the existing Use Group 6 use was rendered non-conforming; and

WHEREAS, the 1983 CO, issued when the site was still within an R10 zoning district stated that the first floor contained "eleven (11) doctors' offices, beauty parlor, law office, storage, three (3) stores, building manager's offices, apartment, lobby and mail room"; the most recent CO, issued in 1996 reflects "three (3) stores" at the first floor, without any notation as to specific use within each store; and

WHEREAS, the site has since been rezoned and 200 feet are now located within an R10A zoning district and the westernmost 50 feet are within a C4-7 zoning district within the Special Lincoln Square District; all three of the retail spaces on the first floor are located within the R10A zoning district, where they are not permitted unless they are established as non-conforming uses; and

WHEREAS, the Appellant represents that the earliest available first floor plan is the 1989 Tax Lot Certification for the condominium which shows "commercial" Unit C-1 (Tax Lot 1001) (located at the corner of West 62nd Street and Central Park West) occupied by Gristedes a "Grocery Store," Unit C-2 (Tax Lot 1002) (located at the corner of West 63rd Street and Central Park West) occupied by a "Drug Store" or "Pharmacy," and Unit C-3 (Tax Lot 1003) (located immediately west of Unit C-2, on West 63rd Street) occupied by "Cleaners;" the building lobby and three doctors' offices separate Unit C-1 from Units C-2 and C-3, which are adjacent to each other; and

WHEREAS, the condominium formation documents reflect that Unit C-1 contains 5,511 sq. ft. of which 2,937 sq. ft. are on the first floor and the balance in the cellar (field measurements show the first floor portion at 3,298 sq. ft.), Unit C-2 contains 2,886 sq. ft. of which 1,062 sq. ft. is on the first floor (field measurements show the first floor portion at 1,580 sq. ft.), and Unit C-3 contains 1,925 sq. ft. of floor area, 888 sq.

MINUTES

ft. of which is on the first floor (field measurements show the first floor portion at 1,119 sq. ft.), for a total of 5,997 sq. ft. in zoning floor area at the first floor based on field measurements, with Unit C-1 comprising 55 percent of the total; and

WHEREAS, the Appellant asserts that Unit C-1 is now occupied by a commercial art gallery, Unit C-2 is occupied by a drug store, and Unit C-3 is occupied by a dry cleaning establishment and that the drug store and dry cleaning establishment have occupied the building for decades; and

WHEREAS, the Appellant asserts that Gristedes grocery store occupied Unit C-1 from the 1950s until July 28, 2007 and the art gallery rented the space in August 2009; and

WHEREAS, the Board notes that none of the background information is being contested except whether or not the art gallery is a commercial use; the question of the art gallery's status is not relevant to this appeal and will not be discussed; and

RELEVANT PROVISIONS OF THE ZONING RESOLUTION

WHEREAS, the primary ZR provisions the Appellant and DOB cite are as follows, in pertinent part:

ZR § 12-10

Non-conforming, or non-conformity

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

* * *

A "use" is:

(a) any purpose for which a #building or other structure# or an open tract of land may be designed, arranged, intended, maintained or occupied; or

(b) any activity, occupation, business or operation carried on, or intended to be carried on, in a #building or other structure# or on an open tract of land.

* * *

ZR § 52-11 – Continuation of Non-Conforming Uses/General Provisions

A #non-conforming use# may be continued, except as otherwise provided in this Chapter.

* * *

ZR § 52-61 – Discontinuance/General Provisions

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

Except in Historic Districts as designated by the Landmarks Preservation Commission, the provisions of this Section shall not apply to vacant

ground floor or #basement# stores in #buildings designed for residential use# located in R5, R6 or R7 Districts where the changed or reactivated #use# is listed in Use Group 6A, 6B, 6C or 6F excluding post offices, veterinary medicine for small animals, automobile supply stores, electrolysis studios and drive-in banks. In addition, the changed or reactivated #use# shall be subject to the provisions of Section 52-34 (Commercial Uses in Residence Districts); and

DISCUSSION

WHEREAS, the Appellant requests that the Board grant its appeal based on the following primary arguments: (1) ZR § 52-61 is clear and unambiguous; (2) substantially all of the non-conforming uses in the building have been continuous; and (3) case law and public policy compel the conclusion that the non-conforming use be entitled to continue as statutes in derogation of the common law are to be construed in favor of the owner; and

A. The Basis of the Appeal

The Plain Meaning of the Zoning Resolution

WHEREAS, the Appellant asserts that the Final Determination is contrary to the plain language of the ZR as ZR §§ 52-11 and 52-61 permit non-conforming uses to remain so long as they do not discontinue for a period of two years or longer because the text of ZR § 52-61 clearly states that "if for a continuous period of two years, . . . the active operation of substantially all the *non-conforming* uses in any *building or other structure* is discontinued, such . . . *building or other structure* shall thereafter be used only for a conforming use;" and

WHEREAS, the Appellant asserts that a plain reading results in the conclusion that all or substantially all of the non-conforming uses in the building must be discontinued for more than two years before the entirety of such building must be used only for conforming uses; and

WHEREAS, the Appellant cites to Toys "R" Us v. Silva, 89 N.Y.2d 411 (1996) in which the Court of Appeals stated that ZR § 52-61 "is not ambiguous – its clear language prohibits additional non-conforming activity when 'substantially all' of the 'active' nonconforming operations are discontinued;" and

WHEREAS, the Appellant notes that ZR § 52-11 states that "*non-conforming use* may be continued, except as otherwise provided in this Chapter" and that "as otherwise provided" is a reference to the ZR § 52-61 condition that "the active operation of substantially all the *non-conforming uses* in any *building or other structure*" must never discontinue for a period of two years or more; and

WHEREAS, the Appellant disagrees with DOB's assertion that the "'substantially all' of the non-conforming uses in any building" is meant to determine whether other non-conforming uses, by unit, in the building (in Unit C-2 and Unit C-3) may continue; and

WHEREAS, the Appellant asserts that such an interpretation which could potentially require active non-conforming uses to terminate is not supported by the text or public policy; and

MINUTES

WHEREAS, the Appellant disagrees with DOB's conclusion that ZR §§ 52-11 and 52-61 "require the elimination of any non-conforming use whose active operation is discontinued by a vacancy for more than two years, notwithstanding the active operation of other non-conforming uses in the same building;" the Appellant states that DOB misreads the plain text in the interest of its stated public policy goals; and

WHEREAS, the Appellant finds that the text is clear that the unit of measure for the "substantially all" analysis is "uses" plural in the "building" as a whole and that there is no support for DOB's conclusion that each use in each unit be measured separately; and

The Substantially All of the Uses in the Building Test

WHEREAS, the Appellant cites to ZR § 52-61 for the rule that if "the active operation of substantially all the *non-conforming uses* in the *building or other structure* is discontinued, such . . . *building or other structure* shall thereafter be used only for a conforming use;" and

WHEREAS, the Appellant asserts that since all three stores were rendered non-conforming in 1961, the three stores are all of the non-conforming commercial uses in the building – because Unit C-1 includes 55 percent of the stores' total floor area and the other two stores, which no one argues have been discontinued, contain 45 percent, there was never a point when less than 45 percent of the stores' total floor area was in continuous use, so the facts do not trigger the limitation set forth in ZR § 52-61 when substantially all the uses are discontinued; and

WHEREAS, the Appellant notes that "substantially all" is not defined in the ZR, but asserts that New York State courts have established a standard which supports a conclusion that even a small percentage of remaining non-conforming use could defeat a claim that "substantially all" had been discontinued, including Marzella v. Munroe, 69 N.Y.2d 967 (1987) which concludes that "abandonment does not occur unless there has been a complete cessation of the non-conforming use;" and

WHEREAS, the Appellant also cites to Toys "R" Us in which the Court of Appeals clarified the distinction between the common law standard and that of ZR § 52-61, holding that "52-61 terminates a non-conforming use when only minimal non-conforming activity continues; in Toys "R" Us, the business maintained 19 crates in a 16-story warehouse which amounted to one-tenth of one percent of the building's volume; and

WHEREAS, the Appellant states that there is no support in ZR § 52-61 or in the case law for treating each commercial unit as a separate non-conforming use that might be susceptible to ZR § 52-61's "substantially all" discontinuance standard on a unit-by-unit basis; and

WHEREAS, the Appellant notes that the warehouse in Toys "R" Us was only occupied by a single use and, thus the court did not analyze the subject issue of how the rights for multiple non-conforming uses to continue in a single building must be preserved; and

WHEREAS, the Appellant finds that Daggett v. Putnam, 40 A.D.2d 576 (4th Dep't. 1972) in which the court determined

that two residential trailers constitute a single non-conforming use so removal of one trailer for six years did not result in the abandonment of the right to maintain two trailers more closely considers the subject issue; and

WHEREAS, the Appellant asserts that Daggett establishes a rule, not refuted by Toys "R" Us that an abandonment analysis should consider the non-conforming portion of the floor in its entirety and not the individual parts or rooms on a floor and that in New York City "substantially all the *non-conforming uses* in any *building*" is required for an abandonment to have occurred; and

WHEREAS, the Appellant concludes that whether the three Use Group 6 retail spaces on the first floor are a single "use" or multiple "uses," substantially all of the use or all of the uses in the building must have been discontinued in order for ZR § 52-61's discontinuance provision to apply in this case; and

WHEREAS, the Appellant analyzed the ZR and argues that there is no basis for considering "building" in ZR § 52-61 to alternately mean "part of a building" or to convert "uses" plural into "use" singular; and

WHEREAS, the Appellant notes that DOB's interpretation would require different language, such as the insertion of the word "establishment" if the intent of ZR § 52-61 were to isolate uses or portions of a building; and

WHEREAS, the Appellant cites to several New York State cases to support its contention that statutes concerning the cessation of non-conforming uses be construed in favor of the property owner; and

WHEREAS, the Appellant notes examples from elsewhere in the state where the complete cessation of non-conforming uses is required before a property owner must convert to a conforming use see Marzella v. Munroe, Agoglia v. Glass, Daggett v. Putnam, and Town of Islip v. P.B.S. Marina; and

WHEREAS, the Appellant cites the principle that zoning regulations, since they are in derogation of the common law, must be strictly construed against the municipality which has enacted and seeks to enforce them see Allen v. Adami, 39 N.Y.2d 275 (1976); and

WHEREAS, accordingly, the Appellant finds that even if there is ambiguity in the statute as DOB suggests, it would be improper to resolve the ambiguity so as to expand the regulatory reach of the ZR to further restrict the use of Unit C-1; and

WHEREAS, the Appellant asserts that there are two public policy goals, rather than one, with regard to the cessation of non-conforming uses which must be balanced; those are (1) to discontinue non-conforming uses in buildings where they have been abandoned and (2) to protect building owners from the harm they would suffer if an amendment to the zoning were to be applied retroactively to pre-existing buildings; and

B. The Department of Buildings' Interpretation

WHEREAS, DOB makes the following primary arguments in support of its position that ZR § 52-61 does not allow the discontinued non-conforming use on Unit C-1 to be reactivated: (1) the non-conforming use in Unit C-1

MINUTES

ended and may no longer be continued per ZR § 52-11; (2) the “use” that may be continued pursuant to ZR § 52-11 refers to each individual non-conforming store; (3) the use was not “continued” per ZR § 52-11; and (4) ZR § 52-61 is not controlling where only one of several non-conforming uses in a building completely ceases; and

WHEREAS, DOB asserts that the plain meaning of ZR § 52-11 only authorizes present and ongoing non-conforming uses to keep operating and that ZR § 52-61 provides for the termination of such non-conforming use after a period of time when only a small portion of the establishment continues to operate; and

WHEREAS, DOB asserts that ZR § 52-11 authorizes each non-conforming “use” to be continued and provides that the right to a non-conforming use in Unit C-1 is examined independently from the other non-conforming uses in the building and not together with all the non-conforming uses in the building as part of a single non-conforming use; and

WHEREAS, DOB looks to the definition of “use” in ZR § 12-10(b) to include any activity, occupation, business or operation carried on in a building to support the position that ZR § 52-11 governs the right to continue each independently operating business in the building; DOB asserts that the text does not support a right to continue all the non-conforming uses as an indivisible category; and

WHEREAS, DOB states that to consider all three non-conforming uses as a single non-conforming use is broader than the definition of a “use” in ZR § 12-10 and is contrary to the public policy to reasonably restrict and ultimately eliminate such uses; and

WHEREAS, to the requirement for continuity, DOB asserts that the facts of allowing a single non-conforming use which was discontinued for a period of greater than two years to reactivate because the other non-conforming uses in the building have continued is not supported by the concept of continuation within ZR § 52-11; and

WHEREAS, DOB asserts that it must consider the general requirement for continuation in ZR § 52-11 together with the two-year discontinuation limit set forth at ZR § 52-61 such that a business which has discontinued does not satisfy the general provision of ZR § 52-11 which requires continuation or the limit that the discontinuation be for a period of less than two years; and

WHEREAS, DOB states that although ZR § 52-11 does not specify that non-conforming status is lost at the end of the second year of vacancy, it is reasonable to infer that an owner has abandoned a non-conforming use when the owner does not employ the space for the non-conforming use for two or more years; and

WHEREAS, to the applicability of ZR § 52-11, DOB states that it allows non-conforming uses to be continued unless limited or terminated by other sections of the ZR and that in the subject case it is not necessary to go any further since none of the section’s exceptions apply; and

WHEREAS, DOB asserts that the Appellant mistakenly treats ZR § 52-61 as a provision that protects the non-conforming use when ZR § 52-61 actually establishes

the point at which the non-conforming use or uses must change to a conforming use or uses, with exceptions as provided in ZR §§ 52-61 and 52-62; and

WHEREAS, DOB interprets ZR § 52-61 “If, for a continuous period of two years, . . . the active operation of substantially all the *non-conforming uses* in any *building or other structure* is discontinued, such . . . *building or other structure* shall thereafter be used only for a conforming use,” to mean that *each* non-conforming use must not discontinue for a period of two years or longer or else it loses the right to change or resume activity regardless of whether other non-conforming uses within the same building have been continuous; and

WHEREAS, to the applicability of ZR § 52-61, DOB asserts that ZR § 52-61 contemplates a limitation on the right to continue a non-conforming use in a building where substantially all of the sole non-conforming use, or substantially all of each of the multiple non-conforming uses, is discontinued; DOB asserts that the purpose of ZR § 52-61 is to set a threshold for when non-conforming uses are no longer allowed in the building; and

WHEREAS, DOB refers to Toys “R” Us v. Silva, 89 N.Y.2d 411 (1996) to support its claim that the courts have applied ZR § 52-61 as the standard for determining whether the sole non-conforming use in a building has substantially ceased operating and only minimal activity is taking place; in Toys “R” Us, the court determined that the occupancy of a small portion of the building by a non-conforming use could not establish the required continuance of the use and thus determined that the reactivation of the non-conforming use in the building was not permitted; and

WHEREAS, therefore, DOB asserts, the text must be read to require that active operation of substantially all of each non-conforming use be discontinued before the entire building must be used for a conforming use; and

WHEREAS, DOB states that ZR § 52-61 is not applicable to a building with multiple non-conforming uses unless each non-conforming uses is substantially discontinued; the discontinuance of the nonconforming use in Unit C-1 alone does not cause the entire building to conform; and

WHEREAS, DOB finds that where one non-conforming use completely ceases for more than two years in a building with several actively operating non-conforming uses, only that particular use is discontinued and the right to continue the use as a non-conforming use under ZR § 52-11 is lost; and

WHEREAS, DOB asserts that the ZR does not expressly provide for every instance in which a non-conforming use status is lost, but rather allows DOB to interpret the relevant provisions of Chapter 5 to achieve the purpose set for in ZR § 51-00 of gradually eliminating non-conforming uses; and

WHEREAS, DOB concludes that ZR § 52-61 does not allow the reactivation of the discontinued use in Unit C-1 as its purpose is to divest the right to a non-conforming use or uses in a building and not grant the right to resume a discontinued non-conforming use; and

MINUTES

WHEREAS, DOB adds that it would seek to amend the certificate of occupancy to reflect a conforming use in Unit C-1; and

CONCLUSION

WHEREAS, the Board agrees with the Appellant's analysis that the ZR does not dictate that when there is a two-year discontinued use of one non-conforming Use Group 6 store while two other non-conforming Use Group 6 stores in the same building remain in continuous use, the vacated store may not reactivate; and

WHEREAS, the Board agrees with the Appellant that the appropriate methodology is to consider the text as follows: (1) begin at ZR § 52-11 which states that non-conforming uses may continue unless limited by the remainder of the chapter; (2) ZR § 52-61 sets forth limits which include that substantially all the non-conforming uses in a building may not discontinue for a period greater than two years; (3) the text reflects that the "substantially all" analysis applies to "uses" plural in the "building" as a whole; and (4) although "substantially all" is not defined, prior DOB determinations and case law do not support the conclusion that 45 percent of continuously operating non-conforming uses would be below the minimum threshold; and

WHEREAS, the Board finds that, although the text does not specifically address situations like the subject building where there are multiple independent stores, the Board does not find a basis for reading the word "establishment" or "portion of a building" into ZR § 52-61 and that the plain meaning of the text reflects a broader reading, as the Appellant suggests; and

WHEREAS, the Board recognizes a distinction between "establishment" and "use" and finds that there is no basis to impose the term "establishment" onto the reading of ZR § 52-61's "uses" so as to allow for a unit by unit analysis as DOB suggests; and

WHEREAS, the Board notes that if the drafters of the ZR intended ZR § 52-61 to apply to each unit, rather than the building as a whole, it could have included more specificity as it has done in regulations related to signage and adult use regulations; and

WHEREAS, the Board was not persuaded by DOB's premise that ZR § 52-11 and not ZR § 52-61 applies to the subject matter; the Board recognizes ZR § 52-11 as the general provision that refers property owners to the limits set forth within the chapter, such as at ZR § 52-61, and does not see any basis to limit the applicability of ZR § 52-61 to only the analysis of whether "substantially all" of the use has ceased; and

WHEREAS, the Board finds that ZR § 52-61 is necessary to inform property owners about the two-year discontinuance condition and does in fact apply to instances where non-conforming uses have been discontinued; and

WHEREAS, the Board acknowledges that there are public policy interests to eliminate non-conforming uses and that the text does not specifically address the subject facts with multiple units and uses in a single building, but it does not find a basis for the public policy as stated by DOB to

substitute for the text; and

WHEREAS, although the Residential Board of Managers withdrew its opposition, the Board notes that it made the following primary arguments in opposition to the appeal (1) the plain language of the ZR bars extension of a non-conforming use into the space at issue because "building" in ZR § 52-61 should be read to mean "any part of any building and "part of such building"; (2) there is a strong public policy goal of gradually eliminating non-conforming uses; (3) ZR § 52-61's "uses" should also be read to mean "use," singular; (4) the spirit of the ZR bars conversion of the vacated space to a non-conforming use; and (5) reviewing each non-conforming use in a building independently is a fair and effective means of administering zoning; and

WHEREAS, the Board acknowledges the Residential Board of Managers' withdrawal of its opposition, but because its arguments were entered into the record and the Board considered them when evaluating the merits of the case, the Board notes that it was not persuaded by any of the arguments; and

WHEREAS, the Board concludes that the evaluation of whether there is discontinuance of substantially all of the non-conforming uses applies to the uses within the building and not to each individual use and since it is not disputed that 45 percent of the building's non-conforming uses have been continuous, as defined by ZR § 52-61, since prior to 1961, a non-conforming Use Group 6 use may re-occupy Unit C-1; and

Therefore it is Resolved that the subject appeal, seeking a reversal of the Final Determination of the Manhattan Borough Commissioner, dated April 8, 2011, denying the non-conforming status of Unit C-1, is hereby granted.

Adopted by the Board of Standards and Appeals, December 6, 2011.

.125-11-A

APPLICANT – Law Offices of Marvin B. Mitzner for 514-516 E. 6th Street, LLC, owner.

SUBJECT – Application August 25, 2011 – Appeal challenging the Department of Buildings' determination to deny the reinstatement of permits that allowed an enlargement to an existing residential building. R7B zoning district.

PREMISES AFFECTED – 514-516 East 6th Street, south side of East 6th Street, between Avenue A and Avenue B, Block 401, Lot 17, 18, Borough of Manhattan.

COMMUNITY BOARD #3M

APPEARANCES –

For Applicant: Marvin B. Mitzner.

For Opposition: John Bantos of Senator Duane Office, Jessica Napomiachi of Council Member Rosie Mendez Office, Alice Baldwin, Anoitto Lloyd and Kevin Shea.

For Administration: Mark Davis, Department of Buildings.

ACTION OF THE BOARD – Laid over to January 24, 2012, at 10 A.M., for continued hearing.

MINUTES

232-10-A

APPLICANT – OTR Media Group, Incorporated, for 4th Avenue Loft Corporation, owner;

SUBJECT – Application December 23, 2010 – An appeal challenging Department of Buildings’ denial of a sign permit on the basis that the advertising sign had not been legally established and not discontinued as per ZR §52-83. C1-6 Zoning District.

PREMISES AFFECTED – 59 Fourth Avenue, 9th Street & Fourth Avenue. Block 555, Lot 11. Borough of Manhattan.

COMMUNITY BOARD #3M

APPEARANCES –

For Applicant: Nadia Alexis.

ACTION OF THE BOARD – Laid over to February 7, 2012, at 10 A.M., for adjourned hearing.

15-11-A

APPLICANT – Slater & Beckerman, LLP., for 1239 Operating Corporation, owner.

SUBJECT – Application February 10, 2011 – Appeal challenging the Department of Building’s determination that a non-illuminated advertising sign and structure is not a legal non-conforming advertising sign pursuant to ZR §52-00. C6 zoning district.

PREMISES AFFECTED – 860 Sixth Avenue, through lot on the north side of West 30th Street, between Broadway and Avenue of the Americas, Block 832, Lot 1. Borough of Manhattan.

COMMUNITY BOARD #5M

APPEARANCES – None.

ACTION OF THE BOARD – Laid over to February 7, 2012, at 10 A.M., for adjourned hearing.

Jeff Mulligan, Executive Director

Adjourned: P.M.

REGULAR MEETING

TUESDAY AFTERNOON, DECEMBER 6, 2011

1:30 P.M.

Present: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.

ZONING CALENDAR

39-11-BZ

CEQR #11-BSA-079K

APPLICANT – Bryan Cave LLP, for Kimball Group, LLC, owner.

SUBJECT – Application April 8, 2011 – Variance (§72-21) to legalize a mixed use building, contrary to floor area (§24-162), parking (ZR §25-31), permitted obstructions (§24-33/23-44), open space access (§12-10), side yard setback (§24-55), and distance required from windows to lot line (§23-861). R4 zoning district.

PREMISES AFFECTED – 2230-2234 Kimball Street, between Avenue U and Avenue V, Block 8556, Lot 55, Borough of Brooklyn.

COMMUNITY BOARD #18BK

APPEARANCES – None.

ACTION OF THE BOARD – Application Denied.

THE VOTE TO GRANT –

Affirmative:0

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

Abstain: Commissioner Hinkson.....1

THE RESOLUTION –

WHEREAS, the decision of the Brooklyn Borough Commissioner dated March 31, 2011, acting on Department of Buildings Application No. 301146739, reads:

1. ZR 24-162: Proposed community facility FAR (1.05) exceeds the maximum permitted for community facility use (.4) in a building with a total FAR of more than .75 pursuant to ZR § 24-162(a).
2. ZR 25-31: Zero off-street parking spaces are provided where 11 parking spaces are required pursuant to ZR § 25-31.
3. ZR 24-33; 23-44: Hanging stairs are not a permitted obstruction in required side yard and are contrary to ZR § 24-33.
4. ZR 23-44; 24-33: Roof staircase is not a permitted obstruction in a required rear yard.
5. ZR 23-141; ZR 23-12; ZR 12-10: 4th through 6th floors do not have access to the proposed open space on the roof of the one-story rear yard extension as required by ZR § 12-10.
6. ZR 24-55: Building does not provide side yard setback above the 5th floor as required by ZR § 24-551.
7. ZR 23-861: Legally required windows on the

MINUTES

west side of the third floor are located less than 15 feet from a side lot line per ZR § 23-861; and

WHEREAS, this is an application under ZR § 72-21, to permit, on a lot within an R4 zoning district, the legalization of a partially constructed mixed-use residential/community facility building, which exceeds the community facility floor area ratio (FAR), fails to provide 11 required parking spaces, includes obstructions in the rear and side yards, fails to provide access to required open space, and fails to provide the required setback and required distance from window to lot line, contrary to ZR §§ 24-162, 25-31, 24-33, 23-44, 23-141, 23-12, 12-10, 24-55, and 23-861; and

WHEREAS, the applicant filed two companion applications – a common law vesting application pursuant to BSA Cal. No. 119-11-A and an administrative appeal pursuant to BSA Cal. No. 75-11-A, which the Board has not yet decided; and

WHEREAS, a public hearing was held on this application on October 18, 2011 after due publication in *The City Record*, and then to decision on December 6, 2011; and

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

WHEREAS, Community Board 18, Brooklyn, recommends that the application be disapproved because the building never complied with relevant zoning regulations; and

WHEREAS, New York State Senator Martin Golden, New York State Assemblyman Alan Maisel, and New York City Councilman Lewis Fidler provided written and oral testimony in opposition to the proposed variance; and

WHEREAS, certain community members provided written and oral testimony in opposition to the proposed variance; and

WHEREAS, the zoning lot is an interior lot with a width of 50'-6", a depth of 100 feet, and approximately 5,050 sq. ft. of lot area, and is located on Kimball Street between Avenue U and Avenue V in an R4 zoning district; the site is within a "predominantly built-up area;" and

WHEREAS, the subject site is occupied by a six-story building (the "Existing Building"), which is partially complete, but where construction has stopped pursuant to a Stop Work Order dated July 14, 2005; and

WHEREAS, the applicant seeks to legalize the Existing Building and complete construction pursuant to plans which do not comply with zoning district regulations; and

Procedural History

WHEREAS, the applicant sets forth the following procedural history; first, it represents that in April 3, 2001 it filed an application with DOB to construct a four-story building at the site, which would have included community facility use (medical offices) in the cellar and first and second floors and residential use on the third and fourth floors; and

WHEREAS, the project architect professionally certified the April 3, 2001 application as complying with all applicable codes and zoning regulations; and

WHEREAS, on April 19, 2001, DOB audited the plans and issued a series of objections, none of which are the subject of the current waiver requests except that the stair in the side yard did not comply with ZR § 24-33; several of the conditions addressed by the current waiver requests existed and were not in compliance with zoning regulations in effect for the first iteration of the building in 2001; and

WHEREAS, the architect revised the plans to reflect a four-story building, 1.05 FAR of community facility use, 0.72 FAR of residential use, and two accessory residential parking spaces, which DOB approved on June 12, 2001 (the "2001 Plans"); and

WHEREAS, on July 26, 2001, the New York City Planning Commission and City Council adopted zoning amendments which were applicable to the project; the applicable regulations include ZR § 24-162 (maximum floor area ratios and special floor area limitations for zoning lots containing residential and community facility uses in certain districts) (the "Zoning Change"); prior to the Zoning Change, ZR § 24-162 permitted mixed-use community facility/residential buildings in R4 zoning districts to contain a maximum FAR of 2.0 for community facility use, 1.35 for residential use, and 2.0 total; as amended, ZR § 24-162 reduced the maximum FAR to 0.4 for community facility use, 1.35 for residential use, and 1.75 total; and

WHEREAS, as a result of the Zoning Change, the 2001 Plans did not comply with the applicable zoning regulations related to FAR; and

WHEREAS, notwithstanding the Zoning Change and the 2001 Plans' zoning non-compliance, the applicant obtained a building permit to construct pursuant to the 2001 Plans on June 30, 2003 and began construction on July 15, 2003; and

WHEREAS, on October 14, 2003, the project architect filed revised plans adding a fifth floor, which was devoted to residential use; and

WHEREAS, in January 2004, DOB audited the plans and issued objections which did not include any of the issues that are the subject of the requested waivers, except for the stair in the side yard; the audit led to a stop work order/intent to revoke the permit dated January 27, 2004; and

WHEREAS, in February 2004, DOB revoked the permit, but reconsidered its objections and on March 29, 2004 approved the plans for the five-story building with 1.05 FAR of community facility use, 0.89 FAR of residential use, and two accessory residential parking spaces (the "March 2004 Plans"); and

WHEREAS, on October 15, 2004, the project architect submitted amended plans adding a sixth floor also for residential use, with 1.05 FAR of community facility use, 1.09 FAR for residential use, and two accessory residential parking spaces; and

WHEREAS, DOB did not issue any objections related to any of the waivers sought, except for the stair in the side

MINUTES

yard, and approved the plans on December 3, 2004 (the "December 2004 Plans"); and

WHEREAS, on June 28, 2005, DOB advised the owner that it intended to revoke the approvals and permits on the ground that the audit revealed non-compliance with the Zoning Change including that the community facility FAR exceeded the 0.4 maximum permitted (as of July 26, 2001 and prior to the issuance of any permits or the commencement of construction); the applicant asserts that as of July 2005, the six-story building approved in the December 2004 Plans was 65 percent complete and topped off at six stories; and

WHEREAS, on July 14, 2005, DOB revoked the Building Permit and ordered all work to stop immediately; in August 2005, DOB conducted an additional audit and issued further objections to the December 2004 Plans; and

WHEREAS, on August 3, 2005, the project architect filed an amendment to the December 2004 Plans making several changes necessary to bring the plans into compliance with the ZR and other regulations; the applicant submitted a request to allow the filing of an alteration application to remedy the objection that the plan contained too much floor area while allowing the sixth floor to remain; and

WHEREAS, on December 9, 2005, the DOB Deputy Commissioner stated that an Alteration Type II application could be filed to answer objections; on December 20, 2005, the Borough Commissioner added a note which stated that the application would comply with an agreement with the community, not described in the note; and

WHEREAS, on March 16, 2006, DOB issued 33 objections and the applicant states that by December 4, 2006 all but two of the objections had been resolved by revisions to the plans; and

WHEREAS, on December 11, 2006, DOB approved revised plans for a five-story building (the "December 2006 Plans" and the "Complying Development") which reflects 0.4 FAR for community facility use, 1.32 FAR for residential use, and three accessory residential parking spaces; and

WHEREAS, however, DOB only partially lifted the July 2005 Stop Work Order, to allow the owner to remove the sixth floor; and

WHEREAS, the applicant notes that on February 2, 2011, the New York City Planning Commission and City Council adopted zoning amendments which were applicable to the project; the applicable regulations include ZR §§ 24-01 and 24-551 (the applicability of side yard setback regulations for community facility buildings contained in ZR Article II, Chapter 4); these sections make ZR § 23-631 applicable to the proposal rather than ZR §§ 24-01 and 24-551 and requires that the maximum permitted height before setback would be reduced to 25 feet instead of 35 feet as formerly permitted; and

WHEREAS, in its companion common law vesting application, the applicant seeks to have the pre-February 2011 regulations apply since it asserts that its foundations were complete prior to the second zoning change; however, the applicant notes that it does not even comply with the

pre-February 2011 regulations as the sixth floor height does not comply with the required side yard setback under the pre-February 2011 or post-February 2011 scheme and thus it seeks a variance to the pre-February 2011 ZR § 24-551; and

WHEREAS, the applicant submitted an analysis of the Complying Development which reflects the elimination of the sixth floor, reduction in the community facility floor area, increase in the residential floor area, and resolution to all other non-complying conditions; and

WHEREAS, the applicant states that the Complying Development is a five-story building with a height of 51'-10", a total of 1.72 FAR, including 0.4 community facility FAR, 1.32 residential FAR, zero community facility parking spaces, and three accessory residential parking spaces, a total floor area of 8,690 sq. ft. (2,007 sq. ft. of community facility floor area and 6,883 sq. ft. of residential floor area); and

WHEREAS, after the negotiations with DOB subsequent to the objections raised in August 2005, the owner received approval in December 2006 for the Complying Development; and

The Variance Proposal

WHEREAS, the applicant proposes to maintain a six-story building with a maximum height of 61'-9", a total of 2.14 FAR, including 1.05 FAR of community facility use and 1.09 FAR of residential use, and two accessory residential parking spaces, with 10,800 sq. ft. of floor area (5,310 sq. ft. community facility and 5,490 sq. ft. residential); and

WHEREAS, the requested relief is as follows: a total height of 61'-9" (a maximum height of 51'-10" is permitted per the sky exposure plane); a total FAR of 2.14 (1.75 is the maximum total permitted); a community facility FAR of 1.05 (0.4 is the maximum permitted); zero community facility parking spaces (11 are the minimum required); two residential parking spaces (three are the minimum required); a total floor area of 10,800 sq. ft. (8,837.5 sq. ft. is the maximum permitted); 5,310 sq. ft. of community facility floor area (2,020 sq. ft. is the maximum permitted); staircase obstructions in the side yard and rear yard; 28.3 percent open space (a minimum of 45 percent is required); a side yard setback of eight feet on each side (a minimum side yard setback of 13.38 feet is required on each side); and a distance of eight feet from window to side lot line at the third floor (a minimum distance of 15 feet is required); and

WHEREAS, as to the FAR, the applicant seeks an increase in the amount permitted; and

WHEREAS, as to the 11 required parking spaces, the applicant asserts that the building's foundation was completed and thus would have been able to vest prior to the May 2004 enactment of the current ZR § 25-31 which requires one parking space per 500 sq. ft. of floor area for medical offices and ZR § 25-33, which only allows waiver of ten or fewer parking spaces; the prior text allowed for one parking space per 400 sq. ft. of floor area with waiver available for up to 25 spaces; and

WHEREAS, however, since the 2001 Plans and the post-approval amendments were filed after May 2004, the

MINUTES

ZR required one parking space per 500 sq. ft. of medical office space and a waiver provision for up to ten spaces, not 25; and

WHEREAS, the applicant was aware of all staircase non-compliance and offers no explanation for their non-complying condition; and

WHEREAS, as to the open space, the applicant acknowledges that it does not provide access to the open space on the roof of the first floor to all residential units so it cannot satisfy the open space requirement; and

WHEREAS, as to the side yard setback, the applicant acknowledges that it does not provide the required setback; and

WHEREAS, as to the distance between window and lot line, the applicant acknowledges that it does not provide the required distance; and

WHEREAS, the applicant alleges that a variance should be granted on the basis that: (1) there is a non-complying building on the site; (2) the building on the site is obsolete; (3) the potential use of the community facility space as a religious or educational institution warrants deference; and (4) the owner relied in good faith on DOB's approvals; and

WHEREAS, as set forth below, the Board is unconvinced by any of the applicant's arguments; and

WHEREAS, as to the first contention, the applicant alleges that the noted conditions are unique physical conditions that lead to practical difficulties and unnecessary hardship in developing the subject lot in full compliance with zoning district regulations; and

WHEREAS, the applicant asserts that the condition of a partially-built building that is approximately 65 percent complete and for which the owner currently has DOB's authorization to continue construction only to remove the sixth floor and not to complete pursuant to prior approvals is a unique hardship; and

WHEREAS, the applicant asserts that completion of the plans in full compliance with zoning would require significant changes to the building's occupancy and design that materially impact its utility and economic viability; and

WHEREAS, the applicant states that the conversion to a complying building would necessitate the removal of 993 sq. ft. of floor area and the conversion of 964 sq. ft. of community facility floor area on the first floor to mechanical space so it would be exempt from floor area calculations; and

WHEREAS, the applicant asserts that the partially-built building is obsolete in accordance with Board precedent to credit obsolescence of existing buildings in the variance context; and

WHEREAS, the applicant cites to prior Board cases including BSA Cal. No. 216-08-BZ (Shore Boulevard, Brooklyn) in which it states that the Board considered that the building previously inhabiting the site was "obsolete for living purposes" and BSA Cal. No. 272-04-BZ (31st Drive, Queens) in which the Board considered (1) whether existing buildings "may be used for their intended purpose," and (2) whether the residential building at issue "may still constitute

a viable residence" and "may be suitably used for residential purposes;" and

WHEREAS, the applicant asserts that the Existing Building, built pursuant to plans dated March and December 2004 is unusable as intended or as a residence because of the required loss of 22 percent of the total floor area, the inability to occupy the sixth floor with residential use, and the inability to use a portion of the first floor for community facility use; and

WHEREAS, the applicant states that the cellar, first, and second floors were designed for community facility use, but that the space could potentially be used by a Use Group 4 not-for-profit organization or house of worship and if such an institution were to occupy the space, the loss of 900 sq. ft. of floor area on the first floor to mechanical space and 1,897 sq. ft. of the second floor to residential use could have a negative impact on the institution's programmatic needs; and

WHEREAS, the applicant notes that the Board has followed New York State courts in cases such as Cornell University v. Bagnardi, 68 N.Y.2d 583 (1986) and Pine Knolls Alliance Church v. Zoning Board of Appeals of the Town of Moreau, 5 N.Y.3d 407 (2005), which presume that schools and religious institutions provide a benefit to the public's health, safety, and welfare and so should be afforded special deference under zoning; and

WHEREAS, the applicant notes that the Board has approved numerous variances for educational and religious institutions based on consideration of the programmatic needs of the institution; and

WHEREAS, the applicant states that because the cellar, first, and second floors were intended for community facility use that could potentially be occupied by a religious or educational institution, the presumption that the project will benefit the public's health, safety, and welfare applies and the proposal is entitled to special deference under zoning; and

WHEREAS, the applicant asserts that the Board must grant the subject application unless there is a showing of significant negative effects on traffic congestion, property values, or municipal services as described in the educational and religious institution case law; and

WHEREAS, the applicant asserts that the hardship associated with developing the site in full compliance with zoning also arises from the owner's good faith reliance on approvals from DOB commencing with construction in July 2003 and continuing until DOB issued the Stop Work Order in July 2005; and

WHEREAS, specifically, the applicant states that DOB accepted three sets of plans – the 2001 Plans, March 2004 Plans, and December 2004 Plans and conducted two audits of the plans (April 19, 2001 and January 26, 2005); and

WHEREAS, the applicant asserts that DOB had numerous opportunities to issue objections to the items that are the subject of this variance application during its review, but never issued the objections that are the subject of the requested waivers before the partial completion of the

MINUTES

Existing Building; and

WHEREAS, the applicant asserts that the issue of the side yard setbacks (covered by the current objection to ZR § 24-511) was addressed in May 2001 through an objection to ZR § 23-631 and agreed that the plans were in compliance with the ZR with respect to the issue of side yard setbacks; DOB raised the same objection under ZR § 23-631 on January 26, 2004, which the project architect addressed by obtaining a reconsideration; the applicant asserts that DOB did not register another objection based on ZR § 24-551 until after the Stop Work Order; and

WHEREAS, the applicant cites to Pantelidis v. Board of Standards and Appeals, 10 N.Y.3d 846 (2008) in which the Court of Appeals determined that a property owner was entitled to a variance where the owner relied in good faith on a [building] permit, for the principle that an owner is entitled to a variance if “in erecting [a] disputed structure [he] acted in good faith reliance on the application, plans and permit approved by . . . New York City Department of Buildings;” and

WHEREAS, the applicant states that the Supreme Court in the earlier Pantelidis v. Board of Standards and Appeals, 10 Misc.3d 1077(A) 814 (N.Y. Sup. 2005) held that the property owner was entitled to the variance because he had relied in good faith on a valid construction permit and the property owner would be burdened by considerable expense and disruption if forced to remove the enlargement; the court found that the uniqueness finding required under ZR § 72-21(a) “may be satisfied under a broad range of circumstances . . . even absent unique circumstances, if the landowner was proceeding in good faith, the variance had minimal impact, and financial hardship was shown;” and

WHEREAS, the applicant states that the Court also found that good faith reliance on a permit valid at the time of construction precludes a finding of self-created hardship; and

WHEREAS, the applicant likens the subject facts to those in Pantelidis in that the owner proceeded in good faith reliance on DOB-approved plans and permits; and

WHEREAS, specifically, the applicant states that there were audits on April 19, 2001 and January 26, 2005, which provided DOB with opportunities to issue concerns with respect to the current objections; and

WHEREAS, the applicant states that DOB raised objections to the original plans submitted, then approved the plans and issued a building permit, and later approved amended plans, similar to the history in Pantelidis; and

WHEREAS, the applicant submitted an affidavit from the project architect which states that all construction work that is the subject of the variance application was performed only after the plans had been audited by either a DOB senior plan examiner or by the review and approval of senior technical staff; and

WHEREAS, the project architect states that, with respect to the four-story building, an audit of the plans initially filed in 2001 was performed by the Borough Commissioner and Chief Examiner, that five meetings took place in connection with the audit, and the plans were

amended in 2003 to reflect the results of the audit; and

WHEREAS, the project architect states, with respect to the five-story building, that its plans to add a fifth floor were audited by the Chief Plan Examiner, three meetings took place in connection with this audit, and the plans were amended to reflect the results of the audit; and

WHEREAS, with respect to the six-story building, the project architect states that the plans were audited by the Deputy Borough Commissioner, three meetings were held, but that the sixth floor was required to be removed; and

WHEREAS, the Board is not persuaded by any of the applicant’s contentions about a hardship at the site; and

WHEREAS, the Board finds no basis or precedent to accept that a new partially-constructed zoning non-compliant building satisfies the requirement for a hardship as required by ZR § 72-21(a); and

WHEREAS, the Board finds that the recent construction of a building that does not comply with zoning is easily distinguished from cases concerning historic pre-existing buildings constructed under prior zoning schemes and/or the advent of modern building requirements; and

WHEREAS, the Board notes that both of the cases the applicant cites for precedent are inapposite as one was a case in which the Board rejected a claim that an existing two-family home was obsolete for its intended residential use and denied the variance application (31st Drive) and another (Shore Boulevard) concerned a historic one-story bungalow, which was the subject of a home enlargement special permit pursuant to ZR § 73-622, which does not require a unique hardship finding; and

WHEREAS, the Board notes that a partially-constructed building would never be deemed suitable for its intended purpose and the applicant’s reference to traditional hardship is misplaced; and

WHEREAS, as to the applicant’s assertion that the inclusion of community facility space which could potentially be used for non-profit or religious use warrants deference under New York State case law, the Board strongly rejects the applicant’s broadening of the deference principle to hypothetical institutions; and

WHEREAS, the Board notes that in the body of variances it has granted to religious and educational institutions, it has required evidence of the institutions’ non-profit status and mission as well as a detailed description of programmatic needs and a clear nexus between the waivers sought and the programmatic goals, and that New York State case law does not support a finding that a hypothetical institution would warrant any deference; and

WHEREAS, as to the good faith reliance doctrine, the Board notes that New York state courts have identified the following requirements: (1) the property owner acted in good faith, (2) there was no reasonable basis with which to charge the property owner with constructive notice that it was building contrary to zoning, and (3) municipal officials charged with carrying out the ZR granted repeated assurances to the property owner; and

WHEREAS, as to whether the property owner acted in good faith, the Board has no reason to believe that the

MINUTES

property owner did not act in good faith; and

WHEREAS, as to whether the property owner had constructive notice that the building did not comport to zoning, the Board finds that no party has made any assertion that the ZR sections which are the subject of the current objections were ambiguous or that there was any question to whether or not they applied; and

WHEREAS, therefore, the Board finds that the property owner had constructive notice that the building did not comply with the zoning in effect at the time of the permit's first issuance in 2003 and subsequent to the approvals that followed; and

WHEREAS, the Board notes that completed construction or omissions in review do not protect a property owner from subsequent review and requirements to correct errors that it is charged with knowing; the onus is not on DOB to identify all provisions that the architect has the burden of following and whose due diligence would have discovered; and

WHEREAS, further the Board notes that errors or omissions during review, such as DOB's failure to review the 2001 Plans after the Zoning Change and prior to the 2003 permit issuance are clearly distinguishable from cases like Pantelidis where there was a single zoning interpretation question at issue, which had clearly been analyzed and discussed by the architect and DOB officials until DOB explicitly approved the disputed condition; and

WHEREAS, although the subject case includes a multi-step review process, the Board identifies the following problems with the applicant's assertion that the burden be shifted to DOB: (1) the 2004 Plans/Permit were void on their face as they did not comply with existing zoning that was adopted prior to the permit's issuance; (2) the two sets of professionally-certified plans, and the 2001 and 2005 audits, and ultimate approvals do not rise to the level of multiple governmental assurances as set forth in the case law; (3) it is true that quantitatively there were multiple approvals, but that is a result of the applicant's multiple revisions to the plans and DOB review which missed and carried over existing non-complying conditions, and were not repeated assurances that the specific non-complying conditions which form the basis of the waiver requests were complying; (4) as the applicant notes, of the current objections, DOB only identified the staircase non-compliance and side setback in earlier reviews; (5) none of the case law regarding good faith reliance, which concern fact patterns involving specific zoning questions that the approving body explicitly addressed, suggests that the doctrine can be expanded so far as to apply to DOB omissions; and (6) public policy does not support such a conclusion that DOB cannot later identify oversights in prior reviews; and

WHEREAS, the Board notes that the record only contains proof of the following: (1) an April 2001 audit prior to the approval or at the time the approval was performed, but prior to the Zoning Change; (2) the architect's claim that there were several audits prior to the issuance of the June 2003 permit, but without any proof; (3) a January 2004 Stop

Work Order which raised zoning issues including zoning calculations; (4) a January 28, 2004 Reconsideration regarding only height and setback and the application of ZR § 24-50; (5) February 2, 2004 Stop Work Order which states inconsistencies and zoning non-compliance; (6) a March 29, 2004 Reconsideration from an examiner recognizing the fifth floor (but the record is unclear as to whether drawings were even reviewed); (7) March 29, 2004 professionally certified stamped plans; (8) December 2004 professionally certified stamped plans with a sixth story; and (9) a June 28, 2005 intent to revoke; and

WHEREAS, the Board finds that the architect's affidavit is vague and unsubstantiated on dates, reviews, and approvals by DOB and that the evidence with higher level DOB official review dates to a period after the sixth story was constructed (all after June 2005); and

WHEREAS, further, the Board notes that most correspondence and audits reflect that they occurred after the June 2005 Stop Work Order and the property owner's attempts to legalize the building; and

WHEREAS, the Board finds that the applicant cannot claim reliance on approvals or communication after the non-compliance it seeks to now remedy was already completed and that because DOB was communicating with the applicant to rectify illegal construction it does not reflect that the applicant has a hardship which arises from after the fact review and consideration; and

WHEREAS, the Board finds that submissions from the time after the 2005 Stop Work Order and the construction of the sixth floor do not contribute to a claim that there were repeated governmental assurances that led to the hardship; and

WHEREAS, in consideration of the good faith reliance factors, the applicant's case fails because (1) there was constructive notice as the ZR provisions related to the subject non-compliance is clear and unambiguous; (2) DOB's failure to identify zoning non-compliances that were not raised by the architect is not evidence of repeated implicit or explicit governmental assurances; and (3) the permit was void on its face – due diligence would have readily revealed that the permit, which was not based on governmental assurances, was invalid; subsequent professionally certified amendments to the plans reflect zoning non-compliance; and

WHEREAS, the Board deems that the need for the waivers results from the property owner's team's failure to perform due diligence; and

WHEREAS, as noted above, the Zoning Change was adopted by the City Planning Commission on July 26, 2001, nearly two years prior to the initial issuance of the permit; and

WHEREAS, after careful consideration of all submitted testimony and evidence in support of these contentions, the Board does not credit any aspect of applicant's good faith reliance argument; and

WHEREAS, the Board notes that an architect is charged with constructive notice of the zoning regulations applicable to the development and if a change in said

MINUTES

regulations would have a substantive effect on the development proposal, especially where an architect uses the Professional Certification program, in which he or she is able to obtain a permit without a full DOB examination, which was employed at various points of the approval process; and

WHEREAS, moreover, the Board finds that information regarding the Zoning Change was readily available to the filing architect prior to issuance of the permits; and

WHEREAS, the Board concludes that there was no good faith reliance and no uniqueness leading to unnecessary hardship or practical difficulties; and

WHEREAS, instead, the need for waivers arises only because the subject building in particular was constructed contrary to zoning; and

WHEREAS, for the reasons set forth above, the Board finds that the applicant has failed to meet the finding set forth at ZR § 72-21(a); and

WHEREAS, the applicant asserts that the hardships due to the existence of a non-complying building on the site, an obsolete building, and the owner's good faith reliance on related approvals were not created by the owner as the obsolescence resulting from purely physical characteristics is not a self-created hardship; and

WHEREAS the applicant also notes that the Court in Pantelidis held that "good faith reliance precludes a finding of self-created hardship" and the owner constructed the partially-built building based upon good faith reliance on the repeated approvals from DOB and therefore a finding of self-created hardship is precluded; and

WHEREAS, the Board does not disagree with the applicant's statement that a finding of good faith reliance precludes a determination that the hardship was self-created, however, the Board does not find that the subject application warrants such consideration; and

WHEREAS, the Board looks to the sequence of approvals and work performed and finds that the applicant commenced construction in 2003 pursuant to plans which had, significantly, been approved prior to the Zoning Change, but whose permit was not issued until after; the Board notes that the project architect alone was charged with the duty to apply the zoning in effect at the time of the permit's issuance and that the non-compliance associated with the Zoning Change could have been readily discovered; and

WHEREAS, subsequent approvals readopted errors unrelated to the Zoning Change which were missed by the architect and DOB previously and do not relieve the applicant of the duty of confirming that all zoning was correct; and

WHEREAS, the Board finds that because the applicant ignored its constructive notice – the clear language of the ZR – it created its own hardship; and

WHEREAS, the Board notes that any financial hardship that the applicant claims would be incurred if demolition of the Building were required is a direct result of the applicant failing to perform due diligence to ascertain

the zoning prior to construction; it has nothing to do with any inherent condition of the site; and

WHEREAS, as stated above, the need to re-design the building now is not a hardship and the waivers arise only because the development was constructed contrary to zoning; and

WHEREAS, hardship that occurs only because of the actions of the property owner is best characterized as self-created, in the absence of any countervailing factors; and

WHEREAS, accordingly, the Board finds that the need for the waivers is a self-created hardship; and

WHEREAS, thus, the Board finds that the applicant has failed to meet the finding set forth at ZR § 72-21(d), which requires that the practical difficulties or unnecessary hardship claimed as the basis for a variance have not been created by the property owner; and

Conclusion

WHEREAS, as to good faith reliance, the Board finds the applicant interprets the case law too broadly, including Jayne Estates v. Raynor, 22 N.Y.2d 417, 239 N.Y.S.2d 75 (1968) and Ellentuck, et al. v. Joseph B. Klein, et al., 51 A.D.2d 964, 380 N.Y.S. 2d 327 (2d Dep't 1976), with regard to when a hardship incurred by the reliance on a permit which is later invalidated is relevant to a variance finding; and

WHEREAS, the Board clarifies that the courts do not extend the good faith reliance principle to all property owners who build pursuant to a permit, which is subsequently invalidated; the courts have limited the applicability of good faith reliance to situations where property owners performed work pursuant to a series of governmental reviews and approvals, addressing specific conditions, that were later reversed; and

WHEREAS, as noted above, the Board finds that the mere fact that the subject project was audited and the site visited during construction logically does not indicate that the owner relied on a series of governmental reviews and approvals, rather, the evidence reflects that the owner performed substantial construction based on permits obtained through the Professional Certification Program or after considerable time had passed between approval and permit issuance, and that such construction would have continued regardless of whether DOB visited the site or audited the project; and

WHEREAS, since the application fails to meet the findings set forth at ZR §§ 72-21 (a) and (d), it must be denied; and

WHEREAS, because the Board finds that the application fails to meet the findings set forth at ZR §§ 72-21(a) and (d), which all address the threshold issue of whether a unique hardship afflicts the site, the Board declines to address the other findings.

Therefore it is Resolved that the decision of the Brooklyn Borough Commissioner, March 31, 2011, acting on Department of Buildings Application No. 301146739, is sustained and the subject application is hereby denied.

Adopted by the Board of Standards and Appeals, December 6, 2011.

MINUTES

90-11-BZ

APPLICANT – Malcom Kaye, AIA, for Jian Guo, owner.
SUBJECT – Application June 23, 2011 – Variance (§72-21) to allow the legalization of two semi-detached homes, contrary to lot area and lot width (§23-32), rear yard (§23-47), parking (§25-141) and floor area (§23-141) regulations. R3-1 zoning district.

PREMISES AFFECTED – 23 Windom Avenue, east side of Windom Avenue, 210’ south of Cedar Avenue, Block 3120, Lot 19, Borough of Staten Island.

COMMUNITY BOARD #2SI

APPEARANCES – None.

ACTION OF THE BOARD – Application Denied.

THE VOTE TO GRANT –

Affirmative:0
Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5

THE RESOLUTION –

WHEREAS, the decision of the Staten Island Borough Commissioner dated June 14, 2011, acting on Department of Buildings Application No. 520060567, reads in pertinent part:

The proposed subdivision of one zoning lot and one tax lot into two separate zoning lots and two separate tax lots is contrary to Sec. 23-32 (ZR) in that the min. lot area required is 3,135 sq. ft. and the min. lot width required is 33 feet for a semi-detached two-family in a R3-1 zoning district; and

WHEREAS, this is an application under ZR § 72-21, to permit, on a lot in an R3-1 zoning district within a Lower Density Growth Management Area (“LDGMA”), the legalization of a semi-detached two-family home that does not comply with the zoning regulations for lot area and lot width, contrary to ZR § 23-32; and

WHEREAS, a companion variance application, filed under BSA Cal. No. 91-11-BZ, for 25 Windom Avenue (“25 Windom”), the adjacent site to the south, was heard concurrently and decided on the same date; and

WHEREAS, a public hearing was held on this application on November 15, 2011 after due publication in *The City Record*, and then to decision on December 6, 2011; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan and Commissioner Montanez; and

WHEREAS, Community Board 2, Staten Island, recommends approval of this application; and

WHEREAS, the subject site is located on the east side of Windom Avenue, between Cedar Avenue and Robin Road, in an R3-1 zoning district within an LDGMA; and

WHEREAS, the subject zoning lot (Lot 18) consists of both 23 Windom (tentative lot 19) and 25 Windom (tentative lot 18) and has a width of 60 feet, a depth of 100 feet, and a total lot area of 6,000 sq. ft. (the “Zoning Lot”); and

WHEREAS, the subject site, 23 Windom (tentative lot 19), has a width of 30 feet, a depth of 100 feet, and a total lot area of 3,000 sq. ft.; and

WHEREAS, the lot to the rear of the Zoning Lot (Lot 49), located at 72 Ocean Avenue (“72 Ocean”) is occupied by a single-family home which encroaches into the rear of the 25 Windom (tentative lot 18); and

WHEREAS, specifically, the home at 72 Ocean occupies an approximately 16.2-ft. by 16.9-ft. portion at the rear of the Zoning Lot (the “Encroachment Area”), which was the subject of an adverse possession claim in Ling v. Lieneck (Index No. 103478/07) wherein, on August 14, 2008, the New York State Supreme Court ordered that the Encroachment Area be merged with tax lot 49 (72 Ocean) through adverse possession; and

WHEREAS, in a letter to the applicant dated January 12, 2011, Department of Buildings’ (“DOB”) Staten Island Borough Commissioner Marshall A. Kaminer noted that the court judgment did not create new zoning lots when it granted fee simple title of the Encroachment Area to the owner of 72 Ocean Avenue; thus, although the court judgment changed the dimensions of tentative tax lot 18, the dimensions of the Zoning Lot remain 60’-0” by 100’-0”; and

WHEREAS, the applicant provided evidence that it has submitted an application to subdivide the Zoning Lot in accordance with ZR § 12-10(c), in an effort to establish 25 Windom as a separate zoning lot that does not include the Encroachment Area in its dimensions (tentative lot 18); and

WHEREAS, the Board notes that the Encroachment Area is located entirely within the 25 Windom site (tentative lot 18), and has no effect on the dimensions of the proposed lot at 23 Windom (tentative lot 19); and

WHEREAS, the applicant represents that the Zoning Lot was formerly occupied by a legal non-complying two-story home; and

WHEREAS, the prior home was demolished in 2004 in anticipation of the construction of two two-family semi-detached homes; and

WHEREAS, the subject site is currently occupied by a semi-detached two-story two-family home which is connected to an identical two-family semi-detached home at 25 Windom; and

WHEREAS, the applicant notes that the current configuration of the two two-family semi-detached homes on the Zoning Lot is non-conforming because multi-family homes are prohibited in R3-1 zoning districts within an LDGMA; therefore the applicant seeks to subdivide the Zoning Lot, which results in the subject non-compliances; and

WHEREAS, the applicant proposes to legalize the subject home, which has the following non-complying parameters: a lot width of 30’-0” (the minimum required lot width is 33’-0”); and a lot area of 3,000 sq. ft. (the minimum required lot area is 3,135 sq. ft.); and

WHEREAS, the Board notes that on August 12, 2004, the City Planning Commission (“CPC”) adopted a text amendment which modified the minimum required lot area and lot width for two-family semi-detached homes in R3-1

MINUTES

zoning districts within the LDGMA (the “Text Amendment”); and

WHEREAS, specifically, the text amendment increased the subject site’s minimum required lot area from 1,700 sq. ft. to 3,135 sq. ft. and increased the minimum required lot width from 18 feet to 33 feet; and

WHEREAS, the applicant states that the architect filed the application for a building permit on February 4, 2005, and DOB issued a permit for the subject home on June 13, 2005, and construction commenced thereafter; and

WHEREAS, the applicant states that the architect also filed a subdivision application with the Department of Finance (“DOF”) in 2005 for the purpose of subdividing the Zoning Lot into two 30’-0” by 100’-0” lots¹; and

WHEREAS, however, the applicant’s development proposal was based upon the assumption that the Zoning Lot could be subdivided into two complying lots; and

WHEREAS, thus, the architect, filing under DOB’s Professional Certification Program, assumed that the requirements for minimum lot area and lot width remained at 1,700 sq. ft. and 18 feet, respectively; and

WHEREAS, the Board notes that ZR § 23-32 provides that for two-family semi-detached homes in R3-1 zoning districts within LDGMAs, the minimum lot area is 3,135 sq. ft. and the minimum lot width is 33 feet; and

WHEREAS, the subdivision now proposed by the applicant would create two substandard lots: a 3,000 sq. ft. lot with a width of 30 feet at 23 Windom, and a 2,728 sq. ft. lot with a width of 30 feet at 25 Windom; and

WHEREAS, the Board notes that the August 12, 2004 text amendment had been in effect at least five months prior to the filing of the permit application and ten months prior to the permit issuance, and therefore the proposed subdivision of the Zoning Lot no longer met the requirements for minimum lot width or lot area; and

WHEREAS, the applicant notes that ZR § 23-33 provides an exemption to the minimum lot width and lot area requirements for existing small lots in R3-1 zoning districts within the LDGMA; however, the subject site is not eligible for the exemption because the owner cannot establish separate and individual ownership of the two lots both on December 8, 2005 and the date of the application for a building permit, as required by ZR § 23-33; and

WHEREAS, a DOB audit on September 28, 2006 revealed the encroachment of the neighbor’s house at the rear of the 25 Windom site (tentative lot 18), which was not reflected on the plans; and

WHEREAS, subsequently, on November 15, 2006, DOB revoked the permit for 25 Windom; and

WHEREAS, the applicant notes that the September 28, 2006 objection DOB issued for 25 Windom and its subsequent revocation of the permit did not affect the permit for 23 Windom, and on March 26, 2007 DOB issued Certificate of Occupancy #500749675F for the subject two-

family semi-detached home on the site; and

WHEREAS, subsequently, on April 12, 2007, the current owner purchased 23 Windom; and

WHEREAS, on March 2, 2010, the applicant states that it filed an application to subdivide the Zoning Lot with DOB; and

WHEREAS, in a letter to the applicant dated August 10, 2010, DOB Staten Island Borough Commissioner Marshall A. Kaminer stated that “the subdivision application was subsequently audited, and the Department noted that the proposed subdivision was contrary to ZR § 23-32 which requires a minimum lot width of 33 feet and a minimum lot area of 3,135 sq. ft. for a semi-detached two-family dwelling;” and

WHEREAS, consequently, the approval and permit that the architect obtained through the Professional Certification Program erroneously allowed for the subdivision of the Zoning Lot into two substandard-sized lots; and

WHEREAS, the applicant alleges that a variance should be granted on the basis that: (1) there are actual unique physical conditions on the site that lead to hardship; and (2) significant expenditures were made in good faith reliance on DOB’s permitting action; and

WHEREAS, as set forth below, the Board is unconvinced by either argument; and

WHEREAS, as to the first contention, the applicant alleges that the following is a unique physical conditions that leads to practical difficulties and unnecessary hardship in developing the subject lot in strict compliance with the underlying zoning requirements: the lot has an irregular shape and size; and

WHEREAS, as to the size of the lot, the applicant represents that the Zoning Lot has an irregularly large width of 60 feet, making it the widest lot on the subject block, which, combined with the Zoning Lot’s 6,000 sq. ft. area, could accommodate a significantly sized house if the Zoning Lot were not subdivided; and

WHEREAS, the applicant states that the width and area of the Zoning Lot are just barely too small to satisfy the requirements of ZR § 23-32, and alleges that the proposed development of two semi-detached two-family homes is more consistent with the surrounding neighborhood character than the construction of one large as-of-right home on the Zoning Lot; and

WHEREAS, alternatively, the applicant claims that tentative lot 19, as subdivided, is irregularly shaped based on its narrow width of 30’-0”²; and

WHEREAS, the Board notes that the 400-ft. radius diagram submitted by the applicant reflects that there are several other sites in the surrounding area with similar lot areas and widths as the Zoning Lot, and that even if this condition was unique to the site, the Board does not consider the fact that the Zoning Lot has a larger width and area than the average lot in the surrounding vicinity to be a hardship; and

WHEREAS, specifically, the Board notes that the applicant could have constructed an as-of-right home on the

¹ As discussed below, the architect failed to file a separate subdivision application with DOB at this time, as required by DOB’s Staten Island Borough Office.

MINUTES

Zoning Lot rather than attempting to subdivide the lot and construct two two-family semi-detached homes, and the Board does not agree that construction of such an as-of-right home would be out of character with the surrounding area, since, unlike the proposed development, it would fully comply with the requirements of the Zoning Resolution; and

WHEREAS, the Board further notes that development of an as-of-right home on the Zoning Lot would not be burdened by the adverse possession determination that affects 25 Windom, as a home that fully complied with the underlying zoning requirements could easily be configured on the Zoning Lot despite the loss of the Encroachment Area; and

WHEREAS, as to the applicant's claim that the Zoning Lot is almost large enough to be subdivided into two lots that satisfy the minimum lot width and lot area requirements of ZR § 23-32, the Board notes that the applicant must satisfy the ZR § 72-21(a) finding regardless of the degree of the non-compliances at issue, and that in any event the Board notes that tentative lot 19 is substandard by approximately 135 sq. ft. in area and three feet in width, which the Board does not consider to be de minimis; and

WHEREAS, as to the applicant's claim that tentative lot 19 is a uniquely narrow lot, the Board disagrees and finds that, although it does not satisfy the minimum lot width and area requirements of ZR § 23-32, tentative lot 19 is a regularly shaped lot with a size that is consistent with the majority of lots in the surrounding area; and

WHEREAS, the Board notes that in its submissions to the Board the applicant specifically noted that the average lot width in the surrounding area is between 25 feet and 30 feet; and

WHEREAS, accordingly, the Board does not find any of the purported unique conditions to rise to the level of unnecessary hardship or practical difficulties; and

WHEREAS, the Board concludes that the need for the minimum lot area and lot width waivers result from the architect's lack of due diligence in identifying the August 12, 2004 text amendment, and the erroneous assumption that the Zoning Lot could be subdivided into two 30'-0" by 100'-0" lots; and

WHEREAS, for the above reasons, the Board concludes that the applicant has not shown that there are unique physical conditions present at the site that lead to unnecessary hardship or practical difficulties in complying with the applicable zoning requirements; and

WHEREAS, the applicant's secondary argument is that a variance is justified based upon good faith reliance on DOB's permitting action; and

WHEREAS, specifically, the applicant claims that at the time development commenced, there was no way for the filing architect to know about the text amendment which changed the minimum lot area and lot width requirements for the site; and

WHEREAS, the applicant claims that the Department of City Planning ("DCP") did not provide proper notice of the zoning change to the professional filing community before the application for the permit was made; and

WHEREAS, as noted above, the text amendment was adopted by the CPC on August 12, 2004, which is more than five months before the permit application was filed with DOB; and

WHEREAS, the applicant claims that CPC did not publish the relevant update to the Zoning Resolution reflecting the text change until October 12, 2005; and

WHEREAS, the applicant argues that the lack of knowledge of the zoning change was not its fault; and

WHEREAS, the applicant also alleges that DOB audited the project and conducted multiple site visits, and therefore it should have been alerted to the error prior to the completion of construction; and

WHEREAS, specifically, the applicant claims that by June 30, 2006 the exterior shell of the home was complete but significant work remained on the site, and that as of that date the site had been inspected by DOB four times and DOB had rescinded a previously issued stop work order, based on responses provided by the architect; and

WHEREAS, the applicant argues that despite DOB's numerous reviews of the project as of June 30, 2006, DOB had never identified the subject non-compliances related to the minimum lot width and lot area which are at issue in this application; and

WHEREAS, the applicant states, after construction of the subject home was complete, DOB inspected the site for a fifth time on October 2, 2006 and signed off on the final Certificate of Occupancy for the home; and

WHEREAS, as noted above a Certificate of Occupancy was issued for the home on March 26, 2007; and

WHEREAS, the applicant states that the non-compliances related to ZR § 23-32 were not identified by DOB until late 2010, more than three years after the Certificate of Occupancy was issued for 23 Windom and the home was sold to the current owner; and

WHEREAS, the applicant argues that if DOB had raised the subject non-compliances during the site visits that occurred prior to June 30, 2006, the applicant would not have incurred the additional costs associated with completing construction of the home, and therefore the owner relied in good faith on DOB's reviews and approvals when construction was partially completed; and

WHEREAS, after careful consideration of all submitted testimony and evidence in support of these contentions, the Board does not credit any aspect of applicant's good faith reliance argument; and

WHEREAS, the Board notes at the outset that it is the burden of the owner and his or her filing representative to properly ascertain the applicable zoning regulations when applying to DOB for a permit, especially where an architect uses the Professional Certification Program, in which he or she is able to obtain a permit without a full DOB examination; and

WHEREAS, the Board further notes that it is appropriate to charge an architect with constructive notice of the applicable zoning regulations, as a change in the zoning may have a substantive effect on a proposed development; and

MINUTES

WHEREAS, moreover, the Board finds that information regarding the zoning change for the subject site was available to the architect prior to its filing the building application; and

WHEREAS, specifically, the Board notes that an application to amend the Zoning Resolution was filed by the Department of City Planning (“DCP”) on May 20, 2004, and that the notice provision in City Charter § 200(a)(1) requires the proposed text amendment to be referred to all community boards, borough boards, and borough presidents for a 60 day review period; and

WHEREAS, subsequently, on July 28, 2004, CPC adopted the text amendment, published a report which explained the purpose and details of the text amendment, and filed the adopted resolution with the Office of the Speaker, City Council, and the Borough President; and

WHEREAS, the Board observes that DCP also maintains a website which provides information on all upcoming and recently passed text amendments and zoning changes, and that the website made such information available as early as September 19, 1999; and

WHEREAS, the Board notes that the architect could have contacted DCP directly to confirm whether there were any upcoming or recent text amendments that could have a substantive effect on the proposed development; and

WHEREAS, accordingly, the Board finds that the owner and filing representative had constructive notice of the text amendment as of its adoption on August 12, 2004, and that the failure to complete its own due diligence in preparing its application before DOB does not cure the invalidity of the permit; and

WHEREAS, the Board concludes that any claim of good faith reliance upon DOB’s permitting action is negated by the lack of due diligence in consulting DCP directly or its website, where information about the zoning change that would have prevented the erroneous DOB filing could easily have been obtained; and

WHEREAS, the Board also rejects the argument that the architect’s lack of due diligence regarding the August 12, 2004 text amendment was negated by DOB’s subsequent review of the project; and

WHEREAS, the Board notes, and the applicant acknowledges, that when the original subdivision application was filed with DOF in 2005, the architect did not file a separate subdivision application with DOB based on the erroneous belief that DOB did not require a separate subdivision application when a New Building application was being filed; and

WHEREAS, the Board further notes that the applicant filed a subdivision application with DOB in 2010 to correct this mistake; and

WHEREAS, as noted above, DOB subsequently issued a letter on August 10, 2010 stating that the subdivision application was audited and DOB determined that it was contrary to ZR § 23-32; and

WHEREAS, accordingly, the Board observes that the architect did not provide DOB with the appropriate documentation, in the form of a separate subdivision

application, at the time it filed for a building permit, and that failure to do so likely hampered DOB’s ability to identify the subject non-compliances at an earlier date; and

WHEREAS, however, the Board finds that, notwithstanding the possibility that DOB could have identified the non-compliances earlier if the architect had followed proper DOB filing procedures, the architect is not absolved from its responsibility to perform due diligence in identifying the applicable zoning text, especially where the permit was obtained through the Professional Certification Program; and

WHEREAS, the Board notes that the mere fact that DOB visited the site prior to the completion of construction does not reflect that the owner detrimentally relied on DOB’s review; rather, the owner commenced construction in reliance on a permit that was obtained through the Professional Certification Program and would have completed the construction based on that permit even if DOB had not visited the site during construction; and

WHEREAS, the Board further notes that, although DOB issued a Certificate of Occupancy for the home at 23 Windom prior to determining that the site does not comply with ZR § 23-32, the home was completed prior to the issuance of the Certificate of Occupancy, and therefore the owner could not have relied upon it in making expenditures toward construction of the home; and

WHEREAS, the Board concludes that there was no good faith reliance and no uniqueness leading to unnecessary hardship or practical difficulties; and

WHEREAS, for the reasons set forth above, the Board finds that the applicant has failed to meet the finding set forth at ZR § 72-21(a); and

WHEREAS, as noted above, the applicant could have constructed a home on the Zoning Lot that fully complied with the underlying zoning regulations, and that any hardship that exists on the subject site is solely the result of the applicant’s attempt to subdivide the Zoning Lot to construct two two-family semi-detached homes; and

WHEREAS, the Board notes that hardship that occurs only because of the actions of the property owner is best characterized as self-created, in the absence of any countervailing factors; and

WHEREAS, accordingly, the Board finds that the need for the requested waivers constitute a self-created hardship; and

WHEREAS, thus, the Board finds that the applicant has failed to meet the finding set forth at ZR § 72-21(d), which requires that the practical difficulties or unnecessary hardship claimed as the basis for a variance have not been created by the property owner; and

WHEREAS, the applicant submitted case law in support of its arguments regarding good faith reliance, including Pantelidis v. BSA, 814 N.Y.S.2d 891 10 (N.Y. Sup. Ct. 2005), Jayne Estates v. Raynor, 22 N.Y.2d 417, 239 N.Y.S.2d 75 (1968) and Ellentuck, et al. v. Joseph B. Klein, et al., 51 A.D.2d 964, 380 N.Y.S. 2d 327 (2d Dep’t 1976), to establish when a hardship incurred by the reliance on a permit which is later invalidated is relevant to a variance

MINUTES

finding; and

WHEREAS, the Board clarifies that the courts do not extend the good faith reliance principle to all property owners who build pursuant to a permit which is subsequently invalidated; the courts have limited the applicability of good faith reliance to situations where property owners performed work pursuant to a series of governmental review and approvals, which were later reversed; and

WHEREAS, the Board distinguishes the subject case which involves building plans approved through the Professional Certification Program, which allows owners to obtain a permit without a full DOB examination; and

WHEREAS, the Board notes, as described above, that any participant in the Professional Certification Program is open to have plans audited at any time; and

WHEREAS, finally, it is clear that the applicant simply did not perform due diligence with regard to the applicable zoning regulations, which had changed ten months prior to the commencement of construction, or with regard to the legal status of the Encroachment Area; and

WHEREAS, the Board is able to distinguish all of the cited case law and, thus, finds the applicant's reliance on it unavailing; and

WHEREAS, the applicant also discusses BK Corporation v. BSA, 210 NY Slip. Op. 3117U (Queens Sup. 2010), and claims that the facts in the subject case can be distinguished from those in BK Corporation, wherein the court upheld the Board's rejection of a good faith reliance claim where the owner failed to identify a change in the Zoning Resolution that occurred approximately two years prior to the commencement of construction and DOB did not audit the plans until after the project was complete; and

WHEREAS, the applicant argues that in contrast to BK Corporation, in the subject case the text amendment occurred ten prior to the commencement of construction and DOB visited the site while construction was still underway, and therefore contends that the site is more deserving of a finding of good faith reliance because the owner relied on DOB's review of the project while the home was only partially completed; and

WHEREAS, the Board is not persuaded that the distinctions between the facts of the subject case and those in BK Corporation warrant a finding of good faith reliance; and

WHEREAS, the Board notes that the failure to identify the text amendment in the subject case was similarly the result of a lack of due diligence, regardless of whether it was ten months or two years after the zoning change; and

WHEREAS, as noted above, the Board finds that the mere fact that the subject project was audited and the site visited during construction logically does not indicate that the owner relied on a series of governmental reviews and approvals, rather, the evidence reflects that the owner performed substantial construction based on a permit obtained through the Professional Certification Program, and that such construction would have continued regardless of whether DOB visited the site or audited the project; and

WHEREAS, since the application fails to meet the findings set forth at ZR §§ 72-21 (a) and (d), it must be denied; and

WHEREAS, because the Board finds that the application fails to meet the findings set forth at ZR §§ 72-21(a) and (d), which address the threshold issue of whether a unique hardship afflicts the site, the Board declines to address the other findings.

Therefore it is Resolved that the decision of the Staten Island Borough Commissioner, dated June 14, 2011, acting on Department of Buildings Application No. 520060567, is sustained and the subject application is hereby denied.

Adopted by the Board of Standards and Appeals, December 6, 2011.

91-11-BZ

CEQR #11-BSA-110K

APPLICANT – Malcom Kaye, AIA, for Jian Guo, owner.
SUBJECT – Application June 23, 2011 – Variance (§72-21) to allow the legalization of two semi-detached homes, contrary to lot area and lot width (§23-32), rear yard (§23-47), parking (§25-141) and floor area (§23-141) regulations. R3-1 zoning district.

PREMISES AFFECTED – 25 Windom Avenue, east side of Windom Avenue, 210' south of Cedar Avenue, Block 3120, Lot 18, Borough of Staten Island.

COMMUNITY BOARD #2SI

APPEARANCES – None.

ACTION OF THE BOARD – Application Denied.

THE VOTE TO GRANT –

Affirmative:0

Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5

THE RESOLUTION:

WHEREAS, the decision of the Staten Island Borough Commissioner dated June 14, 2011, acting on Department of Buildings Application No. 500749684, reads in pertinent part:

1. The proposed minimum lot area and minimum lot width is contrary to Sec 23-32 (ZR)
2. The proposed rear yard is contrary to Sec 23-47 (ZR)
3. The proposed required parking for a two-family dwelling is contrary to Sec. 25-622 (ZR) in that no more than two parking spaces can be in tandem
4. The maximum floor area ratio...is contrary to Sec. 23-141, B (ZR); and

WHEREAS, this is an application under ZR § 72-21, to permit, on a lot in an R3-1 zoning district within a Lower Density Growth Management Area ("LDGMA"), the legalization of a semi-detached two-family home that does not comply with the zoning regulations for lot area, lot width, floor area ratio ("FAR"), rear yard, and parking, contrary to ZR §§ 23-32, 23-141, 23-47, and 25-622; and

WHEREAS, a companion variance application, filed

MINUTES

under BSA Cal. No. 90-11-BZ, for 23 Windom Avenue (“23 Windom”), the adjacent site to the north, was heard concurrently and decided on the same date; and

WHEREAS, a public hearing was held on this application on November 15, 2011 after due publication in *The City Record*, and then to decision on December 6, 2011; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan and Commissioner Montanez; and

WHEREAS, Community Board 2, Staten Island, recommends disapproval of this application; and

WHEREAS, the subject site is located on the east side of Windom Avenue, between Cedar Avenue and Robin Road, in an R3-1 zoning district within an LDGMA; and

WHEREAS, the subject zoning lot (Lot 18) consists of both 23 Windom (tentative lot 19) and 25 Windom (tentative lot 18) and has a width of 60 feet, a depth of 100 feet, and a total lot area of 6,000 sq. ft. (the “Zoning Lot”); and

WHEREAS, the subject site, 25 Windom (tentative lot 18), has a width of 30 feet, a depth ranging between approximately 84 feet and 100 feet, and a total lot area of 2,728 sq. ft.; and

WHEREAS, the adjacent lot to the rear of the site (Lot 49), located at 72 Ocean Avenue (“72 Ocean”) is occupied by a single-family home which encroaches into the rear of the Zoning Lot; and

WHEREAS, specifically, the home at 72 Ocean occupies an approximately 16.2-ft. by 16.9-ft. portion at the rear of the Zoning Lot (the “Encroachment Area”), which was the subject of an adverse possession claim in Ling v. Lieneck (Index No. 103478/07) wherein, on August 14, 2008, the New York State Supreme Court ordered that the Encroachment Area be merged with tax lot 49 (72 Ocean) through adverse possession; and

WHEREAS, in a letter to the applicant dated January 12, 2011, Department of Buildings’ (“DOB”) Staten Island Borough Commissioner Marshall A. Kaminer noted that the court judgment did not create new zoning lots when it granted fee simple title of the Encroachment Area to the owner of 72 Ocean Avenue; thus, although the court judgment changed the dimensions of tentative tax lot 18, the dimensions of the Zoning Lot remain 60’-0” by 100’-0”; and

WHEREAS, the applicant provided evidence that it has submitted an application to subdivide the Zoning Lot in accordance with ZR § 12-10(c), in an effort to establish 25 Windom as a separate zoning lot that does not include the Encroachment Area in its dimensions (tentative lot 18); and

WHEREAS, accordingly, the zoning non-compliances referenced herein are based on the dimensions of the proposed lot at 25 Windom (tentative lot 18), which does not include the Encroachment Area; and

WHEREAS, the applicant represents that the Zoning Lot was formerly occupied by a legal non-complying two-story home; and

WHEREAS, the prior home was demolished in 2004 in anticipation of the construction of two two-family semi-

detached homes; and

WHEREAS, the subject site is currently occupied by a semi-detached two-story two-family home which is connected to an identical two-family semi-detached home at 23 Windom; and

WHEREAS, the applicant notes that the current configuration of the two two-family semi-detached homes on the Zoning Lot is non-conforming because multi-family homes are prohibited in R3-1 zoning districts within an LDGMA; therefore the applicant seeks to subdivide the Zoning Lot, which results in the subject non-compliances; and

WHEREAS, the applicant proposes to legalize the subject home, which has the following non-complying parameters: a lot width of 30’-0” (the minimum required lot width is 33’-0”); a lot area of 2,728 sq. ft. (the minimum required lot area is 3,135 sq. ft.); a floor area of 1,910 sq. ft. (the maximum permitted floor area is 1,637 sq. ft., including a 20 percent bonus for a sloping roof); an FAR of 0.70 (the maximum permitted FAR is 0.60, including a 20 percent bonus for a sloping roof); a rear yard with a minimum depth of 18’-9 ½” (a rear yard with a minimum depth of 30’-0” is required); and three tandem parking spaces (a minimum of three parking spaces are required, but no more than two may be parked in tandem); and

WHEREAS, the Board notes that on August 12, 2004, the City Planning Commission (“CPC”) adopted a text amendment which modified the minimum required lot area and lot width for two-family semi-detached homes in R3-1 zoning districts within the LDGMA (the “Text Amendment”); and

WHEREAS, specifically, the text amendment increased the subject site’s minimum required lot area from 1,700 sq. ft. to 3,135 sq. ft. and increased the minimum required lot width from 18 feet to 33 feet; and

WHEREAS, the applicant states that the architect filed the application for a building permit on January 24, 2005, DOB issued a permit for the subject home on February 7, 2005, and construction commenced thereafter; and

WHEREAS, the applicant states that the architect also filed a subdivision application with the Department of Finance (“DOF”) in 2005 for the purpose of subdividing the Zoning Lot into two 30’-0” by 100’-0” lots¹; and

WHEREAS, however, the applicant’s development proposal was based upon the assumption that the Zoning Lot could be subdivided into two complying lots and that the Encroachment Area remained part of the subject site; and

WHEREAS, thus, the architect, filing under DOB’s Professional Certification Program, assumed that the requirements for minimum lot area and lot width remained at 1,700 sq. ft. and 18 feet, respectively, and that the owner of 72 Ocean was not entitled to adverse possession of the portion of the Zoning Lot which its home encroached upon; and

¹ As discussed below, the architect failed to file a separate subdivision application with DOB at this time, as required by DOB’s Staten Island Borough Office.

MINUTES

WHEREAS, the Board notes that ZR § 23-32 provides that for two-family semi-detached homes in R3-1 zoning districts within LDGMAs, the minimum lot area is 3,135 sq. ft. and the minimum lot width is 33 feet; and

WHEREAS, the subdivision now proposed by the applicant would create two substandard lots: a 3,000 sq. ft. lot with a width of 30 feet at 23 Windom, and a 2,728 sq. ft. lot with a width of 30 feet at 25 Windom; and

WHEREAS, the Board notes that the August 12, 2004 text amendment had been in effect at least five months prior to the filing of the permit application or the permit issuance, and therefore the proposed subdivision of the Zoning Lot no longer met the requirements for minimum lot width or lot area; and

WHEREAS, the applicant notes that ZR § 23-33 provides an exemption to the minimum lot width and lot area requirements for existing small lots in R3-1 zoning districts within the LDGMA; however, the subject site is not eligible for the exemption because the owner cannot establish separate and individual ownership of the two lots both on December 8, 2005 and the date of the application for a building permit, as required by ZR § 23-33; and

WHEREAS, the Board notes that the plans filed by the architect with the initial permit application did not disclose that the home at 72 Ocean encroaches onto the Zoning Lot, and the architect based its zoning calculations for the subject site on a 3,000 sq. ft. lot and did not account for the Encroachment Area; and

WHEREAS, a DOB audit on September 28, 2006 revealed the encroachment of the neighbor's house at the rear of the site, which was not reflected on the plans; and

WHEREAS, subsequently, on November 15, 2006, DOB revoked the permit for the subject site; and

WHEREAS, the applicant represents that, by that point, the construction of the home was complete; and

WHEREAS, subsequently, the Encroachment Area was merged into tax lot 49 pursuant to the August 14, 2008 decision in Ling v. Lieneck; and

WHEREAS, the applicant states that as a result of the court order, tentative lot 18 does not comply with the underlying zoning requirements for FAR, rear yard, and parking; and

WHEREAS, consequently, the approval and permit that the architect obtained through the Professional Certification Program erroneously allowed for the subdivision of the Zoning Lot into two substandard-sized lots, and did not account for the rear yard encroachment in calculating the zoning requirements for the site; and

WHEREAS, the applicant alleges that a variance should be granted on the basis that: (1) there are actual unique physical conditions on the site that lead to hardship; and (2) significant expenditures were made in good faith reliance on DOB's permitting action; and

WHEREAS, as set forth below, the Board is unconvinced by either argument; and

WHEREAS, as to the first contention, the applicant alleges that the following are unique physical conditions that lead to practical difficulties and unnecessary hardship in

developing the subject lot in strict compliance with the underlying zoning requirements: (1) the lot has an irregular shape and size; and (2) the adverse possession determination was not foreseeable; and

WHEREAS, as to the size of the lot, the applicant represents that the Zoning Lot has an irregularly large width of 60 feet, making it the widest lot on the subject block, which, combined with the Zoning Lot's 6,000 sq. ft. area, could accommodate a significantly sized house if the Zoning Lot were not subdivided; and

WHEREAS, the applicant states that the width and area of the Zoning Lot are just barely too small to satisfy the requirements of ZR § 23-32, and alleges that the proposed development of two semi-detached two-family homes is more consistent with the surrounding neighborhood character than the construction of one large as-of-right home on the Zoning Lot; and

WHEREAS, alternatively, the applicant argues that tentative lot 18, as subdivided, is irregularly shaped because the Encroachment Area is carved out of the lot, making it extremely difficult to comply with the zoning requirements for the site; and

WHEREAS, as to the adverse possession claim, the applicant states that at the time the property was purchased there was a known encroachment consisting of a kitchen, concrete steps, and a wooden deck with a fence extending into the rear corner of the property from 72 Ocean; and

WHEREAS, the applicant further states that when the owner of the subject site requested that the encroachment be removed, the owner of 72 Ocean asserted a claim of adverse possession, which was ultimately granted by the court on August 14, 2008 in Ling v. Lieneck; and

WHEREAS, the applicant represents that at the time of purchasing the subject property, the owner had no reason to presume that the encroachment from 72 Ocean constituted adverse possession, and that until the date of the court's determination the owner had legal title to that portion of the lot; and

WHEREAS, the applicant claims that DOB issued certain violations against 72 Ocean for work without a permit relating to the portions of the home that encroach into the Zoning Lot, and therefore it was reasonable to believe that the owner would prevail in an action to have the encroaching structures removed; and

WHEREAS, the Board notes that the 400-ft. radius diagram submitted by the applicant reflects that there are several other sites in the surrounding area with similar lot areas and widths as the Zoning Lot, and that even if this condition was unique to the site, the Board does not consider the fact that the Zoning Lot has a larger width and area than the average lot in the surrounding vicinity to be a hardship; and

WHEREAS, specifically, the Board notes that the applicant could have constructed an as-of-right home on the Zoning Lot rather than attempting to subdivide the lot and construct two two-family semi-detached homes, and the Board does not agree that construction of such an as-of-right home would be out of character with the surrounding area,

MINUTES

since, unlike the proposed development, it would fully comply with the requirements of the Zoning Resolution; and

WHEREAS, as to the applicant's claim that the Zoning Lot is almost large enough to be subdivided into two lots that satisfy the minimum lot width and lot area requirements of ZR § 23-32, the Board notes that the applicant must satisfy the ZR § 72-21(a) finding regardless of the degree of the non-compliances at issue, and that in any event the Board notes that tentative lot 18 is substandard by approximately 407 sq. ft. in area and three feet in width, which the Board does not consider to be de minimis; and

WHEREAS, the Board also disagrees with the applicant's argument that the adverse possession determination in Ling v. Lieneck could not have been foreseen, or that the loss of the Encroachment Area is a unique physical condition which creates a hardship in developing the site in compliance with the underlying zoning regulations; and

WHEREAS, the Board notes that the encroachment of the 72 Ocean home onto the rear of the Zoning Lot was not only in existence prior to the date the owner purchased the subject site, but the applicant submitted evidence indicating that at least a portion of the encroachment existed as early as 1926; and

WHEREAS, the Board further notes that the size of the Encroachment Area is significant at approximately 16.2-ft. by 16.9-ft., and is plainly visible on the survey, in the photographs submitted with the application, and based on the site visits conducted by individual Board members, and finds that the architect could have foreseen that the proposed home must either comply with the zoning regulations for minimum distance between buildings or required rear yard, and that the owner of 72 Ocean could make a claim of adverse possession for the Encroachment Area; and

WHEREAS, accordingly, the Board finds the applicant's failure to consider the possibility that the Encroachment Area would be merged with 72 Ocean (tax lot 49) via adverse possession was the result of a lack of due diligence; and

WHEREAS, further, the Board notes that development of an as-of-right home on the Zoning Lot would not be burdened by the adverse possession determination, as a home that fully complied with the underlying zoning requirements could easily be configured on the Zoning Lot despite the loss of the Encroachment Area, and therefore any hardship that results from the adverse possession determination is solely due to the applicant's attempt to subdivide the Zoning Lot; and

WHEREAS, even assuming, in arguendo, that the Board accepted the applicant's claim of a unique hardship based on the adverse possession determination and the resulting irregular shape of the lot, the site would still not comply with the minimum lot area and lot width requirements of ZR § 23-32, which have no relation to the encroachment of the 72 Ocean home at the rear of the site; and

WHEREAS, accordingly, the Board does not find any of the purported unique conditions to rise to the level of

unnecessary hardship or practical difficulties; and

WHEREAS, the Board concludes that the need for the minimum lot area and lot width waivers result from the architect's lack of due diligence in identifying the August 12, 2004 text amendment, and the erroneous assumption that the Zoning Lot could be subdivided into two 30'-0" by 100'-0" lots; and

WHEREAS, the Board further concludes that the need for the FAR, rear yard, and parking waivers similarly result from the architect's failure to perform due diligence as to the legal status of the Encroachment Area; and

WHEREAS, for the above reasons, the Board concludes that the applicant has not shown that there are unique physical conditions present at the site that lead to unnecessary hardship or practical difficulties in complying with the applicable zoning requirements; and

WHEREAS, the applicant's secondary argument is that a variance is justified based upon good faith reliance on DOB's permitting action; and

WHEREAS, specifically, the applicant claims that at the time development commenced, there was no way for the filing architect to know about the text amendment which changed the minimum lot area and lot width requirements for the site; and

WHEREAS, the applicant claims that the Department of City Planning ("DCP") did not provide proper notice of the zoning change to the professional filing community before the application for the permit was made; and

WHEREAS, as noted above, the text amendment was adopted by the CPC on August 12, 2004, which is more than five months before the permit application was filed with DOB; and

WHEREAS, the applicant claims that CPC did not publish the relevant update to the Zoning Resolution reflecting the text change until October 12, 2005; and

WHEREAS, the applicant argues that the lack of knowledge of the zoning change was not its fault; and

WHEREAS, the applicant also alleges that DOB audited the project and conducted multiple site visits, and therefore it should have been alerted to the error prior to the completion of construction; and

WHEREAS, specifically, the applicant claims that by June 30, 2006 the exterior shell of the home was complete but significant work remained on the site, and that as of that date the site had been visited by DOB four times, the project had been subject to an audit, and DOB had rescinded a previously issued stop work order and notice of intent to revoke the building permit, based on responses provided by the architect; and

WHEREAS, the applicant argues that despite DOB's numerous reviews of the project as of June 30, 2006, DOB had never identified any of the non-compliant conditions which are at issue in this application; and

WHEREAS, the applicant contends that the remaining work on the home was completed prior to the September 28, 2006 audit which revealed the encroachment of the neighbor's house at the rear of the site; and

WHEREAS, the applicant argues that if DOB had

MINUTES

raised the subject non-compliances during its audit or the site visits that occurred prior to June 30, 2006, the applicant would not have incurred the additional costs associated with completing construction of the home, and therefore the owner relied in good faith on DOB's reviews and approvals when construction was partially completed; and

WHEREAS, after careful consideration of all submitted testimony and evidence in support of these contentions, the Board does not credit any aspect of applicant's good faith reliance argument; and

WHEREAS, the Board notes at the outset that it is the burden of the owner and his or her filing representative to properly ascertain the applicable zoning regulations when applying to DOB for a permit, especially where an architect uses the Professional Certification Program, in which he or she is able to obtain a permit without a full DOB examination; and

WHEREAS, the Board further notes that it is appropriate to charge an architect with constructive notice of the applicable zoning regulations, as a change in the zoning may have a substantive effect on a proposed development; and

WHEREAS, moreover, the Board finds that information regarding the zoning change for the subject site was available to the architect prior to its filing the building application; and

WHEREAS, specifically, the Board notes that an application to amend the Zoning Resolution was filed by the Department of City Planning ("DCP") on May 20, 2004, and that the notice provision in City Charter § 200(a)(1) requires the proposed text amendment to be referred to all community boards, borough boards, and borough presidents for a 60 day review period; and

WHEREAS, subsequently, on July 28, 2004, CPC adopted the text amendment, published a report which explained the purpose and details of the text amendment, and filed the adopted resolution with the Office of the Speaker, City Council, and the Borough President; and

WHEREAS, the Board observes that DCP also maintains a website which provides information on all upcoming and recently passed text amendments and zoning changes, and that the website made such information available as early as September 19, 1999; and

WHEREAS, the Board notes that the architect could have contacted DCP directly to confirm whether there were any upcoming or recent text amendments that could have a substantive effect on the proposed development; and

WHEREAS, accordingly, the Board finds that the owner and filing representative had constructive notice of the text amendment as of its adoption on August 12, 2004, and that the failure to complete its own due diligence in preparing its application before DOB does not cure the invalidity of the permit; and

WHEREAS, the Board concludes that any claim of good faith reliance upon DOB's permitting action is negated by the lack of due diligence in consulting DCP directly or its website, where information about the zoning change that would have prevented the erroneous DOB filing could easily

have been obtained; and

WHEREAS, the Board also rejects the argument that the architect's lack of due diligence regarding the August 12, 2004 text amendment or the encroachment at the rear of the site was negated by DOB's subsequent review of the project; and

WHEREAS, in a letter to the architect dated March 23, 2009, DOB Staten Island Borough Commissioner Marshall A. Kaminer stated that "[t]he plans upon which the Department's initial approval was based did not show 72 Ocean Avenue's deck and rear portion of the building. If your plans had disclosed the actual site conditions, these plans would not have been approved;" and

WHEREAS, the Board notes, and the applicant acknowledges, that when the original subdivision application was filed with DOF in 2005, the architect did not file a separate subdivision application with DOB based on the erroneous belief that DOB did not require a separate subdivision application when a New Building application was being filed; and

WHEREAS, the Board further notes that the applicant filed a subdivision application with DOB in 2010 to correct this mistake; and

WHEREAS, in a letter to the applicant dated August 10, 2010, DOB Staten Island Borough Commissioner Marshall A. Kaminer stated that "the subdivision application was subsequently audited, and the Department noted that the proposed subdivision was contrary to ZR § 23-32 which requires a minimum lot width of 33 feet and a minimum lot area of 3,135 sq. ft. for a semi-detached two-family dwelling;" and

WHEREAS, accordingly, the Board observes that the architect did not provide DOB with the appropriate documentation (in the form of plans that reflected the encroachment or a separate subdivision application) at the time it filed for a building permit, and that failure to do so likely hampered DOB's ability to identify the subject non-compliances at an earlier date; and

WHEREAS, however, the Board finds that, notwithstanding the possibility that DOB could have identified the non-compliances earlier if the architect had followed proper DOB filing procedures, the architect is not absolved from its responsibility to perform due diligence in identifying the applicable zoning text or in ascertaining the legal status of a longstanding encroachment on the site, especially where the permit was obtained through the Professional Certification Program; and

WHEREAS, the Board notes that the mere fact that DOB audited the project and visited the site before construction was completed does not reflect that the owner detrimentally relied on DOB's review; rather, the owner commenced construction in reliance on a permit that was obtained through the Professional Certification Program and would have completed the construction based on that permit even if DOB had not visited the site or audited the project during construction; and

WHEREAS, the Board concludes that there was no good faith reliance and no uniqueness leading to

MINUTES

unnecessary hardship or practical difficulties; and

WHEREAS, for the reasons set forth above, the Board finds that the applicant has failed to meet the finding set forth at ZR § 72-21(a); and

WHEREAS, as noted above, the applicant could have constructed a home on the Zoning Lot that fully complied with the underlying zoning regulations, and that any hardship that exists on the subject site is solely the result of the applicant's attempt to subdivide the Zoning Lot to construct two two-family semi-detached homes; and

WHEREAS, the Board notes that hardship that occurs only because of the actions of the property owner is best characterized as self-created, in the absence of any countervailing factors; and

WHEREAS, accordingly, the Board finds that the need for the requested waivers constitute a self-created hardship; and

WHEREAS, thus, the Board finds that the applicant has failed to meet the finding set forth at ZR § 72-21(d), which requires that the practical difficulties or unnecessary hardship claimed as the basis for a variance have not been created by the property owner; and

WHEREAS, the applicant submitted case law in support of its arguments regarding good faith reliance, including Pantelidis v. BSA, 814 NYS.2d 891 10 (N.Y. Sup. Ct. 2005), Jayne Estates v. Raynor, 22 N.Y.2d 417, 239 N.Y.S.2d 75 (1968) and Ellentuck, et al. v. Joseph B. Klein, et al., 51 A.D.2d 964, 380 N.Y.S. 2d 327 (2d Dep't 1976), to establish when a hardship incurred by the reliance on a permit which is later invalidated is relevant to a variance finding; and

WHEREAS, the Board clarifies that the courts do not extend the good faith reliance principle to all property owners who build pursuant to a permit which is subsequently invalidated; the courts have limited the applicability of good faith reliance to situations where property owners performed work pursuant to a series of governmental review and approvals, which were later reversed; and

WHEREAS, the Board distinguishes the subject case which involves building plans approved through the Professional Certification Program, which allows owners to obtain a permit without a full DOB examination; and

WHEREAS, the Board notes, as described above, that any participant in the Professional Certification Program is open to have plans audited at any time; and

WHEREAS, finally, it is clear that the applicant simply did not perform due diligence with regard to the applicable zoning regulations, which had changed approximately six months prior to the commencement of construction, or with regard to the legal status of the Encroachment Area; and

WHEREAS, the Board is able to distinguish all of the cited case law and, thus, finds the applicant's reliance on it unavailing; and

WHEREAS, the applicant also discusses BK Corporation v. BSA, 210 NY Slip. Op. 3117U (Queens Sup. 2010), and claims that the facts in the subject case can be

distinguished from those in BK Corporation, wherein the court upheld the Board's rejection of a good faith reliance claim where the owner failed to identify a change in the Zoning Resolution that occurred approximately two years prior to the commencement of construction and DOB did not audit the plans until after the project was complete; and

WHEREAS, the applicant argues that in contrast to BK Corporation, in the subject case the text amendment occurred approximately six months prior to the commencement of construction and DOB audited the project and visited the site while construction was still underway, and therefore contends that the site is more deserving of a finding of good faith reliance because the owner relied on DOB's review of the project while the home was only partially completed; and

WHEREAS, the Board is not persuaded that the distinctions between the facts of the subject case and those in BK Corporation warrant a finding of good faith reliance; and

WHEREAS, the Board notes that the failure to identify the text amendment in the subject case was similarly the result of a lack of due diligence, regardless of whether it was six months or two years after the zoning change; and

WHEREAS, as noted above, the Board finds that the mere fact that the subject project was audited and the site visited during construction logically does not indicate that the owner relied on a series of governmental reviews and approvals, rather, the evidence reflects that the owner performed substantial construction based on a permit obtained through the Professional Certification Program, and that such construction would have continued regardless of whether DOB visited the site or audited the project; and

WHEREAS, since the application fails to meet the findings set forth at ZR §§ 72-21 (a) and (d), it must be denied; and

WHEREAS, because the Board finds that the application fails to meet the findings set forth at ZR §§ 72-21(a) and (d), which address the threshold issue of whether a unique hardship afflicts the site, the Board declines to address the other findings.

Therefore it is Resolved that the decision of the Staten Island Borough Commissioner, dated June 14, 2011, acting on Department of Buildings Application No. 500749684, is sustained and the subject application is hereby denied.

Adopted by the Board of Standards and Appeals, December 6, 2011.

94-11-BZ

CEQR #11-BSA-113Q

APPLICANT – Victor K. Han, RA, AIA, for 149 Northern Plaza, LLC & Seungho Kim, owners. New York Spa & Sauna Corp., lessee.

SUBJECT – Application June 27, 2011 – Special Permit (§73-36) to allow a physical culture establishment (*New York Spa & Sauna*). C2-2/R6A&R5 zoning district.

PREMISES AFFECTED – 149-06 Northern Boulevard, Southeast of Northern Boulevard, 0' Southeast of 149th.

MINUTES

Block 5017, Lot 11, Borough of Queens.

COMMUNITY BOARD #7Q

APPEARANCES – None.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5

Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Queens Borough Commissioner, dated May 27, 2011, acting on Department of Buildings Application No. 410122184, reads in pertinent part:

As per Section 32-31 of the New York City Zoning Resolution, proposed use of a portion of the cellar, portion of the first floor and...portion of the second floor...as a physical culture establishment (Day Spa, Sauna & Fitness Center) is permitted only by special permit from the New York City Board of Standards and Appeals pursuant to Section 73-03 and 73-36 of the Zoning Resolution; and

WHEREAS, this is an application under ZR §§ 73-36 and 73-03, to permit, on a site located partially within a C2-2 (R6A) zoning district and partially within an R5 zoning district, the operation of a physical culture establishment (PCE) in portions of the cellar, first floor and second floor of a six-story mixed-use commercial/residential/community facility building, contrary to ZR § 32-10; and

WHEREAS, a public hearing was held on this application on September 20, 2011, after due notice by publication in *The City Record*, with a continued hearing on November 15, 2011, and then to decision on December 6, 2011; and

WHEREAS, Community Board 7, Queens, recommends approval of this application, with the condition that no liquor license be sought for the proposed PCE; and

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

WHEREAS, the subject site is located on the southeast corner of Northern Boulevard and 149th Street, partially within a C2-2 (R6A) zoning district and partially within an R5 zoning district; and

WHEREAS, the subject site has a total lot area of 19,548 sq. ft. and is occupied by a six-story mixed-use commercial/residential/community facility building which is currently under construction; and

WHEREAS, the proposed PCE will occupy 8,980 sq. ft. of floor area on portions of the first and second floors, with an additional 10,610 sq. ft. of floor space located in a portion of the cellar of the building; and

WHEREAS, the PCE will be operated by New York Spa & Sauna; and

WHEREAS, the proposed hours of operation for the

PCE are: 7:00 a.m. to 11:00 p.m., daily; and

WHEREAS, the applicant states that the services at the PCE will include facilities for the practice of massage by New York State licensed masseurs and masseuses; and

WHEREAS, the Board finds that this action will neither 1) alter the essential character of the surrounding neighborhood; 2) impair the use or development of adjacent properties; nor 3) be detrimental to the public welfare; and

WHEREAS, the Department of Investigation has performed a background check on the corporate owner and operator of the establishment and the principals thereof, and issued a report which the Board has determined to be satisfactory; and

WHEREAS, the PCE will not interfere with any pending public improvement project; and

WHEREAS, the Board finds that, under the conditions and safeguards imposed, any hazard or disadvantage to the community at large due to the proposed special permit use is outweighed by the advantages to be derived by the community; and

WHEREAS, therefore, the Board has determined that the evidence in the record supports the requisite findings pursuant to ZR §§ 73-36 and 73-03; and

WHEREAS, the project is classified as an Unlisted action pursuant to 6 NYCRR Part 617.2; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement, CEQR No. 11BSA113Q, dated June 24, 2011; and

WHEREAS, the EAS documents that the operation of the PCE would not have significant adverse impacts on Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Community Facilities and Services; Open Space; Shadows; Historic Resources; Urban Design and Visual Resources; Neighborhood Character; Natural Resources; Hazardous Materials; Waterfront Revitalization Program; Infrastructure; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; Construction Impacts; and Public Health; and

WHEREAS, no other significant effects upon the environment that would require an Environmental Impact Statement are foreseeable; and

WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment.

Therefore it is Resolved that the Board of Standards and Appeals issues a Negative Declaration prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617 and § 6-07(b) of the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes each and every one of the required findings under ZR §§ 73-36 and 73-03, to permit, on a site located partially within a C2-2 (R6A) zoning district and partially within an R5 zoning district, the operation of a physical culture establishment in portions of the cellar, first floor and second floor of a six-story mixed-use commercial/residential/community facility

MINUTES

building, contrary to ZR § 32-10; *on condition* that all work shall substantially conform to drawings filed with this application marked “Received September 9, 2011” - (2) sheets, “Received November 1, 2011” - (4) sheets and “Received November 4, 2011” - (1) sheet and *on further condition*:

THAT the term of this grant shall expire on December 6, 2021;

THAT there shall be no change in ownership or operating control of the physical culture establishment without prior application to and approval from the Board;

THAT all massages shall be performed by New York State licensed massage therapists;

THAT the above conditions shall appear on the Certificate of Occupancy;

THAT fire safety measures shall be installed and/or maintained as shown on the Board-approved plans;

THAT substantial construction shall be completed in accordance with ZR § 73-70;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s);

THAT the approved plans shall be considered approved only for the portions related to the specific relief granted; and

THAT the Department of Buildings must ensure compliance with all of the applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, December 6, 2011.

101-11-BZ

CEQR #12-BSA-002K

APPLICANT – Dennis D. Dell’Angelo, for Edward Stern, owner.

SUBJECT – Application July 12, 2011 – Special Permit (§73-622) for the enlargement of an existing two-family home, to be converted to a single-family home, contrary to floor area and open space (§23-141); side yard (§23-461) and less than the required rear yard (§23-47). R2 zoning district.

PREMISES AFFECTED – 1152 East 24th Street, west side of East 234th Street, 400’ south of Avenue K, Block 623, Lot 67, Borough of Brooklyn.

COMMUNITY BOARD #14BK

APPEARANCES –

For Applicant: Dennis D. Dell’Angelo.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5

Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Brooklyn Borough Commissioner, dated July 6, 2011, acting on Department of Buildings Application No. 320308797, reads in pertinent part:

1. Proposed FAR and OSR constitutes an increase in the degree of existing non-compliance contrary to Sec. 23-141 of the NYC Zoning Resolution.
2. Proposed horizontal enlargement provides less than the required side yard contrary to Sec. 23-46 ZR and less than the required rear yard contrary to Sec. 23-47 ZR; and

WHEREAS, this is an application under ZR §§ 73-622 and 73-03, to permit, in an R2 zoning district, the proposed enlargement of a two-family home and its conversion into a single-family home, which does not comply with the zoning requirements for floor area ratio (FAR), open space ratio, side yards, and rear yard, contrary to ZR §§ 23-141, 23-461 and 23-47; and

WHEREAS, a public hearing was held on this application on October 25, 2011, after due notice by publication in *The City Record*, with a continued hearing on November 15, 2011, and then to decision on December 6, 2011; and

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

WHEREAS, Community Board 14, Brooklyn, recommends approval of this application; and

WHEREAS, the subject site is located on the west side of East 24th Street, between Avenue K and Avenue L, within an R2 zoning district; and

WHEREAS, the subject site has a total lot area of 3,750 sq. ft., and is occupied by a two-family home with a floor area of 3,080 sq. ft. (0.82 FAR); and

WHEREAS, the premises is within the boundaries of a designated area in which the subject special permit is available; and

WHEREAS, the applicant seeks an increase in the floor area from 3,080 sq. ft. (0.82 FAR) to 3,740 sq. ft. (0.99 FAR); the maximum permitted floor area is 1,875 sq. ft. (0.50 FAR); and

WHEREAS, the applicant proposes to provide an open space ratio of 51 percent (150 percent is the minimum required); and

WHEREAS, the applicant proposes to maintain the existing side yard along the northern lot line with a width of 3’-9”, and to maintain the existing side yard along the southern lot line with a width of 8’-8” (two side yards with minimum widths of 5’-0” each are required); and

WHEREAS, the proposed enlargement will provide a rear yard with a depth of 20’-0” (a minimum rear yard depth of 30’-0” is required); and

WHEREAS, the applicant represents that the proposed building will not alter the essential character of the neighborhood, and will not impair the future use or development of the surrounding area; and

MINUTES

WHEREAS, at hearing, the Board questioned whether the proposed front yard complied with the planting requirements of ZR § 23-451; and

WHEREAS, in response, the applicant submitted revised plans which reflect compliance with ZR § 23-451; and

WHEREAS, based upon its review of the record, the Board finds that the proposed enlargement will neither alter the essential character of the surrounding neighborhood, nor impair the future use and development of the surrounding area; and

WHEREAS, the Board finds that the proposed project will not interfere with any pending public improvement project; and

WHEREAS, the Board finds that, under the conditions and safeguards imposed, any hazard or disadvantage to the community at large due to the proposed special permit use is outweighed by the advantages to be derived by the community; and

WHEREAS, therefore, the Board has determined that the evidence in the record supports the findings required to be made under ZR §§ 73-622 and 73-03.

Therefore it is resolved, that the Board of Standards and Appeals issues a Type II determination under 6 N.Y.C.R.R. Part 617.5 and 617.3 and §§ 5-02(a), 5-02(b)(2) and 6-15 of the Rules of Procedure for City Environmental Quality Review and makes the required findings under ZR §§ 73-622 and 73-03, to permit, within an R2 zoning district, the enlargement of a two-family home and its conversion into a single-family home, which does not comply with the zoning requirements for FAR, open space ratio, side yards, and rear yard, contrary to ZR §§ 23-141, 23-461 and 23-47; *on condition* that all work shall substantially conform to drawings as they apply to the objections above-noted, filed with this application and marked "Received July 12, 2011"-(6) sheets, "October 11, 2011"-(5) sheets, and "November 22, 2011"-(5) sheets; and *on further condition:*

THAT the following shall be the bulk parameters of the building: a maximum floor area of 3,740 sq. ft. (0.99 FAR); a minimum open space ratio of 51 percent; a side yard with a minimum width of 3'-9" along the northern lot line; a side yard with a minimum width of 8'-8" along the southern lot line; and a rear yard with a minimum depth of 20'-0", as illustrated on the BSA-approved plans;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objections(s) only; no approval has been given by the Board as to the use and layout of the cellar;

THAT the approved plans shall be considered approved only for the portions related to the specific relief granted;

THAT DOB shall review and approve compliance with the planting requirements under ZR § 23-451;

THAT substantial construction be completed in accordance with ZR § 73-70; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the

Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of the plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, December 6, 2011.

42-11-BZ

APPLICANT – Eric Palatnik, P.C., for Winden LLC, owner.

SUBJECT – Application April 12, 2011 – Special Permit (§73-44) to permit the reduction in required parking for an ambulatory or diagnostic treatment facility and for office uses. C4-2 zoning district.

PREMISES AFFECTED – 135-11 40th Road, between Prince and Main Streets, Block 5036, Lot 55, Borough of Queens.

COMMUNITY BOARD #7Q

APPEARANCES –

For Applicant: Eric Palatnik.

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....4

Absent: Vice Chair Collin.....1

ACTION OF THE BOARD – Laid over to January 10, 2012, at 1:30 P.M., for decision, hearing closed.

47-11-BZ

APPLICANT – Law Office of Fredrick A. Becker, for USA Outreach Corp., by Shaya Cohen, owner.

SUBJECT – Application April 13, 2011 – Variance (§72-21) to allow a three-story yeshiva (*Yeshiva Zichron Aryeh*) with dormitories, contrary to use (§22-13), floor area (§§23-141 and 24-111), side setback (§24-551) and parking regulations (§25-31). R2 zoning district.

PREMISES AFFECTED – 1213 Bay 25th Street, west side of Bay 25th Street, between Bayswater Avenue and Healy Avenue. Block 15720, Lot 67, Borough of Queens.

COMMUNITY BOARD #14Q

APPEARANCES –

For Applicant: Lyra J. Altman, David Shteierman, Shlomo Cohen, Yaakov Shadimo, David Levy, Moshe Miller, H. Adelman, Suzanne Burger, Elchanon Kvaitsky, Chaim Stober, Chaim Goldenberg, Laurence Brodsky and others.

For Opposition: Enid Glabman, Eugene Falik, Phyllis Rudnick, Marcia Gluck, Gloria Jaeger, Valerie Kelly, Stephan A. Cooper, Donald Richards, Ruth Goros, Helene Greene, Lettie DeWitt, Steve Cromity and others.

ACTION OF THE BOARD – Laid over to January 24, 2012, at 1:30 P.M., for continued hearing.

73-11-BZ

APPLICANT – Rampulla Associates Architects, for Tora Development, LLC, owners.

SUBJECT – Application May 26, 2011 – Variance (§72-21) to allow a three-story, 87-unit residential building, contrary

MINUTES

to use regulations of (§32-11), height (§23-631) and parking (§25-23) regulations. C3A/SRD zoning district.

PREMISES AFFECTED – 70 Tennyson Drive, north side Tennyson Drive, between Nelson Avenue and Cleveland Avenue, Block 5212, Lot 70, Borough of Staten Island.

COMMUNITY BOARD #2SI

APPEARANCES –

For Applicant: Philip Rampulla.

For Opposition: Christine Collella.

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....4

Absent: Vice Chair Collin.....1

ACTION OF THE BOARD – Laid over to January 24, 2012, at 1:30 P.M., for decision, hearing closed.

74-11-BZ

APPLICANT – James Chin & Associates, LLC, for 1058 Forest Avenue Associates, owners.

SUBJECT – Application May 25, 2011 – Variance (§72-21) to allow the conversion of a community facility building for office use, contrary to use regulations. R3-2 & R-2 zoning district.

PREMISES AFFECTED – 1058 Forest Avenue, southeast intersection of Forest Avenue and Manor Road in West Brighton, Block 315, Lot 29, Borough of Staten Island.

COMMUNITY BOARD #1SI

APPEARANCES –

For Applicant: Mindy Chin and James Chin.

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....4

Absent: Vice Chair Collin.....1

ACTION OF THE BOARD – Laid over to January 10, 2012, at 1:30 P.M., for decision, hearing closed.

89-11-BZ

APPLICANT – Law Office of Fredrick A. Becker, for Annie and Kfir Ribak, owners.

SUBJECT – Application June 23, 2011 – Special Permit (§73-622) for the enlargement of an existing single family home, contrary to floor area, open space and lot coverage (§23-141); side yards (§23-461) and perimeter wall height (§23-631). R3-2 zoning district.

PREMISES AFFECTED – 2224 Avenue S, south west corner of Avenue S and East 23rd Street, Block 7301, Lot 9, Borough of Brooklyn.

COMMUNITY BOARD #15BK

APPEARANCES –

For Applicant: Lyra J. Altman.

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....4

Absent: Vice Chair Collin.....1

ACTION OF THE BOARD – Laid over to December 13, 2011 at 1:30 P.M., for decision, hearing closed.

96-11-BZ

APPLICANT – Law Office of Marvin B. Mitzner, for 514-516 East 6th Street, owners.

SUBJECT – Application June 30, 2011 – Variance (§72-21) to legalize enlargements to an existing residential building, contrary to floor area (§23-145) and dwelling units (§23-22). R7B zoning district.

PREMISES AFFECTED – 514-516 East 6th Street, south side of east 6th Street, between Avenue A and Avenue B, Block 401, Lot 17, 18, Borough of Manhattan.

COMMUNITY BOARD #3M

APPEARANCES –

For Applicant: Marvin Mitzner.

For Opposition: Rosie Mendez and Andito Lloyd.

ACTION OF THE BOARD – Laid over to February 14, 2012, at 1:30 P.M., for continued hearing.

105-11-BZ

APPLICANT – Slater & Beckerman, LLP, for 147 Remsen Street Associates, LLC, owner; Team Wellness Corp., lessee.

SUBJECT – Application July 27, 2011 – Special Permit (§73-36) to legalize the operation of a physical culture establishment (*Massage Spa Envy*). C5-2A (Special Downtown Brooklyn District) zoning district.

PREMISES AFFECTED – 147 Remsen Street, north side of Remsen Street, between Clinton Street and Court Street, block 250, Lot 20, Borough of Brooklyn.

COMMUNITY BOARD #2BK

APPEARANCES –

For Applicant: Stefanie Marazzi.

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....4

Absent: Vice Chair Collin.....1

ACTION OF THE BOARD – Laid over to January 10, 2012, at 1:30 P.M., for decision, hearing closed.

115-11-BZ

APPLICANT – Law Office of Fredrick A. Becker, for Thomas Schick, owner.

SUBJECT – Application August 15, 2011 – Special Permit (§73-622) for the enlargement of an existing single family residence contrary to floor area and open space (§23-141); side yard (§23-461) and less than the required rear yard (§23-47). R-2 zoning district.

PREMISES AFFECTED – 1110 East 22nd Street, between Avenue J and Avenue K, Block 7603, Lot 62, Borough of Brooklyn.

COMMUNITY BOARD #14BK

APPEARANCES –

For Applicant: Lyra J. Altman.

THE VOTE TO REOPEN HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin,

MINUTES

Commissioner Ottley-Brown, Commissioner Hinkson and
Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to January
24, 2012, at 1:30 P.M., for adjourned hearing.

Jeff Mulligan, Executive Director

Adjourned: P.M.

*CORRECTION

This resolution adopted on November 1, 2011, under
Calendar No. 235-10-BZ and printed in Volume 96, Bulletin
No. 45, is hereby corrected to read as follows:

235-10-BZ

CEQR #11-BSA-047K

APPLICANT – Paul J. Proulx, Esq., c/o Cozen O’Connor,
for Avenue K Corporation, owner; TD Bank c/o Facilities
Department, lessees.

SUBJECT – Application December 30, 2010 – Variance
 (§72-21) to allow a commercial use in a residential zone,
contrary to use regulations (§22-00). R3-2 zoning district.
PREMISES AFFECTED – 2363 Ralph Avenue, corner of
Ralph Avenue and Avenue K, Block 8339, Lot 1, Borough
of Brooklyn.

COMMUNITY BOARD #18BK

APPEARANCES –

For Applicant: Howard Hornstein.

ACTION OF THE BOARD – Application granted on
condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins,
Commissioner Ottley-Brown, Commissioner Hinkson and
Commissioner Montanez5

Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Brooklyn Borough
Commissioner, dated December 3, 2010, acting on Department
of Buildings Application No. 320238694, reads in pertinent
part:

“Proposed bank, Use Group 6, not permitted in R3-2
district. Refer to Board of Standards and Appeals;”
and

WHEREAS, this is an application under ZR § 72-21, to
permit, in an R3-2 zoning district, the construction of a one-
story bank (Use Group 6) with 20 accessory parking spaces,
which does not conform to district use regulations, contrary to
ZR § 22-10; and

WHEREAS, a public hearing was held on this
application on August 23, 2011 after due notice by publication
in *The City Record*, with a continued hearing on September 27,
2011, and then to decision on November 1, 2011; and

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

WHEREAS, Community Board 18, Brooklyn,
recommends approval of this application; and

WHEREAS, the subject site is located on a triangular-
shaped lot bounded by Ralph Avenue to the west and Avenue
K to the east, within an R3-2 zoning district; and

WHEREAS, the site has approximately 190’-6” of
frontage on Ralph Avenue and 223’-5” of frontage on Avenue
K, with a total lot area of 18,899 sq. ft.; and

WHEREAS, the site is currently occupied by a gasoline

MINUTES

service station; and

WHEREAS, the Board has exercised jurisdiction over the subject site since 1960 when, under BSA Cal. No. 546-59-BZ, the Board granted a variance to permit the construction of a gasoline service station with accessory uses on the site; and

WHEREAS, on July 11, 1967, under BSA Cal. No. 135-67-BZ, the Board granted an enlargement in the lot area of the site and the rearrangement of the gasoline service station, for a term of ten years; and

WHEREAS, subsequently, the grant was amended and the term extended on various occasions; and

WHEREAS, on December 22, 1998, the Board granted an extension of term, which expired on October 11, 2007; and

WHEREAS, the applicant now proposes to construct a one-story commercial building on the site, to be occupied by a bank (Use Group 6), with a total floor area of 2,560 sq. ft. (0.14 FAR), and with 20 accessory parking spaces; and

WHEREAS, because the prior variance has expired and commercial use is not permitted in the subject R3-2 zoning district, the applicant seeks a use variance to permit the proposed Use Group 6 use; and

WHEREAS, the applicant states that the following are unique physical conditions which create unnecessary hardship and practical difficulties in developing the site with a complying development: (1) the irregular shape of the subject lot; (2) the impact of a sewer easement on the site; and (3) the contamination of the soil on the site; and

WHEREAS, as to the site's irregular shape, the applicant states that due to the irregularity of the street grid, the subject site is an irregular, triangularly-shaped lot which is unsuitable for complying residential use; and

WHEREAS, the applicant states that the site is further constrained by the presence of a permanent sewer easement for the benefit of the Department of Environmental Protection ("DEP" and the "DEP Easement") on a portion of the site; and

WHEREAS, the applicant further states that, to protect DEP infrastructure that sits below grade, DEP has instituted an absolute prohibition on new building structures within the easement area; and

WHEREAS, the applicant submitted a survey reflecting that the DEP Easement is adjacent to Ralph Avenue between Avenue K and Bergen Avenue, and that it comprises the first 60 feet of the site's Ralph Avenue frontage; and

WHEREAS, the applicant notes that the DEP Easement occupies approximately 9,965 sq. ft. of the site's total lot area of 18,899 sq. ft., such that more than half (53 percent) of the total lot area on the site is prohibited from being developed; and

WHEREAS, the applicant represents that, together with the yards required under the R3-2 zoning district regulations, the DEP Easement reduces the developable area for a complying development on the subject site to 6,370 sq. ft.; and

WHEREAS, the applicant further represents that, although the next two easterly block fronts north of the site also have irregular angles along the Ralph Avenue frontage and are burdened by the DEP Easement, the subject site is uniquely burdened by the combination of its irregular shape and the DEP Easement on the site; and

WHEREAS, specifically, the applicant states that both of the blocks to the north of the site are comprised of single zoning lots that encompass the balance of the block, and are therefore much larger than the subject site,

and both of the zoning lots have already been improved with large residential developments fronting the side streets, such that the easement area provides yards and open space for the residential developments; and

WHEREAS, the applicant further states that unlike the nearby zoning lots, the unique shape of the subject site and the DEP Easement combine to artificially limit the amount of developable square footage that the lot can be used for, such that it is impossible to fit all of the permitted floor area into a zoning compliant building; and

WHEREAS, specifically, the applicant states that although the subject R3-2 zoning district allows for a community facility FAR of 1.0 to be combined with a residential FAR of 0.6 to create an as-of-right mixed-use building with an FAR of 1.6, the maximum FAR that can be utilized on the subject site is 0.75 because the awkward shape of the zoning lot restricts the number of required parking spaces that can be provided; and

WHEREAS, the applicant also states that the site is subject to unique clean up obligations to address the type of soil remediation necessary for redevelopment; and

WHEREAS, specifically, the applicant states that the site has been occupied by a gasoline service station since 1960, and that a Phase II Site Investigation identified gasoline-related VOC contamination and select SVOC constituents at concentrations exceeding Department of Environmental Conservation standards; and

WHEREAS, the applicant submitted a report from an environmental consultant which estimates that the costs related to the management of the impacted soil and remedial oversight is approximately \$253,000; and

WHEREAS, the applicant notes that aside from the specific non-hazardous petroleum contamination on the site, the cost estimate also addresses the cost of dealing with the other municipal solid waste landfill, which may be contaminated; and

WHEREAS, the applicant represents that before 1960 the site was undeveloped and was used to deposit municipal solid waste landfill; and

WHEREAS, as evidence of the site's former landfill use, the applicant submitted a landfill report which notes that sites in close proximity to large surface-water bodies, such as the subject site, are prone to lateral transport of leachate; and

WHEREAS, the applicant states that, since it is impossible to select out the fill that is contaminated from the fill that is not, the whole site must be out-loaded, characterized, transported, disposed of, and then replaced with clean fill; and

WHEREAS, based upon the above, the Board finds that the aforementioned unique physical conditions, when considered in the aggregate, create unnecessary hardship and practical difficulty in developing the site in conformance with the applicable zoning regulations; and

WHEREAS, the applicant submitted a feasibility study which analyzed: (1) a conforming scenario consisting of a

MINUTES

three-story mixed-use residential/community facility building with a 4,700 sq. ft. medical facility use on the first floor and two 4,700 sq. ft. stories of residential above; (2) an alternative conforming scenario consisting of a three-story 11,200 sq. ft. residential building; and (3) the proposed one-story commercial building occupied by a bank (Use Group 6); and

WHEREAS, the study concluded that the conforming scenarios would not result in a reasonable return, but that the proposed building would realize a reasonable return; and

WHEREAS, based upon the above, the Board has determined that because of the subject lot's unique physical conditions, there is no reasonable possibility that development in strict compliance with zoning will provide a reasonable return; and

WHEREAS, the applicant represents that the proposed building will not alter the essential character of the neighborhood, will not substantially impair the appropriate use or development of adjacent property, and will not be detrimental to the public welfare; and

WHEREAS, the applicant represents that the surrounding area is occupied by a mix of residential, commercial, and community facility uses; and

WHEREAS, the applicant states that the subject site shares the block with a 25,000 sq. ft. medical facility which fronts three sides of the triangular-shaped block; and

WHEREAS, the applicant submitted a 400-ft. radius diagram and photographs of surrounding uses, reflecting that the area immediately surrounding the site consists of a significant commercial presence; and

WHEREAS, the applicant states that the subject site is located on the northeast corner of the intersection of Ralph Avenue and Avenue K, and both southerly corners of the intersection are occupied by commercial uses, including a bank on the southwest corner; and

WHEREAS, the applicant notes that there are commercial overlays to the south and southwest of the site, which permit a range of retail options, including a plaza on the west side of Ralph Avenue and the Georgetown mall directly south of the site on the east side of Ralph Avenue; and

WHEREAS, the applicant notes a commercial overlay and manufacturing and commercial uses are also located a block north of the site, which permit a range of commercial uses as well; and

WHEREAS, the applicant further notes that the proposed variance would allow a bank (Use Group 6) to replace an existing gasoline service station (Use Group 16), and would therefore serve to bring the site closer to conformity with the subject R3-2 zoning district; and

WHEREAS, the applicant represents that a bank is a relatively benign use, as its hours would be during the day with shortened hours on the weekend, the site would be landscaped and well maintained, and it would aesthetically be a significant improvement over the uses which have existed at the site for more than 50 years; and

WHEREAS, as to bulk, the applicant states that he proposed one-story building has a floor area of 2,560 sq. ft. (0.14 FAR), which is considerably below the maximum density for the subject zoning lot, and will

comply with all commercial bulk regulations; and

WHEREAS, the applicant further states that the proposed bank will comply with C1 district signage regulations and will provide 20 parking spaces, which is significantly more than the required ten spaces; and

WHEREAS, based upon the above, the Board finds that this action will not alter the essential character of the surrounding neighborhood nor impair the use or development of adjacent properties, nor will it be detrimental to the public welfare; and

WHEREAS, the Board finds that the hardship herein was not created by the owner or a predecessor in title, but is the result of the site's unique physical conditions; and

WHEREAS, the Board finds that this proposal is the minimum necessary to afford the owner relief; and

WHEREAS, based upon the above, the Board has determined that the evidence in the record supports the findings required to be made under ZR § 72-21; and

WHEREAS, the project is classified as an Unlisted Action pursuant to 6 NYCRR, Part 617.2; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement (EAS) CEQR No. 11-BSA-047K dated September 2010; and

WHEREAS, the EAS documents that the project as proposed would not have significant adverse impacts on Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Community Facilities and Services; Open Space; Shadows; Historic Resources; Urban Design and Visual Resources; Neighborhood Character; Natural Resources; Waterfront Revitalization Program; Infrastructure; Hazardous Materials; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; and Public Health; and

WHEREAS, DEP's Bureau of Environmental Planning and Analysis has reviewed the project for potential hazardous materials; and

WHEREAS, DEP accepts the June 2011 Remedial Action Plan and the May 2011 Construction Health and Safety Plan; and

WHEREAS, DEP requested that a Remedial Closure Report be submitted to DEP for review and approval upon completion of the proposed project; and

WHEREAS, no other significant effects upon the environment that would require an Environmental Impact Statement are foreseeable; and

WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment.

Therefore it is Resolved, that the Board of Standards and Appeals issues a Negative Declaration under 6 NYCRR Part 617 and §6-07(b) of the Rules of Procedure for City Environmental Quality Review and makes each and every one of the required findings under ZR § 72-21 and grants a variance to permit, on a site within an R3-2 zoning district, the construction of a one-story bank (Use Group 6) with 20 accessory parking spaces, which does not conform to district

MINUTES

use regulations, contrary to ZR § 22-10; *on condition* that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked “Received September 13, 2011” – seven (7) sheets; and *on further condition*:

THAT the following are the bulk parameters of the proposed building: a total floor area of 2,560 sq. ft. (0.14 FAR); and 20 accessory parking spaces, as indicated on the BSA-approved plans;

THAT signage on the site shall comply with C1 district regulations;

THAT DOB shall not issue a Certificate of Occupancy until the applicant has provided it with documentation of DEP’s approval of the Remedial Closure Report;

THAT construction shall proceed in accordance with ZR § 72-23;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only;

THAT the approved plans shall be considered approved only for the portions related to the specific relief granted; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, November 1, 2011.

***The resolution has been revised. Corrected in Bulletin Nos. 49-50, Vol. 96, dated December 15, 2011.**